

Csongor István Nagy, **What role for private enforcement in EU competition law? A religion in quest of founder**, in *The Cambridge Handbook of Competition Law Sanctions 218-229* (Cambridge University Press, Tihamer Tóth ed., 2022).

The numbers in the text refer to the page-numbers in the final publication.

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## Chapter 13

### What Role for Private Enforcement in EU Competition Law? A Religion in Quest of Founder

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#### 13.1. Introduction

The history of EU competition law's private enforcement dates back two decades. Although agreements in restraint of trade have been pronounced invalid from the outset<sup>1</sup> and actions for damages have always been a theoretical possibility, focused regulatory endeavors started in the early 2000s. The first important turning point was the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules,<sup>2</sup> followed by the White Paper of the same title.<sup>3</sup> These generated a very vivid scholarly discourse (one could even say: a movement) about the hurdles to private enforcement and the available regulatory means to facilitate actions for damages. Perversely, for a while this movement produced much more scholarly pieces than court judgments. Nonetheless, this started to change lastly and the CJEU addressed various aspects of EU competition law's private enforcement.<sup>4</sup> This process culminated in the adoption of the EU Private Enforcement Directive,<sup>5</sup> which established a detailed European framework.

Notwithstanding the above remarkable developments, private enforcement has ducked the central question of its existence. What is the purpose of EU competition law's private enforcement? Is it merely meant to make compensation a reality or is it destined to deter from violating competition rules? While civil law has traditionally followed the compensation

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<sup>1</sup> Article 101(2) TFEU.

<sup>2</sup> COM(2005) 672 final (Dec. 19, 2005).

<sup>3</sup> COM(2008) 165 final (Apr. 2, 2008).

<sup>4</sup> C-453/99 *Courage and Crehan*, EU:C:2001:465; Joined Cases C-295/04 to C 298/04 *Manfredi and Others*, EU:C:2006:461; Case C-360/09 *Pfleiderer AG v. Bundeskartellamt*, EU:C:2011:389; Case C-199/11 *Europese Gemeenschap v. Otis NV, General Technic-Otis Sàrl, Kone Belgium NV, Kone Luxembourg Sàrl, Schindler NV, Schindler Sàrl, ThyssenKrupp Liften Ascenseurs NV, ThyssenKrupp Ascenseurs Luxembourg Sàrl*, EU:C:2012:684; Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG and Others*, EU:C:2013:366; Case C-557/12 *Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, ThyssenKrupp Aufzüge GmbH v. ÖBB-Infrastruktur AG*, EU:C:2014:1317; Case C-673/17 *Cogeco Communications v. Sport TV Portugal, Controlinveste-SGPS & NOS-SGPS*, EU:C:2019:32.

<sup>5</sup> Directive 2014/104/EU 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 a comprehensive overview of the Directive's national implementation, see B.J Rodger, M. Sousa Ferro and F. Marcos (eds.), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2018).

paradigm, US antitrust law, which has served as a source of inspiration but not a role model for EU competition law, placed more weight on deterrence and conceives private enforcement as a means of enforcement. The difficult theoretical question is exacerbated by the fact that compensation and \*219 deterrence are inseparable and interlinked: compensatory damages deter (though less effectively than super-compensatory damages do) and super-compensatory damages compensate (though much more lavishly than compensatory damages do). Nonetheless, this does not detract from the importance of the question: which one is the main purpose and which one is the side effect? The answer to this question has important implications when it comes to detailed rules.

This paper is a scholarly attempt to identify the purpose of private enforcement in EU competition law. Section 13.2 presents US antitrust law as the model where deterrence has a predominant role in private enforcement and which has served as a source of inspiration but not a role model for EU competition law. Section 13.3 presents the purpose-setting of EU competition law at the intersections of three aims: effective remedy in terms of *in integrum restitutio*, fundamental rights and public policy. Section 13.4 defines the limits of private enforcement's deterrent function in EU competition law. The paper's central argument is that while private enforcement has multiple purposes in EU competition law, it features an idiosyncratic compromise between policy-oriented deterrence and the traditional notions of civil law (full compensation, prohibition of unjust enrichment). It is demonstrated that while serving a public policy purpose and making use of the grey zone between compensatory and super-compensatory damages, EU "private competition law" does not go beyond that and remains within the confines of "compensation." The fact that it is the deterrent side effects that make private enforcement relevant for EU competition law and subject to special legislative attention does not question its compensation-oriented DNA.

### **13.2. US antitrust law: a source of inspiration but not a role model**

US antitrust law has served as a source of inspiration for EU competition law's private enforcement but it certainly did not amount to a role model. In fact, it has been generally accepted from the outset that EU law needs an effective system of private enforcement but should avoid the importation of the US model, which has been seen as alien to the European legal mindset. This made the relationship between US antitrust and EU competition law controversial: although the European scholarship draws on the former, in a certain way, it also considers it an antidote of the "European way."

The root cause of why the American model cannot be either a role model or a benchmark for EU competition law is that, in the US, private enforcement serves as the "Wyatt Earp" of antitrust law. A central piece of the institutional architecture of US antitrust is the privatization of enforcement and the creation of significant financial incentives for private plaintiffs with a view to stimulating private litigation. Private plaintiffs act as "regulatory bounty-hunters" which take over the role of enforcement agencies and further the public interest. This is why statistical comparisons to US antitrust cannot provide any meaningful benchmarking.

The term “private attorney general”<sup>6</sup> – which features various sectoral regimes ranging from antitrust to securities regulation<sup>7</sup> – very well expresses the idea that, owing to the financial \*220 incentives, the efforts of private plaintiffs replace public enforcement to a large extent. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,<sup>8</sup> the Supreme Court highlighted that “the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.”<sup>9</sup> Similarly, in *Hawaii v. Standard Oil Co.*,<sup>10</sup> the Supreme Court, referring to the treble damages available in US antitrust law, stressed that “[b]y offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as ‘private attorneys general.’”<sup>11</sup>

A similar consideration was the driving force behind the 1966 introduction of opt-out class actions in the US.<sup>12</sup> Beforehand, although opt-in class actions had been available since 1938, they had not been a major force. Only the move to the opt-out scheme allowed class actions to become effective and common.<sup>13</sup> The 1966 introduction of opt-out collective actions was inspired by the idea that collective litigation on behalf of large groups of people could effectively supplement the government’s regulatory and enforcement efforts, especially in case of small claims which could not get to court anyway.<sup>14</sup> Furthermore, “[c]ivil rights cases and other suits seeking social change or to implement institutional reform were, in many ways, the quintessential type of class action envisioned at the time of the 1966 amendments.”<sup>15</sup>

As a result of this fundamental difference in terms of purpose and function, several elements of US antitrust make it very different from the ideal European model. One of the most important differences between litigators on the two sides of the Atlantic is that “entrepreneurial lawyering” is virtually missing in Europe.<sup>16</sup> US class actions are funded by lawyers and law firms, in exchange for the promise of a contingency fee.<sup>17</sup> On the other hand, in Europe, law

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<sup>6</sup> See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 147 (1968) (Fortas, J., concurring in result); S. I. Strong, Regulatory litigation in the European Union: does the U.S. class action have a new analogue?, 88 *Notre Dame Law Review* 899-971 (2012); Sándor Udvary, The advantages and disadvantages of class action, 9 *Iustum Aequum Salutare* 67-82 (2013).

<sup>7</sup> See e.g. John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 *Maryland Law Review* 215, 216 (1983); William B. Rubenstein, On What a “Private Attorney General” is – And Why it Matters, 57 *Vanderbilt Law Review* 2129, 2148 & 2142-2155 (2004); Carl W. Hittinger, & Jarod M. Bona, The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court, 4 *Journal of Business & Technology Law* 167 (2009).

<sup>8</sup> 395 U.S. 100 (1969).

<sup>9</sup> 395 U.S. 100, 130-131 (1969).

<sup>10</sup> 405 U.S. 251 (1972).

<sup>11</sup> 405 U.S. 251, 262 (1972).

<sup>12</sup> See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* 229-232 (Yale University Press, 1987).

<sup>13</sup> Edward F. Sherman, American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems, 215 *Federal Rules Decisions* 130, 132-133 (2003).

<sup>14</sup> See Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 *University of Chicago Law Review* 684 (1941).

<sup>15</sup> Nicholas M. Pace, Class Actions in the United States of America: an Overview of the Process and the Empirical Literature, in *GLOBALCLASSACTIONS* 8-9 (2007), available at [http://globalclassactions.stanford.edu/sites/default/files/documents/USA\\_\\_National\\_Report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf)

<sup>16</sup> See Paul G. Karlsgodt, *Chapter 1: United States, in WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE* 49 (Paul G. Karlsgodt ed., OUP, 2012).

<sup>17</sup> See Christopher Hodges, *From Class Actions to Collective Redress: A Revolution in Approach to Compensation*, 28(1) *Civil Justice Quarterly* 41, 42 (2009) (“[T]he claimant has no financial risk but has significant incentive to take action. In particular, any intermediary representing the claimant and funding the litigation has significant incentives.”); Karlsgodt, *supra* note 16, at 53.

suits are normally not financed (not even partially) by law firms, contingency fees (*quota litis* agreements) are rare<sup>18</sup> and in most countries either forbidden or can be used only in a limited set of cases.<sup>19</sup>

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These prohibitions and restrictions may be found in the law or in the codes of ethics of the bars. Some jurisdictions prohibit only pure contingency fees, where the attorney's fee is linked exclusively to the outcome of the case and the attorney receives no remuneration in case of loss. For instance, French law expressly prohibits pure contingency fees, i.e. attorney's fees based exclusively on the outcome of the case, albeit a conditional reward, as a complimentary element, may be combined with a fixed fee.<sup>20</sup> Although the French Supreme Court ("Cour de Cassation") held that a conditional reward need not to be proportionate to the fixed fee and may exceed the latter,<sup>21</sup> it is widely accepted that the fixed fee element may not be negligible. A similar approach is taken by Belgian<sup>22</sup> and Romanian law,<sup>23</sup> which prohibit agreements on fees that are exclusively linked to the outcome of the case but permit the stipulation of a complementary fee conditional on the outcome.

Some jurisdictions are more stringent and prohibit all agreements where the attorney's fee is somehow, even partially, linked to the outcome of the case. In Germany, contingency fees have traditionally been prohibited. The German Federal Constitutional Court ("Bundesverfassungsgericht") held a decade ago that the categorical prohibition of contingency fee arrangements is unconstitutional, but it was quick to add that this deficiency can be easily removed if creating an exception for cases where a fee (hourly fee or flat rate) would deter the plaintiff from pursuing his right by reason of his financial circumstances.<sup>24</sup> As a corollary, German law was amended to make it possible for the parties to agree to contingency fees but only in cases where the client, because of his economic circumstances, would not pursue his claim.<sup>25</sup> Nonetheless, as a matter of practice, contingency fee arrangements are still rare in Germany.

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<sup>18</sup> For a comparative overview see, e.g. Tiffany Chieu, *Class Actions In The European Union?: Importing Lessons Learned From The United States' Experience Into European Community Competition Law*, 18 *Cardozo Journal of International & Comparative Law* 123, 148 (2010). Tiana Leia Russell, *Exporting Class Actions to the European Union*, 28 *Boston University International Law Journal* 141, 173 (2010).

<sup>19</sup> See Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the *acquis communautaire**, 15 *Journal of Transnational Law & Policy* 281, 287–88 (2006); Denis Waelbroeck, Donald Slater & Gil Even-Shoshan, *Comparative Report*, in *STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES 93-94 & 116-17* (Ashurst, 2004), available at [http://ec.europa.eu/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf); Charlotte Leskinen, *Collective Actions: Rethinking Funding and National Cost Rules*, 8 *Competition Law Review* 87, 98-105 (2011).

<sup>20</sup> Section 10 of Loi n° 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques, version consolidée au 12 mars 2017.

<sup>21</sup> Cour de Cassation, Chambre civile 1, du 10 juillet 1995, 93-20.290.

<sup>22</sup> Section 446ter of the Judicial Code (Code judiciaire).

<sup>23</sup> Section 130 of Statutul profesiei de avocat, Adoptat prin Hotărârea Consiliului U.N.B.R. nr. 64/2011 privind adoptarea Statutului profesiei de avocat (M. Of. nr. 898 din 19 decembrie 2011). See ICCJ. Decizia nr. 2131/2013. Civil. Constatate nulitate act. Recurs.

<sup>24</sup> Beschluss des Ersten Senats vom 12. Dezember 2006. 1 BvR 2576/04, available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/12/rs20061212\\_1bvr257604.html;jsessionid=589238D0EE7F427F15D99DB1084F2A85.2\\_cid361](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/12/rs20061212_1bvr257604.html;jsessionid=589238D0EE7F427F15D99DB1084F2A85.2_cid361)

<sup>25</sup> Rechtsanwaltsvergütungsgesetz vom 5. Mai 2004 (BGBl. I S. 718, 788), last amended through Section 13 of Gesetz vom 21. November 2016 (BGBl. I S. 2591), Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (Rechtsanwaltsvergütungsgesetz - RVG), § 4a Erfolgshonorar: "Quota litis (Section 49b(2), first sentence of the [German] Federal Lawyers' Act (Bundesrechtsanwaltsordnung – BRAO) may be agreed only for an individual case and only if the client, upon reasonable consideration, would be deterred from taking legal proceedings without the agreement of quota litis on account of his economic situation. In court proceedings, it may be agreed that in case of failure, no remuneration, or a lower amount than the statutory remuneration, is to be paid

Not surprisingly, the Code of Conduct for Lawyers in the European Union of the Council of Bars and Law Societies of Europe (CCBE),<sup>26</sup> in principle, pronounces contingency fee agreements (*pactum de quota litis*) unethical, unless the agreement “is in accordance with an \*222 officially approved fee scale or under the control of competent authority having jurisdiction over the lawyer.”<sup>27</sup>

Interestingly, in Spain, the ethical prohibition of contingency fee arrangements was quashed in 2008 by reason of competition law: the Spanish Supreme Court found that the Spanish Bar Association’s ban on contingency fees was restrictive of competition and abolished it.<sup>28</sup> However, contingency fee arrangements are, as a matter of practice, rare.

Whatever the precise national rules and the specific limits are, most importantly, contingency fees are still not generally accepted in Europe and there is no market providing litigation services on this basis.

Furthermore, in most European countries, active client-acquiring and lawyer advertisements are banned or heavily restricted,<sup>29</sup> while, in the US, cases are often not client- but lawyer-driven<sup>30</sup> and this is all the more true in class actions.<sup>31</sup>

In other words, contrary to the US, in Europe it would be difficult to argue that there is a well-established industry to assume the litigation risks. This may be traced back to the fact that European legal systems skimp litigators in financial rewards and incentives. Some of these are of general application, some are sectoral and were deliberately introduced to stimulate private enforcement.

Cost-shifting as to legal costs is a pivotal question.<sup>32</sup> According to the “American rule,” each party bears its own costs and attorney’s fees cannot be shifted.<sup>33</sup> Although it is true that US law

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if it is agreed that an appropriate supplement is to be paid on the statutory remuneration in case of success.” Bundesrechtsanwaltsordnung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 303-8, veröffentlichten bereinigten Fassung, last amended through Section 3 of Gesetz vom 19. Februar 2016 (BGBl. I S. 254), § 49b(2).

<sup>26</sup> Available at [http://www.ccbe.eu/NTCdocument/EN\\_CCBE\\_CoCpdf1\\_1382973057.pdf](http://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf)

<sup>27</sup> Section 3.3. Interestingly, in 2008, the Spanish Supreme Court found the Spanish Bar Association’s ban on contingency fees as restrictive of competition and quashed it.

<sup>28</sup> Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, de 4 noviembre 2008 JUR\2009\2800, Recurso de Casación 5837/2005.

<sup>29</sup> While lawyer advertising is interdicted or restricted in several EU member states, in the last period these have been eliminated in several legal systems. See Communication from the Commission: Report on Competition in Professional Services, COM (2004) 83 final, 14; Frank H. Stephen & James H. Love, Regulation of the Legal Profession, in ENCYCLOPEDIA OF LAW AND ECONOMICS VOL. III (THE REGULATION OF CONTRACTS) 987–1017 (Edward Edgar, 2000).

<sup>30</sup> See Guido Calabresi & Kevin S. Schwartz, The Costs of Class Actions: Allocations and Collective Redress in the U.S. Experience, 32 European Journal of Law & Economics 169, 178–79 (2011) (“The business cases are almost entirely lawyer-driven.”).

<sup>31</sup> See Janet C. Alexander, An Introduction to Class Action Procedure in the United States, Paper for Conference: Debates over Group Litigation in Comparative Perspective, 12 (Geneva, July 21–22, 2000), available at <http://law.duke.edu/grouplit/papers/classactionalexander.pdf>

<sup>32</sup> Waelbroeck, *supra* note 19, at 92-95. For a law and economics analysis of the American rule and the European two-way cost shifting principle see Emanuela Carbonara & Francesco Parisi, Rent-Seeking and Litigation: The Hidden Virtues of the Loser-Pays Rule, Minnesota Legal Studies Research Paper No. 12-39 (September 9, 2012), available at <http://ssrn.com/abstract=2144800>.

<sup>33</sup> See Rule 54(d) of the Federal Rules of Civil Procedure. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

contains plentiful exceptions that shift reasonable attorney's fees (a notable example being antitrust law<sup>34</sup>), these rules enable one-way costs shifting from the prevailing plaintiff to the losing defendant.<sup>35</sup> Under the general rule, the prevailing party may request the court to shift attorney's fees only in exceptional cases, such as frivolous law suits where the plaintiff acted in bad faith.<sup>36</sup> In other words, in the US, as a matter of practice, the plaintiff does not run the risk of becoming liable for the prevailing defendant's attorney's fees. \*223

In contrast to this, as in most parts of the world, European jurisdictions traditionally follow the two-way cost-shifting principle,<sup>37</sup> albeit the shiftable legal costs are often limited and rarely cover all the expenses. Some jurisdictions content themselves with limiting the shiftable sum to reasonable legal costs. In Hungarian law, the principle is full reimbursement and it is at the court's discretion whether and to what extent it shifts the prevailing party's attorney's fees. The losing party is liable for all the necessary legal costs that have a causal link to the judicial enforcement of the claim, irrespective of whether they emerged before or during the law suit.<sup>38</sup> The prevailing party may claim reimbursement for the attorney's fee stipulated in the mandate agreement. However, the court may reduce the shiftable attorney's fee, if it is not proportionate to the claim's value or the actual work done.<sup>39</sup> Likewise, in Bulgaria, the losing party may seek reduction of the attorney's fee claimed by the prevailing party, if it is exorbitant in relation to the value and complexity of the case.<sup>40</sup> German law also provides for the shifting of the reasonable legal costs on the losing party;<sup>41</sup> however, the recoverable attorney's fee is capped by a statutory schedule.<sup>42</sup> In French law, attorney's fees, which normally make up the overwhelming majority of the expenses, are shifted on to the losing party to the extent determined by the court, which has to allocate them in an equitable manner and taking into account the losing party's financial situation.<sup>43</sup>

Super-compensatory damages, a very significant impetus for plaintiffs in the US, are not available in Europe.

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<sup>34</sup> Sherman Act, 15 U.S.C. 4304(a).

<sup>35</sup> See, e.g. Fair Labor Standards Act, 29 U.S.C. 216; Magnuson–Moss Warranty Act, 15 U.S.C. 2310(d)(2).

<sup>36</sup> See Rule 11 of the Federal Rules of Civil Procedure; *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973); Sherman Act, 15 U.S.C. 4304(a)(2).

<sup>37</sup> An exception that confirms the rule may be found in the Bulgarian administrative competition procedure. Section 69(2) of the Bulgarian Act on protection of competition provides for one-way cost-shifting. "Where the Commission [on Protection of Competition] issues a decision establishing an infringement under this Law, the Commission shall order the infringer to pay the costs of the proceedings, if so requested by the other party. If no infringement is established, the costs shall be borne by the parties who incurred them." The Act was promulgated in the State Gazette's Issue 102 of 28 November 2008. For an English translation see [www.wipo.int/wipolex/en/text.jsp?file\\_id=238274](http://www.wipo.int/wipolex/en/text.jsp?file_id=238274).

<sup>38</sup> Sections 80 and 83(1) of Act CXXX of 2016 on the Civil Procedure (in Hungarian: "2016. évi CXXX. törvény a polgári perrendtartásról").

<sup>39</sup> Section 2 of Ministry of Justice Decree 32 of 2003 (August 22) on the attorney's costs that may be established in judicial proceedings (in Hungarian: "32/2003. (VIII. 22.) IM rendelet a bírósági eljárásban megállapítható ügyvédi költségekről").

<sup>40</sup> Section 78(5) Bulgarian Code of Civil Procedure.

<sup>41</sup> Section 91 of the German Code of Civil Procedure ("Zivilprozessordnung"), Zivilprozessordnung (in der Fassung der Bekanntmachung vom 5. Dezember 2005 (BGBl. I S. 3202; 2006 I S. 431; 2007 I S. 1781), last amended through Section of the Gesetz vom 21. November 2016 (BGBl. I S. 2591).

<sup>42</sup> Rechtsanwaltsvergütungsgesetz vom 5. Mai 2004 (BGBl. I S. 718, 788), last amended through Section 13 of Gesetz vom 21. November 2016 (BGBl. I S. 2591).

<sup>43</sup> Sections 695-700 of the French Code of Civil Procedure ("Code de la procédure civile"). For a detailed analysis see Sophie Gjidara-Decaix, *Les règles de répartition des frais en procédure civile*, 62(2) *Revue internationale de droit comparé* 325 (2010).

In US law, punitive damages are generally available in all but five states<sup>44</sup> and treble damages are provided for in various state and federal statutes, including the Sherman Act. On the other hand, in continental Europe these goals and this rationale are, in principle, reserved for administrative and criminal law and damages are meant (only) to compensate the injured party for the loss suffered and may under no circumstances entail his enrichment: the purpose of the damages awarded is to restore the initial status (*in integrum restitutio*), that is, to compensate; they are not designed to punish the wrongdoer, although they may certainly have such a side \*224 effect.<sup>45</sup> The Principles of European Tort Law, which are both a restatement of the common core of European tort law and also a proposal for a comprehensive system of tortious liability, stress the compensatory purpose of damages and treat their deterrent effects as a welcome by-product.

*Damages are a money payment to compensate the victim, that is to say, to restore him, so far as money can, to the position he would have been in if the wrong complained of had not been committed. Damages also serve the aim of preventing harm.*<sup>46</sup>

Interestingly, while exemplary damages are, theoretically, available under English common law, in *Rookes v Barnard*<sup>47</sup> the English Supreme Court (at that time, House of Lords) almost fully evirated the legal doctrine that underlay the remarkable conceptual development in the US resulting in the current practice of punitive awards. It held that exemplary damages, aside from the case when they are provided for by a statute, can be awarded only in matters involving “oppressive, arbitrary or unconstitutional action by the servants of the government” and when “the Defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.”<sup>48</sup>

Finally, generous US discovery rules significantly contribute to the success of private enforcement, while the lack of them may choke off claims for damages in Europe. Jury trials, a scheme almost never used in Europe, certainly add to the uncertainty of outcomes but probably to the detriment of defendants.

### **13.3. EU law’s private enforcement at the intersections of tort law, fundamental rights and public policy**

EU competition law’s private enforcement has featured a general tendency of “federalization” and made it subject to a “federal” purpose-setting. The enforcement of EU competition law, both public and private, has traditionally had a dual nature. While substantive provisions are

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<sup>44</sup> Anthony J. Sebok, Punitive damages in the United States, in PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 155 (Helmut Koziol & Vanessa Wilcox eds., Springer, 2009). See Michael L. Rustada, *The closing of punitive damages’ iron cage*, 38 Loyola of Los Angeles Law Review 1297 (2005).

<sup>45</sup> See, e.g., BGH 4 June 1992, BGHZ 118, 312 (Bundesgerichtshof). Quotations refer to the translation in G. Wegen and J. Sherer, Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of U.S. Judgments Awarding Punitive Damages [June 4, 1992], 32 International Legal Materials 1320 (1993) (“often, the sole appropriate aim of the civil action taken in response to an illegal act is to compensate for the effects of that act on the financial circumstances of the parties directly concerned”); M. Requejo Isidro, Punitive Damages from a Private International Law Perspective, in PUNITIVE DAMAGES:, *supra* note 44, at 237, 246.

<sup>46</sup> Principles of European Tort Law. Text and Commentary. European Group on Tort Law. 2009, Article 10:101 (Nature and purpose of damages).

<sup>47</sup> *Rookes v Barnard* [1964] 1 All England Law Reports (All ER) 367.

<sup>48</sup> On exemplary damages in English law see Vanessa Wilcox, Punitive Damages in England, in PUNITIVE DAMAGES, *supra* note 44, at 7-53.

centralized, enforcement is decentralized and member states enjoy procedural autonomy.<sup>49</sup> This procedural autonomy is conceived very widely to embrace not only genuine procedural issues but also legal consequences. In respect to the private enforcement of Articles 101-102 TFEU, this means that EU law sets out the basis of legal consequences and, with the exception of the automatic nullity of restrictive agreements provided for by Article 101(2) TFEU, the private law aspects come under national law (framed by two fundamental principles: the requirement of equivalence, which prohibits discrimination between the application of EU and domestic law, and the requirement of effectiveness, which prescribes that national rules must not make the application of EU law impossible or unduly difficult). The borderline in this dualism is <sup>\*225</sup> becoming, however, more and more blurred for both legislative and judicial developments. The EU Private Enforcement Directive established a rather tight framework, while in *Vantaa v. Skanska and others*<sup>50</sup> the CJEU laid the groundwork of an autonomous and independent (more ambitiously: federal) EU “private competition law.” The CJEU held that as the right to claim compensation for damages caused by competition law violations is secured by EU law, the conditions of the existence of this right (e.g. causality and the definition of the entity from which compensation may be claimed) are questions of EU law and should be given an autonomous meaning.

Although regarded as a seeded player, EU competition law’s private enforcement is part of a wider European private enforcement context, and the relationship between the two has been characterized by mutual interaction. The European movement for competition law’s private enforcement proved to be intensely impactful and, in fact, contributed to the private enforcement of EU law at large. An example of this trans-sectoral impact is European collective redress. While initially the Green Paper and the White Paper addressed this issue in the frame of EU competition law’s private enforcement, finally the Commission decided to introduce a legal instrument of general application that covers the enforcement of EU law in general. This resulted in the adoption of the Recommendation on Collective Redress<sup>51</sup> in 2013 and the introduction of sectoral rules in consumer matters by Directive 2020/1828 on representative actions for the protection of the collective interests of consumers.<sup>52</sup>

EU competition law’s private enforcement emerges from the general requirement that EU law’s enforcement in the member states has to be effective and individuals, as a matter of fundamental right, should be secured an effective remedy when their rights under EU law are violated. It would be very difficult to disagree with the proposition that rights which exist in the books but

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<sup>49</sup> See, e.g., Case 51-54/71 *International Fruit Company*, EU:C:1971:128, paras. 3 and 4; D.-U. GALETTA, PROCEDURAL AUTONOMY OF EU MEMBER STATES: PARADISE LOST? (Springer 2010).

<sup>50</sup> Case C-724/17 *Vantaan kaupunki v. Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy*, EU:C:2019:204. For analysis, see C.S. Rusu, ‘Case C-724/17 *Vantaan Kaupunki v. SIS, NCC & Asfaltmix*: The Journey or the Destination?’, *Radboud Economic Law Blog* (2019), <https://www.ru.nl/law/research/radboud-economic-law-conference/radboud-economic-law-blog/2019/case-724-17-vantaan-kaupunki-sis-ncc-asfaltmix/>; Caroline Cauffman, The EU Competition Law Notion “Undertaking” That Is Used To Determine Liability For Fines Is Also To Be Used When Determining The Entity That Is Liable For Damages, *Competition Policy International* (March 2019), [https://www.researchgate.net/publication/332106552\\_The\\_EU\\_Competition\\_Law\\_Notion\\_Undertaking\\_That\\_Is\\_Used\\_To\\_Determine\\_Liability\\_For\\_Fines\\_Is\\_Also\\_To\\_Be\\_Used\\_When\\_Determining\\_The\\_Entity\\_That\\_Is\\_Liable\\_For\\_Damages](https://www.researchgate.net/publication/332106552_The_EU_Competition_Law_Notion_Undertaking_That_Is_Used_To_Determine_Liability_For_Fines_Is_Also_To_Be_Used_When_Determining_The_Entity_That_Is_Liable_For_Damages); Christian Kersting, Private Law Liability of the Undertaking Pursuant to Art. 101 TFEU, *Wirtschaft und Wettbewerb (WuW)* 290 (2019), <https://ssrn.com/abstract=3439973>.

<sup>51</sup> 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.

<sup>52</sup> [2020] OJ L 409/1.



“cannot be enforced in practice are worthless.”<sup>53</sup> Furthermore, private enforcement also has a significant public policy role in EU law: individuals, when seeking an effective remedy for the violation of their rights, are not only pursuing their own interests but are also instrumental in the effective enforcement of EU law. This creates a triangle of considerations: the natural right to claim compensation for damages caused by illicit conduct, the fundamental right to an effective remedy, and the effectiveness of EU law, which is heavily reliant, besides national authorities and courts, on individuals.

Article 47 of the EU Charter of Fundamental Rights, with reference to legal aid, treats access to justice as part of the right to an effective remedy and to a fair trial.<sup>54</sup> Access to \*226 justice is also part of the requirement of rule of law, one of the core values of the EU enshrined in Article 2 TEU.<sup>55</sup>

Furthermore, member states, due to the principle of loyalty, are obliged to ensure the effective enforcement of EU law. According to Article 4(4) TEU, ‘Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.’ According to the CJEU’s judicial practice, member states’ enforcement of EU law is subject to two general requirements: the principle of equivalence and the principle of effectiveness. National rules governing the enforcement of EU law may not be less favorable than those governing similar domestic actions (principle of equivalence) and they may not make the enforcement of EU law practically impossible or excessively difficult.<sup>56</sup>

Not surprisingly, the Commission’s Recommendation on Collective Redress defines collective actions as a means to “facilitate access to justice in relation to violations of rights under Union law” and to reinforce the effectiveness of EU law.<sup>57</sup>

*The purpose of this Recommendation is to facilitate access to justice, stop illegal practices and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under Union law, while ensuring appropriate procedural safeguards to avoid abusive litigation.*<sup>58</sup>

The Recommendation is based on the premise that collective actions are needed because they enhance both the effectiveness of the law (through stopping and preventing unlawful practices) and the chance to obtain a real legal remedy (compensation).

*These measures are intended to prevent and stop unlawful practices as well as to ensure that compensation can be obtained for the detriment caused in mass harm situations. The possibility of joining claims and pursuing them collectively may constitute a better*

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<sup>53</sup> European Commission Staff Working Document Public Consultation: Towards a coherent European approach to collective redress, SEC (2011) 173 final, para 1.1.

<sup>54</sup> “Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary.”

<sup>55</sup> European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to access to justice 16 (European Union Agency for Fundamental Rights and Council of Europe, 2016), available at <http://fra.europa.eu/en/publication/2016/handbook-european-law-relating-access-justice>.

<sup>56</sup> See e.g. Case C-261/95 *Palmisani* [1997] ECR I-4025, para. 27, Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, para. 29, Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-06619, para 62.

<sup>57</sup> Recital (1) & (10)

<sup>58</sup> Para. 1.

*means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court.*<sup>59</sup>

Nonetheless, while the Recommendation lists access to justice and effectiveness of the law as aims equally important to compensation, it also makes clear that the purview of these is strictly limited by what is permitted by the compensatory function.

*(15) Collective redress mechanisms should preserve procedural safeguards and guarantees of parties to civil actions. In order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in this Recommendation. Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.*

*31. The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been \*227 pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited.*

The EU Private Enforcement Directive also features the above multiplicity of aims. The recital identifies the full effectiveness of EU competition rules as the Directive's aim but at the same time limits the extent of the deterrent and victim-friendly rules by ruling out overcompensation and unjustified enrichment.

*(3) National courts thus have an equally essential part to play in applying the competition rules (private enforcement). ... The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone ... can claim compensation before national courts for the harm caused to them by an infringement of those provisions.*

*(13) This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU. Without prejudice to compensation for loss of opportunity, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.*

The above mindset finds reflection in the detailed rules. While the Directive contains a list of victim-friendly rules in terms of presumptions and reversed burden of proof, these do not question the basic civil law tenet that the injured person may be compensated only for the loss he suffered and cannot become richer as a result of the compensation.

*Skanska* presents an interesting development in this regard. Advocate General Wahl considered private and public enforcement to be part of the same unitary enforcement system and private enforcement's function to be predominantly deterrence, to which the compensatory function is subordinate.<sup>60</sup> This policy consideration shaped his proposed interpretation of EU law.<sup>61</sup>

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<sup>59</sup> Recital (9)

<sup>60</sup> *Ibid.*, paras. 28 and 50.

<sup>61</sup> Based on this policy consideration, he concluded that the doctrines of undertaking and economic continuity should equally apply to public and private enforcement. *Ibid.*, paras. 62-68, 76 and 79. The same as in public

50. *In the final analysis, therefore, the compensatory function of an action for damages for an infringement of competition law remains in my view subordinate to that of its deterrent function.*

Although the CJEU did not expressly take up this notion, it endorsed the idea that public and private enforcement make up a unitary system. This conceptual kinship between public and private enforcement may suggest that deterrence may be one of the primary roles, if not the primary role, of private enforcement.

#### **13.4. Conclusions: the limits of private enforcement's deterrent function in EU competition law**

The use of private enforcement for the advancement of public policy purposes creates a challenge for civil law. It is an entrenched societal concept in Europe that private litigation is characterized by “privity” and may have no public policy function, as the latter comes under the prerogative of the state. Private enforcement questions the ontological tenet that private law is about “private” matters and public policy is the exclusive prerogative of the state. This is in sharp \*228 contrast to the American conception of the relationship between public policy and civil litigation. Because of this societal dogma, EU private enforcement has never been meant to replace public enforcement, but simply to complement and assist it.

The CJEU's ruling in *Skanska*, by lining up private enforcement along with public enforcement and acknowledging its added value in discovering and punishing violations, may give rise to thoughts about a more policy-oriented purpose-setting. It is easy to analogize this stance with US antitrust law's reliance on the private attorney general. Although, in the EU, private enforcement does not and cannot have the kind of weight it has in the US, the explicit articulation of its public policy rationale, which took root as early as *Courage*,<sup>62</sup> is a major development. While this finds no reflection in the ruling, Advocate General Wahl went so far as to say that the major rationale of private enforcement is deterrence and the compensatory function is merely secondary to this. Though this statement could call for a reconsideration of the prevailing paradigm of compensation and the introduction of super-compensatory damages, such as punitive or treble damages, in my view these statements do not question the traditional civil law foundations and the principle that the compensation is not meant to enrich the victim but to duly compensate him. Instead, it simply confirms that the main reason why civil liability is so important for EU law is that it also has a deterrent effect.

Victim-friendly rules may extend until the point where they are tolerable by civil law's compensatory logic. This does not imply that EU competition law's private enforcement rules cannot be more victim-friendly than general tort law. It only means that private enforcement may make use of the grey zone between compensatory and super-compensatory damages but cannot transgress this. Legal presumptions concerning damages, the reversal of the burden of proof as to the passing-on defense, to mention a couple of them, do not question of civil law's basic tenet that compensation has to be limited to the loss suffered. They go beyond general tort law and facilitate actions for damages but conceptually still comply with the principle of full compensation.

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enforcement, in private enforcement the deterrent function is best served if “liability is attached to assets, rather than to a particular legal personality.” *Ibid.*, para 80.

<sup>62</sup> Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

Article 3 of the EU Private Enforcement Directive pronounces that victims shall be entitled to full compensation, extending to the actual loss and lost profit (and interests); however, it makes it explicit that “[f]ull compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.”<sup>63</sup>

Article 17 alleviates the burden of quantifying the harm suffered. First, Article 17(2) introduces a rebuttable presumption of harm: it “shall be presumed that cartel infringements cause harm.” Albeit this presumption does not extend to quantum, it assists victims considerably. In civil law, the fact of loss and quantum are two separate elements of the legal test. The advantage of having a presumption as to the fact of harm is that, if it is not rebutted, it allows the court to establish the quantum of damages via estimation. The presumption of harm may give rise to the application of national rules that address situations where the loss, due to reasons beyond the plaintiff’s sphere of control, cannot be proved appropriately and alleviate the burden of proof as to quantum and increase the court’s discretion in establishing the amount of loss. Second, in line with the foregoing logic, Article 17(1) expects national laws to

*ensure that 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. Member states shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered \*229 harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.*

The treatment of passing-on defense and the claim of indirect purchasers features a similar compromise between the public policy function and traditional compensatory thinking: the EU Private Enforcement Directive stretches the victim-friendly rules until the point where they, though more generous than traditional tort law, can still be conceived as compensatory (and not punitive).

The passing-on defense accrues from the compensatory logic of damages: the injured person cannot be compensated for a harm he did not suffer; if the harm was partially or fully passed on, it was not or not fully suffered by the injured person but by the indirect purchasers, who bought the products from the direct purchaser. At the same time, the passing-on defense may be an effective defensive tactic, because of the problems of proof it raises. In US antitrust law, these policy considerations warranted the discarding of the passing-on defense<sup>64</sup> and, as a consequence, the denial of indirect purchasers’ standing.<sup>65</sup> The principle that passing-on may not be used either defensively against a direct purchaser, or offensively against an antitrust violator is justified by the effectiveness of enforcement. The passing-on defense may highly encumber the enforcement of the claims of direct purchasers, while it is highly unlikely that indirect purchasers could effectively prove the loss they suffered and enforce their claims. Hence, the policy consideration of enhancing the effectiveness of private enforcement suppressed the private law considerations emerging from the notion of compensation.

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<sup>63</sup> See also Article 12(1)-(2) of the EU Private Enforcement Directive.

<sup>64</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

<sup>65</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

*In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case, the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit, and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.<sup>66</sup>*

While this policy-oriented construction could not be reconciled with the European legal mindset, policy considerations did shape the rules on passing on. The EU Private Enforcement Directive refused to step out of the shadow of the compensatory logic and endorsed the passing-on defense and the standing of indirect purchasers,<sup>67</sup> but – with a view to enhancing the effectiveness of private enforcement – placed the burden of proof on the wrongdoer.<sup>68</sup>

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<sup>66</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968).

<sup>67</sup> Article 12(1) & 14 of the EU Private Enforcement Directive.

<sup>68</sup> Article 13 of the EU Private Enforcement Directive.