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Veljko Milutinović

Graduate School of Business Studies, Belgrade

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I. INTRODUCTION

The subject of this paper is the recently enacted 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 ("Damages Directive" or "Directive"). The Directive is aimed at enhancing private enforcement of European Union and national competition law and, in particular, effective and just compensation for victims of infringements. It is submitted that, while striving for just compensation and, in particular, just compensation for so-called "follow-on claimants" (claimants that base their claim on an existing public enforcement decision), the EU Institutions and, especially, the European Commission ("Commission"), as the proponent, have made significant sacrifices regarding:

- the relationship between public and private enforcement (in particular the so-called "system of parallel competences");
- exclusive EU competence;
- legal diversity within the EU; and
- deterrence of anticompetitive conduct.

This paper will not analyze the Directive as a whole; that task will be performed in a much larger, more comprehensive work,[2] while many of the "old" issues in the Directive have already been treated extensively in an existing work, both by the present author.[3] Instead, this paper will focus on the key postulates of this legal instrument; the extent and the justification of the four sacrifices listed above will be examined in view of making a broad assessment of the likely overall impact of the Directive. In this paper, the term "just' compensation" covers, intentionally, two different meanings of the English word: "just" as in *fair* and "just" as in *mere*.

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[1] Assistant Professor of Law, Graduate School of Business Studies, Belgrade; Of Counsel, Samardžić Law Office, Belgrade.

[2] V. Milutinović, *The EU Antitrust Damages Directive: Context, Meaning, Assessment* (Kluwer, forthcoming spring 2015).

[3] V. Milutinović, *The 'Right to Damages' under EU Competition Law: From* Courage v. Crehan *to the White Paper and Beyond* (Kluwer, 2010).

II. THE DAMAGES "AGENDA"

A. Prior to the 2005 Green Paper

Damages actions were first mentioned in official EU (then EEC) discussions more than half a century ago, in the context of what ultimately became the first EU antitrust enforcement regulation (Regulation 17/62).[4] A report on civil claims in the Member States was produced in 1966,[5] then again in 1997;[6] there was also a Notice on Cooperation with National Courts in 1993.[7] However, no comprehensive legislation was adopted at the EU level prior to the Damages Directive.

The damages agenda, as it exists today, developed initially through the case law of the Court of Justice of the European Union ("Court of Justice") and was subsequently picked up by the Commission. In its 1974 judgment in *BRT*, the Court of Justice found that what are now Articles 101(1) and 102 of the Treaty on the Functioning of the European Union ("TFEU") were directly applicable.[8] With the exception of Article 101(3) TFEU which, at the time, lay within the exclusive competence of the Commission,[9] the Commission and national courts operated in a "system of parallel competences.[10] This system of parallel competences has been consistently reaffirmed, in principle, in subsequent Court of Justice case law.[11]

In the Commission's 1999 *White Paper on Modernisation*[12] references to the role of national courts were relatively general, with damages appearing *obiter*, as an advantage of civil proceedings.[13] The main point of that *White Paper* was to decentralize enforcement, and for both National Competition Authorities ("NCAs") and national courts to share the enforcement burden with the Commission.[14] Importantly, in order to effectuate this decentralization, it was

[4] *Rapport fait au nom de la commission du marché interieur ayant pour objet la consultation demandée à l'Assemblée parlementaire européene par le Conseil de la Communaute économique européene sur un premier réglement d'application des articles 85 et 86 du traite´ de la C.E.E.* (Document 104/1960-1961-'Deringer Report'), ¶ 123; the regulation ultimately became Council Regulation (EEC) 17/62, First Regulation implementing Arts 85 and 86 of the Treaty [1959–1962] OJ Eng. Spec. Ed. 87; *see* Milutinović, op. cit. *supra* note 4, 27-28.

[5] European Commission, *La réparation des conséquences dommageables d'une violation des articles 85 et 86 du Traité instituant la CEE*, Série Concurrence No 1 (Brussels, 1966).

[6] European Commission, *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States* (Brussels, 1997).

[7] European Commission, *Notice on cooperation between national courts and the Commission in applying Arts 85 and 86 of the EEC Treaty* [1993] OJ C39/5.

[8] Case 127/73, *BRT v. SABAM* [1974] ECR 51, para 16.

[9] Regulation 17/62, *supra* note 5, Art. 9(3).

[10] Whose outlines were set out in ¶¶20-22 of *BRT*, *supra* note 9.

[11] *See* the discussion in Section 3 *infra*.

[12] European Commission, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty* [1999] OJ C132/1.

[13] *Id.*, point 46.

[14] *Id.*, points 82-100.

suggested that Article 101(3) TFEU become directly applicable,[15] so that both Article 101 and Article 102 TFEU could be applied by national courts and NCAs in their entirety.[16]

The major turn came in the 2001 *Courage* judgment, where the Court of Justice famously held that, under EU law, it must be "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."[17] This was the so-called "Community right to damages," regarding which much has been written, by this and other authors.[18] The Court of Justice built this right to damages progressively, first by establishing, in *Francovich* and *Brasserie du Pêcheur/Factortame,* that it exists between individuals and Member States and then establishing,[19] in *Courage*, that it exists between individuals.[20] Although this is not often mentioned in the literature, a right to restitution of unlawfully paid sums, also for competition infringements, was found to exist by the Court of Justice in *GT-Link*.[21]

In the meantime, in September 2000—a year before *Courage* was delivered—the Commission proposed a new enforcement regulation, which ultimately became Regulation 1/2003.[22] This regulation formally brought national courts into the antitrust enforcement system through an obligation to apply EU antitrust law and the introduction of certain rules regulating the relationship between public and private enforcement.[23] At that point, damages actions were not specifically addressed.

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[15] *Id*., points 69-73.

[16] *See* EUROPEAN COMPETITION ANNUAL 2000: THE MODERNISATION OF EC ANTITRUST POLICY (C.-D. Ehlermann & I. Atanasiu, eds., 2001) and C.-D. Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 CML REV. 537 (2000); *see also* Milutinović, op. cit. *supra* note 4, Ch. 2 (with references to further literature at note 13).

[17] Case C-453/99, *Courage v. Crehan* [2001] ECR I-6297, ¶26.

[18] *See* A. KOMNINOS, EC PRIVATE ANTITRUST ENFORCEMENT: DECENTRALISED APPLICATION OF EC COMPETITION LAW BY NATIONAL COURTS (2008), Ch. 3, Sect. II.b. and Milutinović, op. cit. *supra* note 4, Chs. 3 and 4.

[19] Cases C-6 and 9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5357, ¶¶33–37 and Cases C-46 and 48/93, *Brasserie du Pêcheur v. Germany and R v. Sec. of State for Transport ex parte Factortame* [1996] ECR I-1029, ¶¶20-22.

[20] For an extensive discussion: Komninos, op. cit. *supra* note 19, 165-179; Milutinović, op. cit. *supra* note 4, 60-75 and 83-91.

[21] Case C-242/95, G*T-Link A/S v. De Danske Statsbaner (DSB)* [1997] ECR I-4449, ¶¶ 58-61; on the issue of restitution of anticompetitive overcharges, as opposed to compensation, *see*, generally, Milutinović, op. cit. *supra* note 4, Ch. 8.

[22] European Commission, *Proposal for a Council Regulation on the implementation of the rules on competition laid down in* A*rticles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty")* COM (2000) 582 final; Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2003] OJ L1/1 ('Regulation 1/2003').

[23] Regulation 1/2003, cited *supra* note 22, Art. 3 (obligation to apply EU competition law), Art. 6 (power to apply EU competition law), Art.15 (co-operation with national courts) and Art. 16(1) (duty to abstain from conflicting judgments).

B. From the 2005 Green Paper to the Directive

The push for damages actions began in earnest in 2005, when the Commission published a green paper ("2005 *Green Paper*")[24] wherein it set out a wide set of possible options. In particular, these were with regard to: access to evidence, fault, calculation of damages, the "passing-on defense"/indirect purchasers, consumer interests, costs of actions, coordination of public and private enforcement, jurisdiction and applicable law, appointment of experts, suspension of limitation periods, and causation.[25] The 2005 *Green Paper* received a great number of responses, which varied widely from broad opposition[26] to broad endorsement.[27] Overall, there was agreement to the effect that compensation for breach of Articles 101 and 102 TFEU was, in principle, desirable and necessary, as it contributes to the effectiveness of EU competition rules and corrective justice for victims.[28] As a matter of substance, any notion of damages other than full compensation was controversial,[29] and so was the idea of imposing a ban on the so-called passing-on defense.[30]

In its 2006 *Manfredi* judgment, the Court of Justice confirmed *Courage*,[31] and clarified that the right to damages applies to consumers[32] while also eliciting some minimum rules regarding limitation periods and types of recoverable loss (actual loss and lost profits—the option of punitive or other more-than-compensatory damages remained open to the Member States).[33]

In 2008, the Commission published a white paper ("2008 *White Paper*"),[34] which represented a narrowed-down list of proposals and would become the backbone of the subsequent Damages Directive (including the issues of: passing-on/indirect purchasers,[35] representative actions and opt-in collective actions,[36] *inter partes* disclosure of evidence,[37] protection of corporate leniency statements and leniency applicants, and binding effects of NCA decisions on courts throughout the European Union).[38] A significant exception from the

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[24] European Commission, *Green Paper on Damages Claims for Breach of the EC Antitrust Rules*, COM (2005) 672 final ('2005 *Green Paper*')

[25] *Id.*, points 2.1. to 2.9 and Milutinović, op.cit *supra* note 4, 76-77.

[26] *See*, e.g. the responses of Freshfields Bruckhaus Deringer LLP, the Federation of German Industry (BDI), the Federation of Italian Industry (CONFINDUSTRIA), the German Federal Ministry of Economics and Technology and the Italian Government, *available at* http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html (last viewed: 7 August 2014).

[27] *Id.*, *see*, e.g. the responses of the Amsterdam Centre for Law and Economics, BEUC (European Consumers' Organization), James O'Reilly SC, UFC Que Choisir (France) and Which? (UK).

[28] Milutinović, op. cit. note 4 *supra*, 77-78.

[29] Note 26 *supra*: CONFINDUSTRIA, 3–4; Federal Ministry of Economics and Technology, 3.

[30] Milutinović, op. cit. supra note 4, 77-78.

[31] Cases C-295 to C-298/04, *Manfredi et al. v. Lloyd Adriatico et al.* [2006] ECR I-6619, ¶¶59-61.

[32] *Id.*, ¶ 20, the second question of the referring court.

[33] *Id.*, ¶¶78-79 (limitation periods), ¶ 95 (types of loss) and ¶ 99 (punitive damages).

[34] European Commission, *White Paper on Damages Claims for Breach of the EC Antitrust Rules*, COM (2008) 165 final ('2008 *White Paper*').

[35] *Id.*, points 2.1. and 2.6.

[36] *Id.*, point 2.1.

[37] *Id.*, point 2.2.

[38] *Id.*, points 2.2. and 2.9. (leniency) and 2.3. (binding effect).

transposition of the issues from the 2008 *White Paper* into the Directive is that of collective/representative claims; these were dropped in the competition context in favor of a future "horizontal" solution that would also apply to other fields of EU law.[39]

It is important to note that both the 2005 *Green Paper* and the 2008 *White Paper* dealt with actions for damages brought under EU law, i.e. Articles 101/102 TFEU.

On June 11, 2013, the Commission issued its Proposal for a Directive;[40] on April 17, 2014, the European Parliament adopted the text of the Damages Directive, with significant amendments.[41] On November 10, 2014 the Council approved the final text and it entered into force on Decembeer 25, 2014. The deadline for transposing the Directive into national legal systems was set at December 27, 2016.

According to its Article 1, the Directive aims at the effective exercise of the right to compensation for victims of anticompetitive conduct with "equivalent protection" throughout the European Union, as well as "coordination" between public and private enforcement. Already in the first paragraph of this first article, the Directive makes a significant departure from the 2008 *White Paper*, by specifying that it applies to "harm caused by an infringement of competition law," without specifying whether that law is EU or national law.

The remainder of the Directive contains important rules on damages, evidence, binding effect of NCA decisions, limitation periods, joint and several liability, and passing-on defense/indirect purchaser claims. These solutions will be discussed in the sections that follow. Other solutions, not pertinent to the main argument, will be omitted.[42]

III. THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

A. Generally

In the EU system, the relationship between the Commission and national courts operates, at least in theory, in a system of parallel competences. In its 1974 *BRT* judgment, the Court of Justice held that the Commission could not take away the competence of national courts to apply Articles 101(1) and 102 TFEU and that national courts were protecting directly applicable rights of individuals.[43] Thus began a path dependency, which was carried on through subsequent cases

[39] *See* European Commission, *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory redress mechanisms in the Member States concerning violations of rights granted under EU law* OJ [2013] L201/60; for updates on the situation, visit the web page: http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html (last viewed: 5 Aug. 2014).

[40] European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* COM(2013) 404, 11.6.2013, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html (last viewed: 5 Aug. 2014).

[41] This version is *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN (last viewed: 6 Aug. 2014).

[42] E.g . Art. 18, which provides for suspensive effect of consensual dispute resolution proceedings and Art. 19, which allows for a limitation of exposure of parties who settle.

[43] *BRT*, cited *supra* note 9, ¶¶16-22 .

such as *Delimitis* and *Masterfoods*,[44] whereby the Court of Justice built up the primacy of Commission decisions over national court judgments, while still insisting that the competence of national courts is independent of and parallel to that of the Commission. Thus, in *Delimitis*, competences were "parallel" but national courts should, nonetheless, "avoid" issuing a judgment that conflicts with an envisaged Commission decision.[45] In *Masterfoods*, parallel competences remained and national courts did not have to await the outcome of an Article 263 TFEU action for annulment against a Commission decision;[46] nevertheless, they could also not run counter to an existing Commission decision.[47]

B. Binding Effect

The principles set out in *Delimitis* and *Masterfoods* were codified in Article 16(1) of Regulation 1/2003. Apart from infringement decisions (as in *Masterfoods* itself), some confusion remained with regard to: a) which *part* of a Commission decision is binding b) which *type* of Commission decision is binding and c) whether the findings of the Commission against one infringer could be used in a case against *another* alleged infringer in a civil claim, where the factual and legal circumstances are very similar.[48] It now seems clear that only the operative part or, at most, the operative part and the grounds supporting the operative part of an infringement are binding,[49] and only against the same alleged infringers named in the operative part.[50] Clearly, commitment decisions are binding only on the Commission and the party that provided the commitments.[51]

More controversial are non-infringement ("findings of inapplicability") decisions that the Commission is allowed to adopt, exceptionally, under Article 10 of Regulation 1/2003. It may be

[44] Case C-234/89, *Delimitis v. Henninger Brau* [1991] ECR I-935; Case C-344/98, *Masterfoods v. HB Foods* [2000] ECR I-11369.

[45] *Delimitis*, loc. cit. ¶ 47.

[46] *Masterfoods*, cited *supra* note 45, ¶¶57 and 60; the Advocate General disagreed with this view: ¶ 108 of the Opinion of Advocate General Cosmas; also against this view, V. Milutinović, *The 'Right to Damages' in a 'System of Parallel Competences': a Fresh Look at BRT v. SABAM and its Subsequent Interpretation*, EUROPEAN COMPETITION LAW ANNUAL 2011: INTEGRATING PUBLIC AND PRIVATE ENFORCEMENT-IMPLICATIONS FOR COURTS AND AGENCIES (M. Marquis & P. Lowe, eds. 2014), 341 at 351-353; the paper is *available at* http://ssrn.com/abstract=2293649.

[47] *Masterfoods*, cited *supra* note 45, ¶¶48 and 52.

[48] For an extensive discussion of these issues, *see* Milutinović, op. cit. *supra* note 4, 261-267.

[49] In Case T-138/89, *Nederlandse Bankiersvereniging and Nederlandse Veregining van Banken v. Commission* [1992] ECR II-2181, the parties challenging the decision had acted anticompetitively but escaped punishment because there was no effect on trade between the Member States, so that Article 101 TFEU did not apply; the General Court held, at ¶¶ 31-32, that, despite the fact that the grounds may be incriminating in possible subsequent proceedings under national law, the parties can only challenge those parts of a decision that adversely affect their legal interest.

[50] *See Innterpreneur Pub Company (CPC) and others v. Crehan* [2006] UKHL 38, ¶¶ 62-69.

[51] According to Rec. 13 to Regulation 1/2003 (cited *supra* note 22), 'Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case,' (although they do place the parties in a peculiar position, by indicating, publicly, that there *may have been an infringement*: Milutinović, op. cit *supra* note 4, 258); by opposition, *settlement decisions* (Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases OJ [2008] L 171/3) are infringement decisions and they should, therefore, be treated as such for the purposes of binding effect.

argued that such decisions should not be binding as they would deprive national courts of their power to protect individuals from infringements of Article 101/102 TFEU.[52] The present author has adopted the opposite view;[53] indeed, the power in Article 10 of Regulation 1/2003 is an exceptional one, to be used "in the Community interest." It would make little sense if this exceptional Community interest could be undermined by a contrary national judgment.

Under Article 299 TFEU, national courts must enforce Commission decisions without examining their substance and they may not, in any event, review their legality.[54] Arguably, however, if a final national court judgment was issued before the Commission concluded its proceedings, *res judicata* would apply in favor of the judgment;[55] still, the Commission decision would remain enforceable against its addressees. Thus, any "Jenks conflict" (a conflict of legal orders in the strictest sense,[56]) would be resolved in favor of the Commission. Yet, as was made clear by the Court of Justice more recently in *Otis*, binding effect is broader still: the national judge must take infringement as a given, while remaining free to determine the existence and amount of loss for the claimant.[57] Thus, for example, if the Commission orders a party to pay a fine and then a national court finds that the party is innocent and should not pay damages, there is no Jenks conflict with the Commission decision (the undertaking can comply with both orders simultaneously) but there is a breach of binding effect.

The innovation of the 2008 *White Paper* and the Directive is that they would make decisions of all EU NCAs binding on national courts. Article 9(1) of the Directive makes only NCA infringement decisions binding, which makes sense, *prima facie*, as, under Regulation 1/2003, NCAs are not entitled to adopt non-infringement decisions under EU law.[58] In addition, there is no mention of contemplated NCA decisions; in order to become binding, a NCA decision must be final. Importantly, unlike the proposal of the Commission in the 2008 *White Paper*,[59] there is no mention of cross-border binding effects; NCA decisions would now be binding solely on the courts in the Member State in which they were issued. Nevertheless, under

[52] Milutinović, op. cit. *supra* note 4, 260-261; this view seems, at first sight, to also be supported by Rec. 14 to Regulation 1/2003, which states that the decisions are of a "declaratory nature;: however, the use of the word "declaratory" here can be interpreted as being in opposition to the word "constitutive:" i.e. the conduct was lawful in any event before the Commission took the Art. 10 decision (see Art. 1 of Reg. 1/2003).

[53] Milutinović, loc. cit. *supra* note 53.

[54] Case 314/85, *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, ¶ 20.

[55] *See* Case C-126/97, *Eco Swiss China Time v. Benetton International* [1999] ECR I-3055 ¶ 48: final arbitral awards need not be re-opened to ensure compatibility with Art. 101 TFEU; outside of the competition context, Case C-453/00, *Kühne & Heinz NV v. Produkschap voor Pluimvee en Eiren* [2004] ECR I-837, ¶ 28: there is no duty to re-open *res judicata* national judgments to ensure compliance with a subsequent Court of Justice judgment; the exception to *res judicata* for state aid set out in Case C-119/05, *Ministero dell'industria, del commercio e del artigianato v. Lucchini SpA* [2007] ECR I-6199, ¶ 63 would not be applicable, as in that case there was no 'parallel' competence of the national court: Milutinović, op. cit. *supra* note 4, 256-257.

[56] W. Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. YEARBOOK OF INTEL L. 401,426 (1953): "a conflict in the strict sense of direct incompatibility arises only where a party to the treaties cannot simultaneously comply with its obligations under both treaties."

[57] Case C-199/11, *European Union v. Otis et al* [2012 nyr], ¶ 65.

[58] Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o.*[2011] I-03055, ¶ 30.

[59] 2008 *White Paper*, cited *supra* note 35, point 2.3.

a proviso inserted by the European Parliament in Recital 31 of the Directive, NCA decisions can be presented as "at least *prima facie* evidence" in another Member State.

The binding effect of Commission and NCAs decisions is potentially vulnerable to significant criticism along three main lines: a) human rights, b) parallel competences, and c) independence of the judiciary.

The first issue, concerning human rights,[60] was put to rest as regards Commission proceedings by the Court of Justice and the General Court, who consider Article 263 actions for annulment a sufficient safeguard for the purposes of Article 6 of the European Convention on Human Rights ("ECHR")/Article 47 of the Charter of Fundamental Rights ("CFR").[61] In the 2008 *White Paper* and supporting documents, the Commission made it clear that only final NCA decisions (either approved via judicial review or no judicial review was launched) should be binding so as to safeguard the rights of the defense;[62] the same principle was enacted in Article 9(1) of the Directive.

Admittedly, the assumption that judicial review resolves the human rights issue in NCA cases was made without a serious comparative analysis of the standards and methods of judicial review in each Member State; instead, there was a brief comparative report on competition procedures within the European Competition Network ("ECN").[63] Arguably, this is why a cross-border binding effect of NCA decisions was dropped in the Directive (the Commission itself showed some hesitation already in the *Staff Working Paper* that supported the 2008 *White Paper*.) [64]Although Article 6 ECHR/Article 47 CFR are binding on all Member States, it is one thing to expect Member States to ensure compliance within their own jurisdiction and quite another to expect them ensure it or have trust in it in other jurisdictions.

The second criticism is sound: both Commission and NCA binding effect do undermine parallel competences, as judges are not truly free to exercise their competence in parallel. However, the impact of NCA binding effect (as envisaged in the Directive) is significantly more limited, as it does not include either non-infringement decisions or contemplated decisions.

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[60] *See*, inter alia: R. Brent, *The Binding of Leviathan?-The Changing Role of the European Commission in Competition Cases*, 44 ICLQ 255 (1995); F. Montag, *The Case for a Radical Reform of the Infringement Procedure*, ECLR 28 (1996).

[61] Case T-348/94, *Enso Española v. Commission* [1998] ECR II-1875, ¶¶57–63; *Otis*, cited *supra* note 57, ¶ 56; *see*, more recently, W. P. J. Wils, *The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker*, 37 WORLD COMPETITION 5 (2014), agreeing that the issue is resolved *provided* that the General Court perform a *full* review of Commission decisions.

[62] *Commission staff working paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules* [COM(2008) 165 final] point 155.

[63] *ECN Working Group Cooperation Issues and Due Process Decision-Making Powers Report*, 31 October 2012, *available at* http://ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf (last viewed: Aug. 10, 2014).

[64] *Staff Working Paper*, cite *supra* note 63, point 162: there, the Commission suggested that Member States might be allowed to refuse the binding effect of decisions of foreign NCAs if human rights standards have not been met in the Member State of origin.

In addition, when speaking of parallel competences, one must not lose sight of their origins in the *BRT* judgment, whose main premise—the direct effect of Articles 101/102—was questionable. In 1974, there was hardly anything "sufficiently precise" about Article 102 TFEU,[65] within the *Van Gend en Loos* standard,[66] while Article 101(1) was neither sufficiently precise nor "unconditional," as it was subject to the Article 101(3) individual exemption system.[67] Furthermore, outside of Germany, there were hardly any NCAs to speak of at that time, so it is at least arguable that the Court was motivated, to a substantial extent, by a need to empower more private attorneys general that would enforce the antitrust rules.[68]

Accordingly, one should not lose sight of the unique and somewhat accidental historical context of having to uphold the independence of individual rights under the Treaty on the one hand and the primacy of Commission decisions on the other.[69] This is a delicate balance that the EU legislator has opted to resolve in favor of primacy of Commission (and now NCA) decisions.

The third criticism—independence of the judiciary, in particular its aspect *jus novit curia* ("the court knows the law") has been the most pernicious in the binding effect discourse.[70] Under that principle, the court is competent to make its own factual and legal assessment. However, a court only knows the law insofar as is it allowed to know it in any given allocation of competences;[71] one could equally claim that judgments that run counter to public enforcement decisions undermine the competence (and thus independence) of executive agencies. Once competences are clearly allocated, there should be no misgivings in removing a matter from civil and into administrative jurisdiction, provided that adequate human right safeguards are in place.

The reason for the misgivings in this context is the notion of parallel competences. Trapped in the path dependency created by *BRT*, national courts are told to act in parallel and then asked to avoid conflicting judgments and accept having their findings potentially annulled by subsequent public enforcement decisions.

C. Other Measures

The Directive further devalues the notion of parallel competences through two sets of measures. First, in codifying and amplifying the principles set out in *Manfredi*,[72] it guarantees, in Article 10(4), that claimants in "follow-on" suits will have at least a year to file their claim from the moment a Commission or NCA decision becomes final. One would be foolish to file a claim without awaiting the final word on public enforcement, following which one enjoys a comfortable year-long preparation period.

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[65] The very concepts of dominance and abuse were untested, as *BRT* preceded the first general ruling on these issues (Case 85/76, *Hoffman-La Roche & Co AG v. Commission* [1979] ECR 461): Milutinović, op. cit. *supra* note 47, 349.

[66] Case 26/62, *Van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] Eng. Spec. Ed. 1, 13.

[67] Milutinović, op.cit. *supra* note 47, 348-349.

[68] This argument was used by Craig for *Van Gend & Loos* (note 67 *supra*): Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OJLS 453, at 455 (1992).

[69] Milutinović, op. cit. *supra* note 47, 351.

[70] Milutinović, op. cit. *supra* note 4, 290-295, with further references.

[71] *Id.*

[72] *Manfredi*, cited *supra* note 32, ¶¶77-82 (limitation periods).

Second, Article 6(5) of the Directive orders the Member States to delay the disclosure of evidence prepared for or by a competition authority, as well as settlement submissions that have been withdrawn, until the NCA proceedings are closed. Article 7(2) of the Directive provides that, until public enforcement proceedings are closed, such evidence be deemed inadmissible. Again, a claimant is discouraged from filing in parallel.[73] The primacy of public over private enforcement in the Directive is further demonstrated by Article 6(6) and Article 7(1), which protect from disclosure and make inadmissible permanently any corporate leniency statements, as well as any settlement submissions that have not been withdrawn.

Perhaps more importantly, Article 5(1), the general provision of the Directive on disclosure of evidence, which applies to both evidence disclosed by a competition authority and evidence disclosed *inter partes*, enables disclosure "upon request of a *claimant*" (emphasis added). In doing so, the Directive sidelines a large part of independent private enforcement that is comprised of "shield cases," i.e. cases where the victim acts, initially, as the defendant in a contractual claim.[74] Although such victims have a right to damages under *Courage,* they are deprived of the significant disclosure privileges of the Directive. It would seem that the Directive is bent on encouraging follow-on claims, thus cementing the *status quo* of primacy of public over private enforcement.[75]

Despite its subservience, follow-on private enforcement may receive a significant boost through the rule in Article 6(9) of the Directive, which opens to disclosure all evidence held by competition authorities that is not otherwise explicitly excluded. Binding effect and the suspension of time limits pending public enforcement will help follow-on cases but the prescription of a general, minimum five-year limitation period, with the most subjective criterion possible,[76] will also help stand-alone claimants. Pure *inter partes* disclosure, where no competition authority is involved, also gets a minimum harmonized level and guarantees both follow-on and stand-alone plaintiffs discovery of all relevant evidence, provided (Art. 5(1) of the Directive) that they have "presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of [their] claim for damages."

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[73] Settlement statements may be discouraged by this provision: if a party tries to settle a case with the Commission or a NCA, it can either accept whatever terms the Commission/NCA tries to impose or risk having its (withdrawn) statement disclosed to potential claimants.

[74] In the past, a large share of national cases reported to the Commission by the Member States under Art. 15(2) of Regulation 1/2003 were "shield" cases; *see* the list of reported cases at: http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/ (last viewed: 14 Aug. 24, 2014).

[75] It may be that the EU legislator is diluting the effect of the main finding of the Court of Justice in *Courage*, which is that the English *in pari delicto* rule should not prevent, *a priori*, parties to an unlawful agreement from recovering damages *(Courage,* cited *supra* note 18, ¶ 28); as a matter of law and policy, it may be and has been disputed whether such a right should exist when the victim is a party to the restrictive agreement, as was the case in *Courage:* G. Monti, *Anticompetitive Agreements: the Innocent Party's Right to Damages*, 27 EUR. L. J. 282 (2002); in any event, the right was not unqualified, as the Court had left national courts with the possibility of preventing unjust enrichment and taking into account the culpability of the party claiming compensation (*Courage*, loc. cit. ¶¶ 30-31).

[76] Under Art. 10(2) of the Directive, before the limitation period can begin to run before the victim is aware or can reasonably be expected to be aware not only of the disputed conduct but also that the conduct breaches the competition rules, causes him damage and who the perpetrators are.

IV. EXCLUSIVE COMPETENCE

As originally envisaged in the 2008 *White Paper*, the measures adopted in the Directive could have been adopted using Article 103 TFEU alone, with the Council acting without the European Parliament.[77] The measures originally concerned actions for damages based on EU competition law. Under Article 3 TFEU, the Union has exclusive competence in "establishing of the competition rules necessary for the functioning of the internal market." As is abundantly clear from *Courage* the right to damages constitutes part of the *effet utile* of Articles 101/102 TFEU;[78] thus, it also seems that the European Union can legislate to ensure that *effet utile* as part of its substantive competition law mandate.

All three EU Institutions involved in adopting the Directive made a sacrifice by turning to Article 114 TFEU. For the Commission, that sacrifice was, perhaps, necessary due to the political difficulty of the proposal, as suggested by the fact that more than six years went by between the publication of the 2008 *White Paper* and the adoption of the Directive. Involving the European Parliament gave the proposal greater legitimacy and the latter got a chance to pursue some of its more egalitarian notions (e.g. the Art. 11(2) rule limiting the damages exposure of small and medium enterprises ("SMEs") and the Art. 2(3) ban on punitive damages).

Unlike the use of Article 103, the use of Article 114 and its shared competence imposes upon the EU legislator an obligation to comply with the principle of subsidiarity,[79] opening questions such as: Could the issues have been more adequately resolved at the Member State level? For example, one may ask why it is that the Member States cannot decide for themselves whether they want to impose punitive damages on infringers, as the Court of Justice has allowed in *Manfredi*?[80] One may also wonder how it is that the United States, a federal nation, can allow their federal units to regulate the issue of pass-on/indirect purchasers differently than the federal level does,[81] while the EU must impose the same rules on all 28 Member States?[82]

It is worth wondering, indeed, whether the Commission's agenda, originally limited to EU law cases, was expanded to cover national competition law in order to enable the use of Article 114. According to the Commission, it was necessary to use that provision in order "to ensure a more level playing field for undertakings operating in the internal market" by harmonizing rules that apply in national antitrust law cases.[83] It remains unclear, however, how this epiphany (and the consequent expansion of the subject matter from competition to approximation of laws in the internal market) came about from consistently dealing only with EU law in 2005 and 2008 and then suddenly proclaiming approximation of national competition procedures to be a necessity. According to the Commission:

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[77] Milutinović, op. cit. *supra* note 4, 319-320; the issue of appropriate legal basis is discussed extensively in the same work, 313-321.

[78] *Courage*, cited *supra* note 18, ¶¶ 25-27.

[79] Under Art. 5(3) of the Treaty on European Union (post-Lisbon), subsidiarity applies to acts that do *not* fall within the Union's exclusive competence.

[80] *Manfredi*, cited *supra* note 32, ¶ 93;

[81] *California v. ARC,* 490 U.S. 93 (1989); *see* also Milutinović, op.cit. *supra* note 4, 187-188.

[82] *See* the discussion of "passing-on"/indirect purchaser claims in Section 6 below.

[83] Commission Proposal, cited *supra* note 41, Sect. 3.1. of the *Explanatory Memorandum*.

> Applying diverging rules on civil liability for a single specific instance of anticompetitive behaviour...could lead to conflicting results depending on whether the national court considers the case as an infringement of EU or of national competition law, thus hampering the effective application of those rules.[84]

This argument shows a lack of trust in national courts as EU law courts; if a national court failed to recognize that there is an effect on trade between Member States and failed, consequently, to abide by its duty under Article 3(1) of Regulation 1/2003, it would be acting *contra legem*. The Commission seems to assume that such illegalities would be common.

V. LEGAL DIVERSITY

A. Greater Convergence

Under the assumption, perhaps, that national courts would be unable to separate EU law from non-EU law cases, the EU institutions have opted to harmonize national competition procedures. The substantive rules on restrictive practices are convergent throughout the European Union,[85] while rules on unilateral conduct are almost convergent.[86]

Based on the case law of the Court of Justice, effect on trade between Member States is easy to establish, so that EU competition law would tend to apply to almost any infringement of major significance.[87] By virtue of Article 3(1) of Regulation 1/2003, national courts and NCAs are bound to apply EU law if they would apply national competition law in the same case and effect on inter-state trade exists; by virtue of Article 3(2) of the same regulation, they are bound to reach convergent results, with a limited exception for stricter national rules on unilateral conduct. The question inevitably arises: following Regulation 1/2003 and the Damages Directive, what purpose is served by the continued existence of national competition laws?

Perhaps in order to stall the creeping obsolescence of national competition laws, the European Parliament has inserted a proviso, in Recital 10 to the Directive, to clarify what the Commission had indicated in its Proposal; namely,[88] that the Directive does not apply in cases where there is no effect on trade between the Member States (i.e. where only national competition law applies). If the Directive applies only where Article 3(1) of Regulation 1/2003 does, the Directive then seems to revert, to a great extent, to what was proposed in the 2008 *White Paper*. Indeed, as simultaneity of EU and national law application is highly likely under Regulation 1/2003, with the duty to reach convergent results under EU and national law, the duty

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[84] *Id.*, § 4.1.

[85] This convergence in the "Old Member States" took place over time, seemingly spontaneously, for reasons that are not readily comprehensible: *see* H. Ullrich, *Harmonisation within the European Union*, EUR. COMPETITION L. REV. 178 (1996), while convergence in the "New Member States" largely took place through association agreements and pre-accession negotiations, whereby the EU model was imposed; also, Art. 3(2) of Regulation 1/2003 compels national courts and NCAs not to apply stricter rules on restrictive practices than those prescribed by the EU, insofar as there is an effect on trade between Member States.

[86] Art. 3(2) of Regulation 1/2003 allows for stricter rules for unilateral conduct.

[87] *See* Commission Notice — *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty* [2004] OJ C 101/81; for a comprehensive discussion and list of cases, *see* V. Milutinović, *Enforcement of Articles 81 and 82 EC before National Courts Post*-Courage: *Enhancing a Community Policy or Shifting a Community Law Paradigm* (Florence, EUI Ph. D Thesis, 2008), 45-55.

[88] Loc. cit. note 85 *supra*.

to apply the same procedure for both could be seen as protection of the *effet utile* of EU competition law. Therefore, the argument in favor of using Article 114 as an additional legal basis for adopting the Directive is significantly weakened.

B. "National Procedural Autonomy"

Another issue that concerns the relationship between EU and national law is the so-called "national procedural autonomy." Several respondents to the 2005 *Green Paper* were adamant that the European Union should, in general, regulate substance, while rules on enforcement of damages claims belong to the Member States.[89] Accordingly, under the alleged legal principle of national procedural autonomy, the EU should leave rules on procedure and remedies to the national legislators.[90]

The famous *Rewe-Zentralfinanz* formula, which is repeated in Article 3 of the Directive and constitutes the backbone of that argument states:

> In the absence of [Union] rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [Union] law.[91]

The key phrase is the first one: national law applies in the absence of EU rules. It does so in order to fill the gaps left behind by the incomplete system that is EU law, for as long as those gaps remain.[92] Over time, many of these gaps were filled by the Court of Justice with spadefuls of new EU rules, under the banner of *effet utile* of EU law.[93]

More importantly, national procedural autonomy cannot be a constitutional principle of EU law (even though the term was mentioned at least once by the Court of Justice),[94] as it does not provide a demarcation line that states where EU law ends and national law begins. Last but not least, in this particular context, it does not make sense to speak of national procedural autonomy, when little or no substantive autonomy is left, with mostly convergent substantive antitrust rules and the duty to achieve convergent outcomes.

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[89] *See* the comments on the 2005 *Green Paper* of the German Federal Ministry of Economics and Technology, the German Federal Cartel Office and Freshfields Bruckhaus Deringer, cited *supra* note 27.

[90] Demonstrating that this is not a principle of law *see* C. N. Kakouris, *Do the Member States Posses National Judicial Autonomy*? 34 COMMON MARKET L. REV. 1389 (1997) and Milutinović, op. cit. *supra* note 4, 306-313.

[91] Case 33/76, *Rewe-Zentralfinanz eG et Rewe-Zentral AG v. Landwirtschaftskammer fur das Saarland* [1976] ECR 1989, ¶ 5.

[92] Another argument against "national procedural autonomy" is that Member States cannot enjoy "autonomy" from the EU, as they are Member States and not federal units; on the contrary, EU law enjoys autonomy vis-à-vis national law: Milutinović, op. cit. *supra* note 4, 308-309.

[93] *See* e.g. Case 199/82, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* [1983] ECR 3595, Case C-271/91, *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367; also *Francovich* and *Brasserie du Pêcheur* (both cited *supra* note 20) and, of course, *Courage* itself (cited *supra* note 18).

[94] Case C-201/02, *The Queen ex Parte Delena Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] I-723, ¶ 70; the Court did not give the term a concrete content in that case.

VI. DETERRENCE

A. No Punitive Damages

The Directive stipulates from the outset, in Recital 12 and Article 2, that it aims at full compensation, without overcompensation. Article 2(1) proceeds to lay down the principle that any person must be able to obtain compensation for anticompetitive harm.[95] Article 2(2) explains that compensation means actual loss, loss of profit, plus interest (thus codifying part of *Manfredi*).[96] Article 2(3), however, was changed completely by the European Parliament. In the Commission's Proposal, this provision merely provided that "Member States shall ensure that injured parties can effectively exercise their claims for damages."[97] The final text of Article 2(3) provides that "full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damage." Previously, the Court of Justice in *Manfredi* had left the issue of punitive damages open to the Member States.[98] Therefore, deterrence seems to have been consciously sacrificed for the sake of just—both fair and mere—compensations.

On the pro-deterrence side, it is submitted that, following the (correct) transposition of the Directive into national legal orders, a significant deterrent effect of damages claims could still exist. The Directive does not exclude the cumulation of public fines and private damages.[99] Adding to this the fact that the U.S. federal antitrust law—the world's most famous damages/deterrence system in the world—provides for treble damages but not for pre-judgment interest (which EU systems now must do, under Article 2(2) of the Directive),[100] it is questionable whether EU follow-on damages awards will be much less of a deterrent than American damages awards in many or most cases.

B. Immunity Recipients

On the anti-deterrence side, the solution in Article 11(3)(a) of the Directive, which exempts immunity recipients from damages liability except for their direct or indirect purchasers or providers is regrettable. It is submitted that, for the sake of deterrence, only the second scenario that would allow them to be liable (Art. 11(3)(b) of the Directive) should have been maintained, i.e. liability in the event that the remainder of the cartel is unable to pay. If immunity recipients are exposed to damages claims from their direct and indirect purchasers or providers, they remain fully exposed in many or most cases (except, e.g., cases of collective boycott) whether they are selling or purchasing. Thus, their incentive to apply for leniency is lower and so is the

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[95] 2008 *White Paper*, cited *supra* note 35, point 2.1.

[96] *Manfredi*, cited *supra* note 32, ¶ 95.

[97] *Id.*, ¶ 88: in its submissions to the Court, the Commission itself has supported the freedom of Member States to decide on punitive damages.

[98] *Id.*., ¶ 98.

[99] In *Devenish Nutrition Ltd et al. v. Sanofi Aventis SA et al.* [2007] EWHC 2394 (Ch), Lewinston J found, at ¶¶ 48-52, that a cumulation of public fines and punitive damages would be a violation of the principle of *ne bis in idem*; the point is now moot, as punitive damages are banned at EU level.

[100] C. A. Jones, *A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US*, EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 95, 103–105 (C.-D. Ehlermann & I. Atanasiu, eds. 2003).

deterrent effect of the cartel prohibition, whose successful enforcement depends, to a large extent, on leniency applicants coming forward.[101]

C. Passing-on/indirect purchasers

Last but certainly not least, when speaking about deterrence one must consider the issue of passing-on/indirect purchaser claims.[102] What the passing-on defense does is to prevent the unjust enrichment of a victim who is a direct purchaser by allowing the infringer to prove that the victim has passed-on all or part of the anticompetitive overcharge to his customers. Indirect purchaser claims deploy the same argument from the claimant's side, to recover the overcharge that was passed-on.

In the United States, in the famous *Hanover Shoe* case the U.S. Supreme Court ("the Court") barred defendants from using the passing-on defense[103] on several grounds, but most importantly because pass-on (or pass-through, as it is often referred to in economics) is normally very difficult to prove. The Court determined that, by allowing this defense, the incentive of direct purchasers to sue for treble damages would be greatly reduced and so would the deterrent effect of the antitrust rules.[104]

In *Illinois Brick*, the Court followed up and barred indirect purchaser claims.[105] The (mainly Chicago School) theory was that indirect purchasers have, in general, smaller, scattered claims and fewer incentives to sue.[106] In addition, since the passing-on defense was barred for defendants, allowing its offensive use for claimants could lead to multiple damages recovery.[107] This was under the assumption that both the passing-on defense and the passing-on offensive argument could be successfully proven, with no co-ordination and offsetting between the two claims and in spite of the *dictum* of the Court in *Hanover Shoe* that "the task [of proving pass-on] would normally prove insurmountable" (!).[108]

The decision of the Commission and, ultimately, the European Parliament and the Council, to allow the so-called passing-on defense in Article 13 of the Directive is ostensibly on the anti-deterrence side, as it reduces the incentives of direct purchasers to sue. This is, of course, if one believes the Court: More than three decades after *Illinois Brick*, many prominent U.S.

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[101] As confirmed by the Court of Justice in Case C-360/09, *Pfleiderer v. Bundeskartellamt* [2011] ECR I-05161, ¶¶ 25-27.

[102] For a comprehensive discussion of the 'passing-on'/indirect purchaser solutions in the Directive, *see* Milutinović, op. cit. *supra* note 3, Ch. 6 (forthcoming).

[103] *Hanover Shoe Inc. v. United Shoe Machinery Corp.* 392 U.S. 481 (1968).

[104] *Id.*, 492-493.

[105] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), 735-736.

[106] *See*, most prominently, W. M. Landes & R. A. Posner, *Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 UNIV. CHIC. L. REV. 602, at 609-612 (1978-1979).

[107] *Illinois Brick,* cited *supra* note 106, 729-731.

[108] *Hanover Shoe*, cited *supra* note 104, 493.

antitrust experts still do not and they have, indeed, recommended that the rule in that case should be abolished.[109]

One reason why *Hanover Shoe/Illinois Brick* may be bad law is due process: Defendants are barred from proving that the loss suffered by the claimant is smaller than the overcharge; this solution also allows unjust enrichment for the claimant. Under EU law, Member States were allowed, in *Courage*, to prevent unjust enrichment;[110] under the Directive, they are now obliged to do so, as will be seen immediately below. Also as a matter of due process, under U.S. federal antitrust law, indirect purchasers are denied their right to compensation. Under the Commission's interpretation of *Courage* and *Manfredi*, such an outright denial is not possible due to the directly applicable nature of Articles 101/102 TFEU.[111]

The Directive sets out a general principle in Article 12 to the effect that there should be indirect purchaser claims and that damages should be calculated in such a way as to avoid overcompensation.[112] Article 13 specifically prescribes that the burden of proving the passing-on defense shall rest on the defendant (not surprisingly, as it is a defense). Article 14(2) creates a rebuttable presumption in favor of indirect purchasers that passing-on did occur towards them. Article 15 then provides that Member States must enable national courts to coordinate their cases so as to prevent unjust enrichment (e.g. in the event that both direct and indirect purchasers claim successfully). To assist the national courts, the Commission promises, in Article 16, to issue guidelines specifically on the issue of calculating overcharges,[113] while Article 17(3) enlists the aid of national competition authorities in the quantification of damages, where this is possible.

VII. CONCLUSION

The bias of the Damages Directive for just compensation and follow-on claims seems to have resulted in sacrifices for parallel competences, EU exclusive competence, the diversity of national legal orders, and deterrence. In parallel competences, it is clear whose competence prevails. EU exclusive competence was given away on grounds that are not entirely convincing. Legal diversity is reduced through the harmonization of rules on procedure and remedies. Deterrence was deliberately placed in the back seat when punitive damages were banned, passing-on defenses allowed, and modest incentives given to immunity applicants.

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[109] Antitrust Modernisation Commission, *Report and Recommendations* (Washington, D.C. 2007), *Report and Recommendations*, 265–284 and Recommendation no. 47; the Report is *available at*8http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm (last viewed: Aug. 15, 2014).

[110] *Courage*, cited *supra* note 18, ¶ 30.

[111] 2008 *White Paper*, cited *supra* note 35, point 2.1; the present author disagrees with this interpretation, as one may still distinguish, as the U.S. Supreme Court does, between *standing* (which is broad) and the type of *loss* that can be recovered (which may be narrow); likewise, since *Courage* itself was based on effectiveness of EU law, a rule barring indirect purchasers may, hypothetically, be interpreted as supporting said effectiveness: Milutinović, op. cit. *supra* note 4, 216.

[112] Art. 2(1) and (2) of the Directive.

[113] *See* the already published *Commission Staff Working Document - 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.

Nevertheless, the Directive must not be judged solely from the perspective of what might have been done. It must also (perhaps primarily) be judged from the perspective of the status quo, which it does not harm and, in certain points, improves significantly. Examples include:

1. Parallel competences were already greatly curtailed vis-à-vis Commission decisions; the Directive adopts a much more modest solution for NCA decisions, which is likely to actually facilitate follow-on claims.
2. EU exclusive competence was sacrificed willingly in exchange for greater legitimacy; popular legitimacy is ever more necessary in these turbulent times for the European Union.
3. The demise of legal diversity was set in motion long ago, in the case law of the Court of Justice and in Regulation 1/2003; the Directive reduces it further but in doing so introduces useful harmonization, in particular as regards access to evidence and limitation periods.
4. Deterrence is still increased in comparison to the status quo, as follow-on claims will be more likely. Deterrence entailed in banning the passing-on defense, as the U.S. Supreme Court did, would have been artificial and based on denial of justice for defendants and unjust enrichment for plaintiffs, which is incompatible with the European model adopted in the Directive; the legal instrument is internally coherent in this respect.

Ultimately, with directives, much depends on national implementation. Although national procedural autonomy is not a constitutional principle, the residual application of national law will play a key role in the implementation of some of the more complex provisions of the Directive, such as the rules on indirect purchaser claims. Likewise, when adopting implementing legislation, Member States may opt to stick to the bare minimum, or they may grant more extensive rights, e.g. for *inter partes* disclosure. Very likely, national legislators may choose to make life simpler and extend the effect of the rules in the Directive to purely national law cases. In doing so, they would reduce the utility of national competition law even further but they would, truly, address the issue of divergent procedures for equivalent cases, to which the Commission referred in order to invoke Article 114 TFEU but did not fully resolve with the Directive.

In conclusion, although it stays relatively close to the status quo, the Directive pushes the damages agenda gently but firmly towards a new status quo, where private enforcement of EU (and Member State) antitrust law may become a daily reality to be seriously reckoned with. From that perspective, the EU legislator can mark this legal instrument as a success.