Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement

CATERINA MIGANI*

Building an effective private competition law enforcement system is no doubt dependent on its relationship with public competition law enforcement. The frailty of this relationship becomes particularly clear in the question of whether claimants should be granted access to self-incriminating statements provided by the members of a cartel in the leniency programme. Although recent judgments of the Court of Justice of the European Union have favoured access to leniency statements, the Directive 2014/104/EU denies such access. This choice of denying access appears to be inconsistent with the goal pursued by the Directive that aims to provide full compensation to victims of cartels. This article discusses the problems relating to this choice and proposes a solution for improvement.

I. Introduction

Directive 2014/104/EU, signed into law on the 26th of November 2014 (the 2014 Directive), aims at harmonising the rules for claiming damages suffered by victims of cartels in the EU. The 2014 Directive seeks a balance between the need for a public repression of cartels and the right of private citizens and companies to be compensated for the damages they suffered. However, some of the adopted provisions still appear to prioritise the public system and to encourage the phenomenon of forum shopping towards EU jurisdictions where private enforcement procedures are more efficient. This Article examines the main difficulties in the interaction between public and private competition law enforcement in the EU, in particular in light of the provisions of the 2014 Directive which deny access to leniency corporate statements for claimants in an action for

damages. In this regard, it explains the need for a wider, properly regulated, access to leniency corporate statements.

This article proceeds with three sections. The first section analyses public and private enforcement in the EU, and sheds light on their relationship. Having pinpointed the leniency mechanism as the 'point of balance' between the two systems, the next section examines the leniency programme in the EU. It particularly explains the main views of the EU institutions and of the EU case law with regard to the access to leniency corporate statements to ground actions for damages. Finally, the solution given on the matter by the 2014 Directive will be explained. In the last section, whilst the significance of the effort of the EU to regulate private enforcement is recognised, the main 'shadows' of the proposed solutions are outlined and some suggestions to make the system of disclosure of leniency statements more in line with the goal of 'full compensation' are proposed.

II. Public and private enforcement of EU competition law: A general overview

This section analyses the general features of public and private competition law enforcement and the relationship between them. It intends to discuss the aims of the two systems and, in particular, the deterrent effect of actions for damages.

1. Assessment of public enforcement of EU competition law

Public competition law enforcement refers to the system where Article 101 – prohibiting agreements, decisions by associations of undertakings and concerted practices that are restrictive of competition - and Article 102 - prohibiting abuses of dominant position - of the Treaty on the Functioning of the European Union[1] (TFEU) are enforced by the European Commission (the Commission) and by the National Competition Authorities (NCAs) of the Member States (alongside the national equivalents) when the anti-competitive practices affect trade between Member States.[2] In addition, Articles 101 and 102 TFEU and their national equivalents can be enforced by private parties in domestic courts or by arbitration.[3]

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* Italian Qualified Lawyer, LL.M. Queen Mary University of London, caterina.migani@gmail.com. The Author is thankful to Ashleigh Brocchieri for going through the Article and suggesting improvements.

[1] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

[2] To clarify whether an agreement or practice has an effect on trade between Member States, the Commission has published in 2004 the Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU] [2004] OJ C101/81.

[3] For a comprehensive analysis of public and private enforcement rules see Maher M Dabbah, *EC and UK Competition Law* (1st edn, Cambridge University Press 2004) 627; Richard Wish, David Bailey, *Competition Law* (7th edn, Oxford University Press 2012)

To date, Articles 101 and 102 TFEU have been almost exclusively enforced through administrative procedures carried out by the Commission[4] and the NCAs pursuant to the dispositions laid down in the TFEU, Council Regulation 1/2003,[5] Commission Regulation 773/2004,[6] various Commission notices and guidelines, and the jurisprudence of the EU Courts. Public enforcement has been effective since the very first decades of the European Economic Community, being considered the principal form of enforcement of competition law.

Since 2004, when Regulation 1/2003 entered into force, Articles 101 and 102 TFEU are to be applied in 'close cooperation'[7] by the Commission and the NCAs in the framework of the European Competition Network (ECN), a network within which the Commission and the NCAs discuss the sharing of work.[8] Close cooperation entails an efficient coordination as to the allocation of cases[9] in order to ensure that they are assigned to a 'well placed competition authority'.[10] The Commission is 'particularly well placed' where anti-competitive agreements or practices have effects on competition in more than three Member States.[11]

The main aim pursued by public enforcement of competition law is to deter undertakings from engaging in anti-competitive practices, as stated in the Fining Guidelines of 2006:

> Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order

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248; Alison Jones and Brenda Sufrin, *EU Competition Law. Text, Cases and Materials* (5th edn, Oxford University Press 2014) 922.

[4] The Commission holds decision power, power of investigation and power to impose administrative (non-criminal) sanctions solely on companies; criminal liability of individuals is however provided by the laws of some Member States, eg the Enterprise Act 2002 in the United Kingdom and the Sherman Act in the United States. The decisions of the Commission are subject to the judicial review of the General Court and to a further appeal, limited to points of law, before the European Court of Justice.

[5] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1 (Regulation 1/2003).

[6] Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18 (Regulation 773/2004).

[7] Regulation 1/2003, (n 5) art 11.

[8] The jurisdictional principles according to which cases should be allocated within the ECN are set forth by the Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43 (Notice on NCA cooperation), paras 5-15.

[9] Regulation 1/2003, (n 5) Ch IV.

[10] Notice on NCA cooperation, (n 8) para 16.

[11] Ibid, para 14.

> to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles [101 and 102 TFEU] (general deterrence).[12]

Deterrence is therefore considered to be achieved by the imposition of fines high enough to make it unprofitable for firms to engage in anti-competitive behaviours, and of an amount inversely proportional to the chance of being detected: the lower the chances of being discovered, the higher the sanction.[13] The main principles for the imposition of fines are found in Articles 23 and 24 of Regulation 1/2003, along with the Fining Guidelines of 2006, which provide specific indications for the setting of penalties. Participants to cartels can benefit from a reduction of the fines imposed or even from total immunity by applying for leniency and/or by opting for a settlement procedure.[14]

According to Regulation 1/2003, the maximum fine that can be imposed shall not exceed 10% of the worldwide turnover of the undertaking in the preceding business year,[15] an amount that can be very significant, not being connected with the turnover generated by the specific infringement or with the turnover generated only within the EU. The level of a fine is fixed by having regard to the gravity and duration of the infringement,[16] although the Commission can depart from the usual methods of calculation to achieve effective deterrence.[17]

Notwithstanding the increased level of the fines imposed by the Commission in recent years, in particular in relation to cartels,[18] anti-competitive practices

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[12] Guidelines on the method of setting fines imposed pursuant to Article 23(2)a of Regulation 1/2003 [2006] OJ C210/2 (Fining Guidelines), para 4.

[13] For an economic assessment of fines and a comment on their effectiveness, see Pietro Manzini, 'European Antitrust in Search of the Perfect Fine' (2008) 3 World Competition 3 and Roger J. Van den Bergh, Peter D. Camesasca, *European Competition Law and Economics: a comparative perspective* (2nd edn, Sweet & Maxwell 2006) 311.

[14] On the leniency mechanism, see Section III. As to settlements, the parties already involved in a cartel investigation can acknowledge their liability and therefore request a settlement which, if deemed suitable by the Commission, entitles them to a reduction by 10% of the fine that would otherwise have been applied. On settlements see Commission Regulation 622/2008/EC of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3; Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation No 1/2003 in cartel cases [2008] OJ C167/1.

[15] Regulation 1/2003, (n 5) Article 23(2).

[16] Specific indications for determining the amount of fines are provided by the Fining Guidelines.

[17] See eg Cases 100/80 etc *Musique Diffusion Française SA v Commission* [1983] ECR 1825, [1983] 3 CMLR 221, paras 105-106; Case C-189/02 P *Dansk Rørindustri Als v Commission* [2005] ECR I-5425, [2005] 5 CMLR 796, paras 227-228.

[18] On the matter, and on the possible criminal nature of the fines imposed by the Commission, see Wouter P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR' (2010) 33 World Competition 5.

continue to occur on a large scale[19] and are frequently accompanied by recidivism.[20] The deterrent goal seems therefore far from being achieved. Doctrine has given a variety of explanations to this lack of a proper deterrent effect, including the inadequacy of a maximum fine based solely on turnover figures and unrelated to the effective gains of the infringements, the lack of any criminal sanctions[21] and the underdevelopment of actions for damages.[22]

On this latter point, many scholars consider that private enforcement should provide *additional* deterrence to that typical of the public enforcement system: a potential infringer, while evaluating whether to engage in an anti-competitive practice, should consider the threat of an action for damages as a real cost, as well as the probability to be detected by the competition authorities.[23] It is suffice to say that no trade-off should exist between these two systems: they need to be fully integrated. In terms of deterrence, indeed, 'public enforcement is beneficial, but insufficient, which implies that it needs to be complemented' and therefore 'fuelled (…) by a more consistent contribution of private suits'.[24]

2. Assessment of private enforcement of EU competition law and the 2014 Directive

It is well established that victims of competition infringements have a right to obtain compensation for overcharge harm and lost profits. A private action can be brought either as a follow-on action to a finding of infringement by competition law authorities or as a stand-alone action. Regulation 1/2003 and the Co-operation

[19] Roberto Pardolesi, 'Complementarietà Irrisolte: Presidio (Pubblico) del Mercato e Azioni (Private) di Danno' (2011) 3 Mercato Concorrenza Regole 470.

[20] For a study on recidivism, see John M. Connor, 'Recidivism Revealed: Private International Cartels 1990-2009' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688508> accessed 14 March 2013.

[21] Van den Bergh, Camesasca (n 13) 314.

[22] Barbara L. Boschetti, 'Enforcement nel Diritto Antitrust e Risarcimento del Danno' (2013) 1 Concorrenza e Mercato 27.

[23] This view is supported, among others, by the study of CEPS, EUR and LUISS, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report, (2007) <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 22 March 2014 and by Alessio Aresu, 'Optimal Contract Reformation as a New Approach to Private Antitrust Damages in Cartel Cases' (2010) 35 European Law Review 349. For an opposite view see Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 World Competition 3. On the point, please note that, in general, the *ne bis in idem* principle does not apply as between public and private enforcement, since the two systems have anyway totally different objective and functions. On the point, see Assimakis P. Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008) 21-22.

[24] Pardolesi, (n 19) 479.

Notice[25] promote the decentralisation of the enforcement of EU competition law, emphasising that national courts have an 'essential part to play in applying the [EU] competition rules'[26] which *complements* that of the competition authorities.[27] Regulation 1/2003 provides that Articles 101 and 102 TFEU have a direct effect on undertakings in Member States in their entirety[28] and national courts have power to apply them,[29] alongside national competition law, when the relevant agreements or abusive conducts affect trade between Member States.[30]

National courts and the Commission work in close cooperation[31] by a variety of means. The Commission transmits relevant information, opinions and written and oral observations on the application of EU competition law (thereby acting as *amicus curiae*) to national courts and Member States forward copies of relevant judgments to the Commission.[32] Moreover, the application of EU competition law should be uniform. National courts cannot rule in contrast with a decision adopted by the Commission on the same matter and should consider to staying their proceedings to avoid to making decisions in conflict with a decision contemplated by the Commission in proceedings it has initiated.[33]

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[25] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54.
[26] Regulation 1/2003, (n 5) Recital 7.
[27] Ibid, Recital 7.
[28] Ibid, Article 1.
[29] Ibid, Article 6.
[30] Ibid, Article 3(1).
[31] Ibid, Recital 21.
[32] Ibid, Article 15.
[33] Ibid, Article 16. Further EU provisions in the area of actions for antitrust damages comprise: Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (which has been replaced by Regulation EU 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, which for the most part will enter into force on 10 January 2015), pursuant to which the national courts, under the conditions set forth, have jurisdiction to hear antitrust damages actions and judgments in such actions are recognised and enforced in other Member States; Council Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L174/1, which includes antitrust damages action; Article 6(3) of Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40, containing rules on the law applicable in antitrust damages actions; Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L199/1; Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3.

The right to damages and the direct applicability of Articles 101 and 102 TFEU have been clearly established by the Court of Justice of the European Union (ECJ), in particular in the milestone judgments of *Courage*[34] and *Manfredi*.[35,36] In *Courage*, the ECJ held that '[Articles 101 and 102 TFEU] produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard'.[37] The judges affirmed the peculiar *compensation* function of private enforcement affirming that '*any individual* can rely on a breach of [Article 101(1) TFEU] before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision',[38] provided that the party does not bear significant responsibility for the distortion of competition considering the 'economic and legal context in which the parties find themselves (...) and the respective bargaining power and conduct of the two parties to the contract'.[39] The ECJ also emphasised the role of private enforcement as a *deterrence tool*, holding that 'the existence of such a right [to damages] strengthens the working of the [Union] competition rules and *discourages* agreements or practices (…) which are able to restrict or distort competition' and 'actions for damages before the national courts can make a *significant contribution* to the maintenance of effective competition in the [Union]'.[40]

Similarly, a few years later, in *Manfredi* the ECJ recognised the compensation function of private enforcement, stating that 'the full effectiveness of [Article 101] would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[41] The ECJ recognised – in the absence of an harmonised EU legislation - the autonomy of domestic legal systems in regulating such actions, provided that the relevant rules do not make it impossible or excessively difficult to exercise the rights (principle of effectiveness) and are not less favourable than those governing equivalent national actions (principle of equivalence).[42] According to the ECJ, such

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[34] Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297.
[35] Joined Cases C-295-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni* [2006] ECR I-6619. For a comment on *Courage* and M*anfredi* see Jürgen Basedow, *Private Enforcement of EU Competition Law* (Kluwer Law International 2007) 19.
[36] The ECJ has held also in previous cases that Articles 101 and 102 TFEU produce direct effects in relations between individuals and create rights for the individuals concerned that the national courts must safeguard. See Case C-127/73*BRT and SABAM* [1974] ECR 51, para 16; Case C-282/95 P *Guérin Automobiles v. Commission* [1997] ECR I-1503, para 39.
[37] *Courage* (n 34) 23.
[38] Ibid 24, (emphasis added).
[39] Ibid 32.
[40] Ibid 27, (emphasis added).
[41] *Manfredi* (n 35) 60, (emphasis added).
[42] Ibid 62.

national procedural autonomy included also the possibility to award exemplary or punitive damages, if provided by national law for infringement of corresponding domestic provisions,[43] admitting the deterrent role of actions for damages in addition to their compensatory aim.[44]

In the recent judgment of *Kone*,[45] the ECJ recognised not just the right to claim damages for a loss caused by a conduct or contract liable to restrict or distort competition, but also for the loss caused by 'umbrella pricing', *i.e.* the 'loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions'.[46] Once again, the ECJ recognised the 'any individual' rule and the compensation function of private enforcement. These decisions show that any individual harmed by competition infringements has a right to seek compensation provided that a causal link between the conduct and the harm can be established.

Despite this recognition of its importance, private enforcement has so far had a secondary role in the EU, with the damages-action landscape in the Common Market still considered 'ineffective and uneven'.[47] For instance, in 2008-2012 only 25% of the Commission's decisions on competition infringements were followed by damages actions. Moreover, the actions tend to be brought by large businesses and only in a few Member States where the rules are less complex and more certain, such as the UK, Germany and the Netherlands.[48]

Private competition law enforcement in the majority of the Member States suffers from many shortcomings, in particular related to the cost and risk of litigation and absence of significant incentives, for example treble damages and contingency fees, the uncertainty over the role to be given to the decisions of the NCAs, the sophisticated economic arguments required, and the limited experience of national

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[43] Ibid 93.
[44] The principles set forth in *Courage* and *Mafredi* have been further developed by the ECJ in 2012 in Case C-199/11 *Europese Gemeenschap v Otis NV and Others* (ECJ, 6 November 2012), in which the Court affirmed the right of *any person* (included the European Union represented by the Commission) to 'claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81(1) EC' (para 43).
[45] Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* (not yet reported).
[46] Ibid 37.
[47] Joaquín Almunia, 'Antitrust Damages in EU Law and Policy' (College of Europe CGLC Annual Conference, Brussels, 7 November 2013), European Commission - SPEECH/13/887 <http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm> accessed 14 March 2014.
[48] Ibid.

judges in dealing with competition law matters.[49] Moreover, the asymmetry of information typically suffered by claimants and the difficulty accessing evidence – held by the infringers and subject to different disclosure regimes across the EU – represent a crucial issue which needs to be addressed in order to build an effective private enforcement system.

A harmonised regulation of private enforcement in the EU is the object of the 2014 Directive, adopted by the Commission on the 13th of June 2013[50], by the European Parliament on the 17th of April 2014,[51] by the Council of Ministers on the 10th of November 2014, and finally signed into law on the 26th of November 2014.[52] Following the official adoption, Member States will have two years to implement the directive.[53]

Concerns as to the underdevelopment of private enforcement have been expressed by EU institutions since at least 2005,[54] when the Commission adopted a Green Paper[55] accompanied by a Staff Working Paper.[56] The Green Paper, whilst stressing

[49] To overcome this issue, the Commission has instituted since 2002 a programme for training judges in EU competition law <http://ec.europa.eu/competition/court/training.html> accessed 13 June 2014.

[50] Commission, *'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national laws for infringements of the competition law provisions of the Member States and of the European Union'*, COM (2013) 404 final. Moreover, the Commission issued *the Communication from the Commission on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 and 102 TFEU* [2013] OJ C167/19 accompanied by the Commission Staff Working Document, SWD (2013) 205, and the Impact Assessment Report, SWD (2013) 203 final.

[51] European Parliament, *'Amendments by the European Parliament to the Commission proposal – Directive of the European Parliament and of the Council on certain rules governing actions for damages under national laws for infringements of the competition law provisions of the Member States and of the European Union'*, A7-0089/2014.

[52] European Parliament and Council Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1. In this Paper, all the references to the 2014 Directive are made to the text published on the Official Journal.

[53] For a comment on the 2014 Directive, see Jones and Sufrin (n 3) 1114-1118 and Caroline Cauffman, 'The European Commission Proposal for a Directive on Antitrust Damages: a First Assessment' (2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339938> accessed 13 June 2014.

[54] A first picture of the unsatisfactory system of private antitrust enforcement across Europe was drawn in 2004 in Ashurst, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules' (2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf> accessed 30 May 2014.

[55] Commission, Damages Actions for Breach of EC Antitrust Rules, COM (2005) 672 final (Green Paper).

[56] Commission Staff Working Paper, SEC (2005) 1732.

that private enforcement should guarantee the full compensation of victims, identified the aim of both public and private enforcement as being 'to *deter* anti-competitive practices forbidden by competition law and to protect firms and consumers from these practices and any damages caused by them'.[57] The Green Paper was followed by a White Paper[58] in 2008, accompanied by a Commission Staff Working Document[59] and an Impact Assessment Report.[60] This time the Commission did not clearly state the deterrent aim of private enforcement but recognised that it '*inherently* also produces *beneficial effects* in terms of deterrence of future infringements', being a system that 'complements, but [does] not replace or jeopardise, public enforcement'.[61]

The 2014 Directive is a result of the discussions on the Green Paper and the White Paper. It is mainly aimed at ensuring that 'anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim *full compensation* for that harm from that undertaking or association'.[62] Full compensation includes actual loss and loss of profits, along with the payment of interest,[63] but 'shall not lead to *overcompensation*, whether by means of punitive, multiple or other types of damages'.[64] Any deterrent effect of private enforcement is therefore excluded, since 'sanctioning EU competition law infringement is and should remain the *exclusive* task of competition authorities'.[65] Notwithstanding the above, Recital 6 of the 2014 Directive affirms the *complementarity* relationship between private and public enforcement:

> To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid the divergence of

[57] Green Paper (n 55) para 1.1 (emphasis added).
[58] Commission, White Paper on Damages Actions for Breach of EC Antitrust Rules, COM (2008) 165 final (White Paper).
[59] European Commission, Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC (2008) 404.
[60] European Commission, Commission Staff Working Document Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules – Impact Assessment, SEC (2008) 405.
[61] Ibid, emphasis added.
[62] 2014 Directive, (n 52) Article 1.
[63] Ibid, Article 3(2).
[64] Ibid, Article 3(3) (emphasis added).
[65] Almunia (n 47) (emphasis added).

applicable rules, which could jeopardise the proper functioning of the internal market.

Therefore, according to the 2014 Directive, the enforcement of EU competition law shall comprise the interplay between public enforcement, aimed at deterrence, and private enforcement, aimed at compensation, whose balance point is represented by the access to evidence held by competition authorities, as will be further explored in the following Sections.

3. Objectives pursued by public and private competition law enforcement

Competition law enforcement in general pursues three 'different, yet substantively interconnected'[66] objectives: injunctive (*i.e.*, to bring the infringement to an end), compensatory and punitive/deterrent. Moreover, competition law enforcement helps to clarify and develop the content of the relevant prohibitions.[67] It is unquestionable that the main objective pursued by public enforcement is deterrence and the main objective pursued by private enforcement is compensation; however EU law, case law and academics are not unanimous in recognising that actions for damages should pursue also a goal of deterrence.

The 2014 Directive – along with many scholars - embrace a 'separate-tasks approach', according to which public enforcement is aimed at the clarification and development of the law as well as punishment and deterrence, while actions for damages should pursue exclusively the compensatory objective. Arguably, competition authorities are deemed more suitable and better equipped to objectively clarify Articles 101 and 102 TFEU as private claimants will seek to interpret the legislation to mirror their own interests.[68] As to the deterrent effect, this is considered to be most efficiently reached by the action of competition authorities, which have more functional investigative and sanctioning power than private claimants. Moreover, the public authorities are deemed to be better placed to decide the optimal fine (*i.e.*, an amount inversely proportional to the chance of being detected) and can also impose non-monetary sanctions such as imprisonment and disqualification of directors, while compensation in private actions is connected solely to the loss suffered by the claimant, and the possible trebling of damages cannot be assumed to be the right multiplication to deter abuse of competition law.[69] It has been suggested that private actions for damages 'will often

[66] Komninos, *EC Private Antitrust Enforcement* (n 23) 7.
[67] Jones and Sufrin (n 3) 1087.
[68] Wils, 'The Relationship between Public Antitrust Enforcement' (n 23) 5.
[69] Wouter P.J. Wils, *Principles of European Antitrust Enforcement* (Hart Publishing 2005) 120.

diverge from the general interest',[70] leading to the risk of unmeritorious actions – especially intra-firm actions which may strategically invoke a breach of competition law to escape obligations under a contract.[71]

The extreme view on the consequence of such alleged shortcomings is that private enforcement is in reality unnecessary, even in a supplementary role. The proof of damages is very complicated and there is 'no evidence that the citizens of Europe, outside the narrow circle of competition law professionals, are seriously disturbed by the current absence of compensation for antitrust offences'.[72] This view clearly runs counter to the Commission's policy and to the basic principles of EU law.[73] On the contrary, a large part of the doctrine, the most significant case law and the European Union itself support the view that an efficient system of damages actions is a cornerstone in the protection of individual rights, especially to ensure full compensation for victims and enhance corrective justice.

Some of the advantages of an effective private enforcement system include the creation of a 'culture of competition'[74] among EU citizens and, in the case of stand-alone actions, a relief of pressure on competition authorities, able to save their resources for more complex cases. An efficient private enforcement can have an overall macroeconomic positive impact thanks to the creation of a more competitive market and a reduction of allocative inefficiencies.[75] It has been estimated that a functional enforcement system, composed of complementary public and private actions, could result in annual social benefits as high as 1% of GDP or 117 billion Euros in the EU.[76] In addition, the deterrent effect and the fulfilment of public interest in actions for damages have been supported by many academics and case law,[77] and by the Commission at least until the Green Paper of 2005.

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[70] Wils, 'The Relationship between Public Antitrust Enforcement' (n 23) 9.
[71] See Dabbah (n 3) 677; Sebastian Peyer, 'Cartel Members Only – Revisiting Private Antitrust Enforcement in Europe' (2011) 3 International and Comparative Law Quarterly 627.
[72] Wils, *Principles* (n 69) 125.
[73] For a comprehensive critic of the position supported by Wils, see Clifford A. Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 World Competition 13.
[74] Jones and Sufrin (n 3) 1090.
[75] CEPS, EUR and LUISS (n 23) 10.
[76] Ibid 165.
[77] See for instance the position of the ECJ in the landmark cases, *Courage* (n 34); Manfredi (n 35); *Pfleiderer* (n 108); *Donau Chemie* (n 114). See further Section III.

European private citizens in damages actions have been considered to play a role as 'private attorney-general', as in the United States.[78] Whilst doctrine generally recognised the superiority of public enforcement in pursuing deterrence, some authors assert that by pursuing the primary compensatory goal private enforcement 'generates an important additional deterrent effect, particularly because companies are more likely to avoid infringements of the competition rules when they risk having to pay damages to their competitors'.[79] Therefore, an efficient system of private enforcement will imply that civil damages will be a significant component of any infringer's calculation of the exposure faced.

Moreover, public interest is deemed to be pursued also in private actions. Courts not only 'have to consider economic public policy in their judgment when the dispute in question has a wider impact on the market',[80] but Article 15 of Regulation 1/2003 (setting forth the possibility for the Commission and for the NCAs to intervene in private litigation by submitting observations) has been considered as 'partly due to the public policy/interest nature of this kind of competition law-related litigation'.[81]

Embracing one or the other of the described views is clearly not just a matter of doctrine, but it implies significant consequences in the specific provisions to be adopted to make the competition law enforcement system work. In particular, as will be further explained in the next Sections, a 'separate-tasks approach' implies that no particular measures are required to improve the possible deterrent effect of follow-on private actions: specifically, no access to the self-incriminating leniency statements has to be granted since it could discourage members of a cartel from applying for leniency, thereby undermining the effectiveness of the public enforcement system. On the contrary, embracing the 'deterrence' approach means accepting that an infringer should seriously consider damages when evaluating whether to engage in an anti-competitive action, since the benefit of leniency would not restrict the probability or extent of an action for damages, as leniency statements would in principle be accessible by claimants. In light of this, access to evidence - and in particular to leniency corporate statements - appears to represent the crucial 'point of balance' between public and private enforcement.

In the course of this section, public competition law enforcement and actions for damages have been described as two different yet complementary systems, both indispensable for a proper enforcement of competition law. Due regard has been

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[78] Assimakis P. Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3 Competition Law Review 1, 10-13.
[79] Van den Bergh, Camesasca (n 13) 332 (emphasis added).
[80] Komninos, 'Public and Private Antitrust Enforcement' (n 78) 13.
[81] Ibid.

paid to the orientation according to which also private enforcement can exercise a deterrent effect on infringers; this view is indeed the starting point to support the necessity of granting a degree of access to leniency corporate statements to ground actions for damages. The leniency system and the issue of access to leniency corporate statements are described in details in the course of the next Section.

III. Leniency programmes and access to leniency corporate statements

This Section outlines the main features of the leniency programme in the EU and assesses its efficiency. The access to leniency corporate statements by the victims of competition infringements to be used as a ground in a claim for damages and the significant differences between the approach of the ECJ, other EU institutions and the 2014 Directive are also outlined.

1. The role of leniency programmes in the EU

Immunity from penalties or the reduction of penalties for competition violations can be granted in exchange for cooperation with the competition law enforcement authorities. In the EU, according to the Leniency Notice of 2006 currently in force (the Leniency Notice),[82] the first undertaking in a cartel[83] to 'blow the whistle' -

[82] Notice on Immunity from Fines and Reduction from Fines in Cartel Cases [2006] OJ C298/17 (Leniency Notice). The first Leniency Notice was adopted by the Commission in 1996, even if before 1996 the Commission already in a number of cases reduced fines or granted immunity in recognition of cooperation received, *e.g.* see *Wood Pulp* (Case IV/29.725) Commission Decision 85/202/EEC [1985] OJ L85/1, para 148 and *Polypropylene* (Case IV/31.149) Commission Decision 86/398/EEC [1986] OJ L230/1 para 109. The 1996 Notice was replaced in 2002, the main changes being that the immunity became automatic (instead of being a matter of prosecutorial discretion) and that the reductions of fines became more strictly aligned to the timing of the cooperation. The current Leniency Notice, dated 2006, further clarified the duty of cooperation and the information to be provided to be granted immunity, in line with the principles of the Model Leniency Programme produced in 2006 by the ECN (2006) <http://ec.europa.eu/competition/ecn/model_leniency_en.pdf> accessed 1 July 2014. For a brief history of leniency in competition law enforcement in the US and EU see Wouter P.J. Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 World Competition 1 34. For a commentary on the Leniency Notice see Sari Suurnakki and Maria Luisa Tierno Centella, 'Commission Adopt Revised Leniency Notice to Reward Companies to Report Hard-Core Cartels' (2007) 1 Competition Policy Newsletter 7. Currently, leniency programmes are widespread in the EU domestic jurisdictions and are for many aspects similar to the one designed by the Leniency Notice and therefore fairly harmonised thanks to the ECN Model Leniency Programme; for a list of NCAs having adopted a leniency programme see <http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf> accessed 2 July 2014.

[83] The Leniency Notice indeed applies to 'agreement and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the

thus making a decisive contribution to the opening of an investigation or to the finding of an infringement of Article 101(1) TFEU in connection with the alleged cartel[84] - is rewarded with total immunity from fines.[85] In addition to the specific conditions set forth as to the content of corporate statements[86] (which can be made also *orally*),[87] immunity is granted provided that the applicant cooperates 'genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure'. Moreover, the undertaking must have 'ended its involvement in the alleged cartel immediately following its application (...)'.[88] Other participants to the cartel subsequently providing evidence of 'significant added value with respect to the evidence already in the Commission's possession',[89] *i.e.* evidence strengthening 'by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel',[90] can in turn benefit from a reduction of fines between 20 and 50 per cent.

Finally, the Leniency Notice specifies that whistleblowing 'cannot protect an undertaking from the civil law consequences of its participation'[91] in a cartel, affirming the possible liability of the undertaking to pay damages to victims.

The leniency system assists competition authorities in discovering secret cartels. As stated by the Leniency Notice, cartels are often 'difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them'.[92] Leniency is thus considered the most effective source of evidence. Considering other sources, 'direct force' such as dawn-raids at business premises can produce only existing documents and are very expensive, since the authorities would need an in-depth research before locating any relevant information, and 'compulsion', *i.e.* threatening sanctions for refusal to cooperate, although being less

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fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of import or exports and/or anti-competitive actions against other competitors', Leniency Notice (n 82), para 1.

[84] Leniency Notice, (n 82) para 4.

[85] Ibid, para 8.

[86] Ibid, para 9. The information to be provided include a detailed description of the agreement (including products and services concerned, duration, geographic scope etc.) and details related to both undertakings and individuals involved.

[87] The Commission in fact may accept corporate statements provided orally, unless the applicant has already disclosed their content to third parties; oral statements are thus recorded and transcribed at the Commission's premises, being the undertakings allowed to check their accuracy and to correct their substance in a given time limit (Article 18 Regulation 1/2003 and Articles 3 and 17 Regulation 773/2004).

[88] Leniency Notice, (n 82) para 12.

[89] Ibid, para 24.

[90] Ibid, para 25.

[91] Ibid, para 39.

[92] Ibid, para 3.

costly and not limited to existing documentation, risks unreliability of information. Leniency, on the contrary, can produce different kinds of information (including 'insider' knowledge of the cartel),[93] saves costs connected with the collection of evidence and does not risk any reliability issue, since the benefit of immunity is lost in case of misleading information.[94]

Leniency is deemed to be a significant force in destabilising cartels as the benefit of immunity can trigger a 'race to cooperate', undermining trust among participants, causing a classical prisoners dilemma and finally the 'implosion' of the agreement.[95] Such destabilisation effect can work only if there is a real risk of detection and punishment by the authorities (not just following an application for leniency),[96] if there is clarity and certainty as to the discounts on fines and if the pay-off from defecting and collaborating is greater than the expected pay-off from continuing the cartel.[97]

The Commission receives a significant number of applications for leniency, estimated at around two applications per month in 2013.[98] All four decisions adopted by the Commission in 2013 (for fines totalling 1,882,975,000 Euros) were the result of applications for leniency. This demonstrates that leniency is still considered as a crucial instrument in finding and prosecuting cartels in the EU. In two cartel cases relating to the interest rates derivative industry, EIRD[99] and YIRD,[100] Barclays Bank and UBS obtained immunity from fines, while all the other banks involved in both cartels received discounts in fines and a further reduction of 10% for agreeing to settle the case with the Commission. The same reduction for settlement was granted in favour of companies having received leniency discounts in the Automotive Wire Harnesses decision,[101] which was possible thanks to the undertaking Sumitomo having revealed the existence of the cartel. Finally, the Commission fined four European North Sea shrimps traders

[93] Suurnakki and Tierno Centella (n 82) 8.
[94] Wils, 'Leniency in Antitrust Enforcement' (n 82) 38-41.
[95] Celeste Pesce, 'Il Programma di Clemenza Europeo e la Tutela dei Singoli' (2011) 1 Il Diritto dell'Unione Europea 168.
[96] Wils 'Leniency in Antitrust Enforcement' (n 82) 48.
[97] This concept has been interestingly explained by a mathematical equation in Caroline Cauffman, 'The Interaction of Leniency Programmes and Actions for Damages' (2011) 7 The Competition Law Review 205.
[98] European Commission, Commission Staff Working Document Accompanying the Document Report on Competition Policy 2013, SWD (2014) 148 final, 19.
[99] *Euro Interest Rate Derivatives (EIRD)* (Case 39914) Commission Decision of 4 December 2013 MEMO/13/1090 of 4 December 2013.
[100] *Yen Interest Rate Derivatives (YRD)* (Case 39861) Commission Decision of 4 December 2013 MEMO/13/1090 of 4 December 2013.
[101] *Automotive Wire Harnesses* (Case AT/39748) Commission Decision of 10 July 2013 – Provisional Non-Confidential Version - C(2013) 4222 final.

thanks to the evidence provided by Klaas Puul, which was granted immunity.[102] With these significant decisions the Commission has affirmed that its 'cartel enforcement record remains strong and effective'.[103]

However, data on the increasing number of detected cartels is an unreliable indicator of the effectiveness of enforcement activity: since secrecy is a core feature of cartels, it is impossible to know their overall population. Therefore, an increase in the number of agreements discovered could be due to an improvement in enforcement or just to an increase in the number of cartels formed. Moreover, the increase in leniency applications could be interpreted negatively, since the increase could be a sign of an 'excessive generosity' leading to a weakening of deterrence.[104] This is especially relevant given there is no ban on recidivist firms obtaining immunity and reduction of fines. In theory, they may continue infringing and being granted immunity time after time.[105]

To discard this negative interpretation, companies must apply for leniency because they feel a serious risk of being detected and of paying high fines: in sum, 'the bigger the potential fines, the more attractive is leniency'.[106] On the contrary, since no reduction in any subsequent civil damages is granted to the immunity beneficiaries, the strengthening of the private enforcement system can represent a hurdle to the functioning of public enforcement, thus discouraging application for leniency. A very delicate balance should therefore be established between leniency and actions for damages, as explained in the course of the following paragraphs with specific reference to the access to self-incriminating statements by claimants.

2. Access to leniency corporate statements in competition cases

One of the main hurdles to the development of private enforcement is *information asymmetry*, *i.e.* the difficulty for claimants to obtain evidence of the anti-competitive conduct, which includes economic elements such as the definition of the relevant market and the market shares of the parties: such information, necessary for claimants to prove the damages suffered, are held in the hands of infringers. Clearly, access to self-incriminating leniency corporate statements would be a powerful tool for victims to overcome such asymmetry and thus to bring follow-on actions. However, this would discourage undertakings from applying for leniency, thereby undermining the function of the public enforcement system, which significantly relies on cooperation.

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[102] *Shrimps* (Case 39633) Commission Decision of 27 November 2013 <http://europa.eu/rapid/press-release_IP-13-1175_en.htm> accessed 3 July 2014.
[103] European Commission (n 98) 20.
[104] Wils 'Leniency in Antitrust Enforcement' (n 82) 51-52.
[105] Jones and Sufrin (n 3) 1028.
[106] Ibid.

The EU landscape is currently divided between a recent ECJ case law, which opened up the possibility of disclosure of leniency corporate statements, and the 2014 Directive, providing for their exception from disclosure of evidence in accordance with the Commission and NCAs' existing approach. The most significant – albeit controversial – judgment of the ECJ is represented by the decision of *Pfleiderer* in 2011.[107] In this case the Court was requested to give a ruling as to the right of Pfleiderer, a victim of the German décor paper cartel, to access the file of the German Federal Cartel Office (*Bundeskartellamt*), which included leniency and other documentation provided by the leniency applicant.

Advocate General Mazák, underlining the risk of a loss of attractiveness and effectiveness of leniency mechanisms,[108] affirmed that access to self-incriminating statements should be denied, while access to any other pre-existing documentation submitted in the course of the leniency application should be granted. According to Mazák,[109] such compromise would safeguard the public interest in detecting and punishing cartels and, at the same time would not run counter to the injured party's fundamental right of an effective remedy and a fair trial guaranteed by Article 47, in conjunction with Article 51(1) of the Charter of Fundamental Rights of the European Union.[110]

The ECJ, in contrast, having underlined the significant contribution of civil actions to the maintenance of effective competition in the EU and their deterrent effect, opened up the possibility of access to leniency corporate statements. The Court held that, in the absence of EU binding regulation on the subject, national courts should carry out - on a case-by-case basis – an exercise to 'weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'.[111] As to oral statements, scholars deem that, according to the rule in *Pfleiderer*, civil courts may order the leniency applicant to testify as to to the content of its leniency application or at least to its participation in the cartel.[112, 113]

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[107] Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161.
[108] Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161, Opinion of AG Mazák, para 38.
[109] Ibid para 48.
[110] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.
[111] *Pfleiderer* (n 107) paras 29-31.
[112] Cauffman, 'The Interaction' (n 97) 198-199.
[113] One of the first applications of *Pfleiderer* at the domestic level took place before the High Court of the United Kingdom in 2012. In *National Grid v. ABB* [2011] EWHC 1717 (Ch), [2012] EWHC 869 (Ch), the High Court carried out the balancing exercise, therefore ordering disclosure of some of the leniency documents submitted on the basis of factors like the defendants' legitimate expectations, proportionality and possible prejudice to applicants and to the deterrent effect.

In 2013, such approach was confirmed in *Donau Chemie*,[114] where the ECJ was requested to issue a preliminary ruling as to the compatibility with EU law of an Austrian law prohibiting the disclosure to third parties of the judicial case file in competition cases without the consent of all parties to the proceedings. The Court, once again recalling the importance of private enforcement and its deterrent effect,[115] reiterated the necessity of a weighing exercise by national judges. It held that a national rule forbidding access to leniency corporate statements is liable to undermine the right to compensation, especially when parties have no other way of obtaining evidence. However, a rule of generalised access is not likely to be necessary to ensure compensation and could contradict the protection of professional secrecy of firms and the effectiveness of the leniency mechanism.[116] Therefore, the ECJ was of the opinion that

> in competition law (…) any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, *inter alia*, Article 101 TFEU and the rights that provision confers on individuals.[117]

Notwithstanding the above, the 2014 Directive embraces a quite 'rigid' approach. It considers the balancing exercise of *Pfleiderer* as leading to 'discrepancies between and even within Member States regarding the disclosure of evidence from the files of competition authorities' and to 'uncertainty as to the disclosability of leniency-related information (…) likely to influence an undertaking's choice whether or not to cooperate with the competition authorities under their leniency programme'.[118]

Therefore, the 2014 Directive includes leniency statements (along with settlement submissions) in the 'black list' of documents which national courts can *never* order a party or a third party to disclose,[119] in order to ensure 'the undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions'[120][121]. On the contrary, documents that the parties prepared specifically for competition authority proceedings (*e.g.* the replies

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[114] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie,* 6 June 2013.
[115] Ibid para 23.
[116] Ibid paras 32-33.
[117] Ibid, para 31.
[118] Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11 June 2013, 3 (Explanatory Memorandum).
[119] 2014 Directive, (n 52) Article 6(6).
[120] Ibid, Recital 26.
[121] Jones and Sufrin (n 3)1114-1115.

to the authority's request of information), or that the authority has drawn up and sent to the parties in the course of its proceedings (*e.g.* statements of objections), as well as withdrawn settlement submissions can be disclosed for the purposes of civil actions after the authority closed the proceedings;[122] this solution clearly resembles the opinion of the Advocate General in *Pfleiderer*.

These rules on disclosure apply not just to orders by courts, but also when the relevant evidence is available in the hands of natural or legal persons through access to the file of a competition authority in the context of public enforcement proceedings, *e.g.* in the exercise of the right of defence.[123] Disclosure of documents falling outside the above categories can instead be ordered at any time,[124] provided that the disclosure requested is *proportionate* in light of the evidence already available and considering the breadth of the request of disclosure (which should be as precise and narrow as possible) and the protection of confidential information.[125] It is specified that 'the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection'.[126] Finally, only the subject who obtained access to the Commission's file (or its successor in the rights connected with the claim) is entitled to use the relevant documents as evidence in civil actions.[127]

The approach of European institutions - other than the courts - and of the NCAs in favour of a protection from disclosure of leniency corporate statements, was not born with the 2014 Directive. For instance, the White Paper of 2008 already stressed the necessity of ensuring adequate protection of leniency corporate statements against disclosure in private actions for damages.[128] The Leniency Notice[129] expressly determines that access to leniency corporate statements be granted exclusively to addressees of statements of objections, provided that they do not make any copy of them and that the relevant information is used solely for the purposes mentioned in the Leniency Notice. Other parties, such as complainants, are not granted access but the specific protection is no longer justified when the applicant itself discloses to a third party the content of the leniency declarations. Moreover, the Leniency Notice[130] expressly provides for the possibility of making self-incriminating oral statements, recorded and transcribed by the Commission. The idea is that, since the transcripts of the oral statements are part of the

[122] 2014 Directive, (n 52) Article 6(5).
[123] Ibid, Article 7.
[124] Ibid, Article 6(9).
[125] Ibid, Article 5(3).
[126] Ibid, Article 5(5).
[127] Ibid, Article 7(3).
[128] White Paper (n 58) paras 2.2 and 2.9.
[129] Leniency Notice, (n 82) para 33.
[130] Ibid, n 2.

Commission's file and access to it under EU law[131] is granted solely in favour of the addressees of the statement of objection, under strict conditions, and the parties do not retain a copy of their declarations, third parties will not be able to access such information.[132] The Cooperation Notice has also excluded the transmission of leniency corporate statements from the Commission to the national courts without the consent of the applicants,[133] and the European Parliament repeatedly emphasised the role of leniency, calling on the Commission to ensure that private enforcement does not undermine its effectiveness.[134] Finally, the ECN recently issued a resolution supporting the necessity for protection from disclosure, in particular after the *Pfleiderer* judgment.[135]

So far, however, such protection has been at times prevented by domestic rules of civil procedure providing for the power of the judge to order disclosure of evidence with no particular exceptions for leniency corporate statements. The non-binding nature of the sources providing for protection (like the leniency notices adopted at domestic level) is normally not sufficient to set aside the binding rules of the civil trial. Since the approach of domestic laws towards disclosure is widely diverging, the possibility for victims to have access to evidence significantly depends on the jurisdiction in which they live or do business.

Therefore, the current landscape (at least until the transposition and implementation of the 2014 Directive at the domestic level) is characterised by a significant '*unpredictability*, that follows from the fact that each national court decides on an *ad hoc* basis and according to the applicable national rules whether or not to grant access to leniency-related information'.[136] In light of this, the introduction of rules on disclosure by means of a binding source of law like the 2014 Directive represents a turning point, being able to solve the issue of uncertainty caused by the

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[131] The rules on access to the files of the Commission by the addressee of statements of objection are provided by Articles 15 and 16 of Regulation 773/2004 and by the Commission's Notice on the Rules for Access to the Commission's File OJ [2005] C325/7. Access to the information is limited to the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU and excluding any business secrets, confidential information or internal documents.

[132] Jones and Sufrin (n 3) 1026.

[133] Cooperation Notice (n 25) para 26.

[134] Resolution of the European Parliament of 2 February 2012 – Towards a Coherent Approach to Collective Redress 2011/2089(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0021+0+DOC+XML+V0//EN> accessed on 26 July 2014.

[135] Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012 – Protection of Leniency Material in the Context of Civil Damages Actions, <http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf> accessed 8 July 2014.

[136] Explanatory Memorandum (n 118) 11 (emphasis added).

recent judgments of the ECJ in *Pfleiderer and Donau Chemie* and the different approach of domestic rules of civil procedures in relation to disclosure. However, the prohibition to access leniency corporate statements as a ground for an action for damages is not immune from critics which call for a solution to balance the need for certainty of the law and the right to defence of claimants, as will be explained in the course of the next Section.

IV. The prohibition of disclosure of leniency corporate statements under the 2014 Directive

1. Overview of the new regime

The 2014 Directive represents an important step in the EU competition law enforcement landscape since, once approved, private enforcement will be for the first time regulated by a binding source of EU law and therefore destined to be harmonised throughout the EU. In particular, the provisions concerning the probative effect of the final decisions taken by the NCAs,[137] the rebuttable presumption that cartels cause harm,[138] the limitation period of 5 years to bring the action,[139] and the incentives for parties to settle their dispute consensually140 clearly facilitate actions for damages.

Moreover, the intended balance between public and private enforcement is strengthened by the limitation of joint and several liability of leniency applicants. To prevent undertakings from not blowing the whistle because of a possibility of being the 'primary targets of damages actions',[141] Article 11(4) provides for the limitation of a leniency applicant's joint and several liability to the harm it caused to its own direct or indirect purchasers. However, to guarantee the right of victims to full compensation, such limitation is not absolute. Should the victims be unable to obtain full compensation from other infringers (*e.g.* because of their state of insolvency), the immunity recipient remains 'fully liable as a last-resort debtor'.[142]

The initiative, indeed, has to be welcomed, especially in light of the numerous weaknesses of the current scenario described in the course of this Article. However, the solutions adopted by the 2014 Directive in relation to access to leniency corporate statements raises some doubts as to their consistency with the right to access to documents as provided by Regulation 1049/2001 (Transparency

[137] 2014 Directive, (n 52) Article 9.
[138] Ibid, Article 17(2).
[139] Ibid, Article 10(3).
[140] Ibid, Articles 18 and 19.
[141] Explanatory Memorandum (n 118) 16.
[142] Ibid.

Regulation).[143] Some concern can be expressed as well as to the possible consequences of 'forum shopping' and subsequent possibility to achieve the 'full compensation' objective. This Section will analyse these 'shadows' of the 2014 Directive and suggest possible solutions for improvement, although proper evaluations will not be possible until the transposition and implementation at the national level is complete.

2. Consistency with the right of access to documents

One controversial aspect of the 2014 Directive is the consistency of the black list of absolutely protected documents with the general provisions of EU law related to the access to European Parliament, Council and Commission documents set forth by the Transparency Regulation. This latter is based on the guiding principle of giving the public *the fullest possible* right of access to documents held by the institutions,[144] since 'openness contributes to strengthening the principles of democracy and respect for the fundamental rights (…)'.[145]

Such a wide right to access can however be limited, by way of exception, when imposed by the protection of certain public and private interests.[146] Article 4 specifies what those interests are and among the private interests includes the commercial interests of natural and legal persons and the purpose of inspections, investigations and audits,[147] as well as the protection of the institution's decision-making process.[148] According to case law,[149] such exceptions must be interpreted and applied *strictly*, and the requested institution must explain how disclosure of that documentation could specifically and effectively undermine the interests protected by the exceptions.[150]

The question is whether the protection of public enforcement and of leniency can be considered as a proper justification to derogate to the wide right to access

[143] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Document [2001] OJ L145/43 (Transparency Regulation).
[144] Ibid, Recital 4 and Article 1.
[145] Ibid, Recital 2.
[146] Ibid, Recital 11.
[147] Ibid, Article 4(2).
[148] Ibid, Article 4(3).
[149] Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, para 63; Case C-64/05P *Sweden v. Commission* [2007] ECR I-11389, para 66; C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para 36.
[150] Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, para 49; Case C- 139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECR I-5885, para 33; Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and API v Commission* [2010] ECR I-0000, para 72.

documents granted to EU citizens. The recent case law makes this point fairly controversial. In *CDC Hydrogene Peroxide v. Commission*[151] the General Court annulled a decision of the Commission to reject an application for access to the contents of the case file, on the basis of the following key-principles: (i) the interest of a company which took part in a cartel in avoiding actions for damages cannot be regarded as a commercial interest and, in any event, does not constitute an interest deserving protection, having particular regard to the fact that any individual has the right to claim damages for loss caused to him by conduct which is liable to restrict or distort competition;[152] (ii) the refusal of disclosure of any document likely to undermine the Commission's cartel policy and, in particular, its leniency programme because of the fear of applicants of being the prime targets of actions for damages is not acceptable, since it would amount to permit the Commission to avoid the application of the Transparency Regulation, without any limit in time, to any document in a competition case merely by reference to a possible adverse impact on its leniency programme;[153] (iii) nothing in the Transparency Regulation leads to the supposition that EU competition policy should enjoy, in the application of that regulation, treatment different from other EU policies;[154] and (iv) leniency and co-operation programmes are not the only means of ensuring compliance with EU competition law since actions for damages can make a significant contribution to the maintenance of effective competition in the EU.[155] This judgment of the General Court clearly resembles the approach in *Pfleiderer*[156] in favour of a degree of disclosure of leniency corporate statements and the idea that private enforcement can have also a deterrent effect, as stated in *Courage* and *Manfredi*[157].

However, in 2014, the ECJ in *EnBW Energie Baden-Württemberg AG*[158] ruled that the Commission is allowed to rely on a *general presumption* that access to documents by third parties in cartels procedures undermines the protection of the commercial interests of the undertakings involved and the purpose of the investigations relating to the proceeding.[159] According to the Court, the exceptions to the wide right of access provided by Article 4 of the Transparency Regulation cannot be interpreted without taking into account the specific restrictive rules governing access to documents in cartel proceedings as laid down by Regulations

[151] Case T-437-08 *Hydrogene Peroxide v Commission* [2012] 4 CMLR 14.
[152] Ibid, para 49.
[153] Ibid, para 69-70.
[154] Ibid, para 72.
[155] Ibid, para 77.
[156] See n 107 in ch III.
[157] See n 34 and n 35 in ch II.
[158] Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg AG* (ECJ, 27 February 2014).
[159] Ibid, para 93.

1/2003 and 773/2004.[160] Pursuant to Articles 27(2) and 28 of Regulation 1/2003 and Articles 6, 8, 15 and 16 of Regulation 773/2004, access to documents, either submitted voluntarily (as with leniency statements) or under compulsion[161] is confined to the 'parties concerned' and to 'complainants' whose complaints the Commission intends to reject, subject to the protection of the business secrets and other confidential information of undertakings and internal documents of the Commission and NCAs.[162] Such a strict presumption is however mitigated, according to the ECJ, by the possibility for third parties to demonstrate that a specific document, the disclosure of which has been requested, is not covered by that presumption or that there is an overriding public interest in such disclosure.[163] Arguably, this burden of proof on claimants would not undermine their right to compensation.[164]

This solution[165] - quite surely influenced by the latest orientation of the 2014 Directive towards non-disclosure - is questionable, especially because it poses on claimants – already burdened by 'information asymmetry' – a further burden before the Commission and the NCAs. Such a rule can represent a significant hurdle to the establishment of an effective private enforcement system as envisaged by the 2014 Directive.

3. Concerns related to forum shopping

One of the main goals of the 2014 Directive is '(…) to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages'.[166] According to the Commissioner Almunia, 'the Directive will eliminate the present obstacles and establish minimum standards applicable everywhere across the Union'.[167] However, some doubts remain as to the possibility of creating a level-playing field of access to evidence. Due to differences in domestic civil procedures not 'levelled' by the 2014 Directive, it may be possible that claimants could benefit from a broader access to evidence in certain EU jurisdictions, perhaps compensating the denied access to leniency

[160] Ibid, para 83.
[161] Ibid, para 100.
[162] Ibid, para 86.
[163] Ibid, para 100.
[164] Ibid, para 104-107.
[165] This orientation of the ECJ has been recently embraced also by part of the doctrine. See on the point Andreas Schwab, 'Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims' (2014) 5 Journal of European Competition Law & Practice 65.
[166] 2014 Directive, (n 52) Recital 9.
[167] Joaquín Almunia, 'Developments in EU Competition Policy' (European Competition Day, Athens, 10 April 2014), European Commission – SPEECH/14/312 <http://europa.eu/rapid/press-release_SPEECH-14-312_en.htm> accessed 9 July 2014.

corporate statements. Consequently, even once the 2014 Directive will be implemented, claimants may still choose to bring their claims in such favourable jurisdictions.[168]

One example is the United Kingdom which is considered an 'attractive place in which to litigate antitrust disputes'[169] and which will probably continue to be so in the future.[170] One of the factors[171] determining such attractiveness is the extensive rule on access to evidence based on 'pre-trial adversary disclosure'. In High Court proceedings,[172] disclosure is governed by part 31 of the Civil Procedure Rules (CPR)[173] which requires the parties to search for and disclose all documents in their control *on which they rely* but also documents which *adversely affect their own case*, adversely affect another's party case or *support another party's case.* Moreover, since April 2013, in large cases parties are also required to complete a Disclosure Questionnaire at the outset of the disclosure phase, in order to inform the Court and the other parties of documents which may exist and where they are located. On the basis of the answers to the Disclosure Questionnaire, the parties can agree, or the Court order, which documents the other party may inspect. This tool provides greater transparency as to the existence of documents and also saves

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[168] In the EU the choice of jurisdiction in civil and commercial matters and of the applicable law to non-contractual obligations in litigation cases with cross-border features (as a good number of cartel cases currently is) is governed by, respectively, Regulation 44/2001 (Bruxelles I) and Regulation 864/2007 (Rome II) (n 33). See in particular, as to the numerous jurisdictions available to claimants, Articles 2, 5(3), 5(1)(a) and 6(1) of Bruxelles I and, as to the applicable law, Article 6 of Rome II. Please note that Bruxelles I has been replaced by Regulation EU 1215/2012 of 12 December 2012, which for the most part will enter into force on 10 January 2015 (n 33).

[169] Lesley Farrell and Sarah Ince, 'Private enforcement in the UK' (2008) <www.mondaq.com/article.asp?articleid=67882> accessed 13 July 2014.

[170] For a summary of the England and Wales private antitrust litigation system see Elizabeth Morony and John Alderton, 'England and Wales' in Samantha Mobley (ed) *Private Antitrust Litigation in 24 Jurisdiction Worldwide* (Getting the Deal Through - Global Competition Review, Law Business Research Ltd, 2014).

[171] Other factors making England and Wales a popular jurisdiction to bring private antitrust claims are the existence of a specialist competition court, the CAT (Competition Appeal Tribunal), having jurisdiction to hear follow-on damage claims, with procedural rules more flexible than the Civil Procedure Rules applicable in High Court Proceedings. The cost factor is also relevant, since it is possible to enter into 'conditional fee arrangements' with lawyers, according to which no or little payment is due to lawyers in the event of an unsuccessful claim but an 'uplift' of up to 100 per cent of the basic fees is payable if they win (known as a 'success fee'). Finally, in June 2013 a draft Consumer Right Bill was published providing for specific rules in consumer protection in the field of competition, seeking therefore to make it easier to gain access to redress where there has been an infringement of antitrust provisions. See Morony and Alderton (n 170).

[172] The High Court can hear both follow-on and stand-alone claims, while the CAT has jurisdiction to hear only follow-on damages claims.

[173] Civil Procedure Rules 1999.

the costs of retrieving irrelevant documentation. In the Competition Appeal Tribunal (CAT), the rules on disclosure are more general,[174] since the CAT has full discretion to give directions for the disclosure of documents but the defendant should nonetheless disclose evidence that is potentially helpful to the claimant.

Germany and The Netherlands are also considered attractive jurisdictions for claimants to obtain access to evidence held by the defendant under certain conditions. On the contrary, Member States with court-centred disclosure mechanisms have very limited rules regarding access to evidence, making it difficult for claimants to access documentation in the hands of the defendants. For instance, in Italy, according to case law, the exhibition order by the judge provided by Article 210 of the Codice di Procedura Civile[175] can be used only if the claimant is certain of the existence - in the hands of the defendant - of the requested documents and can specifically locate them. This condition is very unlikely to be met by victims of competition damages suffering from information asymmetry.

In light of these differences, it is debatable whether the rigid solution given by the 2014 Directive denying access to leniency corporate statements could create a level-playing field in the EU. Claimants who can afford to bring their claims before a court granting broader access to evidence – thus 'compensating' the denied access to leniency statements - would be more likely to receive that *full compensation* envisaged by the 2014 Directive. On the contrary, those who cannot afford to forum shop would struggle to prove their claims if their national courts have no comparable provisions. This situation raises serious doubts as to the consistency of this system with the fundamental rights to an effective remedy and a fair trial guaranteed by Article 47, in conjunction with Article 51(1) of the Charter of Fundamental Rights of the European Union,[176] since it would jeopardise the right to full compensation of victims of competition infringements bringing their claims before courts adopting the judicial disclosure procedures. Since an introduction of discovery provisions similar to those in force in the UK into the civil procedure of all EU Member States is unlikely, civil judges may still have a fundamental role to play in 'levelling' the EU access to evidence.

4. Possible solutions for addressing damages claims

The fact that the 2014 Directive never allows disclosure of leniency corporate statements, without exception, can raise serious issues as to its ability to fulfil the goal of full compensation for victims throughout the EU. Moreover, as to the desired *complementarity* of the two systems, the 2014 Directive still seems to give

[174] Competition Appeal Tribunal Rules 2003, s 19(2)k.
[175] R.D. 28 ottobre 1940 n. 1443.
[176] Charter of Fundamental Rights of the European Union (n 110).

priority to public enforcement – and therefore to the identification and sanctioning of cartels by means of the leniency mechanism – rather than to the right of victims to be compensated. If after the transposition of the 2014 Directive at the domestic level such concerns are considered to have merit, modifications of the dispositions regarding disclosure may be proposed.

In particular, the 'balancing role' of the national judge, as supported by the *Pfleiderer* and *Donau Chemie* judgments,[177] could be re-established with improvements. The proposal would be that a judge would grant or deny disclosure of the leniency statements taking into account the possibility of the claimant retrieving other evidence under the applicable domestic law. Should the evidence available to the claimant in the specific case be insufficient (*e.g.* because the relevant civil procedure rules embrace a strict court-centred disclosure mechanism), the judge would grant access to leniency statements. This decision would not be taken on a discretionary basis like in *Pfleiderer* and *Donau Chemie*, but it would be shared with the NCA and based on directions in an *ad hoc* EU regulation. This regulation would provide that, in certain EU jurisdictions, claimants would be granted access to leniency statements because of the scarcity of general evidence available. It can be envisaged that this regulation would grant access also in case of 'not specialised' claimants, *i.e.* individuals or small companies lacking the technical knowledge to properly prove damages.

On the contrary, there should be a limitation to disclosure where the claimant holds a wide basis of evidence (sufficient to prove the facts, damages and causal link), either because wide rules on disclosure apply (for instance the UK rules on pre-trial adversarial disclosure) allowing the claimant to access the necessary evidence, or because the plaintiff is 'specialised' (*e.g.* a multinational company having an in-depth knowledge of the relevant market where the cartel occurred). Should this be the case, the judge and the NCA, albeit relying on a general presumption of accessibility of documents as stated by the General Court in *CDC Hydrogene*, would deny access to leniency statements on the basis of the rules set out in the EU regulation. The rules would describe the specific situations in which the evidence held by the claimant would be considered sufficient to base the claim.

The proposed solution would probably overcome the main concerns raised by the current provisions of the 2014 Directive. First of all, it may create a levelled access to evidence in all EU Member States, reducing the phenomenon of forum shopping and allowing any EU victim of competition infringement, regardless of the jurisdiction, to gain the fullest compensation possible in compliance with the

[177] Text to n 107 and n 114 in ch III.

fundamental rights to an effective remedy and a fair trial and to the right to property.

Moreover, the proposed solution, due to the envisaged collaboration between the judge and the NCA and to the specific rules set forth by the *ad hoc* regulation, would eliminate concerns as to the uncertainty of law which were typical of the 'balancing exercise' as proposed in *Pfleiderer* and *Donau Chemie.* It would affirm once again the general principle of full disclosure of documents and, in line with case law, it would allow derogations to this principle only in specific cases, strictly provided by the regulation, the existence of which would need to be proved by the judge and the NCA, with no burden of proof on the claimant. This 'regulated' balancing exercise would also be in line with the provision in the 2014 Directive that the disclosure of documents, other than the leniency statement, should be *proportionate* to the evidence already available.[178]

In brief, this solution – with all the proper adaptations which only EU institutions are in the position to provide - has the potential of striking a balance between private and public enforcement while strengthening private enforcement thanks to a wider access to evidence. It is not to the detriment of wishtleblowers, since they will have a fairly clear picture of the possibility of disclosure of their leniency statements in their jurisdiction. Clearly, such a 'clear picture' may discourage the members of a cartel to 'blow the whistle' in many cases, at least in jurisdictions where disclosure of evidence is generally difficult. However, the leniency mechanism will probably not be completely set aside as the members of a cartel will continue to consider the opportunity to apply for leniency and to receive immunity or discounts from fines and the possibility of limitation of the joint and several liability in any follow-on action for damages, as introduced by the 2014 Directive. This option may be more desirable to an infringer than being fully fined and jointly and severally liable for damages.

Moreover, in the long run, the possibility of disclosure of leniency corporate statements as proposed would hopefully trigger a 'virtuous cycle': the real possibility of an action for damages would discourage companies from engaging in cartels from the beginning. In brief, the stronger the system of private enforcement the greater its deterrent effect and, consequently, the greater the prevention of anti-competitive conducts. Indeed, the non-existence of cartels would be much more desirable than their existence 'mitigated' by leniency.

This Section has identified the two main 'shadows' of the 'black list' provided by the 2014 Directive in its questionable consistency with the right to access to documents as set forth by the Transparency Regulation and in the risk of further

[178] 2014 Directive, (n 52) Article 5(3)(a).

strengthening the forum shopping phenomenon across the EU. The solution proposed, inspired by the *Pfleiderer* and *Donau Chemie* judgments, identifies the judge and the NCA as the most suitable subjects to discern whether to grant or to deny access to leniency corporate statements. The relevant decisions would not be taken on a discretionary basis, but according to specific rules of an *ad hoc* regulation which would take into account the degrees of access to evidence in EU Member States as well as the specific knowledge of the cartel by the claimant. This solution would guarantee a fairer access to evidence in follow-on actions for damages in the EU.

V. Conclusion

Undeniably, much progress has been made by the EU towards an efficient system of private competition law enforcement in the last decades. After many years dominated by fragmented regimes across the EU, the time has come for the creation of a harmonised framework thanks to the 2014 Directive. The relationship between the public and the private side has been a difficult one, with many scholars supporting the exclusive role of fines in pursuing deterrence while others, backed by the ECJ judgments of *Courage* and *Manfredi*, sustaining that damages should also have an important deterrent effect. To achieve such deterrence, the threat of an action for damages should be a reality and not just a remote possibility. Accordingly, claimants should be in the position to properly base their claims, overcoming the information asymmetry of which they suffer.

Self-incriminating statements provided by infringers in the context of the leniency mechanisms would in no doubt be key for claimants. Granting access to leniency-related documents would strengthen the role of private actions and the right of victims of competition infringements to full compensation; however, it may prevent members of a cartel from whistleblowing, thereby weakening the EU public enforcement, currently relying on the declarations made by leniency applicants. Finding a balance is a very difficult task.

The 2014 Directive tries to achieve such a balance by strengthening the position of claimants (for instance by the binding probative value of a decision of a NCA and the presumption that cartels cause harm) and seeking to preserve and encourage the leniency system (as by the limitation, under specific conditions, of the joint and several liability of the leniency applicant). However, one can argue that the balance is not likely to be achieved by the disposition of the 2014 Directive which denies any access to leniency corporate statements. The provision has been identified as inconsistent with the right to full access to documents as provided by the Transparency Regulation and as increasing forum shopping as victims seek to 'compensate' the absence of access to leniency statements.

This scenario clearly clashes with the main goals pursued by the 2014 Directive, namely the full compensation for victims and the creation of a system where public and private enforcement are strictly complementary. A solution has been proposed which, based on the general principle of full access to documents, designates the national judge, along with the NCA, to carry out - on the basis of an *ad hoc* EU regulation – a balancing exercise granting or denying access to leniency statements. The decision would be based on the effective availability of useful evidence in the hands of the claimants, in light of the applicable domestic system of disclosure as well as of the specific knowledge of the cartel and of the market concerned held by the claimant.

By generally granting access to leniency statements and denying it solely in specific circumstances – *i.e.*, when the claimant is facing no hurdles in retrieving other supporting evidence because of favourable rules on disclosure of evidence or where the claimant is a multinational company with a good knowledge of the cartel and the relevant market – this solution may create a level-playing field across the EU and encourage private actions. Applications for leniency may be discouraged, but not completely set aside, since immunity or reduction from fines and the subsequent possible exclusion of joint and several liability in an action for damages may still be more attractive than being fully fined and jointly and severally liable. An effective system of private enforcement would finally trigger a 'virtuous cycle', creating more deterrence on companies and finally preventing the creation of cartels: prevention is always better than cure.

Consequently, the described solution could be perceived as a quite idealistic one. However, should it be taken into consideration in the course of the five-year monitoring period by the Commission, it may represent a further step towards democracy and equality in the EU.