KU LEUVEN

FACULTY OF LAW

ACADEMIC YEAR 2012-2013

PRIVATE ENFORCEMENT OF COMPETITION LAW IN THE UK AND BELGIUM

Promotor: prof. W. Devroe

Assistant: Z. Vikarská

Masterscriptie ingediend door

Laura DE SCHRYVER

Bij het eindexamen voor de graad van

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Summary

This master thesis looks at the status of private enforcement of competition law in two EU Member States: the United Kingdom and Belgium. Private enforcement of competition law is the situation where private parties who have been harmed by infringements of competition rules bring an action against the offenders in a national court of law, based on the Articles 101 and 102 TFEU. This action can be an action for damages, an injunction to obtain a judgment ordering to cease the anticompetitive practices, or a civil lawsuit to have the anticompetitive agreement declared null and void.

In the UK, private enforcement has since a long time been a popular venue for private enforcement. In Belgium, this is much less the case. This thesis focuses on three types of private enforcement, but also on important matters that play a role in these: the passing-on defence, the distinction between compensatory and punitive damages, collective actions and the matter of standing. In addition, an overview is made of the status of private enforcement in the EU, the arguments in favour and against, and the relationship with public enforcement policy.

In the European Union, the topic of private enforcement has been on the table for several years, but lately more concrete steps have been taken. A new Directive dealing with private enforcement is being drafted, and this thesis aims to provide a clear overview of the current legal situation in the UK and Belgium. In the conclusion, an opinion is formulated on what should be the content of this Directive.

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List of Abbreviations

CA 1998 : Competition Act 1998 (United Kingdom)

CAT: Competition Appeal Tribunal

EA 2002: Enterprise Act 2002 (United Kingdom)

EU : European Union

NCA : National Competition Authorities

UK : European Union

WMPC: Law of 6 April 2010 on Market Practices and Consumer Protection (Belgium)

INTRODUCTION

Both in the European Union, and its Member States competition law enforcement has traditionally been the virtually exclusive domain of administrative authorities, even though private enforcement of antitrust rules has been possible since the 1957 Treaty of Rome. Over the last years however there have been several developments in relation to private enforcement, on both a national and a European level. This master's thesis is an overview of Private Enforcement of Competition Law in the United Kingdom and Belgium. The aim is to describe the current situation of private enforcement in these two countries, as well as how they plan to develop it further into the future.

First, a general picture will be painted of how competition law has evolved in the European Union. The current issues and possible remedies in the field of private enforcement will be discussed on a European level. Attention will also be paid to the relation between private and public forms of competition law enforcement, with a focus on the remedies that private enforcement can provide which public is unable to. Also, I will take a look at the arguments made against private enforcement. It is important to distinguish between the ideas that the Commission has and wants to make reality, and the daily practice of what is already happening, right now. It must be kept in mind that these two are not the same thing. Secondly, a general chapter touching the legal issues will follow. Here the common aspects that will apply to the evaluation of both Member States will be clarified. After that the situation in two specific Member States will be thoroughly described. Firstly, the United Kingdom, where private enforcement is an important method of overcoming infringements of competition law. Secondly, Belgium, where private enforcement is not as developed or important.

In the United Kingdom, private enforcement appears in numerous cases. Their system worked arguable well through the High Court, but recently there has been a proposal to reform and the British Government plans to let all damage actions for infringements of the competition rules go to the Competition Appeal Tribunal (CAT), which has the necessary expertise and means to deal with the case specifics. In Belgium on the other hand, a well tailored system like in the UK remains an ideal. Hardly any case law on the matter exists, although things are in the process of changing with the recent Otis judgment on the prejudicial question of the European Court of Justice. At the end, a conclusion will be drawn in which the situations in these Member States is balanced against each other, with a suggestion of what a future European Directive should look like.

I. PRIVATE ENFORCEMENT OF COMPETITION LAW ON A EUROPEAN LEVEL

1. Competition Law In The EU

1.1 Why Is Competition Law So Important to the EU?

Competition law, the law that promotes and maintains market competition by regulating companies' anticompetitive conduct, is a hot topic in the society nowadays, because it affects three issues the European Union strongly cares about: the functioning of the internal market, the wellbeing of consumers, and a fair competition of undertakings. This area of law and policy has been evolving dramatically over the last years. Not only in the Treaties themselves, but also in several Regulations and other instruments, the Union has adopted many harmonisation measures in the field of competition law to facilitate and encourage private litigation.

Especially in view of the European internal market, which was and still is the main purpose of the European Union, competition law is an important tool in realising this. This makes competition law not one of the EU's goals, but an instrument to reach them.

From a consumer point of view, cartels and other infringements of competition rules can make a difference in their daily spending. As we all know, today's world is more and more a consumer society. Competition law encourages both entrepreneurship and efficiency, which creates a wider choice for consumers and helps to improve quality and reduce prices.

Moreover, also companies benefit from fair competition. To deliver the choice consumers need, businesses need to be innovative in order to make their product different from the rest and stand out. A fair competition within the European Union makes companies more competitive in the global perspective.

There are authorities that sanction infringements of competition law at a European or national level, but for an enterprise which incurred a loss going to court and claiming damages might be more advantageous. This is where Articles 101 and 102 TFEU come in. When companies

and individuals get the chance to use competition law as a sword and go to court themselves, this might solve their problems much better than public enforcement. Hence, there is a great potential in further development and use of private enforcement.

1.2 What Constitutes Private Enforcement of Competition Law?

Within the European Union, two types of enforcement of competition law can be seen: public enforcement by the Commission and national competition authorities, and private enforcement by private parties in national courts.

Public enforcement of competition law is currently the most important enforcement method. The European Commission and the competition authorities of the Member States, which also enforce the relevant provisions of national law, enforce Articles 101 and 102 TFEU. By the power of Regulation 1/2003,[1] they can find and bring to an end the prohibited behaviour of undertakings. In the European Union, public enforcement is by far the most used means of enforcement, unlike in the United States of America. In contrast with private enforcement, public enforcement by the Commission does not award damages for the parties harmed by the infringements.

Private enforcement of competition law is the situation where private parties who have been harmed by infringements of competition rules bring an action for damages against the offenders in a national court of law, based on the Articles 101 and 102 TFEU. These can be follow-on actions, when they are brought following a finding of infringement through public enforcement, or stand-alone actions, which are completely independent from public enforcement. Wils mentions that private enforcement can be used both as a shield, when invoked in defence against a contractual claim for performance of damages because of non-performance, or as a sword, when they are used proactively as a basis for claiming damages or an injunction.[2] Thus, private enforcement constitutes the situation where private parties go to court themselves.

In addition, it should be noted that private complaints do play an important role in public enforcement as well: many competition cases at the Commission start out by private parties

[1] Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty.
[2] W. Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?", *World Competition*, 26(3) 2003, 474.

lodging a complaint.[3] They are given this right under Article 7 of Regulation 1/2003. This does not constitute a third subcategory, since it is nothing more than a way of starting a case.

An in-depth analysis of public enforcement of competition law in the EU however falls outside the scope of this text. Nevertheless, it seems clear that both private and public enforcement could be very useful to guarantee the full effect of competition rules (especially when combined) even though at the moment private enforcement is not nearly as often used as public enforcement.

1.3 Legal Basis: Articles 101 and 102 TFEU

Articles 101 and 102 of the Treaty on the Functioning of the European Union aim to prohibit agreements and conduct which will harm consumer welfare and/or thwarts other objectives of EU law, e.g. the establishment of a free internal market.[4] Firstly, restrictive agreements between undertakings are prohibited by Article 101 TFEU, subject to some limited exceptions. Secondly, undertakings in a dominant position may not abuse that position, pursuant to Article 102 TFEU.

These Articles are directly effective, since the ECJ stated in *BRT v SABAM*[5] that the prohibitions in these Articles by their very nature create direct rights in respect of the individuals concerned which the national courts must safeguard. They may further seek redress, damages, or injunctions to put an immediate end to the violation of competition rules and to prevent future breaches of the rules.[6] Hence, Articles 101 and 102 TFEU are an important instrument to help establish the free market.

Obviously, when applying Articles 101 and 102, national courts are bound to respect the primacy of EU law and to interpret the provisions in accordance with those adopted by the European Court of Justice.[7] The principle of primacy of EU law was set by the Court in *Costa v ENEL.*[8] This means that in cases of competition law, EU rules will prevail, and that national competition authorities will have to take them in to account.

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[3] W. Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?" , *World Competition,* 26(3) 2003, 476.
[4] A. JONES and B. SUFRIN, *EU Competition law : text, cases and materials,* 4th edition, Oxford, OUP, 2011, 1185.
[5] BRT v SABAM, Case 127/73 [1974] 1 ECR 51.
[6] A. JONES and B. SUFRIN, *EU Competition law : text, cases and materials,* 4th edition, Oxford, OUP, 2011, 1185.
[7] Ibid, 1194.
[8] Case 6/64, Falminio Costa v. ENEL [1964] ECR 585, 593

Considering State Aid (Article 107 TFEU): despite the fact that genuine private enforcement before national courts has played a limited role to date, the Commission believes that private enforcement actions offer considerable benefits for State aid policy.[9] There is no doubt that national courts can also offer claimants a very effective remedy in the event of a breach of State Aid rules. However, for the scope of this thesis, further attention will only be paid to private enforcement claims on the basis of Articles 101 and 102 TFEU.

2. EU Sources of Private Enforcement

The proposition that the European Union has supported and encouraged private enforcement for some time can be illustrated by several legislative realizations and documents, such as Regulation 1/2003[10], the Ashurst Report[11], a Green Paper[12] and a White Paper[13]. However, it has not always been like this. In the early years of the development of Union competition law, Regulation 17/62 introduced a very centralised system with the Commission effectively acting as the sole enforcer of competition law.[14] The doctrine of direct effect established by *Van Gend and Loos*[15] however, ensured that private parties could rely on Union law in private litigation. The Court of Justice subsequently confirmed in *BRT v SABAM*[16] that private litigants could use EU competition law as a shield in court procedures, or as a sword, for instance by a claimant seeking damages.[17]

The Commission recognises the importance of a strong private enforcement in addition to public enforcement. On its website,[18] it admits itself that "*the absence of an effective legal framework for antitrust damages actions hampers the full enforcement of the antitrust rules and thus has a negative bearing on vigorous competition in an open internal market.*"[19] They

[9] Competition Handbook on Enforcement of EU State Aid Law by National Courts, Brussels, 2010, http://ec.europa.eu/competition/publications/state_aid/national_courts_booklet_en.pdf, 11.
[10] Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 8210 of the Treaty.
[11] Ashurst Study on the Conditions of Claims for Damages in the Case of Infringement of EC Competition Rules, 2004.
[12] Green Paper on Damages Actions for Breach of EC Antitrust Rules COM/2005/0672.
[13] White Paper on Damages actions for Breach of EC Antitrust Rules COM/2008/0165.
[14] K. MIDDLETON , B.J. RODGER , A. MACCULLOCH and J. GALLOWAY , *Cases and Materials on UK and EC Competition law*, 2nd edition, Oxford, OUP, 2009, 103.
[15] [1963] ECR 1 at 12
[16] Case 127/73 [1974] 1 ECR 51.
[17] K. MIDDLETON , B.J. RODGER , A. MACCULLOCH and J. GALLOWAY , *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 104.
[18] European Commission, Actions for Damages Overview, Steps towards a European Legal Framework, http://ec.europa.eu/competition/antitrust/actionsdamages/index.html, last visited on 11/05/12.
[19] European Commission, Actions for Damages Overview, Steps towards a European Legal Framework, http://ec.europa.eu/competition/antitrust/actionsdamages/index.html, last visited on 11/05/12.

further realise that the current ineffectiveness is best addressed by measures at both EU and national level, and have since 2004 taken a number of steps to stimulate the further development of private enforcement

2.1 Regulation 1/2003 on the Implementation of the Rules on Competition[20]

Regulation 1/2003 has made a great contribution to the development of private enforcement. The key objective of this Regulation was to decentralise the enforcement, and to strengthen the possibility for individuals to seek and obtain effective relief before national courts. This Regulation sets out clear rules on the relationship between national and Union law. It focuses on the essential role that national courts can play in applying the European competition rules, as it is under this regulation that national procedures will be used to enforce the law in the vast majority of cases.[21] As can be illustrated in Article 4 of the Regulation :

"The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3) of the Treaty".

This regulation does not in itself change the substantive law but it has changed the mechanisms for enforcement and application, which has had an impact on the development of the substantive law.[22] By extending the power to apply Article 101(3)[23] to national courts, it removes the possibility for undertakings to delay national court proceedings by a notification to the Commission, hereby eliminating the obstacle for private litigation that existed under Regulation 17/62.[24] This change was made in order to meet the challenges of an integrated market and future enlargement of the Union.[25] Regulation 1/2003 did nonetheless bring a fundamental change in the way in which Articles 101 and 102 are applied in practice: while

[20] Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 8220 of the Treaty.
[21] M. FURSE , *Competition Law of the EC and the UK*, 6th edition, Oxford, OUP, 2008, 55.
[22] A. JONES and B. SUFRIN, *EU Competition Law: text, cases and materials*, 4th edition, Oxford, OUP, 2011, 116.
[23] Previously Article 81(3)
[24] A. JONES and B. SUFRIN, *EC Competition Law: text, cases and materials*, Oxford, OUP, 2008, 1311.
[25] Art 1 Regulation 1/2003.

the Commission remains the guardian of the competition rules, the burden of the enforcement is now the prime responsibility of national competition authorities and national courts.[26]

2.2 Ashurst Report

The Ashurst Report[27] was a study ordered by the European Commission, and carried out by the law firm Ashurst, which makes it not at all legally binding. It focused on the private damage actions only, with the aim of identifying and analysing the obstacles to successful actions for damages and considered the positions across the Member States. The picture that emerged from the study was one of "*astonishing diversity and total underdevelopment*", as said the report in its own introduction.

By the time the report was written in 2004, there had only been 601 cases decided for damages actions, of which only 28 had resulted in an award being made.

2.3 Green Paper 2005[28] and White Paper 2008[29]

The Commission published a Green Paper in 2005 and a White Paper in 2008, both on Damage Actions for Breach of the EC Antitrust Rules, in which it proposes measures to encourage private enforcement. Even though these Papers do not contain actual rules but only ideas for debate and official proposals, their content is significant for what might later on become binding law in the form of a directive.

The Green Paper, following the Ashurst Report[30] admitted that there were still significant obstacles to an effective operation of damages actions in different Member States, and that the right to obtain damages was largely theoretical because most national regimes were not suited to launch antitrust infringement cases.[31] The Commission found that the traditional rules and procedures on civil liability in force in most Member States appeared to be insufficient for antitrust damages cases.[32] Its purpose therefore was to identify these obstacles in order to set

[26] D. BAILEY, " Publication review. The Reform of EC Competition law, New Challenges" by I. KOKKORIS and I. LIANOS" *E.L. Rev*. 2011, 36(2), 313.
[27] Ashurst Study on the conditions of claims for damages in the case of infringement of EC competition rules, 2004[27]
[28] Green Paper on Damages Actions for Breach of EC Antitrust Rules COM/2005/0672.
[29] White Paper on Damages Actions for Breach of EC Antitrust Rules COM/2008/0165.
[30] K. MIDDLETON , B.J. RODGER , A. MACCULLOCH and J. GALLOWAY , *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 122.
[31] J. ALMUNIA, *Common standards for group claims across the EU*, Speech at the EU University of Valladolid, 15 October 2010 (SPEECH/10/554)
[32] Green Paper on Damages Actions for Breach of EC Antitrust Rules COM/2005/0672.

out options for further reflection and possible action, and to invite a discussion on these obstacles.[33]

The Green Paper has been complemented by a White Paper[34] in 2008, which aimed to facilitate actions by private parties harmed by violations of the antitrust rules, and is hoped to foster a greater culture of competition in the EU.[35] Based on the outcomes of several public consultations, the Commission has suggested specific policy choices and measures in this White Paper.[36] The primary objective was to improve the legal conditions to obtain damages. The suggested policy options and measures would help giving all victims of EU antitrust infringements access to effective redress mechanisms so they can be fully compensated for the harm they have suffered.[37] The White Paper has however been criticized as failing to create such sufficient incentives to stimulate private litigation,[38] and so it seems that the Commission did not reach its goal to encourage private parties to a more effective private enforcement.

A follow up to these Papers, the Commission Work Program 2012 included a legislative initiative on actions for damages for breaches of competition law, not only to effective damage actions before national courts but also with the objective of clarifying the interrelation of such private actions with public enforcement by the Commission and the NCA's, in order to preserve the central role of public enforcement in the EU.[39]

With this, the Commission has proposed a number of possible ways to encourage private enforcement before the courts of Member States. Although there has been some criticism, it seems the Commission is determined to make private enforcement a success story. Regulation 1/2003 brought the first set of reforms, now it is waiting what the next step will be. As the individual Member States are taking the European reforms into their own legislations, they could also be going a step further, because the Member States are not sitting down and waiting, they are also taking action themselves. It will be important to see how far they will go, and this will also determine the following initiatives the EU will have to take.

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[33] A. JONES and B. SUFRIN, *EC Competition Law: text, cases and materials*, Oxford, OUP, 2008, 1313.
[34] White Paper on Damages Actions for Breach of EC Antitrust Rules COM/2008/0165.
[35] D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges*, I. LIANOS and I. KOKKORIS (eds.) Wolters Kluwer, 2010, 18.
[36] White Paper on Damages Actions for Breach of EC Antitrust Rules COM/2008/0165.
[37] http://ec.europa.eu/competition/antitrust/actionsdamages/index.html, last visited on 11/05/12
[38] K. MIDDLETON , B.J. RODGER , A. MACCULLOCH and J. GALLOWAY , *Cases and materials on UK and EC competition law*, 2nd edition, Oxford, OUP, 2009, 125.
[39] European Commission Competition website, http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html, last visited 25/03/2013

3. Private or Public Enforcement

3.1 Based on the US System

In contrast to the European system where public enforcement is the traditional way of dealing with infringements, the United States of America have a well developed and mature system of litigation for private enforcement of competition law,[40] based on the antitrust provisions of the Clayton and Sherman Acts.[41] A range of historical factors in the United States have combined to make private enforcement the default setting for antitrust enforcement in general.[42] Wils mentions that in practice, 90% of antitrust cases in the US are private actions.[43] In Europe, this is certainly not the case yet. It could be said that in the field of private enforcement, the EU was inspired by US antitrust law.

3.2 Arguments For Private Enforcement

There are potentially great benefits to an increase in private enforcement. Both in the eyes of the Commission and of most academics, this is fairly obvious. A greater private enforcement would undoubtedly have a significant effect on the application and effectiveness of EU competition rules. Four bigger categories of advantages can be distinguished: compensation for the victims, the deterrent effect for companies, several efficiency reasons such as effective supervision and speed, and lastly the economic benefits private enforcement could bring.

Firstly, even though a monetary compensation could substantially repair the damage inflicted by infringements of competition rules, the Commission itself cannot award damages or other compensations for the loss caused by those infringements. This can only be done by national courts. Awarding damages would increase "corrective justice", since victims of anticompetitive conduct would be fully (or partially) compensated for the loss sustained.[44] The Impact Study on Making Antitrust Damages More Effective in the EU[45] has estimated

[40] K. MIDDLETON, B.J. RODGER., A. MACCULLOCH and J. GALLOWAY, *Cases and materials on UK and EC competition law*, 2nd edition, Oxford, OUP, 2009, 101.
[41] W. WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", World Competition 26, 2003, 476.
[42] K. MIDDLETON, B.J. RODGER., A. MACCULLOCH and J. GALLOWAY, *Cases and materials on UK and EC competition law*, 2nd edition, OUP, 2009, 101.
[43] W. WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", World Competition 26, 2003, 477.
[44] Report for the European Commission, *Making Antitrust Damages Actions More Effective in the EU*, (2007), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf
[45] This study was done in Brussels, Rome and Rotterdam in 2007, by the Centre for European Policy Studies, the Erasmus University Rotterdam and Luiss Guido Carli, and was ordered by the European Commission.

that the potential impact of a more effective system of private antitrust enforcement in Europe could potentially lead to damage recoveries of €25.7 billion yearly.[46]

A second very important advantage of private enforcement would be the enhanced deterrent effect it would have on competitors who might be tempted to break the rules. Infringing companies would face a higher number of lawsuits as well as a larger expected liability. As the Impact Study puts it: it would help ensuring that undertakings violating Union antitrust law completely internalise the negative externalities they impose on society by means of anticompetitive conduct, expressed in terms of overcharges and (additional) deadweight loss.[47] The credible threat of sanctions would most likely be particularly effective[48] and should therefore make businesses refrain from committing infringements.

In addition, there is a reason of efficiency: if public authorities are to be responsible for all of the enforcement, it cannot be expected that they will bring a good outcome in all cases, because of the budgetary constraints, lack of awareness etc. It is impossible for the Commission to bear sole responsibility for the enforcement of EU competition laws.[49] National courts can also act more speedily in interim proceedings and can offer the possibility to combine claims based on national laws and Union law, and to award applicants the costs.[50] If a litigation culture were to grow, the development of competition law would become less heavily influenced by the Commission and more by national courts than in the past.[51]

The vigilance of individuals to protect their rights amounts to an effective supervision, and would be complementing the supervision exercised by the Commission and the Member States.[52] Concerning individual consumers however, truly effective private enforcement of their rights might only be available with the use of collective actions. For bigger victims, such as (multinational) companies, an individual claim might be a real and practical option. Nevertheless competition law would be brought closer to the citizens, raising their awareness

[46] Report for the European Commission, *Making Antitrust Damages Actions More Effective in the EU*, (2007), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf, 26.
[47] Ibid.
[48] W. WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", *World Competition* 26(3), 2003, 478.
[49] A. JONES and B. SUFRIN, *EU Competition law : text, cases and materials,* 4th edition, Oxford, OUP, 2011, 1192.
[50] K. MIDDLETON , B.J. RODGER , A. MACCULLOCH and J. GALLOWAY , *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 108.
[51] A. JONES and B. SUFRIN, *EU Competition law : text, cases and materials,* 4th edition, Oxford, OUP, 2011, 1189.
[52] D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges,* I. LIANOS and I. KOKKORIS (eds.) Wolters Kluwer, 2010, 18.

as to the benefits of an effective competition policy and to their rights to claim damages if they have suffered a disadvantage.[53]

Lastly, a greater deal of private enforcement would have economic benefits for the internal market. It would put businesses and citizens in similar conditions to exercise their right to damages throughout the territory of the EU, and it would reduce legal uncertainty for undertakings wishing to engage in cross-border trade.[54] Furthermore, thanks to a higher competitiveness of the internal market there would be positive effects in terms of growth and new jobs. This in turn would reduce allocative inefficiency by leading to greater output, lower prices and better quality.[55] These economic advantages could again justify an increased use of private enforcement.

To sum up, private enforcement could not only award damages to parties who have suffered from the infringements, something the Commission cannot do, but they would also have a deterrent effect on possible infringers. Combined with the extra efficiency advantages private enforcement can offer, as well as extra vigilance from individuals and economic benefit for the market, this proves that private enforcement definitely has some good things to offer to the European system of competition law. It will be important to keep these benefits in mind while thinking about some arguments against private enforcement.

3.3 Arguments Against Private Enforcement

Not everyone is convinced of the advantages of private enforcement. In 2003, Wils argued in his article that "*the situation where private parties do play an important role in public antitrust enforcement through complaints, but that private actions for damages or injunctive relief do not constitute a desirable situation".* According to him, this is because public enforcement is inherently superior to private, due to firstly the more investigative and sanctioning powers, secondly the fact that private enforcement is driven by private motives which fundamentally diverge from the general interest and lastly, because of the high cost of private antitrust enforcement. Wils even suggests that there is not even a supplementary role

[53] Report for the European Commission, *Making Antitrust Damages Actions More Effective in the EU*, (2007), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf
[54] Ibid.
[55] Ibid.

for private enforcement, since both the adequate level of sanctions and prosecutions can be ensured more effectively and at a lower cost through public enforcement.[56]

Wils, although being a legal official within the European Commission, and a prominent and respected academic, is very much a lone voice in rejecting proposals to enhance and develop private enforcement.[57] Although, Wilsher also mentions in his article some arguments why there could be opposition against private enforcement.[58] There will undoubtedly be a tension between national courts and national competition authorities. As private enforcement will be further stimulated, the courts will develop their own theories of competition, which might be different from the NCA's ideas. Conflict between competition authorities and courts may lead to a decline in the authority and consistency of competition law.[59] This could indeed be a negative aspect of increased private enforcement.

Meanwhile, other authoritative voices say the opposite. For example, Alexander Italianer, Director General for Competition at the European Commission, said in his speech of 17 February 2012 that public and private enforcement are complementary tools to enforce competition law and that both types of enforcement are needed.[60] In brief, there seem to be more voices pro than contra private enforcement, and it seems like the Commission will be going ahead with the further development of competition law.

3.4 The Interrelation Between Public and Private Dimensions of Competition Law

As said, there are two different types of enforcement of competition law: public and private. But how do these two relate to each other? A quote from P. Collins, chairman of the British Office of Fair Trading (OFT), demonstrates that the balance between public and private enforcement is a delicate one: "*There needs to be a balance between those cases that we take*

[56] W.WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", *World Competition* 26(3), 2003, 488.
[57] K. MIDDLETON, B.J. RODGER., A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 109.
[58] D. WILSHER, " Reconciling the public and private dimensions of competition litigation in the European Union" , *G.C.L.R.* 2011, 4(2), 90.
[59] Ibid, 90.
[60] A. ITALIANER, Director General for Competition at the European Commission, Speech at the 5th International Competition Conference, 17 February 2012, Brussels (SPEECH/12/02), 2.

on in the public interest and using the resources of the public purse, and those that we leave pursued by the courts". [61]

On the one hand, public enforcement will always have to exist because private enforcement will never be sufficient to solve all the competition problems. On the other hand, if there were only public enforcement, not only would private parties not have any chance for restitution, but public competition authorities would also be overflowed with work. A good balance between the two, in which they take up complementary roles, is the best solution. Private litigation can in particular deal with cases that the public authorities will not deal with, due to resource constraints and other needs to prioritize.

There are different opinions on the optimal attitude of public bodies, namely courts and competition authorities towards private action. While Wils argues public enforcement is inherently superior, Wilsher claims there is no superiority. He argues that private and public enforcement are perfectly compatible but there needs to be an explicit recognition of the court's role as promoting competition in the public interest, even in private cases.[62] There is no hierarchical superiority of public bodies over private actions, and nor can it be said that decisions by competition authorities should always bind civil courts.[63] Although the Commission's decisions will always be binding on national courts as to the matter of whether there was an infringement, for the other two elements needed, namely damage and causation, the national courts will still enjoy discretion. They are two separate, independent limbs of the system and it is important that the courts preserve this constitutional balance of the enforcement system. It can therefore not be said that whenever a public authority decides on a violation of the competition rules, there will be an automatic right for damages whenever claimed in a national court.

Wils on the other hand describes the separate task approach as "optimal". As more damages claims will go to court, they will be shifting the power more and more to the courts, who will be likely to develop their own theories of competition.[64] Wils finds an argument in the

[61] D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges*, I. LIANOS and I. KOKKORIS (eds.) Wolters Kluwer, 2010, 31.
[62] D. WILSHER, " Reconciling the Public and Private Dimensions of Competition Litigation in the European Union" , *G.C.L.R.* 2011, 4(2), 97.
[63] A.P. KOMNINOS, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap*?", Comp L Rev* 2006, 3(1) 5 at 5, cited in K. MIDDLETON, B.J. RODGER., A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 115.
[64] D. WILSHER, "Reconciling the Public and Private Dimensions of Competition Litigation in the European Union" , *G.C.L.R.* 2011, 4(2), 90.

Commission's 2008 White Paper,[65] which seems to adopt this separate task approach. Public enforcement would be clarifying and developing the law as well as deterring and punishing, while private enforcement would aim at compensating victims. Wils also states private actions would be inevitably driven by the private interests of parties concerned, and that there would be no reason why they would care about the general interest or optimal enforcement.[66] A clear separation with a defined task for both public and private enforcement seems most favourable to Wils, who argues this also lies best in line with the provisions of the Treaty and the case law of the ECJ.[67] According to this author, a separate task approach would definitely be the best one.

Waelbroeck on the other hand calls it a common misconception that public enforcement serves the public interest while private enforcement is only driven by the private interests of litigants.[68] Also Komninos claims private actions enhance the effectiveness of the competition rules and have the same basic aim: the protection of competition.[69] He also emphasises that there is no principle of primacy of public over private enforcement in Union law.

Therefore, it seems that there are various opinions in the literature about what the position of private and public enforcement is towards each other. Some such as Waelbroeck and Wilsher believe there is no hierarchy, and that both are equal. Other, such as Wils suggest that this is not the case, and that public enforcement is superior to private, for several reasons.

3.4.1 Public Authorities Helping Private Enforcement

Public competition authorities can certainly help private litigants. A private party who wants to claim damages could use a conviction by a public competition authority in court, or documents and proofs collected or used by the authorities could be used by private claimants. These are just a few examples of how public enforcement could lend a hand to private damage claims. But how far does the duty of the competition authorities reach to help, encourage and facilitate private enforcement? Wilsher mentions that the issue for the public bodies is more one of how to strike the right balance between pursuing their own policy goals

[65] White Paper on Damages Actions for Breach of EC Antitrust Rules COM/2008/0165.
[66] W. WILS, "The Relationship Between Public Antitrust Enforcement and Private Actions for Damages", *World Competition* 32, 2009, 9.
[67] Ibid, 13.
[68] A.P. KOMNINOS, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", Comp L Rev 2006, 3(1) 5 at 5, cited in K. MIDDLETON, B.J. RODGER., A. MACCULLOCH and J. GALLOWAY, *Cases and materials on UK and EC competition law*, 2nd edition, Oxford, OUP, 2009, 115.
[69] Ibid, 115.

for the whole community, and aiding private litigants.[70] Nevertheless, following the pressure from the EU to help facilitate private litigation, they have to find the right balance so that assisting private parties in litigation does not harm the fulfilment of their primary goals for the wider economy.[71]

Important recent case law from the European Court of Justice seems to lend strong support to the principle that regulators should have a right and even a duty to intervene in certain proceedings to protect competition policy.[72] Regarding follow-on actions, it is important to mention the *Pfleiderer*[73] case. In this case, the ECJ was asked whether principles of EU law stood in the way of giving potential claimants access to documents and incriminating evidence that had been obtained by national competition authorities through its leniency program. It may be clear that if full access were to be granted to all information, leniency programs would lose a lot of their appeal, because they would be likely to be followed by a many damages claims, facilitated by their own information. This ruling was eagerly awaited for the significant implications it could have for the sustainability and future development of private enforcement through follow-on actions.[74] As EU law currently stands, access to leniency corporate statements and supporting documents is governed by national procedural rules, however this does not mean those national rules can simply deny access without any considerations or the rights and interests protected by EU competition law. In practical terms, if national law denies access, it must do so in a way that is compatible with EU law, whereas permitting access is not incompatible with EU law.[75] It does not need to be said that access to those documents would have a considerable meaning for private enforcement cases. In *Pfleiderer*, the national court, which was a German one, decided to protect the leniency documents from disclosure.

3 .4.2 Primacy over Competition Policy

This brings us to one of the key issues: who should have primacy over the competition policy, the courts or the competition authorities? Up to now, it has definitely been the competition authorities, but with the EU's encouragement of private enforcement, the situation might

[70] D. WILSHER, "Reconciling the Public and Private Dimensions of Competition Litigation in the European Union" , G.C.L.R. 2011, 4(2), 89.
[71] D. WILSHER, "Reconciling the Public and Private Dimensions of Competition Litigation in the European Union" , G.C.L.R. 2011, 4(2), 89.
[72] Ibid., 91.
[73] Pfleiderer AG v Bundeskartellamt, C-360/09 [2011]
[74] F. RIZZUTO, 'Case Comment: The procedural implication of Pfleiderer for the Private Enforcement of European Union Competition Law in Follow-up Actions for Damages", *G.C.L.R.* 2011, 4(3), 116.
[75] Ibid, 124.

change. As courts will be likely to preside more competition cases, they might exert influence over it more and more. This will of course be different in each Member State.

For example, in a Member State such as the United Kingdom, private litigation is used more often than in other Member States, such as Belgium. There is also a very important difference of common law with its binding case law and rule of precedent that has to be taken into account, whereas in civil law countries, this is not the case.

There are nevertheless clear voices saying that private actions before national courts should remain complementary to the public enforcement of EU competition law because the role of public authorities will continue to be of critical importance in detecting anti-competitive practices such as hard core cartels.[76] It remains to be seen whether the competition authorities will maintain their role as primary arbitrator in determining competition policy, or if this role will be taken over by national courts, in private cases.

4. Remedies Private Enforcement Can Provide

4.1 Damages

NCA's and the Commission can impose fines on undertakings that have violated competition rules, but they cannot reward damages to private parties who have directly suffered from these infringements. Yet, claiming damages is one of the reasons, if not the most important one, for private parties to go to a court after a violation of competition law. Therefore, the EU has installed and encouraged a system of private enforcement, which would make it possible for these private parties to claim damages.

A key case here is *Courage v Crehan:*[77] individuals have the right to monetary compensation for damages caused by the actions of private parties' action in violation of Article 101 TFEU, even a party to a prohibited contract. The fact that made this case so special was that Mr Crehan himself was party to a vertical agreement for the supply of beer by a brewer to him, an agreement that restricted competition and for which he thus was partly responsible himself.[78] The ECJ's ruling in this case clarified the availability of damages in Article 101 cases. The further details of this case will be considered later on, but it is obvious that the ECJ has

[76] M. MONTI, *Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the new Merger Regulation*, 8th Annual Competition Conference, Fiesole, Italy, 17th September 2004. (SPEECH/04/403)
[77] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C-453/99 [2001]
[78] R.WHISH, *Competition Law*, 6th edition, Oxford, OUP, 2008, 293.

recognised that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU. They made it clear that anyone who has been harmed by an infringement of the antitrust rules must be able to claim compensation for it.

In *Manfredi,*[79] the ECJ confirmed the principle of effectiveness, by saying that " *the practical effect of the prohibition by Article 101(1) 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*[80]". Thus, the ECJ has confirmed its willingness to interpret these principles in order to gradually achieve a minimum harmonisation of national rules and procedures.[81] The ruling also directly considers some of the issues raised in the Green Paper on antitrust damages actions, and unequivocally confirms the Commission's priority that effective legal redress has to be available to the victims of infringements of competition law.[82]

In awarding damages, it is important that they are high enough, to ensure a sufficient motivation for the claimant to pursue the case, but also to ensure sufficient deterrence for possible infringements. The Commission is considering "*whether it would be appropriate to allow the national court more than single damages in case of the most serious antitrust infringements*", this possibly following the example of the US's treble damages rule.[83] In most Member States, with exception of the UK, Cyprus and Ireland, punitive damages do not play any role, and in a context other than competition law policy, the Commission has proposed legislation[84] that would have declared punitive damages contrary to the Union's public policy.[85]

[79] Manfredi v Lloyd Adriatico Assicurazioni SpA (joined cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006] 5 CMLR 17.
[80] Para [90]
[81] E. DE SMIJTER and D. O'SULLIVAN, *The Manfredi judgment of the ECJ and how it relates to the Commission's initiative on EC antitrust damages actions,* Competition Policy Newsletter, number 3, 2006 (autumn), 26.
[82] Ibid, 23.
[83] D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges,* I. LIANOS and I. KOKKORIS (eds.) Wolters Kluwer, 2010, 25.
[84] Waelbroeck mentions the proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('ROME I'), COM/2003/0427 (final) which excluded non compensatory damage as being 'contrary to Community public policy'. This proposal was not retained in the final regulation.
[85] D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges,* I. LIANOS and I. KOKKORIS (eds.) Alphen aan den Rijn, Kluwer Law International, 2010, 26.

Hazelhorst sums up three arguments why these US-inspired punitive damages should not be transposed into EU law.[86] The first reason is that in the US, punitive damages are seen as a deterrence factor. In the EU, this deterrence factor is already present with an effective public enforcement, so the damages are nothing more than compensation suffered for the harm caused by the infringements. Secondly, treble damages in the US were used to close an enforcement gap, one that Europe does not have, since public enforcement in the EU stands much stronger than it does in the US. A final reason would be that the punitive damages could be a reason for the competitors to bring unmeritorious cases, instead of for the right itself to claim damages. For these reasons, Hazelhorst concludes there is no use for punitive damages in EU enforcement.

4.1.1 Collective Actions

In many cases, private enforcement is carried out individually. Often, this is impractical because the loss caused by the infringement is not big enough to justify the costs of litigations and the certainty of the outcome of the trial. Collective actions would be a more obvious solution: in one country, all the victims would get together and join forces, which would allow for judicial processes to be simplified and significant savings to be made.[87] The introduction of an efficient collective action mechanism for antitrust damages is said to be crucial in order to ensure a uniform and efficient enforcement of EU antitrust rules and the Union right to damages,[88] as the cost of civil action often outweighs the loss individual customers or competitors might suffer as a result of an infringement of the competition rules, and this discourages many potential claimants.[89] The Commission therefore thinks that group actions could complement or act as an alternative to follow-on actions (e.g. actions relying on an earlier decision by the Commission or another authority deciding that there has been a breach of competition law).[90]

The existing collective actions are very divergent. Member States usually confer a right on consumers to bring such an action, whereas competitors and customers other than consumers

[86] M. HAZELHORST, "Private Enforcement of EU Competition Law : Why Punitive Damages Are a Step Too Far*", E.R.P.L.* 4, 2010, 770.
[87] J. ALMUNIA, *Common standards for group claims across the EU*, Speech at the EU University of Valladolid, 15 October 2010 (SPEECH/10/554)
[88] C. LESKINEN, "Recent developments on collective antitrust damages actions in the EU", G.C.L.R. 2011, 4(2), 88.
[89] D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges,* I. LIANOS and I. KOKKORIS (eds.), Alphen aan den Rijn, Kluwer Law International, 2010, 28.
[90] Ibid, 29.

usually lack standing.[91] In fact, the existing collective actions barely play a role in enforcing the right to damages. The Commission however proposed in its White Paper[92] two mechanisms for collective redress: representative actions and opt-in collective actions.

Opt-in actions would require members of a group to expressly declare their intention to join the action, this respecting the freedom of individuals. The victims would have to express their intention to join the action in order to be bound by the judgement. This might however be not very effective in constructing a group, regarding consumers' disinterest as the damages are generally very low[93], but the fact that the claimants have to be identified would avoid possible excesses in bringing actions, and the damages could be distributed corresponding to the harm that each claimant has suffered.[94]

A 'wider' option is the representative action, where the action is brought on behalf of a class of identifiable victims, either those officially designed to take such actions such as consumer organisations, or those certified on an *ad hoc* basis, in relation to a particular infringement. This also brings up the issue of the relationship between the representative body and the group, to which the Commission would want to impose strict information obligations in order to prevent conflicting interests.[95] Moreover, the possible damages recovered by such representative group would have to be either divided between the individuals constituting this group,[96] which would be 'preferable' in the Commissions view, or as seems practically more likely 'distributed to related entities or used for related purposes'.[97] That would be contrary to the aim of damages, providing compensation for the consumers.

In any case, whether it be an opt-in action or a representative action, a strong possibility for collective redress would positively help victims of competition law infringements to receive damages in an easier and more economic way .

[91] C. LESKINEN, "Recent Developments on Collective Antitrust Damages Actions in the EU", *G.C.L.R.* 2011, 4(2), 79.
[92] White Paper of 2 April 2008 on Damages actions for breach of the EC antitrust rules (COM(2008)0165)
[93]D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges*, I. LIANOS and I. KOKKORIS (eds.) Wolters Kluwer, 2010, 29.
[94] C. LESKINEN, "Recent Developments on Collective Antitrust Damages Actions in the EU", *G.C.L.R.* 2011, 4(2), 83.
[95]D. WAELBROECK, "Private Enforcement: Current Situation and Methods of Improvement" in *The Reform of EC Competition law: New Challenges*, I. LIANOS and I. KOKKORIS (eds.), Alphen aan den Rijn, Kluwer Law International, 2010, 30.
[96] Ibid, 30.
[97] Ibid, 30.

4.2 Injunctions

The EU has put significant effort into encouraging private enforcement, but it is a fact that it is very difficult to prove and assess the amount of damages. Bringing actions for injunctions instead of damages might be a solution to this problem. When an individual has suffered a loss in result of a breach of competition rules, this might request an injunction to prevent the undertaking(s) committing a breach in the future.[98] An injunction can be defined as "*an order requiring or prohibiting the performance of a specific act".*[99]

Both interim and final injunctions are possible. Interim measures will be applied for when there is an urgent need for something to be done because of a risk of serious and irreparable harm. This of course does not require the same degree of certainty that is required for a final decision.[100] Particularly interim injunctions will be important to an undertaking which believes it is being driven out of the market.

There is a known EU right to injunctions, held by the ECJ in *Factortame,*[101] stating that a national court has an obligation to ensure that interim measures are available when they are necessary for the protection of putative EU rights. Cauffman mentions that the differences between Member States in opportunities for undertakings to obtain injunctive relief for infringements of competition law seem to affect the competitive position of undertakings within the single market, as well as the trade between Member States.[102] It would seem logical that the national procedures to obtain these injunctions would be harmonised, to ensure that the competition rules are offered equal protection in every Member State.[103]

[98] A. JONES and B. SUFRIN, *EU Competition law : text, cases and materials,* 4th edition, Oxford, OUP, 2011, 1221.
[99] C. CAUFFMAN, "Injunctions at the Request of Third Parties in EU Competition Law", *MJ*, 2010, 61.
[100] Ibid, 65.
[101] R v. Secretary of State for Transport, ex parte Factortame Ltd Case 213/89, [1990] ECR I-2433.
[102] C. CAUFFMAN, "Injunctions at the Request of Third Parties in EU Competition Law", *MJ*, 2010, 85.
[103] Ibid, 85.

5. Conclusion on the EU

The European Commission would clearly like private enforcement to become increasingly important in the future. Several legislative steps have been taken to assure that private litigants have the chance to go to a national court and claim damages. As things are evolving, it seems logical even further steps will be taken, since the European Commission has expressed its wish to adopt a uniform approach to private enforcement in all Member States, to improve its effectiveness. The evolution of Member States' own initiatives to promote private enforcement will play a big role in how the EU can do this.

Even though not all authors agree, a strong mechanism of private enforcement could really help the competition situation in Europe. Public enforcement will always be necessary and continue to play a major role, but it cannot be denied that the system has its limits, particularly in its inability to award damages. Private enforcement could prove, and already proves, a worthy and useful addition.

However, certain elements are still unclear, such as who should have primacy over competition policy. Also the fact that the situation in different Member States is very diverse, can be a disadvantage, because possible claimants will always go where they can get the most out of it. Strong rules on who can have standing will be crucial here, or forum shopping might become a problem. Nevertheless, competition rules are being enforced in national courts, and the internal market derives several benefit from this.

II. LEGAL ISSUES IN PRIVATE ENFORCEMENT

1. Legal Sources of Private Enforcement

For both the United Kingdom and Belgium, the first element that matters is legislation and knowing how EU rules are implemented in the national jurisdictions, which is very influential on the effectiveness of private enforcement. The impact of Regulation 1/2003[104] will be especially important, since it aimed to increase private enforcement. Before the Regulation entered into force, private enforcement was possible in all countries, but in reality it was rarely exercised, if at all.[105] However after the Regulation came into force, the number of actions brought did not substantially increase either.[106] Nevertheless, law is the primary source. It is therefore essential to see how it deals with the possibility of private enforcement.

2. Remedies

The main goal for victims of anticompetitive situations to go to court is getting a remedy. The most common remedy is an action for damages. These actions allow claimants who believe they have suffered a loss because of a defendant's infringement of a competition rule to go to court and ask for compensation for the harm that has been done to them. Another option is an injunction. If a claimant foresees the damages and does not want to postpone the case, he can file for an injunction that will order the defendant to stop a certain anticompetitive practice. Several types of injunctions are possible, and they can be a very effective remedy. A third remedy is claiming that an anticompetitive contract is null and void. This can be an interesting option for a party who is in a contract with another party that is breaching competition law, and that wants to get out of it. However, nullity is a civil sanction for a contract, and not an action in tort like the previous two.

[104] Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82104 of the Treaty.
[105] S. MARTINEZ LAGE and R. ALLENDESALAZAR, General Report: The Judicial Application of Competition Law, FIDE, 2.
[106] Ibid, 2.

2.1 Damage Actions

There are two main types of private enforcement actions for damages. Follow-on actions build upon a previous decision of the European Commission or an NCA. The claimant can use this decision to prove the infringement, which significantly lightens his burden of proof. It is however still necessary to establish that there have been damages, and that there is a causal link.

The second type are stand-alone actions in which there has been no previous case or decision. This makes it much harder on the claimant. He has to prove not only damage and causal link, but also that there has been an infringement of the competition rules to begin with. For an individual claimant who does not have the same possibilities and resources as the NCA's or the European Commission, this can be a very hard task.

2.1.1 In General

In tort law, three aspects have to be satisfied in order to have a successful claim. These three are fault, damage and causation. In some jurisdictions, there also has to be an element of intent. However when it comes to private enforcement, we are often dealing with cartels, which implies that the defendants intended to break the rules. Thus, intent will not matter here and will therefore not be mentioned any further.

A) Fault

The first task is proving the defendant committed a fault: he behaved in a way that is wrongful.[107] By his anticompetitive behaviour, the defendant must have breached a rule of contract or tort. Only when a court finds the competition rules have been breached, a claim can succeed. The existence of such an infringement can however present a genuine challenge for the claimant, at the level of facts as well as law.[108] The claimant's position can be made much more comfortable when there has been a previous investigation or conviction by a competition authority. The difference between stand-alone and follow-on actions is crucial here.

Faults may result from either an infringement of a statutory or regulatory rule, or from the failure to comply with a general duty of care.

[107] V. MILUTINOVIC, *The "Right to Damages" under EU Competition Law,* Alphen aan den Rijn, Wolters Kluwer International, 2010, 104.
[108] H. GILLIAMS and L. CORNELIS, "Private Enforcement of Competition Rules in Belgium", *TBM* 2007-2, 22.

B) Damage

After proving a fault it is obviously crucial in order to get a compensation that a claimant can prove he has suffered damages. A claimant should be careful in assessing his losses, courts are unlikely to award the full amount of damages claimed. The amount of damages claimed should be reasonable and based on detailed analysis and reliable evidence.[109]

C) Causation

Once a claimant has proven there has been a fault by the defendant in the way of a breach of the competition rules, and that there has been damage as a result thereof, he will still need to show that this fault is the reason the damage occurred. For a successful claim in damages, causation is an indispensable element.[110]

The ECJ made it clear in *Manfredi*[111] and *Courage v Crehan*[112] that any individual is entitled to compensation if there is a causal relationship between the damages and the other party's infringing behaviour.[113] This causal link was also stressed by the White Paper.[114]

In the *Ashurst Report,*[115] it was stated that "*it is clear that proving a causal link in competition-based claims may be extremely difficult due to the fact that claims will nearly always be for economic loss suffered as a result of anti-competitive conduct and such loss could very likely have many other potential causes".* This is true, and also remarkable: there is no doubt that causation is a necessary element, since it already exists in several European jurisdictions, but it remains difficult to prove. It is therefore a significant obstacle to overcome.

Causation thus seems a logical requirement, and of course it is, but in the field of damages caused by competition infringements, it might show to be harder to prove than it looks at first sight.

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[109] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 401.
[110] V. MILUTINOVIC, *The "Right to Damages" under EU Competition Law,* Alphen aan den Rijn, Wolters Kluwer International, 2010, 136.
[111] Manfredi v Lloyd Adriatico Assicurazioni SpA (joined cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006].
[112] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C- 453/99[2001] .
[113] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 399.
[114] White Paper of 2 April 2008 on Damages actions for breach of the EC antitrust rules (COM(2008)0165)
[115] Ashurst Study on the Conditions of Claims for Damages in the Case of Infringement of EC Competition Rules, 2004.

2.1.2 Possible Claimants

First and foremost, it is important to determine who can possibly have a standing in private enforcement actions.[116] The ECJ clearly stated in *Courage v Crehan*[117] that "*the practical effect of the prohibition laid down in [Article 101 (1)TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"*.[118] The Court strengthened this even further by stating in *Manfredi*[119] that "*any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under [Article 101 TFEU]".*[120]

In some European countries special antitrust claims are possible. It would be preferable to have these special antitrust claims with specific rules everywhere in Europe. This would contribute to clarity, but also enable the legislator to provide for certain rules applying specifically to competition law.[121]

A) Collective Redress

Private enforcement is usually associated with individuals' rights to compensation, but often very large groups are affected by infringements.[122] The incentives for individual consumers to each pursue their own claims are small, because even though the macroeconomic harm of a cartel can be huge, the harm actually done to the end consumer can be so fragmented that it is not worth filing an individual claim.[123] Collective redress in the form of a class action would thus be very useful in this perspective. To this point in 2010 already, the Commissioner for Competition, Vice-President Almunia, underlined the need for a coherent European approach to collective redress.[124]

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[116] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 399.
[117] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C- 453/99[2001]
[118] Courage, para 26.
[119] Manfredi v Lloyd Adriatico Assicurazioni SpA (joined cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006]
[120] Manfredi, para 61.
[121] A. HEINEMANN, "Private Enforcement in Europe" in R. ZACH, A. HEINEMANN and A. KELLERHALS (eds.), *The Development of Competition Law. Global Perspectives*, Cheltenham, EE Publishing, 2010, 303.
[122] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 399.
[123] Ibid, 306.
[124] Joint Information Note, Towards a Coherent European Approach to Collective Redress: Next steps, 5 October 2010, http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf

The main benefit of a class action lies in pooling the resources of a large number of claimants for the purpose of establishing a breach of law.[125] Individual consumers, who often have only suffered relatively low-value damage are often deterred from bringing an individual action for damages, because of the costs, the delay, the risks and the burdens involved.[126] As a result it is very unlikely that they will go to court by themselves. Therefore, if there is a possibility of a joint action, either a representative one by a qualified entity, or an opt in one, the action might be used more frequently, and more people will receive compensation for their loss suffered. The main advantage of a class action is thus that the combination of the claimant's resources will lead to a better, increased enforcement, which will also have a greater deterring effect on the infringers. They might think twice before breaking the rules when they know a big lawsuit by many consumers might follow.

The importance of collective redress is thus twofold. On the one hand, it might be more attractive to individual consumers whose rights have been infringed by the anti-competitive behaviour, knowing that they can just join a claim and not have to go to court themselves. On the other hand, also process economically, the combining of effort and resources provides considerable advantages, both for time and monetary reasons, and increased effectiveness, compared to numerous individual claims.[127]

In neither the UK nor Belgium we will find a class action "US style". But there are two types of collective actions available: the representative actions brought by certain qualified entities such as consumer associations, and the opt-in actions, in which it is possible for claimants to combine their individual claims into a single action.[128]

Collective actions have considerable advantages, for example lower costs and increased effectiveness, and should therefore, according to Stakheyeva, be directly envisaged in law.[129]

B) Competent Courts

Private actions for damages in competition law will be dealt with either by a commercial or a civil court. Especially commercial courts seem to be the "natural environment" for cases like these, since most often there will be a commercial relationship between the claimant and the

[125] B. RODGER, " Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 108.
[126] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 134.
[127] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 400.
[128] Ibid, 400.
[129] Ibid, 405.

defendant. However there is also the possibility of having a specialised court, which is the case in the UK with the Competition Appeal Tribunal (CAT). This has the advantage that they have the specific knowledge and expertise required to judge these cases. Also, all damage cases for breaches of the competition rules in this case will be centralised at the same venue, which will improve efficiency.

2.1.3 Types of Damages

This section addresses the question of what plaintiffs are entitled to when they win their action. The type of damages a possible claimant might obtain can make a difference in the decision whether or not to go to court, and more important, where to go to court. It might also act as a deterrent to infringing competition laws since companies know they risk paying huge amounts of money in the form of exemplary damages.

In *Manfredi,*[130] the ECJ stated that "*injured persons must be able to seek compensation not only for actual loss (…) but also for loss of profit (…) plus interest".*[131] This thus means there has to be a full compensation in damages for all harm the claimant suffered.

Loss of profit is in most jurisdictions recognised an integral part of the compensation, and it is usually claimed by competitors, since their ability to compete and gain profits was harmed as a result of the infringement.[132] This does not take away that the injured party is also required to show reasonable diligence in limiting the extent of his loss, or risk having to bear the damage himself, as the ECJ stated in *Mulder.*[133] It is thus still a party's obligation to make an effort to minimise the loss himself as well.

The European Commission realises that higher damages in the form of full compensation might have a greater deterring impact, but does not want to go as far as exemplary damages, as this would be a form of unjust enrichment. It would not be right if the claimant was overcompensated for the harm that was done to him. Closely related to this is of course the passing-on defence.

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[130] Manfredi v Lloyd Adriatico Assicurazioni SpA (joined cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006].
[131] Para 95.
[132] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 401.
[133] M. Mulder and Otto Heinemann v Council of the European Communities and Commission of the European Communities (Joined cases C-104/89 and C-37/90) [1992] E.C.R. I-03061, para.34; H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 401.

A) Compensatory Damages

It is uncontroversial that claimants are entitled to compensatory damages. The aim of compensatory damages is, as the name suggests, to compensate the claimant for the loss suffered. These damages are calculated on the basis of the actual profit that the defendant got from their infringement of the competition rules, and are justifiable on the basis of *commodum ex iniuria sua nemo habere debet*.[134] They intend to put the victim back into the position it would have been in if there had been no infringement.[135]

Obviously, the most difficult thing in practice is calculating these damages appropriately, as it might be very hard to precisely and objectively measure the loss as a result of the breach. The claimant will still have to establish that they have actually suffered a loss, which may be difficult, since the finding of an infringement can take years, and cartels are secretive by their very nature.[136] Often however, the court takes a pragmatic approach and does not refuse the award of damages just because the victims are incapable of a precise quantification.[137]

B) Exemplary or Punitive Damages

On compensatory damages, the consensus is that they are the general form, and thus accepted by everyone. Punitive damages however are not like this. The fact that the US has treble damages leads to their system being attractive for seeking compensation.[138] As we will see, the UK system provides for exemplary (or punitive) damages, which similarly increases its attractiveness. The UK is the only nation other than Ireland and Cyprus to do so in the EU.

The question whether exemplary damages should be introduced in Europe is very controversial.[139] One could defend the opinion that these punitive damages are nothing more than a form of unjust enrichment, something the Commission seeks to prevent. Also, the main object of private enforcement should be restoring the harm suffered by the victims.[140] There is also the possible problem with the *ne bis in idem* principle: when a company has already been fined by a NCA or the European Commission, is it then fair to "privately fine" them again by imposing punitive damages?

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[134] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 111.
[135] S. BROWN, "The Future of Private Law Claims against Cartelists – the English Experience", *G.C.L.R.* 2009, 2(4), 198.
[136] Ibid, 198.
[137] Ibid, 198.
[138] A. HEINEMANN, "Private Enforcement in Europe" in R. ZACH, A. HEINEMANN and A. KELLERHALS (eds.), *The Development of Competition Law. Global perspectives*, Cheltenham, EE Publishing, 2010, 312.
[139] Ibid, 312.
[140] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 403.

Nevertheless, the great advantage is that the threat of being confronted with punitive damages could have a very strong deterring effect on possible infringers. And if national law allows the use of punitive damages, why would this not be possible in private enforcement cases?

But the European Commission no longer seems to pursue it, and the *Manfredi*[141] judgment seems to imply that it is not what the ECJ has in mind either. The British example will show that the possibility of exemplary damages can exist without there being exaggerated litigation.[142]

2.1.4 Passing-On Defence

Many cartels relate to homogonous raw materials, which are incorporated in products that are then sold to consumers.[143] When a seller infringes competition rules and makes his purchasers pay more than they should, these direct purchasers will most likely pass on this initial overcharge in a higher price to their own customers. If such a direct purchaser then wants to claim damages for loss because of his suppliers infringement of the competition rules, is he allowed to? Because, has he really suffered damages?

By using a passing-on defence, the defendant claims that the plaintiff did not in fact suffer any damages, since he passed on the extra cost to his buyers. The defence thus allows the infringer/defendant to escape liability to the extent of any pass-on by that purchaser.[144] There is a danger in a passing-on defence not being accepted, namely that the defendant risks having to pay twice: once to the direct purchaser, and once to the indirect purchaser.

The question of passing-on is linked rather closely with the question whether indirect purchasers can have standing.[145] This question probably has to be answered affirmatively, since the *Courage*[146] decision of the ECJ giving "*any individual*" a right to claim. The best solution would be for every claimant to be allowed to exactly demand those damages he

[141] Manfredi v Lloyd Adriatico Assicurazioni SpA (joined cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006]
[142] A. HEINEMANN, "Private Enforcement in Europe" in R. ZACH, A. HEINEMANN and A. KELLERHALS (eds.), *The Development of Competition Law. Global Perspectives*, Cheltenham, EE Publishing, 2010, 318.
[143] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and materials on UK and EC competition law*, 2nd edition, Oxford, OUP, 2009, 136.
[144] P. WHELAN, "The Passing-on Defence Should be Recognised in Legislation", UEA Competition Policy Blog, http://competitionpolicy.wordpress.com/2012/05/29/the-passing-on-defence-should-be-recognised-in-legislation/ (last visited 14/03/2013)
[145] A. HEINEMANN, "Private Enforcement in Europe" in R. ZACH, A. HEINEMANN and A. KELLERHALS (eds.), *The Development of Competition Law. Global Perspectives*, Cheltenham, EE Publishing, 2010, 309.
[146] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C- 453/99[2001] .

finally and actually incurred.[147] This is also what the European Commission suggests in its White Paper, saying that *"infringers should be allowed to invoke the possibility that the overcharge might have been passed on. Indeed, to deny this defence could result in unjust enrichment of purchasers who passed overcharge and in undue multiple compensation for the illegal overcharge by the defendant".*[148] This will however only work if an effective collective redress system will be implemented.[149] In *Pfleiderer*,[150] the passing-on defence was accepted, possibly under EU influence.

Stakheyeva argues the passing-on defence should not be presumed to be allowed, but rather be available in a limited number of cases, preferable in situations where vertically integrated companies are involved.[151]

[147] Ibid, 311.
[148] White Paper on Damages Actions for Breach of EC Antitrust Rules COM/2008/0165, para 2.6.
[149] A. HEINEMANN, "Private Enforcement in Europe" in R. ZACH, A. HEINEMANN and A. KELLERHALS (eds.), *The Development of Competition Law. Global Perspectives*, EE Publishing, 2010, 311.
[150] Pfleiderer AG v Bundeskartellamt, C-360/09 [2011].
[151] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 405.

2.2 Injunctions

Even though damages may constitute relief after the harm has been inflicted, in many cases it will be more interesting to stop the infringements as soon as possible, while they are still going on. For example, when a company is being driven out of the market by a dominant undertaking's predatory behaviour,[152] waiting until the losses have occurred is not the best option. Here, injunctions are the appropriate tool.

Injunctions can be mandatory ("positive") when they order a party to perform an act, or they can be prohibitory ("negative") when it is an order prohibiting an act.[153] The latter one is also known as a cease and desist order. The infringing party is then ordered by a court to stop the anticompetitive behaviour, which can happen in a number of ways.

On a European level, these requests for injunctions are most often directed at the Commission by third parties that suffer from the illegal conduct.[154] Seen as this happens before the Commission, that means it is an administrative action, and not so much a real form of private enforcement. Under national law, the power to grant an injunction may result from specific competition legislation, from the general tort and contract rules, or from other rules.[155]

Having an injunction is one thing, but seeing it obeyed quite another. That is why in most cases, the judge will attach a penalty payment: a heavy fine for every time the injunction is breached, or for every day it takes to set the situation straight.

Injunctions are not the same thing as interim relief, although it is possible that an injunction consists of an interim measure. Interim relief is designed to temporarily stop the situation, and the judge will come back to assess the claim on the merits afterwards. But injunctions can also be final decisions: they can once and for all establish that a company's behaviour on the market is in breach of the competition rules, and urge them to stop it permanently.

[152] A. JONES and B. SUFRIN, *EC Competition law: text, cases and materials,* Oxford, OUP, 2011, 1221.
[153] C. CAUFFMAN "Injunctions at the Request of Third Parties in EU Competition Law", *MJ*, 2010, 4.
[154] Ibid, 6.
[155] Ibid, 15.

2.3 Nullity

The civil consequence of nullity can also be seen as a form of private enforcement. Nullity can be claimed on the basis of Articles 101 and 102 TFEU. [156] When a victim thinks another party might have made a contract or engaged in a practice that is contrary to competition law, he can file a complaint to have the contract declared null and void. This too can be a form of private enforcement.

Nullity or voidness is not based on an action in tort, but is a civil consequence of an infringement of the competition rules. Article 101 TFEU renders the prohibited clauses of an agreement void, provided that they have a significant effect on competition within the internal market and on trade between the Member States, and that they do not fall under any of the Article 101(3) exemptions.[157] Apart from being void and unenforceable, an agreement that infringes Article 101 TFEU is also illegal. However, one infringing provision does not automatically render the whole contract void under European law:[158] when possible, other parts can go on to exist further. The consequences of the nullity for those other parts however, are not a matter of EU law, but one of national law to be determined by the national court.[159] This can be criticised: would it not be better for Article 101 TFEU to have an uniform impact across all Member States, rather than varying according to national rules applicable?

In some cases, the sanction of voidness is not really a sanction. Most parties to an illegal agreement, for example a cartel, will not try to enforcing it in court, but instead hide it from the authorities.[160] It can be much more significant in other cases though. The sanction of the agreement becoming null and void has more impact on innocuous agreements, where the harm to the competition is much less obvious.[161]

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[156] V. MILUTINOVIC, *The "Right to Damages" under EU Competition Law,* Alphen aan den Rijn, Wolters Kluwer International, 2010, 143.
[157] C. CAUFFMAN, "The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts", M-EPLI Working paper No. 2013/3, 1.
[158] Société La Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 234,250.
[159] V. MILUTINOVIC, *The "Right to Damages" under EU Competition Law,* Alphen aan den Rijn, Wolters Kluwer International, 2010, 144 .
[160] R. WHISH, *Competition Law,* 6th edition, Oxford, OUP, 2008, 309.
[161] Ibid, 309.

3. Reception of the Changes

Over the years, several changes have been made to the system of private enforcement. But in several countries, the mechanism of private enforcement is still to a large extent ineffective. Despite the possibility to claim damages for antitrust violation and defending their rights, parties are still faced with several difficulties.[162] Provisions in national law are unclear and different across the EU, and there are several differences in standing, calculation of damages and more. A comprehensive Directive that would harmonise all these aspects would have a great additional value.

It is interesting to look at the United Kingdom and Belgium and see how they have incorporated the changes made, partially by their own national system, but also partially imposed by the European one. Moreover it is important to look at what they are planning to do further along: being proactive like the UK, or seemingly waiting for what Europe will do next, as Belgium seems to be doing.

The European Commission seems to be in favour of a "European" model of judicial application of competition law that would avoid the potential excesses of the US system. They support competition law to become more generalised across the Member States. Regulation 1/2003 was an important piece of legislation, and has had several consequences in many Member States. If all of those Member States were to model their systems in the same way, the landscape of private enforcement would definitely be more coherent. However, as evident in the UK, if Europe does not enact proper legislation soon enough, Member States will take it upon themselves to do so.

[162] H. STAKHEYEVA, "Removing Obstacles to a More Effective Private Enforcement of Competition Law", *E.C.L.R.* 2012, 33(9), 405.

III. PRIVATE ENFORCEMENT IN THE UNITED KINGDOM

1. Legal Sources

1.1 Competition Act 1998

The Competition Act 1998 initiated a new area of competition law, by implementing the European legislation into the legal order of the United Kingdom. This main source of competition law in the United Kingdom, which regulates cartels, anti-competitive agreements and abuse of market power, replaced earlier regulation of anti-competitive agreements and abuse of market power laid down in the Restrictive Trade Practices Act 1976, Resale Price Act 1976 and Competition Act 1980.[163] The main purpose of this Act, which came into force in March 2000, was to "soft" harmonise the competition regime of the United Kingdom with that of the European provisions laid down in Articles 101 and 102 TFEU.[164] The change was very much welcomed since it made the system more effective and since it gave those directly affected by infringements of the competition rules an interesting and powerful new weapon of enforcement.[165]

The reason for this regulation was the pressure from the business community, keen to get rid of the burden of having to comply with two different regimes. While some conduct was prohibited by both UK and EU law, there were also examples of conduct which was unlawful pursuant to one of the systems, while not regulated by the other one. This took great effort and knowledge, and solicitors advising on competition law needed to be very familiar with both systems before the Competition Act 1998 came into force.[166] After the implementation of the CA 1998, the regimes were harmonised, which made for a large simplification and an easier application of the rules in practice.

As stated by Lord Haskel: " *I cannot over-emphasise that the purpose of the Bill is to ensure as far as possible a consistency with the EC approach and thereby to ease burdens for*

[163] R. BRADGATE and F. WHITE, *Commercial Law Legal Practice Course Guide*, Oxford, OUP, 2001, 387.
[164] A. MACCULLOCH, "Private Enforcement of the Competition Act Prohibitions" in B.J. RODGER and A. MACCULLOCH, *The UK Competition Act: A New Era for UK Competition Law*, Oxford, Hart Publishing, 2000, 99.
[165] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC Competition Law*, 2nd edition, Oxford, OUP, 2009, 126.
[166] R. BRADGATE and F. WHITE, *Commercial Law Legal Practice Course Guide*, Oxford, OUP, 2001, 364.

business".[167] This shows that one of the main purposes of the Act was to align UK law with the requirements of the European Union. It was also clear that, although there was no positive obligation for the Member States at that time to align their laws with European legislation, the EU competition law was in many aspects more effective than domestic British competition law.[168] The CA 1998 therefore reached its double goal: Union law was made an integral part of the new UK regime and the situation for businesses was made a lot easier.

The Competition Act 1998 not only strengthened administrative enforcement but also enabled private individuals to bring enforcement actions against other individuals who have infringed one of the prohibitions.[169] The importance of the availability of these private actions has been set out before. Private enforcement seems to be something in which the European Union sees great potential, therefore the CA 1998 follows the European guidelines. In addition, this Act also makes a valiant attempt to ensure that the UK rules are interpreted in accordance with existing and future EU jurisprudence through an interpretation clause in Section 60 of this Act.[170]

However, the CA 1998 does not clarify every aspect. It has been argued by MacCulloch[171] that the only relevant provisions in the Act are Section 55, providing that the Director General may disclose information to third parties if the disclosure is made for the purpose of civil proceedings and Section 58, providing that a finding of a fact by the Director General in part 1 proceedings is binding on the parties if the time for bringing an appeal has expired or if an appeal tribunal has confirmed the decision. It thus seems that there is definitely some criticism to the CA 1998.

Nevertheless, the Competition Act 1998 has had a good reception, mainly because the legislators had sought much advice, built consensus and moved with judicious caution. The broad consultations, the neo-pluralist path of involvement of the policy network through a

[167][167] Lord Haskel, Hansard (HL) 17 November 1997, col. 417, cited in M. FURSE, *Competition law of the EC and UK*, 6th edition, Oxford, OUP, 2008, 54.
[168] M. FURSE, *Competition Law of the EC and UK*, 6th edition, Oxford, OUP, 2008, 55.
[169]A. MACCULLOCH, "Private Enforcement of the Competition Act prohibitions" in B.J. RODGER and A. MACCULLOCH, *The UK Competition Act: A New Era for UK Competition Law*, Oxford, Hart Publishing, 2000, 99.
[170] Ibid, 100.
[171] Ibid, 100.

proliferation of Green and White Papers and by giving every indication of listening to the responses,[172] the role of the British government in adopting this Act has been appreciated.

1.1.1.Section 60 of the Competition Act 1998

Section 60 of the Competition Act 1998, also referred to as the "Euro clause" or "Eldorado clause" requires the courts to interpret UK competition law consistently with the equivalent EU provisions. This Section sets out the governing principles to be applied in determining questions which arise in relation to competition within the UK.[173] It thus enables the British courts and competition authorities to apply EU competition law when making decisions under the CA 1998.[174]

At first it appears that Section 60 holds a simple purpose: where a question arises under the 1998 Act, the competition authorities and courts are obliged to consider the EU's position on the matter to ensure consistency.[175] However, the phrase "*in so far as possible having regard to any relevant differences between the provisions concerned"* is clearly intended to permit departures from EU law.[176] This makes sense, as the British structures, systems and procedures are not precisely the same as those of the EU. Yet, the intention of the section remains the same, and reflects the purpose of the CA 1998: to align EU and UK law as far as possible.

One of these 'relevant differences' between the UK and the EU system is Section 2(3), which reads "*if the agreement, decision or practice is or is intended to be implemented in the UK*". Following the ECJ's reasoning in the *Woodpulp* Case, to which this section makes an explicit reference, it is possible that the Chapter 1 prohibition could be applied extra-territorially, where an agreement, that originated outside the UK is implemented on the British territory.[177] By copying this *Woodpulp*test on the face of the Bill, the UK also ensures that in the event that the EU jurisprudence develops and creates a pure effects-doctrine, the application of the

[172] S. WILKS, *In the Public Interest, Competition policy and the Monopolies and Mergers Commission*, Manchester, MUP, 1999, cited in K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, Cases and materials on UK and EC competition law, 2nd edition, Oxford, OUP, 2009, 62.
[173] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 370.
[174] Ibid, 370.
[175] K. MIDDLETON, 'Harmonisation with Community law: the Euro Clause" in B.J. RODGER and A. MACCULLOCH, *The UK Competition Act: A New Era for UK Competition Law*, Oxford, Hart Publishing, 2000, 25.
[176] Ibid, 26.
[177] Ibid, 27.

UK prohibitions will not follow suit, as said by Lord Simon.[178] Therefore, in case the European situation changes too much, the British courts will have the discretion to depart from established Union law.

This Section 60 is, for UK law, a remarkable provision.[179] Not only does it ensures that competition questions in the United Kingdom are dealt with in relation to the rules of the EU, it must also have regard to any relevant decision or statement of the Commission. This comprises not only decisions or statements that have the authority of the European Commission as a whole, but also any clear statements that the Commission has published about its policy approach in the *Annual Report on Competition Policy.*[180]

MacCulloch expresses his worries about Section 60, by questioning how far the jurisprudence of the European court can go in assisting a national court to discover Parliament's intentions. He then reasons through: since the UK laws have copied the wording of Articles 101 and 102 TFEU, seen together in the rulings of the ECJ in *BRT v SABAM*, one should conclude that Parliament must have intended that "the *Chapter I and II prohibitions in the 1998 Act create rights directly enforceable by individuals*."[181] This reasoning held that the Articles 101 and 102 TFEU by their very nature produce direct effect in relations between individuals.

Section 60 has been extremely important in practice and will continue to be so in cases where there is no effect on trade between the Member States with the result that domestic law alone is applicable.[182]

1.2 The Enterprise Act 2002 – Amendments to the CA 1998

The Enterprise Act 2002 introduced some reforms with the principal aim of enhancing the rights of redress available to parties allegedly harmed by infringements of the competition rules. Hereby it also wished to enhance the deterrent effect of the competition rules.[183] It is clear that this Act borrows heavily from the US system. This is particularly the case in its aim

[178] Hansard, HL, 13 November 1977, col 261, cited in K. MIDDLETON, 'Harmonization with Community law: the Euro Clause" in B.J. RODGER and A. MACCULLOCH, *The UK Competition Act: A new era for UK competition law*, Oxford, Hart Publishing, 2000, 28.
[179] M. FURSE, *Competition law of the EC and UK*, 6th edition, Oxford, OUP, 2008, 55.
[180] Ibid, 55.
[181] A. MACCULLOCH, "Private Enforcement of the Competition Act prohibitions" in B.J. RODGER and A. MACCULLOCH, *The UK Competition Act: A New Era for UK Competition Law*, Oxford, Hart Publishing, 2000, 100.
[182] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 370.
[183] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and materials on UK and EC Competition law*, 2nd edition, Oxford, OUP, 2009, 129.

to further expand private enforcement's role in the system to enhance competition law deterrence.[184] The EA 2002 made some major changes to the Competition Act 1998.

This Act has inserted several new Sections into the CA 1998, among others Section 47A, which allows claims for damages to be brought before the Competition Appeal Tribunal, and Section 47B, allowing representative actions on behalf of consumers to be brought before the CAT.[185] This Section however does not affect the right to commence an ordinary civil proceeding in respect of any of the infringements, thus making it clear that there is not yet a unitary system for dealing with damage claims under UK and EU law.[186] It also adds the important Section 58A.

The new Section 47A allows claims for damages or any other sum of money following the adoption of infringement decisions by the OFT and/or the European Commission to be brought before the Competition Appeal Tribunal (CAT).[187] The CAT is bound by any infringement decision by the OFT or the European Commission, once the time limit for appealing has expired, or the appeal has been unsuccessful.[188] The CAT has a dual role: it acts both as an appeal tribunal, and in making damages and other monetary awards under Section 47A. The intention is to make use of the CAT's experience in competition cases.[189] Section 47A(10) makes it clear that a unitary system for dealing with damages claims under EU and UK law has not been instituted, by providing that this section does not affect the right to commence ordinary civil proceedings in respect of any of the infringements.[190]

Section 47B, called the "Erin Brockovich" provision by Rodger, has been added to the CA 1998 by Section 19 of the EA 2002. This Section allows damage claims to be brought before the CAT by a specified body on behalf of two or more consumers who have claims in respect of the same infringement, and is therefore likely to facilitate class actions. Rodger called this a welcome development that will enhance the deterrent effect of the law.[191] Yet, given that there will already be a finding of infringement, the CAT's only function will be determining

[184] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 103.
[185] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC competition law*, 2nd edition, Oxford, OUP, 2009, 129-130.
[186] Ibid, 130.
[187] Ibid, 129.
[188] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 4.
[189] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 104.
[190] Ibid, 106.
[191] Ibid, 108.

and assessing the award of damages to the consumers, after of course establishing that there is a causal link between the infringement and the damage.[192]

Another important change the EA 2002 made was the insertion of 58A into the CA 1998. In any action for damages for a breach of the competition rules, a court will be bound by the OFT or CAT's decision that there has been an infringement, provided that the requisite appeal process has taken place of the period for appeal has lapsed.[193] This means that national courts that have to deal with damage actions do not have the authority to judge on the fact whether there has indeed been an infringement of the competition rules: they only have to respect the ruling of the OFT or CAT. In a way, this makes sense since these tribunals are clearly very much suited to deal with this kind of questions, and arguably more so than the High Court would be.

As has been shown, the Enterprise Act 2002 is a major piece of legislation that amends domestic competition law in a number of ways.[194] It instituted the CAT, which has the power to hear monetary claims brought by third parties where the OFT, the CAT or the European Commission have found an infringement of UK or EU competition law. By adding the important Sections 47A, 47B and 58A to the CA 1998, it has had a major impact on the development of private enforcement in the UK.

1.3 Conclusion

To sum up, both the Competition Act 1998 and the Enterprise Act 2002 have made substantial changes to British competition law, and the private enforcement thereof. The Competition Act 1998 has clearly simplified the situation by conforming UK rules to EU standards, and the Enterprise Act 2002 further refined this with its amendments. It can be said that they both fundamentally changed the substantive provisions and the institutional architecture of the domestic competition law of the UK, and this for the better.[195]

[192] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 108.
[193] Ibid, 108.
[194] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 60.
[195] Ibid, 58.

2. Remedies

2.1 Damage Actions

The principle that a breach of EU competition law gives rise to claims for damages in the English courts has been clearly established in the House of Lord's decision in *Garden Cottage Foods Ltd v Milk Marketing Board,*[196] and has since then been generally accepted. In this case, the Milk Marketing Board sold bulk butter to distributors for resale, but when they reduced their number of distributors from twenty to four, Garden Cottage Foods was not on the list. They raised an injunction to stop Milk Marketing Board from revoking its contract, claiming this would be an infringement of Article [81 EC] and sought damages. The House of Lords did not grant them the injunctive relief, but did allow damages claims.[197]

This is a crucial fact, given that the whole idea behind private enforcement is awarding damages to compensate for losses. In *Garden Cottage,* the House of Lords stated that the "similar domestic action" for the purpose of the principle of equivalence is an action for breach of statutory duty.[198] Thus, it is clear from this judgment that under English law, a breach of the EU rules gives rise to a claim for damages. It follows from this that since the award of damages lies within the competence of national courts, the appropriate amount of these damages is for them to decide.

2.1.1 In General

There are two types of actions in damage claims, stand-alone actions and follow-on actions. Stand-alone actions can be brought when the alleged breach of the competition rules is not yet the subject of an infringement decision by the European Commission or the OFT. The claimant thus has to prove to the court that first of all there is a breach of competition law, and second, that they have suffered a loss as a result of that breach. The second type, follow-on actions, are available when a breach of competition law has already been established in an infringement decision taken by the European Commission or the OFT. The claimant can then rely on this decision, which means he no longer has to prove the breach, but only that they have suffered a loss as a result of the infringement. Nevertheless, in order to bring a follow-on action in England and Wales, a claimant needs to bring additional evidence before the court

[196] A. FOER and J. CUNEO, *International Handbook on Private Enforcement of Competition Law,* Cheltenham, Edward Elgar, 2010, 299.
[197] B. RODGER and A. MACCULLOCH, *Competition Law and Policy in the EC and UK,* Abingdon, Routledge, 2004, 56.
[198] *Garden Cottage Foods v Milk Marketing Board* [1984] 1 AC 130; *Sempra Metals Ltd v IRC* [2007] 3 WLR 354, 377 per Lord Nicholls.

that would not otherwise be available from the public action.[199] It is thus not possible to just take a judgment of the CAT or European Commission and go to an English court asking for damages without adding anything to the picture.

2.1.2. Tortious

For this type of action, a claim will have a basis in tort under English law. An action in tort requires the claimant to show three different elements. Namely, (1) the statute must impose a duty for the benefit of the individual harmed and give rise to civil action, (2) there has been a breach of this statute and (3) the breach has caused the claimant's loss.[200] In short, there has to be a right, a breach of that right, and causation. For a long period, it was not clear whether a breach of one of the competition rules in the Treaty was actionable in tortuous proceedings.[201] Since *Garden Cottage Foods Ltd v Milk Marketing Board* however, the general consensus is that the correct basis is of breach of statutory duty.[202]

A. Statute

Under English law, the tort of breach of statutory duty is the cause of action for damages. The Court of Appeal has confirmed this in its judgment of 21 May 2004 in the *Crehan* case.[203] The basis for action under Articles 101 and 102 is that their breach constitutes a breach of statutory duty.[204] This statutory duty is created by Section 2(1) of the European Communities Act 1972, which provides a statutory basis for the recognition of directly effective rights and duties in the English legal system.[205] The principles of English law applicable to the tort of breach of statutory duty will thus apply to a claim for breach of Articles 101 and 102 TFEU, since these have direct effect in the UK and therefore create rights in respect of individuals.[206]

The principal difficulty is establishing that a statutory duty is owed by the defendant to the particular claimant.[207] It must be shown that the claimant belongs to the class of persons who are intended to benefit from the provision. Much depends here on the purpose attributed to the

[199] A. FOER and J. CUNEO, *International Handbook on Private Enforcement of Competition Law,* Cheltenham, Edward Elgar, 2010, 298.
[200] A. JONES and B. SUFRIN, *EC Competition Law: text, cases and materials,* Oxford, OUP, 2011, 1214.
[201] Ibid, 1214.
[202] Ibid, 1214.
[203] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 9.
[204] Ibid, 9.
[205] Ibid, 2.
[206] Ibid, 3.
[207] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 109.

statutory provision by the court.[208] In addition, the main concern here is what Rodger calls the "floodgates" argument: if everyone who has suffered financially could sue, there would be liability in an indeterminate amount for an indeterminate period to an indeterminate class of people.[209]

B. Breach

It is up to the claimant to prove there has been a breach of statutory duty, and more specifically of Articles 101 or 102 TFEU. No element of fault is needed, a simple breach will suffice. In stand-alone as well as in follow-on cases, for the elements of causation and loss, the same standard of proof applies as in other civil claims in English courts.[210] Since this might result in severe sanctions for the defendant, this proof must - even if just a civil standard - require strong and compelling evidence to support an allegation of breach.[211]

There is a difference between follow-on and stand-alone actions regarding the evidence of breach. It seems obvious that proving a breach will be much easier in the case of a follow-on action, where an NCA or the Commission has already established that the breach exists. The CA 1998, in Section 47A specifically, allows follow-on claims to be brought before the CAT where a breach of the competition rules has already been established in a public law decision In stand-alone cases, where a breach has not previously been established, this burden of proof will be much heavier.

It is not completely clear whether a decision of the OFT is always binding on the courts, or more precisely whether the CAT is bound by findings of facts contained in an infringement decision.[212] In the case of *Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd,*[213] Patten LJ said that "*the use of the word decision makes it clear that s. 47A is differentiating between findings of fact as to the conduct of the defendant made as part of the overall decision (...). It is not open to a claimant (...) to seek to recover damages through the medium of s.47A simply by identifying findings of fact which could arguably amount to such an infringement".* This means the courts have adopted a fairly narrow definition of the

[208] Ibid, 110.
[209] Ibid, 110.
[210] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 47.
[211] A. JONES and B. SUFRIN, EC Competition Law: text, cases and materials, Oxford, OUP, 2011, 1215.
[212] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 504.
[213] Enron Coal Services Ltd. (in liquidation) v English, Scottish and Welsh Railways Ltd, [2009] AWCA Civ 647.

decision, and therefore also a narrow view of the extent to which the CAT is bound by a decision of the OFT.[214]

C. Causation

An element of causation is needed before damages can be awarded under English law: it must be proven that the breach of the competition rules has caused the loss. The burden of proof is again borne by the claimant who has to show that but for the breach of the competition rules by the defendant, the loss would not have occurred. Normally, the claimant only needs to show that the breach materially contributed to the harm.[215]

Causation is a matter of fact. To prove it, one must show that it is more likely than not that the damage occurred "but for" the breach of the statutory duty. If the "but for test" is not satisfied, the damage would have occurred regardless of the infringement, and the causation is not proven. This was the case in *Arkin v Borchard Lines.*[216] Mr Arkin and his wife were the owners of BCL, a former shipping company, against a UK/Northern Europe- Israel shipping conference. They claimed damages for loss of profits, based on Article 101 TFEU for abuse of collective dominance through collective predatory pricing, fighting ships and rumour mongering. The High Court rejected their claim because the judge found they did not sufficiently prove that the behaviour was aimed at eliminating BCL.

The fact that causation is a matter of fact consequently stresses the importance of knowing what qualifies as a binding statement of fact, especially in follow-on cases where claimants rely on infringement decisions of the CAT. This however remains uncertain.[217] For the courts to be able to carry out this exercise, they need to re-examine certain statements made in infringement decisions in light of evidence before the court.

This was discussed in *Enron,*[218] where the Court of Appeal focused on what constitutes a binding finding within the meaning of Section 58 of the CA 1998.[219] In this case, the Office of Rail Regulation decided that the rail freight provider EW&S had abused its dominant position

[214] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 504.
[215] EU National Report on Action for damage in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 10.
[216] Arkin v Borchard Lines Ltd [2005] EWCA Civ 655
[217] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 47.
[218] Enron Coal Services Ltd v English Welsh & Scottish Railway Ltd [2009] CAT 36, [2010] CompAR 108.
[219] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 45.

on the market in Great Britain for coal haulage. Enron claimed that this deprived them of a real or substantial chance of winning a contract for the supply of coal to a power station, estimated at a value of £19.1 million.

The Court of Appeal ruled that the courts reviewing private damages claims are bound by findings of fact contained in an infringement decision of but also that not every statement made in such a decision qualifies as a fact.[220] Moreover, the Court reaffirmed that a claimant must prove that the infringement was the cause of their loss: a claimant cannot just rely on a regulator's decision as evidence that it suffered a loss because of the infringement.[221] The Court of Appeal thus made clear it did not intend to revisit liability, although they did not consider themselves to be bound by statements in a decision that are unimportant to the infringement.[222] They agreed with the CAT, who found that insufficient evidence was given that Enron would have won a contract but for the infringement by EW&S. Finding that EW&S did put Enron at a competitive disadvantage did by itself not mean that Enron would have been awarded the contract: the facts about causation are not necessarily found in an infringement decision.[223]

Woodgate and Filippi claim that as a result of this, it is likely that claimants will find it more difficult to rely on a decision to prove causation and loss, which will in turn render the outcome of damages actions more unpredictable and severely limits the practical application of Section 58 CA 1998.[224] The Court of Appeal's decision in *Enron* has thus left open the debate on what exactly counts as a binding finding of fact.[225]

In conclusion, when these three elements, namely statute, breach and causation can be proven and are accepted by the court, there will be a tort in breach of statutory duty, and the court will be able to award damages on the basis of that. But some difficulties remain. The legal basis seems clear, as does the proof of breach, which is easy in a follow-on decision but less easy in a stand-alone action. Yet the *Enron* decision has left open which statements of an infringement decision constitute binding statements of fact, thus rendering the proof of causation and loss more difficult for claimants, resulting in the fact that they will have to

[220] Ibid, 45.
[221] Ibid, 45.
[222] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 47.
[223] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 311.
[224] Ibid, 47.
[225] Ibid, 48.

gather sufficient evidence. This will likely lead to arguments over jurisdiction and a considerable degree of uncertainty about the outcome of damage claims.[226]

2.1.3. Possible Claimants

Under UK law, Article 101 can be relied upon by anyone, even if the claimant himself is party to the anti-competitive, and therefore unlawful agreement.[227] This means that both third-party claimants and parties to the anticompetitive conduct can claim damages. This was decided by the ECJ in the case of *Courage v Crehan.*[228] Mr Crehan had concluded a lease for public houses, which obliged him to purchase beer from the brewery of Courage. A fixed minimum quantity of specific beers at the prices shown in the price list had to be purchased. When Courage brought an action claiming sums due for unpaid delivery of these beers, Mr Crehan contested it on the merits, contending the contract was a violation of the competition rules, and claimed damages.[229] The question was whether Mr Crehan was allowed to do this, since he was a party to the infringing contract. The ECJ judged that he could: Crehan was in a manifestly weaker position than the brewer, so he did not really have the capacity to negotiate the terms of contract. Since he could not be considered to bear significant responsibility to the contract's terms, he had the right to claim damages.[230] Unfortunately, the contract was later held by the Chancery Division not to have breached the competition rules, so in the end Crehan recovered no damages whatsoever.[231]

Thus, claims in the UK may be brought by any individual or legal person who has suffered a loss because of an infringement of the competition rules, and there are no special rules as to standing when claims are made based on EU competition law.[232]

A. Collective Redress

When consumers are affected by an infringement of the competition rules, it is very unlikely that this would be just one single person. There will always be several people affected. They might therefore be motivated to bundle their claims in a class action. Section 47B of the CA

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[226] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 48.
[227] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 3.
[228] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C-453/99[2001].
[229] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY , *Cases and Materials on UK and EC Competition law*, Oxford, OUP, 2003, 92.
[230] R. WHISH, *Competition Law*, 6th edition, Oxford, OUP, 2011, 294
[231] Ibid, 294
[232] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 517.

1998 provides for a specific collective redress mechanism. Apart from groups of parties with the same claim, it is possible to bring a representative action when more than one party has the same interest in a claim or more commonly a group action when there are multiple claimants and common issues of law or related fact under a Group Litigation Order.[233] Section 47B however only applies to consumer claims, and is not available for small or medium businesses.[234]

In the United Kingdom, an opt-in procedure was instituted by the EA 2002. Representative follow-on actions can be brought before the CAT on behalf of consumers affected by the infringements. These actions are limited to claims brought on behalf of named consumers who have consented to be bound by the outcome of the litigation, and can only be brought by specific bodies.[235]

There are however several shortcomings to the UK's representative action remedy. The first one, as observed by Hodges, is that the "opt-in" model needs to attract enough consumers. This seems to be a problem, for example in the *JJB Sports Case*,[236] only 130 consumers signed up, even though there were thought to be 2 million who had paid too much.[237] This shows that it might be difficult to motivate consumers to join in on these actions. Another difficulty concerns the evidence: the claim form had to include all the essential documents, but not all claimants could adduce proof of purchase. The compensation of each consumer thus varied, depending on their possibility to prove the claim.[238]

To sum up, it seems that the system of class actions offers a variety of advantages: consumers will be more likely to go to court when there is an opt-in action possible, meaning that they don't have to go through the hassle themselves, and there will be a greater deterring effect on the companies not to break the rules. However, there are some negative points to the UK system as well: both the difficulties to inform the consumers and to motivate them to join in on the action, might make the whole instrument lose a lot of its value. Nevertheless, collective redress can be a worthy tool in the private enforcement of competition law.

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[233] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf,7.
[234] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 518.
[235] C. LESKINEN, "Recent Developments on Collective Antitrust Damages in the EU", *G.C.L.R.* 2011, 79.
[236] JJB Sports PLC v Office of Fair Trading [2006] EWCA Civ 1318.
[237] C. LESKINEN, "Recent Developments on Collective Antitrust Damages in the EU", *G.C.L.R.* 2011, 80.
[238] Ibid, 80.

B. Competent Court

Generally, competition law cases in England and Wales are brought before the Chancery Division of the High Court. This is the only available avenue when there has been no previous infringement decision by a national competition authority in the matter.[239] Conversely, when there has been a previous decision, it has since 2003 been possible to bring follow-on actions before the specialist CAT, as well as before the High Court. This tribunal can award monetary compensation for breaches of both UK and EU competition law, but only if the relevant authorities have already established an infringement of the competition rules. Even though it is still possible to file an action at the High Court in follow-on actions, the CAT is more likely to be the forum of choice, due to the flexibility with which issues of evidence may be dealt, and due to its specific expertise in the field of competition law.[240]

2.1.4 Types of Damages

It is important to understand that in most cases, the point in initiating a claim of private enforcement is to receive pecuniary damages meant to repair the harm suffered. Still, it is feasible for the courts and the CAT to award damages in a different way from the basis of awards for infringement of the rules.[241]

In *Crehan*,[242] the High Court held that the damage should be assessed at the date of the judgment, and not at the date of loss which was accepted as the normal rule.[243] Anyone who suffered a loss caused by the infringement can claim damages (*Garden Cottage,*[244] leading judgment by Lord Diplock*)*. However, it is important to note that outside the area of economic torts such as interference with contract, pure economic loss is usually not recoverable under English tort law.[245]

For further analysis, a distinction needs to be made between the two types of damages: compensatory or aggravated damages and exemplary, or punitive damages. Unlike in the United States, treble damages are not available in the United Kingdom.

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[239] A. FOER and J. CUNEO, *International Handbook on Private Enforcement of Competition Law,* Cheltenham, Edward Elgar, 2010, 301.
[240] Ibid, 302.
[241] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 110.
[242] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C-453/99[2001].
[243] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 1.
[244] Garden Cottage Foods v Milk Marketing Board [1984] *AC* 130; [1983] 3 *CMLR.*
[245] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 10.

A. Compensatory Damages

Ever since *Garden Cottage*, the House of Lords stated that breaches of the competition rules are tortious in nature: they are actions for breach of statutory duty.[246] When damages are awarded in tort, their aim is to place the claimant in a position as if the damage had not happened: to be compensated for the loss suffered. It is accordingly logical that compensatory damages are the general object when awarding damages for the breach of competition rules.

B. Exemplary Damages

Exemplary damages overcome the idea that damages are awarded only for the purpose of compensation. They are punitive and intend to deter wrongful conduct.[247] Rodger states that the legitimacy of exemplary damages is based on the ideas of punishment, deterrence and wider social goals.[248] Leveson J. in *Devenish*[249] describes them as damages that are additional to an award which fully compensates the claimant for his loss, and that are intended to punish and deter. He also points out that within the EU, these exemplary damages are known only in England and Wales, Cyprus and Ireland.

Devenish[250] was a follow-on case of the so called "Vitamin Cartel", where three manufacturers of vitamins were fined by the European Commission in 2001. Devenish, a company that produces animal and poultry feedstuffs, purchased vitamins from the three companies involved in the cartel of incorporate in their feeds, which they then sold to third parties. The High Court decided in 2007 that the claimants were not entitled to exemplary damages, although it was common ground that they could claim compensatory damages. They appealed, but this was dismissed unanimously by the Court of Appeal.

But is there a need for this kind of damages in the case of a follow-on action, since when an infringement is found by a competition authority, be it the European Commission or the OFT, they already decide on an appropriate punishment with the idea of deterrence? Would this not constitute a breach of the idea of *ne bis in idem*? The ECJ has held that, in principle, exemplary damages are not precluded by European law. In the United Kingdom, in

[246] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 533.
[247] EU National Report on Actions for Damages in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 27.
[248] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 110.
[249] Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch.).
[250] Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch.).

Devenish,[251] it was held that exemplary damages are not available where a regulator has imposed a fine, because this would amount to a double punishment for the same wrong, and thus a breach of the *ne bis in idem* rule.[252]

The CAT has distinguished from this reasoning in the recent *Cardiff Bus*[253] judgment of 2012. In this case, it was decided that exemplary damage could be awarded against a bus company that had abused its dominant position even if the company was a small undertaking that could not be fined under Section 40 of the CA 1998. The facts of the case were as following: Cardiff Bus operates bus services within Cardiff, and 2 Travel sought to provide a "*no-frills commercial service targeted at senior citizens and young mothers in Cardiff"*.[254] At about the same time, Cardiff Bus started a similar service, at lower prices than its own normal services and below 2 Travel's price. When 2 Travel left the market in 2004, so did Cardiff Bus ended its services too. In 2008, they were convicted by the OFT of having abused their dominant position on the market. They did however not get fined, since they benefited from immunity under Section 40 of the CA 1998.[255] In 2011, 2 Travel brought a follow-on claim before the CAT, seeking both compensatory and exemplary damages.

In this case, the CAT also gave guidance on what had to be taken into account when making such an award. It decided the loss had to be calculated at the date of liquidation on the assumption that the infringement had never taken place. However, since the demise of the company would also have happened without the infringement, the causation part of the claim failed. The key question was whether the infringing company knew its conduct was unlawful. In this case, there was overwhelming evidence the purpose was to exclude the other company from the Cardiff market.

In setting the amount of damages, the CAT considered the following three criteria: first, even though exemplary damages have to bear some relation to compensatory damage, their aim is to punish and deter. Secondly, regard should be given to the economic size of the defendant. Thirdly, because of the fact that a local authority was involved in this case, it meant they would take full account of the judgment. In the *Cardiff Bus Case,* the court concluded that the

[251] Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch.).
[252] S. BROWN, "The Future of Private Law Claims against Cartelists – the English Experience" *G.C.L.R.* 2009, 2(4), 198.
[253] *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19; [2012] Comp. A.R. 211
[254] S. CAMPBELL, "United Kingdom: Cardiff Bus case: the First Successful Follow-on Damages award from the Competition Appeal Tribunal", *G.C.L.R.* 2012, 5(3), R44.
[255] Ibid, R44.

amount of £60 000 had to be paid in exemplary damages, slightly less than the double of the £33 818,79 that were assessed to have been the actual damage.

It is clear that exemplary damages are not undisputed. However, they may only be awarded where the defendant has deliberately and outrageously disregarded the plaintiff's rights, and where other remedies alone would be inadequate.[256] But in a competition law context, the problem often lies in the fact that a company would be unable to predict with certainty whether a proposed measure would amount to an infringement. This might make it very dangerous to expose companies to exemplary damages.

In *Cardiff Bus,* no previous fine had been imposed by the OFT. It has to be noted that where a defendant has already has been ordered to pay a substantial penalty for infringing the competition law, exemplary damages are not available as this would violate the principle of ne bis in idem.[257] This is what the High Court held in *Devenish*: Mr Justice Lewison judged that the principle of *ne bis in idem* precluded the award of exemplary damages in a case in which the defendants had already been fined by the European Commission.[258]

An important addition to this is that the UK Government in its Response to the Consultation on Private Actions in Competition Law,[259] in which it set out a range of proposed reforms, decided that exemplary damages, as awarded in the *Cardiff Bus case* will be prohibited in collective actions. This in order to prevent a litigation culture where claimants from other countries would come to the UK in order to get massive damages.[260]

To sum up it can be said that exemplary damages are in principle possible in the UK legal system. However, as seen in *Devenish,* where there has been a previous fine by a competition authority, they cannot be awarded since this would be a breach of the *ne bis in idem* principle. In the *Cardiff Bus* case on the other hand, it was recently shown that where there has been no previous fine, the CAT did not fail to impose exemplary damages, albeit cautiously, in addition to the compensatory damages that are widely accepted.

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[256] B. RODGER, " Private Enforcement and the Enterprise Act: an Exemplary System of Awarding Damages", *E.C.L.R.* 2003, 24(3), 111.
[257] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 312.
[258] Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch.), para. 52.
[259] Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013.
[260] "UK Proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf

2.1.5. Passing-On Defence

Today, there is presumed to be no possibility for a passing-on defence in English competition law, although the actual status is not completely clear. Some authors[261] think that there is just no need for this in the UK system, and that there is therefore no reason for the law to change to make it possible at all. Others[262] claim that it should be recognised in the English legislation.

Whelan follows the reasoning that if, as the *Manfredi* judgment says "any individual" can claim, Section 60 of the CA 1998 would require that standing is also granted to indirect purchasers. This would mean that it is necessary to acknowledge the existence of the passing-on defence, in order to ensure consistency with the objective of just compensation.[263]

The matter of passing-on defence was also mentioned in *Devenish.*[264] In seeking to prove their losses caused by a cartel infringement of one of their vitamin suppliers, the company could not establish that they had not simply passed on the overcharge to their own customers, and punitive damages were refused. Whelan claims that the passing-on defence would avoid that damages above the level of compensation would be imposed. Allowing the passing-on defence would thus avoid punitive damages being awarded.

To the criticism that the UK courts are not well equipped to deal with this, Whelan continues saying that there will be indeed some difficulties in using the passing-on defence, but not major ones.[265] On top of that: Regulation 1/2003 expects national courts to be able to cope with the demands placed on them by Article 101(3) TFEU, namely that they are required to conduct complex economic assessments. The fact that the courts would not be well equipped can consequently not be considered a reason not to allow the passing-on defence.

The British government however, in the recent Response on the Consultation on Options for Reforms of January 2013, said that it would not be legislation on the passing-on defence.[266] In the Response, they noted in line with the majority of the respondents that there is no strong

[261] D. SHEEHAN, " An Argument Against a Specific Statutory Passing on Defence in Private Enforcement" UEA Competition Policy Blog, 3 July 2012.
[262] P.WHELAN, " The Passing On Defence Should Be Recognised in Legislation" UEA Competition Policy Blog, 29 May 2012.
[263] Ibid.
[264] Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors [2007] EWHC 2394 (Ch.).
[265] P.WHELAN, " The Passing On Defence Should Be Recognised in Legislation" UEA Competition Policy Blog, 29 May 2012.
[266] Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013, 5.

case for new legislation explicitly addressing the passing-on defence. They added that there is no reason for it not to be allowed, and that it would be better to let judicial case law deal with the fine details of its application, rather than via legislation.[267]

Another point, that both Sheehan and the government make, is that the passing-on defence is *"not even a defence properly so-called"*: it is simply a reflection of the principle that a claimant must prove that he suffered a loss as a result of a tort, and that one should just take into account the passing on when calculating this loss.[268] This again argues for not regulating it, it is already taken care of.

2.2. Injunctions

In the UK, injunctions are equitable remedies, which can only be imposed according to the rules of contract or tort law. This gives the courts a margin of discretion whether to grant it or not. Injunctions can only be granted by the High Court, not by the CAT.[269] But there are voices arguing in favour of giving the CAT the power of granting injunctions as well, and the government will allow this in the upcoming reforms.[270]

Sections 32(1) and 33(1) of the CA 1998 state that if the OFT finds an infringement it may give directions to bring the infringement to an end, if it considers such an injunction to be appropriate.[271] It is not certain whether the power to give directions includes the right to impose structural remedies, even though according to Whish such a power would be justified to bring the infringement to an end.[272] Still, pursuant to the CA 1998, these structural remedies will probably not be available against a perpetual abuse of a dominant position. But they might be on the basis of the EA 2002, Chapter 11. To guarantee compliance with the injunction, penalty payments may be imposed.[273]

Injunctions are most commonly used as interim measures. They are ordered when the court is convinced that there is a serious question to be tried and that an award of damages later would

[267] Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013, 25.
[268] Ibid, 24.
[269] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 514.
[270] Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013, 15.
[271] C. CAUFFMAN "Injunctions at the Request of Third Parties in EU Competition Law", *MJ*, 2010, 66
[272] Ibid, 67.
[273] Ibid, 67.

not be an adequate remedy. The case of *Cutsforth v Mansfields Inns*[274] was about coin operated amusement machines, supplied, serviced and operated by the claimants. They leased them to pubs and public houses owned by a brewery, but when another brewery took over, claimants were no longer on the list of nominated suppliers for these machines, and they were asked to remove all their machines and equipments from the pubs. They obtained an injunction against the removal, because the High Court found that damages would not be an adequate remedy, since the plaintiff would have gone bankrupt if interim measures were refused. They were therefore allowed.[275]

Yet in *Garden Cottage Foods,*[276] the House of Lords seemed to prefer a more reluctant approach: an injunction was refused on the grounds that if the action was successful, damages would be an adequate compensation.[277] This decision was however reversed on appeal, where Lord Denning expressed the view that the only effective remedy in a case of abuse of dominance was an injunction.[278]

2.3. Nullity

As a consequence of an infringement, Section 2(4) of the CA 1998 states that "*any agreement or decision which is prohibited by subsection (1) is void*". The High Court may make binding declarations, either final or interim, on the nullity of an agreement by reason of breach of the competition rules.[279] The CAT on the other hand does not have the power to do this.

The English Court of Appeal made an important addition to this in the case of *Passmore v Morland,*[280] in which they determined that the automatic nullity of Article 101 is of a "*temporaneous or transient character".*[281] This case concerned a tenancy agreement between Passmore and a large brewer, IPC, which imposed the obligation on Passmore to buy all of his beer from IPC. But when IPC sold the pub to the much smaller brewer Morland, the agreement's compatibility with Article 101 TFEU was questioned. Passmore claimed the agreement with IPC was null, and therefore also the one with Morland. The Court of Appeal's

[274] Kenneth Frederick *Cutsforth and others*, Trading as For Amusement Only (Hull) *v. Mansfield Inns Ltd*. [1986] 1 CMLR
[275] C. CAUFFMAN "Injunctions at the Request of Third Parties in EU Competition Law", *MJ*, 2010, 67.
[276] Garden Cottage Foods v Milk Marketing Board [1984] *AC* 130; [1983] 3 *CMLR.*
[277] C. CAUFFMAN "Injunctions at the Request of Third Parties in EU Competition Law", *MJ*, 2010, 67.
[278] Ibid, 67.
[279] C. BROWN and D. RYAN, The Judicial Application of European Competition Law – United Kingdom, FIDE 2010, 515.
[280] Passmore v Morland plc [1999] EuLR [1999] 1 CMLR 1129.
[281] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC Competition Law*, Oxford, OUP, 2003, 209.

logic was that nullity is transient, as it always follows illegality.[282] Thus, a pub tenant could claim restitution on the basis of a void provision obliging him to buy a minimum amount of beer during the period that the beer distribution agreement formed part of a network of similar agreements foreclosing the network, but not for the period where it did not form part of this network.[283]

The main case here however is still *Courage v Crehan*:[284] the ECJ confirmed that EU law precluded a rule of national law which prevents the recovery of damages by the mere reason of being party to an illegal contract.[285] In the UK, contracts which are expressly or by implication forbidden by statute or a public policy, are *per se* unlawful.[286] Even when the parties did not intend to break the law and were ignorant of its illegality, the contract will still be void and unenforceable.[287] This constituted a problem for the pub owner in *Courage*: if his contract with the brewery was null and void because it infringed competition law, this consequently meant he had no contractual right against them either, insofar the remedy he sought would have been based on a null clause.[288]

Nullity is demonstrably a useful civil sanction in the UK. It has a firm legal basis, not only in general contract law but specifically in the CA 1998 as well. Numerous case law has shown it can be a victim-friendly remedy in cases of private enforcement, making it another valued addition to the private enforcement system.

[282] V. MILUTINOVIC, *The "Right to Damages" Under EU Competition Law: from Courage v Crehan to the White Paper and Beyond"*, Alphen aan den Rijn, Wolters Kluwer International, 2010, 153.
[283] V. MILUTINOVIC, *The "Right to Damages" Under EU Competition Law: from Courage v Crehan to the White Paper and Beyond"*, Alphen aan den Rijn, Wolters Kluwer International, 2010, 153.
[284] Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others C-453/99[2001].
[285] K. MIDDLETON, B.J. RODGER, A. MACCULLOCH and J. GALLOWAY, *Cases and Materials on UK and EC Competition Law*, Oxford, OUP, 2003, 210.
[286] C. CAUFFMAN, "The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts", M-EPLI Working paper No. 2013/3, 14.
[287] Ibid, 14.
[288] V. MILUTINOVIC, *The "Right to Damages" Under EU Competition Law: from Courage v Crehan to the White Paper and Beyond"*, Alphen aan den Rijn, Wolters Kluwer International, 2010, 151.

3. Evaluation and Reception of the Current Private Enforcement Law in the United Kingdom

3.1 The Competition Act 1998 in Practice

Up to 2012, the OFT has found infringements of Article 101 TFEU and the Chapter I provision of the CA 1998 in 28 occasions, one of which was set aside entirely on appeal to the CAT.[289] The OFT and sectoral regulators have adopted 57 non-infringement decisions under Chapters I and II prohibitions and/or Articles 101 and 102 TFEU.[290] These are all cases of public, not private enforcement

Public policy in the UK has moved more towards private enforcement of the competition rules: the OFT has published a Discussion Paper and Recommendations, and the British Government is considering the case in order to reform the law relating to private actions.[291]

Almost all private actions brought against cartelists are follow-on actions.[292] Hardly any are stand-alone actions. The reason is that, as stated earlier, follow-on actions are preceded by regulatory decisions establishing an infringement which are binding on the courts in follow-on actions, implicating that there is no need to establish liability.[293] In practice however, there has never been "a flood of follow-on actions"[294] after an infringement decision.

3.2 A UK System Perfectly Modelled After EU Norms?

As is clear from the CA 1998, the UK rules are strongly modelled after those of Articles 101 and 102 TFEU. As a result, many cases will be very likely to have the same outcome whether they are investigated under EU law or under domestic law.[295] Yet, even though there is a high degree of convergence between the EU and the UK, the possibility nevertheless remains that there could be different outcomes depending on which system of law is applied.[296] When is there is a clash between EU and UK law, the starting point should be that EU prevails.[297] This was held by the ECJ in *Walt Wilhelm*:[298] conflicts between EU rules and national rules on

[289] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 391.
[290] Ibid, 391.
[291] Ibid, 307.
[292] S. BROWN, "The Future of Private Law Claims Against Cartelists – the English Experience" *G.C.L.R.* 2009, 2(4), 197.
[293] Ibid, 197.
[294] Ibid, 197.
[295] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 75.
[296] Ibid, 75.
[297] Ibid, 75.
[298] Walt Wilhelm v Bundeskartellamt 14/68 [1969]

cartels have to be resolved by applying the principle that EU law takes precedence. Since *Walt Wilhelm* did not provide answers for all situations, these matters are dealt with by Article 3 of the Regulation 1/2003.

In terms of UK law it can be stated that if agreements affect trade between Member States, but do not infringe Article 101, it would not be possible to take action against them under UK national law, since it is not possible for an NCA or national court to apply stricter national competition law than the EU does.[299] Where the CAT is involved, private enforcement of competition rules differs from the usual English torts, because in monetary claims, decisions by the OFT and the European Commission are binding on the CAT.[300]

It has been widely accepted that EU competition rules may be used as a shield: plaintiffs in English courts may defend a claim on the grounds that a contract was tainted by illegality arising from an infringement of EU competition law.[301] Thus, it is clear that private parties may directly apply to a national court for an injunction on the grounds of such a breach. From the EU perspective, private enforcement has long been seen by the European Commission as an additional tool in enforcing competition rules.[302]

3.3 The United Kingdom: a Popular Venue for Litigants

The United Kingdom is considered a very attractive jurisdiction within the EU to bring damages claims in competition cases. This is due to the availability of full disclosure, the UK courts' liberal approach to jurisdiction and the procedural routes available for claimants in both stand-alone and in follow-on actions.[303] As said earlier, stand-alone and follow-on actions can both be brought before the High Court, whereas follow-on actions can also be brought before the CAT.

As mentioned earlier in *Enron*,[304] the Court of Appeal has likely lessened to a limited extent the benefits for claimants in follow-on actions by making it harder for them to prove causation and loss on the basis of an infringement decision, by stating that not all statements in those

[299] R. WHISH and D. BAILEY, *Competition Law*, 7th edition, Oxford, OUP, 2012, 77.
[300] EU National Report on Action for damage in the UK (M. CLOUGH and A. McDOUGALL) - http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports /united_kingdom_en.pdf, 33.
[301] K. HOLMES, "Public Enforcement or Private Enforcement? Enforcement of Competition Law in the EC and UK*", E.C.L.R.*, 2004, 26.
[302] Ibid, 27.
[303] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 45.
[304] Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd [2009] EWCA Civ 647; [2010] Bus. L.R. 28 (CA (Civ Div)).

decisions are binding statements of facts.[305] This might make it harder to obtain damages. But the UK is still a very good jurisdiction, if not the best in the whole of the EU, to obtain damages in a private action for competition law.

3.4 Proposals to Go Even Further

The UK system is already very attractive, yet the British government seems willing to go even further, and introduce opt-out class actions, potentially going beyond what is seen in the USA.[306] On April 24, 2012, the Department for Business, Innovation and Skills published a consultation setting out of various proposals, which was followed by an outline for a new regime of private actions in competition law in January of 2013.[307] There will be three main areas of reform. As well as the new opt-out collective action, the response also enhances the role for the CAT and introduces a fast-track procedure for simpler cases. It also emphasises the role of Alternative Dispute Resolution (ADR) as an alternative.

3.4.1. Collective Redress: A Fundamental Reform For Opt-Out Actions

The Governments response notes the decision to introduce the possibility of an opt-out collective action.[308] The proposal to make opt-out class actions available in the CAT to any business or consumer that has been a victim of an antitrust violation, encompasses that defendants will have to pay the full loss suffered by the entire class. In the current situation, the regime is said to be too restrictive. Being limited to opt-in follow-on actions by representative bodies on behalf of consumers, there has been one successful case in almost ten years, brought by *Which?* against *JJB Sports* regarding replica football shirts.[309]

It would be possible under the proposed regime to bring collective actions in both follow-on and stand-alone cases, either on behalf of consumers or businesses, or even a combination of the two, with these cases being heard only by the CAT.

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[305] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 47.
[306] R. PIKE, "UK Government Seeks to Promote Antitrust Litigation Claims", *G.C.L.R.* 2012, 5(3), 118.
[307] Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013.
[308] "UK proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf
[309] "UK proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf; Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013, 13.

Another important element is that the opt-out will only apply to UK-domiciled claimants, even though non UK claimants can opt-in if they want to.[310] There are also several safeguards provided in order to prevent a full on litigation culture with vexatious and frivolous claims.[311]

3.4.2. CAT Reform

Another aspect the Government wishes to reform is the role of the CAT in private damages actions.[312] The aim is to make the CAT the major venue for competition actions in the UK.[313] Currently, the CAT only adjudicates follow-on actions in which the claimants are strictly bound by the findings of the competition authorities.[314] In the 2012 consultation, it was made clear that they wish and intend to expand this role, and in the consultation document an explicit reference to *Enron*[315]was made, stating that it "*severely limits the scope of cases that the CAT can consider".*[316] Under the new regime, the cases would be concentrated at the CAT, which would then be able to deal with stand-alone cases and to transfer cases to the courts as well as hear injunction claims.[317] This will obviously reduce the current attraction for claimants in bringing stand-alone actions to the High Court.[318] In addition, limitation periods would also be set at six years, making them the same as those for the High Courts,[319] as the current shorter limitation period for the CAT has led to uncertainty and spawned satellite litigation.[320]

The UK Government also considered that the CAT should have access to all remedies possible, including the possibility of granting injunctions.[321]

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[310] "UK Proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf
[311]Ibid.
[312] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 48.
[313] S. PEYER, "Has the UK Opened the Floodgates to Private Enforcement of Competition Law?", UEA Competition Policy Blog, 30 January 2013.
[314] Ibid.
[315] Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd [2009] EWCA Civ 647; [2010] Bus. L.R. 28 (CA (Civ Div)) para.4.5. on p.16.
[316] T. WOODGATE and I. FILIPPI, " The decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 48.
[317] S. PEYER, "Has the UK opened the Floodgates to Private Enforcement of Competition Law?", UEA Competition Policy Blog, 30 January 2013.
[318] T. WOODGATE and I. FILIPPI, " The Decision that Binds: Follow-on Actions for Competition Damages after Enron", *G.C.L.R.* 2012, 5(2), 48.
[319] "UK Proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf
[320] S. PEYER, "Has the UK opened the floodgates to private enforcement of competition law?", UEA Competition Policy Blog, 30 January 2013.
[321]"UK Proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf

3.4.3. Fast Track Procedure For Simpler Cases

The BIS proposed a fast track procedure for injunction claims, with the aim of reducing the costs of litigation. This fast track would be mainly focused on granting injunctive relief for the simpler cases.[322] Peyer however states that *"the devil is in the details"*, as he doubts the feasibility since the UK government has proposed a cost cap to separate complex cases that would not be suitable for fast track procedures, from those that could be dealt with in a shorter time. Whether or not it will work, this will depend on how this flexible cost cap is shaped.[323]

Nevertheless, a fast track procedure could definitely help reducing both litigation costs and time spent in court, and is thus to be welcomed.

3.4.5. Alternative Dispute Resolution

The UK Government decided to strongly encourage ADR, but not to make it mandatory. This would be too restrictive and undermine parties basic rights to take matters to court.[324] Several specific measures will be introduced to make ADR a more popular solution.

3.4.6. Conclusion on the New Proposals

Even though these proposals go very far, the British Government insisted they are not looking to introduce a US litigation culture, as there will still be no treble damages or jury trials for this type of claims.[325] The BIS also emphasised the safeguards in the future framework, which will make a sudden increase in the amount of class actions being brought in the UK very unlikely.[326] Nevertheless, it is clear from these proposals that the British Government wishes to go further on the path of private enforcement of competition law, just like the European Commission plans to do.

However, Pike makes remarks on some serious flaws in these proposals.[327] For example, he criticises that the issue of enforcement of UK class action rulings outside the UK is not addressed. Since it is by no means obvious that UK judgments will be enforced by other

[322] "UK proposals to Increase Private Action in Competition Law", Winston & Strawn London, 2013, http://www.winston.com/siteFiles/Publications/Towards_UK_Class_Actions.pdf
[323] S. PEYER, "Has the UK Opened the Floodgates to Private Enforcement of Competition Law?", UEA Competition Policy Blog, 30 January 2013.
[324] Private Actions in Competition Law: A Consultation on Options for Reform – Government Response, Department for Business Innovation & Skills, January 2013, 44.
[325] R. PIKE, "UK Government Seeks to Promote Antitrust Litigation Claims", *G.C.L.R.* 2012, 5(3), 119.
[326] S. PEYER, "Has the UK Opened the Floodgates to Private Enforcement of Competition Law?", UEA Competition Policy Blog, 30 January 2013.
[327] R. PIKE, "UK Government Seeks to Promote Antitrust Litigation Claims", *G.C.L.R.* 2012, 5(3), 119.

Member States against victims who were not included in the UK proceedings, this might lead to firstly those not taking part in the UK procedure awaiting to see the outcome and if necessary try again in another Member State, or secondly that defendants risk paying twice.[328]

Peyer argues that *"the floodgates have not been opened"*, as under the current framework, class actions may work as a threat to incentivise firms to take part in collective settlements and redress schemes, but are still not very likely to become everyday business in competition law.

It must however be noted that this is still no positive law, but merely a response of the UK Government to the consultation round. The coming months still have to prove whether or not the opt-out procedure will survive.[329]

[328] R. PIKE, "UK Government Seeks to Promote Antitrust Litigation Claims", *G.C.L.R.* 2012, 5(3), 119.
[329] S. PEYER, "Has the UK Opened the Floodgates to Private Enforcement of Competition Law?", UEA Competition Policy Blog, 30 January 2013.

4. Conclusion on the Status of Private Enforcement in the United Kingdom

The Competition Act 1998 has brought into force a new regime in the British landscape that was much appreciated and meant a great step forward. The modernisation based on the European rules enabled private claimants to obtain damages more easily. Thanks to the important Section 60, courts were required to interpret this national provision consistently with the equivalent EU provision. This has had important practical consequences as it means that there is now one, more uniform system. The well received Act was further complemented by the Enterprise Act 2002, which amended the 1998 Act in several ways and has also had a major impact.

These Acts constitute a sound legal basis to obtain damages for an infringement of the competition rules in the United Kingdom, and they produce the desired effect. After the institution of the Competition Appeal Tribunal in 2003 it has been possible to bring follow-on actions before this specialised court, that can make monetary awards. Since the *Cardiff Bus* case, it seems that also exemplary damages are possible under English law, albeit under strict conditions. For standalone actions, the High Court is still competent. This system of tortious liability for breach of the competition rules appears to work. Since damages are not always the appropriate remedy, injunctions are also possible, thus improving the situation for victims of infringements of competition law even more.

Private enforcement of competition law is already a familiar aspect in British competition law, and with the new reforms that are to be expected, this will become even more the case. As the CAT will gain strength and also get jurisdiction over standalone actions as well as follow-on actions, private enforcement will complement public enforcement even more and so provide a further deterrence for possible infringements. But the question has been justly asked: will this not open the floodgates, and attract lots of private enforcement cases to the UK, which would not succeed in other countries? It remains to be seen whether the safeguards the government plans to build in will be effective enough to prevent these adverse effects.

IV. PRIVATE ENFORCEMENT IN BELGIUM

1. Legal Sources

1.1 The Belgian Competition Act[330]

The Belgian Competition Act is the main Belgian piece of legislation when it comes to competition law. In 2006, this new Belgian law on competition came into force and replaced the previous one of 1999 in its entirety.[331] Instead of amending it, they chose to install a completely new regulatory framework.[332] The institutional structure and the procedural aspect were not only separated from each other, but also further refined.[333]

The Act was created after several thorough discussions with all involved institutions, in an attempt to improve and modernize the regime and to adapt it to European standards. The Competition Act of 2006 created a framework for an efficient instrument to enforce competition law.[334] The procedures were simplified, and the NCA's powers were extended. The fact that Belgian law was aligned with the European rules brought more security, which is a good thing in a small country with a Euro-focused economy.[335]

On March 21st, 2013, the Senate approved a new Belgian Competition Act, aiming at making the Belgian Competition Authority even more effective by making it the single authority responsible for publicly enforcing competition law in Belgium. This Act will enter into force in September 2013. The enforcement procedures will become shorter and will create challenges for companies under investigation.[336] To the regime on private enforcement however, this Act does not make any changes.

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[330] Gecoördineerde Wet tot Bescherming van de Economische Mededinging/ Loi Coordonnée sur la Protection de la Concurrence Economique of 15 September 2006 (*BS* 29 September 2006)
[331] M. HOLMES and L. DAVEY *A Practical Guide to National Competition Rules Across Europe*, 2nd edition, Alphen aan den Rijn, Kluwer Law International, 2007, 70.
[332] Ibid, 70.
[333] J. YSEWYN, "Tien Jaar Belgisch Mededingingsrecht – Rechtspraakoverzicht", Brussel, Larcier, 2008.
[334] J. STUYCK, W. DEVROE and P. WYTINCK, *De Nieuwe Belgische Mededingingswet 2006*, Mechelen, Kluwer, 2007, 255.
[335] Ibid, 256.
[336] J. YSEWIJN, 22 March 2013, www.cliffordchance.com/publicationviews/publications/2013/03/the_new_belgian_competitionact.html.

2. Remedies

2.1 Damage Actions

There is no specific statutory basis for bringing actions for damages for a breach of competition law under the Belgian Competition Act. This accordingly means that there is no specific procedural or evidentiary rule in this respect either.[337] Thus damages actions, in Belgium today are based on a fault in the contractual or tort basis. Gilliams and Cornelis mention the example in which a buyer claims reimbursement of items he bought from a seller when those goods were the subject of price fixing. Even though there is a contractual relationship between the two, the buyer's claim is not contractual in nature.[338] It is on the contrary a claim in tort: the seller caused harm to the buyer, for which now compensation is sought.[339]

Hardly any judgments of private enforcement in Belgium are known.[340] Wytinck questions why this is the case, noting that also the Ashurst Report barely mentions any Belgian cases.[341] Is this a consequence of a lack of knowledge of its existence or of the fact that there are more cases like this brought before a judge in other countries? Or is it a consequence of out-of-court settlements, being scared of the costs it might bring or not actually having experienced any damages from it, due to a passing on defence?[342] More recently though, the Otis lift cartel case[343] has emerged, which might prove to be a very big case for private enforcement in Belgium.

2.1.1 In General

The distinction between stand-alone and follow-on actions can be made in Belgium as well. In both cases, the existence of an infringement will turn out to present a genuine challenge for the claimant to prove both fact and law.[344] In the case where there has already been a decision by the Raad voor de Mededinging, the Belgian NCA, the burden of proof will be lighter than

[337] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 1.
[338] H. GILLIAMS and L. CORNELIS, "Private Enforcement of Competition Rules in Belgium", *TBM* 2007-2, 16.
[339] Ibid, 16.
[340] P. WYTINCK, " Sancties, Risico's en Kosten bij Overtredingen van het Mededingingsrecht" in *Gericht op mededinging, Consacré à la Concurrence*, P. WYTINCK, (ed.), Antwerpen, Maklu, 2011, 148.
[341] Ibid, 148.
[342] Ibid, 148.
[343] Europese Gemeenschap v Otis NV and Others, 6 November 2012, C-199/11.
[344] L. CORNELIS and H. GILLIAMS, Private Enforcement of Competition Law in Belgium: 2 Current Issues in STUYCK, J., DEVROE, W. and WYTINCK, P., *De nieuwe Belgische Mededingingswet 2006*, Mechelen, Kluwer, 2007, 236.

when the claimant is the first one to take this case anywhere and no previous proceedings have existed.

2.1.2 Tortious

Tortious liability requires, as said earlier, proof of fault, loss, and causation between the infringement and the alleged loss, this is no different in Belgian law.

A. Fault – Articles 1382 and 1383 Civil Code

The first thing to show in a claim for tort is that the defendant has committed a fault to the Articles 1382 and 1383 of the Civil Code. These Articles describe the notion of tort liability in civil law and are very significant under Belgian law. A fault in the meaning of Articles 1382 and 1383 Civil Code may result from either an infringement of a statutory or regulatory rule, or the failure to comply with a general duty of diligence.[345] It is however also important to see whether an infringement of the competition rules will necessarily amount to such a fault.

Even though competition rules have a public character, the Commission's Green Paper suggests that this public policy nature makes every infringement of the rules amount to a fault in tort liability.[346] Cornelis and Gilliams do not agree on this, claiming that what is relevant is whether the specific implications of those rules for the behaviour of those who are subject to them are sufficiently precise, and that this is not the case on account of the abstract and open wording of the relevant provisions.[347]

In order to successfully establish a claim of breach of competition law in Belgium, two elements are necessary.[348] Firstly, proof needs to be delivered of the existence of an infringement. Secondly, that finding of an infringement must be sufficient to conclude a fault in the meaning of Articles 1382-1383 of the Belgian Civil Code.[349] This fault can either be an infringement of a statutory or regulatory rule, or the failure to comply with the general

[345] L. CORNELIS and H. GILLIAMS, "Private Enforcement of Competition Law in Belgium: 2 Current Issues" in STUYCK, J., DEVROE, W. and WYTINCK, P. , *De Nieuwe Belgische Mededingingswet 2006*, Mechelen, Kluwer, 2007, 251.
[346] Ibid, 251.
[347] Ibid, 251.
[348] Ibid, 235.
[349] Ibid, 235.

diligence duty.[350] In Belgium, damage actions for breaches of the competition rules are thus possible when a civil fault can be shown.[351]

Obviously, when one claims the competition rules have been infringed, proof must be delivered of that fact. Private enforcement is no different from other types of claims here. As a general rule, Belgian law follows the principle that the claimant needs to deliver the proof of facts he claims to be true. The way in which this can be done depends on whether there has been a previous decision or investigation by a competition authority with respect to those facts.[352] Cornelis and Gilliams distinguish three different situations in this: the case where there has not been any decision or investigation by a competition authority, the case where there has been an investigation, but no decision yet, and the case where there is a final decision by a competition authority.[353] Clearly the latter will be the case in which the claimant has the easiest task of proving the infringement, as this constitutes follow-on actions.

B. Damage

Once the fault has been proven, the next element for the claimant to show that the damage has occurred. Damage caused by unlawful behaviour, under which an infringement of the competition rules classifies, must be repaired by the party who has done the damage. It is for the claimant to demonstrate and quantify his damages.[354] If proven, the damages will cover the entirety of the loss incurred as a result of the infringement. Evidence of this can be presented in whichever form, and the judge is entitled to assess any evidence put forward.[355]

Under Belgian law, an infringement of a legal rule gives in itself rise to liability, provided that the relevant provision prescribes a certain behaviour. Liability will however not arise when it is demonstrated that there are reasons such as force majeure why the party who normally would held liable, cannot be held liable.[356]

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[350] H. GILLIAMS and L. CORNELIS, "Private Enforcement of Competition Rules in Belgium", *TBM* 2007-2, 17.
[351] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 201.
[352] L. CORNELIS and H. GILLIAMS, "Private Enforcement of Competition Law in Belgium: 2 Current Issues" in STUYCK, J., DEVROE, W. and WYTINCK, P. , *De nieuwe Belgische Mededingingswet 2006*, Mechelen, Kluwer, 2007, 236.
[353] Ibid, 236.
[354] H. GILLIAMS and L. CORNELIS, "Private Enforcement of Competition Rules in Belgium", *TBM* 2007-2, 20.
[355] M. HOLMES and L. DAVEY *A Practical Guide to National Competition Rules Across Europe*, 2nd edition, Alphen aan den Rijn, Kluwer Law International, 2007, 111.
[356] L. CORNELIS and H. GILLIAMS, "Private Parties Entitlement to Damages on Account of Infringements of the Competition Rules"" in STUYCK, J. and GILLIAMS, H. (eds.), *Modernisation of European Competition*

C. Causation

Where there needed to be statute, breach and causation in the English system, this is quite similar in the Belgian one. Obviously, causation between the infringement and the damages has to be proven in order to obtain compensation for damages. The causal link will be accepted when it is shown that the damage that actually occurred would not have occurred, or at least not to the same extent if there had been no fault, i.e. an infringement of the competition rules.[357]

It is up to the claimant to prove that without the defendant's infringement of the relevant competition rules, the losses he suffered would not have occurred.[358]

This shows that the situation in Belgium is not so different from the one in the UK. The same elements of tort are present and they are applied in the same way.

2.1.3 Possible Claimants

Knowing who can have standing is an important element. Damages, as well as cease and desist order can be claimed by any party that has an interest in it, in accordance with the ECJ's *Manfredi* judgment.[359] Under Belgian law, standing is limited to natural persons and legal persons, with strict exceptions existing for associations. It is necessary for the claimant to be the holder of the right that he invokes, as well as having a personal, direct, legal, immediate interest when filing the claim.[360]

A. Collective Redress

Under Belgian law, every party in an action must show that they have an existing, current, personal and legitimate interest.[361] The Code of Civil Procedure is individualistically inspired, and allows joined actions only in a limited set of circumstances.[362] In competition law, it could be said that the main interest is a public one, however the fact that it is an infringement

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Law – The Commission's Proposal For a New Regulation Implementing Articles 81 and 82 EC, Antwerpen, Intersentia, 2003, 156.

[357] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 9.

[358] M. HOLMES and L. DAVEY *A Practical Guide to National Competition Rules Across Europe*, 2nd edition, Alphen aan den Rijn, Kluwer Law International, 2007, 111.

[359] Manfredi v Lloyd Adriatico Assicurazioni SpA (joined cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006] 5 CMLR 17.

[360] Executive Summary And Overview of the National Report For Belgium, http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/belgium_en.pdf

[361] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na kartelinbreuken", *NJW* 2011, 239, 207.

[362] C. CAUFFMAN, "Een Model voor een Belgische Class Action? De Advocatuur Neemt het Voortouw", *RW* 17/2009,708.

of a law that serves the public interest, does not necessarily exclude that one can have a personal interest in receiving damages.[363] The Belgian Supreme Court also recognized this.[364] In essence, it comes down to that matter that the claimant has to prove that he has more of an interest than the average citizen in companies respecting competition rules.[365]

Wytinck mentions that on a Belgian level, a class action procedure which is not aimed specifically at competition law infringements, but that could nonetheless be used for such claims is being prepared.[366] Also Cauffman mentions that the Bar Association has adopted a set of rules and guidelines for collective actions for damage claims, inside the applicable, contemporary legislator frame.[367] Yet up till now, there is no legal equivalent for class actions under Belgian law as there is, for example, in the United States.

Under certain circumstances however, there is a possibility for specific associations to initiate proceedings to represent either several individual or collective damages.[368] In order to do this these associations need either an explicit mandate to act for their members, or a provision in their articles of association.[369] It must be stressed that claims cannot be filed in the general interest: a personal interest from an individual or several individuals who suffered damages caused by the infringement is necessary. The mere fact that an association pursues the fulfilment of its articles of association is not enough to fulfil the personal interest criterion.[370]

Of course, persons who have suffered individual damage can group themselves in order to file a single claim, but in that case damages will be awarded to each individual and not to the group as a whole.[371]

[363] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 207.
[364] Cass. 27 March 2001, P.99.0983.N, cited in T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 207.
[365] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 207.
[366] P. WYTINCK, " Sancties, Risico's en Kosten bij Overtredingen van het Mededingingsrecht" in *Gericht op mededinging, Consacré à la Concurrence*, P. WYTINCK, (ed.), Antwerpen, Maklu, 2011, 149.
[367] C. CAUFFMAN, C., "Een Model voor een Belgische Class Action? De Advocatuur Neemt het Voortouw", *RW* 17/2009, 690.
[368] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 3.
[369] Ibid, 3.
[370] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 4.
[371] Ibid, 4.

B. Competent Courts

Due to the commercial nature of defendants in competition law, the commercial courts are mostly competent. However, in the case a defendant would not be commercially active, the civil court can also have competence.[372]

2.1.4 Types of Damages

A. Compensatory Damages

Once a claimant has proven the presence of damage and the court has accepted there is a causal link between the fault of the defendant and the damages the claimant incurred, the amount of damages to be paid will have to be established. The damages obtained for the infringement will cover the entirety of the incurred damages, and will thus be compensatory damages.[373] The legal basis of this is Article 1382 of the Civil code, which aims at restoring the victim to the situation in which he would have been if there had not been an infringement in the first place. The Belgian court of Cassation has confirmed many times[374] that the victim has a right to a full compensation of the damages he incurred.[375] This means the victim has to be restored to the position it would be in if there had been no violation of the competition rules by the defendant. This is the same as the English 'but for' test.[376] It is also necessary that the damages are certain and conclusive ("zeker en vaststaand"). This does not mean that the damage cannot be in the future, as long as its existence is certain enough. Hence, compensatory damages are the standard form of damages in Belgium.

B. Exemplary Damages

There are no exemplary or punitive damages available in Belgium. The legal system as such does not use them.[377] The damages awarded cannot exceed the injuries.

However, a system of penalty payments does exist ("dwangsom"/ "astreinte").[378] They can be awarded as a measure supplementary to a primary conviction. These penalties payments will be due if the awarded court order is not complied with, either per infringement of the order or

[372] Ibid, 2.
[373] Ibid, 4.
[374] For example: Cass 21 December 2001, *Arr. Cass. 2001, 2283.*
[375] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", NJW 2011, 239, 202.
[376] Ibid, 203.
[377] Ibid, 203.
[378] Article 1385bis Code of Civil Procedure.

per day delay of not complying with it.[379] They can be set very high, and thus resemble punitive damages but they serve a different purpose: they do not mean to punish the infringer, but rather make him comply with the court order, and act as a deterrence for not complying. It must be stressed these penalty payments are not a form of damages, but merely a way to make sure the defendant complies with the judgment.

In some ways the absence of exemplary damages in Belgium is regrettable, because they would provide a great deterrent to possible infringers of the rules, but on the other hand, the Belgian system of damage claims seems to work fine without this. Since there are also many opposing arguments against exemplary damages, it does not seem likely they will be introduced into the Belgian system. Yet in comparison to the United Kingdom, this could be an important reason for claimants to choose the UK over Belgium.

2.1.5 Passing-On Defence

When we translate the idea of passing-on defence to Belgian law, Belgian tort law does not seem to object to the concept of it.[380] The question is however, whether the prejudiced party can either accumulate the damages it receives from the infringing party with the ones it already received from other parties in connection with that same infringement, or whether the infringing party can deduct the ones the prejudiced party already received from others from the damages he has to pay her.[381] Since Belgian tort law, requires the victim of a fault to be placed in the situation it would have been in when the infringement would not have occurred, it is thus only entitled to compensation for damages it has actually suffered.

On this matter, the Belgian Court of Cassation ruled[382] that the accumulation of compensations is possible if those compensations do not have the same legal cause, and if they have a different object.[383] Based here on, it would be unlikely that a defendant could be exempt from paying damages based on a passing-on defence.[384] However, if it would be a case in which a third party has paid a compensation to the prejudiced party to file a claim against the infringing party instead of the prejudiced party, this would be a case where

[379] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 13.
[380] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 204.
[381] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 10.
[382] Court of Cassation, 15 April 1937, 4 November 1971, 26 June 1990, 28 April 1992.
[383] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 10.
[384] Ibid, 10.

compensations have the same legal cause and object. When it would then be allowed for the indirect purchaser to claim damages from the infringing party, he would have to pay twice, both to the prejudiced party and the indirect purchaser, which would not be acceptable.[385]

In short, the passing-on defence has up to today not been explicitly accepted in Belgian law, and it might be argued that if it would be, this would not be fair.

2.2 Injunctions: the Cease and Desist Order[386]

Under Article 95 of the Law of 6 April 2010 on Market Practices and Consumer Protection, there is a procedure that allows plaintiffs to receive a cease and desist order against other traders committing acts of unfair competition.[387] The aim of such an order is to ask the president of the commercial court to order the abandonment of a practice that breaches one or more of the competition rules in the WMPC. An infringement of the EU competition rules will usually also be seen as an unfair commercial practice in respect of this Article.[388] It can therefore prove to be a very useful tool. In some ways, this action might be more useful than claiming monetary damages afterwards, since the harm might be prevented from happening in the first place.

A special feature of this cease and desist order is that it combines the advantages of both an interim procedure and a claim on the merits.[389] The case can be brought to court as if it was an interim procedure (Article 118 WMPC), which results in a speedy treatment, but the judge nevertheless rules on the merits of the claim, and not just on provisional measures.[390] In addition, there is no need to prove urgency, unlike in interim procedures, or a loss or causal link between loss and infringement, unlike in ordinary tort proceedings.[391] By combining these two aspects, it is much more effective. This unusual aspect of the measure has led to its frequent use.

A cease and desist order can be brought by any interested party, as states Article 113 § 1 WMPC. A professional or inter-professional organisation with legal personality, a recognised

[385] Ibid, 10.
[386] Article 93 Belgian Law on Trade Practices.
[387] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 1; C. CAUFFMAN," Injunctions at the Request of Third Parties", M-EPLI Working Paper 2011/05, 18.
[388] C. CAUFFMAN," Injunctions at the Request of Third Parties", M-EPLI Working Paper 2011/05, 18.
[389] E. DIRIX, R.STEENNOT, H. VANHEES, *Handels en economisch recht in hoofdlijnen*, 9th edition, Intersentia, 2011, 437.
[390] Ibid, 437.
[391] C. CAUFFMAN, "Injunctions at the Request of Third Parties", M-EPLI Working Paper 2011/05, 18.

consumer organisation, and even the government (unless the action concerns an infringement of Article 95 WMPC) can thus bring an action.[392] Proof of the alleged unfair practice is obviously required, as well as the detrimental or possible effect it has on the plaintiff.[393] An important limit to these however is that the order cannot be brought later than one year after the facts on which it relies have come to an end, as states Article 117 WMPC.[394]

In response to a cease and desist order, the Commercial Court has several options. A first option for the court is to order the cessation of the behaviour that infringes the competition rules.[395] This seems to be the major reason for plaintiffs to go to court under this provision. If necessary, based on Article 112 WMPC, the court can grant the infringing company some time to make adjustments and end the unlawful behaviour.[396] A second means the court has to its disposal is ordering their judgment rendering the behaviour unlawful to be published, if this can contribute to compensating the infringement. The legal basis for this is Article 116 WMPC. A third option for the court is to impose penalty payments on the convicted company for each time a new infringement takes place.[397] This too can prove to be a very effective measure. But there is a limitation: according to Cauffman, the majority opinion is that a cease and desist order can only lead to "*an injunction to do something to the extent that what has to be done is stopping the continuation of the unfair practice"*.[398] In addition, if the infringement also constitutes a breach of contract, it is not possible to use the cease and desist order either, instead the normal contractual remedies will have to be used.[399]

It has to be noted that on the basis of this type of action, no damages can be claimed. The sole purpose of this remedy is to stop the behaviour that infringes the competition rules and to restore the balance. If a party that has suffered harm wants to receive monetary compensation, he will have to file a claim for damages separately. Nevertheless, the combined elements of this cease and desist order, which give it both speed and a thorough examination, may prove very efficient when being confronted with a competitor who does not play by the rules.

[392] Ibid, 18.
[393] D. WAELBROECK, K. CHERRETTE, A. GERTH, EU National Report on Actions for Damages in Belgium, 1.
[394] E. DIRIX, R.STEENNOT, H. VANHEES, *Handels en Economisch Recht in Hoofdlijnen*, 9th edition, Antwerpen, Intersentia, 2011, 438.
[395] Ibid, 438.
[396] Ibid, 438.
[397] Ibid, 438.
[398] C. CAUFFMAN, "Injunctions at the Request of Third Parties", M-EPLI Working Paper 2011/05, 19.
[399] Ibid, 19.

2.3 Nullity

In Belgium, a contract can be declared void when its subject matter or its cause is unlawful. The cause of the contract is held to reside not only in the other party's obligation, but also in each contracting party's determining motive.[400] An example of this is a judgment of the Civil court of Brussels of 18 January 1994, where a contract concluded on cartelised terms was held invalid, not for the reason on infringing Article 101 TFEU, but because it did not have a legitimate cause according to the Articles 1131- 1133 Civil Code.[401] Also contracts which are contrary to public (economic) order or good morals are void, and are held never to have existed.[402] Competition rules are part of public policy, and accordingly contracts that aim at restricting competition have an unlawful cause or subject matter, and can consequently be declared null.[403]

Contracts that are incompatible with the EU competition rules will be struck with absolute invalidity under Belgian law, as opposed to relative invalidity.[404] This is also what the ECJ states in *Béguelin:*[405] breaches of Article 101 § 2 TFEU give rise to absolute invalidity.

Nullity is under Belgian law generally considered to be a sanction imposed by the legislator on the infringing party, but it can be enforced at the initiative of private parties.[406] As well as by the contracting parties, it can also be invoked by third parties, and by the court of its own motion.[407] In addition, it is not relevant whether the party seeking the invalidation of the contract is at fault as far as the infringement is concerned: also the "bad" party could claim the nullity, and not only the victim.[408]

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[400] C. CAUFFMAN, "The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts", M-EPLI Working paper No. 2013/3, 11

[401] Ibid, 11

[402] Ibid, 12.

[403] H. GILLIAMS and L. CORNELIS, "Private Enforcement of the Competition Rules in Belgium", *TBM* 2007-2, 13.

[404] L. CORNELIS and H. GILLIAMS, "Private Parties Entitlement to Damages on Account of Infringements of the Competition Rules" in STUYCK, J. and GILLIAMS, H. (eds.), *Modernisation of European Competition Law – The Commission's Proposal For a New Regulation Implementing Articles 81 and 82 EC*, Antwerpen, Intersentia, 2003, 163.

[405] Béguelin, [1971] case 22/71, ECR 949.

[406] L. CORNELIS and H. GILLIAMS, "Private Parties Entitlement to Damages on Account of Infringements of the Competition Rules" in STUYCK, J. and GILLIAMS, H. (eds.), *Modernisation of European Competition Law – The Commission's Proposal For a New Regulation Implementing Articles 81 and 82 EC*, Antwerpen, Intersentia, 2003, 158.

[407] C. CAUFFMAN, "The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts", M-EPLI Working paper No. 2013/3, 13.

[408] H. GILLIAMS and L. CORNELIS, "Private Enforcement of the Competition Rules in Belgium", *TBM* 2007-2, 14.

However, it is not necessary that the voidness affects the entire contract, it can also just affect separate parts of it.[409] It is possible that only those aspects of the contract that are contrary to Article 101 TFEU are invalid, but that as a consequence of that the whole contract is invalid too, because those parts are not severable from it.[410] Whether this is possible or not is a matter of fact that is to be determined by the court, in function of the intentions on the parties to the contract.[411] Belgian law allows parties to deal with this issue beforehand, by putting a "partial invalidity clause" in the contract. This is a valid and fairly common practice in Belgium.[412]

3. Evaluation and Reception of the Current Private Enforcement Law in Belgium

As to date, very few private enforcement cases are known in Belgium. Partially because most of them do not even reach court, but are instead solved in a private settlement, but also because the very interesting position of the UK in private enforcement matters makes parties choose to go to court there, if they have the option.

Nevertheless, this might be changing in the near future: also Belgium is no longer immune against the fashion of private enforcement, as shown by a recent case potentially worth billions.[413] This new development could be expected from the Otis lift cartel case,[414] which is currently at trial. The facts of the case are the following: four builders of lifts and elevators: Kone, Schindler, ThyssenKrupp and the well known Otis, are sued in June 2008 before the Brussels Commercial court by the European Commission for their involvement in a cartel. The European Commission had previously convicted the cartelists in a pubic enforcement case in 2007, but now demands damages from them, as the Commissions Berlaymont building in Brussels was equipped with lifts affected by the cartel.[415]

[409] C. CAUFFMAN, "The Impact of Voidness for Infringement of Article 101 TFEU on Linked Contracts", M-EPLI Working paper No. 2013/3, 13.
[410] L. CORNELIS and H. GILLIAMS, "Private Parties Entitlement to Damages on Account of Infringements of the Competition Rules" in STUYCK, J. and GILLIAMS, H. (eds.), *Modernisation of European Competition Law – The Commission's Proposal For a New Regulation Implementing Articles 81 and 82 EC*, Antwerpen, Intersentia, 2003, 165.
[411] Ibid, 166.
[412] Ibid, 166.
[413] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 212.
[414] Europese Gemeenschap v Otis NV and Others, 6 November 2012, C-199/11.
[415] Belgium: European Commission and lift-makers plead before Brussels Commercial Court in Damages Case relating to lifts and escalators cartel, G.C.L.R. 2010, 3(3), R55.

This is a unique follow-on case, as the party claiming the damages is the same one that convicted the cartelists of infringing Article 101 TFEU in the first place. The Brussels Commercial court did not know if this was possible, since it could very well have been a breach the *ne bis in idem* rule. Therefore, they sent a preliminary reference to the European Court of Justice, in order to know whether it was allowed for the European Commission to play this role in the proceedings, and its powers to initiate a claim for damages.

The Court of Justice decided on the preliminary ruling in November 2012, saying that it is not prohibited for the Commission to bring an action, on behalf of the EU, before a national court for compensation for loss caused to the EU by a practice that is contrary to EU law. The Court also stated that it is true that national courts are bound by the Commission's findings of infringements of the competition rules, but that nevertheless the fact remains that the national courts alone have the competence to assess whether there has been a loss and a direct causal link between the prohibited conduct and the loss.[416]

The Court also stated that in any event, the use of information gathered by the Commission in the competition investigation is prohibited for purposes other than that investigation, and cannot be used in the damage claim before the national court.[417]

We will have to wait until the implications of this case have become clear. Possibly, this is the first of a long line of private enforcement cases that will go before Belgian Courts.

[416] Court of Justice of the European Union Press Release, Luxemburg, 6 November 2012, judgment in case C-199/11, Europese Gemeenschap v Otis NV and Others.
[417] Court of Justice of the European Union Press Release, Luxemburg, 6 November 2012, judgment in case C-199/11, Europese Gemeenschap v Otis NV and Others.

4. Conclusion on the Status of Private Enforcement in the Belgium

It is clear the Belgian legislator has drawn strongly upon the EU rules in drafting the Competition Act, in order to introduce the necessary reforms to bring Belgian law in line with the modernised European rules on competition after Regulation 1/2003.[418]

The way Belgian law currently stands, private enforcement of competition law is possible, but based on tort law and thus has to comply with the elements thereof, being fault, damage and causation.[419] This is no different from most other countries in the European Union. Clearly, the Belgian case law on private enforcement is not nearly as elaborate as in the United Kingdom, but this does not mean there are no good things about it. Especially with the ongoing Otis Lift Cartel case, things might be changing.

The system of the cease and desist order seems to work very well, and is a popular and commonly used tool. Combining the speed of an interim order with the thoroughness of a claim to the merits, it is an excellent example of how an injunction can be the perfect remedy against an infringement of the competition rules.

The third remedy, the civil consequence of nullity is also being developed in Belgian law, and since it can be claimed by either party it also seems like a strong weapon. Negative points to this are that the infringing party can claim it too, and then when the victim gets out of the contract, it will not necessarily mean his situation will be better afterwards.

Summarised, the scene of Belgian private enforcement can lead to a set of different conclusions. On a positive note there is the possibility for a cease and desist order and the recent development in the damages action against Otis. But this is just the beginning, and much work will still need to be done before it can be said that private enforcement really is a powerful tool in Belgium.

[418] Ibid, 70.
[419] T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na Kartelinbreuken", *NJW* 2011, 239, 213.

VI. CONCLUSION

A new European Directive that will finally harmonise the legal basis of private enforcement is being drafted. After long and thorough debates, a first step was taken in the form of Regulation 1/2003, empowering national courts to make full use of the Articles 101 and 102 TFEU. This was followed by a Green Paper, a White Paper, several studies and now finally a definitive Directive. But Member States have taken steps adjusting their national legislation to facilitate damage claims too. After studying the UK and the Belgian system, this conclusion will make recommendations towards the content of that Directive.

In the UK, private enforcement is currently firmly anchored in national competition legislation. The famous Competition Act 1998 introduced a completely new approach and aligned English law with the European rules. After the amendments by the Enterprise Act 2002, the CA 1998 now contains three provisions dealing with damage claims. It has been widely accepted in English courts that a plaintiff affected by a breach of competition rules can seek injunctive relief or pursue a claim in damages. In the UK, private enforcement is already a familiar element in the competition scene. The government realised this and launched a large consultation round in 2012, to which a response was published last January. They plan on subjecting the proposed reforms to changes in primary legislation as soon as possible. This is yet another sign Member States are going ahead without waiting for the EU. The new Directive will have to be strong enough to weigh up to this.

Such a strong legislative basis is not present in Belgium, where actions of private enforcement have to be brought according to the Articles 1382-1383 of the Civil Code. Up until now, private enforcement in Belgium mainly took the form of actions directed at the discontinuation or prevention of anticompetitive practices, the so-called cease and desist orders. In areas such as damage actions and invalidation of the contractual commitments, private enforcement has been quite underdeveloped, especially when compared to the UK.

On a European level a separate, legal basis for private enforcement in which elements of both tort and procedural law are harmonised would mean a great step forward. Commerce in the EU is far from a national matter, so a Directive can add a real value and deliver an advantage the Member States themselves cannot. A uniform set of rules on private enforcement with a clear basis would level the playing field and prevent forum shopping. Currently, for claimants who have the choice, going to the UK instead of Belgium would be much more advantageous.

Clear legal rules setting the same basis for every EU Member State could prevent this, making every national jurisdiction equally valuable.

The CA 1998 provides for a right of private enforcement, yet is it not the actual basis on which the claim is brought: the actual basis is a claim in tort, namely breach of statutory duty. In Belgium this is the same, based on the Articles 1382-1383 of the Civil Code. This system works effectively in both countries.

Three types of remedies were discussed. In tort, we saw damage and injunctions, and as a civil sanction, nullity of the infringing agreement was a possibility. Damage actions are the first remedy that comes to mind when thinking about private enforcement, and they also seem to be the most common type of claims in the UK, with countless examples such as the *Cardiff Bus Case, Enron, Devenish*, etc. In Belgium, there has only been one high profile case up till recently, the *Otis Lift Cartel case*. A uniform legal instrument for the whole of Europe would be most pragmatic when based on a tort structure, which is already being used in the Member States with good results. There are many examples of case law in the UK, but no similar amount of Belgian cases. Yet all scholars agree that the tort system is the appropriate tool.

The most important type of remedy is without a doubt the action for damages. The three-legged structure of fault-damage-causation holds a clear test and it is to be expected that the Directive will hold the same test.

Collective actions for damages, if decided they will be introduced, will be a very important and valuable feature of the new Directive. Opportunities for collective redress are available in the UK but they display a number of shortcomings. Because of the opt-in system and the fact that it is only available to consumers and not businesses, the full amount of potential claimants in not being reached. Belgium currently has a rather individualistic system, but voices were heard in favour of introducing an option for collective action. The EU seems in favour of a collective redress system, and it should rightly be encouraged to appear in the new Directive. The advantages are numerous. Consumers would be more likely to claim damages for the harm suffered by cartelists and unfair competition. A collective action would be able to reunite those consumers and go after the damages that one consumer would never be motivated enough to sue for himself, as they are simply just too small. But competition rules are only then fully effective when victims know they are able to take their case to court and win, and when the benefits of bringing the action outweigh the costs. This is why an opt-out system would have the greatest effect. An opt-in system would simply not sufficiently

motivate enough people. The British government realised this and plans to introduce it, but this will only be available for UK based claimants. Hopefully the new Directive will implement such an opt-out system as well across the whole EU.

We can expect the introduction of a collective action to lead to more private enforcement cases and damages in compensation. But what kind of damages should these be then? Compensatory damages are the logical form and they are strongly anchored in the legal systems of both Belgium and the UK. Punitive or exemplary damages are another issue. In Belgium, they are simply not available at the moment. In the UK on the other hand, punitive damages are a possibility when no previous fine has been imposed on the company, as showed the *Cardiff Bus case,* where almost double of the actual amount of damages suffered had to be paid out to plaintiff. In *Devenish*, the company had been previously fined in public enforcement proceedings, and the High Court ruled punitive damages were not possible, as this would violate the *ne bis in idem* principle. In collective actions however, the British government plans to prohibit these exemplary damages. In my opinion, the Directive should not introduce them either. Public enforcement still plays a very big role in the EU, and this is not about to change. With the European Commission already imposing heavy fines in public competition cases, the element of deterrence inherent to punitive damages is already present. Combined with the principle of *ne bis in idem*, this leads to think that the toll on companies infringing the rules could turn out to be much heavier than reasonably expected.

Closely related to this is the possibility of a passing-on defence. The policy is not very clear in Belgium, nor is it in the UK very. One thing is sure: scholars do not agree on it. The British government seems to be against it, since they decided on not regulating it. But after making the balance, the passing-on defence definitely has its merits. If it is not accepted, the defendant risks paying twice. In combination with the EU's heavy fines, this could mean the death of the company. Equally important, an action for damages cannot become a source of unjust enrichment: companies that pass on the surplus to their customers in fact did not suffer a loss, or at least not as much as they could have. It is therefore recommendable for the Directive to allow the use of the passing-on defence.

Damages are not the only form of private enforcement available. Injunctions are also a worthy type of action. Although available in both countries, they seem to be more prominent in Belgium than in the UK. The Belgian unfair competition procedure is very efficient and the most commonly used and appreciated procedure before the civil courts. In combining the best

aspects of an interim order and a claim on the merits, this cease and desist order can act swiftly, yet still decide on the merits of the case. The English High Court also has jurisdiction to grant interim or final injunctions, as an equitable remedy, and plans are being made to empower the CAT to grant them as well. If the new Directive were to introduce an injunction especially tailored for private enforcement, it would be a good idea to base this on the Belgian cease and desist order, which shows to have many excellent qualities. Injunctions are definitely not to be forgotten in the Directive.

The third remedy discussed, the civil sanction of nullity, is in a way different from the previous two. This is a civil consequence affecting the infringing agreement itself, and does not as such do something that "helps" the victim. Yet it is still an important form of private enforcement. In my opinion, there is no need for the Directive to introduce a change to the nullity regime. There is sufficient case law already, for example *Manfredi,* demonstrating the state of the law. Nevertheless, if the Directive were to regulate on it, a clear stand on the transient character of the nullity sanction would be essential.

In a final consideration, it can be said there are many opportunities for a new Directive to make significant contributions to private enforcement. As I have described, a number of things could certainly be improved, and many consumers as well as businesses would benefit from this. On a national level, the British government's plans are beyond doubt a step in the right direction. The proposals go far, but not as far as to introducing a type of "US litigation culture". They maintain a balance between the needs for efficiency and the reactions gathered in the consultation round. Change is on its way in Belgium as well with a new version of the Competition Act 2006 voted in by the Senate and entering into force later this year. It will be interesting to see if this Act resembles the upcoming Directive; will the Belgian legislator and the European legislator have had the same ideas and goals?

Private enforcement of competition law certainly is on the rise in Europe, and this will only continue in the future.

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