Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios

FINAL REPORT

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Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios

EXECUTIVE SUMMARY

Private enforcement of antitrust rules has been possible in the European Union since the 1957 Treaty of Rome. The role of private enforcement in complementing public enforcement by competition authorities has been often stressed by the European Commission, and gained new momentum after the modernisation of EC competition law. As recalled in Regulation 1/2003, the role of national courts in protecting subjective rights and awarding damages to victims of infringements complements that of the competition authorities. The European Court of Justice (ECJ) decisions in *Courage v. Crehan* and in *Manfredi* recognised that the full effectiveness of the Treaty would be put at risk if it were not open to any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition. At the same time, the ECJ held that there is an obligation to provide for effective means to exercise the right to compensation of harm suffered as a result of an antitrust infringement.

Against this background, private enforcement of antitrust laws through private damages actions has been found to be in a state of "total underdevelopment" in a study carried out in 2004 for the European Commission, and the analysis we performed (contained in Section 1.2.2 of the Introduction to our Report) suggests that things have not significantly improved since then, although in a very narrow set of countries antitrust damages actions seem to be slowly becoming more frequent. As a matter of fact, 17 of the 27 Member States still have no trace of private antitrust damages actions, and also in other Member States private antitrust litigation seems very sparse and related to isolated streams of cases. In the EU27, public enforcement remains by far the most common remedy for antitrust infringement, whereas in other countries, the vast majority of all antitrust cases are pursued by private parties as opposed to the competent public authority (in the US, for example, the ratio of private to public cases is approximately 9:1).

The potential benefits of effective antitrust damages actions in the EU include: (i) *increased corrective justice – i.e.* securing that victims of anticompetitive conduct are fully compensated for the loss sustained; (ii) *enhanced deterrence – i.e.,* ensuring that undertakings that violate Community 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; (iii) *internal market benefits – i.e.,* ensuring that EU businesses and citizens are put in similar conditions to exercise their right to damages throughout the territory of the EU, and reducing legal uncertainty for undertakings wishing to engage in cross-border trade.; (iv) *bringing competition law closer to the citizen – i.e.*, raising the awareness of citizens as regards the benefits of effective competition policy as well as their right to claim damage compensation in case of antitrust injury can contribute to the development of a solid culture of competition in Europe; and (v) *macroeconomic impacts – e.g.*, positive effects in terms of competitiveness, growth and jobs due to more competitive markets, which reduce allocative inefficiency by leading to greater output, lower prices and better quality.

The path towards achieving the goal of effective antitrust damages actions in Europe must be approached with caution, in order to secure the potential advantages of creating a “second pillar” of enforcement in Europe, without incurring the drawbacks of badly designed private damages actions. The European Commission identified possible policy options in the 2005 Green Paper on damages actions for breach of EC antitrust rules. The adoption of a White Paper on antitrust damages actions is expected in 2008.

The present study is conceived to support the impact assessment of the upcoming White Paper. The study is composed of three main parts: in Part I, we review the existing literature and academic debate, illustrate the impact of the current ineffectiveness of antitrust damages actions in the EU and assess the maximum expected impact of a more effective system of private antitrust damages actions, intended as the “frontier” Europe could reach if actions for damages developed substantially in the years to come; in Part II, we assess the impact of alternative policy options for seven different proposed measures, ranging from multiple damages to fee-shifting rules, rules on group litigation, access to evidence, limitation periods, the treatment of leniency applicants in private damages cases and methods to calculate damages; in Part III, we combine our assessment of these specific issues into a scenario analysis. The main findings of our analysis are summarised below.

1 The potential impact of more effective private damages actions

Predicting the future development of private damages actions in Europe is not straightforward, as the legal changes that would be introduced in order to facilitate private actions for damages are not defined yet. In Part I of our Report, we develop a range for the potential impact of more effective private damages actions for breach of the rules prohibiting cartels and other types of anticompetitive behaviour, by relying mostly on data from a jurisdiction with effective private enforcement, *i.e.* the US, although it is often observed that in the latter jurisdiction a “litigation culture” has emerged in the past years. Accordingly, the results we obtain are to be considered as a mere indication of

the potential for private antitrust damages actions to provide private parties with recovery of antitrust injury, not as a precise calculation of how the future antitrust enforcement will look like in the EU27.

The main results of our analysis are the following:

- Under reasonable assumptions (*e.g.*, a detection rate of cartels of 20%), if double damages with no prejudgment interest (to be considered as broadly comparable to single damages plus prejudgment interest) are available, the yearly damage recovery could reach €17.3 billion; whereas, if treble damages without prejudgment interest (or double damages with prejudgment interest) were awarded, the yearly damage recovery could reach €25.7 billion. This would amount to 0.23% of EU GDP. If double damages plus prejudgment interest were introduced only for cartel cases, economic actors suffering antitrust injury may recover up to €20.9 billion Euros yearly. This would amount to 0.19% of EU GDP[1].
- The impact on deterrence is significant at the margin, although firms would still not be fully deterred from forming cartels and engaging in other anticompetitive conduct. Prospective infringers may face an expected liability of up to €29.4 billion yearly (including the opponents' legal fees).
- If private antitrust damages actions do not become more effective in the years to come, foregone benefits for victims of antitrust infringement would range between €5.7 billion and €23.3 billion.
- Expected costs are significant, but never offset the corrective justice impact of enhanced private antitrust enforcement. Lawyers' fees and court fees, which are by far the largest portion of expected costs, would amount to approximately 15%-20% of damage recovery (this result was reached using US data as a benchmark, as no EU data were available).
- Overall, more effective enforcement of antitrust laws in Europe (with public and private enforcement) could bring about yearly social benefits as high as 1% of GDP, or €113 billion in 2006. The contribution of private enforcement to this impact is expected to be substantial.

2 Selected options and scenarios

In assessing alternative policy options, we analyse potential benefits under three main headings, defined as follows:

- *Impact on corrective justice*. We consider this goal to be fully achieved whenever private claimants are granted *restitutio in integrum*, and

[1] Note, in this respect, that according to existing studies (*i.e.* Lande 1993, Lovell 1982) treble damages without prejudgment interest would fall between single and double damage awards with prejudgment interest.

accordingly neither over- nor under-compensation are likely to be observed. We distinguish between (i) increased number of compensated victims; and (ii) extent to which compensation is aligned with actual harm.

- *Impact on deterrence*. We consider this impact to be maximised when the best possible level of deterrence is achieved – thus, neither under- no over-deterrence emerges from the implementation of a given option. Deterrence can be achieved due to superior information available to private claimants; due to increased likelihood that a legal action is initiated; and as a result of increased prospective liability for would-be infringers.
- *Impact on the internal market*. This includes potential benefits as regards the elimination of disparities in the legal regime for antitrust damages actions in the member states, and the creation of a level playing field between national jurisdictions as regards both the possibility for private claimants to seek compensation in national courts, and the reduction of legal uncertainty, which can represent a barrier for companies wishing to engage in cross-border trade.

As regards potential negative impacts, we analyse the following cost items:

- *Litigation costs*. This category of costs includes the cost for litigants when the case is brought to court; settlement costs; and the enforcement cost for courts and competition authorities.
- *Administrative burdens*. In line with the European Commission's Impact Assessment Guidelines, we include in this category only "costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties." As a result, trial costs and other enforcement costs that do not depend on a specific information obligation included in the law are not considered as administrative burdens, and are categorised as costs in the broader "litigation costs" heading described above.
- *Error costs*. This category includes the costs related to the likelihood that courts issue a mistaken decision concerning the existence of an infringement, proof of causation or the occurrence of harm. Thus, this heading covers mostly the likelihood of type I and type II error costs (*i.e.,* costs of false convictions and false acquittals), but includes neither errors in the quantification of damage (included as over- or undercompensation in "impact on corrective justice" above); nor the extortion of settlements by claimants bringing frivolous suits (included as over-deterrence in "impact on deterrence" above, and in litigation costs if it leads to significant increase in the number of strategic actions filed).
- *Harmonisation costs*. These relate to the need to introduce changes in national jurisdictions to increase the effectiveness of private antitrust damages actions, in response to an initiative at EU level.

In addition, we consider the likely impact of the selected scenarios on SMEs and consumers; as well as in macroeconomic terms, on competitiveness, growth and jobs.

In Part II of our Report, we perform a qualitative assessment of the options, which results in summary tables at the end of each section. For each benefit and cost heading, we also assess the available options by associating scores from "0" to "5", where "0" means that the impact is lowest, and "5" that the impact is highest. Our scores only provide a measure of the "intensity" with which certain effects would materialise under each of the options. On this basis, we assess the following potential types of rules for enhancing the effectiveness of antitrust damages actions:

- *Costs and rewards of antitrust damages actions*. We assess the costs and benefits of a number of different options, which combine rules on damage multiples (single damages; double damages for cartels; double damages for all types of infringements; decoupling of damages) with rules on fee allocation (loser-pays; one-way fee-shifting, meaning that the losing claimant does not have to pay the defendant's legal expenses; and discretionary fee-shifting rules such as cost-capping or cost-protection orders). We also discuss the impact of conditional and contingency fees and an option where the competition authority acts as *amicus curiae* for the quantification of overall harm.
- *Group litigation*. We assess the costs and benefits of opt-in collective actions, opt-out collective actions, opt-in representative actions, opt-out representative actions, mandatory representative actions, joinder of parties and test cases, and joinder of claims.
- *Access to evidence*. This section assesses the pros and cons of the different policy options set out in the Green Paper, which all preserve the requirement of fact-pleading, although with a reasonable threshold for initial fact-pleading to facilitate access to justice. We analyse options such as the possibility to request the disclosure of specific documents, of classes of documents, and also an adversarial system of *inter partes* disclosure. In addition, we also analyse two options as regards the disclosure of documents handed over to the competition authority in a previous public proceeding – one imposing a disclosure obligation directly on the defendant, the other entailing a request by the judge.
- *Damage calculation.* In this section, we compare the merits of harm-based methods and gain-based methods (*i.e.* methods that approximate the damage suffered by the claimant by assessing the profit reaped by the defendant as a result of an antitrust infringement). We survey available techniques such as overcharge-based methods, and techniques used to measure lost profits. We assume that adopting only a gain-based method would be hardly feasible and certainly not desirable, and consequently we provide an impact assessment of an option which entails the availability of gain-based measurement whenever the harm is difficult or impossible to

calculate. We finally combine the harm-based and gain-based options with two different assumptions as regards the calculation of the prejudgment interest – depending on whether interest is calculate from the date in which the infringement occurred, or from the date in which the harm suffered by the claimant occurred.

- *Passing-on defence and indirect purchasers' standing.* At EU level, the decision of the European Court of Justice in the *Manfredi* case implies that indirect purchasers cannot be refused to have standing. At the same time, there are currently no legal or statutory provisions directly impeding indirect purchasers' claims in the European legal systems. In our Report, we assess the potential impact of four different options: (i) allowing the passing-on defence, but not indirect standing; (ii) allowing both the passing-on defence and indirect standing; (iii) denying the passing-on defence, but allowing indirect standing; and (iv) denying both the passing-on defence and indirect standing.
- *Interaction between leniency programmes and private enforcement*. We compare the impact of two options: (i) a fixed or variable rebate on damages that can be sought from leniency applicants; and (ii) the removal of joint liability of the successful immunity applicant.
- *Limitation periods*. Finally, we address the issue of the optimal limitation period for antitrust damages claims, distinguishing between standalone actions and follow-on actions. The options we consider are: (i) "independence of private and public enforcement" where no suspension of the limitation period is provided if a competition authority starts a proceeding on a related issue; (ii) the "German option", where the limitation period is suspended when the competition authority institutes a proceeding that is relevant for that same damage action, and resumes again when the proceeding is closed; (iii) a "modified Spanish option", in which a new limitation period starts running after a court of last instance has decided on the issue of infringement; and (iv) a "shortest period option", where the limitation period is five years from the date in which the private party having suffered antitrust injury becomes aware of the damage suffered, or 1-2 years from the date when a public decision on the matter cannot be challenged anymore, whichever is shorter.

2.1 Impact assessment of selected scenarios

In order to assess the combined effect of a number of different individual measures, the European Commission selected five alternative bundles of measures as potential policy scenarios for further analysis in our Report. The five scenarios selected for in-depth assessment are intended to reflect the wide spectrum of options for individual measures identified in the Green Paper and analysed in detail in Part II of our Report. In addition, there is a no intervention

and a non-regulatory policy scenario. The combination of various individual measures in the scenarios was made so that each scenario reflects a coherent policy line and similar level of intervention. The table below summarises the scenarios identified, which are constituted of different combinations of policy options already assessed – for the most part – in Part II of our Report.

Table A – Selected scenarios

N.	Damages	Cost rule	Access to evidence	Passing-on defence	Indirect purchaser	Collective redress	Limitation period
0	No action	No action	No action	No action	No action	No action	No action
1	Double damages plus prejudg, interest	One-way fee-shifting	Broad disclosure with low threshold	Not allowed	Allowed	Opt-out class actions	20 years as of damage + subjective period of 5 years
2	Double damages for cartels, plus prejudg, interest	Loser-pays, but judge may shift all costs	Initial provision of lists + Broad disclosure based on fact-pleading	Allowed	Allowed	Opt-in collective + non-mandatory representative actions	Minimum 5 years as of reasonable knowledge + restart (2 years)
3	Single damages plus prejudg, interest	Loser-pays, but judge may shift some of the costs	Disclosure of specific categories of documents, fact-pleading, proportionality	Allowed	Allowed	Non-mandatory representative actions	Minimum 5 years as of reasonable knowledge + suspension
4	Recommen-dation of single damages plus prejudg, interest.	Recommen-dation of discretionary shifting of some of the costs at the judge's discretion	Recommen-dation through soft-law of measures listed under option 3.	Recommen-dation of allowing the defence	Recommen-dation of allowing standing to indirect purchasers	Recommen-dation of non-mandatory representative actions	Recommen-dation of a 5-year limitation period, to be suspended during a public proceeding

***Legenda**: shaded areas are those where no binding policy action is needed at EU level*

In what follows, we summarise our benefit-cost analysis of each of the scenarios identified.

2.1.1 "No policy change" scenario

2.1.1.1 Benefits

- ***Corrective justice.*** We found no strong evidence suggesting that, absent intervention at Community level, the number of compensated victims will increase rapidly in the next few years. In this respect, the "no policy change" scenario corresponds to a continued very low level of corrective justice.

- ***Deterrence***. The "no policy change" scenario would entail, at best, a very small increase in deterrence in the years to come, thanks mostly to national initiatives aimed at encouraging actions for damages. The impact on cartel deterrence of the "no policy change" scenario would be minimal from a forward-looking perspective; private damages actions may to some extent develop for vertical restraints – where private antitrust litigation is already common in some countries – whereas as regards other abuses of dominance, under this scenario private parties would not be able to effectively contribute to enforcement, mostly due to costly litigation and low win rates. This in turn would lead to a negligible contribution to deterrence.
- ***Internal market.*** Under the "no policy change" scenario no positive impact would be felt on the internal market goal - the current fragmentation could be even more visible in a few years from now. We also found no evidence that suggests that a virtuous "mutual learning" process (or a "race to the top" in a competition of legal orders) would stimulate the adoption of best practices in Member States. To the contrary, forum shopping is likely to emerge, with some countries becoming more attractive fora for damage actions than others.

2.1.1.2 Costs

- ***Litigation costs***. If we assume that a slight, gradual increase in the number of cases would emerge even absent EU intervention, litigation costs may correspondingly increase. To be sure, in individual cases litigation costs may be very high. But overall, given the low number of cases expected under this scenario, the impact is very small.
- ***Administrative burdens*** are not likely to increase under this scenario. As an upper-bound assessment, we can assume that: (i) a (slow) development of private enforcement in the next few years may slightly increase the "population" associated with some administrative activities, such as disclosure of specific documents during trial; and (ii) changes in national legislation may lead to broader disclosure obligations and/or a relaxation of the threshold for initial fact-pleading. Were this to be the case, the "frequency" of some administrative activities linked to information obligations would further increase. Overall, the impact would not be substantial.
- Also ***error costs*** would remain negligible as they are today. In absolute terms, Type I and Type II errors may increase if the number of cases filed also gradually increases overtime. At the same time, however, the statistical incidence of error costs would decrease alongside with an increase in the number of cases filed, as courts get more familiar with the technicalities of private enforcement.
- Finally, absent EU intervention, no ***harmonisation costs*** would emerge.

2.1.1.3 Other impacts

- *SMEs and consumers* would be the most disadvantaged categories under the "no policy change" scenario: absent intervention at EU level, in most member states smaller claimants would still face significant obstacles in obtaining access to justice to exercise their rights to compensation of harm suffered. In addition, as we explain in Part II of the Report, the lack of significantly widespread group litigation in EU countries would leave smaller claimants having sustained small losses virtually unable to exercise their rights.
- As regards *macroeconomic impacts***,** under this scenario the contribution of private antitrust enforcement to market efficiency would remain very limited, as we expect only a slow development of private antitrust litigation over the next years.

2.1.2 Scenario 1: summary of impact assessment

Under scenario 1, double damages (including pre-judgment interest) would be introduced for all types of antitrust infringement together with mandatory one-way fee-shifting and broad disclosure rules subject to fact pleading; the passing-on defence is excluded, whereas the passing-on offence is allowed. A system of opt-out class actions would be introduced. Finally, a 20-year limitation period from the occurrence of the damage claimed would be introduced, together with a subjective limitation period of 5 years from the date in which the claimant had reasonable knowledge of the harm. Below, we assess the likely impacts of this scenario in terms of benefits and costs.

2.1.2.1 Benefits

- ***Corrective justice***. Scenario 1 would exert a positive impact since the number of compensated victims would substantially increase; at the same time, for each of the victims, overcompensation might materialise in some cases. As a matter of fact, although double damages (including prejudgment interest) may in principle overcompensate claimants with respect to the actual loss sustained, in reality most cases settle before trial for amounts lower than the nominal damage claim. Opt-out class actions would lead to compensation of a larger number of victims, although the precise effect on corrective justice crucially depends on how damages are collected and distributed. Broad disclosure rules with a low threshold can increase the number of compensated victims and increase the accuracy of fact-finding, consequently allowing for a more precise quantification of the actual loss suffered. The 5-year subjective limitation period certainly exerts a positive impact on corrective justice, as it gives sufficient time for claimants to exercise their rights; however, the absence of suspension or restart may create situations in which claimants have insufficient time to exercise their right to damages. Finally, excluding the passing-on defence can exert a

mixed impact on corrective justice, leading in some cases to instances of duplicative liability.

- ***Deterrence.*** This scenario would clearly increase the deterrence effect of private enforcement. Defendants would face both a higher number of lawsuits and also larger expected liability. For (i) *cartels,* this option would certainly provide economic actors with a significant incentive to monitor and detect infringements, and at the same time would greatly facilitate actions by victims having suffered scattered damages, through opt-out class actions; (ii) for *vertical restraints*, the effect is highly positive, although likely to prove over-deterrent, as mandatory one-way fee-shifting and broad disclosure rules would provide claimants with the possibility of threatening to sue the defendant, imposing on the latter significant litigation expenses; (iii) in *abuses of dominance,* the likelihood of strategic lawsuits and the development of a "litigation culture" would be even more pronounced. An over-deterrent effect of private damages actions may also emerge since direct purchasers would have an increased incentive to file suit, given that the passing-on defence is not allowed.
- ***Internal Market.*** This scenario entails the creation of an entirely new and far-reaching set of rules that would be applicable in all EU member states. Needless to say, this option would contribute to put European victims in similar conditions as regards the possibility to exercise their rights to compensation before national and foreign courts.

2.1.2.2 Costs

- ***Litigation costs.*** Many of the features of this scenario facilitate litigation, be that for meritorious or for unmeritorious reasons. The major factors that would affect litigation costs are the combination of one-way fee-shifting, double damages and broad disclosure rules – which maximises the incentive to litigate, again leading in some cases to frivolous lawsuits; and opt-out class actions, which are normally very expensive to litigate.
- ***Error costs.*** On the one hand, broad disclosure rules would enable a more accurate scrutiny of the facts by the court, leading to a lower statistical incidence of errors. However, as litigation increases, errors would increase in absolute terms. In addition, the negative impact of each false acquittal and each false conviction would become greater, due to the combined effect of the damage multiple, opt-out group litigation and the absence of the passing-on defence. The magnitude of error costs is likely to be larger for cartel cases and for cases of abuse, as in cartel cases the number of victims represented in opt-out actions is likely to be large in some cases, and in cases of abuse the incentive to file strategic lawsuits would be significant.
- ***Administrative burdens***. Scenario 1 would lead both to a significant increase in the "number" of information obligations (due to broader disclosure rules); in the "population" of firms affected by each information obligation;

and in the "frequency" of administrative activities associated with each information obligation (due to an increase in the number of cases).

- ***Harmonisation costs.*** Scenario 1 is very far from the "no policy change" scenario, and would entail a brand new set of legal rules for most, if not all member states. Harmonisation costs would be consequently very high. Although it is certainly true that harmonisation costs are one-off costs to be weighed against more long-lasting benefits, in this case the enhancement of private antitrust actions that would certainly be observed under option 1 would come at a remarkably high cost.

2.1.2.3 Other impacts

- This scenario would definitely bring competition laws closer to smaller claimants, such as *SMEs and consumers*. Since these categories are most likely to have limited financial resources to devote to litigation and may be more risk averse, mandatory one-way fee-shifting, especially if coupled with broad disclosure rules, can facilitate them in suing for damages. Opt-out class actions also have the potential to involve larger classes of consumers and small firms having suffered scattered damages. At the same time, depending on market conditions, consumers might be harmed by the development of a "litigation culture", especially if litigation expenses for industry players increase significantly.
- Assessing the likely *macroeconomic impact* of this scenario is difficult, as a lot would depend on whether a "litigation boom" would emerge in Europe. If sufficient safeguards are introduced, especially to avoid the proliferation of frivolous and strategic suits, this scenario is expected to bring substantial benefits in terms of growth and employment if compared to the "no policy change" scenario, as it bears a potential impact on the competitiveness of markets and the possibility of entry of new firms.

2.1.3 Scenario 2: summary of impact assessment

This scenario entails the introduction of double damages only for cartels, whereas single damages would be awarded for all other types of infringement. Damage awards would include pre-judgment interest. As regards access to evidence rules, this would be based on an initial provision of lists of documents, leading to a rather broad possibility of disclosure based on fact-pleading. Both the passing-on defence and offence are allowed. No mandatory one-way fee-shifting would be introduced, but the judge would be given the discretion to derogate from the "loser-pays" rule by shifting all costs. These rules are coupled with opt-in collective actions, plus non-mandatory representative actions. The minimum limitation period is set at 5 years from the date in which the claimant should reasonably have realised the occurrence of damage, but a new limitation period of 2 years would start after the end of a public proceeding.

2.1.3.1 Benefits

- ***Corrective justice***. Imposing *single damages plus prejudgment interest* for non-cartel cases avoids the problem of overcompensation of claimants, although – compared to scenario 1 – the number of compensated claimants would be somewhat lower, due to a weaker incentive to file suit. In addition, some claimants in cases other than cartels may end up being undercompensated as most cases settle before trial for lower amounts than the actual harm suffered. Broad disclosure based on an initial provision of lists can reach the desirable results of facilitating proof of causation for claimants. *Opt-in collective and representative actions* ensure that scattered damage is compensated to a group of identifiable consumers. Corrective justice could also be enhanced by *discretionary fee-shifting rules*, if correctly implemented with clear guiding principles. Not excluding the *passing-on defence* is also more in line with the corrective justice goal. Finally, the limitation period selected in scenario 2 is the most desirable, as we observe in Section II.7 of our Report, as it ensures that claimants would have sufficient time to exercise their rights both in standalone and follow-on cases, without creating excessive uncertainty for potential defendants.
- ***Deterrence.*** This scenario would increase the deterrence effect of private antitrust damages actions, although to a lesser extent than scenario 1. For cartel cases, double damages and group litigation would encourage victims to exercise their right to damage compensation, with no risk of overdeterrence. The risk of overdeterrence is also minimal for *vertical restraints*, due to the absence of double damages. In these cases, informed claimants may be facilitated in filing suit mostly due to the access to evidence rule based on the initial provision of lists, which we found to be the most suitable to facilitate lawsuits and increase deterrence in Part II.3 of our Report. A similar rationale applies to *abuses*, where competitors and downstream purchasers are likely to act as claimants: article 82 cases are often very time-consuming, and proof of antitrust injury could be arduous and require a lengthy litigation process. Discretionary one-way fee-shifting can encourage claimants to file a meritorious lawsuit even if they fear that litigation would be lengthy and costly.
- ***Internal market***. Action may be needed for all individual measures, which would entail a transition period, after which EU member states would be endowed with a new legal system for antitrust damages actions. The likelihood that scenario 2 contributes to creating a level playing field is also high as the underlying assumption of this scenario is that the envisaged rules would be introduced through binding Community legislation.

2.1.3.2 Costs

- ***Litigation costs*** would increase under scenario 2, although to a lesser extent than under scenario 1. In particular, most of the increase would be due to

the achievement of the overarching goal of the policy actions at hand – ensuring that victims of EC competition law infringements have access to truly effective mechanisms for obtaining full compensation for the harm they suffered. This includes, most notably, the availability of opt-in collective and representative actions. Important safeguards against unmeritorious actions would be: (i) the judicial control of one-way fee-shifting and; (ii) requiring that the judge controls the proportionality of access requests in *inter partes* disclosure rules, although *ex post* – *i.e.* leaving it to the parties to exchange documents, but intervening in case the request is disproportionate.

- ***Error costs.*** Even if, due to the increased number of cases, the absolute number of mistaken judgments might increase, we do not expect scenario 2 to cause an increase in the statistical incidence of error costs. Rather, broad disclosure rules should enable more accurate fact-finding, and the application of the loser-pays rule – when the judge does not order one-way fee-shifting – stimulates a better selection of cases for litigation, thus preventing frivolous suits.
- ***Administrative burdens*** under scenario 2 would be mostly due to broad disclosure rules, which may increase the frequency of information obligations, such as gathering and communication of documents, and the increase in the number and type of documents that may be kept and communicated. Overall, the increase in administrative burdens would be lower than under scenario 1, although compared to the "no policy change" option the population of affected businesses would be larger, and the frequency and time associated with some information obligations will strongly increase compared to *status quo*.
- ***Harmonisation costs.*** Scenario 2 entails the enactment of a number of far-reaching changes to national laws, especially as far as civil procedure rules are concerned. The most significant harmonisation costs that would emerge include the need to overcome the problem of *double damages* in most member states; and the introduction of *broad disclosure rules* that resemble more an adversarial, rather than inquisitorial access to evidence system, and require no *ex ante* control by the judge.

2.1.3.3 Other impacts

- The availability of representative actions could greatly encourage ***SMEs and consumers*** to get involved in antitrust damages actions, as it would reduce the cost of filing suit, informing the unaware victims and reducing the rational apathy problem. Also the introduction of double damages for cartel cases and discretionary fee-shifting, when applied on the basis of clearly specified criteria (*e.g.* the financial conditions of the claimant), may encourage these claimants to file suit.

- As regards ***macroeconomic impacts***, the outlook of scenario 2 would appear less uncertain than that of scenario 1. We see no significant risk of a deteriorating business environment due to excessive litigation. To the contrary, we consider that this scenario would positively contribute to the deterrence and corrective justice goals of antitrust enforcement, by fostering the creation of the "second pillar" of enforcement.

2.1.4 Scenario 3: summary of impact assessment

This scenario would imply the award of single damages (including pre-judgment interest) for all types of infringement. Access to evidence would be based on disclosure of specific categories of documents, fact-pleading and proportionality criteria. Both the passing-on defence and offence are allowed. The judge would be given the discretion to derogate from the "loser-pays" rule by shifting some of the costs borne by the parties. Non-mandatory representative actions would be available for all types of infringement. The minimum limitation period is set at 5 years from the date in which the claimant should reasonably have had knowledge of the occurrence of damage, but such period would be suspended in case a public proceeding is started.

2.1.4.1 Benefits

- ***Corrective justice***. Scenario 3 would contribute to the attainment of corrective justice, although to a lesser extent than scenarios 1 and 2. Compared with the *status quo*, this scenario increases the extent to which victims receive *restitutio in integrum*, but does not lead to a large increase in the number of compensated victims. Incremental corrective justice would be achieved mostly as a result of representative actions and the disclosure of classes of documents. The *5 year minimum limitation period* is certainly sufficient to enable recovery of antitrust injury: however, as we observed in Part II of our Report, the suspension of the limitation period under this rule may create a narrow set of cases in which the remaining time for exercising a private right following a previous decision would be insufficient.
- ***Deterrence***. This scenario would contribute positively to deterrence, although the extent of this contribution would be significantly smaller than under scenarios 1 and 2. The *disclosure of classes of documents* would increase the probability of success for claimants compared to the *status quo*, at the same time increasing accuracy in damage assessment, which can contribute to deterrence. The introduction of *representative actions* may lead to significant benefits in terms of improved information/detection in *cartel cases*, as proving the existence of a cartel tends to be a very complex exercise. In addition, a representative action by a consumer association may cure the rational apathy problem in case of scattered damages. In cases of *vertical restraints*, some information savings would materialise, as parties do not always possess optimal information. In cases of *abuse of dominance*, the availability of representative actions would contribute positively to

deterrence, especially since these forms of litigation exhibit significant economies of scale, can cure the rational apathy problem and also stimulate further individual proceedings from plaintiffs outside the represented group. Finally, representative bodies (especially trade associations) may have informational advantages compared to their represented parties. Given the features of scenario 3 – *e.g.* the loser-pays rule and narrower disclosure rules than in scenarios 1 and 2 – we deem unlikely that frivolous suits would increase significantly.

- ***Internal market***. This scenario would enable partial convergence as regards limitation periods and the use of discretionary partial fee shifting, which is already applied in some countries. Most importantly, representative actions would become available in all member states. At the same time, however, this scenario would introduce only a limited set of new rules, whereas some EU member states (*e.g.* the UK) already have a different set of rules for encouraging private antitrust enforcement. For example, punitive damages and the adversarial model of *inter partes* disclosure would remain available only in a few European countries. All in all, the conditions for bringing claims for antitrust injury in Europe would remain different from country to country.

2.1.4.2 Costs

- ***Litigation costs*** would slightly increase compared to the *status quo*, as a consequence of the increased number of actions. Such an increase would be mostly due to representative actions, and only marginally because of the disclosure rule and the discretionary, partial fee-shifting. At the same time, there are reasons to expect that litigation costs *per case* would decrease, as representative actions may reduce costs for claimants and for courts in cases involving large groups of members, and the disclosure rule may reduce the cost of gathering evidence for both claimants and defendants due to the more reasonable threshold for initial fact-pleading and the broader scope of disclosure relative to *status quo* in most countries. As the disclosure rule preserves the centrality of the judge, costs for the parties and the risk of both "fishing expeditions" and "discovery blackmail" would be reduced. As a result, we expect total litigation costs under this scenario to exhibit a slight increase, depending on the uptake of representative actions in the member states.
- ***Error costs.*** Under this scenario, we also see no reason why these costs should increase, at least in terms of statistical incidence on the total number of trials. To the contrary, more accurate fact-finding due to access to a larger amount of information in many countries may lead to lower incidence of errors. This effect may be offset by the expected slight increase in the number of cases.

- ***Administrative burdens*** would slightly increase as a result of the introduction of access to classes of documents, because of the expected likely increase in the number of cases and of the longer limitation periods in some member states (*i.e.*, Cyprus, Spain, Portugal, Malta, Lithuania and Slovenia), leading to longer record-keeping obligations and accordingly an increase in the time associated with each record-keeping obligation.
- ***Harmonisation costs*** would not be as high as in the previous two scenarios, and would be mostly due to: (i) an extension of limitation periods for antitrust damages actions in Cyprus, Spain, Portugal, Malta, Lithuania and Slovenia; (ii) changes in access to evidence rules in most countries, *i.e.* those countries where disclosure is limited to specifically identified documents; and (iii) the need to allow for representative actions brought by qualified or "certified" bodies. Whether discretionary partial cost-shifting would entail harmonisation costs, it depends on the way in which such rule would be introduced at EU level.

2.1.4.3 Other impacts

- Overall, scenario 3 may encourage and help *SMEs and consumers* to get involved in private damages claims, mostly thanks to the availability of representative actions, although the degree of involvement would be lower than under scenarios 1 and 2. In particular, smaller claimants wishing to initiate a standalone lawsuit would be still significantly discouraged, especially if they do not possess enough information to substantiate their claim.
- The ***macroeconomic impact*** of this scenario relative to the "no policy change" scenario will be smaller relative to scenarios 1 and 2, but still significant. This set of rules is less likely to enable the emergence of a strong "second pillar" of enforcement, but would add to public enforcement the instrument of representative actions by certified and qualified bodies. Accordingly, the emergence of any impact depends on whether representative actions would actually develop, allowing consumers and businesses to exercise their rights at lower costs.

2.1.5 Scenario 4: summary of impact assessment

Scenario 4 is identical to Scenario 3, but – unlike the first three scenarios – does not entail any legislative measure at EU level. Under scenario 4, the European Commission would identify and recommend the adoption by member states of a set of measures and good practices observed at national level, with a view to facilitating antitrust damages actions in the EU. Accordingly, this option only requires the issuing of soft law by the Commission. Compared to the previous scenarios, the suitability of scenario 4 to achieve the desired goal of ensuring that victims of EC competition law infringements have access to truly effective mechanisms for obtaining full compensation for the harm they suffered –

besides a more general "awareness-raising" impact – would have to rely on: (i) a *"moral suasion" effect*, which leads member states to consider legislation according to the recommendations of the Commission; and (ii) *a "regulatory competition" effect,* with best practices being adopted by member states through mutual learning, leading to a "race to the top". However, our findings in the Report suggest that there is no evidence that these effects would actually emerge in Europe.

2.1.5.1 Benefits

- ***Corrective justice***. The prospects for increased compensation of harm suffered would be mostly dependent on whether, on top of the very few national legislators that are already taking action to enhance private antitrust enforcement, others would follow suit due to soft law, awareness-raising instruments are adopted by the Commission.
- ***Deterrence.*** The adoption of soft law recommending a limited number of legal changes would entail a fairly limited impact. As scenario 4 is identical to scenario 3, but is implemented only through soft law (*i.e.* a recommendation), the already limited impact of scenario 3 on deterrence – mostly confined to the introduction of representative actions, discretionary partial cost-shifting and access to classes of documents instead of specific documents – here becomes even weaker.
- ***Internal market***. We do not consider this option as likely to achieve a level-playing field, by putting European businesses and consumers in similar conditions to exercise their right to damages regardless of the national jurisdiction where they seek redress. To the contrary, if existing differences in legal regimes persist or become even wider, a significant risk of "forum shopping" by claimants might emerge, leading to selective litigation and a further fragmentation in the application of competition rules in EU member states.

2.1.5.2 Costs

- ***Litigation costs.*** The impact of soft law adopted by the European Commission on litigation costs would not be significant. To the extent that this action leads national legislators to enact legislation in this field, an increase in litigation costs may ensue. If representative actions become more widespread, litigation costs per case would decrease due to economies of scale.
- Likewise, it is impossible at this stage to assess what the impact of scenario 4 would be on ***administrative burdens*** and ***error costs***. Even if legislation is enacted at national level, the impact would be low, as the legislation enacted would be of the same type analyse in scenario 3 by definition. And ***harmonisation costs*** would not emerge, as there would be no direct harmonisation imposed by EU legislation; Member States that follow the

Commission recommendations would anyway incur some implementation costs, which anyway would not necessarily lead to harmonisation at EU level.

3 Conclusion

Our Report contains an extensive analysis of policy options aimed at making private antitrust damages actions more effective in the EU, which we first analyse in isolation, and then combine into policy scenarios. After providing an estimate of the potential impact of a more effective system of private antitrust enforcement in Europe, which we find to potentially lead to damage recoveries of €25.7 billion yearly, we compare alternative scenarios that could, although to different degrees, approximate this potential. The five scenarios identified have widely different impacts on both benefits and costs, and indicating the most suitable combination of options would fall outside the scope of this report: however, we found strong evidence in favour of action at EU level, as the use of soft law measures does not seem suitable to significantly increase the corrective justice and deterrence goals that are embedded in this policy initiative.

Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*

1 Introduction

This Report contains an analysis of the potential impact of more effective damages actions based on the breach of antitrust rules in the European Union, as well as an assessment of the available options to encourage meritorious antitrust damages actions before national courts in the EU27. As requested by the European Commission, the present study is conceived to support the impact assessment of the upcoming White Paper on antitrust damages actions, which will illustrate the direction the Commission intends to take to enhance private antitrust enforcement through damages actions in the EU[2].

Private enforcement of EC antitrust rules has been possible in the European Union since the 1957 Treaty of Rome, as Articles 81 and 82 of the Treaty are directly applicable in member states[3]. Since 1973, the Commission has repeatedly expressed the view that private actions can provide a useful complement to its role as public enforcer[4]. Such application can take different forms – *e.g.*, actions for injunctive relief, and actions for damage awards to those who have suffered a loss caused by an infringement of the antitrust rules.

The role of private enforcement in complementing public enforcement by the European Commission and NCAs has been further stressed after the modernisation of EC competition law. As recalled in Regulation 1/2003, the role of national courts in protecting subjective rights and awarding damages to victims of infringements complements that of the national competition authorities (NCAs) of the Member States.[5] The ECJ decision in *Courage v. Crehan*

* The Authors wish to thank Aleksandra Ossowska and Albert Sanchez Graells for their contribution to this Report.

[2] Throughout the text, we refer both to "private antitrust enforcement" and "private antitrust damages actions". These terms are often used interchangeably in the literature; however, private enforcement does not only refer to damages actions, as it encompasses also actions aiming at injunctive relief. Readers should therefore keep in mind that the main focus of our Report is on private damages actions for breach of EC antitrust rules.

[3] Article 81(3) is directly applicable and enforceable only since 2004, after the modernisation of EC competition rules.

[4] W. P. J. Wils., *Should private enforcement be encouraged in Europe?*, in World Competition, 2003, 478.

[5] Recital 7 of Reg. 1/2003.

has further highlighted the possibility for victims of antitrust infringements to claim damages before national courts.[6] Both in *Courage* and in Joined Cases C 295/04 to C 298/04 (*Manfredi et al.*), the ECJ recognised that the full effectiveness of the Treaty would be put at risk if it were not open to any individual to claim damages for loss caused to him by conduct liable to restrict or distort competition. At the same time, the ECJ held that there is an obligation to provide for effective means to exercise the right to compensation of damages suffered as a result of an antitrust infringement.

Against this background, private enforcement of antitrust laws has been found to be in a state of "total underdevelopment" in a study completed in 2004 for the European Commission, and things have only marginally changed since then[7]. In Europe, public enforcement is by far the most common remedy for antitrust infringement, and statistics show that at most 10% of antitrust litigation is initiated by a private claim before a national court[8]. On the contrary, in the United States the ratio of public to private enforcement is completely reversed: at least 90% of legal actions for antitrust damages are initiated by private parties[9].

Several reasons can be identified for the current underdevelopment of private antitrust damages actions in Europe. As a general note, the European system of competition law enforcement has been traditionally less geared towards achieving deterrence through the initiative of private plaintiffs, as opposed to the US system, where private enforcement is way more developed, and public enforcement was added only at a later stage. This is both the cause and effect of existing procedural arrangements in the US – such as the possibility to award multiple damages, broad adversarial discovery rules, a favourable legal landscape for collective actions including contingency fees for lawyers, etc.

In addition, damages actions are limited also since victims of antitrust infringement often have limited knowledge of actual harm: especially SMEs and final consumers have little awareness of actual anticompetitive conduct, let alone the harm this may inflict on them, *e.g.* in terms of higher prices. Accordingly, absent intervention by a public authority, it may be difficult for them to realise that an antitrust infringement has occurred. On the other hand, while public authorities have a specific mandate for detecting antitrust

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[6] See, *e.g.*, Case C-453/99, *Courage Ltd. v. Bernard Crehan*, 2001, ECR, I-6297 and the recent decision of the European Court of Justice, joint cases C- 295/04, 297/04 e 298/04 *Manfredi et al. v. Lloyd Adriatico assicurazioni Spa e Assitalia Spa*, 2006, not yet published.

[7] Ashurst (2004), *Study on the conditions of claims for damages in case of infringement of EC Competition rules*, Brussels, 2004, 27. See, in addition, our update of this analysis at Section 1.2 below and in Annex I to this Report.

[8] See *infra*, Section 1.2.2 for an analysis of recent cases.

[9] In 2004, 95.7% of all antitrust cases filed were private cases. See *Sourcebook of Criminal Justice Statistics Online*, http//www.albany.edu/sourcebook/pdf/t5412004.pdf - Table 5.41.2004.

violations, and have more effective investigation tools at their disposal, they also have limited resources.

Furthermore, antitrust violations often produce scattered damages for numerous victims, where the damage suffered by each individual victim is small[10]. The resulting problem is that individual victims may have scant incentives to sue, even when the overall damage imposed on society as a result of the anticompetitive conduct is significant. Moreover, as a single anticompetitive conduct may affect a large group of undertakings or consumers, every victim may have an incentive to wait for others to bring legal action for obtaining compensation, and then take a free ride on a previous judgment. This "leader-follower" dilemma, which can be framed as a collective action/free-riding problem, can discourage victims from acting as first-movers in deciding whether to sue for damages[11].

Moreover, damages actions may remain underdeveloped since, even when a private party holds more information than a public authority, for example because she participated to some meetings of a cartel, actually proving that such meetings led to anticompetitive conduct is not automatic, and often requires further evidence[12]. Another reason is that, for some types of infringements, proof of anticompetitive behaviour requires an assessment of the effects and of the potential pro-competitive nature of the observed practice; competition authorities and national courts are normally in a better condition to assess the merits and drawbacks of observed conduct, and substantiating a claim for a private party can prove very difficult, costly and time-consuming. As regards cartels, even where leniency programmes exist, undertakings or individuals wishing to 'whistleblow' may face likely retaliation by other cartel participants: especially in case of lengthy proceedings, this could potentially discourage private parties from applying for leniency, although existing evidence – mostly from the US – shows that effective private enforcement and leniency programmes can actually co-exist.[13]

Finally, legal uncertainty still exists as to whether and under what conditions private enforcement would be allowed before national courts: rules on the passing-on defence, existing civil procedure rules, the impact of previous

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[10] This problem is of course not specific to antitrust damages, and was tackled in several other fields in the literature, including products liability and environmental damages.

[11] See R. Van den Bergh, P. Camesasca, European Competition Law and Economics: A Comparative Perspective, London, 2006, at 331.

[12] Id., at 327; W. H. Page, *Antitrust damages and economic efficiency: an approach to antitrust injury*, 47 Chicago Law Review, 1980, 482, warned about the need to assess the possible positive effects on efficiency even in horizontal agreement cases, since they could bring about a reduction of average costs.

[13] R. Van den Bergh and P. Camesasca, *cit.*, 2006, 322-324.

decisions by the Commission or NCA on national courts and many other issues still wait for further clarification/harmonisation at EU level[14].

Against this background, the Commission has launched an extensive debate on the potential for enhancing private enforcement of antitrust rules in Europe, by focusing on antitrust damages actions. Modernisation aimed, *inter alia*, at an "increase in deterrence resulting from encouraging private litigation, as well as, the relief of bureaucratic burden that rested on the European system since its inception and the strive for fairer compensation of injured firms and individuals".[15]

The overarching goals of enhanced private enforcement in the EU can be illustrated as follows:

- *Enhanced deterrence.* Ensuring that undertakings that violate Community 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.
- *Corrective justice*. As opposed to public enforcement, an effective private enforcement secures that gains from anticompetitive conduct are transferred back to victims of anticompetitive conduct. This is equal to stating that victims should be put in the same condition in which they would have been absent anticompetitive conduct – the so-called *Differenzmethode* or "differential method"[16]. The need to ensure that victims are compensated for damages suffered as a consequence of third party anticompetitive conduct highlights the difference between enhancing public enforcement through higher fines and increasing private enforcement.[17]

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[14] In some countries it has been stressed that the direct application of art. 81 par. 3 could hinder the referral of antitrust cases to courts, since the uncertainty about the outcome is increased, see K. Schmidt, *Procedural issues in the private enforcement of EC competition rules: consideration related to German civil procedure*, in Ehlermann and Atanasiou (Eds.), *European competition law annual 2001: Effective private enforcement of EC antitrust law*, Oregon, 2003, 253.

[15] White paper on modernisation of the rules implementing articles 85 and 86 [*now 81 and 82*] of the EC Treaty - *Commission programme No. 99/027 - approved on 28.04.1999*

[16] Different measures of damages can be envisaged in this respect, as will be clarified in the next sections.

[17] Many commentators argued that efficient incentives and optimal deterrence can be achieved also by increasing the expected sanction imposed by public authorities on undertakings guilty of anticompetitive conduct.[17] A good example is cartels: in some cases, some undertakings or consumers may even have profited from buying goods or services at a supracompetitive price – for example, when the value of goods purchased at supracompetitive prices increases at a later stage due to exogenous and unforeseeable circumstances (*e.g.* a war or a natural disaster). See *e.g.* Van Den Bergh R.J., W. Van Boom, M. Van der Woude, *The EC Green Paper on damages actions in antitrust cases: an academic comment*, Rotterdam, 2006, 15 available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/119.pdf. (last visit: 10 January 2007), stating that "it cannot be excluded that some purchasers may benefit

- *Ensuring that EU companies and citizens are put in similar conditions to exercise their right to damages and to conduct business on an equal footing throughout the territory of the EU*. Currently, member states take very different approaches, with very different outcomes as regards the conditions for the exercise of the right to seek compensation of losses sustained as a result of antitrust infringements[18].
- *Bringing competition law closer to the citizen*. Raising the awareness of citizens as regards the benefits of effective competition policy as well as their right to claim damage compensation in case of antitrust injury can contribute to the development of a solid culture of competition in Europe.[19]
- *Contributing to competitiveness, growth and jobs.* Since more competitive markets reduce allocative inefficiency by leading to greater output, lower prices and better quality, achieving the abovementioned goals would also contribute significantly to European growth and employment, thus increasing EU competitiveness in light of the Lisbon goals.

However, as will be highlighted in the next sections, setting up an effective antitrust damages action system is difficult and costly. As a matter of fact, a distinctive feature of enhanced antitrust private enforcement is that the benefits are most often very difficult to quantify. One of the reasons is that in jurisdictions where private damages actions are widespread, most of the cases settle before trial at undisclosed terms, whereas some of the upfront costs of private enforcement are easier to observe – including, for example, lawyers' fees and increased administrative burdens for litigants, courts and other parties involved in the proceedings[20]. Also, the real deterrent effect of private antitrust damages actions – *i.e.*, the extent to which firms would choose to comply with antitrust laws due to more effective antitrust damages actions – is very difficult to measure, as it highly depends on undertakings' subjective expectations on the probability of detection, the probability of conviction and the expected exposure to damage awards.

An important risk of enhanced private enforcement lies in the potential for increased frivolous suits, as well as in a greater likelihood of Type I errors in adjudication, as courts are not always optimally placed to appreciate the

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from a cartel price increase (*e.g.* margins of oil companies when OPEC raises the price)." These 'lucky victims' may have an interest in continuing the commercial relationship with the infringing undertaking. Once the anticompetitive agreement is detected and sanctioned by the competition authority, it would be preferable to leave private parties to decide whether to sue or not for obtaining compensation and the annulment of the contractual agreement with their supplier. See also, on a more general note, A. M. Polinsky, *Private versus Public Enforcement of Fines*, 9 Journal of Legal Studies, 1980, 105.

[18] See Ashurst (2004), *supra* note 7.

[19] See, *e.g.*, Case C-453/99, *Courage Ltd. V. Bernard Crehan*, 2001, ECR, I-6297.

[20] See, *e.g.* Segal and Whinston (2006).

features of a case, and may be captured by claimants into unmeritorious suits[21]. Examples of strategic use of antitrust law are frequent in the economic literature, and are reported, *i.a.* by Baumol and Ordover (1985), Breit and Elzinga (1985), Shughart II (1990), Brodley (1995), Shavell (1997), McAfee and Vakkur (2004) and McAfee, Mialon, and Mialon (2006).

Another risk of an ill-conceived system of damages actions is that of potential negative consequences of growth and employment, especially since increasing damage awards may face the limit of firms' ability to pay, as was observed, *i.a.*, by Kraakman (1984), Craycraft *et al.* (1997) and Wils (2005). Langus and Motta (2005) show that "stock markets react to news of, respectively, a dawn raid, an infringement Decision and a Court judgment upholding the Commission's Decision, by reducing the firm's market value on average by respectively 2%, 3,3% and 1.3%. Overall, therefore, the successful prosecution of a firm for illegal behaviour might decrease its market value by more than 6%"[22]. This, of course, does not mean that antitrust enforcement negatively affects market forces: to the contrary, if markets develop expectations that the convicted firm's profits will decrease overtime, this means that antitrust action is effective. At the same time, however, it is very important to ensure that private antitrust enforcement does not lead to a high amount of false convictions (Type I errors), as the mistakenly convicted firm would face important shortcomings in the market where it operates.

In summary, the path towards achieving the goal of more effective antitrust damages actions in Europe must be approached with caution, in order to secure the many advantages of creating a "second pillar" of enforcement in Europe, without incurring the drawbacks of badly designed private damages actions. The European Commission has started to identify possible options for

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[21] Also the opposite is possible – that judges issue a mistaken judgment in favour of the defendant, leading to a Type II error. To clarify what we mean by Type I and II errors: Type I errors are defined as false condemnations, *i.e.* cases in which a court comdemns a conduct that was not anticompetitive, or mandates compensation of harm for which there was no causation; a Type II error is defined as a false acquittal, *i.e.* a case in which a court fails to condemn a conduct, which was anticompetitive. The Type I/Type II terminology has been borrowed since the 1980s by antitrust scholars from the field of behavioural sciences, where it is commonly used to define possible errors in determining whether there is a relationship between variables in the population from which sample data are drawn. One of the first papers to import this terminology was Fisher, A.A. and R.H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 Cal. L. Rev. 1582 (1983).

[22] Data on the impact of dawn raids, NCA decisions or Court decisions refer to a time horizon of 5 days. See Table 2 in Langus, G. and M. Motta (2007), *The effect of EU antitrust investigations and fines on a firm's valuation*. London: CEPR Discussion Paper No. 6176, March 2007; and see Motta (2007), *On Cartel Deterrence and Fines in the EU*, written for (and presented at) the Meeting of the Economic Advisory Group on Competition Policy at the European Commission, Brussels, 14 September 2007. An earlier paper that used event studies analysis to infer the impact of antitrust enforcement on the stock market valuation of a firm is Bizjak and Coles (1995).

encouraging antitrust damages actions in the 2005 Green Paper on damages actions for breach of EC antitrust rules. Below, we briefly describe the scope and purpose of the Green Paper.

1.1 The Green Paper on Antitrust Damages and the upcoming White Paper

The purpose of the Green Paper and of the companion Commission Staff Working Paper was to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection, as well as possible ways to improve damage recovery both in follow-on actions (*e.g.*, when the civil action is brought after a competition authority has found an infringement) and in stand-alone actions (*i.e.*, actions which do not follow on from a prior finding of an infringement of competition law by a competition authority). In order to achieve both deterrence and corrective justice, the Green Paper identifies a number of alternative options, which should be subject to assessment as regards their likely impact[23].

The Green Paper was subject to extensive consultation and will soon lead to the adoption of a White Paper on antitrust damages actions, expected in 2008.[24] In line with the Commission's Better Regulation agenda, the White Paper will be subject to an impact assessment, aimed at highlighting the likely economic and social impacts of the various options available to ensuring effective private enforcement of antitrust rules in Europe. Amongst the issues that need to be explored in-depth, we see the following as particularly important:

- *Deterrence v. compensation: conflicting goals?* Achieving greater victim compensation does not necessarily imply achieving optimal deterrence. Available alternatives and procedural arrangements identified by the Commission, although in principle apt to facilitating private antitrust damages actions, do not guarantee that optimal deterrence and compensation will be achieved at the very end. To the contrary, in some cases the proposed options might lead to suboptimal deterrence and/or inefficient compensation[25]. In other cases, the risk of over-deterrence is likely to materialise. An example could be the "multiple damages" option, which was included – although only for cartel cases and limited to double damages

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[23] COM(2005)72 Final, 19.12.2005.

[24] See Commission Legislative and Work Programme, Roadmap 2007COMP/001. Comments received during the consultation phase are available online at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html.

[25] R. Van Den Bergh, W. Van Boom, M. Van der Woude, *cit.*, 2006, 2.

– in the remedies aimed at promoting greater use of private enforcement.[26] Some legal systems offer the possibility to claim multiple damages, which target deterrence much more than fair compensation. Multiple damages are considered as a response (although often imprecise[27]) to statistical evidence implying that violations are not always detected.[28] Where sanctions have already been imposed by a public authority, there is a risk that multiple damages merely result in a deterrence-creating weapon in the hands of plaintiffs[29]. Such damages could even lead defendants to go bankrupt in some cases, with evident negative impacts on the business environment for the overall stability of the business environment[30]. Seeking the right balance between corrective justice and deterrence is thus essential for the effectiveness and efficiency of a system of private antitrust damages actions: when this potential trade-off is duly taken into account, also the "conflicting goals" problem can be solved.

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[26] European Commission *Green Paper - Damages actions for breach of the EC antitrust rules* COM(2005) 672, 19.12.2005, option 16, 7, available at http://eur-lex.europa.eu/LexUriServ /site /en/com/2005/ com2005_0672en01.pdf.

[27] See J. Sidak, *Rethinking antitrust damages*, in 33 Stanford Law Review, 1981, 330. A. M. Polinsky, *Detrebling versus decoupling antitrust damages: lessons from theory of enforcement*, in "Private Antitrust Litigation", MIT Press, Cambridge, Massachusetts, 1988, 87. The risk of losing control on the overall deterrence effect of the consequences of the infringement is underlined by A. Douglas Melamed, *Damages, deterrence and antitrust – A comment on Cooter*, Law and Contemporary Problems, 1997, 94.

[28] On the deterrence function of treble damages see K. Roach, M.J. Trebilcock, *Private enforcement of Competition Laws*, 34 (3) Osgoode Hall Law Journal, 1997, 506. The need to maintain treble damages in US antitrust has been recently reconsidered by the Antitrust Modernization Commission (AMC) in the US. For a critical opinion, see R. H. Lande, *The Four Myths about Antitrust Damages*, Statement before the AMC, 28 July 2005, available at http://www.amc.gov/commission_hearings/pdf/Lande.pdf. In 1993, Lande calculated that due to the time factor and the corresponding interest rate the nominal "treble damages" multiplier would be reduced down to a true multiplier that was between 1.65 and 1.25. See Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?* 54 Ohio State L. J. 115, 134-36 (1993).

[29] Most of these concerns have been raised as regards the use of treble damages in US private antitrust enforcement. In Europe, the Commission proposed a lower damage multiple (double damages) for cartels in one of the options envisaged by the Green Paper (option 16). However, the application of prejudgment interest in Europe may lead double damages to end up being larger than treble damages without prejudgment interest. See Lande (1993), *supra* note 28, and Lovell (1982). Accordingly, we consider that similar concerns as regards the defendants' ability to pay – although highly debated in the literature – are worth a mention also for the purposes of this Report.

[30] As we will explain in detail below, the risk of overdeterrence for cartel cases is normally to be excluded – but see, *contra*, Kobayashi (2001) and Denger (2003). As regards the defendant's ability to pay, see in particular Werden and Simon (1987), Craycraft *et al.* (1997) and Wils (2006).

- *Risk of strategic abuse of competition law.* Absent a precise evaluation of each single option, there may be a risk of strategic use of antitrust rules[31]. A good example is that of very broad disclosure obligations imposed on defendants under US antitrust rules. In this respect, it can be highlighted that, if this option is undertaken with no changes or variants (*e.g.* business secrets to be confined to the legal advisers/experts of the parties), firms could consider filing strategic damages actions against a more efficient competitor to obtain disclosure of confidential information such as business secrets. The Commission Green Paper considered a range of "adversarial" *inter partes* disclosure systems amongst the alternative options to be considered for enhancing private enforcement; these options entail some important differences compared to US–style discovery (*e.g.* as regards the fact-pleading requirement)[32]. In Part II of this Report, we will consider whether such options would minimize the risk of plaintiffs using antitrust laws strategically[33].
- *Should there be a single criterion for different types of violation?* Currently, the Green Paper seems to be considering a "one-size-fits-all" approach, which would neither distinguish between potential plaintiffs, nor between types of abusive conduct, with the exception of option 16, which introduces double damages only for cartel cases. However, some types of anticompetitive conduct are more often associated with damages occurring to consumers, whereas others entail more often damages to competitors.[34] For example, collaboration between competitors that results in anticompetitive conduct more often creates damages directly on consumers, which hardly realise the existence of the damage absent intervention by a public authority. To the contrary, a dominant firm's refusal to provide access to an essential input is likely to be immediately detected by firms operating in the downstream market. Accordingly, given the type of conduct at stake, costs and benefits of private enforcement may be very different.
- *Measuring the amount of damages to be compensated.* Damages actions for violation of antitrust law can be considered as claims for compensation of pure economic loss. These losses do not necessarily represent a social

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[31] Examples are reported, *i.a.*, in Baumol and Ordover (1985), Breit and Elzinga (1985), Shughart II (1990), Brodley (1995), Shavell (1997), McAfee and Vakkur (2004) and McAfee, Mialon, and Mialon (2006).

[32] See option 3 in the Green Paper. The differences with the US discovery include the preservation of fact-pleading, which provides for a threshold test (as opposed to mere notice pleading in the US). See *infra*, Part II, Section 3 of this Report for a more in-depth illustration of the difference between the three options envisaged by the Green Paper (options 1-3) and the US discovery system.

[33] See Section 3 in Part II below.

[34] R. Van den Bergh, P. Camesasca, *cit.*, 2006, at 331.

welfare loss, but can result from a redistribution of welfare from consumers to dominant players. In any event, such claims should be encouraged as they challenge intentional behaviour in violation of a precise legal obligation. Whereas such reasoning appears convincing especially for horizontal agreements, for other types of antitrust violations the issue is less evident.

- *Standing and causation.* It is very important to define which categories of victims will be allowed to sue for antitrust damages. Given the limited caselaw available, it is far from clear which claims should be considered as standing within the scope of antitrust enforcement. Some, for example, might claim damages as they would have liked to purchase given goods, but refrained to do so because the price was set at a supracompetitive level, and ended up buying a lower-quality good. Others might sue since they were foreclosed from the relevant market as a result of the anticompetitive agreement. In order to solve these issues, it might be appropriate to require that plaintiffs provide solid evidence, *e.g.* that high prices were the only reason for failure of a negotiation.[35] At the same time, the European Court of Justice has clarified in *Courage* that "the practical effect of the prohibition laid down in Article 81(1) EC 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 conduct liable to restrict or distort competition"; and later confirmed in *Manfredi* that "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and the agreement or practice prohibited under Article 81 EC". There is reason to believe that such reasoning would also apply to Article 82 EC Treaty. Based on these statements, it seems that the success of a claim in the EU would be dependent on whether the plaintiff is actually able to prove causation.
- *Need for greater harmonisation*. Globalisation and integration of markets increases the risk that – absent harmonisation – the costs of private enforcement end up affecting only a few legal systems[36]. Such negative externalities would accrue from the fact that not all countries effectively allow for private damages actions, or that private enforcement systems pursue different goals.[37] In addition, there seems to be no convincing

[35] See W. H. Page (1980), *cit.*, at 482. On the contrary access to damages is usually denied to third parties that are affected only by the lower profits and consumptions of the victims of the infringement.

[36] Up to ten years ago, the US DoJ Antitrust division was involved in two international investigations only, whereas more recently almost 70% of cases are filed against non US firms and 33% of convicted individuals are foreigners, see OECD, *Third report on the implementation of the 1998 recommendation*, 30, available at http://www.oecd.org/dataoecd/58/1/35863307.pdf.

[37] Although 90 countries reportedly had antitrust rules in 2002 (see Kolasky, 2002), some of them do not provide for private enforcement. Hylton and Deng (2007) report 102 countries having antitrust laws.

evidence in favour of a spontaneous mutual learning process that would lead to a "race to the top", with national legislators adopting rules successfully enacted in other jurisdictions. In other words, a Community instrument seems appropriate to achieve the goal of putting EU businesses and consumers in similar conditions when they exercise the right to compensation of antitrust damages.

As regards the expected intervention at EU level, the main options identified include:

a) taking no further action ("zero" option);
b) the development of optional practical tools/best practices which would be recommended to the Member States ("soft law" option);
c) some approximation of national procedural rules via Community legislation (*i.e.* through a Directive); and
d) full harmonisation of national procedural rules via Community legislation (through either a Directive or a Regulation).

This Report is aimed at performing an in-depth analysis of a number of selected options, by examining their likely impact, as well as a number of specific procedural issues which may significantly improve the position of claimants for damages resulting from infringements of the competition rules in respect of the possibilities for effective exercise of their rights. Note that not all the options identified by the Green Paper are being considered in this Report. For example, we do not deal with the issue of fault requirements, nor with standards for establishing causation and possible reversals of the burden of proof.

1.2 Current development of private damages actions in European member states

In 2004, the Ashurst study on private enforcement found only 60 cases involving damages claims based on both national and EU competition law[38], since the adoption of EU and national competition laws. These findings, together with the analysis of the conditions to claim damages in different Member States, supported the statement of "astonishing diversity and total underdevelopment" of antitrust private enforcement in Europe. In subsequent years, and especially after the Commission Green Paper, the debate on private enforcement of competition law has developed significantly. As a result, some countries adopted rules in order to facilitate damages claims, and/or national

[38] Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Bruxelles, 2004, 1.

courts were asked to clarify some controversial issues on private enforcement of antitrust rules[39].

The aim of this section is to provide a brief survey of the recent developments of private antitrust damages actions in the EU in the period between 1st of May 2004 and the third quarter of 2007. As also noted in the Ashurst study, there are no official statistics on private antitrust damages actions in the EU, such that the findings of that study were based on a survey of national experts. Although a full update of the Ashurst study would fall outside the scope of this Report, in the following pages we describe available data to provide an overview of the developments that occurred in Europe in the last three years.

The methodology followed in this section is different compared to the one followed by the Ashurst study, as we include antitrust actions where damages were claimed by alleged victims of antitrust infringements, regardless of whether the claimants succeeded or failed[40]. In addition and in line with the scope of our study, we only analyse judgments based on EU rules or on both

[39] In some countries the changes specifically regarded the antitrust rules (like in Germany, with the 7th GWB amendments, or the CAT jurisdiction in UK, see on these issues C. MIEGE, *Modernisation and Enforcement Pluralism– The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", "Remedies and Sanctions in Competition Policy"* Workshop organized by the *Amsterdam Centre of Law and Economics ACLE*, 17th of February 2005, available at www.acle.nl; U. BOGE – K. OST, *Up and running, or is it? Private enforcement - the situation in Germany and policy perspectives*, in *European Competition Law Review*, 2006, 197; B. RODGER, *Private enforcement and the Enterprise Act: an exemplary system of awarding damages*, in *European Competition Law Review*, 2003, 103), whereas in others a wider debate emerged on access to justice for small claims and class actions. In Italy, some important refinements on the scope of antitrust rules and the requirements for damages claims characterized a number of Supreme Court decisions; in Sweden, important decisions were issued by the Stockholm Market Court sentences on passive and active standing for cartel cases; in Germany, an important decision was issued by the Dusseldorf District Court judgement on CDC SA standing to claim damages on behalf of the victims; finally, the first damages decision of a Spanish court was issued in the *Conduit* case.

[40] The definition of "antitrust damages actions" is not straightforward, since consequences of anticompetitive behaviour might differ depending on the underlying relationship between the litigants, the content of the pleading and the legal system. Often the antitrust argument is raised in a contractual dispute, in order to challenge the validity of a clause. In other cases, the damages claim is based on tort law. The analysis of our sample of cases is carried out with specific reference to cases where a pecuniary request (either contractual or based on tort law) derives from breach of competition law. Simple injunctions claims, purely procedural decisions, as well as pure Eurodefence cases have not been included in the definition of antitrust damages actions. During research carried out for this Study, the number of these antitrust claims amounted to 90 additional cases, out of the overall 186 cases where antitrust issues have been raised.

national and EU rules. This, in turn means that claims based only on national competition law are not included in our sample[41].

The sources consulted include the database set up by the Commission according to art. 15(2) of Reg. No. 1/2003, which requires every Member State to provide the Commission with a copy of every relevant decision on competition law issued by national courts[42]. However, it is well known that some countries do not regularly fulfil the legal obligation set up by the Regulation. Besides the Commission database, we have thus looked at several reviews and newsletters dealing with antitrust matters[43]. For some countries, we asked national experts to validate our findings.

Notwithstanding these *caveats*, the data reported below represent a reasonably accurate snapshot of the current development of private damages actions for breach of EU antitrust rules.

1.2.1 Antitrust damages actions: developments between May 2004 and the 3Q2007

In the reference period (1st of May 2004 - 3Q2007), *we found 96 antitrust damages actions for the EU27*. This figure shows that there has been a limited growth of private antitrust cases across Europe, compared to the findings of the Ashurst

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[41] This may lead to under-inclusiveness especially with regard to some countries, like Germany, Italy and UK. With regard to Germany, breach of EC rules is less often claimed than breach of national competition law, due to the broader scope of national rules on unilateral practices. According to the Bundeskartellamt database on private enforcement cases, since 2004 there has been a considerable number of private enforcement cases (240 as of 2006). However, only 68 of these claims were brought "offensively" and, above all, most of these cases were decided under national law and only a few successful cases in 3 years were brought for breach of EC Rules. For what concerns Italy, the national competition law (Law no. 287/90) established a specific jurisdiction for claims based on national antitrust rules, whereas claims based on EU antitrust rules follow the ordinary rules on jurisdiction. This implies an "either-or" choice of the legal basis of the claim at the very outset of the case. As a result, to date most of the damages claims specifically based on breach of antitrust rules have been ruled on the basis of national antitrust law (like, for instance, most of follow-on litigation on damages stemming from the Motor Insurance case decided in 2000). Moreover, one reported case is based on national law, but partially follows on the findings of NCAs based on EC Treaty provisions. In the UK, the specific features of the civil procedural system encourage out of court settlements, rather than final decisions; thus, a specific focus on the impact of settlements within the UK system is provided in Section 1.2.2 below.

[42] See http://ec.europa.eu/comm/competition/antitrust/national_courts/index_en.html. Most of the decisions contained in this database are referred to judicial review of NCAs decisions by a Court. However, other decisions refer to private litigation.

[43] These sources include: E-Concurrences; European Commercial Law; Clifford Chance competition newsletters; Cleary Gottlieb competition newsletters; Freshfields competition newsletter; Bird & Bird Competition Bulletin; Mayer-Brown EU and UK Antitrust/Competition Legal Update; International Law Office – Competition update; Van Bael-Bellis Competition law newsletter; Salan Bulletin de la concurrence.

report. However, a more in-depth analysis shows some differences in current developments, according to the type of allegation and also across countries:

- *Private antitrust damages actions were observed only in 10 of the 27 Member States*[44].
- *Litigation on vertical restraints was the more common* in the timeframe considered: 61 cases (out of 96) involved vertical agreements, whereas only 13 cases concerned horizontal agreements, concerted practices or naked cartels (12 on hardcore cartels or concerted practices, 1 on horizontal agreements); and 22 cases involved abuses of dominance.
- *We did not find vertical restraints cases where antitrust damages have been awarded in a final judgment no longer subject to appeal*. The *Courage* damages award, decided in 2004, was overruled in 2006 by the House of Lords[45]. Approximately 13% of these cases resulted in a finding of infringement by the court. On the contrary, antitrust damages awards are more common in cartel and dominance cases: 6 out of 13 cartel cases (46%) and 12 out of 22 abuses cases (55%) led to damages being awarded.
- *More generally, recent developments are dependent on a limited number of "clusters" of claims*, *i.e.* streams of follow-on cases that can be referred to the same standalone decision. Thus, *the contribution of stand-alone cases to the overall volume of private antitrust damages litigation was relatively small.* The "clusters" of claims include, most notably: (*i*) cases related to the entry into force of Commission Regulation (EC) No 1400/2002[46] on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (especially in France, Germany, The Netherlands)[47]; (*ii*) disputes between oil companies and distributors (especially in Spain, where this "cluster" represents 90% of total cases), concerning the limitations of distributors' freedom to set prices, or the length of exclusive purchasing agreements[48]; (*iii*) litigation following the EC *Vitamins* decision (especially in the UK, France and, above all, Germany),

[44] These are Austria, Belgium, Denmark, France, Germany, Italy, The Netherlands, Spain, Sweden and the UK. In Lithuania, Hungary, Czech Republic, however, some antitrust claims have been filed. In Ireland, Luxemburg and Portugal very limited private antitrust litigation has been observed, but in the few cases filed antitrust infringement only played a secondary role; thus, these cases were not included in our dataset.

[45] *Inntrepreneur Pub Company (CPC) et al.* v. *Crehan* (HL), [2006] UKHL 38.

[46] Commission Regulation n° 1400/2002, of 31 July 2002, *OJ L 203*, 1st August 2002, 30.

[47] Although this litigation did not lead to "tort" damages cases, the plaintiff often claimed damages due to unlawful termination of the agreement. The unlawfulness would stem from infringement of the provisions contained in the new Motor Block Exemption.

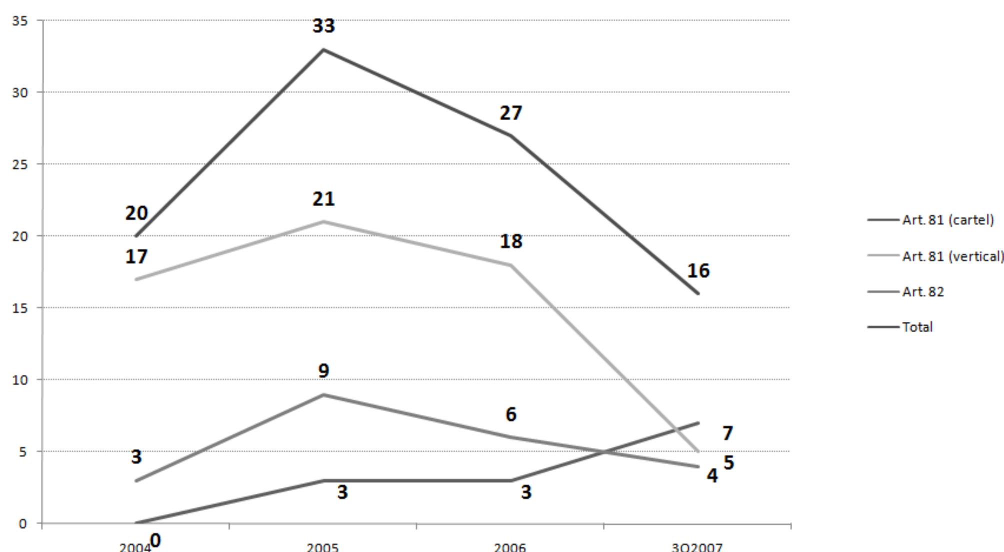
[48] See also the *Repsol* case, which followed a first stream of private litigation cases. Case COMP/38.348 *Repsol CPP* Commission decision, 12.4.2006.

although no damages have been awarded in the reference period[49]; and (*iv*) litigation that followed the *Rc Auto* cartel case in Italy[50] .

- As regards the distribution of cases overtime, *a peak was observed in 2005*, with 33 cases decided.[51] As already mentioned, the higher number of cases observed in 2005 is mostly related to contractual disputes on car distribution and oil station agreements initiated in early 2000 in Spain, Germany and France, which were adjudicated in that year[52], leading to an increase in vertical contractual claims based on Article 81.

Figure 1 below shows the distribution of cases over time, by type of allegation. Table 1 shows the damages awarded by type of allegation, for those cases for which information is available.

Figure 1 - Cases by type and year, May 2004-3Q2007



[49] Only 1 case has been successful, in Germany, but before 1st of May 2004.

[50] The cartel involved several Motor Insurance Companies and was first sanctioned by the Italian NCA in 2000 (AGCM, 28th of July 2000, no 8546). Later, several suits were filed by individual consumers, mainly on the basis of national law. In the panel data only the (few) decisions based on EC law (after the famous *Manfredi* case decided by ECJ) have been included.

[51] As regards 2007 figures, a possible time lag between the decision and its publication needs to be taken into account.

[52] These cases started after the changes in the treatment of vertical agreements under EC competition law in the late 1990s and 2002.

Table 1 – Damages awards by type of claim, May 2004 - 3Q2007

Year	Vertical	Abuse	Cartel
Total no. of cases	**61**	**22**	**13**
Antitrust damages awarded (%)	**0%***	**55%**	**46%**

***Note**: the damage award in 2004 in the *Crehan* judgment was overturned by the House of Lords in 2006.

These findings suggest that, notwithstanding the slight increase in private antitrust enforcement observed in the EU in the 2004-2007 period, successful damages actions (for the claimant) are still rare. Moreover, the majority of Member States have had no experience of private antitrust damages actions to date.

1.2.2 A focus on the UK – an analysis of 43 settlements[53]

One of the member states where the debate on encouraging private antitrust damages actions has been more lively is the UK, where the Office of Fair Trading has recently issued Recommendations on Private Actions in Competition Law (OFT 2007c). Accordingly, it is worth looking at whether private antitrust litigation has increased significantly in the UK. We anticipate that despite a number of important developments over the last twenty years there is very limited evidence of an increase in competition law litigation in the UK in recent years.[54]

Previous research by Rodger (2006a, 2006b and 2006c) on all cases up to 2004 revealed a limited number of cases and judgments, at 90 in total since the 1970s. These findings also suggested, partly based on anecdotal evidence, that a fuller picture of what is happening in terms of competition law litigation would require to include consideration of cases which settled out of court. In this section, we provide data on the number and types of competition law settlements which have taken place between 2000 and 2005 in the UK, the type of claims that have been raised, the motivations for settlement and the obstacles to proceeding with a court action effectively. These data shed light on 43 settlements in the UK between 2000-2005 inclusive, whereas only 1 of those settlements had previously reached the public domain.

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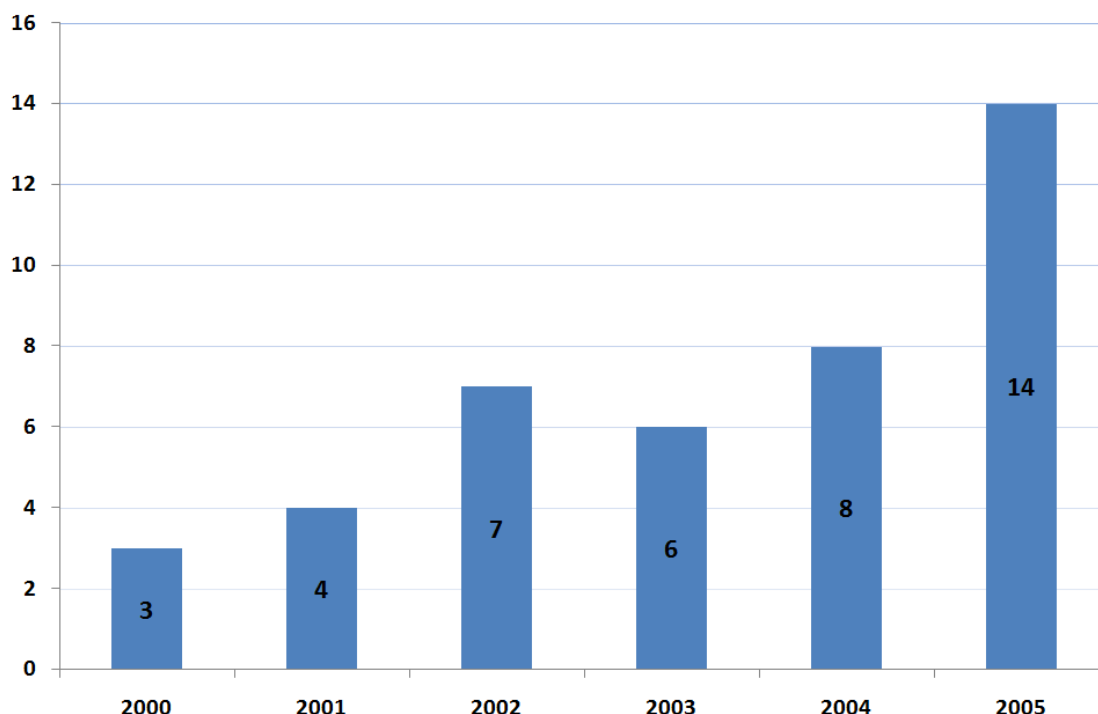
[53] This section summarises the main findings of an empirical study carried out by Prof. Barry Rodger, forthcoming. The first findings of this study have been published in B. Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I* [2006] ECLR 241; *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part II* [2006] ECLR 279; and *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part III* [2006] ECLR 341.

[54] Id.

Figure 2 below provides the total number of settlements in UK competition law litigation for each year between 2000 and 2005[55]. These figures show an increase in recent years, and especially in 2005[56].

Figure 2 - Number and Period of Settlements in the UK, 2000-2005



Source: Rodger (forthcoming)

Interestingly, 25.6% of these settlements were related to Article 81 EU Treaty, whereas 9.3% were based on Chapter 1 of the UK 1998 Competition Act (which prohibits anticompetitive agreements) and 7% were based on both provisions. As regards abuses, 4.7% of the settlements were based on an alleged infringement of Article 82 EU Treaty, 20.9% on an infringement of Chapter 2 of the Competition Act and 16.3% on both allegations. These figures confirm that also allegations of abusive conduct can play an important role in private antitrust litigation, and that their relative weight on all cases – as was found by the Georgetown study – may be greater than that of cartels and other types of anticompetitive agreements.

Another important finding of the study by Rodger is related to the timing of settlements. Out of a total dataset of 43 settlements, 51.2% were concluded after

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[55] One questionnaire was completed except for this question.

[56] Nonetheless, this may reflect the likelihood that respondents simply remembered recent settlement practice more vividly, and may also be due to changes at the respondent law firm.

commencement of court proceedings, with Article 81 cases being the most likely to settle after the commencement of trial, whereas Chapter 2 cases were the most likely to settle before a case is filed. Accordingly, in this stage of development of competition litigation in the UK, it certainly appears that parties are settling at an earlier phase than occurs in the USA.[57] Of the 43 settlements analysed by Rodger, damages were sought in 32 cases (74.4%), and the sum sought was over £20 million in 10 of these 32 cases. Of these 10 cases, payment *in lieu* of damages was a sole or partial basis of settlement in 8.

The main motivation for settling instead of going to trial seems to have been the uncertainty of litigation (55.8% of respondents), and in particular in Article 81/Chapter 1 cases, with 61.1% of respondents citing uncertainty of litigation as a factor. Another, less recurrent motivating factors were "to smooth ongoing business relationships" (46.5% of respondents). 48.8% if respondents stated that competition law issues were the most important factor for settlement, and another 30.2% that they were a major contributory factor.

In summary, observation of the development of private litigation in the UK suggests the following:

- *the majority of private disputes*, including competition/antitrust disputes, *settle out of court before a final judgment on the* merits, although it is difficult to provide any accurate figures for this where we consider settlements at all phases after the dispute has arisen, irrespective of whether an action has been raised in the relevant courts.
- There is *evidence of an increase in settlements in recent years*, which include most notably cases of abuse of dominance;
- *A significant share of disputes settle before a case is filed* (48.8% in 2000-2005), and mostly *for reasons related to legal uncertainty* and the need to smooth business relationships.

We will take these findings into account when modelling the likely effect of legal changes on the development of private enforcement in Europe.

[57] In fact one aspect which could be considered in future research is whether settlement followed an earlier court ruling, as eelier research, as detailed in B Rodger [2006] ECLR supra note 53, demonstrated that there had been a number of court rulings over the years (not a significant number) and that many of them had been procedural judgments as part of the interim process with very few post-trial final rulings on the substance.

2 Methodological notes on the present study

As already recalled, this Report is related to the forthcoming impact assessment of the EC White Paper on Antitrust Damages. As a result, the methodology used is meant to be in line with the Commission's Impact Assessment Guidelines as adopted in June 2005.[58] It is useful to note, already at this stage, that tailoring a study for the peculiar needs of a forthcoming impact assessment implies a very different approach if compared with existing scholarly studies. We therefore plan to target the overall social and economic impact of various scenarios, corresponding to different combinations of identified alternative options to enhance private enforcement in the EU27.

Together with an overall assessment of economic and social impacts – which may help Commission services in identifying the most preferable option to be undertaken – we will also provide an assessment of the administrative burdens that alternative scenarios would entail, in line with Annex X to the 2005 Impact Assessment Guidelines and with the stronger emphasis currently put on administrative burdens generated by European legislation.[59] Administrative burdens, in this case, arise from information obligations potentially affecting businesses, citizens, public administrations (NCAs) and national courts.

Different methodologies are used to reach the outcome requested by the European Commission within the present call for tender. First, in Part I we rely on statistical evidence on cartel overcharges and recovered damages in jurisdictions with enhanced private enforcement, following the growing literature in this field. We also base our analysis on the theory of optimal deterrence developed in the law and economics literature since the seminal contributions of Landes and Becker. Part II applies legal and economic reasoning to specific issues, by drawing on consolidated streams of literature, mostly from the US debate on antitrust enforcement and tort law design, but also from the burgeoning European debate. Finally, Part III applies the findings of the first two parts of the study to the analysis of a number of stylised scenarios selected by the European Commission.

Our methodological choice is to approach the problem from both a deterrence perspective (*ex ante*) and from the standpoint of corrective justice (*ex post*), by modelling the changes in firms' incentives as a result of different variants of private enforcement, which include also the "zero" or "no policy change" option. As a result, in Part I we mostly adopt the *ex ante* perspective of the

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[58] European Commission, *Impact assessment Guidelines*, SEC (2005)791, 15th of June 2005, available at http://ec.europa.eu/governance/impact/docs/key_docs/sec_2005_0791_en.pdf

[59] European Commission, *Communication – "Action programme for reducing administrative burdens in the EU"* – COM(2007) 23 (draft version), available at http://ec.europa.eu/enterprise/regulation/better_regulation/docs/com_2007_23_en.pdf.

potential offender, whereas in Part II we adopt both this perspective and the perspective of the potential plaintiff (both *ex ante* and *ex post*).

In Parts II and III we apply a common theoretical framework, where costs and benefits are grouped in the same categories for each of the specific issues to be analysed. In particular, we define the following benefits:

- *Impact on deterrence*. We consider this impact to be maximised when the best possible level of deterrence is achieved – thus, neither under- nor over-deterrence emerges from the implementation of a given option. In most cases, we further break down this heading into three different determinants, which are closely intertwined: (i) deterrence achieved due to superior information available to private plaintiffs; (ii) due to increased likelihood that a legal action is initiated; and (iii) as a result of increased prospective financial sanctions for would-be infringers[60].
- *Impact on corrective justice*. We consider this goal to be fully achieved whenever private plaintiffs are granted *restitutio in integrum*, and accordingly neither over- nor under-compensation are likely to be observed. In this respect, we further distinguish between (i) increased number of compensated victims; and (ii) degree to which compensation is aligned with actual harm[61].
- *Impact on the internal market*. This heading includes potential benefits accruing from the implementation of a given option as regards the elimination of disparities in antitrust private enforcement in the member states, and the creation of a level playing field between national jurisdictions as regards the possibility for private plaintiffs to seek compensation in national courts. We also consider benefits accruing from the reduction of legal uncertainty, which can constitute a barrier for companies wishing to engage in cross-border trade.

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[60] This does not imply that better information and detection are exclusively referred to the deterrence objective of private antitrust enforcement. However, under this heading we consider the *ex ante* perspective of the potential infringer, and thus account for the increase probability of being caught as a potential disciplining effect on the infringer's conduct. Similarly, increased magnitude of damage awards may also contribute to corrective justice: under the heading "deterrence", we consider it as a potential means of achieving optimal deterrence. For example, if the magnitude of sanctions for cartels may be appropriate for full compensation of victims, but not optimal for deterring anticompetitive behaviour. In this case, the same policy option would score differently under "deterrence" and "corrective justice".

[61] Here too, the probability of detection and conviction play a very important role, and are not confined to the assessment of deterrence. However, in assessing the impact on corrective justice, we adopt the *ex post* perspective of the victim: in this respect, the ultimate impact is the extent to which a victim will be compensated – this of course depends on the probability that the conduct is detected, that the victim ultimately sues for damages, that she wins at trial, and that damages are correctly quantified. All these conditions are implicitly (and where possible, explicitly) taken into account under this heading in our impact assessment below (see Parts II and III).

In addition to these benefits, enhanced private enforcement may also exert a *significant impact on macroeconomic variables*, such as competitiveness, growth and jobs, and innovation. The extent to which these impacts (especially the impact on innovation) would materialise under a more effective system of private enforcement is still subject to a hectic debate in the literature, as will be clarified in Part I of this Report[62]. We deem it highly likely that – to the extent that it leads to a greater deterrence of anticompetitive behaviour and generally to more competitive markets and lower allocative inefficiency – an effective and efficient system of private enforcement would contribute positively to growth and employment.

Likewise, we identify the following cost items:

- *Litigation costs*. This broad category of costs includes the cost for litigants when the case is brought to court; settlement costs; principal-agent costs arising in the elation ship between clients and their lawyers; and the enforcement cost for courts and NCAs. All impacts of procedural rules or any other option on the incentive to spend resources in litigation, on the incentive to litigate the case or on the procedural requirements needed to start a case are included under this heading.
- *Administrative burdens*. We define these burdens rather narrowly, in line with the European Commission's definition in the Impact Assessment Guidelines. Accordingly, we include in this category only "costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties." As a result, trial costs and other enforcement costs that do not depend on a specific information obligation included in the law will not be considered as administrative burdens, and are categorized as enforcement costs (in the broader "litigation costs" heading illustrated above). Furthermore, we consider administrative burdens as "net costs", *i.e.* as not including administrative activities that would be carried out even absent a legal prescription (so-called "Business-As-Usual" or BAU costs).
- *Error costs*. In this category we include the costs related to the likelihood that courts issue a mistaken decision. Thus, this heading covers mostly the likelihood of type I and type II costs, but includes neither errors in the quantification of damages (included as undercompensation in "impact on corrective justice" above); nor errors due to extortion of settlements by plaintiffs bringing frivolous suits (included as over-deterrence in "impact on deterrence" above).

[62] See *infra*, in particular, section 1 and section 6.1 in Part I of this Report.

- *Harmonisation costs*. These are costs related to the existing situation in member states, and the need to introduce rules that would require high adaptation costs in national jurisdictions. Such costs are rather high, for example, whenever an option considered would run counter with established principles or legal rules in a large number of member states.

On this basis, Part III of the study identifies feasible scenarios and adds to this theoretical framework also the potential macroeconomic impacts and the potential to bring competition closer to the citizens and SMEs.

3 Structure of the study

In line with the tasks described above, we have structured this Report as follows.

Part I below contains a preliminary welfare analysis, aimed at explaining the potential for more effective private enforcement to lead to enhanced recovery of damages and increase social welfare; we interpret this activity as assessing the likely impact of "taking no further action" or "zero" option. This section therefore contains a qualitative and quantitative analysis of gains and losses that may accrue to citizens and market players from enhanced access to damages claims.

In Part II, we perform a qualitative assessment of the social and economic impact of individual issues such as:

- costs/rewards of damages actions;
- collective actions;
- access to evidence;
- methods to calculate damages;
- the passing-on defence;
- removing joint and several liability for leniency applicants in follow-on damages actions; and
- limitation periods applicable in member states.

For each of these issues, several options are considered and assessed. A key task is also that of identifying potential interrelations between the individual issues. For each option, we also perform an assessment of the extent of harmonisation needed at EU level. This is directly related to the type of analysis needed for the forthcoming impact assessment, where the issue of whether to adopt non-binding instruments, to partially approximate or to fully harmonise national legislation will have to be tackled.

In Part III, we develop a theoretical framework to assess the efficiency and effectiveness of the available scenarios or "bundles of options" and assess the potential impact of five stylized scenarios selected by the European Commission. This analysis differentiates – where appropriate – between types

of antitrust violation, category of claimant, and type of action (stand-alone v. follow-on). The different scenarios are compared in terms of costs and benefits, as illustrated above, in section 1.3.

PART I

POTENTIAL IMPACT OF MORE EFFECTIVE ANTITRUST DAMAGES ACTIONS

PART I: POTENTIAL IMPACT OF MORE EFFECTIVE ANTITRUST DAMAGES ACTIONS

In this section, we estimate the potential consequences that could derive from encouraging private antitrust damages actions in the EU. In order to assess the potential welfare gains, we would need to take into account a number of potential changes that would occur in case private enforcement is encouraged in Europe. This obviously depends on the specific measures that will be undertaken or recommended by the European Commission in order to achieve enhanced private enforcement. Hence, our main objective at this stage is to reach an estimate of the maximum potential welfare impact obtained from enhanced private enforcement, not the impact that would follow from a specific combination of changes in substantive and procedural law.

We proceed as follows. Section 1 below addresses a fundamental question: whether antitrust as a whole can be said to contribute significantly to social welfare. We review the existing literature to find out whether this basic assumption can be held in the following sections of this Report. Section 1.1 then summarises the debate on whether private enforcement can be considered as a substitute or a complement to public antitrust enforcement. Section 2 then identifies the specific ways in which private enforcement can contribute to social welfare, including deterrence, corrective justice, easier access to justice and macroeconomic impacts such as competitiveness, growth and employment. Section 3 contains a quantification of the welfare-enhancing potential of enhanced antitrust private enforcement, with a focus on cartel detection and deterrence. We also attempt to expand the analysis to other types of antitrust violation and to model a number of corrective factors, based on existing and new data. In section 4 we provide a range for the potential welfare contribution of encouraging private damages actions in the EU27, and spell out the necessary *caveats*.

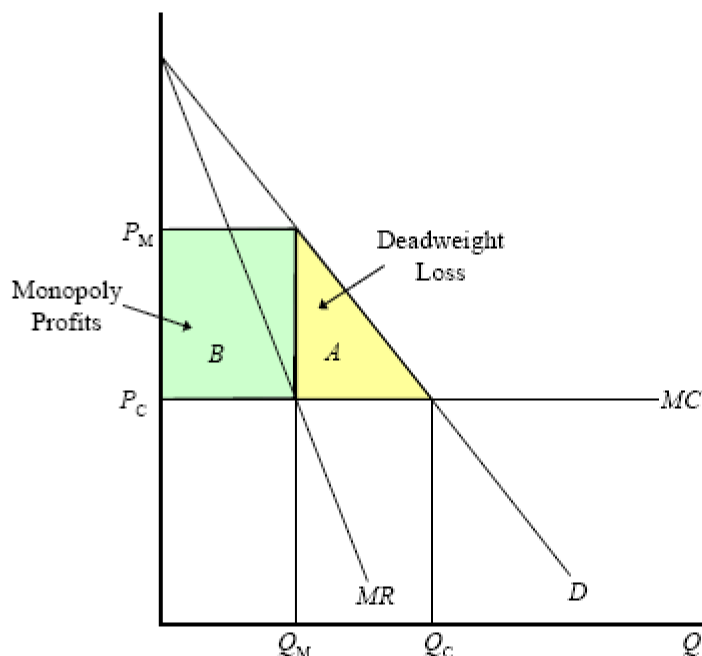
1 Does antitrust contribute to social welfare?

There is a substantial stream of literature discussing the contribution of antitrust enforcement as a whole to social welfare. Early authors such as Lerner (1937) and Harberger (1954) have significantly shaped the debate on the social cost of monopoly, and potential ways to measure it.[63] More sectoral studies such as Nold, Block and Sidak (1981) found that a credible threat of large damage awards has the deterrent effect of reducing mark-ups.

[63] See Lee and Brown (2005) at http://cowles.econ.yale.edu/P/cd/d15a/d1528.pdf

The most widely acknowledged explanation of why competition should be pursued as a public interest goal is rooted in the theory of the social cost of monopoly. Judge Richard A. Posner argues that "the economic theory of monopoly provides the only sound basis for antitrust policy"[64], and indeed many scholars agree with this statement. Figure 3 shows the textbook example of a deadweight loss caused by monopoly.

Figure 3 – Partial equilibrium analysis and the social cost of monopoly



The "Chicagoan" deadweight loss analysis has been criticised because it amounts to a "resourcist" calculation, and does not take into account the relative utility levels of consumers and firms. Moreover, it relies on the assumption that firms seek to maximise profits – an assumption that Robert Bork considered "crucial", but appears to lay on rather shaky grounds.[65] The deadweight loss analysis is a partial equilibrium analysis, and does not take into account the potential spillover effects of inducing competition in a given industry. Furthermore, many authors have remarked that the partial equilibrium analysis shown in Figure 3 deals only with static efficiency, whereas dynamic efficiency is a more important goal that antitrust policy should pursue. For example, the partial equilibrium analysis shown in Figure 3 does not apply to markets where firms compete "for" the market instead of

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[64] Richard A. Posner, *Antitrust Law*, 2001.

[65] For a comment, see Lee and Brown (2005).

competing "in" the market, as is the case for most markets with significant network externalities and learning effects.[66] Other authors have therefore proposed to used slightly refined (Posner, 2001; Hovenkamp, 1989) or more sophisticated models (Lee and Brown, 2005). For example, Hovenkamp (1989) distinguishes between three different types of welfare loss from monopoly, which include the resources wasted in order to achieve and preserve monopoly power, and losses not captured by the demand curve, such as the "umbrella effects" of non-competitive markets, ranging from negative impacts on employment to loss of investment, opportunity cost of inefficient resource allocation, and welfare losses incurred by fringe firms when the market is cartelised.[67] The debate, despite being more than a century old, is still ongoing and fierce.[68]

In any event, economists widely agree that non-competitive markets entail some harmful restriction of output in most industries, and as such are often inferior to competitive markets from a social welfare standpoint. Anticompetitive behaviour such as horizontal price-fixing, in this respect, often gives rise to two separate effects, namely: (i) a welfare transfer from buyers to sellers, represented by area B in Figure 3; and (ii) a net loss to society represented by area A, *i.e.* the foregone consumers surplus as a result of output restriction imposed by the profit-maximising choices of the monopolists. This latter type of loss is a form of allocative inefficiency that leaves society as a whole worse-off.

The debate on the contribution of antitrust to social welfare has resurged mostly after Bob Crandall and Clifford Winston (2003) published a paper in which they found little empirical support for the proposition that antitrust enforcement has provided direct benefits to consumers or deterred anticompetitive conduct.[69] Crandall and Winston studied three main areas of antitrust enforcement: monopolisation, collusion, and mergers. In each area, they concluded that the empirical evidence does not demonstrate that enforcement has benefited consumers by lowering prices or increasing output, most often because of the

[66] See, *e.g.* Pardolesi, R. and A. Renda (2003), *How Safe is the King's Throne? Network Externalities on Trial*, in Cucinotta, Pardolesi and Van Den Bergh (Eds), "Post-Chicago Developments in Antitrust Law", Edward Elgar Publishing, February 1, 2003. And Pardolesi and Renda (2004), *The European Commission's Case against Microsoft: Kill Bill?*, World Competition, 2004.

[67] On the welfare loss generated by cartels when fringe firms are active in the market, see also Page (1985).

[68] See, *e.g.* Foer (2005), Peritz (2001), etc.

[69] *See* Robert W. Crandall and Clifford Winston (2003), *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, J. ECON. PERSP. 3. With respect to cartel enforcement, Crandall and Winston concluded that "researchers have not shown that government prosecution of alleged collusion has systematically led to significant non-transitory declines in consumer prices." Crandall & Winston, at 15. They acknowledged, however, that there have been a substantial number of cartels in which firms have colluded to raise prices. *Id.* at 15.

length of the investigation and litigation, during which whatever monopoly power may have existed was dissipated by marketplace evolution.[70]

Most scholarly studies have however reached the opposite conclusion. In particular, the paper by Crandall and Winston has been directly criticised by many authors, including Baker (2003), Kwoka (2003) and Werden (2004).[71] On monopolisation, for example, Baker (2003) points out empirical work not discussed by Crandall and Winston indicating that Standard Oil's behaviour may have been monopolistic.[72] Similarly, both Baker (2003) and Werden (2004) strongly challenge the conclusions drawn by Crandall and Winston regarding cartel enforcement. Baker points to widespread and durable collusion during the 1930s under the National Industrial Recovery Act (NIRA), when "fair competition" codes relaxed antitrust prohibitions. Baker and Werden separately point to substantial evidence about cartels that have appeared to have raised prices substantially, including the *lysine* and *vitamins* cartels.[73] On merger policy, Werden (2004) also criticised Crandall and Winston by pointing out that price-cost margin values cannot be considered valid indicators of the relationship between economic cost and price. In addition, using broad 2-digit industry codes—which typically do not constitute relevant "antitrust markets"— runs a high risk of masking any potential effects[74].

As recently recalled within the activities of the US Antitrust Modernization Commission, there are several ways in which the impact of antitrust on consumer welfare can be inferred. These include empirical studies on specific industries and markets such as Kaysen (1956), Tennant (1950) and Nichols (1951); new empirical industrial organisation studies based on empirical models such as Bresnahan (1989)[75]; "natural experiments" such as those carried out by Vita (2000), Gilligan (1992), Ashenfelter *et al.* (2004) and many others.

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[70] Previously, some authors had even stated the need to repeal antitrust as a whole. See Armentano (1999).

[71] Jonathan B. Baker, *The Case for Antitrust Enforcement*, J. Econ. Persp. 27 (Fall 2003); Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, AEI-Brookings Joint Center For Regulatory Studies, Related Publication 04-09 (Apr. 2004), *available at* http://aei-brookings.org/admin/authorpdfs/page.php?id=933; John E. Kwoka, Jr., *The Attack On Antitrust Policy and Consumer Welfare: A Response To Crandall and Winston*, Northeastern University, Department of Economics Working Paper 03-005 (March 2003), *available at* http://www.economics.neu.edu/library/research/john2.pdf.

[72] Baker (2003), citing Elizabeth Granitz and Benjamin Klein, *Monopolization by "Raising Rivals' Costs": The Standard Oil Case*, 39 J. L. & ECON. 1 (1996).

[73] *See* Baker (2003), at 28-29; Werden (2004) at 3-4, citing John M. Connor, *Global Price Fixing: Our Customers are the Enemies* (2001).

[74] *See* Werden (2004), at 5.

[75] Typically such studies estimate demand, cost, and relationships describing pricing behaviour, in a framework that allows estimation of the degree to which market power is exercised. Such studies are sometimes called the "New Empirical Industrial Organisation." *See* Timothy F.

Finally, some studies compare the market structure in countries with different competition laws or regulatory frameworks. For example, in its seminal study, George J. Stigler (1966) found that industry concentration had increased somewhat more in the UK, which at the time had little merger enforcement, than in the US.[76]

In order to assess the welfare impact of enhanced private enforcement, we adopt the latter approach, by comparing jurisdictions where private enforcement is widespread, such as the US, with EU member states, where private damages actions are still in a state of "total underdevelopment".[77] In general terms, following the major orientation in the economic literature, we start from the following assumptions:

- *Effective antitrust enforcement can deter socially harmful conduct.* Absent antitrust scrutiny, firms would be led to set supracompetitive prices and restrict output in many markets, thus creating a welfare loss to society, the magnitude of which depends on the elasticity of demand and supply, and on other structural and contingent market conditions.
- *Industry players act rationally.* Market players considering the adoption of an anticompetitive conduct may decide not to undertake it as the expected sanctions increase – *i.e.* if the probability of detection and/or the expected magnitude of sanctions/damages increase. Likewise, actors that suffered antitrust injury may decide to sue for damages or file a complaint with a public antitrust authority if the probability of winning the case and the expected reward are sufficiently high to more-than-compensate the cost of legal action. Finally, industry players may decide to file a nuisance suit – like any suit – if their expected benefit from this action more-than-compensates the cost.
- *Resources are limited.* Public antitrust enforcers have limited resources to devote to case handling and detection of anticompetitive conduct; and private parties have limited resources to devote to litigation[78].
- *Information is imperfect.* Public enforcers are imperfectly informed about the specific features of each case, and the probability that they take a correct decision depends on the signal they receive from the market, as well as information they receive from undertakings filing a complaint. Also private

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Bresnahan, *Industries with Market Power*, *in* Richard Schmalensee & Robert Willig eds., (1989). Based on such estimates, one might, for example, estimate the effects of mergers that were prevented by antitrust enforcement.

[76] *See* George Stigler, *The Economic Effects of the Antitrust Laws*, Journal of Law and Economics, Vol. 9, Oct., 1966 (Oct., 1966), pp. 225-258.

[77] Ashurst study (2004), *cit.*.

[78] See, *i.a.* Souam (2001), And Martini and Rovesti (2004).

actors wishing to sue for damages may mistakenly interpret a player's conduct as anticompetitive.

- *Enforcers can make mistakes.* Depending on the specifics of the single case, public and private enforcers can incur errors of both Type I and II. In particular, if public enforcers are imperfectly informed, private parties can send imperfect signals, thus leading either administrations or judges to adopt wrong decisions.

Antitrust rules can be enforced in different ways, which are to be seen as complementary, more than substitute. The three most important ways in which antitrust rules can be enforced are through public enforcement, private rights of actions and imprisonment for antitrust violations. For the purposes of our study, we do not deal with the latter mode of enforcement, whereas in the next section we explore the interrelation and potential conflicts between public and private enforcement.

1.1 Private and public enforcement: face-off

The need to allow private enforcement as a complement to public enforcement is rooted in the insufficiency of public scrutiny of anticompetitive conduct in serving an optimal deterrence function. As recently recalled by Lande and Davis (2006), public authorities "cannot be expected to do all or even most of the necessary enforcing for various reasons including: budgetary constraints; undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by "losers" that they were in fact victims of anticompetitive behaviour; higher turnover among government attorneys, and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are at times politically motivated."[79]

The law and economics literature has extensively explored the relative merits and the potential complementarity between public and private enforcement since the seminal contribution of Gary Becker and George Stigler (1974), who argued that deterrence could be effectively achieved if private individuals enforced the law by competing for the high damages that would follow from demonstrating that a defendant was liable. In addition, they found that "private attorneys general" motivated by their self-interest could enjoy an implicit advantage over public officials – rewarded by a fixed salary – and could thus remedy a sort of government failure leading to inaction in a number of antitrust cases.[80] This seminal contribution also led to the application of the theory of optimal sanctions to the problem of antitrust enforcement. According to the

[79] Lande and Davis, *Interim Report* (2006).

[80] The term "private Attorney General" was reportedly coined by Judge Jerome Frank, one of the founding fathers of Legal Realism. See Roach and Trebilcock (1996).

authors, "society is more likely to use fines equal to damages divided by the probability of conviction to punish offenders if it must pay this amount to successful enforcers"[81]. Becker and Stigler also anticipated the problem of over-enforcement and "race to damage", but observed that these problems did not affect the general idea that private enforcement could prove as efficient as public enforcement.

This conclusion was challenged by Landes and Posner (1975), but also Schwartz (1981) and Posner (1992), mostly highlighting the risk that very high damage awards – required by the need to set optimal sanctions – would encourage an excessive number of plaintiffs to start competing for the damage award, thus leading to excessive litigation, over-deterrence and a consequent waste of resources. These observations shed more light on the inherent limits of private enforcement through optimal sanctions, and paved the way to a hectic debate on the potential over-deterring effect of private damages actions. The resulting conclusion, however, did not imply that private enforcement ought to be abandoned *tout-court*: to the contrary, it highlighted the problem of striking the delicate balance between public and private enforcement as complementary means to achieve optimal deterrence of anticompetitive behaviour.

In this respect, A. Mitchell Polinsky (1980) observed that the risk of over-deterrence as illustrated by Landes and Posner is not as significant as it might have appeared at first blush, since potential plaintiffs would only act in cases where the reward available was greater than the costs of enforcement: in other words, if the latter cost significantly increase as a result of growing competition for the "bounty" of damages, some plaintiffs would drop the action as not worth the cost of litigation. Again, as noted by Roach and Trebilcock (1996), this did not imply that private enforcement had to be abandoned: it meant that private enforcement is particularly efficient when the rewards available are greater than their enforcement costs. In all other cases, public enforcement could remedy the failure in the "market for damage awards".

This early debate can help us shape our analysis in the context of this Report. First, as was correctly observed in the law and economics literature, private enforcement must be looked at under the lens of rational individual behaviour – *i.e.* plaintiffs will decide to sue for damages only after a cost-benefit assessment of the merit of such action. Secondly, the imperfect information and limited resources available to public authorities are the main grounds for envisaging a role for private Attorney Generals in enforcing antitrust rules. Thirdly, there is a limit to the magnitude of the damage award, *i.e.* the risk that litigation costs would significantly increase and the risk of over-deterrence,

[81] Gary S. Becker, George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers,* Journal of Legal Studies, Vol. 3, No. 1 (Jan., 1974), pp. 1-18.

which could jeopardise the sustainability of the enforcement system, resulting in a misallocation of resources and a net loss to society.

Later contributions in the literature have further clarified some of the potential advantages of (well-conceived) private over public enforcement. These include informational advantages, proximity to the violation, and also increased legal certainty over the contours of antitrust law (Priest and Klein, 1984). At the same time, the growing emphasis on potential inefficiencies of public enforcement has tilted the balance towards private enforcement, at least in the US literature. Arguments that move in this direction include the risk of capture of public authorities by private interest groups; inefficiencies linked to the behaviour and incentives of "Weberian" bureaucrats often criticised in the "new public management" and "reinventing government" streams of literature; lengthy administrative procedures, the confirmation bias that affects public enforcers; the "hindsight bias" or path-dependency of public enforcers; the desire to progress in career, etc.[82] In this respect, supplemental private enforcement can improve the accountability of public enforcers, by ensuring an alternative means of scrutiny in cases where public authorities arbitrarily decide not to proceed with an investigation.

Moreover, more effective private enforcement has an impact on deterrence by significantly affecting both the so-called "availability bias" and challenging the "overconfidence bias" as described by Wils (2006)[83]. In this respect, achieving effective – thus, well-conceived – private enforcement may be construed as a case of "debiasing through law".[84] Finally, private enforcement can to a certain extent solve moral hazard problems, by leading potential offenders to take increased account of the consequences of anticompetitive actions when considering whether to undertake them.[85]

Beyond the boundaries of this debate, it emerges clearly that private enforcement is superior to public enforcement in achieving corrective justice. Although sanctions imposed by public authorities could in principle be reallocated to society as a whole, or result in an alleviation of the tax burden for

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[82] For example, Coffee. And Wils (2004); and Eger and Weise (2006).

[83] Overconfidence bias leads prospective infringers to overestimate the gain and underestimate the probability of detection and punishment; whereas the availability bias leads individuals to "rely disproportionately on those incidents which can easily be brought to mind, because they are recent, happened close to them, or were well publicized." See, again Wils (2006); for a more detailed explanation of the applications of these cognitive biases to law, see Ulen and Korobkin (2000). Finally, for a more scientific description, see Krueger and Funder (2003).

[84] See. C. Jolls, and C. R. Sunstein, *Debiasing Through Law* (March 2005). U. Chi. Law & Economics, Olin Working Paper No. 225; Harvard Law and Economics Discussion Paper No. 495. Available online at http://ssrn.com/abstract_id=590929.

[85] See, *e.g.*, Segal and Whinston, *Public v. Private Enforcement of Antitrust Law: A Survey* (December 15, 2006). Stanford Law and Economics Olin Working Paper No. 335 Available at http://ssrn.com/abstract=952067.

citizens, direct damage awards can serve the goal of *restitutio in integrum*, *i.e.* putting victims of antitrust injury in the same condition in which they would have been, had the antitrust violation not occurred. In this respect, private enforcement can be seen as a reflection of antitrust injury as a tort law matter.

On the other hand, many authors also highlighted the potential risks connected with a replacement of public with private enforcement. According to Prichard (1979), factors such as economies of scale in some types of investigation, superior investigative tools, the absence of appropriability, and the simplicity and flexibility of the fine represent efficiency advantages of public enforcement[86]. The prevalence of strategic abuse of the antitrust laws by private firms is documented by, *i.a.*, Baumol and Ordover (1985), Breit and Elzinga (1985), Shughart II (1990), Brodley (1995), McAfee and Vakkur (2004), and McAfee *et al.* (2005).

Finally, private enforcement has been seen by a limited number of authors as potentially undermining the effectiveness of public enforcement policies. The fact that private goals overlap with public policy objectives can in some cases lead to a dilution in the consistency of policymaking, and this problem is likely to be observed at EU level under the decentralised approach adopted by Regulation 1/2003.[87] In this respect, arguments on the potentially harmful consequences of private rights of action in defence of the public interest echo the never-ending debate on the possibility for the "invisible hand" to serve the overarching goal of social welfare maximisation.

1.1.1 Optimal deterrence and optimal fines: the case of cartels

According to many scholars, a possible way to maximize the effectiveness of antitrust while minimising the use of resources is by achieving the so-called "optimal deterrence" in public enforcement. This requires that the expected sanction faced by undertakings wishing to adopt an anticompetitive conduct is just sufficient to deter that conduct without deterring also purely legal actions. If this is possible, then all illegal actions will be deterred, and there would not be any need for private enforcement. William Landes and George Stigler (1970) showed that to achieve optimal deterrence the damages from an antitrust violation should be equal to the violation's "net harm to others", divided by the probability of detection.[88]

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[86] J.R.S. Prichard (1979), *Private Enforcement and Class Actions*, in J.R.S. Prichard, W.T. Stanbury & T.A. Wilson, eds., *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) 217 at 237.

[87] See J.L. Mashaw (1975), Private Enforcement of Public Regulatory Provisions: The 'Citizen Suit', 4 Class Action Rep. 29 at 33.

[88] Landes (1983), at 666-68. The theory of optimal deterrence has become widespread also amongst EU scholars – see, *e.g.*, Garoupa (1997), Harding and Joshua (2004), Wils (2005), Camilli (2006), Baks *et al.* (2005).

A decisional model based on benefit-cost analysis has been developed by many scholars, especially as regards the decision whether to form a (or join an existing) cartel. Firms will expect to bear costs ($E(C)$), which includes prospective fines and damage awards discounted at present value, and will compare such costs with the private benefit from participating in the cartel. The latter figure will be determined by the affected sales (AS) times the size of the mark-up on the competitive price (M). In summary, following Connor (2007), only if

$$E(C) < M \cdot AS$$

the firm will choose to create (or join) the cartel. In the simplest model (as in Posner, 2001), $E(C) = p \bullet F$, *i.e.* the probability of cartel detection (p) times the expected amount of the fine and/or damage award. Connor (2007) refines this model by adding the probability of conviction: thus,

$$E(C) = p \cdot c \cdot E(F)$$

where c is the probability of conviction or settlement, and $E(F)$ is the expected fine or damage award, which depends on several factors, including the potential to apply for leniency and its legal and economic consequences (*e.g.* reduction of the fine, amnesty, removal of joint and several liability, etc.).

A further refinement of this analysis implies that other prospective costs are taken into account, most notably prospective legal expenses and reputational ("stigmatisation") effects. In addition, the likelihood of settlement and the expected reduction of the sanction following a settlement transaction should be taken into account in order to portray a reasonable picture of the incentive scheme of a rational decision-maker having to choose whether to join a conspiracy or not.

In the simple version of the model, the optimal fine would have to make the potential wrongdoer indifferent between joining a cartel and not joining. In other words, the expected cost should equal the expected benefit. This requires that the sanction F be equal to the expected benefit divided by the probability of conviction.

$$F = (M \cdot AS)/(p \cdot c)$$

This, when the probability of detection/conviction is low, the optimal sanction has to be remarkably higher than actual harm in order to satisfy the above optimality condition.[89] This has led some commentators to argue that:

- *Fines should be set at a very high level* in order to efficiently deter anticompetitive actions: optimal sanctions estimated empirically in the literature were often several times higher than the actual overcharge. For example, Werden and Simon (1987) estimated that the optimal fine for the average cartel convicted by the Department of Justice from 1975 to 1980 was 111 times higher than the fine actually paid by the cartelists in their sample[90]; whereas Gallo *et al.* (2005) found that actual US fines were only 0.043% of the optimal fine in their sample of 250 cartels for the period 1955-1993, and rose to approximately 1% after 1985[91]; Wils (2005) finds that the optimal fine would reach 150% of affected sales, and within the range of 5.0 to 7.5 times the overcharge[92]; Schinkel (2006) concludes that in the EU optimal fines would need at least an 83% probability of detection, which – as will be explained in more detail below – is way greater than what empirical observation suggests.[93] Motta (2007) estimates that the minimum level of fine (relative to market turnover) necessary to deter cartel formation (if the competitive mark-up is 50% and the demand elasticity is 0.6) is around 68% per year of the relevant market turnover of the firm. And Combe (2007), under rather conservative assumptions, calculates the optimal sanction as being 6.6 times higher than the loss of consumer surplus, or – for a five-year cartel – 300% of turnover![94]

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[89] The simple formula shown here assumes that would-be cartelists are risk-neutral. The economic literature is split on this issue: on the one hand, Landes (1983) and Posner (2001) assume that the criminals are risk-neutral. As elaborated by Polinsky and Shavell (2000), a more comprehensive approach to optimal deterrence requires attention to the risk attitudes of perpetrators. Baks *et al.* (2005) argue that cartelists are risk-loving (p. 8). If so, then the ratio of expected penalties to the expected monopoly profits must be higher. Present systems of calculating monetary penalties do not take into account the risk attitudes of defendants.

[90] Werden and Simon make several simplifying assumptions: the average M is at least 0.10, p is 0.10, the average duration of collusion is 74 months, and that the average interest rate is 10%.

[91] Gallo *et al.* (1994) use a variant of the optimal sanction model, where a term ($AS \cdot 0.5M \cdot \varepsilon$) that represents the deadweight loss due to price fixing. They assume a monopoly pricing equilibrium, linear demand, a 10% mean overcharge, unitary elasticity ($\varepsilon = 1$), and a 15% detection probability. These assumptions imply that the deadweight loss is 5% of the income transfer, that Becker's net harm from price fixing is 0.105 of AS, and that F* is 0.70 of AS.

[92] Wils (2005) applies model [6] in the context of cartels prosecuted in the European Union (EU). He assumes a 20% cartel overcharge, duration of five years, and a 33% probability of detection.

[93] Schinkel (2006) assumes a 25% overcharge, five-year duration, fines of single damages, and a 30% annual depreciation rate; he also assumes that full amnesty and all cooperation discounts are granted by the EC.

[94] Here is a numerical example: let 100 be the competitive price and 110 the cartelized price. Quantity sold under the cartel is 20 units, and turnover is 2200, of which 200 is the overcharge.

- If the probability of detection cannot be raised beyond certain thresholds, then *optimal fines are inconsistent with ceilings* currently imposed on fines on both sides of the Atlantic; this includes: the 1987 US Sentencing Guidelines for criminal price fixing, which impose an upper limit of 80% of the guilty firm's US affected sales[95]; the updated EC fining guidelines, which do not overcome 30% of affected sales even in cases of "gravity" and maintain, in any case, the cap of 10% of the convicted firm's global turnover; and the Japanese cartel policy, where the JFTC never overcame 6% of Japanese affected commerce.
- *The setting of an optimal fine is hardly feasible*, also because too high fines will face the limit of the defendant's ability to pay. In particular, Werden and Simon (1987) observe that the optimal fine would lead several firms to bankruptcy.[96] Wils (2006) also claims that "[i]f such high fines were really imposed, many of the companies concerned would be forced into bankruptcy". Also, Craycraft *et al.* (1997) found that in the US only 42% of the firms would have been able to pay the optimal fine without falling into bankruptcy, and only 26% by means of the highest measure of the operating funds.[97]

In other words, the theory of optimal fines depicts a world in which the impossibility to achieve a reasonably high probability of detection leads to the setting of too high fines, which would prove too burdensome for infringers that are actually convicted. In this respect, *private enforcement effectively acts as a complement to public enforcement in a second-best context*, where the optimal solution is impossible to achieve. Private enforcement contributes to more effective deterrence by: (i) increasing the probability of detection *p*; and (ii) adding (or replacing) damage awards to the prospective fines imposed by

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If probability of detection is 15%, the optimal sanction will be 6.6 times the overcharge, *i.e.* 1320 Euros. This is the same as stating that the sanction should be 60% the total turnover (2200*60% = 1320). If the duration is 5 years, the optimal sanction will be 6600 Euros, *i.e.* three times the annual turnover and 33 times the overcharge.

[95] However, a significant body of evidence suggests that half or less of all historical cartels exhibit long run price effects below 25% (Connor and Lande 2005). The proportion of global cartels below the 25% threshold is even smaller. Although at first blush 80% sounds harsh enough to punish the most flagrant violators, under the simplest models of *ex ante* cartel deterrence only national cartels with overcharges below 15% to 25% will be deterred.

[96] Werden G.J. and Simon M.J. (1987), *Why Price Fixers Should Go to Prison*, Antitrust Bulletin, vol. 32(4), 917-937. The authors find that optimal fines would exceed firms' financial capacity to pay, and thus support imprisonment of price-fixers as a more effective means of achieving deterrence.

[97] C. Craycraft, J. L. Craycraft and J. C. Gallo (1997), *Antitrust Sanctions and a Firm's Ability to Pay*, 12 Review of Industrial Organisation, 175-176. The authors find that 95 to 100% of all firms fined for price fixing 1995-1993 were able to pay their fines.

public enforcers – depending on whether a private suit is stand-alone or follow-on.[98]

Turning back to optimal sanctions, as explained by Connor (2007), a cartelist in a jurisdiction with both public and private enforcement would face the following benefit-cost calculation:

$$E(C) = p_g c_g E(F) + p_p c_p E(S) + E(R)$$

Thus, the expected penalty faced *ex ante* by a cartelist is the sum of expected public penalties ($E(F)$), expected private damage settlements ($E(S)$) and expected (negative) reputational effects ($E(R)$).

This also implies that if the probability of detection with private and public enforcement is greater than under pure public enforcement – and the prospective damage award is significant – then deterrence can be achieved more effectively with both private and public enforcement. A simple example would help in clarifying this point. Let 15% be the detection/conviction rate under pure public enforcement ($p_g c_g$), and 10% the additional detection/conviction rate with private enforcement ($p_p c_p$). Further, assume that the prospective settlement value totals 100 million, whereas the expected fine would not be greater than 50 million. This being the case, the deterrence effect contribution under both public and private enforcement would be 1.33 times greater than under pure public enforcement. A widely acknowledged *tenet* in the literature on optimal fines is that, given the impossibility to raise fines over certain levels, *an increase in the probability of detection is more important than the increase in the amount of fines and sanctions* in order to achieve more effective deterrence of anticompetitive conduct. Absent this finding, public and private enforcement do not differ noticeably in terms of deterrence potential, and the only advantage of private over public enforcement would lie in the greater potential for corrective justice.

Several refinements are needed in order to approximate this very simple model to reality. Furthermore, as we turn our attention to the welfare impact of enhanced private enforcement, it is important to take into account both the perspective of the would-be cartelists, as well as the standpoint and incentives

[98] As stated in the recent consultation document published by the OFT, "[a] more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or a claimant will increase. As these financial risks increase, so does (or should) the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups). In this way public enforcement and private actions are complementary."

of economic actors having suffered antitrust injury and having to decide whether to sue or not. We adopt the perspective of the former in the next section, whereas in Part II of this Report we will look more closely at possible options to encourage damages actions from the standpoint of the plaintiffs.

2 An analysis of the impact of enhanced private enforcement in the EU

In this section, we assess the potential for private enforcement to contribute to social welfare by improving the detection and deterrence of anticompetitive conduct, by fostering damage compensation and the degree of market competition. We take as reference a theoretically effective system of private enforcement, regardless of the means through which such effective system has been reached.[99]

Examples of recent papers that analyse the welfare contribution of private enforcement as a complement to public enforcement include Martini and Rovesti (2004) – who find that social welfare increase if both private and public agents can launch an investigation, and that private enforcement can remedy the lack of resources and information constraint of public authorities; and McAfee *et al.* (2005), which find that mixed public and private enforcement is superior to pure private enforcement and – under certain conditions – also to pure public enforcement. The authors also find that pure private enforcement is always suboptimal, and that introducing more effective private enforcement leads overtime to private actions outpacing public actions. More recently, Segal and Whinston (2006) also illustrate a model of private v. public enforcement, and conclude that there might be some role for using the superior information of private parties, as private litigation does, but that this use also creates a number of potential problems. According to the authors, whether the potential benefits outweigh the costs is ultimately an empirical question.

Figures 4a and 4b below sketch the differences between a world with only public enforcement, and one with mixed public and private enforcement.[100] In the figure, Firm 1 decides whether to undertake a legal or an illegal action – *e.g.* participating to a cartel, acting in conscious parallelism with a rival, abusing its dominant position, etc. Following such decision, Nature sends a signal to the competition authority – such signal can be correct or not. Depending on the signal received, a national competition authority (NCA) decides whether to scrutinise the conduct or not, issuing a decision on whether Firm 1 is guilty or innocent. This, in turn, can lead to Type I and Type II errors, along with correct decisions.

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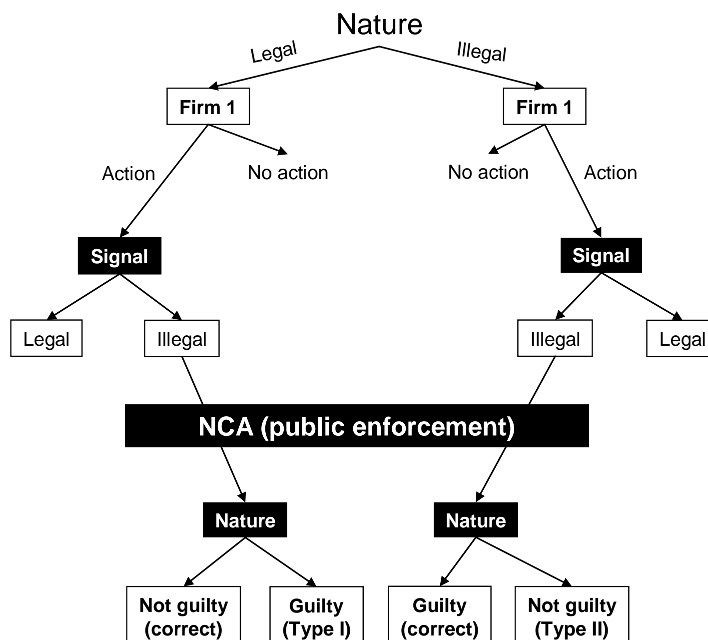
[99] Such means will then be tackled in the assessment of specific measures (see below, Part II).

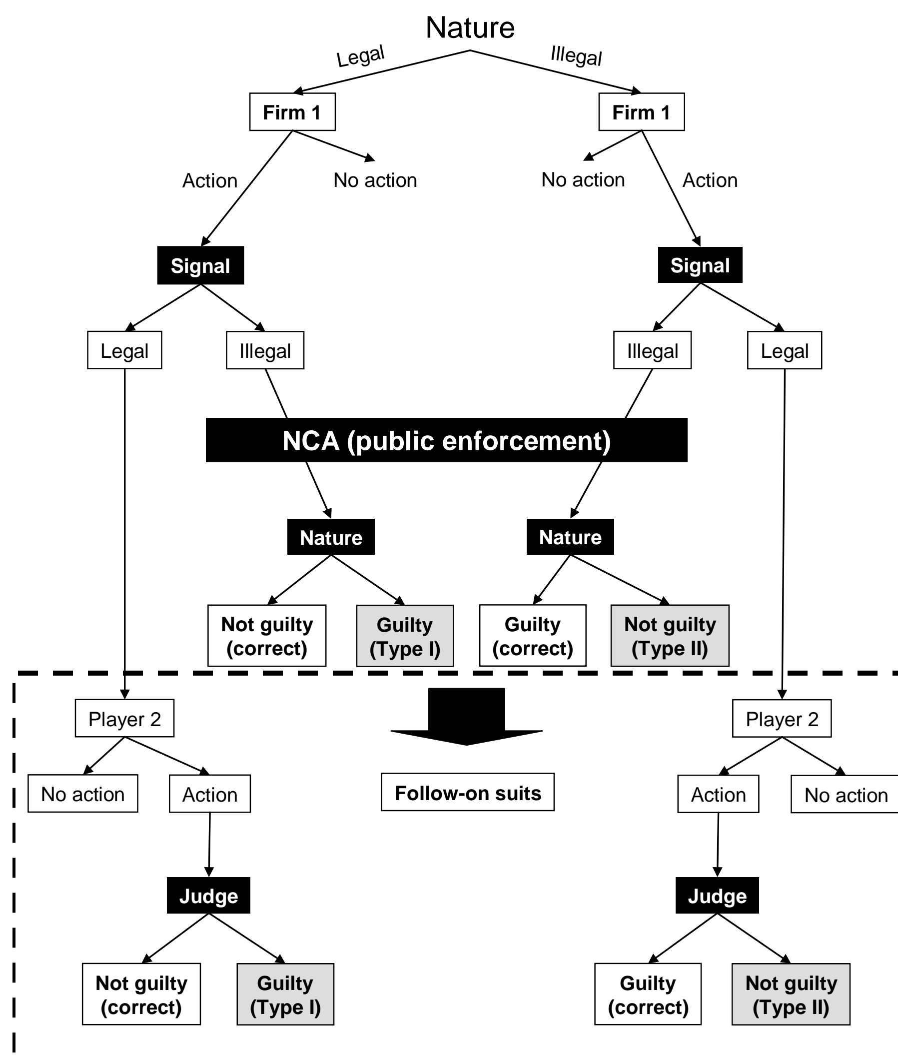
[100] The figure is an elaboration on R. Preston McAfee, H. P. Mialon & S. H. Mialon (2005), *Private v. Public Antitrust Enforcement: a Strategic Analysis*, Emory Law and Economics Research Paper No. 05-20.

Figure 4a – Public enforcement



With private enforcement (Figure 4b), the channels that can be activated to challenge an otherwise undetected anticompetitive conduct are multiplied. First, player 2 (*e.g.* a competitor, a downstream firm, a consumer or group of consumers) can take a stand-alone antitrust damages action before a national court: under the assumption that this player holds better information than the NCA, this can lead to both enhanced effectiveness of antitrust enforcement, as well as increased strategic abuse of antitrust laws. Depending on what courts decide, correct judgments, Type I and Type II errors can materialise. In addition, private enforcement allows for follow-on suits both when an NCA has adopted a decision – *e.g.*, to impose a fine on Firm 1 for its anticompetitive conduct – and when a national court has done so. All such suits can be settled before trial by the parties: in case this occurs, transaction costs would increase, but administrative costs borne by NCAs and national courts would be lower. Finally, if private enforcement is facilitated and gradually outpaces public enforcement, trial costs would increase, whereas administrative costs (*i.e.* workload) of the NCA would be reduced.

Figure 4b – Public and private enforcement



This complex picture reveals the mixed impact that enhanced private enforcement can exert on overall welfare. As a preliminary statement:

- *if private enforcement is effectively designed, the probability of detection of an illegal conduct increases, the accuracy of fact-finding increases, and deterrence also increases*. This, in turn, would increase workload for national courts, increase trial costs for private parties, increase the competitiveness of markets overall, and reduce the potential for strategic abuse of antitrust laws.
- *If private enforcement is relatively more efficient than public enforcement, this leads private antitrust damages actions to gradually outnumber public enforcement cases* – *e.g.* in the US, at least 90% of antitrust actions are initiated by private parties. However, if private enforcement is not effectively designed, this can

lead to an undue multiplication of private actions and an over-deterrence effect on firms.

- *Moreover, if private enforcement fosters strategic abuse of antitrust laws, this can lead to increased Type I errors* (false convictions), and thus to inadequate investment, unmeritorious (strategic) suits and unmeritorious settlements. This has led authoritative commentators to argue that private enforcement is inferior to (effective) public enforcement and should not be encouraged in Europe.[101]

As a result, the potential impact of private enforcement on social welfare is not easy to determine, and can be said to depend on several factors, including:

- *the probability that an illegal action is deterred*: such probability should increase alongside with enhanced private enforcement, as it is widely acknowledged in the literature that detection rates for anticompetitive conduct increase in jurisdictions that allow for private rights of action. However, the incentive to sue for private parties heavily depends on procedural rules introduced, including fee-shifting rules, client-lawyer fee arrangements and rules on access to evidence, as we will clarify in more detail in Part II of this Report.
- *the probability that an illegal action is undertaken, but is then overturned by the court*: such probability should increase with both private and public enforcement, as private parties often hold superior information on the occurrence of anticompetitive behaviour, due to superior knowledge of the market and proximity to the damage. They can therefore sue for damages in their own interest, at the same time defending the public interest in maximising competition and its beneficial effects on the market. The likelihood of Type II errors (false acquittals) may encourage firms to undertake illegal actions, even if they know that they will be sued before a court or prosecuted by a NCA. For this reason, we consider the probability of conviction (after legal action has been taken) as a separate variable from the probability of detection (the mere fact of being prosecuted for anticompetitive behaviour).
- *the probability that a legal action is deterred*: this also potentially increase when private enforcement is coupled with measures aimed at encouraging access to justice by competitors, direct and indirect purchasers, as well as consumers. The threat of nuisance suits and excessive litigation can act as a burden for firms, which will try to incorporate the risk of future settlements already in their prices. In this respect, strategic abuse of antitrust laws and over-deterrent damage multiples could, under certain circumstance, jeopardise the inherent goal of private enforcement.

[101] W. P. J. Wils, *cit.* 2003.

- *the probability that a legal action is overturned*: this is the case of Type I errors (false convictions). If this probability turns out to be significant, then the overall welfare-enhancing potential of the competition rules may be threatened. As was recalled by many scholars and courts in the past decades, especially for some types of allegedly anticompetitive conduct (*e.g.* predatory pricing, bundling), inaccurate antitrust scrutiny can harm society as much as absence of scrutiny. The same can be said when plaintiffs can exert an influence on judges in the discovery process, thus "capturing" an imperfectly informed court: this at once harms incentives to undertake perfectly lawful actions, and undermines the foundations of competition law by creating uncertainty over the standards that will be applied to specific types of conduct.[102]
- *the expected trial costs*: depending on the extent to which private damages actions outnumber public cases, and on the relative costs of the two means of enforcing antitrust rules, measures aimed at facilitating private damages actions could result in increased costs due to lengthy proceedings, legal expenses and excessive transaction costs due to litigation. With a contingency fee system, widespread collective actions and aggressive rules on access to evidence (referred to as "the trinity" of US-style private enforcement), legal fees have reached very high stakes in jurisdictions such as the US[103].

In terms of social welfare, as the probability that illegal actions are deterred increases, social welfare also increases through the elimination of the deadweight loss resulting from non-competitive markets; likewise, if illegal actions undertaken are then overturned by a court, social welfare does not necessarily increase, but a welfare transfer occurs through damage compensation, net of the costs of trial.[104] On the other hand, cases of Type I errors (false convictions) arising from strategic abuse of antitrust laws can have a negative impact on social welfare, by challenging otherwise welfare-

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[102] For such reason, the standard to be applied to predatory pricing is normally conceived to minimise Type I errors, as evidence of low prices – normally beneficial for end consumers - should not lead to a prima facie case for infringement of the antitrust rules. See, *e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)), where the US Supreme Court states that if a court erroneously concludes that a firm has engaged in illegal predatory pricing, "the costs of [such] an erroneous finding of liability are high" because firms may be reluctant to cut prices aggressively if they fear predatory pricing allegations.

[103] Riley and Peysner (2006), Damages in EC Antitrust Actions Who Pays the Piper?, E. L. Rev 748-761.

[104] Normally damage awards do not take into account the deadweight loss resulting from anticompetitive conduct. For such reason, even with damage compensation aimed at *restitutio in integrum* – *i.e.* not taking into account damage multiples – no real recoupment of the deadweight loss caused by anticompetitive action will be achieved.

enhancing conducts. Likewise, Type II errors (false acquittals) can legitimate anticompetitive conduct which produces a negative effect on society as a whole.

The complexity of the debate on the potential for private enforcement to efficiently and effectively complement public enforcement calls for a careful illustration of the means through which private damages actions can serve the overarching goal of achieving optimal deterrence of anticompetitive conduct. For this reason, in the next section we introduce a model of optimal sanctions and deterrence, which will then inspire our welfare analysis.

Overall, the main impacts of more effective (*i.e.* not simply "enhanced") private enforcement would include the following:

- *Greater deterrence*: with easier access to justice by relatively more informed players, adding greater private enforcement to existing public enforcement may increase both the likelihood of detection and the expected sanction for potential infringers, and as such would lead to increased deterrence and compliance with antitrust laws.
- *Greater compensation*: also in terms of achieving corrective justice, more effective private enforcement would certainly lead to improvements if compared to a situation of low or no private enforcement. However, the extent to which greater corrective justice can be expected in a system with more effective private enforcement is hard to quantify.
- *Smaller deadweight loss*: to the extent that private enforcement can exert a deterrence effect on potential offenders, and also depending on the extent to which causation can be proved by all victims, the social loss resulting from anticompetitive behaviour would be reduced. This would in turn lead to beneficial social effects at more aggregate (macroeconomic level)[105].
- *Administrative burdens*. A complete welfare analysis of the impact of more effective private enforcement requires an estimate of administrative burdens that would be faced by NCAs, national courts and private parties when dealing with private damages actions.

Below, we illustrate the available evidence for each of these impacts.

2.1 Can private enforcement achieve greater deterrence?

In theory, private damages actions can increase the deterrent effect of antitrust rules in at least three ways: by increasing the detection rate; by increasing the prospective penalty after detection; and by ensuring more accurate fact-finding.

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[105] But see below, our discussion in Section 6.2.

2.1.1 Deterrence through enhanced likelihood of detection

As already mentioned, one of the potential advantages for coupling private and public antitrust enforcement is the superior information held by private plaintiffs. This, in principle, should result in a higher detection rate, and correspondingly to a greater deterrence effect, independently of the expected magnitude of the sanction or damage award.

In the United States, the first to analyse the probability of being caught were Bryant and Eckard (1991), who concluded that the detection rate would fall between 13% and 17%. They analysed the birth and death of a sample of 184 price-fixing conspiracies for the period from 1961-1988, at a time when the US had not launched its revised leniency policy, which after 1993 reportedly caused a major increase in the number of applications.[106] Accordingly, it is fair to expect the detection rate in the US to be greater than 17% today.

To the contrary, most studies on the detection rate of global cartels seem to converge to a 15% figure.[107] The OECD study on a small sample of cartels (2003) suggested that only one cartel out of six or seven is detected and prosecuted. Connor (2003) also estimates that the probability of detection falls between 10% and 20%, and once discovered, cartelists are condemned in 50%-75% of the cases.[108] Connor and Lande (2004) quote that Assistant Attorney General Douglas Ginsburg stated that price fixing violations had no more than 10% chance of detection in the US (USSG 1986:15).[109] Finally, Calvani (2005) quotes by analogy the probability of theft detection in the US, which does not exceed 19%.

It could be possible to infer the contribution of private enforcement to increased cartel detection rates by comparing current rates in the US with those in the EU, where private enforcement is relatively underdeveloped[110]. However, to our

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[106] The original US programme was implemented in 1978; the revised leniency programme on 10 August 1993. Hammond (2003) describes that while the old programme exposed an average of one cartel per year, the revised programme caused a trend-break by generating an average exposure rate of more than one cartel per month. (p. 5).

[107] Levenstein and Suslow (2002) note that U.S. government antitrust prosecutions accounted for only 10% of some of the best documented cartels (p.16). However, this finding is related to an observation of cartels in the interwar period, and as such cannot be applied to today's situation.

[108] According to Connor (2007), even if cartelists are indicted by the U.S. DOJ, the chances of being convicted are less than 100 percent. "The DOJ likes to boast that more than 80 percent of its indictments end in guilty pleas, which is true because the per se evidence is so damning in most cases that defendants usually negotiate a guilty plea. On the other hand, when accused price fixers choose to litigate a criminal price-fixing case, the government wins their cases less than half the time. Thus, cartelists adept at covering up their clandestine meetings or able to afford the best legal defense teams might well judge their chances of conviction to be in the 50 to 75 percent range".

[109] Werden and Simon (1987) adopt this figure as a reference.

[110] For a justification of this statement, see Section 1.2.4 in the introduction to this Report.

knowledge no accurate estimates exist as regards transatlantic differences in cartel detection. The highest figure ever suggested in the literature is that of Landes (1983) – later followed also by Cohen and Scheffman (1989) – who assumes a 33% detection rate, although his analysis is to be considered as merely illustrative. Wils (2006) assumed a probability of detection and punishment of 16%, which he considered to be a conservative estimate. He also acknowledges that the detection rate in Europe should be lower than in the US, given the weaker investigative powers of EU antitrust authorities compared to the US ones.[111] Lately, Commissioner for Competition Neelie Kroes stated that the detection rate in the EU is improving as a result of effective leniency policy.[112]

Most recently, Combe and Monnier (2007) analysed all the 86 cartels convicted by the European Commission from the *Quinine* cartel in 1969 and the *Lifts and Escalators* Cartel in February 2007. They estimate that the probability of being caught in a given year, conditional to the probability of being detected, would be at most between 12.9% and 13.2%.

Table 2 below summarises the main estimates for detection rates provided in the literature over the past decades. Based on these data, we assume that the probability of detection of cartels in the US is approximately 20%, and higher than in the EU. For simplicity, we will assume the probability of cartel detection in at EU level to be approximately 15%, due to lack of effective private enforcement. As a matter of fact, the contribution of private enforcement to the detection rate is considered to be positive.[113]

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[111] Back in 1985, in a survey conducted by Feinberg of antitrust lawyers working in Brussels, only 5% disagreed with the statement "The [EC] fails to detect most [price-fixing] violations", whereas 62% agreed with the statement. Other interesting results were: 95% agreed that price fixing was intentional and for profit gain and 100% agreed that the greatest deterrents are a high probability of detection and high EU fines.

[112] See Neelie Kroes, *Enforcement of Prohibition of Cartels in Europe,* speech at the European University Institute, available online at http://www.iue.it/RSCAS/research/Competition/2006(pdf)/200610-COMPed-Kroes.pdf.

[113] In his model, Connor (2007) states that the probability of detection and legal action by private parties (p_p) is slightly greater in size than the likelihood of detection by public officials (p_g).

Table 2 – Estimates on cartel detection rates

Source	Probability	Comment
Landes (1983)	0.33	Merely an illustration
USSD (1986:15)	0.10	Contains a transcript of 1987 testimony of DAAG for Antitrust Ginsberg; probably refers to domestic cartels 1970-1980s
Cohen and Scheffman (1989)	0.33	No source; probably influenced by Landes 1983
Beckstein and Gabel (1982)	Less than 0.50	A large anonymous survey of antitrust lawyers in ABA, mean response 3.6
Feinberg (1985:379)	Less than 0.50	An anonymous confidential survey of antitrust lawyers working in Brussels and observing EC, the mean response was 4.4
Werden-Simon (1987)	Less than 0.10	Quoting the 1987 testimony of DAAG for Antitrust Ginsberg
Bryant-Eckard (1991)	0.13-0.17	Quantitative estimate derived from an event study of US prosecuted cartels 1961-1988
OECD (2002: 19)	0.13-0.17	Accepts Bryant and Eckard
Golub *et al.* (2005)	0.13-0.17	Replicated Bryant and Eckard (1991) using US cartels from later periods and finds few differences in deterrence
Wils (2005:30)	Less than 0.33	Cites with approval Bryant and Eckard (1991) but the author believes that the US probability has increased since 1961- 1988 and is lower in EU than in US, 0.33 is a conservative upper limit for the EU.
Wils (2006: 24)	16%	Cites with approval Bryant and Eckard (1991), and assumes 16% is still a conservative estimate for the EU, due to weaker investigative powers of EU authorities.
Schinkel (2006:25)	0.15	Cites only Bryant and Eckard (1991) but considers it controversial and outdated.
Bush *et al.* (2004)	0.10-0.33	Summary of most of the sources in this table
Stucke (2006:47)	unknown	Although without certainty, the author favourably cites USSG (1986), OECD (2002) and Bryant and Eckard (1991)
Combe-Monnier (2007)	0.129-0.132	Analysis of the 86 cartels convicted by the Commission between 1969 and February 2007. The authors consider it an upper bound estimate.

Source: own elaboration based on Connor (2007).

2.1.2 Greater deterrence through increased sanctions and damage awards

Another way in which private enforcement contributes to increase the expected cost of joining a conspiracy is by increasing the magnitude of the expected penalty. According to a recent study by Connor and Helmers (2006), for 283 modern private international cartels discovered anywhere in the world from January 1990 to the end of 2005, aggregate damages were over $300 billion in

real 2005 dollars (a median overcharge of 27% over sales of $1.2 trillion). For those cartels, worldwide, median penalties were less than 21% of actual overcharges. US and Canadian fines, nearly all of them flanked by criminal convictions, resulted in the highest median average fine ratios (15% to 18%), whereas the EU fines are much lower, averaging less than 10% of overcharges for detected and non detected cartels in the EU market. In addition, private settlements comprise the largest single category of world-wide cartels penalties, *i.e.* 48% of all penalties. In the sample scrutinised by Connor and Helmers, the median real penalty/sales ratio varied from 1.4 to 4.9%, depending on the type of prosecution. As a proportion of *damages*, median fines ranged from less than 4% for EU Member States' cartels to 17.6% for Canada.

In the US, as recently reported by Connor (2007) based on the same dataset, damage awards remarkably contributed to deterrence, and represented more than 90% of penalties. In absolute terms, Connor (2007) reports than EU fines are on average 72% of US fines for the same type of cartel, although this estimate is based only on those five cartels that were sanctioned in the US, EU and Canada.[114] In addition, US public fines were in the range of 27%-67% of the overcharge, whereas Canadian fines were in the 28-92% range; EU fines were in the 23-79% range; and US and Canadian settlements of private damages actions fell in the 87-313% range, thus representing, also in terms of actual cost for cartelists, the lion's share of *ex post* punishment.[115] Against this background, we assume that enhanced private enforcement has a clear potential to enhance deterrence.

2.1.3 Greater deterrence through more accurate fact-finding

The fact that private parties possess more detailed information about existing anticompetitive behaviour is widely acknowledged in the economic literature. As recalled by Shavell (1984), "private parties should generally enjoy an inherent advantage in knowledge" over public regulators", as "for a regulator to obtain comparable information would often require virtually continuous observation of parties' behaviour, and thus would be a practical impossibility".[116] Also Brodley (1996) argued that "competitors and takeover targets are ideal litigants in terms of litigation capability because they are likely

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[114] See Connor (2003), Table 16.

[115] Although EU fines were comparable to the US ones in terms of percentage of overcharge, the affected sales in the EU were on average higher. For this reason, Connor (2007) observes that EU fines are generally lower than US ones. Also, Connor (2003) reports that in practice the EC has rarely needed to worry about breaching the 10% cap provided in its earlier fining guidelines for cartels and later at Article 23(2) of Reg. 1/2003.

[116] Shavell (1984), at 360.

to have the skill, knowledge of the industry … and motivation to mount a powerful case … with speed and precision"[117].

Greater deterrence is normally achieved in antitrust private enforcement both by actions aimed at injunctive relief and by damages actions. For the purposes of this Report, we focus more on the latter. Evidence from the US shows that private damages action can significantly improve the accuracy and scope of antitrust enforcement, as victims are often more informed than public authorities on the exact length, nature and impact of observed conducts. As an example, in the criminal pleas arising from the bulk vitamins price fixing cartel, the US DOJ accepted pleas with respect to 9 vitamins for time periods shown in the table below. In contrast, after three years of pre-trial discovery, a plaintiffs' expert report documented the workings of the cartel with respect to 7 additional vitamins and, for the original nine vitamins, the private plaintiffs established that the conspiracy's duration lasted considerably longer than the DOJ pleas had indicated.

Table 3 – Informational contribution of private plaintiffs: the vitamin case

Vitamin	Conspiracy Period According to DOJ Pleas	Conspiracy Period Proved by Private Plaintiffs
Premix	Jan 1991 – Dec 1997	Jan 1991 – Dec 1997
Vitamin E	Jan 1990 – Feb 1999[43]	Jan 1985 – Feb 1999
Vitamin A	Jan 1990 – Feb 1999	Jan 1985 – Feb 1999
Vitamin C	Jan 1991 – Nov 1995	Jan 1985 – Nov 1995
Choline Chloride (B4)	Jan 1988 – Sep 1998	Jan 1988 – Sep 1998
Beta Carotene	Jan 1991 – Dec 1998	Jan 1988 – Dec 1998
Calpan (B5)	Jan 1991 – Feb 1999[44]	Jan 1985 – Feb 1999
Niacin (B3)	Jan 1992 – Mar 1998[45]	Sep 1990 – Mar 1998
Riboflavin (B2)	Jan 1991 – Fall 1995	Jan 1985 – Sep 1995
Biotin (H)	No prosecution	Jan 1985 – Sep 1995
Thiamine (B1)	No prosecution	Jan 1985 – June 1994
Vitamin B12	No prosecution	Jan 1990 – Dec 1997
Pyridoxine (B6)	No prosecution	Jan 1985 – Dec 1994
Carotenoids	No prosecution	Jan 1988 – Dec 1998
Vitamin D3	No prosecution	Jan 1985 – Feb 1999
Folic Acid (B9)	No prosecution	Jan 1991 – June 1994

Source: Lande and Davis (2006)

In the recent interim report of the study by Robert Lande and Joshua Davis for the American Antitrust Institute, evidence was found that in many instances the contribution of private plaintiffs in broadening the scope of antitrust scrutiny and increasing the sanction/damage award faced by defendants was significant. For example, in the *Automotive Refinishing Paint*

[117] See Brodley (1996), at 35.

case, government investigation yielded no indictments, whereas private cases led to a recovery of $67 million. In the *El Paso* case, private plaintiffs obviated the need for separate government action seeking monetary recovery. In *Polypropylene Carpet*, private plaintiffs obtained greater monetary recovery and prosecuted larger number of defendants. In *Relafen*, there was no federal case, and state governments intervened only after settlement – private plaintiffs provided the compensation to victims; in *Sun v. Microsoft*, private plaintiffs made broader allegations than U.S. government action, obtained information that supported later European action, and protected distribution of "pure" Java software. Finally, in *Specialty Steel*, private action led to a finding of longer time period[118].

However, two *caveats* have to be put forward before concluding over the alleged superior accuracy of private enforcement over public enforcement. First, the superior information held by private parties can also lead to increased risk of capture for national courts.

Secondly, it must be recalled that private parties cannot be assumed to hold greater information than public enforcers in all possible cases: as pointed out, *i.a.*, by Segal and Whinston (2006), the legal/illegal signal received by private parties (see above, figure 4b) in observing the market behaviour of a firm or group of firms can be significantly hard to interpret for anticompetitive conducts that are scrutinised under a rule of reason – *i.e.*, an assessment of the likely social costs and benefits of the observed conduct. In these cases, rules on access to evidence play a key role in ensuring at once that substantial information can be collected during trial, and that no ill-conceived lawsuit is filed by private plaintiff on the basis of a mistaken interpretation of the defendant's behaviour. Otherwise, public enforcers such as NCAs may possess better knowledge and skills to appraise the relative merit of the action from a social welfare perspective.

The assessment of the potential impact of more effective private enforcement on deterrence must, therefore, be carried out very carefully and for different types of violations:

- In the case of *cartels*, as already recalled, enhanced private enforcement may lead to increased probability of detection and more accurate fact-finding, especially where evidence of agreement is not directly observable. However, when evidence of a cartel is not straightforward, the risk of judicial error can be substantial – in some cases, NCAs only infer the existence of a cartel by

[118] See R. H. Lande & J. P. Davis¸ *An Evaluation of Private Antitrust Enforcement: 29 Case Studies*, interim report, 8 November 2006, available online at http://www.antitrustinstitute.org/recent2/550b.pdf.

using sophisticated techniques[119]. Moreover, the interrelation between extensive availability of private enforcement and leniency programmes has to be carefully taken into account, in order to secure that increased deterrence for potential cartelists does not hamper the incentives provided by leniency mechanisms, which are currently the most effective public enforcement investigative tool against secret naked cartels. In this respect, evidence from the US suggests that more effective private enforcement and powerful leniency programmes can successfully co-exist, as despite the risk of prospective damages claims, leniency applications are still filed.

- The case of *exclusionary abuses* is very different[120]. First, the typical claimant in these cases would be a rival firm, normally holding more information than public authorities. Adding private enforcement to public enforcement in these cases may lead to greater deterrence by increasing both the prospective sanction and the likelihood of detection. However, also the risk of strategic abuse of antitrust laws, in the form of unmeritorious claims, may increase. Moreover, the assessment of damages can become quite difficult, as it might imply the assessment of foregone profits or opportunity costs for competitors, the loss of dynamic efficiency through market foreclosure, etc.[121]
- For what concerns *vertical restraints*, again private parties such as direct rivals on both the upstream and downstream markets may have significant information and an incentive to sue for damages. The added deterrence for firms considering whether to engage in such conduct is significant, as the probability of detection of these conducts is high. However, for conducts subject to a rule of reason, the risk of nuisance suits and also inadvertently ill-grounded claims increases along with trial costs.

2.2 Private enforcement and corrective justice

To be sure, instead of only providing for fines to be paid to public authorities and then (only indirectly) redistributed to society, private enforcement can lead to a direct recovery of damages, linked in one way or another to the magnitude of the loss suffered by victims.[122] Existing empirical studies confirm that *ex post*

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[119] See, *e.g.*, Friederiszick and Maier-Rigaud, *The Role of Economics in Cartel Detection in Europe*, in D. Schmidtchen, M. Albert and S. Voigt (eds.), *The More Economic Approach in European Competition Law*, Mohr Siebeck, Tübingen, 2007.

[120] In cases of bundling/tying and predatory pricing private damages actions are unlikely to be filed by consumers or direct purchasers. Competitors seeking an injunction are more likely to lodge a complaint at the NCA or EC.

[121] See *infra,* Part II, Section 4 of this Report.

[122] On the indirect impact on corrective justice of fines collected by NCAs, see, *e.g.* W.P.J Wils, *Optimal Antitrust Fines: Theory and Practice*, in World Competition, Vol. 29, No. 2, June 2006, 183. This, to be sure, does not extend to past deadweight losses, as not all subjects damaged by

private enforcement enables the (at least partial) recovery of injury suffered, and – depending on the calculation of damages – may even go beyond the actual loss suffered, for example as a result of trebling of damages.

The assessment of the potential for greater corrective justice under more effective private enforcement must, again, be appraised by distinguishing between types of antitrust violation:

- In the case of *cartels*, damages may be recovered by both direct and indirect purchasers, including consumers – especially where collective actions are easily accessible and legally allowed. Damages can be calculated as cartel overcharges, as other measures of damage – especially for foreclosed or otherwise damaged competitors – are harder to monetise.[123] In these cases, reliance on disgorgement of profits also can contribute to corrective justice, when invoked by downstream players[124]. Following Connor (2000), we can distinguish five groups that potentially sustain an economic loss from a price-fixing conspiracy:
    a) *direct purchasers*, downstream firms or final customers, who pay the cartel overcharge for their inputs or final products;
    b) *customers who did not purchase from cartel members but from fringe firms* outside the cartel, but within the same relevant market, that charge a *higher* price as a non-cooperative response to the cartel price[125];

anticompetitive conduct can claim back the damage; to the contrary, private enforcement can avoid future losses through injunctions by national courts, as the degree of competition increases in relevant markets. The compensatory effect would mostly be observed in 'traditional' markets, where monopoly prices exceed marginal and average cost and quantities produced are lower than under a competitive scenario. A much weaker impact would be felt, for example, in two-sided markets, as well as in markets where marginal costs are very low and price is less important than product/service diffusion. In these markets – which comprise most ICT markets – losses avoided through enhanced private enforcement are to be measured over a longer term, as loss of dynamic efficiency and innovation.

[123] There are two general approaches towards assessing the price overcharge. The first approach quantifies the price overcharge using comparators (*e.g.*, measuring the actual cartel prices and comparing these to the pre- and post-cartel prices, or to prices in comparable sectors, or to prices in the same sector in comparable countries); the second approach aims at directly constructing the competitive but-for price using only information on the cartelised market itself – through simple cost-plus analysis or a full-fledged simulation analysis.

[124] The FTC has stated that "disgorgement and restitution can play a useful role in some competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties". See FTC, *Policy Statement on Monetary Equitable Remedies in Competition Cases*, 68 Fed. Reg. 45,820 (Aug. 4. 2003). *Contra*, see D. K. Park & L. Wolfram, *The FTC's Use of Disgorgement in Antitrust Actions Threatens to Undermine the Efficient Enforcement of Federal Antitrust Law*, the Antitrust Source, September 2002.

[125] This is the so-called "umbrella effect" of a cartel.

c) *indirect purchasers who pay inflated prices for products that contain the cartelised input* (if the overcharge is partly passed-on by direct purchasers to the next layer of the supply chain);
d) *purchasers* who would have purchased the cartel product at a competitive price, *but who either do not purchase at all or purchase a less-preferred alternative outside the cartel*; and
e) *suppliers to the cartel or to other firms who sell products that contain the cartelised input*, who both sell less because of the output restriction at the cartel *price*.

We can assume that, in order to achieve perfect compensation/corrective justice, all these groups should be granted access to justice to recover damages: however, for many reasons, only some of these groups are actually granted standing to sue in jurisdictions where private enforcement is effective. For example, based on our knowledge, the last two groups are never granted standing in the US, whereas following the ECJ decision in *Courage* and *Manfredi* they would have standing in the EU[126]; the success of their claim would then depend on the extent to which they can prove causation.

- In cases of *exclusionary abuses*, damage compensation can be obtained by potentially damaged players, in the form of lost profits (reduction in earnings), plus interest on past losses, and the application of financial discounting on future losses. Potential claimants are thus normally competitors. However, in most cases the quantification of damage for compensatory purposes is quite difficult. These cases are more likely to be initiated by public or private parties for the purpose of seeking injunctive relief. Downstream or aftermarket firms – in particular, SMEs – will have a chance to claim damages for cases of exploitative abuse, *e.g.* abuses of economic dependency. As regards consumers, in some cases – *e.g.* when predatory pricing behaviour is successfully challenged by a NCA – the anticompetitive conduct may even entail a positive payoff. Restoring full

[126] See *supra*, section 1.1. It is possible to imagine also other categories that may sustain a loss as a consequence of antitrust infringements. One example could be the terminated employee of the direct purchaser. In *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (7th Cir. 1910), the Seventh Circuit ruled that shareholders could not sue for harm inflicted on the corporation they owned, characterizing such injuries as too "indirect, remote, and consequential." Suffice here to remind that, already in the 1970s, some US courts formulated a "target area" test for antitrust standing, and a related "zone of interests" test. See *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975) ("target area"); *Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980) ("target area"); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) ("zone of interests"). These tests sought to combine the existing notions of directness and foreseeability.

corrective justice would even entail a disgorgement of profits unduly obtained by direct purchasers or consumers.[127]

- *Vertical restraints* can create obstacles to competition in a relevant market, which in a limited number of cases will entail evidence of supracompetitive pricing. Non-price vertical restraints are unlikely to lead to damage actions by indirect purchasers, and the compensatory nature of damage awards in this case would hardly provide a reasonable approximation of the loss to society from the restriction of competition.

2.3 Would enhanced private enforcement increase administrative burdens?

According to the latest version of the EU Impact Assessment Guidelines (updated March 2006), new major proposals should undergo an assessment of the administrative burdens for citizens, business and public administrations, based on the EU Standard Cost Model.[128] Although such an exercise is not mandatory for a White Paper (and requires a more refined idea of what specific procedural arrangements will be adopted in Europe to encourage antitrust damages actions), it is important to assess whether enhanced private enforcement is likely to bring increased administrative burdens.

Administrative burdens are often confused with administrative costs. To the contrary, as shown in Figure 5 below, administrative burdens are only a subset of administrative costs. More precisely, they are the part of administrative costs which is caused by regulatory requirements. Conversely, administrative costs normally also include activities which would be carried out also absent regulation.

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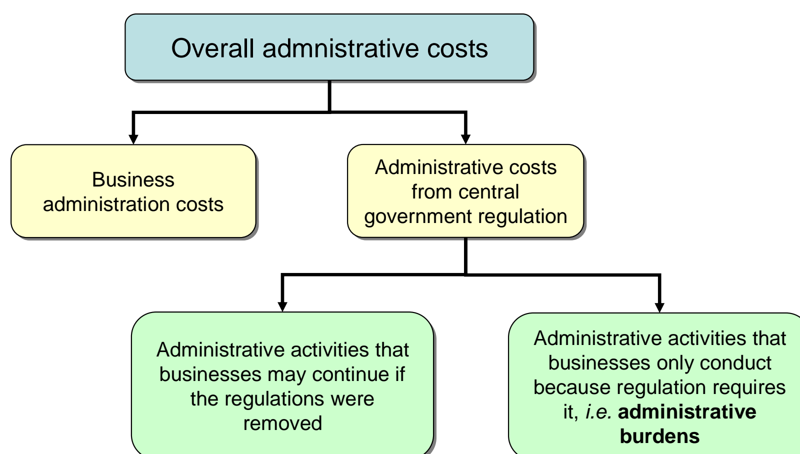
[127] See, *e.g.* Segal & Whinston, *cit.*.

[128] See European Commission, *Impact Assessment Guidelines*, SEC(2005) 791, updated March 2006.

Figure 5 – Administrative Burden versus Administrative Cost

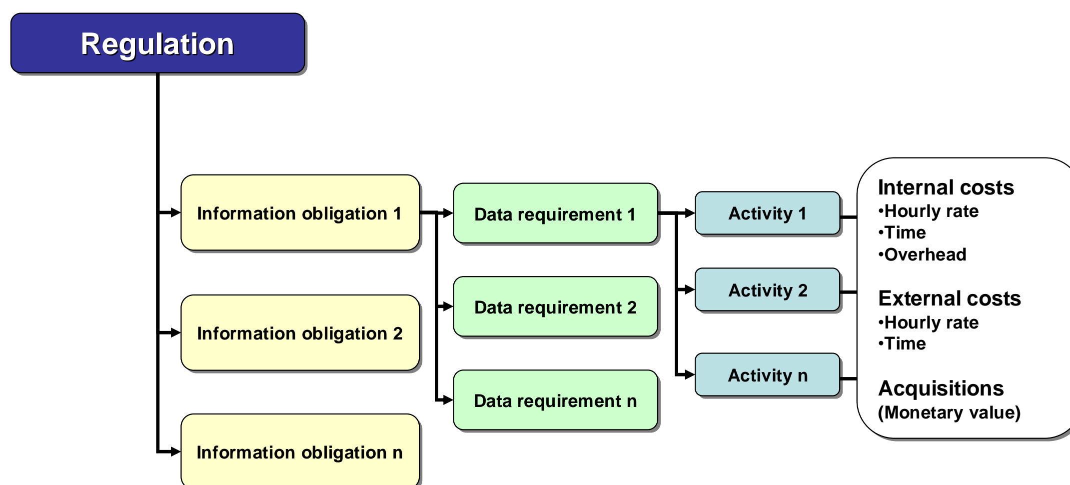


Source: SCM Network, International Standard Cost Model Manual, p. 7

The "standard cost model" (SCM) methodology makes it possible to produce standardised figures for the resources used by businesses in order to comply with information obligations contained in legal rules.[129] To fulfil the required information obligations – or rather, to produce the requested information – affected businesses normally have to carry out additional administrative activities. The costs of these additional activities may arise from internal consumption in form of use of employees' time or on the other hand from external consumption of resources (*e.g.*, fees for external experts, outsourcing costs, and cost of acquisitions). Therefore the administrative costs of a piece of legislation are defined as the costs of carrying out the various activities required by regulation. Figure 6 shows how the SCM splits the requirements of regulation into detailed activities, which can be measured or further estimated.

[129] In practice, the SCM aims at identifying those textual parts of regulation that require businesses to make information available to public authorities or third parties.

Figure 6 – Information obligations, data requirements and activities



Source: SCM Network, International Standard Cost Model Manual, p. 9

Each data requirement is then expressed in terms of administrative activities: the cost of each administrative activity is then estimated with the following basic formula:

Cost per administrative activity = Price x Time x Quantity (population x frequency)

Whereas:

- the **price** is a tariff for additional activities, divided in internal – *e.g.* hourly wage as a measure of the unit costs of additional activities demanded by information obligations – and external prices – *e.g.* unit costs (hourly rates) of outsourcing the activity; whereas only activities demanded by the information obligation are relevant.[130]
- **Time** means the number of time units (*e.g.* hours) needed to perform the required activity;
- **Quantity** represents how often the activity has to be carried out per year (frequency) by the effected number of businesses (population).

The list of information obligations that was adopted by the European Commission and by the International Standard Cost Model Network as

[130] Additional costs (*e.g.* necessary acquisitions) also have to be considered as elements of cost relevant to the administrative activity at hand.

reference includes items such as: returns and reports; notification of activities; entry in a register; carrying out inspections; cooperating with audits/inspections; applying for subsidies or grants; providing statutory information to third parties; framing complaints and appeals. Corresponding administrative activities include the familiarisation with the information obligation, information retrieval and assessment, calculation and presentation of figures, settlement/payment, internal and external meetings, inspection by public authorities, correction of results from inspection by public authorities, training, updating on statutory requirements, copying, distribution, filing, and reporting/submitting information.[131]

In this Report, we attempt to assess the impact of various policy options on administrative burdens incurred by businesses, citizens and public administrations. Of course, a significant impact on administrative burdens will only be observed whenever a policy option entails:

- the introduction of new information obligations,
- an increase in the amount of information to be provided as a result of a specific legal obligation;
- an increase in the population affected by a pre-existing information obligation; or
- a increase in the frequency of reporting information to the public administrations or to third parties

For example, if defendants have to keep records and documents to be provided to plaintiffs under pre-trial disclosure obligations, this can be considered as an increased administrative burden that the forthcoming impact assessment would need to take into account. Likewise, an increase in inspections or the need to request access to evidence in possession of a NCA would be considered as an administrative burden.

An example of potential administrative burdens generated by (public) antitrust enforcement is found in the UK database developed by the Better Regulation Executive in the Cabinet Office. There, the "net cost" (administrative burden) generated by Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty were found to amount to approximately £600,000 yearly for a population of 500-1,000 firms, depending on the administrative activity and

[131] For a more detailed explanation, see WiFo-CEPS, *Pilot Project on Administrative Burdens,* Final Report, December 2006, available online at http://ec.europa.eu/enterprise/calls/files/06_061/pilot_project_admin_burd.pdf.

frequency.[132] At the EU27 level, such a figure can be extrapolated based on Kox (2005) and on GDP data, reaching almost 14 million Euros.[133]

The main administrative activities considered to reach this estimate include

- providing explanations to the Commission;
- making a complaint;
- providing details of alleged infringement and evidence, explaining the finding or remedy sought;
- providing information about whether the plaintiff approached any other competition authority and/or whether a lawsuit has been brought before a national court;
- submitting three paper copies and (if possible) an electronic copy to the Commission;
- submitting a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint;
- submitting written views regarding a statement of objections that the Commission has issued;
- identifying confidential material and providing a separate, non-confidential version (with supporting reasons) to the Commission by their set date;
- submitting written views in the event of the Commission rejecting the complaint on the basis of insufficient grounds, and doing this within the set time limit;
- requesting access to Commission documentation in relation to the Commission's intention to reject a complaint regarding restrictive practices and dominant positions; making submissions in writing and according to the set time limit following objections concerning restrictive practices/dominant position being raised;
- requesting a copy of the recording of a hearing by the Commission on restrictive practices/dominant position;
- making a request to the Commission for access to a file regarding a statement of objections concerning restrictive practices and dominant position.

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[132] See DTI Final Report, available online at http://www.dti.gov.uk/files/file35841.pdf. (last visited on June 22, 2007). The UK database on administrative burdens only contains information on burdens borne by businesses, and excludes citizens and public administrations. See, again, WiFo-CEPS, *Final Report*, *supra* note 131.

[133] ID: 2392 ff. on 773/2004 creates £441,000, and is categorised as A (no national discretion). Conversion from UK pounds to Euros is based on a conversion rate of 1.571.

In this respect, administrative burdens generated by private enforcement will mostly accrue from access to evidence rules. For example, filing an application to request evidence in possession of a NCA could generate a moderate increase in administrative burdens; other impacts may be felt as regards record-keeping, responding to requests by the court and inspections. In Part II of this Report, we will identify the main headings of administrative burdens for each of the specific issues addressed. Furthermore, in Part III of the Report, we will assess administrative burdens for each of the selected scenarios.

2.4 Costs of enforcement and litigation: the case of the US

Costs of enforcement and litigation are different from administrative burdens, as the latter only refer to the burden faced (by businesses and public entities) as a result of specific information obligations and data requirements imposed by EU or national legislation. Under the costs of private enforcement, though, a major heading would certainly be the risk that litigation costs significantly increase, as reportedly happened in the US over the past decades.

Data reported on US tort litigation costs have spurred a hectic debate in the US in the past few years. On the one hand, regular reports such as those prepared by Tillinghast show that US tort litigation costs have increased nearly three times faster than its GDP since 1950 – to a 2005 total of $261 billion or $880 per US citizen per year, and the increase is particularly pronounced in the most expensive types of litigation, such as antitrust litigation.

Data on antitrust cases are also enlightening when it comes to assessing whether private enforcement actually replaced or supplemented public enforcement. In this respect, the number of cases initiated by the DoJ and the FTC remained rather stable between 1961 and the early 1980s indicating that *public enforcement has not been restricted nor replaced by private enforcement*. At the same time, the ratio or private to public-initiated cases grew from 7:1 to 25:1 in the same period, and has remained more or less stable since then, as shown in Figures 7a and 7b below.[134]

[134] See Abere, *Trends in private Antitrust Litigation 1980-2004*, available at http://www.econgroup.com/news_view.asp?newid=19&pageno=1.

Figure 7a – Government antitrust cases filed in US District Courts, 1980-2004

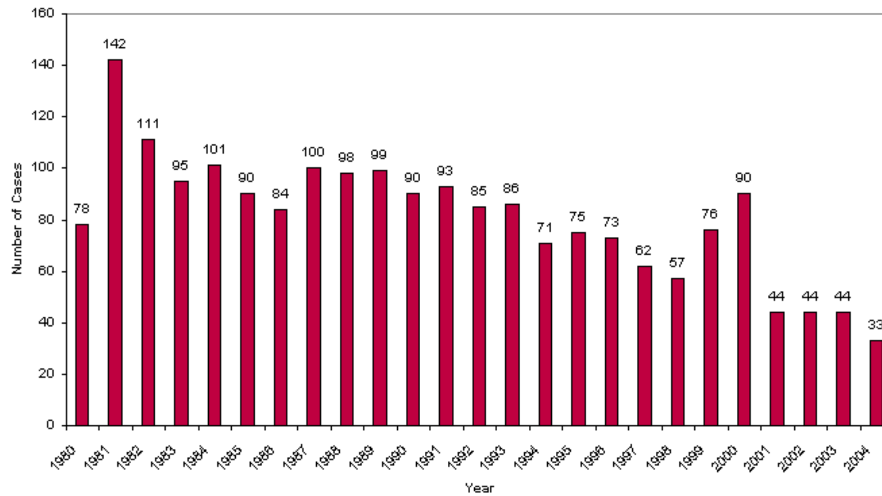
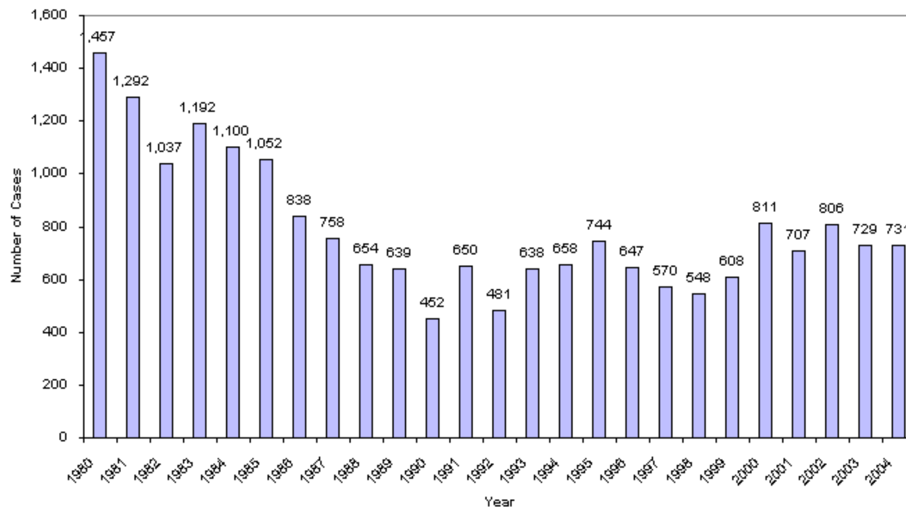


Figure 7b – Private antitrust cases filed in US District Courts, 1980-2004



As recently observed, *i.a.* by Crane (2006), the statistics kept by the administrative offices of the federal courts suggest that a tiny fraction of private antitrust cases ever reach a jury: as stated by the author, "between 2001 and 2005, 3,766 private antitrust cases were terminated in the federal courts. 861, or about 23%, were terminated through voluntary dismissal or private settlement. 2,828, or about 75% of the cases, were dismissed by order of the court before trial, most often in response to a defendant's motion to dismiss or for summary judgment. Only 77 cases, about 2% of the cases, went to trial and of these only 45 cases were tried to juries".[135] Thus, there are on average only 9 antitrust civil

[135] These statistics are compiled from the annual reports of the administrative offices of the U.S. courts, available at http://www.uscourts.gov. Connor and Helmers (2006) report that "The great majority of private antitrust suits are resolved through settlements rather than final

jury trials a year, only about 1% of the total dispositions of antitrust civil cases. Crane (2007) also reports consistent figures for 2005: "of the 707 federal antitrust cases that were terminated in 2005, 203 were terminated through voluntary dismissal or private settlement, 492 by court dismissal on a motion to dismiss or summary judgment, and only 12 cases, 1.7% of all cases terminated, reached a trial. Of those 12 cases, only 9 were tried to juries"[136]. The word "dismissed" should not be interpreted as a negative outcome for the plaintiff: cases may be terminated by a court also due to a settlement. This evidence suggests that, should private enforcement be enhanced in Europe in a similar way as in the US, the main costs of the enforcement system could, under certain circumstances, be transaction costs linked to a system of trial avoidance.

An estimate of the costs borne by litigating parties during settlement and trial was provided by the Georgetown Project back in 1984, and analysed in-depth by Salop and White (1986) and by White (1988). Salop and White estimated that the total annual costs of private antitrust litigation reached approximately $250 million per year for all private suits filed between 1973 and 1983[137]. In general, for cases that reached the jury, legal fees were in the range of 10% to 20% of the award[138]. Also for cases that were settled, the percentage of lawyers' fees on the nominal award was 20.3%[139].

These data are useful also to understand why settlements are so prominent in US antitrust litigation. As reported by Salop and White (1986), in the 28% of private antitrust suits that proceeded to a final judgment in the plaintiff's favour between 1973 and 1983, the average award was $456,000[140]. On average, then, the plaintiff in an antitrust trial had a 28% chance of winning $456,000. Assuming that the plaintiff's legal costs (which would be borne by the plaintiff 72% of the time) represented 20% of this figure (or $91,200), then the average plaintiff's net expected gain from pursuing a private antitrust case through a

decisions from a trial, making them a small drain on federal judicial resources. In the case of international cartels that operated globally, out of 36 cartels convicted in the United States during 1990-2003, only 5 (14%) had corporate defendants go to trial".

[136] See Crane, D. (2007), *Antitrust Modesty*, 105 Mich. L. Rev., 1193-1212. The statistics reported by Crane come from United States Courts 2005, Table C-4, *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, during the 12-Month Period Ending September 30, 2005 (2005)*, http://www.uscourts.gov/judbus2005/appendices/c4.pdf (last visit: October 12, 2007). See also, for 2006, http://www.uscourts.gov/judbus2006/contents.html. (last visit: October 12, 2007).

[137] Elzinga and Wood (1985) estimated $280,000 per case. Reich (1980) estimated that total legal costs in 1979 amounted to $2.1 billion. This estimate includes counselling, negotiating, and legal defence against government cases. See Salop and White in White (Ed. (1988), at 15.

[138] See Salop and White (1986), Table 10 and accompanying text.

[139] Kelly (1972) finds a much lower percentage (6.5%) after analysing US antitrust judgments from 1904 to 1972.

[140] In 1984 dollars and excluding one case in which the award was very large.

court trial was $62,000. On the other hand, the defendant in these cases faced a 28% probability of having to pay damages of $456,000 plus the plaintiff's legal costs. If we assume that the defendant would incur similar legal expenses from litigation, the average defendant's expected financial exposure at trial was $244,400. For the average case, then, both parties would be inclined to settle out of court for some figure between $62,000 and $244,400[141].

In the next sections, we will assume that private damages actions in Europe will exhibit similar trends, with legal fees amounting to 10%-20% of the awards. This can be considered only as an approximation, since in Europe legal fees exhibit different features compared to the US, and are normally not expressed as a proportion of the damage award, as *pactum quota litis* is not allowed by the ethical code of the European association of lawyers[142]. In addition, lawyers' fees, and more generally litigation costs are highly dependent on the specific procedural rules enacted in a given jurisdiction: US rules on access to evidence certainly exert a different impact on litigation costs than rules enacted in many Civil Law countries, as will be explained in more detailed in Section II.3 below. Overall, given that litigation costs are often considered to be particularly high in the US, it is safe to assume that our assumption in terms of ratio of legal fees to claimant's recovery can be taken as a ceiling, *i.e.* an upper-bound estimate of the ratio that would emerge in Europe, at least in the short term.

Lawyers' fees are, however, not the only costs associated with private antitrust enforcement. Other, significant cost headings include:

- *the opportunity cost of the parties' employees*, whose working time is distracted from potentially more productive activities and devoted to issues related to antitrust litigation. The Georgetown project obtained responses from 225 officials, who stated that they spent on average 203 hours of executive time per case.[143] This figure did not include administrative or non-executive time, corporate overhead or direct expenses, Board of Directors time, in-house counsel time, time wasted because of disruption of employees' routine, or time spent by employees discussing the case. On this basis, Lande (1993) calculates that the "average" lawsuit would cost the corporation $40,600 to $60,900, or 53%-79% as much as the attorneys' fees.
- *The cost of the judicial system*. Again, Lande (1993) reports a 1979 Federal Judicial Center study, according to which federal district court judges spent

[141] See Salop and White (1986), at 1019, footnotes 62-64 and accompanying text.

[142] Some EU member states – starting with the UK already in the 1990s – have started allowing conditional fee agreements or "no win, no fee" agreements, *i.e.* agreements under which the plaintiff lawyer can obtain a success fee on top of the initial legal fee of up to 100% if the client wins.[142] The lawyer takes all the risk and, in case the client loses, the lawyer is responsible under the loser-pays rule for both sides' costs.

[143] See Teplitz, in White (ed.) (1988).

approximately 4.1% of their time on civil antitrust cases not involving the federal government[144]. He assumes a similar figure for federal court of appeals judges or magistrates, and calculates that the average total cost to the judicial system of handling antitrust cases would be approximately $21,000 per case, or 5.5% of the average plaintiff (trebled) award, *i.e.* approximately sixteen percent of the nominal income transfer from sellers to buyers[145].

These figures, although not updated, highlight that enhancing private enforcement does not come without costs, although there are good reasons to assume that lawyers' fees, firms' opportunity costs and the cost of the legal system never outweigh the wealth transfer effect of private damages actions.

2.5 Macroeconomic impacts

Besides direct impacts on deterrence and corrective justice, an effective antitrust enforcement system may bring significant benefits also in more macroeconomic terms, by ensuring greater allocative efficiency and an impact on productivity, growth and employment. A quantification of the likely impact is possible, under certain assumptions; given the average elasticity of demand in the affected sectors, it would be possible to calculate the macroeconomic impact of removing, at least partially, the social cost of monopoly.

Examples of studies that have traced the impact of enhanced competition on productivity and growth are manifold. Recently, the OECD (2007) has published a note on the relationship between competition and economic performance, which summarises the most relevant contributions in the economic literature on large-scale effects of competition. The focus of most analyses is on productivity and dynamic efficiency.

Studies that have assessed the impact of competition on productivity include Ahn (2002) and Nicoletti and Scarpetta (2003), where productivity increases are categorised as superior productive efficiency (using current inputs with less slack), better technology selection and innovation. Aghion and Griffiths (2005) have identified the relationship between competition and innovation, by depicting a U-shaped curve where excessive entry stifles incentives to invest and exerts a lower impact on innovation.

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[144] This, of course, depends on the very high ratio of private to public antitrust enforcement cases in the US, which is unlikely to be reached in Europe, at least in the short term.

[145] In Europe, court costs are often expressed as a percentage of the damage award, which can range – depending on the country and on the value of the claim – from 2% to 6%. In addition, it must be recalled that in the US damage awards do not include prejudgment interest. For this reason, when calculating the ratio of judicial administration costs to claimants' recovery in Europe, it must be considered that treble damages without prejudgment interest are deemed to be broadly comparable to double damages with prejudgment interest.

Alongside with these contributions in the literature, some more recent studies have modelled the effect of antitrust policy on efficiency and growth[146]. Symeonidis (2003) finds strong evidence of a negative effect of collusion on labour productivity growth. Labour productivity grew more slowly in collusive industries than in non-collusive industries before the implementation of the 1956 cartel legislation. Once cartels became illegal, no significant differences between collusive and non-collusive industries existed in terms of rates of labour productivity growth. Broadberry and Crafts (2000) find that price fixing agreements were widespread prior to the 1956 Restrictive Practices Act and seem to have had an adverse effect on costs and productivity. Symeonidis (2007) examines the impact of competition on wages and productivity using a panel data set of UK manufacturing industries over 1954-1973. Some empirical studies concentrate on the direct impact of competition on price levels and inflation via downward pressure on profit margins and mark-ups and changes in the institutional structure (*e.g.* Neiss, 2001; Cavelaars, 2003; Przybyla and Roma; 2005). Another stream of literature directly infers the impact of competition on economic performance and growth by looking at the relationship between product and/or service market liberalisation and productivity. For example, Nickell (1996) analyses a dataset of 700 British manufacturing companies between 1972 and 1986 and finds that a 10% increase in price mark-ups resulted on average in a 1.3%–1.6% loss in TFP growth. Similar results were found by Disney, Hasken and Heden (2003)[147].

The impact of enhanced private enforcement on dynamic efficiency and innovation is more ambiguously framed in the literature, although empirical data are sparse in this field. The actual relationship between competition and innovation is subject to a long-lasting debate in the economic literature, and is often referred to the diverging views of Joseph Schumpeter (1942), who considered that more concentrated markets favour innovation; and Kenneth Arrow (1962), who took the opposite stance[148]. One of the papers that have looked at the impact of antitrust enforcement on innovation is Marinova *et al.* (2005), where the impact of civil antitrust filings by the DoJ on the level of

[146] See the survey contained in the study by the OFT, *Productivity and Competition*, January 2007.

[147] See, *i.a.*, Haskel, 1991; Nickell, 1996; Disney, Haskel and Heden, 2003; CPB, 2006; OECD, 2006; Conway *et al.*, 2006); growth (Rey, 1997; Dutz and Hayri, 2001); or employment (Nicoletti and Scarpetta, 2005).

[148] See, *i.a.*, R. Gilbert, *Looking for Mr. Schumpeter: Where Are We in the Competition-Innovation Debate?*, in 6 Innovation Policy And The Economy 159 (Adam B. Jaffe, Josh Lerner & Scott Stern, eds. 2006).And Baker, J. B., *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation* (June 2007). Kauffman Foundation Conference & Seminar Research Paper No. 15.

innovation (measured through patent activity) is found to have been statistically significant in the US in the period 1953-2000[149].

Needless to say, a reduction in the deadweight loss and an increase in the intensity of competition can lead to *growth and employment in the medium term*, whereas in the short run adverse effects may be observed, if established firms with market power are challenged by private antitrust damages actions. In this respect, authors such as Young and Shughart II (2007) have observed that innovations in antitrust enforcement can act like technology shocks. But the same authors – by modelling the contribution of the US DoJ's enforcement activity on macroeconomic variables in the US in the period 1947-2003 – find no strong evidence that antitrust enforcement actually contributes to macroeconomic indicators, and observe that "[i]nnovations in antitrust law enforcement apparently do not constrain market power in the economy, but do hamper productivity growth, at least temporarily. Perhaps antitrust achieves its stated objectives in the small. Even if so, it does not seem to do so in the large"[150].

The view adopted by Young and Shughart II (2007) also echoes the scepticism shown by Clifford and Whinston, and heavily criticised by authors such as Werden and many others[151]. Available evidence in support of a positive contribution of antitrust policy and enforcement to macroeconomic variables include the following:

- Baker (2005) observes that "the annual welfare benefits from deterring the exercise of market power through antitrust laws as they are enforced today could readily exceed 1% of GDP, or $100 billion per year" (which applied to Europe, would yield a yearly benefit of *€117 billion*), whereas the costs for public and private enforcers are not likely to be greater than $2 billion per year in the US[152]. This, of course, would largely guarantee that antitrust

[149] Marinova, McAleer and Slottje, *Antitrust Environment and Innovation,* Scientometrics, Vol. 64, No. 3 (2005) 301-311.

[150] More recently, the relationship between the scope and institutional design of competition policy and economic performance has been made possible by the expansion of statistical cross-country analyses based on economic indicators, such as in Voigt (2007), where all the four indicators used - objectives and the instruments of competition laws, degree to which an economic approach to competition policy has been chosen, formal independence and factual independence of competition agencies – turn out to contribute to explaining differences in total factor productivity.

[151] See above, Section 1.

[152] This estimate does not take into account the opportunity cost of time spent in litigation by private litigants' internal staff. For an illustration, see *supra*, Section 2.4, footnote 143 and accompanying text.

enforcement is meritorious and ensures "value for money" from a social standpoint[153].

- A legal system in which the impact of effective competition policy on GDP growth has been measured, although with some degree of approximation, is Australia. This is also a legal system with enhanced private enforcement if compared with Europe, although private antitrust litigation is not as developed as in the US. In a recent report, the OECD estimated that effective competition policy in Australia added 2.5% to GDP, which applied to Europe would yield a contribution in the order of *€396 billion*. However, this estimate encompasses the whole competition policy implementation, which goes well beyond the enforcement of antitrust rules and most notably includes deregulation initiatives, such as the reduction in rail freight rates, electricity charges and port charges.

In this Report, we assume that, to the extent that enhanced private enforcement can reach more competitive markets, greater allocative, productive and dynamic efficiency may be achieved. In Part III of this Report, we will comment on the likely impact of a number of selected scenarios on EU competitiveness and growth.

2.6 Bringing competition policy closer to consumers

Needless to say, increased private enforcement might lead to greater awareness of potential antitrust infringements on the side of consumers. This would happen especially if indirect purchasers are allowed to sue for damages, or alternative systems are put in place to make sure that consumers ultimately are directly compensated for the loss suffered.

A crucial issue in this respect – also affecting SMEs – is whether legal action by indirect purchasers will be allowed in Europe. If a bar on offensive passing-on such as that established in the US by *Illinois Brick* were introduced in Europe, the number of expected suits by consumers or consumer associations would probably be lower than it would be absent those rules. This, in turn, would also limit the potential for private antitrust enforcement to raise the awareness of

[153] Baker's tentative estimate is based on the observation that the traditional ways in which economists calculate the economy-wide welfare loss from the exercise of market power – mostly based on consumer surplus, as in the seminal contribution by Harberger (1954) – fail to take into account a number of factors that magnify the impact of the exercise of market power on the economy. These include the assumption of unitary elasticity for all sectors of the economy, the loss of consumer surplus arising from overcharges (the consumer surplus "rectangle"), dissipation of oligopoly profits through rent-seeking, the reduction of incentives to innovate absent vibrant competitive pressure, etc. When taking into account some of these factors, Cowling and Mueller (1978) find that the overall social cost from the exercise of market power can be as high as 12% of GDP.

competition issues amongst consumers. In addition, potential measures aimed at encouraging collective actions on the side of end consumers have an awareness-raising potential and may also reduce defendants' cognitive biases such as the "availability bias"[154].

The extent to which a potential set of measures would bring competition policy closer to consumers will be qualitatively assessed for each of the scenarios identified in Part III of the Report.

[154] See *supra,* note 83 for a definition of the availability bias.

3 Assessing the impact of more effective private antitrust damages actions: a thought exercise

The potential impacts that may accrue to economic actors and citizens in the EU as a result of enhanced private enforcement depend on a number of factors. In this section, we rely on available estimates on the social cost of cartels and formulate assumptions as regards the extent to which encouraging private damages actions may help deterring the formation of cartels, at the same time providing plaintiffs with (at least partial) redress for the loss suffered as a result of anticompetitive conduct. We provide a calculation of the potential impact of greater deterrence and compensation of losses, and then refine the analysis in several ways. Finally, we put forward a number of *caveats*.

3.1 Estimating the social loss and welfare transfers induced by cartels

In the US several scholars, including Levenstein and Suslow (2001), Connor (2004, 2005), Connor and Lande (2004), Connor and Bolotova (2005), Lande and Davis (2006) and Connor and Helmers (2006) have studied the impact of cartels and the effect of antitrust enforcement on overcharges.[155] At EU level, the literature is now proliferating, with significant contributions from Connor (2005), Schinkel (2006), Veljanovski (2007), Combe *et alii*. (2007), Combe and Monnier (2007), and Motta (2007). These studies will be taken as reference to compare welfare impacts in jurisdictions where private enforcement is commonplace, as opposed to the EU, where we found private enforcement to be still underdeveloped[156]. However, to date no study has attempted to calculate the actual welfare impact of effective competitive scrutiny of price-fixing conspiracies. Most of the aforementioned studies calculate the median and mean average of cartels over variable timeframes, starting from the 19th century[157].

A "quick" assessment of the potential welfare impact of fighting cartel behaviour through more effective private enforcement in the EU can be obtained directly by referring to these studies. As acknowledged in the literature, overcharges applied by cartelists in modern international cartels

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[155] As reported by Connor (2005), "Other than in economics textbooks, 103 years has passed since the last dedicated survey of the cartel literature (Bullock 1901). Nearly all quantitative analyses of cartel price effects have been published since 1901. To my knowledge no one else has since published a work aimed principally at surveying and analyzing cartel overcharges."

[156] See *supra*, Section 1.2.4 in the Introduction to this Report.

[157] Veljanovski (2007) provides an updated calculation of penalties inflicted at EU level on cartels, revised according to the new EC Fining Guidelines.

average at least 25%, contrary to the initial implicit assumption made in the US Sentencing Guidelines, which implied a 10% overcharge. Furthermore, Connor (2006) estimates that penalties imposed by the European Commission on the average cartelist fall in the range between 20% and 70% of the overcharge[158]. Such penalties have totalled €6.24 billion (pre-leniency) in the period from 2002 to April 2007.[159] Finally, as explained in the previous sections economists seem to agree that a reasonable detection rate for cartels would fall in the range between 10% and 30%.

Based on these assumptions, we can infer that overcharges imposed on EU consumers by cartels in the 2002-2007 period are way larger than penalties imposed on the detected cartels. Assuming a 30% detection rate and the most "generous" estimate of the ratio between penalties and overcharges (70%), the total overcharge from EU-wide (detected and undetected) cartels would reach €29.7 billion; if the deadweight loss is calculated under textbook assumptions of linear demand, constant unit costs and unitary elasticity (*i.e.* 50% of the overcharge), *the total impact of EU-wide cartels over the period 2002-2007 would reach €44.6 billion, of which approximately €14.9 billion is the net loss to society from reduced output (allocative inefficiency), whereas €29.7 billion is the transfer from buyers to sellers (cartelists).*

Based on this calculation, the *lower-bound estimate yearly impact of EU-wide cartels would be €8.9 billion, of which €5.95 billion would represent the net transfer from sellers to buyers, and €2.97 billion the deadweight loss.* This, as recalled, is a very conservative estimate. If we assume that the detection rate of cartels per given year is in line with the majority of estimates, *i.e.* around 15%, and the ratio between penalties and overcharges is 30%, then *the estimated (upper-bound) yearly impact of EU-wide cartels would reach 138.7 billion Euros.*

This is, however, only a sub-set of the cartels operating in Europe. Besides cartels detected and convicted by the European Commission, it is necessary to take into account cartels operating at domestic level, which are normally under the competency of national competition authorities. According to data reported by Connor (2005), penalties imposed by EU countries on 72 cartels in the period between 1990 and 2005 totalled $1.9 billion in real 2005 dollars, of which 67 cases were brought in Western European countries (totalling $1.86 billion in real 2005 dollars) and 5 in Eastern EU member states (totalling $43 million). Against this background, the corresponding EC penalties in the same period for 86 cartels were $2.15 billion in real 2005 dollars ($961.2 million for EU-wide cartels, plus €1.188 billion for global cartels sanctioned by the European Commission). This means that, for the period 1990-2005, *penalties imposed at member state level were 88.4% of penalties imposed at EU level*. If our assumptions on the detection

[158] See Connor (2006), *Optimal Deterrence and Private International Cartels*, (April 9, 2007). Available at SSRN: http://ssrn.com/abstract=787927.

[159] European Commission, Cartel Statistics 2002-2007, updated 18 April 2007.

rate and the ratio between penalties and overcharges are maintained also for national cartels, *the yearly impact of national cartels would range between €7.88 billion and €122.55 bn*. Summing up the two figures, we reach a first estimate of the total yearly impact of cartels in Europe, which would be as follows:

- *Lower bound estimate:* the yearly impact of cartels in Europe would amount to €16.8 billion, of which €11.2 billion would represent the net transfer from sellers to buyers, and €5.6 billion the deadweight loss. This would in turn mean an impact of *0.15% of the EU GDP*.[160]
- *Upper bound estimate:* the yearly impact of cartels in Europe would amount to €261.22 billion, of which €174.14 billion would represent the net transfer from sellers to buyers, and €87.07 billion the deadweight loss. This would in turn mean an impact of *2.3% of the EU GDP.*

These first estimates need to be refined in order to reach a reliable calculation of the potential welfare impact of enhanced private damages actions in Europe. A major difficulty at this stage is foreseeing the expected rise in damages actions, the damage multiple that will be applied, and whether there will be significant substitution between private damages actions and public enforcement. These and other issues will be analysed in more detail below, in Part II of this Report, whereas in Part III of the Report we will assess the impact of specific scenarios.

3.1.1 A model on ex ante incentives to form a cartel

At this stage, the only possibility to model changes in deterrence for international and national cartels is to develop a microeconomic model, in which we assess the incentive to form a cartel *ex ante*, based on the theory of optimal sanctions. Based on the discussion in the previous sections, we make the following assumptions.

3.1.1.1 Probability of cartel detection and conviction

As we have shown in section 2.1.1 above, the cartel detection rate found in various studies ranges from 10% to 33%, and most economists generally agree that the most reliable figure is approximately 15%. Recent studies such as Wils (2006) assume a 16% rate, to be considered as a conservative (*i.e.* probably too high) estimate for Europe, since Bryant and Eckard (1991) find a probability between 13% and 17% and EU authorities have weaker investigative powers than the US ones. Also Gallo *et al.* (1994), Schinkel (2006) and Motta (2007) assume a 15% probability in their papers. In addition, as already recalled, little is known about the differences in cartel detection rates between the US and

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[160] The nominal GDP in the EU27 in 2006 was $14.527 trillion, as reported by the IMF http://www.imf.org/external/pubs/ft/weo/2007/01/data/weorept.aspx?sy=2005&ey=2007&scsm=1&ssd=1&sort=country&ds=.&br=1&c=998&s=NGDPD%2CPPPWGT&grp=1&a=1&pr1.x=50&pr1.y=9. For conservative reasons, we assume a 1.30 Dollar/Euro conversion rate, which leads to an estimated EU GDP in 2006 of €11.175 trillion.

Europe, although both the OECD study (2002) and Wils (2005, 2006) generally assumes it to be lower in Europe than in the US.[161]

We assume, for simplicity, that the conviction rate after detection is 75%. This estimate is based on evidence from the US, where more than 80% of DOJ's indictments end in guilty pleas, but when accused price fixers choose to litigate a criminal price-fixing case, the government wins their cases less than half the time. Thus, cartelists adept at covering up their clandestine meetings or able to afford the best legal defence teams might well judge their chances of conviction to be in the 50 to 75 percent range (Connor 2007).

As a result, we assume that:

- the cartel detection rate in Europe is in the range between 10% and 20%; whereas
- the detection rate in the US is in the range between 15% and 25%.
- the conviction rate in cartel cases is 75%.

3.1.1.2 Cartel duration

Also for what concerns the average duration of a cartel, estimates vary noticeably. On the one hand, early studies such as Bryant and Eckard (1991) have found an average duration between 5.8 and 7.27 years, with 22% of conspiracies lasting more than 10 years. Later, Levenstein and Suslow (2001) have found the percentage of surveyed cartels that had lasted more than 5 years to be within 40% and 60%. Combe (2007) observes that empirical studies seem to underestimate the real duration of price-fixing conspiracies, as the end date of a cartel considered in these studies is the date in which the cartel is discovered by the antitrust authority. Likewise, the starting date depends on the first available evidence of concerted actions, whereas the cartel could have been started long before. Accordingly, it is quite likely that the average duration of cartels is greater than 5 years.[162] Combe and Monnier (2007) analyse the 86 cartels convicted by the European Commission from 1964 to February 2007, and

[161] Some commentators have observed that after the European Commission launched its leniency policy the detection rate has increased. However, as observed by Veljanovski (2007), the degree to which the EU leniency programme has actually increased the detection rate should not be overstated, especially for global cartels. Theoretical analyses of leniency programmes have ambiguous conclusions about the effects on deterrence (Spagnolo 2004). Effective programs might require positive rewards to the first defector (Aubert, *et al.* 2005). A rare empirical study of leniency programmes finds that the EU's first (1996) corporate leniency programme finds that the effect on prosecution costs was small and that the effect on deterrence is neutral (Brenner 2005). However, the EU's new 2001 revised leniency programme was not studied.

[162] Combe (2007) assumes an average duration of eight years (plus an overcharge of 10% and a probability of detection of 15%) the optimal sanction would reach 480% of turnover for a 5-year cartel.

find a median duration of 5.8 years. However, Wils (2006), Schinkel (2006) and Bolotova (2006) assume an average duration of 5 years.[163]

In what follows, as a conservative estimate, we will assume an average cartel duration of **5 years**.

3.1.1.3 Size of the overcharge

As regards the size of the overcharge, we base our assumption on a number of existing studies. Some of these are summarised below, in Table 3.

Table 4 – Size of the overcharge – early studies

Reference	Number of Cartels	Average Overcharge	
		Mean	Median
		Percent	
1. Cohen and Scheffman (1989)	5-7	7.7-10.8	7.8-14.0
2. Werden (2003)	13	21	18
3. Posner (2001)	12	49	38
4. Levenstein and Suslow (2002)	22	43	44.5
5. Griffin (1989), private cartels	38	46	44
6. OECD (2003), excluding peaks	12	15.75	12.75
Total, simple average	102-104	30.7	28.1
Total, weighted average	102-104	36.7	34.6

More recently, Connor (2003) presented a comprehensive survey of 167 modern international cartels that were discovered by antitrust authorities since 1990. Over 200 'social science studies' suggest higher estimates – an overcharge of 40% positively skewed with the median of 25%, and one-fifth at 10% or less. International cartels have a larger median overcharge of 30%-33% compared to 17%-19% for domestic cartels.

Connor et Bolotova (2005) analysed a large sample of 674 cartels and found a median overcharge of 25% (20% for domestic cartels and 34% for international

[163] Bolotova (2006, p.35), shows that the longer the cartel operates, the larger the overcharges it tends to achieve. If cartel duration is from 5 to 10 years, it tends to achieve overcharges that are 2.88 percentage points higher than overcharges imposed by a cartel that lasted less than 5 years (reference group). If a cartel operates from 10-15 years, its impact on overcharge level is even greater than in previous case, and overcharges are 7.14 and 9.59 percentage higher than the reference group overcharges. These marginal effects are statistically significant. In addition, the Wald test applied to the variables in Bolotova (2006, p. 38) finds that the cartel duration variables are jointly statistically significant. These cartel duration effects are even stronger for modern international cartels.

cartels). They also find that overcharges imposed in EU member states are lower than those in North America.[164] This is contrary to Connor (2005), which estimates the overcharge for the US to be 30% and EU 33%.

For our purposes, we will assume that the overcharges imposed by global cartels are 34%, whereas those imposed by intra-EU (both EU-wide and domestic) cartels are 20%.

3.1.1.4 Size of the deadweight loss

In order to appraise the expected impact of private enforcement on social welfare, it is important to make assumptions as to the relative size of the deadweight loss, which represents the real loss suffered by society as a result of anti-competitive conduct. An estimate of the size of the deadweight loss would require knowledge about the elasticity of demand for all the markets in which cartels are operational or will be launched in the next years.[165] Often, economic studies assume a "textbook" linear demand, constant unit costs and unitary elasticity, where the deadweight loss equals 50% of the cartel overcharge.[166]

Connor (2007) acknowledges that deadweight losses can equal as much as 50% of the overcharge, but adds that empirical studies tend to find that deadweight losses are from 10% to 20% of the overcharge (Peterson and Connor 1995).

In what follows, we assume that the deadweight loss falls in the range between **10%** and **50%** of the overcharge.

3.1.1.5 Size of penalties and damage awards

Another important assumption we need to make is the size of the prospective damage awards that will be granted by EU courts under enhanced private damages actions. In this respect, available data relate mostly to the US and Canadian experience.

Connor and Helmers (2006) analyse 283 modern private international cartels discovered anywhere in the world from January 1990 to the end of 2005. Aggregate damages were over $300 billion (27% of 1.2 trillion). For those cartels, worldwide, median penalties were less than 21% of actual overcharges. US and Canadian fines, nearly all of them flanked by criminal convictions, resulted in the highest median average fine ratios (15% to 18%), whereas the EU

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[164] From an optimal-deterrence perspective, this result may justify lower fines (as a percentage of affected sales) on local cartels by the EU and its member states than local cartels in North America. However, this result does not justify lower EU fines than the public and private sanctions placed by North American authorities on global cartels. In this respect, they report the example of the vitamins case, in which EU fines were approximately 20% of the fines imposed in the US by private and public enforcement, despite the greater size of affected sales in Europe.

[165] See Peterson and Connor (1996); and Connor (2005), p.67.

[166] Also Veljanovski (2007) adopts a 50% estimate.

fines for these international cartels were much lower, averaging less than 10% of estimated overcharges in the EU market[167]. In addition, private settlements comprise the largest single category of world-wide cartels penalties, *i.e.* 48% of all penalties. Private plaintiffs obtained 38% of suffered damages from international cartelists. Worldwide, median real cartel penalties of all types amounted to less than 21% of overcharges.

Based on these findings, Connor (2007) calculates the expected damage awards in US, Canada and Europe for the *ex ante* perspective of a prospective global cartelist, based on available evidence of damages granted in the period 1990-2005. Assuming that US fines equal 25% of the overcharge (expressed as the mark-up times the affected sales accrued in the US) and doubled for deterrence purposes, then Canadian fines add approximately 6% to this figure. This means that *aggregate fines imposed in North America are 53% of the overcharge*.

Compared with these levels, for cartels sanctioned in all three jurisdictions (US, Canada and Europe) EU fines have totalled 72% of the fines imposed in the US, and can be calculated at *38% of the overcharge*.[168]

The contribution of private enforcement found by Connor (2007) is significant. *Private settlements account for almost 94% of the total overcharge recovered in the US, and almost 19% of the total overcharge recovered in Canada.*

This means that, *ex post*, the damages faced by an international cartelist are almost double the overcharge (187% of the overcharge). If the probability of detection were 1, this would mean that cartel sanctions/damage awards would prove over-deterrent, and in most cases would more than compensate also the deadweight loss. However, assuming a detection rate of 15%, a conviction rate of 75% for stand-alone actions and 100% for follow-on actions, the *ex ante* costs faced by a cartelists are still as low as 23% of the expected profit.

As regards the size of fines and damage awards relative to damages in each jurisdiction, Connor (2007) applies the Chebychev rule by establishing two confidence intervals on his observation of the main parameters.

We adopt the figures reached in Connor (2007) for the 90% confidence interval in the following calculations. Thus, we assume that:

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[167] In the sample analysed by Connor and Helmers (2006), other Government fines – composed mostly by EU member states – are lower, totalling approximately 4% of the overcharge.

[168] Connor (2005) also reports very interesting data on the size of the fines imposed on the vitamins cartel in the US, EU and other parts of the world. In particular, the European Commission's fines were weaker than those in North America, amounting to only 26-40% of the EU overcharges, for several reasons. Although the EU fines were almost as large as the US, the EU sales and overcharges were much larger. Interestingly, in the vitamins case, the US fines as a percentage the overcharge were not significantly higher than the EU ones (43-55% of the overcharge). However, private damages added from 103% to 154% of the overcharge: this led US cartel policy to reach 171-208% of the overcharge).

- US fines re in the range of 27%-67% of damages
- Canadian fines are in the 28-92% range
- EU fines are in the 23-79% range
- US and Canadian settlements fall in the 87-313% range under the assumption of treble damages.
- Global penalties are in the 8-27% range.

3.1.1.6 Estimating the deterrence effect of private enforcement

Following our assumptions in section 3.1.1.1 above, we assume three different detection rates and build three scenarios, where the detection rate in the US is always 5% higher than in Europe. Moreover, as already specified, we assume that the probability of being convicted is 75% after a cartel has been discovered. We thus model the results obtained by Connor and Helmers (2006) based on our assumptions and those made in Connors (2007). The results are shown below, in Table 5.

Table 5 – *Ex ante* deterrence for a global cartelist, without EC private damages actions

	Scenario		
Jurisdiction	**Low**	**Medium**	**High**
Europe			
Detection rate	10%	15%	20%
Conviction rate	75%	75%	75%
Ex ante probability of conviction	7.5%	11.3%	15.0%
EU penalty % on overcharge	22.9%	51.2%	79.4%
Ratio of expected liability to overcharge	**1.7%**	**5.8%**	**11.9%**
North America			
Detection rate	15%	20%	25%
Conviction rate	75%	75%	75%
Ex ante probability of conviction	11.3%	15.0%	18.8%
Public fines US - % of overcharge	27.1%	47.0%	66.9%
Public fines Canada - % of overcharge	28.1%	60.1%	92.1%
Combined North America	27.2%	47.9%	68.7%
Awards/settlements North America	87%	200%	313%
Total liability - public and private	114%	247%	380%
Proportion of awards/settlements on public fines	***320%***	***417%***	***456%***
Ratio of expected liability to overcharge	**12.8%**	**37.1%**	**71.2%**

In Table 5, we calculate the deterrence impact of antitrust enforcement on cartelists in Europe and North America based on available statistics on the percentage of overcharge normally accounted for by public and private enforcement *vis à vis* an international cartel. The deterrence factor calculated represents the percentage of expected liability on the total overcharge in each jurisdiction.[169] For example, in the intermediate scenario – the one we deem more reasonable – a prospective average cartelist would face expected sanctions up to 5.8% of the overcharge imposed – which of course does not carry any deterrent effect on the conduct of a would-be conspirator.

As shown in Table 5:

- deterrence in Europe is much lower than in North America mostly due to the underdevelopment of private damages actions. In the low-end scenario, the average *ex post* liability (public fines and private damage awards/settlements) are approximately 23% of the overcharge in Europe and 114% in North America; whereas the intermediate scenario leads to average *ex post* liability of 51.2% of the overcharge in Europe and 247% in the US, which is likely to be closer to the optimal sanction.[170]
- From an *ex ante* perspective, however, also North American penalties are not sufficient to deter the formation of cartels. Only with the most generous assumptions would the *ex ante* penalty faced by a US cartelist approximate the magnitude of the overcharge. This has led some commentators to

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[169] The combined fines and settlements for US and Canada are obtained by assuming that 93% of penalties in North America are imposed in the US, and 7% in Canada. See Connor (2007).

[170] Connor (2007) finds that in the US, with the most generous assumptions on the detection and conviction rates,

$C^* = (0.08 \text{ to } 0.27)[93\%(27.1 \text{ to } 66.9) + 7\%(28.1 \text{ to } 92.1) + (87.0 \text{ to } 313.2)]$

Low end = 9.1% of damages

High end = 103.1% of damages

This means that if we take the most generous assumptions on Pg, Cg and F, slightly more than 10% of all would-be cartels are optimally deterred or over deterred in the US. To the contrary, in the EU the absence of private enforcement implies that, with a 15% detection probability and a 25% chance of escape conviction, a prospective cartelist faces an expected public sanction between

$C^* = (0.08 \text{ to } 0.27) * (22.9 \text{ to } 79.4)$

Low end = 1.8%

High end = 21.4%

This, in turn, means that, without private enforcement, even under the most optimistic prosecutorial assumptions, EU-wide cartels cannot be deterred. Even with certainty of being caught (p=100%), cartels will be formed; even if EU fines are quintupled, at most 10% of all such cartels will be deterred from forming.

suggest that cartel fines in the US are still sub-optimal when seen from an *ex ante* perspective[171].

Based on these findings, we can simulate the introduction of private damages actions in Europe. In line with our observation of private antitrust litigation actions in the US, we assume that private damages actions in Europe will complement public enforcement, without replacing it, and assume that the effectiveness of private damages actions in recovering antitrust injury suffered by plaintiffs will resemble that of the US and Canada.

Under this scenario, adding private damages actions in the EU would exert a significant impact on the level of liability faced by cartelists. In addition, as acknowledged in the literature, an increase in the detection rate can be expected with enhanced private damages actions[172]. The result of this exercise is shown below, in Table 6.

Table 6 – *Ex ante* deterrence with EU private damages actions

	Scenario		
Jurisdiction	**Low**	**Medium**	**High**
EU cartels with private enforcement			
Detection rate	15%	20%	25%
Conviction rate	75%	75%	75%
Ex ante probability of conviction	11.3%	15.0%	18.8%
EU penalty - % on overcharge	22.9%	51.2%	79.4%
Awards/settlements	73%	213%	362%
Total liability - public and private	96%	265%	441%
Ratio of expected liability to overcharge	**10.8%**	**39.7%**	**82.8%**

In Table 6, we assume that damage awards and settlements would reach the same percentage of public fines than in the US. This leads to settlements in the range between 73% and 362% of the overcharge. The table shows a remarkable increase in the deterrence factor, although a significant deterrence impact would be felt only under the least conservative assumptions[173]. For this reason, we assume that most of the existing cartels would still be formed.

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[171] See Connor (2005, 2007).

[172] See section 2.1 above for an explanation of why private enforcement may enhance deterrence for cartels.

[173] In this exercise, we are not considering a number of factors, which may change both sides of the "optimal deterrence" equation. For example, fear of reputational losses may increase the deterrence factor beyond the direct effect of the financial penalty. Besides the case of cartelists' risk aversion, important evidence of reputational losses is provided by those scholarly papers that have estimated the impact of antitrust enforcement on the stock market valuation of a firm. See, *e.g.*, Bizjak and Coles (1995), whose event study analysis on US private antitrust litigation

These preliminary findings are, anyway, to be taken with caution. Below, we add a number of refinements. In particular, we differentiate between global cartels and intra-EU or domestic cartels.

3.1.1.7 Global cartels and domestic cartels

Given the existence of ongoing international collaboration for the detection of global cartels, we do not expect that enhanced private enforcement in the EU would lead to a substantial increase in the detection rate. Here, we assume that the EU detection rate will contribute to the detection rate of global cartels, which will increase to 20%, and refrain from adding up the detection potential of EU and US private plaintiffs.

Table 7 below shows our estimate of the *ex ante* perspective of a global cartelist with and without enhanced EU private enforcement.

In order to build table 7, we made the following assumptions (in addition to the ones illustrated above for Tables 8-9):

- The detection rate for a global cartelist increases by 20% of the EU detection rate in addition to the basic US detection rate.
- EU penalties amount to 72% of US penalties;
- EU settlements would be in the same proportion to EU penalties as US settlements are to US penalties[174];
- The global cartel's expected profits are 40% in the US, 40% in Europe and 20% in the rest of the world (*e.g.* Latin America, Asia), where no significant private enforcement is expected.[175]

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shows that defendants lose on average 0.6% of their equity value; and more recently, Langus and Motta (2005), who show that the successful prosecution of a firm for illegal behaviour might decrease its market value by more than 6%. On the other hand, also the benefits of a cartel may be greater or smaller than the overcharge. For example, the benefits of a cartel can be greater than the overcharge whenever the cartel agreement leads to some efficiencies (*e.g.* cost reductions) for cartelists; conversely, whenever running a cartel entails coordination or monitoring costs, such costs would have to be factored in, thus being deducted from the expected benefit reaped by cartelists. The relative magnitude of these effects must be appraised on a case-by-case basis, and for this reason is not explicitly taken into account in our exercise.

[174] This apparently implies that treble damages would be made available in Europe, whereas we acknowledge that the Green Paper only mentions double damages for cartels as a possible option (see Option 16). However, we consider that, due to the application of prejudgment interest, the estimates based on US treble damages would still be meaningful. As a matter of fact, some authors have observed that US treble damages, due to the lack of prejudgment interest, often amount only to single or at best double damages. See Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?* 54 Ohio State L. J. 115, 134-36 (1993); and Lovell (1982), *Are Treble Damages Double Damages?*, Journal of Economics and Business, vol. 34, issue 3, pages 263-268.

Based on these assumptions, we show that for a prospective global cartelist the liability/overcharge ratio would double as a result of enhanced private enforcement in the EU. However, in the intermediate scenario, with 18% expected probability of being convicted, EU private enforcement leads to a liability/overcharge ratio of 37.5%, which is still too low to deter the formation of cartels. Under the most generous assumptions, the liability/overcharge ratio reaches 75.3%, which means that some global cartels might be deterred.

Table 7 – Deterrence for a global cartelist

	Scenario		
Jurisdiction	**Low**	**Medium**	**High**
Global Cartels			
Detection rate	18%	24%	30%
Conviction rate	75%	75%	75%
Ex ante probability of conviction	13.5%	18.0%	22.5%
Public fines US - % of overcharge	10.8%	18.8%	26.8%
Public fines Canada - % of overcharge	11.2%	24.0%	36.8%
Combined North America	10.9%	19.2%	27.5%
EU penalty - % on overcharge	9.2%	20.5%	31.8%
Combined North America and Europe	20.0%	39.6%	59.2%
Global penalties	1.6%	3.5%	5.4%
Combined penalties	21.6%	43.1%	64.7%
Awards/settlements North America	35%	80%	125%
Awards/settlements EU	29%	85%	145%
Awards/settlements combined	64%	165%	270%
Total liability - public fines and private awards/settl.	86%	209%	335%
Deterrence w/out EU private enf.	**7.6%**	**22.2%**	**42.7%**
Deterrence with EU private enf.	**11.6%**	**37.5%**	**75.3%**

In summary, under these assumptions, the deterrence factor for a prospective global cartelist increases significantly. Here too, the absence of private enforcement in other jurisdictions undermines deterrence for would-be conspirators. For this reason, some commentators have argued that "permitting treble damages on global purchases rather than just the minor portion of sales

[175] This is consistent with the distribution of sales in the sample analysed by Connor and Helmers (2006), which includes 277 cartels in the 1990-2005 timeframe. For those cartels, 39% of sales were in the US and 39% in Europe. See Table 16 in the study.

transacted in the United States would go far in remedying antitrust under deterrence"[176].

3.1.2 Welfare impact of *status quo* (zero option)

The model developed in the previous sections can be a useful starting point for assessing the social cost of cartels at EU level. We assume that the loss to society consists of two components – the overcharge (OC) on the cartelised goods; and the lost consumers' surplus (CS) on the output not produced because in order to raise price the cartel restricted output[177]. Accordingly:

- We infer from available statistical analyses that EU penalties imposed on cartels are between 23% and 79% of the overcharge, as calculated by Connor (2007). We adopt the median value of 51.2% for our calculation.[178]
- We base our analysis on penalties imposed at the EU level in the period 2002-april 2007, as recently reported by the European Commission (2007), and not corrected for leniency (*i.e.*, €6.24 billion). This period also corresponds to our estimate of the average duration of a cartel. We will then estimate the yearly impact of cartels by dividing for the number of years (5). Thus, yearly penalties at EU level are €1.25 billion.
- We do not consider the 10% cap on worldwide turnover, which played a role in at least some of the cartel investigations so far[179].
- We assume, at this stage, that the deadweight loss equals either 10% or 50% of the overcharge.[180]

Accordingly, the impact of private damages actions would look like in Table 8 below.

[176] See Connor (2004). In the US, the DOJ has the option to calculate the fine based on global overcharges, but has never resorted to this option.

[177] This is equal to the "deadweight loss triangle" in textbook examples of the social loss from monopoly. See *supra*, area A in Figure 4; whereas OC corresponds to area B.

[178] See also Connor (2005), stating that in his sample of cartels from 1990 to 2003, "fines on cartels that operated in Europe averaged a bit more than half of their estimated overcharges".

[179] See Veljanovski (2007).

[180] See, *e.g.* Schinkel (2006), and Maier-Rigaud (2007).

Table 8 – Impact of *status quo*, EU-wide cartels[181]

	Scenarios		
	Scenario 1	Scenario 2	Scenario 3
EU yearly penalties	€ 1,248,400,054	€ 1,248,400,054	€ 1,248,400,054
% Penalties on overcharge	51.2%	51.2%	51.2%
Detection rate	10%	15%	20%
Overcharge - detected cartels	€ 2,440,664,817	€ 2,440,664,817	€ 2,440,664,817
Overcharge all cartels	€ 24,406,648,172	€ 16,271,098,781	€ 12,203,324,086
DWL (10%)	€ 2,440,664,817	€ 1,627,109,878	€ 1,220,332,409
DWL (50%)	€ 12,203,324,086	€ 8,135,549,391	€ 6,101,662,043
Total welfare impact			
If DWL = 10%	**€ 26,847,312,989**	**€ 17,898,208,659**	**€ 13,423,656,495**
If DWL = 50%	**€ 36,609,972,258**	**€ 24,406,648,172**	**€ 18,304,986,129**

Table 8 shows that, under the most conservative estimates (deadweight loss equal to 10%, high detection rate absent private enforcement equal to 20%), the deadweight loss would amount to €1.2 billion, and total overcharges imposed by EU-wide cartels on consumers would amount to €12.2 billion. With the least conservative estimates, the social cost of cartels would be composed by €24.4 billion of overcharges (*i.e.* welfare transfer from buyers to sellers) plus a net loss of €12.2 billion, totalling €36.6 billion.

Based on these results, the yearly welfare impact of EU-wide cartels would be in the range between €13.4 billion and €36.6 billion, *i.e.* between 0.12% and 0.33% of EU GDP in 2006.[182]

3.1.3 Impact of enhanced private enforcement

The figures in Table 8 still do not provide us with a picture of the potential for enhanced private enforcement to increase social welfare by reducing the deadweight loss and the recovery of overcharges.

In order to estimate the opportunity cost of taking no action to enhance private enforcement in the EU, we assume the following:

- As in the previous sections, we assume that the detection rate of cartels would increase by 5%, falling in the range between 15% and 25%[183].

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[181] For a combined table with domestic cartels, see *infra* Table 10.

[182] The nominal GDP in the EU27 in 2006 was $14.527 trillion, see *supra* note 160.

[183] A potential refinement to this analysis would imply that the detection rate is made dependant on the damage multiple chosen. The reason for this would be that, as the expected recovery increases, also the incentive to gather information on potential cartels and the incentive to file suit would increase. If this effect is taken into account, the figures shown in

- As in Table 7 above, we initially assume that EU settlements are in the same proportion to EU penalties as US settlements are to US penalties.
- At this stage, we do not consider a potential reduction in the number of cartels, in line with our findings in Table 7 above.
- In order to reach a very preliminary estimate of the magnitude of damage awards, we further assume that private damages actions can seek single, double or treble damages, and we do not take into account prejudgment interest.[184]

We proceed as follows:

- First, we derive the magnitude of settlements in the EU by multiplying the estimated overcharge for detected cartels in Table 8 (€2.44 billion) by the expected ratio of settlements to overcharge in the EU as calculated in Table 6. For example, under the assumption that the detection rate for cartels is 10% without private enforcement and 15% with private enforcement, then the amount of the expected settlements would be {[(€2.44 billion · 73%)/0.10] · 0.15} = €2.68 billion), as reported in Table 9 below[185].
- We then subtract the amount of settlements from the total welfare impact of cartels as estimated in Table 11 above. For example, under the assumption that private enforcement leads the detection rate to increase from 10% to 15%, then the impact of cartels without private enforcement and with a deadweight loss of 10%(€26.85 billion in Table 8) would be reduced by €2.68 billion), leading to an unrecovered welfare loss of €24.16 billion, as reported

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Table 9 below would further diverge: for example, if the increase in the detection rate is assumed equal to 5% in case of treble damages, but not for double and single damages, then the difference between the damage recovery under treble damages and the recovery under lower multiple would widen – for simplicity, one could confront the right column for treble damages with the middle column for double and single damages.

[184] Our calculation of expected settlements in case of double and single damage awards may be overestimated, as incentives for the plaintiff are not as significant as in the case of treble damages, and consequently the bargaining strength and the "best alternative to negotiated agreement" (BATNA) of the litigating parties in the settlement process is way more balanced. See Ayres & Nalebuff (1974) on the concept of BATNA. And see below, Part II, Section 1 for a more detailed illustration of settlement incentives.

[185] Likewise, to find the amount of settlements under the assumption that the detection rate would be 15% without private enforcement, and 20% with private enforcement, we multiply the estimated overcharge in Table 8 (€2.44 billion) by the expected ratio of settlements to overcharge in the EU as calculated in Table 9 when the detection rate is 20%. Thus, the amount of settlements would be {[(€2.44 billion · 213%)/0.15] · 0.20} = €6.95 billion) for a 5-year period, as reported in Table 9 below. Finally, if we assume that the detection rate would increase from 20% to 25%, the amount of settlements would be {[(€2.44 billion · 362%)/0.20] · 0.25} = €11.04 billion) for a 5-year period.

in Table 9. Calculations are reported for the two assumptions of deadweight loss equal to 10% and 50% of the overcharge.

- We derive the results for double damages and single damages by a simple arithmetic calculation. Note that, as the expected settlements in the EU are derived as a proportion of private damages to public fines equal to that observed in the US, such figures do not account for prejudgment interest. In line with contributions in the literature, such as Lande (1993) and Lovell (1982), we can assume that including prejudgment interest in the award of double damages (as in option 16 of the Green Paper) would lead to results close to our estimations in Table 9 for treble damages[186].

Table 9 – Yearly impact of cartel private enforcement, with damage multiples (Euros)

	Scenario 1	Scenario 2	Scenario 3
	Detection = 15%	Detection = 20%	Detection = 25%
Treble damages (without prejudgment interest)			
Awards/Settlements	**€ 2,684,506,725**	**€ 6,947,569,361**	**€ 11,042,156,401**
Unrecovered			
DWL = 10%	€ 24,162,806,264	€ 10,950,639,299	€ 2,381,500,094
DWL = 50%	€ 33,925,465,533	€ 17,459,078,811	€ 7,262,829,728
Double damages (without prejudgment interest)			
Awards/Settlements	**€ 1,789,671,150**	**€ 4,631,712,907**	**€ 7,361,437,601**
Unrecovered			
DWL = 10%	€ 25,057,641,839	€ 13,266,495,752	€ 6,062,218,894
DWL = 50%	€ 34,820,301,108	€ 19,774,935,265	€ 10,943,548,528
Single damages (without prejudgment interest)			
Awards/Settlements	**€ 894,835,575**	**€ 2,315,856,454**	**€ 3,680,718,800**
Unrecovered			
DWL = 10%	€ 25,952,477,414	€ 15,582,352,206	€ 9,742,937,694
DWL = 50%	€ 35,715,136,683	€ 22,090,791,718	€ 14,624,267,329

The preliminary results in Table 9 above show that if treble damages (or, similarly, double damages with prejudgment interest) were awarded in Europe, enhanced private damages actions would still not recover the full societal loss from detected and undetected cartels. Depending on the assumptions, private enforcement can allow for the recovery of part of the social loss from cartels.

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[186] Lande (1993) *Are treble damages really single damages?* as well as Lovell (1982), *Are Treble Damages Double Damages?*, Journal of Economics and Business, vol. 34, issue 3, pages 263-268.

In particular:

- with treble damages, private enforcement would allow for recovery of up to €11 billion, or 88.2% of the total loss from cartels;
- with double damages, private enforcement would allow for recovery of up to €7.4 billion, or 54.8% of the total loss from cartels;
- with single damages, private enforcement would allow for recovery of up to €3.7 billion, or 27.4% of the total loss from cartels[187].

3.2 Refinements

A number of refinements can be introduced in our analysis of the potential impact of more effective private enforcement in cartel cases. Some of these are crucial for the accuracy of an impact assessment. These include the need to take into account also domestic cartels; the peculiarities of the industry mix in EU as opposed to the US; and the impact of leniency on the variables used in the previous analysis. We address each of these issues in the sections below.

3.2.1 Accounting for domestic cartels

As we already recalled in section 3.1, besides cartels detected and convicted by the European Commission, it is necessary to take into account cartels operating at domestic level, which are normally under the competency of national competition authorities. Not accounting for those cartels would mean underestimating the potential of private enforcement in challenging anticompetitive conduct and affect social welfare.

In our tables 11 and 12 above we have only considered penalties imposed at EU level on cartels between 2002 and 2007, and based our estimate of overcharges on those figures. There are no available data on the amount of penalties imposed in the EU27 in the same period. According to data reported by Connor (2005), penalties imposed by EU27 countries on 72 cartels in the period between 1990 and 2005 totalled $1.9 billion in real 2005 dollars, of which 67 cases were brought in Western European countries (totalling $1.86 billion in real 2005 dollars) and 5 in Eastern EU member states (totalling $43 million). The combined figure accounted for 88.4% of the figure for EU-wide and global cartels sanctioned in Europe. This, in our analysis, would also mean that *the social cost of cartels is almost double our estimates in Table 9*[188]. Based on this

[187] These results are easily derived by dividing the results for awards/settlements in Table 9 by the total welfare impact of cartels under *status quo* in Table 8.

[188] As a *caveat*, it must be clarified that the ratio domestic/EU cartels is based on estimates from the 1990-2005 period, whereas our previous analysis referred to data on EU cartel fines in the period 2002-2007. Unfortunately, we do not possess enough data on all sanctions imposed on

assumption, Table 10 below shows the estimated overall impact of cartels operating in Europe, and shows that such impact *would fall in the range between €25 billion and €69 billion, which amount to 0.23% and 0.62% of GDP, respectively.*

The next sections of this Report will take domestic cartels into account, by assuming that their impact accounts for 88.4% of the impact of EU cartels.

Table 10 – Yearly impact of *status quo*, EU-wide and domestic cartels

	Scenarios		
	Scenario 1	**Scenario 2**	**Scenario 3**
EU yearly penalties	€ 1,248,400,054	€ 1,248,400,054	€ 1,248,400,054
% Penalties on overcharge	51.2%	51.2%	51.2%
Detection rate	10%	15%	20%
Overcharge - detected cartels	€ 2,440,664,817	€ 2,440,664,817	€ 2,440,664,817
Overcharge EU cartels	€ 24,406,648,172	€ 16,271,098,781	€ 12,203,324,086
Overcharge domestic cartels	€ 21,575,476,984	€ 14,383,651,323	€ 10,787,738,492
Overcharge all cartels	€ 45,982,125,156	€ 30,654,750,104	€ 22,991,062,578
DWL (10%)	€ 4,598,212,516	€ 3,065,475,010	€ 2,299,106,258
DWL (50%)	€ 22,991,062,578	€ 15,327,375,052	€ 11,495,531,289
Total welfare impact			
If DWL = 10%	**€ 50,580,337,672**	**€ 33,720,225,114**	**€ 25,290,168,836**
% of EU GDP in 2006	**0.45%**	**0.30%**	**0.23%**
If DWL = 50%	**€ 68,973,187,734**	**€ 45,982,125,156**	**€ 34,486,593,867**
% of EU GDP in 2006	**0.62%**	**0.41%**	**0.31%**

3.2.2 Accounting for the industry mix[189]

As acknowledged in the economic literature, the type of industry that is involved in price fixing significantly influences the size of overcharge.[190] In Bolotova (2006), many estimated coefficients for industry variables significantly affect the size of the overcharge[191]. When considering all cartels, the effects are particularly strong and important for our analysis in the services sector, as cartels in services are found to increase overcharge by 11% compared to the reference group in Bolotova's paper (*i.e.,* chemicals). Considering that the US and EU services market differ largely, this could lead to potential overcharge discrepancy between the EU and US. We could ignore this *caveat* if we find that all cartels in the EU and US recently were found to be in similar, largely

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domestic cartels in the EU27 in the period 2002-2007. Most of the cartels in the sample analysed by Connor (2005) refer to cartel cases that ended before 2002.

[189] We owe this section to Aleksandra Ossowska.

[190] See *e.g.* Connor (2005) p.50; and Bolotova (2006) p.39.

[191] See Bolotova (2006), at pp. 39 and 51.

homogenous goods, which could be true considering that such cartels are easiest to enforce.

Table 11 – Effect of industry mix of cartel on overcharge - all cartels

Industry type*	Estimated coefficient	Standard Error	Significance
Food	-4.95	2.34	Significant(**)
Construction	-3.02	3.30	Not significant
Natural Resources	-4.48	3.03	Significant (***)
Metal	-0.92	2.98	Not significant
Timber	-9.97	4.27	Significant (**)
Shipment	-1.25	4.75	Not significant
Equipment	-8.23	3.62	Significant (**)
Fuel	-7.80	4.89	Significant (***)
Paper	-3.51	5.06	Not significant
Service	**11.74**	**6.11**	**Significant (**)**
Others	4.97	3.45	Significant (****)

* The reference group is the chemical industry.

** The estimated coefficient is statistically significant at 10% level of probability of type I error using a two sided test. Ho: $\beta=0$ and Ha: β not=0.

*** The null hypothesis Ho: $\beta > 0$ is rejected in favour of Ha: $\beta \leq 0$ under a one-sided test and 10% significance level.

**** The null hypothesis Ho: $\beta < 0$ is rejected in favour of Ha: $\beta \geq 0$ under a one-sided test and a 10% significance level.

Source, Bolotova (2006), p.52

This industry variable effect on the size of overcharge – as shown in Table 12 below – is also especially strong in international cartels for Metal, Transport and Construction variables which are as large as -10.65, -12.40 and -21.63 and statistically significant. This suggests that the overcharges attained in these industries are lower than the overcharges achieved in industry producing durable goods.

Table 12 – Effect of industry mix – modern international cartels

Industry type*	Estimated coefficient	Standard Error	Significance
Metal	-10.65	6.40	Significant (**)
Equipment	-1.39	5.36	Not significant
Service	-1.12	7.36	Not significant
Transport	-12.40	6.77	Significant (**)
Construction	-21.63	11.18	Significant (**)

* The reference group is the chemical industry.

** The estimated coefficient is statistically significant at 10% level of probability of type I error using a two sided test. Ho: $\beta=0$ and Ha: $\beta \neq 0$.

Source, Bolotova (2006), p.54.

This information can be used in our model, together with information on the industry mix of cartels in the EU and US, to control for the difference in industry mix variable. Tables 16 and 17 below shows that there are differences between the industry mix in the United States and Europe and that these would have a significant and meaningful impact on the difference of the size of the overcharge in Europe. The biggest difference between the US and EU industry mix in cartelised markets is in the food area, where in the US there had been 24 cartels while in Europe only 5. This exerts an influence on the size of the overcharge, which is almost 5% lower for foods than for the reference group overcharges (chemicals in Bolotova's paper). Similar large difference is observed in the equipment markets where in Europe there were 32 instances of cartels and in the US only 12. This could on the other hand contribute to European overcharges being lower than the US ones, since 'equipment' cartels lower the size of the overcharge by 8% from the reference group overcharges. Similarly, a well known fact that European services market exhibit a different structure than US ones is confirmed by the data, as in Europe there are more cartels in services, which could cause the European overcharge to be larger than the US one. Namely, cartels in services markets have an overcharge larger than the reference group (chemicals) by 11%[192].

[192] For an analysis of European cartels convicted by the European Commission between 1964 and February 2007, broken down by industry, see Combe and Monnier (2007).

Table 13 – Effect of industry mix of cartel on overcharge in Europe and the US - all cartels

Industry type*	Estimated coefficient	Significance	Europe	US
Food	-4.95	Significant (**)	5	24
Natural Resources	-4.48	Significant (***)	18	14
Timber	-9.97	Significant (**)		1
Equipment	-8.23	Significant (**)	32	12
Fuel	-7.80	Significant (***)	3	4
Service	11.74	Significant (**)	20	15

* The reference group is the chemical industry.

** The estimated coefficient is statistically significant at 10% level of probability of type 1 error (false acquittal) using a two sided test. Ho: β=0 and Ha: β not=0.

*** The null hypothesis Ho: β>0 is rejected in favour of Ha: β < or =0 under a one-sided test and 10% significance level.

Source, Bolotova (2006), p.52, Connor (2006) p.81-87

As far as international cartels are concerned, where in metal and transport markets overcharges are 10% higher and in construction even 20% larger than the reference group overcharges (chemicals), Europe seems to dominate, which would again contribute to making the European overcharges larger than the US ones.

Table 14 – Effect of industry mix overcharge in Europe and the US – modern international cartels

Industry type*	Estimated coefficient	Significance	Europe	US
Metal	-10.65	Significant (**)	6	2
Transport	-12.40	Significant (**)	3	
Construction	-21.63	Significant (**)	2	

* The reference group is the chemical industry.

** The estimated coefficient is statistically significant at 10% level of probability of type II error (false acquittal) using a two sided test. Ho: β=0 and Ha: β ≠ 0.

Source, Bolotova (2006), p.54, and Connor (2006), pp. 81-87.

These data are very scarce, and can only be indicative[193]. Moreover, as observed by Bolotova (2006), many other cartelised markets have no influence on the size of the overcharge, and hence on the difference in the overcharge between Europe and the US. Similarly, the 2001 OECD Competition Committee "Global Forum on Competition" found no single "profile" of markets that were subject to cartelisation.[194] However, it identified that some characteristics come up repeatedly: high barriers to entry, high concentration (but not necessarily in some service markets), homogeneous products and the existence of an industry trade association that provided the opportunity for conspirators to meet and agree. Some of these cartels had existed for many years, even decades, especially in countries that had not long been prosecuting cartels actively[195].

3.2.3 Are detected cartels' overcharges a proxy for total overcharges?

Another important issue is whether overcharges of detected cartels can be considered as a good proxy of overcharges of all cartels, including the ones that are not detected. There are critics of studies on welfare impact of cartels that are based on convicted cartels because they "are inept compared to cartels that either had no fear of sanctions or remained clandestine. (Connor 2005 p.52)" Carlton and Perloff (1990) also point out that it is not known whether cartels that find themselves in court are unsuccessful or merely unlucky.[196]

The influential study by Asch and Seneca (1976) paradoxically finds that price fixers that were caught in 1958-1967 were significantly less profitable during collusion than a control group of unprosecuted firms. The authors interpret it as a signal that firms are more likely to collude when industry conditions cause profits to decline, or cartels that are relatively ineffective at raising prices are also inept at hiding their illegal conduct, and, consequently, the most likely to be detected and indicated by the antitrust authorities. This lower profitability ought to be reflected in relatively low overcharges, which indeed can be seen in the table below, drawn from Connor (2006, p.50) for years 1946-1973 covered by Asch and Seneca (1976). The fact that overcharges are lower for guilty than for legal cartels also holds for the periods 1891-1919 and 1974-1990.

[193] It must also be recalled that the regression in Bolotova (2006) controls for endogenous variables such as cartel duration. See *id.*, at 32-33 for an explanation of the problem related to duration in Bolotova's exercise,. And see Zimmerman and Connor (2005), Connor (2005) and Combe and Monnier (2007) for a description of the determinants of cartel duration.

[194] OECD (2002), Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws, DAFFE/COMP(2002)7, p.7

[195] Id.

[196] Carlton and Perloff (1990), at 216-217.

Table 15 - Median Average Overcharges (in percent) by Year and Legal Status

Cartel episode end date	Found Guilty	Legal
1780-1891	32	22
1891-1919	25	35
1920-1945	45	32
1946-1973	13	23
1974-1990	22	25
1991-2004	24-25	20
All years	**23-25**	**28**

However, the other periods, and most importantly the recent 1991-2004 one, show that overcharges are in fact higher for guilty rather than legal cartels. This result would be intuitive – higher overcharges being a result of illegal price fixing. Connor (2006, p. 52) suggests that Asch and Seneca's study may be mistaken because of sample selection bias. Cartels punished in the study were relatively inept because their median overcharges of 13% are the lowest by far of the guilty cartels in any of the six time periods. In addition, the sample appears to be disproportionately drawn from domestic bid rigging conspiracies, categories that throughout history have generated the lowest overcharges.

3.2.4 Leniency and the detection rate

In our analysis above we have assumed a rather low detection rate for cartels in Europe. Some may argue that the detection rate has increased since the Commission launched its corporate leniency programme. However, although the impact of the leniency programme in Europe has certainly been positive, the magnitude of such impact may be reduced since, with leniency available, also the prospective penalty significantly decreases, especially for non-ringleaders, as testified by the heavy discounts applied by the Commission from 2002 to 2007, which reduced overall cartel fines by almost 50%[197].

In the literature, opinions are mixed:

- Some commentators argued that leniency does not always impact the detection rate: for example, Veljanovski (2007) analyses a sample of 39 cartels investigations in Europe from 1999 to 2006, and finds that "12 of these cartels had already been detected by the US authorities and a further 5 … were under parallel investigation", which leads him to conclude that "one may question whether leniency was central to either detecting the cartel or securing a successful prosecution".

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[197] See European Commission, *Cartel Statistics*. And Veljanovski (2007), Figure 2.

- Combe and Monnier (2007) find that the number of detected cartels after 1996 (when leniency programmes were introduced in the EU) increased from 1.64 annually (in 1964-1996) to 5 annually (between 1997 and 2007). However the authors acknowledge that this could imply that the intensity of detection is higher, but could also result from an increase in the birth rate of cartels after 1996.

As a result, estimates that the detection rate in Europe is lower than in the US have been made also recently, *i.e.* after the 2002 leniency policy came into force. Accordingly, for the purposes of our preliminary welfare analysis we do not deem it necessary to adjust the detection rate to account for leniency.

4 Other types of infringement

Our preliminary welfare analysis looked at cartels, and so far did not consider other types of anticompetitive conduct. Of course, enhanced private enforcement would cover also cases on other types of antitrust violation, such as horizontal agreements, exclusionary abuses, vertical restraints, etc. These cases pose different problems when it comes to private enforcement. As we already explained in the previous sections, the type of plaintiff, the type of allegation and the detection rate may differ noticeably when compared to hard-core price-fixing conspiracies.

The prospective breakdown of private suits by type of infringement in Europe is hard to envisage at this stage. In the US, the Georgetown study found that in 1973-1983, after horizontal price-fixing, the most common allegations were "refusal to deal" and "tying or exclusive dealing", followed by "dealer termination", "monopolization" and "vertical price-fixing". The ratio between horizontal price-fixing cases and vertical price-fixing cases was approximately 5:1. Also, in his study of private rights of action in five jurisdictions, Roberts (2000) concludes that "[t]ied selling, exclusive dealing and refusal to deal … make up at least 40-50% of the private actions that are filed".[198] Also the Ashurst study and in the evidence reported at sections 1.2 and 1.3 of this Report confirmed that other types of allegations, and in particular abuses of dominance, can account for a significant share of private antitrust damages actions[199].

For these cases, also the damage estimation is likely to follow different sets of criteria. For example, in the case of exclusionary abuses, lost profits will be the main criterion to assess damage for foreclosed would-be entrants, whereas for end consumers damage will mostly be calculated on the basis of the

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[198] See Roberts (2000), at 3.

[199] See also Tables 16 and 17 below.

overcharge.[200] In other cases, the disgorgement of the defendant's illegally achieved profits could be the main basis for calculating damages.[201]

Table 16 – Private actions in the Georgetown study, by type of plaintiff

Alleged Illegal Practice Information	Stand-alone competitor	Vertically integrated competitor	Direct Customer	Final supplier	End customer	Other	No
Horizontal Price Fixing	7.2	22	24	19.4	0.4	20.4	4.8
Vertical Price Fixing	6.9	13	19.2	5.4	6.9	6.6	0.7
Dealer Termination	1.6	1.6	22.6	4.3	0	2	0.7
Refusal to Deal	23.4	40.6	35.3	31.2	12.6	23.7	0.7
Predatory Pricing	23.2	11.8	8.5	8.6	3.4	2	1.5
Asset Accumulation	9.6	12.2	3.2	4.3	3.4	3.3	1.1
Price Discrimination	16.2	25.2	23.6	15.1	14.9	4	2.2
Vert. Price Discrimination	5.3	10.2	9.2	4.3	1.1	2.6	0.7
Tying/Exclusive Dealing	22.3	22.8	30.7	21.5	17.2	14.2	3.7
Merger/Joint Venture	13.8	6.3	3	4.3	4	4	0.4
Induce Govt. Action	1.8	1.2	0.4	0	0	1.3	0
"Conspiracy"	8	6.6	4.6	8.6	6.9	8.6	1.1
"Restraint of trade"	13.1	11	9	11.8	8	13.8	2.7
Monopolization"	15.2	12.2	7.2	3.2	6.3	7.9	2.6
Other	11.6	10.6	5.5	12.9	8	23	1.1
No Information	2.7	3.4	0.9	2.2	2.3	4	84.4

As illustrated by Hovenkamp (1989), some types of infringements are way more problematic than price-fixing conspiracies, when it comes to identifying an optimal private enforcement system. First, for these types of anticompetitive conduct there is little reason to believe that damage multiples and the "optimal deterrence" approach would be as useful as in the case of cartels. As stated by Kauper and Snyder (1986), "because vertical practices are not likely to be covert, one rationale for trebling damages, to encourage efforts to detect offenses, may not apply. Therefore, if the bulk of private antitrust cases allege vertical offenses, then more concern about non-meritorious suits is appropriate. The question of the plaintiff's business relationship to the defendant is related to the analysis of offenses alleged since the business relationship provides additional information regarding the probable merit of the case. Within the horizontal class the probable merit of cases may vary greatly, with cases filed by customers likely to be the most meritorious. In contrast, cases filed by plaintiffs against their competitors are among the most suspect of all private antitrust litigation."

Secondly, although private parties are often in the best position to detect that an anticompetitive infringement has occurred, the superior information held by

[200] See Hovenkamp (1989) and Blair & Piette (2006).

[201] On damage calculation for different types of infringement, see, *e.g.*, Hoyt, Dahl and Gibson (1976).

private parties in interpreting the signal sent by the market on the lawfulness of the defendant's action is not always observed in damages actions for these types of infringements. In particular, for offences subject to a rule of reason instead of a *per se* rule, private parties are not always best positioned to discern whether the observed conduct was actually in breach of EC Competition Rules. To the contrary, public authorities may be in a better condition to carry out such task.

Thirdly, for most exclusionary conduct there is often no correlation between the plaintiff's lost profits as a result of an antitrust violation, and the profitability of the violation for the defendant[202]. In other words, while in cartel cases the damage award can be calculated on the basis of the wealth transfer occurred from the defendant to the plaintiff, for exclusionary abuses calculating the optimal sanction may be more challenging, as the conduct itself may also generate significant efficiencies. In order to force the infringer to internalise *ex ante* the damage that will be suffered by a competitor as a result of exclusion, detailed knowledge of the outcome of the infringement would be needed. Calculating damages on the basis of the plaintiff's lost profit may prove over-deterrent, especially when exit of the plaintiff was due to superior efficiency or "business acumen" of the defendant[203]. The theory of optimal deterrence suggests that a clear distinction should be made between exclusionary conducts that lead to output restrictions and/or foreclosure of equally efficient competitors, and competition on the merits. Only in the former case there a proper antitrust injury should be found, which the plaintiff would be called to compensate[204].

An issue that may emerge in estimating the potential for private enforcement of Article 82 on the basis of a comparison with the US system is the difference existing between the current approach to the application of Section 2 Sherman Act (*monopolization*) in the US, as opposed to article 82 enforcement (*abuse of dominance*). Recent cases such as *Trinko* and *Microsoft* have clearly shown how differently single-firm conduct is approached by the US and EU competition

[202] See below, Section 4 in Part II of this Report, for a more detailed analysis of methods to calculate damage awards.

[203] See Crane (2006).

[204] In the words of Judge Learned Hand, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." As recalled by DAAG Delrahim in a recent speech, "[t]he challenge is that, with respect to unilateral conduct, it is extremely difficult to distinguish between aggressive competition and anticompetitive conduct. As a result, over-zealous enforcers and courts run a significant risk of deterring hard - yet legitimate - competition. Enforcement in this area is further complicated because, even if we are able to conclude that certain conduct is anticompetitive, it may be more difficult to implement workable remedies that will restore any lost competition". See Delrahim (2004), at http://www.usdoj.gov/atr/public/speeches/208479.htm.

enforcers[205]. In *Trinko*, the Court explicitly rejected expansive views of a monopolist's duty to deal with its competitors, emphasising that compelling firms to share their assets "is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."[206] On the other hand, at EU level the "special responsibility" attributed to dominant firms and the stricter standards adopted in cases of tying, refusal to deal and predation may lead to a higher incidence of claims made by competitors and/or direct purchasers for lost profits and overcharges, respectively.[207]

In summary, the main problems that emerge when private enforcement is applied to non-cartel cases are the following:

- *Lower accuracy*: there is a risk that plaintiffs misinterpret (or strategically interpret) the signals sent by the defendant's market conduct, especially when the conduct may have also created efficiencies[208];
- *Risk of false positives*: as a result of inaccuracy and courts' limited information, the risk of Type I and Type II errors becomes substantial, in turn leading to potential negative impacts on competition on the merits, and competitiveness as a whole.[209] This is particularly important when courts apply a standard, rather than a rule, to establish the case for antitrust injury[210];

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[205] At the same time, private enforcement of article 82 in the EU currently cannot rely on a range of incentives currently available in the US, such as broad discovery based on notice pleading, contingency fee arrangements and mandatory one-way fee-shifting. This may ultimately rebalance our comparison between the US "more lenient" approach to monopolization and the EU approach to article 82.

[206] The Supreme Court also declared that "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, 124 S. Ct. 872, 879 (2004).

[207] But see, on the special responsibility of dominant firms, Temple Lang (2006).

[208] William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247 (1985).

[209] Buccirossi *et al.* (2006) have analysed for the OFT the problem of inaccuracy in the intervention of competition authorities in abuse of dominance cases. One of the findings of the study is that the negative welfare effects of conducts that raise rivals' costs (RRC) are often compensated for by relatively small increases in consumers' willingness to pay for the dominant firm's product; and the negative welfare effects of strategies aimed at lowering rivals' demand (LRD) that entail a reduction in consumers' willingness to pay for the product offered by the rivals of the dominant firm are only compensated for by a large reduction in the dominant firm's cost of production.

[210] See Crane (2006).

- *Over-deterrence*: when seen together, inaccuracy of enforcement and the risk of false positives lead to excessive deterrence, *i.e.* a risk that efficient market behaviour is sanctioned by private or public enforcers, and thus discouraged.
- *Little or no deterrence-based reason for damage trebling*: there seems to be less grounds for allowing a trebling of damages in these cases, because: (i) plaintiffs are often very well informed about potential illegal behaviour on the side of the defendant; (ii) when plaintiffs are direct purchasers, antitrust remedies with a trebled award may become a too attractive alternative to standard contract law suits; (iii) the "internalisation of externalities" argument in favour of treble damages makes little sense, as the conduct may even create efficiencies, and does not necessarily result in a deadweight loss; (iv) the "punish one, educate ten" argument often used in the optimal deterrence theory here is less justified, as firms will have to carefully weigh all the efficiencies and inefficiencies created by *their own* conduct before deciding, rationally, whether to engage in a given market behaviour.

On this latter point, however, it is worth recalling that the literature is still split. For example, Lande (2006) argues that the trebling of damages may even be more important in rule of reason cases, as the latter are normally more complex and challenging for plaintiffs, and the prospect of a long litigation with an uncertain outcome could discourage many plaintiffs from bringing suit.[211] Klingsberg (1988) also argued that treble damages are vital for allegations other than price-fixing, as they help plaintiffs overcome their reluctance to sue.

On the other hand, Crane (2006) observed that "[b]undled discounting programs are not usually difficult to detect … At best, the treble damages remedy is unnecessary to deter exclusionary mixed bundling. At worst, it threatens to chill vigorous price competition by causing the gains from even lawful price discounting to be overshadowed by the prospect of an erroneous treble damages judgment in favor of a rent-seeking competitor". Also, Melamed (1997) implicitly argues that in some cases, even single damages may be overdeterrent if the plaintiff is entitled to recover its entire loss.

Put differently, one of the major problems with encouraging private enforcement of these types of anticompetitive behaviour is that, unlike what occurs in cartels, here the conducts at hand cannot be deemed *a priori* socially harmful. For these types of conduct, firms themselves have to carefully weigh

[211] Lande (2006): "It is even possible that 'treble' damages are more important in rule of reason cases. 'Treble' damages were probably adopted, in part, to provide an incentive for private litigants to find and prove violations. Rule of reason cases are tremendously risky, protracted, and expensive. Abolishing 'treble' damages in rule of reason cases could effectively decimate rule of reason private antitrust enforcement. The number of rule of reason actions could decrease tremendously, eventually resulting in a substantial number of additional rule of reason violations."

costs and benefits before deciding whether to proceed: the policy problem is not ensuring that firms always refrain from engaging in a given conduct, but securing that firms face the right set of incentives – *i.e.*, the right magnitude of expected costs and benefits – when deciding to act. Any other deterrence-based approach would result in a socially undesirable outcome.

The economic literature thus supports a different approach for most of these types of infringement.

- *Vertical restraints.* The empirical evidence reported by Cooper *et al.* (2005) and Lafontaine and Slade (2005) shows that most vertical restraints actually enhance welfare. As the authors observe, "in the setting that we focus on, namely manufacturer/retailer or franchisor/franchisee relationships, the empirical evidence concerning the effects of vertical restraints on consumer wellbeing is surprisingly consistent. It appears that when manufacturers choose to impose such restraints, not only do they make themselves better off, but they also typically allow consumers to benefit from higher quality products and better service provision".[212] As also Europe has moved to a more flexible approach after its 2000 guidelines on vertical restraints, envisaging a treble damages system would probably leave plaintiffs with a significant incentive to sue for damages to recover a multiple of the antitrust injury suffered, if any. In any event, the potential for a counterparty in a vertical agreement to sue for damages after contract termination can have the following, interrelated effects: (i) an increase in transaction costs between manufacturers and distributors; (ii) a distortionary effect on the "make or buy" strategies of industry players, which would tilt towards vertical integration; (iii) a chilling effect on the formation of distribution contracts. At a minimum, there seem to be argument in favour of decoupling damage awards: this being the case, the *ex ante* decision of the would-be wrongdoer would still be "disciplined" by the threat of multiple damages, and the plaintiff would not be enticed by the mirage of profitable damage awards.[213]
- *Predatory pricing* practices are considered to be quite uncommon, and require the application of a test (for Europe, normally the *Akzo* test) to show that the price being set is not lower than a measure of cost (often, the average variable cost, AVC). For these cases, further problems emerge in considering the potential efficiency of private enforcement: (i) the alleged predator's cost functions are not always directly observable by competitors, *i.e.* the

[212] Lafontaine F. and M. Slade (2005), *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in P. Buccirossi (Ed.) 'Handbook of Antitrust Economics', Cambridge, The MIT Press.

[213] See Polinsky (1988); more recently, Choi and Sanchirico (2004) reached a slightly different result.

"superior information" held by private plaintiffs here is at its lowest; (ii) in some markets, pricing below AVC for a specific service may be the best possible option, irrespective of the degree of market power held by the firm – this is mostly the case of multi-sided markets; (iii) the plaintiff is normally a competitor, whose claim would focus on lost profit, but compensating rivals' lost profits may end up over-deterring firms that sell products or services at a low price, thus benefiting consumers in the short term; (iv) accordingly, any risk of over-deterrence is particularly delicate and undesirable, as it may discourage practices that enhance consumer welfare.[214] Here, the motivation normally stated for multiplying damage awards is less evident: the practice is indeed observable, the expected detection rate is high, and certainly plaintiffs should not be encouraged to engage in profit-seeking by filing unmeritorious suits.

- *Tying, bundling, loyalty rebates.* These practices, though ubiquitous in our modern economy, are still subject to a *per se* rule in Europe, also due to the extreme paucity of cases. Since the early days of the "Harvardian" leverage theory, both the Chicago School and post-Chicago scholars have agreed that a rule of reason would be more appropriate for these practices, especially when mixed bundling is at hand.[215] There is currently a wide agreement, in the literature, that under certain circumstances bundling can be welfare-enhancing, as it creates economies of scale and scope and several demand-side advantages. The US *Jefferson Parish* rule already introduced a "modified *per se*" rule in 1984, and more recent cases (including *Microsoft III*, although confined to cases of technological integration) have testified of a shift towards a rule of reason *tout court*. Also, the 2005 Discussion Paper published by the Commission has advocated for a move towards a rules of reason. As a result, as we expect those practices to be increasingly subject to a careful "balancing test" in the years to come: private plaintiffs (*i.e.*, competitors unable to replicate the bundle, downstream players complaining about full-line forcing) may not be in a superior position to detect those practices that actually amount to an infringement of Article 82. As regards loyalty rebates, Crane (2006) observed that "many of the recent bundled discounting cases have been brought by frustrated competitors

[214] For an analysis of the incentives for competitors to engage in frivolous predation litigation, see Helsel (1995).

[215] See Adams & Yellen (1976), Carlton & Perloff (2004), Evans & Padilla (2004), Hylton & Salinger (2004), Tirole (2004), Nalebuff (2003, 2005). For a survey, see Kobayashi (2006) and Choi (2005).

seeking to deny a commercial advantage to a more diversified rival, not by firms who are in any real danger of being excluded from the market".[216]

- *Refusals to deal.* This, at the time when the results of the Georgetown project were made public in the US, was the second most common allegation in private enforcement cases, and the most common secondary allegation. In cases of refusal to deal, the plaintiff is normally a downstream player claiming lost profits. In those cases, standards like the *Magill/IMS* test require a careful appraisal of whether the refusal was objectively justified, and whether the refused asset was really indispensable for the plaintiff to continue operating in the relevant market. Although it would not be impossible for both the wrongdoer and the allegedly damaged firm to assess *ex ante* whether a given conduct would be deemed unlawful under EC competition law, to be sure the average detection rate here is much closer to 100% than in the case of cartels, and – if prejudgment interest is awarded – multiple damages seem less justified from the perspective of both deterrence and corrective justice.

Finally, the impact of private damages actions can be substantially different, depending on the peculiar economic features of the sector in which the allegedly anticompetitive conduct is observed. For example, assessing damages in so-called "new economy" markets or knowledge-based industries can create insurmountable difficulties, and both the detection of the conduct and the outcome of trial are particularly uncertain. Lopatka (2006) argues that estimating "the injury suffered by purchasers is exponentially more difficult", in particular as network and learning effects, market "tipping" and the combination of very high fixed costs with low or negligible marginal costs create serious challenges in the determination of the counterfactual – the so-called "but-for" market situation.

The next section bases our welfare assessment on the abovementioned considerations. In any case, we will come back to many of these issues below, in Part II.[217]

4.1 Impact Assessment

To our knowledge, an assessment of the potential for compensation and deterrence of private actions filed for non-cartel infringements has never been carried out in the literature. Available data are mostly confined to the realm of price-fixing conspiracies, although non-cartel cases seem to have played a

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[216] For example, in *3M v. LePage's* a competitor likely to be less efficient than the defendant succeeded in recovering damages: since then, there has been an explosion of bundled discounting claims See Crane (2006).

[217] See, in particular, Section 1 on the costs and rewards of antitrust damages actions.

remarkable role in jurisdictions where private enforcement is more developed, such as the US.[218] To be sure, most of the landmark US cases on these types of infringement were initiated by private parties, not by the DoJ.[219]

In line with what we argued in the previous section, we assume that the types of antitrust infringement at hand differ from horizontal price-fixing, since:

- *The detection rate is higher*. The private sector has been recognised as being better equipped than the public sector to detect anticompetitive conduct such as tied selling, exclusive dealing and refusal to deal. "Market participants can detect this type of conduct as it has an obvious economic impact on them."[220] For cases where nuisance suits are likely to be filed, the detection rate could even be greater than 1 – *i.e.* plaintiff will claim antitrust injury even when no anticompetitive behaviour has occurred.
- *The conviction rate is lower*. This occurs especially for rule of reason cases, which have been defined "tremendously risky, protracted, and expensive". The need to balance pro- and anticompetitive effects leads to a more uncertain outcome, as also confirmed by the available statistics on the probability of plaintiff victory.[221] With specific reference to the rule of reason approach to non-price vertical restraints, Ginsburg (2005) observes that "experience shows that when plaintiffs had to prove the challenged practices harmed competition, they were very rarely able to do so".

This, apparently, does not change the outcome of the formula shown in Section I.1.1 above. However, in reality this circumstance makes a big difference, as:

- The *lower conviction rate is coupled with a greater possibility of error* for both public and private enforcers. Even disregarding the peril of false convictions, the potential for a private action to be dismissed is definitely higher than in cartel cases, as courts would have to apply a balancing test to ascertain the anticompetitive nature of the contested conduct.
- The *number of detected violations can be assumed as a proxy for the total number of violations*. For most types of non-cartel infringement, this statement is easy to prove: a market player facing a refusal to deal from a dominant firm will not fail to recognise the antitrust relevance of the conduct; in some cases, the

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[218] See *e.g.* Calkins (2006).

[219] See Lande and Davis (2006), observing that "The leading modern cases on monopolization, attempted monopolization, joint ventures, proof of agreement; boycott; other horizontal restraints of trade, resale price maintenance, territorial restraints, vertical boycott claims, tying, price discrimination, jurisdiction, and exemptions are almost all the result of litigation brought by someone other than the Justice Department." See also, more crecently, Lande and Davis (2007).

[220] See New Zealand's Economic Committee, "Increasing Detection", quoted in Canadian Competition Bureau (1994).

[221] We refer to the Georgetown project, but also to available statistics on Australia and Japan.

market player may decide not to sue although the conduct was actually anticompetitive, whereas in other cases the player might decide to sue even if there is no actual grounds for alleging an antitrust infringement. But overall, we do not expect a huge difference between "detected" and "total" anticompetitive conducts such as that observed for price-fixing conspiracies. Such rationale applies to vertical restraints, bundling/tying, refusals to deal and other exclusionary conduct. The case of predation is somewhat different, but – as acknowledged in the literature – predatory pricing is a rather uncommon practice, and its welfare impact is very likely to be mixed.

In order to assess the impact of enhanced private antitrust damages actions alleging non-cartel infringements, we distinguish between vertical restraints, on the one hand, and abuse of dominance, on the other.

Table 17 below shows the distribution of private cases according to the type of allegation in Australia and US, as reported by Roberts (2000) and updated at June 1999. The table shows that horizontal price-fixing was not the most frequent allegation in private cases in both jurisdictions.[222] Such finding also holds in the case of New Zealand, Ireland and the UK, where the majority of cases were reportedly based on an alleged monopolization or abuse of dominance.[223]

A notable difference between cartel and non-cartel cases is that, at least in some jurisdictions, most of the non-cartel cases were not damages actions, but actions seeking injunctive relief[224]. In this respect, unfortunately, no available data exist as regards the relative portion of damage awards and injunctions granted by courts. In New Zealand, no damages had been granted as of June 1999, whereas Brunt (1990) reported that "[i]n Australia most private applicants are satisfied if they achieve the award of an injunction", implying that damages awards play a much smaller role in that jurisdiction as opposed to the United States.

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[222] The table reports data also from Brunt (1990), a study that surveyed all private actions in Australia from 1975 to 1989. Roberts (2000) focuses also on the period 1990-1999.

[223] See, again, Roberts (2000), where only qualitative data are reported for New Zealand and Ireland.; and B. Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part I* [2006] ECLR 241; *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part II* [2006] ECLR 279; and *Competition Law Litigation in the UK Courts: A Study of All Cases to 2004- Part III* [2006] ECLR 341.

[224] See also the empirical findings in our section 1.2 in the Introduction to this Report.

Table 17 – Allegations in private actions in Australia and US

Country	Australia		United States	
Allegation	***Roberts (2000)***	***Brunt (1990)***	***Georgetown project***	**Average**
Horizontal Price Fixing	5.9%	2.0%	21.3%	9.7%
Non-cartel cases				
Vertical restraints				
Vertical price fixing/RPM	6.7%	4.9%	10.3%	7.3%
Exclusive Dealing	27.7%	19.6%	21.1%	22.8%
Abuse of dominance				
Abuse of Dominance (Monopolization)	3.4%	19.6%	8.8%	10.6%
Conspiracy	41.2%	41.0%	21.3%	34.5%
Refusal to Deal	*(Included in Conspiracy)*		25.4%	25.4%
Price Discrimination And/Or Predatory Pricing	10.1%	10.8%	26.8%	15.9%
Tied Selling	5.0%	*(In Exclusive Dealing)*	*(In Exclusive Dealing)*	5.0%
Other				
Merger/Joint Venture	0.0%	2.0%	5.8%	2.6%
Total*	100.0%	99.9%	115.4%	
Share of cartel infringements	5.9%	2.0%	18.5%	**8.8%**
Share of non-cartel infringements				
Vertical restraints	34.4%	24.5%	27.2%	**28.7%**
Abuse of dominance	59.7%	71.4%	49.3%	**60.1%**
Other	0.0%	2.0%	5.0%	**2.3%**
				100.0%

** The total is greater than 100% in the US as in some cases there were two or more allegations.*

Based on the data reported in Table 17, we can assume that private actions aimed at claiming overcharge damages from cartel infringements would represent at most 18.5% of total private actions. The US figure seems to be more reliable, in this respect, than the Australian one for our purposes, since – as already recalled – most of the Australian legal suits are aimed at injunction, more than damage awards.

For non-cartel types of actions, we assume that the detection rate is 1. The conviction rate, however, is expected to be lower, at least for some types of allegations. In a seminal paper, Perloff *et al.* (1996) develop a model on the probability of trial and settlement based on a subset of the cases included in the Georgetown study. They find that, in 1973-1983, a plaintiff was more likely to win if the case involved an allegation of price fixing, mergers, price discrimination, tying, or dealer termination, and less likely to win if the case concerned allegations of predation, refusal to deal, or vertical restraints. Table 18 below shows their results, showing the probability that the plaintiff wins at trial and the probability of settlement, which in their model depends on the chances that the plaintiff has if the case is litigated. In reality, most cases eventually settled during the 1973-1983 period. Thus, we also show the

probability of settlement as illustrated by Perloff and Rubinfeld (1988) on data from the Georgetown study.[225]

Table 18 – Probabilities of settlement and plaintiff's victory at trial

	Probability of winning at trial		Probability of settlement		
	Perloff et al (1996)		*Perloff et al (1996)*		*Perloff & Rubinfeld (1988)*
	coeff	*Probability*	*coeff*	*Probability*	*Probability*
All	-	50%	-	50%	
Tying	100.0	100%	-3.8	48%	94%
Price discrimination	99.7	100%	-2.9	49%	85%
Dealer termination	94.1	97%	2.1	51%	83%
Price-fixing	49.3	75%	82.2	91%	81%
Monopolization	-	46%	6.0	53%	82%
Predation	-34.6	33%	-84.1	8%	91%
Vertical restraints	-36.6	32%	-81.1	9%	85%
Refusal to deal	-49.8	25%	-77.3	11%	82%

Source: Perloff et al. (1996) and Perloff and Rubinfeld (1988).

As shown in the table, the probability of conviction once a case is tried before a court varies substantially according to the type of allegation.[226] The model developed by Perloff *et al.* (1996) confirms, *i.a.*, the estimate later made by Connor (2007) and used in our previous sections, that the conviction rate for horizontal price-fixing cases would be approximately 75%. The probability of winning at trial would then fall down to 25% for refusals to deal, 32% for vertical restraints, 33% for predation and 46% for monopolization cases.

We factor these findings into our previous results for cartel violations, in order to assess the welfare impact of non-cartel violations and the expected recovery of damages in those cases.

In summary, our model carries the following assumptions:

- The detection rate of these conducts is 100%.
- The distribution of cases by type of allegation follows the findings of the Georgetown study in the US. In particular, we adopt the distribution of cases for the last year available, 1983, as this year reflects changes in the antitrust treatment of some types of infringement (*e.g.*, resale price maintenance) that

[225] See Perloff & Rubinfeld (1988), Table 4.4.

[226] The result for tying, however, refers to the period before *Jefferson Parish*, at a time when a *per se* rule still fully applied in the US. Also the result for dealer termination appears inflated by the fact that the empirical survey was conducted during the so-called "Populist Shift" in the US: see, *i.a.*, Bohling, W. B. (1975), *Franchise Termination under the Sherman Act: Populism and Relational Power*, 53 Tex. L. Rev. 1180. The term "populist shift" was first coined by Kauper, T.E. (1968), *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, Michigan Law Review, Vol. 67, No. 2 (Dec., 1968), pp. 325-342.

occurred during the period, and can therefore be considered more in line with the approach that would be adopted in Europe today.

- The distribution of cases by type of plaintiff follows the data shown in Table 16 above;
- The conviction rate varies as in Table 18 above.
- The percentage of cases that settle is derived again from Table 18 above. We chose to use data from the Georgetown study, although these data may reflect an excess settlement rate. The model predictions in Perloff *et al.* (1996), as a matter of fact, yield very low settlement rates, which we consider hardly reliable.

The next sections describe the main assumptions for each of the allegations.

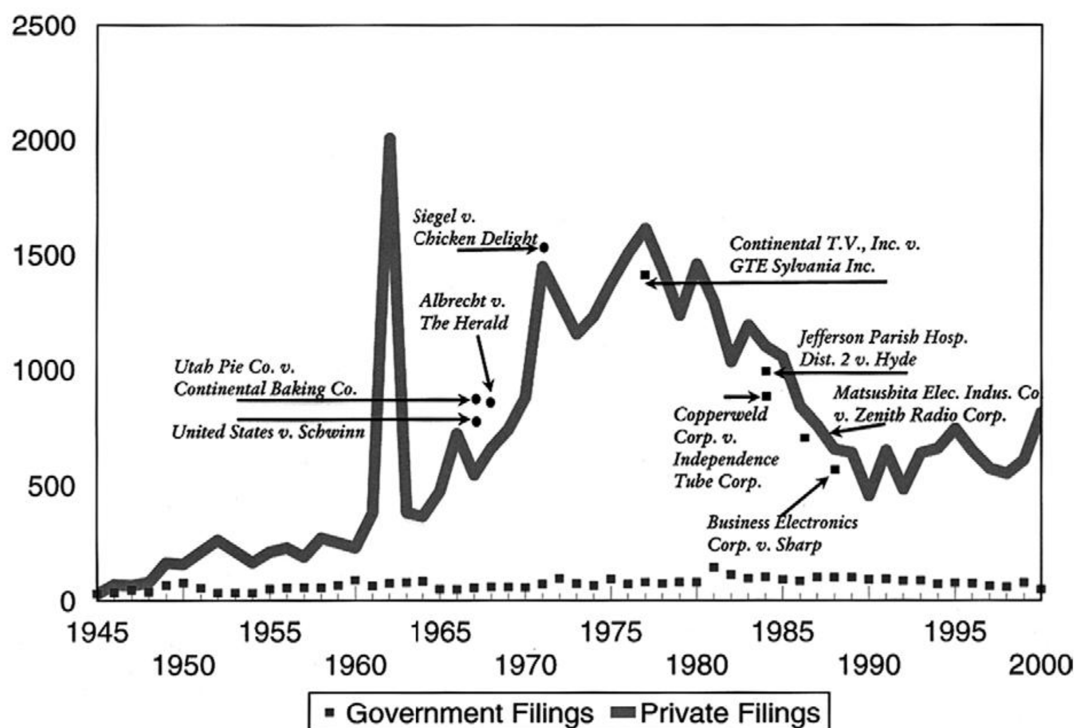
4.1.1 Vertical restraints

As we have shown in the previous sections, vertical restraints cases are likely to be filed by direct customers and vertically integrated competitors. For these cases, we reported estimates of very low probability of winning at trial (32%), which also leads to a probability of settlement of 85%. When these cases are adjudicated in favour of the plaintiff, however, they can lead to large damage awards. In the US, large multi-state settlements of vertical cases in the 1993-2002 period include those with Keds (1994, $7.2 million); Reebok (1995, $9.5 million); American Cyanamid (1997); Zeneca, Inc. (1997, $3.9 million); Nine West (2000, $30.5 million; FTC also sued); and Toys R Us (2000, $50 million). Earlier settlements include Toyota (1984, conduct remedy); Nintendo (1991, coupon recovery; FTC charges set tied as well); and Mitsubishi (1992, $7.95 million).[227]

However, as reported by Salop and White (1986), "the expected value to a plaintiff of bringing a non-price vertical restraint case likely was higher before the Supreme Court's decision in *Continental TV, Inc. v. GTS Sylvania, Inc*." As a result, available data show that the number of actions claiming damages for non-price vertical restraints declined significantly after reaching a peak in the 1978-1979.

[227] American Bar Association Section of Antitrust Law, *Antitrust Law Developments*, 5th ed. (Chicago : ABA, 2002), 829-30.

Figure 8 – Public and private filings on vertical restraints in the US, 1945-2000



Source: Ginsburg (2005)

Salop and White (1986) report that the percentage of cases alleging a section 1 violation or horizontal price fixing has remained relatively constant from 1973 to 1983, whereas the percentage of cases alleging other statute violations or other illegal practices declined during the same period: "the percentage of cases alleging a violation of section 2 of the Clayton Act or alleging vertical price fixing, dealer terminations, refusal to deal, or price discrimination peaked in 1978 and 1979 and then declined rapidly."[228]

In order to estimate the impact of more effective private enforcement on vertical restraints, we need to take into account several factors, and formulate rather compelling hypotheses.

We assume that:

- as the EC competition law adopts an approach to vertical restraints more similar to that adopted in the US after *Sylvania*, the ratio of filings alleging vertical restraints will be more similar to that observed in the US after that case. We take as reference 1983, the last year available in the Georgetown study, when vertical price-fixing actions were 8% of all cases, dealer

[228] Salop & White (1986) at 1040.

termination was alleged in 2.7% of the cases, and tying/exclusive dealing were reported in aggregate at 21.1% of all cases.

- The detection rate of these conduct is 1;
- For some of these cases – *i.e.*, vertical restraints – there would be a low probability of winning at trial (32%). On the contrary, for dealer termination (97%) and tying/exclusive dealing (100%) the probability of plaintiff's victory at trial is much higher, in line with estimates by Perloff *et al.* (1996)[229].
- The number of cases settled – in line with table 18 above – would be 85% for vertical price-fixing, 83% for dealer termination and 94% for tying/exclusive dealing.
- Settlement would imply the award of a lower amount of damages than trial. In line with the economic theory of litigation, we assume that parties would be willing to settle in order to avoid uncertainty and future legal expenses. As legal expenses account for approximately 10%-20% of the expected award, and are borne by both parties, we consider it reasonable to adopt 50% as a ratio of settlement to damage claim[230].
- Finally, as data on the average damage award for vertical restraints are not available, we derive damages for vertical restraint as a function of damages for cartel cases.

As a result, we foresee that vertical restraints will contribute to private damages actions in the following way:

$$A_i = (1 - s_i) \cdot (n_i / n_{ca}) \cdot p_i \cdot D + s_i \cdot (n_i / n_{ca}) \cdot 0.50 \cdot D$$

where

i can be vertical price-fixing, dealer termination or tying/exclusive dealing.

A_i = damage awards in actions claiming anticompetitive vertical restraint i,

n_i = percentage of cases alleging vertical restraint i on total cases,

n_{ca} = percentage of cases alleging cartels on total cases,

[229] On the probability of winning at trial for dealer termination and tying, see *supra*, Table 18.

[230] The extent to which the settlement amount would come close to the initial damage claim depends on a number of factors, such as the perceived probability of claimant success, the expected length of the litigation and, not least, the fee allocation rule applied. In Part II, Section 1 of this Report we show the impact of different fee allocation rules on the parties' willingness to settle a claim.

p_i = probability of winning at trial for vertical restraint allegation *i*,

s_i = settlement rate for each type of vertical restraint allegation *i*,

0.50 = ratio of settlement amount to damage claim,

D = damage amount calculated for cartel cases.

If we assume that the average damage claim is equal to that in cartel cases, we can substitute D in the formula according to our findings in section 3.1 above. We also substitute n_i, n_i, s_i and p_i.[231]

We find that damages obtained for vertical restraints cases will total 0.3987D, *i.e.* 39.9% of damages awarded for cartel cases. These include damages awarded for vertical price-fixing (4.7%), damages for dealer termination (4.9%) and damages for tying/exclusive dealing (30.3%).

4.1.2 Monopolization/abuse of dominance cases

Under similar assumptions, we can model the prospective impact of dominance cases in private damages actions.

We thus assume that:

- The detection rate is 1[232];
- The probability of winning at trial is 25% for refusal to deal, 33% for predation and 100% for price discrimination cases[233].
- The number of cases settled would be 82% for refusal to deal, 91% for predation and 85% for price discrimination cases.
- The amount of the settlement is 50% of the initial damage claim.[234]

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[231] According to the latest year available in the Georgetown database, n_i equals 8% for (i = vertical price-fixing), 2.7% for (i = dealer termination), 21.1% for (i = tying/exclusive dealing).

[232] This can be a strong assumption especially for predatory pricing.

[233] This latter assumption is probably due to the enforcement of the Robison-Patman Act in the US, which condemns price differences (Section 2a) and establishes a *prima facie* presumption against the defendant (section 2b) unless he proves that "his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor". To the contrary, an allegation of price discrimination under Article 82 is way more difficult to substantiate, as it requires, *i.a.*, proof that competitors were put at a competitive disadvantage. The 100% success rate, therefore, here seems to be overstated. Given the unavailability of reliable data on the likelihood of victory in private price discrimination case in Europe, we keep this figure here.

[234] This assumption must be carefully considered, as empirical evidence (e.g. Hughes and Snyder 1995) and theoretical evidence (Priest and Klein) show that the average settlement amount is normally higher than the average judgment award, due to the selection of cases for litigation. However, for each case, the parties would be expected to settle for a lower amount than the nominal damage claim. See, *e.g.*, Lande and Davis (2007), at 3, where the authors state

- Here again, as data on the average damage award for monopolization cases are not available, we derive damages as a function of damages for cartel cases.

As a result, we foresee that monopolization/abuse of dominance cases will contribute to private damages actions in the following way:

$$A_j = (1 - s_j) \cdot (n_j/n_{ca}) \cdot p_j \cdot D + s_j \cdot (n_j/n_{ca}) \cdot 0.50 \cdot D$$

where

j can be refusal to deal, predation or price discrimination.

A_j = damages in actions for monopolization allegation j,

n_j = percentage of cases alleging monopolization type j on all cases,

n_{ca} = percentage of cases alleging cartels on all cases,

p_j = probability of winning at trial for monopolization allegation j,

s_j = settlement rate for each type of monopolization allegation j,

0.50 = ratio of settlement amount to damage claim,

D = damage amount calculated for cartel cases.

If we assume that the average damage claim is equal to that in cartel cases, we can substitute D in the formula according to our findings in section 3.1 above. We also substitute n_j, n_j, s_j and p_j.[235]

We find that damages obtained for abuse of dominance cases will total 0.2829D, *i.e.* 28.3% of damages awarded for cartel cases. These include damages awarded for refusal to deal (7.2%), damages for predation (3.1%) and damages for price discrimination (18%)[236].

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that "we believe that few, if any, of the many antitrust cases that settle do so for more than single damages. See also *infra*, Section II.1.

[235] According to the latest year available in the Georgetown database, n_i equals 15.2% for (j = refusal to deal), 5.4% for (j = predatory pricing), 9.8% for (j = price discrimination).

[236] This latter heading of damages (price discrimination) may well be overestimated for Europe. See *supra*, footnote 233.

4.1.3 Estimate of total damage recovery for all types of infringements at EU level

Following our estimates in the previous sections, we are able to estimate the total amount of damage awards under three different scenarios, depending on the damage multiple applied. Table 19 below summarises the result of our exercise.

As shown in the table, damage recoveries for cartels are approximately half of total damages recovered. As the results are derived as a function of damage awards and settlements in cartel cases, they highly depend on our assumption on the detection rate for cartels (15%, 20% or 25%). For simplicity's sake, we illustrate our main findings for the intermediate scenario, where private antitrust enforcement leads the detection rate for cartels to increase from 15% to 20%. In this scenario

- private antitrust enforcement (EU and domestic) allows for a yearly damage recovery of €22 billion of damages if treble damages are available[237];
- horizontal price fixing cases represent 31.2% of the total in number, but 59.6% of damages awarded due to the higher probability of winning at trial;
- to the contrary, refusal to deal cases represent 15.2% of total cases, but account for only 4% of total damage awards;
- Vertical price fixing and dealer termination account for 3% of total damage recovery, whereas predatory pricing account for 2%. Price discrimination represents 11% of total damage recovery, and tying and exclusive dealing for 18%.

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[237] As we already recalled, these estimates do not take into account that the detection rate for cartels may change according to the damage multiple applied. See *supra*, note 183.

Table 19 – Simulation on yearly damage recovery for all types of infringement

Treble damages					damage awards			Settlements			Total	
	% on total	% trial	% plaintiff wins	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%
Horizontal price-fixing	31.2%	19%	75%	€ 461,466,706	€ 1,194,287,173	€ 1,898,146,685	€ 2,223,040,019	€ 5,753,282,188	€ 9,144,009,716	€ 2,684,506,725	€ 6,947,569,361	€ 11,042,156,401
Vertical price-fixing	8.0%	15%	32%	€ 32,136,987	€ 83,171,312	€ 132,188,769	€ 94,065,116	€ 243,442,830	€ 386,917,160	€ 126,202,103	€ 326,614,143	€ 519,105,929
Dealer Termination	2.7%	17%	97%	€ 37,542,259	€ 97,160,288	€ 154,422,221	€ 93,900,715	€ 243,017,359	€ 386,240,934	€ 131,442,974	€ 340,177,646	€ 540,663,156
Refusal to deal	15.2%	18%	25%	€ 58,394,905	€ 151,127,448	€ 240,195,215	€ 134,282,124	€ 347,525,436	€ 552,341,404	€ 192,677,029	€ 498,652,884	€ 792,536,619
Predatory pricing	5.4%	9%	33%	€ 13,830,062	€ 35,792,541	€ 56,887,066	€ 69,748,286	€ 180,510,277	€ 286,894,972	€ 83,578,348	€ 216,302,819	€ 343,782,038
Price discrimination	9.8%	15%	100%	€ 123,193,046	€ 318,826,630	€ 506,728,804	€ 360,008,700	€ 931,711,360	€ 1,480,820,417	€ 483,201,746	€ 1,250,537,990	€ 1,987,549,222
Tying/exclusive dealing	17.9%	6%	100%	€ 85,016,263	€ 220,024,177	€ 349,696,599	€ 727,566,714	€ 1,882,960,532	€ 2,992,693,360	€ 812,582,977	€ 2,102,984,710	€ 3,342,389,960
Other	9.8%	-	-	-	-	-	-	-	-	-	-	-
Total EU enforcement	100%			€ 811,580,228	€ 2,100,389,570	€ 3,338,265,360	€ 3,702,611,674	€ 9,582,449,983	€ 15,229,917,964	€ 4,514,191,903	€ 11,682,839,553	€ 18,568,183,324
Domestic enforcement	88%			€ 717,436,922	€ 1,856,744,380	€ 2,951,026,578	€ 3,273,108,720	€ 8,470,885,785	€ 13,463,247,480	€ 3,990,545,642	€ 10,327,630,165	€ 16,414,274,059
TOTAL RECOVERY				€ 1,529,017,150	€ 3,957,133,950	€ 6,289,291,939	€ 6,975,720,395	€ 18,053,335,768	€ 28,693,165,444	**€ 8,504,737,544**	**€ 22,010,469,717**	**€ 34,982,457,383**

Double damages					damage awards			Settlements			Total	
	% on total	% trial	% plaintiff wins	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%
Horizontal price-fixing	31.2%	19%	75%	€ 307,644,471	€ 796,191,449	€ 1,265,431,124	€ 1,482,026,680	€ 3,835,521,459	€ 6,096,006,477	€ 1,789,671,150	€ 4,631,712,907	€ 7,361,437,601
Vertical price-fixing	8.0%	15%	32%	€ 21,424,658	€ 55,447,542	€ 88,125,846	€ 62,710,077	€ 162,295,220	€ 257,944,774	€ 84,134,735	€ 217,742,762	€ 346,070,619
Dealer Termination	2.7%	17%	97%	€ 25,028,172	€ 64,773,525	€ 102,948,148	€ 62,600,477	€ 162,011,572	€ 257,493,956	€ 87,628,649	€ 226,785,098	€ 360,442,104
Refusal to deal	15.2%	18%	25%	€ 38,929,936	€ 100,751,632	€ 160,130,143	€ 89,521,416	€ 231,683,624	€ 368,227,603	€ 128,451,352	€ 332,435,256	€ 528,357,746
Predatory pricing	5.4%	9%	33%	€ 9,220,042	€ 23,861,694	€ 37,924,711	€ 46,498,857	€ 120,340,185	€ 191,263,315	€ 55,718,899	€ 144,201,879	€ 229,188,025
Price discrimination	9.8%	15%	100%	€ 82,128,697	€ 212,551,087	€ 337,819,203	€ 240,005,800	€ 621,140,907	€ 987,213,612	€ 322,134,497	€ 833,691,994	€ 1,325,032,814
Tying/exclusive dealing	17.9%	6%	100%	€ 56,677,509	€ 146,682,785	€ 233,131,066	€ 485,044,476	€ 1,255,307,022	€ 1,995,128,907	€ 541,721,985	€ 1,401,989,807	€ 2,228,259,973
Other	9.8%	-	-	-	-	-	-	-	-	-	-	-
Total	100%			€ 541,053,485	€ 1,400,259,713	€ 2,225,510,240	€ 2,468,407,783	€ 6,388,299,989	€ 10,153,278,643	€ 3,009,461,268	€ 7,788,559,702	€ 12,378,788,883
Domestic enforcement	88%			€ 478,291,281	€ 1,237,829,587	€ 1,967,351,052	€ 2,182,072,480	€ 5,647,257,190	€ 8,975,498,320	€ 2,660,363,761	€ 6,885,086,776	€ 10,942,849,372
TOTAL RECOVERY				€ 1,019,344,767	€ 2,638,089,300	€ 4,192,861,292	€ 4,650,480,263	€ 12,035,557,178	€ 19,128,776,963	**€ 5,669,825,030**	**€ 14,673,646,478**	**€ 23,321,638,255**

Single damages					damage awards			Settlements			Total	
	% on total	% trial	% plaintiff wins	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%
Horizontal price-fixing	31.2%	19%	75%	€ 153,822,235	€ 398,095,724	€ 632,715,562	€ 741,013,340	€ 1,917,760,729	€ 3,048,003,239	€ 894,835,575	€ 2,315,856,454	€ 3,680,718,800
Vertical price-fixing	8.0%	15%	32%	€ 10,712,329	€ 27,723,771	€ 44,062,923	€ 31,355,039	€ 81,147,610	€ 128,972,387	€ 42,067,368	€ 108,871,381	€ 173,035,310
Dealer Termination	2.7%	17%	97%	€ 12,514,086	€ 32,386,763	€ 51,474,074	€ 31,300,238	€ 81,005,786	€ 128,746,978	€ 43,814,325	€ 113,392,549	€ 180,221,052
Refusal to deal	15.2%	18%	25%	€ 19,464,968	€ 50,375,816	€ 80,065,072	€ 44,760,708	€ 115,841,812	€ 184,113,801	€ 64,225,676	€ 166,217,628	€ 264,178,873
Predatory pricing	5.4%	9%	33%	€ 4,610,021	€ 11,930,847	€ 18,962,355	€ 23,249,429	€ 60,170,092	€ 95,631,657	€ 27,859,449	€ 72,100,940	€ 114,594,013
Price discrimination	9.8%	15%	100%	€ 41,064,349	€ 106,275,543	€ 168,909,601	€ 120,002,900	€ 310,570,453	€ 493,606,806	€ 161,067,249	€ 416,845,997	€ 662,516,407
Tying/exclusive dealing	17.9%	6%	100%	€ 28,338,754	€ 73,341,392	€ 116,565,533	€ 242,522,238	€ 627,653,511	€ 997,564,453	€ 270,860,992	€ 700,994,903	€ 1,114,129,987
Other	9.8%	-	-	-	-	-	-	-	-	-	-	-
Total	100%			€ 270,526,743	€ 700,129,857	€ 1,112,755,120	€ 1,234,203,891	€ 3,194,149,994	€ 5,076,639,321	€ 1,504,730,634	€ 3,894,279,851	€ 6,189,394,441
Domestic enforcement	88%			€ 239,145,641	€ 618,914,793	€ 983,675,526	€ 1,091,036,240	€ 2,823,628,595	€ 4,487,749,160	€ 1,330,181,881	€ 3,442,543,388	€ 5,471,424,686
TOTAL RECOVERY				€ 509,672,383	€ 1,319,044,650	€ 2,096,430,646	€ 2,325,240,132	€ 6,017,778,589	€ 9,564,388,481	**€ 2,834,912,515**	**€ 7,336,823,239**	**€ 11,660,819,128**

5 Refinements and *caveats*

The results we obtained in the previous sections are to be seen as tentative estimates, given the complex conundrum of interrelated factors that affect the potential for private damages actions to develop in Europe. Below, we illustrate the main assumptions that led us to obtain these results.

First, we have derived the results for other types of infringements only as a function of expected damage awards on cartels, which in turn were based on a number of strong assumptions. This choice was dictated by the lack of empirical data, as we are modelling a future antitrust scenario which will depend on many variables, not least the potential legal changes that will be analysed in Part II of this Report.

Secondly, our results are based on the assumption that the average damage claim would be equal for cartels and other types of infringements, absent empirical data on this aspect.

Thirdly, we have assumed a detection rate of 100% for other types of conduct, to reflect the fact that these conducts are not concealed as clandestine cartels indeed are. This was meant to reflect the fact that victims actually *can* detect the violation quite immediately in many cases (*e.g.* refusal to deal, tying, dealer termination), but this does not mean that they *will* actually sue for damages. In this respect, we have assumed that the probability of winning at trial would look like the one derived by Perloff *et al.* (1996) and Perloff and Rubinfeld (1988) and reported in Table 18 above.

Fourthly, we have added domestic enforcement to EU enforcement by simple a simple arithmetic calculation, *i.e.* by adding 88.4% to the figure obtained for EU enforcement. This figure is derived from our analysis of cartels, but may vary significantly for other types of allegation. In addition, our aim is that of simulating a "potential" for private enforcement – *i.e.,* a maximum frontier that may reached, under a set of strong assumptions, in case private enforcement in the EU becomes more effective.

Finally, as already recalled, we distinguish between single, double and treble damages. Again, we acknowledge that treble damages are not an option envisaged by the Green Paper; these results, however, are obtained with reference to US data for damages, where prejudgment interest is not applied to damage recovery[238]. As a result, following some contributions in the literature,

[238] More precisely, in antitrust cases, Section 4 of the Clayton Act provides that a court may award prejudgment interest for the period between the filing of the complaint and judgment, if such an award "is just in the circumstances". This determination is however based on three quite restrictive factors: as a result, there are no reported antitrust cases in which prejudgment interest has been awarded. See ABA Section Of Antitrust Law, Antitrust Law Developments 882 (5th ed. 2002).

our findings for treble damages might be close to full single or double damage awards with prejudgment interest[239]. This finding needs to be refined in light of the potential over-deterrent effect of treble and double damages for non-cartel cases, as will be explained in detail in Part II of this Report.

In addition, in order to reach a preliminary assessment we have set aside a number of very important issues, which warrant careful scrutiny while estimating the welfare potential of enhanced private enforcement. These include, *i.a.*, the impact of procedural rules on the likely development of private antitrust enforcement; the role and merit of out-of-court settlement *vis à vis* trial adjudication; the expected increase in enforcement and litigation costs; the reputational effects and risk attitude of industry players; and the differences between stand-alone and follow-on suits. We tackle each of these issues below.

5.1 Settlement, litigation, and procedural rules

In the previous sections, we have made reference to the US situation as an example of jurisdiction where private antitrust enforcement is more widespread. Evidence that as many as 95% of the antitrust cases are initiated by private parties, and that most of the landmark cases in the US are privately initiated cases testifies that "private attorney generals" have played a paramount role in the development of US antitrust law over the past decades. However, it is very hard to imagine that private damages actions in Europe would develop exactly as they did in the US. The main reason for this is that in the US, procedural rules have been crafted with the intent to encourage private antitrust litigation, and such rules currently differ substantially from the rules applicable to tort law cases in Europe. Even more importantly, the US private enforcement system seems to be designed to maximise deterrence, more than corrective justice, and indeed some prominent scholars have argued that the US antitrust rules are primarily a deterrence mechanism[240].

The procedural rules that boosted the development of private enforcement in the US include the mandatory trebling of damages for all types of antitrust violations, rules limiting standing to direct purchasers, the availability of contingency fees in antitrust litigation, the possibility to file collective actions, the availability of "one-way fee-shifting" and rules on access to evidence that

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[239] Lande (1993) calculates that the failure of the antitrust laws to provide for prejudgment interest reduces the treble damages multiplier down to a true multiplier between 1.25 and 1.66. See, for an earlier contribution, Lovell (1982), *Are Treble Damages Double Damages?*, Journal of Economics and Business, vol. 34, issue 3, pages 263-268.

[240] See, *i.a.*, Posner, *Antitrust Law*, 2nd Ed. (2001).

allow for pre-trial discovery. The joint effect of these rules was certainly to encourage private parties to engage in litigation.[241]

5.1.1 A basic model on trial and settlement

In the model developed so far, we have not explicitly taken into account the role of settlement in private antitrust litigation, which seems absolutely paramount in the US[242]. However, in the case of cartels, in assuming that the percentage of damage awards in Europe would mimic that of the US, we have implicitly taken into account the potential reduction in awards that occurs whenever the parties decide to settle instead of going to court. Furthermore, for other types of infringements we have calculated settlement rates by type of infringement and assumed that settlement would lead to a 50% reduction of the damage award.

In this section, we illustrate a model that describes the decision-making perspective of both the plaintiff and the defendant involved in a private antitrust litigation. Our model draws on the extensive law and economics literature in this field.[243] In its most simple version the decision to settle or go to trial, both the plaintiff and the defendant form beliefs on the outcome of trial. Such beliefs may, of course, diverge.

From the viewpoint of the plaintiff, settlement is a viable option whenever the settlement amount is greater than the expected reward at trial, minus expected legal expenses. For example,

- if the plaintiff expects to win the trial with a 60% probability, damages claimed are €1 million, and prospective (incremental) legal expenses if parties go to trial are €200,000, then she would be willing to settle for any amount greater than (€1,000,000 · 60% - €200,000) = €400,000. This occurs, of course, as the value of the settlement is greater than the expected value of trial.
- Likewise, a defendant will accept to settle if the cost of the settlement is lower than the expected cost of trial. In our example, if the defendant believes she will be convicted at trial in 40% of the cases, and her

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[241] See Antitrust Modernization Commission, *Final Report and Recommendations,* 2007, arguing that "[t]he vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs."

[242] As observed by Connor and Helmers (2006), "The great majority of private antitrust suits are resolved through settlements rather than final decisions from a trial, making them a small drain on federal judicial resources. In the case of international cartels that operated globally, out of 36 cartels convicted in the United States during 1990-2003, only 5 (14%) had corporate defendants go to trial."

[243] See, *e.g.*, Shavell (2004), quoting Friedman (1969), Landes (1971), Gould (1973), Posner (1972) and Shavell (1982).

prospective (incremental) legal expenses equal €100,000, then settlement is an attractive option whenever the settlement amount is lower than (€1,000,000 · 40% + €100,000) = €500,000.

Whenever the minimum (reservation) value for the plaintiff is lower than the maximum acceptable offer for the defendant, the parties have the possibility to settle efficiently. Shavell (2004) shows that a mutually beneficial settlement can be reached whenever the difference between the parties' estimates of the expected judgment do not exceed the sum of their (incremental) trial costs. In this simple model of bargaining "in the shadow of the law", settling an antitrust suit appears as a viable option under certain circumstances, and is efficient from both the private and social standpoint.[244]

However, this model is only a rough representation of reality. In particular, the law and economics literature has elaborated on this common scheme to provide a better description of the parties' behaviour, and identify cases in which private and social incentives to settle may diverge, thus leading to inefficient, sub-optimal levels of litigation.[245] Subsequent developments in the literature include so-called "Bayesian" models, private information models, multi-stage litigation models and real option models.

More in detail, the most important models of settlement and litigation can be grouped into:

- *Optimism models*, in which the parties diverge as regards their beliefs on the likely outcome of trial – a situation that may lead them not to settle when such an option would be efficient.[246] In general, these models predict that parties will settle only when they are both optimistic about the outcome of the litigation.[247] These models include Priest and Klein (1984), a seminal paper on the selection of cases for trial, based on the famous 50% assumption: when parties have equal litigation costs, equal stakes, and differ only in their beliefs on the outcome of trial, the outcome of litigated cases will tend towards an equal split.[248]

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[244] In the US reality, as we already recalled, the lion's share of private antitrust suits settle before trial.

[245] Professor Shavell's work has stimulated an extensive literature on this topic. See for example Louis Kaplow, *Private Versus Social Costs in Bringing Suit* (1986) 15 J. Legal Stud. 371; Peter S. Menell, *A Note on Private Versus Social Incentives to Sue in a Costly Legal System*, (1983) 12 J. Legal Stud. 41 (1983).

[246] Gould (1973), Landes (1971) and Posner (1973). Spier (2005) also illustrates cases in which the parties are "too stubborn" and fail to adapt their beliefs as they learn overtime about the probability of winning at trial.

[247] Posner (1998), at 610.

[248] The model was then refined by Priest (1985, 1987), Eisenberg (1990), Wittman (1985, 1988), Cooter (1987).

- *Private information models*, when one of the parties has information that the other party does not have, and which affects the likely outcome of trial. Private information may cover the level of damage suffered, the credibility of witnesses, and additional evidence that may tilt the balance in favour of either party. Specific cases of private information models are the so-called "screening" and "signalling" models, in which the more informed party has an incentive to reveal its "type" in order to secure a greater settlement amount.[249]
- *"Real option" models*. More recently, authors such as Cornell (1990) developed a different framework, in which the litigation process is modelled as a multi-stage game, in which the parties adjust their expected costs and rewards after each stage – *e.g.* discovery, pre-trial negotiation, trial. This creates a number of "options". The plaintiff may then initiate procedures inherent in the legal process, such as discovery, various types of motions, settlement and set the pace of the proceeding. Cornell notes that a plaintiff will not settle an action unless the settlement offer exceeds the sum of expected trial proceeds and the claim's "option value". That option value depends on plaintiff's cost of continuing the claim and defence costs imposed on the other party. Similarly, Grundfest and Huang (1997) and Armstrong (2007) elaborate on this model to show how option pricing can change the outcome of multi-stage litigation processes.
- *"NEV" suits models*. Some models also identify circumstances in which players may have an incentive to file "negative expected value" (NEV) suits, *i.e.* lawsuits that the plaintiff would not likely bring to trial, were settlement not available. For example, Rosenberg and Shavell (1985) focus on those situations in which the plaintiff files a suit at no or little cost and the defendant must incur some significant costs to respond: in these cases, the plaintiff can credibly threaten to proceed through the first stage and thus impose the upfront costs on the defendant. In this situation, even if the defendant knows that the plaintiff will drop the case once the defendant responds and incurs its upfront costs, the defendant will be willing to pay a settlement (which might be up to the costs of responding) to avoid incurring these upfront costs. On the same line, Bebchuk (1997) shows that under some circumstances (most importantly, the assumption that litigation costs are divisible), plaintiffs will have an incentive to file NEV suits and still obtain a positive settlement amount.

According to these streams of literature, the main situations in which private incentives to settle may diverge from social incentives are the following:

[249] Private information models are developed by Bebchuk (1984), Katz (1990), Nalebuff (1987), Reinengaum and Wilde (1986), Spier (1992, 1997) and P'ng (1983).

- *Parties may have asymmetric and/or incomplete information*. Imperfect signals sent by either party can tilt the settlement process in favour of that party, if not correctly interpreted by the other party. For example, a defendant may not know whether its counterparty is committed to bring the case to trial, nor does she know whether the plaintiff believes she will win at trial, and with what probability. Especially when settlement offers are made on a "take-it-or-leave-it" basis, the plaintiff may accept a settlement offer only because she has false beliefs on the counterparty's best alternative to the settlement offer.[250]
- *Parties may have diverging risk attitudes*, which could jeopardise the stipulation of efficient settlements, or encourage the parties to settle when such option is inefficient. This also heavily depends on the fee allocation rules adopted, as we will clarify in Part II of this Report.
- *Parties may engage in opportunistic behaviour.* As observed by Gross and Syverud (1991), most of the litigated cases are cases that parties failed to settle because of opportunistic behaviour. For example, a plaintiff may refuse a settlement offer because she believes that the defendant will respond with a better offer in a subsequent stage of the game. Alternatively, plaintiffs may file a lawsuit with the specific intent to settle the case before trial, as is the case for NEV suits[251].
- *Parties may be influenced by external factors*. Such factors can include reputational effects, the threat of follow-on cases, the urge to maintain the confidential nature of the settlement and/or the information that would need to be disclosed at trial. For example, a defendant may wish to settle the case even if she does not agree with the merit of the plaintiff's claim, in order to avoid disastrous reputational effects. The same occurs with follow-on suits: in some cases, clearing the case before it surfaces in the litigation arena may be of significant value for the defendant. If the plaintiff anticipates this effect, she would have an increased incentive to file a lawsuit and settle before trial[252].
- *The plaintiff incurs little or no cost of filing suit, whereas the defendant incurs costs in responding*. In these cases, the plaintiff can threaten to impose significant litigation costs on the defendant up to discovery. This threat is particularly effective if the litigation process is multi-stage and legal expenses are divisible[253].

[250] See Ayres & Nalebuff (1997). And see also P'ng (1983) and Bebchuk (1994).

[251] Bebchuk (1997).

[252] See, *i.a.*, Kim (2004).

[253] Rosenberg and Shavell (1985), and Cornell (1990).

- *Parties do not consider other social or policy goals when settling.* These include the impact of settlement on deterrence, the need to secure harmonised application of antitrust rules and legal certainty, and the need to achieve optimal externalities between cases[254].

A more extensive explanation of incentives to sue and settle will be offered in Part II, Section 1 of this Report.

5.1.2 Impact of procedural rules on settlement

The law and economics theory has extensively analysed the impact of different procedural rules on the extent and outcome of litigation. The focus of is mainly related to the incentive of the plaintiff to file suit and the impact of civil/criminal procedural rules on that incentive and on overall litigation costs (Spier, 2005)[255]. In turn, the private incentive to litigation and the consequent costs have an impact on the compliance rate (Kaplow, 1994)[256], although Shavell (1982) showed that private incentive to litigate may substantially differ from the optimal amount from a social point of view.[257]

Within this framework, particular relevance is paid to the impact of litigation rules on settlement rate[258]. Indeed the outcome of settlement is economically explained as a cost-minimisation device, aimed at achieving an efficient enforcement of rules with a substantial saving in terms of litigation costs. Besides some theoretical methods assuming symmetrical information of the parties[259], asymmetric information of the parties is commonly assumed, and such situation has important effects on the settlement rate, since different expectations on the outcome of the case will strengthen the incentive to go to trial[260]. This general framework has been also applied to antitrust litigation,

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[254] Spier (2005).

[255] Spier, *Litigation*, in Handbook of Law and Economics , (2005).

[256] Kaplow, *The Value of Accuracy in Adjudication*, in 23 Journal of Legal Studies, 307 (1994).

[257] Shavell, The Social versus the Private Incentive to Bring Suit in a Costly Legal System, in 11 Journal of Legal Studies, (1982), 333. See also Shavell, The Fundamental Divergence Between the Private and the Social Motive to use the Legal System, in 26 Journal of Legal Studies, 575.

[258] Daughety, *Settlement*, in Bouckaert and De Geest (eds.), *Encyclopaedia of Law and Economics*, 2000, Hay and Spier, *Settlement of Litigation*, in Newman (ed.), The New Palgrave Dictionary of Economics and the Law, 1998.

[259] Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, in 25 *Journal of legal studies*, 1, (1996), where it is stressed that in such an environment there would be an unique subgame-perfect equilibrium with immediate settlement and full pay-off for the first mover (first offer).

[260] Landes (1971), *An economic analysis of the courts*, in 14 Journal of Law and Economics, 61; Gould (1973), *The economics of legal conflicts*, in 2 Journal of Legal Studies, 279; Posner (1973), An economic approach to legal procedure and judicial administration, in 2 Journal of Legal Studies, 399,. For formal, game-theoretic analysis of the asymmetric environment see also P'ng (1983),

with reference to the data set gathered within the Georgetown project[261]. On the other hand, settlement has some effect in reducing the precautions (or the deterrent effect, if speaking about antitrust) to avoid the lawsuit to begin with[262].

In particular, the available law and economics literature suggests the following conclusions:

- *Mandatory trebling of damages tilts the litigation and settlement process in favour of the plaintiff.* As stated by Lande (2005), settlement is significantly influenced by the damage multiple applied by the courts. The practical effect of mandatory trebling in the US is "to tilt the settlement process in the plaintiff's favour because mandatory trebling so inflates the defendant's cost of losing and the plaintiff's value of a victory in a rule of reason case".
- *One-way fee-shifting encourages plaintiffs to spend more on litigation than other cost allocation rules.* Fee shifting increases expenditure in litigation in two different ways: by increasing the stakes of the case by making legal expenditures part of the potential damages; and by lowering the expected marginal cost of legal expenditure. This finding is supported by several authors, including Braeutigam, Owen and Panzar (1984) and Katz (1987). Lande (2005) observes that "[t]he one-way cost rule in the Clayton Act simply echoes and enhances the effect of mandatory trebling, as already discussed. It further tilts the risk evaluation and settlement process in favour of the plaintiff." Shavell (1982), extending the work of Landes (1971) and Gould (1973) on the incentives to sue, generalized this argument to show that the "loser-pays rule", and indemnification in general, works to encourage lawsuits by plaintiffs with relatively small claims but relatively high *ex ante* probability of victory. The ""each party bears her own cost" rule, conversely, encourages plaintiffs with relatively large claims but lower probability of winning at trial. Snyder and Hughes (1990) and Hughes and Snyder (1991) also contain empirical analyses of settlement and litigation under the loser-pays and "each party bears her own cost" rules. In this respect, a one-way fee-shifting rule seems to maximise the plaintiff's incentives to file suit: as a matter of fact, the plaintiff having a large claim with low probability to win will sue, and so will do a plaintiff with small

Strategic behavior in suit, settlement, and trial, in 14 Rand Journal of Economics, 539; and Bebchuk (1984), *Litigation and settlement under imperfect information*, in 15 RAND Journal of Economics 404.

[261] Perloff and Rubinfeld (1988), *Settlements in private antitrust litigation*, in White (ed), Private antitrust litigation.

[262] Polinsky and Rubinfeld (1988), *The deterrent effects of settlements and trials*, in 8 International Review of Law and Economics, 109.

claims and a high probability.[263] The limits to this finding are: (i) the possibility of frivolous suit; (ii) the likelihood that defendants settle unwarranted claims only because they will bear litigation costs anyway; and (ii) the incomplete indemnification of plaintiffs from legal expenses found by several authors, including Salop and White (1988), and also confirmed by available empirical evidence at EU level.[264]

- *Broad discovery rules also tilt the litigation process in favour of the plaintiff.* The effect of a US-style discovery rule is to shift the costs of gathering information from the requesting to the responding party, and this might also lead to moral-hazard and strategic behaviour into the demand for pre-trial discovery. Katz (1999) observed that, "[b]ecause the costs of responding to a discovery request are, in many cases, larger than the cost of making a request, this externalization predicts that parties will request information well past the point where the marginal value of information outweighs the marginal costs of gathering the information". Wagener (2003) also illustrates a model of discovery abuse, in which asymmetric costs of discovery lead to an excessive amount of frivolous suits[265].
- *Collective actions play a paramount role in enhancing private antitrust litigation*. For example, in the sample analysed by Lande and Davis (2007), 34 out of the 40 cases are class actions[266].
- *Contingency fees encourage settlement*, as lawyers may have an incentive to settle the case too often, and for too low an amount.[267] However, Polinsky and Rubinfeld (2001) show that, assuming that the plaintiff's lawyer will put

[263] Indemnification is often justified also on the basis of empirical evidence that plaintiffs are often smaller firms than the defendants – the so-called "David v. Goliath" case mentioned in Salop and White (1988) and Perloff *et al.* (1988).

[264] See Lawrence (2006), arguing that "One need only consider the example of an American-style plaintiff bar and possible vexatious claims being settled as a result not of the merits of the claim, but of the costs risk in continuing the action as defendants must pay their costs whether they win or lose (plus plaintiffs' costs when they lose). This would not result in the required equilibrium". See also Ashurst (2004).

[265] The options identified by the Green Paper as regards access to evidence (options 1-3) preserve a fundamental difference with US-style discovery, *i.e.* fact-pleading as opposed to notice pleading. This leads to a threshold test that shields defendants, to a certain extent, from the threat of excessive strategic litigation and frivolous suits. At the same time, fact-pleading to a certain extent increases the cost of access to justice for plaintiffs, although this effect depends on the criteria used by judges for admitting a claim. For a detailed explanation of these effect, see *infra,* Part II, section 3.

[266] See Lande and Davis (2007), note 37 and accompanying text. The authors also acknowledge that the very high share of class actions in their sample of 40 cartel cases may be due to the fact that class actions settlements need court approval, and accordingly public information on the outcome of these cases is more easily found.

[267] Schwartz and Mitchell (1970), Miller (1987), Thomason (1991), Gravelle and Waterson (1993) and Moorehouse (2003).

insufficient effort once at trial, this conclusion is reversed, and the lawyer will make an excessive settlement offer, leading to a low settlement rate.

- *Joint and several liability of the defendants may lead to a "race to settle".* This occurs as defendants that "clear" their liability with the plaintiff at an early stage may minimise the risk of having to compensate the plaintiff also for the co-infringers' share of liability.[268]

Other jurisdictions that have tried to encourage private damages actions have enacted more balanced procedural rules. A full discussion of the differences between these legal systems would fall outside the scope of this section, and will be left to the following sections in Part II of this Report. However, it is important to note that the proliferation of private damages actions in the US is directly linked to the introduction of procedural rules that are not likely to be replicated in Europe. For example, the US approach to the passing-on defence is not likely to be adopted by EU member states, especially in Civil Law countries, where causation and damage apportionment are key steps in tort law cases[269]; at the same time, multiple (exemplary, punitive) damages are allowed only in England, Ireland and Cyprus, but not in other countries, where *restitutio in integrum* – including both *damnum emergens* and *lucrum cessans* – is a ceiling to damage compensation. Moreover, group litigation is significantly underdeveloped in Europe, with only a few countries having an established system of collective actions[270].

Table 20 below shows the results obtained by Salop and White on the impact of beliefs and costs on the likelihood of settlement and on the plaintiff's win rate. As shown in the table, the subjective beliefs of the parties are a key factor that affects the likelihood of settlement – this finding is also in line with the results obtained by Barry Rodger in his analysis of 43 cases of settlements in the UK, where legal uncertainty was found to be a major reason for settling the case[271].

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[268] See AMC *Final Report and Recommendations* (2007), Recommendation n. 46.

[269] Exception being Germany, which recently amended its *Gesetz gegen Wettbewerbsbeschränkungen 1958* and now specifically excludes the passing-on defence, although it has not adopted the indirect purchaser rule.

[270] See *infra*, Part II, Section 2 for an in-depth analysis.

[271] See *supra*, Section 1.2.2 of the Introduction to this Report.

Table 20 – Impact of beliefs and costs on settlement and plaintiff win rate

	Effect on settlement	Effect on observed plaintiff win rate
Increased relative plaintiff optimism as to his probability of prevailing	—	+
Increased relative plaintiff optimism as to award	—	+
Increased trial costs	+	—
Increased defendant follow-on costs from loss at trial	+	—
Increased defendant differential loss from injunctive relief	—	+
Increased defendant differential cost of settlement consequences	—	+
Increased stakes (if plaintiff is relatively optimistic)	—	+
Increased stakes (if plaintiff is relatively pessimistic)	+	—

Source: Salop & White (1986), Table 1.13.

Table 20 also shows that the trial costs and increased stakes (depending on the perception of the plaintiff) exert an influence on the parties' incentives to settle a case. As a result, the expected increase in private damages actions in Europe heavily depends on the procedural rules that will be introduced in the next few years. A related issue is whether, absent such procedural rules, out-of-court settlement would become predominant as in the US. An authoritative commentator has observed that the main challenge for Europe is trying to encourage a "competition culture" without facing an increase in "litigation culture"[272]. But whether out-of-court settlement is to be actually encouraged to a full extent, still remains an open question in the literature, as we will observe in the next section.

It must, however, be taken into account that the specific procedural features of antitrust enforcement can change the bargaining position of the parties to a significant extent. This heavily influences the likelihood of spurious suits and strategic use of litigation and, in turn, the occurrence of Type I errors. For this reason, we will address the expected amount of settlement for each of the scenarios identified in Part III of this Report.[273]

5.1.3 Should out-of-court settlement be maximised?

In this section, we ask whether a significant amount of out-of-court settlement would be socially desirable in Europe. The economic literature has extensively

[272] C. Baudenbacher, presentation at CEPS Conference on Private Enforcement, 2 March 2007.

[273] In addition, the expected amount of settlement may differ across member states, due to procedural differences. See Rüggeberg (2001).

elaborated on this issue, mostly starting from models of Coasian bargaining. For example, Gross and Syverud (1991) argue that "a trial is a failure", meaning that "pretrial settlement is almost always cheaper, faster and better than trial".[274] From a slightly different perspective, Shavell (1999) observes that "the legal system is a very expensive social institution", and that settlement may be socially beneficial as it reduces the cost of dispute resolution. Accordingly, in the US some procedural rules are clearly aimed at favouring pre-trial settlement.[275] Such vision, however, has been challenged by some scholars: for example, Polinsky and Rubinfeld (1988) observe that trials may have a greater deterrent effect on infringers than settlement, and are therefore more desirable.

In economic terms, the optimal amount of out-of court settlement in a given jurisdiction depends on the (private and social) costs and rewards of settlement v. the (private and social) costs and rewards of trial.

Under the simplest model of settlement, corrective justice is not affected by the choice whether to settle of go to trial, as plaintiffs will not accept *ex ante* a settlement offer for less that their expected net reward. However, once incomplete information, bounded rationality, opportunistic behaviour, uncertainty and risk aversion are included in the analysis, the possibility that parties inefficiently settle their disputes becomes more likely. In this respect, procedural rules that tilt the balance in favour of the plaintiff may lead defendants to choose settlement in order to avoid worse consequences at trial. In particular, the need to reduce litigation expenses and avoid future lawsuits, adverse reputational effects or the disclosure of confidential information may lead the defendant to prefer settlement over any other alternative. On the other hand, the unavailability of rules that encourage the plaintiff's legal action would lead to reluctance to sue.

Policymakers should therefore aim at optimal – not maximum – out-of-court settlement; this implies that procedural rules are chosen with the aim of facilitating the plaintiff's action, at the same time avoiding frivolous suits. In the US, where – as we already recalled – procedural rules have been crafted to maximise incentives for plaintiffs to engage in private antitrust litigation, some commentators have advocated for a removal of the "one-way fee-shifting" rule in favour of the "loser-pays" rule, as well as for the redesign of the currently aggressive discovery rules, in order to avoid frivolous suit and an excessive amount of litigation.[276] For the same reason, authoritative scholars have

[274] Gross & Syverud (1991), at 320.

[275] Rule 16 provides for sanctions if parties do not participate in pre-trial conferences aimed at promoting settlement, and rule 68 imposes legal costs on a party that rejects a settlement offer that turns out to be more favourable than the trial outcome.

[276] See, *e.g.*, Wagener (2003). Anecdotal evidence on the widespread perception that litigation is excessive in the US is reported by Bone, *Modeling Frivolous Suits*, 145 U. Penn. L. Rev. 519, 1997.

advocated the decoupling of damage awards.[277] Finally, the use of summary judgment and motions to dismiss has been broadened in order to shield defendants from patently frivolous lawsuits, and in *Twombly* the Second Circuit was even considered to require "proof of the case already at the pleading stage".[278] In other words, even from a corrective justice standpoint, maximum out-of-court settlement is not socially desirable. Encouraging plaintiffs to file suit should not lead to overcompensation and settlement in frivolous suits.

The undesirability of maximum out-of-court settlement is apparently more straightforward if seen from a deterrence perspective. The thesis is as follows. Firms that anticipate the possibility to settle claims will be more induced to infringe antitrust laws, as both the prospective penalty and the anticipated lawyers' fees are lower than in the case of trial. A simple numerical example may help illustrating this finding. Assume that a firm is considering whether to engage in an anticompetitive conduct, which may lead to losing at trial with 100% probability, a damage award of 1€ million and legal fees of €200,000. The defendant's prospective costs of the anticompetitive conduct are 1,200,000. However, if the player believes that she will be able to settle the claim with 80% probability, for an amount of €500,000 and with reduced legal fees of €100,000, then the prospective cost becomes [80% · (€500,000 + €100,000) + 20% · €1,200,000] = €720,000. In this respect, the possibility to settle claims reduces the incentive to take "optimal care" on the side of the defendant.

For such reason, some authors have advocated for damage trebling not only as a tool to encourage plaintiff's actions, but also as a deterrence mechanism for would-be infringers. For example, as also observed by Shavell (1999), as the prospective damage award at trial modifies the bargaining position of the parties and – hence – the outcome of settlement negotiations, increasing the damage award at trial may overcome the problem of under-deterrence irrespective of whether a lawsuit ends up in court or is settled out of court.[279] Once damage multiples are applied, settlement may become again a socially desirable outcome.

In summary, under simple models of settlement and trial, the use of the legal system should be kept to a minimum. Does this mean that policymakers should

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[277] See Polinsky and Che (1993); and Choi and Sanchirico (2004).

[278] See Shinder and Dumas-Eymard (2007). *Twombly v. Bell Atlantic,* 425 F.3d 99, 111 (2d Cir. 2005). "[i]f a pleaded conspiracy is implausible on the basis of the facts as pleaded –- if the allegations amount to no more than "unlikely speculations" –- the complaint will be dismissed." The Supreme Court decision was rendered on May 27, 2007. See 2007 WL 1461066 (US).

[279] In our simple example, a doubling of damages may lead to a prospective settlement for €1,000,000, and the *ex ante* costs faced by the plaintiff become [80% · (€1,000,000 + €100,000) + 20% · €2,200,000] = €1,320,000.

encourage private parties to settle all their claims without going to court? In reality, there are several reasons that suggest a more balanced approach:

- *Incomplete information can lead to inefficient levels of settlement.* As observed, *i.a.*, by Wickelgren (2004), under (one-sided) private information, settlement negotiations can end up in a pooling equilibrium, in which defendants settle for a favourable amount. This can lead settlement to produce under-deterrence.
- *The need to preserve confidential information may lead some defendants to settle inefficiently.* Especially when broad discovery rules are enacted, parties may wish to minimise the amount of information disclosed by settling disputes as early as possible. This is the case especially for large firms, whose settlement rate is reportedly higher than average.[280]
- *Plantiffs may be (on average) more risk averse than defendants.* Empirical data from the US show that private antitrust litigation is often "David v. Goliath", meaning that plaintiffs are on average smaller in size than defendants. This may lead the parties to settle under different bargaining strength and retaliation potential. As a result, corrective justice may be hampered by the absence of an impartial *arbiter*.
- *Privately interested lawyers may settle inefficiently.* Under the standard assumption that lawyers act to maximise their own reward, it can be assumed that settlement would become an appealing option for them even when such an option would not be in the client's interest. Evidence that the ratio of legal fees on the settlement amount is much greater than the ratio of fees on the damage award at trial confirms that lawyers may have an incentive to put less effort in litigation and settle early for a comparatively more appealing reward.[281]
- *Parties do not consider positive externalities when deciding whether to settle or go to trial.* In particular, as noted by Shavell (1999), when a party engages in litigation, she does not take into account the effect that this has on incentives to reduce harm. As a result, "the privately determined level of litigation can depart from the socially optimal level".
- *Privately interested plaintiffs may cause significant harm to follow-on plaintiffs by settling a case.* If settlement leads to "clearing" of pending positions, a defendant may have an incentive to settle with the first plaintiff, thus compromising corrective justice for follow-on claimants. A further refinement of this argument relies on the assumption that defendants' behaviour in repeat litigation is path-dependent – *i.e.*, adaptive expectations lead defendants to adjust their expected penalty depending on the outcome

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[280] See White (1988).

[281] See Salop & White (1988), at 13.

of previous litigation. For example, defendants will be more willing to settle cases following a conviction by a competition authority, and plaintiffs will be more optimistic about the outcome of a trial. Such a finding can lead to a significant shift in the parties' relative bargaining strength.

- *Legal certainty is facilitated by publicly observable trial outcomes*. The development of antitrust jurisprudence is facilitated by the existence of trial outcomes; in a world in which all cases settle, there is no possibility of influencing firms' behaviour by setting competition rules and policy objectives.

Finally, the choice between settlement and trial is certainly made in a second-best context, as an optimization problem between two imperfect systems. In this respect, the optimal level of settlement crucially depends on the comparison between the transaction costs and inefficient outcomes generated by settlement, as opposed to administrative costs and legal errors occurring at trial. From this standpoint, crafting *ad hoc* procedural rules to encourage efficient decisions by private parties when facing the settlement/trial trade-off appears highly desirable.

As regards our initial question, we confirm that policymakers should allow for a significant possibility of settling lawsuits out of court, given the high cost of the legal system. However, the *optimal* level of settlement is never a *maximum* settlement level. In the next sections, we will tackle the issue of how different combinations of procedural rules affect the possibility of efficient and inefficient settlement, and efficient use of the legal system.[282]

5.2 Enforcement and litigation costs

In the case of private enforcement, as the number of private actions increases, also the following costs are expected to be on the rise:

- Administrative costs for national courts;
- Legal fees and court costs;
- Opportunity costs for both parties' employees;
- Administrative burdens for the parties in complying with information obligations imposed by law.

The optimal level of litigation is the one that minimizes the sum of these costs and the social cost of monopoly in a given economy, as shown in Figure 9 below.[283]

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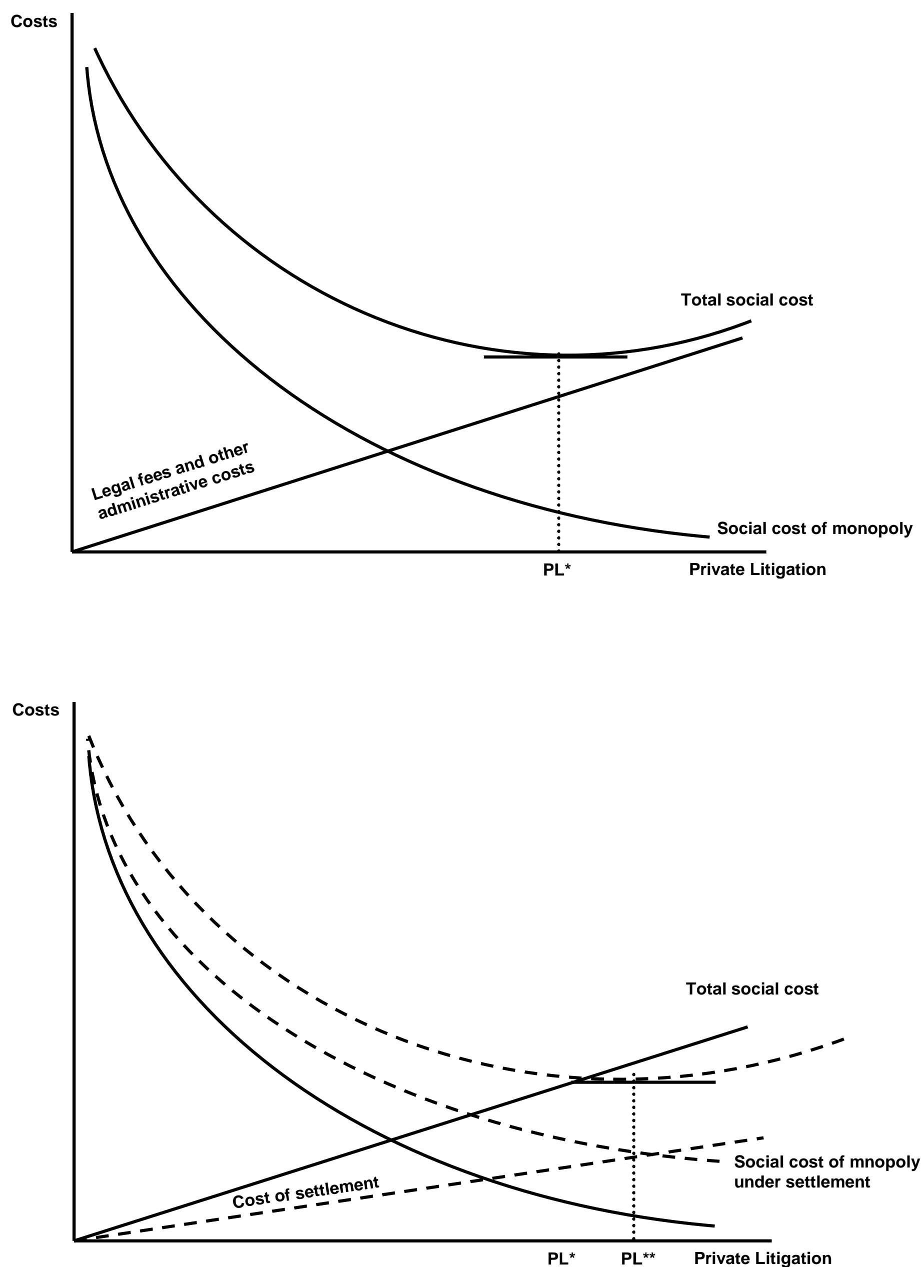
[282] See Part II, Section 1.

[283] See, *i.a.,* Calabresi (1970).

Figure 9 – Optimal amount of private litigation with and without settlement



As we recalled in section 2.4 above, after the Georgetown Project published its findings Salop and White (1986) estimated that for cases that reached the final decision by a jury, legal fees would amount to 10%-20% of the final damage award (trebled). Lande (1993) elaborates on this estimate and on alternative estimates by Elzinga and Wood, and estimates that parties will further spend 53%-79% in addition to the lawyers' fees expenses in corporate expenses related to litigation, such as time spent by executives, etc.; finally, the cost of the legal system would represent 5.5% of the (untrebled) award. Hence, after adjustments, Lande assumes that parties would "dissipate" between 20% and

65% of the award in litigation costs. In addition, society would bear an additional 5.5% of the untrebled award in costs for the use of the legal system.[284] The impact of these costs on the enforcement system is likely to be significant, although such costs would never offset the damage recovery.

If we rely on our estimates in Table 19 and assume for simplicity's sake that only one party is plaintiff for each damage suit, with treble damage awards and a 20% cartel detection probability, out of total damage awards and settlements of €22 billion:

- legal fees would account for an average €3.3 billion[285],
- the cost for parties that engage in litigation would amount to €2.2 billion[286], and
- the cost for use of the legal system would reach €404 million[287].

This, in turn, changes our findings as regards the incentives for parties to engage in litigation, the potential for damage awards to reach *restitutio in integrum*, and the resulting optimal level of private enforcement. Whether plaintiffs will ultimately bear legal fees, it depends on the cost allocation rule adopted by the jurisdiction in which the case is brought. In the US, the general rule is that "each party bears her own costs", but for antitrust damages actions a mandatory one-way fee shifting was introduced in the Clayton Act to facilitate action by the plaintiffs. In Europe, the dominant rule is "loser-pays".

We will adjust our figures according to these results in Section 6 below.

5.3 Reputational effects and risk-aversion

Our analysis so far did not take into account potential reputational effects on the side of potential cartelists. The relevance of such effects is indeed uncertain: in the literature, one commentator recently argued that "stigmatization of the offender *vis-à-vis* its consumers … can be more effective than fines in putting an end to anticompetitive conduct".[288] On the other hand, Alexander (1999) and Connor (2007) observed that such effects are often ephemeral, and as such

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[284] A similar calculation can be made for Europe, based on the findings of the Ashurst Study. '[I]n all countries it appears that on the basis of a €1 million claim where the level of damages is relatively easy to establish, costs would run into tens of thousands of euro. In the UK and Ireland this figure is even higher, going well above €100,000. See Ashurst study, at 96.

[285] Average fees were calculated by assuming the mean value in the range estimated by Salop and White (1986), *i.e.* 15%.

[286] Here too, average opportunity costs are obtained by assuming the mean value in the range estimated by Lande (1993), *i.e.*66%.

[287] This is obtained by multiplying the untrebled award by 5.5%.

[288] Calviño (2006).

should not be considered as relevant, at least from a long-run perspective, for the *ex ante* calculation of the optimal sanction. A similar result is also reached by Perloff *et al.* (1996).[289]

Reputational losses can be seen, however, as a specific case for the more general problem of cartelists' risk aversion. In line with standard economic theory, if the would-be offender is risk-averse, then the optimal sanction *ex ante* would be lower than when potential wrongdoers are risk-neutral or risk-loving. Risk-attitude also has an impact at a later stage, during litigation, as a risk-averse defendant may be willing to settle for an overly generous amount to escape the probability that a jury or judge awards damages to the plaintiff.

The most significant effect of risk aversion, from an *ex ante* perspective, is that a lower liability/overcharge ratio would be needed in order to deter the formation of cartels. However, no empirical evidence is available as to the risk aversion of cartelists; to the contrary, the "overconfidence bias" mentioned by Wils (2006) would call for a more risk-loving behaviour from an *ex ante* perspective, and possibly a more risk-averse behaviour post-detection, when the defendant faces a threat of high fines which come close to the firm's ability to pay. Baks *et al.* (2005) also argue convincingly that cartelists are risk-loving.[290]

As arguments exist both for risk aversion and risk preference of would-be tortfeasors, we do not assume risk aversion as a basis of our analysis. We will come back to risk attitude and its relevance below, in Part II of this Report.

5.4 Stand-alone v. follow-on suits

A potential refinement to our welfare analysis implies that private actions are differentiated between stand-alone and follow-on cases. There are several reasons that might call for establishing such differentiation. In particular, stand-alone cases can be assumed to contribute more significantly to the detection rate of cartels, although the conviction rate can be assumed to be lower. In addition, both stand-alone actions and follow-on cases can exert a deterrence effect from an *ex ante* perspective – the former through enhanced detection, the latter through increased expected penalties. So-called "indirect follow-on" suits also contribute to greater accuracy in fact-finding, by extending a previous investigation to a different set of circumstances (*e.g.* different product and/or geographic markets, longer time-span, etc.).

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[289] See also Kauper-Snyder (1986) at 1208, quoting extensive literature.

[290] Although bounded rationality is often applied to individuals than organisations in law and economics, "satisficing" decisions are also taken by complex organisations, as explained by Simon (1977). In this respect, the overconfidence bias is very similar to "framing effects" illustrated by Kahneman and Tversky and applied in the legal and economic framework by Jolls and Sunstein (2005) as well as by Ulen and Korobkin (2000).

If follow-on actions were to play a paramount role in Europe's private enforcement system, our analysis would have to be refined by assuming a greater conviction rate, and accordingly a higher likelihood of penalty (detection rate times conviction rate). However, available empirical evidence does not confirm this sensation. The findings of the Georgetown study testified that:

- 91% of total private antitrust cases initiated in the US between 1973 and 1983 were stand-alone actions;
- when grouped according to the type of violation alleged, stand-alone actions for horizontal violations were in a ratio of 4:1 with follow-on suits.[291]
- 60% of follow-on actions were brought by customers, contrary to what happened for stand-alone actions, which were mostly by competitors (26%) and dealers (29%).
- As regards cases alleging horizontal price-fixing, however, the number of cases initiated by customers was roughly equally divided between stand-alone (76) and follow-on (71), and the overall ratio (for all plaintiffs) between the two types of actions was 2.2:1 (206 stand-alone cases, 92 follow-on). For these cases, the conviction rate is already high also for stand-alone suits.

Of course, the problem becomes more relevant when we move onto an *ex post* analysis. There, follow-on actions for treble damages can have a disproportionate effect on the parties, by allowing overcompensation of plaintiffs and disruption of defendants' financial resources. This has led some commentators to argue that, in order to preserve efficient incentives to sue and avoid a harmful "race to damages", damage awards could be doubled, but then decoupled (Polinsky, 1980).

[291] See Kauper & Snyder (1986), at 1180.

6 Assessment of the impact of more effective private damages actions

Predicting the future development of private damages actions in Europe is not easy, as the procedural changes that will be introduced in order to encourage private parties to enforce antitrust laws are not defined yet. In this part of the study, mostly due to the absence of empirical evidence for Europe, we have developed a range for the potential impact of private enforcement of cartels and other types of antitrust infringements, by relying mostly on data from a jurisdiction with enhanced private enforcement and a widely acknowledged "litigation culture", *i.e.* the US. Accordingly, the results we obtained are to be considered as a mere indication of the potential for private enforcement to provide private parties with recovery of antitrust injury, not as a precise calculation of how the future antitrust enforcement will look like in the EU27.

With this *caveat* in mind, we are able to combine our results for cartel enforcement at EU-wide and national level (Table 10), and the enforcement of other types of infringement (Table 19), to derive an estimate of the yearly impact of encouraging private damages actions on different types of plaintiffs. Based on the distribution of actions by type of plaintiff observed in the Georgetown study and shown above, in Table 16, we are able to model the impact of enhanced private enforcement on competitor plaintiffs, direct supplies, direct purchasers, and end consumers. Table 21 below shows the results of this simulation. For simplicity, we have reported only the data obtained under our intermediate scenario, developed under the assumption that the cartel detection rate is 20%[292].

In assessing the potential impact of enhanced private enforcement on different economic actors, we need to take due account of the expected lawyers' fees. Assuming that:

- Lawyers' fees for plaintiffs will amount to approximately 15% of the damage award; and
- court costs will amount to 5.5% of the untrebled award,

we can develop a table in which we adjust the expected recovery, net of lawyers' fees and court fees[293].

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[292] The results in Table 21 are of course highly dependent on the treatment of passing-on under the US antitrust laws. Were the passing-on defence allowed in Europe, the apportionment of damage might follow a different pattern if compared to that observed in the Georgetown study. See Part II, Section 5 of this Report.

[293] Again, figures on damages do not include prejudgment interest, as this simulation was run starting from data from the US, where – as already recalled – prejudgment interest is not included in damage awards.

In Table 21 below, we also show the expected costs for defendants of cases that lead to a damage recovery under two different systems of cost allocation, *i.e.* "each party bears her own cost" and "loser-pays". As regards the deterrence effect, the prospective cost for defendants will be equal to the first rows of Table 24 below, plus expected legal fees.[294]

Table 21 – Estimated yearly recovery for all infringements (EU and domestic), according to damage multiple (Euros) and cost allocation rule

	Competitor	Dealer	Customer company	Franchisee/Licensee	Final customer/user	Supplier	Employee	State/local gov.	Total
Percentage on all cases	*36.5%*	*27.3%*	*12.5%*	*2.9%*	*8.7%*	*5.6%*	*3.5%*	*1.4%*	
Claimant' recovery (without prejudgment interest)									
Treble damages	€ 8,033,821,447	€ 5,948,259	€ 2,723,562	€ 631,866	€ 1,895,599	€ 1,220,156	€ 762,597	€ 305,039	**€ 22,010,469,717**
Double damages	€ 5,301,867	€ 3,965,506	€ 1,815,708	€ 421,244	€ 1,263,733	€ 813,437	€ 508,398	€ 203,359	**€ 14,673,646,478**
Single damages	€ 2,650,934	€ 1,982,753	€ 907,854	€ 210,622	€ 631,866	€ 406,719	€ 254,199	€ 101,680	**€ 7,336,823,239**
Legal fees (one party)									
Treble damages	€ 1,205,219,018	€ 1,001,290	€ 458,466	€ 106,364	€ 319,093	€ 205,393	€ 128,371	€ 51,348	**€ 3,705,095,736**
Double damages	€ 941,081	€ 703,877	€ 322,288	€ 74,771	€ 224,313	€ 144,385	€ 90,241	€ 36,096	**€ 2,604,572,250**
Single damages	€ 543,441	€ 406,464	€ 186,110	€ 43,178	€ 129,533	€ 83,377	€ 52,111	€ 20,844	**€ 1,504,048,764**
Claimant's recovery under loser pays (without prejudgment interest)									
Treble damages	€ 9,239,040,465	€ 6,949,550	€ 3,182,028	€ 738,231	€ 2,214,692	€ 1,425,549	€ 890,968	€ 356,387	**€ 25,715,565,453**
Double damages	€ 6,242,949	€ 4,669,384	€ 2,137,996	€ 496,015	€ 1,488,045	€ 957,822	€ 598,639	€ 239,456	**€ 17,278,218,728**
Single damages	€ 3,194,375	€ 2,389,218	€ 1,093,964	€ 253,800	€ 761,399	€ 490,096	€ 306,310	€ 122,524	**€ 8,840,872,003**
Defendant costs if each party bears its own cost (without prejudgment interest)									
Treble damages	€ 9,239,040,465	€ 6,949,550	€ 3,182,028	€ 738,231	€ 2,214,692	€ 1,425,549	€ 890,968	€ 356,387	**€ 25,715,565,453**
Double damages	€ 6,242,949	€ 4,669,384	€ 2,137,996	€ 496,015	€ 1,488,045	€ 957,822	€ 598,639	€ 239,456	**€ 17,278,218,728**
Single damages	€ 3,194,375	€ 2,389,218	€ 1,093,964	€ 253,800	€ 761,399	€ 490,096	€ 306,310	€ 122,524	**€ 8,840,872,003**
Defendant costs with loser pays (without prejudgment interest)									
Treble damages	€ 10,444,259,484	€ 7,950,840	€ 3,640,495	€ 844,595	€ 2,533,784	€ 1,630,942	€ 1,019,338	€ 407,735	**€ 29,420,661,189**
Double damages	€ 7,184,030	€ 5,373,261	€ 2,460,284	€ 570,786	€ 1,712,358	€ 1,102,207	€ 688,880	€ 275,552	**€ 19,882,790,978**
Single damages	€ 3,737,816	€ 2,795,682	€ 1,280,074	€ 296,977	€ 890,932	€ 573,473	€ 358,421	€ 143,368	**€ 10,344,920,767**

Our findings suggest that:

- Enhanced private enforcement has a significant potential in terms of corrective justice: economic actors suffering antitrust injury may recover up to 22 billion Euros yearly, net of legal expenses. This would amount to 0.2% of EU GDP in 2006.[295]

[294] We define "legal fees" as including both lawyers' fees and court fees. The relevance of legal fees of course depends on the specific fee allocation rules chosen. For the purposes if this preliminary analysis, we assume that defendants expect to bear their own legal fees, although in most European systems a "loser-pays" rule is applied. Section 1, Part II of this Report addresses this issue in more detail.

[295] See IMF, *supra* at note 160.

- The impact on deterrence is also significant at the margin, although firms would still have an incentive to form cartels and engage in other anticompetitive conduct. Prospective infringers may face an expected cost of up to €29.4 billion yearly (including the opponents' legal fees), or 0.26% of EU GDP in 2006.
- Expected legal fees are significant – in the range of €1.5 to €3.7 billion per party in our simulation – but never offset the corrective justice impact of enhanced private enforcement.

Table 22 below shows the estimated recovery for claimants and costs for defendants in the three different scenarios, *i.e.* according to our assumption on the detection rate for cartels. As shown in the table, under the most generous assumptions, economic actors suffering antitrust injury would recover up to 35 billion Euros yearly, net of legal expenses, which would amount to 0.3% of EU GDP in 2006[296]. Prospective infringers may face an expected cost of up to €46.8 billion yearly (including the opponents' legal fees), or 0.42% of EU GDP in 2006. Here too, expected legal fees are significant – in the range of €2.4 to €5.9 billion per party in our simulation – but never offset the corrective justice impact of enhanced private enforcement.

The figures do not take into account prejudgment interest: as already explained, and in line with Lande (1993) and Lovell (1982), the results of our simulation for double damages without prejudgment interest can be taken as a reasonable (and likely conservative) indication of the corresponding figure for single damages with prejudgment interest[297]. For example, in Table 22 the expected claimant's recovery under the assumption that treble damages are awarded without prejudgment interest and a loser-pays rule applies (ranging from €9.9 to €40.9 billion) can be considered as a conservative estimate of claimants' yearly recovery with double damages for all infringements, plus prejudgment interest. Likewise, the result for double damages without prejudgment interest in Table 22 (ranging from €6.7 to €27.5 billion) can be said to approximate the claimants' recovery with single damages plus prejudgment interest.

Table 22 below also allows us to estimate the foregone benefits for victims of antitrust infringements, due to the current underdevelopment of private antitrust damages actions in Europe. The first rows in Table 22 show the pure damage recovery estimated, without taking into account legal costs. For

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[296] See IMF, *supra* at note 160.

[297] See also Lande and Davis (2007), at 2-3, stating that although the award of treble damages (without prejudgment interest) in the US "might suggest that at least two-thirds of the damages remedy was intended only for punitive or deterrence purposes … even this portion is necessary to compensate plaintiffs for the difficulty of bringing suit, for unawarded prejudgment interest, and for difficult to quantify and unawarded damages items such as the allocative inefficiency effects of market power and the value of plaintiff's time expended pursuing litigation".

example, with single damages plus prejudgment interest (*i.e.* double damages without interest in Table 22), the expected yearly recovery by claimants would range between €5.7 billion and €23.3 billion.

In the next sections, we provide for additional simulations that may prove useful especially for Parts II and III of this Report. We then address the issue of how these findings might translate into aggregate welfare impacts, *i.e.* impacts on variables such as competitiveness, productivity, innovation and growth.

Table 22 – Yearly recovery for all infringements (EU and domestic), damage multiple and fee allocation for three different cartel detection rates (Euros)

	Scenario 1	Scenario 2	Scenario 3
	Cartel det. 15%	Cartel det. 20%	Cartel det. 25%
Percentage on all cases			
Claimant' recovery (without prejudgment interest)			
Treble damages	€ 8,504,737,544	€ 22,010,469,717	€ 34,982,457,383
Double damages	€ 5,669,825,030	€ 14,673,646,478	€ 23,321,638,255
Single damages	€ 2,834,912,515	€ 7,336,823,239	€ 11,660,819,128
Legal fees (one party)			
Treble damages	€ 1,431,630,820	€ 3,705,095,736	€ 5,888,713,659
Double damages	€ 1,006,393,943	€ 2,604,572,250	€ 4,139,590,790
Single damages	€ 581,157,066	€ 1,504,048,764	€ 2,390,467,921
Claimant's recovery under loser pays (without prejudgment interest)			
Treble damages	€ 9,936,368,364	€ 25,715,565,453	€ 40,871,171,042
Double damages	€ 6,676,218,972	€ 17,278,218,728	€ 27,461,229,045
Single damages	€ 3,416,069,580	€ 8,840,872,003	€ 14,051,287,049
Defendant costs if each party bears its own cost (without prejudgment interest)			
Treble damages	€ 9,936,368,364	€ 25,715,565,453	€ 40,871,171,042
Double damages	€ 6,676,218,972	€ 17,278,218,728	€ 27,461,229,045
Single damages	€ 3,416,069,580	€ 8,840,872,003	€ 14,051,287,049
Defendant costs with loser pays (without prejudgment interest)			
Treble damages	€ 11,367,999,184	€ 29,420,661,189	€ 46,759,884,702
Double damages	€ 7,682,612,915	€ 19,882,790,978	€ 31,600,819,836
Single damages	€ 3,997,226,646	€ 10,344,920,767	€ 16,441,754,970

6.1 Additional simulations

Below, we simulate the potential impact for different cost allocation rules and also for the case of double damages for cartel cases, coupled with single damages for all other types of allegations.

6.1.1 One-way fee shifting v. loser-pays

In this section, we illustrate the results of additional simulations as regards the potential impact of different cost allocation rules. For example, the difference between a mandatory one-way fee-shifting rule and a loser-pays rule cannot be seen in Tables 24 and 25 above. To show the different level of plaintiff recovery, we need to take into account the probability that plaintiff actually wins at trial. We estimated this probability based on Perloff *et al.* (1996) and Perloff and Rubinfeld (1988) and reported it in Table 18 above. Based on these figures, we can estimate the plaintiff recovery in case of full fee-shifting. We also include a case in which plaintiffs ultimately recover only 50% of their costs, as empirical evidence and evidence from the US reveal that even under one-way fee-shifting, plaintiffs are unlikely to recover all their costs. As these are only simulations, it is worth recalling that we do not take into account the effect of the two rules on the incentive to sue of the party, nor the effect of the damage multiple on the detection rate of cartels. This issue will be tackled in Section 1, Part II of this Report.

Table 23 shows the results of the simulation. As is seen from the table, the availability of one-way fee-shifting puts the plaintiff in a more favourable condition, as she would be shielded from the risk of having to pay the defendant's legal expenses if she wins. In addition, the loser-pays rule bears and advantage over the "each party bears her own cost" from the plaintiff's perspective, and is therefore more suitable to encourage antitrust damages actions.

6.1.2 Double damages for cartels

Option 16 in the Green Paper envisages the introduction of double damages only for cartel cases. In case this option is introduced, the damage recovery would look different from the one illustrated above, in Tables 24 and 25 and 26. Table 24 below shows that economic actors suffering antitrust injury may recover up to 12.9 billion Euros yearly, net of legal expenses. This would amount to 0.12% of EU GDP in 2006.

These figures, however, do not take into account prejudgment interest. If we rely on estimates such as those reported by Lovell (1982) and Lande (1993), it is fair to assume that awarding double damages plus prejudgment interest would lead to awards at least as high as the treble damage awards in the US. Accordingly, Table 25 shows our upper bound estimates for the case of double damages for cartel cases, contemplated in the Green Paper as option 16.

Economic actors suffering antitrust injury may recover up to 20.9 billion Euros yearly, net of legal expenses. This would amount to 0.19% of EU GDP in 2006.

Table 23 – Estimated yearly recovery by type of plaintiff, damage multiple and cost allocation rule

Treble damages					Plaintiff recovery				Cost for the defendant			
	% on total	% plaintiff wins	Damage award	Legal fees (one party)	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs
Horizontal price-fixing	31.2%	75%	€ 6,947,569,361	€ 1,169,507,509	€ 7,239,946,238	€ 7,532,323,115	€ 7,386,134,677	€ 5,778,061,852	€ 8,409,453,747	€ 10,438,722,965	€ 9,570,276,795	€ 8,117,076,870
Vertical price-fixing	8.0%	32%	€ 326,614,143	€ 54,980,047	€ 269,434,894	€ 306,821,326	€ 288,128,110	€ 271,634,095	€ 324,414,941	€ 583,898,990	€ 472,850,182	€ 381,594,190
Dealer Termination	2.7%	97%	€ 340,177,646	€ 57,263,237	€ 392,287,192	€ 394,005,089	€ 393,146,141	€ 282,914,409	€ 449,550,429	€ 461,473,656	€ 456,370,991	€ 397,440,884
Refusal to deal	15.2%	25%	€ 498,652,884	€ 83,939,902	€ 393,728,006	€ 456,682,933	€ 425,205,469	€ 414,712,982	€ 477,667,908	€ 914,612,498	€ 727,617,666	€ 582,592,786
Predatory pricing	5.4%	33%	€ 216,302,819	€ 36,410,974	€ 179,527,735	€ 203,923,087	€ 191,725,411	€ 179,891,844	€ 215,938,709	€ 385,256,950	€ 312,795,506	€ 252,713,793
Price discrimination	9.8%	100%	€ 1,250,537,990	€ 210,507,228	€ 1,461,045,219	€ 1,461,045,219	€ 1,461,045,219	€ 1,040,030,762	€ 1,671,552,447	€ 1,671,552,447	€ 1,671,552,447	€ 1,461,045,219
Tying/exclusive dealing	17.9%	100%	€ 2,102,984,710	€ 354,002,426	€ 2,456,987,136	€ 2,456,987,136	€ 2,456,987,136	€ 1,748,982,284	€ 2,810,989,562	€ 2,810,989,562	€ 2,810,989,562	€ 2,456,987,136
Other	9.8%	-	-	-								
Total EU enforcement	100%		€ 11,682,839,553	€ 1,966,611,325	€ 12,392,956,419	€ 12,811,787,905	€ 12,602,372,162	€ 9,716,228,228	€ 14,359,567,744	€ 17,266,507,068	€ 16,022,453,149	€ 13,649,450,877
Domestic enforcement	88.4%		€ 10,327,630,165	€ 1,738,484,411	€ 10,955,373,475	€ 11,325,620,508	€ 11,140,496,991	€ 8,589,145,754	€ 12,693,857,886	€ 15,263,592,248	€ 14,163,848,584	€ 12,066,114,576
TOTAL RECOVERY			**€ 22,010,469,717**	**€ 3,705,095,736**	**€ 23,348,329,894**	**€ 24,137,408,414**	**€ 23,742,869,154**	**€ 18,305,373,982**	**€ 27,053,425,630**	**€ 32,530,099,316**	**€ 30,186,301,733**	**€ 25,715,565,453**

Double damages					Plaintiff recovery				Cost for the defendant			
	% on total	% plaintiff wins	Damage award	Legal fees (one party)	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs
Horizontal price-fixing	31.2%	75%	€ 4,631,712,907	€ 822,129,041	€ 4,837,245,168	€ 5,042,777,428	€ 4,940,011,298	€ 3,809,583,866	€ 5,659,374,209	€ 7,022,834,696	€ 6,443,870,582	€ 5,453,841,948
Vertical price-fixing	8.0%	32%	€ 217,742,762	€ 38,649,340	€ 177,547,448	€ 203,828,999	€ 190,688,224	€ 179,093,422	€ 216,196,788	€ 390,543,418	€ 316,510,879	€ 256,392,102
Dealer Termination	2.7%	97%	€ 226,785,098	€ 40,254,355	€ 263,416,561	€ 264,624,191	€ 264,020,376	€ 186,530,743	€ 303,670,915	€ 311,682,099	€ 308,280,322	€ 267,039,452
Refusal to deal	15.2%	25%	€ 332,435,256	€ 59,007,258	€ 258,676,183	€ 302,931,627	€ 280,803,905	€ 273,427,998	€ 317,683,441	€ 611,265,327	€ 486,602,106	€ 391,442,514
Predatory pricing	5.4%	33%	€ 144,201,879	€ 25,595,834	€ 118,350,087	€ 135,499,296	€ 126,924,692	€ 118,606,046	€ 143,945,921	€ 257,710,388	€ 209,402,759	€ 169,797,713
Price discrimination	9.8%	100%	€ 833,691,994	€ 147,980,329	€ 981,672,322	€ 981,672,322	€ 981,672,322	€ 685,711,665	€ 1,129,652,651	€ 1,129,652,651	€ 1,129,652,651	€ 981,672,322
Tying/exclusive dealing	17.9%	100%	€ 1,401,989,807	€ 248,853,191	€ 1,650,842,997	€ 1,650,842,997	€ 1,650,842,997	€ 1,153,136,616	€ 1,899,696,188	€ 1,899,696,188	€ 1,899,696,188	€ 1,650,842,997
Other	9.8%	-	-	-								
Total	100%		€ 7,788,559,702	€ 1,382,469,347	€ 8,287,750,766	€ 8,582,176,861	€ 8,434,963,813	€ 6,406,090,355	€ 9,670,220,113	€ 11,623,384,766	€ 10,794,015,487	€ 9,171,029,049
Domestic enforcement	88.4%		€ 6,885,086,776	€ 1,222,102,903	€ 7,326,371,678	€ 7,586,644,345	€ 7,456,508,011	€ 5,662,983,874	€ 8,548,474,580	€ 10,275,072,133	€ 9,541,909,691	€ 8,107,189,679
TOTAL RECOVERY			**€ 14,673,646,478**	**€ 2,604,572,250**	**€ 15,614,122,444**	**€ 16,168,821,205**	**€ 15,891,471,825**	**€ 12,069,074,228**	**€ 18,218,694,694**	**€ 21,898,456,900**	**€ 20,335,925,178**	**€ 17,278,218,728**

Single damages					Plaintiff recovery				Cost for the defendant			
	% on total	% plaintiff wins	Damage award	Legal fees (one party)	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs
Horizontal price-fixing	31.2%	75%	€ 2,315,856,454	€ 474,750,573	€ 2,434,544,097	€ 2,553,231,740	€ 2,493,887,919	€ 1,841,105,881	€ 2,909,294,670	€ 3,606,946,427	€ 3,317,464,370	€ 2,790,607,027
Vertical price-fixing	8.0%	32%	€ 108,871,381	€ 22,318,633	€ 85,660,003	€ 100,836,673	€ 93,248,338	€ 86,552,748	€ 107,978,636	€ 197,187,845	€ 160,171,576	€ 131,190,014
Dealer Termination	2.7%	97%	€ 113,392,549	€ 23,245,473	€ 134,545,929	€ 135,243,293	€ 134,894,611	€ 90,147,076	€ 157,791,401	€ 161,890,542	€ 160,189,654	€ 136,638,021
Refusal to deal	15.2%	25%	€ 166,217,628	€ 34,074,614	€ 123,624,361	€ 149,180,321	€ 136,402,341	€ 132,143,014	€ 157,698,974	€ 307,918,156	€ 245,586,545	€ 200,292,242
Predatory pricing	5.4%	33%	€ 72,100,940	€ 14,780,693	€ 57,172,440	€ 67,075,504	€ 62,123,972	€ 57,320,247	€ 71,953,133	€ 130,163,826	€ 106,010,011	€ 86,881,632
Price discrimination	9.8%	100%	€ 416,845,997	€ 85,453,429	€ 502,299,426	€ 502,299,426	€ 502,299,426	€ 331,392,567	€ 587,752,855	€ 587,752,855	€ 587,752,855	€ 502,299,426
Tying/exclusive dealing	17.9%	100%	€ 700,994,903	€ 143,703,955	€ 844,698,858	€ 844,698,858	€ 844,698,858	€ 557,290,948	€ 988,402,814	€ 988,402,814	€ 988,402,814	€ 844,698,858
Other	9.8%	-	-	-								
Total	100%		€ 3,894,279,851	€ 798,327,369	€ 4,182,545,114	€ 4,352,565,816	€ 4,267,555,465	€ 3,095,952,481	€ 4,980,872,483	€ 5,980,262,465	€ 5,565,577,825	€ 4,692,607,220
Domestic enforcement	88.4%		€ 3,442,543,388	€ 705,721,395	€ 3,697,369,880	€ 3,847,668,181	€ 3,772,519,031	€ 2,736,821,994	€ 4,403,091,275	€ 5,286,552,019	€ 4,919,970,797	€ 4,148,264,783
TOTAL RECOVERY			**€ 7,336,823,239**	**€ 1,504,048,764**	**€ 7,879,914,994**	**€ 8,200,233,997**	**€ 8,040,074,495**	**€ 5,832,774,475**	**€ 9,383,963,758**	**€ 11,266,814,483**	**€ 10,485,548,622**	**€ 8,840,872,003**

Table 24 – Estimated yearly recovery by type of plaintiff, double damages for cartels and cost allocation rule

Double damages for cartels	% on total	% plaintiff wins	Plaintiff recovery: Loser pays	Plaintiff recovery: One-way fee-shifting	Plaintiff recovery: Partial one-way fee-shifting	Plaintiff recovery: Each party bears its own costs	Cost for the defendant: Loser pays	Cost for the defendant: One-way fee-shifting	Cost for the defendant: Partial one-way fee-shifting	Cost for the defendant: Each party bears its own costs
Horizontal price-fixing	31.2%	75%	€ 4,837,245,168	€ 5,042,777,428	€ 4,940,011,298	€ 3,809,583,866	€ 5,659,374,209	€ 7,022,834,696	€ 6,443,870,582	€ 5,453,841,948
Vertical price-fixing	8.0%	32%	€ 85,660,003	€ 100,836,673	€ 93,248,338	€ 86,552,748	€ 107,978,636	€ 197,187,845	€ 160,171,576	€ 131,190,014
Dealer Termination	2.7%	97%	€ 134,545,929	€ 135,243,293	€ 134,894,611	€ 90,147,076	€ 157,791,401	€ 161,890,542	€ 160,189,654	€ 136,638,021
Refusal to deal	15.2%	25%	€ 123,624,361	€ 149,180,321	€ 136,402,341	€ 132,143,014	€ 157,698,974	€ 307,918,156	€ 245,586,545	€ 200,292,242
Predatory pricing	5.4%	33%	€ 57,172,440	€ 67,075,504	€ 62,123,972	€ 57,320,247	€ 71,953,133	€ 130,163,826	€ 106,010,011	€ 86,881,632
Price discrimination	9.8%	100%	€ 502,299,426	€ 502,299,426	€ 502,299,426	€ 331,392,567	€ 587,752,855	€ 587,752,855	€ 587,752,855	€ 502,299,426
Tying/exclusive dealing	17.9%	100%	€ 844,698,858	€ 844,698,858	€ 844,698,858	€ 557,290,948	€ 988,402,814	€ 988,402,814	€ 988,402,814	€ 844,698,858
Other	9.8%	-								
Total	100%		€ 6,585,246,184	€ 6,842,111,503	€ 6,713,678,844	€ 5,064,430,467	€ 7,730,952,022	€ 9,396,150,734	€ 8,691,984,037	€ 7,355,842,142
Domestic enforcement	88%		€ 5,821,357,627	€ 6,048,426,569	€ 5,934,892,098	€ 4,476,956,533	€ 6,834,161,587	€ 8,306,197,249	€ 7,683,713,889	€ 6,502,564,454
TOTAL RECOVERY			**€ 12,406,603,811**	**€ 12,890,538,073**	**€ 12,648,570,942**	**€ 9,541,387,000**	**€ 14,565,113,609**	**€ 17,702,347,982**	**€ 16,375,697,926**	**€ 13,858,406,596**

Table 25 – Estimated yearly recovery by type of plaintiff, double damages for cartels and cost allocation rule, plus prejudgment interest

Double damages for cartels, single for other cases, with			Plaintiff recovery				Cost for the defendant			
	% on total	% plaintiff wins	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs	Loser pays	One-way fee-shifting	Partial one-way fee-shifting	Each party bears its own costs
Horizontal price-fixing	31.2%	75%	€ 7,239,946,238	€ 7,532,323,115	€ 7,386,134,677	€ 5,778,061,852	€ 8,409,453,747	€ 10,438,722,965	€ 9,570,276,795	€ 8,117,076,870
Vertical price-fixing	8.0%	32%	€ 177,547,448	€ 203,828,999	€ 190,688,224	€ 179,093,422	€ 216,196,788	€ 390,543,418	€ 316,510,879	€ 256,392,102
Dealer Termination	2.7%	97%	€ 263,416,561	€ 264,624,191	€ 264,020,376	€ 186,530,743	€ 303,670,915	€ 311,682,099	€ 308,280,322	€ 267,039,452
Refusal to deal	15.2%	25%	€ 258,676,183	€ 302,931,627	€ 280,803,905	€ 273,427,998	€ 317,683,441	€ 611,265,327	€ 486,602,106	€ 391,442,514
Predatory pricing	5.4%	33%	€ 118,350,087	€ 135,499,296	€ 126,924,692	€ 118,606,046	€ 143,945,921	€ 257,710,388	€ 209,402,759	€ 169,797,713
Price discrimination	9.8%	100%	€ 981,672,322	€ 981,672,322	€ 981,672,322	€ 685,711,665	€ 1,129,652,651	€ 1,129,652,651	€ 1,129,652,651	€ 981,672,322
Tying/exclusive dealing	17.9%	100%	€ 1,650,842,997	€ 1,650,842,997	€ 1,650,842,997	€ 1,153,136,616	€ 1,899,696,188	€ 1,899,696,188	€ 1,899,696,188	€ 1,650,842,997
Other	9.8%	-								
Total	100%		€ 10,690,451,837	€ 11,071,722,548	€ 10,881,087,193	€ 8,374,568,340	€ 12,420,299,652	€ 15,039,273,035	€ 13,920,421,699	€ 11,834,263,971
Domestic enforcement	88%		€ 9,450,359,424	€ 9,787,402,733	€ 9,618,881,078	€ 7,403,118,413	€ 10,979,544,893	€ 13,294,717,363	€ 12,305,652,782	€ 10,461,489,350
TOTAL RECOVERY			**€ 20,140,811,261**	**€ 20,859,125,281**	**€ 20,499,968,271**	**€ 15,777,686,753**	**€ 23,399,844,545**	**€ 28,333,990,399**	**€ 26,226,074,482**	**€ 22,295,753,321**

6.2 Macroeconomic impact of more effective antitrust damages actions

In its 2005 Impact Assessment Guidelines, the Commission specifies that macroeconomic impacts may be considered when carrying out an impact assessment, subject to the principle of proportionate analysis. In particular, the Commission explains that "the effect on key macroeconomic aggregates such as economic growth, the unemployment rate and so on, will often be rather small, and need not be considered in much detail in the analysis. However, in some instances a proposal may have impacts that are discernable at the macroeconomic level or impacts at the microeconomic level might accumulate to an impact at the macroeconomic level", including in particular "economic growth and its links with investment in human and physical capital, labour market participation, unemployment, the functioning of product and capital markets"; and "price levels and stability and their links to aggregate demand and supply, production costs, etc."

In the case of enhanced private antitrust enforcement, the magnitude of potential macroeconomic impact is likely to be significant, although very difficult to quantify. In sections 1 and 2.1 above, we have illustrated the currently available evidence on the contribution of antitrust enforcement to social welfare, growth, productivity and innovation. In line with the approach adopted in the previous sections of this Report, we consider a scenario in which private antitrust enforcement is enhanced compared to today's level, and resembles, with some important changes, other legal systems in which private enforcement is more widespread. This exercise is carried out without reference to the actual measures that will be adopted to enhance private enforcement in European member states; some of these measures will be analysed in detail in Part II of this Report.

The deterrence effect of enhanced private enforcement would have to be analysed separately for different types of infringements. In this respect, the following effects may be considered:

- In line with our findings in the previous sections, *enhanced private enforcement would exert a positive impact on the detection rate of cartels*, and consequently on deterrence. This effect would mostly be felt at the margin, as deterrence would remain suboptimal given the rather low detection rate estimated by available studies in the economic literature. Based on our findings in the previous sections, we can infer that the deterrence effect for potential cartelists would increase significantly, as the ratio between the expected liability and the overcharge would reach 39.7% in our intermediate scenario, from the current 5.8%. In this respect, Europe will broadly align with the US, where the estimated liability/overcharge ratio – based on Connor (2007) – is 37.1%.

- Enhanced private enforcement *may deter other types of infringements to a larger extent*, as the detection rate for these conducts is assumed to be higher, and prospective infringers would now face the prospect of having to compensate victims of antitrust injury for the loss sustained. This would lead, under rather restrictive assumptions, to an almost optimal incentive scheme for the potential infringer, once public and private enforcement are jointly considered. In particular, the loss sustained by plaintiffs is often a subset of the social harm imposed by anticompetitive conduct, due to problems in proving causation for certain types of victims. Moreover, as most cases settle before trial, the amount compensated would normally be lower than the actual loss sustained. It is therefore important to enact measures that strongly encourage plaintiffs in non-cartel cases to sue for damages when their case is meritorious. This also leads to a different treatment of cartel and non-cartel cases in the next sections of this Report.

Overall, if we consider the figure provided by Jonathan Baker (2005) as reasonable for a system in which private enforcement substantially complements public enforcement such as the US, we could tentatively estimate that, with the effect of enhanced private enforcement, the enforcement of antitrust laws in Europe with public and private enforcement could bring about *yearly social benefits as high as 1% of GDP or €117 billion*.

But how much of these impacts would be due to private enforcement? In the US, it can be fairly stated that most of the deterrent effect of antitrust laws, as well as the actual enforcement of such laws comes from private enforcement, to the extent that at least 90% of antitrust cases are filed by private attorneys generals seeking redress. Most of the operation of the antitrust system in the US is left to private litigation. We do not deem it likely that a similar scenario develops also in Europe in the next few years. In legal systems that have a consolidated private enforcement tradition, such as Australia, the ratio of private to public enforcement cases is much lower than in the US, and averaged 1.44 in the period from 1990 to 1999. To be sure, in our stylised "frontier" of enhanced private enforcement in Europe, private cases would gradually outnumber public proceedings. In this scenario, the contribution of antitrust private enforcement to social welfare would certainly be substantial[298].

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[298] As recalled by Stelzer (2006), "some 80% of court decisions establishing important principles in the competition policy area have resulted from private actions". A possible way of calculating the relative contribution of private enforcement relative public enforcement to economic growth is to look at the relative number of cases that the two pillars would exhibit. As regards public enforcement, available statistics indicate that in 2006 21 cases were started by the Commission and 144 by NCAs. Of these cases, in 64 the European Competition Network reported that a final decision was envisaged. If we assume that private enforcement case will outnumber public enforcement cases as they did in jurisdictions with more effective private enforcement, such as Australia and the US, the number of yearly private damages actions may

6.3 Summary of findings

In this Part I of our Report, we have simulated the potential impact of more effective private antitrust damages actions in Europe, based on available data from jurisdictions where private antitrust litigation is more widespread. Given the comparative nature of the exercise, and the many different features of the legal systems considered as reference for our analysis, it bear repeating that our findings are to be considered only as an approximation of the potential impact of more effective private antitrust damages actions in Europe. As the main reference for our analysis is the US legal system, it can also be observed that our analysis is aimed at identifying a "frontier" for potential claimants' recovery and associated costs in Europe in the years to come, under the assumption that private antitrust damages actions develop significantly.

Our main findings can be summarised as follows.

Main findings – Part I

Distribution of cases

- In a system with more effective private antitrust enforcement, based on assumptions derived from the data reported in the US Georgetown study, horizontal price fixing cases would represent 31.2% of the total in number, but would account for 59.6% of damages awards. Refusal to deal cases would represent 15.2% of total cases, but account for only 4% of total damage awards. Vertical price fixing and dealer termination would account for 3% of total damage recovery, whereas predatory pricing only 2%. Price discrimination would represent 11% of total damage recovery, and tying and exclusive dealing 18%.

Corrective justice – cartel cases

- The estimated yearly welfare impact of EU-wide cartels is in the range between €13.4 billion and €36.6 billion, *i.e.* between 0.12% and 0.33% of EU GDP in 2006 (see Table 8 above).
- The estimated overall impact of EU-wide and domestic cartels falls in the range between €25 billion and €69 billion, which amount to 0.23% and 0.62% of GDP, respectively (see Table 10).

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be five (Australia) to ten (US) times higher than public cases, leading to a number of cases in the range between 865 and 1,650.

- If treble damages are available without prejudgment interest – or, as an approximation, double damages are available with prejudgment interest – private damages actions in cartel cases would allow for recovery of up to €11 billion, or 88.2% of the total loss from cartels (seller-buyer transfer plus lost customer surplus).
- If double damages are available without prejudgment interest – or, as an approximation, single damages are available with prejudgment interest – private enforcement would allow for recovery of up to €7.4 billion, or 54.8% of the total loss from cartels (seller-buyer transfer plus lost customer surplus).
- If single damages are available without prejudgment interest, private enforcement would allow for recovery of up to €3.7 billion, or 27.4% of the total loss from cartels.

Corrective justice – all cases

- Under reasonable assumptions (*e.g.*, a detection rate of cartels of 20%), if double damages with no prejudgment interest (to be considered as broadly comparable to single damages plus prejudgment interest) are available, the yearly damage recovery could reach €17.3 billion.
- If treble damages without prejudgment interest (or double damages with prejudgment interest) were awarded, the yearly damage recovery could reach €25.7 billion. This would amount to 0.23% of EU GDP.
- If double damages plus prejudgment interest were introduced only for cartel cases, whereas single damages plus prejudgment interest are awarded in all other cases, economic actors suffering antitrust injury would be able to recover up to €20.9 billion Euros yearly. This would amount to 0.19% of EU GDP.

Deterrence

- The impact on deterrence is significant at the margin, although firms would still have an incentive to form cartels and engage in other anticompetitive conduct. Prospective infringers may face an expected liability of up to €29.4 billion yearly (including the opponents' legal fees), or 0.26% of EU GDP in 2006.

Cost of non-action

- If private antitrust damages actions do not become more effective in the years to come, foregone benefits for victims of antitrust infringement would range between €5.7 billion and €23.3 billion.

Costs

- Expected costs are significant, but never offset the corrective justice impact of enhanced private antitrust enforcement. Lawyers' fees and court fees, which represent by far the largest portion of costs, would amount to approximately 15%-20% of damage recovery.
- The availability of one-way fee-shifting puts the plaintiff in a more favourable condition, as she would be shielded from the risk of having to pay the defendant's legal expenses if her claim is unsuccessful.

Upper bound scenario

- In our upper bound scenario, *i.e.* under the least conservative assumptions, economic actors suffering antitrust injury would recover up to 35 billion Euros yearly, net of legal expenses, which would amount to 0.3% of EU GDP in 2006. Prospective infringers may face an expected cost of up to €46.8 billion yearly (including the opponents' legal fees), or 0.42% of EU GDP in 2006. Expected legal fees would fall in the range of €2.4 to €5.9 billion per party in our simulation, and would never offset the corrective justice impact of enhanced private enforcement.

Macroeconomic effects

- Estimates on the contribution of enhanced antitrust enforcement on productivity and innovation are very difficult to draw. In general, we can assume a positive and significant impact, although the magnitude of such impact would heavily depend on the actual measures that are undertaken to encourage private damages actions in Europe.
- Overall, more effective enforcement of antitrust laws in Europe (with public and private enforcement) could bring about yearly social benefits as high as 1% of GDP, or €117 billion in 2006.
- The expected contribution of private antitrust damages actions to this impact is substantial. With effective private enforcement, we expect private damages actions in Europe to significantly outnumber public enforcement cases, reaching, under reasonable assumptions, several hundred cases per year in the long run.

These findings will be then refined in Part III of this Report, where we analyse a number of scenarios for private antitrust enforcement in Europe. In particular, some of the potential impact of enhanced private enforcement – *i.e.* the impact on the internal market, or bringing competition closer to EU citizens – can be assessed only by looking at the specific legal changes introduced. For example, a Regulation or a Directive harmonising some of the procedural rules that

currently diverge noticeably in Europe – *e.g.* limitation periods, or rules on access to evidence – would exert a significant impact on the internal market by levelling the playing field; likewise, rules on passing-on and group litigation can determine whether competition policy would be brought closer to European citizens.

PART II

ASSESSMENT OF SPECIFIC ISSUES

PART II: ASSESSMENT OF SPECIFIC ISSUES

In this Part of the Report, we draw on the main findings of our preliminary welfare analysis, and assess possible arrangements and legal changes that could be introduced in EU member states in order to facilitate antitrust damages actions, and in turn achieve a positive impact on both the goal of deterring anticompetitive conduct and achieving greater compensation of private plaintiffs having suffered antitrust injury.

We assess, in particular, seven different aspects of private antitrust enforcement. Section 1, on the costs and rewards of antitrust damages actions, deals with the role of fee shifting, legal costs and damage multiples in encouraging private damages actions and, in turn, deterrence and corrective justice. Section 2 analyses available options on group litigation, ranging from opt-out and opt-in collective actions to representative actions and joinder of claims. Section 3 analyses the potential impact of introducing different rules for access to evidence, including discovery and disclosure rules. Section 4 tackles the issue of different methods to calculate damages and their impact on the effectiveness and efficiency of private antitrust enforcement. Section 5, then, addresses the specific issue of how defensive and offensive passing-on should be treated in antitrust damages actions. Section 6 assesses available options on the specific issue of the interaction between leniency programmes and private enforcement, and in particular on the merit of removing joint liability for leniency applicants when facing damages actions. Finally, Section 7 discusses the most appropriate options as regards the harmonisation of limitation periods for both stand-alone and follow-on damages actions.

In assessing the available alternatives for each of the options, we follow the Commission's Impact Assessment Guidelines in several respects. In particular, each of the alternatives is evaluated with specific reference to the "zero" or "do nothing" scenario, in order to assess the incremental impact of available alternatives on the current state of private enforcement. Secondly, we provide a separate assessment of administrative burdens, where appropriate, as recommended by Annex 10 of the Commission Guidelines, added in March 2006.

Furthermore, we assess each issue by means of a homogeneous theoretical framework, which allows us to assess the impact of most feasible and effective "scenarios" or "bundles of options", in Part III of this Report. The theoretical framework includes the identification of standardised headings of both benefits and costs connected to each of the alternatives.

In particular, we define the following benefits:

- *Impact on deterrence*. We consider this impact to be maximised when the best possible level of deterrence is achieved – thus, neither under- no over-deterrence emerges from the implementation of a given option. In most

cases, we further break down this heading into deterrence achieved due to superior information available to private plaintiffs; due to increased likelihood that a legal action is initiated; and as a result of increased prospective penalties for would-be infringers[299].

- *Impact on corrective justice*. We consider this goal to be fully achieved whenever private plaintiffs are granted *restitutio in integrum*, and accordingly neither over- nor under-compensation are likely to be observed. In this respect, we further distinguish between (i) increased number of compensated victims; and (ii) degree to which compensation is aligned with actual harm.
- *Impact on the internal market*. This heading includes potential benefits accruing from the implementation of a given option as regards the elimination of disparities in antitrust private enforcement in the member states, and the creation of a level playing field between national jurisdictions as regards the possibility for private plaintiffs to seek compensation in national courts. We also consider the benefits accruing from the reduction of legal uncertainty, which can constitute a barrier for companies wishing to engage in cross-border trade. To the contrary, this heading does not include macroeconomic impacts, such as competitiveness, growth and jobs. These impacts will be dealt with more specifically in Part III of this Report.

Likewise, we identify the following cost items:

- *Litigation costs*. This broad category of costs includes the cost for litigants when the case is brought to court; settlement costs; and the enforcement cost for courts and NCAs. All impacts of procedural rules or any other option on the incentive to spend resources in litigation, on the incentive to litigate the case or on the procedural requirements needed to start a case are included under this heading.
- *Administrative burdens*. We define these burdens rather narrowly, in line with the European Commission's definition in the Impact Assessment Guidelines.[300] Accordingly, we include in this category only "costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or

[299] We distinguish between increased information available to the plaintiff and the likelihood that an action is ultimately brought for a practical reason. In some cases, superior information increases detection absent procedural rules that encourage plaintiffs to sue; in other cases, the information of plaintiffs being constant, the introduction of a specific policy option (*e.g.* fee-shifting, broader disclosure, lower thresholds for fact-pleading, the availability of group litigation, extended limitation periods, exclusion of the passing-on defence, etc.) may lead the plaintiff to decide to initiate a lawsuit. This way, we can identify more accurately the reason why deterrence increases.

[300] See above, Part I, Section 2.3.

production, either to public authorities or to private parties." As a result, trial costs and other enforcement costs that do not depend on a specific information obligation included in the law will not be considered as administrative burdens, and are categorized as enforcement costs (in the broader "litigation costs" heading illustrated above). Furthermore, we consider administrative burdens as "net costs", *i.e.* as not including administrative activities that would be carried out anyway even absent a legal prescription (so-called "Business-As-Usual" or BAU costs).

- *Error costs*. In this category we include the costs related to the likelihood that courts issue a mistaken decision. Thus, this heading covers mostly the likelihood of type I and type II error costs, but includes neither errors in the quantification of damages (included as undercompensation in "impact on corrective justice" above); nor errors due to extortion of settlements by plaintiffs bringing frivolous suits (included as over-deterrence in "impact on deterrence" above).
- *Harmonisation costs*. These are costs related to the existing situation in member states, and the need to introduce rules that would require high adaptation costs in national jurisdictions. Such costs are rather high, for example, whenever an option considered would run counter to established principles or legal rules in a large number of member states. At the same time, these costs are often one-off costs, to be compared with benefits that may emerge over a longer time span. Even more importantly, these costs can be assessed only qualitatively, if not for certain subset of costs that can be quantified/monetised (*e.g.* need for training of judges).

In this Report we perform a qualitative assessment of the options, which results in summary tables at the end of each section. For each heading, we assess the available options by attributing scores in the range from "0" to "5", whereas "0" means that the impact is lowest compared to *status quo*, and "5" that the impact is highest. It is worth noting, at this stage, that the impacts are not weighed – *e.g.* a "5" score for error costs is not assumed as having the same impact on overall costs of a "5" on harmonisation costs. Likewise, a "5" score for deterrence is not assumed as having the same impact on the benefits compared to a "5" on corrective justice. Accordingly, our scores only provide a relative ranking of options and a measure of the "intensity" with which certain effects would materialise under each of the options. An assessment of the likely impacts of different scenarios is then provided in Part III of this Report.

1 Costs and rewards of antitrust damages actions

In this section, we assess possible options that might strike the balance between the need to facilitate private damages actions for victims of antitrust infringement, and the need to avoid unmeritorious claims. After having analysed the *ex ante* perspective of the would-be wrongdoer in the previous part of this Report, here we complete the picture by analysing the incentive schemes of the would-be plaintiff and, where appropriate, her lawyer. Important elements to be taken into account are thus the plaintiff's private incentive to sue for damages; the lawyer's effort function; and the socially optimal incentive to use the legal system.

There are many ways in which claims can be facilitated. These include:

(i) making legal actions cheaper for the plaintiffs, *e.g.* by introducing one-way shifting of legal expenses, or by allowing contingency fees, or by developing private or public funding instruments;

(ii) increasing the prospective reward for plaintiffs, *e.g.* by multiplying damages;

(iii) making evidence more easily available for plaintiffs at the pre-trial stage;

(iv) allowing claims to be brought on a representative or collective basis;

(v) facilitating follow-on actions by establishing previous public decisions as *prima facie* evidence in favour of the plaintiff.

In this section, we deal mostly with the first two means of encouraging private damages actions. Section 1.1 below analyses the privately and the socially optimal incentives to sue, by considering a one-stage and a two-stage litigation model. Section 1.2. illustrates the effect of the different fee allocation schemes used in various jurisdictions, including EU member states and the US. Section 1.3 departs from the analysis of options that reduce the cost of filing suit, and describes the impact of damage multiples and damage decoupling on the incentive to sue. The likely consequences of fee allocation rules and damage multiples on the incentive to file nuisance suits are addressed in Section 1.4. Section 1.5. then contains a welfare assessment of the alternative options available to facilitate meritorious antitrust damages actions. We then introduce a number of refinements, such as differentiating by type of plaintiff, introducing conditional or contingent fees, and providing private or public funding of legal actions brought by plaintiffs with limited financial resources.

1.1 The plaintiff's incentive to sue: a simple model

As already recalled in Part I of this Report, the plaintiff's incentive to sue can be framed as the result of a cost-benefit comparison, or – according to more recent economic literature – as an investment decision.[301] Accordingly, such a decision is the result of a rational initiative undertaken by individuals or companies seeking a positive payoff.[302] In this section, we introduce a very simple model of incentives to sue, which we will refine in the next sections.

Assume that the prospective costs for a plaintiff are the opportunity cost of time spent in litigation (OC_t) or settlement (OC_s), costs of access to courts (AC) and – depending on the fee allocation rule chosen – legal costs for litigation (LC_t) and settlement (LC_s). Expected rewards are the damages claimed (D), times the probability of winning at trial (w), and the expected settlement amount (S), times the probability to settle the claim before trial ($1 - p$).[303] The plaintiff will then sue whenever

(1) $$p[wD - (OC_t + LC_t + AC)] + (1 - p)[S - (OC_s + LC_s)] > 0$$

where $OC_s < OC_t$; $LC_s < LC_t$; and $S < D$.[304] In other words, the plaintiff's net expected reward from filing suit has two main components: the reward from settlement and the reward from trial. The relative weight of these two components, of course, depends on the (perceived) likelihood of settlement and trial.

Based on the formula above, we can consider the impact that different procedural rules or damage multiples can exert on the plaintiff's incentive to sue. For example:

- Multiple damages increase the incentive to sue, as it increases D.

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[301] See Cornell (1990).

[302] Several authors have contributed to the development of this stream of literature, starting with Landes (1971). The basic model was then refined by Gould (1973), Posner (1973) and Shavell (1982). In these papers, plaintiffs decide whether to sue or not, with no intermediate possibilities along the way. As a result, plaintiffs will observe their net expected payoff from initiating a damages action: if the net discounted cash flow from such an endeavour is positive, they will decide to file suit.

[303] The expected reward can also be different from the damage award. For example, it could be a settlement that takes place at some time prior to the trial, or include an increase in the plaintiff's business reputation.

[304] We assume that both the opportunity cost of litigation and the legal fees paid for litigating the case are greater than in the case of settlement. Consideration of time is also important, as the legal fees are to be paid upfront, whereas damages are awarded after the case has been adjudicated or settled.

- A reversal of the burden of proof in favour of the plaintiff increases the incentives to sue, alongside with w.
- A one-way fee-shifting rule increases incentives to sue, as it removes LC_t and AC from the equation.
- All the rules that increase the probability of victory for the plaintiff (w) or increase the prospective cost of the defendant, in turn, have the effect of increasing the probability that the case will settle (1 – p), and also the settlement amount (S).
- All means of funding private litigation increase the probability that the plaintiff will sue, of course, as they would reduce or eliminate LC_t and AC.

The plaintiff's decision to sue depends *in primis* on her subjective perception of p, w and S. With imperfect information, the following cases may arise:

- The plaintiff overestimates the probability of winning at trial (w). For example, if the plaintiff incorrectly interprets the defendant's conduct, she may expect the judge to award damages; however, especially in cases where a rule of reason applies, the judge may find redeeming efficiencies and decide in favour of the defendant;
- The plaintiff mistakenly estimates the probability of settling the case (1 - p). This can occur, for example, whenever the plaintiff expects the defendant to agree on the likelihood of plaintiff victory; whereas in reality, the defendant expects a different outcome – *i.e.*, the parties are both optimistic on the trial outcome.

Accordingly, the defendant's expected reaction is important for the plaintiff's decision. If the defendant signals her nature of "tough negotiator", the plaintiff may overestimate p, and may refrain from suing in order to avoid a costly and lengthy litigation.

1.2 The effect of fee shifting rules on corrective justice and deterrence

The law and economics literature has extensively explored the impact of different fee allocation schemes on the incentives to sue. Important contributions in the literature have been provided by Hughes and Snyder (1995, 1998), Shavell (1982), Braeutingam *et al.* (1984), Reinengaum and Wilde (1986), Katz (1990), Cornell (1990), Kaplow (1993), Bebchuk (1996), Polinsky and Rubinfeld (1996), Spier (1997), Hylton (2002) and Wagener (2003). The most

relevant rules analysed in the literature are the "each party bears her own cost" rule, the "loser-pays" rule, one-way fee-shifting, and offer-of-judgment rules[305].

However, there seems to be a wide disagreement on the impact that fee allocation schemes exert on various aspects of private antitrust enforcement, including the probability of settlement, the volume of litigation, the incentives to reach a socially optimal level of litigation, and incentives to sue. To quote Avery Katz (2000),

> *"the current state of economic knowledge does not enable us to reliably predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate. The reason for this agnostic conclusion is straightforward. Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place ... The combination of all these external effects are too complicated to be remedied by a simple rule of "loser-pays". Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others."*

In what follows, we summarise the main results of the theoretical and empirical literature on the relative merit of alternative fee allocation rules as regards corrective justice, deterrence, and incentives to sue and settle. Besides the general paucity of relevant empirical literature in this field – a exception being the study by Hughes and Snyder (1990, 1995) on Florida's natural experiment with the "loser-pays" (there, termed "English") rule in medical malpractice cases – we also need to take into account that fee allocation rules cannot be analysed in isolation, as their impact depends both on other procedural rules, as well as on even less controllable factors, such as cultural attitude towards litigation and other country-specific substantive differences between jurisdictions.[306]

The Ashurst Report (2004) revealed that in all Member States legal costs have to be paid upfront, and in all but two Member States the loser-pays rule applies – *i.e.*, that the loser-pays all or a substantial amount of the legal costs which may

[305] Mandatory one-way fee-shifting implies that the losing claimant does not have to pay the defendant's legal expenses. With offer-of judgment rules, the defendant can make a settlement offer: if the plaintiff refuses, she will be liable to pay the defendant's expenses at the end of trial whenever the final damage award is inferior to the initial settlement offer.

[306] For almost exhaustive surveys of the empirical literature, see Kritzer (2002) and Baye, Kovenock and De Vries (2005). For example, Casagrande and Spallone (2003) find that the Italian partial fee-shifting system would be most suitable to encouraging pre-trial settlement than the "each party bears her own cost" one, but the degree of pre-trial negotiation appears to be extremely lower in Italy due to "different social and cultural backgrounds, and/or the relative cost for the counterparts of settling a litigation versus facing a trial".

include the fees of experts.[307] According to the law and economics literature, moving from the "each party bears her own cost" to the loser-pays rule has a mixed effect on the plaintiff's incentive to sue and on overall welfare. In particular, the following effects are observed or predicted.

- *The loser-pays rule increases the parties' spending in litigation* (compared to the "each party bears own costs"). This is due to two main reasons: first, (two-way) fee-shifting increases the stakes of the case by making legal expenditures part of the potential damages.[308] Second, it lowers the expected marginal cost of legal expenditure, making litigation investment more attractive. Investment will increase the more optimistic are the parties on the outcome of trial.[309] To the contrary, if the probability of a plaintiff verdict is very high, and both parties agree on this, then the defendant will have a very low incentive to invest in litigation, whereas the plaintiff will perceive its litigation costs as virtually nil.[310] Braeutigam *et al.* (1984) show that, in any case, under Nash equilibrium the sum of the parties' litigation expenditure increases under a loser-pays rule.[311] At the same time, however, the rule acts as a disincentive for plaintiffs, and may also reduce the number of actions that are undertaken by victims.
- *The loser-pays rule encourages in particular small-stakes, high-probability suits – i.e.*, cases in which the plaintiffs perceives a high probability of victory, and the damage claim is not high – while *the "each party bears her own cost" rule encourages high stakes, low-probability suits – i.e.*, cases in which the plaintiffs perceives a low probability of victory, and the damage claim is high.[312]
- Likewise, *the "each party bears her own cost" rule encourages defendants to invest in litigation when the stakes are high and litigation costs are low*, while the *loser-pays rule encourages high-probability defences in high-cost, low-stakes cases*.[313]

[307] In reality, the "loser-pays" rule (also called "English" or "British" in the literature) is nowhere perfectly applied (not even in England).

[308] Braeutigam *et al.* (1984), Katz (1987, 2000) and Spier (2005).

[309] For a technical explanation, see Katz (2000).

[310] In reality litigation costs are almost never fully compensated.

[311] Variants to the loser-pays are discussed by Katz (2000). "For example, under both English and US practice, indemnification is limited to reasonable expenditures. Similarly, some recent US proposals provide that a losing party need not pay any indemnification in excess of his or her own litigation costs. Both of these variations reduce the private benefits of legal expenditure relative to the pure loser-pays; and as Hughes and Woglom (1996) show, the latter actually operates as a tax on the weaker party's expenditure, since increases in his spending raise the cap on the indemnification potentially payable to his opponent."

[312] This result is mostly due to Landes (1971), Gould (1973) and Shavell (1982).

[313] See Katz (2000), stating that "[b]ecause indemnification encourages parties to litigate their disputes more intensively, it increases the expected cost of bringing and defending suits *ex ante*. This will deter parties on the margin of litigation from pursuing their cases, whether they are on the margin because of low stakes, high cost, or low probability. This effect is essentially

The loser-pays rule thus tends to increase the parties' expenditures which, when coupled with risk aversion, may encourage individuals with meritorious claims to abandon their actions or settle too early – an outcome that also leads to an under-supply of legal precedents.

- An empirically observed effect of the loser-pays rule is that cases selected for litigation exhibit a *greater probability of adjudication in the plaintiff's favour*[314]. Such arguments lend support to the frequently expressed view that the loser-pays rule is superior on grounds of corrective justice, since the claims and defences that it promotes are relatively meritorious ones - at least when viewed from an *ex ante* perspective. As Rosenberg and Shavell (1985) have shown, indemnification from legal expenses can help discourage certain frivolous or "strike" suits, by emboldening defendants to put forward costly defences against them[315].

As a result, moving from an "each party bears her own cost" to a loser-pays rule creates *a trade-off between greater litigation expenditures and the reduced likelihood of litigation*, with uncertain impacts on social welfare. As noted by Snyder and Hughes (1995), "the welfare effects depend on whether the additional expenditures at trial are socially productive (*i.e.*, whether they serve to reduce legal error [by the creation of precedent] and thereby improve the reliability and appropriateness of the verdicts obtained). If the greater expenditures serve their purposes, then the loser-pays rule should be viewed in a more favourable light."

The effects of the loser-pays rule on the probability of settlement are uncertain. According to both "optimism" and "Bayesian" models of settlement bargaining[316], the loser-pays rule discourages settlement whenever disputes regard the *an* of liability, but not the *quantum* of damages.[317] However, Hause (1989), Hersch (1990) and Hylton (1993) find that the loser-pays rule increases the probability of settlement as it increases parties' spending in litigation. In

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analogous to a tax on litigation; as both Bowles (1987) and Hause (1989) have observed, to the extent it is empirically significant it could outweigh the effects described above."

[314] Hughes and Snyder (1995).

[315] Assuming that the frivolous nature of the suit is common knowledge; as Katz (1990) argues, the loser-pays may do little to discourage strike suits that cannot be identified as such without a trial.

[316] For a definition of these models, see *supra,* Section I.5.1.1, note 246 and accompanying text.

[317] As recalled by Katz (2000), this depends on the fact that differences in risk aversion, time preference and different opinions on damage quantification are not affected by the fee allocation rule, whereas differences in private cost and in information relevant to liability are. As the loser-pays magnifies the difference between the reservation values of parties with favourable private information and high litigation costs on one hand, and parties with unfavourable information and low litigation costs on the other (typically, the defendant and the plaintiff, respectively), the parties will be led to toughen their overall bargaining positions, thus lowering the probability of settlement. See also Fournier and Zuehlke (1989).

their famous analysis of Florida's experiment with the loser-pays rule in medical malpractice cases, Hughes and Snyder (1995) also find that the loser-pays rule led to increased frequency of plaintiff success rates at trial, increased jury awards, and larger out-of-court settlements.[318] At the same time, the law and economics literature seems to converge on the conclusion that the loser-pays rule – and fee-shifting in general – can lead to settlement amounts closer to the initial damage claim, thus performing better than the "each party bears her own costs" in terms of final compensation.[319]

As regards the impact on deterrence, under the assumption that courts make no Type I or II errors, the loser-pays rule seems to perform better than the "each party bears her own costs" rule, as it increases the net expected cost from engaging in illegal conduct and encourages high-probability lawsuits.[320] At the same time, the loser-pays rule seems suitable to prevent over-deterrence, as tortfeasors are more shielded from frivolous suits due to the "better" selection of cases that are litigated. However, this result does not hold when courts incur legal errors: in this case, neither rule is first-best optimal.[321] Overall, some authors in the law and economics literature highlighted that fee-shifting is efficient in tort law whenever the degree of negligence of the tortfeasor does not affect the magnitude of the harm suffered by the plaintiff.[322] This is likely to be the case especially for cartel cases, which can be framed as the result of wilful infringement by private firms, not as an "accident" setting. The same can be said for many cases of defensive and offensive leveraging. Also for other types of antitrust infringement – such as refusal to deal, tying, predatory pricing, price discrimination, etc. –whether the defendant actually acted under gross negligence or simple negligence normally does not affect the magnitude of the harm.

In summary, there is a degree of uncertainty over the actual expected impact of different fee allocation schemes in terms of deterrence and corrective justice. In Europe, as already recalled, most member states adopt some form of partial fee-shifting rule, closer to the loser-pays than to the "each party bears her own cost" rule. This, in turn, means that private antitrust damages actions would, absent initiative at EU or national level, fall mostly under this fee allocation scheme.

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[318] These increases were significant not just statistically but in absolute terms; for instance, the average judgment in litigated cases increased from $25,190 in cases governed by the "each party bears her own cost" rule to $69,390 in cases governed by the loser-pays rule. These results appear to be driven by the case selection effects detailed in the first article.

[319] Cooter and Rubinfeld (1994), and Bebchuk and Chang (1996).

[320] Rose-Ackerman and Geistfeld (1987) and Polinsky and Rubinfeld (1988).

[321] P'ng (1987) and Polinsky and Shavell (1989).

[322] Hylton (1992)

Beyond this divergence in scholarly opinions, it can be fairly stated that a loser-pays scheme should lead to:

- better selection of cases,
- relatively low number of frivolous suits, and
- relatively high settlement amounts.

On the other hand:

- the loser-pays rule may discourage some plaintiffs from bringing lawsuits, especially for those types of antitrust infringements that exhibit a low plaintiff victory rate at trial.[323]
- Furthermore, a loser-pays rule would significantly increase lawyers' fees overall, as it increases on average the parties' spending in litigation.

The impact of a loser-pays rule – as well as other fee allocation schemes – on overall welfare remarkably depends on what other procedural rules are in force for private antitrust litigation. In particular, some authors have claimed that conditional/contingency fees and/or damage multiples can serve the deterrence objective more efficiently (*i.e.* at lower cost) than fee-shifting, mostly because they allegedly entail a lower increase of the parties' spending in litigation or settlement bargaining.[324]

1.2.1 One-way fee-shifting

In the Green Paper on damages actions for breach of EC antitrust rules, the European Commission observed that the most commonly applied fee allocation scheme – the loser-pays rule – exerts an ambiguous impact on incentives to sue, and may discourage damages actions in some circumstances, especially when the damages claimed are low, when the lawyers' fees are granted on the basis of the value of the claim, and when the outcome of the case cannot be assessed upfront[325]. Accordingly, the Commission proposes to consider an alternative option (n. 37 in the Green Paper), under which the losing claimant would be liable to pay the defendant's legal costs only if she acted in a manifestly unreasonable way. Such a rule, according to the Commission Staff Working Paper, "would work to protect claimants while at the same time working as a mechanism against unmeritorious litigation"[326]. Such a one-way fee-shifting rule would resemble the rule introduced in the US by Section 4 of the Clayton Act, which expressly provides that a successful plaintiff may recover "the cost

[323] See above, Part I of the study, and especially Table 21.

[324] See, *e.g.* Kaplow (1993) and Gravelle (1993).

[325] See Staff Working Paper, COM(2005) 672 final, 19.12.2005, §215-217.

[326] Id., at §220.

of the suit, including a reasonable attorney's fee"[327]. For this reason, the rule has been extensively discussed in the law and economics literature[328].

When compared with both the "each party bears her own costs" and loser-pays rules, one-way fee-shifting rules such as that introduced in the US Clayton Act for private antitrust litigation seems to possess some virtues[329].

On the one hand, *mandatory one-way fee-shifting certainly encourages plaintiffs to file suit*, be they high- or low-stake, with high or low probability, and with high or low expected litigation costs. In this respect, in a second-best world, and depending on many other circumstances and procedural rules, one-way fee-shifting is expected to significantly encourage litigation and settlement compared to the "each party bears her own cost" and the loser-pays rule, leading to:

- an increase in the number of cases filed,
- an increase in the net expected cost of trial for defendants, and accordingly
- a higher probability of settlement.

At the same time, *one-way fee-shifting does not provide for the "selection effect" observed under the loser-pays rule*: especially when lawyers are remunerated with contingency fees, since plaintiffs will have almost full insurance on litigation expenses, they will not select litigated cases according to the probability of winning[330]. One-way fee-shifting thus may create excessive incentives to file suit, reduce the average quality of litigated cases, and consequently create a risk of over-deterrence[331].

The impact of introducing a one-way fee-shifting rule for non-frivolous damages actions will be analysed below, in Section 1.6 the main impacts that can be identified in this respect are the following:

- *Greater number of legal actions*, as plaintiffs are more indemnified from legal expenses and thus have a greater incentive to sue.
- *(Potentially) greater corrective justice*: both the increase in the number of damages actions and the likely upward impact on settlement amounts can lead to more complete compensation of plaintiffs when compared to alternative fee allocation rules. The impact on corrective justice must

[327] 15 U.S.C. § 15(a)

[328] See, *e.g.*, Braeutingam *et al.* (1984), Reinengaum and Wilde (1986), Katz (1990), Cornell (1990), Kaplow (1993), Bebchuk (1996), Polinsky and Rubinfeld (1996), Spier (1997).

[329] Harold J. Krent (1993), *Explaining One Way Fee-Shifting*, 79 VA. L. REV. 2039, 2045-75.

[330] See, *i.a.*, Wagener (2003), and, for a partial discussion of these issues, Braetigaum *et al.* (1984), addressing the effect of moving from the "each party bears her own costs" rule to a loser-pays rule and to one-way shifting in favour of either the plaintiff and the defendant.

[331] As observed by Krent (1993), this would occur only in cases of strict liability, and to a limited extent.

however also be appraised with respect to the likelihood of frivolous suits, which we illustrate below.

- *Greater risk of frivolous suits*. Even if the one-way fee-shifting rule is subject to a court order, and thus to the appreciation of the merit of the plaintiff's lawsuit by the judge, this does not entirely eliminate the risk of frivolous suits. In particular, plaintiffs holding private information and having clear expectations on the defendant's behaviour may decide to file suits with negative expected value ("NEV" suits[332]) with the clear intention to successfully settle before trial or to secure some non-monetary reward (*e.g.*, negatively affecting a competitor's reputation, retaliating from a previous lawsuit, etc.). A typical case occurs when the plaintiff knows that her lawsuit would pave the way for follow-on cases, and expects the defendant to prefer a confidential settlement rather that a publicly litigated case.
- *Higher litigation and settlement costs*: here too, the stronger incentive to file suit would lead to an increase in litigation costs, including overall lawyers' fees, workload for courts, and opportunity cost of time spent in litigation by plaintiffs.
- *Harmonisation costs*. No member state currently adopts a one-way fee-shifting rule. Accordingly, imposing such a change at pan-European level would certainly impose adaptation costs, which would not arise if the loser-pays rule is maintained. However, some member states already adopt forms of partial cost-shifting depending on the circumstances of the case. This is the case for Germany, the UK, Finland and Italy, although in these countries normally cost shifting is partial and (with the exception of Germany) decided by the court *ex post*. Even in these countries, however nothing like a mandatory one-way fee-shifting rule exists.

Once again, a careful consideration of these and other cost headings is needed in order to assess whether the undoubted virtues of the one-way fee-shifting rules would be more-than-compensated by its related implementation and social costs. The relative magnitude of these effects would determine whether the move from two-way to one-way fee-shifting is likely to constitute an improvement in the welfare impact of private antitrust enforcement. In addition, it is important to point out that moving to one-way fee-shifting may be an effective means of achieving greater compensation and deterrence, but not the most cost-effective. In particular, damage multiples and contingency fees may be considered as either alternative or complementary to the adoption of such a fee allocation scheme.

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[332] For a definition of NEV suits, see *supra*, Section I.5.1.1 this Report. And Bebchuk, L. A. (1998), *Negative Expected Value Suits*, NBER Working Paper No. W6474.

1.2.2 A simple numerical example

A numerical, non-technical example may help understanding the differences between the "each party bears her own costs" rule, the loser-pays rule and one-way fee shifting. Recall our previous formula, where the plaintiffs initiates a legal action only when

(1) $$p[wD - (OC_t + LC_t + AC)] + (1 - p)[S - (OC_s + LC_s)] > 0$$

And assume that:

- the prospective damage award (D) is €500,000,
- the probability to settle ($1 - p$) is 80%,
- the probability to win at trial (w) is 50%,
- the settlement amount (S) is €300,000
- legal fees for litigation (LC_t) are €240,000
- legal fees for settlement (LC_s) are €100,000
- court fees (AC) equal €15,000
- the opportunity cost of effort devoted to litigation (OC_t) is €100,000
- the opportunity cost of effort devoted to settlement (OC_s) is €75,000

Then:

- under an "each party bears her own cost" rule, the plaintiff will decide not to file suit. The result of our formula above would indeed be negative (-€1,000). More in detail, the "settlement part" of the formula yields a positive value (+€20,000), but the "trial part" has a greater negative value (- € 21,000).
- However, under a loser-pays rule, where the plaintiff bears LC_t and AC only when she loses at trial (50% of 20% of the cases = 10% of the cases), the plaintiff will then sue. Here, the "settlement part" of the formula yields the same positive value (+€20,000), which more-than-compensates the "trial part" (- € 19,500).[333]

[333] With a loser-pays rule, our formula becomes $p[wD - [OC_t + (1 - w)(2LC_t + AC)] + (1 - p)[S - (OC_s + LC_s)] > 0$. The underlying assumption is that the defendant's legal costs are equal to the plaintiff's.

- Thirdly, under a one-way fee-shifting rule, the plaintiff will have a much greater incentive to sue. As a matter of fact, the formula above gives a positive result of (+€25,000).[334]

The difference between the incentives provided by the fee allocation schemes is even more visible if, in our example, we assume that the probability of settlement is only 50%. In this case, the incidence of the different fee allocation rules of course increases. If each party bears her own costs, the plaintiff would certainly refrain from suing, as her expected payoff is -€40,000. The same applies if the loser-pays, where the expected payoff is -€36,250. With one-way fee-shifting, the plaintiff is indemnified from legal expenses, as her payoff is always €25,000.

We can already identify cases in which plaintiffs will have an inefficient incentive to sue. For example, if the plaintiff believes she has 80% probability to settle the case, whereas the actual likelihood is 50%, she will sue even in cases where the correct expected payoff would be negative. Likewise, if the plaintiff underestimates her probability to win at trial, under our initial example she will not sue even under a loser-pays rule.[335]

A similar result is found if the plaintiff underestimates the expected settlement amount.[336] These are commonly termed "negative expected value" (NEV) suits – in particular, here the "settlement reward" is positive, the "trial reward" is negative, and the total expected payoff is negative. By definition, under the assumption that information is perfect, no NEV suit is ever successful. As a matter of fact, no defendant would ever accept to settle if she knows that the plaintiff does not have any incentive to litigate the case. However, under imperfect information, the plaintiff could signal her commitment to litigate the case if the defendant refuses to settle. If the signal is sent successfully, the plaintiff would be able to settle a case with negative expected payoff.[337]

This simple model can be refined by assuming that legal actions are multi-stage, and the plaintiff can settle or drop the case at different stages, with different payoffs.

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[334] With one-way fee-shifting, our formula becomes $p[wD - [OC_t + (1 - w)(LC_t + AC)] + (1 - p)[S - (OC_s + LC_s)] > 0$. Note also that the outcome of the formula is positive also when damages are doubled. With double damages and the "each party bears her own cost" rule, a plaintiff will sue: as a matter of fact, even ignoring the impact that double damages would exert on the prospective settlement amount, the formula above would yield a positive result (+ €49,000).

[335] Our formula in this case, with $w = 30\%$, yields a payoff of (- €1,000).

[336] Note that an identical result is reached also if the plaintiff is risk-averse.

[337] See Bebchuk (1997).

1.2.3 Multi-stage litigation with real options

The standard model in the economics literature views litigation as a one-stage game. In reality, the litigation process can be divided in different stages, and the same can be said for legal expenses.[338] This is important for a more precise description of the incentive to sue, as was recalled by Rosenberg and Shavell (1985), Cornell (1990), Bebchuk (1996, 1997) and Grundfest and Huang (1996, 2006). In this section, we assume, for simplicity, that there are two major steps to litigate a case: (i) disclosure; and (ii) adjudication.[339] The underlying assumption is that parties with imperfect information may file suit to access the disclosure stage, and then – depending on the outcome – adjust their expectations on the probability of winning at trial.

After the disclosure phase, the plaintiff can exercise three options:

- she can continue to trial;
- she can sell her entitlement to damages to the defendant by settling the case;
- she can drop the case.

Let us turn back to our initial numerical example, and assume that the plaintiff has a negative expected payoff from initiating the case. We already found that a significant probability of settling the case can increase incentives to sue. In addition, it can be also shown that, with a two-stage litigation process, plaintiffs can be led to initiate a case with overall negative expected payoff. If we assume that[340]:

- the damage claim is €400,000;
- the probability of "positive" disclosure is 50%[341];
- the fee allocation rule is the "each party bears her own costs" rule;
- the probability of winning at trial after a positive disclosure is 90%;
- the probability of winning at trial after a negative disclosure is 10%;
- Legal costs up to disclosure are €50,000, then to settle the case after disclosure the plaintiff must pay additional €50,000, and to proceed to litigating the case before the judge a total of €210,000.

Then, the plaintiff knows that: at the pre-disclosure stage, the expected payoff from fully litigating the case is (45% · €400,000 – €210,000) = - €30,000. Accordingly, the plaintiff would not initiate the case, nor would the defendant

[338] See, *e.g.*, Baxter (1980), noting this discrepancy in the standard theory of suit and settlement.

[339] In Cornell (1990), the stages of litigation are three: discovery, pre-trial manoeuvring and trial.

[340] For simplicity, we do not consider opportunity costs, court fees and the possibility of settlement.

[341] We define as cases of positive disclosure those cases in which evidence disclosed suggests the existence of infringement, tilting the litigation process in favour of the plaintiff.

accept settlement, knowing that her counterparty does not have an interest to proceed to court. However, the plaintiff has an incentive to proceed to the disclosure stage, as the expected cost of €50,000 grants her a possibility to either recover €190,000 (with a 45% probability), lose €210,000 (with a 5% probability), or drop the case (then losing legal expenses of €50,000).[342] Her expected reward if disclosure is positive becomes (€171,000 – €21,000) = €150,000.[343] Thus, investing in the first stage of litigation has a net expected value of €50,000.[344] This occurs since, if something "goes wrong" in the disclosure process, the plaintiff can always decide to exercise her option to drop the entitlement at an anticipated cost (*i.e.*, the legal expenses incurred up to that stage).

Note that the parties might anticipate the structure of the game, and may decide to settle both at the pre-disclosure and at the post-disclosure stage. In the pre-disclosure phase, the plaintiff would settle for any amount above €50,000, whereas in the post-disclosure phase, if discovery is favourable to the plaintiff, the latter would be available to settle the case for any amount above €150,000.

Figure 10 below shows the incentive to file suit under an "each party bears her own cost" rule and a two-stage litigation process.

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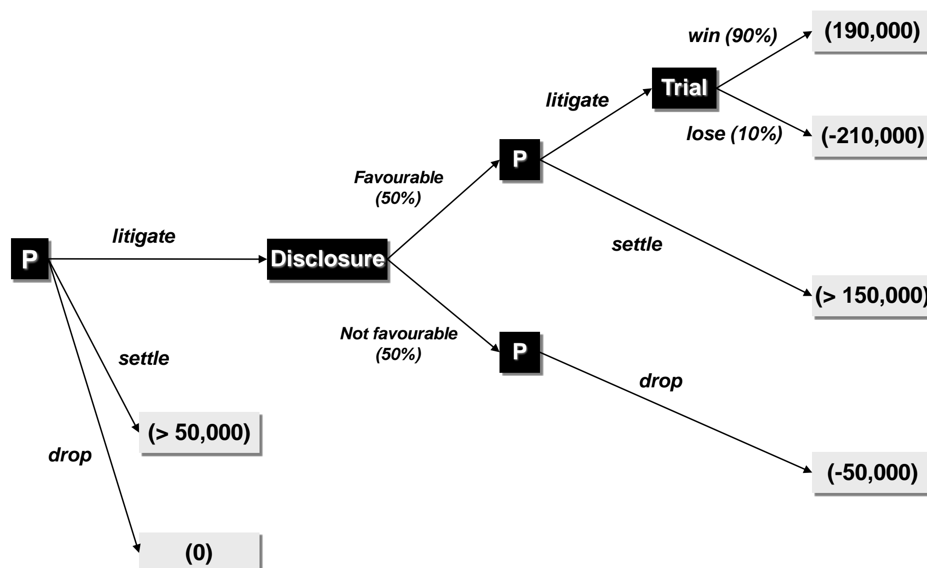
[342] €190,000 is the damage recovery (€400,000) minus expected legal costs (€210,000). Since the fee allocation rule is the "each party bears her own cost" rule, the party always bears her own costs.

[343] €171,000 is the expected recovery (€190,000 · 90%); (- €21,000) is the expected loss in case the plaintiffs proceeds to trial and loses, as she would have to pay €210,000 of legal expenses. This latter outcome occurs in 10% of the cases if the plaintiff proceeds to trial.

[344] This is because the plaintiff expects to win €190,000 in 45% of the cases (90% of 50%), to lose €210,000 in 5% of the cases (10% of 50%), and to drop the case, losing €50,000, in 50% of the cases. Hence, (€190,000*45% - €210,000*5% - €50,000*50%) = €50,000.

Figure 10 – Multi-stage litigation when each party bears own costs



In case the fee allocation rule is the loser-pays rule, the plaintiff knows that: at the pre-disclosure stage, the expected payoff from fully litigating the case is (45% · €400,000 – 55% · 420,000) = - €51,000. Accordingly, the plaintiff would not initiate the case, nor would the defendant accept settlement. However, the plaintiff has an even greater incentive to proceed to the disclosure stage, as the expected cost of €50,000 grants her a possibility to either recover €400,000 (with a 45% probability), lose €420,000 (with a 5% probability), or drop the case (without incurring further legal expenses).[345] Her payoff at that stage becomes (€180,000 – €21,000 – €25,000) = €134,000.[346] Thus, investing in the first stage of litigation has a positive expected value of €84,000.[347] The plaintiff's expected reward if disclosure is positive becomes (€360,000 – €42,000) = €318,000.[348] If the disclosure process leads to an unfavourable outcome, the plaintiff can always decide to drop her entitlement at an anticipated cost (legal expenses incurred up to that stage). In the pre-disclosure phase, the plaintiff would settle for any amount above €84,000, whereas in the post-disclosure phase, if disclosure is

[345] €190,000 is the damage recovery (€400,000) minus expected legal costs (€200,000).

[346] €171,000 is the expected recovery (€190,000 · 90%); (- €25,000) is the expected cost of dropping the case [50% · (-€50,000)], as the plaintiff would lose legal expenses incurred up to that stage.

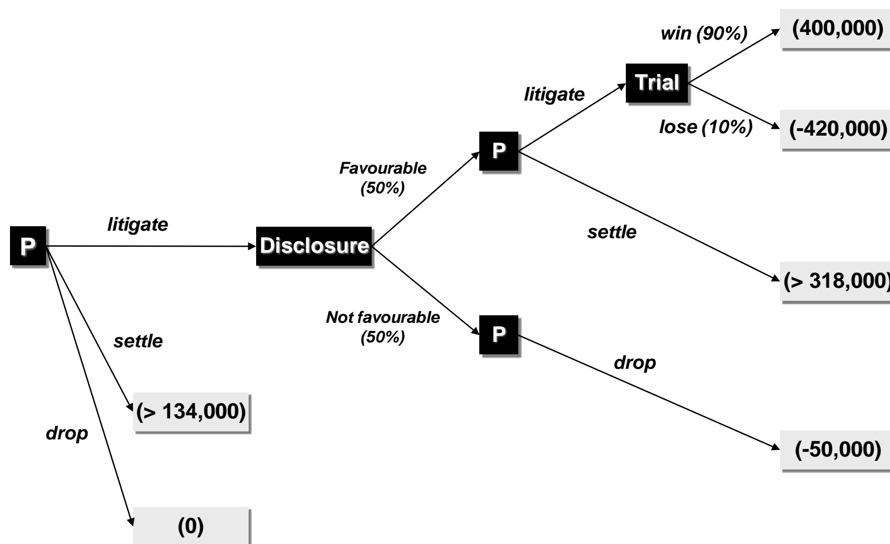
[347] This is the expected payoff of €144,000, minus legal expenses to "enter the game", *i.e.* €50,000.

[348] €360,000 is the expected recovery (€400,000 · 90%); (- €42,000) is the expected loss in case the plaintiffs proceeds to trial and loses, as she would have to pay €210,000 of legal expenses for herself and €210,000 for the defendant. This latter outcome occurs in 10% of the cases if the plaintiff proceeds to trial.

favourable to the plaintiff, the latter would be available to settle the case for any amount above €318,000.

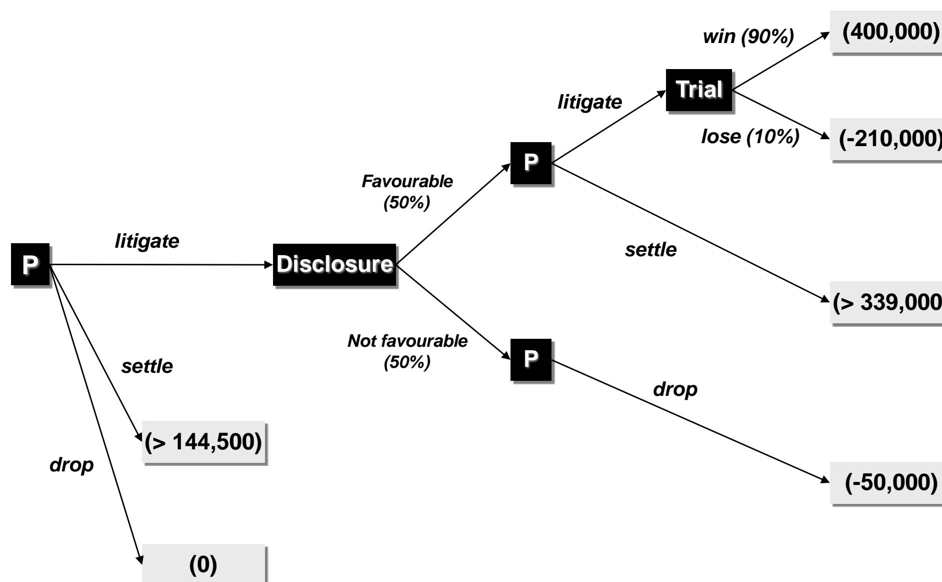
Figure 11 below shows the incentive to file suit under a loser-pays rule and a two-stage litigation process.

Figure 11 – Multi-stage litigation and the loser-pays rule



Finally, the same exercise can be replicated for the case of one-way fee-shifting, a procedural rule adopted in the US in order to encourage plaintiffs to initiate cases. Figure 12 below shows that the minimum settlement amounts for the plaintiffs increase to €314,000 at the pre-discovery stage, and to €339,000 at the post-discovery stage.

Figure 12 – Multi-stage litigation and one-way fee-shifting



Of course, our findings heavily depend on the initial assumptions made. In particular, we assumed that legal expenses are divisible, that a large amount of the expenses is incurred after discovery, that parties are risk-neutral and have the same beliefs on the distribution of probability of disclosure and trial outcomes, and that a favourable disclosure process increases substantially the probability of winning at trial. However, this example reveals more general aspects of litigation:

- First, when legal expenses are divisible, as the stages of litigation increase, plaintiff have a growing incentive to file a lawsuit, given that the options to drop litigation or settle the case at different stages increase.
- Secondly, moving from an "each party bears her own costs" rule to a loser-pays rule increases incentives to file suit, and such incentives are maximised with one-way fee-shifting[349]. For example, if the plaintiff expects to have only 50% likelihood of winning at trial after a successful disclosure, then she would not initiate any legal action under neither the "each party bears her own costs" rule nor under a loser-pays rule (payoffs from the initial investment would be -€30,000 in both cases); but she would still find it profitable to initiate a legal action under a one-way fee-shifting rule, as her payoff from the initial investment is positive (€22,500).
- Thirdly, the loser-pays rule will lead the plaintiff to settle for a higher amount compared to the "each party bears her own costs" rule. To clarify

[349] This is in line with our findings in Tables 23, 24 and 25 above.

this point, consider Figures 10 and 11 above. On the one hand, it is true that the loser-pays rule leads to an increase in the plaintiff's reservation rate when negotiating settlement (€84,000 instead of €50,000 in our example). At the same time, however, the defendant's maximum reservation value would change. As a matter of fact, the expected cost for the defendant is as high as €390,000 with the "each party bears her own costs" rule, and €369,000 with the loser-pays rule. If the parties settle at an early stage and divide the surplus form negotiation equally, then the plaintiff's payoff would be €167,500 under an "each party bears her own costs" rule, and €251,500 with the loser-pays rule. The same result holds in all circumstances. If the probability of winning at trial after a favourable disclosure is lower than 90% - say, 60% - then the plaintiff would be better-off with the "each party bears her own costs" rule, as she would be able to settle the claim for €107,500. Under the loser-pays rule, the cooperative early settlement outcome would not be greater than €128,500.

- Finally, a one-way fee-shifting rule can lead the parties to settle for an amount that is even closer to the initial damage claim, and always greater than the settlement amount under both the "each party bears her own costs" rule and a loser-pays rule. In our example, where the probability of winning at trial after favourable disclosure is 90%, the plaintiff would be able to settle at an early stage for as high as €262,000. If the probability of winning is 60%, then the settlement amount would be €170,000.

Our results still do not take into account of the possibility that a particular design of the litigation rules leads frivolous suits to increase. For example, one author recently analysed the effect of procedural rules on "discovery abuse".[350] We will address this issue in detail below, in Section 3. One result that emerges from our analysis is that, absent judicial control in the disclosure stage and with highly imperfect information of the defendant, plaintiffs would be able to file even NEV suits and extract positive settlement in many circumstances. Accordingly, a rule that introduces one-way fee-shifting is potentially conducive to frivolous suits: the plaintiff could always threaten to force the defendant to litigate the case and bear substantial legal costs, even if there is a very low probability of verdict in favour of the plaintiff. More generally, as described by Grundfest and Huang (2006), the existence of real options during the proceeding, such as the one illustrated above, can lead to a very interesting result, in that it transforms the risk aversion of the plaintiff into apparently risk-seeking behaviour, since the parties initiate actions that would not make economic sense absent multi-stage learning processes.

Hence, any one-way fee-shifting rules could be implemented with safeguards, such as:

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[350] Wagener (2003).

- the removal of one-way fee-shifting in case the judge finds that the plaintiff behaved unreasonably;
- rules that award fee-shifting only in case the plaintiff's case was frivolous or of very low merit: under these rules, if the defendant wins in a rout, the plaintiff would be called to compensate her for legal expenses; but in close cases, the plaintiff would bear only her own costs[351];
- the possibility of applying sanctions for the case of unreasonable plaintiff's behaviour;
- offer-of-judgment rules, where the defendant can make a settlement offer: if the plaintiff refuses, she will be liable to pay the defendant's expenses at the end of trial whenever the final damage award is inferior to the initial settlement offer[352].
- cases in which the judge may shift all or some costs depending on the circumstances of the case or on the specific conditions of the plaintiff (*e.g.* limited financial resources, pioneer cases etc.).

These latter rules will be analysed more in depth in section 1.7 below.

1.3 Punitive or multiple damages

An alternative way to facilitate the filing of antitrust damages actions would consist in allowing for the award of punitive damages. At first blush, using damage multiples appears as a viable solution to encourage risk averse and

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[351] Bebchuk and Chang (1996) describe rules such as Rule 11 in the US Federal Rules of Civil Procedure condition fee shifting on the winner's margin of victory. See also Katz (2000). In the case we describe, fee shifting is always granted if the plaintiff wins; but the plaintiff will be called to compensate the defendant's legal expenses only if the defendant wins in a rout. More recently, a similar result was found by Bourjade *et al.* (forthcoming).

[352] In the US, many exceptions have been introduced since the 1930s to the "each party bears her own cost" rule. The most famous provision is Rule 68 introduced in the Federal Rules of Civil Procedure in 1938, which provides for an offer-of-judgment rule. This rule can be used only by the defendant and was limited to the shifting of court costs, not attorney's fees. Cases such as the Supreme Court decision in *Marek v. Chesny* in 1985 spurred a hectic debate, which culminated in 1995, when the 104th Congress first introduced the *Common Sense Legal Reforms Act* of 1995 which required the application of the "loser-pays" rule in actions arising under state law but brought in federal courts under diversity jurisdiction. The proposed rule was later modified by the 1995 *Attorney Accountability Act* [H.R. 988, 104th Cong. § 2 (1995)] with a provision that allowed any party to make an offer of judgment to an opposing party. As reported by Sherman (1998), "If this offer of judgment were refused, and the ultimate judgment were not more favorable than the original offer, the offeree would have to pay the offeror's costs, including its attorneys' fees up to an amount equal to the offeree's attorneys' fees." Rule 68 has become law in at least one US state (Georgia, in 2006), with a provision that allows for a 25% flexibility between the initial offer of judgment and the final award.

reluctant plaintiffs to overcome the problem of significant upfront legal expenses and initiate a lawsuit.

The introduction of punitive or exemplary damages in the US and – more recently – in some EU jurisdictions (and under a narrow set of circumstances) is considered to serve both corrective justice and deterrence purposes. In the US, the award of treble damages has recently been defined as "the central feature of private antitrust remedies".[353] More in detail, according to several commentators, including Shavell (1987), Cooter (1989), and Landes and Stigler (1970), the main purpose of damage multiples is and remains that of deterring anticompetitive conduct. This rationale is very closely linked to the theory of "optimal deterrence", as outlined above, in Part I, Section 1.4.1, and implies that multiplying damage awards serves a primary purpose of providing would-be tortfeasors with optimal incentives to avoid imposing harm on society. Thus, if the probability of detection of illegal conduct is 1/3, then the optimal fine should equal the harm to society multiplied by three, so that the choice faced by the tortfeasor internalizes all the negative externalities the illegal conduct would impose on society.

Under this perspective, as recently observed, *i.a.*, by Crane (2006), "damages multipliers make sense when the unlawful conduct is difficult to detect and therefore the expected value of a violation is positive even if an award of damages would take away all of the profits from the violation. This is certainly true of hard-core price-fixing cartels that are concealed and difficult to detect. Indeed, trebling may be too low a multiplier number, given the rate of detection."

Punitive damages have been justified also for reasons other than deterrence, and sometimes also for types of antitrust infringements other than hard core cartels. As already recalled above, some commentators have argued that the award of multiple damages may be important in rule of reason cases, which are normally more complex and challenging for plaintiffs, as the prospect of a long litigation with an uncertain outcome could discourage many plaintiffs from bringing suit.[354] Also Polinsky and Shavell (2000), who mostly focus on the deterrence effect of damage measures, acknowledge that there is increased scope for punitive damages even when the conduct is likely to be detected, if litigation costs are high.

However, the award of multiple damages for non-cartel infringements cannot rely on the explanation put forward to multiplying damage awards in cartel cases. This depends on the following main reasons.

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[353] See Antitrust Modernization Commission, *Final Report and Recommendations*, 2007, at 243.

[354] See Lande (2006) and Klingsberg (1988).

- *The detection rate is higher.* These practices are not concealed, and as a result the probability of detection is much higher, as we explained in Part I of this Report. A potential objection to this statement might be that punitive damages can be justified on a deterrence basis even if the probability of detection is 1, whenever the damage award is not representative of the harm to society caused by the illegal conduct. This would be the case, for example: (i) when access to justice is limited to certain categories of economic actors having suffered antitrust injury, and is not easy for others for whatever reason[355]; (ii) when the damage award does not take into account the deadweight loss imposed on society or so-called "umbrella effects" from abuse of market power.[356] According to this view, awarding exemplary or punitive damages in these cases would still be justified for reasons linked to the need to provide tortfeasors with an optimal set of incentives - especially if the likelihood of settlement is taken into account.[357]
- *The risk of over-deterrence is far more substantial.* Most of these practices are subject to a rule of reason, and any risk of incurring in a Type I error raises more significant concerns than in the case of cartels, where over-deterrence is normally considered to be quite unlikely[358]. Over-deterrence for these types of infringements could result in chilling welfare-enhancing conduct.[359] Authoritative commentators such as Calkins (1986) and Kovacic (2004, 2007) have offered the hypothesis that U.S. courts in private antitrust cases have been imposing stricter standards for establishing liability, especially in unilateral conduct cases, to "offset perceived excesses in the system of

[355] This can occur, for example, when it is too difficult for victims (that are granted standing) to prove causation – as in the case of individuals or firms who reportedly did not buy a product because it was priced at a supracompetitive level; or in the case of suppliers harmed by the restriction of output in a downstream market – as in Eger and Weise (2007).

[356] See, *e.g.* Lande (2006).

[357] See, most recently, Leslie (2006), arguing that "[u]nderstanding the role of deadweight loss in many antitrust violations should counsel against detrebling antitrust damages. If violators pay only single damages, then they will almost definitely inflict more harm on consumers than they are being held responsible for. That results in a suboptimal fine because the optimal antitrust fine should include a measurement for the deadweight loss caused by the violation."

[358] As we explained in Part I of this Report, many authors have stressed that the damage level needed to obtain optimal deterrence for hard-core cartels is way above treble damages.

[359] See, *e.g.*, Areeda and Turner (1978), Crane (2006), arguing that "If the success of predation through bundled discounting depends on its observation by rivals, it is particularly senseless to justify the treble damages remedy as necessary because the bundled discounting may go undetected. At best, the treble damages remedy is unnecessary to deter exclusionary mixed bundling. At worst, it threatens to chill vigorous price competition by causing the gains from even lawful price discounting to be overshadowed by the prospect of an erroneous treble damages judgment in favor of a rent-seeking competitor."

mandatory treble damages". This would be the case, for example, in the US Supreme Court's decision to reject treble damages in *Trinko*.[360]

- *Sub-optimal deterrence, sub-optimal compensation.* Besides failing to reach optimal deterrence, awarding more than single damages for these types of conduct may also fail to reach optimal compensation. As a matter of fact, in jurisdictions where prejudgment interest is commonly awarded – as occurs in Europe at both national and EU level – the main compensation-based grounds for awarding more than single damages does not apply. In this respect, an accurate definition of (single) damage provides plaintiffs with adequate, full restitution.
- *Risk of frivolous suits.* A related argument against damage multiples for non-cartel cases is that such multiples may lead plaintiffs to seek profitable damage awards by filing frivolous suits, thus polluting the legal systems with an unwarranted degree of litigiousness. From the latter perspective, as already recalled above, there would be at least a need to de-treble damage awards for those infringements that are easily detected. To be sure, there are grounds for believing that *restitutio in integrum* is not always fully achieved with single damages, since – as we showed in Part I of this Report – most cases normally settle out of court, and legal expenses are often (at least to a certain extent) internalized by plaintiffs, regardless of the fee allocation rule.[361] Moreover, time lags between the injury suffered and the award – absent pre-judgment interest – can dilute the compensatory potential of the damages awarded. In this respect, Lande (2006) argued that "[i]f you examine antitrust's so-called 'treble' damages remedy carefully you will find that it really only amounts to approximately single damages. In part this is true because prejudgment interest is not awarded in antitrust cases." Lande (1993) calculated that the failure of the antitrust laws to provide for prejudgment interest reduces the treble damages multiplier down to a true multiplier between 1.25 and 1.66.

In summary, the award of more-than-single damages might serve deterrence and compensation purposes when the detection rate is low, the alleged conduct is subject to a *per se rule*, when pre-judgment interest is not granted, and when litigation costs are particularly high. At the same time, however, multiple damages carry significant risks when applied to other types of infringement.

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[360] Kovacic (2007) further notes: "I am attracted to the hypothesis that the U.S. courts since the early 1970s have retrenched substantive liability standards for abuse of dominance in order to counteract what judges believe to be excesses in the design of the mechanism for private enforcement. To assert, as I have, that judges perceive the U.S. system of private rights to be excessive does not mean that their perceptions are invariably correct or enjoy convincing empirical support."

[361] See, *e.g.*, Kritzer, *The English Rule*, 78 ABA Journal, November 1992, at 54-58, describing the problems in the practical implementation of two-way fee-shifting rules.

Finally, and more generally, introducing exemplary or punitive damages in Europe seems far from an easy task. The European Commission acknowledges, in the Staff Working Paper adopted together with the Green Paper on Damages Actions for breach of EC antitrust rules, that most member states still see multiple damages in competition cases as contrary to their public policy, as well as to the inherently compensatory nature of damage awards[362]. This certainly raises the harmonisation costs related to the adoption of such a proposal, currently envisaged in the Green Paper as option 16 and limited to horizontal cartels.

Moreover, the award of multiple damages in Europe is likely to be coupled with prejudgment interest, as the award of interest is the norm in European jurisdictions. As we observed in Part I of this Report, the award of double damages plus prejudgment interest may well lead to a final award that is higher than treble damages awarded in the US. The extent to which prejudgment interest increases the final award also depends on the date from which interest is calculated, as we will further explain below, in Section 4.

In any event, the merit of treble damages cannot be seen in isolation, disentangled from the other procedural features of US antitrust enforcement. For such reason, in the next section we look more closely at the relationship between damage multiples, fee allocation schemes and legal cost arrangements.

1.3.1 Damage multiples, fee and cost rules combined

The welfare impact of multiple damages must be seen in combination with different assumptions as regards fee allocation and arrangements as regards legal costs. From this standpoint, it can be easily inferred that damage multiples encourage plaintiffs to file suits, as the prospective rewards (*D*, in our previous examples) is higher than with single damages. However, depending on the fee allocation scheme, multiple damages may approximate or exceed full compensation. In our basic example illustrated above, at Section 1.1.1, one-way fee-shifting led the plaintiff to achieve almost full compensation of single damages: coupling multiple damages with under one-way fee-shifting is thus very likely to result in overcompensation of plaintiffs. This, in turn, may attract frivolous suits and chill welfare-enhancing conduct, leading to very undesirable welfare consequences at societal level. Such a combination would then be warranted only when the detection rate is very low, and would serve mostly deterrence purposes for hard-core antitrust violations.[363]

On the other hand, a loser-pays rule coupled with punitive damages may serve both compensatory and deterrence purposes, especially for high-cost cases,

[362] See Commission Staff Working Paper, §121.

[363] However, once we relax the assumption that one-way fee-shifting leads to full award of attorney's fees, our result may not hold anymore, of not to a full extent.

where litigation is expected to be lengthy and complex. Under the assumption that legal fees may account for up to 25% of the single damage award, and settlement under a loser-pays rule reduces the final award by 30%-40%, the plaintiff would be able to recover only approximately half of the initial damage claim through either settlement or litigation. The threat of frivolous suits could be mitigated by the loser-pays rule, which – as we already recalled – provides for more efficient selection of cases to be brought to court. Efficient contingency fee arrangements could, in addition, facilitate the role of lawyers as "gatekeepers" – *i.e.* the self-interest of lawyers would prove welfare-enhancing, as they would not take cases that exhibit a low probability of success[364]. Such a result would suggest that double damages could provide efficient incentives to initiate legal actions, whereas treble damages might prove over-deterrent in non-cartel cases.

A further issue that need to be taken into account is that of pre-judgment interest. As we already explained, the rationale for damage multiples in non-cartel cases is often linked to the unavailability of such heading of damage in the US. However, the award of pre-judgment interest is commonplace in Europe, and we see no reason why courts could not include pre-judgment interest in the computation of damages, with the *caveats* and techniques that will be exposed below, in Section 5.7, especially as regards the date of imposition of interest. Once this is taken into account, the need for damage multiples on the basis of the "complex, lengthy proceeding" argument becomes way less evident. To the contrary, the possibility of contingent or conditional fees could solve the problem by partially indemnifying plaintiffs from legal expenses. In addition, the award of interim damages - where possible – could provide plaintiffs with financial resources to pay their lawyers even before the case if finally adjudicated.

Finally, another finding in our analysis is that adopting the "each party bears her own costs" rule would significantly reduce the expected reward for plaintiffs. With an "each party bears her own costs" rule, treble damages may be justified both in terms of corrective justice and deterrence, and – as observed in Part I for the case of cartels – even treble damages may prove insufficient to deter hard-core anticompetitive conduct. In this respect, Kaplow (1993) argues that damage multipliers, such as treble damages, are cheaper than fee-shifting in achieving any given amount of deterrence. The reason is that damage multipliers provide incentives for private law enforcement to be undertaken by those plaintiffs whose litigation costs are lowest; fee shifting, in contrast, encourages plaintiffs to bring lawsuits without regard to their costs of litigation.

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[364] See Kritzer (1997). The role of gatekeeper played by lawyers under contingent fee agreements is limited by the information asymmetry between client and lawyer: this would lead lawyers to decide to settle the case inefficiently. See *supra*, note 281 and accompanying text.

In summary, we find strong evidence for multiplying damages in cartel cases, both on grounds of deterrence and corrective justice; the same cannot be said for non-cartel cases, especially if contingency fees are available. If contingency fees are not available, then exemplary or punitive damages may encourage litigation by enhancing the expected reward and thus encouraging plaintiffs to file suit. These and other combinations of options will be analysed below, in Section 1.5.

1.3.2 Decoupling damage awards?

As we already recalled in the previous sections, the goal of optimally deterring anticompetitive conduct normally leads economists to conclude that damages should be equal to the harm inflicted by the tortfeasor to society, divided by the probability of detection. Since the seminal work of Gary Becker (1968), this view led many economists to propose the use of multiple damages to achieve deterrence. However, under simplified assumptions, once a plaintiff successfully brings suit, the final damage award will likely be greater than the harm suffered, and this circumstance may lead profit-seeking plaintiff to have an excessive incentive to file suit. For this reason, some scholars, starting with Polinsky (1980), have advocated for joint use of multiple damages and decoupled damages as a solution that would solve at once the problem of under-deterrence and that of incentives for unmeritorious claims. In other words, these scholars address the following question: should plaintiffs win what defendants lose?

The underlying idea is straightforward: if the two complementary goals of private antitrust enforcement are efficient deterrence and full compensation, then, any damage measure that implies the equivalence between the sanction paid and the reward to plaintiff carries some shortcomings in terms of either goal. For example, treble damages foster deterrence but may overcompensate the plaintiff, providing excess incentives to sue; to the contrary, single damages are conceived to achieve optimal compensation and optimal incentives to sue; however, given that the probability of detection is often low for some type of anticompetitive conduct, single damages also lead to under-deterrence, as widely acknowledged in the literature. As a result, according to Polinsky (1980) and Polinsky and Che (1991), the optimal solution would be to multiply damages when defining the sanction to be imposed to the guilty defendant, but award only decoupled (single) damages to plaintiffs. The underlying insight is that, if compared to a situation where the plaintiff's recovery is equal to the defendant's damages, the same level of deterrence can be achieved by lowering the recovery and increasing damages: this, in turn, lowers enforcement and litigation costs, by reducing the number of legal actions.

In a more recent paper, McAfee *et al.* (2005) also argue that optimal private enforcement can be achieved by multiplying and decoupling damages. They also argue that such a system would be easier to implement in Europe than in

the US, given that EU courts base their effort and accuracy more on their own cost function than on the litigants' one.[365]

This argument has been challenged by some authors in more recent years. First, Kahan and Tuckman (1995) pointed out that the reduction in litigation costs assumed by Polinsky and Che (1991) only holds where litigation effort is exogenous to recovery.[366] As the reduction in the number of suits is coupled with an increase in the average stakes of the case, this may lead to increased litigation costs.[367] Their argument is based on evidence that median total lawyers work per hour increases almost exponentially alongside with the stakes of the case, and this is even more so for average lawyers work per hour.

Choi and Sanchirico (2004) elaborated on Polinsky's analysis by exploring the effect of both the reduction of recovery and the increase of damages on the expected litigation costs, and show that decoupling is not always welfare-improving. Their argument goes as follows: if the stakes of the case are raised, then the pro-deterrent impact of increased damages is much smaller than the negative impact on deterrence from reduced recovery, as increasing damages increases the defendant's expected loss from trial, divided by the likelihood that the plaintiff will sue. As the reduction of recovery reduces the plaintiff's effort and consequently the probability of trial, the detection and trial rate will be reduced from the defendant's perspective, leading to lower deterrence. In other words, reducing recovery may reduce the plaintiff's litigation effort, which reduces the defendant's expected trial losses, and therefore the deterrence effect.[368]

Further problems may emerge as the costs of administrating a decoupled recovery system may prove rather high. In particular, choosing the optimal multiplier/de-multiplier in terms of optimal deterrence can be an arduous task. In addition, the part of the damage awards that is not recovered by plaintiffs

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[365] Decoupled liability already occurs in the US under certain state laws, with punitive damages decoupled and the state treasury or a public compensation fund receiving one-third or some other portion of punitive damages. Decoupling also exists in other aspects of private antitrust litigation, as federal tax laws partly decouple damages in private antitrust actions following successful criminal prosecutions by the government. In those cases, all of the plaintiff's award may be treated at taxable income, while only one-third of the defendant's payment can be deducted. Similarly, shareholder derivative suits produce damages not for the litigants, but for the corporation itself.

[366] Albert Choi and Chris William Sanchirico, Should Plaintiffs Win What Defendants Lose? Litigation Stakes, Litigation Effort, and the Benefits of Decoupling, 33 J. Legal Stud. 323, 323 (2004).

[367] Rosenberg, 88 Va. L. Rev. at 1900.

[368] Id.

would have to be confiscated or used as subsidy to courts dealing with private antitrust enforcement.[369]

1.3.3 The NCA as *amicus curiae* for the assessment of total damages

A partial alternative to damage multiples is the introduction of a cooperation mechanism between the NCAs and national courts. Under this option, if the defendant's conduct appears as a serious infringement of competition laws, conducive to substantial harm to society, then judges might wish to activate a national competition authority (NCA) as *amicus curiae* to quantify the harm caused by the defendant, including the deadweight loss and the loss to all those economic actors affected by the conduct, which may find it difficult to prove causation and thus be compensated for the loss sustained. This way, the defendant would probably be called to pay more than her perceived profit from the violation, and the additional award could be used, for example, to fund collective actions. This option would, at least in theory, possess the virtue of being perfectly compatible with the compensatory nature of damage awards in most EU countries, at the same time preserving a deterrence function for would-be infringers in non-cartel cases. The potential lack of incentives for plaintiffs to file suit could then be solved by allowing conditional fee agreements, and/or introducing one-way fee-shifting to (almost) fully indemnify plaintiffs from legal fees.

The possibility for NCAs or the European Commission to act as *amici curiae* in private antitrust litigation was expressly provided in article 15.3 of Regulation 1/2003, although this mechanism is not conceived for the assessment of the harm. Moreover, such a possibility already existed in common law countries before this Regulation. Many countries, including the Netherlands and Spain have introduced new rules to facilitate this procedure.[370]

However, is must be observed that the cost associated with such a system would probably be very high in terms of administrative burden and increased resource needs for NCAs. As a matter of fact, the activities carried out by NCAs within competition investigation normally do not include the quantification of the damage suffered by individuals, and the two activities are not likely to overlap quite often. Although a move towards an effects-based approach to Article 82 could lead NCAs to become more familiar overtime with instances of damage quantification, the role of *amicus curiae* might represent an

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[369] In case the exceeding damage award subsidises court fees, this could to some extent encourage litigation, partly neutralising the effect of decoupling on plaintiff's litigation effort.

[370] In 2004 the Dutch competition authority has published guidelines indicating that it will exercise sparingly its *amicus curiae* competence. In principle, it will only intervene during the appeal stage of proceedings in which a question of interpretation of Articles 81 and 82 of the EC Treaty. The Spanish Competition Act entered into force on January 1, 2007 expressly introduced this procedure.

economically viable option only if the threshold for activating such procedure is very high – *i.e.* NCAs intervene only in cases with very high stakes.

1.4 Contingency fees

An alternative means of facilitating access to justice for plaintiffs may be the introduction of contingency fees. However, these fee arrangements between clients and lawyers are treated very differently in the EU27; in particular, they are prohibited in most jurisdictions, and are rather heavily regulated in others. Moreover, the European Commission did not envisage taking specific action on contingency fees in the Green Paper, and only briefly mentioned this means of facilitating access to justice in the Staff Working Paper.[371] At the same time, however, contingency fees can be seen as a powerful instrument to facilitate the bringing of antitrust damage claims. Since some countries – including Belgium, the Netherlands, Italy, the UK, Ireland and to a certain extent Germany – have been discussing the introduction of contingent fee agreements in the recent years, we deem it appropriate to assess the potential for these instruments to enhance the effectiveness of private enforcement, especially if coupled with other procedural rules, such as fee shifting rules and damage multiples.[372]

The merit of contingency fees has been extensively analysed in the literature, especially as a way to overcome the obstacles of financing the litigation when the liquidity of plaintiffs is constrained (*e.g.* Schwartz and Mitchell (1970); Gravelle and Waterson (1993); Rubinfeld and Scotchmer (1998); and Schaefer (2000)); This occurs because the lawyer bears the initial expenses, and as a result the plaintiff can avoid paying legal expenses upfront – the latter being one of the major obstacles to the decision of initiating a legal action, also according to the Commission's Green Paper.[373]

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[371] Commission Staff Working Paper, §218.

[372] In March 2007 the German Constitutional Court (*Bundesverfassungsgericht*) decided that a law barring contingency fees in all cases was unconstitutional, and held that, under certain narrow circumstances, there is a constitutional right to be able to bring a civil action by means of a contingency fee contract with a lawyer. See in the matter 1 BR 2576/04, and press release 27/2007 of March 7, 2007, available at http://www.bundesverfassungsgericht.de/en/press/bvg07-027.html. The Italian government also removed the prohibition of the *pactum quota litis* with the recent decree 223/06.

[373] In the academic literature, scholars also discuss insurance schemes as an alternative solution to the problem of financing damage claims. Riley and Peysner (2006) propose the establishment of a contingency legal aid fund (CLAF) for cartel cases in the European context, since such a scheme may be preferable in the European state of affairs as national procedural rules would not have to be harmonized while providing comparable benefits as contingency fees. The Office of Fair Trading (OFT) (2007b) suggested the development of a menu of financing opportunities for potential plaintiffs, consisting of conditional fees (providing a mark-up on the fee in case the trial is won and a discount in case the trial is lost), after-the-event insurance and loans by professional funders. After a consultation that took place between April and September 2007, in

Secondly, part of the literature focuses on the efficiency of contingent fee agreements as a way to share risks more effectively between clients and lawyers (*e.g.* Danzon 1983; Halpern and Turnbull 1983). This is often seen also as a suitable mechanism to solve the predicament of information asymmetries between client and attorney (*e.g.* Rubinfeld and Scotchmer 1993). According to Rubinfeld and Scotchmer (1993), the optimal fee arrangement is influenced by problems of asymmetric information between client and attorney. They argue that allowing a multitude of mixed contracts creates signalling and screening mechanisms to overcome the problems of information asymmetries concerning the merits of the case (which the plaintiff cannot make credible without discovery) and with regard to the quality of the lawyer (which the plaintiff cannot assess adequately). In their analysis, contingency fees create a sort of "unravelling result".[374] As a matter of fact, in order to enable the lawyer to distinguish strong from weak cases, she may offer a multitude of different fee arrangements, in consequence of which clients will signal strong cases by choosing the contracts with a low contingency fee and a mostly hourly based payment or a fixed fee. Correspondingly, high quality lawyers will prefer contingency fee arrangements providing them with a large share, while low quality lawyers would be willing to work for lower percentage shares, maybe connected to a fixed fee. Also Hay (1996) examines which linear contingency fee would be preferable from the client's point of view, focusing on the solution of principal-agent problems. He concludes that the optimal fee will be lower, the higher the expected recovery and the lower the effort needed to obtain that recoupment, as large rewards for the attorney are necessary to provide incentives to exercise effort. Therefore, he cautions against regulation of maximum fee rewards but also states that in low-stake claims, other alternatives would be preferable. Halpern and Turnbull (1983) discuss some of the incentives of contingent fee contracts in connection to different cost-shifting rules, and propose a pure contingency fee arrangement to overcome principal-agent problems, linked to a cost shifting rule where the losing party has to bear at least part of the litigation costs of the prevailing party, in order to discourage unmeritorious suits. Dana and Spier (1993) present contingency fees as an efficient solution to the problem of inadequate representation in class actions

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November the OFT (2007c) recommended that the Government: (i) consult on the possibility of allowing a percentage increase of more than 100% in conditional fee agreements in competition cases, subject to judicial supervision of the funding arrangement; (ii) consult on the possibility of either codifying or, in Scotland, introducing cost-capping or cost-protection measures at the discretion of the judge (especially for representative actions); (iii) considers the creation of merits-based litigation fund; and (iv) gives due consideration to the alternative options proposed by Civil Justice Council in *Improved Access to Justice: Funding Options and Proportionate Costs*, June 2007 (which focuses in particular on self-funding systems, Supplementary Legal Aid Schemes, third-party funding and regulated contingency fees).

[374] See Baird, Gertner and Picker (1995).

due to prohibitive monitoring costs on the client's side. Their argument is that if the lawyer works on a contingency fee basis, it will be in her own interest to properly use the information gained in discovery by advising to drop unmeritorious cases and switching to other cases with better prospects. If, on the other hand, lawyers work on an hourly fee basis, they might be encouraged to prolong the cases at hand, rather than switching to new cases.

Thirdly, the impact of contingent fee agreements on litigation expenditure and the settlement rate has been extensively discussed. A common criticism against contingency fees is that they are likely to increase principal-agent problem between client and attorney, as the latter will have incentives to settle sooner and also for lower amounts in order to induce the defendant to settle at an early stage.[375] For example:

- Schwartz and Mitchell (1970) analyse the effects of linear contingency fees, consisting of a fixed percentage, compared to hourly fees under different risk attitudes of client and attorney, and conclude that a linear contingency fee arrangement may not always be the optimal contract for the client. For similar reasons, nonlinear contingency fees have been recommended, whereby the percentage depends on either the amount recovered or the effort put in the case.[376] Others have suggested a hybrid contingent fee, in which the lawyer receives a fraction or maybe all of the recovery but makes a fixed side payment to the client.[377]
- Schaefer (2000) analyses the incentives to put effort by the lawyer under a contingency fee arrangement, showing that the effort will always be less than optimal. He also argues that neither competitive pressure on the market for legal services nor reputation mechanism or judicial review can effectively challenge this predicament.
- Also Danzon (1983) states that the incentives for the lawyer to devote effort to litigation are affected negatively by a contingent fee arrangement and that only under an hourly fee contract the lawyer will act in the client's interest. According to her view, contingency fee will never lead to the optimal incentives, as the lawyer only receives a share of the recovery. The optimal solution would then be to allow the client to sell the claim to the lawyer, increasing her fraction of the recovery to 100%. However, the utility for the

[375] See Schwartz and Mitchell 1970, Miller 1987, and Gravelle and Waterson 1993, Schaefer 2000)

[376] See, *e.g.* Miller (1987), describing contracts in which the lawyer's percentage depends on the stage of litigation in which the suit is resolved; and Clermont and Currivan (1978), proposing contingent hourly fees combined with percentage bonuses.

[377] Rubinfeld and Scotchmer (1993), Danzon (1983)

plaintiff will always be higher under a contingency fee contract, when she is risk averse, due to the risk-shifting feature of contingency contracts.[378]

Conversely, other scholars suggest that the opposite is the case and that contingency fees may give too little incentives for lawyers to settle.[379]

- Polinsky and Rubinfeld (2002) model the amount of effort put in by the lawyer and the minimum amount of settlement she demands under contingency fee and hourly fee contracts. They conclude that under a contingency fee arrangement, the minimum settlement amount is higher and therefore settlement is less likely. Empirical evidence seems to substantiate these theories.
- Danzon and Lillard (1983) run a regression analysis on settlement awards and find that the introduction of a cap on contingency fees decreased settlement amounts and increased settlement rates.
- Results by Cumming (2001) econometrically analyzing survey data from lawyers, finding that settlements are less frequent when lawyers were working on a contingency basis or on an hourly fee with a success bonus, also strengthen the theoretical results.

Fourthly, the impact of contingency fees as a potential incentive to file nuisance or frivolous suits has been analysed in the literature. Miceli (1994) develops a theoretical model to analyse how contingency fees compared to hourly fee rates influence the incentives to bring frivolous suits, concluding that the results of the model do not provide general backup for the assertion that contingency fees promote frivolous suits. Clermont and Currivan (1978) argue that contingency fees may lead to a reduction of unmeritorious suits being filed, when the lawyer working on a contingency basis acts as gatekeeper in the civil justice system, being in a better position than the client to sort out cases with low or no merits, as the lawyer will drop an unmeritorious case even if plaintiffs would be willing to go to trial. This argument found support in the survey of contingency fee practitioners by Kritzer (1997), who found that lawyers turn down at least 50% of the cases brought to them and the majority of these on grounds of no merits. He concludes that lawyers under a contingency fee arrangement act as gatekeepers while pursuing their own interest. Helland and Tabarrok (2003), provide an overview over existing empirical literature on the topic of contingency fees. The conclusion of their own study on the legal quality under an hourly fee agreement compared to a contingency fee contract also seconds that under the former arrangement the lawyer will have more incentives to

[378] Eisenberg and Miller (2004a) find that risk has an influence on the percentage the lawyer receives; they also state that contingency fees have been relatively stable over the last decade. However, Priest (1997b) criticises the conclusions drawn from their case analysis.

[379] Miceli (1994), Bebchuck and Guzman (1996), Polinsky and Rubinfeld (2002)

continue cases with little merit and prolong the time until settlement than under the latter.

In summary, the literature is split as to the impact of contingency fees on the litigation expenditure, on the settlement rate and on the quality of the lawsuits filed by plaintiffs. To be sure, however, most authors agree that contingency fees can significantly facilitate plaintiffs in initiating legal actions.

1.4.1 Contingency fees and fee allocation schemes, combined

Despite the great attention that both fee allocation schemes and contingency fees have elicited among scholars, the interrelation between the two has been explored only to a very limited extent.[380] In this section we explore the possibility that both contingent fee agreements and *ad hoc* cost allocation rules are introduced to facilitate the filing of private damages actions.

As observed, *i.a.*, by Katz (2000), one obvious effect of a contingent fee agreement on the incentives to file suit, settle and litigate is the different management of risk under a loser-pays rule. As we explained in Section 1.1 above, a loser-pays rule increases the risk associated with litigation, thus increasing the probability of early settlement if the litigating parties are risk averse. If the parties can allocate part of the risk to their lawyers, two-way fee-shifting becomes less scary. In the most extreme case, a plaintiff may think that, if she loses the trial, she may be called to pay only the defendant's (reasonable) expenses, and not her own; whereas, if she wins, she would be indemnified from paying either expense. Of course, this finding changes completely the incentives of the plaintiff during litigation, with an outcome similar to that of a one-way fee-shifting rule.

In other words, the main problem that arises under a loser-pays rule – *i.e.*, that risk aversion of plaintiffs may be exacerbated, thus leading to scant incentives to file suit – may be mitigated by the use of a contingent fee system. In this respect, Dewees *et al.* (1981) analyse nine different forms of cost and fee rules for collective actions. These include *two-way certain* rules, resembling the loser-pays rule, with no contingent fee agreement (*i.e.* lawyers are paid independently of the trial outcome); *no-way certain* rules, close to the "each party bears her own costs" rule; *one-way certain* rules, such as one-way fee-shifting without contingent fee agreements; *two-way contingent* rules, with risk borne by client; *two-way contingent* rules, with risk borne by lawyer; *no-way contingent*, with risk borne by lawyer; *one-way contingent*, with risk borne by lawyer; *no-way contingent percentage fee*, with risk borne by lawyer. As is easily

[380] See Katz (2000), observing that "[a] systematic analysis of the effects of fee shifting under contingent fee contracts ... remains to be undertaken". An exception is Farmer and Pecorino (2003).

seen, the first four rules place the risk of losing at trial on the client, whereas the latter four place the risk on the lawyer.

Dewees *et al.* (1981) conclude that, especially in the case of class actions, rules that place the risk on lawyers are more suited to encourage litigation, especially under the loser-pays rule. In addition, rules that are based on contingent fee agreements are more likely to encourage litigation: as a matter of fact, low-probability cases would not be taken on board by lawyers based on a fixed fee, unless such fee is particularly high. With a contingent percentage fee, especially in high-stakes, low-probability cases, lawyers may have an incentive to accept the case in view of a future reward, which may easily exceed the value of the time they spend in litigation or in settling the case. Farmer and Pecorino (2003) warn that a combination of contingent fee agreements and (two-way) fee-shifting may lead to more negotiation failures at the settlement stage, in turn leading to more cases being litigated.

More generally, we can illustrate the effect of contingent percentage fee schemes on the plaintiff's incentive to file suit and settle. In addition, we introduce another variable – the effort of the client's lawyer. If θ is the percentage of the final reward that accrues to the client's lawyer as a result of the contingent fee, our formula of the net expected plaintiff payoff from litigation becomes the following, under an "each party bears her own costs" rule:

(2) $$p\,(wD - \theta D) + (1 - p)(1 - \theta)S > 0$$

In other words, the reward if the case is litigated (with probability p) depends on the probability of winning the case (w) and the size of the damage award (D), minus the percentage to be paid to the lawyer (θD).[381] If the case is settled (probability of $1 - p$), the settlement amount will be discounted by the lawyer's percentage payment.

Under the loser-pays rule, the formula would become:

(3) $$p\,[wD - (1 - w)\theta D) + (1 - p)(1 - \theta)S > 0$$

and the "trial part" of the equation would be composed by the expected damages award at trial ($p \cdot w \cdot D$) minus the need to pay legal expenses for the

[381] For simplicity, here we do not take into account court fees and opportunity costs of time spent by the plaintiff's employees in litigation.

other party's lawyer – here, for simplicity, considered as equal to the plaintiff's lawyer fees.

Finally, under one-way fee-shifting, the plaintiff files suit if:

(4) $$pwD + (1 - p)(1 - \theta)S > 0$$

as in all cases the plaintiff would not have to pay her legal expenses – better, is the plaintiff wins, the damage recovery would cover legal expenses; if she loses, the contingent fee agreement with risk falling on the lawyer would lead to no payment.

Under these conditions, *the plaintiff's expected payoff from trial will always be higher under the loser-pays rule than under the "each party bears her own costs" rule*, and will be highest with one-way fee-shifting.[382]

In addition,

- with the "each party bears her own costs" rule, the net expected reward from filing suit is greater under a contingent fee arrangement if the fixed legal expenses (X) are greater than θD;
- with the loser-pays rule, the net expected reward from filing suit is greater under a contingent fee arrangement if the fixed legal expenses (X) are greater than half of θD, thus $X > \theta D/2$;
- with one-way fee-shifting, the net expected reward from filing suit is always greater under a contingent fee arrangement.[383]

In summary, under our very simple assumptions fee-shifting rules tilt the balance in favour of contingent fee arrangements, when seen from the perspective of plaintiffs. Under the loser-pays rule, the cases in which the plaintiff will prefer a contingent percentage fee agreement are double than under the "each party bears her own costs" rule. As appears obvious, with one-way fee-shifting, the plaintiff will always choose a contingent fee arrangement: if she wins, her lawyers will be paid on top of the damage award; if she loses, she will not have to pay her lawyers. In this respect, is can be easily seen that contingent fees mitigate the plaintiff's risk aversion, by allowing her to overcome her reluctance to sue in low-probability cases. If coupled with one-

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[382] In algebraic terms, pwD is always greater than $p\,[wD - (1 - w)\theta D) = pwD - p(1 - w)\,\theta D$, and the latter will always be greater than $p\,(wD - \theta D) = pwD - p\,\theta D$. Hence, the net expected reward from trial is highest under one-way fee-shifting, and lowest with the "each party bears her own cost" rule.

[383] Indeed, $pwD > pwD - X$.

way fee-shifting, contingent fee arrangements can lead to "full insurance" for the plaintiff, thus potentially encouraging frivolous and strategic suits. However, as pointed out by Miceli (1994) and Kritzer (1997), the lawyers themselves will act as gatekeeper in these cases, by turning down defences when the probability of winning is too low.

More generally, the viewpoint of the lawyer is particularly important when assessing the relative merits of contingent versus fixed-sum legal fees. In our formula, the lawyer's expected payoff under all fee allocation rules and a contingent fee would be:

(5) $$(pw\theta D - E_L) + [(1 - p)(\theta S - E_S)]$$

Where E_L and E_S represent the effort spent in litigating or in settling the case (with $E_S < E_L$). Then, depending on the relative magnitude of E_L and E_S, a self-interested lawyer may prefer settlement over trial, if trial entail lengthy proceedings and an increased opportunity cost of the lawyer's time.

1.4.2 Contingent v. conditional fees

Perhaps the main problem related to contingent fee agreements in EU private antitrust enforcement is the fact that such agreement are explicitly prohibited in virtually all member states, and *pactum quota litis* is not allowed by the ethical code of the European association of lawyers. However, some EU member states – starting with the UK already in the 1990s – have started allowing conditional fee agreements or "no win, no fee" agreements, *i.e.* agreements under which the plaintiff lawyer can obtain a success fee on top of the initial legal fee of up to 100% if the client wins.[384] The lawyer takes all the risk and, in case the client loses, the lawyer is responsible under the loser-pays rule for both sides' costs.

Two recent companion papers, Emons (2004) and Emons and Garoupa (2004), provide an insightful comparison between contingent fees an conditional fees, with focus on the risk attitude of the plaintiff and the effort devoted to litigation by the plaintiff's lawyer.[385] The underlying assumptions are that the probability of winning the case depends on the lawyer's effort in litigation (e) – which exhibits decreasing marginal returns –, but such effort cannot be fully observed by the plaintiff. The two papers address the issue of the plaintiff/lawyer relationship as a principal-agent setting. Emons and Garoupa (2004) conclude

[384] Before 1997, conditional fees were used in personal injury, insolvency and cases to the European Court of Human Rights only, and in 1997 were extended to most civil cases (Yarrow, 2001).

[385] See also Emons and Garoupa (2006).

that under symmetric imperfect information contingent fees are more efficient than conditional fees if the lawyer is risk neutral and the plaintiff is risk averse, as contingent fees will allocate the risk between the two actors more efficiently The different risk attitude of the parties may hold true when the plaintiff is a private individuals, and less likely when the plaintiff is a corporation.[386] When the plaintiff is less risk averse than her lawyer, then conditional fees allow for more efficient risk sharing, despite lower effort incentives for the lawyer. The compromise between risk sharing and incentives offered by conditional fees suggests that conditional fees are superior also to flat fees in this case.

Emons (2004) compares conditional and contingent fees in a framework where lawyers are uninformed about the clients' cases, and once they learn about the case they can choose between a safe and a risky litigation strategy. He finds that under conditional fees lawyers are more geared towards safer strategies, whereas under contingent fees they tend to prefer the more risky ones. He also concludes that when legal costs are high, risk-averse plaintiffs prefer contingent over conditional fee agreements. Finally, he finds that, if there is asymmetric information about the merits of cases, in equilibrium attorneys will offer only conditional fees; whereas if there is asymmetric information about the risk of cases, only contingent fee contracts are offered in equilibrium.

In introducing conditional fee agreements, the UK government acknowledged that such agreements "address the fundamental problem of the British legal system", *i.e.* that few people can afford to litigate unless they can get legal aid. More in detail, conditional fees were introduced to fill the gap between low-income citizens who could get legal aid, and high-income people who could afford a lawyer – *i.e.* they essentially targeted middle-income plaintiffs to improve their access to justice.[387] Data reported by Yarrow (2000) showed that by March 1999, about 60,000 conditional fee agreements had been signed, but only one in ten personal injury cases was funded by conditional fees, compared to 44% funded by legal aid. She thus concludes that the impact on conditional fees on access to justice could be overstated. However, Fenn *et al.* (2006) report that in 2002-2003 conditional fee agreements had become by far the predominant means of funding legal actions for personal injury cases, and suggest that the introduction of the Collective Conditional Fee Agreements (CCFA) may have exerted a significant impact on this observed trend. The impact of conditional fees on the litigation rate of cases seems to have been slightly positive, especially in the case of CCFAs[388]. However, Peysner (2007) warns that there is no evidence that conditional fee agreements are being

[386] However, reputational effects and potential follow-on cases may lead to risk aversion of the plaintiff.

[387] See Yarrow (2001).

[388] Fenn *et al.* (2004).

frequently used in competition cases in England, due to the complexity of cases and their often unpredictable outcome. This evidence is consistent with the assumption that lawyers may behave in a rather risk averse manner.

From a more theoretical perspective, it seems fair to conclude that conditional fees may improve access to justice for risk averse plaintiffs, although not as much as contingency fees do. Risk averse plaintiffs with limited financial resources also can find conditional fee agreements more advantageous than flat or hourly fees. At the same time, the limited empirical evidence available suggests that lawyers can also be significantly risk averse, and may tend to drop low-stake, low probability cases if the success fee does not justify the risk that they are "buying". Heavy capping of success fees can also discourage lawyers from accepting low-probability cases, although they might solve information asymmetries between the client and her lawyer, avoiding client's exploitation by the attorney, the uncontrolled increase of litigation costs and – under the loser-pays rule – also the increase of defendant's costs in cases with a high probability of plaintiff verdict.

The assessment of conditional fee agreements also heavily depends on the fee allocation scheme chosen:

- Under an "each party bears her own costs" system, a conditional fee agreement effectively reduces the cost of access to justice for plaintiffs with low financial resources, but contingency fees – for the reason explained above – may appear even more efficient, depending on the client's and the lawyer's risk attitude.
- With two-way fee-shifting, a losing plaintiff would be bound to compensate the defendant's legal expenses, including at least the basic fee of the defendant's lawyer. This may stifle her incentives to take legal action compared to what occurs under the "each party bears her own costs" rule.
- Under one-way fee-shifting, however, the losing plaintiff will not be called to compensate the defendant's (reasonable) legal expenses, and will only bear her own lawyer's basic fee. This, in turn, provides her with greater incentives to sue.

These arguments seem to suggest that conditional fees improve access to justice when compared to hourly fees, but contingency fees can perform even better. The situation slightly changes after looking at the lawyers' behaviour and incentives.

For example, under the "each party bears her own costs" rule, a risk averse lawyer will be more likely to accept cases under a conditional fee agreement, as even if the case is lost, she would still earn a basic fee. A simple example can help understanding this point. Assume that the damage claim is €500, and that

the parties' legal costs are equal. Then, assume that a contingency agreement implies a 30% fee on the damage award (€150), whereas a conditional fee would imply a €50 basic fee plus a success fee of another €50.[389] Then, if the plaintiff's lawyer expects to have a 70% probability to win, she will prefer a contingent fee, which would leave her with a total payoff of €105. A conditional fee, on the other hand, would have an expected payoff of €85.[390] However, if the expected probability of winning the case is estimated at only 30%, then the plaintiff's lawyer will prefer a conditional fee, as the expected payoff would be €65, whereas with contingency fees the payoff would be €45[391].

Hence, in terms of access to legal assistance, lawyers are more likely to accept cases with a conditional fee agreement if the case has a low probability of success (or the lawyer is risk averse, *i.e.* magnifies the likelihood of losing); the opposite occurs for high-probability cases. This finding holds irrespective of the fee allocation scheme chosen.

From the perspective of the plaintiff, however, things are quite different. Under the same assumptions, if the probability of success is 70%, then:

- Under the "each party bears her own costs" rule, the plaintiff will prefer to pay conditional fees, as her expected payoff would amount to €265, whereas contingent fees would leave her with an expected €245 stake[392].
- Under the loser-pays rule, the plaintiff will face an expected payoff of €305 irrespective of the fee agreement[393].

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[389] As contingency fee contracts are more risky, we assume that the maximum payoff with contingent fees is higher than with conditional fees.

[390] This happens under all fee allocation schemes. As a matter of fact, with the "each party bears her own cost" rule and conditional fees the plaintiff's lawyer will receive the full fee (€100) from her client in 70% of the cases, and only the basic fee €50 in 30% of the cases, which makes up for an expected payoff of €85. With contingent fees, an award of 500 would leave the lawyer with €150 in 70% of the cases and nothing in 30% of the cases, *i.e.* €105. The same holds for both two-way and one-way fee-shifting, with the only difference that the legal expenses (€100) in case of plaintiff victory (70%) will be paid by the defendant.

[391] This, again, happens under all fee allocation schemes. With the "each party bears her own cost" rule and conditional fees the plaintiff's lawyer will receive the full fee (€100) from her client in 30% of the cases, and only the basic fee €50 in 70% of the cases, which makes up for an expected payoff of €65. With contingent fees, an award of €500 would leave the lawyer with €150 in 30% of the cases and nothing in 70% of the cases, *i.e.* €45.

[392] This figure is obtained as: with a conditional fee agreement, in 70% of cases the plaintiff will receive a €500 award but will have to pay her lawyer €100; in the remaining 30% of cases, the plaintiff will pay her lawyer €50. Accordingly, [(70% · 400) + (30% · (-50)] = €265; with a contingency fee agreement, in 70% of cases the plaintiff will receive a €500 award but will have to pay her lawyer €150; in the remaining 30% of cases, the plaintiff will not pay anything. Accordingly, (70% · 350) = €245.

[393] With a contingent fee agreement, in 70% of cases the plaintiff will receive a €500 award and will not bear any legal cost; in the remaining 30% of cases, the plaintiff will pay her opponent's

- Under one-way fee-shifting, the plaintiff will prefer to pay contingent fees, as her expected payoff would amount to €350, whereas with conditional fees her expected payoff would be €335[394].

On the other hand, if the probability of success is 30%, then:

- Under the "each party bears her own costs" rule, the plaintiff will prefer to pay contingent fees, as her expected payoff would amount to €105, whereas conditional fees would leave her with an expected €85 stake[395].
- Under the loser-pays rule, the plaintiff will face an expected payoff of €45 irrespective of the fee agreement[396].
- Under one-way fee-shifting, the plaintiff will prefer to pay contingent fees, as her expected payoff would amount to €150, whereas with conditional fees her expected payoff would be €115[397].

As a result, there will be opposite preferences as regards the most appropriate fee agreement between client and lawyer in many cases. The loser-pays rule is the only rule that makes the plaintiff indifferent whether to use contingent or conditional fees, although such combination may lead more cases to be litigated when the parties have different beliefs and behave strategically in negotiating settlement. Otherwise:

- in high-probability cases a plaintiff prefers contingent fees under one-way fee-shifting, and conditional fees under the "each party bears her own cost" rule; the lawyer always prefers contingent fees;

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lawyer €150. Accordingly, [(70% · 500) + (30% · (-150)] = €305; with a conditional fee agreement, in 30% of cases, the plaintiff pays her lawyer €50 and her opponent's lawyer €100. Accordingly, [(70% · 500) + (30% · (-150)] = €305.

394 Here, with a contingent fee agreement, in 70% of cases the plaintiff receives €500 and does not bear any legal cost; in the remaining 30% of cases, the plaintiff pays nothing to her lawyer. Accordingly, [(70% · 500)] = €350; with a conditional fee agreement, in 30% of cases, the plaintiff pays her lawyer €50. Accordingly, [(70% · 500) + (30% · (-50)] = €335.

395 With a conditional fee agreement, in 30% of cases the plaintiff will receive a €500 award but will have to pay her lawyer €100; in the remaining 70% of cases, the plaintiff will pay her lawyer €50. Accordingly, [(30% · 400) + (70% · (-50)] = €85; with a contingency fee agreement, in 30% of cases the plaintiff receives €500 award but pays her lawyer €150; in 70% of cases, the plaintiff does not pay anything. Accordingly, (30% · 350) = €105.

396 With a contingent fee agreement, in 30% of cases the plaintiff receives €500 and does not bear any legal cost; in 70% of cases, the plaintiff pays her opponent's lawyer €150. Accordingly, [(30% · 500) + (70% · (-150)] = €45; with a conditional fee agreement, in 70% of cases the plaintiff pays her lawyer €50 and her opponent's lawyer €100. Accordingly, [(30% · 500) + (30% · (-150)] = €45.

397 Here, with a contingent fee agreement, in 30% of cases the plaintiff receives €500 and does not bear any legal cost; in the remaining 70% of cases, the plaintiff pays nothing to her lawyer. Accordingly, [(30% · 500)] = €150; with a conditional fee agreement, in 70% of cases the plaintiff pays her lawyer €50. Accordingly, [(30% · 500) + (70% · (-50)] = €115.

- in low-probability cases a plaintiff always prefers contingent fees; the lawyer always prefers conditional fees.

Table 26 below shows the results of our exercise, for both a high-probability and a low-probability case, where *P* is the plaintiff and *PL* is the Plaintiff's Lawyer. We also show the payoffs of the Defendant (*D*) and of the Defendant's Lawyer (*DL*), under the simplifying assumption that contractual schemes and legal costs are identical.

Table 26 – Fee agreements, fee allocation and probability of success

High prob

Contingency fees

Each party bears her own cost

		P	PL	D	DL
70%	W	245	105	-350	0
30%	L	0	0	-45	45
	Total	245	105	-395	45

Loser-pays

		P	PL	D	DL
70%	W	350	105	-455	0
30%	L	-45	0	0	45
	Total	305	105	-455	45

One-way fee shifting

		P	PL	D	DL
70%	W	350	105	-455	0
30%	L	0	0	0	45
	Total	350	105	-455	45

Conditional fees

Each party bears her own cost

		P	PL	D	DL
70%	W	280	70	-385	35
30%	L	-15	15	-30	30
	Total	265	85	-415	65

Loser-pays

		P	PL	D	DL
70%	W	350	70	-455	35
30%	L	-45	15	0	30
	Total	305	85	-455	65

One-way fee shifting

		P	PL	D	DL
70%	W	350	70	-455	35
30%	L	-15	15	-30	30
	Total	335	85	-485	65

Low prob

Contingency fees

Each party bears her own cost

		P	PL	D	DL
30%	W	105	45	-150	0
70%	L	0	0	-105	-105
	Total	105	45	-255	-105

Loser-pays

		P	PL	D	DL
30%	W	150	45	-195	0
70%	L	-105	0	0	105
	Total	45	45	-195	105

One-way fee shifting

		P	PL	D	DL
30%	W	150	45	-195	0
70%	L	0	0	0	105
	Total	150	45	-195	105

Conditional fees

Each party bears her own cost

		P	PL	D	DL
30%	W	120	30	-165	15
70%	L	-35	35	-70	70
	Total	85	65	-235	85

Loser-pays

		P	PL	D	DL
30%	W	150	30	-195	15
70%	L	-105	35	0	70
	Total	45	65	-195	85

One-way fee shifting

		P	PL	D	DL
30%	W	150	30	-195	15
70%	L	-35	35	-70	70
	Total	115	65	-265	85

1.5 Avoiding frivolous and unmeritorious suits

Before we analyse the welfare impact of potential procedural rules aimed at encouraging meritorious private damages actions, it is worth briefly summarising the impact that the various procedural arrangements described above may have on the incentive to file frivolous suits. In addition, we draw the attention on potential other means to avoid unmeritorious damages actions, such as the use of summary judgments and motions to dismiss in the US context. Suits with negative expected value have been almost ignored in the early literature on suit, settlement and litigation incentives. Rosenberg and Shavell (1985), Bebchuk (1988, 1997); Katz (1990) and Bone (1997) shed more light on this issue, mostly relying on game theoretical issues.

First, as regards fee allocation rules, a loser-pays rule such as the one applied – with variants – in EU countries seems to strike a more satisfactory balance than the "each party bears her own cost" rule, as the two-way shifting mechanism discourages unmeritorious claims – indeed, a plaintiff with a low-probability of success at trial will refrain from initiating a private action, and mostly high-probability cases will be brought. Coupling the loser-pays rule with contingency fees would not create problems in this respect: as a matter of fact, the plaintiff will pay legal expenses (to her lawyer) if she wins, and will pay legal costs (to the defendant's lawyer) also if she loses.[398] Conditional fees, in this respect, may act as a slight disincentive since, if the plaintiff loses, she will have to pay the fees of both parties' lawyers. In this respect, coupled with the loser-pays, contingency fees may perform better than conditional fee agreements – in neither case would the plaintiff have an incentive to file unmeritorious suits, but in the latter case the plaintiff may be discouraged from initiating a damage action[399]. If anything, therefore, the practical application of the loser-pays rule may create the opposite problem, *i.e.* discouraging meritorious suits, as observed by Kritzer (1992).

Secondly, under full-fledged one-way fee-shifting and contingency fees, plaintiffs are greatly encouraged to file suit, as they would be fully indemnified from legal expenses – *i.e.* at least in theory, they would pay zero legal expenses regardless of the outcome of the case. This situation will certainly lead to significant incentives to file both meritorious and unmeritorious suits. Such a finding is of course mitigated by the lawyers' decision: even under one-way fee-shifting, purely frivolous suits with low probability of success will be accepted by a lawyer only if they exhibit a significant potential for a positive settlement; otherwise, the lawyer will anticipate that the suit has a very low expected value for her, and will not accept the case. In this respect, contingency fees, contrary to what is normally observed, do not necessarily increase nuisance suits if compared with hourly fees: when the lawyer is more informed than the plaintiff about the relative merit of the case, she may suggest that the case is litigated and will charge fixed hourly fees even if she realises that the case has a negative expected value for the client.

Thirdly, multiple damages can create incentives to file unmeritorious suits, especially if coupled with "aggressive" fee allocation and legal cost rules. Especially in non-cartel cases, the threat of frivolous suits becomes particularly significant and socially harmful, if plaintiffs face a significant windfall from punitive damages.[400] Besides cases in which multiple damages serve a clear

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[398] Lorraine Wright Feuerstein, Comment, Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits, 23 Pepp. L. Rev. 125, 128 (1995).

[399] Depends on whether the total legal costs change under the two arrangements.

[400] See, *i.a.*, Sharkey (2003).

compensatory purpose – *e.g.* in absence of pre-judgment interest – all cases in which the expected value for the plaintiff is greater than the actual harm suffered can lead to frivolous suits. This also applies to negative expected value suits, where the plaintiff or her lawyer manage to settle successfully for a positive amount prior to trial.

Fourthly, all in all, the impact of contingency fees on frivolous suits is ambiguous, and mostly depends on the risk attitude of the plaintiff, the plaintiff's lawyer, the information held by both subjects, and of course the merit of the case and the corresponding probability of victory at trial. As a general note, contingency fees may encourage frivolous suits when: (i) the plaintiff's lawyer is less informed than the plaintiff; (ii) the lawyer is optimistic about the probability of settling the case before trial; (iii) the plaintiff is shielded from the obligation to pay the defendant's legal costs (*i.e.* the "each party bears her own cost" rule or one-way fee-shifting).

Finally, the risk of frivolous suit can be effectively reduced if fee shifting rules are corrected by *ad hoc* arrangements. These include procedural rules that force the losing plaintiff to pay the defendant's legal costs if the judge finds that the case was frivolous; and offer-of-judgment rules (like the US Federal Rule 68 and Part 36 of the English Civil Procedure rules), under which the defendant can make a settlement offer to the plaintiff; if the offer is rejected and the plaintiff loses at trial, then the defendant must be indemnified for legal expenses.[401]

Another possibility is adjusting pleading standards to avoid suits based only on anecdotal or barely circumstantial evidence. An example from US practice is the standard adopted for predation cases (*e.g.*, in *Brooke Group*) or in the recent *Twombly* decision, which was dismissed at the pleading stage by the District Court since evidence brought by the plaintiff was found entirely consistent with pro-competitive, profit-seeking behaviour of the defendant (Bell Atlantic). This decision was later reversed by the Second Circuit, as it had allegedly established a narrower pleading standard than the one provided by the Federal Rules of Civil Procedure. On May 21, 2007 the Supreme Court decided in favour of heightened standards for allegations of conscious parallelism, and thus overturned the pleading standard in force since *Conley v. Gibson*: this will make dismissal prior to discovery more likely in the future[402]. As a result, our findings in this section will have to be combined with the findings of section 3

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[401] See Katz (2000) for a survey of the literature on offer-of-judgment rules.

[402] As recalled by Hylton (2006), in a multi-stage litigation setting heightened pleading standards can be particularly effective in avoiding discovery abuse, although too strict standards can also discourage risk-averse or partially uninformed plaintiffs from seeking redress through trial. Stricter standards can, also, reduce the likelihood of early settlement, as the defendant may consider it less likely that the plaintiff will proceed to costly and lengthy discovery.

below (on access to evidence). Pleading standards indeed can significantly affect the incentive to file suit and the likelihood of frivolous suits.

1.6 Impact assessment

In this section, we identify the combinations of procedural rules and damage multiples that are more likely to exert a positive impact on welfare. In the previous sections, we have identified already possible options as regards fee allocation, fee agreements and damage multiples. In this section, we make specific reference to the options already identified by the European Commission in its Green Paper on Damages Actions for breach of EC Antitrust Rules.[403] In addition, we compare those options with alternative options that did not appear strictly dominated in our analysis, such as the decoupling of damages and the role of the competition authority as *amicus curiae*.

In particular, we focus on:

- *Fee allocation schemes*: the loser-pays rule, and one-way fee-shifting[404]; and
- *Damage multiples*: single damages, double damages, decoupled damages, and modified decoupling with the NCA of the Commission as *amicus curiae*. All these measures of damages include the award of prejudgment interest[405].

When approaching the problem of welfare maximization, it is necessary to adopt a welfare standard as a reference. As regards procedural rules, the optimal set of rules normally also minimises the sum of under-deterrence, over-

[403] Accordingly, we will not address directly the adoption of conditional or contingent fee agreements, as the Commission does not mention this possibility in the Green Paper. Some countries have already decided to lift the ban on contingency fees (Italy, Germany), whereas others are discussing the express prohibition of such fee agreements (The Netherlands); others have chosen conditional fees (UK, the Netherlands, Belgium, Greece); and others still retain their *a priori* ban on any remuneration tied to the outcome of the case. Potential alternative means of funding antitrust damages actions, such as Contingency Legal Aid Funds and private after-the-event insurance products will also not be directly addressed. We consider that public initiatives to facilitate access to justice for low-income plaintiffs would fall under the general obligation to provide access to justice as stated *ex* Article 6 of the European Convention on Human Rights.

[404] We do not consider the "each party bears her own cost" rule, as this option was not considered by the Green Paper. In addition, in the previous sections we observed that this option is likely to discourage private antitrust litigation, as confirmed also by the US experience, where such a rule, which represents the default rule in tort litigation, was replaced with one-way fee-shifting for antitrust cases (Section 4 of the Clayton Act). In this respect, adopting this cost-shifting rule would not contribute to the goal of making private antitrust damages actions more effective in the EU.

[405] Although some of these options (decoupling, NCA as *amicus curiae*) were not considered in the Green Paper, we keep them in the welfare assessment as our analysis in this section suggested that they might prove beneficial, although not necessarily the most beneficial.

deterrence and litigation costs. Put differently, this would be the set of rules that minimises Type I, Type II errors and litigation costs.[406] In our approach, the ideal set of rules would be the one that maximises the difference between benefits and costs, where benefits are expressed in terms of deterrence and corrective justice, and costs include litigation costs, legal errors, administrative and enforcement costs and the costs of harmonisation at EU level.

We then assess the costs and benefits of the following options:

Option 0 *loser-pays rule, single damages, prejudgment interest*: this option broadly corresponds to the actual situation in the EU27. It also corresponds to a "zero option" or "no policy change" option in the impact assessment jargon.

Option 1 *Double damages*. We further distinguish between:

- 1a. Double damages (plus prejudgment interest) only for horizontal cartel cases;
- 1b. Double damages (plus prejudgment interest) for all cases;
- 1c. Double damages (plus prejudgment interest) for horizontal cartels, decoupling for other types of infringement.
- 1d. Decoupled damages for all cases;
- 1e. NCA as *amicus curiae*.

Option 2 *Introducing one-way fee-shifting*. Here again, we distinguish different sub-options:

- 2a. Zero option plus one-way fee-shifting;
- 2b. One-way fee-shifting and double damages (plus prejudgment interest) for horizontal cartel cases;
- 2c. One-way fee-shifting and double damages;
- 2d. One-way fee-shifting, double damages (plus prejudgment interest) for cartel cases and decoupling for other types of infringement;
- 2e. One-way fee-shifting (plus prejudgment interest) and decoupled damages.
- 2f. One-way fee-shifting and NCA as *amicus curiae.*

Table 27 below summarises the features of the different combinations we analyse in our welfare assessment.

[406] See Hylton (2006).

Table 27 – Options on costs/rewards of damages actions

Option	Fee allocation	Damage multiple (all but cartels)	Prejudgment interest	Damage multiple (cartel cases)
0	Loser-pays	Single damages	Yes	Single damages
Option 1 – introducing double damages				
1a	Loser-pays	Single damages	Yes	Double damages
1b	Loser-pays	Double damages	Yes	Double damages
1c	Loser-pays	Decoupled damages	Yes	Double damages
1d	Loser-pays	Decoupled damages	Yes	Decoupled damages
1e	Loser-pays	NCA *amicus curiae*	Yes	NCA *amicus curiae*
Option 2 – introducing one-way fee-shifting				
2a	One-way	Single damages	Yes	Single damages
2b	One-way	Single damages	Yes	Double damages
2c	One-way	Double damages	Yes	Double damages
2d	One-way	Decoupled damages	Yes	Double damages
2e	One-way	Decoupled damages	Yes	Decoupled damages
2f	One-way	NCA *amicus curiae*	Yes	NCA *amicus curiae*

Below, we assess the expected costs and benefits of each of the options identified.

1.6.1 Zero option ("no policy change")

As we illustrated above, in section 1.2 of the Introduction of this Report, the underdevelopment of private antitrust damages actions in Europe highlighted by the Ashurst report in 2004 still characterises Europe in 2007. As a result, the zero option can be associated with a situation of very slow and uncertain development of private antitrust enforcement in the years to come. Specifying a zero option is anyway useful as a reference for the other options identified, as we assess the likely *incremental* impact of the selected options relative to the expected development of private antitrust damages actions absent a specific intervention by the European Commission. Such an approach enables us to capture the potential for current procedural rules and damage measures to enable, overtime, an increased access to justice by plaintiffs claiming antitrust injury.

As this section of our Report deals with the costs and rewards of antitrust damages actions, and in particular with damage awards and fee allocation

rules, the zero option can be said to broadly correspond to the award of single damages plus prejudgment interest, and the application of a loser-pays rule. Below, we briefly assess the likely benefits and costs of this option.

A. BENEFITS

A1. Deterrence

In order to assess the potential for option zero to lead to significant deterrence, we distinguish between types of antitrust infringements.

- *Cartels.* As we already observed in Part I of this Report, when we illustrated the theory of optimal deterrence and the empirical estimates on the cartel detection rate, *the award of single damages plus prejudgment interest is very likely to be insufficient to deter cartels*. As the estimated detection rate is very low, in the range between 10% and 30%, it is unlikely that the zero option would lead to enhanced deterrence of cartels. As this option does not significantly encourage plaintiffs to sue for damages, we consider that the associated level of deterrence would be very low.
- *Vertical restraints*. In vertical restraints, often the plaintiff is a downstream buyer or an upstream producer of inputs. As these cases exhibit a greater detection rate, as we observed in the previous sections of this Report, the deterrence-based rationale for multiplying damages seems less evident than in the case of cartels. At the same time, however, in these cases the probability of winning at trial may be significantly lower than in the case of cartels. Many of these cases require a careful balancing of the costs and benefits that the alleged practices create, and as such may prove onerous and difficult to litigate. In addition, evidence from the US reveals that often private antitrust damages actions are "David v. Goliath", which could mean that at least some plaintiffs have more limited resources to spend in litigation than defendants. When this is the case, the loser-pays rule may fail to encourage some victims to sue for damages, since – as we have shown in Section 1.2 above – this rule leads to a rather high spending on litigation for cases that are initiated, and discourages cases with low probability of victory[407]. As a result, we expect that the zero option would not lead to a significant enhancement of private antitrust litigation in cases of vertical restraints. This finding is confirmed by available evidence, which shows that in the period between 2004 and the first semester of 2007 there has been only one case in which the allegation of vertical restraint led to a damage award[408].

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[407] See *supra*, footnote 313 and accompanying text.

[408] See Section 1.2.2 in the Introduction of this Report.

- *Abuses of dominance*. For these cases, the plaintiff will often be a competitor or a player in an upstream or downstream market. These players can be considered as well informed of the occurrence of a given conduct, but in some cases they may not be best positioned to perform a competition assessment of the observed behaviour, which will have to be done by the judge especially in rule of reason cases. This, in turn, can lead to significant uncertainty as regards the outcome of trial. Here too, the probability of winning at trial, depending on the type of allegation, can be lower than the win rate for cartel cases. Article 82 cases (or monopolization cases in the US) are frequently considered as the most lengthy and difficult to litigate, as they can be difficult to substantiate and may require access to confidential documents held by the defendant. Absent one-way fee-shifting rules, and absent double damage awards, prospective plaintiffs may find it ill-advised to initiate a lawsuit. However, in these cases parties may have widely diverging expectations on the outcome of trial, which may discourage settlement to a limited extent. Our empirical analysis showed that damage awards have been more common in cases based on abuses of dominance than in cases of vertical restraints. In any event, we consider that the potential for private litigation to deter these types of conduct is bound to remain low under the zero option.

In summary, we consider that the zero option would lead to a very low deterrence of antitrust infringement, as confirmed by existing empirical evidence in Europe[409].

A2. Corrective justice

The extent to which a given option can be considered to achieve corrective justice, in our impact assessment, is linked to its suitability to lead to *restitutio in integrum* for a large number of victims. As a result, it heavily depends both on the accuracy in the assessment of damage awards, on the estimated level of recovery per plaintiff, and also on the estimated number of plaintiffs that will ultimately be compensated for the loss sustained. In this respect, the zero option exhibits the following features:

- *Cartels*. In cartel cases, the zero option is likely to achieve insufficient compensation for a very low number of plaintiffs. As a matter of fact, *restitutio in integrum* is in principle achieved by the award of single damages plus prejudgment interest. However, as the likelihood of settlement is quite high (see Table 18 in Part I above), and parties normally settle for less than the nominal damage award, the final result is that most of the plaintiffs that sue would not be fully compensated, and many plaintiffs would not sue.

[409] See Ashurst (2004) and Section 1.2 in the Introduction of this Report.

This effect is reinforced by the loser-pays rule: under this rule, the "case selection effect" encourages plaintiffs to initiate lawsuits with high win rate, such as cartel cases; but given the high likelihood of plaintiff victory, parties' expectations in cartel cases may more easily converge, leading to a high probability of settlement.

- *Vertical restraints*. For cases of vertical restraints, firms located on the value chain would be most likely to be acting as plaintiffs. Here too, under the zero option, for the reasons exposed above under the heading "deterrence", plaintiffs would have scant incentives to sue. Thus, the number of compensated plaintiffs will remain low as it is today. In addition, as these cases exhibit a low probability of winning at trial, the loser-pays rule is not the most suitable to encourage plaintiffs to sue. In addition, defendants' will anticipate the low plaintiff win rate and will signal their commitment to litigate to increase the expected cost of case litigation for the plaintiff – as found in the literature, the loser-pays rule encourages high-probability defences with high litigation costs and relatively small stakes. This is likely to be the case for vertical restraints.
- *Abuses of dominance.* For these cases, and especially exclusionary abuses, loser-pays rule seems to provide the lowest incentives to sue, as the expected spending in litigation is high, the probability that the defendant has more financial resources than the plaintiff is also high, and so is the probability of losing at trial. As a result, plaintiffs in close cases would probably refrain from suing, or would accept settlements for amounts that are lower than the loss sustained. This reflects the greater uncertainty of litigation: as we already observed, especially in rule of reason cases the parties may be positioned to observe the conduct vis-à-vis public authorities, but may be less competent to judge whether the conduct can actually be construed as an antitrust infringement. When this is the case, plaintiffs may perceive a greater uncertainty as regards the outcome of trial, and may also refrain from fully litigating the case, dropping it or accepting an early settlement.

Overall, the impact of the zero option on corrective justice is low. More precisely, single damages plus prejudgment interest are in principle suitable to achieve *restitutio in integrum*, but the uncertainty of the trial outcome – especially for vertical restraints – and the likelihood of settlement leads plaintiffs to end up being less than fully compensated. Most importantly, too few plaintiffs will decide to initiate lawsuits, leading to a persisting state of underdevelopment.

A3. Internal market

Under this heading, we assess the potential for a given option to realise the "level-playing-field" between countries, *i.e.* a situation in which citizens and businesses enjoy similar conditions for bringing private damages actions for

breach of antitrust rules; whereas this potential should correspond to conditions that actually facilitate the exercise of this right. Under the zero option, and limited to the issue of costs and rewards of antitrust damages actions, the current situation in Europe exhibits a number of differences between member states, which include the possibility of awarding punitive damages in some jurisdictions (UK, Ireland, Cyprus)[410]; and the existence of provisions for discretionary or partial fee-shifting in a limited number of countries (Finland, France, Germany, Italy, UK).

Overall, the zero option provides for a common situation of underdevelopment, which cannot be considered beneficial in terms of impact on the internal market. Most importantly, the developments at national level are not likely to lead to a "race to the top" in the search for the most efficient solution to enhance private enforcement in Europe. We will come back to this issue in Part III below.

B. COSTS

B1. Litigation costs

Under the zero option, litigation costs would be minimized. As a matter of fact, the very limited number of cases filed also brings to very low costs for the parties and for courts. As regards the fee allocation rule, as we observed in the previous sections the loser-pays rule leads to an increase in the parties' spending in litigation for cases they both perceive as characterise by a high probability of success. At the same time, the "case selection effect" of the loser-pays rule can lead to many cases being dropped, especially when the perceive plaintiff win rate is low (*e.g.*, vertical restraints).

B2. Administrative burdens

No significant administrative burdens can be associated to the award of single damages and the loser-pays rule. Also in terms of population and frequency, the underdevelopment of private antitrust enforcement under the zero option leads to a situation in which such burdens are minimised.

B3. Error costs

With private enforcement being significantly underdeveloped, also the impact of error costs is minimal. Given that no damage multiple is applied, also the expected impact for every Type I or Type II error would be kept at a minimum. Finally, absent rules that encourage parties to file standalone actions, we expect

[410] But see, for developments in Germany and Spain, note 423 below.

that most of the future developments in private antitrust litigation would be represented by follow-on actions, especially in cartel cases[411]. Were this to be the case, the likelihood of error would not be high, as these cases can rely on a previous fact-finding by a public authority.

However, as private antitrust enforcement remains underdeveloped, under the zero option it is unlikely that judges will profit from learning effects overtime. As the number of cases would remain low, the statistical incidence of errors may prove significant.

B1. Harmonisation costs

As there would be no harmonisation, there would also be no harmonisation costs.

[411] Whereas, with enhanced private enforcement, this would not necessarily be the case. As we have shown in the Introduction and in Part I of this Report, standalone cases represent a significant part of total cartel cases in the US.

1.6.1.1 Summary table on the zero option

Table 28 – Zero option

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**0** • *low detection rate, low incentives to sue, low number of cases, low expected damage award*	**1** • *high detection, high information, likelihood of early settlement* • *some litigation already observed*	**0** • *uncertainty of trial outcome, scant incentives to sue*
Corrective justice	**1** • ***n. of compensated victims:*** *very low number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**1** • ***n. of compensated victims:*** *low number of cases, low win rate, thus likely under-compensation due to settlement)* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**1** • ***n. of compensated victims:*** *very low number of cases, very costly litigation, diverging expectations, settlement less likely)* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum
Internal market	**0** • *fragmentation would remain, together with underdevelopment*	**0** • *fragmentation would remain, together with underdevelopment*	**0** • *fragmentation would remain, together with underdevelopment*
Costs			
Litigation costs	**0** • *low number of cases and trial costs*	**1** • *some litigation already observed*	**0** • *low number of cases and trial costs*
Administrative burdens	**0** • *choice of damage multiple does not affect administrative burdens*	**0** • *choice of damage multiple does not affect administrative burdens*	**0** • *choice of damage multiple does not affect administrative burdens*
Error costs	**0** • *the per se rule makes mistakes less likely*	**1** • *likelihood of error due to absence of learning effect for judges, especially when applying a rule of reason*	**1** • *likelihood of error due to absence of learning effect for judges, especially when applying a rule of reason*
Harmonisation costs	**0** • *no harmonisation*	**0** • *no harmonisation*	**0** • *no harmonisation*

1.6.2 Option 1 – double damages

As we already recalled, multiple damages are often justified in the literature in terms of deterrence. Some authors have also observed that in the US – mostly due to the absence of pre-judgment interest – multiple damages are also quite important when litigation is more costly and complex, and the probability of

winning at trial is low. Below, we summarise the findings of our previous sections and assess the prospective benefits and costs of multiple damages in a EU setting.

When we refer to multiple damages, an important issue to be defined at this stage is of course which damage multiple will be chosen. In this respect, as emerged from the previous sections, we can observe the following:

- In cartel cases, damage multiples do not create significant problems in terms of over-deterrence, as the detection rate is very low;
- With prejudgment interest, more than double damages can significantly overcompensate plaintiffs, thus paving the way for frivolous suit and, in any case, for excessive litigation expenditure. Following Lande (1993), treble damages plus prejudgment interest would reach between 3.75 and 5 times the initial damage claim[412];
- For infringements other than cartels, absent prejudgment interest multiple damages may serve to a certain extent also a compensatory purpose, due to the likelihood of settlement for lower amounts than the damage claim;
- For violations other than cartels, with prejudgment interest multiple damages may create a significant risk of over-deterrence, over-compensation and encouragement of frivolous suits.
- In general, adopting multiple damages can create very high harmonisation costs, as most member states do not allow for this possibility, as they rely on the compensatory – not punitive – nature of damage awards.

Thus, even adopting a purely deterrence-oriented perspective may suggest the adoption of a high damage multiplier for cartels, but still single damages and prejudgment interest in non-cartel cases, as the detection rate is already quite high and frivolous suits would be greatly encouraged. A more balanced approach, based on both deterrence and corrective justice principles, would suggest the application of single damages to all plaintiffs, whichever the damage multiple applied to the defendant.

We compare the following five sub-options with respect to different categories of benefits and costs.

1a. Double damages (plus prejudgment interest) only for horizontal cartel cases;

1b. Double damages (plus prejudgment interest) for all cases;

1c. Double damages (plus prejudgment interest) for horizontal cartels, decoupling for other types of infringement.

[412] More precisely, Lande (1993) calculates that absence of prejudgment interest reduces the treble damages multiplier down to a true multiplier between 1.25 and 1.66.

1d. Double and decoupled damages for all cases;

1e. NCA as *amicus curiae*.

A. BENEFITS

A1. Deterrence

Awarding multiple damages certainly increases deterrence for all types of anticompetitive conduct. This is true also for cartel cases, where the conduct is concealed and the detection rate is considered to be very low.[413] For cases of hard-core price-fixing conspiracies, most commentators argue that over-deterrence should not be considered as a likely scenario. As we have shown in Part I of this Report, deterrence of cartels is still likely to be insufficient with treble damages, given that the estimated detection rate is below one third. Accordingly, multiplying damages appears as a viable solution to enhance private enforcement of antitrust, and also deter would-be cartelists from entering conspiracies at least in some cases. As a result, the impact on deterrence of multiplying damage awards is certainly positive and significant.

Two concomitant (although closely interrelated) impacts can be distinguished in this respect:

- the increased magnitude of the expected penalty for each case (increase in both D and S in our formula **(1)** above, in Section 1.1); and
- an increase in the number of cases, due to the higher expected reward for plaintiffs.

Both effects lead to enhanced deterrence of cartels. In this respect, the damage multiple can also be very high – *e.g.* treble damages or more – as over-deterrence is not really a likely scenario for cartels. The only problem that may emerge with high damage multiples is the limit of the defendant's ability to pay, as discussed in Part I above.

For other types of infringements, the unavailability of multiple damages (in most member states) and/or one-way fee-shifting is likely to leave private antitrust enforcement in a state of underdevelopment. As a result:

- *we consider option 1a as having no incremental impact on deterrence relative to the zero option for other types of infringements*. This is even more true for cases with low probability of winning at trial, as the loser-pays rule discourages legal actions for these cases, by magnifying the variance of potential payoffs.
- To the contrary, *if multiple damages are introduced for all types of conduct, as in option 1b, there might be a risk of over-deterrence for conducts such as vertical*

[413] See above, part I for a discussion.

restraints and monopolization, as these conducts are observable and the detection rate can be assumed to be higher than for cartels. More in detail:

- as some categories of victims may experience problems in proving causation, *double damages could achieve more efficient deterrence* by forcing would-be infringers to internalise the full harm to society (including the deadweight loss). This could have positive effects on deterrence and approximate optimal deterrence.
- however, as these conducts are observable and more easily detected, double damages may lead some plaintiffs to file frivolous suits, thus potentially leading to an overdeterrent effect in some cases. This effect would be particularly undesirable, as it would discourage efficient behaviour (*e.g.* frivolous predatory pricing allegations may inhibit welfare-enhancing price cuts; strategic use of antitrust laws in vertical claims may lead to inefficient "make or buy" decisions, etc.).

- Compared to option *1b*, option *1c* apparently achieves the same level of deterrence, as the magnitude of the expected penalty is the same. However, the incentive for plaintiffs to file suit for non-cartel cases would remain the same as it is today, and only one of the two identified effects – *i.e.*, the increased prospective penalty for each case – would be significant; whereas the number of cases is not likely to increase. Would-be infringers would anticipate the absence of increased incentives to sue, and – once a lawsuit has been filed – would try to settle for lower amounts or discourage litigation by signalling their nature of "tough negotiators". As the loser-pays rule characterises this option, the increase in the defendants' spending in litigation would thus magnify the perceived cost of trial for plaintiffs, who may refrain from filing suit in cases with low win rate, as most vertical restraints and abuse of dominance cases are expected to be. Thus, widespread settlement reduced incentive to litigate may offset the intended "disciplining" effect of awarding more than single damages, leading to a low level of deterrence overall, as the probability of being sued for damages would not increase.
- Option *1d* shares the same problems of option *1c*, but extends them to cartels. As a result, the deterrence potential of option *1d* is likely to be lower than in the previous three options. No increase in the incentive to file suit would be observed, and only an increase in sanctions would emerge. Under such a rule, the number of litigated cases would remain the same, but those few cases that are litigated would lead to punitive damages for the defendant. The deterrent effect of this option is therefore rather limited, and slightly higher than in the *status quo*.
- Finally, option *1e* presents a totally different solution. As we mentioned already in section 1.3.2 above, an alternative way to reach a deterrent effect without imposing a significant procedural change in national legal systems is a procedure under which the court asks the NCA or the European

Commission – both in standalone and follow-on cases – to act as *amicus curiae* and assess the total damage created by the alleged conduct. The judge would then apportion the damage and compensate the plaintiff according to the general principle of *restitutio in integrum*. The *amicus curiae* outcome would then serve as a basis also for follow-on suits. For what concerns the magnitude of expected sanctions per given case, this option might at first blush seem as deterrent as option *1b*: knowing that the NCA will assess the overall damage, the infringer would be faced *ex ante* with an expected sanction close to the social harm imposed by the anticompetitive conduct; the magnitude of the expected financial sanction may then be smaller or larger than double damages, independently of whether the multiple is applied to the harm or to the gain.[414] On the other hand, the incentive to sue will be lower under this option compared to option *1b*, since individual plaintiffs will not face any reward greater than the loss sustained. In addition, the deterrent impact of this option changes depending on the type of violation. The activation of NCA as *amicus curiae* to assess the total social harm imposed by the anticompetitive conduct cannot represent a substantial added deterrence in many non-cartel cases, and especially for vertical restraints, where the harm often coincides more or less with the plaintiff's lost profits or with the defendant's illegal gain.

In summary:

- options *1a* exerts the most desirable impact on deterrence;
- option *1b* has a potential over-deterrent effect, mostly due to frivolous lawsuits;
- options *1c* and (even more so) *1d* only slightly increase deterrence compared to the *status quo*.
- option *1e* increases deterrence, but provides limited encouragement to plaintiffs to file lawsuit. As a result, its impact is expected to be lower than under *option 1a*.

We will report these results in Tables 32-36 below, with scores from 0 to 5.

A2. Corrective justice

Greater corrective justice can be achieved in two fundamental ways:

(i) when an increased number of plaintiffs initiate a legal action and win at trial; and

(ii) when each individual plaintiff is fully compensated for the private harm suffered.

[414] See below, Section 4.2.3, for an analysis of this issue.

In this respect, for cartel cases:

- Awarding double damages (*option 1a*, *1b* and *1c*) provides for a slight increase in corrective justice, as more plaintiffs would have an incentive to file suit and be compensated. However, since prejudgment interest is awarded, some plaintiffs may in principle be overcompensated, *i.e.* they would receive a damage award that is greater than the harm suffered. This finding, however, has to be confronted with the likelihood of settlement: as most cartel cases can be expected to settle before trial, the settlement amount may be significantly lower than the initial damage claim. If this is the case, introducing double damages may lead private plaintiffs to be more fully compensated, as the settlement amount is affected by the likely outcome of trial.[415]
- Option *1d* would not lead to a similar increase in the number of cases, but would in theory perform better as regards the adherence of the damage award to the principle of *restitutio in integrum.* More precisely, the first effect is likely to be particularly significant for cartel, as risk averse parties with scattered damages and little knowledge of the harm will decide to refrain from suing for damages, thus leaving the accounts of the cartelist almost untouched. The second effect also highly depends on whether most cases would settle. As the reservation value of the plaintiff in the settlement negotiation is lower, and the plaintiff bears some risk of having to pay the defendant's and her own costs, we would expect cases to settle for an amount that is lower than full compensation.
- Option *1e* would greatly contribute to corrective justice, as one could consider that the damage quantification by a competition authority would secure a greater accuracy. However, the plaintiff's incentive to sue would remain almost unchanged, as the plaintiff would not reap the further benefit of the increase in sanctions. This lower incentive – which we considered also under the heading "deterrence" above, here is important as it may lead to a lower number of compensated victims. However, the plaintiff's bargaining power in the settlement process may in some cases be stronger than under options *1c* and *1d*, especially when the calculation of total loss imposed on society leads to a sanction that is significantly larger than double damages. This may lead to the plaintiff to settle at quite favourable conditions.

The outcome is different when looking at other types of infringement, such as vertical restraints and abuses of dominance. Here:

- Option *1a* does not improve over the *status quo*.

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[415] For example, if the plaintiff knows that going to trial she would have 50% likelihood of winning, and her damage claim (including interest) is €400, then she would not accept any settlement below €200. If the damage award is doubled, she would settle for any amount above €400.

- Option *1b* can create the risk of overcompensation, as the parties would receive more than *restitutio in integrum* However, depending on the extent to which the parties would settle the case, and to the expected amount of settlement, this option may not depart too significantly from full compensation. This is more true for cases that exhibit a low win rate and relatively low stakes at trial, as is often the case for vertical restraints: for these cases, as we already observed, the loser-pays rule may lead victims to refrain from initiating a lawsuit: whereas double damages increase the stakes of the case, and thus encourages victims to sue. For abuses of dominance, this rationale only partly applies, as the stakes of the case are often higher and parties are less likely to settle.
- Likewise, under options *1c* and *1d* (identical for all types of infringement but for cartel cases), with the loser-pays rule, plaintiffs with low probability of prevailing would be discouraged from filing suit, for the prospect of having to pay also the defendant's legal costs with significant probability. As a matter of fact, empirical evidence from the US suggests leads us to infer that the probability of winning at trial for most of these types of infringement may be relatively low. And even those who would decide to initiate a lawsuit may be led to settle the case early, knowing that the probability of winning at trial is low. The settlement amount is likely to be lower than under option *1b*: while plaintiffs can anticipate that the prospective penalty for the defendant is now doubled, also defendants will anticipate that the plaintiff has only limited expectations in the settlement negotiation, as her reservation value is affected by the lower payoff in case of victory at trial.
- Option *1e* could positively contribute to corrective justice through greater accuracy in damage calculation. However, as stated above for the case of cartels, it is likely to lead only to a limited increase in the number of cases filed.

In summary, none of the options is completely satisfactory when it comes to the expected impact on corrective justice. All options are in principle suited to achieve full compensation of those plaintiffs that get to court. However, the options may differ:

(i) as to the extent to which they encourage plaintiffs to file legal action; and

(ii) in the extent to which they affect the settlement amount.

More in detail:

- Option *1a* weakly dominates options *1d* and *1e* – it yields the same results for non-cartel cases, and is likely to perform better for cartel cases.
- Option *1b* apparently seems less preferable than Option *1a*, as it creates concerns as regards overcompensation and unmeritorious suits (*i.e.* compensation of the wrong plaintiffs).

- Option *1e* is preferable to options *1c* and *1d*, as it ties the total damage assessed to the social harm inflicted to society, but may lead only to a limited increase in the number of compensated victims compared to the *status quo*.

A3. Internal market

Impacts on the internal market, as we defined them at the beginning of Part II of this Report, mostly relate to the creation of a level playing field between EU member states, and possibly a playing field where victims can effectively exercise their rights. In this respect, the award of double damages would positively contribute the internal market. The main impact would be the possibility of awarding punitive damages in all member states, whereas this possibility is currently envisaged only in the UK, Ireland and Cyprus[416].

As a result,

- Option *1b*, *1d* and *1e* would provide the most significant impact, whereas
- Option *1a* and *1c* would create a more levelled playing field only for horizontal cartel allegations.
- As regards option *1e*, this option would have a significant impact on the internal market, as both the possibility for NCAs to act as *amicus curiae* for the assessment of the harm and the award of multiple damages are currently available only in a small number of member states. Introducing and streamlining this procedure at pan-European level may certainly contribute to the level playing field. However, differences would probably persist as the procedure appears unlikely to be extended to all cases, and also because NCAs have different skills and resources to deal with this issue in EU member states.

B. COSTS

B1. Litigation costs

All the options envisaged would have an incremental impact on litigation expenses. This, however, is not necessarily undesirable, provided that enhanced private enforcement necessarily passes through an increase in the number of lawsuits initiated. However, litigation costs may also increase as a result of increased frivolous lawsuits, or because enforcement and administration costs for courts and other authorities involved in private enforcement increase. Some of the option at hand exhibit this type of problem.

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[416] However, Behr (2003) reports that German courts have in some cases started to award punitive damages in some civil law disputes, and a Spanish Court has endorsed a US judgment awarding punitive damages in *Miller v. Alabastres*. See Jablonsky (2005).

More in detail:

- Option *1a* would increase litigation costs for cartel cases, due to the expected increase in the number of cases filed. In addition, we expect that in these cases the parties would have an incentive to settle, as it is likely that the expectations on the outcome of trial converge (high plaintiff win rate). The increase in litigation costs would then be mostly related to increases in parties' attorneys' fees and transaction costs, more than costs of use of the legal system.
- Option *1b*, in this respect, obviously has an even greater impact on litigation costs. More precisely, it would have the same impact as option *1a* for cartel cases, and a way more significant impact on other types of infringement. This latter impact would be probably including also greater costs for courts, as these cases are more likely to be litigated by parties having diverging expectations on the likely outcome of trial, and/or may be frivolous lawsuits initially filed with the intent to settle before trial. Moreover, this impact is likely to be highest for abuses of dominance, which are considered to be the most costly and difficult to litigate.
- Options *1c* – besides being identical to option *1a* for cartel cases – may entail some additional costs for courts, due to the need to manage decoupling, and in particular to allocate in some way the portion of the overall sanction that exceed single damages – *e.g.* confiscating the exceeding portion of damages or using it as subsidy to courts dealing with private antitrust enforcement can generate additional costs.
- Option *1d* would extend this problem also to cartels. Overall, due to the lower increase in the number of cases, this option would lead to a lower increase in litigation costs compared to Options *1a*, *1b* and *1c*. However, it would still increase such costs compared to the zero option, due to settlement costs and costs incurred by courts in managing decoupling. Under this option, in particular, settlement costs may slightly increase, as the parties may find it easier to agree on an intermediate sum – the expected payoffs would always be significantly distant, with decoupled damages, even if the parties are both optimistic as regards the verdict.[417]
- Option *1e* would portrait an entirely different situation: as the defendant knows that litigating the case would open the door to the assessment of the total social ham and consequent apportionment, she would have an urge to

[417] For example, if the plaintiff expects to have a 90% probability of winning €500 at trial, and the defendant expects to win in 40% of the cases, then the plaintiff would not settle for any amount below €460, and the defendant would not settle for any amount above €300 – thus, the parties do not settle. To the contrary, if the defendant's expected cost is doubled, she would be available to settle for up to €600 in order not to go to trial. Hence, double decoupled damages facilitate pre-trial settlement.

settle the case at the earliest possible stage, possibly on a confidential basis. Knowing that the defendant has a strong need to settle at an early stage, the plaintiff (or her lawyer) would in turn enjoy a "threat advantage": the best alternative to the negotiated agreement (BATNA) of the defendant would be rather undesirable, and accordingly the plaintiff may extract almost the total damage award to keep the settlement confidential. This generates an increase in legal actions, but a decrease in the percentage of cases that reach the court. Besides this effect, costs for courts and NCAs will increase, alongside with administrative burdens (see below): an obvious additional cost would be the need to expand the resources and the staff of competition authorities in light of their role as *amici curiae*. The magnitude of both impacts (on parties' transaction costs and on competition authorities) would depend on the threshold chosen for the activation of the procedure – again, we deem it unlikely (and hardly sustainable from a financial viewpoint) that with enhanced private enforcement competition authorities may intervene in all cases.

An additional issue to be carefully appraised is the likely increase in frivolous suits for all those options that provide for an overcompensation of plaintiffs. Or that anyway put plaintiffs in a favourable condition to extract early settlements even if their claim was frivolous. This is particularly the case for option *1b*, and especially for exclusionary abuses, due to the likelihood that plaintiffs are competitors.

B2. Administrative burdens

Introducing multiple damages does not in and of itself increase administrative burdens for firms, courts and NCAs, as the procedural rules would remain unchanged, and no further information obligations would be imposed by law. However, as the number of cases filed would likely increase, also (in the jargon of the Standard Cost Model) the "population" associated with each information obligation would be on the rise.

As a result, we consider that

- option *1b* and – to a lesser extent – *1a* and *1c* would lead to an increase in administrative burdens. Of these, option *1c* and – even more – *1d* would also lead to the emergence of new information obligations, depending on the way in which the sanction in excess of single damages is allocated. Record-keeping and reporting of activities may probably emerge if the exceeding portion of damages is confiscated.
- option *1e* is the most burdensome in this respect. The need to constantly exchange information between the court and the *amicus curiae* is likely to lead to additional information obligations and cost of acquisitions (in some cases, also hiring new qualified staff) on the side of public administrations.

The lower the threshold that is established to activate the procedure, the larger these costs become, especially as NCAs have limited resources.

B3. Error costs

Error costs may increase for three main reasons:

- The increased number of cases litigated reduces accuracy in adjudication ("increase in the number of legal errors");
- The magnitude of the harm generated by a legal error increases as the damages awarded are multiplied ("increase of the average cost of each individual legal error");
- Potential pressure on national judges to avoid imposing liability in close cases, due to the magnitude of the expected fine ("equilibrating tendencies in adjudication")[418].

At the same time, error costs can decrease alongside with an increase in the number of cases filed, as courts may profit from learning effects and would get more familiar with adjudication in private antitrust damages actions.

For these reasons, if double damages are introduced (Options *1a*, *1b*, *1c* and *1d*), we see a potential impact on error costs[419]. More in detail:

- Option *1a* increases the number and average cost of errors in cartel cases. This impact does not seem particularly significant, however, as cartel cases are less prone to costly errors than other types of infringements, due to the application of a *per se rule*.
- Option *1b* is thus more costly than option *1a*, as it increases the number and average cost of judicial mistakes also for cases of vertical restraints, and – most importantly – monopolization cases. The latter cases are particularly important, especially as regards the impact of Type I errors on conducts that shift the demand curve outwards, as is likely to be the case, *i.a.*, in knowledge-based industries characterised by strong direct and indirect network effects.[420] Under this option, the risk of judicial mistakes triggered by "equilibrating tendencies" may emerge. The typical case would arise when a judge knows that, by declaring an alleged infringer guilty in a close

[418] See *supra*, Section II.1.3, note 359 and accompanying text, quoting Calkins (1986) and Kovacic (2007).

[419] As a matter of fact, we do not consider frivolous suits that settle before trial as instances of legal errors – we consider type I and type II errors to arise only when a judge issues the wrong decision. Such "wrong" settlements are captured as reductions of benefits – mostly, as failures to achieve the compensation goal.

[420] Pardolesi and Renda (2000), *How safe*, cit. And see Buccirossi *et al.* (2006), *The cost of inappropriate interventions/non interventions under Article 82*, Economic Discussion Paper, OFT.

case, she would lead the defendant to be overwhelmed by follow-on actions of plaintiffs seeking double damages plus prejudgment interest. If the judge intimately considers that such consequence would be too harsh for the defendant, she may decide to refrain from declaring her guilty, thus leading to a potential judicial mistake triggered by the availability of double damages. Authoritative commentators such as Calkins (1986) and Kovacic (2007) have mentioned equilibrating tendencies as a possible key to interpret some developments in US antitrust enforcement over the past few decades, and especially after the advent of the Chicago School.

- Option *1c* is less costly than option *1b*, but more costly than option *1a*. On the one hand, compared to option *1b*, it does not lead to an increase in the number of non-cartel cases. On the other hand, compared to option *1a*, it would lead to a greater average cost of errors, thus to a larger impact of judicial mistakes for vertical restraints and abuses of dominance, due to the application of a sanction that exceeds single damages.
- Option *1d* limits the cost of judicial mistakes, as the number of cases filed would only slightly increase compared to the zero option. Thus, the number of errors would not increase significantly. At the same time, however, the average cost of each individual judicial mistake would increase, due to the application of a sanction that exceeds single damages. It is difficult to assess whether the overall impact would be greater under option *1d* compared to option *1c*, as this depends on assumptions as regards the relative magnitude of the "increase in the number of legal errors" effect and the "increase of the average cost of each individual legal error" effect.
- Option *1e* would probably lead to a reduction in the statistical incidence of legal errors, as the damage calculation is provided by the NCA as *amicus curiae*, and as such may be considered as potentially more accurate, at least in some cases. As we explained above, we expect that – assuming that the application of article 82 gradually moves towards an effects-based approach – NCAs may develop overtime a superior expertise than courts in assessing the overall negative consequences of an alleged anticompetitive conduct. This being the case, also the accuracy of the competitive assessment might improve. At the same time, however, if an inaccurate calculation by the NCA reverberates on follow-on cases, the impact of individual errors would be magnified. Finally, if judges mistakenly apportion the damage calculated by the NCA, this would create other possible error costs.

In summary, all options provide for at least a small increase in error costs, mostly due to the expected increase in the number of cases, but also on the parties affected by each individual error and/or the extent to which parties are affected by an error. Of these, option *1b* creates substantial concerns, especially as regards abuses of dominance.

B4. Harmonisation costs

Harmonising national legislation by mandating that national judges award exemplary or punitive damages would be far from easy. This depends on the traditional reliance, in most civil law countries, on the "restitutionary" nature of damage awards, which precludes any possibility of punitive damages, considered contrary to public policy. Also, Advocate General Geelhoed in *Manfredi* suggested that the award of punitive damages is to be left under the competency of national legislators. Since, as already recalled, in as few as three member states punitive damages can be awarded, extending the application of punitive damages also to other jurisdictions – although for a precisely circumscribed set of cases – seems difficult at best, and highly costly in terms of harmonisation.

To be sure, over the past few years the total ban on punitive damages seems to have been slightly relaxed in some European jurisdictions. For example, Behr (2003) reports that German courts have in some cases started to award punitive damages in some civil law disputes, and a Spanish Court has endorsed a US judgment awarding punitive damages in *Miller v. Alabastres*.[421] At the same time, however, the Italian Corte di Cassazione recently refused to enforce a US punitive damage award as contrary to the *ordre public*.[422] Overall, the European landscape seems quite far from allowing for punitive damage awards on a large scale.

Harmonisation costs are a substantial cost heading in the assessment of the likely impact of double damages. Such costs would be significant especially in options *1b*, *1c* and *1d*. whereas we consider option *1a* to be more feasible, in that it could be justified on the principle of effective access to justice provided for at Article 6 ECHR, but also on more theoretical considerations such as the need to consider pre-trial settlement, legal expenses, the seriousness of the conduct, and the very low detection rate normally attributed to horizontal cartels.

To the contrary, a different option such as option *1e* would create less problems in terms of conflict with national legislation. As already recalled, such possibility is already envisaged at Article 15.3 of Regulation 1/2003, and some EU countries have already taken *ad hoc* measures to encourage cooperation between NCAs and national courts. Such option preserves the compensatory nature of damages, and links the assessment of the overall *quantum* to an evaluation of the total social harm resulting from the anticompetitive conduct, to be then apportioned by the judge. Of course, implementing such an option would not prove easy, and would have to rely on an unprecedented

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[421] See Jablonski (2005).

[422] This occurred in the *Fimez* case, Corte di Cassazione n. 1183, 19 January 2007. See, *i.a.*, Gotanda (2006).

coordination between NCAs and judges. However, no significant problems of conflict with the *ordre public* would be likely to emerge.

In summary, all the envisaged options would lead to harmonisation costs. The most costly options are *1b*, and to a lesser extent *1c* and *1d*. Option *1e* would create mostly implementation problems, may take many years to put in practice, and would be feasible only for high stakes cases. Option *1a* seems more justifiable, although it would still conflict with consolidated legal principles in most European jurisdictions.

1.6.2.1 Summary tables on Option 1

Table 29 – Option 1a (double damages for cartel cases)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *Increase in sanctions, increase in incentive to sue* • *no risk of over-deterrence* • *may not suffice to deter many cartels*	**1** • *high detection, high information* • *some litigation already observed*	**0** • *uncertainty of trial outcome, scant incentives to sue*
Corrective justice	**4** • ***n. of compensated victims:*** *Increase in the number of cases* • ***alignment with actual harm:*** *possible risk of overcompensation, mitigated by likelihood of settlement*	**1** • ***n. of compensated victims:*** *low number of cases, low win rate, thus likely under-compensation due to settlement)* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**1** • ***n. of compensated victims:*** *very low number of cases, very costly litigation, diverging expectations, settlement less likely)* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum
Internal market	**4** • *today only 3 member states can award punitive damages*	**0** • *fragmentation would remain, together with slow development*	**0** • *fragmentation would remain, together with slow development*
Costs			
Litigation costs	**3** • *greater incentive to sue;* • *likelihood of settlement as many cases would be follow-on;* • *increase in legal consultancy costs*	**1** • *some litigation already observed*	**0** • *low number of cases and trial costs*
Administrative burdens	**2** • *increase in population associated with each information obligation;* •	**0** • *choice of damage multiples does not affect administrative burdens*	**0** • *choice of damage multiples does not affect administrative burdens*
Error costs	**2** • *increase in the number of cases and the magnitude of sanctions* • *per se rule mitigates this increase*	**1** • *likelihood of error due to absence of learning effect for judges, especially when applying a rule of reason*	**1** • *likelihood of error due to absence of learning effect for judges, especially when applying a rule of reason*
Harmonisation costs	**3** • *contrary to* ordre public *in most countries, but justifiable on the basis of Art. 6 ECHR*	**0** • *no harmonisation*	**0** • *no harmonisation*

Table 30 – Option 1b (double damages for all cases)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *Increase in sanctions, increase in incentive to sue* • *no risk of over-deterrence* • *may not suffice to deter many cartels*	**4** • *Increase in sanctions, increase in incentive to sue* • *risk of over-deterrence, as detection rate is high*	**4** • *Increase in sanctions, increase in incentive to sue* • *risk of over-deterrence especially if claimant is a competitor*
Corrective justice	**4** • ***n. of compensated victims:*** *Increase in the number of cases* • ***alignment with actual harm:*** *possible risk of overcompensation, mitigated by likelihood of settlement*	**3** • ***n. of compensated victims:*** *increase in the number of cases,* • ***alignment with actual harm:*** *high risk of overcompensation, mitigated by likelihood of settlement*	**2** • ***n. of compensated victims:*** *increase in the number of cases,* • ***alignment with actual harm:*** *very high risk of overcompensation*
Internal market	**4** • *today only 3 member states can award punitive damages*	**4** • *today only 3 member states can award punitive damages*	**4** • *today only 3 member states can award punitive damages*
Costs			
Litigation costs	**3** • *greater incentive to sue;* • *likelihood of settlement as many cases would be follow-on;* • *increase in legal consultancy costs*	**4** • *greater incentive to sue (both standalone and follow-on cases)* • *high increase in legal consultancy costs* • *increased workload for courts* • *risk of frivolous suits*	**4** • *greater incentive to sue (both standalone and follow-on cases)* • *high increase in legal consultancy costs* • *increased workload for courts* • *risk of frivolous suits*
Administrative burdens	**2** • *increase in population associated with each information obligation;*	**2** • *increase in population associated with each information obligation*	**2** • *increase in population associated with each information obligation*
Error costs	**2** • *increase in the number of cases and the magnitude of sanctions* • *per se rule mitigates this increase*	**3** • *increase in the number of cases and the magnitude of sanctions* • *rule of reason cases particularly affected*	**4** • *increase in the number of cases and the magnitude of sanctions* • *rule of reason cases particularly affected* • *risk of frivolous suits by competitors, mitigated by loser-pays*
Harmonisation costs	**3** • *contrary to* ordre public *in most countries, but justifiable on the basis of Art. 6 ECHR*	**4** • *contrary to* ordre public *in most countries*	**4** • *contrary to* ordre public *in most countries*

Table 31 – Option 1c (decoupled damages, double for cartels)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *Increase in sanctions, increase in incentive to sue* • *no risk of over-deterrence* • *may not suffice to deter many cartels*	**2** • *Increase in sanctions* • *low increase in incentive to sue due to contractual relationship* • *risk of over-deterrence as detection rate is high*	**2** • *increase in sanctions* • *slight increase in incentive to sue especially if claimant is a competitor* • *risk of over-deterrence when claimant is a competitor*
Corrective justice	**4** • ***n. of compensated victims:*** *Increase in the number of cases* • ***alignment with actual harm:*** *possible risk of overcompensation, mitigated by likelihood of settlement*	**2** • ***n. of compensated victims:*** *slight increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**2** • ***n. of compensated victims:*** *slight increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum
Internal market	**4** • *today only 3 member states can award punitive damages*	**4** • *would level the playing field*	**4** • *would level the playing field*
Costs			
Litigation costs	**3** • *greater incentive to sue;* • *likelihood of settlement as many cases would be follow-on;* • *increase in legal consultancy costs*	**3** • *slight increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage*	**3** • *slight increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage*
Administrative burdens	**2** • *increase in population associated with each information obligation;*	**2** • *slight increase in population associated with each information obligation* • *record-keeping and reporting of activities may emerge if damages are confiscated*	**2** • *slight increase in population associated with each information obligation* • *record-keeping and reporting of activities may emerge if damages are confiscated*
Error costs	**2** • *increase in the number of cases and the magnitude of sanctions* • *per se rule mitigates this increase*	**3** • *small increase in the number of cases* • *increase in magnitude of sanctions* • *rule of reason cases particularly affected*	**3** • *slight increase in the number of cases* • *increase in magnitude of sanctions* • *rule of reason cases particularly affected*
Harmonisation costs	**3** • *contrary to* ordre public *in most countries, but justifiable on the basis of Art. 6 ECHR*	**2** • *judges should be trained*	**2** • *judges should be trained*

Table 32 – Option 1d (decoupled damages for all cases)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *increase in sanctions* • *slight increase in incentive to sue in follow-on cases, due to more favourable settlement terms* • *no risk of over-deterrence*	**2** • *Increase in sanctions* • *low increase in incentive to sue due to contractual relationship* *risk of over-deterrence as detection rate is high*	**2** • *increase in sanctions* • *slight increase in incentive to sue especially if claimant is a competitor* • *risk of over-deterrence when claimant is a competitor*
Corrective justice	**2** • ***n. of compensated victims:*** *slight increase in the number of follow-on cases, due to more favourable settlement terms* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**2** • ***n. of compensated victims:*** *slight increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**2** • ***n. of compensated victims:*** *slight increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum
Internal market	**4** • *would level the playing field*	**4** • *would level the playing field*	**4** • *would level the playing field*
Costs			
Litigation costs	**2** • *slight increase in incentive to sue, but only for follow-on cases* • *settlement highly likely* • *cost of allocating the exceeding part of damage, but only when cases are not settled*	**3** • *slight increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage*	**3** • *slight increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage*
Administrative burdens	**1** • *slight increase in population associated with each information obligation* • *record-keeping and reporting of activities may emerge if damages are confiscated* • *limited to cases that are not settled [also true for verticals and abuses where there is also increase in settlements]*	**2** • *slight increase in population associated with each information obligation* • *record-keeping and reporting of activities may emerge if damages are confiscated*	**2** • *slight increase in population associated with each information obligation* • *record-keeping and reporting of activities may emerge if damages are confiscated*
Error costs	**1** • *slight increase in the number of cases* • *greater magnitude of sanctions* • *limited to cases that are not settled* • *mitigated by the per se rule*	**3** • *small increase in the number of cases* • *increase in magnitude of sanctions* • *rule of reason cases particularly affected*	**3** • *slight increase in the number of cases* • *increase in magnitude of sanctions* • *rule of reason cases particularly affected*
Harmonisation costs	**2** • *judges should be trained*	**2** • *judges should be trained*	**2** • *judges should be trained*

Table 33 – Option 1e (NCA as *amicus curiae*)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *sanctions would increase compared to status quo due to calculation of deadweight loss* • *increase in incentive to sue also for standalone cases* • *no risk of overdeterrence*	**1** • *unlikely that sanctions would increase compared to status quo* • *no increase in incentive to sue due to contractual relationship* • *no risk of overdeterrence*	**2** • *sanctions might increase compared to status quo when deadweight loss is measured* • *no risk of overdeterrence*
Corrective justice	**3** • ***n. of compensated victims:*** *slight increase in the number of standalone and follow-on cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum; *includes deadweight loss*	**1** • ***n. of compensated victims:*** *no increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**3** • ***n. of compensated victims:*** *slight increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum; *includes deadweight loss*
Internal market	**4** • *would level the playing field; potential difference due to gaps between NCAs*	**4** • *would level the playing field; potential difference due to gaps between NCAs*	**4** • *would level the playing field; potential difference due to gaps between NCAs*
Costs			
Litigation costs	**3** • *increase in incentive to sue, for both standalone and follow-on cases* • *cost of NCA assessment and coordination with courts* • *if properly implemented, claimant does not have to fully calculate damage*	**4** • *no increase in incentive to sue* • *cost of NCA assessment and coordination with courts* • *more costly for NCA to calculate damage compared to the claimant* • *parties may litigate over the nature of the case, to call for NCA assessment*	**4** • *slight increase in incentive to sue* • *cost of coordination between NCA and courts* • *more costly for NCA to calculate damage compared to the claimant*
Administrative burdens	**4** • *increase in population associated with each information obligation* • *burdensome exchange of forms between court and NCA*	**3** • *no increase in population associated with each information obligation* • *burdensome exchange of forms between court and NCA*	**4** • *slight increase in population associated with each information obligation* • *burdensome exchange of forms between court and NCA*
Error costs	**2** • *increase in the number of cases and sanctions* • *NCA intervention may increase accuracy of judgment* • *Use of NCA calculation for follow-on cases may magnify effect of error* • *Judges may err in apportionment*	**1** • *unlikely increase in the number of cases, unlikely increase in sanctions* • *NCA intervention may increase accuracy of judgment* • *Use of NCA calculation for follow-on cases may magnify effect of error*	**1** • *slight increase in the number of cases and sanctions* • *NCA intervention may increase accuracy of judgment in rule of reason cases* • *Use of NCA calculation for follow-on cases may magnify effect of error*
Harmonisation costs	**5** • *new coordination mechanism; would take many years of training and more resources for NCAs*	**5** • *new coordination mechanism; would take many years of training and more resources for NCAs*	**5** • *new coordination mechanism; would take many years of training and more resources for NCAs*

1.6.3 Option 2 - Introducing one-way fee-shifting

The second group of options we identified in this Section is the introduction of a one-way fee-shifting rule, under which the plaintiff would be called to compensate the defendant's legal expenses only when she acted in a manifestly unreasonable way. Based on our analysis at Section 1.2 above, we analyse the following options:

Option 2a. Zero option plus one-way fee-shifting;

Option 2b. One-way fee-shifting and double damages (plus prejudgment interest) for cartel cases;

Option 2c. One-way fee-shifting and double damages (plus prejudgment interest);

Option 2d. One-way fee-shifting, double damages (plus prejudgment interest) for cartel cases and decoupled damages for other types of infringement;

Option 2e. One-way fee-shifting and decoupled damages.

Option 2f. One-way fee-shifting and *amicus curiae* procedure.

A. BENEFITS

A1. Deterrence

One-way fee-shifting increases deterrence by indemnifying plaintiffs from legal expenses, thus encouraging them to file a lawsuit. As we highlighted in the previous sections, one-way fee-shifting would lead to a greater number of legal actions, with a clear deterrent effect for the defendant.

- Option *2a* would only introduce one-way fee-shifting over the *status quo*. This option would increase deterrence especially for non-cartel cases, given that in these cases the conduct is more easily observable, and under the loser-pays rule plaintiffs refrain from litigating because litigation is more risky and costly, and the plaintiff win rate is low. In cartel cases, this effect would be less pronounced, as the plaintiff win rate is higher, and the impact of one-way fee-shifting on the incentive to sue correspondingly lower[423]. This effect would be probably different for vertical restraints and abuse of dominance cases. On the one hand, in vertical restraints the likelihood that the plaintiff is of smaller size than defendant is high: in these cases, risk averse plaintiffs may be greatly encouraged from the introduction of one-way fee-shifting. In abuse of dominance cases, competitor plaintiffs may

[423] See formula (1) in Section 1.1, above, where one-way fee shifting shields the plaintiff from having to pay the defendant's costs in *(1 – p)* cases. As p increase, the effect of one-way fee-shifting is reduced.

profit from one-way fee-shifting also by filing strategic suits, with potential over-deterrent effects. If safeguards against strategic suits are introduced in the one-way fee-shifting rule, as envisaged by the Green Paper, this risk could be significantly reduced. Under this assumption, we consider that one-way fee-shifting would create no substantial risk of over-deterrence in abuse of dominance cases, and could significantly encourage plaintiffs to file suit despite the prospects of a difficult and costly litigation[424].

- Option *2b* would encourage plaintiffs to file lawsuits alleging hard-core cartel infringements, where over-deterrence is unlikely to be reached, due to the very low detection rate. This option certainly entails a low risk of over-deterrence, and at the same time encourages victims to file suit also in cases of vertical restraints and abuse of dominance, due to one-way fee-shifting. The magnitude of this impact is larger: (i) the more lengthy and costly is litigation, (ii) the most uncertain (or low) is the plaintiff win rate; and (iii) if safeguards are introduced against the case of frivolous suits – *e.g.* no fee-shifting for unreasonable or frivolous behaviour, offer-of-judgment rules, discretionary or partial fee-shifting etc. Accordingly, we consider that deterrence would significantly increase for all cases under option *2b*, and in particular for cartels (due to double damages and one-way fee-shifting) and for abuses of dominance (where litigation is normally most costly, and provided that safeguards against nuisance suits are introduced).
- In our set of options, the highest deterrence would be reached under option *2c*, as the defendants would face a higher number of lawsuits and also a larger expected penalty. In line with our conclusions on option *1b* above, and *a fortiori*, this option may be seen as over-deterrent for defendants. To be sure, in some cases, if causation is difficult to prove for certain victims, double damages and one-way fee-shifting could achieve stronger deterrence by forcing would-be infringers to internalise the full harm to society (including the dead-weight loss). This is particularly true where the damage claim normally comes from direct purchasers or end consumers, and in all cases where the damage claim is a sub-set of the larger harm inflicted to society by the anticompetitive conduct put in place by the defendant. It is, however, not likely to be the case when the lawsuit is filed by a competitor alleging an exclusionary abuse, as in those cases the damaged claimed is often identical to the loss suffered by the plaintiff, and the additional social harm generated by the conduct is way more difficult to establish. In some cases – *e.g.* predation, tying, bundled discounts – competitor plaintiffs may even claim damages which are higher than the net loss to society, as consumers may have gained in the short term from tied selling or from very

[424] Of course, the increase in the number of cases also means that cases will become, at the margin, of lower quality (absence of the so-called "selection effect" associated with the loser-pays rule). See, *i.a.* Bourjade *et al.* (mimeo).

low prices. As a result, we consider that granting one-way fee-shifting in competitor plaintiff suits would prove over-deterrent, and – as we will observe below – would provide a free token for strategic lawsuits in the hands of competitors.[425]

- Option *2d* is equal to Option *2b* for cartel cases, and adds decoupled damages for other types of infringements. This option would be certainly less (over)deterrent than option *2c*, but would still create concerns as regards the potential for competitors to impose excessive penalties on defendants, by forcing them to bear legal expenses and ultimately settle for a substantial amount. This is mostly due to the discrepancy between the plaintiff's expected reward and the defendant's expected penalty (which includes, when the defendant loses, also the plaintiff's reasonable legal expenses).
- Option *2e* shares the same risks we identified for option *2d*, especially as regards suits filed by competitors in abuse of dominance cases. At the same time, it proves less deterrent for cartel cases that options *2b* and *2d*, as it provides for lower incentives to sue on the side of potential plaintiffs, and for lower settlement amounts whenever the plaintiff sues and settles.
- Finally, option *2f* presents a totally different scenario. The activation of NCA as *amicus curiae* to assess the total social harm imposed by the anticompetitive conduct cannot represent a substantial added deterrence in many non-cartel cases, and especially in vertical restraints cases, whenever the harm coincides more or less with the plaintiff's lost profits or with the defendant's illegal gain. There, the quantification of total damages would not amount to a significant multiple of the plaintiff's damage claim, and at best could include a measure of the deadweight loss generated by a restriction of competition.

  To the contrary, in cartel cases the one-way fee-shifting rule may help overcome a collective action problem under this scenario. To understand why this could happen, assume that an SME wishes to file suit against a cartelist, to recover the antitrust injury suffered in terms of overcharge. A "collective action" problem may emerge if the SME expected this action to lead to legal expenses, and that the NCA's quantification of damages could be used by follow-on purchasers as reference for the apportionment of damages. This leader-follower dilemma could paralyse the filing of lawsuits against cartels under the *amicus curiae* scenario. To the contrary, with one-way fee-shifting, the plaintiff would be indemnified of legal expenses for bringing a claim which constitutes a quasi-public good, as in case of plaintiff verdict follow-on plaintiffs will have access to justice at lower cost by

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[425] As we have shown in Table 16 above, the Georgetown study in the US highlighted that in cartel cases the percentage of competitors acting as plaintiffs is far lower than in cases where the allegation is monopolization, predation, price discrimination or tied selling.

relying on the previous decision and on the consequent apportionment criteria.

In summary, the most significant impact on deterrence is reached under options *2b* and *2d*, whereas option *2c* must be considered as over-deterrent. Options *2b* and *2d* also dominate option *2a* in terms of deterrence, due to the provision for double damage awards in cartel cases. Finally, option *2f* would be particularly deterrent for cartels, but less so for abuse of dominance cases and vertical restraints.

A2. Corrective justice

The main compensatory effects of a one-way fee-shifting rule are: (i) the increase in the number of plaintiffs that are compensated; and (ii) the higher expected settlement amount. Adding these effects to the options available under damage multiples generates the following impacts in terms of corrective justice:

- Option *2a* – introducing one-way fee-shifting without any damage multiple – would entail an increase in corrective justice, mostly linked to the expected increase in the number of private damages actions. It also would exert a positive impact on the settlement amount, as we explained above in section 1.2.2. Finally, such option would not carry significant risks of overcompensation.
- Option *2b* – introducing one-way fee-shifting and multiple damage for cartel cases – may also increase corrective justice; as a matter of fact, more plaintiffs would be compensated, as the detection rate increases. However, since prejudgment interest is awarded, some plaintiffs would be overcompensated, *i.e.* they would receive a damage award that is greater than the harm suffered. This finding has to be confronted with the likelihood of settlement: as most cartel cases settle before trial, the settlement amount may be significantly lower than the initial damage claim. If this is the case, introducing double damages may lead private plaintiffs to be more fully compensated, as the settlement amount is affected by the likely outcome of trial. In terms of corrective justice, hence, this option might prove superior to option *2a*, if the increase in the compensated plaintiffs is greater than the potential overcompensation of plaintiffs that results from higher settlement amounts.[426]

[426] For example, a plaintiff having suffered a harm of €400 and having a 75% likelihood of winning at trial may settle the case for not less than €300. If legal expenses are €100 for each of the parties, then under the loser-pays the plaintiff will also have to take into account expected legal costs of €50 (as in 25% of the cases she would have to pay €200). She would then settle only for an amount greater than €250. With one-way fee-shifting, the plaintiff's reservation value for settling the case is €275 (as in 25% of the cases she would have to pay €100). With one-way fee-

- To the contrary, option *2c* – introducing one-way fee-shifting and multiple damages in all cases – appears dominated by the previous, for the reasons already stated above for option *1b*. The risk of overcompensation is evident, and likely to be greater than the potential increase in corrective justice arising from the increase in the number of cases. Under this option, unless adequate safeguards are introduce to limit nuisance suits, strategic lawsuits may significantly increase especially in abuse of dominance cases, as competitor plaintiffs would have a sort of "free token" to attack their rivals, regardless of the harm suffered.
- Option *2d* – *i.e.,* one-way fee-shifting, multiple damages for cartel cases, multiple and decoupled damages for other cases – carries lower risks of overcompensation than the previous option. As a result it may lead to a lower increase in the number of cases, but also to a more correct set of incentives for plaintiffs to initiate legal actions.
- Option *2e* – one-way fee-shifting and decoupled damages for all types of infringement – is likely to be dominated by the previous option, as it would lead to a lower incentive to sue. This option would still contribute positively to the goal of corrective justice, and would probably be superior in this respect to the simple introduction of one-way fee-shifting (option *2a*).
- Option *2f* – one-way fee-shifting plus the "NCA as *amicus curiae*" scenario – may lead to compensation of a lower number of plaintiffs in cartel cases, due to the absence of double damages, but in principle can achieve optimal compensation for those plaintiffs that litigate the case, if the NCA is able to correctly estimate total damages including the lost profits, and the judge precisely apportions the damage award to the plaintiff. In addition, this procedure could facilitate other plaintiffs in filing follow-on suits, thus further increasing corrective justice. However, the significant increase in settlement expected under this option may lead to less-than-optimal compensation for plaintiffs, although the settlement amount would be probably close to the initial damage award, also due to the introduction of one-way fee-shifting.

In summary, the most significant increase in corrective justice would be achieved with one-way fee-shifting and double damages for cartel cases only (option *2b* and *2d*), and with one-way fee-shifting and the *amicus curiae* procedure (option *2f*). All options would contribute positively to the goal of compensating plaintiffs, with option *2e* being slightly preferable to option *2a* and the latter being less at risk of overcompensation than option *2c*.

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shifting and double damages, the plaintiff would settle the case for any amount greater than €575, and would then be overcompensated for the damage suffered. With contingent fee agreements and one-way fee-shifting, the situation is different: the plaintiff's reservation value in settling the case would be €600.

A3. Internal market

No EU country currently adopts mandatory one-way fee-shifting as a rule aimed at facilitating plaintiff's legal action, although some countries (UK, Germany, Finland, Italy, France) have enacted some form of discretionary fee-shifting measure[427]. In addition, only three countries, as stated above, allow the award of punitive of exemplary damages. Accordingly, all the options considered would change the legal landscape, and those options that couple one-way fee-shifting with multiple damages would further contribute to the creating a level-playing field in EU jurisdictions. Another important impact would be felt as one-way fee-shifting is a measure that facilitates action by low-income plaintiffs. As a result, the following two impacts would be observed:

- More equal opportunity between low-income and high-income individual plaintiffs, and between SMEs and large firms, as far as access to justice is concerned;
- More equal access to justice between similar categories of plaintiffs in the EU27 – especially between countries that already provide legal aid or have a mature "after-the-event" insurance market and those that don't.

In this respect, options *2c*, *2d*, *2e* and *2f* would provide the most significant impact, whereas option *2b* would create a more levelled playing field only for horizontal cartel allegations, and option *2a* would contribute only to the goal of creating a legal environment more conducive to (meritorious) litigation in all jurisdictions, provided that the one-way fee-shifting rule is not applied whenever the judge observes that the plaintiff behave unreasonably. However, some countries would still provide more encouragement to plaintiffs in suing for damages, as punitive damages would be applicable.

Finally, as regards option *2f*, this option would have a significant impact on the internal market, as the possibility for NCAs to act as *amicus curiae* in the quantification of damages, is currently available only in a small number of member states. Introducing and streamlining this procedure at pan-European level may certainly contribute to the level playing field, although the feasibility of this option would have to be tested in practice.

B. COSTS

B1. Litigation costs

All one-way fee-shifting rules are conceived to increase litigation, and consequently litigation costs, due to increased incentive to file suit. This includes higher overall lawyers' fees, higher workload for courts when cases

[427] See *supra,* Section I.1.7.2 for an illustration.

are litigated, and higher opportunity cost of time spent in litigation by plaintiffs. As a result,

- option *1a* would have a positive impact on litigation costs.
- Coupling one-way fee-shifting with multiple damages for all cases (option *2c*) creates excessive incentives to file suit, carries a risk of over-deterrence and overcompensation, and consequently also maximises litigation and settlement costs.
- The impact of option *2b*, which limits multiple damages to cartel cases, is necessarily lower than that of option *2c*.
- The same applies to options *2d* and even more for option *2e*, as the latter two options both entail lower incentives to sue, for non-cartel cases (option *2c*) or for all cases (option *2e*). However, it must be taken into account that options that provide for decoupled damages create an additional cost for courts, *i.e.* the cost of allocating the portion of total damages that is not awarded to the plaintiff. As we already explained above, confiscating the exceeding portion of damages or using it as subsidy to courts dealing with private antitrust enforcement can generate additional costs.
- Settlement costs and enforcement costs are also likely to increase under option *2f*, where the NCA acts as *amicus curiae*. Under this scenario litigation costs for parties may be high in the first stand-alone case, but exhibit economies of scale and scope for all follow-on cases. Thus, this option may even economise on parties' litigation costs. At the same time, as already mentioned, this option would steadily increase costs for competition authorities, with these costs also including the need to hire more staff to devote to the damage quantification exercise. Finally, given the greater procedural complexity of the option at hand, the length of proceedings may increase.

In summary, all options considered would increase litigation, settlement and enforcement costs – the most costly ones being one-way fee-shifting coupled with multiple damages for all cases (*2c*) and the NCA as *amicus curiae* option (*2f*). The least costly option is likely to be simple one-way fee-shifting (*2a*).

B3. Administrative burdens

Introducing one-way fee-shifting does not directly increase administrative burdens for firms, courts and NCAs, as the procedural rules would remain unchanged. However, if safeguards are introduced to avoid strategic lawsuits, the judge would have to issue an order at the end of trial to deny fee-shifting for plaintiffs that behaved strategically. This would represent an additional activity to be considered as an administrative burden. Besides this one, no further information obligations would be imposed by law.

However, depending on the expected increase in the number of cases, one-way fee-shifting can lead to a significant increase in the population affected by information obligations, thus leading to a quantitative impact on overall administrative burdens for firms and courts.

Moreover, options that entail decoupling of damages may create new information obligations, depending on the way in which the sanction in excess of single damages is allocated. Record-keeping and reporting of activities may probably emerge if the exceeding portion of damages is confiscated.

Finally, under option *2f* the need to constantly exchange information between the court and the *amicus curiae* is likely to lead to additional information obligations and cost of acquisitions (in some cases, also hiring new qualified staff) on the side of public administrations. The lower the threshold that is established to activate the procedure, the larger these costs become, especially as NCAs have limited resources.

Given our "narrow" definition of administrative burdens, and the economies and scale and scope generated between stand-alone and follow-on cases, the impact is in any case likely to be small. As with one-way fee-shifting the number of stand-alone suits is likely to increase, such burden is expected to be greater than the corresponding burden under option *1e* above.

B4. Error costs

As stated above, error costs may increase for three main reasons:

- The increased number of cases litigated reduces accuracy in adjudication ("increase in the number of legal errors");
- The magnitude of the harm generated by a legal error increases as the damages awarded are multiplied ("increase of the average cost of each individual legal error");
- Potential pressure on national judges to avoid imposing liability in close cases, due to the magnitude of the expected fine ("equilibrating tendencies in adjudication")[428].

At the same time, error costs can decrease alongside with an increase in the number of cases filed, as courts may profit from learning effects and would get more familiar with adjudication in private antitrust damages actions.

In this respect,

[428] See *supra*, Section II.1.3, note 359 and accompanying text, quoting Calkins (1986) and Kovacic (2007).

- the simple introduction of one-way fee-shifting (option *2a*) does not exert a significant impact on error costs, if not for the "physiological" increase in error costs as the number of private damages actions increases.[429]

If double damages are introduced (Options *2b*, *2c*, *2d* and *2e*), we see a potential impact on error costs also due to increased strategic lawsuits[430].

- Option *2b* increases the number and average cost of errors in cartel cases. This impact does not seem particularly significant, however, as cartel cases are less prone to costly errors than other types of infringements, due to the application of a *per se rule*.
- Option *2c* is more costly than option *2b*, as it increases the number and average cost of judicial mistakes also for cases of vertical restraints, and – most importantly – monopolization cases. Again, it is worth recalling that the latter cases are particularly important, especially as regards the impact of Type I errors on conducts that increase demand on the relevant market. Under this option, the risk of judicial mistakes triggered by "equilibrating tendencies" is also very likely to emerge, as stated above, for option *1b*.
- Option *2d* is less costly than option *2c*, but more costly than option *2b*. On the one hand, compared to option *2c*, it does not lead to an increase in the number of non-cartel cases. On the other hand, compared to option *2b*, it would lead to a greater average cost of errors, thus to a larger impact of judicial mistakes for vertical restraints and abuses of dominance, due to the application of a sanction that exceeds single damages.
- Under Option *2e*, the number of cases (and of errors) would increase significantly compared to the zero option, due to one-way fee-shifting. At the same time, however, the average cost of each individual judicial mistake would increase, due to the application of a sanction that exceeds single damages. It is difficult to assess whether the overall impact would be greater under option *2e* compared to option *2d*, as this depends on assumptions as regards the relative magnitude of the "increase in the number of legal errors" effect and the "increase of the average cost of each individual legal error" effect.
- Option *2f* might lead to a reduction in the statistical incidence of legal errors, as the damage calculation is provided by the NCA as *amicus curiae*. As we

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[429] The risk of frivolous suits is not included in error costs, as we assume that when cases are litigated the judge will not decide to indemnify plaintiffs from legal expenses if they behaved unreasonably. Thus, the impact of frivolous suits will be mostly felt for cases that settle, and is included in litigation costs above.

[430] As a matter of fact, we do not consider frivolous suits that settle before trial as instances of legal errors – we consider type I and type II errors to arise only when a judge issues the wrong decision. Such "wrong" settlements are captured as reductions of benefits – mostly, as failures to achieve the compensation goal.

explained above, if the application of article 82 gradually moves towards an effects-based approach, NCAs could develop overtime a superior expertise than courts in assessing the overall negative consequences of an alleged anticompetitive conduct. This being the case, also the accuracy of the competitive assessment might improve. At the same time, however, judges may make mistakes in apportioning the damage; and if the NCA calculation is inaccurate, its use in follow-on cases would magnify the effect of the error.

In summary, all options provide for an increase in error costs. Options *2a* and *2b* would be less costly than options *2c*, *2d*, and *2e*, and *2f*.

B5. Harmonisation costs

No member state currently adopts a mandatory one-way fee-shifting rule. Accordingly, imposing such a change at pan-European level would certainly impose adaptation costs, which would not arise if the loser-pays rule is maintained. Such a change does not seem, however, particularly burdensome for national judges, which are in most cases familiar with more than one fee allocation rule, and could order a different allocation without revolutionising their *modus operandi*.

To the contrary, harmonising national legislation by mandating that national judges award double damages would be far from easy, as we already recalled above, due to the traditional reliance, in most civil law countries, on the "restitutionary" nature of damage awards, which precludes any possibility of punitive damages, considered contrary to the *ordre public*. In this respect, we consider option *2b* to be more easily achieved, as it could be justified on the principle of effective access to justice provided for at Article 6 ECHR, but also on more theoretical considerations such as the need to consider pre-trial settlement, legal expenses, the seriousness of the conduct, and the very low detection rate normally attributed to horizontal cartels.

And also the decoupling procedure may create significant problems, due to the need to confiscate/redistribute the exceeding portion of damages.

Finally, a different option such as option *2f* would create fewer problems in terms of conflict with national legislation. Such option preserves the compensatory nature of damage awards, and links the assessment of the overall *quantum* to an evaluation of the total social harm resulting from the anticompetitive conduct, to be then apportioned by the judge. In addition, as already observed, the possibility of *amicus curiae* is already envisaged (though for different purposes) at Article 15.3 of Regulation 1/2003, although implementing for the assessment of the harm it would certainly have to rely on an unprecedented coordination between NCAs and judges. At least, no significant problems of conflict with the *ordre public* would be likely to emerge, but harmonisation would take a lot of time and training.

In summary, harmonisation costs are likely to be less significant for those options that do not entail the award of double or decoupled damages.

Accordingly, such costs would be significant especially in options *2c*, *2d,* and *2e*. Option *2f* would be costly and financially burdensome in terms of implementation, whereas we consider option *2a* and *2b* as more feasible.

1.6.3.1 Summary tables on option 2

Table 34 – Option 2a (one-way fee-shifting)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**1** • *greater incentive to sue* • *liability exposure remains low*	**2** • *greater incentive to sue;* • *claimants do not bear the cost of litigating these cases* • *risk of overdeterrence: need for safeguards against frivolous suits*	**2** • *greater incentive to sue;* • *claimants do not bear the often large cost of litigating these cases* • *risk of overdeterrence: need for safeguards against frivolous suits*
Corrective justice	**3** • ***n. of compensated victims:*** *increase in the number of standalone cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum*; settlement amounts closer to loss sustained*	**3** • ***n. of compensated victims:*** *increase in the number of standalone cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum*; settlement amounts closer to loss sustained*	**3** • ***n. of compensated victims:*** *increase in the number of standalone cases (these cases are the most costly to litigate)* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum*; settlement amounts closer to loss sustained* • *Possibility that frivolous suits settle, especially when the claimant is a competitor*
Internal market	**4** • *Level-playing field; more equal access to justice*	**4** • *Level-playing field; more equal access to justice*	**4** • *Level-playing field; more equal access to justice*
Costs			
Litigation costs	**2** • *worse selection of cases for litigation compared to loser-pays; mitigated by high win rate and per se rule* • *increase in trial costs*	**2** • *worse selection of cases for litigation compared to loser-pays* • *increase in trial costs*	**2** • *worse selection of cases for litigation compared to loser-pays* • *increase in trial costs* • *risk of frivolous suits, especially when claimant is a competitor*
Administrative burdens	**1** • *increase in population associated with each information obligation*	**1** • *increase in population associated with each information obligation*	**1** • *increase in population associated with each information obligation*
Error costs	**1** • *worse selection of cases increases statistical incidence of errors* • *mitigated by per se rule*	**2** • *worse selection of cases increases statistical incidence of errors* • *rule of reason cases most affected*	**3** • *worse selection of cases increases statistical incidence of errors* • *rule of reason cases most affected* • *risk of frivolous suits*
Harmonisation costs	**2** • *need to change fee allocation rules for antitrust cases* • *no significant legal obstacles in member states*	**2** • *need to change fee allocation rules for antitrust cases* • *no significant legal obstacles in member states*	**2** • *need to change fee allocation rules for antitrust cases* • *no significant legal obstacles in member states*

Table 35 – Option 2b (one-way fee-shifting and double damages for cartels)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *increase in sanctions* • *large increase in incentive to sue* • *no risk of over-deterrence*	**2** • *greater incentive to sue;* • *claimants do not bear the cost of litigating these cases* • *risk of overdeterrence: need for safeguards against frivolous suits*	**2** • *greater incentive to sue;* • *claimants do not bear the often large cost of litigating these cases* • *risk of overdeterrence: need for safeguards against frivolous suits*
Corrective justice	**4** • ***n. of compensated victims:*** *Increase in the number of standalone cases compared to double damages and loser-pays* • ***alignment with actual harm:*** *possible risk of overcompensation, offset by likelihood of settlement. Effect is greater than with double damages and loser-pays*	**3** • ***n. of compensated victims:*** *increase in the number of standalone cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum*; settlement amounts closer to loss sustained*	**3** • ***n. of compensated victims:*** *increase in the number of standalone cases (these cases are the most costly to litigate)* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum*; settlement amounts closer to loss sustained* • *Possibility that frivolous suits settle, especially when the claimant is a competitor*
Internal market	**5** • *today only 3 member states can award punitive damages* • *level-playing field in fee-shifting rule*	**4** • *Level-playing field; more equal access to justice*	**4** • *Level-playing field; more equal access to justice*
Costs			
Litigation costs	**4** • *greater incentive to sue* • *likelihood of settlement for both standalone and follow-on cases* • *worse selection of cases due to one-way fee-shifting*	**2** • *worse selection of cases for litigation compared to loser-pays* • *increase in trial costs*	**2** • *worse selection of cases for litigation compared to loser-pays* • *increase in trial costs* • *risk of frivolous suits, especially when claimant is a competitor*
Administrative burdens	**3** • *significant increase in population associated with each information obligation*	**1** • *increase in population associated with each information obligation*	**1** • *increase in population associated with each information obligation*
Error costs	**2** • *increase in the number of cases and the magnitude of sanctions* • *worse selection of cases, but per se rule mitigates this increase*	**2** • *worse selection of cases increases statistical incidence of errors* • *rule of reason cases most affected*	**3** • *worse selection of cases increases statistical incidence of errors* • *rule of reason cases most affected* • *risk of frivolous suits*
Harmonisation costs	**4** • *contrary to* ordre public *in most countries, but justifiable on the basis of Art. 6 ECHR* • *need to change fee allocation rules for antitrust cases*	**2** • *need to change fee allocation rules for antitrust cases* • *no significant legal obstacles in member states*	**2** • *need to change fee allocation rules for antitrust cases* • *no significant legal obstacles in member states*

Table 36 – Option 2c (one-way fee-shifting and double damages for all cases)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *increase in sanctions* • *large increase in incentive to sue* • *no risk of over-deterrence*	**4** • *increase in sanctions* • *large increase in incentive to sue* • *risk of over-deterrence, as detection rate is high*	**4** • *increase in sanctions,* • *large increase in incentive to sue* • *risk of over-deterrence especially if claimant is a competitor*
Corrective justice	**4** • ***n. of compensated victims:*** *increase in the number of standalone cases compared to double damages and loser-pays* • ***alignment with actual harm:*** *possible risk of overcompensation, offset by likelihood of settlement. Effect is greater than with double damages and loser-pays*	**3** • ***n. of compensated victims:*** *increase in the number of cases, greater than with loser-pays* • ***alignment with actual harm:*** *high risk of overcompensation*	**3** • ***n. of compensated victims:*** *significant increase in the number of cases (these cases are the most costly to litigate)* • ***alignment with actual harm:*** *very high risk of overcompensation*
Internal market	**5** • *today only 3 member states can award punitive damages* • *level-playing field in fee-shifting rule*	**5** • *today only 3 member states can award punitive damages* • *level-playing field in fee-shifting rule*	**5** • *today only 3 member states can award punitive damages* • *level-playing field in fee-shifting rule*
Costs			
Litigation costs	**4** • *greater incentive to sue* • *likelihood of settlement for both standalone and follow-on cases* • *worse selection of cases due to one-way fee-shifting*	**5** • *greater incentive to sue (both standalone and follow-on cases)* • *high increase in legal consultancy costs* • *increased workload for courts* • *risk of frivolous suits* • *worse selection of cases compared to loser-pays*	**5** • *greater incentive to sue (both standalone and follow-on cases)* • *high increase in legal consultancy costs* • *increased workload for courts* • *risk of frivolous suits* • *worse selection of cases compared to loser-pays*
Administrative burdens	**3** • *significant increase in population associated with each information obligation*	**3** • *significant increase in population associated with each information obligation*	**3** • *significant increase in population associated with each information obligation*
Error costs	**2** • *increase in the number of cases and the magnitude of sanctions* • *worse selection of cases, but per se rule mitigates this increase*	**5** • *increase in the number of cases and the magnitude of sanctions* • *rule of reason cases particularly affected* • *worse selection of cases compared to loser-pays*	**5** • *increase in the number of cases and the magnitude of sanctions* • *rule of reason cases particularly affected* • *risk of frivolous suits by competitors* • *worse selection of cases compared to loser-pays*
Harmonisation costs	**4** • *contrary to* ordre public *in most countries, but justifiable on the basis of Art. 6 ECHR* • *need to change fee allocation rules for antitrust cases*	**5** • *contrary to* ordre public *in most countries* • *need to change fee allocation rules for antitrust cases*	**5** • *contrary to* ordre public *in most countries* • *need to change fee allocation rules for antitrust cases*

Table 37 – Option 2d (one-way fee-shifting, decoupled damages, double damages for cartels)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *increase in sanctions* • *large increase in incentive to sue* • *no risk of over-deterrence*	**3** • *increase in sanctions* • *slight increase in incentive to sue due to one-way fee-shifting* • *risk of over-deterrence as detection rate is high*	**3** • *increase in sanctions* • *increase in incentive to sue compared to loser-pays, especially if claimant is a competitor* • *risk of over-deterrence when claimant is a competitor*
Corrective justice	**4** • ***n. of compensated victims:*** *increase in the number of standalone cases compared to double damages and loser-pays* • ***alignment with actual harm:*** *risk of overcompensation, offset by likelihood of settlement.*	**3** • ***n. of compensated victims:*** *increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum. *settlement amounts closer to loss sustained*	**3** • ***n. of compensated victims:*** *increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum • *Possibility of frivolous suits that settle*
Internal market	**5** • *today only 3 member states can award punitive damages* • *level-playing field in fee-shifting rule*	**5** • *would level the playing field* • *level-playing field in fee-shifting rule*	**5** • *would level the playing field* • *level-playing field in fee-shifting rule*
Costs			
Litigation costs	**4** • *greater incentive to sue* • *likelihood of settlement for both standalone and follow-on cases* • *worse selection of cases due to one-way fee-shifting*	**4** • *increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage* • *worse selection of cases due to one-way fee-shifting*	**4** • *increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage* • *worse selection of cases due to one-way fee-shifting*
Administrative burdens	**3** • *significant increase in population associated with each information obligation*	**3** • *increase in population associated with each information obligation* • *record-keeping/ reporting of activities may emerge if damages are confiscated*	**3** • *increase in population associated with each information obligation* • *record-keeping/reporting of activities may emerge if damages are confiscated*
Error costs	**2** • *increase in the number of cases and the magnitude of sanctions* • *worse selection of cases, but per se rule mitigates this increase*	**3** • *increase in n. of cases and magnitude of sanctions* • *rule of reason cases particularly affected* • *worse selection of cases compared to loser-pays*	**4** • *increase in n. of cases and magnitude of sanctions* • *rule of reason cases particularly affected* • *worse selection of cases compared to loser-pays* • *risk of frivolous suits*
Harmonisation costs	**4** • *contrary to ordre public in most countries, but justifiable on the basis of Art. 6 ECHR* • *need to change fee allocation rules for antitrust cases*	**3** • *judges should be trained* • *need to change fee allocation rules for antitrust cases*	**3** • *judges should be trained* • *need to change fee allocation rules for antitrust cases*

Table 38 – Option 2e (one-way fee-shifting and decoupled damages)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *increase in sanctions* • *increase in incentive to sue in follow-on cases, due to more favourable settlement terms* • *no risk of over-deterrence*	**3** • *increase in sanctions* • *slight increase in incentive to sue due to one-way fee-shifting* • *risk of over-deterrence as detection rate is high*	**3** • *increase in sanctions* • *increase in incentive to sue compared to loser-pays, especially if claimant is a competitor* • *risk of over-deterrence when claimant is a competitor*
Corrective justice	**3** • ***n. of compensated victims:*** *increase in the number of follow-on cases, due to more favourable settlement terms* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum. *settlement amounts closer to loss sustained*	**3** • ***n. of compensated victims:*** *increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum. *settlement amounts closer to loss sustained*	**3** • ***n. of compensated victims:*** *increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum • *Possibility of frivolous suits that settle*
Internal market	**5** • *would level the playing field* • *level-playing field in fee-shifting rule*	**5** • *would level the playing field* • *level-playing field in fee-shifting rule*	**5** • *would level the playing field* • *level-playing field in fee-shifting rule*
Costs			
Litigation costs	**3** • *increase in incentive to sue, but only for follow-on cases* • *settlement highly likely* • *cost of allocating the exceeding part of damage, but only when cases are not settled* • *worse selection of cases due to one-way fee-shifting*	**4** • *increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage* • *worse selection of cases due to one-way fee-shifting*	**4** • *increase in incentive to sue* • *increase in settlement* • *cost of allocating the exceeding part of damage* • *worse selection of cases due to one-way fee-shifting*
Administrative burdens	**2** • *increase in population associated with each information obligation* • *record-keeping and reporting of activities may emerge if damages are confiscated* • *limited to cases that are not settled*	**3** • *increase in population associated with each information obligation* • *record-keeping/ reporting of activities may emerge if damages are confiscated*	**3** • *increase in population associated with each information obligation* • *record-keeping/reporting of activities may emerge if damages are confiscated*
Error costs	**2** • *increase in the number of cases and magnitude of sanctions* • *limited to cases that are not settled* • *mitigated by the per se rule*	**3** • *increase in n. of cases and magnitude of sanctions* • *rule of reason cases particularly affected* • *worse selection of cases compared to loser-pays*	**4** • *increase in n. of cases and magnitude of sanctions* • *rule of reason cases particularly affected* • *worse selection of cases compared to loser-pays* • *risk of frivolous suits*
Harmonisation costs	**3** • *significant increase in population associated with each information obligation*	**3** • *significant increase in population associated with each information obligation*	**3** • *significant increase in population associated with each information obligation*

Table 39 – Option 2f (one-way fee-shifting and *amicus curiae*)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *sanctions increase compared to status quo due to calculation of deadweight loss* • *increase in incentive to sue also for standalone cases* • *no risk of overdeterrence*	**3** • *unlikely that sanctions would increase compared to status quo* • *slight increase in incentive to sue due to avoidance of costs of litigating these cases*	**3** • *sanctions might increase compared to status quo when deadweight loss is measured* • *increase in incentive to sue due to avoidance of large costs of litigating these cases*
Corrective justice	**4** • ***n. of compensated victims:*** *increase in the number of standalone and follow-on cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum; *includes deadweight loss*	**3** • ***n. of compensated victims:*** *slight increase in the number of cases; limited benefit of NCA intervention* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum	**4** • ***n. of compensated victims:*** *increase in the number of cases* • ***alignment with actual harm:*** *in theory, in line with* restitutio in integrum; *includes deadweight loss*
Internal market	**4** • *level-playing field; potential difference due to gaps between NCAs*	**4** • *level-playing field; potential difference due to gaps between NCAs*	**4** • *level-playing field; potential difference due to gaps between NCAs*
Costs			
Litigation costs	**4** • *Significant increase in incentive to sue, for both standalone and follow-on cases* • *cost of NCA assessment and coordination with courts* • *if properly implemented, claimant does not have to fully calculate damage* • *worse selection of cases*	**5** • *slight increase in incentive to sue* • *cost of NCA assessment and coordination with courts* • *more costly for NCA to calculate damage compared to the claimant* • *parties may litigate over the nature of the case, to call for NCA assessment* • *worse selection of cases*	**5** • *increase in incentive to sue* • *cost of coordination between NCA and courts* • *more costly for NCA to calculate damage compared to the claimant* • *worse selection of cases*
Administrative burdens	**5** • *significant increase in population associated with each information obligation* • *burdensome exchange of forms between court and NCA*	**4** • *slight increase in population associated with each information obligation* • *burdensome exchange of forms between court and NCA*	**5** • *increase in population associated with each information obligation* • *burdensome exchange of forms between court and NCA*
Error costs	**3** • *increase in the number of standalone and follow-on cases, increase in sanctions* • *NCA intervention may increase accuracy of judgment: this limits the "worse selection of cases" effect* • *Use of NCA calculation for follow-on cases may magnify effect of error* • *Judges may err in apportionment*	**2** • *slight increase in the number of cases, unlikely increase in sanctions* • *limited benefit of NCA intervention, as claimants are best positioned to assess harm* • *Judges may err in apportionment*	**2** • *increase in the number of cases and sanctions* • *NCA intervention may increase accuracy of judgment: this limits the "worse selection of cases" effect* • *Judges may err in apportionment*
Harmonisation costs	**5** • *would take many years of training and more resources for NCAs*	**5** • *would take many years of training and more resources for NCAs*	**5** • *would take many years of training and more resources for NCAs*

1.7 Refinements

In the previous sections, we assessed the potential impact of various combinations of damage multiples and fee allocation rules. The options identified would exert a rather different impact depending on the type of damage actions, the type of allegation and – in most cases – the specific features of the case.[431] In this section, we analyse two issues: (i) whether different rules should be introduced for private damages actions where the plaintiff is a competitor, an intermediate buyer or an end consumer; and (ii) whether different rules would be warranted for stand-alone v. follow-on actions. Finally, we briefly describe alternative instruments available in some national jurisdictions for the funding of private litigation, ranging from private insurance to national legal aid.

1.7.1 Different plaintiffs, different rules?

The options considered in the previous sections are aimed, *i.a.*, at facilitating access to justice for low-income plaintiffs and at overcoming reluctance to sue whenever the private incentive to initiate legal action is inferior to the socially optimal incentive, sue to the need to pay upfront legal fees and to engage in costly litigation of cases. It must also be borne in mind that, as resulted from the empirical analysis that preceded the publication of the Georgetown study, that often private damages actions are "David v. Goliath" actions, where the plaintiffs have less resources to devote to litigation and – consequently – also a greater risk aversion than the plaintiff. This, however, is not always the case, and is more likely to occur when the plaintiff is an end consumer or an SME. Introducing pro-plaintiff fee allocation rules to facilitate access to justice for those economic actors may also prove a double-edged sword, as large players would be led to use litigation strategically, in order to inflict harm on competitors.

In addition, intermediate buyers may have a different bargaining strength than end consumers when they initiate a legal action. Especially in cases of vertical restraints, direct purchasers on a value chain may have an incentive to file antitrust damages actions instead of enforcing contract law, if antitrust law provides for double damages and/or one-way fee-shifting.

Below, we address these two problems separately, and draw conclusions on whether our impact assessment of the options identified above, in Section 1.6, should be modified to take into account the potential risks of strategic use of the legal system.

[431] In this section, we do not deal with the problem of individual v. collective action, which will be tackled in Section 3 below.

1.7.1.1 The problem of competitor plaintiffs

Granting standing to competitors in private antitrust litigation is in line with the idea of "private attorneys generals" enforcing antitrust rules, as a complement to public enforcement. As a matter of fact, competitors are often best positioned to realise in a timely and effective manner the emergence of antitrust injury as a result of a rival's anticompetitive conduct. In many instances, it can therefore be deemed efficient to exploit competitors' superior information by allowing them to take legal action to enforce antitrust laws.

On the other hand, the competitors' superior information and their subjective interpretation of whether a rival's market conduct constituted an antitrust infringement can lead to highly undesirable results. First, if competitors misinterpret the signal sent by their rivals' behaviour, they would have a suboptimal incentive to use the legal system: this is likely to be the case for rule of reason cases, in which the efficiencies generated by a firm's conduct could be found to more-than-compensate the harm inflicted to society. These are the cases where antitrust scholars normally claim that antitrust law is designed to protect "competition, not competitors". Competitors may disagree with this purpose, or mistakenly believe that they would deserve standing to sue for compensation even when the conduct cannot be qualified as infringing antitrust laws.

Secondly, as we observed in the previous sections, competitors may have an incentive to file frivolous suits to affect the competitor's reputation, to exploit likely imperfections in the standards applied by judges, to extract positive settlement amounts at the pre-trial or pre-disclosure stage, or finally to force – especially under one-way indemnification rules – the defendant to bear significant legal expenses.

The two arguments outlined above have been summarised in the literature as the problem of "competitor plaintiffs". In particular, Kauper and Snyder (1991), after analysing the Georgetown study dataset, concluded that the landmark decision by Justice Marshall in *Brunswick* had not affected competitor-filed lawsuits; that competitor plaintiffs could easily pass the pleading stage by manipulating their allegations to include the necessary allegations for antitrust injury; and that in order to avoid such strategic use of the antitrust laws standing to sue should be completely denied for competitors and replaced with a *parens patriae* system. Conversely, Page and Blair (1992) criticised this view by arguing that the grounds for inferring the ineffectiveness of *Brunswick* in controlling competitor lawsuits were shaky at best.

The relevance of the competitor plaintiff problem with respect to the choice of damage multiples and fee allocation schemes is self-evident. In particular, competitors appear to be the most frequent plaintiffs in allegations such as predation, tying, price discrimination and refusal to deal. For these cases, choosing double or treble damages carries a significant risk of overcompensation for plaintiffs, especially if prejudgment interest is awarded;

in addition, one-way fee-shifting creates an imbalance in a situation that is way more likely to be *inter pares* than any other private antitrust damage action.

These observations are relevant to our welfare assessment of the options identified above, both for option 1 and 2. In particular, it is quite unclear whether competitors should be allowed to claim double damage awards in cases where the availability of pre-judgment interest ensures that the plaintiff will be overcompensated. For the same reasons, the perspective of allowing competitors to gain access to justice with one-way fee-shifting and also claim double damages raises significant concerns, especially as regards the need to preserve a business environment conducive to competitiveness, rather than a quagmire permeated by the "culture of litigation".

Accordingly, with specific reference to cases where the plaintiff is a competitor of the defendant, we consider one-way fee-shifting as being particularly troublesome. Just as it can be decisive in facilitating access to justice by low-income individuals and SMEs, one-way fee-shifting can also open the door to a wave of strategic complaints.

As we already observed, potential solutions to this problem are:

(ii) adopting heightened pleading standards or a narrower definition of antitrust injury to limit the overflow of lawsuits filed by competitors;

(iii) limiting one-way fee-shifting to cases of financially disadvantaged plaintiffs (as in Germany) and/or cases of publicly funded litigation (as is the case in the UK); or

(iv) leaving it to the discretion of the judge to decide whether one-way fee-shifting should apply, based on the resources available to the plaintiff and to the expected risk of litigating the case. This latter option, if not correctly implemented, might prove conducive to greater legal uncertainty, which in turn would dilute the potential for one-way fee-shifting to encourage plaintiffs to overcome their reluctance to sue.

1.7.1.2 Intermediate buyers and final consumers

Also intermediate buyers of goods, when compared with private individuals acting as final consumers, seem to exhibit different characteristics when filing a lawsuit. In particular, the potential for intermediate buyers to detect a violation and enforce antitrust rules as "private attorney general" is much greater, whereas consumers are very much likely to be unaware of existing violations, and the damage they suffer may be too dispersed to create a solid incentive to file suit. Also for this reason, the main approach in the US has been to grant full standing to direct purchasers and exclude defensive passing-on to maximise the

incentive to sue for these players and in turn also the deterrence effect of private antitrust enforcement.[432]

Once again, intermediate buyers are often more likely to realise that an antitrust violation has occurred than final consumers. As detection of illegal antitrust conduct is easier for those players, and financial resources to litigate the case could also be greater for the former actors, one could wonder whether multiple damages or fee-shifting should be made available also to these players, or only to end consumers as a potential incentive to engage in litigation.

In our opinion, there are several reasons to reject the possibility of differentiating rules according to the type of plaintiff. First, such rules may be circumvented in some cases. Secondly, evidence from the Georgetown Project suggested that many lawsuits are filed by plaintiffs that are significantly smaller than the defendants, even if they are business plaintiffs. Thirdly, failing to facilitate damages action by those players that are more informed about the occurrence of illegal conduct, and also best equipped to interpret the signal sent by the infringer's behaviour seems ill-advised.

As a result, we consider that differentiating between intermediate buyers and consumers as regards fee allocation and damage multiples has less merit and theoretical backing that differentiating between competitors and other plaintiffs. Recently, Lipsky (2006) mildly advocated for confining of the fee-shifting and treble damages rules only to consumer lawsuits, but only distinguished between consumers and competitors in making this argument.

1.7.2 Discretionary fee-shifting rules

As we explained in the last section, the introduction of mandatory one-way fee-shifting can both encourage victims of antitrust infringements and plaintiffs wishing to file strategic or frivolous lawsuits to initiate antitrust damages action, absent certain safeguards such as rules aimed at sanctioning the unreasonable behaviour of the plaintiff. An alternative possibility existing in some member states is that the some conditions are defined by law, under which the judge can order cost-shifting to protect the plaintiff from excessive cost exposure in case she loses at trial. *Discretionary fee-shifting* rules – whether all costs or only a portion is eventually shifted – potentially contribute to deterrence and corrective justice, although a lot depends on the way in which such rules are formulated and implemented. Existing examples are the following:

- in Germany, where the rule is mostly addressed at solving the problem of plaintiffs in disadvantaged financial situation, the practice of "adjusting" the value of the claim for the purpose of reducing the cost exposure of losing

[432] See below, Section 5 for an extensive analysis of passing-on.

plaintiffs serves the goal of encouraging certain categories of victims of antitrust infringement to exercise their right to redress. This rule works *ex ante* (*i.e.*, the judge does not decide at the end of trial whether to award cost-shifting to the plaintiff) and is coupled with strictly regulated lawyers' fees.

- In other European jurisdictions (*e.g.* Finland, Italy) discretionary partial one-way fee-shifting can be ordered by the judge at the end of trial, depending on whether some conditions are met. Most of these conditions are related to the financial situation of the plaintiff (such as in the UK) or to the assessment of the novelty, complexity or ambiguity of the case (*e.g.* Finland, Italy).
- Cost-capping orders are not a widespread practice in the UK, but where they have been applied, the main reason was the financially disadvantaged condition of the plaintiff[433]. Recently, the OFT (2007c) has recommended that cost-capping and cost-protection orders be considered as measures that would facilitate private actions for breach of competition law.

These rules introduce a discretionary element in the selection of the cost rule, which in turn can introduce also an element of uncertainty of the cost allocation that will emerge at trial. In our model of multi-stage litigation below, introducing the possibility that the judge issues an order by capping costs or shifting all costs to shield the plaintiff from excessive litigation costs can be introduced in two different ways.

- First, we can assume that a discretionary fee-shifting rule depends on the *characteristics of the case*, not of the plaintiff. This would resemble the solution adopted in some civil law countries (*e.g.* Italy), where costs are shifted when the case is particularly unusual or complex. If we assume that the complexity of the case leads the plaintiff to bear great uncertainty as regards the likelihood of winning at trial, this may lead some plaintiffs to refrain from suing under a loser-pays rule. Recall from our example in section 1.2.2 above that a plaintiff underestimating her probability of winning at trial

[433] In the leading case, King v Telegraph Group Ltd ([2004] EWCA (Civ) 613), the Court of Appeal observed that "it cannot be just to subject defendants where the right of freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win". The inequality in this case stemmed from the fact that the Claimant was of limited means and could not afford an insurance policy, to cover his opponent's costs in the event that she lost his case for defamation. Subsequently, In Andrew Knight v Beyond Properties Pty Ltd ([2006] EWHC 1212 (Ch D) the Court of Appeal clarified that the principles relating to costs capping orders laid down in King v Telegraph Group Ltd related to defamation cases only and were not applicable to other types of litigation. Most recently, in Brenda Willis v Neil Alick Nicolson ([2007] EWCA Civ 199) the Court of Appeal called on the Civil Procedure Rules Committee to provide clarification following extensive consultation with the legal profession.

may not sue under the loser-pays rule, but would initiate a legal action under one-way fee-shifting[434]. As a matter of fact, a risk averse plaintiff having no perception of the likelihood of winning the case at trial may underestimate this probability[435]. A fee-shifting rule that linked the shifting of all or part of the costs to the complexity or uncertainty of the case might help some plaintiffs overcome this risk aversion and decide to sue for damages. As a matter of fact, in our example above if the perceived probability of winning at trial equals 30%, the plaintiff would not sue under the loser-pays rule, whereas it would sue under a one-way fee-shifting rule. The extent to which the result would be reached would highly depend on the following factors: (i) the degree of certainty offered by the legal rule, *i.e.* the extent to which the criteria for issuing a cost-shifting order are precisely defined in the law; (ii) the timing of the decision in multi-stage litigation settings – whereas the earlier the decision, the greater the effect on the plaintiff's incentive to sue; and (iii) the extent to which costs would be shifted – *e.g.*, only court costs, attorney's fees that exceed that of the plaintiff, reasonable attorney's fees, or all costs. At the same time, and depending on the same factors, this rule can pave the way for additional litigation, as the conditions for applicability the cost-shifting may be challenged by the defendant[436].

- Secondly, discretionary cost-shifting rules may be made dependent on the *characteristics of the plaintiff*, and in particular on her financial conditions, as in the German rule or in cost-capping orders sometimes applied in the UK[437]. In these cases, the rule would have the effect of remedying the difficulty for the plaintiff in litigating the case for lack of financial resources. Here, if the rule is clearly formulated and based on precise criteria, the situation would be less ambiguous than in the previous case, and the rule would lead to the application of one-way fee-shifting instead of the "default" loser-pays rule. This may lead, under certain conditions, to achieving the desirable result of encouraging financially impaired plaintiffs to file suit, thus increasing deterrence and corrective justice. To achieve this effect, however, the cost-shifting order by the court should be issued at an

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[434] See *supra,* note 349 and accompanying text.

[435] In the jargon of cognitive psychology and neuroeconomics, the plaintiff would here be faced with an "ambiguous", rather than "risky" distribution of future events. This is also known as the "Ellsberg paradox" in the literature. In this cases, available empirical studies show that individual tend to exhibit greater risk aversion. For an illustration, see Hsu *et al.* (2005), *Neural Systems Responding to Degrees of Uncertainty In Human Decision Making*", Science, 310: 1624-1625.

[436] This problem emerged in the US especially in the application of the *Equal Access to Justice Act* (EAJA). See *e.g.* Krent (1993).

[437] See *supra,* note 433.

early stage of litigation, and possibly at the outset of trial, like in the German case.

- Thirdly, other rules that alleviate the burden of litigation costs on less "pecunious" plaintiffs are those rules that allow for cost-shifting in case the plaintiff is represented by legal aid. The problem that may emerge in these cases relates mostly to eligibility for legal aid under national schemes[438].

Overall, the impact of discretionary and/or partial cost-shifting highly depends on the way the rules are designed. Evidence from, *i.a.*, the US debate on Rule 68 of the Federal Rules of Civil Procedure and on the UK debate on cost-capping orders following *King v. Telegraph Road* reveals that to carefully and efficiently craft such rules is extraordinarily difficult[439].

In Part III of this Report, we will analyse two scenarios in which discretionary and/or partial cost-shifting is introduced in Europe.

1.7.3 Stand-alone v. follow-on actions

In our discussion of costs and rewards of private damages actions for breach of EC antitrust rules, we have not distinguished between stand-alone and follow-on actions. At first blush, it would seem logic to differentiate between the two types of cases, as stand-alone cases: (i) contribute to the detection of antitrust conduct; (ii) are in theory more risky *ex ante*; and (iii) are expected to be lengthier and entail more costly litigation. Thus:

- if damage multiples are to be awarded for all types of infringements, awarding multiple damages also for follow-on cases would appear hardly meaningful from a compensation perspective, even less than stand-alone cases;
- likewise, if one-way fee-shifting is conceived to encourage plaintiffs to sue for damages, after a previous decision has already been issued, the need to facilitate access to justice may not be as strong as it is for stand-alone, "pioneer" plaintiffs.

We agree with the former argument, related to damage multiples. However, we already pointed out, in our analysis of option 1 above, that extending damage multiples to non-cartel cases appear conducive to overcompensation in most cases, irrespective of whether an action is stand-alone or follow-on. Consequently, as will be explained in more detail in Section 1.8 below, we consider that extending damage multiples to non-cartel cases would not be the most desirable option, independently of the nature of the damages action. For

[438] See Kellogg, Jr., E. H. *The "English Rule" Won't Work Here*, Tex. Law., July 3, 1995, at 1.
[439] See, for a description of the US experience, Sherman (1998), From "Loser-pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice, 76 Tex. L. Rev. 1863

cartel cases, the deterrent nature of multiple damages still holds irrespectively of whether an action is filed as stand-alone or as follow-on: the true objective of double damages in this case would be to increase the prospective penalty faced *ex ante* by the cartelist, in order to discourage would-be conspirators from joining or creating a cartel. Accordingly, we see no reason to differentiate according to whether the action was stand-alone or follow-on, nor there is any need to discourage follow-on actions in cartel cases.

As regards one-way fee-shifting, the abovementioned argument would hold if all follow-on actions were filed by plaintiffs claiming damages in line with a previous public or private enforcement actions. However, plaintiffs may seek private remedies also where previous decisions have acquitted the defendant. For example, Kauper and Snyder (1988) report that in their sample of 21 follow-on cases that were litigated, 13 followed successful government cases, and 8 followed unsuccessful government cases. As the role of private enforcement is also that of increasing the accuracy of antitrust enforcement, and also challenging inaccurate public enforcement, we see no reason to discourage those lawsuits by removing one-way fee-shifting, if such procedural rule is enacted for stand-alone plaintiffs[440].

[440] The findings of the Georgetown study testified that 91% of total private antitrust cases initiated in the US between 1973 and 1983 were stand-alone actions; when grouped according to the type of violation alleged, stand-alone actions for horizontal violations were in a ratio of 4:1 with follow-on suits. 60% of follow-on actions were brought by customers, contrary to what happened for stand-alone actions, which were mostly by competitors (26%) and dealers (29%). As regards cases alleging horizontal price-fixing, however, the number of cases initiated by customers was roughly equally divided between stand-alone (76) and follow-on (71), and overall ratio between the two types of actions was 2.2:1 (206 stand-alone cases, 92 follow-on).

2 Group litigation

Group litigation has the potential to significantly alleviate the financial burden for both plaintiffs and defendants in damages actions, thanks to economies of scale. The European legal landscape has shifted in the last few years so that forms of group litigation are increasingly available. Amongst others, the UK, Sweden, Spain, Germany, and the Netherlands all allow for some form of group litigation. France, Ireland, Italy, Finland, Denmark and Norway are all considering or have introduced very recently legislation that facilitates certain kinds of group actions. Although increasingly steps are taken to introduce or facilitate group litigation in the Member States, countries so far came up with different solutions.

2.1 Definition of different types of group action and their conformity with the legal systems of the Member States

At the outset, it should be emphasised that there is an immense variety of forms of group litigation, so that any categorization of existing procedures necessarily is artificial. Boundaries between different categories tend to be blurry and the impact of a specific system depends on a multitude of regulations, including also non-procedural rules. Our preliminary classification below is necessarily artificial, as there are many variations in existing systems and particular features of group litigation may co-exist. For example, representative actions by associations are possible in France, but may be hampered compared to other countries by bans on the possibility to approach potential victims, whereas in Lithuania the Code of Civil procedure provides the possibility of a group action for damages in the public interest which cannot be used in practice because regulations on grounds are missing (Stuyck *et al.*, 2007). Whatever the classification, experiences in Europe with actions for damages have been quite recent, very limited and often subject to reforms, which reduces the information that can be gained though comparative law (Lutfalla and Magnier 2006; Cafaggi and Micklitz 2007).

In this analysis, emphasis is placed not only on the distinction between the mere bundling of several individual claims in one procedure, for example through assignment of rights to one entity (classified as “representative actions” by Cafaggi and Micklitz, 2007) and actions brought by an entity on behalf of a group with similar claims (classified as “group actions” by Cafaggi and Micklitz, 2007). In the context of this Report, also distinctions between different forms of bringing a claim on behalf of a group are made. Therefore different forms of group litigation have been classified as follows.

2.1.1 Joinder of parties, test cases and joinder of claims

In procedures of consolidation, joinder, or test cases, all victims bring their own claims but these individual actions are bundled in a single trial. This allows achieving economies of scale and thus reduces costs of litigation. Damages sued for are specific, as the claims remain individual and are only tried together. The important feature is that in all cases the claims are treated independently and individual cases must be initiated by the plaintiffs, who also in one way or another have the possibility to be involved in the litigation process. This is the major difference to collective or representative actions, where no individual claims have to be filed by the victims and they typically have no or very limited possibility to intervene in the proceeding.

Joinder of parties refers to a number of individual claims initiated by identified plaintiffs that are grouped in a single trial. This may happen through the plaintiffs, who then may be at least in majority represented by the same lawyer or an association or by order of the court. Under a joinder procedure, only those parties who filed individual claims will be bound by the outcome of the case.

A similar mechanism is test case procedures. Under this arrangement, questions common to several individual claims are decided upon in a single trial (the test case) and the result (*e.g.* the establishment of a competition law infringement as cause of harm) is binding for all plaintiffs in the test procedure. Conversely, the remaining issues not common to all claims (*e.g.*, the amount of individual damages) have to be decided subsequently in individual proceedings. Moreover, under the German test case procedure (*Musterklageverfahren*), the plaintiffs still have the possibility to be present and influence the test case (Reuschle, Effektiver Rechtsschutz Band I, 2006). We will discuss these forms of group litigation under the common heading of joinder of parties and test cases, as the basic effects and features of the three types are comparable to a large extent.

Another variant of joinder procedures are joinder of claims. This mechanism refers to the possibility to consolidate different claims of one plaintiff against the same defendant or group of defendants in one trial. Such procedures can be used when several plaintiffs transfer their claims to one individual or an association, which then can claim these rights on its own behalf. Positive experiences with such an arrangement have been made for example in Austria. In 2001 a number of individual claims were transferred to the Association for Consumer Information (Verband zur Konsumenteninformation, VKI) which then enforced these claims on its own behalf. This procedure was subsequently used frequently (Pirker-Hörmann/Kolba, in: Kollektive Rechtsdurchsetzung, 2006). Perceived major benefits are economies of scale in the costs of procedures and the possibility to employ the services of professional litigation cost financers. Another example, but with a profit organization instead of an association, can be found in Belgium/Germany. The Belgian Cartel Damage Claim S.A. brought claims of 28 victims for damages in its own name against a

German concrete cartel (*Zementkartell*) in front of a German court (after investigations of the German Cartel Authority) claiming a total of 100 million euro. This case is considered a precedent but commentators doubt that such a procedure would be feasible for claims of small value (Dreher, National Report, 2007). Such organizations presumably will prefer to invest their resources in cases with large (net) recoveries (large pay-offs). Cases with small total value or cases where the damages are spread over a large number of victims are likely to be unattractive, as the expected recovery is too small to justify the costs of finding, contacting and contracting (transfer of rights) potential victims. Less successful has been the experience in France, however, where the "*action en representation conjointe*" has led to only 5 cases in 15 years (Stuyck *et al.*).

2.1.2 Collective actions

Under a collective action scheme, a victim initiates legal proceedings on his/her own behalf and on behalf of a number of other victims (the group) that she represents. Collective actions are a group litigation mechanism in which not all but at least one of the actual plaintiffs is involved in the process from the very beginning. Both in the American-style class action and in the Swedish collective action it is a named plaintiff, who sues on behalf of the group she belongs to.

The outcome of a collective action is binding on all members of the specified group, unless they opt-out or never opted in. In an opt-in system, only those who explicitly declared their agreement to become members of the group are bound. Opt-in decisions may be taken before the trial and at all stages of the legal proceedings. The difference with a joinder of parties is that victims who opt-in do not become involved in the trial themselves. In an opt-out system, all members of the group are bound, unless they explicitly declare otherwise. Also opt-out decisions may be taken at all stages of the proceedings. In a mandatory system, all members of the group are bound, without having the possibility to opt-out.

The major benefit of collective actions compared to a joinder procedure is that it becomes possible to compensate much larger groups of individuals. Otherwise, these victims would not have been compensated at all, either because of lack of knowledge or because the individual damages would not be worth the expected costs of a trial. It also allows for economies of scale in such cases, where the sheer number of individual claims would make a joinder too complex to manage or too costly. Ideally, in an opt-in collective action, each victim who has opted-in receives compensation for its exact harm after the liability requirements have been decided collectively. In practice, compensation may be less perfect than under individual or joinder procedures. The picture becomes even more complex in opt-out collective actions. For example, in some countries (*e.g.* Australia and Canada) courts may make an aggregate assessment of the damages (Scottish Law Commission, 1996) which can be used to compensate a larger number of individuals through either a proportional or an

average distribution (as in Ontario, Canada; see Law Reform Commission Ireland, 2003).

2.1.3 Representative actions

Representative actions are initiated by an *ex ante* authorized representative body on behalf of a specific group of victims. Such representative actions, although not always for the remedy of damages, exist for example in Italy, Spain, UK, The Netherlands, Greece, The Czech Republic and Germany. This cluster of group actions also refers to actions brought on behalf of a group of individuals with or without their prior consent, as do collective actions, but it is not initiated by an individual or a group of individuals. This distinction between collective actions and representative actions has been made to allow the analysis of possibly different motivations of the representing party (association or individual), financing possibilities and control mechanisms. Again, the outcome may be made binding on all members of the specified group, unless they opt-out or never opted in. Such procedures will be especially beneficial when individuals lack the information about the infringements and their right to claim damages, but also in cases of widely dispersed trifle damage.

Representative actions may be initiated by consumer associations, associations of traders or by a public body. Associations may claim damages on behalf of their members because they generally represent their interests, or because the association is established with the particular aim to represent the claims of its members in specific cases (as was done for example in the Swedish *Skandia* case)[441]. Also in the case of representative actions brought by associations, opt-in or opt-out mechanisms may still be used (*e.g.* in the Netherlands, victims may opt-out of a settlement that was declared generally binding by the court). Another possibility is to allow representative actions for damages on behalf of a specific group, which is not restricted to its members. If such a group consists of the public at large, the alternative resembles a public interest litigation and will typically be a mandatory representative action, under which victims will not have the possibility to opt-out. Under the latter scheme alternative mechanisms of compensation and distribution of damages have to be found.

In both scenarios of representative or collective action it is generally possible that damages may be assigned to the group as a whole as well as individually. In some cases it may be more feasible to generalize the damage amount,

[441] The *Skandia* case concerned the illegal transfer of money between the parent company Skandia AB and other subsidiaries to the detriment of 1.2 million private insurance policy holders of the subsidiary Skandia Liv. To make the procedure manageable the association Foereningen Grupptalan mot Skandia was founded. In the first six months already 15,000 victims became members and paid a small membership fee. The fees were used to partially finance the class action, in combination with a risk-contract with the lawyers.

especially when the group of affected individuals is extremely large and individual damages are small. When individual claims have to be somehow substantiated before they can be included into the group action and the court is going to assign individual damages to individual plaintiffs, the effects resemble more traditional mechanisms of bundling claims, such as joinder or granting the power of mandate to some institution, and procedural efficiency may be reduced.

2.1.4 Conformity of different types of group action with EU legal systems

A major problem for the development of forms of group litigation through which non-individualized damages are claimed flows from legal constitutional restrictions. For example, the German constitution extremely limits the possibility of an individual to be bound by a judgement given in a proceeding in which she did not take part or never had the possibility to intervene. Commentators, therefore, restrict the feasible options in Germany to opt-in procedures (Micklitz and Stadler 2005). As it will be further clarified in the welfare analysis, concerns for legal consistency may conflict with welfare considerations, in particular the deterrence goal.

Opt-in mechanisms come closest to the traditional legal principle that the outcome of a case is binding only *inter partes* (if the individual plaintiffs were facing the defendant(s) with individual claims). Under an opt-in scheme, the individual group member is only bound by a legal decision or settlement if (s)he becomes active by opting in, even though (s)he does not become an active party in the trial. There is no risk that a party will be bound without being aware of the proceedings. If opt-in occurs before the decision stage, the defendant knows for certain how many individual claims are going to be settled in the settlement stage or decided upon in the judgment. This may be a vital factor on the defendant's willingness to settle. However, under an opt-in system the size of the group is likely to be smaller than under an opt-out system. Opt-out mechanisms have an impact on the rights of individual parties unless they become active and declare not to be willing being bound by the judgement or settlement. Therefore, opt-out is farther away from the idea of *inter partes* litigation. It carries the risk that individuals who were not aware of the proceeding become bound by the resulting verdict, but is more inclusive by nature than opt-in. If opt-out is allowed after a settlement is reached, the incentives for the defendant to settle may be less than if opt-out is only possible until the decision stage. Moreover, under opt-out schemes group members may remain unidentified. Finally, a mandatory system binds all members of a certified group. It is the farthest away from traditional legal principles of *inter partes* litigation and poses the largest problems concerning constitutional and other legal restraints.

Joinder of claims or parties are possible in most EU jurisdictions. Examples include UK, Spain, Greece, Germany and Austria. In France, the *Code de la*

consummation (1993) offers the possibility for associations to claim material damages (*action en representation conjointe* (see Beuchler, Länderbericht Frankreich, 2005*)*. Although the proceeding will be conducted by an association, this system resembles more a form of joinder of parties, because individual claims are transferred to the representing association prior the proceeding. Enacted in 1992, it did not meet the high expectations set in it. Problems with minor and widely dispersed damages could not be overcome and the organisational and financial burdens on associations lowered their incentives to become active. Often joining of parties is possible even when legal proceedings have already started. In countries where collective actions exist, their use may be subject to the requirement that a joinder is unfeasible; this is the case both in the US and Sweden. Some EU Member States also have experience with the concept of test or pilot cases: Finland, Germany, Austria and the UK constitute examples. Since joinder procedures already exist in the jurisdictions of Member States, facilitating the use of these mechanisms will be much more feasible than introducing new collective action mechanisms. Facilitating damages claims could be achieved by removing various obstacles, such as the ban on lawyers or associations to approach potential clients to join the claim.

Representative actions also depart from traditional litigation, as the representative is acting only on behalf of a group, without being a member of that group. Therefore the representing body is enforcing not its own rights, but rights of third parties. Three potential scenarios can be distinguished. First, the representative body is acting on behalf of its (identified) members. This possibility comes closer to the opt-in collective action and traditional litigation than if the representative body would be acting on behalf of a more general group or even the public at large. The problems connected to adequate notification of victims should be lowest in these cases, as the represented members are all identifiable. Also the goal of compensating individual harm may be reached to a higher degree. An example is the Consumer Associations Action according to Art. 10 (8) of the Greek Consumer Protection Law (see Beuchler, Länderbericht Griechenland, 2005). Only members of the association may be represented, who have been named and their claims stay intact. However, such a procedure moves the representative action closer to the bundling of similar rights in one procedure, *i.e.* joinder procedures. The settlement or judgment may be made binding for all members, eventually subject to an opt-in or an opt-out procedure. An example of the latter procedure is the Collective Settlement of Mass Damages Act (2005) in the Netherlands, where a representative organisation acting in the interests of victims may enter into a contract with the infringer regarding the compensation of harm. The settlement may be declared binding upon all persons to whom the damage has been caused, unless they opt-out. Second, the representative body is filing an action on behalf of a more general group. An example is the Spanish representative actions by associations which defend "diffuse interests" of

largely unidentifiable parties. This is similar to a collective action, but there is no involvement of any group member in the initiation stage or the procedure. Represented victims may be allowed to opt-in or to opt-out. As will be explained in the welfare analysis, the choice of these options has an immediate impact on the achievement of the compensation goal and the magnitude of the litigation costs and administrative burdens. Third, the representative body may act on behalf of the public at large, without providing individuals the possibility to opt-in or opt-out.

Representative actions by associations are possible in the absolute majority of Member States, although often limited to obtaining injunctions and not for claiming damages. Moreover, the specific designs of representative actions differ greatly from one another. Examples of countries with representative actions include Belgium, Germany, Italy, Spain, UK and the Netherlands. The collective action for damages in Sweden can also be brought by an association or public body, such as the *Ombudsman*. Finland, though initially considering to also adopt the Swedish Model, decided to limit the opt-in collective action to a representative action brought by the Ombudsman. This "Act on Class Action" came into force in October 2007 (Ministry of Justice Finland, 2007). In France, the *Code de la consommation (1993)* offers another possibility for associations to claim damages (see Beuchler, Länderbericht Frankreich, 2005). When harm is caused to the consumers at large an action (for generally immaterial damages) in the general interest of consumers (*intérêt collectif des consommateurs*) can be brought. The difficulty to establish the damage has led courts to often merely reimburse associations their costs for bringing the suit. A special regulation on the use of the damage payments does not exist. The Spanish civil process regulation allows for representative actions on behalf of consumers and on behalf of other interest groups (for example, associations of traders). There exist some specific regulations in this respect (*acciones colectivas típicas*, for example in the area of Law Against Unfair Competition or in Trademark regulations, which mainly concern actions for cease-and-desist orders. A more general regulation exists in the area of consumer protection (*acciones colectivas atípicas*). Since the reform of the law on civil procedure (LEC 2001), representative actions for damages exist in Spain in the area of consumer protection.[442] Two forms may be distinguished according to the possibility to identify the represented parties (consumers). If they are easily identifiable, the action will be brought on behalf of collective consumer interests (*intereses colectivos de los consumidores y usuarios*). If the group consists of unidentifiable or difficult to identify members, the action is considered on behalf of diffuse consumer interests (*intereses difusos de los consumidores y usuarios*). In both cases, the association or organization representing the victims has notification obligations.

[442] The regulation is also applicable the law on unfair terms in standard form contracts, where also non-consumers may be represented (Mom, Länderbericht Spanine, 2005).

Only in the first case this has to be done in written form before the proceeding commences. In both cases the successful commencement of the action will be published in the media. Affected victims may decide to join the procedure and in the first scenario, it is a requirement that the majority of victims will do so for the action to be admissible. This is not an opt-in solution, but more a joinder as the group members that join will be parties in the proceeding, being able to act upon all the connected rights but for those rights that are precluded. The court will also explicitly decide upon the claims of those who joined. To facilitate the identification of the members before a proceeding on behalf of collective consumer interest, a special pre-trial action is designed, where also the defendant might have to assist in providing information. In both cases, group members who do not join may however still be able to benefit from the decision later, when they establish their membership of the defined group, as generally, decisions are binding *ultra partes*. However, as there is no opt-out possibility, all group members will also be bound by a dismissal of the case. Damages shall be calculated as the sum of actual damages of all represented group members (whether joined or not), but there is no specific regulation how that shall be done and how distribution shall take place. Therefore, represented parties in both cases will have to enforce their title for damages against the defendant individually (Mom, Länderbericht Spanien, 2005).

Experiences with collective actions brought by individuals on behalf of a group of similarly affected parties still are rare in the legal systems of Member States. The possibility of claims for damages under the Portuguese popular action has resulted in only one case so far (Cafaggi and Micklitz 2007). The most prominent example that allows for damages is the Swedish opt-in class action, which came into force in 2003 (Lag (2002:599) Om Grupprättegång). Group actions can be brought by private individuals, associations and public bodies (so far the Consumer Ombudsman and the Environment Protection Agency are entitled). The procedure is one of opt-in, whereby only represented parties are bound by the outcome provided they expressed their wish to be represented. In order to limit the financing problem, the possibility of a special fee regulation (contingent fee) was also introduced. When initiating a group litigation, the members of the group shall be known by name, unless it is not necessary for the proceedings (Art. 9). Special regulations for the assessment or distribution of damages were not enacted, which is interpreted as requiring the individual plaintiffs to become active in claiming their compensation payments from the defendant (see Mom, Länderbericht Schweden, 2005). So far the experience has been limited. Only six cases were brought in the first three years (Lindblom and Nordbeck 2006) and a total of 4 cases for damages were brought until 2007 (Cafaggi and Micklitz 2007).

EC Member States are currently considering the possibility to enlarge the scope for collective actions, particularly in the case of an infringement of competition law. In the UK, a representative action may be brought in the Competition Appeal Tribunal after the establishment of an infringement by the Office of Fair

Trading (OFT), a concurrent regulator or the European Commission (section 47 B of the Competition Act 1998). Recently the OFT has recommended allowing representative bodies (designated bodies or bodies granted permission by the courts) to bring not only follow-on cases but also stand alone representative actions on behalf of consumers. This new possibility would allow a greater number of meritorious cases to be brought without prior action by a competition authority. The OFT has suggested also giving representative bodies the power to bring stand alone and follow-on representative actions on behalf of businesses. The OFT Recommendations equally discuss the advantages and disadvantages of opt-in versus opt-out schemes and conclude that both regimes can co-exist. It could be left to the judge to decide, based upon the circumstances of individual cases, whether claims should be brought as a representative action on behalf of consumers/businesses at large (opt-out), as a representative action on behalf of named consumers/businesses or as individual actions (Office of Fair Trading, *Private actions in competition law: effective redress for consumers and business*, November 2007).

2.2 Advantages, disadvantages and the design of group litigation

There is a vast literature on group litigation, written by both economists and legal scholars. The theoretical economic literature is largely American and also (limited) empirical work has so far mainly been done on the effects of the American-style class action. In Europe, only few theoretical contributions exist; the vast majority of the literature is written by legal scholars and related to policy issues. The overview below encompasses all three branches of literature.

In the theoretical economic literature, there is general agreement about the potential advantages and disadvantages of (any form of) group litigation. An overview paper on the US by Yeazell (1989) analyses collective litigation ("class action"[443]) from different angles, highlighting the specific advantages and disadvantages of group litigation. In the European context, Schaefer (2000) describes the positive and negative effects of group litigation in general and argues that the particular form of bundling similar interests has a decisive impact on the scope of these effects.

Disputes arise mainly regarding the empirical proof of the theoretical predictions and, more particularly, with respect to the extent to which they occur in different variations of group litigation. Moreover, commentators may attach different weights to different aims of group litigation.

The specific problems and advantages of the American-style class actions can also be found, albeit to differing degrees, in other forms of group litigation.

[443] The terms collective actions and class actions are synonyms. The latter expression is more common in the US than in Europe.

Therefore, the focus in the literature often is on the discussion of the characteristics of American-style class actions, also described as *the* example (*Paradebeispiel*) of group litigation (Beuchler, Länderbericht Vereinigte Staten, 2005), with some qualifications and adaptations when the effects of other forms of group litigation are discussed. Unfortunately, both critics and proponents of the American-style class action do not always clearly distinguish between effects that stem merely from group action and effects that are caused by other procedural features, such as the financing of collective actions (contingency fees), discovery rules, requirements of certification or the existence of jury trials. Often, the theoretical literature uses the term "class actions" (collective actions), without reference to any specific type of regulation. As there is no tradition of group litigation in Europe, most of the available empirical studies discuss the American class action[444]. Again, effects of other features of the system, such as the lawyers' fee awarding scheme, are not always controlled for. However, as the viability of collective actions remains dependent on adequate funding of such litigation, the results may still provide useful insights.

2.2.1 Advantages

In contrast with the diverging views on the disadvantages of group litigation and possible solutions to overcome these problems, wide consensus exists concerning the potential benefits of group litigation in the literature. The literature focuses on two main benefits of group litigation: (1) their potential to reduce costs (costs of the court system and legal proceedings), and (2) their potential to overcome the rational apathy problem.

From a viewpoint of procedural efficiency, it is often thought that costs of group litigation are lower than the expenses that would need to be incurred if the same claims had to be tried in several individual proceedings (see *e.g.* Dam 1975, Bernstein 1978 and Micklitz and Stadler 2005 for the European discussion). Steinman (1995a and 1995b) discusses the effects of consolidation of claims under American procedural law and states that such proceedings can be more efficient than individual trials. However, administrative savings do not materialize in the case of small value claims that would not have been brought in the absence of some form of group litigation. In addition, Willging *et al.* (1996), analyzing all class actions in four districts terminated in the study period, provide evidence that class action proceedings take considerably longer than other trials and require more attention by the judge. Therefore, in the US it has been proposed to introduce a cost-benefit analysis of class actions, to establish whether the costs of the trial would be justified (for an overview of this discussion, see Hensler *et al.* 2000, chapter 15).

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[444] We will then also describe these using the term "class actions".

In a seminal paper Kalven and Rosenfield (1941) argue that a major advantage of group litigation is the potential to overcome the problem of rational apathy. If individual damages are too small for plaintiffs to find it worthwhile to incur the costs of an independent legal claim, they will abstain from initiating proceedings. These arguments are also made by European authors, see Schaefer 2000, Micklitz and Stadler 2006, Stuyck *et al.* 2007. The increased willingness to bring suit – and thus the solution of the rational apathy problem–, is partially ascribed to the cost reduction effect for the plaintiffs who will be able to share the litigation costs (either in pre-financing or costs they are liable for after the proceeding), such as lawyer and court fees or the payments for experts hired (see *e.g.* Silver 1999, Rosenfield 1976, Micklitz and Stadler 2005). The theory is supported by empirical evidence in the study conducted by Eisenberg and Miller (2004a), analyzing a set of US class actions that settled, who find that individual costs of litigation and counselling decrease with an increasing number of participants in the group.

There is also some evidence in Europe that the possibility of collective actions might overcome the rational apathy problem. According to a Eurobarometer survey conducted in 2004, 67 % of European Union citizens would be more willing to defend their rights before a court if they could join with other consumers who complain about the same issue. These findings were confirmed in the 2006 Eurobarometer where 77 % made the same statement. However, as this is just a survey, it is risky to base policy conclusions on it since real life decisions (taken under budget constraints) may be different from hypothetical scenarios.

Some authors argue that reduction of litigation costs is necessary to decrease existing asymmetries between plaintiffs and defendants regarding their incentives to invest in litigation, as the latter are able and willing to outspend the former (Rosenberg 1984, Coffee 1987, Hay and Rosenberg 2000, Silver 2003). It is also argued that collective actions may put plaintiffs in a more equal bargaining position in settlements, as joining forces makes the threat of litigation credible (Silver 1999, Rosenberg and Sullivan 2006, Micklitz and Stadler, 2005). Compared to voluntary cooperation of plaintiffs, consolidation of claims and collective actions enable the realisation of these benefits also in cases, where transaction costs or free-riding behaviour bar a voluntary joining (Silver 1991). Such arguments are supported by DuVal (1976a and 1976b), who analysed antitrust treble damages class and non-class actions within a six-year period in the Northern District of Illinois. The data suggests that class actions are a useful enforcement tool to enable cases that otherwise would not be brought due to the size of the claims.

2.2.2 Disadvantages

There are two major disadvantages of group litigation discussed in the theoretical literature: (1) principal-agent problems, and (2) the risk of frivolous

suits. After a discussion of these disadvantages, several proposals to overcome the mentioned problems will be reviewed.

2.2.2.1 Principal-agent problems

The most prominent cause for concern arises from so-called principal-agent problems. These are the consequence of the limited ability of the represented party to monitor and control the conduct of the representing party as the number of represented parties increases (Coffee 1986; Coffee 1995; Macey and Miller 1991; Koniak 1995; Schaefer 2000). Silver (1991), analyses involuntary group litigation, *i.e.* consolidations and class actions, and shows that agency problems can be worrisome in such cases compared to voluntary bundling of interests and even more serious in class actions compared to consolidations. Such conflicts of interest may not only arise between lawyers and plaintiffs, but also between the representing party (a lead plaintiff or an association) and the (potentially numerous) passive group members, who may have different preferences (Beuchler, Länderbericht Vereinigte Staaten, 2005). Hence, these problems may arise in all forms of group litigation, albeit to differing degrees, depending on the size of the group, the homogeneity of interests and the interest of the representing party (see 2.3.; Cafaggi and Micklitz 2007).

Principal-agent problems manifest themselves mainly in the context of settlements. The interests of attorneys may differ from those of the represented parties and result in inadequate representation (Coffee 1995, Hay 1997, Dana 2004, Koniak 1995, Issacharoff 1997, Beuchler, Länderbericht Vereinigte Staaten, 2005). A prominent example of these problems is provided by the discussion about coupon settlements in the US. These are cases where the class action settlement provides the victims with low-value coupons for price reductions on further purchases from the defendant instead of payments and the high lawyers' fee is calculated on basis of the total value of coupons (Bronsteen, 2005). The perceived abuse of coupon settlements to the detriment of the class was one of the reasons for the Class Action Fairness Act 2005 (Roedder 2006). Settlements in class actions that resulted in gains to attorneys at the expense of the class in US class actions are found in studies by Rosenfield (1976) and also by Hensler *et al.* (2000).

Concerns about inadequate representation seem corroborated by findings that most class actions lead to settlements (Cafaggi and Micklitz 2007; Hensler and Rowe 2001; and in the field of securities class actions see Bohn and Choi 1996). Similar experiences have also been made in Austria where most group actions (*Sammelklagen)* settle (Pirker-Hörmann and Kolba, *Kollektive Rechtsdurchsetzung*, 2006) and in other Member States which introduced group action mechanisms (Cafaggi and Micklitz, 2007). Also Lindblom and Nordbeck (2006) report that from the six cases that were brought under the Swedish Group Proceedings Act

2003 in the first three years, none resulted in a verdict. According to the authors, such a result was to be expected, as the "absolute majority of group actions all over the world are settled"[445].

2.2.2.2 Frivolous suits

Group litigation also gives rise to the concern that it may enhance the risk of unmeritorious cases, which are brought in order to extract a settlement (Hay and Rosenberg 2000, Kozel and Rosenberg 2004, Schaefer 2000, Beuchler, Länderbericht Vereinigte Staaten 2005). A formal model of incentives to file a nuisance suit has been developed by Rosenberg and Shavell (1985). In the European discussion, the theoretical argument is also made by Schaefer (2000). By contrast, Silver (2003) criticizes the idea that class actions may pressure defendants into settlements. He analyses the connected assertions and theories and concludes that they have no substance.

Hensler *et al.* (2000) discuss the obstacles connected to the empirical assessment of benefits and costs of class actions, including the lack of information on settled cases (Hensler *et al.* 2000, chapter 15). Consequently few empirical studies have been conducted concerning the US class actions. Hensler *et al.*, studied 10 cases composed of consumer class actions and mass tort class actions, to show whether the alleged disadvantages, such as frivolous suits, disproportional benefits for lawyers compared to plaintiffs and larger transaction costs than benefits to the class, had any merit. Although typically designed as class actions that offer represented parties the possibility to opt-out, in one of the mass tort cases, an opt-out period was followed by a notice requiring plaintiffs to opt-in and one of the consumer class actions followed a non-opt-out scheme (Hensler *et al.* 2000, chapter 15). Moreover, four cases concluded with a settlement that denied the opt-out option for some sub-group or all members of the class, as defendants were eager to settle the cases with as many plaintiffs as possible (Hensler *et al.* 2000, chapter 15). The results of the empirical studies were ambiguous, but hinted to some problems regarding the adequacy of representation. Also Willging *et al.* (1996) report mixed findings when trying to assess the frequency of strike suits, but excluded cases with opt-in procedures. In the field of securities law, the concern about unmeritorious suits is corroborated by Bohn and Choi (1996), who find that most of the class actions analyzed were frivolous in nature and targeted mainly at large firms. Similarly, Choi (2004) discusses three major problems concerning class actions in the field of securities litigation, namely frivolous suits, focus on large companies as targets and principal-agent problems, using several studies conducted in that area and evaluating their results. He concludes that evidence suggests the presence of frivolous suits and that the introduction of the Private Securities

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[445] Lindblom and Nordbeck (2006), p. 197.

Litigation Reform Act of 1995 (the "PSLRA") in fact reduced the number of frivolous suits, as intended by the Congress, although also cases with merits may have been discouraged.

2.2.2.3 Remedies

Different solutions have been suggested in the theoretical discussion to mitigate principal-agent and frivolous suit problems, which may materialize to different degrees in all forms of group litigation. These include: auctioning of rights, regulation of the attorneys' fees, preliminary screening, test cases, third-party monitoring and judicial review of the terms of the settlement.

- *Auctioning of rights:* Several authors discuss auctioning as solutions to principal-agent problems (see *e.g.* Schaefer, 2000). Macey and Miller (1991 and 1992) suggest the auctioning of the rights (the claims), compensating the original claimants through the proceeds of the auction. These authors propose an auction (when deemed adequate by the judge), where everyone, including the defendant, plaintiffs and lawyers may make bids. Each party participating in the auction would make its own assessment of the expected (net) recovery in the subsequent proceeding when it wins the auction, and would be willing to bid an amount up to that expected recovery. The highest bidder would win the auction, pay the amount of the bid and then proceed the litigation on its own behalf and on its own risk. The payment made in the bid would be distributed amongst class members, after a deduction of costs that were incurred. In case the defendant would win, a settlement would be the result. Also, in combination with mandatory classes, Rosenberg and Sullivan (2006) propose auctioning as optimal solution to principal-agent problems. The basic effect of auctioning claims to competing lawyers is to unite lawyers and claimants interests, as the lawyer winning the bid will succeed to the rights of the plaintiffs. Plaintiffs may be compensated from the proceeds of the auction.
- *Regulation of attorney's fees:* Hay (1997) proposes to limit the fee in case of a class-wide settlement up to the amount (as a fraction of the class recovery) the attorney would have received in a trial, thereby ensuring the class members a recovery not lower than the outcome of a trial.
- *Preliminary screening:* One way to combat inadequate settlements is introducing a preliminary test of the merits of the case (Bone and Evans 2002, Miller 2004). This has been implemented in the US Securities Litigation Reform Act. However, the results of the reform were ambiguous, as unmeritorious and meritorious claims may have been discouraged alike (see Choi 2004, reviewing several studies). Kozel and Rosenberg (2004) reframe the problem of class actions exacerbating the nuisance-value settlement and propose a mandatory summary judgment as a superior solution to a pre-certification merits review.

- *Test cases*: A solution to both categories of problems discussed above (unmeritorious claims and inadequate settlements) is proposed by Hay and Rosenberg (2000). Their suggested solution comprises several (test) trials to be held taking the average as outcome for the class and an attorney fee set by the court equalling the amount received if there had been no settlement.
- *Judicial review:* In order to avoid the risk of inefficient settlements, national judges may be called to monitor and signal cases in which the settlement reached does not fully satisfy the claims of the represented victims.[446] The settled terms and even the lawyers' fees may be subject to approval by the Court. Resnik (1997) analyzes problems of inadequate settlements and generally finds that judicial review of settlement procedures and outcomes is necessary in all aggregates. Dana (2005) proposes judicial review considering a hypothetical settlement as the baseline all class members would have agreed upon. Sweden has implemented judicial approval of settlements for such reasons (Mom, Länderbericht Schweden, 2005) and judicial review is also required in Australia.

  However, judicial review may imply higher judicial costs, and does not guarantee that judicial control will not ultimately be fictitious – judges may not favour a reopening of the case, which would result in increased workload with no corresponding reward. Koniak and Cohen (1996) argue that judges have powerful incentives to approve class action settlements and that settlements are very difficult to evaluate, which is why they propose to make class counseling subject to civil and criminal liability instead, enabling class members to sue for malpractice and collusion.
- *Third-party monitoring:* Klement (2002) proposes third-party monitoring, as neither class members nor courts are in a position to monitor lawyers conduct sufficiently.
- *Plaintiff-friendly class-actions* : An alternative option is providing that no judicial certification is needed at all and that the burden of proving that the group action does not satisfy pre-requisites such as numerosity, typicality, fairness and adequacy is inverted.[447] It would then rest on the defendant to demonstrate that the action is not the most efficient way to protect the interests of the represented parties. Moreover, the judge will have the possibility to include in the class individuals whose rights have emerged at a later stage. The group members may have as a general rule no obligation to pay any legal cost to a successful defendant.

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[446] See *e.g.* the new U.S. *Class Action Fairness Act*, (C.A.F.A.), Feb. 18, 2005, Pub. L. No. 109-2, 119 Stat. 4.

[447] These are the prerequisites indicated by Rule 23, lett. A, of the U.S. Federal Rules of Civil Procedure.

- *Auctioning of the right to represent the class, fee-forfeiture and a ban on inadequate settlements*: Harel and Stein (2001) give an overview of different solutions to the above mentioned problems: judicial review of fees and settlements, auctioning, franchising the law enforcement, auctions for class attorney services, multiplying damages, restoring client control, 'voice, exit and loyalty'[448] and *parens patriae* (action by the state on behalf of citizens)[449]. They criticize these solutions as inefficient and propose a new solution themselves, consisting of auctioning of the right to represent the class, fee-forfeiture and a ban on inadequate settlements. In this scenario, the right to represent the class would be auctioned to the bidder with the highest expected recovery. In case the lawyer fails to recover that amount later, (s)he would lose his/her contingency fee if the bid was unreasonably optimistic. Settlements yielding less than the proposed recovery for claimants would be prohibited. With these three mechanisms at work, so Harel and Stein (2001) argue, the principal-agent problems would be solved efficiently, while the interests of the claimants would be appropriately protected.

The advantages and disadvantages of the US American class actions are likely to be enhanced by other features of the US American system, such as jury trials and plaintiff friendly cost shifting rules (Beuchler, *Länderbericht Vereinigte Staaten*, 2005). Other common law countries with similar class action regimes have different procedural rules (*e.g.* Canada and Australia, concerning the cost shifting rules) or have other regulations that may have an impact on the magnitude and likelihood of both disadvantages and advantages of class actions. Even if similar regulations exist, the actual use or interpretation by judges or lawyers may differ and affect the overall impact of the regulation. Canada may be taken as an example. In the context of antitrust cases, Canada has opt-out procedures that are very similar to their US counterpart but so far class actions have only been certified on consent and in connection with settlements (Private Antitrust Litigation, 2007). Possible reasons for this are manifold and include differences in the specific regulations connected to the litigation. For example, jury trials in (opt-out) class actions due to antitrust infringements are possible both in the US and in Canada. However, while this option has been used in the US, no jury trial has been litigated in Canada, yet, as plaintiff`s lawyers in Canada consider antitrust cases as too complex to be heard by a jury (Private Antitrust Litigation, 2007). Also the specific requirements in the certification of a group proceeding may influence the

[448] Referring to Coffee (2000), discussed in detail below

[449] *Parens patriae* refers to actions taken by the state on behalf of its citizens. In antitrust, the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (15 USC 15(c)), through Section 4C of the Clayton Act, permits state attorneys general to bring *parens patriae* suits on behalf of those injured by violations of the Sherman Act. See also the discussion of *parens patriae* in more detail below.

effective use of a class action scheme. In Quebec, certification requirements are slightly less stringent than in other Canadian provinces, which increasingly drew consumer class actions to be brought in that province (Private Antitrust Litigation, 2007). Also, in Canada, the successful party may be awarded the full amount of its costs (at the courts discretion), which includes the successful defendant in a class action proceeding (Private Antitrust Litigation, 2007). It is also worth noticing that the vast majority of private damages actions in Canada has been settled and brought in cases where defendants pleaded guilty to criminal charges (Private Antitrust Litigation, 2007).

The overall impact, *i.e.* the actual size of advantages and disadvantages realized by a specific legislation concerning group litigation will not only depend on the regulations that directly concern the group litigation mechanism, but also on related laws of civil procedure and the way regulations are interpreted and legal standards are applied by the courts.

2.3 Specific problems related to the design of group litigation

After the discussion of the general advantages and disadvantages of group litigation, this section focuses on a number of specific problems, which have received particular attention in the literature. The topics discussed are: contingency fees, the choice between opt-in and opt-out mechanisms, collection and distribution of damages, representative actions and obstacles to introduce group litigation in EC Member States.

2.3.1 Funding issues

2.3.1.1 Contingency fees

Contingency fees have been proposed in the theoretical literature as solution to a number of problems related to class actions and litigation in general. Even if group litigation is made possible, the problem remains that collective actions must be appropriately financed. It is commonly argued that contingency fees are a way to overcome the obstacles of financing the litigation when the liquidity of plaintiffs is constrained (*e.g.* Rubinfeld and Scotchmer (1998), Gravelle and Waterson (1993); Schwartz and Mitchell (1970); Schaefer (2000)). Moreover, contingency fees allow for better risk-sharing between client and attorney (*e.g.* Danzon (1983); Halpern and Turnbull (1983)) and are considered a suitable mechanism to solve the predicament of information asymmetries between client and attorney (*e.g.* Rubinfeld and Scotchmer (1993)). On the negative side, contingency fees may exacerbate principal-agent problems between lawyers and clients. However, authors disagree with respect to the effects on both the risk of early settlements and frivolous suits. These issues have already been discussed above, see Section II.1.

2.3.1.2 *Alternative ways to fund group litigation*

Besides contingent or conditional fee agreements, in some jurisdictions both private and public funding of litigation has developed in the past years. These include private insurance products, such as "before-the-event" (BTE) and "after-the-event" (ATE) insurance; Contingency Legal Aid Funds (CLAFs) such as those existing in Ontario and Quebec; and more ordinary ways of public funding of litigants. As one-way fee-shifting and especially contingency fees are normally introduced also with the aim of facilitating access to justice for low-income plaintiffs, such instruments may serve as useful complements or partial alternatives to solve the problem of access to justice. Annex I to this Report contains a more detailed description of these instruments.

Some authors, including Riley and Peysner (2006) and Peysner (2007) have suggested that some of the schemes could usefully contribute to the goal of facilitating access to justice by EU firms and consumers. In particular:

- Legal aid is available in most EU member states, as highlighted by the Ashurst Study in 2004.[450]
- The market for after-the-event insurance (ATEI) products has developed essentially in England. Under ATEI agreements, "the insurer will cover the contingent risk of both sides' costs if the case is lost, or, more commonly, the opponent's costs with 'own side' costs being covered by a CFA"[451]. In exchange, the insured party pays a premium.[452] These instruments can develop mostly in countries that allow for conditional or contingent fee agreements.
- The same caveats apply also to subrogated litigation models, where one party acquires rights to claim damages on behalf of a group of plaintiffs. A recent example is the € 210 million lawsuit brought by a private Belgian company, Cartel Damage Claims SA to recover cartel damages on behalf of 29 German construction companies. The claim followed a judgment by the German Bundeskartellamt against six German cement producers. Cartel Damage Claims SA then committed to pay 85% of damage recovery to the initial assignors, which amounts de facto to a contingent fee agreement, to which anyway the Landgericht Düsseldorf did not object.
- One option that could be considered by the European Union or by individual Member States as means to facilitate private litigation is the creation of one or more Contingency Legal Aid Funds (CLAFs) for damages

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[450] In 2004, legal aid was available in 21 member states.

[451] "CFA" stands for Conditional Fee Agreement.

[452] Peysner (2007). In England, if the case is won, the premium can be recovered under the provisions of the Access to Justice Act 1999.

actions, especially in cartel cases.[453] CLAFs are operational in Canada, Australia, Hong Kong, and are being discussed in Ireland. However, setting similar funds at EU level would create problems of initial funding, eligibility and ownership. In addition, the same problems with the introduction of contingency fees apply also to CLAFs, which are run on a contingent fee basis – winning plaintiffs pay a percentage of the damage recovery into the fund[454].

- In some Member States, small claims tribunals are an important contact point for consumers wishing to claim damages for antitrust infringements.[455] The Council reached a Common position of the European Small Claims Procedure in June 2007, and the procedure will be available starting from June 2009 on. The availability of such a procedure for EU consumers in the case of infringements of EC antitrust laws may prove important to facilitate access to justice and the reduction of legal costs. It is worth recalling that the Regulation establishing the procedure introduces, under certain circumstance, indemnification of plaintiffs from legal expenses. Article 14(2) reads: "When the unsuccessful party is a natural person and is not represented by a lawyer or another legal professional, he shall not be obliged to reimburse the fees of a lawyer or another legal professional of the other party"[456].

2.3.2 Opt-out or opt-in?

Under an opt-out system, all members of the represented group are bound by the outcome of the action unless they declare their wish not to be a member of the group after being notified of the proceeding. Such a system tends to capture a larger number of represented parties and lead to more consistent decisions overall (Law Reform Commission Ireland, 2003). On the contrary, under an opt-in procedure, the represented party would have to explicitly express its desire to be part of the group after having been notified in order to benefit from the outcome of the action. The group then tends to be smaller, but it is avoided that parties may be bound by the outcome, while being unaware of the proceeding.

In the theoretical literature the option to opt-out has been presented as necessary to protect claimants from inadequate representation and thus as a mechanism to combat principal-agent problems (Issacharoff 2000, focusing on small claims , Koniak 1995). Coffee (1995) similarly argues against mandatory

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[453] See Riley and Peysner (2006) and Zander (1988).

[454] For a more in-depth discussion of CLAFs, see Annex I to this Report.

[455] For example, the *RC Auto* case in Italy led to what the Ashurst study defines as "the most successful set of parallel competition-based damages claims ever brought in the EC". See Ashurst comparative study (2004), at 104.

[456] See also *infra*, Section III.2.1 for a description of the European Small Claims Procedure.

collective actions, since they eliminate a mechanism for plaintiffs to protect themselves against inadequate settlements by opting-out and enable defendants to settle high stake claims cheaply. In a later paper, the same author (Coffee 2000) again supports opt-out and analyzes the adverse effects of collective actions (in particular principal-agent problems, as they may occur in all forms of group litigation). In analogy with the theory of corporate governance he contrasts three different solutions, namely exit (*i.e.* enhanced and/or additional opt-out possibilities for those represented), voice (*i.e.* more possibilities of the represented to choose and remove the attorney and to make collective decisions with regard to the proceeding) and loyalty (increasing ethical and fiduciary duties of the representative of the group), and concludes that exit (opt-out) is the most valuable. Cramton (1995) endorses opt-out on grounds of plaintiff autonomy and due process, but also recognizes that the possibility to opt-out is unevenly distributed among members of the group, as small claims may not be worth pursuing an individual trial. Also Dayagi-Epstein (2007) endorses opt-out procedures as a mechanism to overcome the rational apathy problem.

In opposition, Bronsteen (2005) argues for a change of the American default rule in settlements from opt-out to opt-in, as such a shift would decrease the distortion in settlements, *i.e.* nuisance suits and inadequate settlements, and give a higher award to plaintiffs with meritorious cases. Correspondingly, Friedman (1990) discusses the concept of individualism in group litigation and analyses the free-rider problems that may occur if individual plaintiffs are allowed to opt-out. As only some group members will have an incentive to opt-out and pursue their claims individually, there is the possibility to free-ride on the decision rendered in the class action on the expense of the remaining class members. As the number of opt-outs increases not only does settlement becomes less valuable for the defendant, but also the viability of the group action with all its benefits is put at risk. Concluding, Friedmann (1990) promotes regulation that makes the exercise of opt-out rights conditional on the submission of a "good cause". On the economic theory of free-rider problems in collective actions, see Stigler (1974).

Perino (1997) argues that the principal agent theory is not the right theory to analyze problems inherent in class actions, but that the theory of the core explains the relevant phenomena better and leads to other conclusions, especially regarding the desirability of opt-out rights. The core theory provides support for a restriction of opt-out rights not only in large-stake but also in small-claim class actions, as opt-out options may render the class action not viable and may result in fewer benefits than traditional theory assumes.

In respect to the latter risk, it is notable that according to empirical studies the exercise of opt-out rights seems extremely limited. Several studies (Bertelsen et. al 1974, Willging *et al.* 1996, and Eisenberg and Miller, 2004b) found that actual opt-out rates are extremely low. Eisenberg and Miller (2004b), who found an average of 0,6% opt-out rate, conclude that these findings raise questions concerning several features of the current (US American) class action system,

including the discussion about mandatory versus opt-out class actions and adequacy of representation. However, even a small number of opt-outs may have an impact on the overall success of the class, especially when high value claims (with a presumably large interest in monitoring the proceeding) drop out.

In the discussion focusing on legal arguments, the opt-out solution for group litigation in Europe has also been deemed unfeasible by some commentators on constitutional grounds, as it may conflict with principles of due process or the right for a day in court. Stadler (2003) notes that an opt-out solution would be not in line with German constitutional rights that guarantee the freedom of disposition (*Dispositionsfreiheit*) and "a day in court" (*rechtliches Gehör*), as even the sophisticated modern mechanisms of communication cannot guarantee that all who may be affected will be aware of the proceeding. These arguments are frequently raised and have also been made during the Swedish reform process and in the German reform proposal (see Nordh 2005; Micklitz and Stadler 2005). Other views reject opt-out as generally impractical to be incorporated into the existing civil law systems (Gidi 2006; Micklitz and Stadler 2006; but see OFT 2007c). Further arguments against an opt-out scheme include the view that individuals should be part of litigation only as last resort and after weighing costs and benefits (Scottish Law Commission 1996); conflicts of an opt-out feature with the principles of party autonomy and the inclusion of "lazy or passive claimants at the expense of the defendant"[457] (Law Reform Commission Ireland 2003). Micklitz and Stadler (2006) propose an opt-in solution instead of opt-out, because the experience in Sweden and the UK pointed out the resistance in European Member states to introduce the opt-out collective action. Conversely, Mulheron (2005) supports the opt-out collective action as viable alternative in future reforms, as the opt-in approach of the GLO may not be able to solve all problems of collective action efficiently. Such concerns were also raised in the US, but often allowing for opt-out was seen as a sufficient safeguard to assure adequate representation. In Europe, Portugal may serve as an example for the possibility to overcome such concerns. However, other European countries discussing the introduction of a group litigation mechanism decided against an opt-out scheme and established an opt-in procedure (for example Sweden and Finland), or limited the use of opt-out to special cases (for example to exceptional cases brought by the public authorities in Denmark or only to settlements achieved by a representative consumer association in the Netherlands).[458]

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[457] Law Reform Commission Ireland 2003, p. 81

[458] It may be added that in those countries (Portugal, Denmark, The Netherlands) the constitutional/ECHR arguments have been overcome. In the Netherlands, the Court of Appeals in Amsterdam ruled explicitly that an opt-out scheme is not contrary to Article 6 ECHR as long

2.3.3 Collection and distribution of damages

Depending on the number of (at least ex-ante) unidentified group members represented in certain group litigations, the collection and distribution of damage awards may pose peculiar concerns. When individual compensation is not possible or impracticable or parts of the total recovery of the group remain unclaimed after the action is finalized, some indirect mechanism to compensate injured parties may be used, such as *fluid recovery* or *cy pres*,[459] which may also be implemented by the state. When victims have to enforce their damage claims against the defendant individually after a group action provided them with a title, unclaimed damages will of course remain with the defendant. Especially in actions where group members did not join or opt-in, this may hamper the effectiveness with regard to deterrence, but also concerning compensation. Such unclaimed damages may occur not only when represented victims remain unidentified due to an opt-out procedure, but also when group members refrain from claiming their damages after the action is finalized because of rational apathy. Such a risk is given in cases where individual damages are small and individual victims have to enforce their claim against the defendant individually, especially when the group action will only result in the establishment of liability, whereas damage and causation have to be proven in subsequent individual trials. In some circumstances it may be more feasible to establish the total damage done to the group than to establish the exact amount of individual damages. Therefore in many jurisdictions that have established systems of class actions, such as Canada and Australia, aggregate assessments of damages of the group as a whole are provided for. Moreover, in some cases it may not be economically efficient to distribute the awards to those represented, as costs of distribution can be large compared to the individual damages (see Farmer, 1999; Eichholtz, 2002; Stuyck *et al.* 2007). Whenever such problems arise, the method of distribution becomes important. Possibilities to deal with the part of the recovery granted to the group that remains unclaimed include a forced price reduction, a distribution amongst the identified group members or the return of the unclaimed funds to the defendant. The unclaimed part may also flow to the state or some other institution to be used in the interest of the group members originally represented.

Sheperd (1972) describes different approaches to dealing with uncollected claims or unidentifiable claimants in large class actions in the US. Courts faced with these problems had redefined the class in retrospect to only include

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as there are sufficient information mechanisms (LJN: AZ7033, Gerechtshof Amsterdam, 1783/05, 25 January 2007).

[459] *Fluid recovery* or *cy press* constitutes a means to put (unclaimed) damage awards to their "next best" use (see *e.g.*, OFT 2007), which may take many different forms, such as a general price-reduction or awarding the damages to some agency that will use the proceeds in the interest of the represented group

identifiable plaintiffs. Another solution analyzed was raising the requirements of transaction documentation, so that the defendant is placed in a position to identify possible claimants. Sheperd (1972) criticizes these approaches and also the intensively debated *Eisen* price-reduction solution (a *cy press* distribution through the market) chosen in the antitrust case *Eisen v. Carlisle & Jacquelin*[460] as inefficient from both the deterrence and compensatory justice perspectives. The reasons supporting this criticism are: the difficulty to assess gross damages accurately, the fact that compensation would only materialize if victims make additional purchases in the future, the windfalls general price reductions could constitute for non class (group) members, the risk that the defendant reacts to the forced price reduction with a reduction in quality and that the market forces may be distorted by forced price reduction. Similar arguments are also made by Dam (1975). Instead, Sheperd (1972) suggests a *cy press* distribution through the state as more suitable remedy. Also Miller and Singer (1997) endorse c*y press* distribution. They economically analyze different forms of non-pecuniary class action settlements, including *coupon settlements* and *fluid recovery*, and deduce that, in connection with safeguards in the litigation process to prevent abuse, these settlements may overall be beneficial, contrary to the general perception.

Cy press distribution is of special importance in *parens patriae* actions (actions brought by the state on behalf of its citizens). Farmer (1999) compares the *cy pres* distribution in *parens patriae* antitrust actions and in antitrust class actions and portrays *parens patriae* as an efficient enforcement instrument, not only concerning deterrence, and proposes a general four-factor test when deciding whether or not to apply *cy press*. According to this author, a *cy press* distribution would be appropriate when the number of represented victims is large and the group (class) is almost unidentifiable, the individual damages suffered are small, there are no better alternatives to compensate the victims and the chosen method will most likely benefit the represented victims in question.

In opposition, Malina (1972) criticizes fluid class recovery as antitrust remedy and argues that a number of characteristics of the procedure, such as limits to the standing for indirect purchasers, the inequality of individual damages and unjustified awards to undamaged persons, render this remedy inefficient. Also Dam (1975) criticizes *fluid recovery* and points out that, when the unclaimed part or all of the recovery is flowing to the state, it might be more appropriate to also put the burden of litigation on the state.

Forms of *cy press* distribution can also be found outside the US. In Canada, the province of British Columbia allows for *cy press* distribution of unclaimed parts of awards (Scottish Law Commission, 1996). Such *cy press* distribution can also be found in some Member States of the European Union. In Greece, for example, the Minister of Trade finally decides upon the use of the rewards

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[460] *Eisen v. Carlisle & Jacqueling*, 417 U.S. 156 (1974).

granted in a representative action brought in the general interest of consumers (Beuchler, Länderbericht Griechenland, 2005). A comparable solution for undistributed awards is found in Portugal. When a fund is established for the rewards granted in a popular action in the area of consumer protection to the group as a whole, unclaimed compensation payments flow to the Ministry of Justice to be used as support for future popular actions (Harbour *et al.*, 2003). Also in Germany, awards granted to associations in "skimming of procedures" for illegally gained profits or advantages (*Vorteilsabschöpfung*) under the new law against unfair competition and the new competition law flow to the Federal Treasury (Stuyck *et al.*, 2007).

2.3.4 Specific questions concerning representative actions

The distinction made here is that between collective actions, where a named plaintiff initiates an action on behalf of a group she belongs to, and representative actions, where a body representing the interests of a certain group is authorized to initiate an action based on pre-determined criteria (see OFT 2007). Under this definition, the above mentioned *parens patriae* action may also be considered as a representative action.

Principal-agent problems may be expected also in all forms of representative actions, whenever the group of represented is not actively involved (Schaefer, 2000; Dayagi-Epstein 2007). Schaefer (2000) examines the principal-agent problems in representative actions by associations and concludes that they offer more possibilities to curb principal-agent problems than class actions do. Moreover, they may be more in line with the existing legal systems in Europe. The German experience may be illuminating in showing the potential abuses of representative actions and the need to design appropriate safeguards. The *Verbandsklage* gives standing to organisations to bring claims in cases of infringements of the law against unfair competition (*UWG*) on behalf of the group of competitors. When notifying the defendant that a claim for injunctive relief will be filed, unless the defendant signs a declaration of injunction, the organisation becomes entitled for a fixed compensation to be paid by the defendant for the notification expenses. This fact gave rise to the development of commercial associations (*Abmahnvereine*), which looked for obvious and trifle infringements, sometimes filing identical complaints against several branches of the same holding, making a profit due to the warning fee (*Abmahnpauschale*). As a consequence, the original design of an agency acting on behalf and in the interest of a certain specified group was stretched beyond recognition (see Eichholtz, 2002). Dayagi-Epstein (2007) provides an overview of recent developments in representative actions in Europe and proposes ways to overcome principal-agent problems and to enhance the efficiency of consumer associations' actions in the interests of the consumer. Suggestions include greater access to evidence gathered by competition authorities, a widening of the scope of claims associations may bring, ways to increase incentives to

become a member and finally also adequate training, funding and cooperation with other associations.

Kalven and Rosenfield (1941) analyze the efficiency of class actions also with respect to the options to have the class represented by a private lawyer or by administrative bodies, highlighting the benefits and difficulties of each system. After describing the class action as superior to a general joinder of parties as a means to enable collective action, the authors compare class actions brought by private persons through private attorneys and those brought by public officials through public lawyers. They conclude that leaving the enforcement to an administrative body eliminates the problems of rational apathy, inadequate knowledge and insufficient funding. But as the public action may pose its own problems, allowing both types of group actions to complement each other would be the best solution in their view.

In the US *parens patriae* actions can be brought by the attorney general. The Hard Scott Rodino Act does not even require the Attorney General to notify the victims at the beginning of the proceeding (although the court has the discretion concerning the notification). Victims are generally presumed to have been notified and may opt-out (Farmer 1999). Moreover, to facilitate such action, the Attorney General is not required to prove actual harm, but may estimate aggregate damages (Farmer 1999). Due to the different status of the attorney general, it is argued that (s)he is better placed to serve the general interests, rather than focusing on individual benefits. In Portugal, a so-called "public action" (with a joinder/opt-out solution) on behalf of a group of victims can also be initiated by the public prosecutor (not only by individuals and associations) although this form of *parens patriae* action, *i.e.* the action brought by the Public Prosecutor, is not used (Stuyck et a., 2007). According to Leslie (2006), state officials in bringing such an action are not motivated by private gains, can efficiently pursue antitrust violations, can weigh the benefits and costs of bringing a particular suit and, therefore, are less likely to bring nuisance suits. Moreover, the damages recovered then may be an aggregate, based on the total loss caused to society (deadweight loss). This way, victims that otherwise may have no possibility to prove damage and/or causation, such as excluded end consumers, may be represented.

Farmer (1999) contrasts *parens patriae* antitrust actions and antitrust class actions and describes how the former were introduced in antitrust enforcement as a remedy to perceived pitfalls of class actions. She portrays *parens patriae* as an efficient enforcement instrument, not only concerning deterrence, and proposes a general four-factor test when deciding whether or not to apply *cy pres*. In particular, the author deems cy press adequate when the group of represented parties is large and basically unidentifiable, only small individual damages were suffered, no creative alternatives exist and the cy press will be for the benefit of the represented parties.

Along similar lines of reasoning DuVal (1976b) comes to the conclusion that *parens patriae* constitutes an important and valuable alternative to private class actions, as well. Dam (1975) discusses the virtues and pitfalls of collective litigation (in the form of a class action) as means to achieve the goals of administrative and overall efficiency in litigation, compensation and deterrence. According to this author, administrative cost savings are achieved only when a number of class members would otherwise have filed individual suits (an assumption the author rejects as "unrealistic" in the majority of cases)[461], so that increased efficiency of the court system does not materialise in every class action. Moreover, compensation of some class members in the class proceeding may come at the expense of other plaintiffs (individually filed suits may be delayed, future claims be barred) or damages may be too small to make individual compensation feasible. As class actions therefore may not be the optimal means to achieve the goals of administrative efficiency and compensatory justice, the contributions of class actions to deterrence come into the picture. However, also on this point Dam (1975) sees problems for courts to set the amount of damages at the optimal levels to reach deterrence. He provides arguments for *parens patriae* and fluid recovery procedures as attractive alternatives to class actions and continues, that optimal deterrence can better be achieved by strengthening public enforcement, whereas private enforcement should remain subordinate to public enforcement.

It may be argued that a *parens patriae* action should be ascribed to the domain of public enforcement, rather than private enforcement. Harel and Stein (2001) also discuss the possibility of "deprivatizing class actions" by making public authorities the representative party of victims, note, however, that the problems of class (collective) actions (as discussed in the literature) would be replaced with problems of limited capacities of public authorities to pursue also smaller violations, a generally more deterrence based approach, dependence on politicians, budget constraints and biases in the selection of cases.

2.3.5 Perceived impediments to group litigation in Europe

An extensive overview of existing systems of group litigation in different Member States and also outside the EU, including legal rules on standing and possibilities of financing suits, is provided by Stuyck *et al.* (*Leuven Study*, 2007). The different forms of group litigation include test or pilot cases (*e.g.* in Germany and Austria), joinder of parties (the most frequent form of group litigation), representative actions (*e.g.* in Netherlands and England) and collective actions (*e.g.* in Portugal and Sweden). Micklitz and Stadler *et al.* also conducted an extensive research on collective legal actions in Europe for the German Federal Ministry of Food, Agriculture and Consumer Protection

[461] DuVal (1975), p. 50

(Micklitz and Stadler 2005), including country studies on seven Member States and the United States of America. The table below provides an overview of existing forms of group litigation in a number of EU Member States.

A number of articles look more closely at the legislation and reform proposals in several Member States. Micklitz and Stadler (2006) summarize the results of their research and describe a comprehensive draft bill proposed for Germany, containing rules on legal actions taken by associations, test cases and group proceedings (GVMuG). An overview of the Swedish debate and proposals for reform can be found in Nordh (2001). The author describes the procedures in Sweden that existed prior to the reform, such as joinder and test cases, and concludes that they are inadequate to deal with mass litigation in an efficient way. Nordh argues for a need to enhance access to justice by introducing new forms of group litigation. Lindblom and Nordbeck (2006) describe the Group Proceedings Act 2003 and briefly discuss the experience with the six cases that were brought in the first three years. For an overview of group action procedures in Estonia, Lithuania and Latvia, see Viitanen (1997). The latter author states that no genuine group actions for damages exist in the Baltic States and substantial changes in the Codes of Civil Procedure would be necessary if such systems should be introduced. For a discussion of the possibilities and necessity to introduce collective actions in France, see Lutfalla and Magnier (2006). After describing different reform proposals in France the authors discuss the obstacles to an introduction of collective actions in France, pointing to differences with the former legal systems, such as the much stronger state intervention in France, large uncertainty concerning the effects of such a reform, fear of increased litigation and the changes necessary concerning the regulation of lawyers (allowing both advertising and contingency fees). They conclude that major changes would be necessary if collective actions are to be introduced in France.

Table 40 – Existing forms of group litigation in a number of Member States[462]

Type of group litigation	Country
Joinder of claims	• **Germany** (civil procedure) • **Austria** (Sammelklage, brought by association after claims have been assigned)
Joinder of parties	• **Hungary** (civil procedure) • **Romania** (civil procedure) • **Spain** (civil procedure, part of representative/requirement for collective action) • **Bulgaria** (granting power of mandate to association) • **France** (*action en representation conjointe,* brought by association after been giving mandate) • **Sweden** (civil procedure) • **UK** (*joint plaintiffs*, civil procedure) • **Greece** (civil procedure) • **Baltic states** (civil procedure and theoretically, associations may get power of mandate to represent) • **Sweden** (civil procedure)
Test cases	• **Austria** (*Mustersammelklage*, brought by association) • **Germany** (brought by individuals or associations) • **UK** (*test cases* or *lead actions*) • **Sweden** (civil procedure) • **Greece** (claim brought by representative association to establish liability)
Representative opt-in	• **Sweden** (*Om Grupprättegång*, brought by association or Ombudsman) • **Finland** ("Act on Class Action", only brought by Ombudsman) • **UK** (only follow-on in case of competition law infringements, on behalf of consumers and brought by specified body). Recently the OFT (2007c) has recommended allowing both follow-on and standalone actions on behalf of both consumers and businesses. • **Denmark** ("Class Action" brought by public body or association)
Representative opt-out	• **The Netherlands** (settlement only, brought by consumer association) • **Portugal** (*actio popularis*, brought by association or Public Prosecutor) • **Denmark** ("Class Action", only when brought by public authority)
Representative mandatory	• **Germany** (*Abschöpfungsklage*, skimming-off procedures brought by associations) • **Bulgaria** (brought by consumer association on behalf of collective consumer interest) • **Spain** (brought by associations, combined with joinder)
Collective opt-in	• **Sweden** (*Om Grupprättegång*, brought by individuals) • **Denmark** ("class action", brought by individuals)
Collective opt-out	• **Portugal** (*actio popularis*, brought by individuals)
Collective mandatory	• **Spain** (brought by individuals, joinder predominates mandatory)

[462] This table is meant for illustrative purposes; it is not meant to be exhaustive.

An extensive overview of the Scottish procedures and reform proposals has been made by the Scottish Law Commission (1996). Perceived advantages of a class action are related to costs of proceedings and overcoming problems of unawareness or shyness of victims. Perceived disadvantages include the potentials for abuse ("blackmailing"), inappropriate burden on judges and the legal system, as well as lawyers taking charge of the class action. A discussion of the group action procedures available in England and suggestions for reform is presented by Mulheron (2005). She discusses the Group Litigation Order (GLO) recently introduced in the United Kingdom and contrasts the English approach of an opt-in procedure to the American class action. Mulheron provides a good overview of advantages (such as guaranteeing a minimal interest of beneficiaries or making the action more manageable) and disadvantages (such as the risk of people wishing to be represented remaining unaware of the proceeding or the risk of multiple legal actions) related to an opt-in procedure. Hodges (2001) contrasts the current status of multi-party litigation in Europe, especially in England, to the US-style class action. Highlighting cultural differences and describing the English experiences with the Group Litigation Order as less successful, the author questions the necessity for a further development of multi-party actions in Europe. Taruffo (2001) illustrates the differences and changes in the legal view on the objectives of actions for damages and the general legal traditions and cultural values in Europe compared to the US. He attributes the reluctance towards class actions to these factors but also discusses misconceptions concerning the nature of US-style class actions. Dayagi-Epstein (2007) criticises the recent developments concerning representative actions in Europe and especially the UK as insufficient and notes that there still are problems to overcome in order to make representative actions effective, including free-riding, the lack of legitimacy, shortage of resources, biased selection of cases and agency problems. To improve this method of consumer redress, the author proposes greater access to evidence gathered by competition authorities, a widening of the scope of claims associations may bring, ways to increase incentives to become a member and finally also adequate training, funding and cooperation with other associations. Concentrating on Switzerland and Germany as examples, Walter (2001) describes the available group proceedings as effective and concludes that generally administrative bodies or legal regulation are in a better position to deal with mass tort problems than the courts are. According to Koch (2001), major obstacles to an introduction of collective actions include the traditional approach to actions for damages existing exclusively to compensate the victim rather than for deterrence effects and the general requirement to establish the precise size of the damage. He then argues that granting standing to associations may provide some safeguard against abuse and analyses the possibility to subsidize associations in their function as law enforcers. Koch shows that many Member States already have representative actions by associations (some not only for injunctive relief, but also for damages). In

consequence, Koch proposes the construction of representative actions for damages initiated by associations, stating that this type of damages claim may be the form of group litigation most suitable in light of the European traditions. This view is shared by Schaefer (2000), who examines the principal-agent problems in representative actions by associations and concludes that it may be easier to mitigate principal-agent problems when associations represent the victims than in (US-style) class actions, where the lawyer plays a dominant role. The latter system creates incentives for unmeritorious suits and early settlements, which may be detrimental to the victims' interests regardless of the form of lawyers' remuneration. Similar problems may also arise in representative actions, but Schaefer (2000) states that it may be easier to regulate and control associations than lawyers. Another interesting approach contrasting civil law procedure with the American procedure and proposing ways how group action could be adapted to civil law procedure is presented by Gidi (2006). He describes the "class action" system introduced in Brazil, which had the US-style class action as basis but was adjusted to blend into the existing civil law system, as very successful and being able to avoid the perceived pitfalls of the US-style class action. However, the largest difference to the US system is that in actions for damages only liability is established, whereas each individual has to file its own suit for obtaining damages, having to prove causation and the size of the individual harm. The amount of both advantages (especially economies of scale regarding the costs of litigation) and disadvantages (especially the level of individual compensatory justice) which can be realized by any form of group litigation are connected to the departure from the necessity to litigate each claim individually, as done in traditional litigation. Some generalisations may be necessary to make group litigation for a very large number of represented group members manageable. In the Spanish collective action concerning an unidentifiable or difficult to identify group, for example, group members wishing to enforce their title for damages as granted in the group proceeding only need to establish their membership to the group, but no longer need to prove causation and the size of the harm (Mom, Länderbericht Spanien, 2005). Therefore some commentators, such as Micklitz and Stadler (2005), make a general remark that any bundling of interests, especially in actions for damages, raises questions of individual justice.

2.4 Impact assessment

In this part of the Report, we will assess the likely welfare impact of allowing group litigation to claim damages in cases of violation of Articles 81-82 EC Treaty. The term group litigation covers joinder or consolidation of parties and joinder of claims, test cases, collective actions and representative actions. In the welfare assessment below, we focus both on the benefits and the costs of the different types of group litigation presented above.

The benefits of group litigation may be substantial. If private damages claims for infringements of rules of competition law are made more feasible, the threat of private litigation may have a positive effect on the level of deterrence. Economies of scale may be realised, when a group proceeding is brought instead of several individual claims. However, the overall costs savings that may be realised that way depend on the specific features of the legal system and the number of suits that would have been individually filed. Moreover, the goal of corrective justice will be served if a larger number of victims of those violations receive compensation that is equal to the harm suffered (and also if a greater number of victims can access the court). Finally, also the process of market integration may be advanced by creating a level playing field for companies in Europe and bringing competition law closer to the citizens, thus promoting a competition culture in Europe.

Group litigation may also increase costs. First, litigation costs (costs of parties, costs of courts) may be higher when use is made of group litigation (in particular, collective actions) compared to the situation where one traditional claim is brought. These costs also include the procedural burdens (such as notifications and costs of distribution of damages) which are the consequence of an increased use of certain types of group litigation. Second, principal-agent problems that are caused by information asymmetries between lawyers and clients may also increase if lawyers represent a group of victims with whom they have no direct relationship. Third, error costs (false convictions, false acquittals) may increase compared to the case where only individual claims may be brought. Finally, an effective implementation of group actions for private damages claims may require changes in procedural laws of some Member States and may even run counter to constitutional or other legal principles. Therefore, the costs of harmonisation measures (in particular when forms of group action do not yet exist) are an important fourth component of the overall costs of facilitating group litigation.

Hereinafter, we present the welfare analysis of different options of group litigation in the following order: opt-in collective actions, opt-out collective actions, representative actions (distinguishing between opt-in, opt-out and mandatory schemes), joinder of plaintiffs and joinder of claims.

2.4.1 Opt-in collective actions

A. BENEFITS

A1. Deterrence

Opt-in collective actions may improve deterrence of competition law infringements in three ways: by providing better information on violations and thus improving detection, by increasing the likelihood that an action is brought, and by augmenting the magnitude of the sanction imposed. The impact on deterrence will depend on the type of infringement (horizontal cartels, vertical

restraints, abuses of a dominant position) and the type of damages claim (stand-alone or follow-on).

a. Effects on the level of information (detection)

Victims of competition law infringements may face several information problems. They may not know that a violation has occurred; they may be unable to assess the damage suffered and be unaware of the legal steps that must be taken to claim compensation. An opt-in collective action starts with a notification of victims. When it is made public that a collective action is filed, individuals will be informed that they are victims of prohibited practices and those who already know that they are victims may gain additional information about the size of the suffered damage. In this way, a larger group of victims will become informed about the infringement – even though there is no guarantee that the announcement reaches all victims –, and be better able to decide whether they want to opt-in when a collective action will be brought. However, the asymmetric information problems will be overcome only if the initiator of the legal proceedings has sufficient information on the infringement, the size of the harm and the legal steps to be taken to enable recovery. This will depend on the type of infringement.

As described in an earlier part of this Report, finding out the existence of a cartel may be a very complex exercise. Generally, evidence of such anti-competitive agreements is not directly observable. End consumers who suffered trifle damage may not be aware of the violation. The announcement that a collective action will be initiated may cure this information problem. A major benefit of opt-in collective actions materializes when no individual claims would have been brought by the group members because of lack of information about the infringement. In the case of exclusionary abuses, victims will be primarily rival firms rather than consumers. These firms do not face the same information problems and may even be better informed than public authorities, which provides an important argument to prefer private enforcement by individual parties to public enforcement (however, as explained below, the risk of type I errors may be high). The same reasoning goes for vertical restraints, where rivals on both the upstream and the downstream market will be readily aware of anti-competitive agreements. Generally, undertakings are better informed about the behaviour of competitors in the market than private end-consumers. Theoretically, end consumers could be informed about a prospective collective action by a competing firm. However, uniting different types of victims (competitors and consumers) in one group may not be feasible, as their claims are likely to differ too much and thereby make the certification of such a mixed group unlikely (see, for example, the requirements of the American and Swedish class action concerning typicality of the named plaintiffs claim and commonality of issues).

A part of the information problems are due to the difficulties of assessing whether rules of competition law have been violated. If lawyers have an interest to initiate collective actions, they may increase the level of information on the victims' side. Specialised competition lawyers are better able to evaluate the likely success of an infringement procedure than individual consumers. The level of deterrence may be increased by giving lawyers incentives to become actively involved in the detection of competition law infringements. This may be achieved when lawyers are paid on the basis of a contingency fee arrangement or receive a fee which increases with the total value of the claim. However, these benefits will not fully materialize in those EU jurisdictions that still prohibit contingency fees or limit advertising by lawyers. In addition, some jurisdictions severely limit their possibilities to approach potential clients. These anti-competitive restrictions will limit the lawyers' abilities to reach victims of competition law infringements. Restrictions of competition in the legal profession may have hampered the use of traditional legal means to bundle claims in the past and may remain an obstacle to collective actions in the future.

In sum, the increase in the detection rate of competition law infringements through improving information flows depends on the business relationship between victims and infringers, the complexity of assessing a violation of competition law and the degree of sophistication of the victim. Gaining relevant information for the victim becomes costlier:

- the weaker is the business relationship between victim and infringer (compare direct and indirect customer; large scale orders versus single transaction; repeated interaction versus one-shot transactions),
- the more complex is the establishment of an infringement (compare per se prohibitions and rule of reason cases) and
- the less sophisticated is the victim (compare private end-consumers and competitors).

Therefore, the savings in information costs will be largest in cases of cartel agreements, in particular price fixing, where the start of an opt-in collective action may inform end consumers about the existence of infringements.

Stand-alone cases will generate greater beneficial effects than follow-on cases as far as the level of detection is concerned. In follow-on cases, a major part of the relevant information has already been discovered in the preceding public case. More in particular, the most complex part of establishing a competition law infringement has already been done. There is, however, a (small) possibility that collective actions following public enforcement may also correct inaccurate findings by public enforcement authorities.

b. Effects on the likelihood that an action will be brought

Improving information is just a first step in trying to achieve greater deterrence. An opt-in collective action will only be initiated if it is expected that a sufficient number of victims opt-in after being notified. Even informed victims of competition law infringements may still lack incentives to bring damage claims. Consequently, deterrence may remain far from optimal due to three remaining problems: the rational apathy on the side of individual victims (in particular, those who suffered trifle damage), problems to finance the law suit and the risk of free-riding, which may equally reduce the number of claims brought below the efficient level.

First, a solution must be found to solve the remaining problem of rational apathy, which emerges whenever the expected benefits of a damages claim are lower than the expected costs. On the one hand, victims who suffered a relatively large damage are likely to opt-in, when the expected damage award is equal or larger than the net damage award they could receive in individual litigation. On the other hand, victims who suffered small and widely dispersed damage may still not have sufficient incentives to participate in an opt-in collective action. However, as these actions allow sharing of risks and costs among those who opt-in, and thereby decrease these costs compared to individual law suits, an overall larger number of damage claims may be brought. The expected costs of litigation (including not only own litigation cost, but under the loser-pays rule also defendants' cost) presumably are split between those group members that opt-in, thus reducing the initial rational apathy problem. The availability of an opt-in collective action reduces the expected costs of litigation and claims may be brought as soon as these costs become lower than the expected rewards. Not only end consumers but also companies may not find it profitable to file individual claims, but be willing to use other litigation mechanism that allow sharing of risk and costs, as for example in the case of the Cartel Damage Claim Company (see above, 2.3.1.1. and Dreher, 2007). Companies might make more use of their rights when a collective action procedure allows them to reduce costs, share the risks of litigation or overcome the free-rider problems.

Opt-in collective actions reduce the rational apathy problem, but do not fully eliminate it. First, the prospect of having to share the risks and costs of the litigation (including defendants' costs under a loser-pays rule) may still impede decisions to opt-in. In this respect, one should keep in mind that the actual number of group members amongst which the costs will be shared will only be known after the opt-in period has expired. Therefore, the potential lead plaintiff (named plaintiff) may remain reluctant to initiate proceedings, unless the risk associated with losing the claim is borne by another party, such as the lawyer working on a contingency fee basis, an after-the-event insurance or a professional financier.

Second, the problem of financing the law suit remains. Admittedly, the costs that the prevailing plaintiffs incurred may be compensated out of the damages awards, before these are distributed among the group members. However, this presupposes some pre-financing mechanism. The lead plaintiff might be held liable for pre-financing the lawsuit (as for example in Sweden) granting him/her the right of compensation from public funds, the damage awards or otherwise. However, without any financing mechanism in place which would shift the burden of pre-financing the case, the incentives to initiate a group proceeding will be severely reduced. When the case is lost, all group members would have to bear their share of the costs of litigation (under the loser-pays rule including the litigation costs of the prevailing defendant).

Third, the free rider problem will not be entirely overcome in the case of an opt-in collective action. The opt-in collective action has the potential to reduce the initial free-rider problem that may exist in traditional litigation, where each individual victim may not bring an action hoping to free-ride on the litigation expenses of another. As only those members of the group that opt-in would be represented, however, free-riders may still benefit from the collective action, when the judgement or settlement constitutes a kind of prima facie case. Moreover, other victims who would not fit into the certified group may also free-ride on the outcome achieved in the collective action.

c. Effects on the amount of sanction

Every collective action for damages that is brought where no individual litigation on the same scale or at all would have been initiated, increases the total sanction faced by the potential competition law infringer compared to individual litigation. The prospect of such cases therefore increases the deterrence effect. This effect will be intensified if multiple damages can be awarded (see the discussion in Part II, Section 1 of this Report).

If damage claims take place on behalf of members in stand-alone or follow-on opt-in collective actions, the total amount of damages to be paid depends on how many victims will opt-in – which may be difficult to estimate accurately *ex ante*. The total amount of sanctions faced will also differ, depending on the bundle of combined private and public enforcement. If public enforcement takes place after private enforcement (stand-alone collective action), the amount of public fines may be reduced according to the damages already compensated, provided there is a legal basis for such a reduction. If collective actions follow public enforcement, no such adaptation takes place.

In consequence, the expected payments a firm has to make in case its competition law infringement is discovered are difficult to estimate *ex ante*. However, given the common assumption that current public fines are much too low to achieve efficient deterrence, additional expected compensation payments would not necessarily lead to over-deterrence.

A2. Corrective justice

Collective actions including victims who would not bring individual suits generally have the potential to increase compensatory justice. The more difficult the establishment of a competition law infringement and the smaller the individual harm (especially compared to the costs of litigation), the less likely will be an individual claim for compensation and the greater the potential for improving corrective justice. The size of actual damages seems to be very hard to estimate and depends very much on the particular case. The following data provide an example. A legal report conducted for the German *Bund Deutscher Industrie* (BDI) in 2005 reports that the only known research on the amount of damages due to competition law infringements in Germany was done in 1978 (Micklitz and Stadler, 2005). According to that study, 8% of the investigated cases had a value below 30 DM, 21% a value between 30 DM and 100 DM , 29 % a value between 100 DM and 500 DM, 11% a value between 500 DM and 1000 DM, 13% a value between 1000 DM and 5000 DM and in 6 % of the cases the damage was even higher. In the majority of these cases the amounts were higher (taking inflation into account) than the amount usually considered to be too small to be claimed by the individual, which is estimated between 25 euro and 75 euro (BDI, 2005; Micklitz and Stadler, 2005). Hence, damages were large enough to justify individual actions. The total damage caused yearly by selling products in lesser quantities than is proclaimed on the package is estimated by a working group on metrology and calibration (*Mess- und Eichwesen*) at 50 million euro and for liquids almost 20 million euro, whereas consumer associations estimate the total damage to be at 750 million euro per year (BDI, 2005; Micklitz and Stadler, 2005). The latest OFT Paper (November 2007) provides recent data on the harm to consumers in competition law cases. The OFT estimates that if cartels had not been brought to an end by the OFT's intervention, consumers would have been overcharged by tens (40-50) of millions of pounds.

Ideally, under opt-in collective actions, each victim who opted-in receives compensation for its exact harm. The approach of opt-in collective actions taken here also considers the possibility that judges will assess one claim that is representative for all the claims of the group members and make the outcome of the case binding on all those who opted-in, *i.e.* that compensation will be more an average than exact.[463] Victims who opted-in will then receive the representative amount of damages granted in either the judgement or the settlement. Under such a distribution scheme, some victims receive a

[463] Sometimes it may be more feasible to establish the total harm caused in other ways than calculating the individual damages of victims, such as basing the total harm caused on the illegal gain (Dayagi-Epstein, 2007).

compensation that is higher and others an amount that is lower than their actual damage. Even if the damages sued for cover the total amount of all individual claims, individual justice may be less than perfect, as the features of individual cases will not be taken into account during the proceeding (otherwise the system would be close to joinder). This problem is exacerbated when victims who opted in will also be bound by any settlement that will result. An illustrative example may be an Austrian joinder of claims case, brought by the VKI representing victims (who transferred their rights to the VKI) of excess interest for credits and malpractice against a bank. The victims represented by the VKI received around 21% of their original claim, whereas claims tried individually resulted in awards amounting to about 50% of the original claim (Stuyck *et al.* 2007). However, this outcome may depend also on other factors, such as different financing mechanisms used. If all victims had filed individual suits for their actual damages, the level of compensatory justice under an opt-in collective action thus may be lower than under traditional litigation or joinder procedures. However, it is likely that a large number of victims represented in the collective action would not have filed individual suits. Therefore, opt-in collective actions will allow compensation to victims who otherwise would not have received anything. Moreover, the requirements placed on the certification of the group and the adequacy of representation of individual claims through the claim of the named plaintiff is typically considered to make sure that the individual claims do not differ too much from each other.

Informed parties who suffered relatively large damages are more likely to have incentives to file a suit than those with small damages. Where the former are present, however, they may initiate a collective action proceeding instead of traditional litigation, or the court may decide to turn it into a collective action (as has happened in the Swedish *Aer Olympic* case, see Mom, *Länderbericht Schweden*, 2005), and also uninformed parties or possibly parties with smaller claims will be represented. In such cases, increased compensatory justice is made achievable for these victims.

As far as compensatory justice is concerned, there is no difference between stand-alone and follow-on private damages actions. This would be different only if the fine imposed by the competition authorities is considered to be not only a deterrence mechanism but also an indirect instrument to achieve justice for victims of competition law infringements.

A3. Internal market

The current system of decentralised enforcement of competition law, as it has been organised by Regulation 1/2003, allows for substantial variations in procedural laws. This results in remarkable differences as to the possibility of group litigation in general and on the availability of a collective action in particular. It is generally argued that such differences must be contained in

order to create a 'level playing field' for industry in Europe. Also, a broader availability of collective actions to claim damages in cases of competition law infringements may contribute to the creation of a competition culture in Europe. In the theoretical economic literature, the above issues are assessed by looking at arguments in favour or against (de)centralisation.

Several economic arguments may be advanced in favour of decentralised enforcement of competition law. First, a preference for decentralised enforcement follows from the need to deal with informational asymmetries between regulatory agencies and regulated firms. Other things being equal, decentralisation is the more efficient the more valuable local information is for appropriate law enforcement. Regulation 1/2003 has given full powers to all national competition authorities and judges to apply Articles 81 and 82 EC Treaty. Compared to the enforcement monopoly of the European Commission, the application of Article 81 (3) EC Treaty by many national competition authorities and courts allows better access to the relevant information. National competition authorities and judges can more easily take a closer look at the markets and firms to be controlled. Their information advantage will be the greatest when the anticompetitive effects of agreements manifest themselves mainly within the territory of a single Member State. A second argument in favour of decentralised enforcement is that it allows for learning processes, which are particularly important in fields of law, such as competition law, that are plagued by great uncertainties in designing the most appropriate substantive rules and methods of enforcement. Current systems of enforcement differ with respect to the type of sanctions, the range of antitrust offenders that can be sanctioned and the magnitude of the sanctions. Some Member States (for example, United Kingdom, Ireland, The Netherlands) have criminalised the most serious infringements of the competition laws, whereas other Member States exclusively rely on administrative and civil sanctions. Differences also exist with respect to initiative collective actions for damages in cases of competition law infringements. These differences in the legal systems of enforcement allow learning processes that may be very valuable for designing the optimal system of enforcement.

However, the information advantages at lower levels of government and the potentially beneficial effects of learning processes are not the full story. Decentralisation of enforcement efforts also comes at a cost. Competition between different enforcement regimes may generate negative interstate externalities. If the costs of non-enforcement or of a too lenient public and/or private enforcement of competition law in one of the Member States are borne by businesses and consumers in other Member States, increased possibilities for private enforcement may help to ensure that the negative interstate externalities are internalised. A second argument against decentralised enforcement is that it may generate a "race to the bottom". Member States may wish to outbid each other in adopting lenient public and/or private enforcement regimes in order to attract business to locate in their jurisdiction. The European Commission is

usually concerned about divergent competition laws for the related reason, that such differences create unequal conditions of competition for firms active in the internal market and are at odds with the goal to create a level playing field for industry.

The contribution of opt-in collective actions to achieve market integration by curing interstate externalities or preventing a 'race to the bottom' in competition law enforcement seems modest. The achievement of the market integration goal requires above all elimination of trade barriers created by public law and minimum harmonisation measures are the adequate tool to cope with the risk of a race to the bottom. However, the availability of opt-in collective actions may contribute to the effectiveness of competition law. Opt-in collective actions also may contribute to a competition culture, even though this contribution may be smaller than the added value of alternative forms of group litigation, such as opt-out schemes and representative actions. The latter may be a more effective device in bringing competition law closer to the citizens

B. COSTS

As explained earlier in this Report (see section 1, Part II), the costs of private damages actions are broken down in four categories: litigation costs, administrative burdens, error costs and costs of harmonisation. Litigation costs comprise the total expenses of using the legal system (court fees, lawyers' fees and other expenses) and the costs of settlements. Administrative burdens are narrowly defined and relate only to information duties imposed by the legal system and the connected formalities of notifying interested parties, filling out forms or keeping documents. Error costs occur in the case of false convictions or false acquittals. Finally, the costs of harmonisation are the consequence of the changes of the legal systems of the EC Member States that are necessary to make private damages actions more effective.

In the analysis of collective actions, litigation costs do not only comprise the costs of the legal system but also costs caused by principal-agent problems and costs due to the collection and distribution of damages. Principal-agent problems are the consequence of the limited ability of the represented parties (clients/victims of competition law infringements) to monitor and control the conduct of the representing party (lawyer/consumer association). Principal-agent problems are exacerbated in collective action settings and get the more serious the greater will be the number of represented parties and their distance to the lawyer of the named plaintiff and the other victims whose interests have to be defended. The costs of collecting and distributing damages largely depend on the type of collective action. At the outset, costs increase if victims must be identified before a collective action may be brought. Conversely, distribution of damages will be easier and probably less costly if the identity of victims is known. In the analysis below, the different types of litigation costs are

discussed consecutively. Thereafter, the attention shifts to the other types of costs: administrative burdens, error costs, and costs of harmonisation.

B1. Litigation costs

a. Costs of legal proceedings

The impact of collective actions on litigation costs has two sides. On the one hand, it is argued that collective actions are more expensive and time consuming compared to traditional individual litigation (Scottish Law Commission, 1996). This may be due to several reasons. First, in many EU Member States court fees and sometimes also lawyers' fees are linked to the value of the claim, so that larger values are connected to higher fees, although typically on a decreasing scale. Second, collective actions demand more active involvement of lawyers and judges, as they depart from the traditional two-party litigation and therefore the adequacy of representation has to be assured (Micklitz and Stadler, 2005). This can be observed by looking at the control mechanisms that have been developed in the US, the UK, Canada and Sweden. In the Canada, for example, a settlement agreement has to be approved by the judge, also to avoid sweetheart deals. Under the Swedish legislation the court shall replace the named plaintiff when she is no longer considered appropriate to represent the group. In a Group Litigation Order (GLO) in the UK, the judge becomes the case manager (Beuchler, *Länderbericht Vereinigtes Königreich*, p. 891). These and similar additional requirements, which generally do not apply to the individual one-to-one litigation, presumably make a collective action more costly than an individual litigation.

On the other hand, the overall burden of litigation costs may largely be reduced as economies of scale can be exploited by filing only one suit instead of several individual suits by all or a large number of group members. However, such an increase in overall efficiency would only materialise, if several individual actions indeed had been brought absent the collective action. This may not always be the case (see also Dam, 1975). Also, increased costs of litigation may be outweighed by the created benefits in terms of deterrence, corrective justice and an integrated market with a competition culture benefiting the citizens. Finally, collective actions may induce a greater number of settlements which are cheaper than judgements. According to the literature on class actions, one of the main motivations to settle are the connected savings of litigation costs. It seems reasonable to assume that a settlement is less costly than a judicial trial. Procedural requirements are lower and not all the merits of individual cases have to be evaluated and decided upon, so that it is likely that a settlement can be less time consuming than a trial.

In sum, the overall impact of opt-in collective actions on litigation costs depends on whether the achieved economies of scale are sufficiently large to outweigh a more complex and potentially more expensive type of litigation.

b. Principal-agent problems

Other costs may be incurred due to principal-agent problems arising under opt-in collective actions, whether initiated by a lawyer or the named plaintiff. The interests of group members represented in the trial, who do not partake themselves, may differ from those of the lawyer and/or named plaintiff. The group members' ability to monitor the adequacy of representation and to influence the proceeding is severely limited. This is why legal systems that offer collective action pose special requirements to insure the adequacy of representation. Principal-agent problems may be more serious when the lawyer is the driving force, rather than the named plaintiff. Under an hourly arrangement, the lawyer does not have a personal interest in maximizing the value of the judgement or the settlement, apart from reputation concerns. Under a contingency fee arrangement, the incentives of lawyer and plaintiffs are generally considered to be more aligned, at least in a part of the theoretical literature (see above).

Principal-agent problems manifest themselves mainly in the context of settlements. The interests of attorneys may differ from those of the represented parties and result in inadequate representation. Settlements that resulted in gains to attorneys at the expense of the class are found in studies by Rosenfield (1976) and also by Hensler *et al.* (2000). The scope for conflict of interests may be influenced by the way lawyers receive remuneration for their services. A common criticism against contingency fees is that they are likely to increase principal-agent problem between client and attorney, as the latter will have incentives to settle sooner and also for lower amounts in order to induce the defendant to settle at an early stage (see Schwartz and Mitchell 1970, Miller 1987, and Gravelle and Waterson 1993, Schaefer 2000). A contingency fee will never lead to the optimal incentives, as the lawyer only receives a share of the recovery. Neither competitive pressure on the market for legal services nor reputation mechanisms or judicial review can effectively combat this predicament (Schaefer 2000). Conversely, other scholars (Miceli 1994, Bebchuk and Guzman 1996, Polinsky and Rubinfeld 2002) suggest that the opposite is the case and that contingency fees may give too little incentives for lawyers to settle. Polinsky and Rubinfeld (2002), model the amount of effort put in by the lawyer and the minimum amount of settlement she demands under contingency fee and hourly fee contracts. They conclude that under a contingency fee arrangement, the minimum settlement amount is higher and therefore settlement is less likely. Empirical evidence seems to substantiate these theories. Danzon and Lillard (1983) ran a regression analysis on settlement awards and found that the introduction of a cap on contingency fees decreased settlement amounts and increased settlement rates. Research by Cumming (2001), who econometrically analyzed survey data from lawyers, finding that settlements are less frequent when lawyers were working on a

contingency basis or on an hourly fee with a success bonus, also strengthens the latter theoretical results.

c. Costs of distribution of damages

Compared to individual litigation, collective actions create specific costs: the certification of the group and identification of group members and the distribution of damages. As has been observed in the US class action, the costs of distribution may be too large to make compensation of individual victims who suffered only small damages feasible (Eichholtz, 2002; Beuchler, *Länderbericht Vereinigte Staaten*, 2005; see also section 2.2.3.) The costs of distributing the damages in cases of opt-in collective actions are lower than under opt-out collective actions. The reason is that the group members who opt-in thereby identify themselves as victims during the proceeding. However, the certification of the group may be quite costly when, as is requested in Sweden (Mom, *Länderbericht Schweden*, 2005), the group members should be identified with names and addresses when applying for a group proceeding. Such costs may be avoided when mechanisms such as price reduction are employed to compensate the victims. However, this approach would necessitate some monitoring of the defendant, which again could be costly.

B2. Administrative burdens

Under opt-in collective actions, no additional administrative burdens arise. Given the narrow definition of administrative burdens in this Report, the additional costs must be qualified as litigation costs. The latter include the expenses due to the need to inform potential victims and the formalities that must be fulfilled to become a member of the group. Notification can take place in different forms: advertisements in newspapers, announcements on the internet or information targeted at special groups. Costs will vary according to the information measures used. However, notification costs and costs of opting-in as a group member cannot be considered administrative burdens.

B3 Error costs

It is difficult to assess whether the availability of collective actions would increase the risk of false convictions or false acquittals. In a trial, there is no reason why a collective action should lead to more false convictions or why courts should be biased in favour of the group.

It may be different in case settlements. If the threat of a collective action would induce defendants to settle even if the cases have little or no merits in order to avoid the trial costs and negative effects on reputation, error costs may increase compared to traditional litigation. Such arguments have been made in the literature concerning the problems connected to collective actions and also been

found in some studies concerning US class actions settlements in securities litigation (see discussion on frivolous suits in section 2.1.2. above).

The costs of a false conviction or a false acquittal are larger than under traditional litigation (though presumably smaller than under opt-out solutions covering larger groups and including a higher number of unmeritorious claims), as more claims are decided upon in a single trial and more victims either receive an unjustified compensation or more victims (all those who opted-in) are deprived of their possibility to individually claim damages. In that way, collective actions magnify the effects of mistakes that are also possible in traditional litigation procedures. However, there is no increase in statistical incidence of errors.

Under the heading of error costs, also problems with the notification system and certification of groups may be discussed. Problems in the notification system could deprive benefits from individuals who would be willing to be part of the group and would like to be represented, if they remain unaware of the proceeding. However, under an opt-in scheme they would still have the possibility to file their own claims. Also an inaccurate certification of groups may cause error costs. If the group is defined too narrowly, those who would like to have been represented will not benefit from the opt-in collective action. However, the result of the damages claim may help them to litigate their own cases.

B4 Harmonisation costs

Adaptations of national legal systems may be needed to enable opt-in collective actions. This will cause harmonisation costs. First, collective actions may cause inconsistencies within national legal systems by creating "islands of private damages claims" in a legal environment that is generally inhospitable to collective actions. Second, also the administrative costs of changing national rules due to path dependency may be quite high. Only few Member States[464] so far introduced collective actions and if collective actions are allowed, then this possibility has been created only quite recently. Hence, little experience is available in Europe. In Sweden, between 2003 and 2006 only 6 private cases have been filed (Åbyhammar 2006). It may be noted that at least one case was originally started by an individual victim litigating its own claim before the procedure was turned into a collective action by the court. In another case the

[464] These countries are Sweden (opt-in), Denmark (opt-in, with an opt-out solution in special circumstances - to come into force), Spain (collective mandatory action, but joinder predominates) and Portugal (opt-out). In the latter two countries, collective action is originally considered less a means for individual compensation than an action in the collective interest, (on Portugal, see Stuyck et al (2007); on Spain see Mom, Länderbericht Spanien (2005)). Representative actions are more common, see below.

collective action led to the founding of an association (to make it better manageable) with a large number of victims becoming members even before the procedure started. Given the fact that collective actions for damages are a novelty for many legal systems in the European Union (even though most countries know representative actions for injunctions) and changes in procedural laws may be necessary, the costs of harmonisation can be considered relatively high if opt-in collective actions must be allowed

However, given the current trend in Member States to increase the possibility of some form of group litigation, also the number of Member States willing to introduce opt-in collective actions may increase and, consequently, the costs of harmonisation may decrease in the near future.

2.4.2 Opt-out collective actions

A. BENEFITS

A1. Deterrence

Most of what has been written above about the way in which opt-in collective actions may improve deterrence of competition law infringements also applies to opt-out collective actions. However, for the reasons explained below, the contribution of opt-out schemes to an increased level of deterrence may be higher than under an opt-in scheme.

a. Effects on the level of information (detection)

Victims who did not know about the competition law infringement or where not aware of their own damage cannot start a procedure, but may gain information when notified about a collective action proceeding they might opt-out from. However, the initiator of the proceeding must have sufficient information to start the procedure, which is less likely in the case of the end-consumer who suffered minor harm.

As explained above, lawyers may have an interest to initiate proceedings, due to a contingency fee arrangement or a prospective fee increasing with the total value of the claim. Therefore, competition lawyers may become an additional interested party and thus contribute to increasing the level of information on the victims' side. However, the *caveat* with respect to the limited possibilities for lawyers to approach potential clients to become the named plaintiff also applies here. Compared to opt-in schemes, opt-out collective actions may provide more incentives for lawyers to monitor firm's behaviour and initiate proceedings, when their expected fees is linked to the size of the group or the total value of the claim. This may be the case under a contingency fee or a value-of-claim related fee arrangement. The total fees are likely to be higher under such a scheme than under the opt-in options, as it can be expected that the group size will be larger.

The above considerations on the types of infringements, nature of victims and the difference between stand-alone actions and follow-on actions (see the discussion of opt in collective actions above) also fully apply with respect to opt-out collective actions.

b. Effects on the likelihood that an action will be brought

Several reasons may be indicated why it will be more likely that collective actions will be initiated under an opt-out scheme than in the case of opt-in collective actions. First, the number of victims reached will be larger and, consequently, better risk sharing and larger cost savings will become possible. The rational apathy problem, which may remain pervasive under opt-in schemes, will be much better overcome. Second, the problem of pre-financing the law suit may become less pressing because of the larger expected gain. Third, also the free riding problem is better overcome than under an opt-in mechanism.

Opt-in collective actions are likely to be initiated only if it is reasonable to assume that a sufficiently large number of victims will opt-in after being notified. Also here, the expected costs of litigation (including not only own litigation cost, but under the loser-pays rule also defendants' costs) are split between group members, reducing the initial rational apathy problem. Under opt-out, the group is largest from the outset and it seems reasonable to assume that opt-out rates will be low, especially in cases of small damage amounts. It seems reasonable to assume that victims who decide to opt-out will have a higher expected outcome (defined as probability of winning times value of compensation payments) when pursuing individual litigation. As these may well be those plaintiffs with larger damages, their opting-out may have a negative effect on the overall benefits of the collective action, as economies of scale are reduced and several proceedings are held. This may be especially the case, when the financing of the proceedings is done out of the total recovery (*e.g.* contingency fees or professional litigation financers). However, the magnitude of the impact depends on a large variety of factors, including the individual values of the damages, the number of represented parties that remain and the number of parties that drop out.

The group can be expected to be larger than under an opt-in system, as experience in the US shows that only few individuals make use of the opt-out option. Several studies (Bertelsen et. al 1974, Willing *et al.* 1996, and Eisenberg and Miller, 2004b) found that actual opt-out rates are extremely low. For example, Eisenberg and Miller (2004b) found an average of 0,6 % opt-out rate. Therefore, the costs for the individual group member would be smaller than under opt-in. It is therefore reasonable to assume, that the group under opt-out will be considerably larger than under opt-in. Victims with minor damages would be better comprised by opt-out (or mandatory) collective action, as they are unlikely to opt-out and start their own procedure.

However, the achievement of these benefits will crucially depend on the concrete design of opt-out collective actions. The effects of an opt-out scheme will not greatly differ from an opt-in scheme, if group members have to be named when applying for a collective action procedure. Such a requirement may severely limit the number of possible cases. However, if the members of the group do not have to be identified, but are defined in a more abstract way, the questions of how to notify all victims, how to finance the procedure and how to distribute the damages can become much more difficult.

Just as opt-in collective actions, opt-out procedures have the potential to reduce the initial free-rider problem that may exist in traditional litigation, where each victim may not bring an action hoping to free-ride on the litigation expenses of another. Moreover, victims who would like to free-ride on the decision would now have to become active and opt-out.

c. Effects on the amount of the sanction

It may be repeated that every collective action for damages that will be brought where no individual litigation on the same scale would have been brought increases the total sanction faced by the potential competition law infringer compared to individual litigation. The prospect of such cases therefore increases the deterrence effect. Under opt-out, compared to opt-in, the group represented will tend to be larger, so that opt-out will lead to higher sanctions than opt-in. But how large the amount of sanction will be depends on the collection and distribution mechanisms of the damage awards, discussed below. The deterrence effect will be largest, when the whole damage done to the victims as a group has to be paid. However, not all of these damages may then be used to directly compensate victims.

Also here, the amount of total expected sanctions depends on the combination of public fines and private damage claims. However, under opt-out systems the number of represented parties may be larger and depending on the possible form of damage collections and distribution the amount of compensation to be paid may be even more difficult to estimate ex-ante than under opt-in.

A2. Corrective justice

Generally speaking, collective actions including victims who would not file individual suits have the potential to increase corrective justice. The more difficult the establishment of a competition law infringement and the smaller the individual damages, the less likely will be an individual claim for compensation. Since an opt-out scheme encompasses a larger number of victims than an opt-in scheme, the goal of corrective justice will be reached for a larger group of victims.

The precise effect on compensatory justice from an opt-out collective action crucially depends on how damages are collected and distributed. As it is the

case under opt-in collective actions, the awarded damages will not lead to full compensation of every victim. Some victims will receive a higher compensation and others a lower amount than their actual harm. If all victims had filed individual suits for their actual damages, compensatory justice would be lower than under traditional litigation. However, when it is likely that a sufficient number of group members would not have filed individual suits, some compensatory justice can be achieved for those who otherwise would not have received anything. Moreover, the requirements placed on the certification of the group and the adequacy of representation of individual claims through the claim of the lead plaintiff is typically considered to make sure that the individual claims do not differ too much from each other.

As already discussed, under opt-out collective actions victims may be entitled to damage awards granted in the collective action that remain unidentified. Under such circumstances it is necessary to decide whether individual compensation that is less accurate but is likely to compensate a larger number of victims and has a larger deterrence effect (such as a price-reduction scheme or indirect use of the damage awards in the interest of the group) is preferable to a more accurate compensation of a smaller number of victims (those who become active after the trial and claim their damages) with a possibly lower deterrence effect.

If the members of the group are not identified or identifiable, it will be difficult to compensate them. In some cases, it may be possible to identify the individual members of the group, for example from the sales records of the defendant (consider for example a cartel amongst car dealers or real estate agents) or similar sources. But this is not always the case, as the example of price fixing between breweries may illustrate.

Victims who did not opt-out may claim their damage awards after the judgement or settlement, either directly from the defendant or from a created fund, in which the total damage award is paid. But not all of the victims may be aware of the proceeding and especially in minor damage cases, not all of them may find it worthwhile to become active and claim their damage awards or may be in a position to prove their affiliation to the group (consider for example the end-consumers of the beer cartel).[465] A myriad of ways to deal with such situations are possible. If not all damage awards are claimed, the rest may go back to the defendant, to the state, be distributed among those who did claim their damages, or given to some association or institution that may use the

[465] Another possibility is that the reward is directly distributed by the defendant, with no requirement for an active role by the victims. However, difficult issues will arise under such a scenario. When the defendant can rely on group members to remain passive, a third party would have to incur the costs of monitoring and punishing the defendant in case of non-compliance to the distribution plan until all obligations are fulfilled.

money in the interest of the group. Similarly, non-pecuniary damage awards such as coupons may be considered. However, especially in cases of minor individual damages, the defendant presumably can count on the passivity of the claimants also after the trial. Another avenue of dealing with this question are more indirect forms of compensation, such as a forced-price reduction, although they (and also coupon-awards) would have to be devised in a way that does not lead to distortion of competition on the market in question. Under such a scheme, also group members who were not aware of the collective action and the awarded damages may be compensated, but also many non-group members. Nevertheless, such damage awards may be more relevant from a deterrence than from a corrective justice point of view.

A3. Internal market

The way in which collective actions may contribute to the goal of market integration has already been discussed above (see section 2.1. C). As recently observed by the OFT (2007c) in the UK, compared to opt-in collective actions, an opt-out scheme may more effectively enforce the right of individuals to claim damages for competition law infringements. Accordingly, opt-out schemes may significantly contribute to the creation of a competition culture in Europe. If rules on collective actions are sufficiently harmonized, this will also contribute to create a level playing field for industry in Europe.

B. COSTS

B1. Litigation costs

a. Costs of legal proceedings

The discussion above on factors having an impact on the size of the litigation costs, including costs of settlements also applies here. Costs related to the certification of the group and identification of group members are similar to the costs of an opt-in mechanism. Compared to opt-in collective actions, the costs of opt-out schemes tend to be higher. Opt-out schemes require an even more active involvement of lawyers and judges to manage the collective action, because the group will tend to be larger and the adequacy of representation will be even more difficult to assure, when the victims are and may remain unidentified. It may be even necessary to introduce additional procedural steps to do so, for example a second possibility to opt-out of settlement agreements.

b. Principal- agent problems.

The arguments made on principal-agent problems in general and more specifically in collective actions are also relevant here. Principal-agent problems are likely to be even larger under an opt-out solution, as under an opt-in scheme a minimum of effort and interest by the represented parties is

guaranteed. Under an opt-out scheme, the group of silent plaintiffs is presumably larger and there is also a risk that some people may not even be aware of the proceeding.

c. Costs of distributing damages

The costs of distributing damages in cases of opt-out collective actions are possibly larger than under an opt-in collective action, as the class members will be more difficult to identify. Unless class members have to be named before the class is certified, the distribution of damages may become a very complex task (see also the discussion on distributing damages in section 2.2.3).

B2. Administrative burdens

Opt-out actions may entail significant litigation costs but do not increase administrative burdens, as defined in this Report.

B3. Error costs

Because victim groups are likely to be larger under an opt-out scheme, judicial errors will have greater detrimental effect than under an opt-in mechanism. However, an increase in the statistical incidence of errors seems unlikely.

B4. Harmonisation costs

No Member State so far introduced a pure opt-out collective action into its legal system. Such an option was debated in course of the Swedish reform, but rejected in the end. Norway and Denmark also discussed a more flexible system where the general rule would be an opt-in procedure, but leaving it to the discretion of the court to turn it into an opt-out system under special circumstances. In Denmark, this law will come into force in 2008. Opt-out will be restricted to cases brought by public authorities. Portugal offers an opt-out option concerning the so-called popular action, but combined with a joinder, as the notice provides group members to either participate or to opt-out (see Harbour et al 2003). The vast majority of Member States, however, so far only allows opt-in collective actions or joinder procedures. Due to constitutional and other restrictions in the legal systems of Member States, introducing opt-out collective actions would require substantially larger changes than other forms of group litigation in many legal systems. Under opt-out, members of the group who never were aware of the proceeding may be bound by the outcome. Such a possibility creates conflicts with constitutional rights (for example in Germany)

and seems to be a major reason why opt-out collective actions are generally rejected in the Member States[466].

[466] For a more detailed discussion on such arguments, see Section II.1.1.4. above

2.4.3 Representative Actions

Representative actions may take different forms. First, representative bodies, such as consumer associations, may be enabled to claim damages on behalf of their members who paid the membership fees. Second, an association may be established to represent the interests of its members in a specific case of harm caused to victims of competition law infringements. Third, representative bodies may be empowered to claim damage compensation on behalf of a specified group that is larger than their members, such as end-consumers at large. Under each of these scenarios, opt-in or opt-out mechanisms can still be applied, so that victims must either expressly declare their will to be bound by the outcome of the case or may decide to withdraw from the litigation. If opting-in or opting-out is not possible, the mandatory representative action will resemble a public interest litigation.

The welfare effects of representative actions crucially depend on the way in which they are designed. If group members are given the opportunity to opt-in, the effects will be comparable to those of an opt-in collective action. If group members can opt-out, the representative action will have effects similar to those of opt-out collective actions. If victims are neither allowed to opt-in nor to opt-out, the representative action resembles a mandatory collective action. Problems connected with an adequate collection and distribution of damages will be most serious under the last scenario. Although opt-out and mandatory representative actions are better mechanisms to include a larger number of victims and to overcome the problem of rational apathy, they also pose more problems with respect to compensatory justice and their development may be hindered by constitutional limitations or other legal concerns. This will be further explained below.

A. BENEFITS

A1. Deterrence

a. Effects on information

Representative actions may generate potentially large benefits in terms of deterrence. Damages claims may also be brought when no individual claims would have been filed, because of lack of information about the infringement. Even though some individual parties (for example, close competitors who are direct victims of anti-competitive conduct) will have easier access to information than representative bodies (which remain third-parties), it is fair to assume that representative actions will allow a less costly gathering of information compared to individual suits. Representative bodies may specialize on certain topics and diversify the costs of information, as they are likely to be repeat-players. This gives them an information advantage compared to individual parties, who are generally less informed about competition law infringements and/or for whom gathering and assessing the relevant

information is relatively costly. Moreover, associations or organisations are considered to be a more equal opponent to a company as defendant than a possibly less experienced and sophisticated individual. In this way, representative bodies may equally provide countervailing power in areas related to access to information, legal knowledge and trial experience. Similar arguments apply to a lawyer as initiator of a group action. However, the association may have slight advantages concerning the gathering, interpretation and distribution of information over an individual lawyer.

The benefits in terms of improved information seem to be the greatest if harm is suffered by individual consumers. As stated above, establishing a cartel tends to be a very complex exercise whenever evidence of an agreement is not directly observable. Representative bodies may reduce costs of information gathering, especially with respect to the size of the harm suffered. Victims of exclusionary abuses and vertical restraints will primarily be individual companies. In cases of vertical restraints private litigation is already common. A party desiring to have the restrictive clauses declared void will invoke Article 81 EC whenever possible. Even though the information savings from allowing representative actions will be lower, they do not disappear. Directly concerned parties will not always possess optimal information on relevant data to define the relevant market or assess the anti-competitive effects and the outweighing efficiency benefits.

Both business associations and associations of consumers may be granted standing to protect the interests of their members. Associations of traders may dispose of specialised knowledge of the relevant market, the applicable rules of competition law and trial experience that the individual members may not have. It may be expected that associations of traders will bring actions not only when they are harmed by a cartel (for example, buyers of input goods) but also (and maybe even predominantly) in cases of illegal vertical restraints or abuses of a dominant position. In the latter cases the risk of frivolous suits will need to be contained. Associations of consumers may make their members aware of competition law infringements and the resulting harm. In addition, a representative action by a consumer association may cure the rational apathy problem in cases of widely spread and trifle damage. The improvement of information flows will not only benefit the members of the representative associations, but also the non-members. When it becomes public that the association successfully sued on behalf of its members, other victims gain information about their own harm. This may lead to additional individual proceedings.

As the incentives for representative bodies to bring actions will be different from those of other actors who might bring damages claims, for example reputation effects, the representative body will be an additional actor having an interest and the means to detect and pursue competition law infringements. Consequently, the introduction of representative actions has the potential to

increase the level of detection of competition law infringements, provided that the representing bodies are endowed with adequate incentives to act.

Compared to stand-alone cases, representative actions brought as follow-on cases will have less beneficial effects as far as the reduction of information asymmetries is concerned. A major part of the relevant information has already been discovered in the preceding public case (especially the establishment of a competition law infringement). There is, however, a small possibility that representative actions following public enforcement may also correct possibly inaccurate findings by public enforcement authorities.

b. Effects on the likelihood that an action will be brought

As it is the case with collective actions, information about infringements is not sufficient to guarantee that damages claims will be initiated. Besides the information asymmetry, also the rational apathy problem must be overcome. Victims may not bring individual claims under the traditional procedures, because their expected awards are smaller than the expected litigation expenses. Under representative actions, victims do either not bear the costs of litigation or these costs are spread amongst the members of the associations. Consequently, the rational apathy is mitigated or may be even solved.

Opt-in representative actions would be initiated by the representative body, whilst victims would be notified and given an option to opt-in, thereby agreeing to make the outcome of the proceeding binding on them. Such a system is likely to have less people participating than opt-out or mandatory proceedings, as people with very small claims still may not find the expected awards worth-while to become active and to opt-in. Especially if opting-in is connected to becoming a member and paying a membership fee, the number of participating individuals may remain low. However, depending on the limitation period for opt-in, it may relatively early become clear how many victims will be represented at settlement stage. As can be seen from the experience in the US, under opt-out, the group is likely to be much larger because people with small claims will not opt-out.

The decision to bring a representative action will depend on the possibilities to finance such claims and to avoid free-riding by individuals who do not contribute to the legal expenses. Shortage of resources may severely hamper the effectiveness of representative actions. Financing can take different forms: membership fees, bounties, public subsidies, fund solutions, and funding by professional litigation companies.

When financing takes place through membership fees, the costs of litigation are split between members, thus reducing the initial rational apathy problem. Representative actions should therefore be more likely than individual claims, especially when the individual damages are too small to justify individual

litigation. Also compared to individual victims, representative bodies can better specialize on certain topics and diversify risks and costs of litigation.

Organisations and associations may also be financed through other means. Bounties may be generated, although this strategy is highly uncertain and may not raise sufficient revenues. Public subsidies may also be considered, but this moves private enforcement closer to the domain of public enforcement and make associations dependent on their financers. Another solution is the creation of a partially publicly financed fund (Micklitz and Stadler, 2005, 1270 et seq.) in which revenues (for example, proceeds from disgorgement procedures) are used to cross-finance damages claims. Such a fund may also be made accessible for representative actions.

Other alternatives, which may also be available for other forms of group litigation, are financing by professional litigation companies. Such companies already exist in some Member States (Austria and Germany): they typically finance litigation expenses on a percentage-of-awards basis. Such financiers will be more interested in high value and low risk litigation and thereby bias the selection of cases that might be brought. However, it has been pointed out (and it is reasonable to assume) that also consumer associations already tend to focus on high profile cases involving expensive goods. This may be even efficient given the limited resources available and the larger harm inflicted upon consumers in such cases (Dayagi-Epstein, p. 232).

The efficiency of representative actions will be crucially determined by the incentive mechanisms that are chosen. Associations are likely to be in a better position to cross-finance litigation than lawyers bringing a collective action. Their comparative advantage may flow from the membership fees that are levied, fees generated with other services offered, or even public subsidies. They may also be held to higher accountability standards and be less directly motivated by monetary profits, as these gains can generally only be used for achieving the purpose of the organisation and not for private purposes. When associations need to be given authorisation to have standing in court or are subsidised by the state, additional controls may be put into place.

Representative actions reduce the initial free-rider problem, where each victim may not bring an action hoping to free-ride on the litigation expenses (proving competition law infringements) of another victim. However, when representative actions are brought by associations only on behalf of members, non-members may still be able to free-ride on the efforts of the representative body and decide to not opt-in or to opt-out, especially if their damages are larger than what they expect to receive in the representative proceeding. Victims with small damages will not have a realistic outside option, however. The prospect of free-riding behaviour then may decrease incentives to become a member and to pay the membership fee. If the financing takes place through membership fees, the question then arises how to give adequate incentives to become a member. Economic theory traditionally assumes that the main

incentive to become a member is the disposal of services provided by the association to its members, such as newsletters, magazines, etc. However, this mechanism may be severely hampered if other organisations not engaging in representative actions ask a lower or no fee when competing on these services.

If organisations are given standing to sue on behalf of a more general group, the incentives to become a member and pay a membership fee are even lower than under the other alternative, as non-members will also benefit from the actions of the association, without having to incur the costs of a membership fee.

If the representative action is brought by a public body, other problems may arise. Public bodies may be vulnerable to lobbying by pressure groups (even though this is not necessarily the case) and become victims of regulatory capture. They may also select cases according to their potential for attracting media attention or in pursuit of specific political aims. However, compared to traditional individual litigation, the likelihood that claims will be brought may increase.

c. Effects on the amount of the sanction

Every representative action for damages that will be brought in cases where no individual litigation on the same scale or at all would have been initiated, increases the total sanction faced by the competition law infringer. The prospect of such cases therefore increases the deterrence effect. The deterrence effect takes place ex-ante and depends on the possibility of the potential competition law infringer to assess the risk of being sanctioned and the amount of sanctions faced. The amount of sanction faced will depend on several factors, the first of which is whether damage claims will be the only sanctions or whether damage claims will be added to public fines. If public enforcement takes place after private enforcement, the amount of public fines may be reduced according to the damages compensated, provided there is a legal basis for such a reduction. If representative actions take place in the aftermath of public fines, no such adjustment according to the already paid fine would take place and the damages to be paid will come on top of the public fine. However, as already stated in Part I of this Report, it is generally assumed that the fines imposed in Europe are too small to reach optimal deterrence, so that this need not lead to over-deterrence.

Another factor is the number of victims that will be represented. If representative damage claims take place on behalf of a group, defendant firms may not have sufficient information about how many victims would be represented in case of a proceeding. In that case, firms face a large amount of uncertainty, as the number of represented victims is difficult to estimate ex-ante. If representative actions take place on behalf of members, the number of members may provide a first estimate. Another factor having an important impact on the magnitude of the sanction is the choice between an opt-in or opt-out scheme. It must be recalled that the number of victims choosing to opt-out

tends to be very low. Therefore, the amount of sanction expected under opt-out will be larger than under opt-in and would be largest under a mandatory regime.

A2. Corrective justice

Representative actions may contribute to a higher level of corrective justice in two ways: by increasing the number of victims who will be compensated (either other companies or end consumers) and by aligning the amount of the compensation better with the actual magnitude of the harm suffered. The effects on corrective justice will depend on the way in which the representative action is organized: (i) a damages claim on behalf of the members; (ii) a damages claim on behalf of a larger group of victims; (iii) a representative action with an opt-in mechanism; (iv) a representative action with an opt-out mechanism; or (v) a mandatory representative action.

A major group of victims who may be compensated thanks to representative actions are end consumers. Representative actions may partially cure the problems of widely dispersed damage and the ensuing rational apathy of victims concerning filing damages claims. Besides end consumers, also companies could be harmed by competition law infringements but may not have the means or incentives to file suits on their own. In these cases, representative actions initiated by either consumer associations or associations of traders have the potential of increasing compensatory justice, at least for members. In cases of exclusionary abuses and non-price vertical restraints, the quantification of damages in monetary terms may become too complex, so that injunctive relief would provide a good alternative, moving compensatory justice into the background.

When representative associations sue on behalf of their members, the potential victims are identifiable from the outset and the distribution of damages will pose few problems. It must be added that some members may be compensated more and others less, compared to the size of their actual damage, even when associations claim the sum of all already identified individual damages. The departure from exact compensation is due to the inability to incorporate the features of individual cases because of the necessary generalisations and occurs especially when settlements are also binding. If claims were treated individually, the representative action would resemble more a joinder procedure organized (or represented) by the association. Moreover, settlements may result in imperfect compensation, when binding upon victims of competition law infringements. If all association members would have filed individual suits to claim damages covering their actual harm, the level of compensatory justice will be lower than under traditional litigation, even though this situation is unlikely. Lastly, if a *cy press* mechanism of distribution would be used, such as a price reduction, it could lead to over- and undercompensation of individual victims. However, when it is likely that a

sufficient number of members of the representing association would not have filed individual suits and when the damages awards are comparable, a higher level of corrective justice can be achieved for those victims who would not have received any compensation in the absence of a representative action.

Representative actions may also allow compensation of damage for which individual parties would not be able to prove damage and causation in traditional legal procedures. That may be lost sales of suppliers due to an output-restricting cartel or the loss suffered by consumers who did not purchase the product at prices above the competitive level. Depending on their form and the way in which damages are awarded, the introduction of representative actions may be able to grant indirect compensation. If, for example, representative actions on behalf of members for damages result in non-monetary damages, such as a forced price-reduction for a limited period (benefiting also non-members, whether victims or not) or coupons handed out to members, otherwise uncompensated victims may benefit. It must be added, though, that these indirect damage awards may also go to members of the representative body who did not suffer harm. This would then lead to overcompensation, making the overall effect on compensatory justice ambivalent.

From a viewpoint of corrective justice, the number of compensated victims should be as large as possible and, hence, also include non-members of the representative organisation. However, if the association is granted standing to sue on behalf of such a larger group, the actual number of victims represented will be much more complex to estimate and the size of the ultimate damage award may be less aligned with the actual harm. The size of damage awards will crucially depend on the method of calculating damages. One calculation option is an estimated average damage per victim times the number of represented victims. Non-pecuniary damage awards may also be possible, such as price-reductions or coupon awards. Damage awards have to be distributed among the represented parties, which may pose difficult problems. The less specific and the larger the group of represented victims and the more abstract the damages awarded, the larger will be potential gap between damages awarded and real compensation of individual victims.

Under opt-in, the individual plaintiffs represented are identified during the legal proceedings and all those who opted in can receive the damage award for individual victims. It is possible that these abstract damages may not be congruent with the actual harm inflicted on those individuals who opted in. Some may be over-compensated and others may remain under-compensated, compared to the size of the actual damage. However, as long as these victims would not have brought individual claims, compensatory justice is increased.

Under opt-out, however, the identification of victims may pose larger problems, so that the question of distribution becomes more pressing. It may be considered to restrict opt-out representative actions to groups, where the

potential group members are identifiable. But this would severely lessen the effectiveness of the group litigation. If group members do not have to be identifiable, they may remain unknown. First, there is a risk that victims may not be aware of the proceedings or of their group affiliation. Second, small damages may be considered not worthwhile to collect even after trial if opt-out is possible after judgement or settlement. Third, not all group members may be able to proof their affiliation to the group. Under such circumstances the distribution of damages may be done through more indirect means. The total of damage awards then may not be completely distributed among the group represented under an opt-out or mandatory system, since some individual group members may remain unidentified. The remainder may be used to compensate victims indirectly, but then some group members will be overcompensated at the expense of others. However, this may still lead to more compensatory justice than if no representative action had taken place because individual (accurate) damages claims were not practicable. The remainder may also go back to the defendant, but then the deterrence effect would be less than under other options. These difficulties with the distribution of damages will be most prominent in the case of a mandatory representative action.

In sum, the adequacy of compensation will depend on the way in which representative actions are designed. Problems connected with imperfect compensation are more serious under an opt-out scheme than in case of opt-in representative actions. Also, the effect on compensatory justice remains remote as long as no solution for damages distribution is found. Clearly, national laws may need reform in order to enable effective representative actions.

A3. Internal market

The analysis above (see section 4.1. A3) also applies here. Compared to other forms of group litigation, representative actions may better contribute to creating a competition culture and bringing competition law closer to the citizens. For example, consumer associations may bring high-profile damages claims in cases of hard-core violations that receive a lot of media attention. Also, an expanded use of representative actions may contribute to creating a level playing field for industry in Europe.

B. COSTS

B1. Litigation costs

a. Costs of legal proceedings

According to some commentators, it is likely that also representative actions are more expensive and time consuming than traditional individual claims (Scottish Law Commission, 1996; Micklitz and Stadler, 2005). First, in many EU

Member States court fees and possibly also lawyers' fees are linked to the value of the claim, so that larger values are connected to higher fees, although typically on a decreasing scale. However, it may be possible to exempt associations from court fees (as is the case in Romania – Law 146/97). Second, representative actions may require additional time and resources when the courts also have to check requirements of standing or the adequacy of settlements, in order to protect the rights of those represented. Such additional requirements, compared to the individual one-to-one litigation, will probably make the representative action more costly than individual litigation, although these additional costs need not be extremely high. However, compared to collective actions, the representative action is considered to demand less active involvement of lawyers and judges, as they among these alternatives more resemble the traditional two-party litigation (Micklitz and Stadler 2005).

Conversely, compared to individual suits by all or a sufficient number of members, the overall burden of litigation costs on the judiciary system could be reduced as economies of scale can be exploited by filing only one suit. And in general, any increased costs of litigation on society may be outweighed by the created benefits concerning compensatory justice, deterrence and bringing competition law closer to the citizen. However, if no claim would have been filed in the absence of the representative action, the total costs on the judiciary system will increase, as more cases will be brought.

b. Principal-agent-problems

Principal-agent problems may also arise if a representative body represents a group of victims. The reason is that, in order to initiate claims for damages, the representative body needs to have an own interest. An association's interest will never be exactly the same as the interests of the represented plaintiffs. Principal-agent problems may be more serious if the claim is brought by an association, the members of which are remote from the lead plaintiffs of the harmed group (e.g. end-consumers). Conversely, in the case of a trade association, members may be better able to control those who represent their interests. Depending on the incentive mechanisms used, principal-agent problems may be large or small. This will be further explained below. Group members, who are represented in the trial and do not partake themselves, have a reduced ability to monitor the adequacy of representation and to influence the outcome of the legal proceeding. The principal- agent problem is likely to affect most those victims who have no viable outside option. Other victims may well be able to opt-out or never opt-in.

The incentive mechanism used to stimulate representative bodies to bring damages claims should be considered with great care. Allowing some equivalent to contingency fees to be collected by the association could cause similar problems as contingency fees for lawyers, although possibly to a lesser

extent due to the different nature of associations compared to individual persons.

If membership fees have to be used for financing litigation, the cases to be pursued might be selected according to their potential to attract attention and subsequently new additional members.

Associations, representing different types of victims (end-consumers, intermediate costumers, *i.e.* undertakings, or competitors) have different interests and may focus on different markets and different types of infringements. For example, associations not only represent consumers but also companies or certain professions. Consequently, the interests of the represented parties may be in conflict with each other, with the represented parties and goals of other associations and even with the general goals of competition law. For example, it is questionable whether predatory-pricing issues would be tackled by consumer associations, even if it were feasible for them to do so.

In spite of the above mentioned problems, the principal-agent problems may be less serious than with collective actions initiated by a named plaintiff or attorney. To start with, a number of requirements regarding credibility, reputability and commitment may be imposed and checked by governmental bodies or courts before conferring standing to associations to bring representative actions. Organisations may also be held to higher accountability standards and be less directly motivated by monetary gains, as these gains can generally only be used to fulfil the purpose of the organisation and not for private purposes. When associations need to be given authorisation to have standing in particular cases or are subsidised by the state and subject to governmental controls, principal-agent problems may be mitigated.

c. Costs of distribution of damages

Just as in collective actions, the costs of distributing damages in cases of opt-out actions are possibly larger than under an opt-in action, as the class members will be more difficult to identify. Unless represented victims are already identified, the distribution of damages may become a very complex task.

B2. Administrative burdens

Representative actions do not cause new administrative burdens, as defined in this Report. Costs of notification and opting in or out have been qualified as litigation costs. Information duties imposed on associations which are related to their recognition required to file claims have to be taken into account as additional litigation costs.

B3. Error costs

All in all, the risk and related costs of errors seem comparable to those under collective actions. If the threat of representative actions induces defendants to settle even if the cases have little or no merits, error costs may increase compared to traditional litigation. Associations may have an incentive to pursue such claims, if they receive a percentage of the damages awards as incentive and to finance future litigation, but also if important settlements are a way to attract media attention and more members.

B4. Harmonisation costs

Many Member States already know some form of representative actions, although existing schemes may be confined to actions for injunctive relief, or disgorgement. Also, they may exist only to enable organizing the bundling of similar interests in traditional litigation (joinder). However, some questions, such as when an organisation is considered to be representative, how they are financed or controlled, have already been addressed and some experiences have been made in the Member States.[467] Allowing for damage claims may still require changes in the national legislation, but less so than in the case of collective actions.

The constitutional problems of people being bound by a judgement even when they were not heard in the process would arise especially under a mandatory, but also under an opt-out scheme. Conversely, if group members are given a possibility to intervene in the procedure and make use of it, the litigation may quickly become too complex to handle. However, it does not seem very likely that many group members would make use of these possibilities.

2.4.4 Joinder procedures

There is a multitude of different joinder procedures available in different legal systems. Therefore, the discussion below will again focus on the general and most basic functions of such procedures.

A joinder of claims refers to the consolidation of several claims of one plaintiff in one trial. In the framework of group actions, a joinder of claims is possible only if one party is in possession of the rights to these individual claims. This presupposes the transfer of dispersed individual rights to one party before the trial. Such cases were brought, for example, by the Austrian Association for Consumer Information (*Verein fuer Konsumenteninformation* – VKI). The largest difference to a representative action is that the association is not granted standing itself to enforce rights of other parties, so that the victims themselves have to be the first to become active. This may be a barrier to bring claims if, as

[467] See section 2.3.4. above.

it is the case in France, associations may not advertise or otherwise approach potential victims. The impact will then differ depending on a number of issues, including the extent to which rights are transferred and the agreements concerning the distribution of damage payments A joinder of parties (often divided into two legal categories: compulsory and permissive joinder), on the other hand, refers to the possibility to join other parties in a similar claim on the same or similar grounds against the same defendant. Both procedures seem to be common in many civil procedures. Special forms of joinder of parties are test cases, as they have been used for example in Germany, Austria and also in the UK. From a number of joining parties, one case is selected to be tried as a test case. In this trial, the issues common to all the claims of the joining parties are decided upon and the outcome is binding to all parties who have joined.

There are potentially large obstacles to effective joinder procedures: First, the transaction costs, *i.e.* the costs of identifying and contacting other victims to join the claim (joinder of parties) or to transfer their rights (joinder of claims); secondly, the risk that the procedure may become too complex to handle in one trial when a large number of individuals join. Only the latter problem may be overcome when individual victims agree to transfer their claim to a single party, so that the claims can be joined, or by way of introducing an adequately designed test case procedure. A joinder may also be organized by an association (for example by placing as much information as legally allowed on the internet). In contrast with a representative action, however, each victim must file a claim and will become a party in the proceeding.

Additional problems may result from legal restrictions. As lawyers may be severely limited by professional regulation in their ability to organize a joinder and individual victims may not be able to do so, associations may be the best forum to collect and organize claims. One observes that in several joinder of parties procedures representative organisations acted as forum to organize and bundle claims. It seems that organisations such as consumer associations are particularly able to contact and organize potential plaintiffs. In Sweden, in one case even the opt-in group action procedure led to the founding of an association to make the group action better manageable (Mom, Länderbericht Schweden, p. 576). Sometimes however, as for example in Austria, the ability to apply a joinder of parties is contingent on a minimum value of the claims. Associations also may not be allowed to get legal rights transferred to them and claim damages on their own behalf. It is likely that such legal restrictions have hampered the use of means to bundle claims in the past and may remain an obstacle to a wider use of joinder procedures in the future.

A. BENEFITS

A1. Deterrence

a. Effects on the level of information (detection)

Joinder procedures might increase the level of information of victims of competition law infringements in three ways. Victims may gain better knowledge that an infringement has occurred, may become better able to assess their damage and learn which legal steps must be taken to claim compensation.

Under joinder of parties, each victim has to file its own claim. Therefore, a potential plaintiff must either have detected the infringement himself/herself, or must be informed by other parties. As the detection of competition law infringements may be quite complex and transaction cost are very high, at least for the individual, detection rates are unlikely to be substantially improved by joinder possibilities on the side of individual victims such as the private end-consumers. Also the information asymmetries on the side of end-consumers concerning the assessment of the damage and legal means to initiate a claim are likely to be only marginally improved, when such victims have to notify others.

Generally, companies are more likely than private individuals to have access to and be able to evaluate relevant information. But as their relationship to the competition law infringer will be different from that of the end-consumer, it may not be possible to join these different claims. Moreover, firms may have little incentives to notify consumers or even other firms to join their claim even when this would be possible.

Lawyers, who possess the greatest information advantage concerning the legal steps to take, are unlikely to have much larger incentives to initiate a claim merely because a joinder procedure is available, unless their fee would be somehow linked to the number of victims or claims they represent. However, a notification system does not exist under joinder procedures, which may hamper the distribution of information to potential claimants. Lawyers may also be hindered by other regulations to organize a joinder. Last but not least, the transaction cost of organizing a joinder may be too large compared to the potential gains in larger fees.

However, the prospect of organizing and initiating cases may give incentives for associations to inform victims and to organize claims. In contrast to representative actions by associations, each victim will file its own claim and be a party to the procedure with the connected rights to influence the proceeding under the traditional procedural rules. A settlement without the consent of the parties is not possible. Associations will also be better informed about legal procedures than private parties such as end-consumers. Under such circumstances, the level of detection may be improved, as another interested party is introduced which is able to reduce the information deficit. This may particularly benefit end consumers. Similar experiences have already been made in the past, *e.g.* in Germany and Austria, where consumer associations

informed potential victims about their damages and organized a joinder of claims.

b. Effects on the likelihood that an action will be brought

A joinder procedure has the potential to reduce the costs of litigation for the individual victim. Facts common to all claims need only be established only once.

A joinder, especially when organized by an association, has the potential to reduce the rational apathy problem of individual victims, as costs and risks of litigation can be shared or even transferred to another party (joinder of claims). However, each joinder procedure is likely to be initiated only when the claims are substantial enough to justify the expected transaction and litigation costs. Moreover, as each plaintiff still has to file his or her own claim, the rational apathy problem may remain larger than under the alternatives of collective action discussed above. To make such procedures feasible, the costs of organizing a joinder should be reduced where possible.

Several parties can organize a joinder. The private end-consumer, wishing to file a claim but wanting to share the risk and costs with other victims or to notify other victims, may try to identify and contact other victims. However, for a private person, such a task may be very complex and costly. A specialized lawyer may have only slight advantages over private end-consumers and be restricted by professional regulation. Associations could also organize a joinder by contacting victims (for example their members), advising them and managing the procedure, either without any further direct involvement in the trial, by getting the power of attorney from the victims, or even by having the victims' claims transferred to the organisation. Such an association may be very well able to identify and contact other potential victims, especially when the work of the association is related to the case. Associations organizing the joinder may have a large advantage over individuals. As experience shows, informing the members or the society at large through media coverage and internet sources seems to be feasible. When reputation effects and presence in the media are beneficial for the associations, they may also have an interest in organizing joinder procedures.

The number of affected companies may generally be less than the number of affected end-consumers, so that transaction costs can be assumed to be lower for companies than for end-consumers. Moreover, the former are likely to possess some information about other affected companies active in the same market. However, the companies may be reluctant to file a claim in the first place and even more so to invite other affected companies in the relevant market to join their suit. The end-consumers with relatively small claims may not be able and/or willing to incur the costs of identifying and contacting other victims. In this case, another forum which organizes such bundling may be necessary and an association may do the job.

A joinder may also help to get access to financing by professional financiers, when the total value of the claim increases. This could help to solve the financing problem. Associations may well be able to solve the financing problem also through other means, when they are given the power of attorney by victims or when the individual claims are transferred to them. When the claims are joined, professional financiers may become interested in financing the lawsuits, if the value of the claim is sufficiently large.

When few individual victims join as parties in a trial, others may decide to wait and try to free-ride on the decision achieved. This risk and the prospect of having to bear part of the costs of litigation may hamper the incentives to join. However, when associations are able to reach a large part of the victims, offer advice and organize the claim, including the financing, the incentives to free-ride on such a procedure may be reduced. This is especially due to the fact that no average of damages is sued for and each claim remains intact throughout the procedure.

c. Effects on the amount of sanctions

The joinder of parties or claims increases the amount of sanctions faced by the potential competition law infringer to the same extent as the increased number of claims actually tried. Moreover, as sharing costs may also enable the victims to hire better counsel and experts, thereby increasing the probability to prevail at trial, the expected sanction will be enlarged as well. However, the number of represented victims will be lower under a joinder procedure than under other group actions discussed above. Hence, the sanction faced remains lower when the average damage award is the same.

A2. Corrective justice

Procedures of joinder can make compensation more feasible in cases where no individual claims would have been filed because of lack of information or rational apathy. For example, as discussed above, the VKI in Austria uses a joinder of claims procedure, by inducing victims to transfer their claim to the VKI. Therefore, victims do not bring claims, but the VKI does. Such procedures are more likely for small claims and for end consumers than for large claims or companies.

Joinder of parties, test cases and joinder of claims generally allow the most accurate compensation of individual claims of all of the discussed forms of group litigation. As the individual claims stay intact throughout the procedure, the damages awards go directly to individual victims. Under joinder of parties and test-cases, each claim will be kept intact and compensated according to the actual damage inflicted upon the victims. Individual compensatory justice is the same as under traditional litigation and compensatory justice for society is

slightly increased depending on the increase in the likelihood that a case will be brought.

Depending on the contractual agreements concerning the transfer of the claims under a joinder of claims, victims may receive an actual net reimbursement ranging from the full damage award to nothing. Victims may transfer their claims in return of a fixed payment, part or all of the recovery or a combination of these options. Practical examples of such procedures include the *Cartel Damage Claims* case and some procedures initiated by the Austrian VKI. Victims may then not actually receive the full compensatory rewards granted at trial, but they also do not have to bear the costs and risks of the trial.

However, a joinder of parties requires that the victims are actively involved in the proceedings, presumably to a greater extent than under opt-in procedures. This may make the number of compensated victims smaller than under other forms of group litigation discussed above.

A3. Effects on the internal market

Joinder procedures may contribute to a more effective enforcement of competition law infringements and the creation of a competition culture in Europe. However, it seems that this contribution will be smaller than in the case of collective actions or representative actions. Since they are already common in most EC Member States, an increased use of joinder procedures will also contribute to create a level playing field for industry in Europe.

B. COSTS

B1. Litigation costs

a. Costs of legal proceedings

Under joinder of claims, economies of scale are largest compared to other forms of joinder procedures, as all claims are transformed into one, which is then pursued under a standard civil procedure. Trial costs equal those of a traditional one-to-one litigation, as bundling and organizing the procedure takes place before the suit is initiated. Since such procedures presumably are already provided for in the majority of Member States, the changes in costs due to a harmonized further strengthening of such mechanisms are most likely to be small compared to other alternatives discussed above. However, the costs associated with identifying and contacting the victims as well as organizing the transfer of several independent claims to one party can be quite substantial. Because of these large transaction costs, such procedures may only be feasible in some cases.

Joinder of parties procedures may become too complex. It is possible that, as the number of joining parties increases, the joinder may become too costly and unmanageable. This was the reason for the introduction of test case procedures

in Austria and Germany. When test cases are held, the individual damages and other issues that are not part of the common issues decided upon in the test case have to be tried in subsequent individual trials. This makes the total of trial costs much higher than under the other alternatives of group actions discussed above, as economies of scale can only be realised concerning the test case. However, cost savings compared to purely individual litigation by all plaintiffs still are realized, as the facts common to all claims have to be decided upon only once.

Under test-case procedures, costs are likely to be larger than under traditional litigation. The reasons are that the adequate test-case has to be selected and that the parties to the test case (at least in Germany) keep their right to intervene. Moreover, any settlement, if allowed, would have to be scrutinized in order to combat a buying off of the test case plaintiff at the expense of all the other parties in the procedure.

Experience in Germany showed that test cases or joinder of parties demand more active involvement of lawyers and judges than traditional two-party litigation (Micklitz and Stadler 2005, p. 1210, 1213). Therefore, litigation costs are likely to increase slightly also in a joinder of parties procedure and test cases, compared to traditional trials. However, costs caused by special efforts to ensure the adequacy of representation in other procedures are less necessary.

On the other hand, also joinder of parties, as well as test cases, allow for some realization of economies of scale in the litigation costs. The total amount of litigation costs depends on such a great number of variables that concrete statements on potential savings are impossible to make. One example from the UK may be given here, nevertheless. Under a joinder of parties procedure, where the lawyer was allowed to issue only one writ covering all actions, a joinder of 1001 plaintiffs was estimated to save £70,000 (approximately €103,000) in court fees for the writ alone and an additional £10,000 (approximately €15,000 euro) for each interlocutory summons[468]. Also the Austrian *Sammelklage* is said to lead to large cost savings, compared to all victims filing individual suits. An example, given by Klauser (2006) estimates that court and attorneys fees of 100 individual cases claiming €1,000 would amount to €32,373 euro, whereas one individual case claiming €100,000 would only cost €3,880 (Klauser, 2006, p.90). However, as Klauser (2006) also points out, such a procedure may still be very costly in itself when the total amount is very large, as in one case the daily fees for attorneys were estimated at €400,000 (Klauser, 2006, p.90).

[468] Geraint Howells, *Effective Legal Redress*, Conference 2006 in Austria, Report, p.61

b. Principal Agent Problems

Generally, principal agent problems presumably are less than under other alternatives discussed above. The victims file their own claim and are involved, at least to a certain extent, in the trial.

However, the risk of an increase in principal agent costs does not disappear entirely. When a test-case is held, the plaintiff of the test case may have incentives that differ from those of other victims and the defendant may have an interest in buying-off the test case plaintiff. This situation may be comparable to that in a collective action with a named plaintiff. Therefore such cases should proceed to trial, to avoid unfavourable settlements and to decide upon the facts common to all claims (as was stated in the UK). As the individual victims are only bound by the outcome concerning the common issues and individual damage claims have to be pursued in subsequent trials, principal agent problems at that stage are not higher than in individual trials.

Under joinder of claims, all claims are bundled into one claim of one party, which presupposes that all claims are transferred to that party before the trial. Depending on the contractual agreement regulating the transfer of the claim, principal agent problems may occur to a larger or lesser degree. Additional principal agent problems, apart from the problems between lawyer and client, are unlikely, when the agent becomes the principal, *i.e.* when the claims are transferred for example against a fixed payment to the initial right holder. When the transfer takes place against the contractual obligation to pay all or only a part of the rewards to the initial claim holder (the latter agreement resembling a contingency fee arrangement, giving potentially rise to similar problems), the incentives of the claimant may differ from those of the original claim holder and principal agent problems may increase. This may be the case, for example, when an association is mainly interested in large media attention. A settlement may enable to achieve that purpose, making the association more willing to settle than the initial right holder would be.

c. Distribution of damages

Under joinder procedures, the distribution of damages will be done in court, as each claim is kept intact. Only when the claims are joined, the damages awarded may have to be distributed after the trial or settlement by the party who filed the joined claim. These procedures will typically have been decided upon in contracts when the individual claims were transferred to one party, so that here these issues are dealt with individually and outside the court procedure.

B2. Administrative burdens

Joinder of claims generally does not entail any administrative burdens as defined in this welfare analysis. However, test case procedures may be

designed in a way that increases administrative costs compared to the zero option, if legal changes require additional forms to be filled and data to be kept by law.

B3. Error costs

As with other group proceedings, an increase in the statistical incidence of errors seems unlikely. But costs of error are magnified also under joinder procedures because of the fact that not only one claim is decided upon, but several claims are tried at once. It may be assumed that the group of victims will be smaller under joinder procedures than under opt-in or opt-out collective actions, because a joinder requires more effort on the plaintiff's side. Consequently, the total costs of a judicial error are smaller.

B4. Harmonisation costs

Joinder of parties or claims seems to be a very traditional civil procedure and not confined to any specific area of law. The individual claims stay intact and are treated from the legal perspective just as under standard civil procedure.

Test cases are known for example in Germany, Austria and the UK. They already form a step away from traditional litigation in that facts common to all claims are no longer decided for each claim individually. However, at least under the German test case procedure, the other victims still have some possibility to influence the test case. This places the test case somewhere between collective actions and joinder of parties, as far as the involvement of the individual plaintiff is concerned.

In sum, the costs of harmonisation are the lowest if joinder procedures are used to further private damages actions for competition law infringements. Moreover, the costs of introducing such procedures where they did not exist before are likely to be relatively low, as they require the least departure from traditional two-party litigation compared to the other options discussed above, as they basically keep the individual claims intact.

2.4.5 Summary tables on group litigation

Table 41 – Zero option

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**1** • *small likelihood of claim being brought; follow-on more likely than stand-alone*	**1** • *small likelihood of claim being brought; follow-on more likely than stand-alone*	**1** • *small likelihood of claim being brought; follow-on more likely than stand-alone*
Compensation	**1** • *very few victims compensated*	**1** • *very few victims compensated*	**1** • *very few victims compensated*
Internal market	**0** • *No level-playing field, large diversity*	**0** • *No level-playing field, large diversity*	**0** • *No level-playing field, large diversity*
Costs			
Litigation costs	**1** • *Very low level of litigation in competition cases*	**1** • *Very low level of litigation in competition cases*	**1** • *Very low level of litigation in competition cases*
Administrative burdens	**0** • *Very small population and frequency*	**0** • *Very small population and frequency*	**0** • *Very small population and frequency*
Error costs	**0** • *Low number of cases*	**0** • *Low number of cases*	**0** • *Low number of cases*
Harmonisation costs	**0** • *No harmonisation, very fragmented landscape*	**0** • *No harmonisation, very fragmented landscape*	**0** • *No harmonisation, very fragmented landscape*

Table 42 – Opt-in collective actions

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *better information;* • *increase in likelihood of claim being brought;* • *medium increase of expected sanction*	**2** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *medium increase of expected sanction*	**2** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *medium increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *medium increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged in some case*	**3** • ***n. of compensated victims:*** *medium increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged in some case*	**3** • ***n. of compensated victims:*** *medium increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged in some cases*
Internal market	**4** • *level-playing field*	**4** • *level-playing field*	**4** • *level-playing field*
Costs			
Litigation costs	**4** • *legal proceeding more costly;* • *increase in principal-agent problems* • *costs of distributing damages* • *costs of notification and opt-in*	**4** • *legal proceeding more costly;* • *increase in principal-agent problems* • *costs of distributing damages* • *costs of notification and opt-in*	**4** • *legal proceeding more costly;* • *increase in principal-agent problems;* • *costs of distributing damages* • *costs of notification and opt-in*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**1** • *no increase in statistical incidence of errors* • *impact of error would affect a group of victims*	**2** • *no increase in statistical incidence of errors* • *impact of error would affect a group of victims* • *risk of frivolous lawsuits*	**3** • *no increase in statistical incidence of errors* • *impact of error would affect a group of victims* • *significant risk of frivolous lawsuits*
Harmonisation costs	**3** • *not yet common in most Member States*	**3** • *not yet common in most Member States*	**3** • *not yet common in most Member States*

Table 43 – Opt-out collective actions

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *better information;* • *large increase in likelihood of claim being brought;* • *large increase of expected sanction*	**3** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *large increase of expected sanction*	**3** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *large increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged in some cases*	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged in some cases*	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged in some cases*
Internal market	**5** • *Level-playing field* • *Contributes to "competition culture"*	**5** • *Level-playing field* • *Contributes to "competition culture"*	**5** • *Level-playing field* • *Contributes to "competition culture"*
Costs			
Litigation costs	**5** • *Legal proceeding more costly* • *large increase in principal-agent problems;* • *large costs of distributing damages* • *costs of notification and opt-out*	**5** • *Legal proceeding more costly* • *large increase in principal-agent problems;* • *large costs of distributing damages* • *costs of notification and opt-out*	**5** • *Legal proceeding more costly* • *large increase in principal-agent problems;* • *large costs of distributing damages* • *costs of notification and opt-out*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**2** • *no increase in statistical incidence of errors* • *larger group than with opt-in*	**3** • *no increase in statistical incidence of errors* • *larger group than with opt-in* • *higher risk of frivolous lawsuit*	**4** • *no increase in statistical incidence of errors* • *larger group than with opt-in* • *significant risk of frivolous lawsuits*
Harmonisation costs	**5** • *not common in Member States;* • *opt-out less accepted*	**5** • *not common in Member States;* • *opt-out less accepted*	**5** • *not common in Member States;* • *opt-out less accepted*

Table 44 – Opt-in representative actions

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *much better information;* • *large increase in likelihood of claim being brought;* • *increase of expected sanction*	**2** • *increase in information;* • *medium increase in likelihood of claim being brought* • *medium increase of expected sanction*	**2** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *medium increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *medium increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *in theory, aligned with actual harm: compensation likely to be averaged amongst claimants*	**3** • ***n. of compensated victims:*** *medium increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *in theory, aligned with actual harm: compensation likely to be averaged amongst claimants*	**3** • ***n. of compensated victims:*** *medium increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *in theory, aligned with actual harm: compensation likely to be averaged amongst claimants*
Internal market	**5** • *Level-playing field* • *Contributes to "competition culture"*	**5** • *Level-playing field* • *Contributes to "competition culture"*	**5** • *Level-playing field* • *Contributes to "competition culture"*
Costs			
Litigation costs	**3** • *legal proceeding slightly more costly;* • *small increase in principal-agent problems;* • *costs of distributing damages;* • *costs of authorization requirements, notification and opt-in*	**3** • *legal proceeding slightly more costly;* • *small increase in principal-agent problems* • *costs of distributing damages;* • *costs of authorization requirements, notification and opt-in)*	**3** • *legal proceeding slightly more costly;* • *small increase in principal-agent problems* • *costs of distributing damages;* • *costs of authorization requirements, notification and opt-in)*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**1** • *no increase in statistical incidence of errors* • *impact of error would affect a group of victims*	**2** • *no increase in statistical incidence of errors* • *impact of error would affect a group of victims* • *risk of frivolous lawsuits*	**3** • *no increase in statistical incidence of errors* • *impact of error would affect a group of victims* • *significant risk of frivolous lawsuits*
Harmonisation costs	**3** • *different systems existing;* • *opt-in more accepted*	**3** • *different systems existing;* • *opt-in more accepted*	**3** • *different systems existing;* • *opt-in more accepted*

Table 45 – Opt-out representative actions

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *better information;* • *large increase in likelihood of claim being brought;* • *large increase of expected sanction*	**3** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *large increase of expected sanction*	**3** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *large increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged*	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged*	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged*
Internal market	**5** • *Level-playing field* • *Contributes to "competition culture"*	**5** • *Level-playing field* • *Contributes to "competition culture"*	**5** • *Level-playing field* • *Contributes to "competition culture"*
Costs			
Litigation costs	**4** • *increase in principal-agent problems (less than in opt-out collective action)* • *large costs of distributing damages* • *costs of authorization requirements, notification and opt-out*	**4** • *increase in principal-agent problems (less than in opt-out collective action)* • *large costs of distributing damages* • *costs of authorization requirements, notification and opt-out*	**4** • *increase in principal-agent problems (less than in opt-out collective action)* • *large costs of distributing damages* • *costs of authorization requirements, notification and opt-out*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**2** • *no increase in statistical incidence of errors* • *larger group than with opt-in*	**3** • *no increase in statistical incidence of errors* • *larger group than with opt-in* • *risk of frivolous lawsuit*	**4** • *no increase in statistical incidence of errors* • *larger group than with opt-in* • *significant risk of frivolous lawsuits*
Harmonisation costs	**4** • *opt-out less accepted*	**4** • *opt-out less accepted*	**4** • *opt-out less accepted*

Table 46 – Mandatory representative actions

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *better information;* • *large increase in likelihood of claim being brought;* • *large increase of expected sanction*	**3** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *large increase of expected sanction*	**3** • *small increase in information;* • *medium increase in likelihood of claim being brought;* • *large increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged*	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged*	**3** • ***n. of compensated victims:*** *large increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation may be averaged*
Internal market	**5** • *Level-playing field*	**5** • *Level-playing field*	**5** • *Level-playing field*
Costs			
Litigation costs	**4** • *legal proceeding more costly;* • *large increase in principal-agent problems;* • *large costs of distributing damages*	**4** • *legal proceeding more costly;* • *large increase in principal-agent problems;* • *large costs of distributing damages*	**4** • *legal proceeding more costly;* • *large increase in principal-agent problems;* • *large costs of distributing damages*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**3** • *no increase in statistical incidence of errors* • *single errors affect a very large group*	**4** • *no increase in statistical incidence of errors* • *single errors affect a very large group* • *risk of frivolous lawsuit*	**5** • *no increase in statistical incidence of errors* • *single errors affect a very large group* • *significant risk of frivolous lawsuits*
Harmonisation costs	**5** • *not common in Member States;* • *no opt-out possible*	**5** • *not common in Member States;* • *no opt-out possible*	**5** • *not common in Member States;* • *no opt-out possible*

Table 47 – Joinder of parties and test cases

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *increase in information;* • *small increase in likelihood of claim being brought* • *slight increase of expected sanction*	**1** • *little increase in information;* • *slight increase in likelihood of claim being brought* • *slight increase of expected sanction*	**1** • *little increase in information;* • *slight increase in likelihood of claim being brought* • *slight increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *small increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation accurate*	**3** • ***n. of compensated victims:*** *small increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation accurate*	**3** • ***n. of compensated victims:*** *small increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation accurate*
Internal market	**1** • *level-playing field*	**1** • *level-playing field*	**1** • *level-playing field*
Costs			
Litigation costs	**3** • *legal proceeding slightly more costly;* • *possible costs of test case requirements*	**3** • *legal proceeding slightly more costly;* • *possible costs of test case requirements*	**3** • *legal proceeding slightly more costly;* • *possible costs of test case requirements*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Harmonisation costs	**0** • *common in many Member States*	**0** • *common in many Member States*	**0** • *common in many Member States*

Table 48 – Joinder of claims

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *increase in information;* • *small increase in likelihood of claim being brought;* • *slight increase of expected sanction*	**1** • *little increase in information;* • *slight increase in likelihood of claim being brought;* • *slight increase of expected sanction*	**1** • *little increase in information;* • *slight increase in likelihood of claim being brought;* • *slight increase of expected sanction*
Corrective justice	**3** • ***n. of compensated victims:*** *small increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation accurate*	**3** • ***n. of compensated victims:*** *small increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation accurate*	**3** • ***n. of compensated victims:*** *small increase in no. of compensated plaintiffs* • ***alignment with actual harm:*** *compensation accurate*
Internal market	**1** • *level-playing field*	**1** • *level-playing field*	**1** • *level-playing field*
Costs			
Litigation costs	**3** • *traditional one-to-one litigation;* • *large transaction costs ex ante*	**3** • *traditional one-to-one litigation;* • *large transaction costs ex ante*	**3** • *traditional one-to-one litigation;* • *large transaction costs ex ante*
Administrative burdens	**0** • not significant	**0** • not significant	**0** • not significant
Error costs	**0** • *traditional one-to-one litigation*	**0** • *traditional one-to-one litigation*	**0** • *traditional one-to-one litigation*
Harmonisation costs	**0** • *common in many Member States*	**0** • *common in many Member States*	**0** • *common in many Member States*

3 Access to evidence

Private antitrust damages actions are often quite complex and time-consuming, and obtaining the relevant evidence of the alleged infringement is considered to be one of the main problems plaintiffs have to solve in order to prove their case before the judge. As a matter of fact, in many cases the relevant evidence is not publicly available and is held by the alleged infringer or by third parties. For such reasons, the extent to which the claimants can obtain the disclosure of relevant documentary evidence entails important consequences as regards the victim's incentive to sue, her probability of winning at trial and overall litigation costs. In addition, as we will explain in the next sections, rules on access to documentary evidence also substantially affect the settlement rate, the likelihood of Type I or Type II errors and many other important features of an antitrust enforcement system.

The issue of access to evidence as a major obstacle to private enforcement has been extensively debated in the literature. In 2004 the Ashurst study found that "[s]everal national reporters identified the difficulty of obtaining evidence as one of the major obstacles due to the limited scope for ordering disclosure of documents that exists in most Member States". Accordingly, there seems to be widespread agreement in Europe that actions to encourage private antitrust damages actions should include some measures on access to evidence[469]. Without well-conceived rules, it would indeed be very difficult for claimants to effectively exercise their right to seek compensation before a court; and all actions undertaken to facilitate meritorious claims – such as those described in other sections of this Part II – would hardly prove effective.

Of course, the need to gather documentary evidence to support a claim differs according to the type of action. As a matter of fact, in standalone actions significant asymmetric information between the parties is more likely to occur: hence, absent specific disclosure obligations, winning at trial may prove to be quite difficult for victims[470]. On the other hand, in follow-on actions the

[469] Most of the responses to the Green Paper highlighted the need for action on access to evidence rules. As recently stressed by a paper commissioned by the OFT on the deterrent effect of antitrust rules (Deloitte, *The deterrent effect of antitrust enforcement by the OFT*, November 2007, 78), lack of evidences and related difficulties in fulfilling the burden of proof are major factors that limit the deterrent impact of private enforcement, according to the business survey carried out for the study (9 out of 25 companies that did not bring an action in spite of having been harmed provided this answer).

[470] In fact, in Europe "there have so far been no successful damage cases brought by end customers against members of price or market sharing cartels in the absence of a prior decision by a national competition authority". Ashurst (2004), *cit.*, at 108, even if it is added: "nonetheless, it should be pointed out that the *Bluvacanze* case represents a successful damages case brought by a customer (*i.e.* Bluvacanze, a travel agency operator), against members of a boycotting cartel in the absence of a prior decision by the AGCM".

investigation carried on by the EC or the NCAs may be an important source of information, and access to documentary evidence held by the competition authority can become a key step on the way towards a well substantiated claim.

Moreover, the choice of the rule on access to documentary evidence is likely to exert a different impact depending on the alleged infringement. For example, follow-on claims are more often linked to cartel infringements rather than to other types of violations (vertical restraints and abuses). Accordingly, we will maintain the distinction between cartels, abuse of dominance and vertical agreements in assessing the likely impact of different options.

The Commission Green Paper identified alternative policy options as regards access to documentary evidence during or before trial, but also specific measures to ease access to documents held by competition authorities. As regards the former, three main options – all subject to fact-pleading – were identified[471]:

Option 1. Disclosure of relevant and reasonably identified evidence by court order;

Option 2. Mandatory disclosure of classes of documents by court order;

Option 3. Drawing up a list of relevant documents to be made available.

As regards access to documents held by competition authorities, the Green Paper identifies two main options:

- *access to documents submitted by litigants to the Commission or to a national competition authority* (option 6 in the Green Paper). Under this option, litigants would have the right to request other parties to the procedure to make available documents handed over to the Commission or a NCA, with the exception of business secrets, leniency applications and other confidential information;
- *access by national courts to documents held by the Commission* (option 7 in the Green Paper). Under this option, the Commission should respond to a request for relevant documents by making all documents related to the administrative procedure available, and can refuse to hand over this information only for overriding reasons (*e.g.*, need to preserve the interests of the Community, need to preserve confidential information).

The two issues illustrated above – "general" options on access to evidence and "specific" rules on access to documents held by a competition authority – are complementary and interdependent. This, in turn, means that the choice of the "general" option also exerts an impact on the choice of the most effective and efficient rule on access to documentary evidence held by competition

[471] Options 4 and 5 in the Green Paper refer to the introduction of sanctions for the destruction of evidence and, respectively, provisional measures on the preservation of evidence.

authorities. Hence, in the impact assessment below, we will analyse alternative options on access to evidence held by a competition authority, referring to the interrelatonships with the general options on access to documentary evidence.

Our analysis is structured as follows. Section 3.1 summarises the main features of different procedural systems as regards access to documentary evidence, and illustrates the main insights of the law and economics literature on this topic. Section 3.2 contains a welfare assessment of the available options on access to evidence. Section 3.3 is devoted to the specific issue of access to information held by competition authorities.

3.1 A brief comparison of civil law and common law procedural disclosure rules

EU Member States have long-standing rules on access to evidence, which set the threshold for exercising their right to seek compensation before a judge in a damages action. Although the current European landscape appears fragmented, it is possible to differentiate between groups of countries, as is often done in comparative legal studies. One common distinction is between countries that follow a civil law tradition and countries (such as UK, Ireland and Cyprus) that follow a common law tradition. Below, we sketch the main difference between access to evidence rules enacted in these jurisdictions.

- In civil law countries, the collection of evidence in private litigation normally takes place *during the proceeding*, under the direct supervision of the judge. It is up to the judge to decide on the disclosure of documentary evidence, based both on the parties' requests and – with some variants – on an *ex officio* initiative[472]. Furthermore, the court may issue an order requesting the opponent or a third party to disclose a specific document in cases where the requesting party does not hold that document, although the conditions to be fulfilled to obtain a disclosure order vary widely across member states. Only the court can require the disclosure of a specific document in the trial – this is the so-called principle of "centrality" of the judge.
- On the other hand, in common law countries the civil procedure rules exhibit a more "adversarial" nature, and *the pre-trial phase is particularly important* for the outcome of the case, since allowing the plaintiff access to the opponent's information very often leads to a voluntary settlement among the parties, due to the gradual convergence of their previously

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[472] On the differences among the judge's autonomous powers in the collection of evidence in different European countries, see Taruffo (2006).

asymmetric expectations on the outcome[473]. Judicial involvement in this pre-trial discovery process is often minimal, and the parties are under two general obligations during the pre-trial phase: the disclosure obligation and the duty to fulfil discovery requests. Indeed, both obligations are set by the law, and do not require any *ad hoc* disclosure order by the court.

- This implies a completely different regime of information flows among parties compared to the civil law system. In civil law countries, information is generally secret, unless the party decides to reveal it (because she intends to use it in the process), or the court orders its exhibition. In any case, relevant information gradually becomes available to the litigants during trial, as long as the parties, allowed by the judge, are required to disclose it[474]. On the contrary, in common law jurisdictions the information exchange between the parties starts well before the judge is called to assess whether the case has merit; the information exchange between the parties starts right upon the filing of a complaint, which includes the initial pleadings of the parties[475].
- Although with some noticeable differences, fact-pleading requirements are generally much stricter in civil law jurisdictions[476]. This requirement entails a preliminary assessment of the *robustness* of the case, which is evaluated independently from documents to be requested and is conditioned to the proof of some facts, entailing a probability of the claim's success.

A further distinction can be made between civil law countries with regard to the extent to which the judge intervenes in the evidentiary activity. This is particularly important, since the more the judge is able to supplement the

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[473] See Table 17 of the work of Willging *et al.* (1998), reporting that US lawyers who acknowledged an effect of the 1993 amendments to US Fed. Civ. Proc. Rule 26 were more likely to say that initial disclosure increased the prospect of settlements (close to 40%).

[474] In some countries, moreover, the parties are subject to strict deadlines in order to introduce their evidence requests in the file.

[475] In the following paragraphs we mainly refer to the US and UK experiences as the most representative examples of the common law procedural systems.

[476] On the difference between burden of persuasion and burden of proof in the various European legal systems, see Nazzini (2006). Additional detailed information with regard to the burden of proof and the law of evidence in Austria have been obtained by the works of Mayr (2004), Klicka (1995), Ruffler (1995); in Belgium, see Mougenot (2004), Mougenot (2002), Perrot (1989), Poullet (1994), Van Leynseele-Dal (1997); in Finland, see Laukkanen (2004); in France, see Genin Meric (2004), Lagarde (1994), Charbonneau and Pansier (2000), Vincent and Guinchard (1999); in Germany, see Brehm (2004), Boge and Ost (2006); in Greece, see Orfanides (2004), Kerameus, Kondylis, Nikas (2000); in Italy, see among others Tavassi and Scuffi (1998), Giudici (2004), Dondi (1985); in The Netherlands, see De Tombe-Grootenhuis (2004), Margetson (2003), Stein, Rueb (2002); in Portugal, see Lebre De Freitas (2004), De Castro Mendes (1961), Alexandre (1991); in Spain, see Serra Dominguez (2004), Ortiz Navacerrada (1994); in Sweden, see Lindell (2004), Klami (1986).

parties' requests for documentary evidence, the lighter is the *burden of specification* borne by the requesting party (*i.e.* the need to prove that there are specific and substantiated reasons why the party cannot produce the documentary evidence, and to describe the relevant categories of evidence as precisely as can reasonably be expected). With regard to that aspect, at least two different approaches have emerged:

- some systems strictly apply the principle whereby collection of relevant evidence is mainly left to the parties. In these countries, parties need to exactly define the specific document required, its content, its location, the relevance for the case, as well as the reason why they are not able to produce it directly in the trial. As a consequence, court disclosure orders, when allowed, fall on very specific documents. As found by the Ashurst study, the following countries may be included within this category: Austria, Belgium, Estonia, Finland, Germany, Greece, Italy, Lithuania, Portugal, Slovak Republic, Slovenia and Spain.
- On the other hand, in other civil law systems the threshold is lower, because of broader powers of the judge to integrate evidentiary requests by parties and/or less strict requirements to ask for a disclosure order. In some legal systems, the party requesting a disclosure order is not required to specify the document to be admitted, although indeterminate requests, involving generic "classes" of documents, are not allowed. In France, for example, "it is not required for the party to name the exact document he is asking for", but the party "must at least specify what kind of document he wants to be produced"[477]. Other countries that can be said to belong to this group include the Czech Republic, Denmark, Latvia, Luxembourg, Malta, The Netherlands, Poland and Sweden.

In order to fulfil these conditions (the robustness test and the burden of specification), the plaintiff often needs to gather a considerable initial amount of information, which may sometimes be very close to the documentary evidence needed to ultimately win the case. As a consequence, whenever the relevant documents are mostly held by the defendant (information asymmetry), the plaintiff may face serious obstacles in substantiating her claim.

European countries also differ as regards other important features of civil procedure rules. For example, the protection of business secrets in access to evidence – as well as the definition of "business secret" itself – differs among countries, with some jurisdictions reportedly considering business secrets as insufficient grounds for refusing disclosure (*e.g.*, Spain) or limiting such refusal to very narrow circumstances (Czech Republic, France, Germany, Italy, Sweden, United Kingdom). In addition, many countries envisage the imposition

[477] See Ashurst (2004), France Report, available online at http://ec.europa.eu/comm/competition/cartels/studies/reports_france_en.pdf, p. 14.

of financial penalties for unjustified refusal to disclose (*e.g.,* Belgium, Czech Republic, France, Germany, Hungary, Spain, Sweden), whereas in other countries such refusal may be taken into account by the judge to draw adverse inferences (*e.g.,* Hungary, Germany, Italy, Spain, The Netherlands)[478].

Finally, substantial differences can be found in EU and non-EU jurisdictions as regards pleading requirements and disclosure obligations. In this respect, two interesting examples of common law countries where access to evidence rules have been framed in a more adversarial manner are the US and the UK. Below, we illustrate the main features of these two systems, where rules on access to evidence can be said to resemble more closely some of the options envisaged by the Commission in its Green Paper on antitrust damages actions.

3.1.1 Pleading requirements and discovery methods in the US

In the US tradition, "notice pleading" prevails[479]: here the essential legal issues are raised during the pre-trial phase. The plaintiff expects to be able both to increase her body of evidence and specify her claim by obtaining further evidence through discovery procedures. In short, the US approach entails that a plaintiff and their attorneys, who deem to have a reasonable but not perfectly established case, can file a complaint first, put the other side on notice of the lawsuit and then strengthen their case by compelling the defendant to produce evidence during the discovery phase.

The US Federal Rules of Civil Procedure (FRCP) 8(a)(2) require only "a short and plain statement of the claim showing that the pleader is entitled to relief", in order to "give the defendant fair notice of what the...claim is and the grounds upon which it rests". In order to avoid the authorisation of discovery methods, the defendant must respond with a motion to dismiss, which can sometimes become an uphill battle, given the lack of heightened pleading standards in antitrust suits. In the US "notice pleading" system, *the disclosure and discovery obligations stem from a plaintiff's statement on the case and there is no or low judicial control on the robustness of the case*. The beginning of the procedural relationship between parties is marked by a formal act of the plaintiff (the notice pleading) and falls outside the control of the judge, who intervenes only in case of disagreement between the parties.

Discovery procedures are often deemed to be extremely burdensome and tantamount to "fishing expeditions". Accordingly, the US literature has largely

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[478] See Ashurst (2004), Comparative Report, footnote 107 and accompanying text.

[479] For the US approach, see *Hickman v. Taylor*, 329 US 495, 501 (1947) (stating that the Federal Rules of Civil Procedure restrict the pleading to the task of general notice giving). See also Charles and Alan Wright, The Law of Federal Court § 68(6) (5th ed. 1994), noting that the drafters of the Federal Rules explicitly rejected the label notice of fact-pleading). See Marcus (1986) (discussing the history of pleading).

debated the scope of the notice pleading, asking for more specificity especially in antitrust cases[480]. Given the negligible amount of hard evidence sufficient to draft a justiciable complaint (*i.e.* the very low threshold), initiating a lawsuit is relatively inexpensive for an antitrust plaintiff (who, by the way, may obtain treble damages, even if she has to bear the legal fees and part of the litigation costs[481]). From an economic point of view, this system might work efficiently in all those cases where the plaintiff's cost of obtaining evidence on the violation is disproportionately greater than the cost to the defendant of obtaining contrary evidence. But in other cases, procedural rules can lead to an abuse of discovery by plaintiffs wishing to obtain "almost free" access to confidential information, or to file an unmeritorious suit that will likely settle before trial[482].

In the early 1990s, the fully adversarial feature of federal rules on the discovery process in the US was subject to an important review, leading in 1993 to the introduction of initial disclosure obligations; later, beginning 1 December 2000, initial disclosure was instituted on a nation-wide basis as a necessary first step, prior to discovery. Under the current FRCP, §26(a), the lawyers on both sides, within a short time after the pleading, must disclose "all documents, data compilations, and tangible things" in their possession, without a request from the other side[483]. The introduction of a general duty of disclosure reflects a shift

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[480] According to C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–236 (3rd ed. 2004), factual allegations must be enough to raise a right to relief above the speculative level. For a reconstruction of this debate see also Cavanagh (2002).

[481] For antitrust cases, section 4 of the Clayton Act provides for an award of reasonable attorney fees and costs to the prevailing plaintiffs. An award of attorney fee is mandatory when treble damages are awarded.

[482] See, *e.g.* Wagener (2003), for an illustration of strategic threats during the discovery phase and also for a description of the interaction between one-way fee-shifting and discovery abuse.

[483] Rule 26. General Provisions Governing Discovery; Duty of Disclosure (a) Required Disclosures; Methods to Discover Additional Matter. (1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defences, unless solely for impeachment, identifying the subjects of the information; (B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defences, unless solely for impeachment; (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. (E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1): (i) an action for review on an administrative record; (ii) a forfeiture action *in rem* arising from a

away from the traditional method of obtaining discovery through written requests, towards requiring automatic disclosure by the parties of information that would invariably be requested. The goal of triggering automatic initial disclosure is to create a more efficient and expeditious discovery process[484]. However, the scope of initial disclosure is limited to those "documents, data compilations, and tangible things" that the lawyer intends to *use* in the litigation (and does not extend necessarily to all relevant items). This disclosure obligation, basically aimed at creating an initial common knowledge of the case between the parties, has a twofold aim: on the one hand, it allows the parties to assess the strength of their opponent's arguments; on the other hand, it provides the less informed party with a clearer picture of available additional information that can be sought by means of further discovery requests.

After the initial disclosure, the counterparty can ask for more information, relevant to the "claim or defence" of any party raised in the pleadings, by filing a discovery request. If she wishes to request discovery beyond that scope or to encompass the broad "subject matter" of the dispute, she will have to file a request with the judge, who will weigh factors such as potential benefits to the requesting party against the burden to the producing party, costs, etc. (so-called court-managed discovery, FRCP § 26 (b) (1)).

The FRCP grant private litigants fairly broad discovery rights – involving depositions, requests for production of documents[485], interrogatories, examination of witnesses and requests for admission of documentary evidence – without requiring substantial fact-pleading[486]. However, for the purpose of limiting discovery abuses, parties may also ask for a "protective order" issued by the court, which can limit the obligation to submit documents up to an "in

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federal statute; (iii) a petition for *habeas corpus* or other proceeding to challenge a criminal conviction or sentence; (iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision; (v) an action to enforce or quash an administrative summons or *subpoena*; (vi) an action by the United States to recover benefit payments; (vii) an action by the United States to collect on a student loan guaranteed by the United States; (viii) a proceeding ancillary to proceedings in other courts; and (ix) an action to enforce an arbitration award.

[484] See Brazil, *The Adversary Character of Civil Discovery: A Critique and a proposal for change*, 1978.

[485] As reported in the *ABA comments On the Green Paper on Damage Actions for Breaches of EU Antitrust Rules*, "document requests are usually the backbone of discovery proceedings in the United States. Request for documents are thought to provide some of the best evidence of what actually happened in a case. They are often considered contemporaneous evidence of events, rather than testimony that might be biased or based on faded memories of events. They can be used to constrain witnesses from straying too far into speculation or untruths about what has occurred".

[486] US Rule 26(b) Fed. R. Civ. Proc.

camera review" (Rule 26(c) Fed. R. Civ. Proc.)[487]. This order can be issued as long as the party under obligation provides relevant and sufficient motivations.

Moreover, under US practice, failure to comply with one's discovery obligations can have serious repercussions. These can range "from the simple assessment of additional costs incurred by the other side in compelling the refused disclosures, to limiting the testimony of particular witnesses, to barring certain documentary evidence, to shifting the burden of proof on specific issues, to instructing the jury that adverse inferences may be drawn from a party's failure to provide discovery"[488].

Many federal US District Courts provide for similar discovery mechanisms under their respective procedures[489]. Furthermore, many US states have adopted discovery procedures based on the federal system; some closely adhere to the federal model, whereas others introduced significant differences[490].

The uniqueness of the US system of pre-trial discovery has produced significant consequences at the international level[491]: especially in the field of antitrust and securities laws, some countries have even adopted blocking statutes in order to limit American discovery[492]. But also the debate at the national level has recently become hectic. After an increasing number of scholars argued that US judges should adopt a court-made exception to rule 8(a)(2) and require specificity in antitrust cases[493], the US Supreme Court has sensibly modified its

[487] However, such a procedure would be problematic in countries such as Germany owing to the right to be heard in accordance with due process of law, which must be safeguarded.

[488] See ABA comments On the Green Paper on Damage Actions for Breaches of EU Antitrust Rules, available online at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf, at 5.

[489] According to General Order 42 2/22/94 and General Order 25 2/2/94, the US District Courts in Arizona were a clear exception. For a complete overview of the implementation of disclosure in US District Courts, with specific attention to the Amendments of 1993 to Federal Rule of Civil Procedure 261, see, for instance, the work of D. Stienstra (1998).

[490] Some states have taken an entirely different approach to discovery.

[491] See Hazard (1998).

[492] As reported by Born (1996), already in the 1870s American discovery efforts provoked formal German diplomatic notes of protest. In general, blocking statutes are seen by the US doctrine as a convenient way to justify domestic policies that are challenged under American law; see Marcus (1999). In *Intel Corp v Advanced Micro Devices Inc*, 124 S. Ct. 2466 (2004), the US Supreme Court stated that EC Commission investigation into a complaint of abuse of a dominant position on an EC market was a "proceeding in a foreign or international tribunal" for the purposes of the United States Code 28 U.S.C. 1782. Following this reasoning, US federal courts have been given the power to compel the production of documents and testimony provided during the course of discovery in previous District Court proceedings.

[493] The reference case for these approaches is *Associated Ge. Contractors, Inc. v. California State of Council of Carpenters*, 459, U.S. 519, 528 n. 17 (1983) (adopting the view that courts in antitrust cases may insist on some specificity in pleading).

precedent approach towards specificity in pleadings[494]. In the recent *Twombly* decision, the Supreme Court observed that under §1 of the Sherman Act, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do…Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement".

Notwithstanding this recent Supreme Court decision, the US notion of antitrust notice pleading still entails a lower amount of initial evidence than the notion of initial fact-pleading envisaged in all the three options identified in the Green Paper, *i.e.* the need that the plaintiff puts forward *reasonably available evidence* (not a mere claim) supporting its pleading as a necessary requirement. In this respect, option 3 in the Green Paper can be said to still entail a higher threshold than the current US system.

3.1.2 Disclosure in UK

The UK system, compared to other European Member States, is one of the few having adopted wide disclosure provisions (but see also Ireland, Cyprus)[495]. In particular, as reported, *i.a.*, by the OFT and the Ashurst Study, in England and Wales:

- *pre-action disclosure* orders are provided on the application of a prospective party against another; however, this happens only if certain cumulative conditions are satisfied, including the fact that advance disclosure is desirable to dispose of the anticipated proceedings fairly, or to prevent the need to commence proceedings, or to save costs[496]. Furthermore, in doing so, the court must, *i.a.*, specify the documents or the classes of documents that the respondent must disclose. In civil cases pre-action, disclosure may also in some circumstances be ordered against persons who are not prospective defendants[497].
- Once litigation has commenced, the parties have a duty to disclose a list of relevant documents on which each of them intends to rely, together with

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[494] See US Supreme Court in *Bell Atlantic Corp. et al. v. Twombly et al.*, 127 S. Ct. 1955 (2007). For a comment, see, *e.g.* Langenfeld and Schulman, *The Future of US Antitrust Enforcement*, in 8 Sedona L. J., fall 2007, at 1.

[495] Contrary to the US system, the Ashurst study found that, in the EU, national judges' power to request general disclosure of defendant or third party documents is extremely limited. This is especially the case during the pre-trial phase. However, all jurisdictions to some extent empower courts to order the production of documents. Refusal to do so may be taken into account by the judge, resulting *de facto* in a reversal of the burden of proof.

[496] See CPR r. 31.16(1) & (2).

[497] See CPR r. 31.18(a).

non-privileged documents[498], which either adversely affect their own case or challenge/support another party's case (so-called "standard disclosure"[499]).

- If the claimant believes the list to be inadequate, he can ask the court to make an order for specific disclosure or specific inspection for evidence not on the list. An order for specific disclosure requires the party in question to take one or more of the following actions: a) disclose documents or classes of documents specified in the order; b) carry out a search to the extent stated in the order; c) disclose any documents located as a result of that search[500].
- Compared to the US initial disclosure, the UK Civil Procedure Rules (CPR) provide for a broader initial obligation to list all the relevant information the party is aware of, regardless of its confidentiality or of whether such information is already in its possession. Moreover, third party (or "non-party") disclosure is provided once litigation is under way[501].
- The information contained in the list is, in principle, to be disclosed upon request by the counterparty, if the obliged party holds it and does not have a right or duty to refuse disclosure (CPR Part 31.3 (1)). However, the obliged party may claim that some documents, already in the list, may not be disclosed "on the grounds that to do so would be disproportionate" (CPR Part 31.3 (2)). If this is the case, the requesting party will be forced to ask for a specific disclosure order by the court, which will weigh the different interests at stake. The identification of documents to be disclosed, however, usually takes place through a bargaining process between the parties, in order to avoid the direct intervention of the judge (through so-called preliminary meetings). This system could prove ineffective in cases of significant information asymmetry, *i.e.* where one party holds much more information than the other and the disclosure bargaining game is biased in favour of the defendant. As this is the case in many antitrust proceedings,

[498] Privileged documents are considered communications between client and lawyer (which includes in-house and external, English and foreign qualified lawyers) seeking and giving legal advice and to all documents prepared for the purpose of litigation.

[499] See CPR r. 31.6. This process typically takes place after the parties have completed their case statements (*i.e.* several months into the proceedings) and can also involve documents in the possession of third parties.

[500] See CPR r. 31.12. According to practice, the direction of CPR r. 31, at point 5, in deciding whether or not to make an order for specific disclosure, the court will take into account all the circumstances of the case. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise), the court will usually make such order as is necessary to ensure that those obligations are properly complied with.

[501] See CPR r. 31.10(9).

the UK specific rules for follow-on competition cases[502] provide for the judge to more actively supervise in the preliminary phase in order to ensure adequate balance between the parties' positions[503].

Comparing the US and UK systems, it is worth noting that:

1) all the amendments to the federal US discovery rules during the past two decades have been directed to restrain discovery (introduction of limitations on the number and length of depositions and sanctions for obstructive behaviour, etc.);
2) the differences between the two sides of the Atlantic have been narrowed (see the introduction of disclosure in the FRCP)[504], since the UK reforms in 1993 and 1999 introduced concepts and tools such as the "proportionality test" based on the stakes involved, the complexity of the issues and the financial position of the parties. Under this set of rules, a party is no longer entitled to search for a document that may lead to a "fair" enquiry, since both fast and multi-track litigations are subject to the CPR's overriding principle of dealing with cases justly.
3) the initial disclosure obligation in the UK CPR is broader than the US one; the subsequent discovery, on the contrary, seems to be narrower, especially as regards the object (only documents) and the scope of requests. For what concerns the latter aspect, the US FRCP allows further discovery of any (non-privileged) evidence relevant to the subject matter of the pending action, whereas the UK system allows parties to obtain access only to disclosable documents, *i.e.* documents on which the party relies or that affect the case, held by the parties and whose inspection would not cause disproportionate damage for the disclosing party. In other words, the disclosure obligation is, in the US system, only a first step of the following investigative activity of the parties, which is then mainly based on further discovery requests, supervised by the court whenever the parties do not reach an agreement. The UK adversarial system, on the contrary, is mainly based on the initial disclosure obligation, which covers the overall scope of disclosable documents.

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[502] No claim may be made before the CAT until a decision of the OFT or European Commission listed in S47A has established that the relevant prohibition in question has been infringed.

[503] See rule 20(1) of the Competition Appeal Tribunal Rules 2003 and *infra*. Dealing with proceedings brought to the CAT, it has to be underlined that also this Authority may give directions for the disclosure between, or the production by, the parties of documents or classes of documents. In doing this, the CAT has demonstrated broad discretion on the issue of disclosure, subject to the rules of privilege and it has applied its discretion in a way designed to limit, to a greater extent, the volume of documentation disclosed. See Burrows (2006).

[504] See Marcus (1999).

4) Finally, with regard to pre-trial discovery, the low pleading requirements in the US facilitate broad informal pre-trial discovery, whereas UK rules on pre-trial disclosure are far more restrictive and require a more active role of the judge. In particular, the judge may order disclosure only for specific documents or classes of documents, since, absent a formal claim, the judge cannot use the criteria used for standard-disclosure (*i.e.* relevance for the claim) in order to define the scope of the disclosure obligation. It must, however, be underlined that – as reported by Taruffo (2001) – in the UK system only 2-3% of the initiated proceedings are not dismissed, settled or alternatively resolved before final judgement is rendered[505].

3.2 Impact assessment

As already mentioned at the beginning of this section, the civil procedure rules adopted for access to documentary evidence can exert a significant impact on the development of private antitrust enforcement in Europe. For example, rules on access to evidence can affect the claimant's perceived probability of winning at trial, and accordingly enhance her incentive to sue. This, in turn, affects deterrence by increasing the *ex ante* expected sanction faced by potential infringers. In some cases, more accurate fact-finding may also lead to a more precise definition of the scope of the violation and consequently to a higher fine, as was the case in the vitamins cartel (see *supra,* Table 3). Of course, the rules adopted would also have an impact on the extent to which corrective justice is achieved through private antitrust enforcement. As the incentive to sue becomes stronger, more cases will be filed, and broader disclosure obligations can certainly lead to a more accurate estimation of the actual damage sustained by the claimant. Another potential advantage of broader initial disclosure is that the common information available to the litigants increases, thus reducing the information asymmetry. As pointed out by the economic literature on litigation, whenever the two litigants share a similar set of information, the likelihood of settlement increases[506]. Early settlements among informed parties are likely to produce welfare-enhancing outcomes and a positive deterrent effect, if compared to settlements between parties with diverging information and expectations: as parties are likely to agree on the expected verdict, they are also likely to agree on a settled amount that is closer to the actual loss sustained *minus* the plaintiff's litigation costs, *i.e.* the optimal settlement amount. Finally,

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[505] See Taruffo (2001). This finding is corroborated by more detailed research on "multitrack" litigation (*i.e.* above £15,000), where anecdotal evidence indicated that very few cases did not settle before a final decision; see J. Peysner – M. Seveniratne, *The management of civil cases: the courts and post-Woolf landscape*, 2005, DCA Research Series, 9/05, in particular p. 35. See also *supra*, note 135-136 and accompanying text, for US data confirming the large number of cases that are terminated before a final decision is issued by the court.

[506] See Section II.1 above for a detailed explanation of the incentives to sue and settle.

more accurate fact-finding can also reduce error costs, by limiting the instances in which the judge mistakenly condemns or acquits the defendant.

However, broader initial disclosure also comes at a cost. It is likely to bring about an increase in litigation and settlement costs, and could also strengthen the incentive to file frivolous suits to obtain a favourable early settlement even when the case had no substance – thus triggering over-deterrence. In addition, complex (multistage) discovery can increase administrative burdens by forcing firms into reiterated submissions and communications. Finally, the obligation to disclose confidential documents covered by business secrets could provide distorted incentives to plaintiffs, thus paving the way for strategic lawsuits that have little or nothing to do with antitrust injury[507].

As a result, there seems to be a trade-off between broadening the scope of initial disclosure of documentary evidence and reducing the likelihood of "discovery abuse" as well as administrative burdens. Below, we analyse the options identified by the European Commission in the Green Paper from this viewpoint. In Part III of this Report, we will assess in more detail the interrelation between alternative options on access to evidence and other procedural rules, such as one-way fee-shifting, which can significantly alter the incentive scheme provided to the litigants at the trial's outset.

3.2.1 Access to documentary evidence held by the parties

3.2.1.1 Option 1 (individual documents)

Under this option, disclosure should be available once a party has set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations. Court-order disclosure is thus limited to relevant and reasonably identified individual documents. The Green Paper envisages a common minimum notion of "fact-pleading requirement", based on a reasonableness test. This calls into question the definition of *fact-pleading* – as opposed to the US notion of *notice* pleading – as the plaintiff is required to prove some facts to justify her request for documentary evidence. These facts are not pre-defined in absolute terms: to the contrary, they are defined in relative terms, based on a reasonableness test, *i.e.* evidence that may *reasonably* be gathered by the plaintiff.

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507 See the Commission Staff Working Paper attached to the Green Paper, at §57. Indeed, the phenomenon is criticised especially within the US system; see Gary Myers, *Litigation As A Predatory Practice*, 80 KY. L.J. 565, 591 (1992), Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 B.Y.U. L. Rev. 579 (1981). The debate in the early 1980s led to some changes on discovery rules in order to limit the soaring costs.

In other words, although this option does not entail a different structure of the actual procedural mechanism on access to evidence, the new definition of fact-pleading requirement would imply a different burden of proof to be met by the parties in order to obtain court-ordered disclosure. This would be mostly due to the *robustness* test of the request, though mitigated by the reasonabless threshold. In addition, each request for a disclosure order would be subject to a *relevance* and *proportionality* test, which entail an evaluation of the balance between the relevance of the information for the case and the costs for the defendant to disclose. On the other hand, the level of specification of the requested documents, compared to the zero option, would be unchanged.

Since the duty to disclose must be specifically ordered by the court, under this option there would be no room for *inter partes* disclosure negotiation. Each disclosure act is decided on a case by case basis, so that the disclosing party has no incentive to provide early access to its sensible (and potentially inculpatory) information through negotiation with the other party.

Notwithstanding the common root with most Member States' procedural systems, this option would entail an important change compared to the actual framework: the identification of a *common minimum notion of fact-pleading* based on a *reasonabless* test that defines the threshold at which disclosure becomes available. In this respect, there are currently substantial differences among national legal systems with regard to the judge's autonomous fact-finding powers[508], which require different degrees of certainty with regard to the relevance of the requested evidence, its existence and the robustness of the case. In some cases, differences may be found even within the same legal system, with regard to different kinds of applicable procedural rules[509]. Indeed, this option is likely to entail the specification of a minimum degree of fact-pleading as a necessary condition to obtain a court disclosure order: such a pleading requirement may be based on a number of criteria, such as: (1) a "reasonableness" test (fact-pleading that can reasonably be expected from the plaintiff); (2) a "relevance and adequacy" test (the requested documentary

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[508] For a list of countries with broader judge *ex officio* powers, see Ashurst, 2004, 54.

[509] This is especially true for the broad case-management powers of the Competition Appeal Tribunal (CAT) in the UK, as stated in the CAT Rules 2003 (Statutory Instrument no. 1372/03). According to Sec. 44(1) of the Rules, in determining claims for damages the Tribunal is allowed to exercise the same wide powers on evidence provided for in carrying out its judicial review function (Sec. 22). Furthermore, Sec. 44(2) of the Rules establishes that the CAT is requested to use these powers by "dealing with a case justly", *i.e.* "ensuring that parties are on equal footing". Another example is given by the broad investigative powers of the judge in labour lawsuits in Italy, which are much deeper than in normal civil suits. At the EU level, Art. 6 of Directive 2004/48 on IP protection has sought to strengthen national judges' powers when requesting parties apply for the disclosure of evidence that lies in the hands of the opponent. The only requirement is for that party to produce "reasonably available evidence sufficient to support its claim".

evidence should be relevant, adequate and necessary for the case at hand; and (3) a "proportionality test" (the requested information should be proportionate to the stakes of the case and cause no disproportionate harm to the opponent and/or to third parties).

The goal of alleviating fact-pleading standards may also require a degree of flexibility; for example, the judge could be called on to adapt the fact-pleading requirement to the actual plaintiff's conditions and the circumstances of the case. At the same time, such a flexible test may prove difficult to implement for national judges, leading to "adaptive" interpretations (or path-dependency), *i.e.* each national judge may refer to its national legal tradition in interpreting the clause; as a result, the actual national differences in fact-pleading requirements would remain as they stand today. Here, too, a trade-off exists between setting rigid standards that may prove too difficult to comply with for some plaintiffs, and allowing for a degree of flexibility, with a risk of persisting divergent interpretations in Member States.

Below, we assess the likely benefits and costs of this option.

A. BENEFITS

A1. Deterrence

With regard to the probability of detection (and filing of a lawsuit), this option may have a small but positive impact. However, in stand-alone cases, where substantial documentary evidence must be collected in order to substantiate the case and to fulfil the burden of specification, the additional evidence that can be gathered by means of an injunctive order to disclose are limited. The usefulness of such additional documentary evidence is inversely related to the amount of information already held by the party[510], which implies that the amount of initial information substantially affects the victim's incentive to sue and/or settle. The proposed option, on the contrary, does not solve the initial asymmetry between the claimant and the defendant.

A more substantial impact of narrow disclosure obligations might be expected with regard to the probability of success at trial. In this respect, the disclosure of specified documents may be decisive to prove the occurrence of the alleged infringement or other aspects, such as the exact assessment of damages. For the same reason, this option may exert a positive impact on the magnitude of damage awards, since the infringer will know *ex ante* that damages are less likely to be underestimated. However, the impact of a heightened probability of

[510] This feature, for example, explains the different requirements to accede to the leniency programme, depending on the moment the application is filed.

success must be discounted for the probability of detection as well as for the probability that the victim actually sues; accordingly, the overall impact of this option on deterrence should not be overstated. Once again, decisive inculpatory information ("smoking-gun" evidence) is unlikely to be discovered through specific disclosure orders, especially in case of significant informational asymmetry between the parties, when the plaintiff is often unaware of the existence of such key evidence.

Thus, if one looks at the impact of option 1 on deterrence, this kind of disclosure mechanism may appear ineffective especially for stand-alone cases. In these cases, as already recalled, the initial information asymmetries are wider than those faced by follow-on plaintiffs, so that, for instance, merely asking the judge to mandate an extract (a specific document) of the defendant's books will prove useless as the claimant will have difficulties to identify, with a sufficient degree of specification, the relevant document.

On the other hand, the impact may be more substantial for follow-on plaintiffs, since the public decision may provide the information needed to fulfil the initial fact-pleading test and the burden of specification, which remains high in this option. Indeed, even if follow-on plaintiffs might not find sufficient evidence to prove causation and the actual harm by means of access to the commercial accounts of the defendant, some decisive piece of evidence may be at least identified and recalled in the final decision (including the "smoking gun"), where the plaintiff may find the necessary information to fulfil the burden of specification and obtain court-ordered disclosure.

Compared with options 2 and 3 (see below), the fact that disclosure is limited to specifically identified documents limits the risk of over-deterrence caused by discovery abuses. The latter may entail both an excessive workload for the defendant (especially with regard to electronic documents, whose number can be substantial) or the need to disclose confidential information, which will cause harm to the disclosing party that is not directly linked to the infringement. Similarly, from a plaintiff's perspective, the incentive to leverage the disclosure obligation in order to obtain access to valuable confidential information is limited. The central role of the judge in issuing disclosure orders enables strict control on the information flow between the parties, thus limiting the risk of abuses. Hence, the defendant will be more shielded from concerns about reputational effects, or the fear that plaintiffs file strategic frivolous suits.

A2. Corrective justice

Assessing the beneficial effects in terms of *ex post* corrective justice means verifying whether the option at hand significantly facilitates victims in filing suit, thus increasing the number of cases filed; and whether it allows for full compensation of victims (*restitutio in integrum*) without leaving plaintiffs more-than-compensated. When one looks at available options on access to evidence,

this goal is mostly reached by removing obstacles for victims seeking to exercise their right to compensation; and providing the instruments needed for the correct assessment of the harm suffered. The former effect would mostly lead to an increase in the number of cases filed, and accordingly of compensated victims. The latter effect, to the contrary, leads to a more accurate assessment of the damage suffered, and consequently to a better approximation of *restitutio in integrum*.

Since court-ordered disclosure is narrow and limited to specific documents, access to justice would remain extremely burdensome for victims filing a stand-alone lawsuit (especially when the plaintiff is not a business player or suffered small and scattered harm). This occurs since the plaintiff might have limited information on the identity, location and exact content of the relevant documents, and would have to face high costs to fulfil the burden of specification[511]. On the other hand, subtler problems would emerge as regards follow-on cases, where the existence of a previous decision creates a broader set of common knowledge for the parties. With regard to the effect on the exact determination of suffered harm, it can be said that the slightly reduced threshold for fact-pleading can increase the plaintiff's knowledge of identifiable economic data needed in order to assess the extent of the harm, and thus may have a slightly positive impact.

A3. Internal market

To the extent that the Commission defines a more common fact-pleading standard, there may be internal market benefits as victims of antitrust infringements across the EU would be given access to documentary evidence subject to similar fact-pleading requirements. However, if a degree of flexibility is introduced, each national judge might refer to its national legal tradition in interpreting the fact-pleading requirement (so-called "path dependency" or "adaptive interpretation"); accordingly, this option would end up being almost equivalent to the "zero" or "no policy change" option, and the internal market benefits stemming from an explicit rule would end up being negligible.

For common law countries the introduction of court-ordered disclosure would not represent an improvement compared to the specific rules already in place for antitrust damages claims. Since these countries would maintain their broader disclosure rules, they may end up representing a safe-harbour for competition claims; this, in turn, would hamper the full achievement of the internal market goal (so-called level playing field), increasing the risk of forum shopping across member states.

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[511] See Nazzini (2006).

B. COSTS

B1. Litigation costs

The effects of court-ordered disclosure on litigation costs include the following:

- Compared to options 2 and 3 below, this option is unlikely to lead to a remarkable increase in the number of claims; this also means that overall litigation costs will be low. Moreover, when compared to option 2, narrow court-ordered disclosure may exert a more limited impact on litigation costs.
- First, the overall amount of documents to be disclosed is kept at the minimum level, so that the material costs of disclosure and review of both parties are minimised (see *infra*). Hence, judges would be in a better position to assess whether the compliance cost of the burdened party is lower than the increase in the value of the requesting party's claim. This, in turn, helps to keep the focus on the relevant information and limits the strategic use of disclosure/discovery tools. In other words, the centrality of the judge limits instances of discovery abuse and the consequent increase in litigation costs.
- However, as will be mentioned in more detail below (see option 3), the court's increased involvement in supervising and managing disclosure may prove more costly when compared to systems in which the judge is less central. Under option 1, each disclosure request has to be decided by the judge after appraising the different views and interests of the litigants. In order to properly carry out this function, the court should often gather and assess a substantial amount of information. The parties, on their own, will spend resources in challenging the opponent's request. Accordingly, the procedure may become lengthy and cumbersome.
- Finally, reduced incentives to settle due to asymmetric information may at least partly offset the savings in litigation costs highlighted above. Once (and if) the court orders disclosure, most of the initial sunk costs of litigation have been incurred and late settlement may provide little savings in litigation costs.

B2. Administrative burdens

Under this option, the defendants would face very limited or no increase in administrative burdens compared to the zero option. To the extent that a lower threshold for fact-pleading increases the number of victims that file suit, the population of firms affected by information obligations such as storage and production of documents would however increase.

B3. Error costs

The more accurate the fact-finding, the lower the risk that the court issues the wrong decision, be that a false acquittal or a false conviction. If decisive information for the case is not disclosed, the risk of type I and especially type II error costs is high. If compared to the zero option, the introduction of court-ordered disclosure of specific relevant documents would entail a small – if any – reduction of error costs. Compared to options 2 and 3 below, this option would exert a lesser impact in terms of increasing the accuracy of the final verdict, *i.e.* on the statistical incidence of judicial errors. On the other hand, as this option entails a small expected increase in the number of cases filed compared to the *status quo*, the error costs would not increase significantly in absolute terms.

B4. Harmonisation costs

As in most Member States the judge already has some powers to order both parties (and third parties) to disclose specific documents, this option would not entail high harmonisation costs. The fact that an "alleviated" notion of fact-pleading based on the reasonableness test is introduced, however, could bring about the necessity to adapt most restrictive national systems in civil law countries. On the other hand, systems already adopting broader disclosure rules (*i.e.* common law countries) would maintain their different rules on access to evidence, thus facing no harmonisation costs.

3.2.1.2 Option 2 (disclosure of classes of documents)

Under this option, subject to fact-pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, would become possible.

Compared to option 1, this option would maintain two basic features: the initial fact-pleading requirement and the need for a disclosure order by the court. However, under this option disclosure requests would not necessarily specify the individual document(s) to be disclosed, but could refer to broader "classes of documents". On the one hand, the "alleviated" initial fact-pleading would not diverge from the one envisaged by option 1; thus, the requesting party would have to collect some initial information (reasonably available, see above) in order to substantiate the claim. On the other hand, the burden of specification under this option is much lighter, and this is particularly important for stand-alone claims. Finally, the proportionality of plaintiff's request would have to be carefully assessed, as the broader scope of the request might impose a disproportionate burden on the defendant, compared to the usefulness of the requested information for the case at hand.

A. BENEFITS

A1. Deterrence

The impact of option 2 on deterrence can be assessed in terms of increased probability of success for claimants, increased accuracy in damage assessment, and also increased incentive to settle in order to avoid having to disclose relevant and confidential documents during trial.

- With regard to the probability of detection, this option may have a positive impact. Compared to option 1, this would be true also in stand-alone cases, where the additional evidence that can be gathered by means of an order to disclose might be substantial, due to the lowered burden of specification.
- With regard to the claimant's probability of success, the impact would be positive. The (guilty) defendant may anticipate that, if the disclosure of a larger amount of documentary evidence can be requested during trial, the likelihood that the infringement will be effectively ascertained and sanctioned would be higher, since the plaintiff is able to gather most of the additional information needed to further substantiate her complaint at a lower cost.
- The same reasoning applies with regard to the accuracy of the final judgement, and of the quantification of damages. Since the disclosure request can be formulated in broader terms (involving classes of documents) stand-alone plaintiffs in particular would benefit. Compared to follow-on litigants, the former cannot rely on a former antitrust decision, thus they may not possess the information needed to identify a specific document. Requesting the disclosure of classes of documents could thus allow them to subsequently obtain the missing evidence to substantiate their claims.
- As the prospective defendant knows that increased access to evidence may be sought by the plaintiff after the initial fact-pleading, the defendant will likely face two additional costs: first, the cost of materially providing access to the documents (see *infra*); second, and more important, the prejudice that may occur if sensible information is disclosed due to its relevance to the case. This would, in turn, increase the defendant's incentive to settle. Although supervision by the court would tend to minimise abuses, evidence considered relevant (thus disclosable) may also contain information whose value will be diminished right upon disclosure (for example, evidence on commercial strategies or costs).

Summing up, deterrence would increase, since this option gives plaintiffs (especially in stand-alone cases) the opportunity to overcome their information deficits during trial. This is possible as long as access to some key documentary evidence is provided at a lower cost, *i.e.* the lower costs of fulfilling the burden of specification (see also *infra* on litigation costs).

A2. Corrective Justice

This option would positively impact the achievement of corrective justice. The increase in the success rate and the likely improvements in the determination of damages, due to the availability of more complete evidence, would help the achievement of *restitutio in integrum* for victims. Broader disclosure would also minimise instances of overcompensation and error costs, as will be clarified below. This is particularly true with regard to stand-alone claims, but also in cases following an administrative procedure, in which claimants would benefit from a more accurate quantification of damages – information that is normally missing in decisions issued by competition authorities.

However, the greater possibility of information disclosure could also alter the settlement terms. Therefore, rules mandating a party to offer a guarantee for some or all costs of producing the requested documents could be considered, whenever the request is particularly burdensome[512]. Since control by the judge is required under this option, this risk is softened compared to option 3. Compared to the zero option and option 1, this risk would be somewhat greater due to the broader scope of disclosure requests.

A3. Internal market

The impact of option 2 on the internal market is positive, since the extension of the scope of court-ordered disclosure would require a specific Community rule, which would create a minimum common standard in member states' procedural systems. However, compared to option 3 below, the harmonisation benefits can be considered fewer, since some member states, already exhibiting broader disclosure systems, would maintain their systems. In turn, this implies that defendants sued in these countries could still face different rules on access to evidence compared to firms located in other countries, although such a difference would be less significant than under the zero option and option 1.

B. COSTS

B1. Litigation costs

This system would preserve the centrality of the judge, whose importance would remain pivotal. Similarly to option 1, the duty to disclose would not become a general obligation, but would always derive from an *ad hoc* order of the judge. The broader scope of the requests will require a more thorough implementation of the feasibility, relevance, adequacy and proportionality tests

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[512] See Wagener (2003).

in order to minimise the risk of abuses. Compared to option 1, then, the costs for the judicial system would likely increase, because of both the increased number of requests and the broader scope and depth of each request[513]. Moreover, due to the increased amount of information involved, the parties would be willing to spend more resources in litigating over disclosure requests. As a result, attorney fees and litigation expenses would also increase.

As was authoritatively suggested, in applying the relevant tests, that judges should also take into account that the production of evidence may yield benefits beyond the particular case at hand[514]: the disclosed information, if not kept strictly confidential, might prove decisive for other victims of antitrust infringements willing to follow on[515].

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[513] See Sanchez Graells (2006).

[514] See Posner (1999).

[515] See Daughety and Reinganum (2002). A long recognised presumption of public access to court records exists in the common law. The US Supreme Court has stated in *Nixon v. Warner Communications*: "It is clear that the Courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. This right is designed to promote public confidence in the judicial system and to diminish the possibilities for injustice, perjury, and fraud". Some argue that in the US the presumption of public access to court documents is constitutionally based and can only be overcome by the demonstration of a compelling interest. See on this argument Cerruti (1995) and Miller (1991). At the federal US level the Freedom of Information Act and Privacy Act do not apply to the judicial branch and do not govern access to case file documents. Most State Courts are also not subject to state freedom of information laws and some of them favour public access. See, *e.g.* Rule 243.1 (d) of the California Rules of Court, stating that: the Court may order that a record be filed under seal only if it expressly finds facts that establish: (1) that there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) that a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) that the proposed sealing is narrowly tailored; and (5) that no less restrictive means exist to achieve the overriding interest. In the UK prior to 1 October 2005, non-parties were entitled to see a claim form and particulars of a claim if served with the claim form. For court documents filed between 1 October 2005 and 1 October 2006, non-parties were entitled without court permission to see only claim forms (but not any documents filed with or attached to them) and judgments or orders made in public. Access to other documents required the court's permission. For court documents filed after 2 October 2006, non-parties have access to any statements of case, including particulars of claim, defences, third party claims and any replies to such documents. It is worth noting that only those documents filed on or after 2 October 2006 can be accessed. The US notion of docket (all information about a case and the state of the procedure at the jurisdiction, with access to the various documents of the procedure and the full text of the decision) does not really exist in civil law countries, such as, for instance, France, Italy, etc. Of course, the corresponding reality does exist and there is an equivalent: the "rôle", "il ruolo". But persons not directly involved in a case are not allowed to access to anything else than the decision itself. See, for instance, in Italy, Decreto Ministeriale 25 January 1996, n. 115, Art. 5. In Canada see *Erwin Eastmond v. Canadian Pacific Railway & Privacy Commissioner of Canada* (11 June 2004). Here the Court found that Canadian Pacific could collect Eastmond's personal information without his knowledge or consent because it benefited from the exemption in paragraph 7(1)(b) of PIPEDA, which provides that personal information can

A potential source of additional litigation costs can arise whenever the antitrust claim is not the sole object of the proceeding, but both torts and contractual claims are at stake. This is particularly true for allegations of vertical restraints, where litigation is often based on more than one allegation. In such circumstances, two different regimes on access to evidence would have to be implemented, with a negative effect on legal certainty. More specifically, normal contractual claims could be framed as antitrust damages actions in order to benefit from a more generous access to the evidence regime. On the other hand, the defendant would have stronger incentives to rebut such an attempt in order to avoid the application of a broader disclosure regime. This, in turn, may result in increased litigation costs.

As regards settlement, it is difficult to assess whether a broader court-ordered disclosure of documentary evidence would entail a proportionally increased incentive to settle compared to option 1. As under both options 1 and 2 disclosure is requested by the court, no incentive for pre-trial voluntary disclosure would be provided: the case must be filed and the initial fact-pleading needs to be reasonably substantiated. Once access to evidence is allowed, therefore, some relevant sunk costs of litigation have been borne and late settlement may provide less savings in litigation cost than with option 3. However, it is reasonable to expect that defendants anticipate the risk of having to disclose a broader set of (confidential) documents under option 2. As the availability of a broader set of information may also trigger reputational effects and follow-on actions, defendants can be expected to be more willing to settle the case before disclosure under option 2 than under option 1 and option zero. This, in turn, would leave plaintiffs with greater bargaining power during settlement negotiations.

On the other hand, compared to options zero and 1, broader disclosure may also reduce the expected litigation costs for the plaintiffs, since access to some key documentary evidence is provided at a lower cost.

Another potential and relevant impact on litigation costs is linked to the attorney's behaviour and incentives. Compared to options zero and 1, option 2 may create an incentive for the attorney to conduct more discovery than is optimal for the client, with the only aim being to increase her fees. However, compared to option 3, the judge's supervision, the limitation to certain categories of documents and the possibility that lawyers bear discovery's marginal costs, as normally occurs under contingency fee arrangements, *limit*

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be collected without consent if "it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement".

the possibility that this principal-agent problem leads attorneys to deviate from the interests of their clients, asking for more documents than necessary[516].

B2. Administrative burdens

The costs for lawyers and staff to compile and review an increased amount of documents would constitute an additional administrative burden, *i.e.* an administrative activity that follows an information obligation made possible by a change in the civil procedure rules[517]. As option 2 is not found in any legal system, assessing the likely costs is difficult and will be based on rather strong assumptions. As illustrated in Part I of this Report, the approach selected by the Commission 2005 Guidelines on Impact Assessment (Annex 10) for such a measurement is the Standard Cost model[518]. In order to apply this model, one approach might be to assume that the scope of documents requested in a civil claim resembles the amount of documents collected by public enforcers during administrative proceedings[519]. For example, in the Lombard club cartel, private enforcers sought access to the documents handed over to the European Commission by the eight convicted firms[520]. The Commission collected 47,000 pages, which it then divided into 11 macro-categories. In other complex cartel cases, the number of pages amounted to 100,000[521].

Following the CASH table developed by Nijsen, Vellinga (2002)[522], it is possible to elaborate a rough, albeit speculative, estimation of the administrative burdens. Assuming that each of the eight firms submitted the same number of documents, each of them would be required to serve almost 6,000 (5,875) pages of documents for each request. Taking into account a conservative estimate to balance different types of cases, an average of 5,000 pages is a conservative assumption. We calculated that some basic activities would need to be carried out with regard to each page. Moreover, other activities would have to be performed with regard to general categories of documents. Based on the hourly

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[516] On contingency fee arrangements and lawyers' incentives, see *supra*, Section II.1.4.

[517] See Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities on damages actions for breaches of EC Antitrust rules, April 2006.

[518] See Section I.2.3 for a brief illustration of the Standard Cost Model.

[519] This statement, however, needs two major *caveats*: on one hand, information purely related to public enforcement might not be relevant in private litigation; on the other, public enforcers are not required to assess the amount of damages suffered by victims of antitrust infringements. These two effects are likely to counterbalance each other.

[520] *Verein für Konsumenteninformation v. Commission* case (CFI, case T-2/03).

[521] There are of course also far less complex and less voluminous cases.

[522] The CASH table developed for The Netherlands by Nijsen - Velling contains the empirical values for the times required to carry out the individual standard activities of an information obligation.

wages calculated by the German Federal Statistical Office[523], a proxy of costs for each defendant might be approximately €20,000 (see table annexed at the end of this section)[524].

Besides these burdens linked to the fulfilment of disclosure requests, there are supplementary burdens linked to storage obligation of relevant information, especially if option 2 is coupled with sanctions for destruction of evidence (see also discussion on Options 4 and 5 below). Unlike the burdens described above, these types of burdens are borne regardless of whether a suit is filed or not, thus they affect a very large population (all the potential infringers and all relevant documents they hold). However, estimating these burdens may be very difficult, and varies depending on the amount and type of documents to be kept (for instance, paper v. electronic documents). For example, it may be the case that a considerable portion of relevant documents is already kept in the normal course of business and limited additional storage costs are sustained, as with regard to vertical contractual relationships[525]. Other kinds of infringements, on the contrary, might entail more substantial burdens, whose meaningful estimation, however, is not possible, due to its extreme variance.

Compared to the strict requirement on specification contained in option 1, this option is likely to entail higher administrative burdens. On the other hand, compared to option 3, administrative burdens are likely to be lower (see also *infra*, next Sec., B2): although some activities might be similar (especially the collecting and checking phase, which could be comparable to the "first leg" of option 3 activities – drawing of list), the judge's direct supervision limits the risk that principal-agent problems between clients and their attorneys increases the number of documents to be processed.

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523 The wages are referred to company staff, since most of the material activity linked to disclosure is carried out within the company.

524 The table annexed at the end of this section is drawn on the basis of the CASH Table included in the Programme for Bureaucracy Reduction and Better Legislation of the Federal Statistical Office of Germany. See Introduction of the Standard Cost Model, Methodology Manual of the Federal Government, available at http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/InternetEN/ Content/Projekte/SKM/ SkmHandbuchPdf,property=file.pdf. Our measurement yields empirical values for the times required to carry out the individual standard activities of an information obligation. These empirical values are determined on the basis of three levels of complexity and entered in our modified CASH table. The values listed in this table serve as estimated values for the time required to carry out a standard activity depending on whether the activity is judged to be simple, medium or complex.

525 In these cases, the burdens would be categorised as "Business As Usual" (BAU) burdens, and thus not considered in the overall assessment under the Standard Cost Model.

B3. Error costs

With broader access to evidence, both type I and type II errors would be less likely compared to option 1 and especially compared to the zero option. In particular, false acquittals would be significantly reduced due to more accurate fact-finding. Although the statistical incidence of error costs should be lower than in option 1, the likely increase in the number of litigated cases could imply an increment of errors in absolute terms.

B4. Harmonisation costs

The system envisaged by option 2 does not currently exist in any of the Member States; thus most would need to adapt their own legislation. The rule corresponds to the structure of civil law systems, as the disclosure obligation stems from a specific court order. However, among civil law countries, some systems may be more akin to this option. This is the case of countries with wider judge's powers to integrate the parties' evidentiary requests[526]. In these jurisdictions, adapting to option 2 would prove less burdensome, whereas major changes would be needed in countries that adopt a more rigid version of the dispositive principle. On the other hand, lower harmonisation costs would arise compared to option 3, since option 2 would preserve the basic features of civil law systems, *i.e.* the centrality of the judge in controlling the exchange of information between the parties. Common law countries, on the contrary, would be able to maintain their broader disclosure rules.

Table 49 below shows the countries that are likely to fall into different categories as regards the magnitude of harmonisation costs.

Table 49 – Harmonisation costs for option 2 – groups of countries

Negligible	Low	Medium	High
England, Ireland, Cyprus (if current discovery system is to be maintained)	*Czech Republic, Denmark, France, Latvia, Malta, Luxembourg, The Netherlands, Poland, Sweden*	*Austria, Belgium, Bulgaria, Estonia, Finland, Greece, Germany, Hungary, Italy, Lithuania, Portugal, Romania, Slovak Republic, Slovenia, Spain*	

[526] See *supra* at para. 3.1.

3.2.1.3 Option 3 (initial provision of lists of relevant documents)

Under this option, subject to fact-pleading, parties are obliged to provide their opponents with a list of all relevant documents in their possession, which must be made accessible to them unless the Court decides that the disclosure requests are disproportionate. Of course, this option can entail a larger number of documents disclosed, depending on the documents included in the list by each litigant.

Below, we assess this option's likely benefits and costs.

A. BENEFITS

A1. Deterrence

Compared not only to option 1, but also to option 2, this option gives the plaintiff the possibility to obtain a broad view of the documentary evidence in the defendant's possession, immediately after the initial fact-pleading and under a general disclosure obligation. Compared to options 1 and 2, disclosure occurs at an earlier stage of the litigation process, since information provided by the defendant to the plaintiff does not have to be ordered by the court. Since the obligation to provide documents in the list automatically arises from the initial fact-pleading, the parties may anticipate it and could start negotiating disclosure before commencement of proceedings.

Such features make this option the most attractive from a deterrence viewpoint. The probability that a claim is filed increases, since the expected trial costs faced by potential plaintiffs are generally lower than in options 1 and 2. This occurs because valuable information may be disclosed at the outset of the trial, with no need to apply for a court order[527]. Although the initial fact-pleading requirement needs a similar amount of initial evidence, compared to options 1 and 2, the impact on the amount of information gathered at an early stage of trial is greater:

- First, there is no additional burden of specification for the parties, thus the role of the court is not pivotal.
- Second, the plaintiff can gain an accurate and comprehensive knowledge of documentary evidence and of potential arguments that the defendant may put forward during trial.

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[527] Although not decisive, the name of the sender and of the addressee of letters, or email, together with the dates or other identifying elements, may provide important hints on the infringement.

- Finally, this information is in principle available, unless the defendant will prove that its disclosure will be disproportionately harmful for the party who serves the list.

With regard to the impact on the plaintiff's probability of success, the effect may also be positive, thanks to the increased availability of information.

In addition, the accuracy of damages quantification would increase, whereas the cost of a prospective claim is likely to decrease. This potentially paves the way for abusive behaviour on the side of plaintiffs. If the *ex post* judicial supervision is inaccurate or too lenient, then the plaintiff would be able to abuse her right to access relevant evidence, *e.g.* extracting business secrets and unmeritorious settlements (again compared to options 1 and 2) [528]. In turn this could have an overdeterrent ("chilling") effect with regard to pro-competitive business practices, especially for claims filed by competitors (mainly in abuse cases, with regard to rule of reason infringements).

Finally, some of the deterrence benefits highlighted above might not emerge, whenever the defendant can threaten to retaliate against a plaintiff's request (so-called "discovery blackmail")[529]. For example, some parties (or their attorneys) may try to use discovery as a financial sword in an attempt to make the litigation too expensive to continue: taking more depositions than necessary, sending out excessive discovery requests, obfuscating their answers. Defendants, moreover, could opportunistically narrow down the disclosure duty by raising objections on the confidentiality or relevance of information requested by their opponent. This, in turn, will lead to intervention by the judge, further raising overall trial costs. Under a similar scenario, financially powerful defendants may discourage plaintiffs from initiating a lawsuit by signalling their commitment to invest heavily in litigation and behave strategically when facing disclosure requests: if one considers that – as the Georgetown study found in the US – private antitrust damages actions can often be "David v. Goliath", it follows that defendants may easily take advantage of this possibility vis à vis less financially strong plaintiffs. As observed by some authors, both a loser-pays rule and one-way fee-shifting can alleviate the defendant's ability to retaliate against a disclosure request (so-called "discovery blackmail"), whereas if each party bears its own legal costs (so-called "American rule") this risk of retaliation would become more tangible[530].

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[528] See *e.g.* Easterbrook, *Discovery as Abuse*, 69 B. U. L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves").

[529] See *e.g.* Perloff and Rubinfeld (1988) for a description of the ways in which antitrust litigation can be used as blackmail.

[530] See Wagener (2003).

A2. Corrective justice

Since the expected trial costs might be reduced for potential plaintiffs under this option, access to justice might be facilitated[531]. In turn, this should increase the level of corrective justice by increasing the number of compensated victims. However, as already mentioned, without effective *ex post* supervision by national courts, there is a risk that such measures could be abused to extract unmeritorious settlements from the defendant (compared to options 1 and 2). Were this to be the case, the increased number of compensated victims would be coupled with an increased compensation of plaintiffs who suffered no harm as a result of the alleged infringement, especially in commercial litigation where competitors' plaintiffs are involved.

If the court is ineffective in controlling proportionality, or the defendant does not bear the plaintiff's legal costs, both parties may be able to impose external costs on their opponent. The search for evidence might thus exceed the point of optimality, *i.e.* the level of disclosure where the marginal cost of gathering evidence equals the marginal benefit in terms of accuracy of adjudication.

In order to ascertain the impact of this option on the fairness of the outcome, it may be useful to look at empirical data from the US – although option 3 cannot be said to recall the US discovery system, where notice pleading prevails[532]. After the 1993 and 2000 amendments to the FCRP, Rule 26 was changed in order to impose, prior to formal discovery requests, a duty to disclose some basic information necessary to prepare for trial or to make an informed decision about settlement[533].

This change in the FRCP was as an attempt to achieve greater procedural fairness in a system that already experienced very broad discovery: as shown below, in Table 50, 37% of the attorneys believed there was such an impact[534].

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[531] Also in the UK, research shows that the CPR reforms have been successful in improving access to justice: (a) a report jointly commissioned by the Civil Justice Council and the Law Society in April 2002 and (b) a report published by the Lord Chancellor's Department in August 2002.

[532] But see our discussion of *Twombly*, in Section II.3.1.1 above, footnote 526 and accompanying text.

[533] The revision of Rule 26, through the addition of paragraphs (1)-(4), has been carried out with the purpose of accelerating the exchange of basic information about the case and eliminating the paper work involved in requesting such information. See Brazil, *The Adversary Character of Civil Discovery: A Critique and a proposal for change*, 1978.

[534] Moreover, it has to be considered that the US system was moving away from a widespread discovery system. Table 50 is derived from the study by Thomas E. Willging, Donna Stienstra, John Shapard and Dean Miletich, *An empirical study of discovery and disclosure practice under the 1993 federal rule amendments*, Boston College Law Review, 1998, Table 17.

Moreover, considering that the data in Table 49 do not specify whether the standard "American" rule was adopted, in other judicial systems, which allow for narrower disclosure rules but where the "loser pays" system is in place, this fairness-enhancing effect could be amplified, as there would be a lower incentive for parties to retaliate against disclosure requests by behaving strategically and unduly increasing litigation costs.

Table 50 – Percentage of US attorneys reporting specific effects of initial disclosure on the fairness of the outcome.

Effect of initial disclosure on	Increased			Had no effect			Decreased		
	All	Pl.	Def	All	Pl.	Def	All	Pl.	Def.
Overall procedural fairness (N=508)	37	39	36	54	50	57	9	11	7
Fairness of case outcome (N=500)	25	26	24	70	67	72	5	6	4

Source: Willging et al. (1998)

A similar trend was observed in the UK after the 1999 Woolf Reform, which introduced the Standard Disclosure regime in the pre-action phase. A qualitative report published by the Department of Constitutional Affairs surveying the post-Reform landscape[535] found that mandatory initial disclosure, compared to pure discovery systems, had a positive impact on the assessment of the robustness of cases brought.

A3. Internal market

The adoption of option 3 would require an explicit intervention at the Community level, with far-reaching harmonisation effects. Most member states would adopt the same access to evidence regime for all antitrust claims, so that the impact from an internal market perspective might be considered great. Even if Cyprus, Ireland and the UK would keep their own regime on access to evidence, the risk of forum shopping entailed by this option would be the lowest, since, as it has been previously analysed, these countries provide for similar provisions to the ones entailed by option 3.

[535] J. Peysner and M. Seveniratne, *The management of civil cases: the courts and post-Woolf landscape*, 2005, DCA Research Series, 9/05, in particular p. 21.

B. COSTS

B1. Litigation costs

Even in countries where civil procedure rules are similar to option 3, scant data on litigation costs is available[536]. Therefore, quantifying the expected impact of this option on litigation costs is difficult, and can be based only on anecdotal evidence. In systems where pure discovery systems were available the introduction of the initial disclosure obligation evidenced some beneficial effects. The list of documents to be served to the counterpart helps to circumscribe the extent of future discovery activity. The picture seems consistent with what about 39% of US lawyers have reported after the 1993 modifications of the FCPR, as is shown in Table 51 below[537]. In other words, the initial disclosure may help to reduce some undesired effect of discovery systems.

With regard to systems moving from a pure civil law system with limited or no discovery rules, the impact of such an option is complex due to the following effects.

- On the one hand, compared to option 2, litigation costs could decrease under option 3. This may be especially true for the less informed party, *i.e.* in antitrust cases, the plaintiff. This party can gain access to relevant information held by the defendant at rather low cost, since it does not have to face any burden of specification unless a disclosure dispute arises and the proportionality test is applied by the judge upon the defendant's request.
- Similarly, since the judge's intervention is required only *ex post* and only if a dispute on the proportionality of disclosure arises, the overall costs to the judicial system might decrease as well. However, from a broader perspective, it can also be expected that, since access to justice is facilitated, more lawsuits will be initiated. Moreover, disputes on evidentiary issues are likely to be widespread in a system where general access to evidence is granted in very broad terms, thus the decreasing effect on costs could partially be counterbalanced by increased *ex post* disputes. This is a phenomenon that in the UK has been experienced especially in commercial cases, where applications for specific disclosure after initial disclosure remained quite widespread after the Woolf Reform[538].

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[536] Even in the DCA 2005 Report the difficulties in gathering relevant information on costs led the authors to withdraw from a quantitative assessment, p. 55 of the Report.

[537] As already recalled in the text, the US data are extremely indicative since they refer to cases where each party bears its own litigation costs, so that risk of retaliation might have still played a role. See Willging *et al.*, cit., Table 17.

[538] See DCA Report (2005), 21.

- Significantly, available evidence suggests that when initial disclosure is strengthened, trials tend to have a shorter life and settlements increase (see Taruffo, 2001). In the UK, after the scope of pre-action disclosure was broadened, more settlements were reached before the commencement of proceedings, and available evidence on competition cases confirms that most cases now settle before an action is started[539]. This probably happened since parties learn about their opponent's strategy at a very early stage of litigation. Moreover, it has been reported that the time elapsing between issue and hearing for litigated cases has fallen[540]. The picture seems consistent with what about 32% of US lawyers have reported after the 1993 modifications, and shown in Table 51[541].

Table 51 – Initial disclosure and litigation expenses after the reform of the FRCP in 1993

Effect of initial disclosure on	Increased			Had no effect			Decreased		
	All	Pl.	Def	All	Pl.	Def	All	Pl.	Def.
Your client's overall litigation expenses (N=522)	16	16	15	45	44	46	39	40	39
Time from filing to disposition (N=508)	7	9	5	62	57	65	32	33	31

Source: Willging et al. (1998)

It must, however, be taken into account that defendants are likely to bear the major part of costs in this system. This is not only true for material costs of disclosure (see *infra*), but also for overall litigation cost. Whenever the defendant does not agree with the plaintiff on the scope of disclosure obligation, the former will have to sustain the burden of proving the disproportionate nature of their opponent's disclosure request (the opposite of option 2). Otherwise, cases in which the disclosure of information, although relevant to the case, causes prejudice to the defendant are more likely than cases in which the plaintiff is disadvantaged by disclosure. This, in turn, may provide an incentive for the defendant to invest more resources in litigating on

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[539] See Rodger (forthcoming), as described in Section I.1.2 (not included in this version of the Report).

[540] See the report of Goriely, Moorhead, Abrams, jointly commissioned by the Civil Justice Council and the Law Society in April 2002, page XXXVI, DCA Report (2005), with specific reference to Multitrack-cases (above £15,000), p. 35.

[541] See Willging *et al.*, *cit.,* Table 17.

disclosure requests[542]. This might also bring about the risk of frivolous claims (blackmailing) filed by the plaintiff with the sole aim of extorting abusive settlements from the defendant, who may be unwilling to face the litigation costs borne in order to rebut the (albeit groundless) access requests[543].

With regard to principal-agent problems, the absence of an *ex ante* control by the court increases the likelihood that attorneys diverge from the interests of their clients, *e.g.* by asking for more documents than necessary with the aim to increase their fees. As a consequence, the incentives to initiate a lawsuit might end up being higher than under options 1 and 2. As already mentioned, the likelihood of agency problems is lower under clearly defined contingency fee arrangements.

Finally, the risk of "camouflage" or "contamination" in mixed claims (*i.e.* involving both contractual and antitrust-tort issues) can be quite high, even in comparison to option 2, especially with regard to civil law countries. This problem does not involve only harmonisation costs (*i.e.* the need to adapt the national legislation to a different regime), but may further complicate the litigation and affect procedural fairness.

In general, litigation costs for the single plaintiff are likely to decrease and this, in turn, may lead to an increase in the number of filed claims. From a broader perspective, however, overall litigation costs are likely to be higher than in other options, because of to the increased principal-agent problem, overall discovery activity, its contentiousness and the risk of unmeritorious litigation activity owing to the risk of NEV claims[544].

B2. Administrative burdens

The adoption of broad disclosure obligations surely entails an increase of the number and type of information obligations the parties have to comply with. Unfortunately, precise estimates of the costs involved are somewhat biased on the basis of the kind of litigation and the procedural system involved, making any quantitative empirical research likely to be difficult. Some data have been collected with specific reference to the US and UK systems. An interesting

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[542] Furthermore, when fees are paid on the basis of time charges without effective judicial case management, this type of discovery practice provides the lawyer's professional instinct regarding overly used and overly expensive discovery incentive to ask for broader access to documents than is really needed.

[543] This phenomenon leads to the paradoxical situation where claims with Negative Expected Value (NEV claims, whose prospective litigation costs are higher than expected benefits in case of trial) are filed; see also *supra*, Section I.5.1.1; and Bebchuk, L. A. (1998), *Negative Expected Value Suits*, NBER Working Paper No. W6474.

[544] For a description of "NEV claims" or "NEV suits", see *supra*, Section I.5.1.1; and Bebchuk, L. A. (1998), *Negative Expected Value Suits*, NBER Working Paper No. W6474.

"natural experiment" is that of the US, where the 1993 amendments to the FRCP introduce what was defined as a "feature that looks like existing document discovery in England"[545].

The Federal Judicial Center study of 1996 (see Willging *et al.*, 1998) managed to distinguish the discovery costs on the basis of the type of activity carried out and claims. Similarly, the Genn's Survey on litigation costs attached to the Final Woolf Report on Access to Justice in UK (1996) managed to differentiate between the different components of litigation costs by kind of activity and type of claim[546].

Table 52 shows the estimates for the US by Willging *et al.* (1998). In addition, Hazen Genn's Interim and Final Surveys (1995-1996) provided some figures on different headings of litigation in commercial cases, distinguishing the costs of counselling (to be qualified as litigation cost) and of different material activities carried out during litigation[547]. Such figures can be used as anecdotal indications of the initial disclosure costs that may occur under option 3. The relevant costs fall into the category of meet/conference discovery planning ($14,400 for the US, or $18,689 in 2007 dollars; £1,266 for the UK, or £1,682 in 2006 pounds). Besides the different methodologies underlying the two studies, this difference may be explained by recalling the difference between the two systems. In the US, the initial disclosure, although with a more limited scope (only evidence to be used by the party in the process), directly requires the obliged party to serve the relative evidence to her opponent. Hence, the information obligation is quite burdensome for the party. Conversely, the disclosure list to be prepared according to the UK CPR does not automatically lead to the disclosure of documents, thus initial costs may be more limited. These figures may represent two references for the estimation of option 3, although with some caveats:

- the US figure is biased towards over-estimation, since it includes the material costs of providing the copies of documents to the counterpart.
- On the other hand, the UK data may be biased towards under-estimation. First, the figures estimated by the Hazen Genn's survey do not reflect the subsequent 1999 reform, which broadened the initial disclosure obligation. Second, these figures are referred to general commercial claims, whereby the

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[545] Marcus (1999).

[546] In 1995, an Interim version of the Hazen Genn's Survey on litigation costs was released, with some partial data. Although updated in 1996, some information contained in the Interim version was quite relevant for the determination of the costs component in the present section. This is mainly because the Interim Report contained a more detailed categorisation of costs components. For this reason both the 1995 and 1996 data panels are used.

[547] For the initial discovery planning and conference the Report shows an average value of about £1,000, whereas the material production of the list will cost about £260.

average value may be lower than specific antitrust claims. Third, the UK figures are based only on the costs awarded (*i.e.* those submitted for taxation). The total costs of the rule in antitrust cases, comprehensive of the overall costs borne by the losing party, is thus likely to be substantially higher.

Table 52 – 80th Percentile of disclosure expenses, for respondents reporting any discovery expense (Willging *et al.*, 1998)

Activity	80th percentile patent trademark, securities and antitrust cases
1) Meet and conference/discovery planning	$12,000
2) Initial disclosure of documents	$2,400
3) Expert disclosure or discovery	$42,000
4) Depositions	$135,000
5) Request for/or production of documents	$67,000
6) Interrogatories	$47,000
Total	**$305,400 (in 2007 dollars, $396,352)**

Table 53 – Final Survey on Litigation Costs – Annex III of Woolf Report on Access to Justice in UK – Components of bills by case type (Hazen Genn Survey, 1996), Commercial (N=106+102)

Activity	Commercial cases
1) Counsel Fees	Approx. £7,000
2) Expert Fees	Approx. £4,000
3) Discovery/Documents	Approx. £14,500

As a result, we can consider that a realistic estimate would fall somewhere between these two extremes, *e.g.* an average value of approximately €10,000. This figure, however, is only a proxy for the first element of the disclosure obligation envisaged by option 3 (*i.e.* the list of relevant documents in the party's possession), which does not entail the screening and evaluation of the

text of documents[548]. These latter activities, however, are carried out with regard to the documents contained in the lists that are eventually served. This second element – the act of disclosing the document – is also burdensome in and of itself. In the US system, where both documents and expert discovery[549] are allowed, substantial further expenses are borne (about $380,000 in 2007 US dollars). In this respect, the US system is significantly different from the system envisaged under option 3 of the Green Paper, in that it requires subsequent discovery of evidence on the broad subject matter of the case and can require documentary evidence but also expert discovery, depositions, etc. Consequently, figures for the US end up being hardly representative of the potential EU situation under option 3. Indeed, the estimated figure for the cost of requesting documents in Table 52, *i.e.* $67,000 in 1996 US dollars (or $86,000 in 2007 US dollars) may be taken as the highest (and probably unlikely) estimate of costs for the EU under this option.

In the UK, as shown in Table 53 above, the 1996 Hazen Genn Survey found the average costs of discovery of documents to be approximately £14,500 (£16,800 in 2006 pounds)[550]. Although the UK data might be more reliable, a number of caveats must be spelled out:

- First, antitrust cases are likely to show high values at stake, even with reference to normal commercial cases, to which this survey is referred[551].
- Moreover, the UK figures are based only on the costs awarded (*i.e.* those submitted for taxation).
- Finally, even if the option envisaged in the Green Paper bears a strong resemblence to the standard disclosure of Rule 31.6 of the UK CPR, under option 3 the number of documents to be actually served might be higher than in the UK system. As a matter of fact, under option 3 a party would, subject to fact-pleading, be obliged to serve on all other parties both the *list*

[548] In order to draw a comparison with the calculation carried out with regard to option 2, drafting the list of documents can be deemed to entail the activity of the first heading of the CASH table annexed at the end of this section, *i.e.* gathering the relevant information, plus a probable additional supervisory activity carried out by a senior consultant.

[549] Rule 26(2) of FCPR provides for expert discovery, which might entail the disclosure of a complete statement on the expert activity within the trial and on all other related scientific or judicial activities previously carried out by the expert.

[550] In the Final Survey on Litigation Costs, Table 3.1., 1996, 35, the allocation of cost components is carried out with regard to broader costs categories (Counsel Fees, Expert Fees, Discovery/Documents), with a sensible difference in the mean value, compared to the Interim Survey on Litigation Costs – Annex III of Woolf Interim Report on Access to Justice in UK, Table 3.7. This latter provides much lower figures (about £11,000). The wider panel data of the Final Report, however, advised us to keep the most recent estimates for this heading.

[551] Always with reference to the Final Survey on Litigation Costs attached to the Woolf Report, the discovery costs related to claims whose 1996 value exceeds £250,000 amounted to an average value equal to £22,217, *i.e.* less than 10% of the claim's value.

and *copies* of documents, unless the Court is satisfied that disclosure would cause undue harm to the party who serves the list; conversely, according to the UK CPRs, a party may refuse the disclosure of some documents if such disclosure would cause a disproportionate burden. In this latter case the judge can issue a specific disclosure order. As a result, under option 3 the disclosing party bears the burden of proving that the proportionality test is not met, whereas in the UK CPRs the opposite holds.

In summary, the findings illustrated above may provide some anecdotal evidence of an increase in administrative burdens under option 3, which is likely to be higher than in options 1 and 2. This is also due to the increased storage costs that this option would entail, regardless of whether a specific claim is filed against the defendant. As argued above (see B2 in option 2) the magnitude of these costs is highly uncertain, due to the indefinite affected population and the extreme variance in the number of documents to be kept. It can, however, be supposed that the storage obligation in option 3 will be, *ceteris paribus*, higher than in option 2.

B3. Error costs

Compared to the zero option, Type I and – most important – Type II error costs might be significantly reduced, given the greater availability of documentary evidence, which increases the accuracy of fact-finding. Again, however, the increased number of claims being brought (associated with a positive risk of unmeritorious claims) might lead to an overall increase of judicial errors in absolute terms.

B4. Harmonisation Costs

This solution would entail very high harmonisation costs, since all Civil Law countries would be forced to adapt their legislation to introduce a completely different procedural structure, similar (but not exactly comparable) to the one currently adopted in the UK. This requires, *i.a.*:

- the specification of a new set of rules for antitrust claims;
- training costs for both judges and lawyers;
- risk of "camouflage" or "contamination" effects, especially in cases related to vertical agreements.

For this reason harmonisation costs may be considered to be highest under option 3, since they do not involve the mere clarification/refinement of existing procedural systems, but rather the adoption of a new, *ad hoc* set of civil procedure rules in almost all Member States. Table 54 below shows countries that would be heavily affected by this option in terms of harmonisation costs.

Table 54 – Harmonisation costs for option 3 – groups of countries

Negligible	Low	Medium	High
England, Ireland, Cyprus			*Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden*

3.2.1.4 Option 4 (sanctions for the destruction of evidence and failure to disclose)

This option entails the introduction of supplementary sanctions in order to protect the documents to be disclosed according to options 1 to 3. The sanctions would be applied for several types of behaviour amounting to a breach of the disclosure obligation, such as the destruction of evidence, the breach of the obligation to preserve evidence prior to trial, and the lack of disclosure of relevant documents.

National legal systems may already provide different sanctions for the refusal to hand over a document to the judge or for misleading disclosure. In some cases, only procedural sanctions are provided, such as the reversal of the burden of proof on specific facts, or the impossibility to rely on the non-disclosed document in the proceeding. Sometimes, this behaviour may also amount to a criminal offence[552]. The solutions envisaged in options 4 and 5 would co-exist with the national rules on contempt of court and the judge's management decisions, perhaps providing a minimum harmonisation. Moreover, since these provisions would simply supplement and strengthen the effectiveness of the general disclosure obligation, a specific impact assessment is not carried out in this section. Rather, some minor refinements will be provided, especially with regard to the inter-relationship with the general regime.

Since the extent of the disclosure obligations envisaged in the former options varies considerably, the effectiveness of sanctions for failure to disclose may change accordingly. In option 1, a breach of the disclosure obligation is easy to detect and punish, as the court order is well specified.

[552] See, for example, Art. 374 of the Italian Penal Code or Sec. 31.23 of the UK CPR.

On the contrary, under options 2 and 3, infringements would be more difficult to detect, from both an objective and a subjective viewpoint. This is especially true for option 3, whereby disclosure is not specifically ordered by the judge and the scope of documents to be disclosed is not defined. With regard to option 2, these difficulties are less stringent, since the categories of documents are specified in the court order; however, the risk of strategic behaviour is not minimised as under option 1. Moreover, due to the rather indefinite scope of documents to be disclosed, proving the intention to breach the law, especially if the sanction is extended to pre-trial behaviour, may prove to be extremely difficult. The adoption of a lower negligence standard may solve some of these detection problems, although it could raise the costs borne to fulfil the obligation, since the defendant will have to keep more records in order not to be considered negligent. This is particularly true for some types of digital documents (like e-mail correspondence), where intentional or negligent destruction needs to be distinguished by routine erasure[553].

On the other hand, from an objective viewpoint, the choice to extend the duty of care in disclosure (*i.e.* the duty to keep all the documents that might be reasonably relevant for the case) to any kind of destruction taking place before the litigation started is debatable. With specific regard to the *ex ante* disclosure system provided for in option 3, the extension of the duty appears to be heavily burdensome, if not impossible to bear, for the potential parties. In some countries, the indeterminacy of such an obligation could impede the adoption of criminal sanctions, which are less prone to "tarification" (see next paragraph). In any case, courts will be reluctant to apply rules that may be considered unjust because of their opaqueness.

Furthermore, if the duty to preserve potentially relevant evidence is defined too broadly and entails criminal consequences, administrative burdens, due to the need to store a potentially endless range of documents, could be substantial. The burden will vary considerably according to the different general disclosure regimes. With regard to option 1, the defendant will have an incentive to keep only the documents that are likely to be requested by the counterpart. These would entail, for example, all the documents named in the final decision, in case of follow-on claims, or the records of public meetings. With regard to option 2, administrative burdens may substantially increase, since all the categories of documents that may be requested are to be stored, although some documents within the category may not be directly relevant to the case. On the other hand, categories of documents could already be kept in the ordinary

[553] As it has already been mentioned above, the problem of disclosure of digital documents in general can represent a major obstacle for the efficient functioning of disclosure systems. From a legal point of view, moreover, additional problems arise, such as the one proposed in the text or the complicated question of where e-mail documents are located for purposes of blocking statutes and the like; on the latter point, see Marcus (1999) and Marcus (2005).

course of business or in fulfilling other information obligations, thus their storage would not entail additional costs. Finally, option 3 would require keeping every document that may be reasonably relevant to the case, imposing the greatest burden on the defendant. Indeed, the latter cannot rely on the assumption that some categories of documents may be unlikely to be requested, since she is under an obligation to spontaneously provide a list of relevant documents.

Moreover, according to the general theory, a pecuniary sanction is likely to be ineffective, since it can be internalised by the defendant as a litigation cost that substantially raises the probability of a successful defence (so-called "tarification" of sanctions). Whereas pecuniary sanctions may prove more effective in option 1-like systems (each breach will provoke a sanction and the benefits from destruction are supposed to be lower), criminal sanctions may be more difficult to implement under options 2 and 3.

In other words, the introduction of a general sanction (either pecuniary or criminal) for breach of statutory obligation, without any further specification, raises difficulties and could entail substantial costs in order to establish whether the obligation has been breached with negligence, if coupled with options that allow for very broad "discovery" rights. In general, then, procedural consequences due to breach of disclosure duties (a more lenient pleading standard, inverse inference) may be far more effective for "borderline" cases. Indeed, in these cases the proof of breach of disclosure rules may be burdensome, since the prosecutor is required to prove facts that took place in the sphere of defendant rights. However, with regard to procedural consequences, it is the party with better information (*i.e.* the defendant – the holder of information) that must prove to have behaved diligently.

3.2.1.5 Option 5 (obligation to preserve relevant evidence)

Under this rule, before a civil action actually begins, a court could order that evidence relevant to that action be preserved by a party. The party requesting such an order should, however, present reasonable evidence to support a *prima facie* infringement case. This option is similar to the "securing evidence" notion analysed by the Ashurst Report (2004), which found it to be common to several civil law jurisdictions[554]. However, it would also entail a "common law influence", especially as regards the possibility to ask for protective orders before the commencement of proceedings.

Notwithstanding the difficulties shown above, defendants should not be exempted from an obligation to preserve evidence for a given period of time,

[554] See Ashurst Final Report (2004), p. 64, which lists Belgium, Czech Republic, Denmark, Estonia, France, Germany, Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain, Sweden, although in some of these sanctions are limited to third party disclosure requests.

also before the civil proceeding is started and procedural sanctions are not available. Under this option, the judge intervenes after a specific request of the prospective plaintiff, backed by some *prima facie* evidence, by means of an *interim* decision.

Most of the concerns arising from the imposition of sanctions for breach of disclosure rules can be overcome if the duty to preserve relevant documentary evidence is rooted in a specific court order. Thus the system envisaged in option 5 is to be considered complementary to the provision of legal sanctions according to option 4. Thanks to the judge's intervention, the scope of the duty to preserve the information is defined on a case-by-case basis. This, in turn, allows for the introduction of criminal sanctions for failure to comply with the court order, which may be effective in deterring the fraudulent destruction of evidence.

As the protective order may be issued also before trial, this system provides for protection of relevant information outside the scope of a given lawsuit. This, in turn, may encourage the parties to begin some early negotiations on disclosure: the *interim* court order can signal the likely amount of information that will be disclosed in the subsequent proceeding, as well as the likely relevance of the information to be preserved as specified by the court order. This also facilitates early settlements, with a positive impact on litigation costs.

To be sure, the requirement of the *prima facie* evidence may prove quite burdensome before the commencement of the proceeding, especially in stand-alone cases. However, the threshold for finding *prima facie* evidence lies within the judge's interpretive power, and should require a lower *onus probandi* if compared to normal disclosure orders issued during trial litigation (within the zero option). This would be the case if the lowered fact-pleading thresholds envisaged in options 1 and 2 were to be adopted.

With regard to litigation costs, this option would entail a likely increase, mostly due to the possibility of litigating the *interim* order. Administrative burdens, on the contrary, would be lower than under option 4, since the court order would specify the information to be preserved, thus limiting the obligation to preserve documentary evidence to the truly relevant documents and increasing legal certainty for the parties. Harmonisation costs would probably be affected, due to the need to specify an *ad hoc* pre-trial procedure to secure evidence. However, several national legal systems already envisage some tools to secure evidence[555], which should of course be adapted to comply with option 5 (*i.e.* entailing an extension to cases where proceeding has not yet started).

[555] Besides the countries listed in the Ashurst Report (p. 64: Czech Republic, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Poland, Slovakia, Slovenia and Spain), it may be recalled that pre-trial disclosure is also provided for in the UK. Although these orders in Civil

Given the likelihood that parties start early negotiations to settle the case before trial, and that destruction of evidence is increasingly deterred thanks to the possibility to apply criminal rules, this option, in conjunction with option 4, may solve some of the problems that could emerge under options 2 and 3 above. As discussed above (see previous paragraph on option 4), in these latter cases, the deterrent effect of the sanctions for failure to fulfil the disclosure obligations might be hampered by the indeterminacy of the obligations themselves.

3.2.2 Access to documents held by a competition authority

The amount of information gathered by public agencies during administrative proceedings may be broader than that collected in proceedings ending with a final (public) conviction of the firm. Information from market inquiries, data collected in preliminary investigations or information collected in a proceeding that ended with undertakings submitted by the defendant (or without a formal decision on the infringement) may also be relevant for private litigation[556].

A substantial amount of non-confidential information is already contained in the final decision adopted by competition authorities. Sometimes this information is sufficient to support the initial fact-pleading against the defendant. This may be the case for effects-based infringements, as competition authorities normally provide evidence of the anticompetitive effects generated by the infringement. However, in cases that do not result in a formal decision, or where a formal decision has not already been issued, access to the file may prove essential to gather the evidence needed to fulfil fact-pleading requirements. In any event, access to the file is also quite useful for the courts, as it can lead to the disclosure of relevant market data that can be used to determine the damage award.

Most often, access to evidence held by a competition authority is sought for the purposes of initiating follow-on litigation. This will be taken into account in the qualitative impact analysis of both the zero option (no policy change) and the alternative options proposed in the Green Paper (options 6 and 7). The options proposed in the Green Paper involve access to evidence held by the EC during civil proceedings, *i.e.* do not affect the general regime for access to the Commission file, as laid down in Reg. No. 1049/01. However, since these options are conceived to provide an additional source of information during trial, they are likely to exert an impact on the application of the general rules on transparency: given that the prospective plaintiff knows that access to

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Law countries usually are not triggered before the proceeding starts, it might be recalled that they can be requested within interim judgements.

[556] In 2005, out of 244 cases closed by the Commission, 207 ended without a formal decision.

information held by the Commission may also be obtained during trial, the incentive to directly seek access to the file may be weaker.

Before assessing the impact of the alternative options, it is worth anticipating that:

- *option 6 might prove to have an autonomous relevance only if combined with a restrictive disclosure regime such as that envisaged under option 1 or the zero option*. Combined with option 2 or 3, the introduction of option 6 would not bear any additional utility, since the same outcome may be achieved *via* the general regime. Indeed, with option 2 (access to classes of documents), the first disclosure request in follow-on cases will supposedly involve the documents handed over to the authority during the investigation. Under option 3 (provision of initial lists), the defendant will certainly be obliged to include in the list the documents handed over to the authority, since their relevance to the case may be presumed. Crucially, documents that can be requested from the competition authorities would not cover evidence related to leniency applications; otherwise, the effectiveness of leniency programmes could end up being jeopardised. In terms of effectiveness, the outcome achieved by the combination of option 2 or 3, or alternatively by option 6, would look as follows:
    - Options 2 and 3 entail higher benefits and costs because facilitated access to evidence is also available to stand-alone plaintiffs.
    - Second, compared to access to the information handed over to the competition authority that could be sought through option 2, option 6 entails some slight improvements and increased legal certainty. It would clarify that a certain class of document (pertaining to the administrative proceeding) will be accessible anyway and, at the same time, could improve voluntary disclosure in the pre-action phase.
- A similar reasoning can *a fortiori* be applied to option 7, since this regime only provides for some minor adjustments relative to the current system. For this reason, in the synoptical tables of the welfare impact assessment at the end of this Section, the combinations between these options are not specifically shown.
- On the other hand, option 7 (the introduction of a specific rule regulating the transmission of information by the EC to national judges) may bring about an additional impact if bundled with option 1, which entails a rather narrow court-ordered disclosure of specific relevant documentary evidence, based on fact-pleading. The introduction of option 7 together as a standalone policy measure or in combination with option 1 may be considered as a "light-touch" regulatory option.
- Finally, option 1, if coupled with either option 6 or 7, may yield different costs and benefits for follow-on claims. For this reason, in our summary tables below we include also a separate assessment of these "bundles of

options" (1+6 and 1+7). These bundles would encourage follow-on private damages actions, whereas they would have no impact on stand-alone cases. Since cartel cases are more often (but not exclusively) initiated on a follow-on basis, the impact of these bundles will be mostly related to these infringements[557].

Despite the order in which the options are presented in the Green Paper, we analyse option 7 before option 6. The reason is that option 7 does not really propose the adoption of a new disclosure system, compared to the one already provided in Reg. No. 1/2003; whereas option 6 envisages a different regime.

3.2.2.1 Current general provisions on access to the file of the Competition authorities ("no policy change" option)

Legal provisions, both at the Community level, already allow litigants to gain access to evidence held by the EC or individual NCAs. The Community framework contains two different sets of rules aimed at the protection of individual rights and at fulfilling transparency goals:

- the rules contained in the discipline on the access to the Commission file laid down in Articles 27 and 28 of Reg. No. 1/2003, Articles 8 and 15 of Reg. No. 774/04, and in the Notice on the rules for access to the Commission file[558].
- the general discipline on transparency of Community institutions contained in Reg. No. 1049/01.

Both sets of rules focus on the pivotal role of the public institution that holds the information, and involve direct access to the Commission file. The only provisions that sketch an embryonic (partially) decentralised information management system linked to the protection of individual rights covered by EC competition rules (included the right to damages) are the ones involving the dialogue between the Commission and the national courts[559].

With regard to information held by public agencies, a clear distinction must be made between the right to access conferred to the defendant (which is under public investigation) and the right conferred to third parties participating in the

[557] The reader needs to be warned that this latter simplification is mainly due to the need for harmonised synoptical tables within the overall study. Indeed, for access to evidence purposes, the most relevant distinction is to be drawn between follow-on and stand-alone cases. However, according to the actual features of litigation, the assumption of a greater number of follow-on cases involving cartel infringements is still reasonable.

[558] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004 Official Journal C 325, 22.12.2005, p. 7-15.

[559] Article 15 of Reg. 1/2003. Commission Notice on the co-operation between the Commission and the courts of EU member states in the application of Articles 81 and 82 EC, OJ 2004 C 101/54, paragraphs 21 to 26.

administrative proceeding[560]. In particular, with regard to third parties participating in the proceeding, the Notice on the rules for access to the Commission file provides for some strict limitations[561]; whereas third parties that did not participate to the administrative proceeding may seek access only on the basis of Reg. No. 1049/01 and, within trial litigation, through specific requests for information sent by the court to the Commission, according to Article 15 of Reg. No. 1/2003. In both cases, however, access to confidential information will not be allowed, unless the court provides the Commission the proof that confidentiality of information will be kept, implying that the information will not be included in the court's docket and used for the final decision, which is public.

The framework is obviously much more fragmented with regard to NCAs, since access to information held by each authority is to be regulated according to national law. However, with regard to investigations carried out by NCAs pursuant to Articles 81 and 82 of the Treaty, Article 28 of Regulation No. 1/2003 applies (information held is subject to the same secrecy obligation imposed on the Commission).

In conclusion, the current legal framework on access to the file by third parties exhibits the following features:

- direct access to the file under Reg. 1049/01 is often refused by the Commission, due to Article 4 of Reg. No. 1049/01, which specifies that access to documents can be denied whenever the disclosure would provoke a prejudice to the commercial interests of a party or to the investigations of the Commission or that may be in contrast with overriding Community interests;
- within the framework of Reg. No. 773/04, access by the parties to the administrative proceeding is not allowed for confidential information, *i.e.* information that the Commission qualified as not available (according to the criteria set forth in Article 16 of Regulation No. 773/04);
- the access process is managed by the Commission (and by the NCAs according to their procedural rules), and involves both the qualification of information as confidential, the management of access (providing facilities) and the possible litigation costs that could arise due to refusal to provide access and the likely following litigation between the EC and the party seeking access;

[560] The asymmetry is clearly stated in the Commission Notice on access to the file (par. 30) and is endorsed by the Community jurisprudence, see sentence T-17/93 *Matra-Hachette SA/Commission*, ECR 1994, II-595, par. 34.

[561] Article 6 par. 1 of Reg. 773/04.

- the system defined in Reg. No.1049/01, in general, does not require the need to show any *prima facie* evidence[562]. This lowers the pre-trial plaintiff's cost, since access may be sought at a preliminary stage in order to build the case and to assess the likelihood of the claim's success; but also carries the risk that access is sought for reasons that are not linked to any real antitrust claim;
- as a consequence, this access regime does not allow for a distinction between generic or frivolous requests and access sought by potential plaintiffs[563]. As a result, the Commission often applies the exceptions spelled out at Article 4 Reg. No. 1049/01, in order to balance the broad subjective scope of application of the transparency regime and to avoid the collapse of the centralised information management system due to excessive access requests and negative effects on its capacity to undertake public enforcement. The practice implemented by the Commission has not been tested on substantive grounds, rather on procedural ones in the *Verein für Konsumenteninformation v. Commission* case (CFI, case T-2/03). In this case, the CFI annulled a Commission's decision to refuse access to the file related to the *Lombard Club* cartel by a consumer association. The annulment, however, was based on a breach of the obligation to motivate the refusal for each specific document requested, or to compare alternative solutions to alleviate the relative burden. It may be safely assumed that the exceptions provided for in Article 4 may hold with regard to access to the file required whilst investigation is ongoing or an appeal on the decision is still pending. In this case, exclusion from access is based on the need to preserve the effectiveness of ongoing public investigation and that may be easily reasoned. After the final decision, however, the refusal to process the access request should be substantiated by the specific reasons that make the review of documents requested a disproportionate burden for the Commission[564]. This consideration, although not explicitly provided by Reg. 1049/01, has been recognised by the Court of First Instance in the *Verein für Konsumenteninformation* case[565], but only in very exceptional circumstances and after a comparison with the interests of access of the requesting party. The Commission, then, is obliged either to review the admissibility of Article 4 exceptions for all documents contained

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[562] Joined cases T-110/03, T-150/03 and T-405/03, *Jose Maria Sison v. Council*, Judgment of 26 April 2005.

[563] Indeed, the CFI's decision on the *Verein für Konsumenteninformation v. Commission* case (CFI, case T-2/03) may provide some help in striking a balance between access requests and confidentiality. The obligation to assess the request with regard to each specific document, and to ascertain that there are no means to alleviate the relative burden, may increase the accuracy of the decision, but it may also lead to higher costs.

[564] Although it has been argued that the exception could not be grounded after the final decision on the appeal; see Reynolds and Anderson (2007).

[565] See in particular para. 112-114 of the Decision.

in the file or to prove that the related burden would be unreasonable, and no alternative means to offer a partial disclosure or an assessment on confidentiality are available.

A. BENEFITS

A1. Deterrence

Ensuring that the plaintiff can have access to evidence held by the public agency has a positive effect both on the plaintiff's incentive to sue and on the expected magnitude of the damage award. As regards the former, the availability of more detailed information is likely to increase the probability of final conviction. For what concerns the magnitude of the award, access to evidence improves the accuracy of the final decision.

Within the current legal framework, access to the file by third parties may be potentially sought, but the Commission is still free to refuse access on the basis of confidentiality, albeit with more intense procedural safeguards stemming from the specification of reasons as provided for by the recent CFI decision. For this reason, the amount of documents that can be discoverable by means of Reg. No. 1049/01 may be limited, as testified by the approach originally adopted by the Commission in *Verein für Konsumenteninformation v. Commission*.

A2. Corrective justice

As highlighted above, the CFI stressed that the procedural safeguards underpinning the refusal to grant access to the file, especially with regard to the reasoning of the balance between the interest to disclosure and the confidentiality of each specific document, may not be circumvented by simply referring to the excessive burden of review. This entails a higher degree of control on the information by the Commission. From a corrective justice point of view this entails two opposite effects.

On one hand, the deeper review envisaged in the *Verein für Konsumenteninformation v. Commission* case could potentially bring about a more accurate assessment of both the confidentiality and the relevance to the case, as well as alternative methods to provide some access to evidence for the claimant.

On the other hand, it may be stressed that in practice the likely overload for the Commission due to an increase of access requests and a more lengthy check on confidentiality might provoke the collapse of the centralised information management system. The impact of an inefficient centralised information management system on corrective justice is mainly linked to increased costs of access to courts, due to the lack of information and increased pre-trial litigation costs carried out in order to collect the relevant information to file the claim.

A3. Internal market

Absent Community intervention, different legal regimes will be applied by NCAs and the EC, thus preserving significant differences across member states. The impact on the internal market would therefore not be felt.

B. COSTS

B1. Litigation costs

With regard to the optimal amount of discovery of documents held by the public authority, the rule has some important effects with regard to the litigants' incentives. This is particularly important in order to assess the impact of the option being considered on litigation.

First, the incentive structure of the parties affects the burden of the public agency handling the information management system. In addition to managing access requests from potential plaintiffs, the agency might experience an increasingly contentious relationship with the owner of the information, with a negative impact on litigation costs.

Currently, the plaintiff bears negligible costs in seeking access to information held by the Commission or a NCA. This might prompt the risk that overall requests for access become too numerous, *i.e.* above the level where the social benefits of access (in terms of increased conviction of guilty defendants) are equal to the social costs of providing access. Under this scenario, the agency will have to devote more resources in order to effectively assess confidentiality, identify alternative methods of analysis of access request and check the the robustness of access requests.

An increase of litigation costs due to increased private enforcement and higher incentive to gain access to the information held by the Commission may also affect the legal framework provided by Reg. No. 773/04, setting the rules on access to the file by parties within the administrative proceeding. Should divergences on confidentiality arise between the submitting party and the Commission, a further procedure would have to be carried out[566]. Here again, the defendant would bear low costs in invoking the confidentiality of information. Moreover, since a narrower access to information can lead to a decrease in the probability of conviction in subsequent civil cases, the defendant's incentive would be stronger, as long as its benefits from resisting disclosure not consist only of the protection against a generic prejudice to its commercial interests, but also of a "shield" effect from future antitrust litigation. Needless to say, this can lead to additional litigation costs for both the Commission and the prospective defendant.

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[566] See para. 39 ff. of the Notice on the rules for access to the Commission file.

The equilibrium deriving from this structure of incentives might paradoxically reduce overall litigation costs, with a parallel increase of administrative burdens. As a matter of fact, access requests must always be screened by the Commission, but a broad interpretation of Article 4 exceptions may limit the amount of documents disclosed. This in turn reduces the probability that civil claims are filed against the defendant and the relative litigation costs.

With specific respect to access to the Commission file, the restrictive approach that could derive from an increased tension between confidentiality and access may have a negative effect on the pre-trial settlement rate. On the other hand, the risk of unmeritorious/opportunistic claims is minimised. The former (negative) effect is due to the fact that pre-trial expectations on outcome of the case do not converge if access is not granted. The latter (positive) effect is due to the stricter control the Commission is able to keep on the diffusion of information held in the file.

B3. Administrative burdens

The costs of the system of access to evidence borne by the Commission with regard to competition are already quite high, despite the current low private enforcement level. Out of 2,600 requests for access to Commission documents filed in 2004 according to Reg. No. 1049/01, about 379 (14.58%) were targeted at DG Comp[567]. Each request may involve a large number of documents, especially when access is sought to entire categories of documents or to the whole file. On average, about 75% of individual documents whose access is requested need to be reviewed in order to ascertain whether disclosure would cause prejudice or run counter to overriding Community interests. The amount of pages to be screened may be substantial: in the *Lombard Cartel* case the file amounted to approximately 47,000 pages, without taking into account internal documents; recent complex cartel case files reached 100,000-150,000 pages.

The administrative burden of reviewing the documents, based on a conservative estimate of 50,000 pages per file, is considerable: about 14,212,500 pages need to be reviewed. Although this activity could partially overlap with the qualification process of documents carried out according to Article 16 of Reg. No. 773/04 by request of the person who submits the documents (a document that was given the confidentiality status during the proceeding is unlikely to be disclosed according to Reg. No. 1049/01), it has to be stressed that the two processes do not take place at the same time and the qualification under Article 16 does not have any binding relevance to the review to be carried out under Reg. 1049/01. This means that the there is a concrete risk of

[567] See Report on the application in 2004 of Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents {COM(2005)348 final}.

duplication of costs under the two regimes. Moreover, an additional procedure must be carried out whenever the submitting party and the Commission do not agree on the confidentiality of information[568]. Once access is allowed, further activity must be carried out in order to provide the facilities or the partial version of documents.

The recent increase in the number of requests targeted at DG Comp from 2002 to 2004 (trebled from 125 to 379) may give a first impression of the possible future trend with enhanced private litigation and follow-on actions. Within this framework, handling the access to evidence system can become an increasingly resource-intensive activity. This is due to the combined effect of the centralisation procedure and the absence of a threshold or standard criteria to admit a request.

With regard to the defendant's administrative burdens, Reg. No. 773/04 requires that the person interested in the protection of her information submits a request for confidentiality and provides a non-confidential version. It is doubtful whether this latter version, which is targeted to other parties of the administrative proceeding, can be considered as disclosable following a general access request under Reg. No. 1049/01. The standard of confidentiality is supposed to be higher for access by the general public than for access by parties in the proceeding. This being the case, in order to ensure potential plaintiffs partial access to the non-confidential version under Reg. No. 1049/01, an additional non-confidential version may be drafted, with additional costs for the defendants.

The plaintiff's administrative burdens in such a system are mainly linked to the fact that access, within a decentralised system, is to be sought from an administrative authority (the Commission or the NCAs) rather than against the defendant itself. Thus the specific procedural steps provided for in Reg. No. 1049/01 need to be carried out, *i.e.* submitting the form for requesting access and covering the material costs of having access to Commission facilities. These costs can, however, be considered negligible.

B3. Error Costs

As access to relevant information may be restricted, the risk of false acquittals (type II error) could be significant in some cases, especially if relevant evidence undermines the accuracy of judicial fact-finding. However, as in most cases information would be requested to litigate as a follow-on case (mostly following a conviction), the magnitude of Type II errors is likely to be very limited.

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[568] See para. 39 ff. of the Notice on the rules for access to the Commission file. Moreover, one should not ignore the likelihood of litigation based on alleged breaches of the confidentiality obligation of Article 287 EU Treaty.

B4. Harmonisation costs

Low or no harmonisation costs will be borne, since no legislative change is required and different regimes will be applied with regard to NCAs.

3.2.2.2 Access by national courts (option 7 in the Green Paper)

Option 7 involves an intermediate form of decentralisation of the system that is already in place. The information flow between the Commission and the court is regulated by Reg. No. 1/2003 and the Notice on Cooperation, within the broader framework defined by Articles 10, 255 and 287 of the Treaty. As a matter of principle, the court is entitled to request both confidential and non-confidential information. The Commission is obliged to verify that the transmission of sensible information to national judges does not cause a breach of its secrecy obligation and does not interfere with the functioning of the investigation system. Up to now, this obligation limits the extent of the cooperation between the Commission and the national courts[569]. In order to overcome this problem, an explicit rule on the confidentiality of the information transmitted to judges should thus be introduced.

National courts could be given access to the whole file, upon request of the party supported by *prima facie* evidence or *ex officio*. The transmission of the file would take place after fact-pleading, once the documentary evidence provided by the parties has clearly shown that access is necessary for deciding the case. However, the transmission of the entire file may take place only if the addressee judge's legal framework provides sufficient safeguards on the confidentiality regime established by Reg. No. 1/03. For this reason, a more effective cooperation between the Commission and national courts should imply that the information qualified as confidential by the Commission and received by the national court is included in a separate docket inaccessible to the parties of the civil proceedings[570]. The court's access would be aimed at levelling the information asymmetry between the parties and the judge: the information kept

[569] On the legal constraints on the transmission of documents between the EC and the National Courts, see par. 25 of the Notice on Cooperation between EC and National Courts, in *OJ*, 2004/C 101/04).

[570] A useful example of a similar system adopted in order to protect the confidentiality of the file transmitted by the NCA is represented by the rules governing the procedure to be applicable whenever the Office of Fair Trading applies to the Court for a *warrant* according to the 1998 Competition Act. The "practice direction" attached to the Civil Procedure Rules related to the issue of warrants provides for a specific confidentiality regime of the information transmitted by the OFT to the judge (see par. 3.3. of the Direction: "When a claim form is issued the court file will be marked 'Not for disclosure' and, unless a High Court judge grants permission, the court records relating to the application (including the claim form and documents filed in support and any warrant or order that is issued) will not be made available by the court for any person to inspect or copy, either before or after the hearing of the application").

secret would not be used to motivate the verdict, nor should it be disclosed to the parties.

In fact, the parties are given free access only to non-confidential information. The plaintiff is also allowed to ask for the disclosure of defendant or third party documents, according to the general disclosure regime. If the defendant (or the third party) objects to the disclosure, the judge is called on to render a decision based on two criteria: the utility of the information to the plaintiff with regard to the case, and the prejudice in favour of the defendant. This decision, however, will be taken by the judge on the basis of the potential knowledge of the whole file, with the possibility of carefully screening the requests and the objections to disclosure.

Compared to option 6 (see *infra*), this rule would have a more inquisitorial flavour due to the judge's monitoring role[571]. Indeed, constitutional concerns related to the due process and right to defence principles could be raised, since the judge would have different knowledge of the case than the parties. On the other hand, it would entail a broader scope, since it involves both the information held by the defendant and third parties, and would not endanger the Community confidentiality duty, which would also be extended to the judge. The actual disclosure of confidential information among parties would occur on the basis of the general disclosure regime, and the file transmitted by the Commission would not be the object of these disclosure requests.

A. BENEFITS

A1. Deterrence

The possibility to obtain access to confidential information under this option is greater than with option 1 (confidential if necessary according to the national law); and greater also than under option 6 (third-party information is not affected by that option, which involves only the document held by the litigants and handed over to the EC). This bears a positive effect on deterrence, thanks to an increased likelihood of civil conviction and more accurate fact-finding. However, despite the increased amount of accessible information, the absence of an automatic disclosure mechanism requires the fulfilment of the burden of specification and proportionality of the request. For this reason the actual access to information may be limited compared to option 6, and will moreover take place only after the proceeding starts, under the judge's disclosure order.

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[571] Unlike normal discovery, there is no real competition between the parties, in contrast with what Posner (1999) advocated for adversarial systems. However, since the right to exploit a "sunk" administrative cost (the public investigation) is at stake, uncontrolled *inter partes* competition might result in increased costs for both parties.

On the other hand, the likely increase of available information, compared to more radical options modifying the general access to evidence regime, is limited to follow-on cases, based on Commission decisions (without affecting the internal relationship between NCAs and courts). Thus in general its impact will be more limited. Moreover, compared to option 2, the amount of accessible information could increase with regard to the information needed to prove the infringement (which is more likely to be collected by the Commission) and third party non-confidential information, although it would be less relevant to additional information needed in substantiating private claims (involving causation and quantification). The net effect, in this case, could be positive. Compared to option 3, however, the broader access to relevant information specific to the private claim could offset the advantages of availability of information on third parties.

Moreover, with regard to the effectiveness of leniency programmes, this option may exert a negative effect, unless among the weighting criteria reference is made to the need to protect the applicant from information leaks.

A2. Corrective justice

Broader access to non-confidential information (available directly in the judge's file) may increase the likelihood that the plaintiff achieves optimal compensation of actual harm, without excessive prejudice for the defendant's interests. Moreover, the judge who decides on the disclosure of relevant (although confidential) information is better informed on the actual relevance of the request, and thus procedural fairness may be enhanced.

However, as only information gathered by the Commission is affected by this option, and the specific information needed by private claimants might not be included in the public investigation file, the impact compared to options 2 and 3 is more limited.

A3. Internal market

The optimisation of the information flow between the national courts and the Commission may have a positive impact on the uniform application of Community competition rules. However, since such a fine-tuning will not directly involve the relationship between the NCAs applying the Community rules and the national courts, the benefits will be fewer than in option 6, which provides for disclosure rules involving both the Commission and the NCAs.

B. COSTS

B1. Litigation costs

The proposed mixed rule aims at strengthening the information flow between the Commission and the courts, the availability of information for the parties

and the protection of commercial interests of the defendant and third parties. This is achieved by means of a court-managed system for access to evidence, which operates as a filter between the parties and the Commission.

With regard to access before commencement of the court proceeding, the suggested rule may have little effect: since the judge-managed system will be activated only when the fact-pleading has been issued, the prospective plaintiff will have to seek access to the Commission file by means of the general rules on transparency, with the same costs for both parties.

The defendant's litigation costs will increase due to the introduction of an objection phase before the court. Moreover, the incentive remains to behave opportunistically, *i.e.* groundlessly objecting confidentiality. However, the defendant will have to play with an "informed" player, the judge, more capable of distinguishing genuine confidentiality claims from strategic ones. Moreover, because access to information is not granted automatically (unlike in option 6), litigation will take place more rarely.

Moving to the plaintiff, pre-trial litigation costs are likely to be unaffected, compared to both the zero option and option 6: nevertheless, preventive access could be sought according to the general transparency rules. Litigation costs, instead, may slightly increase: since access to evidence is filtered by the judge, litigation with the defendant may arise and the judge may detect opportunistic behaviour by the plaintiff ("fishing expeditions"). However, compared to option zero, access is gained within the civil process and a chance to have access to sensible information, if necessary for the case, is given. Moreover, since the judge is the manager of the entire file, the plaintiff may also have access to third party information and thus to a larger stock of information than with option 6. In this case, however, there is the risk of third party involvement in the case, with a related increase in costs.

Finally, the fourth actor of the system, the national court, will probably face the highest cost increase compared to the other options. As a matter of fact, the court will have to balance the interests of the defendants and the plaintiffs. It can be assumed that part of the costs currently borne by the Commission within a centralised system would be shifted downstream to national courts.

Compared to options 2 and 3, this increase might be substantial. In the former case, the judge would keep the gatekeeper role only for broader disclosure requests. In the latter option, the judge intervention would be triggered ex post only if disputes on the extent of disclosure arise.

B2. Administrative burdens

The system could manage to alleviate the pressure on the Commission, stemming from the numerous access requests that could emerge with enhanced private enforcement. On the other hand, the administrative burden faced by the Commission in a direct access system will be shifted to national courts. Storage

costs, material management of the transmitted file and its disclosure, with the need to preserve the distinction among freely accessible and confidential information, will now be borne by national judges.

The defendant would face slightly increasing burdens due to the higher number of disclosure requests (increase in frequency). The administrative burdens for the plaintiff, on the other hand, seem negligible.

In conclusion, compared to a system where access is only sought through direct request to the Commission, the overall administrative burden is supposed to remain unchanged, if not slightly increased due to some possible overlaps between the Commission and national judges (*e.g.* duplication of requests at pre-trial and trial stage). On the other hand, the increase of administrative burden, compared to option 2 (even more with option 3), would be less significant, as the number of processed documents is probably lower.

B3. Error costs

Error costs are supposed to be reduced as a result of more accurate fact-finding, due to enhanced collaboration between the Commission and the courts.

B4. Harmonisation costs

The main concern with the implementation of this system would regard the risk of clashing with constitutional principles on right of defence and due process, since the parties would have different knowledge of the case than the judge, although the undisclosed information may not be used to render the final decision. This concern might represent a serious hurdle for many or most Member States that could hamper in principle the adoption of such an option. In order to adapt this option with constitutional principles, some procedural safeguards should be provided, with relevant changes in national procedure systems, maybe with reference to issues related to "secrecy of state" objections. For example, the file could be handled by a different judge (or administrative authority) from the one competent for the decision, which would decide on disclosure requests by parties. In any case, this would entail high harmonisation costs.

3.2.2.3 Defendant's disclosure of information provided to the Commission or the NCA (option 6 in the Green Paper)

This regulatory option would replace a centralised system for access to the file, managed by the public agency, with a decentralised one, managed by the parties themselves. The defendant at trial would face the obligation to disclose all the documents handed over to the public agencies during the administrative procedure, with the exception of information related to leniency applications and confidential information, as defined by the law of the forum.

A. BENEFITS

A1. Deterrence

Deterrence will probably increase, depending on the degree of disclosure allowed under national law. If access to confidential information becomes broader, two effects can occur[572]:

- as the probability of successful claims increases, victims will be encouraged to sue, thus enhancing deterrence;
- defendants will anticipate that, whenever they are found to have infringed competition rules, they might also be forced to disclose sensible information to (follow-on) private plaintiffs, thus facing more negative consequences. This also increases deterrence.

Compared to option 2, the differences on the amount of disclosed information and the related increase in the probability of success are likely to be minimal[573]. On one hand, within a more general framework on access, information specific to private claims might be available too; on the other, a minimal burden of specification is to be fulfilled. Option 3, however, would provide broader access to available information, involving both information handed over to the competition authority and specific information on causation and quantification, without the need to fulfil the burden of specification.

A2. Corrective justice

As far as increased access to information is granted thanks to judicial disclosure, a positive impact on corrective justice may derive from a decrease of litigation costs borne by the plaintiff in order to be correctly compensated. Moreover, the accuracy of the civil judgement would be enhanced. Finally, thanks to lower costs of access to justice, the number of compensated plaintiffs may also increase.

Again, however, compared to option 3 (and to a much more limited extent, option 2), access to information handed over to the competition authority might be not sufficient to substantiate all the elements of the private claim.

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[572] A potentially negative impact on deterrence would arise if national disclosure rules were allowed to interfere with the leniency programmes. For this reason, the exclusion (endorsed by the option itself) from disclosure of all information related to leniency application is to be considered essential in order to maintain coordination with the public enforcement system. Option 6 in the Green Paper specifies that leniency applications would not be covered by the litigant's right to request evidence handed over to the Commission or NCA.

[573] This statement is obviously limited to follow-on cases. For stand-alone claims Option 6 does not bear effects.

A3. Internal market

The adoption of a specific disclosure rule for all the information handed over to the Commission and the NCAs would achieve significant harmonisation of the coordination between public and private enforcers; thus the relative benefits in terms of levelling the playing field would be substantial. However, the exceptions of confidentiality and protection of business secrets would still be left to the law of the forum, which would leave national differences untouched.

B. COSTS

B1. Litigation costs

Compared to a centralised system, the decentralisation will provoke a substantially different allocation of costs, which will partially take place in a different moment (once the proceeding starts) compared to the general access to public information. Moreover, due to the fact that the information flow is not managed by a third party (the Commission or the judge), the contentiousness of the disclosure issue may increase, with a likely overall increase on costs.

Indeed, there is the risk of increasing unmeritorious objections of the defendant to disclosure. On the plaintiff's side, fishing expedition claims might be facilitated. Overall, this option would be closer to creating a "litigation culture" among the parties, who would probably end up spending more resources in litigating over the disclosure of confidential documents. Depending on how the law of the forum defines and approaches the protection of business secrets, such a system may also pave the way for frivolous suits, aimed not only at settling before trial at favourable terms, but also at securing access to valuable private information held by the defendant.

Duplicative costs may take place. In fact, in the pre-trial access is to be sought according to general rules; and the plaintiffs can cross-check the reliability of the defendant's disclosure. Afterwards, once the trial starts and if pre-trial access has been refused by the Commission, the plaintiff will seek access through the judge-managed system. In this case double costs will be borne by the parties involved (EC, parties, judge).

On the other hand, it may be assumed that the defendant's screening of the information would be more cost effective, especially compared to third parties (like a judge in option 7, but also within the actual zero option). Here, the defendant holds a complete knowledge of the file and may handle requests of confidential information more effectively.

The likely impact on the settlement rate depends on the amount of information that the plaintiff may gain access to, thanks to broader disclosure granted by national law. Indeed, under a general obligation to disclose, the parties will likely engage in some pre-trial voluntary disclosure.

In general this option may entail increased litigation costs, compared to a centralised system. These would be qualitatively similar to those entailed by option 3, but with some relevant quantitative differences. First of all, the risk of frivolous/blackmail suits is effectively limited, although not eliminated[574], as only follow-on claims are at stake and the information handed over to the authority is probably relevant to the case. Second, the amount of information subject to disclosure is much more limited (and more akin to option 2), thus less litigation over disclosure is likely. Compared to option 2, litigation costs could be considered similar (obviously only for follow-on cases). Indeed, although option 6 provides cheaper access to information (because *ex ante* judge intervention is not required), it does not include access to information specific to private claims, whose access will be sought at a higher cost through ordinary evidentiary means.

B2. Administrative burdens

The firm under public investigation (and later the defendant in a civil lawsuit) plays the pivotal role under this option. She will have to disclose the documents to the plaintiff and will be under an obligation to store the relevant information. The fee allocation rule, however, may redress this imbalance. To be sure, some costs are to be borne exclusively by the prospective defendant (for example, the storage and conservation of documents handed over to the competition authority, while awaiting the request in a future civil claim), whereas costs related to the actual disclosure (the material cost of access once accorded) are to be allocated according to the fee-rule. In this respect:

- under a "loser-pays" rule, these costs will be borne by the losing party;
- with one-way fee-shifting, the costs will remain with the defendant regardless of the outcome of the case.

Compared to a centralised system, these burdens here are shifted mostly to the defendant firm. Moreover, since the request is not mediated by the judge, disclosure is likely to take place more frequently. Some pre-trial access, in addition, may be equally sought in order to ascertain the likelihood of the claim's success before filing suit (although the fact that follow-on actions are at stake here may limit this incentive). On the other hand, most material costs of disclosure envisaged by option 6 are already borne during the public investigation, like the collection and selection of relevant information. The firm under investigation will just fall under an additional obligation to keep a list and a copy of evidence handed over to the authority, with the associated minimal storage costs.

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[574] This could happen due to the fact that, for example, an infringement sanctioned by the public authority for its object (*i.e.* under a *per se* rule) did not have any detrimental effect.

Compared to a pure public enforcement system, the additional administrative burden for the defendant would slightly increase due to the obligation to store the relevant information. However, administrative burdens borne by the Commission under the general access regime of Reg. 1049/01 would be reduced, as prospective plaintiffs would probably prefer to avoid the burdensome procedure on access to the file envisaged by Reg. No. 1049/01 as currently interpreted by the Court of First Instance, and would rather prefer to ask disclosure directly from the defendant. As a consequence, a general reduction of administrative burden could be observed.

This might be true also in comparison with options 2 and 3. Indeed, the number of documents to be processed under option 2 is likely to be higher, since this option also includes the possibility of gaining access to information that has not been handed over to the authority. This is even more evident with regard to option 3.

B3. Error costs

The increased amount of evidence available will reduce the risk of judicial errors, especially type II errors (false acquittals).

B4. Harmonisation costs

Additional harmonisation costs are mainly linked to the general regime on access to the opponent's evidence. If some form of general disclosure obligation is introduced with regard to antitrust claims (see options 2 and 3 of the Green Paper), the additional costs for evidence handed over to the authority would not be significant. On the other hand, the introduction of such a specific rule combined with option 1 would entail substantial harmonisation costs, due both to the existing differences in national legal traditions and to the broad scope of such a rule, which involves both the relationship between the Commission and national courts and the link between the NCAs and the courts.

Annex to the Section

Table 55 – Assessment of average administrative burdens for option 2

Activity/Item	Complexity of activity/minutes per item	Qualification level/fee per minute	Total
Collecting the required information/N=5000	Low/1	Low/0.32	€1,600
Assessing the required information and figures-data/N=5000	Medium/6	Medium/0.47	€14,100
Printing out – Recording the results/N=5000	Low/1	Low/0.32	€1,600
Checking and possibly correcting the results/N=5000	Low/1	High/0.7	€3,500
Consultation/N=11	High/34	High/0.7	€261
Explanations – Declaration/N=11	High/54	High/0.7	415
Total			**€21,476**

3.3 Summary tables on access to evidence

Table 56 – Zero option

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**1** • *low probability of claim being brought* • *low probability of success if claimant does not know the evidence to be disclosed*	**1** • *low probability of claim being brought* • *low probability of success if claimant does not know the evidence to be disclosed*	**1** • *low probability of claim being brought* • *low probability of success if claimant does not know the evidence to be disclosed*
Corrective justice	**0** • ***n. of compensated victims:*** *low number of cases due to high burden of specification and high fact-pleading* • ***alignment with actual harm:*** *limited availability of evidence reduces accuracy in assessment of damage*	**0** • ***n. of compensated victims:*** *low number of cases due to high burden of specification and high fact-pleading* • ***alignment with actual harm:*** *limited availability of evidence reduces accuracy in assessment of damage*	**0** • ***n. of compensated victims:*** *low number of cases due to high burden of specification and high fact-pleading* • ***alignment with actual harm:*** *limited availability of evidence reduces accuracy in assessment of damage*
Internal market	**0** • *stark divergences, especially between civil law and common law countries*	**0** • *stark divergences, especially between civil law and common law countries*	**0** • *stark divergences, especially between civil law and common law countries*
Costs			
Litigation costs	**1** • *very low number of cases* • *limited evidentiary activity* • *inequality of arms within the process*	**1** • *very low number of cases* • *limited evidentiary activity* • *inequality of arms within the process*	**1** • *very low number of cases* • *limited evidentiary activity* • *inequality of arms within the process*
Administrative burdens	**1** • *low number of documents to be processed*	**1** • *low number of documents to be processed*	**1** • *low number of documents to be processed*
Error costs	**3** • *low number of cases* • *narrow disclosure affects ease of proving the infringement*	**3** • *low number of cases* • *narrow disclosure affects ease of proving the infringement*	**3** • *low number of cases* • *narrow disclosure affects ease of proving the infringement*
Harmonisation costs	**0** • *no harmonisation*	**0** • *no harmonisation*	**0** • *no harmonisation*

Table 57 – Option 1 (Specific documents)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**1** • *low probability of claim being brought, especially for standalone cases* • *low probability of success if claimant does not know the evidence to be disclosed*	**1** • *low probability of claim being brought, especially for standalone cases* • *low probability of success if claimant does not know the evidence to be disclosed*	**1** • *low probability of claim being brought, especially for standalone cases* • *low probability of success if claimant does not know the evidence to be disclosed*
Corrective justice	**1** • ***n. of compensated victims:*** *low number of cases due to high burden of specification* • ***alignment with actual harm:*** *limited availability of evidence reduces accuracy in assessment of damage*	**1** • ***n. of compensated victims:*** *low number of cases due to high burden of specification* • ***alignment with actual harm:*** *limited availability of evidence reduces accuracy in assessment of damage*	**1** • ***n. of compensated victims:*** *low number of cases due to high burden of specification* • ***alignment with actual harm:*** *limited availability of evidence reduces accuracy in assessment of damage*
Internal market	**1** • *limited harmonisation among Member States; risk of forum shopping due to remaining differences (e.g. disclosure in the UK)*	**1** • *limited harmonisation among Member States; risk of forum shopping due to remaining differences (e.g. disclosure in the UK)*	**1** • *limited harmonisation among Member States; risk of forum shopping due to remaining differences (e.g. disclosure in the UK)*
Costs			
Litigation costs	**1** • *low number of cases* • *limited evidentiary activity* • *ex ante control on access requests by courts might slightly increase court costs*	**1** • *low number of cases* • *limited evidentiary activity* • *ex ante control on access requests by courts might slightly increase court costs*	**1** • *low number of cases* • *limited evidentiary activity* • *ex ante control on access requests by courts might slightly increase court costs*
Administrative burdens	**1** • *low number of documents to be processed*	**1** • *low number of documents to be processed*	**1** • *low number of documents to be processed*
Error costs	**2** • *low number of cases* • *narrow disclosure affects ease of proving the infringement* • *compared to zero option, slight reduction of type II errors (threshold would be lower than currently applied in many countries)*	**2** • *low number of cases* • *narrow disclosure affects ease of proving the infringement* • *compared to zero option, slight reduction of type II errors (threshold would be lower than currently applied in many countries)*	**2** • *low number of cases* • *narrow disclosure affects ease of proving the infringement* • *compared to zero option, slight reduction of type II errors (threshold would be lower than currently applied in many countries)*
Harmonisation costs	**2** • *minimum harmonisation: would entail a lowering of the threshold in many Member States*	**2** • *minimum harmonisation: would entail a lowering of the threshold in many Member States*	**2** • *minimum harmonisation: would entail a lowering of the threshold in many Member States*

Table 58 – Option 2 (Classes of documents)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *compared to option 1, incentive to sue increases due to higher probability of success* • *defendant may fear disclosure of a broad set of documents* • *impact is particularly high for standalone cases due to softened burden of specification*	**3** • *compared to option 1, incentive to sue increases due to higher probability of success* • *defendant may fear disclosure of a broad set of documents* • *impact is particularly high for standalone cases due to softened burden of specification*	**3** • *compared to option 1, incentive to sue increases due to higher probability of success* • *defendant may fear disclosure of a broad set of documents* • *impact is particularly high for standalone cases due to softened burden of specification*
Corrective justice	**3** • ***n. of compensated victims:*** *increase in number of compensated victims* • ***alignment with actual harm:*** *more accuracy in restitution*	**3** • ***n. of compensated victims:*** *increase in number of compensated victims* • ***alignment with actual harm:*** *more accuracy in restitution*	**3** • ***n. of compensated victims:*** *increase in number of compensated victims* • ***alignment with actual harm:*** *more accuracy in restitution*
Internal market	**3** • *partial harmonisation among different Member States; risk of forum shopping (in Common Law countries) is lower than in option 1*	**3** • *partial harmonisation among different Member States; risk of forum shopping (in Common Law countries) is lower than in option 1*	**3** • *partial harmonisation among different Member States; risk of forum shopping (in Common Law countries) is lower than in option 1*
Costs			
Litigation costs	**3** • *number of disclosure requests increases compared to option 1* • *low settlement rate, since access is granted only during trial* • ex ante *intervention by courts and deeper assessment on proportionality of requests*	**4** • *number of disclosure requests increases compared to option 1* • *low settlement rate, since access is granted only during trial* • ex ante *intervention by courts and deeper assessment on proportionality of requests* • *limited risk of fishing expeditions* • *"mixed claims" problem*	**4** • *number of disclosure requests increases compared to option 1* • *low settlement rate, since access is granted only during trial* • ex ante *intervention by courts and deeper assessment on proportionality of requests* • *risk of fishing expeditions when claimants are competitors*
Administrative burdens	**3** • *more documents to be processed*	**3** • *more documents to be processed*	**3** • *more documents to be processed*
Error costs	**2** • *number of cases increases compared to option 1* • *broad disclosure facilitates proof of the infringement, reducing statistical incidence of type II errors*	**2** • *number of cases increases compared to option 1* • *broad disclosure facilitates proof of the infringement, reducing statistical incidence of type II errors*	**2** • *number of cases increases compared to option 1* • *broad disclosure facilitates proof of the infringement, reducing statistical incidence of type II errors*
Harmonisation costs	**3** • *most Member States would have to adapt their own legal systems*	**3** • *most Member States would have to adapt their own legal systems*	**3** • *most Member States would have to adapt their own legal systems*

Table 59 – Option 3 (Initial Disclosure)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *compared to options 1 and 2, incentive to sue increases due to higher probability of claim being brought and probability of success of each claim (especially for standalone)* • *defendant may fear disclosure of a broad set of documents*	**4** • *compared to options 1 and 2, incentive to sue increases due to higher probability of claim being brought and probability of success of each claim (especially for standalone)* • *defendant may fear disclosure of a broad set of documents: risk of overdeterrence due to disclosure of confidential information not relevant to the case*	**4** • *compared to options 1 and 2, incentive to sue increases due to higher probability of claim being brought and probability of success of each claim (especially for stand alone* • *defendant may fear disclosure of a broad set of documents: risk of overdeterrence due to disclosure of confidential information not relevant to the case, especially when the claimant is a competitor*
Corrective justice	**4** • ***n. of compensated victims:*** *large increase in number of compensated victims* • ***alignment with actual harm:*** *accuracy in restitution*	**4** • ***n. of compensated victims:*** *large increase in number of compensated victims* • ***alignment with actual harm:*** *accuracy in restitution*	**4** • ***n. of compensated victims:*** *large increase in number of compensated victims* • ***alignment with actual harm:*** *accuracy in restitution*
Internal market	**5** • *highest degree of harmonisation among different Member States*	**5** • *highest degree of harmonisation among different Member States*	**5** • *highest degree of harmonisation among different Member States*
Costs			
Litigation costs	**4** • *initial litigation costs for plaintiffs may decrease* • *number of claims increases* • *likely increase in early settlements* • *risk of fishing expeditions and NEV claims* • *cost of ex post intervention by the judge*	**5** • *initial litigation costs for plaintiffs may decrease* • *number of claims increases* • *likely increase in early settlements* • *high risk of fishing expeditions and NEV claims* • *cost of ex post intervention by the judge*	**5** • *initial litigation costs for plaintiffs may decrease* • *number of claims increases* • *likely increase in early settlements* • *high risk of fishing expeditions and NEV claims* • *cost of ex post intervention by the judge*
Administrative burdens	**5** • *highest amount of documents to be processed* – inter partes *information obligations*	**5** • *highest amount of documents to be processed* – inter partes *information obligations*	**5** • *highest amount of documents to be processed* – inter partes *information obligations*
Error costs	**2** • *number of cases increases compared to options 1 and 2* • *broader disclosure facilitates proof of the infringement, reducing statistical incidence of type II errors*	**2** • *number of cases increases compared to options 1 and 2* • *broader disclosure facilitates proof of the infringement, reducing statistical incidence of type II errors*	**2** • *number of cases increases compared to options 1 and 2* • *broader disclosure facilitates proof of the infringement, reducing statistical incidence of type II errors*
Harmonisation costs	**5** • *most Member States would have to radically change their own legal systems*	**5** • *most Member States would have to radically change their own legal systems*	**5** • *most Member States would have to radically change their own legal systems*

Table 60 –Option 6 (compared with Option 1 alone)

	Cartels[575]	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *increase of probability of claim being brought* • *increase in probability of success*	-	-
Corrective justice	**3** • ***n. of compensated victims:*** *increase in number of compensated victims* • ***alignment with actual harm:*** *more accuracy in restitution*	-	-
Internal market	**3** • *level-playing field in information exchange between public and private enforcers* • *lower costs for cross-border claims*	-	-
Costs			
Litigation costs	**3** • *reduction of plaintiff's cost of access to information* • *increase of prospective settlements* • *increase of claims being brought* • *increase of litigation on confidentiality and ex post judge intervention* • *risk of duplicative costs* • *risk of frivolous suits*	-	-
Administrative burdens	**2** • *relevant amount of information to be processed by parties, though some costs are already borne in the public proceeding* • *possible reduction of direct access requests under Reg. 1049/01*	-	-
Error costs	**1** • *reduction of type II errors due to availability of information handed over to the competition authority*	-	-
Harmonisation costs	**4** • *need to adopt an ad hoc common disclosure system for follow-on claims*	-	-

[575] To be intended as "follow-on".

Table 61 – Option 7 (compared with Option 1 alone)

	Cartels[576]	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *increased probability of success, but not as in option 6 as incentive to sue is lower*	-	-
Corrective justice	**2** • ***n. of compensated victims:*** *slight increase compared with option 1* • ***alignment with actual harm:*** *better informed judge; access to third party information*	-	-
Internal market	**1** • *harmonised duty of confidentiality between EC and national courts, but does not involve the relationships between courts and NCAs*	-	-
Costs			
Litigation costs	**3** • *slight increase of number of claims* • *cost of ex ante judge intervention when defendant objects to disclosure of information* • *costly procedure to keep confidentiality of information*	-	-
Administrative burdens	**5** • *judge bears record-keeping costs to keep confidentiality of information* • *duplication of access request to the EC and during trial*	-	-
Error costs	**2** • *slight or no reduction of type II errors*	-	-
Harmonisation costs	**4** • *need to adapt national procedures in order to impose the EC confidentiality duty on national judges*	-	-

[576] To be intended as “follow-on”.

4 Damages

An important element of antitrust private enforcement is the definition and the quantification of the damage occurred as a result of an antitrust infringement. The concept of antitrust injury has been extensively analysed, especially after the US Supreme Court decision in *Brunswick Corp v. Pueblo-Bowl-O-Mat, Inc.*[577]. Whether all types of antitrust injury should give rise of a private right of action, is highly questioned in the literature. As a matter of fact, economists and lawyers agree that antitrust infringements may cause harm to a plurality of economic actors in various stages of the value chain; however, only a subset of these actors is granted standing to sue under antitrust law, at least in jurisdictions where private antitrust litigation is widespread, such as the US[578]. As we explained in the introduction to this Report, the welfare transfer from buyers to sellers and the welfare loss resulting from an output restriction are only a portion of the welfare effects that can be observed as a result of anticompetitive conduct. Additional negative impacts include the waste of resources in maintaining or achieving the anticompetitive equilibrium (*e.g.*, coordination costs to manage a cartel and monitor the behaviour of cartelists; rent seeking behaviour for the attainment of dominance[579]), losses not absorbed by the demand curve, such as the "umbrella effects" of non-competitive markets, ranging from negative impacts on employment to loss of investment, opportunity cost of inefficient resource allocation, and welfare losses incurred by fringe firms when the market is cartelised. These effects are borne by competitors, upstream suppliers, downstream purchasers, but also by consumers, due to the deadweight loss occurring not only as a result of the output restriction imposed by the cartel, but also of the adaptive behaviour of fringe firms[580].

However, only part of these negative welfare impacts can be actually compensated through private damages actions, either due to standing limitations or because proof of causation is too difficult. The example of cartels is enlightening. As recalled by Connor (2000), we can distinguish five groups potentially exposed to economic damage from a price-fixing conspiracy:

a) *direct purchasers*, downstream firms or final customers, who pay the cartel overcharge for their inputs or final products;

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[577] 429 U.S. 477 (1977).

[578] Note that, as we explained in the introduction to this Report, in Europe the ECJ *Manfredi* decision granted standing, in principle, to any individual who suffered harm as a result of antitrust infringement. See *supra*, note 35 and accompanying text.

[579] See Hovenkamp (1989), defining this welfare loss as WL2.

[580] Defined as WL3 in Hovenkamp (1989).

b) *customers who did not purchase from cartel members but from fringe firms* outside the cartel, but within the same relevant market, that charge a *higher* price as a non-cooperative response to the cartel price[581];

c) *indirect purchasers who pay inflated prices for products that contain the cartelised input* (if the overcharge is partly passed-on by direct purchasers to the next layer of the supply chain);

d) *purchasers* who would have purchased the cartel product at a competitive price, *but who either do not purchase at all or purchase a less-preferred alternative outside the cartel*; and

e) *suppliers to the cartel or to other firms who sell products that contain the cartelised input*, who both sell less because of the output contraction at the cartel *price*.

Although *Courage* and *Manfredi* do not envisage any *ex ante* standing limitation, transaction costs – more specifically, the costs of proving the injury suffered before a court – would make it impossible for some of the victims to claim adequate compensation. Problems in access to evidence or lack of incentive to sue might endanger both the corrective justice and the deterrence objective, whenever a subset of potential "private attorney generals" can sue for recovery of their own damage, thus leaving the infringer with a residual share of the illegal gain occurring from the infringement, or also when the probability of punishment is low. This may raise some questions on whether the claimant should be empowered to claim an amount of damages higher (or lower) than its own in order to either increase the overall magnitude of damages that can be claimed or to reduce the transaction costs in proving its claims. A tension between corrective justice and the deterrence objective of antitrust enforcement might thus arise, due to the fact that, according to the latter, the optimal sanction often exceeds the damages actually caused by the infringing conduct[582].

If damages are defined with an eye to both optimal deterrence and perfect compensation, plaintiffs should be able to recover all the social loss stemming from anticompetitive conduct, including the various forms of deadweight loss resulting from restrictions of competition. The reason for this is that, from an *ex ante* perspective, economic actors should be led to engage in socially harmful conduct only in the fairly limited subset of cases where the private gain resulting from the infringement is greater than the overall loss imposed on society – in other words, when the conduct is "Kaldor-Hicks efficient" (or "potentially Pareto-efficient"). When this is the case, after damages are awarded, society as a whole would remain better-off. Without damage

[581] This is the so-called "umbrella effect" of a cartel.

[582] See above, Section I.1.1.1 for a description of the theory of optimal deterrence and optimal sanctions.

compensation, important concerns as to the welfare consequences of anticompetitive behaviour may arise, as is normally the case for conduct justified in terms of Kaldor-Hicks efficiency[583]. More generally, incentives to behave efficiently are reached whenever the would-be infringer internalises all the negative externalities that her privately profitable conduct would impose on society. This also means that, when deciding whether to engage in anticompetitive conduct, the infringer should be confronted with an expected penalty which represents, or approximates, the social loss that would occur as a direct consequence of such behaviour.

Since the seminal paper by Landes (1983), a relevant part of the US law and economics literature relied on the assumption that antitrust damages are awarded with the overarching goal of deterring firms from engaging in socially inefficient practices[584]. This literature is mainly based on the US experience, where several features of the private enforcement system support this view and private antitrust litigation is highly developed. By assuming welfare maximisation as the predominant aim of antitrust enforcement, the definition of "optimal sanction" refers to the measure of damage that deters inefficient behaviour at the lowest possible cost. The conceptual tools identified in the economic theory of crime and punishment, as developed by Becker (1968) and applied by Stigler (1970) to the enforcement of legal rules in general, were also applied to the antitrust realm. In Landes (1983), the optimal sanction would equal the "net harm to persons other than the offender". This view – typically endorsed by the Chicago school – has important consequences on several aspects of private antitrust enforcement, which were analysed by Page (1985) under the broad notion of the "scope of liability", and include the determination of damages to be awarded (*i.e.*, the antitrust injury), the individuation of the potential plaintiffs allowed to sue (standing) and the treatment of the passing-on issue.

In this section, we address the problem of damages in private antitrust enforcement by analysing in detail two main issues. First, we look at the definition of those types of antitrust injury that give rise to a private right o action under antitrust law. This inevitably dwells on the identification of the "types", or "headings" of damages consequent to antitrust violations. Secondly, we explore the technical methods used to calculate the magnitude of each type of damages, and their associated advantages and shortcomings.

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[583] See, i.a. Calabresi, The Pointlessness of Pareto. Carrying Coase Further.

[584] W. H. PAGE, The Chicago school and the evolution of antitrust: Characterization, Antitrust, Injury and Evidentiary sufficiency, 75 VA. LAW REVIEW, 1221 (1989).

4.1 Types of awarded damages

The definition of types of awarded damage has been undertaken both by legal and economic scholars. It heavily depends on the theoretical view expressed on the goals of antitrust law and, consequently, on the scope of liability for the infringement of antitrust rules. As regards the quantification of damages, the "scope of liability" is the most relevant issue. As stated by the US Supreme Court in *Brunswick*, antitrust injury represents the injury plaintiffs suffered from the anticompetitive aspect of the defendant's conduct. Page (1985, 1990) puts together the concepts of antitrust injury and optimal sanction, by interpreting the former as a first approximation of the latter through the standard of proportional variation. This standard implies that direct causation is found whenever the alleged harm varies in direct proportion to the output restriction resulting from the infringement. This criterion is then used both for the determination of actual losses and lost profits.

An equally important goal of antitrust enforcement is corrective justice. Scholars sharing this view have proposed a different approach, which recognises the compensation aim as being equally important. Accordingly, damage measures that compensate individual harm cannot be seen purely as instruments to achieve deterrence: they must make the plaintiff "whole", by exactly compensating the harm suffered[585]. This does not mean that private enforcement should set aside the goal of minimising the social cost of monopoly; to the contrary, it should adequately consider all components of such social loss, including the harm suffered by competitors (whereas the Chicago School approach includes these costs in the damage assessment only if they are linked to the antitrust infringement according to the standard of proportional variation)[586].

These partly diverging approaches have important consequences on the practical determination of the type of damages that can be awarded and on their quantification. As underlined by Crane (2006) every theory of damages has its root on a corresponding liability theory, *i.e.* on the criteria used to determine whether antitrust injury resulted from the anticompetitive behaviour of the defendant. In other words, every theory of the *quantum* descends from a corresponding theoretical framework to identify the *an debeatur*, *i.e.* the scope of liability. As a matter of fact, if antitrust injury were assessed with reference to the sole standard of proportional variation, the damages awarded would only be limited to those accruing from the output restriction. To the contrary, if antitrust injury is defined more broadly, and linked to the legal notion of

[585] See, *e.g.*, Hovenkamp (1989) and Fisher (1990), the latter with broader reference to general damages.

[586] This is defined as WL3 loss in Hovenkamp (1989).

causation, a broader set of losses would be included in the awardable damages, and standing would be granted to a larger set of victims[587].

In many respects, the economic theory reconciles the two views on the matter, by postulating that the penalty should equal the net harm inflicted to third parties by the infringement (*i.e.* the social cost). According to Polinsky and Shavell (1994) such penalty would deter inefficient behaviour, *i.e.* behaviour causing higher social costs than private benefits, whereas efficient infringements would not be deterred, as the infringer can keep some profits even after having paid damages. The main difference between the two approaches rests on the determination of social harm, especially with regard to infringements that do not necessarily result in output restrictions.

In this respect, there appears to be substantial consensus on the need to include the harm suffered by competitors and directly caused by the infringement in the category of damages that can be claimed under antitrust laws. Where the economic theory fails to "square the circle", is in indicating whether other negative effects arising from antitrust infringements should be included in the category – and how.

The tension between the deterrence-based view and the compensation-based view of antitrust enforcement is reflected also in the models adopted by courts for damage quantification. Below, we assess the welfare consequences of the options identified by the European Commission in the Green Paper for breach of the EC antitrust rules.

4.2 Impact assessment

Among the regulatory options proposed in the Green Paper, one is based on the loss suffered by the claimant (option 14), whereas another implies that damages are calculated based on the illegal gain made by the infringer (option 15). As will be shown, there might be significant differences in the adoption of one basis or the other. These differences need to be carefully taken into account in evaluating the potential impact of private antitrust enforcement. However, it can be already anticipated that a definitive choice in favour of either criterion is hardly possible, as there is no one-size-fits-all rule when it comes to the basis for damage calculation. Indeed, most often, the choice of the quantification rule lies in the interpretative power of the judge. For example, whenever reliable information on the loss suffered by the plaintiff is not available, a gain-based

[587] The difference is especially relevant for those types of infringements that do not necessarily result in output restrictions, such as price discrimination or exclusionary conduct; as well as for harm suffered by non-equally efficient competitors. The most evident effects of the different attitude towards the scope of antitrust liability regard the determination of actual loss, lost profits and prejudgement interest.

damage award may be considered as a suitable proxy in assessing amount of compensation to be granted[588]. Furthermore, it must be taken into account that, according to the ECJ *Manfredi* decision, damages actions based on art. 81 of the Treaty are mainly aimed at restoring the harm suffered by the victims. This principle does not eliminate the possibility that punitive or exemplary damages are used, but sets a minimum level of compensation. This implies that gain-based calculations would be consistent with the ECJ jurisprudence only in two cases – *i.e.*, whenever such methods provide a proxy for the determination of harm; and whenever they lead to an amount of damages greater than the suffered harm.

Accordingly, we analyse the gain-based method of calculation not as a separate regulatory option, but as a complementary method to the harm-based one. For similar reasons, we will not include the choice of the method of damage quantification in the scenarios analysed in Part III of this Report: as a matter of fact, as will be explained in more detail below, we consider that a rule that leaves the choice of the basis for defining damages in the hand of the judge would strictly dominate any other options in terms of desirability and prospective efficiency. After all, such rule is consistent with the current practice in many national courts, and thus does not necessarily require intervention at EU or national level.

4.2.1 Compensatory damages

The compensatory principle is based on the idea that a person that suffered antitrust injury has to be made whole of the loss sustained. Reference to the loss sustained is also the most common element taken into account in tort law systems[589]; hence, it can also be defined as the "zero option", or the regulatory option that would be automatically applied to the large majority of antitrust claims, absent any intervention at EU or national level.

Based on this option, the plaintiff is entitled to claim damages equal to the loss or harm suffered, in order to be placed back in the same situation in which she would have been, had the harm not occurred. The concept of harm includes both the *damnum emergens* and the *lucrum cessans*. Moreover, in fault-based tort systems damages may not be awarded for harm suffered by the plaintiff due to its negligence, since the lack of diligence affects the causation link between the infringement and the loss occurred (in French-like systems); or makes it impossible to include the harm within the scope of protection the infringed rule

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[588] A similar approach has been endorsed also in an impact assessment study carried out by the UK Law Commission in 1999. The Law Commission, Item 2 of the Sixth Programme of Law Reform: Damages – Aggravated, Exemplary and Restitutionary Damages (Law Com no. 247/1999), Part III: section 3(1), paras 3.38-3.47

[589] The principle of full reparation is common in most legal systems, see from a comparative point of view Van Gerven, Lever and Larouche, *Tort law*, 2000, Hart, at 770 ff.

awards to the plaintiff (in UK and German-like systems, based on the proximity principle). Hence, in ordinary tort law the plaintiff's behaviour and its duty to mitigate the effect of the infringement must be taken into due account.

Another aspect that deserves being mentioned is the scope of damage compensation – *i.e.,* the headings of damage that can be recovered. The loss to buyers caused by a restriction of output is widely accepted as eligible for compensation, although competitors would only be entitled to claim damages if they prove that the harm they suffered was causally linked to the output restriction[590]. This view is, however, rather questionable if seen from a dynamic perspective, which takes into account also time and investment decisions. Exclusion of equally efficient competitors or pre-emption of new product developments are to be considered socially harmful as well as the loss sustained by a purchaser. The inhibition of efficient investment deprives the market of a future potential output increase, product differentiation, lower prices, higher quality, etc.; as a result, it would have to be considered as social loss directly caused by the infringement, whenever direct causation is proven. Compensation of this harm also allows for greater deterrence, and approximates the goal of providing would-be infringers with efficient incentives, in that they internalise to a larger extent the negative externalities created by their conduct.

As regards the related issue of the probability that a claim is brought and the likelihood of success, some categories of harmed individuals or firms may not be able to prove the harm suffered or the causation link (typically the buyers who did not buy the good due to the higher price, which would be entitled to part of the deadweight loss). The fact that many of these plaintiffs would not be granted standing could lead the overall social harm (H^s) to be higher than the private harm compensated through antitrust damages actions (H^p). Thus, if D are the damages awarded in court,

$$D = H^p < H^s$$

With regard to the qualitative impact assessment of this regulatory option, and in line with the assessment of all the other issues in Part II of this Report, three main categories of effects are examined: a) the effects on deterrence, b) the impact on the goal of enhanced corrective justice; and c) the likely associated costs, especially litigation costs, error costs, administrative burdens and harmonisation costs.

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[590] This point is stressed by Page (1988), but criticised by Hovenkamp (1988).

A. BENEFITS

A1. Deterrence

The deterrence impact of private antitrust damages actions must be analysed mostly with reference to the *ex ante* perspective of the would-be infringer. In this respect, effective deterrence requires that the infringer compares the expected penalty with the expected benefit of undertaking an illegal conduct. This, seemingly, points at the illegal gain – more than the private harm suffered by the plaintiff - as the most useful basis for calculating the damage. Nevertheless, the law and economics literature offers some strong arguments that reconcile the adoption of harm-based damage awards with the quest for optimal deterrence. From a deterrence perspective, harm-based damages are deemed to be optimal since they deter only inefficient infringements, *i.e.* infringements where the private gain for the infringer is lower than the harm caused to society[591]. In this respect, harm-based damages are closer to the deterrence goal, the closer the damage measure is to overall social harm.

As observed in the literature, whenever a given conduct produces a sufficiently large private benefit for the infringer, including an efficiency increase, the conduct is not deterred by a harm-based damage award. However, thanks to the harm-based award, the victims of the illicit behaviour (the buyers) will be made whole of the damages suffered. In theory this setting is Pareto efficient, since consumers are not worse off, thanks to the compensation received; and at the same time, the infringer which decided to engage in antitrust violation still enjoys a residual gain.

As a result, we consider harm-based damage measures to achieve significant deterrence especially for anticompetitive conducts causing harm to a limited – or in any case, precisely identifiable – number of individuals or firms. If most of the potential plaintiffs are easily identifiable and have reasonably easy access to justice, then harm-based damages may approximate efficient deterrence (for example in exploitative abuses or contractual claims). In these cases, victims are likely to be in the most suitable position to claim the harm caused by the infringement, including the deadweight loss. In such a situation, the recoverable private harm and the social harm would coincide.

Potential risks of under-deterrence under single harm-based damages – which are, however, unlikely to be solved by adopting the gain-based method – arise in the following cases:

- *when the private gain from the infringement is higher than the private loss that can be compensated, but the social harm provoked by the infringement is higher than the private gain*. In this case socially undesirable behaviour is not deterred by a

[591] See Page (1985) and Landes (1983) on antitrust damages, and more generally Shavell & Polinsky (1994).

harm-based damage that does not take into account the overall deadweight loss. As stressed above, the possibility that some victims may find difficult proving the harm suffered may provoke a divergence between the private (or compensable) harm and the social harm. This situation is likely to occur for infringements that produce both an output restriction and some efficiency gains for the infringer. In this case, if the efficiency gain is lower than the deadweight loss caused by the input restriction, the behaviour would be socially wasteful even after damage compensation, if recovering the deadweight loss is burdensome and costly.

- *When the infringement is concealed and difficult to detect*. This is typically the case of naked cartels, especially when the goods or services are directly sold to small buyers and/or passed-on damages need to be recovered by final consumers. In such a case, the probability that the negative consequences of the infringement are actually borne by the infringer is substantially lower than 100%. This is due to the fact that the infringement may not be detected neither by the public agency nor by private enforcers, since dispersed buyers having suffered scattered damages might not have sufficient incentives to sue. According to the theory of optimal deterrence, when the punishment is uncertain, the penalty should be set equal to the expected gain; this, in turn, means that the damages awarded should be equal to the gain divided by the probability of detection. In the case of concealed infringements, as we observed in Part I of this Report, single harm-based damages alone are unlikely to deter the infringement, even if coupled with heavy public fines[592]. As a matter of fact, the administrative fines have to be discounted for the probability of detection, since once the cartel is discovered the *per se* prohibition and the tough attitude towards hard core violations will very likely lead to administrative conviction of the cartelists. The amount of private damages, on the contrary, needs to be discounted twice, by the probability of detection and the probability that successful claims will be filed and that damages will ultimately be awarded. This requires additional efforts due to the need to coordinate plaintiffs, prove causation (or proximity of harm suffered) and fulfil the burden of proof with respect to the *quantum*.

[592] In naked cartels, the additional deterrent effect due to public enforcement has to be added, in order to check the overall deterrent effect of the enforcement of prohibition. As we observed in Part I of this Report, with the recent modification of the Fining Guidelines in 2006, the European Commission committed itself to a gain-based method for determining fines in cartel cases. This method implies that a percentage (equal to 30% for cartel cases) of affected commerce has to be taken into account in order to establish the basic fine. It is arguable whether this share of the affected commerce would represent a fine equal to a double or a single measure of the overcharge of the cartel.

Harm-based methods can also affect deterrence when quantifying the harm is difficult. This effect might have different effects on deterrence, depending on the type of infringement. As regards follow-on litigation on cartels, individual small claimants could find it more difficult to prove the loss sustained, whilst (at least some) information on the defendant's gain could be rather easy to find in the text of the administrative decision. This, in turn, could lead to under-deterrence, due to the negative impact on probability of success of the claim.

To the contrary, in foreclosure cases (especially in exclusionary abuses), basing the calculation on the harm might have a different effect, as difficulties in the assessment of the exact harm suffered could provide the plaintiff with an incentive to inflate it. This can have two different effects, on deterrence and, as a consequence, on litigation costs. With regard to the former, from an *ex ante* deterrent perspective, the risk of over-deterrence is limited, especially in comparison with multiple damages[593] and *gain based* systems (see next para). The plaintiff's threat to *aggravate* damages is not credible, since it does not bring about the application of a multiplier; however a slight increase of deterrent effect could derive from the risk that the amount of damages is opportunistically *inflated* within the quantification process, by exploiting the technical difficulties in determining the harm. This holds especially in the case of competitor plaintiffs, where measuring the loss suffered as a result of the infringement and separating it from other losses that are not directly generated by the defendant's conduct may prove particularly difficult. On the other hand, the incentive of the plaintiff to behave strategically in the quantification of damages can make its assessment more contentious between parties. As a consequence litigation costs might slightly increase. (see sec. B1)

In summary, *harm-based damage measures are generally compatible with the deterrence goal, although infringements with low detection rate such as naked cartels may face a problem of suboptimal deterrence*. As will be clarified below, for naked cartels neither gain-based nor harm-based damage measures can be said to achieve optimal deterrence, due to the very low detection rate. Compared to a pure gain-based rule, though, there is at least some possibility to claim compensation of the deadweight loss (although proof of causation and magnitude of damage would most often be difficult).

[593] Such aspect was carefully scrutinised within the debate on treble damages in the US. For example, Breit and Elzinga underline that with treble damages, the plaintiff has no incentive to limit the losses it suffers, given that it will recover a trebled amount – thus, damage recovery will more than compensate any additional loss, see Breit – Elzinga, The antitrust penalties: a study of law and economics, New Haven, 1976, 64.

A2. Corrective justice

Unlike the deterrence aim, the corrective justice view is mainly based on an *ex post* analysis of the enforcing system, since it is based on the idea that once the tort is committed, law enforcement should aim at restoring the *status quo ante*. The link between harm-based damages and corrective justice is rather straightforward, and was extensively analysed in the literature, even with reference to the definition of corrective justice provided by Aristotle in the *Nicomachean Ethics* already in 350 B.C. Since then, authors that have extensively analysed the issue of corrective justice in tort law include Fletcher (1972), Epstein (1973), Borgo (1979), Coleman (1980) and Posner (1981). As was more recently stated, the idea of corrective justice "embodies a notion both of the relationship of the remedy to the injustice that it remedies and of the relationship between the parties to that injustice" (Weinrib, 2000). Within this framework, a central element is represented by the concept of *correlativity* between the injustice (*i.e.,* the tort) and the remedy provided by law. As long as the remedy is apt to undoing the injustice provoked, the remedy is consistent with the corrective justice objective.

Traditionally, the compensation of loss suffered is seen as perfectly consistent with the correlativity principle, as far as the harm is linked to the tort committed by a causation link. From the viewpoint of perfect corrective justice, thus, a harm-based penalty does not pose any conceptual problem. In addition, reference to the harm is essential in order to apportion the damages to be awarded in multiple plaintiffs cases: with gain-based methods, damages need to be apportioned with reference to other criteria (*e.g.* market share), which however might not leads to correct apportionment.

Some practical problems emerge in the application of harm-based damage measures to private antitrust litigation. First, for some types of infringements it may be difficult to define the harm directly caused by the infringement. Secondly, failing to define precisely the scope of the duty to mitigate the loss imposed on the plaintiff may cause over-compensation, or compensation of losses that are not directly linked to the infringement. This is an often obtained result in tort law, whenever fault-based or strict liability rules are not coupled with adequate rules on contributory or comparative negligence in bilateral accidents[594]. Cases of overcompensation may occur, for example, whenever the foreclosed plaintiff manages to recover inefficient lost investment (this is especially true for exclusionary abuses). In this case, the investment would have been socially inefficient even if the infringement had not taken place; hence, including the corresponding loss in the damage award would represent an undeserved windfall for the recipient.

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[594] See, *e.g.* Shavell (1982).

A similar reasoning can be drawn more generally with regard to the failure to mitigate defence in foreclosure cases. In these cases, the difficulties for the defendant in rebutting the claimant's allegations might lead to over-compensation. As showed by Lambert (2006), by not taking into account the failure to mitigate the loss, there is a serious chance that inefficient competitors would be compensated, which in turn leads to over-deterrence of otherwise efficient conducts; the opposite, on the contrary, would hold for failure to mitigate in buyers-sellers relationships[595]. The difficulties in ascertaining the reasonableness of the behaviour carried out by the claimant may make the "failure to mitigate" issue rather contentious (see Milutinović, 2007 and the *Arkin* case).

Another limit of the "compensatory approach" to damage calculation is that the deadweight loss stemming from the violation remains most often uncompensated, although some consumers/competitors suffered it. This means that from an overall welfare perspective, full compensation may not be achieved through compensation of the sole private harm claimed in court. In this respect, the potential for harm-based damage measures to achieve full compensation heavily depends on the rules on standing to sue for recovery of damages. Whereas lack of compensation of the deadweight loss is mostly inherent to the nature of the harm (affecting only potential transactions), the corrective justice goal may be further undermined by the fact that actual harm (*i.e.* that took place as a consequence of the infringement) is not compensated due to problems in proving causation, which leads to lack of (or too costly) access to justice. This aspect is specifically dealt with in the next section.

A3. Internal Market

The adoption of an explicit harm-based method would not bear significant consequences for the internal market, since all Member States already refer to the injury suffered by the victims in their tort systems. In general terms, the compensatory nature of damages is already a standard principle in all Member

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[595] Lambert (2006) developed a model analysing the efficiency of a failure to mitigate defence with regard to different type of damage measurement (overcharges and lost profits). In case the damage award is limited to the buyer-seller wealth transfer, *i.e.* the actual overcharge suffered by the plaintiff, Lambert argues that such a defence may be inefficient, as it lowers the deterrent effect of the penalty, without any additional value for the plaintiff. See Lambert (2006), *The "failure to mitigate" defense in antitrust*, 51 The Antitrust Bulletin 569, at 573. The same problem has been analysed also by Esquibel, *The rule of avoidable consequences in antitrust cases: A law and economics approach*, in 26 Hofstra L. Rev., 891, (1998) and Hamilton and Cone, *Mitigation of antitrust damages*, in 66 Oregon L. Rev., 339 (1987). A similar problem is the disaggregation of antitrust damages, which requires plaintiffs defining with precision the part of damages claimed which is linked to the specific antitrust offence, see Royall, *Disaggregation of antitrust damages*, in 65 Antitrust Law Journal, 311, (1996).

States. Harmonisation would take place as regards the limited subset of countries where punitive damages can be awarded (Cyprus, Ireland, UK). However, it must be recalled that in no competition case punitive damages have been awarded to date in these countries[596]; thus, the risk of forum shopping would still be limited.

B. COSTS

B1. Litigation costs

High litigation costs may hamper the achievement of compensation for plaintiffs; as we illustrated in Section II.1 above, the plaintiff will have an incentive to sue whenever the expected amount of litigation costs is lower than the expected damage award. Accordingly, the greater are litigation costs, and the lower the probability to win in court or settle successfully, the lower would be the incentive to file suit. This in turn affects deterrence, by making the threat of private damages actions less credible[597].

By the same token, the impact of a harm-based rule on litigation costs is mainly linked to the initial information endowment of the parties and the potential to solve existing asymmetries in information. For this reason, a distinction has to be drawn among different categories of plaintiffs, defendants and infringements. In particular, we distinguish between litigation costs borne by the plaintiff, and litigation costs imposed on the defendant for different types of allegation.

As regards litigation costs borne by the plaintiff:

- a harm-based method of calculation generally appears to favour the plaintiff: as the harm occurs within her sphere of rights, she should be in a favourable position to collect the relevant private information needed to quantify the damage. This, in turn, means that a harm-based definition of damages would mitigate the claimant's litigation costs, with a positive effect on the incentive to sue and consequently on the deterrent effect of the overall private enforcement system. This may be true for some categories of plaintiffs (direct purchasers or competitors), which usually hold sufficient

[596] One exceptional case of punitive/multiple damages has been recently sentenced by an Italian judge within the Motor Insurance Litigation. This was possible since, according to Italian law, the small-claims judge is allowed to quantify the damages award on the basis of equitable considerations (art. 113 2nd para Civil Procedure Code). Within this discretion, the *Giudice di Pace di Bitonto*, sentenced double damages against the Insurance Company participating in the Motor Insurance Cartel, see decision GdP Bitonto, 21st of May 2007, *Manfredi/Lloyd Adriatico*.

[597] The focus of the economics of litigation is mainly related to the incentive of the plaintiff to sue and the impact of civil/criminal procedural rules on that incentive and on the overall litigation costs (Spier, 2005). In turn the private incentive to litigation and the consequent costs have an impact on the compliance rate (Kaplow, 1994).

private information on the harm suffered, due to different reasons – *e.g.* proximity to the infringer, frequency of interaction with the infringer, magnitude of the harm, harm borne by a limited number of persons, business expertise, etc.

- Furthermore, some infringements are clearly aimed at harming precisely identifiable actors, which may find it difficult to pass-on any loss downstream to other economic actors. This is typically the case of exclusionary abuses (*e.g.* refusal to supply). In these cases, a harm-based quantification involves an efficient allocation of litigation costs between the parties, since the claimant has a stronger incentive to gather the relevant information on harm and bears the lowest costs of providing the necessary evidence.
- Other infringements and categories of plaintiffs exhibit different features. For example, final consumers or indirect purchasers usually face substantial costs in assessing the harm suffered. Their private information endowment may be limited, since they suffered the effects of remote infringements passed-on along the value chain. The unavailability of private information on the harm occurred may not be complemented by public information, *i.e.* the one collected within public enforcement and available in follow-on claims, especially for *per se* infringements.

Concerning the litigation costs borne by the defendant, a harm-based method of calculation does not solve the problem of the "failure to mitigate" defence and the determination of lost profits, especially where the determination of harm is contentious and the plaintiff may strategically inflate the suffered prejudice (*e.g.* for foreclosure cases, and especially in exclusionary abuses). As shown above, in order to efficiently apply harm-based damages, only injuries directly linked to the infringement have to be taken into account. Thus, the defendant should be allowed to prove that the harm claimed was not directly caused by the infringement, or that the plaintiff's failure to mitigate led to the emergence of a loss. Proving the opponent's failure to mitigate may be quite costly for the defendant, as such proof would be mainly based on private information held by the claimant. Accordingly, when such defence is allowed litigation costs would probably increase (see also above, A1). If no failure to mitigate defence is allowed, litigation costs for the defendant *per case* may be lower; however, total litigation costs may increase, as the impossibility of a "failure to mitigate" defence increases unmeritorious victims' incentives to sue[598].

Furthermore, the choice of the method of calculation may also exert an impact on the enforcement costs, *i.e.* the cost of using the judicial system, especially

[598] A similar reasoning can be applied to the determination of the plaintiff's lost profit: this determination is mainly based on the private information of the plaintiff, whereas the defendant faces substantial costs to rebut it.

since it may affect the settlement rate. In particular, if the information asymmetry between the parties is significant, also the parties' expectations regarding the outcome of trial may diverge; in this respect, a harm-based method of calculation may negatively affect the settlement rate, since the harm is assessed according to information that is privately held by one party (the claimant).

In general, the calculation of damages requires a comparison between existing and observable evidence (the post-infringement "state of the world") and the "counterfactual", as will be explained in more detail in Section II.4.3 below. In this respect, the victim's incentive to sue and invest in litigation increases: (i) the larger is the loss suffered; (ii) the more proximate the loss sustained is to the infringement; and (iii) the smaller the number of other claimants. The opposite holds for the defendant, especially in the case of costly litigation between competitors. The overall effect might lead to more litigation and related costs.

B2. Error costs

The impact of the proposed option on error costs is mainly linked to the risk that defendants are forced to compensate harm that is not directly caused by their behaviour. This effect mirrors the risk of over-compensation highlighted above, and occurs also whenever there are differences between the actual harm suffered and the damage claimed in court, due to the difficulties the defendant may face in rebutting the plaintiff's allegations on the *quantum* of damage. This risk is especially relevant whenever the plaintiff holds the relevant private information on harm suffered, *i.e.* claims involving competitors or direct purchasers.

B3. Administrative burdens

There are not foreseeable effects on administrative burdens linked to this option, as no significant additional information obligation would be imposed on either private parties or public enforcers.

B4. Harmonisation costs

Whereas punitive/exemplary damages can only be applied in a limited number of countries (UK, Ireland and Cyprus), all European jurisdictions adopt the harm-based method as a general rule in tort law. This regulatory option, thus, would require very low or no harmonisation costs.

4.2.2 Disgorgement of profits

Disgorgement of profits is an exception to the principle according to which damage awards should be "restitutionary", and provides an alternative method of assessing damages[599]. With this method, damages are quantified based on the profit (or gain) made by the infringer(s) as a result of unlawful conduct. This option has been sometimes put forward as a viable solution for private antitrust litigation and was explicitly considered among the regulatory options of the EC Green Paper on damages actions for breach of EC antitrust rules (option 15)[600]. The companion EC Staff Working Paper also contemplates two sub-options in this respect:

- the plaintiff claims the entire overcharge from the defendant, and the award is then allocated to all victims who suffered a loss; or
- a pro-quota system is envisaged, where each plaintiff is entitled to recover her share of damages individually[601].

Below, we assess the main expected impact of adopting a gain-based method of damage calculation for private antitrust actions. As this option is to be considered as a complement to the "zero" or harm-based option, we only consider the potential co-existence of the two methods, not the introduction of a gain-based method as a standalone policy option.

A. BENEFITS

A1. Deterrence

According to the economic theory of crime and punishment, optimal deterrence would be achieved through a probability-adjusted penalty equal to the gain[602]. A gain-based fine, thus, is apparently more consistent with the deterrence goal than a harm-based method to define damages. At the same time, however, with a full-fledged gain-based method the infringer may not fully internalise the social harm caused to society, as the expected penalty would still fail to include the different types of deadweight loss generated by her conduct. As a result, the impact of this option on deterrence depends mostly on the relative magnitude of the private (recoverable) harm, the private illegal gain made by the infringer, and the social harm caused by the infringement.

In particular:

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[599] Also called restitutionary damages.

[600] See on the point Van Gerven (2003).

[601] Since the apportionment method represent a viable tool to achieve split of proceedings and consolidation of indirect purchaser's suits, a more detailed analysis is carried out also *infra*, in Section II.5.3.2.

[602] See K. G. Elzinga and W. Breit, (1976) p. 117.

- *when the private harm that can be claimed in court is smaller than the private illegal gain, but the overall social harm caused by the infringement is larger than the private illegal gain*, harm-based damages could prove less effective in deterring anticompetitive conduct than gain-based damages. Although gain-based methods fail to account for the deadweight loss, if such loss cannot be fully recovered due to problems in proving causation, from an *ex ante* perspective the gain-based method could be preferable, as they would force the infringer to consider the likelihood that the illegal gain from the infringement is granted to successful claimants. Needless to say, with 100% probability of conviction, a gain-based method would prove optimal in terms of deterrence, as it would leave the would-be infringer in a situation of indifference between the decision to violate or to respect the law.
- *when the private harm that can be claimed in court is greater than the private illegal gain,* then harm-based damage awards may prove more deterrent than gain-based awards. Under a gain-based method, the infringer would undertake illegal conduct whenever the detection rate is lower than 100%, regardless of the harm imposed on victims. If, in addition, the infringer expects that the victims would have limited incentives to sue, *e.g.* due to significant legal expenses or heavy burden of proof, then a gain-based definition of damages may significantly under-deter illegal conduct.

The former scenario is more likely to occur than the latter, in case of cartels and exploitative abuses, where plaintiffs are normally economic actors operating downstream on the value chain. Also in the latter case (for example in exclusionary abuses) a gain-based award could sometimes prove effectively deterrent, especially since the detection rate is normally higher than in the case of cartels; and also since quantifying the defendant's illegal gain may be easier than proving the loss suffered by a competitor, *e.g.* when such loss must be calculated based on foregone revenues due to market foreclosure. In these cases gain-based damage awards can provide a cost-effective approximation of optimal deterrence. In addition, when the detection rate is very high, the gain-based method can help to achieve optimal deterrence "at the lowest cost": for example, this may happen when the harm caused to society is significantly larger than the illegal gain accrued to the defendant; in this case, a conduct could be deterred simply by imposing a penalty equal to (or slightly higher than) the defendant's illegal gain[603].

A different case occurs when the detection rate is low, and the social harm is significantly greater than both the private harm and the private illegal gain. In this case, simple damages based on the defendant's gain would certainly be under-deterrent, as the infringer would fail to internalise the greater cost

603 This is the so-called "gain-plus" sanction analysed by Polinsky and Shavell (1994).

imposed on society; and in addition, she would adjust her expected sanction by accounting for the low detection rate.

Other important impacts would be observed as regards the claimant's incentive to sue. In particular, the impact of the two sub-options envisaged by the Commission in the Staff Working Paper would be as follows:

- when a single victim is entitled to claim the entire overcharge, and the award is subsequently allocated to all plaintiffs, a "collective action" problem may emerge, as no individual plaintiff would have an incentive to sue in the first place, and would prefer to wait for other plaintiffs to file a lawsuit, in order not to incur legal expenses, the "free riding" problem, and the risk of losing at trial. In these cases, a joinder of claims may solve the problem of multi-plaintiff lawsuits, but also entails significant coordination costs between the plaintiffs, absent a clear legal framework. Another solution, which could run counter to the corrective justice principle, would be to allow the plaintiff to retain unclaimed damages (see *infra*).
- Under the pro-quota method, less significant collective action problems would emerge, although claimants would still have scant incentives to sue, in order not face the risk of losing at trial and incurring legal expenses (depending on the fee allocation rule, for herself or for both parties).

Finally, a related issue is whether, and under which circumstances, adopting a gain-based method would increase the risk of over- or under-deterrence. We perform this analysis with specific reference to the "zero option", *i.e.* to the harm-based option considered above.

- whenever the detection rate is below 100%, a gain-based award such as single gain-based damages may prove under-deterrent. Multiplied gain-based damages may, however, offset this shortcoming;
- in the subset of cases in which the infringement is efficient, *i.e.* the private gain is greater than the social harm, gain-based damages might prove over-deterrent, whereas harm-based penalties, in principle, are not[604]. Moreover, over-deterrence might more easily be experienced in litigation between competitors, especially in foreclosure cases. Compared to an harm based system, the lure of disgorgement of profits could incentive groundless claims by inefficient competitors. An inefficient rival could strategically file a suit against the defendant, alleging foreclosure by the efficient dominant firm, knowing that disgorged profits would be higher than the harm effectively provoked due to foreclosure. As a result, efficient firms might be penalized.

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[604] On that drawback of gain-based penalty in liability, see Polinsky and Shavell (1994). This scenario – typically crafted for the efficient breach of contract in the law and economics literature – is unlikely to materialise with significant frequency in antitrust damages actions.

Evidence that the private gain is normally lower than social harm accruing from anticompetitive conduct suggests that pure gain-based damages have a slightly lower deterrence potential compared to harm-based ones. On the other hand, if gain-based assessment were introduced as an alternative to the harm-based method and/or as a consolidating tool (through the mentioned sub-options), the opposite would hold. As a matter of fact, the defendant would know that she will probably be sued for the largest amount, and also problems of causation (and accordingly of the claim's success) would be lower. At the same time, leaving such choice to the claimant could facilitate a strategic abuse of the disgorgement alternative by competitors, ultimately harming competition on the merits and creating an undesirable "litigation culture".

Secondly, a gain-based definition of damages is likely to reduce litigation costs, thus facilitating access to justice and settlement. In this respect, the higher the probability of a lawsuit, the higher will be the overall deterrent effect.

A2. Corrective justice

A gain-based method of calculation may be seen as less desirable than a harm-based definition of damage from the standpoint of corrective justice, as such measure of damages does not bear any direct relationship with the harm caused by the infringement. As a matter of fact, especially for certain types of antitrust infringement, the defendant's profits are only indirectly linked to the harm. However, this lack of "correlativity" does not mean that the corrective justice objective is always hampered by the adoption of a gain-based system. First, restitution of gains can be linked with the compensatory objective based on the principle that one should not profit from a wrong[605]. Hence, also disgorgement would be compensatory, since it helps to restore the situation of the parties prior to the infringement.

Another "compensatory" view of restitutionary damages is carried on by Weinrib (2000), who sees disgorgement of profit as a means to fully compensate the value of property. Indeed, the owner's entitlement encompasses also the potential gains from the property's use or alienation; if the infringement deprives the owner from such right, to the benefit of the wrongdoer, then disgorgement can be seen a form of restoration of this specific right. This "compensatory view" of restitutionary damages may be particularly well-suited for infringements that lead to loss of opportunity or investments on the side of competitor plaintiffs, as can often be the case for refusal to deal or predation. In these cases, profits collected by the infringer may represent a viable figure for the determination of the claimant's lost profits, especially if the opponents operate at the same level of production chain. In this case, the

[605] Andrew Burrows, *The Law of Restitution* 376, 395-6 (1993)

adoption of gain-based damages would also be particularly useful to distinguish real predatory conduct from competition on the merits, since damages would be awarded only for "rational" predatory conduct, *i.e.* the one that could lead to recoupment of losses and eventually profits in the medium term.

More generally, gain-based methods exhibit the following features:

- *Inaccurate compensation.* The most straightforward consequence of using a gain-based method to calculate damage awards for all types of anticompetitive allegations is that the plaintiff may receive a compensation which is either higher or lower than the actual loss suffered. This risk arises especially with regard to lost profits claims, whenever the plaintiff operates at a different level of the production chain: in this case the gain of the upstream/downstream infringer might not bear any relationship with the loss sustained by the claimant. Conversely, the gain might represent a proxy for calculation of lost profits claimed by competitors. Actual harm due to overcharge, in addition, is normally linked more strongly with extra-profits earned by a cartelist, unless fringe firms or costly collusion exert a significant impact on the defendant's gain (see below).
- *No compensation of the deadweight loss.* In addition, gain-based damage assessment would certainly fail to consider the deadweight loss. As argued above, however, the difficulties linked to prove prejudice for potential purchasers or for claimants who "bought less" characterise also harm-based systems[606].
- *Potential over/under-compensation.* Overcompensation occurs when the private harm claimed in court is smaller than the private gain, and is coupled with over-deterrence whenever the overall welfare loss is smaller than the private gain. The opposite case (under-compensation) occurs whenever the private gain is smaller than the private loss sustained. Consider the example of a cartel with fringe firms: a loss may be claimed by buyers who bought from fringe firms, but such loss may bear little relation with the cartelists' gain. If these plaintiffs are granted standing, the defendant's gain may not suffice to provide full compensation. Likewise, consider the case where cartelists bear some cost to maintain the collusive equilibrium (*e.g.* excessive capacity as retaliatory mechanism): this would result in lower profits compared to the overcharge imposed on buyers.

[606] With regard to apportionment of damages among plaintiffs, the gain based principle requires some supplementary mechanism in order to provide fair compensation. If plaintiffs are competitors or downstream firms, their market share can be used as a proxy for the calculation of the loss suffered. If plaintiffs are purchasers, measures of goods or services purchased may be used.

- *Incentive to mitigate the loss (overcompensation).* The gain-based option also affects the victim's incentive to mitigate the loss suffered, although with systemic beneficial effects. Since the claimant is able to recover the profits accrued to the defendant, she will have a strong incentive to minimize the harm suffered, since these efforts will not result in a decrease of the awarded damages. At the very end the positive difference between the gain-based damages and the suffered harm will amount to a net profit for the claimant. This holds true particularly when plaintiffs sue to recover lost profit. In these cases, victims have an enhanced incentive to replace the lost investment by allocating resources to alternative, productive uses[607]. These efforts will be worth as long as their impact on output restriction and deadweight loss is higher than the corresponding cost. In turn, however, the increased incentive to sue could have a side over-deterrent effect in case of groundless claims (see above, A1)

Furthermore, corrective justice may be affected under both sub-options envisaged by the Commission in the Staff Working Paper accompanying the Green Paper on damages for breach of EC antitrust rules. When the plaintiff can recover the full overcharge, she may be over-compensated whenever some of the victims are not identifiable or do not claim their share of the damage award. Under the second sub-option, all plaintiffs would be compensated pro-quota: when the private gain exceeds the actual loss sustained, this may result in overcompensation; to the contrary, if the private gain is smaller than the overall loss suffered by the claimants, undercompensation may occur.

In conclusion, the corrective justice objective can be achieved by means of gain-based methods, but such finding is mostly limited to the calculation of lost profits of competitors. For other types of infringement, the gain-based method may complement the harm-based option only when the loss sustained is difficult to prove, and the illegal gain made by the defendant can be seen as a reasonable and easier proxy to calculate of the loss occurred. If introduced as an alternative to harm-based calculation, the availability of a supplementary means of calculating damages might have a beneficial effect on corrective justice, compared to a pure harm-based system.

A3. Internal market

The adoption of an explicit rule allowing for disgorgement of profits as an alternative method of calculation of damages award could have a positive impact on internal market objective. Assuming that this rule would provide a supplementary tool for the determination of awarded damages, the introduction of such a provision could level the conditions faced by different

[607] See Lambert (2006).

plaintiffs across Member States. Indeed in some countries, either informally or based on an explicit provision, the Court may be already allowed to use the measure of profits in order to alleviate the burden of proof on the counterfactual in the determination of the harm suffered[608].

B. COSTS

B1. Litigation costs

Unlike harm-based techniques, in gain-based methods the comparison between the *ex post* situation and the "but-for" one is carried out with reference to the defendant's situation. The impact of a gain-based method on litigation costs differs along with the different types of antitrust infringement. As shown above, most litigation costs are born in the attempt to reduce asymmetric information between litigants. Some categories of claimants, mainly downstream firms, often hold extensive private information on the harm suffered, whereas they hardly have access to the defendant's commercial information on profits.

The situation is completely reversed for other categories of plaintiffs and cases. When damages are scattered, private information on the harm sustained may be quite costly to collect, and high litigation costs may offset the likely damages. Moreover, in follow-on cases information contained in the final decision of the competition authority is available. Such information is probably more accurate with regard to the determination of the infringer's gain than on the victim's harm, as the investigation is mainly focused on the defendant: the gain could provide an indication of the effect of the infringement, and may be relevant in the determination of the fine. With regard to foreclosed competitors, moreover, the adoption of a gain-based system could reduce litigation costs, as it reduces the risk that plaintiffs claim speculative damages based on a highly contentious calculation of harm.

Gain-based methods exert an impact on litigation costs also since the failure to mitigate defence is likely to have a more limited impact. This feature may bear some consequences for litigation costs, since the defendant cannot escape liability by proving the plaintiff's partially negligent behaviour in failing to mitigate the loss, nor will the plaintiff engage in costly litigation expenses to rebut such proof. Moreover, the gain-based option is likely to reduce uncertainty in adjudication, as the comparison between the actual and "but-for" situation is to be carried out with reference to a more limited set of data (assuming that plaintiffs are often more numerous than the infringer(s)).

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[608] As found by the Ashurst study, in Italy, Lithuania, Luxembourg, Netherlands, Poland, Spain the case law showed this possibility. In Germany, reference to the illegal profits is explicitly allowed in the GWB, after the 7th amendment; see Ashurst (2004), 80.

A gain-based system might also exert a positive impact on the settlement rate, since information on the illegal gain made by the infringer can be made more easily available to all parties, and expectations on the outcome of trial are less likely to diverge.

As regards the first sub-option envisaged in the Staff Working Paper, i.e. allowing a victim to recover the whole gain from the defendant with a further allocating phase of damages among other victims, it is doubtful whether the single plaintiff method may entail greater incentives to litigate, as we already mentioned above. This is mostly due to the "collective action problem" that may occur whenever the claimant is a private individual[609]. This problem could be at least partially solved if the claimant were allowed to retain a larger part of the recovered gain, *e.g.* the damages that are not allocated among the plaintiffs in the second proceeding. However, even in this case, the magnitude of the unallocated gain is likely to be contentious, and may spur higher litigation costs. Finally, such an option would raise some doubts as regards the corrective justice goal. On the other hand, a single claimant system can be deemed to have a positive impact on overall litigation cost with regard to mass claims, since it entails a *consolidation effect*[610].

In general, the adoption of the gain-based calculation as an alternative to harm-based systems can have a positive impact on litigation costs, as long as reference to the gain provides a viable (and less costly) proxy for the calculation of damages, when assessing the harm proves difficult or highly contentious.

B2. Error costs

The impact of gain-based damage measures on error costs can be significant. On the one hand, no impact on the frequency of legal error is observed when gain-based damage measures are used instead of harm-based measures. However, errors in the quantification of damages can produce important welfare consequences, which are likely to be greater in case a gain-based measure is adopted. Polinsky and Shavell (1984) analyse this issue in detail, and conclude that when both gain and harm are not perfectly observable, and errors are not anticipated, harm-based liability is superior to gain-based liability. The magnitude of such negative impact depends on the relative size of gain and harm. In any event, even a slight underestimation of the gain would encourage the injurer to pursue her illegal conduct, regardless of whether the private and social harm were significantly greater. As a result, even small errors in assessing the gain can create substantial welfare losses.

[609] This result does not hold, of course, for *parens patriae* suits.

[610] For a more detailed analysis if this option, see *infra* Section II.5.3.2.

If the gain-based system is used in conjunction with a harm-based one, this risk is limited. Moreover, due to the likely reduction of litigation costs, accuracy in fact-finding may increase, and correspondingly the likelihood of guilty defendants being acquitted would be reduced (*i.e.* reduction of type II errors). On the other hand, the risk of strategic abuse of the "gain-based" alternative (especially for groundless claims brought by inefficient competitors) and, above all, the lack of correlativity could have a negative impact on type I errors.

B3. Administrative burdens

No significant impact on administrative burdens is foreseeable in this scenario, as this option does not entail the introduction of any additional information obligation. If anything, the need to collect information from either party could entail different costs, especially if the number of the defendants is lower than the number of the plaintiffs overall. This would reduce the frequency of requests for information by courts, as well as the population affected. In summary, we would expect a slightly positive impact of this option on administrative burdens.

B4. Harmonisation costs

Member States mostly rely on the compensation of harm in defining damages in tort cases. Imposing gain-based damage awards, besides being hardly advisable in many cases, would also imply very high harmonisation costs, due to the changes it implies in national law. Furthermore, such an option would imply the co-existence of different definitions of damages within the same jurisdiction, which could raise some problems of coordination, especially when the same lawsuit also entails non-antitrust allegations. On the other hand, if the gain principle is claimed as a reliable proxy for the determination of damages, harmonisation costs may be limited. This would occur if national courts were advised to use illegal gains only as a proxy for the victim's harm when defining damages, especially in competitor plaintiff cases. Finally, with regard to the sub-options envisaged in the Green Paper, they would require substantial changes in national legislation, mainly falling on the criteria to be used in the apportionment process.

4.2.3 The basis for calculating double damages in cartel cases

As seen above, the risk of under-deterrence for concealed infringements (most notably naked cartels) is particularly high, both with compensatory and restitutionary damages. This is the rationale behind the introduction of a different rule for these types of infringements, allowing for a multiplier of damages. As we extensively addressed the issue of multiple damages in Section 1 above, in this section we simply discuss the most appropriate basis for calculating double damages in cartel cases.

In cartel cases, the following conditions typically emerge:

- The risk of over-deterrence is quite low;
- The typical plaintiff is a downstream purchaser or a consumer, with significant likelihood of mass claims;
- The loss sustained by the plaintiff has a direct relationship with the overcharge, i.e., the illegal gain made by the infringer;

Consequently, damage awards defined on the basis of the overcharge are consistent with the goal of achieving corrective justice. Considering that gain-based measures of damage could imply substantial savings in litigation costs, a gain-based system could be more suitable for cartel litigation. In any event, the particular feature of cartel cases infringements and its focus on overcharge, rather than lost profits, makes the quantitative difference between gain-based and harm-based damages quite small[611].

The introduction of double damages for cartels may exert a significant impact on deterrence, corrective justice, litigation costs and harmonisation costs, as we discussed in Section II.1.6 above.

4.2.4 Pre-judgement interest

An important feature of damage awards is whether prejudgment interest is computed as part of the overall compensation[612]. In Europe, as reported also by the Ashurst study, the calculation of interests for the harm suffered is normally included in the basic sum, with the aim to fully compensate the plaintiff for the loss sustained and leave her – to the extent possible – indifferent as regards the time elapsed between the occurrence of the harm and the date in which

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[611] The tension between harm-based and gain-based methods in cartel cases is alleviated when the claimant is a purchaser; see Hovenkamp, *Antitrust protected classes*, in 88 *Mich. Law Review*, 1989, 5. This does not mean that lost profits are not to be deemed relevant in cartel cases. As stated by the ECJ in *Manfredi*, both *lucrum cessans* and *damnum emergens* are to be compensated. However, when purchaser claims are at stake, the amount of lost profits may be easily drawn on the basis of its average return on capital, to be applied to the overcharge paid. This latter would be the main difference between the harm- and gain-based principles. On the contrary, when a competitor claims to have suffered lost profits, the potential course of business she would have faced without the infringement needs to be assessed. In this case, lost profits are the sole or the major heading of damages that the competitor can claim.

[612] A major problem in the determination of the prejudgment interest is how to take into account the time elapsed and the relative uncertainties and risks. The problem is tackled in economic and general terms by Patell, Weill and Wolfson (1982), Lanzillotti and Esquibel (1989), Fisher (1990), and with express reference to antitrust damages by Fisher (2006). According to these authors a distinction has to be made with regard to actual losses and lost profits: (i) for actual losses, the defendant's risk-adjusted interest rate should be used (Patell *et al.*; Fisher 1990); (ii) with regard to lost profit stream, they should be discounted by using the plaintiff's risk-adjusted rate (Fisher, 1990).

compensation is received[613]. This section, then, does not address the question whether interest should be introduced or not – an issue that is still heavily debated in the US[614]. However, as reported by the Ashurst study, the date from which the interest is calculated varies significantly[615]. Some countries start applying the interest rate from the date of the infringement, from the date in which the damage occurs, or when a cause of action accrues; whereas in other countries pre-judgment interest is calculated from the day in which the damages are quantified and the defendant is informed, or from the date in which a legal action is started. Finally, most countries allow for some flexibility in the determination of the starting date for the calculation of the interest.

Based on the goal of achieving corrective justice, pre-judgement interest should be computed from the moment when the harm occurs to the claimant. Alternatively, awarding the pre-judgement interest since the time of the infringement exerts a positive impact on deterrence.

The main divergence between these two options arises for certain types of infringements and categories of plaintiffs, whereas for other allegations the difference is likely to be less relevant, due to the lack of a significant time lag between the date of the infringement and the occurrence of the harm. For example,

- In *foreclosure* cases, potential competitors may suffer antitrust injury long after the infringement occurred (*e.g.*, discount rebates or exclusive dealing clauses), for example if the plaintiff seeks to access the market at a later stage. Conversely, competitors who are refused access to an essential input will immediately suffer and recognise the occurrence of the harm.
- In *predation* cases, competitors suffer an immediate prejudice due to decrease of market share, whereas final consumers may be injured only afterwards, when the infringer restricts output and raises prices to recoup the losses incurred in the predation period.
- In *cartel* cases, the infringement may remain concealed for a long time, and actual harm may occur to the victim after many years from the date when the cartel started its operations. (for example new buyers)

Building a precise taxonomy of cases and identifying the most appropriate date from which interest is calculated is likely to be of limited use, since the delay

[613] A. Van. Casteren, Art. 215[2] EC and the question of interest, in T. Heukels and A. McDonnell, The Action for Damages in Community Law, 1997, The Hague.

[614] Although available on discretion of the court (see Sec. 4 Clayton Act, as amended in 1980), there have not been cases where pre-judgement interest has been awarded by judges in antitrust cases. See American Bar Association, *Section of Antitrust Law, Antitrust Law Developments*, 846 (6th ed. 2007). In 2007 the Antitrust Modernization Commission of US suggested no changes on current pre-judgement interest rules (see AMC Report, 2007, 250).

[615] See Ashurst (2004), Table 13.

between the infringement and its effect mainly depends on the circumstances of the specific case. It can be assumed, although roughly, that final consumers (or indirect purchasers) are likely to bear the harm with some delay, since competitors or downstream firms may take some countermeasures to limit the effect of the infringement.

The real difference among the two methods is related to litigation costs: under the first option (interest starts when the harm occurs), each plaintiff has to prove the moment when the harm occurred; whereas in the second option the date of infringement will be equal for all plaintiffs in a given case.

In the following sections the two different options will be evaluated with regard to deterrence, corrective justice and litigation costs.

A. BENEFITS

A1. Deterrence

The occurrence of harm is logically and often temporally subsequent to the date of the infringement; thus, computing the prejudgment interest from the date when the infringement occurred will result in a higher final damage award. This may of course increase deterrence, although, depending on the specific feature of the case, the extent to which deterrence would increase is not easily predictable.

For example, in cartel cases the time elapsed between the infringement and the harm can be very significant; in these cases, the increase in deterrence may be substantial. However, there are other kinds of infringements where over-deterrence may be a problem. This is the case for vertical agreements, where the infringement based calculation may be ill-advised. Most of the time, private litigation involving vertical agreements implies a time lag between the stipulation of the agreement and the harm occurred. In these cases, the risk of plaintiff's opportunistic behaviour may be heightened by an infringement-based calculation. As the infringement is found in the (earlier) illicit agreement, the time lag between the infringement and the harm could be exploited by the plaintiff in order to artificially increase the private recoverable damage, without any actual increase of social harm provoked. In this case, recoverable damages may overcome the private harm suffered and exceed the private gain, and the overall social harm would paradoxically be below the private gain. As a result, there would be stronger and inefficient incentives to litigate.

A2. Corrective justice

The calculation of interest from the date when the harm occurred is the most consistent with the objective of compensating plaintiffs for the loss sustained, since it is based on the opportunity costs incurred by the plaintiff due to the loss suffered. The alternative option would entail a substantial departure from the

principle of correlativity, since the interests are granted also for a timeframe during which the plaintiff did not suffer any loss. As a result, the impact of the former option on corrective justice is certainly greater.

Moreover, if different categories of plaintiffs are involved, the calculation of interest from the date of infringement implies the adoption of a unique calculation method for claimants that may have suffered injuries at different times: in cartel cases, this may be the case for consumers who bought the goods at different time. The departure from the principle of equal treatment may thus be significant, as different categories of plaintiffs would be treated equally.

A3. Internal Market

As recalled above, prejudgement interests are currently available in all MSs and some degree of flexibility is usually left for the judge in the specific case. Indeed, many countries provide for calculation since the infringement occurred/injury suffered (9 Member States) or since the first plaintiff's notice of breach (10 Member States), but there are countries using both (3) and a few (Cyprus and Lithuania) awarding them only since suit is filed[616].

A specific rule providing for an unique date of calculation of interests could enhance the internal market objective, with specific regard to the conditions different plaintiffs across Europe face. Thus both the options would have a positive effect.

B. COSTS

B1. Litigation costs

Litigation costs may be significantly affected by the choice of the date from which calculation of prejudgment interest starts. In particular:

- if the interest is calculated from the date of infringement, litigation costs may be reduced as there would be a single reference point in time from which interest is calculated for all plaintiffs. Thus, the reduction in litigation costs would be mostly felt in multi-plaintiff litigation. Also in follow-on litigation, once the infringement has been established, plaintiffs do not have to bear any cost to prove the exact moment in which the infringement was committed. This is particularly true in follow-on litigation, and whenever this option is coupled with a gain-based method of calculating damages. In the opposite case (pre-judgement interest since the infringement occurred coupled with harm-based calculation), calculation since the harm might have already been carried out in determining the harm suffered. At the same time, to the extent that greater damage awards encourage litigation, overall

[616] See Ashurst Report, (2004), 86.

litigation costs may increase under this option, along with the increase in the number of cases.

- This reduction in litigation costs is likely to be less significant for stand-alone actions, since the private information held by the plaintiff may be sufficient to establish the exact moment the prejudice accrued; whereas more difficulties may be encountered in establishing the moment in which the infringement occurred, especially if the infringement took place long before the harm materialised.
- On the contrary, if interest is calculated from the date in which the damage occurred, a separate assessment would be required for each plaintiff or category of plaintiffs, with an increase of fixed costs of the single claim. This increase is likely to be negligible or absent if a harm-based system is adopted, as most of these costs are already borne in the calculation of the overall harm. Moreover, in follow-on litigation the information provided by a previous NCA or court decision might be of little use. In addition, litigation costs are likely to be higher as the exact date in which the harm accrued to the plaintiff is likely to be more controversial.

As regards the settlement rate, calculation of interest from the time of infringement may exert a positive impact for two reasons: first, the increased reward may foster the plaintiff's commitment to litigate, and the credibility of such threat could lead the defendant to seek settlement in order to minimise her exposure; secondly, the lower uncertainty offered by this option may reduce the asymmetric expectations on the final outcome of trial, thus increasing the likelihood of pre-trial settlement. Under the alternative option, the occurrence of harm would be based on the private information of the plaintiff, and would consequently be more prone to the asymmetric evaluation of the parties.

B2. Error costs

The envisaged options would not have a foreseeable effect on the probability that an innocent is convicted or a guilty declared innocent, since they only concern the quantification of damages.

B3. Administrative burdens

No foreseeable effects can be foreseen under this option.

B3. Harmonisation costs

Interest accruing from the date in which the harm occurred is most in line with current practice in many EU member states. The rule providing for calculation since the first plaintiff's notice of harm, indeed, represents a procedural tool to establish a well defined moment where damage is deemed to accrue. In any event, both methods (since the harm or since the infringement) would entail

rather low harmonisation costs, as most member states already allow for a degree of flexibility in setting the date from which interest can accrue.

4.3 Methods of calculation

The available methods of calculation, with regard to overcharge and lost profits, entail different degrees of complexity and require different amounts of information, which in turn is reflected in different litigation costs. To be sure, there is no "one-size-fits-all" method: the judge is best positioned to assess the pros and cons of using a given method on a case-by-case basis. Below, we briefly describe the most common method to measure the overcharge and lost profits.

4.3.1 Measuring the overcharge

The damage award based on the overcharge is normally calculated by the courts as equal to the mark-up on the competitive price multiplied by the quantity bought by the plaintiff. Calculation of the overcharge does not take into account the deadweight loss[617]. An important issue to be analysed is whether the damage award should also include the deadweight loss and other types of inefficiencies resulting from the anticompetitive conduct. Here too, the divergence between a deterrence-based and a compensation-based approach emerges. A purely compensatory remedy would imply that only the actual overcharge paid by the plaintiff is included in the damage award; however, as we recalled above, such a measure of damage would not suffice to provide the would-be infringer with efficient incentives from an *ex ante* perspective. From a theoretical standpoint, the need to include the deadweight loss as a means to approximate the optimal sanction has been stressed by several authors, starting from Landes (1983)[618].

Furthermore, some authors have argued that plaintiffs that purchased goods or services from members of a cartel should be allowed to recover not only the overcharge they suffered, but also an amount equal to the deadweight loss and the productive inefficiency caused by increased production by fringe firms[619]. This view implies that all social costs, including the so-called umbrella costs of

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[617] Leslie, *Antitrust Damages and Deadweight Loss*, in 51 The Antitrust Bulletin, 521 (2006).

[618] Landes, Optimal sanctions for antitrust violations, in 50 Univ. of Chicago Law R., 654-56, 1983.

[619] See Blair and Maurer, Umbrella pricing and antitrust standing: An economic analysis, in Utah L. R., 763 (1982); and Blair and Romano, Distinguishing participants from non-participants in a price-fixing conspiracy: Liability and damages, in 28 Am. Bus. L. J., 33 (1990), arguing that colluders have to pay damages to the umbrella plaintiffs.

anticompetitive conduct, are included in the assessment of the *quantum* of damage award.[620]

4.3.1.1 Measurement techniques

When damages are based on the overcharge, there are two main types of techniques that can be used to assess the overcharge injury: those using a comparator, which include the before-and-after and the yardstick methods; and those using direct information on the cartelised market, such as the critical loss analysis and the simulation methods.[621]

- The "before and after" method requires the comparison between the price the cartel/monopolist applied and the "but for" price defined as the one observed on the market before the cartel was formed, or after the cartel terminated its activities[622]. As showed by Connor (2002, 2000), the main difficulties with this method are related to the choice of the non cartelised price and the need to rely on stable, non-volatile prices with exact information on the duration of the cartel[623]; on the other hand, Hovenkamp (1999) observes that such method relies on the rather strong assumptions that the "before" price would have remained unchanged over time absent the cartel[624]. More recently, some scholars underlined that after-the-cartel prices could lead to an underestimation of overcharges. For example, Connor (2004) claims that since implicit or tacit collusion is more likely after explicit collusion, after-the-cartel prices may be higher than the "but-for" ones[625]. Harrington (2004) shows that the likelihood of damage assessment based on post-cartel prices may in fact create an incentive for the cartelists to price above the non-collusive price in the post-cartel period. The estimation of "but for" price is often complemented with regression analysis, in order to isolate exogenous variables that affected the price trend, but were not caused by the antitrust infringement[626].

[620] Page, *Optimal antitrust penalties and competitors' injury*, in 88 Mic. L. R., 2151, (1990). Note, Standing at the fringe: antitrust damages and the fringe producer, 35 Stan. L. R., 763 (1983).

[621] Van Dijk and Verboven, *Quantification of damages*, in Collins (ed), *Issues in competition law and policy*, forthcoming, ABA, Antitrust sec.

[622] But Connor, *Forensic economics, an introduction*, paper presented at the ACLE conference, 16th of March 2006 (2006), stresses that the comparative price is simple the one "without" collusion, even if it took place after the cartelized period.

[623] Connor, *Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation* (1996), Connor, Archer Daniels Midland: Price-Fixer to the World, in Staff Paper 00-11, Dept. of Agricultural Economics, Purdue University (2000), 64.

[624] Hovenkamp, *Federal Antitrust Policy*, 1999, 662.

[625] Connor, *Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation* (1996); Kwoka and White (eds), The Antitrust Revolution: Economics, Competition and Policy, (2004)

[626] On the utilization of regression analysis in antitrust cases, see Finkelstein and Levenbach, *Regression Estimates of Damages in Price-Fixing Cases*, in 46 Law and Contemporary Problems,

- The *yardstick* approach requires the identification of a market similar to the one in which prices were fixed, but where prices have remained at a competitive level. This method is particularly suited for localized cartels, where comparable (competitive) markets can normally be found. The yardstick method has been applied to price-fixing cartels in many markets, including bread (Mueller and Parker 1992)[627] and fluid milk (Porter and Zona 1999)[628]; and also in bid-rigging cases (Howard and Kaserman, 1989)[629]. As noted by Connor (2006), however, the method is hardly appropriate for global cartels, and could not be applied in the famous lysine and vitamins cases. To the contrary, this method is more appropriate for markets "with nonstorable products, with high transportation costs relative to price, and for localized services".
- Some of the flaws of the simple "before-and-after" method may be addressed by means of "difference-in-difference" approach (DID), which turns to be a simple instrument to isolate and assess the collusive variable from other endogenous variables affecting the market. This approach is also called "before and after design with an untreated comparison group"[630] and bears some similarities with both "before-and-after" and "yardstick" methods. The approach is based on the availability of time series data on the allegedly cartelized market (so-called treatment group) and on a similar market where collusion did not take place (control group). The "difference in difference" estimate is given by the difference in the average outcome in the treatment group before and after the treatment (*i.e.*, the antitrust infringement), *minus* the difference in the average outcome in the control group in the same time periods (*i.e.*, before and after the antitrust infringement, even if such infringement did not have any effect in this latter

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(1983); Fisher, *Multiple Regression in Legal Proceedings*, in 80 Colum. L. Rev. 720 (1980); Rubinfeld and Steiner, *Quantitative Methods in Antitrust Litigation*, in 46 Law and Contemporary Problems, (1983); Baker and Rubinfeld, *Empirical Methods in Antitrust: Review and Critique*, 1 Am. L. & Econ. Rev. 386 (1999); Page, *Proving Antitrust Damages: Legal and Economic Issues* (1996), Chapter 5 (on Econometrics and Regression Analysis) provides an overview of the main statistical techniques and related problems. For a review of application of regression analysis and its possible abuses, see Gleuck and Reed, *Use and Abuse of Regression Analysis in Determining Damages in Antitrust*, paper presented at the ACLE conference on Forensic Economics, 16th of March 2006, available at http://www.kernbureau.uva.nl/acle/object.cfm/objectid=003D2CBC-57D6-445C-97DDC73DE2F93BE7

[627] Mueller and Parker, *Bakers of Washington Cartel: Twenty-Five Years Later*, in 7 Review of Industrial Organization, 75 (1992).

[628] Porter and Zona Ohio School Milk Markets: *An Analysis of Bidding*, in 30 RAND Journal of Economics, 263 (1999).

[629] Howard and Kaserman, *Proof of damages in bid-rigging cases*, in 34 Antitrust Bulletin, 1989, 359.

[630] See B. D. Meyer, Natural and Quasi-experiments in economics, in 13 Journal of business and economic statistics, 1995, 154 and ff.

group)[631]. In this way the changes in prices due to variables that affected both market are not taken into account in assessing the specific impact of the infringement on market prices. This method provides for a simple substitute for regression analysis, since it provides the net effect of the infringement, although it faces some limitations[632]. The most important difficulty affecting this method is the need to find a very similar market where the infringement does not take place (as in the yardstick method) and the need that both groups tends to move in parallel, *i.e.* they face similar endogenous variables, but for the infringement. For this reason this method has been used in competition law in order to assess the effects on prices on local markets[633], affected by changes in their competitive structure[634]. However, they could be used for the estimation of output restriction (and changes in prices) due to other kind of infringements. This is especially true for cases where yardstick approach would be feasible. Compared to this latter method, indeed, the DID allows for a far more precise estimate of the effect of the infringement.

- The cost-based approach is the simplest amongst the methods that do not use any comparator. It aims at rebuilding the supply curve of the colluding firms, and estimating the competitive "but-for" price on the basis of some measure of costs per unit plus a mark-up allowance for "reasonable" profit.[635] Since applying this method requires use of accounting data, the result may provide a distorted picture of the decision-making perspective of economic agents. As stated by Van Dijk and Verboven (2005), where "an accounting system amortises fixed costs and generates annual depreciation

[631] In the easiest version, the difference in difference method may be described by $\beta_{DD} = \bar{y}_1^1 - \bar{y}_0^1 - \left(\bar{y}_1^0 - \bar{y}_0^0\right)$, with the first difference involving the differential in the treatment group (1) in time 1 and 0 and the second one the differential in the control group (0) in the same periods, see B. D. Meyer, *op. cit. supra*, 152. More advanced versions uses multiple comparison groups (see B. D. Meyer, *A quasi-experimental approach to the effects of unemployment insurance*, in *NBER Working Paper n. 3159*, 1989) or multiple pre-treatment or post-treatment time periods (see B. D. Meyer, *Quasi-experimental evidence on the effects of unemployment insurance from New York State*, in *Northwestern University Working Papers in Economics*, 1992).

[632] Some flaws of the method are highlighted by M. Bertrand, E. Duflo, S. Mullainathan, *How Much Should We Trust Differences-in-Differences Estimates?*, in 119(1) *Quarterly Journal of Economics*, 249.

[633] J. Hastings, Vertical Relationships and Competition in Retail Gasoline Markets: Empirical Evidence from Contract Changes in Southern California, in 94(1) American Economic Review, 2004, 317.

[634] With specific regard to the assessment of merger effects, see E.H. Kim, and V. Singal, *Mergers and Market Power: Evidence from the Airline Industry*, in 83 (3) *American Economic Review*, 1993, 549.

[635] A variant is the constant margin approach (Connor, 2006), where a "but for" margin is applied to the variable costs.

costs, from an economic cost perspective, at least in the short run, these fixed costs are bygone and should no longer play a role in price-setting in a competitive environment". Moreover, this method does not consider that the "but-for" price is not always a competitive price, since markets are often imperfectly competitive, and some form of oligopolistic competition might have taken place before the allegedly anticompetitive conduct. Another problem that may emerge in the implementation of this model, as stressed by Clark *et al.* (2004) and Connor (2002), is the need to choose the appropriate profit mark-up.

- Critical loss analysis is used in order to determine the upper bound of the overcharge (Van Dijk and Verboven, 2005). This method, developed by Harris and Simons (1989)[636], is increasingly used in the definition of the relevant market for antitrust purposes and in the assessment of the effects of horizontal mergers, but may also be used as a supplementary cross check for other damages estimates[637].
- The most complex methods for the quantification of damages entail the development of an economic equilibrium model that explains the demand and cost conditions, as well as the nature and causes of oligopolistic behaviour in the market at hand[638]. The determination of demand elasticities and structure[639], together with the application of the economic model allows for predictions on the "but-for" world on the basis of data on costs and market transactions.

The practical application of these methods is illustrated, *i.a.*, in Connor (2002), with regard to the different estimates that can be reached in a classical price-fixing cartel; in Lopatka (2006); and in Hall and Hall (2000)[640], with reference to the different problems that may emerge in defining the "but-for" world in new economy markets[641]. Especially in the latter case, the peculiar economics of

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[636] Harris and Simons, *Focusing Market Definition: How Much Substitution is Necessary?* in 12 *Research in Law and Economics* 207 (1989)

[637] Harris and Veljanovski, *Critical Loss Analysis: Its Growing Use in Competition Law*, in *E.C.L.R.* (2003) 213

[638] Rubinfeld D. L. and P. O. Steiner, *Quantitative methods in antitrust litigation*, in (46) Law and contemporary problems, 1983, 69, with the discussion of some case law involving monopolization (*mailing machine case*) and foreclosure (*Ampicillin case*).

[639] Several methods are discussed in Baker and Rubinfeld, *Empirical Methods in Antitrust Litigation: Review and Critique*, in American law and economic review, 386 (1999).

[640] Hall & Hall, Towards a quantification of the effects of Microsoft's conducts, in 90 Amer. Ec. Rev., 188 (2000).

[641] In Polinsky and Rubinfeld (2006), the efficiency aspects of coupon systems for the restitution of overcharge damages to mass-consumers are analyzed. Polinsky & Rubinfeld, *The Deadweight Loss of Coupon Remedies for Price Overcharges*, in *Berkeley Program in Law & Economics, Working Paper Series*, n. 201/2006. Always with regard to antitrust coupons, see Borenstein, *Settling for*

knowledge-based industries, where network externalities and learning effects determine the emergence of "market tipping", make the measurement of harm highly speculative[642]. In these industries, firms normally compete "for" the market, rather than "in" the market. As a result, assuming that the "but-for" price is a competitive price is not at all straightforward; indeed, a "but-for" price may even be higher than the price observed after the anticompetitive infringement[643]. This is even more likely to occur in multi-sided markets with high-fixed costs and low or negligible marginal costs, where the demand curve shifts outwards after the market "tips", thus making whatever comparison between the observed price and the "but-for" price "exponentially difficult".[644] In case of anticompetitive bundling/tying, this assessment becomes even more arduous[645].

4.3.2 Measuring lost profits

Just as the overcharge is the measure currently used to assess the actual harm suffered by direct purchasers of the good or service (or sellers in monopsony cases[646]), lost profits are the natural starting point to assess the damage caused by infringements that impair the plaintiff's economic relationships with other economic agents along the value chain. The tension between the deterrence-based and the compensation-based views of antitrust damages is, in this respect, clearly visible. Most often, lost profits claims involve competitor plaintiffs, who claim that they were harmed in their ability to compete[647]. However, advocates of the theory of "optimal sanction" warn against the inclusion of this type of harm in the social costs resulting from the

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Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits, 39 *Journal of Law and Economics*, 379 (1996); Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, in 49 *UCLA Law Review*, 991 (2002). See more generally on coupon damages Polinsky & Rubinfeld, *A Damage-Revelation Rationale for Coupon Remedies*, in *Berkeley Program in Law & Economics, Working Paper Series*, n. 200/2006.

[642] See, *i.a.*, Pardolesi, R. and A. Renda (2003), *How Safe is the King's Throne? Network Externalities on Trial*, in Cucinotta, Pardolesi and Van Den Bergh (Eds), *Post-Chicago Developments in Antitrust Law*, Edward Elgar Publishing, February 1, 2003.

[643] Lopatka, Overcharge damages for monopolization of new economy markets, in 51 The Antitrust Bulletin, 453, (2006).

[644] Id.

[645] With regard to the hurdles to estimate overcharges in tying agreements, see Areeda, Blair and Hovenkamp (2005), *Antitrust law*, 2nd ed., 550.

[646] On monopsony, see Blair and Harrison, *Antitrust policy and monopsony*, in 76 *Cornell L. R.*, 297 (1991)

[647] See however Hovenkamp, *The antitrust enterprise: Principles and execution*, 2005, 73, which argues that the lost profit measure may be used to assess the damages suffered by the business purchaser in a price fixing agreement. On the theoretical superiority of lost profits measure, see Harrison, *The lost profits measure of damages in price enhancement cases*, in 64 *Minn. L. R.*, 751 (1980).

infringement, *i.e.* in the overall antitrust injury[648]. The deterrence-based view underlying this approach flows from its narrow scope of antitrust bans: since such prohibitions are aimed at deterring inefficient behaviour (*i.e.* behaviour that leads to output restrictions and consequently to a deadweight loss), lost profits that are not linked to output restrictions should not be compensated.

On the other hand, the compensation-based approach adopts a less narrow approach to the measure of damages that can be awarded to competitors. Hovenkamp recalls that competitors are one of the categories protected by the Sherman Act[649]; hence, the harm suffered by them as a result of antitrust infringements is to be considered as giving rise to a private right of action under antitrust law. For example, lost profits occurred due to the defendant's predatory pricing strategy should be awarded to harmed competitors; the same occurs for lost profits due to a monopolist's exclusionary conduct[650]. In some cases, awarding damages to competitors for their lost profits even before the output restriction has occurred may be advisable, as it may represent an "early warning" that prevents foreclosure from occurring, at the same avoiding higher damages (due to overcharge) for consumers in the future[651].

Another important issue is whether a given measure of damages can prove over-deterrent, in that it discourages firms from undertaking pro-competitive conduct that would result in a net benefit for society. Advocates of the deterrence-based view of private enforcement have put significant emphasis on this issue, by stressing the need to distinguish instances of competition on the merits from cases of strategic conduct. A typical example is that of tying, a type of conduct which is typically subject to both pro-competitive and strategic explanations.[652]

When a given conduct is found to be anticompetitive, the plaintiff still has a duty to mitigate the loss to the extent possible.[653] Only damages that occurred

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[648] See, *e.g.*, Easterbrook, *Detrebling antitrust damages*, 28 J. L. & Econ., 445, (1985).

[649] Hovenkamp, *Antitrust's protected classes*, in 88 Mich. L. R., 1, (1989), which put forwards the rent seeking argument too.

[650] A deterrence-based view, on the contrary, would unlikely include this harm within the concept of *antitrust injury*, since they might not be directly caused by an output restriction.

[651] See Hovenkamp, *cit. supra*, 31-33.

[652] See Nalebuff (2003) and Kobayashi (2006), for an illustration.

[653] Lambert, *The "failure to mitigate" defense in antitrust*, in 51 *The Antitrust Bulletin*, 569, 592, (2006). The extent of duty to mitigate, indeed, considerably varies across Member States. As reported in the Ashurst Study (2004), 79-80, all Member States but he UK provide for a reduction of damages whenever the plaintiff contributes to the infringement. This may be considered a basic "passive" duty not to aggravate the losses, present in all MS. With regard to a duty to "actively" behave in order to mitigate the losses, it is provided in all MS but France and Luxembourg. The specific determination of duty of diligence of the plaintiff, finally, is set with reference to the negligence standards, thus it varies among MSs and within each MS, with regard to the case law.

as a result of anticompetitive conduct and could not be reasonably mitigated by the plaintiffs are eligible for compensation.[654] However, applying the failure to mitigate can be particularly challenging, since it may require that the plaintiff realises *ex ante* the optimal loss-minimizing behaviour. And even when this occurs, a mitigating behaviour may prove efficient for the individual plaintiff, but suboptimal or detrimental to society[655].

4.3.2.1 Measurement techniques

The measurement of lost profits involves the determination of the present value of the profit stream that would have accrued to the plaintiff "but for" the harm suffered as a result of anticompetitive conduct. In this respect, as observed, *i.a.*, by Areeda, Blair and Hovenkamp (2005), a distinction has to be drawn between the determination of lost profits and the calculation of the present value of such profits. On this issue, three traditional methods are used[656]: two of these – the "before-and-after" and the yardstick method – have been described above; whereas the third method, the "market share" method, looks at the variation of market shares during the time in which the infringement occurred, in order to distinguish other independent variables that might have affected the whole market profits[657].

However, these methods are not applicable whenever the exclusionary conduct led a firm to decide not to enter the market at all or suddenly terminates its market operations. In order to cope with these problems, several different solutions have been put forward in the literature[658]. With regard to suddenly terminated business, two alternative methods are reported by Hovenkamp

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[654] This aspect is dealt with specific regard to exclusionary bundling in Crane, *Damages for exclusionary bundled discounts*, in 51 *The Antitrust Bulletin*, 507, 512 (2006).

[655] Milutinović (2007) illustrates this problem in predatory pricing cases, with respect to the victim's choice between the "fight" and the "flight" strategies. In this case, a strict application of duty to mitigate would suggest that the victim is under a duty to retreat from the market ("flight" strategy) instead of engaging in a price war ("fight" strategy) whenever this minimises the loss. But this, in turn, may amount to imposing on the victim a duty to facilitate the violation. A similar problem was addressed by English courts in the *Arkin case* (*Arkin v. Brochard Lines Ltd and Others*, [2003] EWHC 687).

[656] Hovenkamp, *op. cit.*, 667 (1999).

[657] But a more reliable measure may be the output reduction, see HOVENKAMP, *op. cit.*, 672 (1999). On the market share method see GIBBONS, *The "market share" theory of damages in private enforcement cases*, in 18 *Antitrust Bulletin*, 743 (1973).

[658] See, *e.g.*, Hoyt, Dahl and Gibson, Comprehensive models for assessing lost profits to antitrust plaintiffs, in 60 Minn. L. R., 1233, (1976) with regard to the foregone profit model; Tye, Kalos and Kolbe, How to value a lost opportunity: Defining, proving and measuring damages from market foreclosure, in 17 Res. L. & Ec., 83 (1995); and Hovenkamp, op. cit., 676 (1999), proposing the awarding of damages equal to sunk costs and contractual obligations the prospective entrant already incurred. Contra, see Blair and Page (1995), *"Speculative" antitrust damages*, in 70 Wash L. R., 423.

(1999), being the discounted present value of anticipated profits and the going concern method, which essentially is based on the value a reasonable buyer would have paid for the business before the violation occurred[659].

Different accounting methods have been recently used in order to assess the value of affected business, which Clark *et al.* (2004) and Areeda *et al.* (2005) grouped in three classes[660]:

(i) earning based (or capitalized earnings) approaches, which involve discounting sales, costs and cash flows from the income statement in order to provide an estimate of the but for scenario;

(ii) market-based methods, which use financial indicators to value the injured business, such as stock market values or profits of comparable businesses with publicly traded shares; and

(iii) assets-based methods, which use information from the balance sheet to value a business. Relevant measures include the book value of tangible net worth, fair market value of tangible net worth and liquidation value.

4.3.3 Measuring the deadweight loss

Even if, from a legal point of view, the deadweight loss could be included in the broader category of lost profits, from an economic viewpoint a clear distinction can be drawn between this kind of losses and losses of competitors due to the reduction of their own sales. The deadweight loss is directly related to the overall market output reduction due to the infringement, and involves the buyer-seller vertical relationship. Lost profits for competitors, on the contrary, are caused by reduction of competitors' sales, which however do not necessarily lead to a reduction of overall market output, at least in the short run. Due to the different characteristics of claimants (more often buyers in the former case, competitors in the latter), evidentiary problems may be more likely to arise for the proof of deadweight losses, especially in the case of passed-on damages[661]. Final consumers having suffered scattered damages may have serious difficulties in detecting the harm suffered and in proving it, whereas competitors in horizontal relationship may more easily sue the infringer.

The need to include the deadweight loss in the damage award has been stressed by some scholars, together with the need to solve the evidentiary difficulties that impede full compensation of this loss[662]. According to this view, the

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[659] See also Hoyt, Dahl and Gibson (1976)

[660] See Van Dijk and Verboven (2005).

[661] See *infra,* Section II.5 for an analysis of passing-on.

[662] See LANDE, *Are antitrust "treble" damages really single damages?*, in 54 *Ohio St. L. J.*, 115, 152, (1993). The question has been partially addressed by US scholars by referring to the fact that treble damages would include also the deadweight loss, see CAVANAGH, *Detrebling antitrust damages: An idea whose time has come?*, in 61 Tul. L. R., 777, 786 (1987).

inclusion of the deadweight loss is first of all important to deter inefficient antitrust violations that nevertheless allow the monopolist to achieve some productive efficiencies[663]. From the standpoint of compensation, the deadweight loss should be awarded as damage to those firms or consumers who did not buy the good (or who bought a lower quantity of the good) because it was priced at a supracompetitive level; however, as we already mentioned, these potential claimants normally do not have easy access to justice, due to significant evidentiary problems[664]. For these cases, Leslie (2006) recently supported the role of *parens patriae* suits by public enforcers, *i.e.* US states[665]. Such role has also been praised by the US Antitrust Modernization Commission in its recent Final Report with Recommendations. *Parens patriae* suits, however, still do not solve the problem of identifying those consumers that were actually harmed by the output restriction.

Another type of deadweight loss that is often considered in the economic literature is the litigation costs. Besides the effects of fee allocation schemes on the incentive to sue – which we addressed in Section 1 above – these costs can be considered as directly stemming from the antitrust infringement, and should be calculated in the determination of the social harm[666].

4.3.4 Comparators, direct information and *ex aequo et bono* assessment

In several cases the determination of the actual harm suffered is made by comparing the actual situation with a benchmark, which can be given by historical information on prices (but-for-price) or different geographical markets (yardstick) or market share fluctuations (market share approach for lost profits claims). The utilization of these methods is mainly based on public information, *i.e.* information based on the observation of some indicators which are publicly available. This might entail moderate costs, since the main obstacle is represented by the need to choose the appropriate benchmark. For this reason, these methods are not particularly suited for long-lasting infringements, which significantly affected market dynamics; for global cartels; and when prices are particularly volatile.

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[663] See LANDES, *op. cit.*, (1983).

[664] Hausmann (1981) and Hausmann – Newey (1995) underline the possibility to derive the compensated demand curves from actual market curves. Hausmann, *Exact consumer's surplus and deadweight loss*, in 71 *Am. Ec. Rev.*, 662, 1981. Haussmann and Newey, *Non parametric estimation of exact consumers surplus and deadweight loss*, in 63 *Econometrica*, 1445, (1995).

[665] Both are addressed by LESLIE, Antitrust damages and deadweight loss, in 51 The Antitrust Bulletin, 521 (2006).

[666] Polinsky and Shavell, *Should the liability be based on the harm to the victim or the gain to the injurer?*, 10 The Journal of Law, Economics & Organization (1994), p. 427.

On the determination of litigation costs, with reference to the US systems, the results of the Georgetown project and its ratio with awarded damages, see BREIT – ELZINGA, *The costs of the legal system in private antitrust enforcement*, in White (Ed.), *Private antitrust litigation*, 1988, 107

The simplicity of the method, however, also entails some loss of accuracy. For example, variables that may have affected the chosen comparator are normally not taken into account, with a risk of over- or under estimating certain effects. In order to cope with this problem, regression analysis may be integrated in the "but-for" determination, in order to identify the impact of different variables that are not linked to the infringement. If the appropriate benchmark is established and the irrelevant variables are identified and excluded, this method can be particularly suited for claims involving plaintiffs that operate in upstream or downstream markets, like buyers or sellers. These undertakings are normally active in more than one market, and face their investment decisions by comparing different market options and price fluctuations; thus, they may encounter lower difficulties in gathering the relevant information.

In other cases, direct information available on the structure of the market and the parties involved can be used. These methods are characterized by their reference to the cost structure of the infringer(s) in order to define the "normal" price that should have been emerged in the market absent the infringement (cost-based approach). More advanced methods add the definition of a hypothetical demand curve (like in the critical loss analysis) and the interaction model (simulation) in order to reach a more accurate description of the counterfactual. These methods often require extensive private information, *i.e.* information that is held by the defendant (especially in cartel cases) or by competitors facing similar supply and demand curves. For this reason, they normally lead to higher litigation costs. Moreover, simulation methods may be criticised on the basis of the economic model chosen or the underlying assumptions of the model.

Lost profits claims may entail additional problems, especially in foreclosure cases, due to the need to measure forgone profits. Again, private information is needed in order to assess the profitability of a potential competitor. On the other hand, actualisation of costs incurred by the potential entrant can rely on hard evidence, although this method is likely to under-compensate lost profits[667].

Finally, in other cases the determination of the harm (or gain) can be left to the equitable appreciation of the judge, leading to a drastic reduction of litigation costs. This is particularly important for low-stake cases, where high litigation costs would discourage victims from filing suit. For example, in the "motor insurance" litigation in Italy, the first claims were filed asking for an equitable remedy, without the need to provide a precise assessment of the harm suffered[668]. After 2001, also due to the introduction of a specific legal

[667] See, *e.g.*, Hovenkamp (1999).

[668] Afterwards the 2001, a new law required the determination according to the law for standard contract, in order to limit the impact of mass-claim litigation.

requirement, the judges started to refer to the difference between Italian and average European tariffs, as was stated in the NCA's decision. This amount was then also linked to a yardstick method: the average damage award was calculated as 20% of the price paid during the concerted practice, ranging from €100 to €1,000 depending on the risk-class, the number of insured vehicles and the place of residence of the plaintiff. The equitable remedy thus allowed for individual recovery of very small claims, since no significant costs were incurred in the determination of damages.

In summary, equitable damage assessment is highly suitable for small mass claims filed by individual final consumers, despite the foreseeable lack of accuracy. The example showed above may be quite meaningful: insurance tariffs are strongly linked to some national (or even local or personal) characteristics, like regulation, indemnification systems, accidents rate, and so forth. This is typically a market that would not be suited for yardstick comparison, thus assuming a 20% overcharge was probably not the most accurate damage quantification exercise. Moreover, given that the determination of damages is based on the subjective assessment of the judge, using this method may lead to starkly different damage assessments (especially if involving judges from different jurisdictions).

4.3.5 Summary tables

Table 62 – Option "Harm-based" plus interest since harm occurred

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *amount higher than gain due to deadweight loss* • *overcharge may be difficult or costly to quantify in some cases* • *no overdeterrence due to low probability of detection*	**3** • *significant deterrence in contractual claims, also due to difficulties in proving claimant's failure to mitigate harm* • *harm may be difficult or costly to quantify for foreclosed claimants* • *no risk of overdeterrence for "efficient" infringement*	**2** • *significant deterrence in exploitative abuses (limited number of cases)* • *harm may be difficult or costly to quantify in exclusionary abuses* • *no risk of overdeterrence for "efficient" infringement*
Corrective justice	**4** • ***n. of compensated victims:*** *overcharge may be difficult or costly to quantify in some cases* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered*	**4** • ***n. of compensated victims:*** *harm may be difficult or costly to quantify only in a limited set of cases (foreclosed claimants)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered*	**3** • ***n. of compensated victims:*** *harm may be difficult or costly to quantify in cases of exclusionary abuse* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered*
Internal market	**1** • *harm based damages are currently the standard in all MSs*	**1** • *harm based damages are currently the standard in all MSs*	**1** • *harm based damages are currently the standard in all MSs*
Costs			
Litigation costs	**2** • *overcharge may be difficult or costly to quantify in some cases, especially in mass claims*	**2** • *proximity of plaintiff favours the proof on quantification* • *harm may be difficult or costly to quantify for foreclosed claimants* • *probability of settlement may be reduced whenever the defendant has limited knowledge of claimant's harm*	**3** • *proximity of plaintiff favours the proof on quantification* • *harm may be difficult or costly to quantify in exclusionary abuses* • *probability of settlement may be reduced whenever the defendant has limited knowledge of claimant's harm*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**1** • *Type II errors may emerge whenever the claimant fails to prove harm*	**1** • *Type II errors may emerge whenever the claimant fails to prove harm (especially for foreclosed claimants)*	**2** • *Type II errors may emerge whenever the claimant fails to prove harm (especially in exclusionary abuses)*
Harmonisation costs	**0** • *it is the present standard*	**0** • *it is the present standard*	**0** • *it is the present standard*

Table 63 – Option "Gain-based available in addition to harm-based" plus "prejudgment interest since harm occurred"

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *Limited increase in deterrence only for those cases in which harm is difficult to prove (low number of cases)*	**3** • *Increase in deterrence for cases in which harm is difficult/costly to quantify (for foreclosed claimants)* • *limited risk of overdeterrence for "efficient" infringement; leading to a strategic abuse of the gain-based alternative*	**3** • *Increase in deterrence for cases in which harm is difficult/costly to quantify (exclusionary abuses)* • *risk of overdeterrence for "efficient" infringement; leading to a strategic abuse of the gain-based alternative*
Corrective justice	**4** • ***n. of compensated victims:*** *limited increase: only for those claimants that find it difficult to prove harm (low number of cases)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered if gain is used as an alternative to harm; risk of overcompensation if the plaintiff is able to retain the unclaimed damages awards (see sub-option 1 in the main text)*	**4** • ***n. of compensated victims:*** *limited increase: only for those claimants that find it difficult to prove harm (low number of cases)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered; limited risk of overcompensation due to strategic abuse*	**4** • ***n. of compensated victims:*** *limited increase: only for those claimants that find it difficult to prove harm (exclusionary abuses)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered risk of overcompensation due to strategic abuse*
Internal market	**4** • *if introduced as an alternative basis, it may level the differences faced by the plaintiff between different jurisdictions – all systems would contemplate a gain-based option*	**4** • *if introduced as an alternative basis, it may level the differences faced by the plaintiff between different jurisdictions – all systems would contemplate a gain-based option*	**4** • *if introduced as an alternative basis, it may level the differences faced by the plaintiff between different jurisdictions – all systems would contemplate a gain-based option*
Costs			
Litigation costs	**1** • *if harm is too difficult or costly to prove, a gain-based option can reduce costs for claimants (especially in mass claims)* • *reduction of number of claims if used as a consolidation mechanism (see sub-options 1 and 2 in the main text)*	**1** • *if harm is too difficult or costly to prove, a gain-based option can reduce costs for claimants (especially for foreclosed competitors)* • *consolidation mechanism is less useful (see sub-options 1 and 2 in the main text)*	**1** • *if harm is too difficult or costly to prove, a gain-based option can reduce costs for claimants (especially for exclusionary abuses)* • *consolidation mechanism is less useful (see sub-options 1 and 2 in the main text)*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**1** • *no significant change compared to option "harm-based"*	**2** • *due to lack of correlativity, risk of type I errors*	**2** • *due to lack of correlativity, risk of type I errors*
Harmonisation costs	**2** • *need to harmonize different legal systems, partially departing from the pure harm based approach* • *Costs may be substantially higher if gain-based system and sub-options are used*	**2** • *need to harmonize different legal systems, partially departing from the pure harm based approach* • *Costs may be substantially higher if gain-based system and sub-options are used*	**2** • *need to harmonize different legal systems, partially departing from the pure harm based approach* • *Costs may be substantially higher if gain-based system and sub-options are used*

Table 64 – Option "harm-based" plus "pre-judgement interests since infringement occurred"

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *more deterrent than option "harm-based", especially in case harm materialised well after the infringement*	**3** • *more deterrent than option "harm-based", especially in case harm materialised well after the infringement (low impact as such delay is less likely in vertical restraints)*	**3** • *more deterrent than option "harm-based", especially in case harm materialised well after the infringement*
Corrective justice	**3** • ***n. of compensated victims:*** *as in option "harm-based"* • ***alignment with actual harm:*** *less aligned than option "harm-based", since (i) delay between infringement and harm may lead to over-compensation; (ii) different treatment in multi-claimant suits*	**2** • ***n. of compensated victims:*** *as in option "harm-based"* • ***alignment with actual harm:*** *less aligned than option "harm-based", since (i) delay between infringement and harm may lead to over-compensation; (ii) different treatment in multi-claimant suits (less likely to occur than in cartel cases)*	**2** • ***n. of compensated victims:*** *as in option "harm-based"* • ***alignment with actual harm:*** *less aligned than option "harm-based", since (i) delay between infringement and harm may lead to over-compensation; (ii) different treatment in multi-claimant suits (less likely to occur than in cartel cases)*
Internal market	**4** • *fully levelled playing field for damages actions across MS*	**4** • *fully levelled playing field for damages actions across MS*	**4** • *fully levelled playing field for damages actions across MS*
Costs			
Litigation costs	**2** • *as in option "harm-based"* • *occurrence of infringement may be easier to prove than date in which harm occurred, especially for multi-plaintiff and follow-on litigation.* • *however this impact is minimal due to loss of "economies of scope", since calculation of harm is anyway carried out*	**2** • *as in option "harm-based"* • *date in which infringement started may be easier to prove than date of harm* • *however this impact is minimal due to loss of "economies of scope", since calculation of harm is anyway carried out*	**3** • *as in option "harm-based"* • *date in which infringement started may be easier to prove than date of harm* • *however this impact is minimal due to loss of "economies of scope", since calculation of harm is anyway carried out*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**1** • *as in option "gain-based"*	**1** • *as in option "gain-based"*	**1** • *as in option "gain-based"*
Harmonisation costs	**2** • *need to harmonize different legal systems, partially departing from the pure harm based approach*	**2** • *need to harmonize different legal systems, partially departing from the pure harm based approach*	**2** • *need to harmonize different legal systems, partially departing from the pure harm based approach*

Table 65 – Option "gain based" plus "pre-judgement interests since infringement occurred"

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *Limited increase in deterrence only for those cases in which harm is difficult to prove (low number of cases)* • *Additional deterrence when there is a delay between infringement and harm*	**3** • *Increase in deterrence for cases in which harm is difficult/costly to quantify (for foreclosed claimants)* • *risk of overdeterrence for "efficient" infringement; leading to a strategic abuse of the gain-based alternative* • *more deterrent if harm materialised well after the infringement (low likelihood)*	**3** • *Increase in deterrence for cases in which harm is difficult/costly to quantify (exclusionary abuses)* • *risk of overdeterrence for "efficient" infringement; leading to a strategic abuse of the gain-based alternative* • *more deterrent if harm materialised well after the infringement*
Corrective justice	**3** • ***n. of compensated victims:*** *limited increase: only for those claimants that find it difficult to prove harm (low number of cases)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered if gain is used as an alternative to harm; less aligned than option "harm-based", since (i) delay between infringement and harm may lead to over-compensation; (ii) different treatment in multi-claimant suits*	**3** • ***n. of compensated victims:*** *limited increase: only for those claimants that find it difficult to prove harm (low number of cases)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered; less aligned than option "harm-based", since (i) delay between infringement and harm may lead to over-compensation; (ii) different treatment in multi-claimant suits (less likely to occur than in cartel cases)*	**3** • ***n. of compensated victims:*** *limited increase: only for those claimants that find it difficult to prove harm (exclusionary abuses)* • ***alignment with actual harm:*** *correlativity damages awarded - harm suffered; less aligned than option "harm-based", since (i) delay between infringement and harm may lead to over-compensation; (ii) different treatment in multi-claimant suits (less likely to occur than in cartel cases)*
Internal market	**5** • *total harmonization of conditions across MS*	**5** • *total harmonization of conditions across MS*	**5** • *total harmonization of conditions across MS*
Costs			
Litigation costs	**1** • *as in option "gain-based"* • *occurrence of infringement may be easier to prove than date in which harm occurred, especially for multi-plaintiff and follow-on litigation.*	**1** • *as in option "gain-based"* • *date in which infringement started may be easier to prove than date of harm (limited impact compared to cartels)*	**1** • *as in option "gain-based"* • *date in which infringement started may be easier to prove than date of harm (limited impact compared to cartels)*
Administrative burdens	**0** • *not significant*	**0** • *not significant*	**0** • *not significant*
Error costs	**1** • *no significant change compared to option "gain-based"*	**2** • *no significant change compared to option "gain-based"*	**2** • *no significant change compared to option "gain-based"*
Harmonisation costs	**3** • *need to harmonize different legal systems* • *may be substantially higher if gain-based system with sub-options are used*	**3** • *need to harmonize different legal systems* • *may be substantially higher if gain-based system with sub-options are used*	**3** • *need to harmonize different legal systems* • *may be substantially higher if gain-based system with sub-options are used*

5 Passing-on defence

In multi-stage distribution chains, firms having to pay supra-competitive prices resulting from an antitrust infringement may be able to pass overcharges downstream to "indirect purchasers", be they producers deploying the cartelized component in their manufacturing process, distributors, or end consumers.[669] The problem arises typically in a price-fixing setting (which is the normal starting point in the academic debate). But there is no theoretical reason to exclude its relevance for dominance abuses: though it is to be stressed that, given the somewhat limited application of the prohibition for exploitative abuses[670], the overall weight of the problem is doomed to be less significant. On the contrary, the passing-on perspective does not seem to appreciably affect 'pure' vertical restraints: in fact, leaving aside cases where the vertical minimum price-fixing (RPM) provision is used as an aid to support a horizontal (manufacturers') collusion or to implement an abuse of dominance through imperfect price discrimination [671], the main concern of such practices, namely non-price restraints, is focused on foreclosure or limitation of the autonomy margins of involved firms, which may distort (interbrand/intrabrand) competition but do not usually translate into transfer of overcharges. To be sure, the interests of a producer and those of its distributors diverge, implying that: (i) a vertical arrangement does not lead (directly) to an increase of the

[669] R. Harris, L. Sullivan, *Passing on the monopoly overcharge: a comprehensive policy analysis*, in 128 University of Pennsylvania Law Review, 1979-80, 269.

[670] As explained by E. Paulis, *Article 82 EC and exploitative conducts*, European Competition Law Annual 2007, (C. D. Ehlermann & M. Marquis eds.), 2007, "practical difficulties are so convincing and the risk of competition authorities arriving at the wrong result so great that enforcement actions against exploitative conducts…should be taken only as a last resort".

[671] For an in-depth discussion of consumers' by-products stemming from the adoption of RPM schemes, see R.D. Blair, J. B. Herndon and J. B. Lopatka, *Resale price maintenance and the private antitrust plaintiff,* in Washington University Law Quarterly, 2005, 657, remarking that, "when a manufacturer supplies its product to retail distributors who resell to the ultimate consumer, its RPM plan may be attacked by consumers or distributors. For consumers, the prices they actually pay will almost certainly exceed the prices they would have paid (at least on average) absent the RPM program. After all, the point of any RPM plan is to keep the price higher than it would otherwise be. Consequently, a consumer may sue for damages alleging that she was overcharged pursuant to an agreement between the manufacturer and the retailer. In overcharge cases, the proper measure of damages is the difference between the actual price paid and the price that would have been paid "but for" the antitrust violation. To prove antitrust injury and properly estimate damages, however, one must net out of the overcharge any benefits that the consumer received as a result of the RPM program. *This, of course, requires knowing much more than simply whether an RPM plan existed*" (p. 688, footnotes omitted, emphasis added). In other words, an RPM scheme adopted in order to support the supply of additional pre-/post-sale services does not end up in overcharge (and, absent significant market power, would be difficult to be conceived of). As a consequence, an actual problem of passing-on is likely to surface only in case of an RPM perfecting a manufacturer cartel or, as noted by the Authors , implementing an imperfect price-discrimination.

manufacturer's market power; (ii) each side of the relationship tries to maximize its profit; (iii) the producer's interest tends to align with the consumer's interest, because the former has the typical incentive to squeeze the distributors rather than to give them the power to inflate the costs of distribution. As a consequence, non-price vertical restraints might end up in an anticompetitive overcharge only in the rather unlikely settings where the producer, strong but not dominant: *a*) imposes a restriction (such as exclusive purchasing) without conceding any advantage in exchange); or *b*) is willing to share its market power with the distributor, by conferring a privilege (say, exclusive territory) which allows the latter to increase prices (overcharge), in absence of pro-competitive justifications (additional services, etc.).[672]

In the US, whether indirect purchasers should be allowed to sue for damages is still an unresolved dispute, after cases such as *Illinois Brick*.[673] In particular, authoritative commentators have argued that determining who should be deemed to belong to the category of indirect purchasers is as difficult as identifying the category ultimately affected by a tax[674]. As of now, however, this argument is rejected by the prevailing literature[675]. First, it can be fairly objected that difficulties in identifying categories affected by a given harm is common in all tort law[676]. Difficulties in fact-finding can be alleviated by assumptions and

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[672] Needless to say, the agreement would affect third parties (to be considered direct purchasers) and create a situation where the prejudice can be passed on other subjects (indirect purchasers), provided that the chain of distribution is constituted by more than two levels. Thus, the picture would look like the following: A (producer) and B (wholesale distributor) jointly devise a distribution agreement which (violates competition law and) determines an overcharge, accruing directly to B (but presumably shared by A); C (direct purchaser/retail distributor) might decide to sue B, alone or jointly with A, claiming compensation for the anticompetitive overcharge that she assumes to have suffered from such violation. B (or B and A) might then invoke the passing-on defence arguing that C has been able to pass-on to D (final consumer) the overcharge.

[673] In the US standing to sue has been denied to indirect purchaser in *Illinois Brick v. Illinois*, 431, US 720, 1977. Strong criticism is expressed in R. Harris, L. Sullivan, cit., 269. However a considerable number of States (30) allowed indirect purchaser access to damages, see the decision *California v. ARC America*, 490, US 93, 1989. At federal level the ABA Commission, in a report to be presented at the Congress, recommended to adopt "major statutory changes to overrule *Illinois Brick* to allow indirect purchasers to sue for damages in federal court". Moreover it is added that: "the Commission may also recommend limitations to *Hanover Shoe* and the passing-on defense to those cases where only direct purchasers sue in federal court, and to allow removal of all state indirect purchaser actions to federal court to the extent constitutionally permissible". Such view has been opposed in the comments of a Working Group on Civil Remedies established by the American Antitrust Institute for purposes of responding to the AMC's June 12, 2006, request for public comments, July 10, 2006. Such document is available at http://www.antitrustinstitute.org/archives/files/519.pdf.

[674] See W. Breit, K. G. Elzinga, *Private antitrust enforcement: the new learning,* 28 Journal of Law and Economics, 1985, 405.

[675] See Antitrust Modernization Commission (2006).

[676] See K. Roach, M.J. Trebilcock, *cit..*, 495.

economic analysis, *e.g.* by observing or estimating the elasticity of demand and supply in the relevant and neighbouring markets[677].

In the following pages, the term 'indirect purchaser' will be intended as any purchaser of an illegally monopolized or overcharged product or service from any party in the vertical supply chain, other than the party suspected of the antitrust violation. It falls therefore out of the scope of the present analysis any attempt to examine the pros and cons of –contrary to the mainstream legal wisdom- allowing standing to all other business entities or consumers that may also be included in the "target area" of an anticompetitive conduct[678]: though it is plausible to imagine that most of the arguments herein provided can be extended to other possible indirect or remote victims of antitrust infringement.

Having thus delimited the scope of our research, the main additional obstacle to these indirect claims, compared to direct ones, is the unavailability of an effective group litigation mechanism in the large majority of Member States[679]. Because of lack of mechanisms capable to diminish and spread the costs of litigation, finding evidence of the harm is clearly more expensive for indirect purchaser than for direct ones[680]. This is due to the fact that, even in follow-on

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[677] Techniques include a theoretical approach which would start from a theoretical model of the plaintiffs market and the structural determinants of pass-on (with empirical evidence used to support the assumptions underlying the model), to an approach which directly estimates the extent of pass-on using a statistical study of the historical relationship between the plaintiffs prices and the determinants of these prices. An alternative approach uses statistical techniques to examine how marginal cost changes in the past (whether this is due to increases in the price of the raw material which is subject to the cartel or other inputs) have actually affected product prices (this avoids imposing an economic model as to how pass on is determined). An econometric estimation approach is recommended on the basis that it provides an empirically tested estimate of the pass-on rate, as opposed to an estimate derived from a theoretical construction of market dynamics. However it is important that the statistical analysis is tested thoroughly and that it is fully supported by qualitative information about the industry. For a sample of specific studies, see Bettendorf, Verboven (2000), Borenstein, Cameron and Gilbert (1997). Cotterill, Egan, Buckhold (2001).

[678] It is worth reminding that, already in the seventies, some US courts formulated a "target area" test for antitrust standing, and a related "zone of interests" test. See *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975) ("target area"); *Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980) ("target area"); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (6th Cir. 1975) ("zone of interests"). These tests sought to combine the existing notions of directness and foreseeability.

[679] See Rüggeberg (2005).

[680] See Ashurst (2004). See however judgment of the Corte d'Appello di Torino of 6 July 2000, in Danno e Responsabilità, 2001, p. 46, where the Court appears to have refused to award damages on the grounds that the claimant had passed on the effects of the defendant's anticompetitive behaviour to the final consumers. See also Corte d'Appello of Cagliari of 23 January 1999, *Unimare S.r.l. v. Geasar S.p.A.*

cases, direct purchasers are closer to the infringement, so that information costs of identifying and suing an antitrust violator are lower[681].

In fact, there are no legal or statutory provisions impeding indirect purchasers' claims in the European legal systems. Instead, "many states underline the restitutionary-compensatory function of damages (Germany, Italy etc.)"[682]. Applied in the abstract, this logic would tend to allow both for indirect purchasers to claim, where they have indeed suffered loss, and for defendants to invoke a passing on defence, where higher prices have been passed on. Furthermore, it has been widely recognized that indirect claims would be in line with the Community law principle of effectiveness; and the recent ECJ judgment in *Manfredi*[683], which states that 'any individual' (seemingly whether a direct or indirect purchaser) must be able to rely on article 81 EC to claim invalidity of an arrangement or practice prohibited under the competition rules and claim compensation for the harm suffered as a result of the breach. Moreover, given the similarity of the unjust enrichment arguments raised in competition and tax cases, it seem likely that, when considering passing-on arguments in the context of competition law, the ECJ will apply the following analysis used in the cases of *San Giorgio* and *Weber's Wine World*[684]: "where it is clear that a recoverable tax was passed on to someone other than the taxable person, the Member State may resist making the repayments where such a repayment would constitute *unjust enrichment*"[685]. As to the passing-on defence,

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[681] This is the main argument used by "the sceptical view", that finds its main foundation in the works of W. M. Landes and R. A. Posner (1979), Werden and Schwartz (1984), Benston (1986). Their opinion is shared, among others, by J. H. Andersen, (1980); E. D. Cavanagh, (1983); W.H. Page, (1985); Lopatka and Page (2003); N. Reich, (2005), and the American Antitrust Institute (2006). On the other hand, supporters of the "sanguine view" are Harris and Sullivan (1979), Mantell (1982), Roach and Trebilcock (1997). See also the opinion of Cooter (1981).

[682] Ashurst Report (2004).

[683] Joined Cases C-295 and 298/04, *Manfredi*, [2006] ECR I-6619.

[684] ECJ, 2 October 2003, Case C-147/01, Weber's Wine World Handels-GmbH, Ernestine Rathgeber, Karl Schlosser, Beta-Leasing GmbH v. Abgabenberufungskommission Wien [2003] ECR I-11365; Case 199/82, Amministrazione delle Finanze dello Stato v. SpA San Giorgio [1983] ECR 03595.

[685] According to F. Cengiz, *Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?*, CCP Working Paper 07-21, "[t]he Court faced the question as to whether passing-on defense exists under Community law directly in cases regarding the extra-contractual liability of the Community and liability of the Member States in breaches of Community law and indirectly in damage actions against violations of Community competition law", implicitly recognising "a passing-on defense in various cases", analysing "detailed statistical pricing data", and ruling "to what extent the plaintiff had passed the damages on to consumers before deciding on the damage award". However, given the particular features of the involved discipline, "it does not seem possible let alone plausible to transfer the principles created to be applied within the field of Community liability to the sphere of liability of individuals for breaches of Community

the Staff Working Paper seems way more cautious. In fact, after suggesting its likely redundancy, it states "there is no passing-on defence in Community law". Immediately after, however, it specifies that such a defence is (not reneged, but) encompassed, together with the proof of no reduction in sales or profits, as a pre-condition of the defence of unjust enrichment[686]. The final implication would seem to be that passing-on cannot be invoked as a defence whenever the price increase has been offset by a decrease in sales volume, meaning that the intermediary has 'absorbed' the overcharge: a conclusion which cannot be but endorsed and practically translates into a more detailed description of the available defence.

5.1 Impact assessment

Despite finding that indirect purchaser's claims and defensive use of passing-on (under the different label of unjust enrichment) would be compatible either with European law as it stands (see *Courage*) or with State members' domestic disciplines, the Green Paper has intended to test the efficiency of these legal frameworks. For this purpose, it has identified four main options related specifically to the issue of the "passing on defence" and "indirect purchaser standing".

In order to assess the potential impact of these options, we have reviewed the results of relevant US empirical studies[687]. The US experience has given us the opportunity to test directly these specific options[688], since State antitrust laws

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competition law". The same holds true for cases regarding the liability of Member States for breaches of Community law.

[686] Actually, "[m]atters of unjust enrichment and passing-on defense are essentially similar in terms of their underlying rationales. They both stem from the fairness consideration, albeit one deals with the question whether an individual should be entitled to damages under conditions which do not fully justify such damage award, and the other whether an individual should be entitled to damages he did not actually incur. The only practical difference is that analysis of passing-on proves much more complicated than that of unjust enrichment as it involves technical economic and econometric data. That difference aside, it is not hard to imagine that the Court's position would not be dramatically different in the matter of passing-on defense from its position regarding unjust enrichment" (Cengiz, 2007).

[687] See The Georgetown Private Antitrust Litigation Project (1973-83), Handler (1977), Block, Demmert and Nold (1979), Harris and Sullivan (1980), Landes and Posner (1979), Snyder (1985), Page (2005), Lande and Davis (2006), Antitrust Modernization Commission (2006).

[688] From the study of Angland *et alii* (2006) it is possible to infer that at least 26 states in total, plus the District of Columbia, now allow some type of indirect purchaser suits for antitrust violations. Approximately nineteen states and the District of Columbia have enacted statutes, granting antitrust standing to indirect purchasers. See Ala. Code § 6-5-60(a); Cal. Bus. & Prof. Code § 16750(a); D.C. Code § 28-4509(a); Haw. Rev. Stat. § 480-3; Idaho Code § 48-108; 740 Ill. Comp. Stat. 10/7(2);654 Kan. Stat. § 50-161; Me. Rev. Stat. tit. 10, § 1104(1); Md. Code Com. Law II 11-209(b)(2); Mich. Comp. Laws § 445.778; Minn. Stat. § 325D.57; Miss. Code § 75-21-9; Nev.

are not pre-empted by federal antitrust law (*California v. Arc America Corp.*, 1989), and the majority of States permit classes of indirect purchasers to recover under state antitrust law suits[689].

5.1.1 Passing-on defence allowed and indirect standing allowed

In a sense, this option might be considered a "zero option", since, as was stated above, it is not precluded by any European system. On the other hand, it is crystal clear that a plain recognition of its full feasibility would represent a definite progress toward an effective private enforcement of the antitrust discipline.

A: BENEFITS

A1. Deterrence

Allowing the wrongdoer to avail of a passing-on defence can, in theory, remedy the over-deterrence problem normally associated with the risk of duplicative liability. At the same time, the deterrent effect of such an option strongly

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Rev. Stat. §§ 598A.160, 598A.210; N.M. Stat. § 57-1-3; N.Y. Gen. Bus. Law § 340(6); Or. Rev. Stat. §646.775; R.I. Gen. Laws § 6-36-12(g); S.D. Codified Laws § 37-1-33; Vt. Stat. tit. 9, § 2465; Wis. Stat. § 133.18(1)(a) In four more states, indirect purchaser standing has been created by judicial decisions, under the state's antitrust laws. See Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99, 109 (Ariz. 2003); Comes v. Microsoft Corp., 646 N.W.2d 440, 449-50 (Iowa 2002); Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 687 (N.C. Ct. App. 1996); Sherwood v. Microsoft Corp., No. M2000-1850-COA-R9-CV, 2003 Tenn. Ct. App. LEXIS 539, at *80 (July 31, 2003). In at least further three states, courts have ruled that indirect-purchaser consumers can sue under state consumer protection laws for antitrust violations. State consumer protection laws often provide a private right of action for the violation of any of a state's other laws whose purpose is to protect the rights of consumers. See Ciardi v. F. Hoffmann-La Roche, Ltd., 762 N.E.2d 303, 312 (Mass. 2002); Arthur v. Microsoft Corp., 267 Neb. 586, [7], No. S-01-1325, 2004 Neb. LEXIS 43, 22 (2004); Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 110 (Fla. Dist. Ct. App. 1996).

[689] K. J. O'Connor, (2001) (reporting that "thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers", although some of them restrict the use of class action procedure in such cases. In the federal context the story is well known. In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), a lessor of shoemaking machinery sought to defend itself from damages asserted by one of its lessees on the ground that the lessee had passed all overcharges on to its customers, the buyers of the finished shoes. The Supreme Court foreclosed this defense, holding that whatever the merits of the individual case, it is not generally feasible for courts to examine the economics of pass-through. Later on, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Supreme Court held that the purchaser of new buildings (the state of Illinois, suing in its individual capacity as a person in commerce) cannot recover for overcharges by colluding concrete block manufacturers that were allegedly passed to the plaintiff through the contractors and subcontractors that incorporated the blocks into the plaintiff's buildings. The Illinois Brick rule established the basic standing regime for federal antitrust damages claims in multi-tiered distribution contexts: overcharges may be recovered in their entirety by direct purchasers, and only by direct purchasers.

depends on whether indirect purchasers are able to effectively claim recovery of the losses sustained as a result of passing-on, which in turn depends on a host of procedural and substantive factors. Assuming, for the sake of simplicity, that indirect purchasers can overcome collective action problems as well as difficulties concerning the causation issue, then the defensive use of passing-on would turn out to be a zero-sum game – *i.e.,* the same deterrence effect would be observed both with and without passing-on.

Conversely, precluding indirect purchasers' claims is likely to prove negative from the deterrence perspective. There seems to be a growing consensus in the economic literature on the fact that the technique, commonly resorted to in order to measure antitrust damages and usually identified as the overcharge on the amount that has been directly purchased from the wrongdoer(s), is doomed to lead to under-deterrence.

According to Basso and Ross (2007), this approach, represented by the rectangle B in Figure 3 above, may significantly underestimate the harm done to direct and indirect purchasers, even if the but-for price is correctly assessed. In fact, it ignores the triangle A, consisting of lost surplus (gains to buyers for units they would have purchased at the lower but-for price, actually , *i.e.* the deadweight-loss), on the double assumption that this area is small in comparison to the former and its computation would require additional information, which is usually unavailable. Both reasons turn out to be less than compelling, since the estimation might be feasible and produce an outcome justifying the effort of computation (Brander and Ross, 2006, provide a simple model where the triangle is half as large as the rectangle, implying that the standard damage measure misses 1/3 of the actual harm). But there is still another reason for doubting the consistency of the standard approach. When cartels raise prices to direct purchasers, who distribute and resell the product or use the product as an input into the production of some other product, one would expect the cartel's price increase to eventually lead to higher prices all the way downstream to final consumers. "Along the way there is the potential for additional harm to be created as each stage suffers from some reduction in its consumers' surplus". This point is equally stressed by Hellwig (2006), who convincingly shows that the lost surplus (in his wording, the business-loss effect) "may actually outweigh the per-unit revenue enhancing effect"[690].

Following this path, it is possible to demonstrate that, when the downward market is essentially monopolized, the harm measured by B+A is exactly the loss of profits suffered by the firm, or firms in the case of a cartel, downstream. Even if some of the prejudice is passed on to their customers, these are harms in addition to the B+A harm suffered by the direct purchasers. "Put another way, [B+A] is the true measure of the harm suffered by the direct purchasers in these

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[690] See also Verboven and Van Dijk (2007).

cases – that is the harm they are left with after accounting for the higher prices they will themselves collect from their customers". This conclusion, shared by the authors cited above, implies that to reduce the damages collected by the single or cartelized purchasers below B+A on the theory that they passed on some of this harm would be incorrect. The alternative scenario is represented by the possibility that the B+A area may overstate the harm that remained with direct purchasers when they are fiercely competing downstream, so that each benefits (somewhat) indirectly through higher input prices prompting rivals to raise their retail prices.

Such a stream of arguments induces to believe that passing-on effects absorbed by indirect purchasers should come on top of damages granted to the monopolistic direct buyer, whereas this determination is way more opaque, at least in the short run, when direct buyers are competing fiercely[691]. But, by this time, it should be clear that the common practice of using area B to measure harm to direct and indirect purchasers can result in missing more than 50% of the harm; and there is room to believe that the fraction of damages suffered by direct purchasers would represent, as a maximum, 2/3 of the total harm (when they hold a monopolistic position), but might be even zero in a hypothetical environment of perfect competition (Basso and Ross, 2007).

If the foregoing holds true, it is pointless to emphasize the risk, stemming from allowing indirect purchasers' initiatives, that successful claims at several levels may lead to multiple recovery against the same defendant, since the picture appears monotonically dominated by under-deterrence. Accordingly, a clear benefit of the option under exam would be to increase prospective penalties for would-be infringers.

Since indirect purchasers might know better their business situation (which seems plausible when indirect purchasers are SME), it is obvious that they can aptly contribute to a more precise determination of the amount of damages, whereas the likelihood that a legal action is initiated depends upon the availability of collective forms of action, which might offset the disincentives due to the fragmentation of claims.

A2. Corrective justice

Independently of the complexity of the issue – the "insurmountable" task invoked by Justice White in *Hanover Shoe* – it is evident, from all the plausible models examined, that there are situations in which the prejudice suffered by direct purchasers is passed downward – in the form of overcharge – along the

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[691] See Hellwig (2006).

production/distribution chain, thus falling on indirect purchasers[692]. In such cases, allowing the passing-on defence would be in line with the corrective justice principle, since it prevents direct purchasers from recovering a greater stake than the harm suffered, and at the same time allows indirect purchasers to claim their portion of the harm from the wrongdoer. On the other hand, to exclude *ex ante* indirect victims from any compensation would be hardly acceptable in terms of corrective justice. If indirect purchasers can establish injury and the necessary causal connection between the injury and the unlawful conduct, then they should be allowed to claim damages in any European context.

One could argue, as Hellwig does, that "the overcharge on the actual quantity that a direct buyer purchases from the cartel member is a *lower bound* to the overall damages that he suffers"; and that "an appropriate assessment of damages for the direct buyer, taking account of both the business-loss effect and the per-unit revenue enhancing effect actually requires the same procedure as the assessment of damages when the direct buyer is a final consumer", so that passing-on effects suffered by indirect buyers would eventually come on top of the damages suffered by the direct buyer. A conclusion, which -- coupled with the recognition that: *a*) the business-loss effect that a direct buyer experiences when she raises her own price is counteracted by a business-gain effect that is due to the other direct buyers also raising their prices [693], ***[I don't see the logical link, so (a) remains an argument in favour of the passing-on defence],*** but *b*) the above business-gain effect is to be disregarded, because of manifold problems of causation links arising along the vertical chain,—would seem to support the choice, endorsed by the German Monopolies Commission in 2004, of prohibiting the passing-on defence altogether[694].

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[692] According to Verboven and Van Dijk (2007), the purchaser plaintiff's lost profits from the cartel can be decomposed into a direct and two indirect effects. The direct cost effect is the anticompetitive price overcharge suffered by the plaintiff, multiplied by the number of units purchased at that price. The first indirect effect, pass-on, reflects the extent to which the purchaser can shift the burden of the price overcharge to its own customers. In the authors' view, the pass-on effect also implies a usually neglected output effect, which refers to the sales that may be lost when part of the price overcharge is passed on to the customers. They note, however, that a proper account of the output effect in the passing-on defense may actually turn against the defendant, when one considers the cartel's total harm (i.e. including the effect on final consumers). This means that the defense would be resorted to by the defendant with care, since "the same evidence may actually also be used to show that the cartel's total harm is higher than the traditional cost effect"

[693] See Hellwig, 19 ff.

[694] Monopolies Commission, Special Report No. 41, marginal numbers 67 et seq. According to Hellwig, 26, "the passing-on defence is actually irrelevant to a proper assessment of damages. Once one takes account of the allocation effect, as well as the distributive effect, of price-fixing, one sees that potential gains from passing-on effects are matched by the business loss that occurs because the increase in the downstream price lowers demand".

But such a view ends up disregarding the perspective of corrective justice. Were it true that the area A dominates B, which helps deny room for the passing-on defence, it should be kept in mind that B can be, and is routinely loaded on indirect purchasers[695]. With the double, unfortunate effect of penalizing the indirect purchasers (unless they are allowed, as recommended by the German Monopolies Commission, to claim damages against antitrust offenders, apparently – as was suggested somewhat maliciously -- just because their difficulties in providing sufficient evidence for the damages that they suffer would limit the practical significance of the recommendation only to those cases where the link between upstream and downstream prices was obvious and the direct purchasers might have few incentives to sue for damages themselves), while enriching upward buyers, who actually succeeded in transferring the overcharge[696].

It is certainly true that to demonstrate the causation nexus may prove difficult (we can conceive of chains where tracing the overcharge is almost impossible). But this is not always the case (let alone the fact that such a situation should be dealt with prospectively while considering the opportunity of introducing multiple damages), since there is plenty of circumstances where estimating the rate of passing-on seems entirely workable[697]. At any rate, be it as it may, the

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[695] Several scenarios of likely pass-on are commonly recognized: *a*) perfectly inelastic demand, so that the cartel may increase the price it charges to its customers without suffering any loss in volume (this is the 'cost-plus fixed quality' exception admitted by the U.S. Supreme Court, which might be reasonably expanded, in Hovenkamp's opinion, to all cost-plus contracts; *b*) perfectly elastic supply, practically approximated by the multi-product large retailer, who can easily shift staff and shelf space in accordance with the volume of sales of a given product; *c*) a contestable market, where the cost of exit is low; *d*) the "small but vital part" scenario, where the intermediate purchaser has no choice but to buy the part while, due to the fact that the overall price increase is modest, there will be no opposition to the overcharge at any subsequent level of the chain. See Milutinović (2007).

[696] § 33 (3) GWB, emerging from the 7th Reform of the *Kartellrecht,* actually adopts an intermediate stance with respect to the position of the German Monopolies Commission, suggesting the prohibition of the passing-on defence, and the ruling of the Landgericht Mannheim (2004), subsequently endorsed and reinforced by the Oberlandesgericht Karlsruhe (2004) according to which, in view of the *Vorteilsausgleichung* principle, cartel members are not liable towards direct purchasers if plaintiffs had passed on the higher prices towards downstream customers. Under the new law, it cannot be argued any longer that purchasers do not sustain damage when they resell the goods or services to customers in downstream markets (and it can be inferred that, in cases in which the inflated prices were not passed onto downstream purchasers, direct purchasers may recover damages calculated by reference to the amount of overcharge rather than their actual loss). But the new law does not categorically exclude the possibility to offset benefits resulting from the resale in cases in which direct purchasers manage to pass on the higher prices. See Wurmnest (2005).

[697] As Hellwig himself admits, "the assessment that indirect purchasers claims may be difficult to establish in practice is not a good reason for denying them standing", though this conclusion is reached on the different ground of deterrence. In fact, in his opinion, "by giving the indirect purchasers standing to claim damages from the members of the upstream cartel, one can hope

task of ascertaining whether a sufficient causation link exists should be left with the courts: the risk that something be missed in the process should be balanced against the opportunity to redress precisely the situations that have been effectively injured. In addition, the traditional argument based on the limited incentives of the indirect purchasers, due to the possibly modest measure of their harm, comes to grips with the awareness that this problem, typical of consumer litigation, should be properly cured with expedients other than denying compensation; while the trust on direct purchasers as better enforcers, because of their closed involvement in the matter, is counter-balanced by the risk that proximity translates into the greater likelihood of collusion between the seller and the direct purchaser (see *infra*).

In sum, even assuming that direct purchasers may be better detectors in particular cases, there is absolutely no empirical evidence showing that they are so definitely superior to deserve an exclusive enforcement right to claim damages from the wrongdoer. On the contrary, it appears that the option of allowing indirect purchasers' suits, while allowing a passing-on defence, would increase the scope of compensation, bringing it more in line with actual harm. Considering this, it comes to the surprise of no one that even in a system where the passing-on defence is precluded by an almost 'venerable' line of cases, with the strong support of economic arguments bearing on various profiles (effectiveness of the private enforcement, abatement of administrative costs, and so on), the AMC has endorsed the proposal to re-open the field[698].

A3. Internal market

The relative underdevelopment of the legal praxis in the EU makes it difficult to evaluate the benefits that would accrue from the implementation of this option. Nonetheless, it seems plausible to imply that developing a common

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to counteract the incentives for implicit collusion between the upstream cartel and the direct purchasers. As mentioned above, if the business-gain effect from rivals' cost increases is sufficiently strong, the direct purchasers actually benefit from the cartelization upstream. Apart from follow-on suits, their incentives for suing cartel members for damages may therefore be weak even if damages are assessed without considering business-gain effects. In such a situation, allowing the indirect purchasers to sue for damages may provide a substitute threat against the upstream cartel. In some circumstances, the indirect purchasers may in fact be able to provide sufficient proof of a link between the high prices that they have to pay and the price-fixing upstream. In cases where the direct buyer follows a simple mark-up rule, *e.g.*, when the direct buyer is a utility under a system of cost plus regulation, there should be no problem in doing so". It is worth noting that the 7th Reform of the GWB has incorporated the UWG 'affected parties test', which refers to "market participants" so as to include consumers and businesses that have no direct relationship to the party infringing upon fair competition. Therefore, one may infer that, under the novel test, indirect purchasers are also entitled to recover from cartel members that conspired to fix prices or quotas.

[698] See AMC (2006).

understanding with regard to indirect purchasers' suits would eliminate possible disparities and promote the possibility, for private plaintiffs, of seeking compensation in national courts, well beyond the level which might be presently feasible.

B. COSTS

B1. Litigation costs

Needless to say, when compared to options 2 and 4, allowing a larger number of potential plaintiffs to sue generally would lead to an increase in litigation costs. However, compared with option 3, the availability of a passing-on defence would probably discourage some duplicative claims. Moreover, there is room to believe that certain procedural mechanisms might contribute to minimise the increase in litigation costs, fostering consolidation of correlated proceedings into a single trial (such kind of procedural tools will be briefly discussed below, in Section 5.3.2).

Another reason why litigation costs would also increase is the complexity of calculating pass-through rates, which require the determination of both supply and demand elasticities at each level of the distribution chain. However – even ignoring the fact that, from a due process perspective, denying a defence only because proof would be too difficult is hardly satisfactory – use of alternative methods and techniques may partly solve this problem. For example, econometric techniques might be used to calculate directly how monopoly overcharges result in higher prices to indirect purchasers. Such techniques can potentially determine the ultimate pass-through rate, without prompting excessive litigation burdens in terms of expert surveys costs.

B2. Administrative burdens

In the context we are examining, this heading appears mostly related to the number of suits that the wrongdoer will have to face. Compared to option 2 and 4 more suits might be filled against the same wrongdoer, so that the latter might have to produce and review a larger amount of documents. The overall number of claims would be generally higher than with option 4, since direct purchasers face not only the risk of retaliation, but also free-riding problems (see infra). Administrative burdens would be less than under option 3, where the number of expected claims against the wrongdoer is the highest, since there is no possibility of filtering direct purchasers' claims through the use of the passing-on defence.

B3. Error costs

Compared to options 2 and 4, the complexity of calculating pass-through rates may slightly increase the risk of duplicative liability (type I error costs),

meaning that the same part of the total harm might be recovered both by direct and indirect purchasers. There keep being two possibilities of error due to the fact that there are separate judicial proceedings and, possibly, no coordination: (i) the defendant's passing-on defence is mistakenly rejected on its facts, though a degree of passing-on actually occurred, so that the defendant pays damages to the direct purchaser, whereas indirect purchasers get eventually compensated for the passed-on overcharge; (ii) the pass-through rate is miscalculated in the first trial, and the follow-on trial involving indirect purchasers leads to a portion of damages being compensated twice (in which case, the error lies in the fact that the same portion of damages is compensated twice).

Leaving aside the possibility that direct purchasers be discouraged by the very existence of passing-on defence (an assumption which, without more, runs afoul of their presumed rationality), the above risk might be reduced by the likely reluctance of indirect purchasers to sue if the intermediaries have already promoted a judicial initiative, the more so if, in this trial, the passing-on defence is rejected; on the other hand, its weight increases if this option is coupled with the possibility for plaintiff to recover multiple damages. However, the argument of excessive recoveries has no obvious application, for instance where the dealer prices through cost-plus contracts[699] or when applicable laws or regulations require the direct purchaser to resell the product or service with a fixed or formula mark-up[700]. The rationale for these exceptions is that, in such instances, it will be relatively easy for a defendant to prove that a customer passed on any overcharges and therefore sustained no damage, as far as overcharge is concerned.

Furthermore, it should be kept in mind that, also in other area of torts law, apportionment has always emerged as a tricky business, which, however, the courts are quite accustomed to deal with, though via very crude approximations. The evil would not lie so much with a poor apportioning, but with the risk of granting damages exceeding actual damages. Such a risk does not seem intractable, even if the only workable solution passes through an obliged step: introducing some sort of consolidating mechanism for the multitude of actual and potential damages[701]. These mechanisms will be discussed at the end of the analysis developed in this section.

[699] See on similar ground the US Supreme Court in Hanover Shoe, 392 U.S. at 494. For a comment on this exception see Hovenkamp (1990).

[700] See again the U.S. Supreme Court in Illinois v. Borg, Inc., 548 F. Supp. 972 (N.D. Ill. 1982).

[701] See Rüggeberg, Schinkel (2006); Gavil (2001).

B4. Harmonisation costs

With regard to the need of harmonisation required, taking into account the data collected through the Ashurst Study and updated with the Private Antitrust Litigation Report and other similar studies[702], this option does not entail additional harmonisation costs, since all European systems appear formally consistent with its tenets. The problem, if any, concerns the practical implementation, thus far still missing, so that the application of the approach at hand would represent a departure from the situation as it currently stands.

5.1.2 Passing-on defence not allowed and indirect standing not allowed

A. BENEFITS

A1. Deterrence

It has been argued that information costs of identifying and suing an antitrust violator are lower for the direct than for the indirect purchaser, because they are closer to the violation. The corollary of this statement is that the former category would have more incentive to sue, qualifying, from a deterrence perspective, as the most efficient enforcers.

However, assuming this corollary obtains, its scope is to be limited to stand-alone actions, because in follow-on suits both direct and indirect purchasers hold relevant information on the existing violation. With this *caveat* in mind, it is important to emphasize the substantial role that follow-on cases can play in private antitrust litigation. In the U.S. experience, as portrayed with reference to the time frame and judicial districts covered by the Georgetown Study, follow-on suits already constituted more than 30% of horizontal price fixing cases[703]. Nowadays it is plausible to assume that these cases account for a larger percentage of the balance, taking into account the increase in the rate of detection due to the introduction of leniency mechanism, and accepting a wide notion of "follow-on" cases (cases filed after federal government investigations settled by consent decree or terminated without prosecution, or starting on general announcement of whistle-blowing employees etc.). In all these situations both direct and indirect purchasers have a relevant amount of information at their disposal. Moreover, it is not pointless to recall that the US case law experience already provides indirect purchasers with a large amount of information and data, that would incentivise them to the "follow-on"

[702] See "Private antitrust Litigation" (2006) appeared in the Global Competition Review. For a first look at the debate in France, see Vignal (2006), Pecnard and Ruiz (1993). In Germany, see Oetker (2003), Bornkamm (2001), Roth (1999 and 2006), Bulst (2004), Miege (2005), Boge and Ost (2006); in Italy, see Toffoletto (1996), Frignani, Pardolesi, Patroni Griffi and Ubertazzi (1993).

[703] See Kauper and Snyder (1988).

discovery of international antitrust infringements, without suffering excessive additional information costs.

Moreover, the mentioned "better detector" argument should discount the fact that the key element is often not which purchaser has the lowest information costs, but, given the trade-off of costs and incentives, which purchaser is most likely to investigate, discover the violation and sue[704]. The presence of the so-called "Illinois Walls", in which downstream firms are given a part of the upstream cartel profits through a symmetric rationing of their input at low prices, might be a serious impediment to the detection and conviction of the wrongdoer by the direct purchasers[705]. Furthermore, empirical data suggest that, presumably because of their "*vicinitas*" or the by-products of relational contracts, direct purchaser can fear the risk of retaliation from their suppliers, namely the forced end of advantageous commercial relationships. An interesting hint about the incentives to sue comes from the study conducted on the follow-on Microsoft cases aroused, between 1999 and 2004, in the US[706]. Where allowed under state antitrust law, all cases brought by indirect purchasers were concluded with substantial settlement, while Microsoft direct purchasers have not sued. This can be a strong argument to support indirect purchaser's claims also from the deterrence perspective.

Moreover, the only empirical evidence, brought about by the American Antitrust Institute as a support for the assumed superiority of *Illinois Brick* and *Hanover Shoe* from a deterrence perspective, derives from the study of professors Lande and Davis[707]. This survey states that, in 29 successful private antitrust cases, direct actions have led to recovery five times greater than the one of indirect actions (collectively, at least $11.2 billion vs. $2.1 billion); and that even if awards to indirect purchasers doubled (as might be expected once the 50% of the nation's population, currently unable to bring indirect cases at all, is given such an opportunity), the consequent increase would not nearly offset the decrease in expected awards to direct purchasers, pursuant to the AMC's proposal[708]. Unfortunately, information about the number of direct purchasers that have sued in the past tell us nothing about their importance,

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[704] See on this specific issue Mantell (1982) and Hovenkamp (1990), the latter arguing that the terminated or disciplined employee should have standing to sue and recover treble damages, because they have inside information.

[705] See Schinkel, Tuinstra, Rüggeberg (2003).

[706] See Page (2005).

[707] See Lande & Davis "Interim Report of the American Antitrust Institute's Private Enforcement Project," by Profs., dated and submitted to the AMC on November 14, 2006 (available at www.antitrustinstitute.org).

[708] For example, using this same data, if direct purchaser recoveries dropped by even 25% -- and they likely would drop much more than this -- this decrease would entirely offset gains by indirect purchasers, even if their recoveries doubled (25% of $11.2 billion = $2.8 billion).

unless we also know the total number of overcharges that, because of *Illinois Brick*, have not been detected or convicted. Bluntly speaking, no data supports the idea that, on the average, *Illinois Brick* furthers the deterrence goal.

However, it could be argued that a narrow standing to sue is compensated, on the deterrence side, if multiple damages,, *e.g.* treble, are awarded. Now, first of all, it has to be pointed out once more that this option entails additional harmonisation costs, because, as of now, punitive or exemplary damages conflict with the basic principles of national tort laws (theoretical exceptions can be found in Ireland and England). Secondly, multiple damages are nothing more than an (often imprecise) answer to the problem that not all the antitrust infringements are detected. Therefore, from an optimal deterrence perspective, we think that this calculus should be left to a centralized authority. Were this complicate task left to single national judges, the final sanction would be probably sub-optimal, unless remarkable coordination costs are sustained.

At any rate, even assuming the incentive capacity of awarding multiple damages is crucial, the scope of this argument should be limited. In fact, it would be appropriate only for those kinds of claims that will be more likely to be brought on a standalone basis, such as vertical restraints and Article 82 cases (assuming that an appropriate bundle of new procedural mechanisms will be available to potential European plaintiffs).

Summing up, we would incline to conclude that the option does not fare satisfactorily even on the deterrence side.

A2. Corrective justice

From a corrective justice perspective, denying wrongdoers the possibility of demonstrating that direct purchaser have passed on to others the harm suffered is clearly inequitable. This will routinely create a windfall for direct purchasers, with the exception of those few and unlikely scenarios where the prejudice cannot be passed-on at all (see infra).

Furthermore, a direct injury test is under-inclusive in achieving corrective justice since it impedes indirect purchasers and ultimate consumers from seeking compensation for antitrust injuries they have suffered.

Some authors doubt that impeding indirect purchasers' claims would be always inequitable from a corrective justice perspective. The underlying idea is that, if direct purchasers increase prices by the amount of the overcharge, they will also reduce prices by an amount equal to the present discounted value of the expected damage award (the so-called "passing back theory")[709]. But, then, one should discount that managers decide what to do with gains of anticipated

[709] See Landes and Posner (1979).

litigation against specific suppliers only after the violation has been uncovered: which implies that supporters of the passing-back theory undervalue the existence of such information costs[710]. In addition, antitrust claims are a risky activity, that includes also the possibility of substantial losses - attorneys' fees and other litigation costs -, which are not recoverable, should the plaintiff fail to establish liability. Considering all these factors, it is reasonable to argue that the passing-back theory ascribes the management an implausible pricing policy[711].

A3. Internal market

This option, as the following ones, would basically substitute a legal framework, being already rather homogeneous (though scarcely implemented), with an alternative one.

B. COSTS

B1. Litigation Costs

Comparing to option 1, this option entails a substantial decrease in the following costs: legal and other litigation fees and costs; the cost of allocating damages to indirect purchasers who also sustained prejudices; the cost of defining and locating the final consumers actually damaged; enforcement costs[712]. In particular, coordination costs will decrease, as the risk of duplicative liability will disappear [713].

Compared to option 3, option 2 entails an even more relevant decrease of litigation costs, since no action for damages may be brought by indirect purchasers and the calculation of the passing-on rate is not necessary.

Litigation costs would be also lower than with option 4, which provides that only direct purchaser might file a suit against the wrongdoer, while indirect purchasers are allowed to claim damages only from direct purchasers. Even if with option 4 less suits might be filed by direct purchasers against the wrongdoer (fear of retaliation and free-riding problem, see infra), this does not mean a relative decrease in overall litigation costs, since the number of "copy-cat" indirect purchasers' claims and the relative complexity of calculating the harm passed on to them would still be relevant.

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[710] See Harris and Sullivan (1979).

[711] See Mantell (1982).

[712] See Benston (1986). Schaefer (1975), Dubow (2003), Mantell (1982) Blair, Harrison (1999), Bulst (2006) have described tools able to minimize these costs.

[713] These costs are well described by Lopatka and Page (2005), Gavil (2001). Mechanism that are able to minimize coordination costs are described by Antitrust Modernization Commission (2006).

B2. Administrative burdens

The antitrust wrongdoer will avoid indirect purchasers' claims; therefore, the number of documents and forms to be produced and reviewed is likely to be smaller than with options 1 and 3. Administrative burdens would be also less than with option 4: even if the latter implies a lower number of direct purchasers' claims (fear of retaliation and free-riding problem, see infra), such effect is offset by a relative increase of copy-cat indirect purchasers' claims.

B3. Error costs

This option provides direct purchasers the possibility to recover damages they were able to pass-on. However, the risk of duplicative liability (type 1 error-cost) does not arise, since indirect purchasers are not allowed to recover damages suffered from the same wrongdoer.

B4. Harmonisation Costs

Considering that causality analysis in antitrust cases borrows from tort law conceptions of proximate cause, harmonisation costs will be relevant: this is due to the need of making it sure that, as far as indirect purchasers are concerned, Member states will uniformly adapt their causal link discipline in awarding damages for torts.

Furthermore, denying the passing-on defence would create additional harmonization costs, even though the passing-on defence is not explicitly contemplated under the Member States law. In fact, according to the common legal principles of the Member States, the loss or damage claimed must arise as a result of the infringement, *i.e.* must be caused by it: there is little margin for basing an award on anything but principles of compensation. Since the whole purpose of the *Hanover Shoe* approach to passing-on is, on the contrary, to enable the direct purchaser plaintiff to claim all loss or damage suffered as a result of the cartel, whether suffered by the plaintiff or not, it appears incompatible with the law as it stands in the European framework.

5.1.3 Passing-on defence not allowed, but indirect standing allowed

A. BENEFITS

A1. Deterrence

Considering this option from a deterrence perspective, it's useful to look back at the debate arisen in the U.S. literature, at the end of 70's, between the

"sceptical" and the "sanguine" view[714]. Part of the latter school of thought provided us with a very simple model, suggesting that, by taking a period of one year after the antitrust infringement as a demarcation point, the rate of passing on is likely to be high already in this short run[715]. In this model, it is assumed that the distribution chain is constituted of three levels: producer (P), retailer (R), and consumer (C); and that the downstream market is perfectly competitive, so that undertakings (R), in order to maximize profits, will fix their prices where marginal costs equal marginal revenues.

Using the conventional assumptions of neoclassical microeconomics, it has been convincingly shown that in the short run, if the exercise of market power at the producer level carries an increase in the price of a product that is relative to the variable costs faced by (R), then the latter can immediately adopt measures aiming to safeguard its profits. The variable cost increase affects directly the marginal cost curve of (R), that in a perfect competitive market coincide with its supply curve.

As a consequence, consumers will buy less, paying a higher price, so that (R) will pass on them the entire overcharge imposed by (P). The higher the elasticity of supply relative to demand, the greater is the percentage of the overcharge which will be passed on by the direct purchaser to indirect purchasers. It is certainly true that measuring the relative demand and supply elasticities is no easy task and involves the collection of a bulky amount of data[716].

However, denying *sic et simpliciter* passing-on defence and allowing direct and indirect purchasers standing significantly tilts the balance in favour of claimants, since the defendants will be forced to compensate both purchasers in any case, also where passing on occurred in the short run (assumed to be one year). This risk of facing duplicative liability –though linked to the concurrence of initiatives of direct purchasers and indirect ones (which the U.S. experience suggests to be quite small) - will lead to potential over-deterrence.

A2. Corrective justice

On the basis of the assumptions considered above, this option would be clearly not in line with the corrective justice principle in two cases: a) when the demand faced by (R) is completely inelastic; b) the supply curve for industry (R) is perfectly elastic. In such situations the entire monopoly overcharge

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[714] See supra, note 681.

[715] See Harris and Sullivan (1979).

[716] See W. Breit, K. G. Elzinga, *Private antitrust enforcement: the new learning*, 28 Journal of Law and Economics, 1985, 405.

imposed is passed on directly to consumer, so that allowing redress also to resellers would be completely inequitable.

This option would be aligned with corrective justice only in a few (arguably extremely rare) cases: a) where the demand curve faced by (R) is perfectly elastic, so that (R) could not augment its prices, but only increase or diminish the quantity bought and sold; b) where the supply curve is perfectly inelastic, so that it will cross the demand curve in only one point, who determines the price of the re-sale. In such cases, where passing on cannot occur, it's equitable to allow standing to direct purchasers. However, the first case is really difficult to materialize, considering that, usually, the demand faced by (P) can be considered as a consequence of the demand faced by (R) (the elasticity of the two will be even equal whenever transformation of the product by R doesn't occur), so that rarely (R) will be completely worse off when P will exploit its market power increasing its prices. Also the second case is not likely to occur, because in the real world it's more probable that the supply curve will be at least sensibly elastic.

A more likely scenario of no passing-on is based on a situation where the plaintiff bids for discrete tenders against a less efficient competitor, which does not need to pay the abusively higher input prices. In such a circumstance, the plaintiff will typically seek to set its bid price just below its best estimate of the minimum its competitor can afford to bid. This being the case, the plaintiff pays no attention to its own costs in setting its bid level, so that any increase in its own costs would not be passed on, were it to be successful and win the bid.

Though limited to just one simple model, these conclusions make it emblematically patent that corrective justice can be seriously disrupted in many cases. Moreover, the importance of applying the above mentioned microeconomic theory should not be ignored also in those intermediate cases where the market for the passer's product is not perfectly competitive; the proponents of the sanguine view have clearly argued that it explains and anticipates also the conducts of "real world" firms[717].

Therefore, after having acknowledged the adjustments that resellers can undertake (not only in the long, but also) in the short run, we conclude that in all these cases denying defendants the use of passing on and granting redress also to others than the real victims is inequitable; defendants will face duplicative liability and the level of corrective justice will also decrease.

[717] See among others Harris and Sullivan (1979).

B. COSTS

B1. Litigation Costs

Compared to option 1, the overall increase in the number of unfiltered direct purchasers' claims might increase litigation costs. Such increase would be only partially offset by the fact that such claims are not necessary to calculate the passing-on rate. Furthermore, the need to precisely allocate damages to indirect purchasers requires in any case the exact calculation of the passing-on rate.

Litigation costs would be higher than those entailed by option 2, since the latter option does not require the calculation of passing-on rates and, even more importantly, the limitation on standing leads the overall number of claims to be lower.

Litigation costs would be also higher than those entailed by option 4, since, as discussed below, the absence of free-riding problems sensibly encourages direct purchasers action for damages.

B2. Administrative burdens

The number of potential claims against the same wrongdoer will be the highest, since there is no limitation on standing for indirect purchasers. Moreover the exclusion of a passing-on defence and the absence of a free-riding problem (see infra) implies that the expected damages awards for direct purchasers are, in the average, the highest. Assuming a positive relation between the number of claims brought to court and the amount of documents and forms to be produced and reviewed by the defendant, this option entails the highest amount of administrative burdens.

B3. Error costs

This option entails the highest risk of duplicative liability (type 1 error-cost). Leaving aside the rare situations where the prejudice is entirely suffered only by direct purchasers[718], disallowing passing-on defence would likely engender situations where the same part of harm passed-on is recovered both by direct and indirect purchasers.

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[718] See Option 3, A2, 2nd para. Here we are not referring to the situation where passing-on is unlikely, but only to those cases where passing-on cannot occur at all (i.e.: a) where the demand curve faced by (R) is perfectly elastic, so that (R) could not augment its prices, but only increase or diminish the quantity bought and sold; b) where the supply curve is perfectly inelastic, so that it will cross the demand curve in only one point, which determines the price of the re-sale.

B4. Harmonisation Costs

As already recalled, the passing-on defence is not explicitly contemplated under the Member States law. However, we are not aware of any relevant case law where the passing-on defence has been rejected[719]. Even if case law is not sufficiently developed at this stage, and it is not possible to go beyond speculation on the conditions under which the passing-on defence would be admitted by national courts, an explicit rule denying passing-on defence will create additional harmonisation costs. This is due to the fact that most, if not all member states have to adapt their own legal system, providing for a legislative exception to the unjust enrichment principle. This might also create spill-over effects in other branches of the legal system.

5.1.4 Passing-on defence not allowed, and indirect purchasers allowed to claim compensation from direct purchasers.

The very sense of the fourth option proposed by the Green Paper is not entirely clear. One way of interpreting it might be the one we are suggesting, with initial proceedings entirely devoted to the ascertainment of (the infringement and) the total overcharge (no passing-on defence allowed), and a subsequent phase where all affected victims step in claiming their portion of damages. To our knowledge, at least one alternative reading has been advanced, according to which this option would basically decouple the establishment of infringement and causation from proceeding for the award of damages, the main advantage for it being that it would make possible to “outsource the business of damage calculation to a more specialised body”[720]. We do believe, however, that such opportunity (*i.e.*, involving the binding expertise of a specialized authority) is not related to this particular option and might represent a development beyond the alternatives proposed by the Green Paper, thus deserving a separate discussion.

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[719] In Italy, the Turin Court of Appeals found that a wholesaler or retailer cannot claim the antitrust damages that it was able to pass on to final consumers (Appello Torino, 6 July 2000). The CAT discussed the defence in BCL Old Co Limited and Ors v Aventis and Ors (2005) and referred to it as a “novel and important issue”, but the case was settled before trial. In the decision rendered on 11 May 2006, the French court dismissed a claim for damages by Arkopharma (a direct purchaser from members of the Vitamins cartel) based on the application of the passing-on defence.

[720] Milutinović (2007). This interpretation, mirroring Option No. 20, appears however at odds with the “infringer…sued for total overcharge” language of the Staff Working Paper.

A. BENEFITS

A1. Deterrence

This option will not substantially increase the actual level of deterrence, because just giving the possibility to sue both to direct and indirect purchasers doesn't imply that a larger amount of cases will be brought to court. As already recalled, direct purchasers might fear the risk of retaliation from their suppliers, loosing advantageous commercial relationships. Moreover, when passing-on has significantly occurred also in the short run, direct purchaser will have no or little incentive to go to courts, considering that indirect purchasers will then free ride on their claims, obtaining easily from them the recovery of all their losses.

A2. Corrective justice

The option might end up permitting someone to achieve restoration of damages not suffered, which is obviously contrary to the well-established principle of the *compensatory function of damage* actions, given the absence of any punitive element separate from that function (even if, as already suggested, theoretical exceptions can be found in Ireland and UK). This risk should be averted, however, by a set of rules making it easy to join the second stage in view of the apportioning of damages; following this path, duplicative liability would be avoided, since the assessment of the total damage related to the conduct of the infringer will be done only once.

B. COSTS

B1. Litigation Costs

This system entails a potential decrease of actual litigation costs, since the number of claims brought to Courts will be generally lower, compared to the first option: direct purchaser might fear not only the risk of retaliation from their suppliers, but also that indirect purchaser will be able to free ride on their claims.

With respect to option 2, the free riding problem keeps lower the number of claims brought by direct purchasers. However it has to be discounted that such lower number of direct purchaser claims would be routinely followed by a large amount of copy-cat indirect purchaser claims. Each of these indirect purchaser claims requires calculating precisely the passing-on rate. Therefore, under this option, overall litigation costs would be higher than with option 2.

Compared to option 3, litigation costs are lower. Costs related to the complexity of calculating the prejudice suffered by indirect purchasers are entailed by both the options, but option 3 further increases the number of suits that might be filed by the direct purchasers, who will not face the risk of free-riding on their claims.

B2. Administrative burdens

Fear of retaliation from their suppliers and the possibility of free riding might decrease the number of direct purchasers' claims against the antitrust wrongdoer, if compared to option 2. On the other hand, indirect purchaser copy-cat claims will increase the administrative burdens faced by direct purchaser. Overall, considering the positive relation between the number of claims brought to court and the amount of documents to be produced by the parties, administrative burdens might be less than those entailed by option 1 and 3, but more than those carried by option 2.

B3. Error costs

With regard to the wrongdoer, this option entails no risk of duplicative liability (type 1 error-cost), since the total overcharge would be recovered, as a first approximation, only by direct purchasers, while indirect purchasers are not allowed to recover "directly" such damages from the wrongdoer. However, with respect to direct purchasers, there might still be a minimal risk of duplicative liability: direct purchasers might be obliged to pay different indirect purchasers (*i.e.* positioned on different level of the distribution chain) more damages than they were able to recover from the wrongdoer.

B4. Harmonisation Costs

As far as harmonisation is concerned, the pertinent costs would be rather consistent, since no such articulation of stages and adjudicatory phases is nowadays contemplated by the Member States legal systems.

5.2 Further remarks

Compared to options 2 and 4 discussed above, option 1 and 3 are the most effective way to bring competition law closer to the citizens, since every final consumer will have the possibility to be directly involved in the recovery of damages suffered from antitrust wrongdoers. Options 1 and 3, on the other hand, will be effective in preventing a race to the bottom in competition law (*i.e.* creation of islands where domestic firms are freed from indirect purchaser claims). The same holds for option 4, to the extent that direct purchaser will not fear the risk of retaliation from their suppliers or that indirect purchasers will free ride on their claims.

However, given the fact that most of the member states recognize only the *compensatory function of damages*, only option 1 would contribute to the achievement of market harmonisation and the prevention of a race to the bottom without requiring additional costs.

5.3 Refinements

5.3.1 Beyond the options discussed in the EC Green Paper

An important suggestion can be derived from option 4: it offers arguments supporting the introduction of some sort of a consolidation system, which could be beneficial in order to minimise coordination costs, necessary to avoid duplicative liability.

In fact, a Community-wide antitrust case raises two issues: adjudicatory jurisdiction (*i.e.* whether a national court may entertain an action in a case which has a relevant connection with other legal systems), and conflict of laws. As to the former, it may emerge – according to the *Shevill* jurisprudence of the Court of Justice – the need for multiple filings, only partially contained by Article 28 of Reg. 44/2001. Once jurisdiction is established, and given the existence of points of contacts with more than one municipal system, it is necessary to determine the law that will be applied to the dispute.

At the moment, the issue of the law applicable to non-contractual obligations is not governed within the Community by uniform rules. Thus, whenever several plaintiffs bring almost simultaneously separate actions that involve a common question of law or fact against the same defendant, a serious risk of different substantive outcomes materializes, bringing about a lower level of legal certainty for individuals and economic operators. From 11 January 2009 on, Reg. 864/2007 will impose the application of the *lex loci damni,* with the remarkable exception detailed by Article 6.3 (b)[721]. This will contribute to reduce, to a certain degree, complexity and litigation costs. But it is apparent that the best way to minimize both of them would be to make claims of multiple and sequential plaintiffs converge into a single proceeding: a system that can consolidate suits alleging a common antitrust violation would make significant strides towards preserving valuable judicial and litigation resources.

Moreover, were collective actions introduced in our scenario, the current rules would inescapably create, just because of lack of consolidation, what in the US

[721] "When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage, who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court". Practically, when a host of national laws gets involved, the plaintiff has the choice to resort to the *lex fori* instead of the *lex loci damni*. Since, however, independent suits are likely to be promoted against multiple defendants in multiple forums, the provision falls short of solving the problem.

has been regarded as a "waste of judicial resources [and] societal resources," with plenty of cases where "dozens of lawyers – in each state on each side – [are] working on what really is the same matter."[722]

It deserves noting that the consolidation of all individual claims in a centralized procedure has been recently advocated as a way out of the many drawbacks stemming from the choice of restricting the passing-on defence as the "first step in an inevitable sequence of further legal corollary condition to private actions"[723], which would seriously endanger the perspectives of consumers' recovery.

5.3.2 Consolidation mechanisms: a quick look.

As we have pointed out, option 1, compared to option 2 and 4, entails a potential increase in litigation costs. This is due to the fact that this option does not put any specific restriction on standing, so that complex calculations of damages will be required. Also in order to minimize the risk of duplicative liability, one might think of procedural mechanisms designed to monitor and limit coordination costs. Needless to say, the achievement of such a goal, already problematic in a domestic perspective, would imply more consistent hurdles, and thus very high harmonization costs, when transplanted to an inter-state scenario.

5.3.2.1 The Musterfrage model

The *Musterfrage* model has been introduced in Germany as a way to consolidate several claims involving the same question of law or fact. Taking this model as our reference, the private antitrust claims would be articulated in the following way: both direct and indirect purchasers will be allowed to sue the infringer in a lower national court. At the moment of the introduction of the claim, the proceeding will be interrupted in order to allow other claims involving the same question of law or fact to be decided together. When the deadline will expire, all the claims joined together will be deferred to a higher Court that is supposed to have enough expertise to handle a "big trial". In the opposite case, where a determined amount of claims will not be reached, this model prescribes

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[722] See AMC (2006), p. 7.

[723] Ruggeberg e Schinkel (2006). In addition to overruling *Illinois Brick* and *Hanover Shoe,* the AMC has proposed (though with scanty perspectives of success) the adoption of mechanisms for the removal of state indirect purchaser actions to the federal courts and consolidation of all indirect and direct purchaser damage actions regarding the same conduct before the same federal forum, so that state indirect and direct damage actions might be removed to federal courts for consolidation with the federal cases regarding the same violation. Accordingly, the passing-on defense would be allowed; damages would be apportioned among different clusters of defendants, depending on how much of the overcharge is passed-on; threats of inconsistent judgments and multiple recoveries would be eliminated.

that all the claims will have to be decided separately, following the national law regulating jurisdiction.

Obviously this kind of consolidation mechanism implies high harmonisation costs, due to the need to relax requirements of diversity jurisdiction in private antitrust litigation.

5.3.2.2 US multidistrict litigation

Because antitrust defendants become frequently the target of a host of similar cases filed in (or removed to) many different tribunals, there should be the possibility that the various related litigations are consolidated in a single trial[724]. In the US, such trials are consolidated, upon *ex officio* initiative or motion filed by a party, already for pre-trial purposes by the Judicial Panel on Multidistrict Litigation; then the Panel selects a district court where all proceedings prior to trial, including class certification, discovery and summary judgment motions, are conducted. When the cases are ready for trial, they are remanded back to the transferor courts[725]. Furthermore, the panel selects a forum "for the convenience of parties and witnesses", 28 U.S.C. § 1407(a), which is not bound by the usual rules of proper venue and may consider other factors, such as the available docket space at various candidate courts or a particular judge's experience with related claims.

The multidistrict litigation model might be useful also in the damage assessment phase, in all cases involving the same questions of law or fact, where direct and indirect purchasers have filed different claims against the same defendant. If transplanted to the EU legal environment, such a procedural tool, by promoting inter-state cooperation, might enhance the ability of national courts to reach a higher rate of international cartels conviction, reduce litigation costs and the risk of inconsistencies between enforcement systems (both type I and II error costs). It should be stressed that the learning process concerning the techniques of damage quantification, which the present system can be credited to have fostered, would not be altogether interrupted, as violations that do not entail any negative interstate externalities will continue to occur. Scale economies and transaction cost savings seem therefore to support this kind of consolidation mechanism[726].

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[724] See 28 U.S.C. § 1407. In any case, opposition to multi-districting should be possible: parties may argue that substantial differences exist between the various litigations.

[725] See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). With respect to the interrelation between the new CAFA and the Supreme Court's ruling in Lexecon, see AMC report (2006), at 267.

[726] On this count, another useful suggestion might be derived from the Supreme Court in *Hanover Shoe*. While expressing no opinion as to whether passing-on occurred, it allowed for the use of an interest bearing escrow account until the statute of limitations becomes a bar to other possible claims. A possible elaboration on this suggestion is that this fund be made accessible to

Compared to the *Musterfrage* Model, this mechanism has the important advantage to imply a "softer consolidation", related only to a specific "phase" of the trial. Gauged from this perspective, this kind of consolidation in courts would elicit a lower amount of harmonisation costs, which however would remain quite substantial.

5.3.2.3 Assessment by the antitrust enforcers? Bifurcation of proceedings

Beyond the 'feasibility' of the above models, as well as of the last option among the policy proposals devised by the Commission's Green Paper (foreseeing a two-step procedure, where both the indirect and direct purchasers can sue and where damages are apportioned between the two classes in the second phase of litigation)[727], it is reasonable to presume a widespread consensus on the idea that, in order to avoid a system failure like the one which is bewildering the US experience, "related cases should be litigated either under a single set of standards before a single legal forum or before multiple forums in a coordinated way".[728] Assuming that, under the present rules of jurisdiction, a typical antitrust violation would elicit various actions for redress in different markets before different courts, the only alternative to the optimal solution of a single forum adjudicating connected cases under a single set of standard would be a strict cooperation among the multiple courts involved.

A possible variation/refinement of the above mechanisms would be geared to an overall evaluation of the antitrust injury by the European Commission or a NCA, depending on the geographic dimension of the infringement.

It is worth to recall that, according the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005), when assessing the exclusionary abuses with the objective of protecting competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources, "the Commission will adopt an approach which is based on the likely effects on the market". This means that the attention will be focused on "anticompetitive effects in the market and which can harm consumers in a direct or indirect way", implying that: a) "the longer the conduct has already been going on, the more weight will in general be given to actual effects"; b) "harm to intermediate buyers is generally presumed to create

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plaintiffs who sue within the statutory period and establish damages: as a consequence, the total damage assessment would be unified for all separate actions involving "a common question of law or fact", though not filed contemporaneously.

[727] This option comes very close to the one proposed by the AMC; and, given the present European scenario, appears no less impracticable than the latter (which, according to some commentators, was to be considered "dead on arrival").

[728] Cengiz (2007).

harm to final consumers"; c) "not only short term harm, but also medium and long term harm arising from foreclosure is taken into account".

Though the evaluation of the comprehensive harm caused by the abuse is not a necessary step in the routinary process of enforcing Article 82, it is plausible to assume that, while producing its balancing evaluation of the case, the Commission/NCA might come very close to an overall assessment of the negative effects[729]. As a consequence, the public enforcement, exorcizing the evils of duplication and reducing those of underestimation, might significantly contribute to an appropriate apportioning of individual damages by the courts in the context of follow-on suits.[730]

By the same token, a substantially analogue trajectory could be developed for stand-alone initiatives. Once the first of a possible series of claims is started before a national court with a significant possibility of plaintiff verdict, the case might be submitted to a NCA or the European Commission, according to the relative competences, for an antitrust damage report.

Acting as an *amicus curiae*, according to a scheme that has been already illustrated above[731], the competition authority would produce a comprehensive assessment, where not only the damages suffered by the initiating plaintiff will be computed, but also actual injuries incurred at various positions in the complex chain by other possible serial claimants.

The final outcome would be more precise and objective than to the ones that economic experts would be able to conduct[732]. Moreover, the risk of duplicative liability would be diminished, since follow-on suits, involving the same question of law or fact, would then be decided according to the quantification done by the public authority, serving as a guide to the national judges in the

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[729] In the same vein, Rüggeberg and Schinkel (2006) propose to "consolidate all individual claims into one centralized procedure in which the damages related to one and the same infringement are assessed once in their entirety. The assessment procedure is public and results in a consolidated damage report. It prevents wasteful private and public cost of litigation in multiple court cases, whilst refraining from severe intervention of denying parties their right to compensation. The procedure could be implemented with relatively few changes to the existing enforcement structure. The proposal allows for unrestricted standing and defence and thus ensures the possibility of compensation for all parties affected. It reconciles a fair amount of compensation for parties with actual antitrust injury with detection and deterrence. … The procedure further pools all the available evidence, without requiring class actions to bundle dispersed individual claims".

[730] Follow-on actions would be facilitated by the previous determination of the overall damages, which would render more coherent any further sharing along the line of involved victims.

[731] See *supra,* Section I.1.3.3.

[732] "The essential point is that all related damages are assessed once and completely for each infringement by a specialist team in the form of an advise to the relevant courts": Rüggeberg and Schinkel (2006).

liquidation phase[733]. One possible qualification is that the system should be shaped in a manner that does not preclude third parties from contributing, with the information in their possession, to the quantification of damages, even if their claims have not been already brought to court.

The administrative burdens of such a development, even if destined to shrink over time, are still to be considered high, due to the need to refine/standardise the techniques deployed by the authorities involved. As to the opportunity cost linked to such use of public resources, a more comprehensive view suggests that claims of overburden cut both ways, since also courts' resources are scarce (and public), whereas public enforcement might have already done most of the work and developed a specialized expertise (economies of scale and scope). Moreover, and decisively, consolidated assessment of antitrust damages should be considered essentially a public good. Producing it would be an additional task for NCAs or the Commission, beyond the existing duties, so that additional resources should be appropriated (and kept separate, in order to avoid misallocation), and new personnel recruited. One way of covering costs would be to include, in principle, the cost of producing the assessment could in the court costs, as an expenditure on expert witnesses, which the defendant, found liable for the breach of competition law, would eventually pay[734]. All in all, nothing would be lost in terms of opportunity costs, and the advantages of a better enforcement would accrue.

Harmonisation costs, on the other hand, will be lower than those entailed by the precedent two options.

5.4 Summary of the main findings

As for the specific issue being examined, the attribution of standing to both direct and indirect purchaser, and of the allowance of the defensive use of passing-on to the infringer, seems to fare better than alternative solutions. Giving standing just to direct purchasers and failing to compensate indirect purchasers might create substantial problems from a corrective justice perspective. Moreover, empirical evidence does not show that deterrence arguments are strong enough to support the opposite view. However, since uncertainty as to the amount of pass through would likely create a disincentive

[733] In the proposal of Rüggeberg and Schinkel (2006), the consolidated damages report would map out the production chain and take into account the degree of pass-on of damages at every horizontal layer. It then would compare the anticompetitively raised input price and its effects in the chain with what would have been the various prices, profit levels and levels of consumer surplus if competition had prevailed instead, *i.e.*, in the "but-for" world. The final report would thus present estimates of the (average) damages suffered per unit of volume for the direct purchasers, indirect purchasers and consumers.

[734] Cf. Rüggeberg and Schinkel (2006).

for direct purchasers to sue, it will be important to assure that the pass-on defence would apply only after having precisely analyzed whether there is space for actual and substantial recovery for indirect purchasers.

Finally, we have suggested some consolidation mechanisms that would allow single Member States to minimize risks of duplicative liability. They will have to choose the one which best fits their own legal system.

5.4.1 Summary tables on passing-on

Table 66 – Option 1 (passing-on defence allowed, indirect standing allowed)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *standing to indirect purchasers increases probability of lawsuit* • *direct purchasers have limited incentive to sue if they passed-on the overcharge*	**2** • *lower impact as passing-on is unlikely to be often raised in these cases* ***[dangerous assumption]***	**3** • *standing to indirect purchasers increases probability of lawsuit* • *limited to exploitative abuses* • *direct purchasers have limited incentive to sue if they passed-on the overcharge*
Corrective justice	**5** • ***n. of compensated victims:*** *all affected victims can be compensated* • ***alignment with actual harm:*** *in line with* restitution in integrum	**3** • *lower impact as passing-on is unlikely to be often raised in these cases*	**4** • ***n. of compensated victims:*** *all affected victims can be compensated* • *limited to exploitative abuses* • ***alignment with actual harm:*** *in line with* restitutio in integrum
Internal market	**5** • *promotes the possibility for all private plaintiffs, including final consumers, to seek compensation*	**5** • *promotes the possibility for all private plaintiffs, including final consumers, to seek compensation*	**5** • *promotes the possibility for all private plaintiffs, including final consumers, to seek compensation*
Costs			
Litigation costs	**4** • *high number of potential claimants* • *pass-through rates and apportionment of damages are complex to calculate*	**2** • *lower impact as passing-on is unlikely to be an issue in these cases*	**3** • *high number of potential claimants* • *not all abuses involve passing-on problems (only exploitative abuses)* • *calculating pass-through rates and apportionment are complex tasks*
Administrative burdens	**4** • *large population of firms affected by each information obligation*	**2** • *lower impact as passing-on is unlikely to be an issue in these cases*	**3** • *large population of firms affected by each information obligation* • *not all abuses involve passing-on problems (only exploitative abuses)*
Error costs	**4** • *complexity of calculating pass-through rates may increase the risk of duplicative liability, increasing the impact of judicial mistakes.*	**2** • *lower impact as passing-on is unlikely to be an issue in these cases*	**3** • *the complexity of calculating pass-through rates may increase the risk of duplicative liability, increasing the impact of judicial mistakes.* • *limited to exploitative abuses*
Harmonisation costs	**1** • *compatible both with EU law as it stands and with domestic disciplines*	**1** • *compatible both with EU law as it stands and with domestic disciplines*	**1** • *compatible both with EU law as it stands and with domestic disciplines*

Table 67 – Option 2 (passing-on defence not allowed, indirect standing not allowed)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *direct purchasers have incentive to sue even if they passed-on the overcharge* • *not allowing standing to indirect purchasers reduces probability of suit* • *direct purchasers may not file suit if they fear retaliation*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**1** • *direct purchasers have incentive to sue even if they passed-on the overcharge* • *limited to exploitative abuses* • *not allowing standing to indirect purchasers reduces probability of lawsuit* • *direct purchasers may not file suit if they fear retaliation*
Corrective justice	**2** • ***n. of compensated victims:*** *not all affected victims can be compensated; direct purchasers would file suit, if they do not fear retaliation* • ***alignment with actual harm:*** *not in line with* restitutio in integrum *– unjust enrichment for direct purchasers that were able to pass-on the overcharge*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**1** • ***n. of compensated victims:*** *not all affected victims can be compensated; direct purchasers would file suit, if they do not fear retaliation* • *limited to exploitative abuses* • ***alignment with actual harm:*** *not in line with* restitutio in integrum *– unjust enrichment for direct purchasers that were able to pass-on the overcharge*
Internal market	**5** • *would replace a legal framework already rather homogeneous in member states*	**5** • *would replace a legal framework already rather homogeneous in member states*	**5** • *would replace a legal framework already rather homogeneous in member states*
Costs			
Litigation costs	**2** • *compared to option 1, coordination costs and the cost of apportionment would disappear*	**1** • *lower impact as passing-on is unlikely to be often raised in these cases*	**1** • *compared to option 1, coordination costs and the cost of apportionment would disappear* • *limited to exploitative abuses*
Administrative burdens	**2** • *compared to option 1, reduction in the population of firms affected by each information obligation*	**1** • *lower impact as passing-on is unlikely to be often raised in these cases*	**1** • *compared to option 1, reduction in the population of firms affected by each information obligation* • *not all abuses involve passing-on problems (only exploitative abuses)*
Error costs	**2** • *no risk of duplicative liability, since indirect purchasers are not allowed to recover damages*	**1** • *lower impact as passing-on is unlikely to be often raised in these cases*	**1** • *no risk of duplicative liability, since indirect purchasers are not allowed to recover damages* • *limited to exploitative abuses*
Harmonisation costs	**5** • *member states would have to uniformly adapt their treatment of causal link in awarding damages for torts*	**5** • *member states would have to uniformly adapt their treatment of causal link in awarding damages for torts*	**5** • *member states would have to uniformly adapt their treatment of causal link in awarding damages for torts*

Table 68 – Option 3 (Passing-on defence not allowed, indirect standing allowed)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *direct purchasers have incentive to sue even if they passed-on the overcharge* • *allowing standing to indirect purchasers increases probability of lawsuit* • *no risk of overdeterrence; potential underderrence if direct purchasers do not file suit as they fear retaliation*	**3** • *lower impact : passing-on is unlikely to be an issue in these cases*	**4** • *direct purchasers have incentive to sue even if they passed-on the overcharge* • *allowing standing to indirect purchasers increases probability of lawsuit* • *limited to exploitative abuses* • *no risk of overdeterrence; potential underderrence if direct purchasers do not file suit as they fear retaliation*
Corrective justice	**4** • ***n. of compensated victims:** all affected victims can be compensated* • ***alignment with actual harm:** not in line with* restitutio in integrum – *unjust enrichment for purchasers that were able to pass-on the overcharge*	**2** • *lower impact as passing-on is unlikely to be an issue in these cases*	**3** • ***n. of compensated victims:** all affected victims can be compensated not all abuses involve passing-on problems (only exploitative abuses)* • ***alignment with actual harm:** not in line with* restitutio in integrum – *unjust enrichment for purchasers that were able to pass-on the overcharge*
Internal market	**5** • *need to replace a legal framework already rather homogeneous in member states*	**5** • *need to replace a legal framework already rather homogeneous in member states*	**5** • *need to replace a legal framework already rather homogeneous in member states*
Costs			
Litigation costs	**5** • *calculating pass-through rates remains complex for indirect purchasers claims* • *more claims will be brought by direct and indirect purchasers*	**3** • *lower impact as passing-on is unlikely to be an issue in these cases*	**4** • *calculating pass-through rates remains complex for indirect purchasers claims* • *more claims will be brought by direct and indirect purchasers* • *limited to exploitative abuses*
Administrative burdens	**5** • *increase in the population of firms affected by each information obligation*	**3** • *lower impact as passing-on is unlikely to be an issue in these cases*	**4** • *increase in the population of firms affected by each information obligation* • *not all abuses involve passing-on problems (only exploitative abuses)*
Error costs	**5** • *very high risk of duplicative liability: the part of damages passed-on is recovered both by direct and indirect purchasers*	**3** • *lower impact as passing-on is unlikely to be an issue in these cases*	**4** • *very high risk of duplicative liability: the part of damages passed-on is recovered both by direct and indirect purchasers* • *limited to exploitative abuses*
Harmonisation costs	**5** • *member states would have to uniformly adapt their treatment of causal link in awarding damages for torts*	**5** • *member states would have to uniformly adapt their treatment of causal link in awarding damages for torts*	**5** • *member states would have to uniformly adapt their treatment of causal link in awarding damages for torts*

Table 69 – Option 4 (Passing-on defence not allowed, indirect standing allowed for claims to direct purchasers)

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *direct purchasers may have scant incentive to sue due to free riding problem and fear of retaliation* • *no risk of overdeterrence; potential underderrence if direct purchasers do not file suit as they fear retaliation and/or free riding*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**2** • *direct purchasers may have scant incentive to sue due to free riding problem and fear of retaliation* • *no risk of overdeterrence;* • *potential underderrence if direct purchasers do not file suit as they fear retaliation and/or free riding* • *limited to exploitative abuses*
Corrective justice	**3** • *n. of compensated victims: all affected victims can potentially be compensated, but direct purchasers may have low incentive to sue due to free riding problem and fear of retaliation, thus preventing indirect purchasers from being compensated* • *alignment with actual harm: in line with restitutio in integrum*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**2** • *n. of compensated victims: all affected victims can potentially be compensated, but direct purchasers may have low incentive to sue due to free riding problem and fear of retaliation, thus preventing indirect purchasers from being compensated* • *limited to exploitative abuses* • *alignment with actual harm: in line with restitutio in integrum*
Internal market	**5** • *would replace a legal framework already rather homogeneous in member states*	**5** • *would replace a legal framework already rather homogeneous in member states*	**5** • *would replace a legal framework already rather homogeneous in member states*
Costs			
Litigation costs	**3** • *compared to option 1, potential decrease of litigation costs:* • *number of claims brought to Courts will be generally lower;* • *costs of copy-cat indirect purchasers claims remains (depends on initial claims by direct purchasers)*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**2** • *compared to option 1, potential decrease of litigation costs* • *number of claims brought will be generally lower* • *limited to exploitative abuses* • *costs of copy-cat indirect purchasers claims remains*
Administrative burdens	**3** • *lower population of firms affected by information obligations;* • *administrative burdens may be less than under option 1 and 3, but more than those carried by option 2*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**2** • *lower population of firms affected by information obligations;* • *limited to exploitative abuses* • *administrative burdens may be less than under option 1 and 3, but more than those carried by option 2*
Error costs	**3** • *low risk of duplicative liability since the total overcharge can be recovered at the first stage only by direct purchaser*	**1** • *lower impact as passing-on is unlikely to be an issue in these cases*	**2** • *low risk of duplicative liability since the total overcharge can be recovered at the first stage only by direct purchaser* • *limited to exploitative abuses*
Harmonisation costs	**5** • *Member states would have to adapt their legal systems*	**5** • *Member states would have to adapt their legal systems*	**5** • *Member states would have to adapt their legal systems*

6 Interaction between leniency programmes and private enforcement

Leniency programmes are widely acknowledged as being one of the most effective investigative tools in the fight against hard-core cartels. Were enhanced private enforcement of antitrust rules achieved in Europe, the impact on the leniency programme would have to be carefully taken into account. As a matter of fact, the risk that a leniency application leads to subsequent private damages actions is one of the factors that may negatively influence the firm's decision on whether to apply to the programme[735]. As a result, the European Commission has identified three options to ensure better coordination between private antitrust enforcement and leniency programmes for cartels, and eventually to leverage the additional deterrent impact of enhanced private enforcement to further reduce the stability of cartels. Each of the options identified by the Commission endorses a different approach in order to solve the potential tension between enhanced private enforcement and the public enforcement objectives underlying leniency programmes.

- *Option 28* of the Green Paper mainly relies on procedural arrangements, by limiting access to evidence gathered in the administrative proceeding thanks to leniency applications. We already discussed the potential impact of this option in Section II.3 of this Report, where we provide an assessment of available options on access to evidence, in particular as regards the specific issue of access to documents held by competition authorities. As highlighted in that section, preserving the confidentiality of documentary evidence disclosed in leniency applications is particularly important to avoid the effectiveness of leniency programmes being jeopardised by the risk of future claimants gaining access to them to substantiate their claims. On the other hand, also in the most restrictive access to evidence regime envisaged in the Green Paper (option 1), the judge can order the disclosure of some specific documents attached to the leniency application and specified in the final decision. The effectiveness of this procedural rule, then, may prove insufficient to prevent some potential leniency applicants from refraining to apply in order to avoid the risk of being disadvantaged in subsequent civil

[735] According to an ICN questionnaire on the matter, the vast majority of NGAs recognised that the risk of follow-on claims is a factor in deciding whether to apply for leniency, although only one asserted that it is the key counter-incentive. This finding is consistent with the actual low deterrent effect of private antitrust enforcement, as recently stressed in a lawyers and company survey carried out by Deloitte on behalf of the OFT on the deterrence effect of damages actions; see Deloitte, *The deterrent effect of competition enforcement: Study commissioned by the OFT*, November 2007, in particular p. 72. On the other hand, some commentators argued that the negative impact could be substantial if the private enforcement role steadily increased (see Bloom, 2006).

proceedings, relative to non-applicants. Further safeguards may thus be needed, as provided for in the Green Paper.

- *Option 29* would adopt a completely different view that can be defined as a "positive-reward" approach. Under this option, the benefits of leniency application are extended to the private enforcement sphere, through the granting of a rebate on the applicant's exposure to damage awards. This option may bring about two different effects: on the one hand, it aims at compensating the likely difficulties that a leniency applicant may face in subsequent private suits; on the other, it may exploit the potential of more effective private enforcement to strengthen the incentive to apply for leniency, thus increasing the difference between applicants and non-applicants and, consequently, further enhancing the effectiveness of leniency programmes.
- Finally, *option 30* can be considered as intermediate between the previous two options: on one side no explicit positive rewards are offered to the leniency applicant, unlike option 29. On the other hand, this option aims at significantly reducing the disadvantages the leniency applicant may face in a subsequent civil proceeding. This option entails the removal of joint liability for successful leniency applicants in order to avoid that collaboration in the administrative proceeding results in a disadvantage in subsequent civil lawsuits, due to the fact that the applicant may be targeted by civil claims asking for full compensation of the damages suffered by the victims of the whole cartel.
- The different approaches underlying these options warrant an *ad hoc* assessment in our impact analysis. In Section 6.1 below, we provide an overview of the law and economics of leniency programmes, whereas Section 6.2 deals with the merit of granting a rebate on the applicant's exposure to liability, and Section 6.3 analyses in detail the removal of joint liability for the leniency applicant.

6.1 Theoretical issues and the current framework

The law and economics studies on leniency emphasise the potential prisoner's dilemma emerging in collusive agreements, and the pay-off structure needed to sustain the collusive agreement (the so-called "incentive compatibility constraint"). This analysis provides important insights on the functioning of leniency programmes and on the cartelists' incentives to collaborate with the competition authority. Beginning with Cyrenne (1999) and Motta and Polo (2003), the possibility to affect the "incentive compatibility constraint" by means of public enforcement has been extensively investigated by economic scholars,

with regard to both the US and the EU experience[736]. The incentive compatibility constraint takes into account the fact that the collusive agreement cannot be legally enforced against co-infringers; hence, the collusive setting may be feasible only if the players find it worthwhile. Indeed, each firm would be better-off by defecting from the agreement and increasing its market share. However, this strategy, if discovered, would presumably kill the collusive agreement, and, consequently, colluding firms may end up facing competitive pressure again, with a significant reduction of extra-profits in the medium term; alternatively, the defecting firm may face the retaliation of the other colluding firms that did not deviate from the agreement (the so-called "punishment phase"). The incentive compatibility constraints also takes into account the fact that the cartel is sustainable only if the cheating strategy is less profitable than the collusive one, *i.e.* the discount rate or future profits from collusion are sufficiently high that the expected payoff from collusion is greater than the payoff from defection.

The role of public enforcement in affecting the incentive compatibility constraint can be relevant: the constraint each cartelist faces includes the likelihood that the collusive behaviour is detected and sanctioned, and the expected magnitude of the related fine. The higher the expected fine, or the probability of detection, the higher the future collusive profits must be to lure the prospective cartelist. By modifying this constraint, it is possible to significantly enhance the deterrence impact of public enforcement on hard-core cartels. This does not only increase the probability that on-going cartels are detected, or that the cartel equilibrium is altered whenever some variable changes (*e.g.* the opening of an investigation, but also the entry of a new competitor, the change of ownership, new technologies, etc.); in addition, from an *ex ante* perspective, it reduces the possibility that stable cartels are formed. In the current low private enforcement situation, where leniency bears an impact only on public enforcement (*i.e.* on the amount of fines), the probability of detection due to public enforcement is the main factor taken into account in deciding whether to apply[737]. This holds especially for domestic (*i.e.* EC-wide) cartels. A partially different analysis could be suggested with regard to global

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[736] For a comprehensive literature review of economic thought on leniency, see Spagnolo, *Leniency and Whistleblowers in Antitrust*, CEPR Working paper, 2006; Chen and Rey, *On the design of leniency programmes*, Working Paper 2007.

[737] This argument is consistent with a recent survey by ICN (2007), *Interaction of public and private enforcement in cartel cases: Report to the ICN annual conference*, May 2007, in particular 36 and ff. The report shows that the vast majority of NGAs advise their client claiming to be victim of a cartel to contact the competition authority and wait for public investigation before filing a damages suit. This means that litigation in cartel cases usually follows public detection. This supports the idea that the prospective leniency applicant will probably bear in mind the probability of detection stemming from public investigation, rather than the risk of detection due to private enforcement.

cartels: in these latter cases the high private enforcement experienced in some countries (*i.e.* the US) might have spill-over effects on other jurisdictions. The firm, fearing public investigation in Europe following private litigation in the US, might take into account the probability of detection by private plaintiffs in the US in deciding whether to apply.

The starting point of our analysis is thus the comparison between the payoff of the non-collaborative firm *vis à vis* the one of the defecting firm that decides to collaborate with the enforcing authority. Then, the equation concerning the static incentive compatibility constraint explains the relationship between the incentive to seek leniency, the profitability of the cartel and of the defection strategy, the probability of detection (hence, government expenditure) and the level of fines and damages.

The basic equation is[738]:

$$\frac{p(\pi^c a - \pi^c b\beta - f) + (1 - p)\pi^c a}{1 - \Gamma} \geq \pi^s - \pi^c b\beta - f + R \qquad (1)$$

Where:

p = probability of detection and administrative conviction

π^c = overall profits of the cartel

a = market share of firm A

b = share of damages paid by firm A

β = probability of civil conviction

f = fine

Γ = probability-adjusted discount factor (probability of an on-going interaction of the cartelists)[739]

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[738] Modified from Camilli (2006). See also, for a similar formal description, G. Spagnolo – P. Buccirossi (2006), *Optimal Fines in the Era of Whistleblowers: Should Price Fixers Still Go To Prison?*, CEPR Discussion paper, n. 5465, 22, equation (3).

[739] This adjusted-discount factor simply takes into account the fact that the cartel may collapse at every stage of the interaction game with the other players. For this reason we consider that the cartelist will not discount the future profits from collusion on the basis of the "textbook" discount factor for infinite streams of future profits (R=1/1+i), but they will observe that cooperation may suddenly cease with some probability at every stage, *i.e.* R has to be discounted for the probability of interaction ($p^i R$). This probability of interaction may vary considerably, according to the specific market characteristics, the entrance of new competitors, etc. See also Pepall, Richards and Norman (2002), at 369. Moreover, Spagnolo and Buccirossi (2006), 24, also stressed the impact on discount factor stemming from the risk that other firms may apply for leniency, which is a further deterrence enhancing feature of leniency programs.

π^s = firm A profits from deviation

R = reward in case of successful leniency application.

The left side of the equation shows the payoff of the colluding firm that decides not to apply for leniency. With probability *p*, Firm A will be caught by the enforcing agency and will be obliged to subtract from the cartel profits the fine imposed (f) and the likely damages paid due to follow-on actions ($\pi^c b\beta$). With probability *(1 - p)*, the cartel will not be discovered and full cartel profit ($\pi^c a$) will be collected by firm A. These future collusive profits need to be discounted for $1/(1 - \Gamma)$, in order to be compared with the immediate profits from defection (π^s).

The right side of the equation shows the pay-off of the leniency applicant. We assume that the leniency applicant will be able to exploit her deviation from the cartel, by under-pricing the other cartelists and increasing her market share ($\pi^s > a\pi^c$). This is a standard textbook condition in assessing the trade-off between collusion and simple defection. However, in case of defection associated with collaboration, the extent of π^s may be negligible. The actual amount of profits due to (anticipated) deviation largely depends on the features of the involved market and on the time elapsing between the filing of the application and the moment in which public investigation is made public through dawn-raids. During this period the applicant's top management is obliged to keep the utmost secrecy on the ongoing investigation in order not to alert the co-infringers. Deviation then could not take place, although a time advantage compared to the other cartelist in favour of the applicant may be recognised. The reward (R) offered for collaboration varies depending on the legal framework. In case of immunity, R will be equal to f, such that f – R = 0. Although normally R will be smaller than f, it could exceed the amount of f, whenever the law provides for additional benefits exceeding the amount of fines imposed (for example, in the case of damages rebates).

Finally, damage awards are assumed to be quantified as price overcharge, *i.e.* on the basis of the cartel mark-up. This is quite a strong assumption, due to the fact that restitutionary and compensatory damages may exhibit quite different features[740]. In practical terms, however, the quantification of damages (at least for direct purchasers) is usually made with reference to the difference between the price paid and the "but-for" price, so that it includes the profits from collusion[741].

[740] See our analysis in Section 4 above.

[741] Although in an oligopoly setting, where a Cournot non-cooperative model of competition would lead to supra-competitive prices, some extra-profits will be earned even without collusion.

The alteration of the incentive compatibility constraint is the basic effect that the introduction of a leniency programme brings about, with the main consequence of destabilising the collusive agreement. Law and economics scholars, however, highlighted a further side-effect deriving from the introduction of leniency programmes, *i.e.* the reduction of the expected magnitude of fine imposed, thus the risk that the deterrent effect of fines is ultimately reduced[742]. This could in turn facilitate the creation of collusive agreements, albeit less stable. Accordingly, Spagnolo (2006) put forward the reduction of deterrent effect due to leniency and, above all, the risk of strategic exploitation of programmes (see *infra*) as alternative explanations for the increase in the number of leniency applications. In order to counterbalance this effect, the differential treatment between the applicant and the other co-infringers (*i.e.* the destabilising effect) needs to be increased, for example, by an increase of level of fines (see Wils, 2007)[743].

Indeed, some authors have pointed out the risk of "exploitation" of leniency schemes (see Spagnolo, 2004), which actually enhances the value of the collusive agreement. In these cases, firms will apply for leniency (in the original model by Spagnolo, this is more likely if substantial fine cuts are granted to following applicants), and contextually maintain the collusive agreement for the future, exploiting the fine reduction in order to mitigate the negative expected consequences. A similar risk of abuse may emerge if leniency applications are sought for cartels nearing natural collapse. These risks have also been recently investigated by Chen and Rey (2007), who define the conditions under which firms may sustain a strategy involving the choice to apply for leniency and subsequently revert to collusion[744]. These findings are particularly important with regard to the determination of the leniency reward and the optimal balance between the destabilising effect and the reduction of deterrence effect due to the reduction of public fines. This is especially true with regard to two features of leniency programmes. First, to the case where "positive" (although implicit) rewards are offered, *i.e.* rewards that exceed the amount of the

[742] In Motta and Polo (2003) the trade-off between the desistance effect (making collusion more unstable) and the deterrent effect (reducing the amount of fines imposed) is stressed. Within their model, if total *ex ante* deterrence might be achieved through normal investigative tools and fines, the adoption of leniency programmes would reduce total welfare, whereas it would be welfare-enhancing only as a second-best tool.

[743] Wils, (2007), Leniency in antitrust enforcement: Theory and practice, in 30 World Competition, 46.

[744] In the Chen – Rey model, the magnitude of reward leading to report and collude strategies is inversely related to the probability of detection, according to the relationship shown by the equation $R=2(1-p)$: the higher the probability that the cartel will be detected without the need of leniency application, the lower the amount of the reward that can sustain the collude and report strategy, since the firms know that in any case their conduct is likely to be detected and sanctioned.

imposed fine[745], although in this case the correlate opposite effect of increased differential of pay-offs between applicant and non-collaborating firms (destabilising effect) needs to be taken into account. Second, the balance between the destabilising effect and the deterrence effect could be jeopardised by the excessive openness of the programme to further informants[746]. Indeed, the reduction of fine for further informants following the first applicant is a common feature of most leniency programmes. Past experience on the application of the EC leniency notice shows that out of 37 cases decided from 1998 to mid-2006 under the 1996 and 2002 Notices, on average 4.5 firms per case enjoyed some reduction of fines, ranging from 10% to full immunity[747]. In fact the advantage stemming from further collaboration may be substantial for public prosecutors, but the risk of collusive behaviour in reporting should be taken into account when assessing the scope of application of leniency reductions.

Spagnolo (2003), on the contrary, considers that the trade off between the reduction of deterrence and the destabilising effect could be overcome by means of "courageous" leniency programmes, providing positive rewards for the applicant equal to the sum of the fines collected by the other co-infringers. Within this model the possibility for a strategic collusive exploitation of leniency programmes would be significantly reduced, due to the only-one-takes-all feature of the programmes and the differential treatment between the payoffs of the applicant and of other co-infringers, which becomes so significant that internal compensation and side-payments between cartelists becomes hardly feasible. In other words, the balance between the destabilising effect and the deterrence effect would completely be shifted to the former element. This, in turn, could increase the risk of unilateral (rather than collective) exploitation of programmes (for example, coercing firms or counterfeiting evidence)[748].

In fact, there are also other practical, though less extreme, means to limit the strategic use of leniency programmes, like the unavailability of the programme for repeated offenders (which aims to avoid the systematic use of the "report and collude" strategy)[749]; or excluding the ring-leader from the programme

[745] The risk of exploitation in case of positive rewards scheme is stressed also by Wils (2007), 62.

[746] See Wils (2007), 46.

[747] Elaboration from data in Bloom (2006).

[748] See also Wils (2007), 62 cited *supra*.

[749] This measure may prove to be effective in limiting the collude and report strategy, but may have the opposite effect of enforcing the alternative "report once and never after that" strategy; see Chen and Rey (2007). That would have the effect of reinforcing, for the periods following the first application, the collusive agreement, since leniency is not available anymore and the agreement is reinforced as in the absence of leniency programmes, as described by Harrington (2005).

(thus reducing the risk of coordination of reporting strategies carried out by a ring-leader and unilateral strategic behaviour).

The effectiveness of a leniency programme is also affected by the availability of substantial reduction of fines after an investigation has been launched. After this possibility was introduced in the US (1993) and in the EC (2002), the number of leniency applications steadily increased. Some cartels may not be destabilised by the mere existence of a leniency programme, since the probability of detection is supposedly too low to trigger a "race to the courthouse". However, the opening of an investigation dramatically alters the incentive compatibility constraint, by raising the probability that the infringement is sanctioned and increasing the incentive to apply for leniency. This, in turn, amplifies the effectiveness of the public investigation[750]. On the other hand, granting leniency after the commencement of proceedings may reinforce the risk of "collude and report strategy" strategies ("collude and report in case of investigation" strategy). Also in this case, the trade-off between increasing the destabilising effect and reducing the magnitude of public fines may emerge.

These being the main findings of the law and economics literature on the incentive to apply for leniency, the likely effect of increased private enforcement within the present legal framework can be briefly summarised.

- From a *deterrence* point of view, leniency programmes have been considered the most effective investigation tools in the fight against cartels. From 1996 to 2003, under the previous Notice, the number of cartel cases sanctioned by the EC amounted to 38, compared to the 15 cases filed in the previous six years[751]. Again, after 2002 and until 2006, the number of immunity applications increased to 87[752]. Besides that, the deterrent effect of leniency programmes is widely acknowledged, although empirical studies have not showed its precise extent to date[753]. Wils (2007) stresses the increased level of sanction as a signal of enhanced effectiveness of leniency programmes[754]. However, a future increased risk of damages actions may negatively influence a firm decision on whether to apply for leniency. This effect might more easily take place for immunity applications filed before the

[750] As well as the amnesty plus, see Klawiter (2006).

[751] See S. Brenner, An empirical study of the European Corporate Leniency programme, Paper presented at the 2005 EARIE Conference, 2005, available at http://www.fep.up.pt/conferences/earie2005/cd_rom/Session%20VII/VII.G/brenner.pdf. This outcome, however, is not interpreted by the author as an unambiguous element of the deterrent potential of leniency programmes, since the rise of observation could also be due to increased cartel activity after the achievement of market integration.

[752] See Bloom (2006).

[753] For references on this issue, see above, Section I.3.2.4.

[754] Wils (2007), 57.

commencement of proceedings, since in this case a leniency application significantly alters the probability of future antitrust damages actions. In any event, limitations in the right of access to leniency statements (par. 40 of the 2006 Notice on leniency) limits the possible negative consequences of private enforcement on the incentives to apply for leniency.

- This limitation, in turn, might negatively affect the objective of full *compensation* for victims, as long as the leniency application provides reliable and decisive information needed to prove the infringement or to define the extent of damages. On the other hand, this limitation itself is needed to avoid that the applicant ends up worse-off than she would have been had she not applied for leniency[755]. In addition, the information can be obtained through other means, for example, from the other cartelists, depending on the access to evidence regime (see *supra*, Part. II, chap. 3).
- The *internal market* objective is not likely to be achieved, absent coordination at Community level with regard to leniency programmes. To date, such programmes have been mainly qualified as tools to increase the investigative potential of competition authorities. This led the Commission to promote the adoption of these programmes by means of soft law. The absence of binding community rules on the subject matter brought about a degree of variety in the programmes adopted across Europe, with some countries still having no leniency programme at all. More important, a leniency application filed in a Member State does not have any impact on other jurisdictions, as no "one-stop-shop" system is in place. Moreover, the limitation of disclosure of leniency statements provided for in the 2006 EC Notice on leniency (par. 40) does not apply to national leniency programmes, where different regimes may be applicable. Finally, the different (and more favourable) regime provided for by some Member States could create the risk of "forum shopping", with firms choosing to apply to more favourable programmes.
- As seen above, the limitation of the disclosure of leniency statements is a key feature in order to limit the risk that enhanced private enforcement generates negative spillovers on incentives to apply for leniency. However, it also bears an effect for claimants' *litigation costs*, since access to the leniency application would represent a valuable source of information for private litigation. Moreover, due to the subsequent risk of private damages claims, the applicant does not have the incentive to disclose documentary evidence that could be relevant for future claimants, if such evidence is not explicitly requested by the public enforcer (although this behaviour could

[755] On this latter principle, see OFT, Private actions in competition law: effective redress for consumers and business, April 2007, 46.

entail some risks for the applicant, if qualified by the agency as a breach of the full collaboration obligation).

- Finally, limitation of access to leniency statements might have negative effects on *error costs*, if the existence of the infringement or its causation cannot be assessed through the information contained in the public agency decision. However, this risk of error cost is limited as regards the establishment of the infringement (once the public decision is issued).

6.2 Rebate on damages

Leniency programmes are public enforcement tools. As a consequence, the conditions granted to leniency applicants are usually confined to changes in public fines, not in damage awards[756]. However, external effects may take place on the private enforcement side: the increase of probability of public conviction due to leniency may raise the probability of civil claims being brought and the expected amount of damages to be paid. Furthermore, collaboration in the administrative proceeding may put the informant in a weaker position in following civil claims. In turn, this may strengthen the collusive agreement once formed, by reducing the collaborating payoff *vis à vis* the collusive one[757]. These are the main arguments currently put forward in order to sustain the possible negative influence of private enforcement on the incentive to apply for leniency.

On the other hand, the increased likelihood of future antitrust damages actions caused by the leniency application may greatly reduce the risk of strategic use of leniency programmes. Since leniency treatment only concerns the public pillar of antitrust enforcement, the general deterrence potential of antitrust enforcement is not compromised by the reduction of the public fine.

Option 29 of the Green Paper would provide for a substantial extension of leniency treatment to private enforcement, through a rebate on damages the successful applicant is liable for. At the same time, the rule would preserve the victim's right to damages, since the rebate would be covered through liability of the co-infringers. The effect of this provision is twofold. On the one hand, option 29 would preserve the incentive to apply for leniency and disclose as much information as possible, as admission of the infringement during the public proceeding reduces the exposure to liability in subsequent civil actions. On the other hand, incentive to apply for leniency is not only shielded from private enforcement, but even strengthened by provisions that affect the applicant's liability for damage compensation; this widens the gap between the

[756] Up to now, only the US system, following the 2004 Antitrust Modernization Act, entails some effects of leniency application on private enforcement.

[757] See also Leslie (2004).

collusive and the collaborative pay-off. As regards the incentive compatibility constraint, two major changes will take place:

- the collusive pay-off will decrease, as the colluding firm will be more exposed to damages claims, also *in lieu* of the applicant;
- the collaborating pay-off, on the contrary, will increase, due to the prospective rebate on damages.

Put differently, the rebate scheme entails a positive reward for the applicant, at the same time providing for a (minimal) multiplier of damages for other cartelists. Recalling the trade-off between the destabilising effect and the deterrence effect, this rule appears biased towards the former, since the amount of overall sanctions for the applicant (civil and administrative ones) is reduced. In reality, the effect of such a rule entails more complex consequences, since the overall amount of damages due for the whole cartel does not change. Setting aside the extreme case in which a cartel involves two perfectly symmetric firms, the relationship between the reduction of the expected sanction due to collaboration and the increase of expected liability in the collusive option varies along with the number of cartelists and their size. For smaller firms (especially if the cartel involves a large number of undertakings), deterrence would be higher, since they risk facing liability for the share of damages of collaborating larger firms. For large firms, the increase of the destabilising effect may be more significant than the increase of the sanction, since the reduction of damages in case of successful collaboration is higher than the increase of civil damages in the event of non-collaboration. Similarly, an increase of the number of firms strengthens the destabilising effect. In other words, the rule amplifies the asymmetries within the cartel, thus also the distrust among cartelists[758].

At the same time, the increased incentive to exploit leniency programmes due to the increase of the reward may be wiped out by some specifications of the rule.

- First, *the rebate on damages must be granted only to the first successful immunity applicant*. This limits the reduction of the deterrence effect of civil and administrative sanctions, and at the same time strengthens the "first-comer-takes-all" effect. Furthermore, it may reduce the impact of several leniency treatments on the deterrence effect of public enforcement. Additional information and collaboration may be decisive for the public investigation, and is favoured in the current EC leniency scheme. Leniency for subsequent applicants is also useful since it reduces the risk that cartelists avoid

[758] On distrust as a major feature of leniency programmes and the role of asymmetries, see Leslie (2004) in the US and Clarich (2007) for the recent Italian experience.

collaborating since they fear being second on the list[759]. However, it may also reduce the deterrence of public fines and the differential between the collusive and the collaborative pay-off (*i.e.* what we termed the "destabilising effect"). As a consequence, strategic abuse of leniency may be facilitated, as showed by Chen and Rey (2007). Offering the "civil" rebate only to the first successful applicant greatly reduces these drawbacks, without excessively affecting the incentive to collaborate within the administrative proceeding. Once the first application is accepted and the investigation is opened, the likelihood of detection and conviction in a public proceeding increases substantially. Firms, however, do not know whether additional information would prove essential for the definition of the case, whereas on the contrary they may be lured by the reduction of fines.

- Second, *rebates on damages must be granted only to leniency applications filed before the opening of a formal investigation*. Also, this feature is important for the correct interaction between leniency programmes and private damages actions. If the rebate was made available after the opening of an investigation, as shown above, the risk of strategic use of leniency programmes would increase, together with the probability of conviction; the minimum reward compatible with a strategy where firms collude and report after an investigation is launched would thus become lower. Put in other terms, the opening of an investigation may help the coordination between cartelists, in turn strengthening the stability of the cartel before the investigation is launched, and leading to a (somehow agreed) collapse of the cartel. In a pure public enforcement system, the reward is limited, and the destabilising effect due to increased probability of conviction is likely to be greater than the increased risk of strategic use of leniency. If a rebate were granted after the opening of an investigation, the expected reward offered would substantially increase, along with the risk of strategic coordination by cartelists. Finally, the effectiveness of leniency programmes would not be greatly enhanced by the availability of a rebate after the investigation is launched. As the probability of conviction is already relatively high once the investigation has started, the whistleblower may be mainly interested in avoiding public fines, without taking into account the further likelihood of conviction in civil cases. In this respect, the reduction of public fines may already represent a sufficient reward to destabilise the cartel.

Besides these efficiency-oriented arguments, there is also an equitative reason for granting the rebate only before the investigation is started. If the cartelist "whistleblows" before any investigation is opened, the increased likelihood of

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[759] See Leslie, (2004). Similarly, in the US, amnesty against criminal enforcement is granted to the first applicant and the reduction of damages to be paid provided for the 2004 Antitrust Modernization Act is applicable only for firms who were discharged by criminal enforcement.

civil conviction would be linked to her "spontaneous" behaviour. On the contrary, after the investigation is launched, the public investigation is the key element triggering the race to the courthouse, and leniency applications are a consequence of the increased probability of conviction. In the former case, the granting of a rebate is functional to the increase in the detection rate; in the latter, it is an effect, not a cause, of the opening of a public proceeding.

This leads to the third feature of the rule contained in the Commission Working Paper, *i.e.* requiring the applicant's full collaboration with the claimant during the civil proceeding. From the viewpoint of corrective justice, if a positive reward is to be offered to the leniency applicant, this will be due to the spill-overs flowing from public to private enforcement. This positive spill-over is maximised when the applicant collaborates with the claimant, for two reasons: (i) depending on the size of the rebate granted, the applicant's incentive to strategically conceal or destroy the information held decreases; (ii) providing hard documentary evidence on the co-infringers' liability may increase the probability that the latter are convicted, which in turn widens the gap between the collaborative and the collusive pay-offs. The collaboration clause also became a key feature of the US system after the 2004 Antitrust Modernization Act, which up to now represents the sole example of a rule regulating the leniency effects on private enforcement.

In addition, the granting of a rebate implies an implicit "consolidation of claims" effect. Since the rebate is to be covered by co-infringers, claimants will have an incentive to collectively sue the applicant *and* the co-infringers in order to avoid duplication of claims. A different consolidation mechanism is envisaged in the OFT Discussion Paper on private enforcement[760], where the applicant may be targeted by private claims for the whole amount of damages but is able to recover up to 100% of paid damages from co-defendants. This mechanism would have the advantage of reducing litigation costs borne by the claimant. On the other hand, this solution has also important drawbacks[761]: the prospective applicant would know that she may be liable for the entire amount in the first place, whereas the subsequent possibility of recoupment from co-infringers and the related litigation costs could be highly uncertain. This is especially true for cross-border litigation, where the applicant may be subject to a proceeding in one Member State according to national evidentiary rules, whereas at the same time recoupment must be sought from co-infringers

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[760] OFT (2007b), Private actions in competition law: effective redress for consumers and business, April 2007, 47 and ff.

[761] Most of these drawbacks have been confirmed during the debate following the Discussion Paper, and were reflected in the final Recommendations of OFT to the government on measures to implement private enforcement; see OFT, *Private actions in competition law: effective redress for consumers and business Recommendations from the Office of Fair Trading*, November 2007, in particular 38, advising not to adopt this option.

established in different Member States and according to different procedural rules, with a risk of inconsistent judgements. Moreover, the risk of insolvency of co-infringers (see also *infra*) is shouldered by the applicant, which again limits the attractiveness of rebate schemes.

Finally, it may be anticipated here that the effect of a damages rebate may be achieved through different tools.

- *A fixed rate of rebate* may be established by statute, under certain well defined conditions, to be ascertained by the public enforcer in granting leniency treatment and/or by the civil court ruling on damages (the latter, for example, will be better suited to assess the fulfilment of cooperation clause during the civil proceeding).
- *A case by case rebate* may be granted by specific decision, according to the extent of collaboration and the overall effect on the fairness of the case.
- As highlighted again below (see Section II.6.3), the practical effect of a rebate on damages may be achieved also by an *asymmetric removal of joint and several liability for leniency applicants, implemented with a settlement reduction rule and protection from contribution from coinfringers, subject to collaboration*[762]. In this latter case, low-value settlements between the applicant and the claimant could be subsequently recouped by the latter from non-collaborating defendants, who can be held liable for the whole damage, minus the amount settled.

Although the main aim of these three legal instruments is similar, there are important differences that should be highlighted. The first instrument (fixed rebate) entails greater legal certainty and control by the enforcing authority, with increasingly homogeneous interpretations of the collaboration clause; this, in turn, may exert a positive impact on deterrence, since the *ex ante* collaborating pay-off becomes more predictable. The second instrument (flexible rebate decided by the judge/enforcing authority) may have a lower deterrence potential, and may be prone to inconsistent interpretations, in turn, increasing litigation costs. The third instrument ("asymmetric" joint and several liability with settlement reduction rule) may achieve greater flexibility at lower costs compared to the former, since the size of the rebate is left to the bargaining process of the parties. The most likely outcome would be similar, in practice, to full collaboration with total rebate, unless the expected probability of insolvency of other co-infringers is particularly high. Again, however, the outcome is surrounded by higher uncertainty compared to the first instrument (fixed rebate). In general, the impact of such a rule on the parties' incentive to settle has been deemed to provoke increased frivolous suits and NEV (Negative

[762] The provision of a collaboration clause, however, would differentiate this option from option 30 (removal) in settlement reduction jurisdiction.

Expected Value) settlements[763]. This is due to the "whipsaw" effect of having no contribution and settlement reduction rules, with defendants racing to settle earlier than co-infringers in order to leave them liable for most of the (expected) remaining damage[764]. This negative effect, however, could be limited, if the protection from contribution and the settlement reduction set off were to be limited to the sole leniency applicant.

6.2.1 Impact assessment

A. BENEFITS

A1. Deterrence

The overall impact on deterrence – *i.e.* the sum of the destabilising effect and the effect on the magnitude of overall sanctions imposed – is likely to be positive. Indeed, the proposed rule will affect both the probability of detection and the magnitude of fines/awards. The former is affected positively by the destabilising effect, as shown by the changes involving the incentive compatibility constraint. With regard to the latter, the overall effect is ambiguous: depending on the number of cartelists, the market share held and the amount of the rebate, the expected reduction of damage awards against the applicant in case of successful collaboration could be higher than the individual expected increase of damages for other tortfeasors, due to joint liability for the rebated share of damages not paid by the applicant. However, the combined outcome of the destabilising effect and the deterrent effect has a positive influence on detection, since unstable cartels may be more likely detected. Furthermore, as highlighted above, the specifications of the rule may effectively limit the negative effect of the rebate on the magnitude of overall sanctions (*i.e.* the incentive to behave strategically in filing the leniency applications). In general, the increase on the probability of detection due to the destabilising effect outweighs the small reduction of expected penalties due to extended leniency[765].

Moreover, the increase of *ex ante* probability of detection stemming from the destabilising effect and the deterrent effect causes another effect, as underlined by Buccirossi and Spagnolo (2006). The fact that interaction among cartelists will more probably be discontinued due to antitrust enforcement, affects the size of the probability-adjusted discount factor (Γ in the equation 1 above, Sec.

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[763] For a definition of NEV suits, see *supra*, Section I.5.1.1 of this Report, and Bebchuk, L. A. (1998), *Negative Expected Value Suits*, NBER Working Paper No. W6474.

[764] The undesirable effect of such a rule is highlighted by C. J. Goetz – R. S. Higgins – F. S. McChesney, *More can be better: contribution and set-off in antitrust*, in (51) *Antitrust Bulletin*, 2006, 631. Similar concerns from overdeterrence and corrective justice perspectives have been raised by the US Antitrust Modernization Commission, *Report and recommendations*, 2007, 251 and ff.

[765] On the decisive effect of the distrust effect on the probability of detection, see Leslie (2004), 653.

6.1.), reducing its value. The reduction of the relevant discount factor further reduces the value of the collusive pay-off, which makes the incentive constraint unfeasible since future collusive profits are more uncertain.

Coupled with multiple damages, this option may help to offset some of the major drawbacks of the multiplier on leniency incentive, including the risk of free-riding by the claimants and the risk of reducing the incentive to apply for leniency.

Hard empirical evidence of the effectiveness of rebates on damages is still lacking in the US, where a five-year experimental legislation passed in late 2004 provided for de-trebling of antitrust damages for firms that enjoyed amnesty from criminal prosecution due to violation of Sec. 1 of the Sherman Act (*i.e.* hard-core cartels). Due to the length of criminal proceedings and the confidentiality surrounding on-going cartel investigations, the time elapsed is still too short for official statistics to reflect the rule's impact. However, in 2005 and 2006 the number of initiated Grand Jury criminal investigations substantially increased compared to the previous nine years[766]. Furthermore, anecdotal evidence shows an increased (and partly unexpected) number of leniency applications[767], such that the DoJ was repeatedly asked to use the marker to determine whether there was a criminal violation[768]. The potential impact of a similar rule in the EU context is hard to foresee, due to the current uncertainty on the rules that will be adopted on private antitrust enforcement at EU and national levels. Within the US system, rebates have a much greater impact than they would have in the EU legal framework, without multiple damages and with the right to contribution. Of course, the rule's ultimate impact also depends on the amount of the rebate granted.

In conclusion, the impact on deterrence is likely to be positive. This is due to the destabilising effect and the (probable) increase of the deterrent effect for non-collaborating firms.

A2. Corrective justice

From the claimant's point of view, the proposed option would not entail any negative impact on corrective justice, especially with regard to the risk of overcompensation. On the contrary, since the probability of detection may increase, private claimants may enjoy greater chances of compensation,

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[766] Besides 2003, when Grand Jury investigations peaked to 48, the average number of initiated Grand Jury investigations since 1997 has been approx. 25 per year, with small deviations from the average. In 2005 and 2006 it was 38. Source: DoJ, Antitrust Division, Workload statistics, FY 1997-2006, available at http://www.usdoj.gov/atr/public/workstats.htm.

[767] Leniency is only applicable for criminal infringements, *i.e.* naked cartels.

[768] See Klawiter (2006).

especially since the rebate would be conditioned to the applicant's full collaboration with the claimant in civil claims.

Some commentators of the rule adopted in the US in 2004 pointed out the risk that the rule negatively affects the likelihood of compensation, due to increased risk of failure of the jointly liable firms, which do not qualify for leniency[769]. The underlying assumption is that bigger firms, liable for a higher share of damages, will be the first beneficiaries of de-trebling and will more likely apply for leniency. This, in turn, would shift most (trebled and joint) liability for damages towards smaller firms, which could not be able to repay the victims. The risk, however, appears to be negligible, especially as regards the current EU legal context. For one, cartelised markets generally show a certain degree of symmetry among participants. Second, up to now, multiple damages are not specifically provided in any European country (but for exceptional cases of punitive damages in Common law countries), and joint liability with no right of contribution does not exist in European legal systems. Finally, the assumption that the rebate will be more likely sought by bigger firms still lacks empirical evidence: together with a higher share of expected sanctions, these firms also enjoy a higher share of the collusive profit; sometimes they are the agreement's main enforcers, and thus they may not qualify for leniency; although the expected reward for collaborating is higher than the increased sanction for larger firms, smaller firms may be more sensitive to the increased exposure to damages, and thus may have the same incentive to collaborate, if not to refrain from joining the agreement itself.

Even when there is a risk of failure of one of the non-collaborating firms, this is unlikely to lead to a reduction of the compensation available for claimants, since the increased exposure to (civil) damages is shared among all the cartelists. Also, in limited cases where the number of defendants is very low (*e.g.* two or three) and risk of insolvency is tangible, increase of the risk of under-compensation of plaintiffs is unlikely, compared to the zero option. Although the option does not clarify whether the risk of insolvency of co-defendants is to be shouldered by the plaintiff or by the leniency applicant, the rebate is actually *paid* by co-defendants surrogating the applicant. Thus, in case of their default, one could easily argue that the original liability of the leniency applicant *vis à vis* the plaintiff will revive. This will limit the risk of under-compensation, notwithstanding that it can have a chilling effect on the destabilising effect (especially for cartels with a small number of firms and for larger or wealthier firms).

As regards the defendant's point of view, the proposed rule is exposed to the same criticisms that can be formulated for multiple damages in cartel cases[770].

[769] See Randall (2006).

[770] See Section II.1.3 above for a detailed explanation.

The joint liability for the applicant's share of rebated damages implies an implicit (and undefined) damage multiplier, which mainly depends on the cartel's features, the number and relative dimension of firms and the amount of the rebate granted[771]. However, it is highly unlikely that this rule's effect would resemble that of introducing treble damages; and only in a narrow set of cases would the rule be comparable to a doubling of damages. A partially different outcome, however, would appear if the rebate is implemented together with a multiplier. In this case the rebate rule would amplify the multiplier effect[772], unless the rebate amounts to a reduction of damages award for the plaintiff.

Significantly, unlike what occurs in the case of damage multiples, the option at hand would not raise concerns about overcompensation and the risk of frivolous/nuisance suits by plaintiffs, as long as the reduction is attained by means of an explicit rebate. This is not only due to the fact that awarded damages are not more-than-compensatory; in addition, the rebate is granted subject to full collaboration and involves follow-on actions, where the robustness of the case has already been ascertained in a public proceeding.

In conclusion, the rule's net effect may be considered positive, thanks to the collaboration clause.

A3. Internal market

This option requires an implicit harmonisation of leniency programmes across Member States. Up to now, some leniency programmes have been adopted without the need for legislative intervention, since they did not (directly) affect the private enforcement regime and mainly involved the way public enforcers used their discretion in prosecuting cartels. Adopting the proposed option would change the nature of leniency programmes, which would now interfere with the private rights of involved firms (in that they would increase the share of damages for non-collaborating firms).

As a consequence, extending the effects of leniency programmes to the realm of private antitrust damages actions requires at least the establishment of a common set of rules for the recognition of leniency applications in civil claims established in different countries. Were such recognition not available, the current problems related to multi-jurisdictional cartel proceedings would be amplified: in order to obtain the rebate from every damages action in Europe,

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[771] The multiplier effect may be substantial. For instance, in the extreme case of 100% rebate for the bigger firm in an asymmetric cartel composed of two firms (A with market share equal to 70% and B with a market share amounting to 30%), the smaller liable firm could be held liable for the whole amount of damages, more than three times the provoked damages.

[772] Doubts from a fairness point of view on the simultaneous application of multiplier and joint liability for the whole treble damages (*i.e.* rebate being paid by the co-defendants) after the 2004 US amendments have been raised by Randall (2006).

the applicant should be forced to apply simultaneously in every country. Furthermore, the basic conditions for granting leniency would have to be harmonised in order to avoid discrimination. Otherwise, some defendants would find themselves in more disadvantageous conditions than others, merely because they have been sued in a jurisdiction where leniency programmes – or the rebate – are not available.

Besides the harmonisation of leniency programmes, a system ensuring the recognition of foreign NCA decisions on leniency by national courts would have to be established. In some Member States, some concerns could be raised from a constitutional point of view, especially as regards the binding effect of (especially foreign) NCA decisions on national courts[773]. Actually, in granting the rebate, courts would be bound by the decision of the NCA to accept the leniency application or by final decision confirming leniency. Although the current legal framework already allows for recognition of foreign court decisions, this option would require an extension to administrative decisions. It can be argued, however, that in some Member States the binding force of antitrust administrative decisions is either explicitly recognised[774] or *de facto* present[775]. Alternatively, the rebate introduced through an asymmetric joint and several liability regime coupled with a settlement reduction and no contribution against the sole leniency applicant could alleviate this problem, since in this case the rebate would be agreed to by the parties during settlement bargaining[776].

It may also be recalled that the binding effect of the administrative decisions could be limited to the part of the final decision formally granting leniency as a waiver from damages actions, whereas the judge would be free as to the decision on existence of infringement, causation and quantification of damages.

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[773] The principle of independence of private antitrust enforcement *vis à vis* public authorities decisions is extensively analysed by A. P. Komninos, *Effect of Commission decisions on private antitrust litigation: setting the story straight*, in 44 *Common Market Law Review*, 2007, 1387 and ff. (in favour of the principle); in particular on 1,396, the possibility of binding force of an NCA decision within the actual legal framework defined by Reg. no. 1/2003 is rebutted, due to the fact that NCAs applying Treaty articles cannot be qualified as "Community organs" and the related fidelity obligation stemming from Art. 10 of the EC Treaty cannot be applied.

[774] In particular, in the Czech Republic, Greece, Slovenia and Sweden (though only as regards individual exemption decisions), and in the UK, Hungary and Germany, the binding effect of the administrative decisions is directly recognised; in Poland, Austria and Estonia, with regard to the court decisions on public enforcement, see Ashurst (2004), 69-70.

[775] A particular evidentiary value of antitrust authorities' findings has been ascertained in Belgium, Cyprus, Estonia, France, Ireland, Italy, Lithuania, Malta, Slovakia, Sweden (for decisions not involving exemptions, which are binding, see Ashurst (2004), 69 and also ICN, 2007, 39-40.

[776] The third tool mentioned above, at the beginning of this Section II.6.2, third bullet.

The benefits of such a rule from an internal market perspective may be substantial, as it would lead to a (minimum) harmonisation of leniency programmes, fostering the application of EC Treaty competition rules and introducing a recognition obligation (at least in civil claims). Such a rule may also help to solve some problems linked to the actual absence of a formalised "one-stop-shop" system for leniency applications within the ECN.

B. COSTS

B1. Litigation costs

The main effect on litigation costs is due to the "collaboration clause", requiring that the applicant fully assists the claimant in litigation against the co-infringers. The applicant's collaboration may entail substantial savings for the prospective plaintiff, due to the availability of information from an "insider". Accordingly, the extent of collaboration is crucial to ascertain the likely savings for the plaintiff.

On the one hand, collaboration might be limited to the same subject matter of the related public proceeding, *i.e.* the provision of information on the infringement. This may entail some limited benefits for the claimant, who can find some relevant information on the terms of the agreement (although in a non-confidential version) already in the final decision issued by the competition authority. Conversely, the applicant would face limited additional costs in fulfilling this obligation, since she may simply pass on the findings of internal investigation already carried out within the administrative proceeding. This minimalist approach would limit the discretion in granting the rebate, since the "satisfactory cooperation" test would mirror the assessment carried out by the public enforcer. This, in turn, limits the uncertainty the applicant faces while cooperating with the plaintiff.

Alternatively, the applicant could be required to provide full and active cooperation with the claimant. In extreme cases, the applicant could be required to act as an expert, providing elaboration of data specifically carried out for the litigated case. This would entail cooperation on a broader set of issues, which are not covered by public prosecution, like the assessment of the effects of the infringement, the quantification of damages, the provision of market data and the causality issue. This broader extent of collaboration would bring about greater benefits for the plaintiffs, but also higher costs for the applicants, entailing both increased material costs due to more intense collaboration, and greater harm due to disclosure of potentially sensitive information.

In the US system, the collaboration clause is broadly formulated and includes "full account of the facts known to the applicant…that are potentially relevant to the civil action that are in possession, custody or control of the applicant". This clause has been tested in the *Sulphuric Acid* case, where the judge considered as "satisfactory collaboration" the disclosure of documents and the

provision of witnesses[777]. Within this framework, the extent of the collaboration is defined by the plaintiff's claim: it includes all the relevant information (regardless of any confidentiality), but does not require the applicant to play any consultancy role nor to provide further elaborations of the information provided.

In any case, the collaboration clause may lead to a reduction of the claimant's litigation costs, although in the most restrictive scenario these benefits may be limited. Information collected during the administrative proceeding is usually very relevant in proving the existence of the infringement and the functioning of the cartel, but brings little utility with regard to causation and quantification. Nevertheless, the convergence of the information held by the plaintiff and the remaining defendants may increase the probability of early settlement, with further savings for both parties.

Due to its increased relevance, increased contentiousness could affect the litigation on the leniency qualification on possible decisions withdrawing the benefits granted to the applicant and on the fulfilment of the collaboration clause. An increase in the procedural complexity of civil claims is a likely effect stemming from the introduction of the rebate. The rule poses some serious problems involving the coordination between the administrative decision and the civil action. The final decision of the competition authority on leniency would have effects on the related civil proceeding. Moreover, the non-collaborating firms would have a greater incentive to challenge the administrative decision on leniency, in order to reduce the impact on their share of liability in civil suits. These coordination problems would be magnified in case of cross-border litigation, whenever the decision on leniency issued by a competition authority bears effects on claims filed in different countries. There could be the risk that in some Member States the binding effect on the court clashes with the principle of separation of powers; however, this concern does not necessarily emerge from the envisaged option. The core of judicial appraisal (existence of the infringement, causation, quantification) is not affected by the leniency decision. On the contrary, the granting of the rebate may be qualified as a conditional benefit (or sanction, if viewed from the non-collaborating firm's perspective) granted by the administrative authority within the administrative process. However, this additional benefit might increase the willingness to spend resources in litigation during the administrative proceeding.

Some safeguards against the increase in litigation costs may be introduced in order to reduce uncertainty. The granting of leniency by a competition authority, for example, and the fulfilment of specific requirements (*e.g.* application must be filed before the opening of the investigation, first-comer,

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[777] See Order No. 1:03-CV-04576. *In re Sulfuric Acid Antitrust litig.* (N.D. Ill July 7 2005), Klawiter (2006) and ABA Section of antitrust law (2006), at 173.

eligibility for administrative leniency treatment, etc.) could be made binding on the court. Also, the check on the "collaboration clause" could be (at least partially) centralised in order to avoid divergences of interpretation, especially if multi-jurisdictional suits are at stake; this outcome could be achieved by issuing general Guidelines on the scope of the collaboration to be provided in subsequent civil litigation. The national judge, in addition, could be required to verify *ex post* the extent of collaboration actually provided and to certify it in the civil decision.

Although most of the effect of this rule on litigation costs would be due to the extent and clarity of the collaboration clause, a further (positive) impact could derive from an indirect "consolidation effect" on claims. In fact, the system envisaged provides a strong incentive for (multiple) claimants to file a single lawsuit against (multiple) defendants; this way, the co-infringer's joint liability on the rebated share of damages may be easily claimed within a unique proceeding, without the risk of conflicting decisions or delays. Conversely, this rule may increase litigation costs for individual claimants due to more complex litigation. The different option envisaged in the OFT discussion paper (see above Sec. 6.2.) would overcome this concern by allowing claimants to recover damages directly from the applicant, which in turn can recoup the amount paid from the co-infringers. The advantages of this rule in terms of reduction of litigation costs (and mainly for sparse and non-organised claimants), however, seems to be more than offset by the negative impact on the destabilising mechanism on which leniency is based and the risk of contingent liabilities leading to further litigation[778].

In general, the net effect of a rebate on damages on litigation costs is to be considered positive, mostly due to the introduction of a collaboration clause. However, the magnitude of this impact may vary, since this rule may make litigation more complex and requires strong coordination between private and public enforcement. This is especially the case whenever cross-border litigation is concerned and individual consumers are forced to file multiple suits against different defendants in different jurisdictions.

B2. Administrative burdens

The rebate option does not introduce specific general information obligations and does not directly affect the administrative burden on private parties and public administration. Depending on the scope of the collaboration clause, the applicant may face additional burdens in order to fulfil related information obligations, in particular depending on the standard for "satisfactory collaboration" adopted, and the complexity of the case at stake. Some of these

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[778] See OFT (2007c), para 9.7, p. 39.

costs, however, may have already been borne by the defendant during the administrative proceeding.

Increased harmonisation and the creation of a common "passport" that makes the first successful applicant eligible for rebate throughout the EU would require more intense coordination within the ECN. A common database of leniency applications would have to be set up and managed, leading to one-off costs or the update/upgrade of the information flows within the Network. On the other hand, the possibility to implement a "one-stop-shop" system for leniency applications may exert a positive impact on administrative burdens for potential leniency applicants, due to the avoidance of multiple leniency applications in several Member States.

B3. Error costs

Reduction of information asymmetries due to collaboration is supposed to exert a positive impact on error costs, especially with regard to the risk of false acquittals of already convicted firms within an administrative proceeding. However, since the impact would only involve follow-on litigation – where relevant information is already provided in the final decision – the incremental value on the likelihood of a correct decision by the judge would be limited; whereas it acquires a higher value with regard to private enforcement-related issues (causation and the effects of the cartel).

B4. Harmonisation costs

As highlighted above (in assessing the impact of this option on the internal market), the extension of leniency treatment to liability in private damages actions entails a minimum degree of harmonisation of national rules. Requiring every Member State to adopt a leniency programme would be essential to avoid discriminations in the application of the right to damages provided for by the Treaty; some potential applicants could be put at a disadvantage if leniency programmes were not available in the country where they operate. Consequently, a minimum harmonisation of requirements for the rebate would have to be carried out in order to allow for recognition of leniency applications within claims filed in different countries.

To date, the harmonisation of national leniency programmes has been pursued by means of soft law within the ECN and aimed mostly at fostering the convergence of national schemes and facilitating the handling of parallel applications. Notwithstanding the results achieved by soft law coordination[779], differences across countries still remain. For example, under the rebate option,

[779] Up to now 24 out of 27 EU countries adopted some leniency programmes (the others are Malta, Slovenia, Spain).

the timing of application becomes of paramount importance, in order to identify the first-comer and grant her the relative right to rebate: against this background, especially with regard to the possibility of summary leniency applications and markers, the legal framework in Member States is still fragmented – out of 24 Member States adopting some leniency systems, 7 countries do not allow for summary applications[780]. This aspect would probably call for binding "hard law" harmonisation, with the consequent need to adapt national legislation in some countries and to establish both a "passport" for successful applicants and a common system to apportion the rebate among non-collaborating firms.

The same could be held for the harmonisation of other issues, such as the application of the collaboration clause, the minimum requirements for granting leniency in the administrative proceeding, and its binding force on national courts. The former type of harmonisation (collaboration clause) may be achieved through soft-law, *e.g.* by issuing ECN Guidelines; whereas the latter (*i.e.* recognition of successful leniency application and their binding force on foreign national courts) requires hard law intervention and the need to introduce safeguards to overcome problems of coordination between public and private enforcement decisions[781] (see also above sections A3 and B1).

6.3 Removal of joint liability for the applicant

Since naked cartels are collective antitrust infringements, liability is jointly shared by all the participants in the illicit agreement. This means that an injured claimant may seek damages from any or all the defendants that caused the loss sustained. Whether the convicted defendant eventually pays more of her share of liability depends on the contribution rules, *i.e.* the rules that regulate how the convicted defendant(s) can request contribution to co-infringers. These rules can range from an explicit ban of contribution or "no contribution" rule (like in the US antitrust system, especially after the 1981 Supreme Court decision in *Texas Industries Inc. v. Radcliff Materials Inc*, where pure joint liability was

[780] Austria, Belgium, Bulgaria, Cyprus, Finland, Poland, Romania.

[781] With some problems related to the need to attach a "positive" binding effect of some aspects of competition authorities decisions, see Komninos, 2007, 1427.

applied), to "contribution with claim reduction" rules[782], and "contribution with settlement reduction" rules[783], in case of early settlement by the co-infringers.

These rules, however, vary according to the different jurisdictions and private law traditions. In the European context, the right to contribution is the rule[784]. With regard to the choice between settlement (*i.e. pro tanto*) or claim (*i.e. pro quota*) reduction, the landscape is much more fragmented. On the one hand, several countries following the French *Code Civil* tradition explicitly adopt the claim reduction solution, with the quota of the settling defendant being subtracted from the overall amount of liability[785]. In other Civil Law jurisdictions akin to the German system[786] claim reduction is not expressly stated in the law, since partial settlements have only an *inter partes* effect; however, some courts indirectly stated this principle (the so-called "limited joint effect" or *beschränkte Gesamtwirkung* of settlement) and great importance is

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[782] Under this system, settlement with one party will imply a reduction of claim enforceable against the co-infringers equal to the share of liability claimed against the settling party. Often a different terminology is used, which names this option as *pro-rata set-off*, although strict correspondence is criticised by L. A. Kornhauser – R. L. Revesz (1993), *Settlement under joint and several liability*, in 68 *New York University Law Review*, 445.

[783] Unlike the former system, settlement with one defendant will reduce the amount of damages that can be claimed against the others only within the extent of settlement. The *pro-tanto set off* is often used as alternative terminology.

[784] Actually, the contribution rule is adopted in Civil Law systems, both those referring to the French *Code Civil* (see in particular Art. 1214) and to the German tradition (see GWB § 426). In Common Law the right to contribution does not exist (see *Merryweather v. Nixon* (1799) 8 TR 186), but provisions for contribution have come from statutes in Ireland and the UK, in particular, see the Irish Civil Liability Act (1961) and the UK Civil Liability (Contribution) Act of 1978.

[785] This is clearly provided for by the law in countries following the French Civil Code, see Art. 1210 Code Civil and Civ. 1re, 26 May 1994, in *Bull. Civ. I, n. 187*. Similarly, among others, see the Belgian Civil Code (1285 par. 2), Luxembourg Civil Code (Art. 1210), the Portuguese Civil Code (Art. 522 and 525 par. 2) and the Romanian Civil Code (Art. 1049). In Spain, see the prevalent interpretation of Art. 1146 of the *Codigo* (Pantaleòn, *Comentarios del Codigo Civil*, II (CMJ), 2001. In Italy, the principle is acknowledged by the Supreme Court interpreting Art. 1300 and 1304 of *Codice Civile* (see Cass. 27 March 1999, n. 2931). But this rule is somewhat recalled in other systems too, see Sec. 17 of the Irish Civil Liability Act 1961.

[786] See, for Germany, OLG Köln in [1994], NJW-RR 1307, Noack-Staudinger, *Kommentar zum BGB mit Einführungsgesetz und Nebengesetzen*, 1999, §423 no. 24 and ff.; for Austria, OGH, 1996, *Österreichisches Bank-Archiv* (ÖBA), 651, Gamerinth – Rummel *Kommentar zum ABGB*, 2000, § 891. In Dutch Law, although a settlement reduction rule seems to apply (see van Boom, *Multiple Tortfeasors under Dutch Law*, in Rogers (ed.), *Unification of Tort Law: multiple feasors*, 2004, 140), a similar reasoning to the one carried out in the note above could apply. Similarly, in Poland, SN 3 October 1966, III PZP 17/66, cited by Nesterowicz-Baginska, *Multiple Tortfeasors under Polish Law*, in Rogers (ed.), 2004, 154. In Swedish law both settlement and claim reduction solutions are in principle applicable, according to the terms of settlement (see Dufwa, *Multiple Tortfeasors under Swedish Law*, in Rogers (ed.), 2004, 225). See also the Estonian Law of Obligations Act (§ 69 par. 2).

given to the aim and the terms of settlement[787]. More of a settlement reduction principle appears to be present in the Common Law tradition, but also in this case the terms of settlement are crucial[788]. In the impact assessment below we assume that a standard claim reduction rule applies, although reference to the alternative solution will be made where appropriate.

The law and economics literature related to joint and several liability focuses mainly on the impact of different contribution rules on enforcement variables (*e.g.* deterrence, compensation, settlement rate, etc.). Within this framework, Easterbrook, Landes and Posner (1980)[789] underlined that a no-contribution rule exhibits advantages in terms of deterrence, at the same time increasing the incentive to settle the case. Polinsky and Shavell (1981), on the other hand, observed that if the decision-maker (*i.e.* the manager) is insulated from the damage consequences borne by the firm, a contribution rule can prove more deterrent than a no-contribution one[790]. More recently, Stanley (1994) developed a more complex model, which accounts for different features of the litigants and shows the overall impact of different contribution rules on enforcement variables[791]. A more compensation-oriented view is endorsed, *i.a.*, by Jacobson

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[787] If the Plaintiff (P) settles with defendant A for an amount lower than its share of damages, P will still be able to sue defendant B for the remainder. In turn, B has a right to contribution against A for the amount exceeding its share of damages. However, at this point A can sue P for the amount he paid to B in excess of the share of damages agreed with P in the settlement (so-called "recourse-go-round"). In practice, this mirrors a claim reduction system, but the settling parties are supposed to specify in the agreement that the full share of A is reduced to the amount settled.

[788] In England, settlement with one joint tortfeasor could lead to a total *release by accord and satisfaction*, according to Common Law. The rigidity of this rule has been recently attenuated (see the so-called *Jameson v CEGB*), looking at the aim of settling parties, in particular the plaintiff's willingness to settle only with one defendant. However, partial settlement does not bar the co-defendant that eventually paid the full amount from seeking contribution from the settling defendant, which could only offset the amount paid by settlement, with the same effect of a *pro tanto* rule. However, such an outcome can be avoided, if the parties "conventionally" severe the liability, *i.e.* establish that the settled damage does not fit the meaning of "same damage" and does not lead to joint liability.

[789] Easterbrook, Landes and Posner, *Contribution among Antitrust Defendants: a Legal and Economic Analysis*, in 23 Journal of Law and Economics, 1980, 331.

[790] Polinsky and Shavell, *Contribution and Claim Reduction among Antitrust Defendants: an Economic Analysis*, in 33 Stanford Law Review, 1981, 453-4. The authors stress that the decision-makers (the managers) are likely to bear the sanction (through reduction of salaries, for example) much more leniently than the firm as a whole. This is due to an imperfect corporate governance mechanism. This (although partial) insulation changes the deterrence effect of the contribution or no-contribution rules: since with the latter the single firm has a lower probability of being sanctioned (though for a higher amount), and the decision-maker bears a similar personal sanction either with contribution or no-contribution rules, the deterrence effect of contribution rules may be paradoxically higher.

[791] Stanley, An analysis of rules of contribution and no contribution for joint and several liability in conspiracy cases, in 35 Santa Clara Law Review, 1994, 1.

(1980), who states that the right to contribution is necessary in order to avoid that one of the defendants bears an disproportionate share of the damages, compared to her actual contribution to the overall infringement, with smaller firms free-riding on the greater ability to pay of larger firms with "longer purse"[792]. This literature focuses on the US legal framework, where the Supreme Court decision in *Texas* boosted a hectic debate on the suitability of the no-contribution rule in antitrust matters. Recently, the debate was summarised by the US Antitrust Modernization Commission, which supported the introduction of a right to contribution among non-settling defendants, coupled with a claim reduction rule[793]. Although not specifically linked to the comparison between joint and pure several liability systems, this literature may be useful for assessing the likely impact of joint liability, compared with a situation of pure several liability, where the defendant is insulated from other co-infringers' exposure to damages.

A direct comparison between joint and several liability *vis à vis* pure several liability is carried out by Kornhauser and Revesz (1989; 1990; 1993)[794]. Within this framework, joint and several liability proves to be more deterrent than pure several liability[795]. As regards settlement incentives, the distinction between joint and several liability and pure several liability shows that whereas the latter is neutral with respect to the choice to litigate or settle with one (or both) defendant(s), the former bears a different effect, depending on whether the plaintiff's probability of success against the tortfeasors is independent or correlated, on the amount of litigation costs[796] and on the applicable set off rules (claim or settlement reduction). With correlated probabilities of success, joint liability improves settlements, either with both parties (if their share of liability is similar) or with the party holding the greatest share of liability (if there are

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[792] Note, *Contribution and antitrust policy*, in 78 Michigan Law Review, 1980, 890. Jacobson, Contribution among antitrust defendants: a necessary solution to a recurring problem, in 32 U. Fla. Law Review, 1980, 217. See also Cavanagh, *Contribution, claim reduction and individual treble damages responsibility: which path to reform to antitrust remedies?*, in 40 Vand. Law Review, 1980, 1217.

[793] Antitrust Modernization Commission, *Final report to the Congress*, April 2007, at 253 and ff.

[794] When fault-liability is at stake, cfr. L. A. Kornhauser – R. L. Revesz (1989), *Sharing damages among mulitple tortfeasors*, 98 *Yale Law Journal*, 831; L. A. Kornhauser – R. L. Revesz (1990), *Apportioning damages among potentially insolvent actors*, in 19 *Journal of legal studies*, 617; L. A. Kornhauser – R. L. Revesz (1993), *Settlement under joint and several liability*, 68 *New York University Law Review*, 427.

[795] The opposite holds if, in a joint and several liability system, insolvency of one tortfeasor has an impact on the solvency of the other, since in this case both co-defendants will act as future insolvents, with no deterrent effect.

[796] In the former case, the plaintiff's probability of success against one defendant is the same regardless of whether the plaintiff has prevailed against, lost to, or settled with the other defendant. In the latter, the probabilities are perfectly correlated, thus winning against a defendant implies a 100% probability of success against the other.

sensible differences among co-defendants)[797]. Finally, this effect is offset in case of joint and several liability coupled with a claim reduction rule, since in this case early settlement with the party bearing the greatest liability proportionally reduces the "insurance" of full recovery by the non-settling defendant[798].

In conclusion, there are three major effects stemming from joint liability:

- first, co-infringers share the risk that one of the other defendants is unable to meet her obligation *vis-à-vis* the claimant;
- from a procedural viewpoint, the claimant's burden of proof is alleviated, since she does not need to show the precise allocation of liability for each of the defendants;
- as regards settlement incentives, they are fostered by settlement reduction rules, since they cause a race to settle with the plaintiff. However, with claim reduction, the effect is akin to a pure several liability system.

These being the main findings of law and economics doctrine on joint-liability in general, they need to be adapted to the specific situation of antitrust enforcement.

As regards the incentive compatibility constraint[799], the rule at hand would not dramatically change the pay-offs involved. With full joint and several liability (the "zero option"), a gap may remain between the damages due and the profits actually collected by the colluding firms. Whereas profits are linked to the firm's market share (a), damages are not entirely; rather, they are linked to a different higher share (b) of the overall loss sustained by the claimants, which by definition is equal or higher than a – *i.e.* the convicted firm ends up not recovering the whole sum from its co-infringers[800].

In this respect, the removal of joint and several liability for the successful immunity applicant might represent a tool to limit the consequences of prospective damages on the incentive to apply for leniency. First, it reduces the expected damages to be paid, since the applicant will not be affected by a co-infringer's inability to pay. Second, it may widen the asymmetry between the

[797] L. A. Kornhauser and R. L. Revesz (1993), 453.

[798] Id., at 481.

[799] The fact that the cartel is sustainable only if the cheating strategy is less profitable than the collusive one, *i.e.* the discount rate or future profits from collusion are sufficiently high that the expected payoff from collusion is greater than the payoff from defection.

[800] The opposite case – b is smaller than a, *i.e.* the firms pay less than their share of damages – cannot happen, since in a contribution rule system the assumption that one of the co-infringers pays for an amount lower than her share of culpability is allowed only if the defendant herself becomes insolvent. In this case, supplementary costs are nonetheless incurred, so that the overall consequences of the conviction are likely to be at least equal to $a\pi^c$ (the share of collusive profits of firm a).

two sides of the equation, since the non-collaborating co-infringers remain fully jointly liable.

The introduction of several liability for the leniency applicant was introduced – together with de-trebling of damages – in the *2004 Antitrust Reform Act* in the US. Compared to the rule introduced in the US, the proposed option would bring about a much more limited effect, due to difference in the legal framework. In the US, trebled joint liability in antitrust cases does not imply any right to contribution; accordingly, the introduction of several liability represents a major benefit compared to standard joint liability.

The removal of joint and several liability may be taken into account in the equation (1) by assuming that the liability faced by the successful applicant is strictly proportional to her market share (*a*). On the contrary, a detected non-collaborating firm (thus jointly liable) would face a higher proportion of the overall damage, which takes into account the risk that damages paid will not be recovered by the co-infringers ($b > a$). This, however, requires that if non-collaborating defendants are to be held jointly and severally liable for the overall harm caused by the cartel, contribution from the leniency applicant may be sought only by proving her share of liability (in order to have such an effect, a sort of "asymmetric" removal of joint and several liability needs to be provided, see also *infra*).

The most relevant impact of such an option would probably stem from this second effect, *i.e.* the procedural aspect. Knowing that the applicant may be held liable only for a limited amount, claimants would be unlikely to directly target their suits against the applicant. On the contrary, compensation will be sought against the co-infringers, who will then act for contribution against the applicant. The burden of proof on allocation of damages, thus, will lie on the co-infringers. Furthermore, this effect would eliminate the risk that leniency applicants are targeted by lawsuits claiming compensation for the entire harm suffered.

In this case, the incentive compatibility constraint becomes:

$$\frac{p(\pi^c a - \pi^c b\beta - f) + (1 - p)\pi^c a}{(1 - \Gamma)} = \pi^s - \pi^c a\gamma + R - f \qquad (2)$$

The structure of the equation is very similar to the basic equation in (1), with two major changes in the right side of the equation (the pay-off stemming from collaboration). First, the share of damages (*a*) that the applicant expects to pay is lower than *b*[801] in the non-collaborating pay-off. Second, the probability of civil conviction γ is lower than β (probability of civil conviction without

[801] Share of damages in joint and several liability, including market share *plus* risk of lack of contribution by co-infringers.

collaborating) in the left side of the equation, since the applicant will probably be sued for contribution by the co-infringers, but the burden of proof on the allocation of damages will be borne by the co-infringer. In both cases, however, the quantitative impact would be limited and would vary depending on the facts of the case. The higher share *b*, for example, will depend on the likelihood of insolvency of one of the (non-collaborating) cartelists, and the overall number of co-defendants, as well as the additional burden of proof for the co-infringers, would depend on the standard adopted by the judge.

As regards the impact on the probability-adjusted discount factor (Γ), Buccirossi and Spagnolo (2006) stressed the positive impact it could have in reducing the value of future collusive profits *vis à vis* the defecting ones (see also supra, Section 6.2). In fact, the increase of instability of the cartel is much more uncertain within this option, compared to the "rebate" one. It mainly depends on the specific features of the cartel and the likely destabilising and deterrent effects. A positive effect can nonetheless be assumed, although it is much more limited than in the previous option.

Finally, some other features of the option need to be analysed in order to assess the prospective welfare impact. First of all, the option in the Green Paper does not address the issue of the number of applicants that should be held eligible for the removal of joint liability. This aspect is particularly important, since the average number of firms obtaining some form of leniency treatment within each administrative procedure is usually significant (see above Sec. 6.1.). As the rule affects the allocation of liability for damages between the defendants, if all leniency applicants were automatically granted the benefit proposed in the option, it would *de facto* replicate a several liability system. Most, if not all, the defendants would be able to limit their liability exposure also with late applications and collaboration in the administrative proceeding. Accordingly, the potential exposure of defendants to liability would decrease, and part (if not all) of the risk of insolvency of one of the co-infringers would be shifted to the plaintiffs. The benefit granted in civil proceedings, moreover, would increase the expected reward for further informants, thus raising the incentive to use leniency programmes strategically (see above Sec. 6.1.). This decrease in deterrence is only partially offset by the likely increase in the destabilising effect, which depends on the fact that non-collaborating defendants face a higher potential share of damages – the higher the probability of insolvency of one of the co-infringers, the greater the incentive to strategically collaborate in the administrative proceeding in order to avoid joint liability for the whole amount claimed.

If benefits are granted only to the first applicant, distrust among the cartelists would increase. Also, granting several liability to all the applicants could increase litigation costs for the claimant, since the burden of proof on allocation of damages probably would shift to her. For these reasons, the effectiveness of this option is maximised when only the first successful leniency applicant is eligible for the benefit. The fact that a higher risk of under-compensation due to

insolvency of the obliged party could be shifted to the plaintiff, moreover, justifies the limitation on the number of beneficiaries also on corrective justice grounds. Partial solutions (such as granting the benefit only for the first two applicants) would reduce this option's impact on the destabilising effect, due to a reduced differential between the pay-offs (which is already quite low within this option) and a weakening of the "race-to-the-courthouse" effect. This extension of the benefit would almost entirely eliminate the leveraging effect of private enforcement on incentives to apply for leniency. However, compared to a larger extension of the benefits to all the leniency applicants, it can still have a positive effect on the effectiveness of the leniency programme, since it could limit the risk of "being second in line" and could increase the deterrent effect for the non-collaborating firms (which would keep joint liability), except in the extreme case of a duopoly[802].

With regard to the conditions under which the benefit may be granted, the further aspect of before or after-investigation applications may be briefly analysed. Compared to option 29 (rebate), this option entails much more limited (and uncertain) benefits. The risk of strategic behaviour (*i.e.* collude and defect if investigation is opened) is then much lower. On the contrary, the opening of an investigation could unravel solvency problems of some of the defendants, thus making the grant of several liability more appealing for the potential defecting firm. For this reason, the eligibility for applications filed after the opening of an investigation would not substantially affect the incentive structure.

The third feature of the rule to be analysed involves the type of collaboration to be provided to enjoy the benefit. As occurs under option 29 (rebate), the collaboration clause is crucial in order to exploit the full effectiveness of the system. In particular, the firm would be willing to collaborate to the extent that her liability is rebated. Under option 30 (removal of joint and several liability), the incentive structure is likely to be different. As will be analysed below (on A1, deterrence), a collaboration duty in the civil proceeding is bargained within the settlement process with the plaintiff. In the system envisaged under option 29 (rebate), the claimant's access to documentary evidence held by the applicant exerts an impact on the non-collaborating defendants, which bear the cost of the granted rebate. In option 30 (removal of joint and several liability), however, broader access to information is "paid" by the claimant, who renounces part of its right to damages against the successful leniency applicant in exchange for a higher probability of success[803].

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[802] Only one case in the period 2003-2006.

[803] This is the logic underlying the *Leniency PLUS+ Private Litigation Usage Scheme* developed by Cartel Damages Claims SA for leniency applicants willing to cooperate with the company in recovering damages against other tortfeasors; see http://www.carteldamageclaims.com/english/leniency_plus_engl.htm.

In this respect, the provision of several liability affects this bargaining process, as:

(i) it would increase the claimant's willingness to settle with the applicant, since she knows that the applicant could be held liable for a smaller amount, especially in the case of a "contribution with settlement reduction" rule, whereas admission of the infringement and related information might be used to increase the probability of success against the co-defendants;

(ii) it may lower the applicant's willingness to settle (since her liability is reduced), although the fact that she confessed her participation in the leniency application may counter-balance this effect. Indeed, probability of success against the applicant can be supposed to be higher than *vis à vis* the other tortfeasors.

The overall effect on settlement incentives, thus, could be positive. Accordingly, the granting of several liability should not entail any collaboration clause besides the one provided for in the administrative proceeding, if further settlement incentives between the applicant and the claimant in the civil proceeding is to be preserved.

Finally, the removal of joint and several liability for successful immunity applicants needs to be adapted to the specific scope of the rule, reducing the leniency applicant disadvantage due to collaboration whereas at the same time increasing sanctions for non-collaborating firms. If pure several liability was introduced, the non-collaborating cartelists might be relieved from liability over the applicant's share of damages. This could paradoxically reduce their exposure, since within several liability, joint tortfeasors could not be sued for the applicant share of damages. In order to avoid this negative impact on deterrence, an *asymmetric* form of removal of joint and several liability may be introduced, where the suit can be filed against one of the non-collaborating defendants for the overall damage occurred, including the applicant's share. The defendant, in turn, would be granted a limited right to contribution *vis-à-vis* the applicant. The right to contribution is limited since in case of insolvency of one of the non-collaborating cartelists, the applicant will not bear any shared liability due to insolvency, unlike what occurs in normal joint and several liability regimes with full right to contribution[804]. This asymmetric rule is also useful to avoid duplication of suits and the need to coordinate different claims[805]. Furthermore, it is likely to exert a positive impact on corrective

[804] See *e.g.* Art. 1299 par. 2 of the Italian Civil Code; Art. 1215 par. 2 of the French Civil Code; and § 426 BGB.

[805] Otherwise, the decision (or the settlement) on the claims against the applicant would have an important impact on the remaining liability for the other tortfeasors, because it would determine the amount of the residual damages. That would create an extreme need for

justice, since it minimises the risk of conflicting decisions arising from parallel claims. Finally, if coupled with a statutory provision imposing a settlement reduction rule in favour of the collaborating applicant, this option would *de facto* replicate a rebate system (see *supra*, Section 6.2.).

6.3.1 Impact assessment

A. BENEFITS

A1. Deterrence

The main difference between equation (2) (incentive compatibility constraint with removal of joint liability) and equation (1) above (incentive compatibility constraint without changes) is that in the latter the applicant faces a more limited (and more certain) amount of damages, linked exclusively to its 'share'. By applying for leniency, the firm transfers the risk of inability to pay (by one of the colluders) to the other defendants. This has an impact on incentives to apply for leniency and, in turn, on deterrence, since the probability of detection increases[806].

The extent to which the risk of failure materialises is mainly linked to two variables, *i.e.* the number of cartelists and their likelihood of failure. As regards the former aspect, it bears recalling that cartels usually involve a limited number of firms, due to the difficulty to enforce the collusive mechanism when the number of participants (and the incentive to defect) increases. Between 2002 and October 2007, the average number of firms sanctioned by the European Commission per cartel decision was six[807]. Out of 20 cartel cases decided between 2003 and 2006, eight involved less than five undertakings (or groups of undertakings), although only one case of duopoly took place[808]. With regard to the probability of insolvency, the financial consequences of antitrust enforcement are already serious at the present stage, with only public enforcement effectively in place. In some cases, public prosecution led convicted firms to ask for a reduction of the basic fine, due to financial constraints[809]; this reduction, though not linked to insolvency in technical terms,

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coordinating the two suits and the risk that some plaintiff would not acquire complete compensation.

[806] The impact might be magnified if a measure of deadweight loss is included in the calculation of damages, and the leniency applicant is exempted from this compensation.

[807] Elaboration from EC official statistical data on cartels enforcement, source: http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf. In every observed year the average sensibly changed, ranging from 5,2 firms per cartel decision in 2003 to 8,2 in 2005.

[808] The French Beer case in 2004. Two other cases involved three firms.

[809] Since the 1998 Fining Guidelines, the reduction of financial constraints has been requested eight times, only three of which were granted (Alloy surcharge, 1998; Speciality Graphite, 2002, Carbon & Graphite, 2003); whereas once the requesting firm was allowed to pay the fine in

may represent an early warning of likely future financial distress, which could be reinforced by follow-on private actions. Some US studies underlined that the achievement of optimal deterrence would have led to the insolvency of more than 40% of firms convicted in price-fixing cases during the period 1955-1993[810]. Although these findings should be adapted to present legal systems (particularly by taking into account that leniency programmes might have increased the detection rate), and the consequences of enhanced private enforcement may be felt only in the medium term, it can still be assumed that the risk of insolvency of one of the co-infringers due to the combined effect of public and private enforcement is not trivial, albeit rare. This, in turn, implies that the removal of joint and several liability might lead to a slight increase in the expected share of damages borne by cartelists, *i.e.* an increase in deterrence[811].

The effect might be more significant whenever cartelists are asymmetric: for firms holding a smaller market share, the risk of being held jointly and severally liable may represent a serious obstacle to seeking leniency, since the peril of having to pay a higher share of the damages is significantly greater, in *relative* terms, compared to the profits accruing to the firm from the cartel (of course, the financial consequences of missing recoupment may be more serious for smaller firms). The least profitable or small firms are, in turn, more likely to be attracted by the lure of amnesty if they can rely on the removal of joint and several liability for civil lawsuits[812].

Moreover, as already recalled above, the claimants may have a weaker incentive to file a lawsuit directly against a leniency applicant, since the amount of damages that can be claimed against him is limited. This, in turn, provides an automatic mechanism for consolidation, since a general claim against a non-collaborating defendant yields savings on litigation costs.

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instalments (Aminoacids, 2001). See A: Stephan, *The bankruptcy wildcard in cartel cases*, CCP Working Paper 06-5, 2006.

[810] See C. Craycraft, J. Craycraft and J. C. Gallo, *Antitrust Sanctions and a Firm's Ability to Pay*, in 12 Review of Industrial Organization, 1997, 171 and ff.

[811] This prospective analysis is based on the assumption that private antitrust damages actions will increase in the future. Currently, the sole public enforcement tools are far from optimal deterrence, as observed in Section 2.1 in the Introduction to this Report.

[812] In fact, a commentator of the 2004 US reform stressed that an opposite effect could derive from the removal of joint and several liability coupled with de-trebling: since the gain from collaboration is supposed to be higher for wealthier defendants (due to the simultaneous impact of the no-contribution rule and treble damages), these firms will be more tempted by the amnesty, with possible problems of solvency for the non-collaborating firms. Randall, *Does de-trebling sacrifice recoverability of antitrust awards?*, in 23 *Yale Journal of Regulation*, 2006, 310. This effect, however, can be easily attributed to the specific features of US private enforcement system, *i.e.* the trebling provision and the no-contribution rule.

Concerning incentives to settle, reducing the number of jointly liable defendants may apparently exert a negative impact on the applicant's willingness to settle, since she does not bear the risk of recoupment. On the other hand, the claimant may have a stronger incentive to settle separately with the applicant in order to gain access to information held by an "insider". Since the defendant is liable only for part of the overall damages, the plaintiff could accept to give up part of her share of damages in order to increase the probability of success in subsequent claims where the plaintiff seeks full compensation from jointly liable defendants[813]. This can occur especially if the contribution rule allows for the deduction of the settled sum (so-called "contribution with settlement reduction" rule), whereas the effect is much more limited in systems adopting a "contribution with claim reduction" rule (*i.e.* most Member States, see *supra*, Sec. 6.3 of the Introduction to this Report).

A2. Corrective justice

The likely impact of the removal of joint and several liability on corrective justice is apparently negative, since claimants would have a lower number of defendants to sue and smaller patrimonies to be held liable for. This effect is particularly evident in the extreme case of a duopoly: if the non-cooperating co-infringer is unable to meet her obligation, the claimant's compensation may be seriously hampered. This effect heavily depends on the characteristics of the applicant: the larger (or wealthier) the applicant, the more significant is the risk that full compensation is not attained in case of insolvency of remaining tortfeasors.

On the other hand, settlement with the applicant increases the likelihood of other defendants' conviction, with a positive impact on corrective justice.

More generally, if the removal of joint and several liability encourages cartelists to apply for leniency, this certainly leads to an increase in the detection rate compared to the zero option. If this is the case, corrective justice is primarily reached through an increase in the number of cartels detected.

The impact on corrective justice is also determined by the choice between a "claim reduction" and a "settlement reduction" rule in case of separate settlement between the claimant and the leniency applicant. In the former case, a settlement entails a reduction of joint liability for the other co-infringers equal to the share of damages attributable to the applicant, regardless of the amount of settlement. This, in turn, negatively affects the amount of damages actually compensated. If the settled amount is subtracted from total liability, the plaintiff would still be able to achieve full compensation from co-infringers.

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[813] This is the logic underlying the *Leniency PLUS+ Private Litigation Usage Scheme*, developed by CDC (see also above in the introduction to this section).

A3. Internal market

Implementing this option would call for increased harmonisation of national leniency programmes. Relief provided only for applicants to the EC leniency programme could make such a programme comparatively more convenient for the firm willing to defect, since the applicant would enjoy protection from damages across Europe (whereas a firm that files an application with a NCA would still be exposed to joint liability for antitrust damages actions in other jurisdictions). This, in turn, might negatively affect the allocation of cases between the EC and the NCAs, with an increased burden on the former, even if some of these cases would have been dealt with more effectively by the latter. This "displacing effect" would then be due to "forum-shopping" of the most convenient leniency programme. In order to limit this effect, national leniency programmes need to be coordinated with the Community framework, providing similar relief for the applicant. This could exert a positive impact on the internal market objective, by indirectly promoting convergence between national leniency programmes.

An intermediate solution would imply the removal of joint liability for leniency applicants in all antitrust cases in the EU, regardless of whether the authority enforcing the Treaty rules is the EC or a NCA. This being the case, the effects on the internal market objective would be substantial[814]. A regulation limiting liability for the leniency applicant would imply a minimum harmonisation of leniency programmes among different countries; furthermore, it would force Member States that still do not have a leniency programme to adopt one in order not to jeopardise the right of liability limitation for the applicant, conferred by the regulation. This harmonisation may help to overcome some of the current difficulties due to the absence of an explicit and binding harmonisation of leniency programmes across Member States, like the possibility to apply the "one-stop-shop" principle for the determination of the priority marker[815].

B. COSTS

B1. Litigation costs

Although this option increases the coordination of private and public enforcement proceedings, overall litigation costs could increase as a result of the increase in the number of cases. Moreover, allocation of liability between

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[814] Although different effects of the rule would remain, depending on the general set-off provision (claim reduction or settlement reduction).

[815] See Torchia (2006) on the drawbacks of the lack of formal harmonisation of leniency programmes.

the co-infringers may become more contentious, and the other defendants may be willing to spend more resources in litigating this issue. Notwithstanding that contribution is already a sensitive issue in cartel litigation, the fact that the apportioned share of damages could increase gives a further incentive to litigate.

With regard to the incentive to settle of non-collaborating defendants, the decrease in the number of jointly liable debtors may have two different effects. On the one hand, they would face higher pressure to settle since the risk of recoupment is shared among a smaller number of defendants. On the other, as some commentators observed, a smaller number of defendants may better coordinate in order to follow a "never-settle" strategy"[816]. Moreover, settlement between the applicant and the claimant may lead to a reduction of litigation costs, thanks to the reduction of the claimant's asymmetric information. Overall, compared to the zero option, litigation costs are expected to slightly increase.

B2. Administrative burdens

No significant impact on administrative burdens is expected, if not for the increase in the number of claims. This, in turn, means that no additional information obligations would be introduced, whereas the population affected by existing information obligations could increase. However, if the adoption of this option leads to harmonisation of leniency programmes and the introduction of the "one-stop-shop" principle, the positive effect on administrative simplification could be relevant.

B3. Error costs

If the plaintiff is given access to a broader amount of information, the accuracy of fact-pleading and the overall risk of error would be reduced. Accordingly, compared with the zero option, this option may bring about a reduction of error costs.

B4. Harmonisation costs

Harmonisation costs may be substantial if the removal of joint and several liability does not involve the sole EC leniency programme. If the limitation of liability is applied to the enforcement of EC Treaty rules in general, that would entail an implicit minimum harmonisation of national leniency programmes, and consequently the obligation to take actions in those countries that still have

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[816] See on that point C. J. Goetz, R. S. Higgins and F. S. McChesney, *More can be better: contribution and setoffs in antitrust*, in *Antitrust Bulletin* (51) 2006, 631 and ff.

not adopted any leniency programmes. Together with the benefits on the internal market objective highlighted above, this process may entail some harmonisation costs. The magnitude of these costs mainly depends on the degree of harmonisation required by the rule. Minimum harmonisation would only require the adoption of leniency programmes and the uniform application of the rule on limitation of liability. Higher costs would emerge in case of more complete harmonisation, for instance, the identification of minimum common requirements of leniency programmes, or ensuring that the administrative decision on leniency is binding on courts. Although, compared to the "rebate" option, the removal of joint and several liability bears a more limited effect on the negative consequences faced by other co-infringers, the latter's position could still be affected by the administrative decision, especially if issued by a foreign competition authority.

6.3.2 Summary tables

Table 70 – Option zero[817]

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *deterrent effect of leniency programmes limited to public enforcement (reduction of fines* vis à vis *increase of destabilising effect)* • *risk that the incentive to apply for leniency before investigation starts is affected by risk of future private claims*	-	-
Corrective justice	**1** • ***n. of compensated victims:*** *at present number of compensated victims is low also in follow-on cases* • ***alignment with actual harm:*** *limitation of access to leniency statements, which might hinder access to evidence in private claims*	-	-
Internal market	**1** • *protection of leniency documents* • *absence of one-stop-shop for leniency across Member States* • *risk of "forum shopping" due to different leniency regimes*	-	-
Costs			
Litigation costs	**2** • *low number of suits* • *plaintiff's litigation costs remain high due to limitation of access to the applicant file*	-	-
Administrative burdens	**3** • *need for multiple leniency applications for multi-jurisdictional cases*	-	-
Error costs	**2** • *risk of type II errors due to strategic behaviour of the applicant (limited disclosure of information needed by private plaintiffs in public proceeding and denial of access to leniency statements)*	-	-
Harmonisation costs	**1** • *no harmonisation, except for protection of documents*	-	-

[817] With limitation of access to leniency application at the EC level.

Table 71 – Option "Rebate on damages"[818]

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *increase in sanctions for non-collaborating firms, compared to option zero* • *increase in probability of detection compared to option zero, thanks to increased incentive to defect and collaborate due to stark pay-off asymmetry* • *higher likelihood of success thanks to collaboration clause*	-	-
Corrective justice	**3** • ***n. of compensated victims:*** *high number of follow-on cases* • ***alignment with actual harm:*** *high accuracy thanks to evidentiary support in civil claims issues* • *non-collaborating firms might be over-burdened compared to their role*	-	-
Internal market	**4** • *harmonisation of leniency programmes across Member States* • *recognition of foreign applications, at least in civil courts*	-	-
Costs			
Litigation costs	**3** • *high number of suits compared to option zero* • *reduction of claimant's litigation costs thanks to collaboration clause* • *possible consolidation effect* • *litigation on fulfilment of collaboration clause*	-	-
Administrative burdens	**2** • *administrative burden stemming from collaboration clause* • *simplification of administrative procedure due to harmonisation of leniency programmes (form filling)*	-	-
Error costs	**1** • *collaboration clause highly reduces type II errors, despite the increase in the number of claims*	-	-
Harmonisation costs	**4** • *full harmonisation of leniency programmes and conditions for the rebate* • *foreign NCA's decision on leniency binding on national courts*	-	-

[818] Only for the first applicant and before the opening of an investigation.

Table 72 – Option "Removal of joint and several liability"

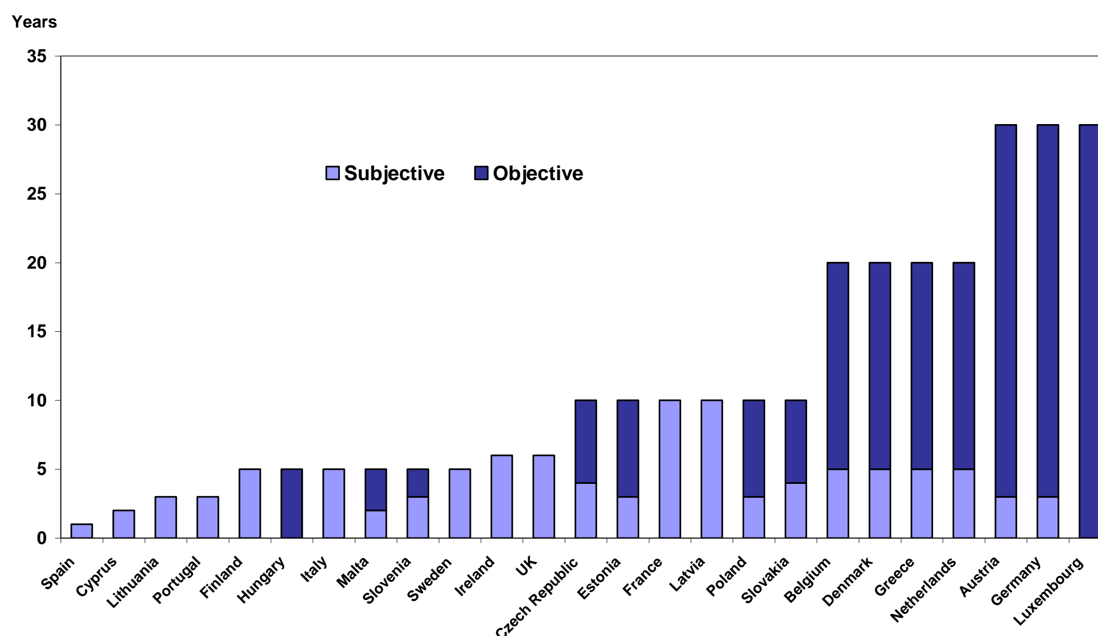
	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**3** • *slight increase in sanctions for non-collaborating firms, in case of failure of co-defendant, compared to option zero* • *slight increase of probability of detection, thanks to higher incentive to defect compared to zero option, especially for smaller firms (higher magnitude of expected damages)*	-	-
Corrective justice	**3** • ***n. of compensated victims:*** *slight increase in number of compensated victims due to follow-on cases compared to option zero* • ***alignment with actual harm:*** *more accuracy thanks to access to information through settlements* • *slight increase in risk of bankruptcy for (small) non-collaborating firms compared to option zero*	-	-
Internal market	**4** • *harmonisation of leniency programmes across Member States* • *recognition of foreign applications, at least in civil courts*	-	-
Costs			
Litigation costs	**2** • *slight increase in the number of claims, compared to option zero* • *higher plaintiff's incentive to separately settle with the applicant, compared to option zero, leading to access to insider's information* • *risk of extensive litigation on apportionment of damages*	-	-
Administrative burdens	**1** • *simplification of administrative procedure due to harmonisation of leniency programmes*	-	-
Error costs	**2** • *higher probability of access to insider information compared to option zero might reduce type II errors. In general terms, however, it could be offset by increase in number of cases*	-	-
Harmonisation costs	**3** • *harmonisation of leniency programmes and conditions* • *foreign NCA's decision on leniency binding on the court with regard to apportionment*	-	-

7 Limitation periods

No legal rule aimed at enhancing private antitrust damages actions would be truly effective if coupled with an inefficient limitation period. In particular, if limitation periods are too short, they may constitute an obstacle to private actions, as some plaintiffs may fail to bring their claim before it is time-barred. This, in turn, would reduce both *ex ante* deterrence and corrective justice, as would-be infringers would consider that at least part of the potential plaintiffs will not be able to exercise their rights in due time.

The Ashurst study found that EU countries differ widely as regards limitation periods for bringing antitrust damages actions. In most cases, these limitation periods apply to most instances of tort law, and range from 1 to 30 years. Figure 13 below shows the different periods in force in the EU25, as reported by the Ashurst Study. The figure shows the difference between subjective time limits – *i.e.*, time limits that start running from the moment when the plaintiff became aware (or should have become aware) of the harm; and limitation periods that are independent of the subjective knowledge of the harm. Some countries apply only one of the two types of limitation periods, whereas other countries, *i.e.* Belgium, Greece, the Netherlands, Austria, Germany, Poland, Czech Republic, Slovakia, Malta and Slovenia apply both types of limitation period, *i.e.* no action can be filed after the objective limitation period has elapsed, and within that time limit plaintiffs must also sue before the subjective limitation period expires.

Figure 13 – Limitation periods in the EU25



As shown in the picture, member states adopt widely differing limitation periods, ranging from one year in Spain, as provided by Article 1968 of the Código Civil, to the subjective limitation period of ten years awarded in France *ex* Article 2270-1 of the Code Civil. Also objective limitation periods are imposed, from 5 years in Hungary to thirty years in Austria, Germany and Luxembourg.

Preserving such a remarkable difference between limitation periods in national tort laws would inevitably lead to widely diverging conditions for bringing antitrust damages actions in EU member states. Of course, each member state has set a limitation period according to domestic legal traditions, and most importantly to standards of care and procedural conditions for bringing a claim. In this respect the Commission Staff Working Paper accompanying the Green Paper on Damages actions for breach of EC antitrust rules already stressed that "a short limitation period could also be problematic where limitations on access to evidence are coupled with an obligation to present all evidence on filing a claim".

Accordingly, the European Commission considered the need to ensure that limitation periods are sufficient to grant all EU citizens and firms the same time limits for bringing claims. Action at EU level, in this respect, must be justified according to the principle of subsidiarity. There are, in any case, other instances in which the Commission has decided to proceed towards harmonisation, as for the Product Liability Directive, which established a (subjective) limitation period of three years and an objective time limit of 10 years.[819] This provision could represent a useful reference for the harmonisation of limitation periods for antitrust damages actions. But there are reasons to believe that the optimal limitation period could not be identical for these two types of claim.

In order to identify the optimal limitation period for antitrust damages actions, at least three main issues need to be taken into account. First, there are pros and cons associated with longer limitation periods, as highlighted in the (relatively sparse and recent) law and economics literature on the issue. Secondly, the optimal period may be different for stand-alone and follow-on actions, as for the latter it can normally be assumed that potential plaintiffs can gain reasonable knowledge in a short timeframe, and also evidentiary burdens may be lower in most cases. Thirdly, the interrelation between public and private enforcement is way more delicate for antitrust claims that it is for product liability litigation: in particular, it remains to be discussed whether limitation periods should be suspended while a public proceeding is in place, and when should they start running again. We analyse these issues in detail below.

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[819] Article 10-11 of the Product Liability Directive, .COM(2004)718 final.

7.1 The costs and benefits of limitation periods

The law and economics literature has almost ignored the issue of limitation periods for a long time, and only recently some authors have started exploring the economic features of the problem. For example, Baker and Miceli (2000) suggest that the optimal statute length should balance the reduction in deterrence from a limit on suits against the savings in litigation and error costs, with specific reference to accident law. Miceli (2000) analyses the impact of statutes of limitation and statutes of repose on product liability enforcement under both strict liability and negligence. He also mentions that the award of prejudgment interest can significantly reduce the problem of the lower *ex ante* deterrence when plaintiffs file their claims with a certain delay; and that wide use of subjective limitation periods (or "rules of discovery") significantly lengthen the limitation period. More recently Hinloopen (2003) analysed the effect of limitation periods (for public enforcement) on cartel stability, finding that an increase in the limitation period paradoxically increases cartel stability, by reducing the expected profits of the cartelist wishing to cheat.

A more systematic analysis of the costs and benefits associate with the choice of the limitation period was carried out by Ogus (2005). By adopting both a legal and economic perspective, he finds that the main costs associated with (short) limitation periods are:

- *Potential reduction of corrective justice*. Claimants who do not bring their claim within the period lose the value of the remedy, often compensation, which they would otherwise have obtained;
- *Potential under-deterrence*. Defendants have a reduced incentive to perform their legal obligations, since some proportion of claims will not be brought within the period.
- *Increased investments in litigation*. The shorter the limitation period, the more plaintiffs would have to invest resources in obtaining the evidence, in order to avoid the time bar;
- *Increased defendants' opportunistic behaviour*. Defendants may adopt strategic behaviour to induce claimants to delay in bringing claims;
- *Reduced settlement amounts.*[820] Plaintiffs have lower bargaining power if the settlement negotiation takes place at a time close to the time limit, or in general if they cannot signal their ability to continue negotiating for a long time.

[820] Ogus (2005) does not include this category in his taxonomy of costs and benefits of limitation periods, which is however not directly tailored for antitrust litigation.

At the same time, shorter limitation periods also create significant benefits:

- *Reduction in overall litigation costs*, as the number of claims is reduced when some plaintiffs fail to respect the time limit;
- *Reduced legal uncertainty for defendants,* who also anticipate lower legal expenditure and can devote resources to more productive uses;
- *Reduction of administrative burdens*, as the parties to a trial, witnesses and public bodies have to store and keep records and information to be used in the trial for a shorter period; and
- *Reduction in error costs*, as the quality of evidentiary information is assumed to decrease over time.

Against this background, the optimal limitation period is the one that maximises the benefit-cost ratio. In this respect, several features of legal systems and individual types of cases affect the choice of the optimal limitation period. These include the rules for access to evidence, the award of prejudgment interest, the investment in litigation and settlement by the parties, etc. Below, we distinguish between standalone and follow-on actions.

7.2 Stand-alone actions

In the case stand-alone actions, the burden of proving antitrust harm falls entirely on the plaintiff, who cannot rely on any previous public or private action establishing the facts of the case. Collecting evidence is of course costly, especially when plaintiffs are end consumers or SMEs, and normally already entail significant legal expenses.

From both a deterrence and a corrective justice perspective, too short limitation periods would appear insufficient in light of the Commission's goal to enhance private antitrust enforcement in Europe. Short limitation periods economise on administrative burdens and overall litigation costs, but also drastically reduce corrective justice and deterrence for stand-alone cases. At the same time, a long limitation period – *e.g.* ten years would lead to an increase in legal errors and administrative burdens, an increase in litigation costs and, most importantly, to undesirable legal uncertainty for market players.

An important feature of limitation periods is the date from which the time limit starts to run. In this respect, concealed practices such as cartels and practices such as exclusionary or exploitative abuses present different problems. As a matter of fact, if the limitation period is set to run from the date in which the infringement occurs, the optimal time limit for covert practices would probably be longer than the optimal time limit for practices that are observable. This argument is in line with our treatment of detection rates in Part I, where we found detection to be way more likely for the latter than for the former types of anticompetitive conduct. As we consider that setting different limitation

periods for different types of allegations of anticompetitive conduct would create excessive complexity in the legal system, the most desirable solution would be to set the starting date of the limitation period at the date in which the victim becomes aware – or should have become aware – of the violation and corresponding harm. Accordingly, we consider a so-called "subjective" limitation period to be best suited for all types of anticompetitive conduct, provided that one single limitation period is chosen for all types of antitrust violations. In this respect, the ECJ in *Manfredi* observed that "[a] national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended"[821].

The lack of precise data on some of the benefits and costs associated with longer limitation periods, as well as the different features of different types of antitrust violations do not allow us to identify an exact period of time to adopt as more efficient than any other length of time. However, we certainly consider the optimal limitation period to fall between 1 and 10 years, and possibly to be close to 3 to 6 years. The optimal limitation period also depends on the relative cost of bringing an action and producing the necessary evidence, and accordingly depends also on the rules on access to evidence that are enacted. If access to justice requires a considerable investment or the production of detailed evidence to induce the court to find *fumus boni juris*, then too short limitation periods would negatively affect both deterrence and compensation, and would in turn run counter to the principle of effectiveness[822].

Against this background, a useful reference is the limitation period applicable to the European Commission in starting a proceeding under EC competition rules, as defined at Article 25 of Regulation No. 1/2003 (substantially reproducing Article 1 Regulation No 2988/74 of 26 November 1974), where it is specified that "the powers of the Commission to impose fines or penalties for infringements of the competition rules is subject to a limitation period of five years".[823] To be sure, such period does not apply to private antitrust damages actions; however, in line with the observations above as regards the costs and

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[821] Cases C-295/04 to C-298/04, Manfredi [2006], ECR I-6619, at §78. This approach is also in line with the limitation period introduced for products liability, where Article 10 of Directive 85/374/EEC clarifies that the three-year "limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer".

[822] A shorter limitation period might work efficiently only in countries where, subject to fact-pleading, broad pre-trial disclosure is available (*e.g.* the UK).

[823] A shorter period of three years is envisaged for "infringements of provisions concerning requests for information or the conduct of inspections".

benefits of limitation periods, we consider a five-year period from the date in which the plaintiff became aware, or should reasonably have become aware, of the damage to be the most appropriate to guarantee effective deterrence and compensation[824].

In the case of public enforcement by the European Commission, Regulation No. 1/2003 specifies that the limitation period starts to run "on the day on which the infringement is committed" or, in the case of continuing or repeated infringements, "on the day on which the infringement ceases". In this respect, it is up to national courts to clarify whether the subjective right to bring an antitrust damages action would still run from the date in which the victim became aware or should have become aware of the damage suffered. This might create the following situation: if an infringement lasted from 2001 up to 2006, the European Commission could start a proceeding even in 2010, but a plaintiff having realised the occurrence of the damage in 2001 could end up being unable to file lawsuit after 2006.[825] This suggests that a similar rule should be applied also to private enforcement – *i.e.* limitation periods in case of continuing infringements should start to run from the date in which the infringement ceases.[826]

As also emerged from some contributions to the public consultation on the Green Paper on damages actions for breach of EC antitrust rules, the need for introducing a longer repose period may be considered. However, such a period would only exert a significant impact if the date upon which the period is set to start is the date at which the infringing conduct started. If the starting date were the date in which the conduct ends, there would be only a few cases in which victims realise the occurrence of the damage more than five years after the conduct has ceased. In addition:

- the main difference between a period of limitation and a period of repose emerges when the conduct is concealed, as is the case for price-fixing conspiracies, whereas for other types of conduct the detection of the

[824] To be sure, there would be no reason why the limitation period for private enforcement should be shorter than the one for public enforcement.

[825] The issue of the date in which the limitation period begins was posed by the Giudice di Pace di Bitonto to the ECJ in the *Manfredi* case. The ECJ recalled that no Community rules exist in this respect, but that the principle of effectiveness requires that limitation periods such not be such as to render impossible in practice the exercise of the rights which the national courts are required to safeguard. See opinion of AG Geelhoed on Cases C-295/04 to C-298/04, 26 January 2006, at §§59-61.

[826] The fact that the Commission or a NCA started a proceeding is normally not held as evidence that the plaintiff should have become aware of the infringement. See, *e.g.*, the decision by the Italian Corte di Cassazione n. 2305/07, holding that the fact that a proceeding is started by the Autorità Garante della Concorrenza e del Mercato does not imply that the plaintiff should be aware of the damage occurred.

infringement is more likely to occur within a reasonable timeframe from the date of the infringement;

- for price-fixing conspiracies, as we already clarified several times in the previous sections, there is a clear situation of under-deterrence due to the low detection rate;
- there is reason to believe that introducing a (sufficiently long) repose period for price-fixing conspiracies may reduce the expected profits of the cartelist's defection, in turn increasing cartel stability.

Accordingly, we see no grounds for advocating for a repose period, as such period would be detrimental to both deterrence and compensation in the case of cartels, and practically ineffective in all other cases.

In summary, for stand-alone damages actions we consider that a five-year limitation period and no repose periods would be the most appropriate option for antitrust private enforcement to be effective in Europe. Such a solution was also envisaged by the European Parliament in its recent Report on the Commission's Green Paper, dated April 10, 2007.[827] In addition, we consider that the limitation period should run from the date in which the plaintiff had knowledge, or should have reasonably had knowledge of the harm. In case of continuing infringements, the limitation period should run from the date in which the infringement ceased.

7.3 Follow-on actions

The findings of the previous section apply exclusively to stand-alone actions, where the length of the limitation period is greatly affected by the investment needed to produce the necessary evidence, and also by the likely time period that elapses between the infringement, the occurrence of the damage and the time at which the victim becomes aware of the damage. For follow-on actions, such issues warrant a different approach. As these lawsuits follow a previous public decision, the problem of detection and awareness seems far less important. Conversely, for follow-on actions the main options available are the following:

Option a "Independence of private and public enforcement". Under this option, no suspension of the limitation period is provided if a NCA of any member state or the European Commission starts a proceeding on a related issue.

Option b "German option": the limitation period is suspended when the European Commission or a NCA institute a proceeding that is

[827] A6-0133/2007, 10 April 2007, at §22.

relevant for that same damage action, and starts running again when the proceeding is closed.[828]

Option c "Modified Spanish option": a new limitation period of 1-2 years starts running after a court of last instance has decided on the issue of infringement.[829]

Option d "Shortest period option": the limitation period is five years from the date in which the private party having suffered antitrust injury becomes aware of the damage suffered, or 1-2 years from the date when a public decision on the matter cannot be challenged anymore, whichever is shorter.

The impact of these options depends mostly on the following factors:

- if the option chosen leads some plaintiffs to fail to produce the necessary evidence in due time, there would be a negative impact on both deterrence and corrective justice;
- if the interaction between public and private enforcement exacerbates the free-riding problem in cases where there are several potential victims, thus leading to a "chilling effect" in the private plaintiff's incentive to sue, there would be a negative impact on deterrence;
- if the chosen option leads to a substantial extension of the time elapsing between the occurrence of the damage and the proceeding at trial, there would be an impact on legal errors, as evidence in support of private damage deteriorates over time;
- if the limitation period expires when the public proceeding has not completed its full course, legal errors may increase if subsequent stages of litigation lead appellate courts to overturn the NCA decision;

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[828] We define this option "German" option since § 33 (5) GWB provides for suspension of the limitation period if a German cartel authority initiates an infringement proceeding, or the European Commission or a cartel authority of another EC member state launches investigations for alleged breaches of Art. 81 or 82 EC Treaty. The suspension ends six month after the decision by the competition authority becomes "rechtskraftig" (whether this means that the decision cannot be challenged anymore, or is simply binding for the addressee, remaining subject to judicial scrutiny, is not entirely clear).

[829] We call this option "modified Spanish option" as in Spain the limitation period is always one year. Absent public enforcement, this one year limitation would run from the date when the party discovers the damage. According to the opinion of most academics, the one year limitation also applies in Spain from the date the Competition Court gives a definitive decision on the infringement in the event that previous administrative procedure has been initiated (Article 1968 and Article 13.2 of the Law 16/1989 in connection with Article 1902 of the Codigo Civil). Under this scenario, we are assuming that the one year period is specifically crafted for follow-on cases, and runs after a court of last instance has decided on the issue of infringement.

- if the running of the limitation period gives rise to uncertain interpretations, legal uncertainty may negatively affect the business environment and the incentives of all parties to effectively respect or enforce competition laws.

In this respect, option *a* above avoids any "chilling" effect on the incentive to sue, as private plaintiff would be aware that the commencement of a proceeding by the European Commission or a NCA would not affect their right to sue for damages at all. Especially for concealed behaviour such as price-fixing conspiracies, as already recalled the limitation period would have to run from the date in which the plaintiff becomes aware of the damage occurred; of course, if the European Commission or an NCA starts a proceeding on the same issue, this could be considered as raising the awareness of private plaintiffs on the occurrence of damage.[830] As a result, the 5-year limitation period envisaged for stand-alone actions in the previous section would start running upon the date in which the public proceeding officially starts.

A potential shortcoming of this option is, however, the duplication and overlap between private and public proceedings: at the same time, a competition authority and a national court would be engaging in fact-finding on the same issue, and defendants would have duplicated litigation costs as they would have to participate in both proceedings. Furthermore, parties would be unwilling to negotiate settlement before the time in which a competition authority decision can no longer be challenged. As courts would also be unwilling to reach a final decision before fact-finding has been completed by a competition authority, the only possibility would be to coordinate private and public proceedings with the competition authority acting as *amicus curiae*. This option would, in any case, lead to too high litigation costs, as parties would not settle before trial, and the added value of private enforcement as a tool to increase the detection of concealed anticompetitive conduct would not be of any significance under this scenario.

The German option (*b*) provides for a suspension of the limitation period when a competition authority starts a proceeding. Similarly, the modified Spanish option (*c*) implies that the limitation period is interrupted when a public proceeding starts, and a new limitation period starts whenever the proceeding has come to an end, either because the competition authority has decided not to proceed, or because a last instance court has issued a final decision, which cannot be challenged anymore.

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[830] At least one national court – the Italian Corte di Cassazione – has stated that proceedings started by the NCA do not imply the awareness of damages parties as regards the occurrence of damage. See Cassazione 2305/07, *supra* note 826. Further problems would emerge as some NCAs do not have an "official" start of proceedings; and even when they have one, it is not public, and consequently victims would find it difficult to calculate the limitation period.

Both these options appear conducive to a better coordination of private and public enforcement, with a consequent reduction in litigation costs. The main practical differences between the two options would be as follows:

- Option *b* ("German") may create uncertainties as to when exactly a proceeding can be deemed to have started, as well as to when the suspension will be considered to be running again[831]. In any case, defendants would have an incentive to behave strategically in order to delay the official start of the public proceeding, for example by putting forward proposed commitments or undertakings, or using other delaying tactics to minimise the risk of an overflow of private suits. Finally, depending on the time elapsed before the NCA initiated a proceeding, the remaining time before the limitation period expires might either be insufficient for private plaintiffs to file suit (*e.g.*, three months); or excessively long once fact-finding has been carried out by the NCA (*e.g.*, three years). This could lead to an ineffective coordination of public and private enforcement, and a consequent reduction in corrective justice (when the remaining period is too short) or an unnecessary increase in legal uncertainty (if the remaining period is too long).
- Option *c* ("Modified Spanish") leads to greater certainty, as it establishes a reasonable period for follow-on litigation (1-2 years). Here, defendants would have no incentive to delay the commencement of such proceedings, as the limitation period for follow-on suits would always be 1-2 years.

Moreover, option *d* ("Shortest time") would differ from option *c* only in a limited subset of cases – when the public enforcement proceeding starts immediately after the damage becomes known to the private party, and completes its course in less than 3-4 years. When this is the case, the limitation period would be reduced: which appears reasonable, if fact-finding has already been carried out by the competition authority.[832] This option would appears thus slightly preferable to the previous, in that it would reduces legal uncertainty and litigation costs, preserving also the incentive for the parties to settle the case without going to court. However, two major problems would emerge, which make this option hardly feasible:

- the need to secure that adequate information is provided to all EU citizens and businesses about the proceedings started and concluded in any member state of the EU; and

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[831] See *supra*, note 828.

[832] As recalled by the European Commission in its Staff Working paper attached to the Green Paper, in *Palmisani*, the ECJ held - although in the context of a limitation period for claims stemming from legislative or administrative malpractice - that a period of one year does not make it excessively difficult to start court proceedings to obtain redress for damages sustained. See Case C-261/95, *Palmisani v INPS* [1997] ECR I-4025, at para. 29.

- the fact that, when a public proceeding is not completed in 3-4 years, this option (as occurs in option b) may force claimants into parallel actions by national courts and competition authorities.

In summary, we consider that option *c* would be the most likely to strike the balance between the need to ensure adequate compensation, deterrence, legal certainty and a "level-playing-field" between member states. At the same time, this option minimises litigation costs, though an increase in administrative burdens would ensue from the need to exchange and disseminate information about public enforcement proceedings. Such system would in any case foster an often stated objective – that of bringing competition rules closer to the attention and awareness of the citizens.

7.4 Conclusions

Limitation periods vary significantly in the EU27, and are in some countries too short to allow for effective access to justice by private plaintiffs. In this section, we identified the major costs and benefits associated with extending the limitation period, and concluded that a five year period would be appropriate for stand-alone actions also thanks to existing references from the public enforcement side, such as article 1 of Regulation 2988/74 and article 25(1)(b) of Regulation 1/2003. This limitation period should run from the date in which the plaintiff had knowledge, or should have reasonably had knowledge of the harm. In case of continuing infringements, the limitation period should run from the date in which the infringement ceased.

As regards follow-on actions, we regard a shorter period (1-2 years) as optimal, if such period starts running after the day in which a decision by the Commission or NCA has become final, and adequate information dissemination is provided on the existence and outcome of public proceedings in the EU area. Such information could be facilitated by the European Competition Network, or – as was authoritatively observed during the consultation on the Green Paper – by establishing a system modelled on the regular notices by the Commission under Directive 98/34.[833]

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[833] See Max Planck Institute for Intellectual Property, Competition and Tax Law, Comments on the Green Paper, at 26.

PART III

ASSESSMENT OF THE IMPACT OF ALTERNATIVE SCENARIOS

PART III – ASSESSMENT OF THE IMPACT OF ALTERNATIVE SCENARIOS

In the previous sections, we have assessed the expected impact of several potential legal changes that may facilitate access to justice for victims of antitrust infringements. Some of the specific issues analysed – *i.e.,* fee allocation rules, double damages for cartel cases, access to evidence rules, collective actions, the legal treatment of defensive and offensive passing-on, limitation rules – are interdependent. For example, the impact of a given fee allocation rule on the incentive to sue changes along with the form of collective action chosen, the availability of multiple damages, the availability of a passing-on defence, etc. Likewise, the impact of multiple damages on deterrence and compensation can change substantially depending on the fee-shifting rule adopted, as well as on the availability of different forms of group litigation; the availability of broad disclosure rules with a low threshold for fact-pleading would exert a different impact – *e.g.* on deterrence, corrective justice, litigation costs – if coupled with mandatory one-way fee-shifting and double damages for cartel cases than if coupled with loser-pays and single damages; etc.

Accordingly, in order to assess whether the options analysed may prove efficient and effective in terms of facilitating private antitrust damages actions, without fostering an undesirable "litigation culture" or paving the way for the proliferation of frivolous lawsuits, we consider a comprehensive theoretical framework for impact assessment to be absolutely essential. Assessing the impact of each option "in isolation", as we did in Part II of this Report, can be thus considered only as a preliminary exercise, aimed at selecting the most viable options for each of the issues analysed and the potential impact of each option on benefit and cost headings compared to the *status quo*.

This Part of the Report combines the results of Part II by assessing five "scenarios" – or "bundles of options" – with the aim to assess their viability and welfare-enhancing potential if adopted at EU level. Section 1 below contains a description of the scenarios selected by the European Commission for analysis, whereas Section 2 provides an assessment of the potential of each scenario.

It must be recalled, at the outset, that this Report does not specifically analyse a number of important issues that may exert a significant impact on the effectiveness of a private enforcement system. For example, we did not deal with fault requirements, nor with standards for establishing causation, nor did we analyse possible reversals of the burden of proof. Accordingly, the results of the exercise carried out in this Part III should be taken as mere indications of the potential impact of selected combinations of policy measures, not as a full impact assessment of a precisely defined set of rules.

1 The selected scenarios

In order to assess the combined effect of a number of different policy actions, the European Commission selected a number of alternative policy scenarios for analysis in this Report. These scenarios are to be considered as broadly representative of different approaches to the same goal – that of facilitating private antitrust damages actions in the EU – and include the so-called "no policy change" scenario, in line with best practices on regulatory impact assessment, and with the Commission 2005 Impact Assessment Guidelines.

As already stated in the previous section, the main reasons why scenario analysis seems appropriate in this impact assessment are: (i) the variety of policy actions we have scrutinized in Part II above; (ii) the possible interdependencies, synergies or inconsistencies between the different policy initiatives analysed in the previous section; and (iii) the need to assess the expected harmonisation costs for combinations of options at an aggregate level.

The scenarios identified are the following:

Scenario 0. *"No policy change"*. This scenario corresponds to the current situation of private enforcement in Europe and its likely developments absent any intervention at EU level.

Scenario 1. Under this scenario, double damages (with prejudgment interest) are introduced for all types of antitrust infringement together with mandatory one-way fee-shifting and broad disclosure rules with a low threshold for fact-pleading; the passing-on defence is excluded, whereas standing is granted to indirect purchasers. A system of opt-out class actions is introduced. Finally, a 20-year limitation period running from the occurrence of the damage claimed is coupled with a subjective limitation period of 5 years from the date in which the claimant had reasonable knowledge of the harm, whichever in shorter.

Scenario 2. This scenario entails the introduction of double damages only for cartel cases, whereas single damages would be awarded for all other types of infringement. Damages would include prejudgment interest. As regards access to evidence rules, this would be based on an initial provision of lists of documents, leading to a rather broad possibility of disclosure based on fact-pleading. Both the passing-on defence and offence are allowed. No mandatory one-way fee-shifting would be introduced, but the judge would be given the discretion to derogate from the loser-pays rule by shifting all costs. These rules are coupled with both opt-in collective actions and non-mandatory representative actions. The minimum limitation period is set at 5 years from the date in which the claimant should reasonably have realised the occurrence of damage, but a new

limitation period of 2 years would start after the end of a public proceeding.

Scenario 3. This scenario would imply the award of single damages (including pre-judgment interest) for all types of infringement. Access to evidence would be based on disclosure of specific categories (classes) of documents, fact-pleading and proportionality criteria. Both the passing-on defence and offence are allowed. The judge would be given the discretion to derogate from the loser-pays rule by shifting some of the costs borne by the parties. Non-mandatory representative actions would be available for all types of infringement. The minimum limitation period is set at 5 years from the date in which the claimant should reasonably have had knowledge of the occurrence of damage; such period would be suspended in case a public proceeding is started.

Scenario 4. This option is identical to Option 3, but – unlike the first three options – does not entail any legislative measure at EU level. Under this scenario, the European Commission would identify and recommend the adoption by member states of a set of measures and good practices observed at national level, by providing national legislators with guiding principles for facilitating private antitrust damages actions in the EU. Accordingly, this option only requires the issuing of soft law by the Commission.

The table below summarises the scenarios identified.

Table 73 – Selected scenarios

N.	Damages	Cost rule	Access to evidence	Passing-on defence	Indirect purchaser	Collective redress	Limitation period
0	No action	No action	No action	No action	No action	No action	No action
1	Double damages plus prejudg, interest	One-way fee-shifting	Broad disclosure with low threshold	Not allowed	Allowed	Opt-out class actions	20 years as of damage + subjective period of 5 years
2	Double damages for cartels, plus prejudg, interest	Loser-pays, but judge may shift all costs	Initial provision of lists + Broad disclosure based on fact-pleading	Allowed	Allowed	Opt-in collective + non-mandatory representative actions	Minimum 5 years as of reasonable knowledge + restart (2 years)
3	Single damages plus prejudg, interest	Loser-pays, but judge may shift some of the costs	Disclosure of specific categories of documents, fact-pleading, proportionality	Allowed	Allowed	Non-mandatory representative actions	Minimum 5 years as of reasonable knowledge + suspension
4	Recommen-dation of single damages plus prejudg, interest.	Recommen-dation of discretionary shifting of some of the costs at the judge's discretion	Recommen-dation through soft-law of measures listed under option 3.	Recommen-dation of allowing the defence	Recommen-dation of allowing standing to indirect purchasers	Recommen-dation of non-mandatory representative actions	Recommen-dation of a 5-year limitation period, to be suspended during a public proceeding

Legenda: *shaded areas are those where no binding policy action is needed at EU level*

As is easily seen from the table above, the scenarios identified correspond to different combinations of policy options already assessed in Part II of this Report. Moreover, not all the scenarios imply a policy action for each individual option identified in Part I. For example, the award of "full" single damages under scenarios 3 and 4 above is in line with the rule currently existing in EU member states. To the contrary, all the rules proposed on limitation, collective redress, the passing-on defence and access to evidence would require some initiative at EU level, for the purpose of either harmonising the conditions for bringing a claim in member states, or (Scenario 4) to recommend that member states take action in specific directions. Finally, most of these scenarios include minimum harmonisation (although at different levels), rather than a full harmonisation of legal rules in the EU27: in particular, options 2, 3, and 4 aim at ensuring a minimum common level of facilitating antitrust damages actions, leaving member states free to maintain (or introduce) further implementation measures.

In what follows, we provide a comprehensive benefit-cost analysis of each of the scenarios identified.

2 Impact assessment of the selected scenarios

In this section, we assess the potential impact of the selected scenarios in terms of benefits and costs. In particular, we consider the following benefits:

- *Impact on deterrence*. We consider this impact to be maximised when the best possible level of deterrence is achieved – thus, neither under- nor over-deterrence emerges from the implementation of a given option. In most cases, we further break down this heading into three different determinants, which are closely intertwined: (i) deterrence achieved due to superior information available to private plaintiffs; (ii) due to increased likelihood that a legal action is initiated; and (iii) as a result of increased prospective financial sanctions for would-be infringers.
- *Impact on corrective justice*. We consider this goal to be fully achieved whenever private plaintiffs are granted *restitutio in integrum*, and accordingly neither over- nor under-compensation are likely to be observed. In this respect, we further distinguish between (i) increased number of compensated victims; and (ii) degree to which compensation is aligned with actual harm.
- *Impact on the internal market*. This heading includes potential benefits accruing from the implementation of a given option as regards the elimination of disparities in antitrust private enforcement in the member states, and the creation of a level playing field between national jurisdictions as regards the possibility for private plaintiffs to seek compensation in national courts. We also consider benefits accruing from the reduction of legal uncertainty, which can constitute a barrier for companies wishing to engage in cross-border trade.

Likewise, we identify the following cost items:

- *Litigation costs*. This broad category of costs includes the cost for litigants when the case is brought to court; settlement costs; and the enforcement cost for courts and NCAs. All impacts of procedural rules or any other option on the incentive to spend resources in litigation, on the incentive to litigate the case or on the procedural requirements needed to start a case are included under this heading.
- *Administrative burdens*. We define these burdens rather narrowly, in line with the European Commission's definition in the Impact Assessment Guidelines at Annex 10. Accordingly, we include in this category only "costs incurred by enterprises, the voluntary sector, public authorities and citizens in

meeting legal obligations to provide information on their action or production, either to public authorities or to private parties"[834]. As a result, trial costs and other enforcement costs that do not depend on a specific information obligation included in the law will not be considered as administrative burdens, and are classified as enforcement costs (in the broader "litigation costs" heading illustrated above). Furthermore, we consider administrative burdens as "net costs", *i.e.* as not including administrative activities that would be carried out anyway even absent a legal prescription (so-called "Business-As-Usual" or BAU burdens)[835].

- *Error costs*. In this category we include the costs related to the likelihood that courts issue a mistaken decision. Thus, this heading covers mostly the likelihood of type I and type II error costs, but includes neither errors in the quantification of damages (included as undercompensation in "impact on corrective justice" above); nor errors due to extortion of settlements by plaintiffs bringing frivolous suits (included as over-deterrence in "impact on deterrence" above)[836].
- *Harmonisation costs*. These costs are a function of the difference between the *status quo* and the scenario considered, and are thus related to the existing situation in member states, and the need to introduce rules that would require high adaptation costs in national jurisdictions. Such costs are quite high, for example, whenever an option considered would run counter to established principles or legal rules in a large number of member states[837].

Below, these benefit and cost items are considered for each of the five scenarios identified. In addition, to reach a more comprehensive impact assessment, we comment on:

- *The impact on SMEs and consumers.* Under these heading, we consider whether the scenarios analysed would significantly facilitate private damages actions by small firms and consumers, enabling them to seek redress from larger defendants.
- *Impact on macroeconomic variables*. The macroeconomic impact of the selected scenarios will be assessed qualitatively on the basis of the specific features of the scenario at hand. In particular, we will focus on impacts on overall static and dynamic efficiency, productivity and growth.

[834] See *supra*, Section I.2.3 for a more detailed description of the EU Standard Cost Model.

[835] See *supra*, note 525 and accompanying text for an example of "BAU" burden.

[836] For a definition of Type I and Type II error costs, see *supra*, note 21 and accompanying text.

[837] This is the case, as we observed in Part II, for multiple damages and – to a certain extent – for opt-out group litigation schemes.

- The compatibility of the proposed scenarios with the *principles of subsidiarity and proportionality*, in line with the Commission's June 2005 Impact Assessment Guidelines.

2.1 The "no policy change" scenario

Under the "no policy change" scenario, Europe would face the same challenges it is facing today. In particular, we have shown in Section I.1.2 of this Report that Europe currently witnesses a situation of very slow and fragmented development of private antitrust enforcement, not far from the "total underdevelopment" found by the Ashurst study back in 2004, so that many victims still remain uncompensated due to obstacles already identified in that study. Benefits and costs of this scenario should thus be assessed against this basic observation, as well as on the likely developments in individual member states. At national level, some member states have already taken action to encourage private antitrust damages. These include countries such as the UK, where the OFT recently issued a consultation document on the issue, and most recently published a set of recommendations for future Government action in this area[838]; and countries where group litigation and fee arrangements between attorneys and clients are being reformed with an eye on facilitating access to justice for tort cases, including antitrust infringement[839].

As regards the impact assessment of this scenario, our starting point will be the analysis conducted in Part II of this Report, where we always considered the "no policy change" option for each of the issues analysed. Illustrating the zero option is useful mostly as a reference for the other scenarios identified, as it allows us to assess the likely *incremental* impact of the selected scenarios relative to the expected development of private antitrust damages actions absent a specific intervention by the European Commission. Such an approach enables us to capture the potential for current procedural rules and damage measures to enable, overtime, an increased access to justice by plaintiffs claiming compensation of loss sustained as a result of antitrust infringement.

Below, we summarise the main benefits and costs associated with the "no policy change" scenario.

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[838] See OFT, *Private Actions in Competition Law: Effective Redress for Consumers and Businesses*, Discussion Paper OFT916, April 2007 (OFT 2007a); and the response to the consultation with final recommendations, OFT916resp, November 2007 (OFT 2007c).

[839] See Section II.1 note 379, for an overview of countries where conditional or contingency fee arrangements are allowed; and Section II.2.3.5 for a description of models of group litigation available in Member States.

A. BENEFITS

A1. Deterrence

Under the "no policy change scenario", the deterrence effect of private antitrust damages actions would remain inadequate for all types of antitrust infringements. Increases in deterrence would have to rely on national *initiatives aimed at facilitating private antitrust enforcement or, more generally, access to justice for victims of torts*. These mostly include initiatives aimed at allowing conditional fee agreements or facilitating group litigation[840]. In this respect, the debate currently taking place in the UK and the recent relaxation of some of the major obstacles for conditional and contingency fee agreements in other Member States (*e.g.* Germany) are certainly significant steps towards facilitating access to justice for victims. However, as we showed in Section I.1.2 of this Report, there currently is no strong evidence that Europe has been moving away from the state of "total underdevelopment" highlighted by the Ashurst study in 2004 (see section 1.2 in Part I). As a result, we assume that private damages actions will not become widespread in many European countries in the years to come absent intervention at EU level.

Accordingly, under this scenario victims of antitrust infringement would not be able to effectively contribute to enforcement, which in turn would lead to a persisting state of "slow development" of private antitrust damages actions[841]. In particular:

- *Cartel cases* may slowly develop if member states take action to facilitate access to justice for consumers and businesses. For example, the OFT recently advocated for opt-out representative actions schemes in the UK, in order to solve the problem of access to justice for smaller plaintiffs; such recommendation was also coupled with discretionary cost-capping or cost-protection measures, and increased attention for funding mechanisms. However, even if this type of litigation develops, most of the lawsuits that would be launched are likely to be follow-on cases, which contribute to deterrence only to a limited extent. A more comprehensive and consistent set of measures to facilitate private antitrust damages actions at EU level may, to the contrary, lead to the development of standalone cartel cases, which are expected to increase the detection rate for cartels[842].

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[840] See Sections 1 and 2 in Part II of this Report.

[841] See Section 2.1, in Part I of this Report.

[842] In the US, the added deterrence of standalone cartel cases is widely acknowledged. See, *e.g.*, Lande and Davis (2007), which consider a sample of 40 cartels, and conclude that "of the total amount recovered the clear majority - at least 62% to 64%; $11.306 to $12.706 billion - came from the sixteen cases that did not follow federal, State, or EU government enforcement actions". Id., at 11, note 32 and accompanying text.

- *Article 82* cases would remain in a significant state of underdevelopment, also due to the high litigation costs often associated with such claims.
- In *vertical restraints*, private litigation is already observable in some countries, but most cases are not real damages actions, but contractual cases in which antitrust is used "as a shield", or the very aim of claimants is to have a contractual clause declared void.

In summary, the "no policy change" scenario would entail, at best, a small increase in deterrence in the years to come, thanks mostly to national initiatives aimed at encouraging private damages actions. However, this impact would be largely insufficient to increase the effectiveness of antitrust enforcement in Europe.

A2. Corrective justice

In line with our methodology in Part II of this Report, we consider corrective justice to be achieved whenever a large number of private claimants can be granted *restitutio in integrum*, and accordingly neither over- nor under-compensation are likely to be observed. In this respect, we further distinguish between (i) increased number of compensated victims; and (ii) degree to which compensation is aligned with actual harm.

- As regards the former, there is little reason to believe that, absent intervention at Community level, the (currently very low) number of compensated victims will increase rapidly in the next few years. In this respect, the "no policy change" scenario corresponds to a very low level of corrective justice.
- For what concerns the latter, under the rules currently applicable at national level, plaintiffs would be able to seek single damages plus prejudgment interest, which is in line with the objective of *restitutio in integrum*. However, evidence that most (of the very few) cases settle before trial would lead them to recover only a subset of the actual loss sustained[843]. In particular, available empirical evidence from the UK shows that legal uncertainty – which is maximised under this scenario – is the most frequently cited reason why firms settle their claims out of court[844].

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[843] Evidence of the ratio of settlements to fully litigated cases has been provided in several sections of this Report. See, for example, data on the US reported by Crane (2007), illustrated in Section I.2.4, notes 151-152 and accompanying text; evidence from the UK, as reported in Rodger (forthcoming), and described at Section I.1.2.3; and data on the likelihood of settlement as calculated by Perloff *et al*. (1986) and Perloff and Rubinfeld (1988), which we used in our simulations in Part I, and are reported *supra* in Table 18.

[844] See Rodger, as quoted *supra*, in I.1.2.3 (not included in this version of the Report).

In summary, we expect that this scenario would imply a very small impact on corrective justice compared to the current situation. Such small impact would also imply a substantial foregone benefit: according to our simulation in Part I of this Report, the "do nothing" option may prevent victims of anticompetitive conduct from recovering up to €25.7 yearly (under the most reasonable assumptions), and antitrust enforcement as a whole to contribute to competitiveness and growth for up to €113 billion.

From the standpoint of corrective justice, the small potential impact associated with the "no policy change" scenario would mostly have to rely on national initiatives aimed at encouraging private damages actions. Were these initiatives to be successful in encouraging private antitrust litigation, in at least some European member states market players and citizens would be encouraged to sue for damages, whereas in most member states the current underdevelopment (when not "total absence" of cases) would persist. Overall, in line with our findings in this Report, we do not consider it safe to assume that important developments would be observed in the short run in Europe.

Finally, contributions to corrective justice for victims of antitrust infringements may also be provided by the entry into force of new rules at EU level, which mostly aim at facilitating access to justice for small-stake claimants. These include:

- The *European Small Claims Procedure* that will apply from 1 January 2009, following Regulation 861/2007 adopted on 11 July 2007. The new procedure will apply in civil and commercial matters where the value of a claim does not exceed €2,000, and will entail simplified rules for the filing of claims, time limits, judge-controlled for access to evidence and the application of the loser-pays rule, with discretionary (partial) cost-protection to be ordered by the judge[845]. Judgments will be recognised and enforced in other Member States automatically, and without any possibility of opposing recognition.
- The *Draft Directive on Mediation in civil and commercial matters*, still pending in the co-decision procedure, which follows a 2002 Green Paper and the "Code of Conduct for Mediators" adopted by the Commission in 2004[846]. The EU Draft Directive on mediation encourages member states to introduce legislation providing for confidentiality measures, guarantees of the quality of mediation and suspension of limitation periods. The directive also proposes that a court should not be able to admit evidence except to enforce

[845] See Article 16 of Reg. 861/2007, stating that "The unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim".

[846] The Code of Conduct is available at http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf.

a settlement agreement reached as a direct result of a mediation, or where the mediator and the parties agree.

These new legislative initiatives may facilitate access to justice in some areas. However, absent a comprehensive and targeted set of measures at EU level, we deem it unlikely that the benefits of private antitrust damages actions would materialise to a full extent in EU Member States.

A3. Internal market

Under the "no policy change" scenario, no significant impact would be felt on the internal market. As most initiatives would be left to individual member states, the current fragmentation could be even more visible in a few years from now.

In this respect, the following arguments can be compared:

- On the one hand, the development of different models of private antitrust enforcement in some member states may trigger a learning process, with virtuous competition between legal systems (so-called "race to the top"). Even in this case, the adoption of best practices would in some cases be difficult, especially if such practices have successfully been adopted by common law countries[847]. An example is punitive damages: even if such more-than-compensatory awards have proven effective in challenging anticompetitive conduct especially in cases where the detection rate is very low (e.g., secret cartels), most member states would face almost insurmountable legal problems in introducing them absent EU intervention. In addition, even if a specific solution can be considered successful in a given legal system, there is no guarantee that its transplant into a different system would lead to a similar outcome[848].
- On the other hand, regulatory competition may also lead to a "race to the bottom", with national jurisdictions starting to compete to attract firms in their own territory, by promising more lenient competition rules. As highlighted by some authors, including Kerber and Budzinski (2004), the features of national competition law, such as its inherent link with the national territory, are such that firms wishing to enter a national market may decide to "vote with the feet" and choose to establish in those markets where competition law is less rigidly enforced (so-called "locational

[847] See also *infra,* Section III.2.5.

[848] This is exactly the reason why we decided to carry out this impact assessment by analysing individual issues first, and then combining them into scenarios to check for combined effects. Even in this Report, as stated above in the introductory section to this Part III, a number of important issues are not considered in our scenarios, including fault requirements, burden of proof issues etc.

competition")[849]. Were this to be the case, there would be reason to believe that the "race to the top" effect, which would lead to mutual learning and context-aware benchmarking between member states, is less likely to materialise than the "race to the bottom" scenario, where states compete to entice firms to settle in their territory by signalling weak antitrust enforcement. At the same time, however, this effect may be mitigated as: (i) the application of antitrust damages rules would not depend on the place of the establishment of the defendant, but in principle on the *lex damni* (*i.e.* the "law of the country where the market is, or is likely to be, affected"), as was recently stated by Article 6 of the "Rome II" Regulation, adopted as Regulation (EC) No. 864/2007 on 11 July 2007[850]; (ii) in addition, the argument that firms may "vote with their feet" may hold only at the margin, for firms wishing to enter a new market, whereas established undertakings are unlikely to move their headquarters only to follow less stringent competition rules.

Whether a "race to the top" or a "race to the bottom" would emerge in this scenario, is ultimately an empirical question, very difficult to solve *ex ante*[851]. Examples of races to the bottom that are often quoted at EU level include the fiscal, tax and labour policies, where "beggar-thy-neighbour" tactics are more

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[849] More precisely, Kerber and Budzinski (2007) conclude that "competition of competition laws is beneficial in the sense that a decentralised system of competition law regimes allows for experimentation and mutual learning about the best ways to protect competition. However, competition of competition laws via international trade, locational competition or choice of law includes the danger of considerable failures and, therefore, needs an adequate institutional framework that impedes defective processes of regulatory competition". See *id.* at 3 and pp. 26 ff. (Section 5). See also Van den Bergh (1996, 2000).

[850] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, [2007], p. 40–49. Article 6(b) derogates from the general principle set for non-contractual obligations (*lex loci delicti commissi*), by stating that: "[w]hen the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court".

[851] The race to the top/bottom argument has been developed in the literature mostly as an analogy to corporate law: the term "race to the bottom" was coined by US Supreme Court Justice Louis Brandeis in 1933, in *Ligget Co. v. Lee*; and the first scholarly paper on the issue is due to William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, (1974). However, the analogy between competition law and corporate law does not entirely hold, since – as already mentioned in this section – competition law applies according to where the business takes place, not where the company is incorporated.

likely to be attractive for Member States. Similar arguments have led to a wide stream of literature on company law. However, compared to these policy fields, competition law exhibits important features: as competition law applies according to where the business takes place, and is thus strongly linked to the territory, there is less reason to believe that either a "race to the top" or a "race to the bottom" would quickly be observed in the future. We will come back to this issue in the discussion of scenario 4 below.

In summary, the impact on the internal market is very likely to be undesirable under this scenario: besides failing to achieve a level playing field between countries, this scenario might end up leading to greater fragmentation between member states. As a result, companies wishing to engage in cross-border trade would be put in widely diverging conditions and would face a fragmented business environment when operating in multiple jurisdictions, which in turn would not lead to creating a suitable context in which companies compete on an equal footing. Even more importantly, there would be no guarantee that businesses and consumers in the European Union would be put in similar conditions to exercise their right to seek compensation for harm caused by antitrust infringements throughout the territory of the EU; and likewise, there would be no guarantee that the emerging solutions are such as to facilitate the exercise of such rights. Suffice it to recall that private antitrust damages action have in principle been possible since the 1957 Rome Treaty, but have not become an important "second pillar" to date.

B. COSTS

B1. Litigation costs

The litigation costs of antitrust damages actions are currently low in Europe, due to the very low number of cases. At the same time, litigation costs "per case" can be considered to be too high, given the absence of measures aimed at facilitating access to justice for claimants (*e.g.* fee-shifting, funding, etc.). Under the "no policy change" scenario, overall litigation costs cannot be expected to rise significantly, as litigation does not appear to be substantially increasing in most member states.

If we assume that a slight, gradual increase in the number of cases would emerge even absent EU intervention – due to national initiatives to encourage private antitrust enforcement – litigation costs may correspondingly increase. Also, the current trends towards enhanced group litigation and conditional fees in some member states may lead to a further impulse to antitrust litigation, and consequently to litigation costs. The impact of such development would be mixed, as group litigation may lead to significant economies of scale: accordingly, one the one hand total litigation costs would increase as a result of the increase in the number of cases; at the same time, litigation costs *per case* would decrease. The ultimate impact on litigation costs under the "no policy

change" scenario would depend on the relative magnitude of these two countervailing factors.

But overall, even from a forward-looking perspective, the expected impact of the "no policy change scenario" is bound to remain small.

B2. Administrative burdens

Administrative burdens are not likely to increase under this scenario. As an upper-bound assessment, we can foresee the following two effects:

- A (slow) development of private enforcement in the next few years may increase the "population" associated with some administrative activities, such as disclosure of specific documents during trial.
- Changes in national legislation may lead to broader disclosure obligations and/or a relaxation of the threshold for fact-pleading. Were this to be the case, the "frequency" of some administrative activities linked to information obligations would further increase.

Overall, the impact would not be significant.

B3. Error costs

Under the no policy change scenario, also the impact on error costs would not change significantly compared to the *status quo*, due to the persisting underdevelopment of private damages actions in Europe. In absolute terms, Type I and Type II errors may increase if the number of cases filed also gradually increases overtime. At the same time, however, the statistical incidence of error costs would decrease alongside with an increase in the number of cases filed, as courts get more familiar with the technicalities of private antitrust damages actions ("learning effect"). However, absent legislative measures aimed at facilitating fact-finding – such as establishing a lower threshold for initial fact-pleading – the number of Type II errors ("false acquittals") would remain high, especially due to problems in proving the nature and extent of the harm sustained, causation, and the anticompetitive nature of the contested conduct.

B4. Harmonisation costs

Absent EU intervention, *i.e.* absent harmonisation, we expect no harmonisation costs to emerge.

2.1.1 Impact on SMEs and consumers

All in all, these victims would be the most disadvantaged under the "no policy change" scenario. Absent intervention at EU level, in most member states smaller plaintiffs would continue to face significant obstacles in obtaining

access to justice to exercise their rights to compensation of antitrust damages. Legal uncertainty and prospective lengthy litigation, and the risk that more powerful defendants signal their commitment to invest very heavily in litigation may inhibit those plaintiffs, discouraging them from filing lawsuit especially in "close" cases – *i.e.,* cases with a particularly uncertain outcome. Needless to say, in cases where the parties' expectations converge, the impact of the currently adopted loser-pays rule would eliminate this latter effect. But evidence that most cases in systems where private enforcement is more effective end up being "David v. Goliath" cases leaves little prospects for smaller plaintiffs absent measures targeted at encouraging lawsuits.

In addition, as widely acknowledged, the lack of significantly widespread group litigation in EU countries would leave smaller plaintiffs having sustained small losses virtually unable to exercise their rights. This is all the way true for those infringements that impose scattered damages on a large number of victims, which would then face a collective action problem with no solution provided by their legal system; but also for abuse of dominance cases, in which plaintiffs may face high prospective costs of litigation. Under the no policy change scenario, the exercise of the right to damages in the future would have to rely exclusively on initiatives at national level.

2.1.2 Macroeconomic impacts

All else being equal, under this scenario the contribution of private antitrust enforcement to allocative, productive and dynamic efficiency would remain limited, as we expect only a slow development of private antitrust litigation over the next years. However, initiatives at national level may contribute to market efficiency and growth in the next years, even absent EU measures to facilitate antitrust damages actions.

In line with our illustration of the debate on the contribution of antitrust to economic growth and innovation in Part I above, we conclude that under this scenario Europe would partially miss the opportunity to enforce antitrust laws more effectively, thus contributing to GDP growth more significantly (up to 1%)[852].

[852] See Section I.6.2 for an illustration of the macroeconomic impacts of antitrust enforcement.

Table 74 – Impact assessment of "no policy change"

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**1** • *national initiatives still sparse; potential for follow-on group litigation in some MS*	**1** • *national initiatives still sparse; some litigation already observed*	**0** • *national initiatives still sparse; evidence of slow or no development*
Corrective justice	**1** • ***n. of compensated victims:*** *very few victims are compensated* • ***alignment with actual harm:*** *in principle, aligned with* restitutio in integrum; *likely undercompensation in settled cases*	**1** • ***n. of compensated victims:*** *very few victims are compensated* • ***alignment with actual harm:*** *in principle, aligned with* restitutio in integrum; *likely undercompensation in settled cases*	**1** • ***n. of compensated victims:*** *very few victims are compensated* • ***alignment with actual harm:*** *in principle, aligned with* restitutio in integrum; *likely undercompensation in settled cases*
Internal market	**0** • *fragmentation would persist and may become wider*	**0** • *fragmentation would persist and may become wider*	**0** • *fragmentation would persist and may become wider*
Costs			
Litigation costs	**1** • *low level of litigation* • *uncertainty and high cost per case*	**1** • *low level of litigation* • *uncertainty and high cost per case*	**0** • *very low level of litigation* • *uncertainty and high cost per case*
Administrative burdens	**0** • *very small population*	**0** • *very small population*	**0** • *very small population*
Error costs	**1** • *low litigation.* • *there may be (Type II) errors due to absence of learning effects and lack of access to accurate evidence*	**1** • *low litigation.* • *there may be (Type II) errors due to absence of learning effects and lack of access to accurate evidence*	**0** • *very low litigation.* • *there may be errors due to absence of learning effects and lack of access to accurate evidence*
Harmonisation costs	**0** • *no harmonisation*	**0** • *no harmonisation*	**0** • *no harmonisation*
Other impacts			
SMEs and consumers	**0** • *very difficult to exercise the right to damages*	**0** • *very difficult to exercise the right to damages*	**0** • *very difficult to exercise the right to damages*
Macroeconomic impacts	**0** • *negligible contribution*	**0** • *negligible contribution*	**0** • *negligible contribution*

2.2 Assessment of Scenario 1

Under this scenario, double damages – including pre-judgment interest – are introduced for all types of antitrust infringement together with mandatory one-way fee-shifting and broad disclosure rules subject to fact-pleading; the passing-on defence is excluded, whereas the passing-on offence is allowed. A system of opt-out class actions would be introduced. Finally, a 20-year limitation period from the occurrence of the harm claimed would be introduced, together with a subjective limitation period of 5 years from the date in which the claimant had reasonable knowledge of the harm suffered, whichever is shorter.

At first blush, under this scenario European private antitrust enforcement might appear as closely resembling the US system, which we adopted as a reference model of a legal system where private antitrust litigation is more widespread. However, important differences would still remain:

- First, the damage multiple would be lower (double, not treble), although prejudgment interest would be applied, as is currently done in European member states. Overall, the ratio of damage awards to the nominal loss sustained might even be higher in Europe than in the US[853].
- Secondly, although broad disclosure rules would be adopted, the European system would differ from the US one as regards the pleading standard adopted – fact-pleading in the EU, notice pleading in the US[854].
- Thirdly, even if opt-out class actions are adopted, the limited availability of contingent fee and conditional fee arrangements in Europe may lead to a less rapid development of this type of group litigation.
- Finally, the limitation period would be slightly longer in Europe than in the US, where the limitation period is four years.

Below, we assess the likely impacts of this scenario in terms of benefits and costs.

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[853] For further information consult for example Lande (1993) *Are treble damages really single damages?* as well as Lovell (1982), *Are Treble Damages Double Damages?*, Journal of Economics and Business, vol. 34, issue 3, pages 263-268.

[854] It must be recalled that in the US the recent Supreme Court decision in *Twombly* stressed that "[i]f a pleaded conspiracy is implausible on the basis of the facts as pleaded –- if the allegations amount to no more than "unlikely speculations" –- the complaint will be dismissed." The Supreme Court decision was rendered on May 27, 2007. See *Twombly v. Bell Atlantic,* 425 F.3d 99, 111 (2d Cir. 2005) 2007 WL 1461066 (US).

A. BENEFITS

A1. Deterrence

This scenario is clearly geared towards increasing the deterrence effect of private antitrust damages actions. In line with our analysis in Part II of this Report, we can recall the assessment of the impact of each of the options included in scenario 1 and provide an evaluation of their joint effect.

- If *double damages and mandatory one-way fee-shifting* are introduced for all types of antitrust infringements, defendants would face both a higher number of lawsuits and also larger expected penalties[855]. This combination of options would exert different impacts, depending on the type of infringement:
    - o *For cartels,* combining one-way fee-shifting and double damages is likely to contribute significantly to deterrence. Although some authors have expressed doubts that optimal deterrence could be achieved even with very high sanctions, this option would certainly provide economic actors with a significant incentive to monitor and detect cartels, and at the same time would greatly encourage damages actions by victims having suffered – as can often be the case for cartels – scattered damages.
    - o For *vertical restraints*, the effect of this option is highly likely to prove over-deterrent. As a matter of fact, in vertical restraints plaintiffs are most often upstream or downstream players, who may have enough information to detect the violation. As a result, the most common deterrence-based justification for multiplying damages here would not hold. In addition, mandatory one-way fee-shifting would provide plaintiffs with the possibility of threatening to sue the defendant, and impose on the latter significant litigation expenses. In this scenario, this possibility is further reinforced by broad disclosure, as we will observe in more detail below. Accordingly, some plaintiffs would end up having a strong incentive to abuse antitrust laws by filing strategic suits, aimed at securing either better contractual conditions in their vertical relations with the defendant, or a very favourable settlement. This way, antitrust enforcement might in some case become a sword in the hands of plaintiffs, more than an opportunity to seek redress for harm suffered. And the likelihood that a "litigation culture" would emerge is high.
    - o *For abuses of dominance,* the over-deterrent impact may be even more pronounced. To be sure, these cases are often considered as the most costly and difficult to litigate, and the low plaintiff win rate would

[855] See *supra*, Section II.1.6.3, option *2c*, for a detailed analysis of this combination of options.

suggest that measures to facilitate the filing of lawsuits are needed especially if the plaintiff is smaller or financially disadvantaged vis-à-vis the defendant. However, coupling mandatory one-way fee-shifting with double damages would not only lead to this desirable result. As a matter of fact, it must be recalled that claimants in abuse of dominance cases are often competitors of the defendant. These claimants are normally well equipped to detect the infringement, and may have an incentive to use antitrust laws strategically. And in these cases, often the harm suffered is very close to the total harm caused by the alleged infringement[856]. As a result, we consider that granting one-way fee-shifting in competitor plaintiff suits would prove over-deterrent, and – as we will observe below – would provide a free token for strategic lawsuits in the hands of competitors.[857]

- When we factor *broad disclosure obligations with a low threshold* into the picture, the over-deterrent effect becomes even more marked[858]. As a matter of fact, the combination of one-way fee-shifting and double damages already created significant concerns in this respect for conducts other than cartels. With broad disclosure, the picture would look as follows:
    - In *cartel cases*, the effect on deterrence would be positive, with very low risk of overdeterrence. The main impact would be that plaintiffs wishing to substantiate their claim would have access to a significant set of documentary evidence at rather low cost and during trial, given that initial fact-pleading would allow them to assert only the evidence that would be reasonably expected from them. This way, it would become easier for victims of cartels to exercise their right to compensation for the harm suffered, especially if these victims are direct purchasers, holding at least some evidence of the overcharge. We would then expect these cases to be also stand-alone cases, as also observed in the US experience, as plaintiffs would not necessarily have to rely on a previous decision by public authority to get a chance of (more than) a day in court[859]. Moreover, as in clandestine

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[856] In some cases – *e.g.* predation, tying, bundled discounts – competitor plaintiffs may even claim damages which are higher than the net loss to society, as consumers may have gained in the short term from tied selling or from very low prices.

[857] As we have shown in Table 16 above, the Georgetown study in the US highlighted that in cartel cases the percentage of competitors acting as plaintiffs is far lower than in cases where the allegation is monopolization, predation, price discrimination or tied selling.

[858] See *supra*, Section II.3.2.1.2 for an analysis of this type of rule.

[859] See Lande and Davis (2006), for evidence that cartel cases are also stand-alone, as we observed *supra*, in Section I.2.1.3, Table 3 and accompanying text. Also, Lande and Davis (2007) consider a sample of 40 cartels, and conclude that "of the total amount recovered the clear majority - at least 62% to 64%; $11.306 to $12.706 billion - came from the sixteen cases that did

cartel cases the expected plaintiff win rate is likely to be quite high, and the *per se rule* leads the expectations of the parties to converge, we would expect these cases to settle quite often.

  - *For vertical restraints*, as already mentioned, over-deterrence would become even more marked. The beneficial effect of broad disclosure – *i.e.* that plaintiffs are put in the condition to exercise their right even when they cannot be expected to point at specific documents held by the defendant as evidence of the infringement – here would become a sword in the hands of plaintiffs. The risk of strategic lawsuits would further increase, and the use of antitrust to either secure advantages in vertical contractual relationships or to extract settlements at very favourable conditions might become prominent. The only partial remedy against this undesirable scenario would be the threshold set for fact-pleading: however, since this threshold is assumed to be low in scenario 1, once the judge is satisfied with initial pleading the only remaining chance for the defendant would be to refuse the disclosure of documentary evidence on grounds of relevance and/or proportionality. All in all, the risk of frivolous suits would still be significant, and the defendant's incentive to offer settlement would likewise increase.
  - *For abuses of dominance*, again broad disclosure would leave plaintiffs – especially competitor plaintiffs – with the possibility of gaining access to valuable information held by the defendant by asserting only reasonable evidence. This, in turn, may pave the way to "fishing expeditions", and would certainly tilt the balance in favour of the plaintiffs in negotiating a settlement. Given the high cost of litigation in these cases, the defendant would be exposed to significant litigation costs, which in turn would lead her to offer settlement.

- *Adding opt-out class actions* to this scenario, the following impacts would be expected. Under an opt-out system, all members of the represented group are bound by the outcome of the action unless they declare their wish not to be a member of the group after being notified of the proceeding. Such a system tends to capture a larger number of represented parties and lead to more consistent decisions overall[860].
  - In *cartel cases*, opt-out collective action schemes allow for enhanced deterrence because, *i.a.,* of the following effects; (i) *better information:* the level of information on a given cartel would increase; (ii) *reduced rational apathy:* the number of victims reached will be larger and,

not follow federal, State, or EU government enforcement actions". Id., at 11, note 32 and accompanying text.

[860] See above, Section II.2.3.2 and II.2.4.2 for a detailed analysis.

consequently, better risk sharing and larger cost savings will become possible; (iii) *fee-shifting:* plaintiffs would be indemnified from legal fees, and – as opt-out rates are expected to be low – lawyers will have a substantial incentive to file a lawsuit, as they would anticipate the represented group to be large; (iv) *increase in the expected sanction:* subject to proof of causation, infringers would face an expected damage award that more closely resembles the actual social harm they imposed on society. The overall impact would lead to an even greater deterrence for cartels.

- In *vertical restraints cases and abuses of dominance*, opt-out class actions would likely be filed by industry or trade associations, who would often represent a smaller group than consumer associations more often involved in cartel cases. Still, with one-way fee-shifting, double damages and broad disclosure, the effect would be an increased stimulus for strategic lawsuits. Overall, the impact of opt-out class actions would be lower for these types of infringements, which often involve individual plaintiffs.

- *Excluding the passing-on defence* and allowing direct and indirect purchasers standing would significantly tilt the balance in favour of claimants in private antitrust damages actions, causing a risk of duplicative liability[861]. At a minimum, procedural safeguards (*e.g.* consolidation of claims by direct and indirect purchasers, or procedures such as that envisaged by option 24 in the Green Paper) would have to be introduced to avoid or limit this risk.
  - In *cartel cases*, the risk of duplicative liability would probably be high: one likely scenario would entail that direct purchasers sue first, followed by a large group of consumers who claim their share of damages. As the defendant would be sued twice, she may face the risk of having to bear the burden of compensating twice (almost) the same harm, and also her own legal cost and those of the (two sets of) plaintiffs. In this case, assume that 70% of the overcharge has been passed-on downstream directly to consumers: then, the expected sanction for the defendant would end up being 170% the overcharge, doubled and with prejudgment interest, *i.e.* 340% the overcharge. If we add legal expenses for all claimants, the expected penalty would be far greater than the harm caused to society[862]. In these cases,

[861] See Section II.5.1.3 for an analysis of this option "in isolation".

[862] Recall from our discussion in Part I.1.1.1 that, as the detection rate of cartels is considered to be quite low (between 10% and 30%) optimal deterrence requires the actual damage award to be much higher than the harm caused to society by the individual prosecuted cartel. Optimal deterrence is reached when the benefit of anticompetitive conduct to potential infringers are more-than-compensated by the expected liability, *i.e.* by the sum of the public fine and prospective damage awards, times the probability of being caught.

effective cartel deterrence may still not be achieved, but antitrust enforcement would certainly ensure a disciplining effect on cartelists. In addition, the risk of strategic lawsuits would emerge also for cartels, although the evidence needed in cartel cases is often easier to identify than in other cases (*e.g.*, abuses).

- *For vertical restraints and abuses*, the impact of this rule would be less significant, as the passing-on is typically referred to infringements that lead to an overcharge. In particular, as we stated already in Section II.5 of this Report, we consider it unlikely that passing-on will be often raised in cases of vertical restraints[863]. If anything, the rule on passing-on may further strengthen the incentive to sue of direct purchasers operating downstream from the defendant, for example in cases of price discrimination or margin squeeze[864]. As the passing-on offense is allowed, the standalone case might lead indirect purchasers and consumers to learn about the infringement and decide to subsequently file suit to recover their damages. Although we expect those cases to be less common than for the case of cartels, and confined mostly to exploitative abuses, we deem it very likely that the defendant would be led to settle the case as early as possible.

- Finally, a 20-year objective *limitation* period, coupled with a 5-year subjective limitation would exert an additional impact on deterrence, compared to the "no policy change" scenario, as it would lead to longer limitation periods in some member states compared to today, and increased legal uncertainty for the business environment.

In light of these findings, we conclude that the overall impact of scenario 1 on deterrence would be very high for cartels, but suboptimal for other types of infringements, and in particular for abuses of dominance. A "culture of litigation boom" would be very likely to emerge, together with what was already defined as a "huge system of trial avoidance"[865].

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[863] See *supra*, note 671 and accompanying text.

[864] An example could be the case of a new entrant in the telecommunications market, who is overcharged by the incumbent and passes-on downstream part of the overcharge to its customers. If the incumbent cannot resort to the passing-on defense, she might have to pay both damages to the new entrant, and to a group of identifiable consumers in an opt-out class action setting. In addition, the defendant would have to bear her own legal costs regardless of the outcome of trial, and the plaintiffs' legal costs if she loses.

[865] See Crane (2006), referring to the US system of private enforcement. See also our illustration of trial avoidance in the US, *supra* section I.2.4, notes 135-136 and accompanying text.

A2. Corrective justice

Assessing the impact on corrective justice, in the impact assessment methodology adopted in this report, also means answering the question whether the scenario identified would lead to achievement of *restitutio in integrum* for claimants. In this respect, scenario 1 largely misses the target. More precisely, scenario 1 would remarkably contribute to corrective justice since the number of compensated victims would substantially increase; however, for each of the victims, overcompensation would be highly likely, unless most cases settle for amounts significantly lower than the expected award in court[866].

As a matter of fact:

- *Double damages (including prejudgment interest)* are likely to overcompensate plaintiffs with respect to the actual loss sustained. However, (a) as we observed in Part I of this Report, most cases can be expected to settle before trial for amounts lower than the nominal damage claim; (b) damage awards are most often underestimated with respect to the actual loss sustained; and (c) legal expenses and the opportunity cost of plaintiffs' internal staff allocated to litigation are not always fully compensated. In this respect, full compensation would probably require a damage multiple greater than one. Here again, a lot depends on the length of the litigation, on the difficulty of substantiating the claim, and on the likelihood of settlement. For such reason, although double damages plus prejudgment interest lead to overcompensation of the claimant, this problem will be less evident when the claimant has undergone extensive litigation, and has not been able to recover all legal expenses despite the one-way fee-shifting rule. This problem should be more likely to emerge in cases of abuse of dominance, which are considered to be the most difficult, lengthy and costly for the parties. At the same time, these cases are the ones where the risk of frivolous suits is highest, as claimant will often be competitors, thus particularly interested in filing profitable suits at the expense of the defendant.
- *One-way fee-shifting* magnifies the increase in the incentive to sue by exempting losing plaintiffs from the obligation to pay the defendants' expenses. Innocent defendants would then be exposed to legal expenses even if they did not commit any infringement. At the same time, however, one-way fee-shifting enables plaintiffs to settle for an amount that is closer to the loss sustained, and as such may improve corrective justice in meritorious cases[867].

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[866] See, *e.g.*, Lande and Davis (2007), at 3, where the authors state that "we believe that few, if any, of the many antitrust cases that settle do so for more than single damages. See also *supra*, Section II.1, for an analysis of incentives to sue and settle.

[867] See Section 1.2.3 in Part II above for an illustration of this finding.

- *Opt-out class actions* would lead to compensation of a larger number of victims; however, the precise effect on corrective justice crucially depends on how damages are collected and distributed. Some victims may receive a higher compensation and others a lower amount than the actual loss sustained. If all victims had filed individual suits for their actual damages – a scenario that we deem, however, highly unlikely – compensatory justice would be lower than under traditional litigation. As observed in Part II above, if the members of the group are not identified or identifiable, it will be difficult to compensate them. In some cases, it may be possible to identify the individual members of the group, for example from the sales records of the defendant (consider for example a cartel amongst car dealers or real estate agents) or similar sources. But this is not always the case, as the example of price fixing between breweries may illustrate. A trade-off would probably emerge in many cases, between the need to compensate the maximum number of victims and the accuracy of the award; in addition, as some victims may not be aware of the proceeding, defendants may to some extent profit from the passivity of some members of the identified group of victims, in cases where class members have to actively request their award at the end of the procedure. Also when the representative claimant can profit from the passivity of class members and retain part of the award, corrective justice would be negatively affected, as some victims would remain uncompensated, whereas one victim (the representative claimant) would be overcompensated.
- *Excluding the passing-on defence* can lead to instances of duplicative liability, unless the demand and supply curves in the relevant market are such that passing-on is not feasible for direct purchasers. After all, this rule, applied in the US following *Hanover Shoe*, is explicitly geared towards deterrence, not compensation.
- *Broad disclosure rules with a low threshold* can increase the number of compensated victims, and as such contribute positively to corrective justice. Also, broader disclosure increases the accuracy of fact-finding, and consequently allows for a more precise quantification of the actual loss suffered. Even when cases are not fully litigated, the settled amount would be closer under broad disclosure rules and mandatory one-way fee shifting, as the plaintiff would enjoy a stronger bargaining power compared with the "no policy change" scenario. At the same time, to the extent that it entices plaintiffs to file also strategic lawsuits in scenario 1, such as fishing expeditions in abuse of dominance case, this rule may end up favouring the compensation of non-victims, with negative effects on corrective justice.
- The *5-year subjective period – coupled with a long objective limitation period –* exerts a positive impact on corrective justice, and corresponds to the

solution we considered more appropriate for private antitrust damages actions in standalone cases[868]. However, the limitation period chosen may prove suboptimal for follow-on cases, as such system may force private actors and public authorities into parallel proceedings. In this respect, in Section II.7 above we observed that coordination between limitation periods for standalone and follow-on actions could be preferable to a system in which the limitation period is set irrespective of the nature of the claim (standalone and follow-on).

In summary, many features of this scenario would encourage victims to seek compensation for antitrust damages, thus increasing corrective justice. However, the combination between low thresholds for pleading a claim, double damages plus prejudgment interests and one-way fee-shifting would lead to a remarkable risk of overcompensation, especially for plaintiffs claiming damages in vertical restraints and dominance cases. Such risk would be mitigated by the likelihood of settlement: as we illustrated above under the "deterrence" heading, the likely increase in frivolous suits under this scenario might lead to compensation (through settlements) of plaintiffs, which suffered no loss as a result of an antitrust infringement. These transfers from defendants to plaintiffs would negatively affect corrective justice.

A3. Internal market

As regards the impact of scenario 1 on the internal market, the impact would certainly be positive. This scenario entails the creation of an entirely new and far-reaching set of rules that would be applicable in all EU member states, including rules on damage multiples, fee-shifting, group litigation, access to evidence and limitation periods. Needless to say, this option would contribute to put European victims in similar conditions as regards the possibility to exercise their rights to compensation before national and foreign courts[869].

B. COSTS

B1. Litigation costs

As we already mentioned above, this scenario is likely to generate the maximum increase in litigation costs compared to the others. As a matter of fact, many of the features of this scenario encourage litigation, be that for meritorious or for unmeritorious reasons. The major factors that would affect litigation costs would be the following:

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[868] See *supra*, Section II.7.2.

[869] Recall that we do not consider macroeconomic impacts as falling under the heading "internal market". These impacts are dealt with separately below.

- *Double damages* encourage litigation for all types of cases, especially as they are coupled with prejudgment interest[870].
- *One-way fee-shifting* encourages plaintiffs to initiate a lawsuit without allowing for an efficient selection of cases for litigation, compared to the "no policy change" option, mostly characterised by a loser-pays rule.
- *The combination of one-way fee-shifting, double damages and broad disclosure* also maximises the incentive to litigate, again be that for meritorious or frivolous reasons. In this respect, costs for plaintiffs would be reduced as a result of the lower threshold to plead the case, but the overall number of cases would substantially increase.
- *Opt-out class actions* can lead to economies of scale, but they are normally expensive to litigate, due to high court (and often lawyers') fees, principal-agent problems, costs linked to the certification of the class, high costs of distribution of damages, etc. These costs might in some cases outweigh the benefits of economies of scale, but this would be because at least some individual actions would not have been brought in the absence of a collective action mechanism[871].
- *Excluding the passing-on defence* would lead to potential duplication of lawsuits, with additional litigation costs for both plaintiffs and defendants.
- *The 20-year limitation period* puts no limit to litigation over a very long time span. No plaintiff would fail to exercise her rights due to time constraints.

In summary, we expect that scenario 1 would cause a very high increase in litigation costs, both because the number of cases would increase, and – to a lower extent – because litigation costs for each case would increase. This latter effect would be mitigated by group litigation (economies of scale) and by the strong incentive to settle the case induced by broad disclosure rules.

B2. Error costs

The impact of this scenario on error costs is likely to be mixed. On the one hand, broad disclosure rules would enable a more accurate scrutiny of the facts by the court. However, the negative impact of each false acquittal and each false conviction would become greater, given that damage awards would be

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[870] It is worth recalling that double damages plus prejudgment interest are likely to be higher than treble damages without prejudgment interest in many instances; see our illustration in Part I, note 197 and accompanying text.

[871] See, *e.g.*, OFT (2007c), at 5.9 and 5.10, arguing that the introduction of standalone representative actions on behalf of consumers (opt-out) "would allow a greater number of meritorious cases to be brought without prior action by a competition authority"; and *Id.*, *passim,* reporting consistent views emerged in the UK consultation.

doubled[872]. In addition, potential errors would occur in case national judges end up underenforcing antitrust rules in close cases, due to the combined effect of the damage multiple and opt-out (follow-on) group litigation, which increased the magnitude of the expected fine ("equilibrating tendencies in adjudication")[873].

The magnitude of error costs is likely to be larger for cartel cases and for cases of abuse, for slightly different reasons:

- In cartel cases, because the effect of a single error may produce consequences for a number of plaintiffs, leading for example to duplication of "mistaken" liability, double damages and opt-out follow-on class actions.
- For abuses of dominance, the assessment of single-firm conduct becomes particularly difficult and challenging, especially when the damage claimed is a competitor's lost profit or a reduction in the variety of products or services available on the market. A type I error on a conduct that shifted the demand curve or favoured consumers (such as predatory pricing, or bundled rebates) may lead to highly undesirable consequences as it would inadvertently harm consumers.

B3. Administrative burdens

Under scenario 1, administrative burdens would exhibit a remarkable increase. This would be due to the following factors:

- The expected increase in the number of cases would lead both to an increase in the population of firms affected by each information obligation, and an increase in the frequency of administrative activities associated with each information obligation.
- Broader disclosure rules would, of course, lead to an increase in the number of information obligations and to the frequency of each information obligation, as firms involved in civil lawsuits would be called to keep and disclose a much larger number of documents compared to the "no policy change" option, characterised by rather narrow access to evidence rules in most member states, and with much higher thresholds for pleading a claim.
- To a lesser extent, also excluding the passing-on defence leads to a slight increase in administrative burdens, as duplication of lawsuits (by direct and

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[872] It is worth recalling, here, that under the heading "error costs" we consider only cases in which litigation leads the court to issue a mistaken judgment; thus, settled suits are not included in this category of costs. For this reason, we do not consider the expected substantial increase in settlements that would emerge under this scenario as belonging to error costs.

[873] See *supra*, Section II.1.3, note 359 and accompanying text, quoting Calkins (1986) and Kovacic (2007).

indirect purchasers) may also lead to a duplication of administrative activities associated with information obligations.

- Finally, a 20-year limitation period significantly increases administrative burdens for firms, especially as regards record-keeping obligations.

Accordingly, scenario 1 can be considered as conducive to substantially higher administrative burdens relative to the "no policy change" scenario. In this respect, it must be observed that such an increase would be only partially dependent on the increase in the number of lawsuits: a significant increase would also depend on access to evidence rules and the long limitation period.

B4. Harmonisation costs

Scenario 1 is very far from the "no policy change" scenario, and would entail a brand new set of legal rules for most, if not all member states. The highest harmonisation costs would derive from the following changes required:

- multiple damages in competition cases are currently against the *ordre public* in several national jurisdictions. Only in England, Ireland and Cyprus the award of punitive damages is currently possible under certain circumstances[874]. Even in these jurisdictions, the notion of double damage for all types of antitrust infringement would entail changes in the legal rules on torts[875].
- All member states would have to introduce changes in their treatment of the passing-on defence. Despite being probably less preferable than the current rule adopted in member states, excluding the passing-on defence would also require that the legal principle that links compensation to the actual loss

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[874] As reported by the UK Department of Trade and Industry in the consultation on the Green Paper, in the UK there is still no decided competition case where punitive damages have been awarded. *See* DTI, *UK response to the Green Paper*, URN 06/1180, 21 April 2006, at 15. More importantly, in the recent *Devenish* case the High Court clarified that exemplary damages were not available in cartel damages cases, since this would infringe the principle of *ne bis in idem*, as such remedy would have the same aim (deterrence and punishment) as the Commission fines. The High Court also stated that an award of exemplary damages would be incompatible with article 16 of Regulation 1/2003/EC, as it would *de facto* imply that the awarding court considered the Commission's fines to be inadequate. See *Devenish Nutrition Limited & Others v Sanofi-Aventis SA (France) & Others*, High Court of Justice, Chancery Division, 19 October 2007, [2007] EWHC 2394 (Ch).

[875] At EU level, as clarified by the ECJ in *Manfredi*, "in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law". See European Court of Justice judgment of 13.07.2006, joined cases C-295/04–C-298/04, OJ C 224, 16.09.2006, at §§93-100 (quoting *Brasserie du pêcheur and Factortame*).

sustained be abandoned in light of allegedly "superior" deterrence purposes.

- Almost all countries (especially civil law countries) would be forced to adapt their legislation to introduce a *completely different access to evidence rules* under this scenario, by requiring, *i.a.,* the specification of a new set of rules for antitrust claims, and training for both judges and lawyers. The introduction of different, *ad hoc* civil procedure rules for antitrust cases would also prove problematic, leading to a risk of strategic behaviour of plaintiffs, who may attempt to frame their claims as antitrust suits to benefit from broader access to evidence.
- *Opt-out class actions an unknown tool in almost all European member states*. The opt-out solution for group litigation in Europe has been rejected by some commentators on constitutional grounds, as it may conflict with principles of due process or the right for a day in court (see Nordh 2005; Micklitz and Stadler 2004). Other authors have rejected opt-out as generally impractical to be incorporated into the existing civil law systems (Gidi 2006; Micklitz and Stadler 2006; but see OFT 2007c). Furthermore, no member state so far introduced a pure US-style opt-out class action into its legal system. However, some member states, *i.e.* Denmark, the Netherlands, Poland, Portugal and Spain have some form of opt-out collective action, and recent developments in the UK – especially after the OFT adopted its Recommendations on Private Actions in competition law in November 2007 - testify of an increasing attention for opt-out forms of group litigation.
- To a lesser extent, problems may emerge as regards limitation periods, as the 20-year limitation period would be applicable only to antitrust damages actions in most member states. As shown in Section II.7 above, Belgium, Denmark, Greece and the Netherlands already apply an objective limitation period of 20 years coupled with a 5-year subjective limitation period, but many other member states currently apply different periods[876].

In summary, we consider harmonisation costs for this scenario to be prohibitive. The cost of introducing a new set of rules for each of the features of this scenario, plus the combined effects of these new rules, suggests that in most European member states many years would be needed before the legal system recovers from such a shock. Although it is certainly true that harmonisation costs are one-off costs to be weighed against more long-lasting benefits, in this case the enhancement of private antitrust actions that would certainly be observed under option 1 would come at a remarkably high cost.

[876] As shown in Figure 17 in Section II.7 above, Finland, Italy and Sweden already apply a 5-year subjective limitation period, with no objective period.

2.2.1 Impact on SMEs and consumers

This scenario would definitely bring competition laws closer to smaller plaintiffs, for the following main reasons:

- *Mandatory fee-shifting*, especially if coupled with *broad disclosure rules*, encourage plaintiffs with limited financial resources to initiate a lawsuit. These plaintiffs would face a lower initial cost and would also be shielded from the danger that more financially powerful defendants signal their commitment to heavily invest in litigation, thus increasing the prospective costs for plaintiffs should they lose the case. Since SMEs and consumers are most likely to be risk averse in litigation, such rules would certainly encourage them to file suit. As evidence from the US Georgetown Study revealed that private antitrust damages actions are often "David v. Goliath", such effect would be even more important.
- *Opt-out class actions* have the potential to involve larger classes of consumers and small firms having suffered scattered damages. In this respect, the possibility of applying for compensation after the end of trial or the use of coupons raise the awareness of the role and relevance of antitrust laws.

At the same time, however, it is important to stress that consumers may be harmed by the development of a "litigation culture" if litigation expenses for industry players increase significantly. These expenses would then be passed-on downstream and, depending on market conditions, also to end users. Accordingly, to the extent that scenario 1 creates excessive litigation or harms incentives to innovate, consumers may be facilitated in bringing suit, but also disadvantaged through higher market prices or reduced dynamic efficiency.

2.2.2 Macroeconomic impacts

Assessing the likely macroeconomic impact of this scenario is difficult, as a lot would depend on whether a "litigation boom" would emerge in Europe. As both deterrence and corrective justice would be positively affected by this scenario, compared to the "no policy change" scenario, an increase in the level of competition may be observed.

However:

- *Although cartels* would be significantly deterred, firms may face over-deterrence as regards other types of infringements. The impact on price mark-ups would be ambiguous, as cartelists may even anticipate the risk of having to pay double damages and legal expenses by adjusting their cartel prices[877]. At the same time, potential cartelists would also have to account

[877] Harrington, Joseph E. Jr., Optimal Cartel Pricing in the Presence of an Antitrust Authority, International Economic Review, 46 (2005), 145-169. Harrington J. and Chen J. (2006), Cartel

for the potential duplication of liability in cases where indirect purchasers are likely to sue for damages. Finally, the ability for firms to recover high damage awards by raising prices after the cartel has been prosecuted has recently been considered unlikely in the literature[878].

- As regards specifically *vertical restraints*. This scenario might lead firms to adopt inefficient choices, *e.g.* in "make or buy" decisions (inefficient resource allocation), or including contractual safeguards in their relationships with upstream and downstream players, thus increasing transaction costs.
- For what concerns *exclusionary abuses*, firms competing "for the market" may be led to refrain from innovating or investing in R&D, as they fear antitrust damages actions by foreclosed competitors (who may have access to a broad set of confidential documents), the perspective of double damages and no risk of having to pay the opponent's legal expenses (unless some safeguards are introduced, such as sanctions for strategic behaviour in litigating the case).
- Litigation costs might increase significantly, alongside with expensive settlements, with potential negative consequences on market prices.

In theory, this scenario is expected to bring substantial benefits in terms of growth and employment if compared to the "no policy change" scenario. The main reason why this effect may emerge is the greater competitiveness of markets, which brings a decrease in prices and increase in the quality of products and services being offered. Increased competition and market output may also bring positive effects in terms of employment. However, if no adequate procedural safeguards are put in place, such positive impacts may be mitigated by the emergence of legal uncertainty (also for the very long limitation period) and the potential proliferation of strategic lawsuits. For this reason, we would consider it essential to couple these measures with accurate fact-pleading and procedural rules imposing sanctions for frivolous conduct – *e.g.* sanctioning *ex post* claimants that behaved unreasonably or introducing "offer-of-judgment" rules, etc.[879]

2.2.3 Subsidiarity and proportionality

In line with the Commission's Impact Assessment Guidelines, we consider that, in order to comply with the principle of subsidiarity, the comparison of policy options should (*i*) confirm that the proposed objective could not be sufficiently

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Pricing Dynamics with Cost Variability and Endogenous Buyer Detection, 21 International Journal of Industrial Organization 347.

[878] See, *e.g.*, Motta (2007), at 12-14.

[879] See *supra*, Section II.1.5 for an illustration of possible means to limit the risk of frivolous suits.

achieved by the Member States (the necessity test)[880]; and (*ii*) indicate that the proposed objective could be better achieved by the Union (the added-value test)[881]. Also, based on the subsidiarity test recently proposed by Pelkmans (2006), if (*i*) a measure falls within the area of shared competences; (*ii*) based on criteria used (*e.g.,* scale and externalities) a "need to act in common" emerges; and (*iii*) credible cooperation between Member States is not feasible, then the relevant competence must be assigned at EU level[882].

Overall, scenario 1 (as scenarios 2 and 3) appears likely to pass the subsidiarity test, to the extent that this test is assumed to be complied with whenever action at EU level would be needed to achieve the main goals of the policy action. As one of the overarching goals of such a policy action would be to ensure that European firms and citizens face similar conditions in their exercise of the right to claim compensation for the losses sustained as a result of antitrust infringements, action at EU level seems to be preferable to action by member states alone.

To the contrary, scenario 1 appears less likely to pass the proportionality test. In particular, harmonisation costs would be prohibitively high and, as will be illustrated below, less intrusive scenarios are likely to prove more proportionate to the objective sought – that of enhancing private antitrust damages actions and ensure similar conditions for the exercise of the right to claim compensation throughout the territory of the EU27. In particular, the features that are likely to create more concerns as regards proportionality are the limitation period, the provision for opt-out class actions, the introduction of multiple damages (especially for cases other than cartels) and the exclusion of the passing-on defence.

2.2.4 Overall assessment and summary table

This is a "high stakes" scenario, where high potential benefits come at potentially even greater costs. In the short run, such a combination of policy actions would lead to a "legal shock" in most, if not all, member states, as many of the measures envisaged would require profound changes in the national legal systems, including also allowing legal rules that are currently considered unconstitutional in at least some countries (*i.e.* punitive damages, opt-out class actions).

The corresponding benefits are, moreover, uncertain. In particular, enhanced deterrence would carry the risk of over-deterrence especially for vertical

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[880] There should be no (proposal for) EU action if it is not clear that one policy option at least is likely to deliver better results than what Member States alone could do.

[881] See European Commission, Impact Assessment Guidelines, SEC(2005)791, as amended in March 2006, at Section II.5.2, footnotes 48-49 and accompanying text.

[882] See Pelkmans (2006), at 8.

restraints and abuses of dominance, where the costs associated with excessive deterrence would be particularly high. Also the risk of overcompensation would be tangible, given the damage multiple.

As a result, this scenario might lead to the development of a litigation culture whose benefits, also in terms of contribution to macroeconomic variables, appear rather questionable, even if compared with the *status quo*.

Table 75 – Impact assessment of scenario 1

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**5** • *Very significant deterrent effect*	**4** • *potential over-deterrence, strategic lawsuits*	**4** • *over-deterrent, risk of strategic lawsuits and fishing expeditions*
Corrective justice	**4** • ***n. of compensated victims:*** *very large number of compensated victims;* • ***alignment with actual harm:*** *risk of over-compensation mitigated by settlement; risk of duplicative liability*	**4** • ***n. of compensated victims:*** *high number of compensated victims;* • ***alignment with actual harm:*** *risk of over-compensation mitigated by settlement*	**3** • ***n. of compensated victims:*** *high number of compensated victims;* • ***alignment with actual harm:*** *risk of over-compensation mitigated by settlement; risk of compensating non-victims*
Internal market	**5** • *level-playing field*	**5** • *level-playing field*	**5** • *level-playing field*
Costs			
Litigation costs	**5** • *very high increase in the number of lawsuits* • *costs of class actions* • *lawyers' fees* • *trial avoidance*	**5** • *very high increase in the number of lawsuits* • *costs of class actions* • *lawyers' fees* • *trial avoidance*	**5** • *very high increase in the number of lawsuits* • *costs of class actions* • *lawyers' fees* • *trial avoidance*
Administrative burdens	**5** • *very high increase in population and frequency due to disclosure*	**5** • *high increase in population and frequency due to disclosure*	**5** • *high increase in population and frequency due to disclosure*
Error costs	**3** • *greater accuracy in fact-finding, but* • *very high cost of each error* • *no increase in statistical incidence of errors*	**2** • *greater accuracy in fact-finding, but* • *high cost of each error* • *no increase in statistical incidence of errors*	**3** • *greater accuracy in fact-finding, but* • *high cost of each error* • *risk of equilibrating tendencies* • *no increase in statistical incidence of errors*
Harmonisation costs	**5** • *need to enact a brand new set of legal rules, some of which currently contrary to* ordre public in some MS	**5** • *need to enact a brand new set of legal rules, some of which currently contrary to* ordre public in some MS	**5** • *need to enact a brand new set of legal rules, some of which currently contrary to* ordre public in some MS
Other impacts			
SMEs and consumers	**4** • *most advantaged; but* • *potentially harmed by macroeconomic impact*	**4** • *most advantaged; but* • *potentially harmed by macroeconomic impact*	**4** • *most advantaged; but* • *potentially harmed by macroeconomic impact*
Macroeconomic impacts	**3** • *some cartels may be deterred; more competitive markets*	**2** • *positive impact, but risk of "litigation culture" and strategic use of law*	**2** • *positive impact, but risk of "litigation culture" and strategic use of law*

2.3 Assessment of Scenario 2

This scenario entails the introduction of double damages only for cartels, whereas single damages would be awarded for all other types of infringement. Damages would include pre-judgment interest. As regards access to evidence rules, this would be based on an initial provision of lists of documents, leading to a rather broad possibility of disclosure subject to initial fact-pleading. Both the passing-on defence and offence are allowed. No mandatory one-way fee-shifting would be introduced, but the judge would be given the discretion to derogate from the "loser-pays" rule by shifting all costs. These rules are coupled with both opt-in collective actions and non-mandatory representative actions. The minimum limitation period is set at 5 years from the date in which the claimant should reasonably have realised the occurrence of damage, but a new limitation period of 2 years would start after the end of a public proceeding.

This scenario combines a number of features that were separately analysed in Part II of this Report. Below, we assess the expected benefits and costs of this scenario, and provide a summary table of its likely impacts.

A. BENEFITS

A1. Deterrence

This scenario would increase the deterrence effect of private antitrust enforcement, although to a lesser extent than scenario 1. In particular:

- For *cartel* cases, double damages would encourage victims to exercise their right to damage compensation, with no risk of overdeterrence[883]. The availability of double damages for these types of cases increases at once the likelihood that a claim would be brought and the expected magnitude of the damage award. This increase, however, would not be sufficient to approximate optimal deterrence, given the low detection rate.
- The risk of overdeterrence is also minimal for *vertical restraints*, due to the absence of double damages. In these cases, informed plaintiffs may be encouraged to file suit mostly due to the access to evidence rule based on the initial provision of lists, which we found to be the most suitable to facilitate lawsuits and increase deterrence in Part II of this Report[884]. As plaintiffs know that they may have access to documentary evidence that would help them substantiate their claims, they would have a stronger incentive to initiate a lawsuit.

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[883] See our illustration of this rule at Section II.1.6.2 (option *1a*) and, coupled with one-way fee-shifting, at Section II.1.6.2 (option *2b*).

[884] See *supra*, Section II.3.2.1.3.

- A similar rationale applies to *abuses*. Here, competitors and downstream purchasers are most likely to act as plaintiffs. The availability of broad disclosure would encourage these categories of players, normally well informed about the occurrence of an infringement. Article 82 cases are often very time-consuming, and proof of antitrust injury could be arduous and require a lengthy litigation process. If plaintiffs know that they would be give access to sensible private information held by the defendant, they would certainly be encouraged to file suit.

As regards potential *overdeterrence*, no feature in this scenario would suggest such an effect. Overdeterrence is very unlikely to occur for cartel cases, given the low detection rate; and also for other types of allegations, as the cost rule and the rules on access to evidence are conceived not to expose defendants to such risk. As a matter of fact, the loser-pays rule leads to a better selection of cases for litigation, whereas broad disclosure can increase the incentive to settle the case before trial, as it leads to almost immediate availability of information to the plaintiff, at a very early stage of the litigation process. As there is no need for a court order to trigger information exchange *inter partes*, settlement would be greatly encouraged.

In addition, depending on the circumstances, *discretionary one-way fee-shifting* can encourage plaintiffs to file a lawsuit even if they fear that litigation would be lengthy and costly[885]. Especially when plaintiffs are SMEs or consumers, or are in any case smaller than the defendants (as can often be the case in private antitrust litigation), judges may decide to shield them from the obligation to pay the defendant's legal expenses if they lose. This way, claimants would be also shielded from discovery blackmail or any other strategic behaviour on the side of defendants[886]. In this respect, it is particularly important that the decision to shift all costs is adopted at the outset of trial (not *ex post*, as occurs in member states that have adopted similar rules, *e.g.* Finland, Italy, the UK) or at least on the basis of objective criteria, which would enhance legal certainty for prospective plaintiffs that potentially qualify for cost shifting[887].

The *broad disclosure rule based on the initial provision of lists* is likely to exert a significant positive impact on deterrence. As a matter of fact, the plaintiff would be aware of the possibility of gaining access to a substantial amount of information to substantiate her claim during trial, although she would still be bound by fact-pleading requirements at the outset of trial, In this respect, a real

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[885] Discretionary fee-shifting can take different forms, mostly depending on whether it occurs *ex ante* or *ex post*, and on the criteria applied by the judge in deciding whether to order it. In Section II.1.7.2 above, we provide a more detailed illustration.

[886] See Perloff and Rubinfeld (1988) and Wagener (2003), for a description of the ways in which antitrust discovery can be abused for blackmailing purposes.

[887] See Section II.1.7.2 for a brief description of these rules.

deterrence factor would be felt if fact-pleading is limited to a requirement that the plaintiff provides reasonable evidence suggesting that an infringement of competition laws may have occurred. In addition, the defendant should not be able to litigate extensively by refusing to disclose documents by claiming that such disclosure would cause disproportionate harm. In addition, the threat of high litigation costs would be more likely under this scenario, given that the loser-pays rule applies: plaintiffs with limited financial resources and a "close" case (*i.e.* a case with uncertain outcome) may refrain from suing or continuing to litigate a case if the defendant has a "longer purse" and signals her commitment to invest heavily in litigation, potentially increasing the plaintiff's costs, were she to lose the case.

The *passing-on rule* in scenario 2 is slightly less effective than the one in scenario 1 in terms of deterrence, as we explained in detail in Section II.5 of this Report[888]. It must be recalled, in this respect, that the Ashurst study found that "[t]he existence of the passing on defence itself is an obstacle to the extent it complicates claims … to the extent it reduces the money paid to the plaintiff it clearly also reduces the latter's incentive to bring a claim." This led the authors to conclude that "[l]ack of clarity as concerns the possibility for the indirect purchaser to claim and the difficulties of proof (in particular as regards causation and damages) both constitute obstacles to the indirect purchaser's claim"; and that "[t]he combination of the passing on defence (in particular where this is readily accepted) and the difficulties faced by indirect purchasers will seriously restrict private claims."[889] Overall, the impact of this rule on deterrence would depend on the difficulty for indirect purchasers to prove causation. Under a possible scenario, a defendant could be able to escape liability altogether, if direct purchasers refrain from suing because they passed-on most of the overcharge, and indirect purchasers refrain from suing for fear of failing to prove causation. It would therefore be necessary to charge the defendant with the burden of proof: if she manages to rebut a presumption that the plaintiff actually has borne the overcharge by providing sufficient evidence, then she would not be bound to pay damages. This appears as a necessary step to avoid that the passing-on rule instils an element of insufficient deterrence in scenario 2. Finally, as we already explained in Section II.5 above, the impact of this rule would be mostly confined to the realm of cartels and exploitative abuses, whereas for cases of vertical restraints we expect the passing-on defence to be rarely an issue[890].

Also the choice to introduce *opt-in collective actions* would positively contribute to the deterrence of private antitrust damages actions, although to a lesser

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[888] See also the summary tables 66 and 68.

[889] See Ashurst (2004).

[890] On this issue, see *supra*, note 671 and accompanying text.

extent than opt-out actions as envisaged under scenario 1. Opt-in collective actions scheme contribute to deterrence by (i) increasing the amount of information available to potential plaintiffs, by (ii) encouraging such potential plaintiffs to sue, and also by (iii) increasing the magnitude of the prospective fine for potential infringers. The impact on deterrence will depend on the type of infringement and the type of claim (stand-alone or follow-on). The savings in information costs will be largest in cases of cartel agreements, in particular price fixing, where the start of an opt-in collective action may inform end consumers about the existence of infringements.

Besides the opt-in collective action, the choice of introducing *non-mandatory representative actions* (possibly opt-in representative actions) seems to contribute positively to deterrence. As a matter of fact, especially in cartel cases a large group of individual victims may suffer scattered damages, which would leave them with little incentives to face the burden of initiating a lawsuit. If certified or "qualified" (consumer and/or trade) associations are given standing *in lieu* of individual victims, this would lead to an enhanced probability that the lawsuit is eventually brought. Besides solving free-rider problems, representative actions can deter infringements as consumer and trade associations are more likely to be informed plaintiffs than are individual victims[891]. Representative actions would allow a less costly gathering of information compared to individual suits; representative bodies may also specialise on certain topics and diversify the costs of information, as they are likely to be repeat-players[892].

Finally, the *limitation period* (5 years from reasonable knowledge of the harm, plus a new limitation period of 2 years for follow-on actions) seems sufficient to exercise the right to damage compensation, as we concluded in Section II.7 above. This would lead to an increased deterrence in a limited number of countries (Cyprus, Lithuania, Portugal, Spain[893]), whereas other countries would be free to maintain their longer limitation periods.

In summary, this scenario would certainly increase the deterrence effect of private antitrust damages action, by increasing the likelihood that plaintiffs would bring a damages action, as well as the magnitude of the expected fine.

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[891] See our discussion of free-rider problems *supra,* at Section II.2.2.

[892] An important issue to be assessed is whether non-mandatory representative actions should be enacted as a unique tool for antitrust infringements, or as a broader measure within the current debate on collective redress. The European Commission has launched a major study in March 2007 to find out about the current status of collective redress in EU member states. See http://ec.europa.eu/consumers/tenders/information/tenders/index_en.htm.

[894] The lower uncertainty in follow-on cases emerges as fact-finding has already been carried out in a previous proceeding. This enables a convergence in the parties' expectation as regards the likely outcome of trial, in turn making settlement more likely. For an analysis of incentives to sue and settle, see *supra*, Sections I.5.1.1 and II.1.1.

Compared with scenario 1 above, this scenario minimises the risk of over-deterrence, as it limits the use of a damage multiple to cartel cases and maintains the loser-pays rule. Also the choice of opt-in collective and non-mandatory representative actions seems in line with the goal of deterrence, without leading to overdeterrence. The same can be said for the passing-on rule, which compared to scenario 1 – leads to a much lower possibility of duplication of cases and liability, thus leaving defendants with the perspective of having to compensate plaintiffs for the actual damage caused.

A2. Corrective justice

Scenario 2 seems more consistent with the corrective justice goal than scenario 1, for a number of reasons. First, imposing *single damages plus prejudgment interest* for non-cartel cases avoids the problem of overcompensation of plaintiffs, although – compared to scenario 1 – the number of compensated plaintiffs would likely be lower due to a weaker incentive to file suit. In addition, some plaintiffs in cases of *vertical restraints* or *abuses* may still be undercompensated as most cases settle before trial, and for lower amounts than the initial damage claim.

On the other hand, in *cartel cases* plaintiffs may end up being overcompensated, although these cases are often follow-on cases, which have lower uncertainty and are commonly settled before trial[894]. All in all, if an already convicted defendant knows that plaintiffs would be able to access a broad set of documents to substantiate their claim and prove causation, it is quite likely that they would end up settling the case for a rather high amount.

This leads us to the *broad disclosure rules*, which in this scenario impact positively on compensation. If combined with a loser-pays rule, in which a judge may only shift costs under rather restrictive condition, broad disclosure based on an initial provision of lists can reach the desirable results of facilitating proof of causation for plaintiffs. In article 82 cases, which are normally very lengthy and time-consuming, securing access to a broad set of documents encourages plaintiffs to file suit. The probability of settlement also increases in these cases, as the perspective of having to disclose confidential information and (sometimes) business secrets – *e.g.* information on patents – to competitors or downstream purchasers would probably lead the defendant to offer an out of court settlement.

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[894] The lower uncertainty in follow-on cases emerges as fact-finding has already been carried out in a previous proceeding. This enables a convergence in the parties' expectation as regards the likely outcome of trial, in turn making settlement more likely. For an analysis of incentives to sue and settle, see *supra*, Sections I.5.1.1 and II.1.1.

Another feature that would positively contribute to corrective justice under this scenario is the choice of the group litigation model. *Opt-in collective and representative actions* ensure that the damage is compensated to a group of identifiable victims. Depending on the pattern of distribution of damages, it may happen that some plaintiffs are overcompensated, whereas others are undercompensated.

- *Opt-in collective actions* are suitable to achieve *restitutio in integrum* for the victims of antitrust infringement, although – depending on how the damages are awarded and distributed – victims who opted-in may end up receiving a representative share of the final damage award, which may be higher or lower than the actual loss sustained. The availability of a large amount of information due to broad disclosure may facilitate a more accurate quantification of damages. In the case of settlements, which would be greatly encouraged by the disclosure rule and – for cartel cases – by the damage multiple, victims would be bound by the resulting settlement amount, possibly ending up less than compensated for the harm. As we already observed, the availability of double damages for cartel cases, the likelihood that those cases follow a previous decision by a public authority and the high likelihood of settlement may lead to a final compensation that is roughly in line with *restitutio in integrum.*
- *Representative actions* may contribute to a higher level of corrective justice in two ways: by increasing the number of victims who will be compensated (either other companies or end consumers) and by aligning the amount of compensation with the actual magnitude of the harm suffered. The effects on corrective justice, however, depend on the way in which the non-mandatory representative action is organized: i) a damages claim on behalf of the members, or ii) a damages claim on behalf of a larger group of victims. These means of collective redress may take the form of a representative action with an opt-in mechanism, or a representative action with an opt-out mechanism. In case a representative action is introduced as opt-in action, where a representative body is granted standing *in lieu* of a group of identifiable members, the availability of broad disclosure rules may lead to a more accurate quantification of damages for the group members, although this would also encourage binding settlements, normally for less-than-compensatory amounts. Again, in cartel cases the availability of double damages may lead to almost full compensation for victims.
- Corrective justice could also be encouraged by *discretionary fee-shifting rules*, if correctly implemented with clear guiding principles. This way, consumers and (especially small) businesses with limited financial means could gain better access to justice. However, expanding the application of this rule may create perverse incentives for potential business claimants, who may decide to use the rule for strategic reasons such as “fishing expeditions”, due to the opponent’s broad disclosure obligations. As a result, we consider that the

possibility of discretionary fee-shifting would constitute a means to enhance corrective justice only if carefully applied and limited to a narrow set of clearly defined circumstances, such as the limited financial needs of the plaintiff. To the contrary, shifting all costs because the case is unusual or novel (so-called "case of first impression") would not serve the goal of encouraging access to justice for plaintiffs that would not otherwise had filed suit. The better selection of cases for litigation ensured by the loser-pays rule, and the fact that this latter rule shields plaintiffs from discovery blackmail suggests that moving to a broad application of discretionary fee-shifting would not positively contribute to corrective justice. In addition, the availability of broad disclosure likely reduces the cost of initiating a lawsuit for the plaintiff, especially if initial fact-pleading standards are limited to the knowledge that can be reasonably expected from the plaintiff. These rules already serve the goal of reducing costs for plaintiffs, thus encouraging them to file suit without opening the door to frivolous litigation. Finally, the decision to shift all costs should be taken at the outset of trial, and be clearly motivated to avoid spurring further litigation and increase the incentive effect of fee-shifting. In this respect, the rule currently adopted in Germany seems preferable to the rule adopted in Italy, where the court may order *ex post* the compensation of legal costs due to the novelty or complexity of the case. The German rule, however, only provides for an adjustment of the cost exposure of the plaintiff, and as such does not correspond to the option envisaged under scenario 2[895].

- The *limitation period of 5 years*, restarting after a public authority decision has become final, would improve the conditions for effectively exercising the right to compensation in some countries. In line with our findings in Part II, Section 7 above, we consider this rule as providing for effective means of redress for victims of antitrust enforcement. In this respect, scenario 3 improves over the *status quo*.

In summary, under scenario 2 corrective justice would be positively affected, due to the expected increase in the number of compensated victims – due to damage multiples for cartels, broad disclosure, discretionary fee-shifting, and opt-in group litigation – and to the increased accuracy of damage quantification – this depending mostly on broader disclosure and the passing-on rule. We

[895] In Germany, the court can take into account the financial situation of the parties, if the party credibly asserts that the cost of litigating the case would significantly affect her financial situation. This leads to a decision by the judge, according to which the value of the claim is adjusted (*i.e.* reduced) to take account of the financial situation of the party concerned. This adjusted value is taken as a basis for calculating court fees, lawyer's fees and other costs in case the plaintiff loses at trial. Successful plaintiffs pay their lawyers on the basis of the real (not the adjusted) amounts. It must however be recalled that such system is enacted in a jurisdiction where lawyer's fees are strictly regulated. See Section II.1.7.2 above.

consider the contribution of scenario 2 to be greater than under the "no policy change" scenario, especially if the discretionary fee-shifting rule is applied with caution. Compared to scenario 1, this scenario would probably entail a lower increase in the number of claims, due to a number of features – damage multiples, treatment of passing-on, availability of opt-out class actions, etc. – which in scenario 1 substantially facilitate access to justice for victims of antitrust infringement: at the same time, it must be observed that the risk of overcompensation emerging for vertical restraints and abuses under scenario 1 here would be less likely to materialise.

A3. Internal market

Scenario 2 would bring about substantial benefits in terms of contribution to the internal market. It is worth recalling that, for the purposes of our analysis, we consider the internal market goal to be achieved or positively affected whenever the set of rules analysed contribute to the creation of a level playing field between the different national jurisdictions in Europe, and greater legal certainty for undertakings wishing to engage in cross-border trade. Scenario 2, in this respect, enables convergence in the conditions for the exercise of the right to compensation in the EU. Action would be needed for all policy options, and this would entail a transition period, after which EU member states would be endowed with a new set of rules for antitrust damages actions.

The likelihood that scenario 2 contributes to the level playing field highly depends on the type of instrument selected by the Commission for introducing the new sets of rules, and correspondingly the flexibility of implementation given to member states. Episodes of "path-dependency" and "adaptive interpretation" of rules may occur if judges are not given clear-cut criteria for the quantification of damages and the application of discretionary fee-shifting.

The introduction of specific rules for antitrust damages actions could stimulate the convergence of the conditions for bringing claims on antitrust injury in national courts. Rules on representative actions for consumers may also fall within the broader debate on collective redress taking place within the review of the EU consumer *acquis*.

B. COSTS

B1. Litigation costs

The issue of litigation costs is directly linked to the sustainability of new measures aimed at encouraging antitrust damages actions. The underlying problem is to avoid that Europe moves toward a litigation culture instead of a more healthy "competition culture". In this respect, scenario 2 seems to pave the way for a significant increase in overall litigation costs, although such an increase is not likely to offset the benefits in terms of both deterrence and compensation.

The impact on litigation costs *per* case is likely to be ambiguous. Litigation costs are likely to increase slightly as a result of the *damage multiple* introduced for cartel cases, as more plaintiffs would be encouraged to file suit. However, this increase would be partly offset by the lower costs of access to justice for plaintiffs, and the encouragement of early settlement that these rules create. More generally, we consider likely that the following impacts would be observed:

- For *cartel standalone cases*, litigation costs increase as a result of the increase in the detection rate and consequently of the number of victims that file suit. The possibility of gaining access to a broad set of documents during trial may further encourage those plaintiffs by granting them access to valuable information at rather low cost. The likelihood of an early settlement in these cases is consequently high. This, overall, determines a reduction in litigation costs per case.
- For *cartel follow-on cases*, broad disclosure rules and the availability of a previous judgment determine a significant convergence between the expectations of the parties as regards the likely outcome of trial. This maximises the incentive to settle the case, thus reducing litigation costs. However, the likelihood of an action being brought here would be much greater, also due to the availability of representative actions. In these actions, however, victims can profit from economies of scale, which in turn prevent litigation costs from increasing substantially.
- For *vertical restraints*, the possibility of an increase in settlement costs is greater. The availability of opt-in collective actions, on the one hand, and of broad disclosure rules (based on fact-pleading) may exert the maximum impact for these types of cases. As a matter of fact, already well informed (business) plaintiffs may possess enough information to plead their claim, and would be greatly encouraged by the perspective of further substantiating their claim during trial by providing a list of documents that the opponent should make available.
- For *abuse of dominance cases*, the typical plaintiffs will be a competitor, an upstream input provider or a downstream purchaser. Broad disclosure can of course be particularly enticing for competitor plaintiffs, especially when it entails the discoverability of important business secrets. But as the loser-pays rule is applied "by default" here, and we deem it unlikely that judges will decide to shift costs to favour a competitor, then the likelihood of frivolous suits decreases and the "selection of cases" effect contributed to keeping litigation costs under control. To be sure, plaintiffs would be way more encouraged to litigate article 82 cases if the prospective cost of proving the necessary evidence decreases as – as is often recalled in the literature – those cases are often the most difficult and resource-intensive to litigate.

Overall, we consider scenario 2 to increase litigation costs compared to the *status quo*, although to a much lesser extent than under scenario 1. In particular,

most of the increase would be due to the achievement of the overarching goal of the policy actions at hand – that of facilitating meritorious private antitrust damages actions. Important safeguards against the uncontrolled increase of litigation costs would be the narrow application of one-way fee-shifting and the availability of *inter partes* disclosure rules that greatly encourage early settlements. For this reason, we expect that scenario 2 would not lead to a "litigation boom" in Europe – only to a physiological increase in litigation costs, as litigation actually increases.

B2. Error costs

Error costs, in our impact assessment model, correspond exclusively to instances in which the judge issues a mistaken judgment, *i.e.* a false acquittal or a false conviction. In this respect, we expect scenario 2 to reduce the likelihood of error compared to the *status quo*. The following effects can be expected:

- Broad disclosure rules should enable more accurate fact-finding, thus reducing the likelihood of error;
- The loser-pays rule stimulates a better selection of cases for litigation, thus preventing frivolous suits.
- In cartel standalone cases, the possibility of producing a significant amount of evidence would reduce the incidence of error, although the impact of each error would be magnified by the damage multiple and by the fact that, due to collective or representative actions, the judicial error would affect a larger number of plaintiffs.
- In follow-on cases, broad disclosure should allow the judge to quantify the actual loss sustained with greater accuracy.
- For other types of infringements, error costs – especially Type I error costs, which are particularly harmful for conducts such as alleged predatory pricing - would increase due to the large share of standalone cases, although broad disclosure should enable more accurate fact-finding by the judge.

Overall, we do not expect scenario 2 to cause an increase in the incidence of error costs. Due to the increased number of cases, the absolute number of mistaken judgment would increase.

B3. Administrative burdens

The increase in administrative burdens under scenario 2 would be mostly due to broad disclosure rules and the minimum limitation period[896]. In particular,

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[896] Technically, if the notifications to be issued to effectively organise a representative action are imposed by law, such activities would fall under the definition of third-party information

- In Section II.3 above we estimated administrative burdens generated by disclosure rules to fall in the range between €35,000 and €60,000 per case, based on available evidence from comparable systems (UK and, partly, US) and on the expected relative high stakes of antitrust cases compared to other tort cases[897].
- Longer limitation periods would have to be introduced in Cyprus, Spain, Portugal, Malta, Lithuania and Slovenia, leading to longer record-keeping obligations and accordingly an increase in the time associated with each record-keeping obligation.
- Besides this time effect, broad disclosure rules may also increase the frequency of other information obligations, such as gathering and communication of documents.
- Whenever costs are shifted, the court must issue an *ad hoc* order: some of the costs associated with this activity would fall in the definition of administrative burden faced by national administrations, as provided by the EU Standard Cost Model in the 2005 Commission Impact Assessment Guidelines.
- The administrative burden for defendants may substantially increase, since all the categories of documents that may be requested are to be stored, although some documents within the category may be not directly relevant for the case. Defendants would have to store every document that may be reasonably relevant for the case, since they are under a specific obligation to spontaneously provide a list of relevant documents.

Overall, the increase in administrative burdens would be lower than under scenario 1, although compared to the "no policy change" option the population of affected businesses would be larger, and the frequency and time associated with some information obligations will increase.

B4. Harmonisation costs

Scenario 2 entails the enactment of a number of far-reaching changes to national laws, especially as far as civil procedure rules are concerned. The most significant costs that would emerge are the following:

- The need to overcome the problem of *double damages* in most member states, even if confined to cartel cases, would remain under this scenario, just like

obligations covered by the Standard Cost Model. In this case, these additional activities would have to be added to the overall calculation of administrative burdens under scenario 2. If, in addition, representative bodies need to be "certified" to be able to sue *in lieu* of their members, the certification procedure would entail further administrative burdens.

[897] See *supra*, Part II, section 3.2.1.3.

in scenario 1. However, introducing double damages for cartel cases could be justified on the principle of effective access to justice provided for at Article 6 ECHR, but also on more theoretical considerations such as the need to consider pre-trial settlement, legal/administrative expenses that would not be compensated by the defendant, the seriousness of the conduct, and the very low detection rate normally attributed to horizontal cartels. We thus consider this expected cost to be lower than under scenario 1;

- The introduction of *broad disclosure rules* that resemble more an adversarial, rather than inquisitorial access to evidence system, would entail very high harmonisation costs, since all Civil Law countries would be forced to adapt their legislation to introduce a completely different set of rules for antitrust claims; training costs for both judges and lawyers; and the risk of "contamination" effects, especially in cases related to vertical agreements, with plaintiffs trying to frame non-antitrust claims as alleged infringements of antitrust laws to profit from the broader disclosure rules.
- Changes in some national legal systems may be needed to enable *opt-in collective actions* and also, to a lesser extent, *representative actions*. As we recalled above in Part II, in some countries collective actions might cause inconsistencies within national legal systems that are generally inhospitable to group litigation[898].
- Finally, the harmonisation of limitation periods might create problems of consistency with general rules on tort law, at least in some countries.

No significant changes would, to the contrary, be needed as regards passing-on rules and discretionary fee-shifting, although the latter is not common in all member states. Table 76 below summarises the countries that would be more affected by major required legal changes.

[898] See *supra*, Section II.2.4.1.

Table 76 – Harmonisation costs for scenario 2 – groups of countries

Source	Negligible	Low	Medium	High
Punitive damages	*Cyprus, , Ireland, UK*			*Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden.*
Initial provision of lists, based on fact-pleading	*Cyprus, , Ireland, UK*			*Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden.*
Limitation periods	*Belgium, Bulgaria, Denmark, Greece, Finland, France, Ireland, Italy, Latvia, Luxembourg, The Netherlands, Romania, Sweden, and the UK*	*Austria, Czech Rep., Estonia Germany, Hungary, Malta, Poland Slovenia, Slovakia*	*Cyprus, Lithuania, Portugal, Spain*	

2.3.1 Impact on SMEs and consumers

In this section, we assess whether scenario 2 would be likely to encourage SMEs and consumers to exercise their right to damage compensation. In this respect, some features of this scenario are likely to exert a positive impact on these categories of plaintiffs[899]. In this respect:

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[899] We consider SMEs (and of course, consumers) to be far more likely to be involved in private antitrust litigation as plaintiffs, rather than defendants. Evidence from the Georgetown study, showing that in 1973-1983 private antitrust cases in the US were often "David v. Goliath" confirms this impression. Of course, this would be evident in article 82 cases, as firms involved as defendants have to be dominant in their own relevant markets. This is often associated with significant firm size.

- The availability of *group litigation* (opt-in collective actions and non-mandatory representative actions) would greatly encourage plaintiffs to get involved in private antitrust damages actions, as it would reduce the cost of filing suit, informing the unaware victims and reducing the rational apathy problem.
- The introduction of *double damages for cartel cases*, in light of the high incidence of follow-on litigation, *broad disclosure rules* and consequently the high likelihood of settlement, could facilitate action by otherwise rationally reluctant plaintiffs.
- *Discretionary fee-shifting*, when applied on the basis of the financial conditions of the plaintiff, may reduce the cost exposure of SMEs and consumers.

Another aspect that may be taken into account in assessing the likely impact of scenario 2 on SMEs and consumers is the impact on wholesale and/or retail prices in some markets as a result of the expected increased litigation costs, which we considered to be an issue in the analysis of scenario 1 above. As regards this particular issue, we consider that scenario 2 would not lead to the emergence of a "litigation culture", due to a number of – mostly procedural – safeguards such as the (default) loser-pays rule and the unavailability of punitive damages if not for cartel cases.

2.3.2 Macroeconomic impacts

The macroeconomic impacts of scenario 2 would appear as follows:

- Cartels would be deterred only at the margin, and thus would still be formed, as the double damage rule and the lower reach of opt-in (as opposed to opt-out) collective actions may not lead potential cartelists to fully internalise the future costs associated with private damages actions. The detection rate and (to a lesser extent) the likelihood that an action is eventually brought by all affected victims would both contribute to under-deterrence of cartels, although scenario 2 would bring about some improvements compared to the *status quo*.
- As regards other infringements, these may be significantly deterred as plaintiffs would rely on broad disclosure rules, collective/representative actions and – in particular cases, to be precisely defined – one-way cost-shifting. Compared to scenario 1 above, the risk of overdeterrence and strategic lawsuits would be much lower, leading to a less uncertain business environment.
- If the loser-pays rule remains prominent – *i.e.*, the discretionary one-way fee-shifting is not too broadly interpreted – the risk of discovery blackmail would also be lower: this would reduce the risk that firms adopt inefficient choices or face too high transaction costs in their commercial relationship

along the value chain, as could occur under scenario 1 mostly for vertical restraints.

- This also applies to the risk of having to disclose confidential information – such as valuable patents – during litigation. In any case, either the EU or national rules may require that judges limit the circulation of confidential information in several ways - *e.g.*, by requiring that hearings remain private, by introducing non-disclosure agreements outside the parties involved in the trial, etc.

As a result, the macroeconomic outlook of scenario 2 would appear less uncertain than that of scenario 1. We see no significant risk of a deteriorating business environment due to excessive litigation. To the contrary, we consider that this scenario would positively contribute to the deterrence and corrective justice goals of antitrust enforcement, by fostering the creation of the "second pillar" of enforcement.

2.3.3 Subsidiarity and proportionality

Overall, scenario 2 is likely to pass both the "necessity test" and the "added-value" test[900]. Action at EU level is clearly needed to achieve enhanced and more uniform conditions for the exercise of the right to compensation for antitrust injury in Europe.

This scenario would also be more proportionate to the goals pursued than scenario 1. We consider the main novelties introduced by this scenario as creating lower risks of unintended consequences for businesses and society as a whole. For each of the main risks associated with private antitrust enforcement, a corresponding safeguard is introduced. For example:

- The risk of overdeterrence is very limited, as it cannot be established for cartels, and is highly reduced for other infringements;
- The risk of overcompensation is unlikely to materialise, if not – in some cases and depending on the likelihood of settlement – for cartel cases.
- The risk of frivolous lawsuits is limited due to the loser-pays rule, especially if court-ordered cost shifting is limited to clearly defined cases[901].

In addition, scenario 2 seems suitable to bring about substantial benefits for victims of antitrust infringements, and to achieve this goal at relatively low cost – especially, harmonisation costs. In light of these considerations, we conclude that this scenario may be, in principle, considered proportionate to the goals to be achieved.

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[900] For an explanation, see *supra*, Section III.2.2.3, notes 818-819 and accompanying text.

[901] We explained why the loser-pays rule can prove effective in containing frivolous lawsuits in Section II.1.5 above.

2.3.4 Overall assessment and summary table

Scenario 2 is likely to contribute positively to both deterrence and corrective justice, at the same time avoiding the risk of the proliferation of strategic litigation. The risk of fishing expeditions and discovery blackmail, the likelihood of frivolous lawsuits aimed at early settlements, the risk of duplication of liability are all minimised compared with scenario 1. Table 77 below shows the results of our impact assessment.

Table 77 – Impact assessment of scenario 2

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**4** • *deterrence increases but remains suboptimal*	**3** • *increase in deterrence, risk of strategic lawsuits when claimant is a foreclosed competitor*	**3** • *increase in deterrence, risk of strategic lawsuits when claimant is a competitor*
Corrective justice	**4** • ***n. of compensated victims:*** *increase in compensated victims (but lower than in scenario 1); no risk of duplicative liability; case selection effect;* • ***alignment with actual harm:*** *risk of overcompensation mitigated by settlement*	**3** • ***n. of compensated victims:*** *increase in compensated victims; no risk of duplicative liability; case selection effect;* • ***alignment with actual harm:*** *risk of undercompensation due to settlement*	**2** • ***n. of compensated victims:*** *slight increase in compensated victims (win rate is low); no risk of duplicative liability; case selection effect;* • ***alignment with actual harm:*** *high risk of undercompensation due to settlement*
Internal market	**5** • *level-playing field*	**5** • *level-playing field*	**5** • *level-playing field*
Costs			
Litigation costs	**3** • *increase in the number of lawsuits;* • *costs of opt-in actions* • *lawyers' fees*	**2** • *increase in the number of lawsuits;* • *lawyers' fees* • *broad disclosure*	**3** • *increase in the number of lawsuits;* • *lawyers' fees (lengthy and costly litigation)* • *broad disclosure*
Administrative burdens	**3** • *increase in population and in frequency due to disclosure*	**3** • *increase in population and in frequency due to disclosure*	**3** • *increase in population and in frequency due to disclosure*
Error costs	**2** • *greater accuracy in fact-finding, but risk of errors in standalone cases* • *increase in n. of cases* • *no increase in statistical incidence of errors*	**1** • *greater accuracy in fact-finding,* • *increase in n. of cases* • *no increase in statistical incidence of errors*	**1** • *greater accuracy in fact-finding,* • *increase in n. of cases* • *no increase in statistical incidence of errors*
Harmonisation costs	**4** • *need to enact some new legal rules, some of which currently contrary to* ordre public in some MS	**3** • *need to enact new set of legal rules*	**3** • *need to enact new set of legal rules*
Other impacts			
SMEs and consumers	**4** • *encouraged to file lawsuit as these cases have high win rate*	**3** • *encouraged to file lawsuit, but loser-pays discourages suit in low-probability cases*	**3** • *encouraged to file lawsuit, but loser-pays discourages suit in low-probability cases*
Macroeconomic impacts	**2** • *few cartels would be deterred; more competitive markets*	**3** • *effective second pillar of enforcement fosters competitive markets*	**3** • *effective second pillar of enforcement fosters competitive markets*

2.4 Assessment of Scenario 3

This scenario would imply the award of single damages (including pre-judgment interest) for all types of infringement. Access to evidence would be based on disclosure of specific categories of documents, fact-pleading and proportionality criteria. Both the passing-on defence and offence are allowed. The judge would be given the discretion to derogate from the "loser-pays" rule by shifting some of the costs borne by the parties. Non-mandatory representative actions would be available for all types of infringement. The minimum limitation period is set at 5 years from the date in which the claimant should reasonably have had knowledge of the occurrence of damage, but such period would be suspended in case a public proceeding is started.

As a preliminary remark, this scenario entails the enactment of a more limited set of new rules. No change would be envisaged as regards the extent of damage compensation, whereas the treatment of passing-on rule would have to be expressly clarified. The limitation period would have to be increased only in a fairly limited number of member states, on the basis of the principle of effectiveness.

A. BENEFITS

A1. Deterrence

This scenario would contribute positively to deterrence, although the extent of this contribution would be way smaller than under scenario 2. The following positive impacts on deterrence would be observed compared to the *status quo*.

- First, the *disclosure of classes of documents* would increase the probability of success for plaintiffs, at the same time increasing accuracy in damage assessment[902]. As a matter of fact, this option gives plaintiffs (especially in stand-alone cases) the opportunity to overcome their information deficits during trial. This is possible as far as access to some key documentary evidence is provided at a lower cost, *i.e.* the lower costs of fulfilling the burden of specification (see also *infra* on litigation costs). This, in turn, would likely increase incentives to settle, as defendants may be led to avoid having to disclose relevant and confidential documents during trial. More in detail:
    - the (guilty) defendant may anticipate that, if the disclosure of a larger amount of documentary evidence can be requested during trial, the likelihood that the infringement will be effectively ascertained and sanctioned would be higher, since the plaintiff would be able to

[902] See our assessment of option 2 (classes of documents) in Section II.3.2.1.2 above.

gather most of the additional information needed to further substantiate her complaint at a lower cost.

- o since the disclosure request can be formulated in broader terms (involving classes of documents) – provided that the judge is satisfied that the requirements for fact-pleading have been met – stand-alone plaintiffs would be particularly benefited. Compared to follow-on litigants, standalone plaintiffs cannot rely on a former antitrust decision, thus they may not possess the information needed to identify a specific document. Requesting the disclosure of classes of documents could thus allow them to subsequently look for the missing evidence to substantiate their claims.
- o As the prospective defendant knows that increased access to evidence may be sought by the plaintiff after the initial fact-pleading, the defendant will likely face two additional costs: first, the cost of materially providing access to the documents; and the prejudice that may occur if sensible information is disclosed due to its relevance for the case. Although supervision by the court would tend to minimise abuses, evidence considered relevant (thus disclosable) may also contain information whose value will diminish right upon disclosure (for example, evidence on commercial strategies, costs, or patents). Judges may also minimise this effect by requiring, *i.a.* in camera hearings and *inter partes* non-disclosure agreements.

- Secondly, the availability of *representative actions* could greatly encourage the exercise of rights to compensation for consumers and firms having sustained scattered damages. Both business associations and associations of consumers may be granted standing to protect the interests of their members or of a larger group. With representative actions, damages claims may also be brought when no individual claims have been filed, because of lack of information about the infringement or rational apathy. Even though some individual parties (for example, close competitors who are direct victims of anti-competitive conduct) will have easier access to information than representative bodies (which remain third-parties), it is fair to assume that representative actions will allow a less costly gathering of information compared to individual suits. In particular, associations of traders may dispose of specialised knowledge of the relevant market, the applicable rules of competition law and trial experience that the individual members may not have[903].

More in detail, as we observed in Part II.2.4.3 above, with the introduction of *representative actions*:

[903] See *supra*, Section II.2.4.3 above for a more detailed explanation of this issue.

- For *cartel cases*, the benefits in terms of improved information seem to be greatest if harm is suffered by individual consumers, as proving the existence of a cartel case tends to be a very complex exercise whenever evidence of an agreement is not directly observable. In addition, a representative action by a consumer association may cure the rational apathy problem in case of scattered damages, potentially stimulating further individual proceedings from plaintiffs outside the represented group. Representative body may play the role of an additional actor having an interest and the means to detect and pursue competition law infringements. Consequently, the introduction of representative actions has the potential to increase the level of detection of competition law infringements, provided that the representing bodies are endowed with adequate incentives to act. Compared to stand-alone cases, representative actions brought as follow-on cases will have less beneficial effects as far as the reduction of information asymmetries is concerned, as fact-finding has already been carried out. There is, however, a small possibility that representative actions following public enforcement may also correct possibly inaccurate findings by public enforcement authorities[904].
- In cases of *vertical restraints* private litigation is already common, although it rarely entails a damage claim[905]. Even though the information savings from allowing representative actions will be lower, they do not disappear. Directly concerned parties will not always possess optimal information on relevant data to define the relevant market or assess the anti-competitive effects and the outweighing efficiency benefits.
- In cases of *abuse of dominance*, the availability of representative actions would contribute positively to deterrence, especially since these forms of litigation exhibit significant economies of scale, which prove very important as litigating Article 82 cases can often be quite resource-intensive. In this respect, representative actions can cure the rational apathy problem and also stimulate further individual proceedings from plaintiffs outside the represented group. Finally, representative bodies (especially trade associations) may have informational advantages compared to their represented parties. A limited risk of frivolous suits could emerge for these types of allegations, especially when the representative body is a trade or industry association: in these cases, procedural safeguards should be introduced in order to avoid the threat of strategic use of antitrust laws. Given the features of scenario 3 – *e.g.* the loser-pays rule and narrower

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[904] See, *e.g.* the example of vitamin cartels provided by Lande and Davis (2006), reported *supra* in Table 3 and described in Section I.2.1.3 above.

[905] A party desiring to have the restrictive clauses declared void will invoke Article 81 EC whenever possible.

disclosure rules than in scenarios 1 and 2 – we deem unlikely that frivolous suits would increase significantly.

Apart from these two effects, we see additional deterrence factors stemming from scenario 3 compared to the *status quo*, especially due to the following two factors.

- First, the possibility for the court to *shift some of the costs* under certain conditions could contribute to deterrence, but this effect highly depends on the actual conditions that have to be fulfilled in order for judges to order partial cost-shifting, as well as the timing of such order.
- Secondly, the introduction of a *minimum limitation period of 5 years* from reasonable knowledge of the harm appears certainly sufficient to guarantee deterrence, as it would be quite unlikely for a standalone plaintiff to miss the opportunity to exercise her right to damage compensation within this rather generous time limit. At the same time, follow-on plaintiffs would have the possibility of claiming damages after a public proceeding has become final, due to the *suspension of the limitation period*. In a very narrow set of cases, follow-on plaintiffs may find it difficult to exercise their right to damage compensation, as the limitation period may expire too soon after the suspensory effect due to the commencement of a public proceeding. For this reason, in Part II, Section 7 above we have considered that the option of envisaging a new limitation period of 1-2 years elapsing from the date in which the public decision becomes final – as in scenario 2 above – would be preferable to the suspension of the limitation period pending a public decision, as far as the victims' conditions for bringing a claim are concerned.

As a result, we assume that this scenario would contribute positively to deterrence, but to a lesser extent than scenarios 1 and 2 above.

A2. Corrective justice

Corrective justice is fully achieved whenever a high number of victims of antitrust infringements can effectively exercise their right to compensation of an amount that is in line with the actual loss sustained (*restitutio in integrum*). Compared to the *status quo*, an improvement in the attainment of this goal would be observed both if the number of cases increases, and if the extent of damage quantification is in line with full compensation. Scenario 3 is line with the corrective justice goal as regards the latter requirement, but performs less effectively than scenarios 1 and 2 as regards the former. In particular:

- The *award of single damages* ensures that compensation, in cases that are litigated, reflects *restitutio in integrum* if correctly carried out by the court. The availability of classes of documents suggests that the accuracy of damage quantification would improve. But as most cases settle for lower amounts than the nominal damage award, we can expect that in those cases the actual extent to which plaintiffs will be compensated will be less than

full[906]. Of course, one could object that plaintiffs would be available to settle a case if the settlement offer is not more favourable than the expected value of the damage award at trial; however, settlement ensures time savings for the plaintiffs, and also the avoidance of the risk of having to pay the opponent's legal expenses. In addition, as most plaintiffs can be assumed to be more risk averse than the defendants, such plaintiffs would accept to settle for amounts that are lower than the net present value of litigating the case.

- The availability of *non-mandatory representative actions* would increase the number of compensated victims, and would encourage settlement especially if coupled with sufficiently broad disclosure rules, such as those envisaged under this scenario. This would lead to both an increase in the number of cases and an increased accuracy in fact-finding, both contributing to corrective justice[907]. Representative actions also minimise the risk of overcompensation of plaintiffs on average, but they may end up rewarding some plaintiffs more than their actual loss and others less, depending on the way in which collected damages are distributed
- The *5-year minimum limitation period* is certainly sufficient to enable recovery of antitrust injury. Given the suspension of the period in case a public proceeding starts, plaintiffs would normally have sufficient time to prepare their follow-on damages actions. As already mentioned above, in a very narrow set of cases follow-on plaintiffs may find it difficult to exercise their right to damage compensation, as the limitation period may expire too soon after the suspensory effect due to the commencement of a public proceeding. This would negatively affect corrective justice; although such cases can be considered as unlikely to occur with significant frequency.
- As regards the *access to evidence* rule, the option of allowing disclosure of classes of documents preserves the centrality of the judge in scrutinizing the relevance and proportionality of the requests. The increase in the success rate and the likely improvements in the determination of damages, due to the availability of more complete evidence, would both help the achievement of *restitutio in integrum* for victims. Broader disclosure would

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[906] However, this effect will be less than under *status quo* given that scenario 3 may lead to reduced uncertainty.

[907] Introducing representative actions would improve accuracy and corrective justice also in countries where consumer associations already can intervene in existing judgments. An example is the appeals to competition cases in the UK before the CAT. As recalled by Dayagi-Epstein (2006), "consumer associations wishing to intervene are not required to satisfy any designation/specification criteria. In addition, in contrast to representative actions, consumer associations are not required to name the individuals that they represent and can operate without their prior consent". A good example is the *Burgess* case Case 1044/2/1/ 04 *M.E. Burgess J J Burgess & S.J. Burgess v. Office of Fair Trading* (2005) CAT 25.

also minimise instances of overcompensation and error costs, due to increase accuracy of fact-finding. This is particularly true with regard to stand-alone claims, although, also in cases following an administrative procedure, claimants would benefit from a more accurate quantification of damages – information that is normally missing in decisions issued by competition authorities. Finally, the likelihood of fishing expeditions and discovery blackmail is reduced due to the centrality of the judge[908].

- Finally, the *partial, discretionary fee-shifting* rule could contribute to corrective justice, although a lot depends on the way in which such rule is formulated and implemented. We assume that the rule would resemble the rule currently available in Germany, which is mostly addressed at solving the problem of plaintiffs in disadvantaged financial situation. The practice of "adjusting" the value of the claim for the purpose of reducing the cost exposure of losing plaintiffs could serve the goal of encouraging certain categories of victims of antitrust infringement (mostly consumers and small firms) to exercise their right to redress. However, it must be recalled that the German rule is coupled with strictly regulated lawyers' fees. Depending on the national legal tradition, other rules could be envisaged – *e.g.* cost-capping orders in the UK[909]. In this respect, as will be clarified below, probably the most cost-effective way to pursue the goal of reducing the cost exposure for certain categories of claimants would be to clarify at EU level the criteria that should guide judges in deciding whether to issue such orders. Such criteria could range from the financial situation of the plaintiff (such as in Germany or the UK) to the assessment of the novelty, complexity or ambiguity of the case (*e.g.* Finland, Italy) to a more generic assessment of whether the plaintiff would continue to litigate the case under a loser-pays rule. In addition, the timing of the decision is very important – legal certainty and incentives to sue are more effectively pursued if such orders are issued at the outset of trial, not at the end.

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[908] See our analysis of this issue at Section II.3.2.1.2, at A2 ("corrective justice").

[909] Cost-capping is not a widespread practice in the UK, but where they have been applied, the main reason was the financially disadvantaged condition of the plaintiff. In the leading case, *King v Telegraph Group Ltd ([2004] EWCA (Civ) 613)*, the Court of Appeal observed that *"it cannot be just to subject defendants where the right of freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win".* The inequality in this case stemmed from the fact that the Claimant was of limited means and could not afford an insurance policy, to cover his opponent's costs in the event that she lost her case for defamation. Subsequently, In *Andrew Knight v Beyond Properties Pty Ltd ([2006] EWHC 1212 (Ch D)* the Court of Appeal clarified that the principles relating to costs capping orders laid down in *King v Telegraph Group Ltd* related to defamation cases only and were not applicable to other types of litigation. Most recently, in *Brenda Willis v Neil Alick Nicolson ([2007] EWCA Civ 199)* the Court of Appeal called on the Civil Procedure Rules Committee to provide clarification following extensive consultation with the legal profession.

In summary, scenario 3 would contribute to the attainment of corrective justice, although to a lesser extent than scenario 2 – especially due to the absence of double damages for cartels, the partial nature of the discretionary fee-shifting rule and the unavailability of opt-in collective actions. Compared with the *status quo*, this scenario increases both the number of cases filed and the extent to which victims receive *restitutio in integrum*. At the same time, however, the limited number of legal changes introduced makes this scenario closer to the "no policy change" one than scenarios 1 and 2. Incremental corrective justice would be achieved mostly as a result of representative actions and the disclosure of classes of documents.

A3. Internal market

This scenario would contribute to consolidating the internal market by enabling partial convergence of limitation periods, by adding legal certainty for businesses and consumers as regards the treatment of passing-on, by introducing broader access to evidence rules and by enabling the use of discretionary partial fee shifting, which is already applied in some countries although with quite different features. Most importantly, under this scenario representative actions for damages would become available in all member states – an outcome that would not necessarily be confined to antitrust litigation, also in light of the current debate taking place at EU level within the review of the consumer *acquis*.

At the same time, however, this scenario would introduce only a limited set of new rules, whereas some EU member states (*e.g.* the UK) already have a different set of rules for encouraging private antitrust damages actions, and is discussing further how to refine those rules. An example is punitive damages, which would remain available only in a few European countries, and contrary to the public order in many others. Another example is the adversarial model of *inter partes* disclosure adopted in the UK, which would not be echoed by EU legislation. All in all, scenario 3 brings about some minimum level of protection for victims: however, the conditions for bringing claims for antitrust injury in Europe would remain very different from country to country[910].

Finally, no significant impacts would be felt as regards the provisions on the award of full single damages plus prejudgment interest, as this rule is already commonplace in EU member states.

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[910] If we add the availability of conditional fee agreements and after-the-event insurance services in some countries, the difference in the conditions for bringing claims in EU member states would be even wider.

B. COSTS

B1. Litigation costs

Litigation costs would slightly increase compared to the status quo, as a consequence of the increase number of actions. Such an increase would be mostly due to representative actions, and only marginally because of the disclosure rule and the discretionary, partial fee-shifting. At the same time, there are reasons to expect that litigation costs *per case* would decrease, as representative actions may reduce costs for plaintiffs and for courts in cases involving large groups of members, and the disclosure rule may reduce the cost of gathering evidence for both plaintiffs and defendants.

An increase in litigation may be observed if partial cost-shifting rules are not clearly defined. As was the case in UK during *King v. Telegraph Group Ltd.*, the defendant may decide to litigate over the court order to shift part of the costs[911].

Administrative costs for courts may increase compared with scenarios 1 and 2 as the disclosure rules preserve the centrality of the judge, although allowing for disclosure of classes of documents. This rule, at the same time, reduces costs for the parties and also the risk of both "fishing expeditions" and "discovery blackmail".

As a result, we expect litigation costs under this scenario to exhibit a small or even no increase, depending on the uptake of representative actions in the member states.

B2. Error costs

Under this scenario, we see no reason why error costs should increase, at least in terms of statistical incidence on the total number of trials. To the contrary, more accurate fact-finding due to access to a larger amount of information in many countries may lead to less error costs. In absolute terms, the moderate increase in the number of cases may lead to an increase in the number of errors and – where representative actions are brought – a judicial error potentially affects a larger group of plaintiffs. But overall, no significant impact on error costs may be observed.

B3. Administrative burdens

In scenario 3, administrative burdens would change as a result of the introduction of access to classes of documents, because of the expected likely

[911] The claim in *King v. Telegraph group* was that the plaintiff "ought to have made some kind of special order for their protection because the claimant had brought this action under a conditional fee agreement ('CFA') without taking out an 'after the event' ('ATE') insurance policy". See *King v Telegraph Group Ltd* ([2004] EWCA (Civ) 613).

increase in the number of cases and of the longer limitation periods in some member states[912]:

- we estimated, based on a CASH table and on the hourly wages calculated by the Germany Federal Statistical Office, that access to classes of documents would entail administrative burdens of approximately €20,000 for each defendant in complex cartel cases[913].
- The need for judges to issue a disclosure order can be considered as an administrative burden borne by the judiciary, to the extent that it entails an administrative activity in compliance of an information obligation provided by law[914]. Compared to scenarios 1 and 2, which propose an adversarial disclosure system, this scenario requires additional activities by the judge, some of which can be categorised as administrative burdens; at the same time, however, the narrower scope of discoverability leads to lower administrative activities performed by the parties.
- Whenever part of the costs are shifted, the court must issue an *ad hoc* order: some of the cost associated with this activity would fall in the definition of administrative burden faced by national administrations, as provided by the EU Standard Cost Model in the 2005 Commission Impact Assessment Guidelines.
- The limitation period chosen (minimum 5 years plus suspension) can increase administrative burdens. As it is a minimum limitation period, we assume that those countries that already apply longer periods would not change their national rules, whereas other countries (*i.a.*, Cyprus, Lithuania, Portugal, Spain) would have to increase their limitation periods, thus causing an increase in the burdens associated with some information obligations – mostly record-keeping[915].

Overall, we expect administrative burdens to increase slightly with scenario 3, compared to the "no policy change" scenario. The impact would probably be lower than under scenarios 1 and 2.

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[912] Technically, if the notifications to be issued to effectively organise a representative action are imposed by law, such activities would fall under the definition of third-party information obligations covered y the Standard Cost Model. In this case, these additional activities would have to be added to the overall calculation of administrative burdens under scenario 3. If, in addition, representative bodies need to be "certified" to be able to sue *in lieu* of their members, the certification procedure would entail further administrative burdens.

[913] See *supra*, Section II.3.2.1.2. The CASH table was developed by Nijsen, Vellinga (2002) and is commonly used in the implementation of the Standard Cost Model in countries such as the Netherlands and Germany.

[914] Recall that burdens faces by administrations are included in the scope of the EU Standard Cost Model as illustrated in Annex 10 to the Commission's 2005 IA Guidelines.

[915] See *supra*, Table 76 for a list of countries that would face some harmonisation costs to comply with the minimum limitation period.

B4. Harmonisation costs

Compared to scenarios 1 and 2, scenario 3 entails lower harmonisation costs. These costs would be mostly due to the following changes in national legal systems:

- changes in access to evidence rules in most countries, *i.e.* those countries where disclosure is limited to specifically identified documents;
- the need to allow for representative actions for damages brought by qualified or "certified" bodies.
- an extension of limitation periods for antitrust damages actions in Cyprus, Spain, Portugal, Malta, Lithuania and Slovenia.

Whether discretionary partial cost-shifting would entail harmonisation costs, it depends on the way in which such rule would be introduced at EU level. If the Commission selects a rule that defines the objective to be achieved and the criteria to be followed by the judge, but leaves member states free to select between a number of options, then harmonisation costs would be rather low.

2.4.1 Impact on SMEs and consumers

Scenario 3 features a limited number of legal changes that may encourage smaller plaintiffs to sue for antitrust damages. These certainly include the availability of representative actions, which may substantially facilitate access to justice for plaintiffs having sustained scattered damages. Also, the discretionary and partial cost-shifting rule may encourage some plaintiffs with limited financial resources, although a lot depends on the way in which such rule would be implemented.

Overall, scenario 3 may encourage SMEs and consumers to get involved in private damages claims, although the degree of involvement would be lower than under scenarios 1 and 2. In particular, SMEs and consumers wishing to initiate a standalone lawsuit would be still significantly discouraged, especially if they do not possess enough information to substantiate their claim. It would therefore be quite important to set an adequate threshold for fact-pleading, which does not inhibit attempts to file standalone claims on the side of smaller plaintiffs. Setting too low a threshold would, however, reduce the degree of control by the judge on the relative merit of the case.

The impact of representative actions on victims' ability to exercise their right to compensation will generally be positive, but a number factors might potentially create concerns. For example, consumer or trade associations in some member states might lack the financial resources to effectively litigate complex cases, and this would call into question the issue of funding of group litigation. Absent concurring measures aimed at facilitating access to justice, in these cases the mere introduction of representative actions may prove to be insufficient to

exert a significant impact on victims' effective exercise of the right to claim damages.

2.4.2 Macroeconomic impacts

The macroeconomic impact of this scenario relative to "no policy change" would be smaller than scenarios 1 and 2, but still significant. This set of rules is less likely to enable the emergence of a strong "second pillar" of enforcement, but would add to public enforcement the instrument of representative actions by certified and qualified bodies, as well as broader access to evidence rules and – to a limited extent – a degree of cost protection for certain categories of claimants. Accordingly, much would depend on whether representative actions would actually take off rapidly, allowing consumers and businesses to exercise their rights at lower costs.

In this respect, the choice between opt-in and opt-out does not seem to be irrelevant. If an opt-in scheme is selected, there might be a risk that defendants do not internalise all the social cost they impose on society as a result of their anticompetitive behaviour. Accordingly, the real "disciplining" effect on prospective infringers would be lower[916].

More in detail, distinguishing by type of infringement and type of claim, we would expect the following:

- Depending on the effectiveness of representative action schemes introduced, *cartels* may be slightly deterred at the margin. As we would expect well-equipped consumer and trade associations to be able to contribute – although to a very minor extent – to cartel detection, cartelists would then face an additional threat. However, this would not suffice to exert a disciplining effect on prospective cartelists, since: (i) the expected damage awards would often be related to a smaller group than the total number of victims (especially if an opt-in mechanism is chosen); and (ii) cartelists would never have to face punitive damages. As a result, to form a cartel would often remain an appealing option for prospective infringers.
- In *vertical restraints*, upstream and downstream market players may detect an infringing behaviour with greater likelihood than victims of cartels; in these cases, the inquisitorial rule on access to evidence and the limited probability of partial cost shifting would leave them roughly in the same situation as they are today in most member states. They would thus remain

[916] The UK Office of Fair Trading, in its recent response to the Consultation on representative actions in consumer protection legislation, observed that an opt-out mechanism may be more effective to ensure consumer redress. See OFT (2007c).

reluctant to litigate under the loser-pays rule, also due to the lower probability of winning at trial[917].

- As regards *exclusionary abuses*, competitors are unlikely to belong to a very large group, such that group litigation becomes a very useful option. As most of the remaining features of the *status quo* would remain roughly unchanged, we see no disruptive changes occurring for those plaintiffs. Whenever a large group of plaintiffs is affected by the dominant firm's behaviour, a qualified trade association may file a representative action on behalf of a group of named firms, thus reducing litigation costs for plaintiffs.
- More generally, as regards *Article 82* cases – notoriously quite expensive and difficult to litigate – scenario 3 does not appear sufficient to provide adequate encouragement to victims, which would still face the risk of lengthy and expensive litigation, with often low expected win rates.

As a result, we do not expect scenario 3 to contribute significantly to macroeconomic performance. Much would depend on whether representative actions would actually take off rapidly, allowing consumers and businesses to exercise their rights at lower costs.

2.4.3 Subsidiarity and proportionality

As we observed for scenarios 1 and 2, and *a fortiori*, we consider this scenario as being compliant with the subsidiarity principle. To the contrary, this set of policy measures may end up being less than proportionate to the goal, as the expected impact on deterrence and corrective justice would be too small to ensure achievement of the ultimate goal of this policy action – *i.e.* ensuring that victims of EC competition law infringements have access to truly effective mechanisms for obtaining full compensation for the harm they suffered. At the same time, the set of measures proposed would entail lower costs, and especially lower harmonisation costs. In this respect, scenario 3 may still be considered as preferable to the *status quo* in terms of its benefit-cost ratio.

2.4.4 Overall assessment and summary table

If we assume that the ultimate goal of the proposed policy action is to "facilitate the bringing of 'stand-alone' and 'follow-on' private actions claiming damages", this scenario may ultimately prove insufficient to fully attain this objective. Furthermore, if we assume that one of the objectives of the policy measures to be adopted is ensuring that consumers have effective means to seek redress for antitrust injury in the territory of the European Union, here too scenario 3 preserves significant differences between member states. A "natural experiment" in this respect is certainly the UK, a jurisdiction in which

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[917] See above, Part I.4.1, Table 18 for an estimate of probabilities of winning at trial for different types of allegations.

disclosure rules are broader than in most other EU countries (and also broader than those envisaged in scenario 3); cost-capping orders (and various forms of legal aid, such as the CFA) are already to some extent available to solve the problem of the financial disadvantage of the plaintiff; and representative actions are already possible since the 1998 Competition Act. Even in the UK, as we showed in Section 1.2 and 1.3, Part I of this report, private antitrust litigation seems to be developing - and if so, quite slowly - and there is no evidence of litigation increasing exponentially. Likewise, absent more ambitious measures, we do not expect private antitrust litigation to develop quickly and become a true "second pillar" of antitrust enforcement in Europe.

This, of course, does not imply that the measures envisaged under scenario 3 would in no way contribute to the enhancement of private damages actions in Europe. However, concurring measures – including measures not completely falling within the scope of this Report – may be needed either at EU or national level to ensure that victims are actually encouraged to sue for damages.

Table 78 below summarises our assessment of scenario 3.

Table 78 – Impact assessment of scenario 3

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *increase in magnitude of damage award due to repr. actions; but not sufficient to deter cartels*	**2** • *limitation and disclosure rules increase deterrence over status quo*	**2** • *limitation and disclosure rules increase deterrence over status quo*
Corrective justice	**2** • ***n. of compensated victims:*** *increase in compensated victims (but lower than in scenario 1-2);* • ***alignment with actual harm:*** *in principle, aligned, but risk of undercompensation also due to settlement no risk of duplicative liability; case selection effect*	**2** • ***n. of compensated victims:*** *slight increase of compensated victims;* • ***alignment with actual harm:*** *in principle, aligned, but undercompensation due to settlement; no risk of duplicative liability case selection effect*	**2** • ***n. of compensated victims:*** *slight increase of compensated victims;* • ***alignment with actual harm:*** *in principle, aligned, but undercompensation due to settlement; no risk of duplicative liability case selection effect*
Internal market	**2** • *conditions for bringing claims would remain different in member states*	**2** • *conditions for bringing claims would remain different in member states*	**2** • *conditions for bringing claims would remain different in member states*
Costs			
Litigation costs	**2** • *increase in the number of lawsuits;* • *costs of repr. actions* • *lawyers' fees* • *disclosure*	**1** • *increase in the number of lawsuits;* • *lawyers' fees* • *disclosure*	**1** • *increase in the number of lawsuits* • *lawyers' fees* • *disclosure*
Administrative burdens	**1** • *slight increase in population and in frequency*	**1** • *slight increase in population and in frequency*	**1** • *slight increase in population and in frequency*
Error costs	**1** • *greater accuracy in fact-finding* • *slight increase in absolute terms* • *no increase in the statistical incidence of errors*	**1** • *greater accuracy in fact-finding* • *slight increase in absolute terms* • *no increase in the statistical incidence of errors*	**1** • *greater accuracy in fact-finding* • *slight increase in absolute terms* • *no increase in the statistical incidence of errors*
Harmonisation costs	**2** • *need to enact rules on partial fee-shifting and repr. actions*	**2** • *need to enact rules on partial fee-shifting and repr. actions*	**2** • *need to enact rules on partial fee-shifting and repr. actions*
Other impacts			
SMEs and consumers	**2** • *encouraged to file follow-on lawsuits through group litigation*	**1** • *SMEs slightly encouraged to file lawsuit in vertical cases*	**1** • *little encouragement in cases with low win rate due to loser-pays*
Macroeconomic impacts	**1** • *cartels not significantly deterred; moderate increase in follow-on representative actions*	**1** • *moderate increase in cases and follow-on representative actions*	**1** • *moderate increase in cases and follow-on representative actions*

2.5 Assessment of Scenario 4

This option is identical to Option 3, but – unlike the first three options – does not entail any legislative measure at EU level. Under this scenario, the European Commission would identify and recommend the adoption by member states of a set of measures and good practices observed at national level, by providing national legislators with guiding principles for facilitating private antitrust damages actions in the EU. Accordingly, this option only requires the issuing of soft law by the Commission.

In line with scenario 3, such soft law would have to hinge on the following aspects:

- recommending discretionary partial cost-shifting as a potential way to facilitate access to justice for certain categories of consumers;
- clarifying the application of proportionality for national judges issuing disclosure orders on classes of documents;
- illustrating viable models for effectively introducing non-mandatory representative actions;
- recommending that member states where the subjective limitation period is less than 5 years extend it to at least such duration, and recommending that a new, shorter limitation period is introduced for actions following a public authority decision after it becomes final.

Of course, assessing the impact of this scenario relative to scenario 3 highly depends on the degree to which member states will actually receive the Commission recommendations, by enacting new legislation at national level. An obvious advantage of this scenario is that it entail no harmonisation costs, which we found to be positive (although not significant) under scenario 3. An equally obvious shortcoming is that internal market benefits (so-called "level playing field") would be less likely to materialise, as they would be left to the spontaneous initiative of national legislators.

Compared to the previous scenarios, the suitability of scenario 3 to achieve the desired goal of facilitating private antitrust damages actions in Europe – besides a more general "awareness-raising" impact – would have to rely on the following two effects.

- A *"moral suasion" effect, which leads member states to consider legislation according to the recommendations of the Commission*. There is a growing stream of literature on the use of "soft law" to achieve broad policy objectives at international and EU level. As acknowledged in the literature, the least

intrusive means of seeking policy convergence is the use of pure soft law, such as that envisaged under scenario 4[918]. The use of benchmarking, such as recommendation of best practices, has also been widely pursued by international organisation such as the OECD to promote new modes of governance and better regulatory practices. However, there is no convincing evidence that the "moral suasion" effect has ever been so strong as to lead member states to change their national laws, especially when no common objectives/targets had been agreed upon by different legislators[919]. In the case of scenario 4, we assume that no common target in terms of private antitrust litigation could be set[920].

- A *"regulatory competition" effect, with best practices being adopted by member states through mutual learning, leading to a "race to the top"*. Although a complete illustration of the literature on regulatory competition and mutual learning would fall outside the scope of this report, it is worth recalling that some of the most authoritative scholars in the field have expressed their doubts that the "competition between competition laws" would ultimately lead to a race to the top. For example, Kerber and Budzinski (2004) observe that, although in principle "a decentralised system of competition law regimes allows for experimentation and mutual learning about the best ways to protect competition", under the assumption that firms can choose where to establish and operate according to the relative scope and enforcement of antitrust laws, a prisoners' dilemma may emerge, where "[i]ndividually, each firm is interested in being not restricted in its business practices on the market, leading to the choice of less restrictive or poorly enforced competition laws. Although the firms might be interested in being protected from anticompetitive behaviour of others and, therefore, might prefer a stricter competition law, the prisoners' dilemma situation can lead to a process, in which jurisdictions (in order to induce firms to choose their competition law) change their laws to less stricter ones. Consequently, a race to the bottom-process might ensue, leading to a defective competition of

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[918] See, i.a., Citi and Rhodes (2007), New Modes of Governance in the EU: Common Objectives versus National Preferences, European Governance papers N-07-01.

[919] For a study showing the limited efficacy of benchmarking uses at OECD, see Armingeon and Beyeler (2004). For an application to the EU, see Gronendijk (2004).

[920] Recently, the use of soft law as a means to achieve objectives in line with the internal market was rejected by the Commission in the impact assessment on the roaming regulation. There, the Commission stated that "there is a risk that soft law ... will not produce the desired results. There is no guarantee that the 'moral suasion' effect of a recommendation will enhance competition in the mobile roaming market. It also entails a high risk of diverse approaches across the EU. It could bring about greater transparency of prices but it is likely to have low impact on consumers in general, given its likely relative ineffectiveness." We do not consider that the moral suasion effect could work better for an articulated set of policy measures such as the ones that compose scenario 3, let alone scenarios 1 and 2.

> competition laws. From this perspective, the idea that choice of law can be applied to competition law seems to be entirely mistaken and even absurd from the beginning."[921]

However, the risk described by Kerber and Budzinski (2007) may be mitigated by a number of factors. First, the application of antitrust damages rules does not depend on the place of the establishment of the defendant, but on the *lex loci damni* (*i.e.* the "law of the country where the market is, or is likely to be, affected"), as was recently stated by Article 6 of the "Rome II" Regulation, adopted as Regulation (EC) No. 864/2007 on 11 July 2007[922]. Secondly, the argument that firms may "vote with their feet" may hold only at the margin, for firms wishing to enter a new market, whereas established undertakings are unlikely to move their headquarters only to follow less stringent competition rules.

As a result, whether a "race to the top" or a "race to the bottom" would actually emerge in scenario 4, is ultimately an empirical question, very difficult to solve *ex ante*[923]. Although we do not pretend to be exhaustive in our treatment of the subject, what is worth being mentioned is that there are reasonable ground to express concerns that, absent a Community instrument, relying on mutual learning spurred by soft law as a potential means to achieve enhanced private antitrust enforcement in Europe would appear optimistic at best. If one adds that one of the often stated goals of the upcoming White Paper is the attainment of a levelled playing field for the exercise of rights to compensation of antitrust

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[921] See Kerber, W. and O. Budzinsky (2004), *Towards a Differentiated Analysis of Competition of Competition Laws,* German Working Papers in Law and Economics n. 14, 2004.

[922] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, [2007], p. 40–49. Article 6(b) derogates from the general principle set for non-contractual obligations (*lex loci delicti commissi*), by stating that: "[w]hen the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court".

[923] The race to the top/bottom argument has been developed in the literature mostly as an analogy to corporate law: the term "race to the bottom" was coined by US Supreme Court Justice Louis Brandeis in 1933, in *Ligget Co. v. Lee*; and the first scholarly paper on the issue is due to William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, (1974). However, the analogy between competition law and corporate law does not entirely hold, since – as already mentioned in this section – competition law applies according to where the business takes place, not where the company is incorporated.

injury in Europe, the need for a Community instrument becomes even more evident. After all, as we recalled in the introduction to this Report, private antitrust damages action have in principle been possible since the 1957 Rome Treaty, but have not become an important "second pillar" to date.

A. BENEFITS

In terms of deterrence, the adoption of soft law recommending a limited number of legal changes would entail a fairly limited impact. As scenario 4 is identical to scenario 3, but is implemented only through soft law (*i.e.* a recommendation), the already limited impact of scenario 3 on deterrence – mostly confined to the introduction of representative actions, discretionary partial cost-shifting and access to classes of documents instead of specific documents – here becomes even weaker. Depending on whether mutual learning and moral suasion ultimately lead all European legislators to adopt national rules aimed at encouraging private antitrust litigation, a positive impact on deterrence may materialise over time. Most likely, the situation may end up closely resembling the *status quo*, which is already characterised by a limited number of member states introducing policy measures – such as relaxing restrictions to conditional fee arrangements, or introducing representative actions – that pursue the goal of a more effective exercise of the right to damages. In those countries, a small but positive impact on deterrence would therefore be observed anyway in the years to come.

As regards corrective justice, the prospects for increased compensation of damages would be mostly dependent on whether, on top of national legislators that are already taking action to enhance private antitrust enforcement, others would follow suit due to soft law, awareness-raising instruments are adopted by the Commission.

Finally, we do not consider this option as likely to achieve a level-playing field, by putting European businesses and consumers in similar conditions to exercise their right to damages regardless of the national jurisdiction where they seek redress.

B. COSTS

The impact of soft law adopted by the European Commission on litigation costs would be nil. To the extent that this action leads national legislators to enact legislation in this field, an indirect impact on increased litigation costs may ensue. But this would, however, be highly dependent on the actual measures that are undertaken at national level.

Likewise, it is impossible at this stage to assess what the impact of scenario 4 would be on administrative burdens and error costs. And harmonisation costs would not emerge, as – strictly speaking – there would be no harmonisation imposed by the proposed set of non-binding policy measures.

2.5.1 Overall assessment and summary table

For sake of consistency with the assessment of the previous scenarios, we show in Table 79 our assessment of the likely costs and benefits of this scenario.

Table 79 – Impact assessment of scenario 4

	Cartels	Vertical restraints	Abuses
Benefits			
Deterrence	**2** • *would have to rely on national initiatives and recommended representative actions*	**1** • *national initiative still sparse;* • *risk of race to the bottom*	**1** • *national initiative still sparse;* • *risk of race to the bottom*
Corrective justice	**2** • ***n. of compensated victims:*** *compensated victims depend on actions at national level, especially on representative actions* • ***alignment with actual harm:*** *In principle, aligned with* restitutio in integrum, *but see scenario 3*	**1** • ***n. of compensated victims:*** *compensated victims depend on actions at national level, especially on representative actions (low incidence)* • ***alignment with actual harm:*** *In principle, aligned with* restitutio in integrum, *but see scenario 3*	**1** • ***n. of compensated victims:*** *compensated victims depend on actions at national level, especially on representative actions (low incidence)* • ***alignment with actual harm:*** *In principle, aligned with* restitutio in integrum, *but see scenario 3*
Internal market	**1** • *likely fragmentation; limited impact of soft law*	**1** • *likely fragmentation; limited impact of soft law*	**1** • *likely fragmentation; limited impact of soft law*
Costs			
Litigation costs	**1** • *low level of litigation*	**1** • *low level of litigation*	**1** • *low level of litigation*
Administrative burdens	**0** • *very small population*	**0** • *very small population*	**0** • *very small population*
Error costs	**1** • *very little litigation.* • *there may be errors due to absence of learning effects and lack of access to accurate evidence*	**1** • *very little litigation.* • *there may be errors due to absence of learning effects and lack of access to accurate evidence*	**1** • *very little litigation.* • *there may be errors due to absence of learning effects and lack of access to accurate evidence*
Harmonisation costs	**0** • *no harmonisation: potential risk of forum shopping and "race to the bottom"*	**0** • *no harmonisation: potential risk of forum shopping and "race to the bottom"*	**0** • *no harmonisation: potential risk of forum shopping and "race to the bottom"*
Other impacts			
SMEs and consumers	**0** • *no significant change; their access to justice would remain limited*	**0** • *no significant change; their access to justice would remain limited*	**0** • *no significant change; their access to justice would remain limited*
Macroeconomic impacts	**0** • *low or no impact*	**0** • *low or no impact*	**0** • *low or no impact*

ANNEXES

ANNEX I – FUNDING OF ANTITRUST LITIGATION

The difficulties facing prospective claimants in an antitrust damage claim are common throughout all jurisdictions. Can liability be proved? Can causation be demonstrated? If liability and causation can be established can *quantum* be established? Can a competent lawyer be sourced? Can competent forensic experts be found? Can a lawyer prepared to conduct cases on a shared risk basis be found? Difficulties in any of these areas may fatally damage a prospective claim or reduce its prospects so that it fails a cost/benefit test and will be abandoned.

The cost/benefit test will not only be influenced by the factors above but even if the benefits look promising with substantial recovery possible then this has to be weighed against the costs of overcoming the barriers, *i.e.* court fees; expert fees and lawyers and in cases for commercial clients management time and opportunity cost. A case with good prospects of success with a potential high return may fail the test because, for example, the legal costs of losing the case constitute such a large potential risk that prospective claimants are put off.

Taking a cross European view on the cost/benefit test in a sample case which could be litigated in more than one fora on the same fact pattern is to all intents impossible. The matrix of different court cultures, costs and risk sharing arrangements, let alone the relative fees of lawyers and experts make the task so complex as to not be realistically worthwhile as was demonstrated by the Ashurst Report[924]. The situation is also labile as is demonstrated in Germany where court fees were historically high but recoverable legal fees more limited and predictable. More recently law firms (possibly influenced by the Anglo-American model) are reluctant to carry out complex commercial cases except on the basis that they are paid on high hourly rates which are unlikely to be recoverable against the loser.

This section is addressed to this issue of the funding of antitrust litigation and seeks to provide some solutions. It discusses a number of potential funding options, particularly funding by third parties and the contingency legal aid fund option. It argues that these two approaches to funding litigation are worthwhile investigating further and may require the adoption of some limited elements of Community legislation to promote the use of these funding mechanisms. This section also considers the inter-relationship between the 'opt

[924] See pages 92 to 100.

in' and 'opt out' approach to mass claims and the funding of such claims and the operation of the loser-pays rule.

Funding by Third Parties

In discussing the funding by third parties, we begin the discussion with an examination of the position in England and Wales, especially since in these jurisdictions the issue of funding has been subject to thorough debate after the *Woolf* report, which culminated in the Civil Justice Council's recommendations on "Improving Access to Justice" in June 2007, and the proposals issued by the OFT in its Recommendations on Private Actions in Competition Law of November 2007 (OFT, 2007c). Moreover, the problem is particularly marked in England because it is generally acknowledged that, while English court fees are low, lawyers' costs are extremely high and unpredictable – it would not be unusual for legal costs in a competition case to exceed £500,000.

While, the English jurisdiction has probably the greatest potential for recovery of court costs and lawyers fees as the Civil Procedural Rules 1988 start from the premise of the winner recovering his costs from the unsuccessful party[925] the rule is hedged about with discretionary sub-rules which normally reduce recovery. For example, the hourly rate of legal fees may be challenged as excessive. The case can be won but the costs can be lost, either because the winning party has failed to do better than an offer to settle made by their opponent (claimant or defendant or fellow defendant) or that the conduct of the case by a party means that party cannot recover all or part of its costs. A further complication concerns the definition of 'winning'. Overall a party may win on a main issue but lose on subsidiary issues the costs of which can exceed the gains in costs on the main issue. It follows that even in 'follow on' cartel cases with a prior liability finding cost risks remain — failure to beat a Part 36 offer of settlement of settlement by a cartel member or failure to recover all the not inconsiderable fees of a forensic accountant.

The standard means of financing commercial contentious litigation in England and Wales is an arrangement between the client and lawyer with the client being responsible for his own lawyer's fees and outgoings (such as expert fees and court costs) in any event: win or lose. If the case is lost the client pays these fees *and* a substantial proportion of the opponent's fees and expenses. If the case is won the client will still have to pay a proportion — often a substantial proportion — of her own lawyer's fees and expenses. It follows that third party damage claimants, individuals or companies, will look to spread or eliminate their residual risk even in a case where the defendant has admitted a cartel 'offence' but not, of course, liability to a particular claimant or liability at a particular level.

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[925] CPR Rule 44.3 (2)(a)

The policy of choice in England and Wales to reduce or spread cost risks is the conditional fee arrangement. However, while this can reduce or eliminate a claimant's *own* lawyer's costs it may not entirely cover a claimant's own outgoings or a successful (or partly successful) opponent's costs and outgoings. The unique solution to this is After the Event insurance recoverable as an additional outgoing from a losing opponent. However, because of the uncertainties in this area of litigation After the Event insurance is not, in practice, available. Essentially, any After the Event premium in this area would be so expensive as to be a huge burden to buy at the start of litigation and because of the cost not necessarily recoverable.

One alternative commercial approach would be to share risk *and* reward with an external funder in the same way as instructing an agent to sell a business or obtaining external capital by selling a tranche of shares.

Traditionally, English courts have been antipathetic to third party financial support to litigation (maintenance) in particular where it involved taking a share of the reward as well as the risk (champerty). More recently judicial attitudes have shifted to a recognition that such commercial arrangements have a place when conditional fee support backed by After the Event Insurance is not available and the courts have created a solution to the funding of commercial litigation. This solution is particularly useful in cases where the prospective claimant is of limited funds for example a liquidator recovering a company's sole asset or a company financially damaged by cartel activity.

Arkin v. Borchard Lines Ltd [926] was a claim against an alleged shipping conference cartel. The funder, Managers and Processors of Claims,[927] had earlier been involved in the Factortame[928] saga assisting Spanish fishermen in their claims against the UK government. In both cases funds were needed to deal with expert evidence and documentary evidence. Such a funder will normally be paid on a contingency fee based on a percentage of damages recovered. (In the *Arkin* case the claimant's lawyer made the ultimately disastrous decision to conduct the case on a conditional fee basis). The case was lost. The claimant had no assets and there was no After the Event Insurance. The Court of Appeal in a policy decision balanced the interests of successful defendants to be indemnified in costs with the need to allow claimants to engage funders to allow them to access justice. For each £1 that a funder advanced to a party they would have a contingent liability of £1 towards the other party's or parties' costs if the case was lost by the funder's client. In the

[926] [2005] EWCA Civ 655

[927] Now called Elision

[928] Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) No2 [2002] EWCA Civ 932

Arkin case the advance was £1.2 million and the funders contribution to the defendants' costs was therefore capped at £1.2 million.

While, this might be viewed as making third party funding less attractive, in fact the opposite is the case. Prior to *Arkin*, the position was uncertain and there was always the possibility of the third party funder facing uncapped liability. Now the position is clear, the down side liability is predictable and the investment on a total loss basis can be reserved for. This will allow funders to adjust the percentage of damages they require to fund the case according to a matrix of the amount advanced, the contingent cost liability and the predicted chance of success. It is likely that funders will have to factor in the prospective claimants' own lawyer's fees (at least on a discounted basis) if the case is lost, as conditional fees may seem to be unattractive.[929]

Arkin left free the possibility that the court might intervene to bar recovery of third party funding outlays (or stay a case during proceedings) if it was felt that the funder was interfering with the conduct of the case. In *Campbells Cash and Carry Limited v Fostif Pty* [2006] HCA41 (in Australia, another common law jurisdiction) a representative action was brought on behalf of tobacco retailers to recover state license fees unconstitutionally levied. They were backed by a third party funder and this approach survived an attempt to declare it an abuse of process:

"To lawyers raised in the era before such multiple claims, representative actions and litigation funding, such fees and conditions may seem unconventional or horrible. However, when compared with the conditions approved by experienced judges in knowledgeable courts in comparable circumstances, they are not at all unusual. Furthermore, the alternative is that very many persons, with distinctly arguable legal claims, repeatedly vindicated in other like cases, are unable to recover upon those claims in accordance with their legal rights..." and "It is against the inherent inequalities, presented by these litigious facts of life, that a representative action may, under proper conditions, afford a litigant with an individual claim and a justifiable prospect to secure practical access to that litigant's legal rights in association with many others. The individual claim may (as in the case of many tobacco retailers in these proceedings) be comparatively small and hardly worth the expense and trouble of suing. But the aggregate of the claims of those willing to proceed together, as proposed by a funder and organiser such as Firmstones, might be very large indeed. What is a theoretical possibility, as an individual action or series of actions, needs therefore to be converted into a practical case by the intervention of someone

[929] One reason for this is that unlike under US style contingency fee funding the reward for success is an increase on lawyers' fees rather than the much bigger potential pot of a share of the damages. But see OFT (2007c), where the recommendation on (regulated) contingency fees issued by the Civil Justice Council is deemed worthy of further consideration by the UK Office of Fair Trading.

willing to undertake a test case, followed by others willing to organise litigants in a similar position, and under appropriate conditions, to recover their legal rights by helping them to act together..."(Kirby J)

Fostif suggests a more commercial approach which accepts that funders in return for a contingent risk have the right to take the lead in running a case. Any substantial development of this type of funding must inevitably lead to a recognition of funders' rights as a funder will require the means to protect their investment in a case by, for example, arranging for an independent lawyer to decide if a settlement offer is reasonable if funder and client or clients disagree[930]. In any cases involving multiple clients funders may well influence the make up of the group by leading on the marketing of the litigation opportunity. Such arrangements are currently unregulated but, as suggested below, may require regulation on a generic basis beyond what a court may be willing to do in any particular case.

The English market for litigation funding, including competition claims, has not yet been developed and this is reflected in a small number of providers[931]. This limited provision reflects the limited number of insurers providing after the event insurance to back conditional fees for commercial cases. However, this may be about to change[932].

Work could be done to establish across jurisdictions a welcome for such funders in the courts free of technical challenges and procedural difficulties in order to establish a market in funding; to that end, it would be necessary to ensure that there is sufficient legal certainty in national law, so that third party funders are permitted to participate in litigation across the EU.

Contingency Legal Aid Funds

One option to be explored is the contingency legal aid fund. Such schemes operate in different ways but, essentially, they operate as public, non-commercial, funds to support litigation. In Hong Kong the scheme operates a supplement to normal legal aid for those whose income exceeds the eligibility

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[930] Such arrangements are common in After the Event insurance

[931] Commercial Litigation Funding, Corporate Claims International, IM Litigation Funding (IMLF) and Smith & Williamson. Calunius is a broker which does not invest its own funds, but seeks to source funders for claimants.

[932] ProzessFinanz is a small but lively sector in Germany supporting commercial litigation typically for a 30% share of damages whilst indemnifying against costs if the case is lost. Allianz the giant German insurer, through its subsidiary Allianz ProzessFinanz GmbH, has been financing litigation for the past five years, mainly funding cases in Germany, the United Kingdom, Switzerland and Austria. As of November 2007 Allianz is opening an office in London.

limits.[933] Schemes operate in different ways but as a minimum if a scheme accepts a case then in return for a cut of damages the client receives an indemnity against the opponent's costs as well as payment of disbursements.

This leaves the question of how the client's lawyer is paid.[934] This may be by the fund or on a contingency fee basis taking a separate tranche of damages, particularly suitable in class actions where the court can allocate separate compensation to the fund, the lawyers and the class. Essentially, such schemes are third party funders and as such to thrive they need start up and working capital. Start up because even if successful in picking the right cases they will suffer negative cash flow until cases are completed. This problem was resolved in Hong Kong by a loan from the Jockey Club Lottery; elsewhere by loans from the public or community sector.[935] Absent such support, one possible way forward may be by securitisation of the scheme with a third party financier taking on all the present and contingent liabilities until the fund becomes self-sufficient.[936] CLAFs are operating in a number of jurisdictions including Australia but for the purposes of this discussion the most useful examples are in Canada.

Canada being a nation of provinces and territories with both common law and civil law systems offers a unique comparison to the European Union. While there are a number of areas with CLAFs the chosen comparators are Quebec and Ontario representing similar approaches to the problem of financing collective action from two different legal and political traditions.[937]

By an Act Respecting the Class Action 1978 Quebec established its class action procedure and a class action agency: "Fonds d'aide aux recours collectifs" whose objective is to ensure the financing of class actions in the context of a civil law jurisdiction. When deciding whether or not to grant assistance the Fonds:"shall assess whether or not the class action may be brought or continued

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933 Such a supplemental scheme is currently being considered in Northern Ireland for the Northern Ireland Legal Services Commission.

934 Some schemes may pay the lawyer in any event (win or lose), with a higher rate in case of success; whereas some may only pay on success.

935 The scheme was established in 1984 with a loan of $HK1 million. The whole of this amount was never drawn on and operated as an overdraft facility. Money flowed in relatively quickly. ($HK 1 million in 1984 was a substantial capitalisation). By 1989/1990, all of the overdraft facility was paid off and the scheme was self-funding.

936 Asset securitisation involves the sale of income generating financial assets (such as loans, trade receivables and leases) by a company to a special purpose vehicle ("SPV"). The SPV, which might be a trust or a company, finances the purchase of those assets by the issue of bonds, which are secured by those assets. In this instance the client transfers the benefit of the chose in action to the CLAF.

937 See generally "Financing Class Actions", J.H.McMaster and W.K.Branch of Branch McMaster Attorneys, at *wbranch@branchmac.com*.

without such assistance; in addition, if the status of the representative has not yet been ascribed to the applicant, the Fonds shall consider the probable existence of the right he intends to assert and the probability that the class action will be brought."[938]

The Fonds pays the assisted person or persons attorney fees and expert's fees and other incidental expenses; offering vital cash flow as the case proceeds and replacing the firm's bank or the partners' capital in a US plaintiff litigation firm. Up to 1999 the Fonds had made 995 decisions with 79 per cent of cases being approved for funding. Funding was provided to 66 per cent of class actions. The Fond's capital is guaranteed by the provincial government and working capital is provided by a subrogation from damages ranging from 2 to 10 per cent in individual awards to up to 90 per cent of the aggregate award as well as subsidy.[939] Crucially, this subvention applies to all class actions. In effect the class of classes subsidises the system. A further enormous advantage is that although a representative plaintiff remains liable for costs following the event this is ameliorated by the costs being low.[940]

The latest report on the activity of the Fonds[941] demonstrates the continued vigour of this approach. Sixty-five claims were presented and 51 accepted. The level of aid was Can$1,509,123 up by Can$40,000 on the previous year. While 85 per cent of claims were made by individuals 8 per cent were by non-profit making bodies and 5 per cent by co-operatives.[942] Eighty-nine per cent of defendants were for profit organisations, local or central government. Clearly, "equality of arms" is well served in this arrangement.

The Fonds whilst part of a US inspired class procedure is: "essentially part of the statist Quebec tradition in which, the state assumes the responsibility for promoting equality and social justice it aims to put (the applicant) at the level of his adversary in strength and organisation."[943]

Certainly, the Fond are promoted by the Government of Quebec as an essential part of a right to justice and the values of "a modern and united society".[944]

The equivalent arrangement in the common law jurisdiction of Ontario, the Ontario Class Proceedings Fund, was set up with a $500,000 grant from the

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[938] s.23

[939] $600,000 in 2000.

[940] Limited to $1,000 to $3,000. Disbursements remain to be paid. One could envisage a combination of representative plaintiffs with nothing to lose being chosen and disbursements being covered by the plaintiff lawyers to resolve this difficulty.

[941] Fonds D'Aide Aux Recours Collectifs Rapport Annuel 2003–2004.

[942] Ibid.

[943] Translation from C. Younes, *Le Recours Collectif Quebecois; les Réalités Collectives a Travers Le Prism Du Droit* (2000), 15 Can.J.L. & Soc'y 111 at p.114.

[944] The Quebec Portal can be found at www.gouv.qc.ca/wps/portal/pgs/commun.

Ontario Law Foundation. If the case succeeds at trial or on settlement then the Fund recovers its outlay plus 10 per cent.[945] The Fund operates in a procedural environment in Ontario which is open to class proceedings and increasingly open to contingency fee funding; first of all by an element of Nelsonian blind eye but increasingly with legislative support.[946]

A successful applicant will receive funding for disbursements (but not legal fees) and indemnity from adverse costs awards made in favour of the defendants to the class proceeding. The Fund carries the risk. A general view is that the Fund has not been wholly successful.[947] To date, the Fund has failed to achieve its primary objective, namely, access to justice, for a number of possible reasons. First, the 10 per cent levy on any judgment or settlement may be a disincentive. Secondly, there are high transaction costs associated with preparing the application and by time high adverse costs may have been built up without protection. Thirdly, the Fund offers protection but not active litigation support: a lawyer willing to act on a contingency fee must be found.

While, the Quebec Fonds seem well integrated into the legal system, the 2002 and 2003 Annual Reports of the Ontario Fund show that fewer than a dozen applications were made in the period 2001 to 2003, and that fewer than a handful of applications were granted.

"It is likely that, in the early years of the Fund, the Committee administering it was extremely conservative in its funding decisions. Because the original endowment was only $500,000, there was a risk that it could be completely depleted in a short period of time by disbursements and adverse cost awards. However, latterly, the balance in the Fund has been high: in 2001, $613,803; in 2002, $3,492,427; and in 2003, $3,388,310.76 It remains to be seen whether this will result in a greater number of successful applications in future."

The two funds betray their political and social pedigrees with the Quebec Fonds having an element of central state policy while the Ontario Fund although directed towards cases with a public interest appearing to be constrained by a more risk averse approach; perhaps, contributed to by more limited funding.[948] While, Quebec procedure does allow for the loser-pays rule it is limited in scope and, in any event, the quantum of costs is low. In Ontario the loser-pays rule applies in all its rigour unless the case is a test case, raises a novel point of law or a matter of public interest.[949] Thus, although contingency fee funding assists

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[945] Whereas Quebec it is 2–10% of claims not in addition to outlay.

[946] Justice Statute Law Amendment Act 2002.

[947] See Lerners LLP, *www.lerners.ca/commercial lit and f.n. 59.*

[948] See G. Watson, "Class Actions: The Canadian Experience" 11 Duke J.Comp. & Int'l L. 269 at p.3.

[949] Class Proceedings Act S.O. Ch.6, para. 31(1)(1992) (Can).See Lerners LLP, www.lerners.ca/commercial lit and f.n. 59.

plaintiffs in respect of their own side costs it leaves them vulnerable if the case is lost. While, in practice the representative plaintiffs have avoided an adverse cost award,[950] the contingent danger makes this a risky occupation and highly inappropriate in any case that has survived the class certification test. If a class action is supported by the Ontario Fund then this contingent danger is removed: the Fund indemnifies the representative plaintiff. However, from the point of view of the attorney it is unsurprising that in Ontario, whose attorneys are much more influenced by those to the south of the border, the fund with its levy is less attractive than the prospect of taking a contingency fee risk and sharing the spoils. The result is the Fonds has been much more active.

The Canadian Competition Act provides a diet of private remedies not dissimilar to those envisaged in Europe following modernisation of the competition regime. The analysis above suggests that attorneys in Ontario will prefer to take a punt on antitrust damages cases, without troubling the Fund, if the risk seems reasonable and the reward is high enough. Certainly, this was the approach in the price fixing case of *Chada v Bayer Inc*[951] although, ultimately, the class was not certified. Again, in the recent case of *Ford v Hoffman-La Roche Ltd*[952] the Superior Court of Ontario dealt with the settlement of class action vitamins price fixing case. Damages were assessed at about $140 million in favour of a wide range of plaintiffs.[953] In the associated case of *Ford v F. Hoffman-La Roche Ltd* [954] class counsel fees were approved in Ontario equivalent to 15 per cent of the settlement figure plus costs recovered under the "loser-pays rule". In a parallel vitamin case in Quebec *Brochu c. Ajinomoto USA Inc*[955] in the Superior Court of Quebec it is notable that the *Fonds* were involved in funding the case.

From a European perspective the Quebec solution appears at first sight more appropriate, with a possible extension of the scope of the mechanism to include all antitrust civil actions and not just class actions. Clearly, there are some very acute additional questions, as to source of initial funding and the extent to which the loser-pays rule should be ameliorated which are discussed below.

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950 See *Garland v The Consumers' Gas Company* (1998) CanL11 766 (S.C.C.). See G. Watson, *Class Actions: The Canadian Experience*, 11 Duke J.Comp. & Int'l L. 269 at p.3.

951 223 DLR (4th) 78

952 2005 Can LII 8751

953 A direct purchaser fund includes a range of Canada wide organisations with charitable or non-profit making purpose, e.g. The Victoria Order of Nurses, the Canadian Association of Food Banks, etc. and a Consumer Fund benefiting a wide range of consumers and intermediate purchasers by trickling down the money to universities and colleges.

954 2005 Can LII 8689 (ON.SC)

955 2004 Careswell Que 6356

Protecting Individual Consumers

One major issue is how to ensure that individual consumers victims of anti-competitive practices obtain redress especially when the sums involved are relatively small. The lack of interest of consumers in seeking redress for such small amounts in opt in representative proceedings in United Kingdom is marked. In the current case against the *Football Shirt Cartel* in the United Kingdom run by the Consumers' Association as a specified body is understood to have attracted claimants in the low hundreds rather than the thousands who were affected. Equally, the claim brought by the French consumers association UFC Que Choisir against *French Mobile Phone Cartel* was only able to bring in 12,500 consumer litigants out of a total of some 20 million to join the representative action.[956]

The difficulty here from a financing of litigation perspective is that the very small numbers who individually have to agree or 'opt in' are unlikely ever to attract private financing from third party which will enable the case to be funded. Access to financing is not just about being able to pay the other side's costs, in mass claim consumer cases, the likelihood is that where will be also significant upfront costs to even bring the claim, which can make the case close to uneconomic. In the *French Mobile Phone Cartel* case UFC Que Choisir found that it had to devote significant staff resources and finances, approximately €500,000 to running the case, when the total likely claim for 12,500 plaintiffs was only €800,000.[957]

While 'opt out' procedures could be seen to be more open to abuse, an 'opt out' claim from a financing perspective could be an attractive perspective. For example, while a claim against the *French Mobile Phone Cartel* by 12,500 is close to being uneconomic and could not be funded either by a CLAF or a third party funder an opt out claim for 20 million consumers brought by UFC Que Choisir would be able to attract funding (the total estimated consumer losses in that case were €1.2 billion).

The loser-pays rule

A further difficulty to funding cases is the loser-pays rule that the loser pays both sides costs[958]. This rule is the prevailing rule in most EU Member States. This rule is seen to discourage frivolous and abusive litigation. It is possible to develop funding mechanisms which can absorb the costs of the loser-pays rule. In particular both third party funding and a contingency legal aid fund can absorb the costs involved in compliance with the loser-pays.

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[956] BEUC, Private Group Actions: Taking Europe Forward, (2007) 14.

[957] ibid

[958] Although, as indicated above this only takes the analysis so far: the *quantum* of costs and fees may be very variable. See *supra*, Section II.1.2 for a detailed analysis of the loser-pays rule.

However, for one potential plaintiff, the not for profit organisation bringing a mass claim, there is a compelling argument to soften the rigours of the loser-pays rule. Given the costs of running mass claims combined with the prospect of facing the cost consequences of the loser-pays rulenot for profit organisations could be deterred from bringing claims and also find it more difficult to raise funding to pursue litigation. A cap on the costs exposure of not for profit organisations bringing mass claims could solve this difficulty. This would both reduce the costs exposure and make it more likely that such organisations could raise third party funding.

Conclusions

There are a number of steps that could be considered by the Commission which would assist plaintiffs in funding antitrust litigation

- An express rule of law indicating that an assignment of a right of action in a civil competition case is lawful. Such a provision would provide the essential legal certainty for third party funders to provide funding to litigants across the Union. Without such a provision it is likely to be very difficult for funders to enter a number of national legal markets to provide necessary funding.
- An express rule of law that absent an assignment of a right of action it shall not be an abuse of process for a third party funder, acting in the course of business, to exercise reasonable control over the conduct of the litigation it has funded, subject to overall control of the court. In a general way, rather than in a particular case, third party funders should be appropriately regulated.
- The creation of rules for a model CLAF fund which Member States could adopt into national law.
- Establishing national CLAFs.
- The creation of an 'opt out' rule of law for the benefit of not for profit organizations bringing mass claims
- Providing a power to national courts to cap the costs award to a successful defendant against a not for profit plaintiff bringing a mass claim.

While the development of national CLAF funding systems may seem appropriate to assist the funding of antitrust litigation the encouragement of more than one new funding system may be preferable. A CLAF may not be appropriate for all claims, and the size of individual CLAF funds in each Member State may be limited. Strong consideration should also be given to encouraging third party funding of litigation across the Union. These two funding systems, together with additional measures to support not for profit organizations could assist in the development of legitimate claims and social justice.

ANNEX II – BIBLIOGRAPHY

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