Effective Judicial Protection and Damages in EU Law: The Case for the Deterrent Effect



DPHIL LAW THESIS

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ABSTRACT

The aim of the thesis is to examine whether the prohibition of overcompensation in the Antitrust Damages Directive is compatible with the EU legal and normative framework. To this end, the analysis is carried out on two levels. First, the rationale for damages in the selected jurisdictions (England, France and Germany) and in the EU is examined to test the main underpinning justification for the prohibition of overcompensation in the Antitrust Damages Directive, i.e. the "European legal tradition argument". Second, the thesis addresses broader constitutional implications that underpin the debate on the desirability of the pursuit to prohibit overcompensation in the EU. These entail questions pertaining to the adoption of such measures and, thus, exploring whether the EU has the legitimacy to legislate and the related question of competence and the choice of the appropriate legal basis. The argument to be advanced in this thesis is that the aim of achieving a sufficient level of deterrence with awarding damages for EU competition law infringements stems from the very conceptual basis in which the right to damages is grounded – the principle of effective judicial protection and the principle of effectiveness. Thus, as the analysis reveals, the prohibition of overcompensation is inconsistent with the EU legal framework, since it has potential to jeopardise the deterrent or dissuasive function of antitrust damages actions. The prohibition of overcompensation has significantly contributed to the business-biased gist of the Directive, and thus to breaking the link between the rationale for the right to damages for EU competition law infringements, the legal basis and the content of the Directive. The thesis ultimately argues that the Directive's prohibition is incompatible with the principles of conferral, subsidiarity and proportionality, and to a considerable extent inconsistent with the EU's legal and normative framework.

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TABLE OF ABBREVIATIONS

ABGB	Allgemeines bürgerliches Gesetzbuch
ADD	Antitrust Damages Directive
ADR	alternative dispute resolution
AG	Advocate General
AGG	Allgemeine Gleichbehandlungsgesetz
BEUC	European Consumer Organisation
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
CFI	Court of First Instance
CFR	Common Frame of Reference
CJEU	Court of Justice of the European Union
DCFR	Draft Common Frame of Reference
DG	Directorate-General
DM	Deutsche Mark
EC	European Community
ECN	European competition network
EESC	European Economic and Social Committee
EEC	European Economic Community
EP	European Parliament
EU	European Union
FIDE	International Federation of European Law
GC	General Court

GG	Grundgesetz
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte
GWB	Gesetz gegen den unlauteren Wettbewerb
IP	intellectual property
KapMuG	Kapitalanleger-Musterverfahrensgesetz
LJ	Lord Justice
MS	Member State
NCA	National Competition Authority
OFT	Office of Fair Trading
PECL	Principles of European Contract Law
PETL	Principles of European Tort Law
SEA	Single European Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
US	United States
UWG	Gesetz gegen den unlauteren Wettbewerb
VW	Volkswagen

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I INTRODUCTION

> Rules and principles of tort law are not like rocks – rocks just exist, and we are not concerned to ask what justifies the existence of rocks, as opposed to what explains their existence. Law in general, and tort law in particular, is a different matter.[1]

The thesis explores the recent developments in the field of private enforcement[2] of EU competition law,[3] and examines the following provision of the Antitrust Damages Directive: *Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages*.[4] Such an express prohibition of overcompensation is uncommon, if not unique, both at EU level and at national level. The thesis seeks to examine it in terms of its coherence with the existing EU legal framework, its normative desirability,[5] and justifiability.[6] The present introduction outlines the core ideas and arguments elaborated throughout the thesis, the assumptions from which it starts, and explains the structure of the thesis.

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1 P Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 209.

2 Private enforcement in this context means application of antitrust law in civil disputes before national courts. See Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' SEC(2005) 1732, COM(2005) 0672 final (Green Paper) 3. Generally, private enforcement remedies include damages claims, the ability of individuals to claim for injunctive relief, contractual remedies, and interim relief. The thesis focusses on damages claims only.

3 By EU competition law, the thesis refers to the prohibition of cartels and other restrictive agreements and the prohibition of abuse of a dominant position contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (previously Articles 81 and 82 of the Treaty establishing the European Community (EC)). The expression "actions for damages for EU competition law infringements" is used as a synonym for "antitrust damages actions".

4 Article 3(3) of the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349 (ADD).

5 By "desirable", the thesis intends to inquire whether the prohibition of overcompensation in the ADD fits both into "positive" EU law and into its "normative" framework.

6 By "justifiable", the thesis seeks to examine whether convincing underpinning justifications are given for the prohibition of overcompensation in the ADD.

This thesis can be understood both as an examination of the current efforts to prohibit overcompensation based on the "European legal tradition argument",[7] in the EU competition law context in particular, but also more broadly at the EU level,[8] and as an exploration of how to address the constitutional and normative challenges of private law making in the EU context. To this end, the thesis addresses broader constitutional complexities and implications that underpin the debate on the desirability of the pursuit to prohibit overcompensation in the EU. These entail questions pertaining to the adoption of such measures and, thus, exploring whether the EU has the legitimacy to legislate and the related question of competence and the choice of the appropriate legal basis.

For the purposes of this research, overcompensation is understood as an award of damages in excess of harm[9] suffered.[10] It – and especially its prohibition – uncovers friction between the two goals typically attributed to tort law – compensation and deterrence.[11] While compensation is retrospective and aims to compensate harm caused, deterrence is prospective and aims to deter 'from engaging in the future in conduct similar to the conduct

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7 This thesis understands "European legal tradition" as encompassing both "legal tradition common to the Member States" and "EU legal tradition". See ch III, s 4.

8 Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms' [2013] OJ L 201 (Recommendation on Collective Redress).

9 The word "harm" is used as a synonym for "loss" and "damage".

10 It is often difficult to estimate the extent of the loss suffered in the competition law context, so the question of overcompensation is dubious. For this reason, the Commission adopted Communication on quantifying harm in antitrust damages actions (OJ C C 167/19) (Communication on quantifying harm).

11 See, e.g., E J Weinrib, *The Idea of Private Law* (OUP 2012) 5; A Robertson, 'Introduction: Goals, Rights and Obligations' in A Robertson and H W Tang, *The Goals of Private Law* (Hart Publishing 2009) 3-4. On this friction in the EU competition law context, see, e.g., F Marcos and A S Graells, 'Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?' (2008) European Review of Private Law 3 469; P Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?' (2008) 33 European Law Review 36-39. See also D Leczykiewicz, 'Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference' in M Kenny and J Devenney (eds), *The Transformation of European Private Law* (CUP 2013) 279.

sanctioned by the remedy'.[12] The thesis focusses on punitive damages and, thus, on deterrence as a rationale for damages in particular,[13] because this head of damages is at the core of the recent legislative anxiety to prohibit overcompensation in the EU.[14]

This prohibition – included in the Directive on the insistence of the European Parliament, further discussed in Chapter IV – was justified by the fear that overcompensation could 'increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition'.[15] Thus, incompatibility with the "European legal tradition" is the main rationale for the prohibition of overcompensation, and is thus examined by the thesis. Arguably, the deterrence rationale underpinning punitive damages is against public policy in the majority of Member States. However, the examination of the rationale for damages in the selected jurisdictions (England, France and Germany) and in the EU, in Chapters II and III, refutes this assumption by showing that there are instances of deterrent considerations in damages both in the selected Member States and at EU level – in competition law in particular and also more generally. These findings cast considerable doubt upon the persuasiveness of the "European legal tradition argument" used as a justification for the prohibition of overcompensation in the ADD.

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12 Cane, *The Anatomy of Tort Law* (n 1) 207. Deterrence can be either general or specific. Cane understands specific deterrence as a direct extrinsic function of tort law, whereas general deterrence forms part of indirect extrinsic functions of tort law. Working definitions on deterrence and compensation are provided in the analytical framework below, see s 2.

13 It is a widely held view that the main rationales for the imposition of punitive damages are deterrence and punishment. See keywords in the analytical framework below in s 2.

14 The ADD was accompanied by the Recommendation on Collective Redress (n 8). This non-binding Recommendation proposes that Member States prohibit punitive damages in order to prevent abusive litigation. Thus, the anxiety to prohibit overcompensation is not confined to antitrust litigation. See recital 15 of the preamble and point 31 of the Recommendation.

15 This explanation was given in the Recommendation on Collective Redress (n 8), which was published together with the ADD.

In fact, the thesis argues that this prohibition of overcompensation itself could be inconsistent with the so-called European legal tradition, and thus incompatible with the EU legal framework. As developed by the Court of Justice of the EU (Court) and reiterated by several pieces of EU secondary legislation, remedies for EU law infringements must meet the requirements of the "triad of principles" – effectiveness, proportionality and dissuasiveness.[16] This formula is generally applied in EU law – in the civil, administrative, and criminal law contexts.[17] The thesis argues that it should apply also to antitrust damages actions.

The question is – what does this triad of principles entail? For example, does dissuasiveness equal deterrence or is this a different concept? The thesis is based on the premise that dissuasiveness and deterrence have the same normative content. For this reason, the thesis argues that in certain instances the awarding of overcompensation with the aim of achieving the "effective" level of "dissuasiveness" could be legitimate and compatible with the requirements of "proportionality".[18] Thus, a blanket prohibition of overcompensation appears to be incompatible with "European remedial tradition".

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16 This 'important general requirement of EU law' was developed by the Court in Case 14/83 *Von Colson* ECLI:EU:C:1984:153. S Prechal and R Widdershoven, 'Redefining the Relationship between "Rewe-Effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 3134 fn 15. See also F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 European Review of Private Law 3 575.

17 According to the settled case law of the Court, remedies, penalties and sanctions all need to be 'effective, proportionate and dissuasive'. C-42/15 *Home Credit Slovakia* ECLI:EU:C:2016:842; C-377/14 *Radlinger and Radlingerova* ECLI:EU:C:2016:283 (penalties in consumer protection cases). Case *Paoletti* ECLI:EU:C:2016:748 (criminal penalties). Thesis argues in Chapter III that there is a semantic, conceptual and theoretical confusion accompanying the compensation and sanctions/penalties debate in the EU context.

18 The Court has acknowledged that punitive damages are capable of meeting the requirements of proportionality in different fields of law. See Ch III.

In the EU, there is a system of so-called "dual vigilance" or enforcement at two levels, public and private. In regulatory laws, such as competition law, enforcement and the related function of deterrence are usually deemed to be tasks carried out by public authorities. However, already in *Van Gend en Loos* the Court proclaimed that the EU is a *sui generis* legal order in which individuals can enforce EU Treaty obligations in the national courts. The rationale put forward by the Court was that 'the vigilance of individuals concerned to protect their rights amounts to *an effective supervision in addition* to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States'.[19] Once it is established that individuals can rely on certain EU rules, they are entitled to effective judicial protection of rights granted by these rules as regards the remedies and procedural rules available before the domestic courts.[20] The pressing question is what is the rationale for private enforcement in the first place, i.e. what is the role of 'an effective supervision in addition' to public enforcement? If the dominant rationale for private enforcement of EU competition law is deterrence – according to one of the possible readings of *Van Gend en Loos* and the subsequent case law of the Court –, as shall be discussed in Chapter III, is the prohibition of overcompensation compatible with it?

One of the main propositions of the thesis is that an opinion about the rationale for antitrust damages actions depends on one's view on the relationship between public and private law. Though there are of course many nuances in this debate, the thesis argues that the apparent tensions between the compensation and the deterrence rationales rest on the

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19 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1. Emphasis added.

20 M Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing 2004) 2.

clear-cut distinction between private and public law.[21] This distinction serves as a basis for the adoption of the traditional private law perspective,[22] put forward by the "European legal tradition argument", which attributes the function of compensation to private enforcement and reserves the function of deterrence to public enforcement,[23] and wrongly overlooks the regulatory character of private enforcement of EU competition law. The regulatory character of antitrust damages actions has been expressly recognised by the Court's case law and by the legislative programme in the field of EU competition law enforcement, as it is exposed by the thesis.

The thesis argues that it is precisely due to the special enforcement architecture in the EU, in which private enforcement plays an "additional" role to public enforcement, that private damages actions have a binary nature, which results in comprising both compensatory and deterrence rationales.[24] This binary nature is buttressed by the principles of effectiveness of EU law and the principle of effective judicial protection which underpin the creation of private damages actions for EU competition law infringements, as discussed below. As Nazzini rightly argues, the principle of effective judicial protection focusses on the exercise of the individual right (compensation), while the full effectiveness of EU competition law considers the individual right as an instrument for the attainment of the

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21 R Nazzini, 'The objective of private remedies in EU competition law' (2011) 4 Global Competition Litigation Review 132. This is further discussed below in s 1.

22 In this context, traditional private law perspective is understood as a perspective that rejects policy goals and instrumentalism in private law, and, thus, also deterrence as a self-standing rationale for damages actions. This is further discussed below in s 1.

23 See, e.g., M Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) ch 6.

24 See further Ch III.

objectives of the EU (deterrence).[25] Consequently, the aim of achieving a sufficient level of deterrence with awarding damages for EU competition law infringements stems from the very conceptual basis in which the right to damages is grounded. This overarching premise of the thesis is reflected also in the title of the thesis: "Effective Judicial Protection and Damages in EU Law: The Case for the Deterrent Effect".[26]

Debate on private enforcement of EU competition law was sparked off by the decision of the Court in *Courage*[27] in 2001 and by the subsequent initiatives taken by the European Commission (Commission), which culminated in the adoption of the ADD at the end of 2014. There is no general competence authorising the EU to regulate private law, or in particular private damages actions in the field of EU competition law.[28] A right to damages in this context was established and developed by the Court on the grounds of direct effect of Article 101 of the Treaty on the Functioning of the European Union (TFEU).[29] It was *justified* by reliance on the principle of full effectiveness of EU

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25 Nazzini, 'The objective' (n 21). See also, e.g., A K Komninos, 'The Relationship between Public and Private Enforcement: *Quod Dei Deo, Quod Caesaris Caesari*' in P Lowe and M Marquis (eds), *European competition law annual 2011: integrating public and private enforcement of competition law – implications for courts and agencies* (Hart Publishing 2014) 150. This is further discussed in the analytical framework below, see s 2.

26 Though the content of the thesis focusses on EU competition law, the breadth and nature of this project allows it to expose and consider problems of a constitutional nature that transcend issues specific to competition policy. This is why the title of the thesis refers to EU law generally and is not limited to EU competition law.

27 Case C-453/99 *Courage and Crehan (Courage)* ECLI:EU:C:2001:465.

28 In line with the principle of conferral, governed by Article 5 of the Treaty on European Union (TEU), the EU may regulate a given field of law only when explicitly provided for in the Treaties. The principle of conferral, thus, 'represents the source of EU's claim to exercise power on a legitimate basis'. S Weatherill, *Contract Law of the Internal Market* (Intersentia 2016) 3. Consolidated version of the Treaty on European Union [2012] OJ C 326 (TEU).

29 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326 (TFEU).

competition law ('the full effectiveness of Article 101 TFEU'[30]) and the principle of effective judicial protection.[31] Once the rules were judicially created and developed, the Commission used the Court's case law to legitimise its legislative proposal(s) in this field - an issue that is discussed at length in Chapter III.

In its initial policy documents in the field of private enforcement of EU competition law, the Commission prioritised neither the compensation nor the deterrence rationale. However, the ADD denotes a clear shift in the approach, concealing the regulatory character of antitrust damages actions and, thus, the deterrence rationale. This is at odds not only with the Commission's previous approach, but also with the Court's case law in different fields of EU law.[32] To examine this shift and the resulting prohibition of overcompensation in the ADD in terms of its coherence with the EU legal framework, its normative desirability and justifiability, I adopt the functionalist approach – one that comprehends law through its goals.[33]

According to the functionalist approach to private law, private law does not differ from other law – it serves socially desirable purposes, and one understands private law by first identifying these purposes and then evaluating its success in serving them.[34] Thus, the

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30 'The full effectiveness of Article 101 TFEU'. See, e.g. Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317 (*Kone*) paras 21, 33.

31 Nazzini, 'The objective' (n 21) 132.

32 In the competition law context, see e.g. Case C-295/04 *Manfredi* ECLI:EU:C:2006:461 (*Manfredi*); *Kone* (n 30). In the labour law context, see Case C-407/14 *Arjona Camacho* ECLI:EU:C:2015:831 (*Arjona Camacho*). In the IP context, see Case C-367/15, *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich* ECLI:EU:C:2017:36.

33 It can be compared to teleological reasoning.

34 Weinrib, *The Idea of Private Law* (n 11) 2. Weinrib is critical of the functional approach to private law. On the goals of private law, see e.g. A Robertson and H W Tang (eds), *The Goals of Private Law* (Hart Publishing 2009).

focus is on the objective/goal/purpose[35] of a legislative measure and how this measure should be interpreted in the light of that purpose.[36] Taking account of the EU's constitutional constraints (discussed at length in Chapters IV and V), especially in light of the principle of conferral, the EU's purposive competences,[37] and the market-building rationality,[38] this approach squares well with the underlying purpose of this thesis.

Based on the functionalist method, the key premise of the thesis is that the rationale for a civil liability regime should determine the legal basis and the content of a (legislative or judicial) measure governing that civil liability regime.[39] Accordingly, the rationale for civil liability regime determines functions that damages awards should serve and, thus, whether overcompensation should/could be outright prohibited. The identification of the rationale for antitrust damages actions is therefore crucial for the assessment of the quest to prohibit overcompensation in the ADD. The thesis examines the rationale for antitrust damages actions in Chapter III.

To this end, the thesis develops a three-stage model for the assessment of the rationale for damages. At the first stage, the rationale for creating the right to damages is

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35 These terms have certain nuances of meaning. Unless stated otherwise, I use these terms interchangeably to denote both 'the reason behind doing something', as well as 'something a person/an instrument wants to accomplish'.

36 Ernest Weinrib famously argued against this 'dominant contemporary view' of private law. Weinrib, *The Idea of Private Law* (n 11).

37 G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 ELJ 1; also, G Davies, 'Subsidiarity as a Method of Policy Centralisation' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart Publishing 2008).

38 M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 EJL 5 572.

39 See R Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in C Barnard and O Odudu, *The Outer Limits of European Union Law* (Hart Publishing 2009).

examined. It can be either deterrence or compensation.[40] Since the lines between these two rationales are not always clear-cut, but may be blurred, the thesis understands these considerations as opposite ends of the spectrum. At the second stage, the rationale for establishing liability in an actual case is examined. This entails the assessment of conditions of liability for EU law infringements, which are autonomous of national legal concepts (e.g. conferral of a right, damage, fault, sufficiently serious breach, causation).[41] The third stage of assessment, the transformative stage, has a binary nature. It is implicitly engaged already at the second stage of assessment. If a compensatory remedy at the second stage does not serve objectives for the creation of the right to damages identified at the first level (i.e. deterrence), the third level of assessment is triggered and punitive damages are awarded. Thus, the third stage transforms the compensatory award into a non-compensatory one. This stage is triggered only occasionally (e.g. intentional lucrative faults).

Generally, legal scholars have not questioned the case for harmonization of procedural and substantive rules applicable to antitrust damages actions, and in particular, they have not questioned it based on the concerns pertaining to the assessment of the rationale for damages actions.[42] The limited scholarly attention was mostly restricted to

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40 This is further explained in the theoretical framework below, see s 2.

41 In Joined Cases C-46 and 48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79 (*Brasserie*), the Court emphasized the independent nature of the test of liability and rejected the possibility of equating it with national conditions of liability. See R Condon and B van Leeuwen, 'Bottom Up or Rock Bottom Harmonization? *Francovich* State Liability in National Courts' (2016) 35 Yearbook of European Law 1 542.

42 C Petrucci, 'Subsidiarity in Directive 2014/104 EU on Damages Actions for Breach of EU Competition Law' (2017) 23 European Public Law 2 397. At the beginning of the process of facilitation of private enforcement, there were some opponents that objected private enforcement as such. See WPJ Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 WComp 473; C Hodges 'Encouraging Enterprise and Rebalancing Risk: Implications of Economic Policy for Regulation, Enforcement and Compensation' (2009) 20 EBLR 1231, 1261.

discussing the rationale based on the assumption that the EU has competence to legislate in this field.[43] Only recently, and mostly after the adoption of the ADD, a few legal scholars have touched upon this topic in the light of the EU's constitutional framework and underlined the importance of the rationale for damages for the legitimacy of the Directive.[44] The thesis, thus, aims to enrich existing scholarship and contribute to, first, a better understanding of the rationale for damages actions in EU law, focussing on EU competition law, and, second, to a better understanding of implications of the identified rationale for the legal basis, the content of a legislative measure and its operation in practice. In particular, the thesis responds to the criticism that: [45]

> The lack of a coherent rationale for competition law private actions (both at Member State level and at EU level) calls for a closer examination of the legal basis of the right to damages for breach of Community law generally and Article 81 or 82 [now 101 and 102] in particular.

Understanding legal base[46] and the related rationale for antitrust damages actions is important because it provides the EU with the competence to introduce harmonising legislation in a given policy area and determines the legislative process that will be used.[47]

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43 E.g. Nebbia (n 11); Marcos and Sánchez Graells (n 11). The compensation/deterrence dichotomy has been considered by these authors, however, not to unpack the rationale for damages to assess the appropriateness of the measure in light of the broader EU's constitutional framework, but rather to advocate for or against punitive damages for the EU competition law infringements.

44 See F Wilman, *Private Enforcement of EU Law Before National Courts* (Edward Elgar Publishing 2015); Petrucci, 'Subsidiarity' (n 42); although see Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39); and similarly, Nazzini, 'The objective' (n 21) 4.

45 Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 404.

46 "Legal basis" has a twofold meaning here. In Nazzini's quote, it is used for the two principles that underpin the creation of the right to damages. The second meaning refers to the provision in the Treaty on which the adoption of the EU secondary legislation is based. The determination of "legal basis" in its first meaning is crucial for the choice of the appropriate "legal basis" according to its second meaning.

47 A Cygan, 'A step too far? Constitutional objections to harmonisation of EU consumer and contract law' in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016).

The ADD is based on a dual legal basis – on both Articles 103 and 114 TFEU. The initial policy documents and the 2009 leaked proposal for a directive were based on Article 103 TFEU. On the insistence of the European Parliament, the functionally driven Article 114 TFEU was inserted as an additional legal basis that enabled the European Parliament to be involved in the process of the Directive's adoption through the co-decision procedure. Chapter IV argues that the justification for the use of the dual legal basis was not persuasive and can be seen as a pretext for the enhanced European Parliament's involvement in the legislative process. This involvement is constitutionally questionable from the competence and legitimacy perspective, and is discussed at length in Chapter IV.

The thesis claims in Chapter V that the European Parliament's involvement in the legislative process, based on additional Article 114 TFEU as a legal basis for the Directive, if at all justified, should lead to enhancement of consumer protection, referred to in Articles 12 and 114(3) TFEU and in Article 38 of the EU Charter of Fundamental Rights[48] (hereinafter Charter). Article 114 TFEU is a functionally driven competence which in theory squares well with the functionalist perspective adopted by the thesis. However, this provision 'speaks *marketes*'[49] and has an inbuilt market rationality.[50] It shall be argued, in the environment embedded in the market rationality, rules that should protect consumers are transmuted into rules that in practice shield businesses from liability for EU (competition) law violations – including the rule governing the prohibition of overcompensation. The ADD prohibits an aspect of private antitrust enforcement that could

48 Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

49 Borrowing this catchword from D Caruso, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law' in G de Búrca, D Kochenov and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2014).

50 Bartl (n 38).

contribute to facilitation of antitrust damages actions, and thus also to a high level of consumer protection. Instead, this prohibition works by tipping the scales in favour of infringing businesses, as further discussed in Chapter V. Thus, it has significantly contributed to the business-biased gist of the ADD, and thus to breaking the link between the rationale for the right to damages for EU competition law infringements, the legal basis and the content of the Directive. For this reason, the thesis argues that the prohibition of overcompensation in the ADD is neither normatively desirable nor justifiable.

To this end, the analysis draws upon the political theory of input and output legitimacy combined with the legal notion of effectiveness. In the context of private enforcement of EU competition law, the thesis understands the concept of effectiveness as referring to the potential of the new rules to contribute to closing the identified enforcement gap – by facilitating private damages actions and by promoting compliance with EU competition law.[51] Thus, the employed concept of effectiveness reflects the binary nature of antitrust damages action, and thus encompasses two elements – both "victims' incentives to sue" and "infringers' incentive to comply with EU competition law".[52] Therefore, it reflects the compensation/deterrence dichotomy surrounding the ADD. The thesis argues that fused objectives and rationales for a civil liability regime merit fused objectives underpinning the enforcement policy too. This is compatible also with the conceptual basis

51 Cf. C Petrucci, 'Effective private enforcement of EU competition law: an input and output legitimacy analysis of collective redress' in S Drake and M Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016) 233.

52 On liability providing incentive for private actors to comply with legal requirements, see, e.g., B Van Leeuwen, 'Private Regulation and Public Responsibility in the Internal Market' (2014) 33 Yearbook of European Law 1 734.

used by the Court to create the right to damages in this context – the principle of effectiveness of EU competition law and the principle of effective judicial protection.[53]

The analysis in Chapter V points out that the identified shift in the promoted rationales for antitrust damages actions led to four crucial developments or steps that, considered independently or together, undermine the effectiveness of EU competition law and curtail the principle of effective judicial protection, since they do not contribute to facilitating and incentivising antitrust damages claims. Thus, the thesis argues that the European Parliament's involvement through Article 114 TFEU led to lower outcome legitimacy of the ADD.

These steps are analysed in Chapter V. In a nutshell, the first step is the Directive's prioritising or 'preferring to protect' the leniency programme over the right to damages.[54] This approach runs against the Court's approach undertaken in its case law, for example in the case *Pfleiderer*,[55] which had consistently promoted the interest of victims claiming damages.[56] Protection of the leniency programme can be understood as the expression of the limiting function of the principle of full effectiveness of EU competition law. The latter can limit the exercise of the right to damages in certain circumstances, at the expense of the principle of effective judicial protection.[57] The thesis argues, however, that both the

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53 This point is more fully developed in the subsections 1.3 and 2.2 of this Introduction.

54 More precisely, 'over the rights of access to the file for purposes of informing individual damages claims at national level'. W Sauter, *Coherence in EU Competition Law* (OUP 2016) 140. Cf. D Leczykiewicz, '*Contract and Regulation:* Private Regulation, Compliance and Reviewability of Contracts' in R Brownsword, R van Gestel and H-W Micklitz (eds), *Research Handbook on Contract and Regulation* (Edward Elgar 2017) fn 12.

55 Case C‑360/09 *Pfleiderer* ECLI:EU:C:2011:389.

56 Sauter (n 54) 140.

57 Nazzini, 'The objective' (n 21) 143. This is the case when damages actions may 'impair the full effectiveness of EU competition law'.

right to damages and leniency programmes can successfully coexist in accordance with the aforementioned triad of principles, and this coexistence does not entail the prohibition of overcompensation. Judges taking into account "effectiveness, dissuasiveness and proportionality" of damages actions should consider whether in the case of a leniency recipient compensatory damages serve a sufficient level of deterrence, and thus overcompensation amounts to a disproportionate award.

The second step, which logically follows from the first one, is degrading the right to damages from the sole reason for legislative initiative in this area to only 'the second main objective' of the Directive.[58] This can be especially problematic from the perspective of the principle of conferral and is in stark contrast with the Commissioner Almunia's statement that the Commission took the legislative initiative in this field 'to make it easier for the victims of competition-law infringements to seek compensation for the harm they suffered'.[59]

Further, the third step is the shift in the promoted rationales for antitrust damages actions and the related express prohibition of overcompensation. This approach runs against the Court's approach undertaken in its case law, especially in the case *Manfredi*. The fourth step is the withdrawal of the draft provisions on collective redress. The Commission's legislative initiative, also the leaked and withdrawn 2009 proposal for a

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58 Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' COM(2013) 404 final 4 (2013 Proposal for a Directive) 4. The proposal emphasises twice that the right to damages is 'the second main objective'.

59 Speech of the Commissioner Joaquín Almunia, 7.11.2013, http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm.

Directive, included such rules.[60] However, the final legislative proposal did not introduce them. Rather, the Commission released a non-binding recommendation on a horizontal framework for collective redress.[61]

Against this background, the thesis argues that the prohibition of overcompensation in the ADD is neither coherent with the EU legal framework nor normatively desirable or justifiable. The right to damages for EU competition law infringements was established by the Court. The Court's approach has been more aligned to both principles that underpin the creation of the right to damages, the principle of effectiveness of EU competition law and the principle of effective judicial protection. However, some crucial provisions of the ADD detract from the Court's approach.

It is argued that 'the political factors that have driven the Commission to drop deterrence as a goal of private enforcement undercut the need to reform the current system'.[62] Notably, the preamble to the Directive provides:

> This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law/…/ and *does not pre-empt any further development thereof*.[63]

In this context, the thesis also addresses an institutional issue concerning judge made private law through interpretative principles. Since the final content of the Directive – by and large dictated by the European Parliament – seems to be incompatible with the Court's

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60 Petrucci, 'Effective Private Enforcement' (n 51) 237. The thesis discusses this leaked draft proposal from 2009 in Chapters IV and V.

61 Recommendation on Collective Redress (n 8).

62 M A Sittenreich, 'The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions' (2010) 78 Fordham Law Review 5 2708.

63 Recital 12 ADD. Emphasis added.

interpretation of Articles 101 and 102 TFEU, Chapter V suggests that the Court should reinterpret provisions of the Directive in accordance with its settled case-law. Some scholars rightly argue that courts sometimes are in a better position than legislators to effectively achieve certain EU policy goals and to contribute to the democratic legitimation of private law rules.[64] Therefore, the following question is put forward by the thesis: why legislate?

Before going into the substance of this examination, some preliminary issues need attention. First, a brief theoretical framework will set the general tone of the thesis and underline the recurring themes in the first section of the Introduction. The second section sets out the analytical framework used in this thesis as well as the scope of the thesis. Thus, the present introduction sketches the origin of, and the background against which the current thesis should be read. What follows is a schematic overview of the arguments, relevant perspectives and concepts used in the discussion in light of the purpose and scope of the thesis.

64 C Mak, 'First or second best? Judicial law-making in European private law' (2016) Centre for the Study of European Contract Law Working Paper Series No. 2016-12 1 14-15; C Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights', (2011) 4 EUI Working Paper Series Law 2. Cf. S Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 European Constitutional Law Review 1 23.

1 Setting the Scene: Private Enforcement of EU Competition Law and the Compensation/Deterrence Conundrum

(a) Revisiting the Rejection of Overcompensation in Light of the "Regulatory Private Law" and Binary Nature of Damages Actions

The decision in *Courage* has established the obligation for national courts to provide a remedy in damages for EU competition law infringements, yet the focus of discussion has shifted from "damages claims" to "private enforcement".[65] Although these expressions are used interchangeably in the context of competition law, there is allegedly 'a subtle difference between them, as "private enforcement" is semantically biased towards the idea of ensuring compliance with the law, rather than compensating the victim of a wrong.'[66] Thus, while becoming a significant concern in EU competition law and policy making, private enforcement has purportedly triggered tensions between the compensation and the deterrence rationales for antitrust damages actions.[67] These tensions culminated, inter alia, in the prohibition of overcompensation in the ADD and in the non-binding Recommendation on Collective Redress. This is discussed at length in Chapter III.

An inquiry into the rationale for damages actions and its implications for damages awards opens onto a myriad of perspectives and frameworks. The focus of the thesis on damages actions in EU competition law inevitably directs attention to two polarised dimensions – the private dimension of tort law and the public dimension of EU competition

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65 Nebbia (n 11) 24.

66 ibid.

67 See, e.g., Marcos and Sánchez Graells (n 11) 469; Nebbia (n 11) 36-39. See also Leczykiewicz, 'Enforcement or Compensation?' (n 11) 279.

law and its regulatory character.[68] These two dimensions engage also two different perspectives that, therefore, this thesis adopts to examine the prohibition of overcompensation in the ADD – the traditional private law perspective and the regulatory perspective. In what follows, I explain why the approach adopted by this thesis is an apt one.

The rejection of overcompensation in the ADD is based on the aforementioned "European legal tradition argument", underpinned by several related, and often mutually reinforcing, assumptions. These assumptions are based on the traditional private law perspective and on the clear-cut distinction between private and public law. The alleged clear-cut public/private divide is an overarching distinction underpinning all others, as explained in the following paragraphs. This approach is, however, unfounded since it overlooks the public law dimension that is inextricably linked to the assessment of damages actions for EU competition law infringements.

There are well-known objections to overcompensation by means of punitive damages found in the academic writings.[69] In a nutshell, punitive damages are often perceived as contrary to *ordre public*, with the main objections that they do not fit into tort law, as they are not compensatory in nature, that they confuse civil and criminal functions of the law (and that civil law procedure does not offer adequate procedural safeguards to

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68 Competition law in itself is 'a type of economically oriented public law', and has no direct link to private law. See N Dunne, 'Antitrust and the Making of European Tort Law' (2015) 36 Oxford Journal of Legal Studies 1 11.

69 For an overview of the objections to punitive damages, see, e.g., N J McBride, 'Punitive Damages' in P Birks, *Wrongs and Remedies in the Twenty-first Century* (OUP 1996) 194 et seq; H Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana Law Review 3 751-758; R C Meurkens, *Punitive Damages* (Kluwer 2014) ch 6; L Meurkens and E Nordin (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012) ch 3.

award damages that are punitive in nature), that aggrieved parties are unjustly enriched, and that punitive damages are awarded in an arbitrary manner and generate a degree of legal uncertainty. There is another objection, which is less conceptual in its nature and more policy-based – a risk of abusive litigation.[70]

In essence, the classical objections outlined above concern the aforementioned overarching distinction between public law and private law in general and between criminal law and tort law in particular. The very same public/private divide also underpins the distinction between public and private enforcement of EU competition law, and arguably ascribes the deterrent function to the former and the compensatory function to the latter. The approach based on these distinctions is reflected in the Commission's discourse:

> The objective of the fines imposed by the Commission is deterrence, i.e. sanctioning the undertakings concerned (specific deterrence) and deterring other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 101 and 102 TFEU (general deterrence).
>
> While the objective of the fines is deterrence, the point of damages claims is to repair the harm suffered because of an infringement.[71]

Against this backdrop, the public/private divide and the concomitant compensation/deterrence dichotomy are the recurring themes of the thesis. The thesis questions these dichotomies.

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70 See recital 15 of the preamble and point 31 of the Recommendation on Collective Redress (n 8).

71 Communication on quantifying harm (n 10) paras 1-2.

These distinctions are based on the traditional private law perspective and the view that policy goals and regulation[72] have no role to play in private law.[73] I consider that such reasoning is flawed in two important and entangled respects, and is not pertinent to the EU law context. First, it rests on the premise that in the EU there is the private/public divide similar to the (arguably vanishing) divide in the Member States' legal systems.[74] This approach based on a clear-cut distinction gives rise to some doubt.[75] Second, and based on the first proposition, such reasoning adopts a narrow understanding regarding the functions of private law.[76] This narrow understanding overly focusses on the perspective from traditional private law and ignores the transformation of traditional private law into a more "hybrid" regime which combines both private law reasoning and the policy-oriented, instrumental character of regulation.[77] Thus, this hybridisation merits the engagement of

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72 In a relatively classical definition, regulation can be identified as the intentional use of authority to affect behaviour of a different party according to set standards, involving instruments of information-gathering and behaviour modification. See J Black, 'Critical reflections on regulation' [2002] 27 Australian Journal of Legal Philosophy 1.

73 See, e.g., Weinrib, *The Idea of Private Law* (n 11).

74 Though, in the continental European legal systems at least, such traditional private law perspective was never really adopted by the legislators. The typical examples of the infusion of policy goals and regulation into private law is the weaker party protection – weaker parties being workers, tenants, consumers, and more recently also SMEs. See, e.g., A Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in H.-W. Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 102

75 M W Hesselink, 'The Structure of the New European Private Law' in M W Hesselink, *The New European Private Law: Vol. 3: Essays on the Future of Private Law in Europe* (Kluwer Law International 2002).

76 Cane*, The Anatomy of Tort Law* (n 1) 116.

77 C Leone, 'Of Private Law, Market Regulation and Telling Them Apart in the EU' (2017) Amsterdam Law School Legal Studies Research Paper No. 2017-28; H Collins, *The European Civil Code: The Way Forward* (CUP 2008) 108-109. Claes identified three phenomena challenging classic private law: (1) Europeanisation of national law; (2) constitutionalisation of private law and (3) the changing public/private divide and the concurring trends of the deregulating and reregulating state. M Claes, 'The EU, its MS and their Citizens' in S Weatherill and D Leczykiewicz, *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 45-46

the regulatory perspective in the assessment of the rationale for damages actions.[78] In the following paragraphs, I will address both the (vanishing) public/private divide and the transformation of traditional private law into a more "hybrid" regime, ensuing, inter alia, in the binary nature of damages actions.

As to the first proposition, it is commonly believed that the EU is a post-national project that diminishes and blurs 'once well-established boundaries' between public and private law.[79] As Weatherill noted:[80]

> Indeed, EU law lacks any clear distinction between public and private law. One of its features is its pursuit of functional objectives, most of all the completion of the internal market, and this may cause it to be blind to such demarcations made under national law and in consequence to destabilise them.

Thus, this market-making focus generates a form of "hybrid regulation", characterised by the intrusion of typically public law rationales in the realm of horizontal relations.[81] This is typical also for EU measures that affect national private laws. However, a distinction must be drawn between EU measures which 'affect fundamental tort law principle, whose main focus is that of compensating the wrong, and areas in which the directive is part of a

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78 Hesselink, 'The Structure of the New European Private Law' (n 75).

79 M P Maduro, 'The Chameleon State: EU Law and the Blurring of the Private/Public Distinction in the Market' (EUI 2010); H W Micklitz, 'Rethinking the public/private divide' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal inking* (CUP 2014) 271–306; Hesselink, 'The Structure of the New European Private Law' (n 73); S Whittaker, 'Form and substance in the reception of EC Directives into English contract law' (2007) 3(4) European Review of Contract Law 381–409; G Comparato, H-W Micklitz, and Y Svetiev, 'The regulatory character of European private law' in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 38; N Reich, 'The public/private divide in European law' in H-W Micklitz and F Cafaggi (eds), *European Private Law after the Common Frame of Reference* (Edward Elgar 2010).

80 Weatherill, *Contract Law* (n 28) 38.

81 ibid 262; Comparato, Micklitz and Svetiev (n 79) 43. For the same reason, it is possible to identify a series of general principles all over EU law, developed by the Court, which mix both public and private law characteristics. See N Reich, *General Principles of EU Civil Law* (Intersentia 2013).

broader regulatory framework which involves both public and private law'.[82] In the latter context, a damages claim is 'part of this broad framework and it would be misleading to consider it in isolation'.[83] This applies also to the competition law context. Since regulation is used to insert rules into private relations that allow for the promotion of competition it follows that, within the overall purpose of the completion of the internal market, private law and competition law are tightly interlinked through regulation.[84] Thus, antitrust damages actions assume the binary nature and serve purposes of both compensation and deterrence.

"Hybridisation" of private law, referred to also as 'regulatory private law',[85] has not taken place only in the EU context, but also within the national context – even prior to the onset of EU legal integration and also in jurisdictions beyond the EU and on both sides of the Atlantic.[86] Thus, the adoption of both the traditional private law perspective and the regulatory perspective to examine the rationale for antitrust damages actions seems to be an appropriate response to this "hybrid" area which engages both public and private

82 P Giliker, *The Europeanisation of English Tort Law* (Hart Publishing 2014) 43.

83 ibid.

84 Comparato, Micklitz, and Svetiev (n 79) 58-59.

85 ibid 48. The erosion of the public/private divide and the related hybridisation of private law has prompted discourses such as 'regulating contracts', 'the regulatory function of European private law', 'private administrative law' and 'private enforcement as regulation. See F Cafaggi and H Muir-Watt (eds), *The Regulatory Function of European Private Law* (Edward Elgar 2009); H Collins, *Regulating Contracts* (OUP 2002); and in an EU vein, Collins, *The European Civil Code* (n 77). See also R Brownsword, R van Gestel and H-W Micklitz (eds), *Research Handbook on Contract and Regulation* (Edward Elgar 2017, forthcoming); Weatherill, *Contract Law* (n 28) 261; H-W. Micklitz, 'Rethinking the public/private divide' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (CUP 2014) 271–306; A Andreangeli, *Private Enforcement of Antitrust Regulating Corporate Behaviour through Collective Claims in the EU and US* (Edward Elgar 2014).

86 D Kennedy, 'The stages of the decline of the public/private distinction' (1982) 130 University of Pennsylvania Law Review 1349–57; Comparato, Micklitz, and Svetiev (n 79) 43, 48.

dimensions.[87] Against this background, damages actions in the competition law context may well lead, contrary to the view supporting the prohibition of overcompensation in EU competition law context based on the "European legal tradition argument", to divergence from traditional tort law policy.[88]

It must be noted, though, that this "traditional tort law policy", which strictly separates aims of tort law and public law (especially criminal law), is 'only the fruit of modern age'.[89] In this vein, Koziol claims that punitive damages represent 'relapse into the archaic mixture of punishment and compensation', though he acknowledges that even today their separation is not too strict.[90] If this tort/criminal law divide was sufficient justification for the rejection of punitive damages in the past, the inclination towards punitive considerations in national private laws and in the EU law context (as shown by Chapters II and III), and also a mere ongoing debate[91] about the possibility of awarding

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87 The Court has emphasized the public policy character of the EU competition rules in the case C-126/97 *Eco Swiss* ECLI:EU:C:1999:269, paras 36-39. With the recognition of private enforcement in *Courage*, EU competition law has witnessed a paradigm shift towards a mixed public/private model. See Dunne, 'Antitrust and the Making of European Private Law' (n 68) 11. Consumer law is also embracing both the vertical and horizontal dimension. See H-W Micklitz, 'The Transformation of Enforcement in European Private Law: Preliminary Considerations' (2015) 23 European Review of Private Law 4 497.

88 Giliker, *Europeanisation of English Tort Law* (n 82) 44.

89 G Wagner, 'Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden' [2006] Gutachten A zum 66. Deutschen Juristentag 69.

90 H Koziol, 'Comparative Report and Conclusions' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 302; H Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana Law Review 741.

91 For example, there was a conference on punitive damages in Vienna in 2008, organised by the Institute for European Tort Law, which resulted in the publication of Koziol and Wilcox (n 90). See also, e.g., Meurkens and Nordin (n 69); M Hazelhorst, 'Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far' (2010) 18 European Review of Private Law 4 757; E Büyüksagis, I Ebert, D Fairgrieve, R C Meurkens and F Quarta, 'Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism' (2016) 27 European Business Law Review 1 137.

punitive damages in Europe, highlights that this justification might be outdated. Law needs to be constantly revised and "fitness-checked". As Cappelletti wrote long ago,

> even 'the most sacred principles of 'natural justice' must therefore be reconsidered in view of the changed needs of contemporary societies. Reconsideration, however, does not mean abandonment, but rather adaptation.'[92]

It is believed that such 'adaptation' would not drastically challenge the current private law setting or the outlook of private law from the perspective of rationales for damages – neither in the Member States nor at EU level. Endorsement of deterrence rationale for damages would not change the main aim of tort law, but simply add an extra layer in certain instances. Besides, in light of the findings in the first part of the thesis, perhaps all that is needed boils down to the "recognition" of this aim.

The second proposition is closely related to the first one. Since the thesis adopts the functionalist approach to examine the prohibition of overcompensation in the ADD, it inevitably embraces the idea that policy goals, and thus also deterrence, have an important role to play in private law in general and in EU competition law in particular.[93] In his famous work, Weinrib claimed that 'the purpose of private law is simply to be private law'.[94] Contrary to his non-instrumentalist account, private law has been 'infected with the

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92 M Cappelletti, 'Vindicating the Public Interest through the Courts: A Comparativist's Contribution' (1975–76) 25 Buffalo Law Review 643, 686. In this vein, the comments to Article II.-7:301 DCFR aptly state, albeit in different context, that '[t]he public policy underpinning principles recognised as fundamental may change over time, in accordance with the prevailing norms of society as they develop'.

93 Robertson (n 11) 9.

94 Weinrib (n 11) 21. Similarly, R Stevens, 'The Conflict of Rights' in A Robertson and H W Tang (eds), *The Goals of Private Law* (Hart Publishing 2009).

goal-oriented reasoning of regulation', and serves to achieve certain social, political, and economic aims.[95] As Collins put it,[96]

> Private law has become a hybrid model of reasoning that seeks to combine both the *rights-oriented* reasoning of private law with the *policy-oriented*, *instrumental* character of regulation.

It is argued that instrumentalism is a matter of degree and that its reception in private law is not a polar question. There is room for a middle-ground. In fact, 'much contemporary scholarship adopts a mixed view, which recognises the importance of function in private law without subscribing to a wholly instrumentalist account'.[97] However, despite this recognition by legal scholarship, the regulatory character of private law tends to be overlooked in the assessment of the rationale for antitrust damages.

Despite this transformation of traditional private law into a hybrid model, private law did not become the same as regulation.[98] It remained oriented towards the resolution of disputes between individuals.[99] However, it does so in a way that is markedly different from the traditional approach, with new concepts and remedies.[100] Importantly, a comprehensive view of such reconfiguration of private law cannot focus exclusively on the

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95 Collins, *The European Civil Code* (n 77) 108-10; Comparato, Micklitz and Yane Svetiev (n 79) 48; T Wilhelmsson, 'Varieties of welfarism in European contract law' (2004) 10 European Law Journal 712–33.

96 Collins, *The European Civil Code* (n 77) 108-109. Emphasis added.

97 Robertson (n 11) 2, 4-5.

98 Collins, *The European Civil Code* (n 77) 111; Collins, *Regulating Contracts* (n 85); P Cane, 'Tort Law as Regulation' (2002) 31 Comm. L. World Rev 330.

99 M W Hesselink, 'Private Law, Regulation, and Justice' (2016) 22 European Law Journal 5 688; Collins, *The European Civil Code* (n 77) 111; Collins, *Regulating Contracts* (n 85).

100 Hesselink, 'Private Law, Regulation, and Justice' (n 99) 688. Thus, private law became a synthesis which combines 'both its traditional concerns about corrective justice between individuals and instrumental ambitions about steering markets towards distributive justice'. Collins, *The European Civil Code* (n 85) 111; Collins, *Regulating Contracts* (n 85).

law-making moment but must also consider enforcement, as to which new developments also mark an evolution away from non-instrumentalist private law paradigm.[101] Accordingly, it is argued that EU law damages actions constitute a special mechanism of enforcing EU norms and contribute to the regulatory effect of EU law.[102] This, then, applies also in the context of private enforcement of EU competition law.[103] For this reason, national private law, including not only questions of enforceability but also remedies, must embrace the demands of EU competition law.[104]

Despite this hybridisation of private law, the national private law perspective also remains relevant for the assessment of the rationale for antitrust damages actions. One of the reasons is that national courts are the primary venue for victims to assert their rights vested in EU law and, thus, to enforce the right to damages for infringements of EU competition law.[105] It has been shown by Condon and Van Leeuwen, who analysed the Member State liability referred to as *Francovich* liability,[106] that 'although the courts formally recognize the separate and autonomous nature of *Francovich* liability', in practice, the 'substantive criteria of recovery take on a "life of their own" once they are applied by national courts, who draw on their own national traditions of State liability to

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101 Comparato, Micklitz, and Svetiev (n 79) 42; Collins, *The European Civil Code* (n 77) 111.

102 Leczykiewicz, 'Enforcement or Compensation?' (n 11) 2.

103 On the regulatory approach to EU competition law, see N Dunne, 'The Role of Private Enforcement within EU Competition Law' in A Albors-Llorens, K Armstrong and M W Gehring (eds), *Cambridge Yearbook of European Legal Studies, Vol 16 2013-2014* (Hart Publishing 2015) 6-7.

104 Weatherill, *Contract Law* (n 27) 38. Weatherill refers to 'national contract law'.

105 Cf. Wilman (n 44) 10.

106 The *Courage* remedy is based on the *Francovich* liability. See Ch III, s 2.

filter *Francovich* claims'.[107] Thus, the traditional private law perspective is required to properly assess argumentative patterns discussing the rationale for antitrust damages.[108]

Accordingly, to avoid shortcomings stemming from overlooking one function or the other, the thesis adopts both the perspective from traditional private law and the regulatory perspective to examine the rationale for damages actions at the national level and in EU competition law, and to assess the prohibition of overcompensation in the ADD, using the analytical framework developed below. These two perspectives square well with the binary nature of antitrust damages actions and the dual vigilance enforcement system in the EU.

Against this background, the thesis argues that the justification for the prohibition of overcompensation based on the "European legal tradition argument" grounded in the clear-cut public/private divide is not convincing because the clear-cut distinction itself is not convincing. This is the task dealt with primarily by the first part of the thesis (Chapters II and III). Chapter II refutes an assumption that overcompensation is alien to 'the legal traditions of the Member States', while Chapter 3 shows that there is a blurred and fragmented – though favourable for the deterrence rationale and overcompensation – picture painted by EU law when the rationale for damages is dissected.

In the following subsection, the role of private enforcement in the overall EU competition law enforcement is addressed. The focus is on the following question: To what

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107 Condon and van Leeuwen (n 41) 54. Also Giliker, *Europeanisation of English Tort Law* (n 82) 54.

108 Interestingly, the title of the Directive itself refers to 'certain rules governing actions for damages under national law', although the nature of these rules is contentious, especially considering that the Court established and developed the right to damages for EU competition law infringements based on direct effect of Articles 101 and 102 TFEU.

extent do antitrust damages actions serve "traditional" public interest purposes and embrace the deterrence rationale?

(b) The Role of Private Enforcement in the Overall EU Competition Law Enforcement: Public and Private Interests at Stake

This section addresses the role of private enforcement in the overall EU competition law enforcement, focussing on the following question: how far antitrust damages actions are in the public interest and backed by deterrence considerations? This discussion is, again, permeated by the recurring distinctions identified above, the public/private divide and the compensation/deterrence dichotomy. Against this background, the question is whether there are clear and distinct roles for both public and private enforcement of EU competition law? In particular, the question is: which objective(s) the EU wishes to achieve by facilitating private enforcement?[109] Should it be encouraged to achieve deterrence, compensation, or the combination of the two?

The Treaty on the European Union (TEU)[110] stipulates that '[t]he Union shall work for the sustainable development of Europe based on [...] a highly competitive social market economy'.[111] The competition policy is implemented through the enforcement of Articles 101 and 102 of the TFEU which prohibit anticompetitive agreements and abuse of dominant positions on the market. Compliance with EU competition law is ensured through a combination of public and private enforcement – the two pillars of enforcement of EU

109 Wilman (n 44) 562.

110 Consolidated version of the Treaty on European Union [2012] OJ C 326 (TEU).

111 Article 3(3) TEU.

competition rules.[112] This arguably 'complementary duality' of public and private enforcement is encouraged to improve the effectiveness of competition.[113] Public enforcement is carried through by public authorities, such as specialized national competition authorities, national courts and the Commission. Private enforcement takes place in horizontal relations before national courts. Making a distinction between private and public enforcement predates the competition law context and expresses more fundamental ideas about the relationship between the state and private individuals and their respective roles in the implementation of the law.[114] Enforcement at two levels – 'dual vigilance' – is a familiar feature of the EU legal order,[115] endorsed by the Court already in the case of *Van Gend en Loos*.

Corresponding to three ways in which Articles 101 and 102 TFEU can be invoked in litigation between private parties, private enforcement can be seen as a "shield" or as a "sword".[116] It can be used as a shield, that is as a defence against a contractual claim for performance or for damages because of non-performance or against some other claim, for instance in an intellectual property infringement action.[117] It is used as a sword as a basis for claims for injunctive relief and for damages. Private actions may be brought as stand-

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112 Commission, 'Staff Working Paper: Annex to the Green Paper Damages actions for breach of the EC antitrust rules' SEC(2005) 1732 (Commission Staff Working Paper – Green Paper) para 3.

113 Dunne, 'The Role of Private Enforcement' (n 103) 149.

114 A P Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3 Competition Law Review 110.

115 S Weatherill, *Cases and Materials on EU Law* (OUP 2016) 504.

116 W P J Wils, 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 World Competition 1 2; A P Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008) 2.

117 Wils, 'Private Enforcement of EU Antitrust Law' (n 116) 2.

alone actions or they may run in parallel with or follow upon public enforcement proceedings concerning the same alleged infringements (follow-on actions).[118]

Initially, the competition policy relied on the centralized public enforcement framework established by the Regulation 17/1962 with the Commission playing the central role.[119] In 1999 the Commission initiated a modernization programme for a decentralised enforcement of EU competition law, which eventually led to the enactment of the Regulation 1/2003.[120] The new decentralised framework of enforcement has afforded a more prominent role to national courts. As stated in the Preamble to the Regulation 1/2003, national courts 'protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.'[121] In so doing, their role 'complements that of the competition authorities of the Member State'.[122]

The facilitation of private enforcement through national courts could not be timelier in light of the *Courage* judgment delivered by the Court in 2001. Thus, private enforcement of EU competition law was given impetus both at the judicial level and, subsequently, at the administrative level. The *Courage* case and a few other cases decided in its aftermath, together with principles on liability for violations of EU law, constituted the stepping stone on which the Commission built its legislative initiatives to establish a common approach on antitrust damages actions. In 2005, the Commission published a Green Paper on

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118 ibid.

119 Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13.

120 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1 (Regulation 1/2003).

121 Recital 7 of the Regulation 1/2003.

122 ibid.

damages actions for breach of the EC antitrust rules.[123] The Commission's 'follow-up' White Paper on Damages actions for breach of the EC antitrust rules[124] was published in 2008. Against this backdrop, the Commission adopted a proposal for a Directive on antitrust damages actions for breaches of EU competition law in 2013. The Directive was adopted in 2014 and should have been implemented in the national legal systems by 27 December 2016.[125]

A strengthening of private enforcement has been deemed necessary mainly for two reasons – to enhance the effectiveness of the competition law system and to guarantee that victims of antitrust infringements get compensated for harm they have suffered.[126] The first reason is linked to the deterrence rationale, and the second reason is linked to the compensation rationale.[127] Thus, both the deterrence and compensation rationales underpin private enforcement of EU competition law and are reflected in the binary nature of the antitrust damages actions. This issue is closely examined in Chapter III, and the findings serve as a springboard for the second part of the thesis. This is briefly explained in the following two subsections.

123 Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' SEC(2005) 1732, COM(2005) 0672 final (Green Paper). Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 401-435.

124 Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM(2008) 165 final (White Paper).

125 For the overview of the adopted legislation, see http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

126 Komninos, *EC Private Antitrust Enforcement* (n 116) 181.

127 Ioannidou (n 23); Nazzini, 'The objective' (n 21).

Enforcement Gap: Private and Public Dimension

The thesis rests on the premise that there is an enforcement (or a deterrence)[128] gap in EU competition law. The Commission and NCAs do not have limitless resources to investigate all breaches of EU competition law. To remedy this shortcoming, the Commission has sought to encourage private enforcement of competition law which is still largely underdeveloped in the EU Member States.[129] The central focus of this policy is to facilitate the ability of individual litigants to bring claims for damages before national courts for losses suffered as a result of breaches of EU competition law.[130]

A number of reforms have taken place over the past few years in the context of private enforcement with the objective of strengthening the position of the consumer as an enforcer of the EU competition rules before the national courts, the ADD being the prime example.[131] However, 'it would be a mistake to hold that the enforcement issue is "solved", far from it'.[132] Although these reforms aim to facilitate private enforcement, the number of antitrust damages actions is still scarce.

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128 Wils, 'Private Enforcement of EU Antitrust Law' (n 116).

129 The Ashurst study concluded that 'an astonishing diversity and total underdevelopment' existed with regard to private enforcement actions in the EU. D Waelbroeck, D Slater and G Even-Shoshan, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules. Comparative Report' (Ashurst 2004). See also Petrucci, 'Effective Private Enforcement' (n 51) 231. In certain Member States, the situation has improved since the Ashurst study was published, e.g. most notably in England and the Netherlands.

130 Pragmatically, private enforcement means that private resources will be used in order to enforce competition law. Petrucci, 'Effective Private Enforcement' (n 51) 231-232.

131 A Jones and A Albors-Llorens, 'The Images of the Consumer in EU Competition Law' in D Leczykiewicz and S Weatherill (eds), *The Image(s) of the 'Consumer' in EU Law* (Hart Publishing 2016).

132 J Pelkmans and A Correia de Brito, *Enforcement in the EU Single Market* (CEPS 2012) iv.

There are several reasons underpinning this trend: for example, especially in cases where damage is widespread and individual losses are low, consumer (rational) apathy prevails due to small damages claims,[133] some consumers cannot afford litigation, and some consumers do not have information and education to take the necessary steps.[134] They have 'insufficient retributive motives', because their personal financial reward is small compared with the costs of enforcement and they will benefit only marginally from the deterrent effect of enforcing the rules against wrongdoers.[135] As Basedow rightly emphasised, whatever the reasons may be, the victims' rational abstention leads to a gap or a deficit of implementation in the field of competition law.[136]

The remedies provided under traditional private law perspective, thus not embracing their deterrent potential, 'have turned out to be insufficient or even totally inadequate for the protection of competition'.[137] They depend upon the procedural initiative of private parties which will often be lacking.[138] Thus, successful claims for compensation are rare in this field. As Weatherill claimed, '[o]ne may legitimately wonder

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133 W van Boom and M Loos, 'Effective Enforcement of Consumer Law in Europe Synchronizing Private, Public, and Collective Mechanisms' (2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082913.

134 S Grundmann, 'Targeted Consumer Protection' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Bloomsbury Publishing 2016) 239; K J Cseres, 'Towards a European Model of economic justice: the role of competition law' in Hans-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 405440.; R Van der Bergh and L Visscher, 'The Preventive Function of Collective Actions for Damages in Consumer Law' (2008) 1 Erasmus Law Review 2.

135 Cseres (n 134) 440.

136 J Basedow, 'Private Enforcement of EC Competition Law: Introduction' in J Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer Law International 2007) 1; Grundmann, 'Targeted' (n 131) 239.

137 Basedow, 'Private Enforcement of EC Competition Law' (n 136) 1.

138 ibid; Grundmann, 'Targeted' (n 134) 239.

whether the almost total dearth of private litigation over several decades tells a revealing story of profound disincentives to bring such matters before a court.'[139] In this vein, some experts underline the potential benefits of the introduction of punitive damages for the facilitation of private damages claims.[140]

In a system that does not encourage consumers to sue, most antitrust damages claims are brought by competitors, i.e. businesses. Against this backdrop, as the thesis claims, the ADD could be seen as an instrument that favours businesses, both "infringing businesses" and their competitors. This is illustrated with an awkward statement in the proposal for the Directive, while referring to the objective to facilitate the right to damages: 'This will lead to a more level playing field for *undertakings* in the internal market.'[141] This seems to be at odds with the Commissioner Vestager's firm commitment 'to defend *consumers*':[142]

> Competition enforcement doesn't play favourites. We base our decisions on the evidence and the law. But that doesn't mean that our work is neutral. Quite the opposite. Our purpose is clear: we're here to defend the consumer.

The fact that most consumer claims are left unresolved is not only vexed from the point of view of an individual consumer, it is claimed to be damaging to the creation of a viable

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139 Weatherill, *Cases and Materials on EU Law* (n 115) 517.

140 Petrucci, 'Effective Private Enforcement' (n 51) 243; Grundmann, 'Targeted' (n 134) 240.

141 Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union', COM(2013) 404 final (2013) Proposal for a Directive) 4.

142 Speech of the Commissioner Margrethe Vestager, Competition and the rule of law, 18.5.2017, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_en. Emphasis added.

internal market.[143] In this vein, it may well lead to structural non-enforcement of substantive rules of EU law, as highlighted by Van Boom and Loos, turning enforcement into what economists would consider a 'public good'.[144] Infringements of competition law are characterised by a large number of victims and the effects of the infringements are scattered and widespread on all market participants and the competitive process as well.[145] Most competition law violations have immediate effects on the market, causing direct economic harm to market participants who may or may not be contractually related to the violators.[146] In light of these considerations, encouraging private enforcement against such damaging practices is generally seen as in the wider public interest.[147]

Thus, the enforcement gap problem is essentially twofold. On the one hand, it is *objective* – infringements of EU competition law are damaging from the perspective of competition law and the functioning of the internal market. On the other hand, it is *subjective* – these violations infringe individual consumer rights. Both these dimensions are intertwined. This thesis explores whether their panacea should be designed in a fused manner too – reconciling both deterrence and compensation aims, and, in this vein, permitting overcompensation in certain (though limited) cases.

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143 S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2013) 296; Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Alternative dispute resolution for consumer disputes in the Single Market' COM(2011) 791 2-3; I Benöhr, *EU Consumer Law and Human Rights* (OUP 2013) 4.

144 Van Boom and Loos (n 133) 6, and references therein.

145 Cseres (n 134) 439.

146 ibid.

147 D Wilsher, 'The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture' (2007) 3 Competition Law Review 1 27; Cseres (n 134) 439. But, cf. F Jacobs, 'Civil Enforcement of EEC Antitrust Law' (1984) 82 Mich LR 1364; Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (n 42) 473.

In the 2005 Green Paper, the Commission considered introducing punitive damages for horizontal cartel cases. In the US, punitive damages apparently play 'the most significant role in "intentional tort, fraud and employment" actions brought by individuals against corporations.'[148] "Intentional torts" committed with lucrative aspirations are also one of the three established categories in which punitive damages are permitted in England.[149] Recently, a French legislative proposal amending the Code civil has been issued, introducing a new "civil penalty" designed to punish precisely intentional torts with lucrative aims.[150] Thus, tort law might be thought to have considerable regulatory potential in such contexts.[151]

Against this backdrop, the following question comes to the fore: how far are antitrust damages actions in the public interest? This is further addressed in the following subsection.

Objectives of Private Enforcement of EU Competition Law

The enforcement of antitrust prohibitions pursues three systematically different, yet substantively interconnected, objectives from a competition law perspective.[152] The first

148 T Eisenberg, N LaFountain, B Ostrom, D Rottman and M T Wells, 'Juries, Judges and Punitive Damages: An Empirical Study' (2002) 87 Cornell LR 743.

149 These categories were set out by Lord Devlin in the leading case of *Rookes v Barnard*. Ch II, s 2.

150 The French Ministry of Justice published a draft parliamentary bill for the reform of "civil liability" in March 2017. More precisely, art.1266-1 proposed provision of the Civil Code is designed for cases 'where the author of the harm has deliberately committed a fault with the view to making a gain or to saving money'. It is commonly argued that the behaviour-modification potential of tort law is significantly reduced by the widespread use of insurance against the risk of incurring liability to pay tort damages. See Cane, 'Tort Law as Regulation' (n 98) 319. This risk is remedied in the French proposal with excluding the possibility of insuring such liability.

151 Cane, 'Tort Law as Regulation' (n 98) 317-318.

152 Cf. WPJ Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 World Competition 1 5; Komninos, 'Public and Private Antitrust Enforcement

one is *injunctive*, i.e. to bring the infringement of the law to an end. This may entail negative measures, in the sense of an order to abstain from the delinquent conduct, and also positive measures to ensure that that conduct ceases in the future. The second objective is *restorative* or *compensatory*, i.e. to remedy the injury caused by the anti-competitive conduct.[153] The third one is *preventive*, i.e. to *punish* the perpetrator of the illegal acts in question and also to *deter* him and others from future transgressions. The thesis refers to this objective as *deterrence*.

In this light, the question is whether there are clear and distinct roles for both public and private enforcement of EU competition law. In particular, the question is: which objective(s) does the EU wish to achieve by facilitating private enforcement?[154] Should it be encouraged to achieve deterrence, compensation, or the combination of the two?

Despite the dual vigilance enforcement system in the EU and the aforementioned binary nature of damages actions, the ADD conceals the deterrent potential of antitrust damages actions. However, the Green Paper started out by stating that:

> public and private enforcement [...] serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.

Thus, at the initial point of designing framework for private enforcement of EU competition law, the Commission was 'motivated by the desire to secure private litigants

in Europe' (n 114); See C Harding and J Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency* (OUP 2003) 229 et seq.

153 ibid.

154 Wilman (n 44) 562.

as its reliable allies in the fight against anti-competitive practices'.[155] However, the focus in the rationales for damages that are promoted by the ADD allegedly changed.

It needs to be borne in mind that the ADD codifies the right to damages which was initially judge-made. The Court has acknowledged that individual damages actions strengthen the working of the EU competition rules and discourage practices that are liable to restrict or distort competition, thus making a significant contribution to the maintenance of effective competition in the EU.[156] Thus, it is argued that deterrence was the main objective for the creation of the right to damages for EU competition law infringements, whereas compensation served instrumentally[157] to achieve it. This means that antitrust damages actions assume an instrumental role in the enforcement architecture.[158] This is further discussed in the analytical framework below and in Chapter III.

Some scholars argue that public enforcement is hierarchically superior to private actions in pursuing the objectives of deterrence and punishment, whereas private actions for damages are better suited for the pursuit of corrective justice through compensation.[159] Wils claims that actions for damages can *contribute* to deterrence, but public enforcement appears superior for at least two reasons.[160] First, public enforcement, through its reliance on state power, benefits from more effective investigative and sanctioning powers. Public

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155 Weatherill, *Cases and Materials on EU Law* (n 115) 517.

156 *Courage* (n 27) para 27; *Manfredi* (n 32) para 91; Case C‑360/09 *Pfleiderer* ECLI:EU:C:2011:389, para 29; see also, Case C-253/00 *Muñoz* ECLI:EU:C:2002:497, para 30.

157 A P Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and The Community Right to Damages' (2002) 32 CMLRev 3 457, 458, 469.

158 Ioannidou (n 23); Komninos, *EC Private Antitrust Enforcement* (n 116).

159 Wils, 'Private Enforcement of EU Antitrust Law' (n 116) 3; see also Wils, 'The Relationship' (n 152) 32 World Competition 1 12; see also Nebbia (n 11) 26.

160 Wils, 'Private Enforcement of EU Antitrust Law' (n 116) 3.

enforcement is also superior because more effective sanctions are available and because the level of the sanctions can be better controlled. Secondly, private actions for damages are inevitably driven by the private gains and expenses of the parties concerned. In Wils' view, these private interests[161] will often diverge from the general – public[162] – interest.

Komninos rightly rejects Wils' idea and argues that 'there is a common misconception' that public enforcement serves the public interest while private enforcement is only driven by the private interest of litigants.[163] In his view, private actions enhance the effectiveness of the competition law prohibitions and do not vary from the basic aim of the competition rules: the protection of competition.[164] Thus, this is a case where the private interest contributes to the safeguarding of the public interest, so no antinomy exists.[165] Komninos' account is consistent with the account adopted by the thesis – it moves beyond the public/private divided and acknowledges the binary nature of antitrust damages actions. However, this account was not adopted by the ADD, which includes express prohibition of overcompensation based on the view that deterrence should be reserved for public enforcement.

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161 Protecting competitors and consumers through civil "sanctions", most notably civil claims for damages.

162 Protecting the competition norms through administrative or criminal sanctions.

163 Komninos, 'Public and Private Antitrust Enforcement in Europe' (n 114) 5, 12-13.

164 ibid 5.

165 ibid.

(c) "Full compensation model" as a threat to the principle of effective judicial protection

The thesis argues that the focus on "full compensation" and the express prohibition of overcompensation carries mostly negative implications for the principle of effective judicial protection, which underlines the right to damages for EU competition law infringements. This argument is sketched in the following paragraphs.

The thesis points out that the identified shift in the promoted rationales for antitrust damages actions – influenced to a considerable extent by the European Parliament and businesses – led to aforementioned four crucial developments or steps that, considered independently or together, undermine the effectiveness of EU competition law and curtail the principle of effective judicial protection – the two principles that underpin the creation of antitrust damages actions. The thesis examines the advantages and drawbacks of these steps in view of the quest to improve enforcement of EU competition law in Chapter V (in particular by closing the enforcement gap).

The content of the adopted Directive differs from the policy documents and the Court's case law on which it is based. Regrettably, it differs from the policy documents especially in those aspects that were recognised (also by the Commission and to a certain extent by the European Parliament) as positive features for closing the identified enforcement gap and, thus, for both the principle of effectiveness of EU competition law and the principle of effective judicial protection.[166]

[166] This is further discussed in the analytical framework provided below. See, e.g., V Milutinović, 'The 'Right to Damages' in a 'System of Parallel Competences': A Fresh Look at *BRT v. SABAM* and its Subsequent Interpretation' in P Lowe and M Marquis (eds), *European Competition Law Annual*

Against this background, the crucial question that the thesis seeks to address is the desirability and justifiability of these developments in light of the EU's constitutional framework. The Commission has received criticism that proposals and studies elaborated by scholars and experts are torpedoed by intensive economic lobbying and fail to get through the political filter 'based on arguments peculiar to phobia of foreign legal solutions, using legal traditionalism as a successful marketing weapon'.[167] Thus, there are speculations that lobbying boosts the Commission's reliance on the traditional private law perspective, reflected in the "European legal culture" arguments,[168] as a justification for departures from the initial approach. Accordingly, it is believed that the Commission wanted to ensure wider political support for the adoption of the ADD, as some stakeholders (business groups) and the European Parliament had been opposed to the introduction of a remedy based on deterrence.[169] Against this background, the thesis examines whether private enforcement of EU competition law can be considered as "consumers' sword" or, perhaps, it has transformed into "businesses' shield". In the latter case the principle of effective judicial protection in the EU competition law context is under threat. This could suggest that, from the functionalist perspective, in the context of the ADD the link between the legal basis of the right to damages and its content and function is broken.

2011: Integrating Public and Private Enforcement. Implications for Courts and Agencies (Hart Publishing 2014) 18.

167 C I Nagy, 'The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?' (2015) 22 Maastricht Journal of European and Comparative Law 4 531-532, 552.

168 E.g., White Paper (n 124) 3.

169 Petrucci, 'Subsidiarity' (n 42) 248; Ioannidou (n 23) 149; D Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011) 172.

2 Framing the Debate: Developing the Analytical Framework

This section develops an analytical framework in order to grasp the rationale for antitrust damages actions in the national legal systems and at EU level – to examine the "European Legal Tradition" argument –, and to assess the desirability and justifiability of the prohibition of overcompensation in the ADD in light of the considerations presented above. To scrutinise the aforesaid binary nature of antitrust damages, the analytical framework developed in the thesis borrows terminology and ideas from both perspectives – the traditional private law perspective and the regulatory perspective.[170]

To this end, the analytical framework focusses on the *language* used to construct arguments in judicial reasoning and to justify choices in legislation regarding the rationale for antitrust damages actions. Language can be manipulated and certain expressions and concepts can be used as a pretext to conceal the real purpose behind expressions. The analysis therefore aims to move beyond the verbal layer. This involves not only understanding larger legal discourses, but also understanding the political context giving momentum to relevant developments.

The analytical framework rests on the premise that there are certain key terms, expressions and concepts, referred to as "keywords", used by judges and the Commission for the justification, creation and development of the right to damages for EU competition law infringements. These keywords are the following: "the full effectiveness of EU competition law", "the principle of effective judicial protection", "enforcement rationale",

[170] Here, notions like "compensation", "damage", "breach" etc. are borrowed from the traditional private law perspective. Notions like "enforcement" and "deterrence" are typically linked to regulation.

"deterrence", "punishment", "protection of rights", "harm", and "compensation". The analytical framework rests on the premise that these keywords can be divided into two basic groups. These two basic groups underpin two models based on the two principles that justify the creation of the right to damages for antitrust infringements – the full effectiveness of EU competition law and the principle of effective judicial protection, respectively. The former underpins the "enforcement-based" model in which the deterrence rationale is dominant one (keywords: the full effectiveness of EU competition law, enforcement rationale, deterrence, and punishment). The latter underpins the "compensation-based" model in which the compensation rationale is dominant[171] (keywords: the principle of effective judicial protection, protection of rights, harm, compensation). At a theoretical level, as Nazzini argues, it is possible to say that this right to damages may be the manifestation of the legal protection of an individual interest (compensation) or an instrument to achieve the effective enforcement of the law in an objective way (deterrence).[172] As he rightly emphasizes,

> while both legal bases may co-exist, it is relevant to identify which one is prevalent, that is whether certain private rights are used predominantly for

[171] Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) fn 59, 419; Nazzini, 'The objective' (n 21) 132, 142.

[172] Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 410.

> a public policy objective or whether a public policy objective is also, incidentally, served by the legal protection of individual interests.[173]

It is important to bear in mind that on a functional analysis compensation and deterrence are not mutually exclusive.[174] However, it is 'the centre of gravity of the legal basis of a private right' which may determine the function of a right and its content.[175]

Against this background, the thesis analyses arguments and patterns of argumentation related to these keywords in the case law, legislation, and the Commission's policy documents. The thesis develops a three-stage model for the assessment of the rationale: the rationale is examined, first, at the stage of establishing the right to damages; second, at the stage of establishing liability in an actual case; and third, at the transformative stage – to pursue regulatory goals.

I will sketch both models and three-stages of assessment and yield brief working definitions of the keywords in the following subsection.

(a) Two Models and Three Stages of Assessment

The thesis develops a three-stage model for the assessment of the rationale for damages. At every stage, the enforcement-based and the rights-based models are used to identify the rationale for damages. Since the lines between these two models are not always clear-cut, but may be blurred, the thesis understands these two models as opposite ends of the

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173 ibid. See also Nebbia (n 11) 24-36.

174 Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 411 fn 44. Cf, e.g., K Stanton, *The Modern Law of Torts* (Sweet & Maxwell 1994) 11-12. He claims that 'the deterrence and compensation aims are almost certainly incompatible with each other'.

175 Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 411.

spectrum. A civil liability regime is somewhere on this spectrum, but it needs to be identified whether it is predominantly enforcement-based or rights-based.

At the first stage, the rationale for creating the right to damages is examined. It can be either deterrence (embedded in the enforcement-based model) or compensation (embedded in the compensation-based model). At the second stage, the rationale for establishing liability in an actual case is examined. This entails the assessment of conditions of liability for EU law infringements, which are autonomous of national legal concepts (e.g. conferral of a right, damage, fault, sufficiently serious breach, causation).[176] The third stage of assessment, the transformative stage, has a binary nature. It is implicitly engaged already at the second stage of assessment. If a compensatory remedy at the second stage does not serve objectives for the creation of the right to damages identified at the first level (i.e. deterrence), the third level of assessment is triggered and punitive damages are awarded. Thus, the third stage transforms the compensatory award into a non-compensatory one. Importantly, the third stage can be triggered only in cases where deterrence is established as the dominant rationale for damages already at the first stage – *i.e.* if the right to damages was also established as an instrumental tool to achieve certain regulatory goals. Accordingly, this stage is triggered only occasionally (e.g. intentional lucrative faults).

In all three stages, the enforcement-model and the compensation-model are employed as analytical tools to assess the rationale. These two models are built upon the classical distinction between the deterrent and compensatory function of damages

[176] In *Brasserie* (n 41), the Court emphasized the independent nature of the test of liability and rejected the possibility of equating it with national conditions of liability. See Condon and van Leeuwen (n 41) 2.

underpinned by the public/private or regulation/tort divide. They were informatively depicted by Cane's account on two perspectives on tort law – the responsibility-based perspective and the regulatory perspective.[177]

The responsibility-based perspective sees tort law as a set of rules and principles of interpersonal responsibility to repair harm.[178] This thesis refers to this perspective as the 'traditional private law perspective'. Cane identified the interaction of *protected interests*, *sanctioned conduct* and *sanctions* as three distinctive aspects of tort law as a juristic institution,[179] and contrasted views of both perspectives on these three aspects. Cane makes the following intertwined distinctions between the traditional national private law perspective and the regulatory perspective.[180] First, the traditional private law perspective focusses on protected interests, while the regulatory perspective concentrates on sanctioned conduct and sanctions. Thus, the former is victim-oriented, while the latter is wrongdoer-oriented.[181] Second, the regulatory perspective emphasises forward-looking behaviour-modification goals, while the traditional private law perspective emphasises backward-looking responsibility-based values.[182] Third, tort law's concerns are responsibility-based, while regulation has instrumentalist aspirations. Fourth, understood in terms of the traditional private law perspective, tort remedies 'correct' the harm done by the tortious

177 Cane, 'Tort Law as Regulation' (n 98) 306.

178 Cf. Cane, 'Tort Law as Regulation' (n 98) 306; T Eisenberg, N LaFountain, B Ostrom, D Rottman and M T Wells, 'Juries, Judges and Punitive Damages: An Empirical Study' (2002) 87 Cornell LR 743.

179 Cane, 'Tort Law as Regulation' (n 98) 306. Emphasis added.

180 ibid.

181 Tort remedies are typically backward looking, with the exception of injunctions, designed to address either past or continuing breaches. Cane, 'Tort Law as Regulation' (n 98) 316.

182 See also Leczykiewicz, 'Enforcement or Compensation?' (n 11) fn. 1; Nebbia (n 11) 23.

conduct. Understood in regulatory terms, however, they provide an incentive to detect breaches and a reward for the reporting of breaches of regulatory standards to the enforcement agency (i.e. the court or the Commission in the EU competition law context).[183]

Similar distinctions were drawn also by Dorota Leczykiewicz, and served for distinguishing between "compensation-focused" and "enforcement-focused" regimes. As Leczykiewicz summarizes, the compensation-focused regime has the following features:

> 1) the *existence of loss* is a necessary condition of an award; 2) the award *reflects the value of losses* which have actually been proved; and 3) the award *may be* conditional on proving that the defendant acted negligently (was at *fault*), but the gravity of the defendant's misconduct *does not affect the measure of damages*.[184]

Thus, if the three-stage model of assessment is applied to the compensation-focused regime, it can be concluded that all these three features are pertinent to *conditions of liability* and, thus, play a role in the second stage of the assessment of the nature of a remedy of damages. However, they are crucial also for the (implicit) exclusion of the third stage from the assessment exercise. The first two features of the model focus on the protected interests and are, thus, backed by the traditional private law perspective. The third feature can shift focus to the wrongdoer, since the gravity of his misconduct may be a condition for establishing the liability. However, this should not influence the size of damages awards. The fact that the gravity of misconduct does not affect the size of the award

183 Cane, 'Tort Law as Regulation' (n 98) 316.

184 Leczykiewicz, 'Enforcement or Compensation?' (n 11). Emphasis added.

characterises the remedy as "compensatory" or "quasi-compensatory",[185] since the third stage of assessment is not triggered and, thus, the remedy should not be transformed into a deterrent one.

On the other hand, Leczykiewicz's enforcement-focused regime has the following features: [186]

> 1) the *existence of loss is not* a necessary condition of liability; 2) the necessary condition of liability is *a breach of a regulatory standard*; 3) the *award may exceed the value of losses* which have actually been proved; 4) *the gravity* of the defendant's misconduct affects the measure of damages (directly or at least indirectly); *slight violation* of a norm may be left *unsanctioned*; and 5) *punitive damages* are not excluded.

Applying the three-stage model of assessment reveals that these three features play a role in the second and the third stage of the assessment of the rationale for damages. All the features shift the focus to the sanctioned conduct and are, thus, backed by the regulatory perspective. The nature of a remedy may be non-compensatory, either under-compensatory ('slight violation of a norm may be left unsanctioned'), or over-compensatory ('punitive damages are not excluded'). The third stage of assessment, leading to punitive damages, will be triggered only if a compensatory remedy (in the second stage) does not sufficiently serve objectives identified in the first stage.

Leczykiewicz's two models are informative for the present thesis, however, they are incomplete from the functionalist perspective adopted by the thesis, as they focus only on the second and the third level of assessment of the nature of a remedy. They do not

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185 If the conditions for liability limit access to damages, this can lead to a situation in which not all harm is compensated, hence, such regime is "quasi-compensatory". For example, the *Francovich* liability, which compensates only harm caused with the "sufficiently serious breach".

186 Leczykiewicz, 'Enforcement or Compensation?' (n 11). Emphasis added.

address the first level which establishes the rationale for the creation of a civil liability regime and is, thus, crucial for the examination of the key premise of the thesis – that the rationale for civil liability regime should determine the legal basis and the content of a (legislative or judicial) measure governing that civil liability regime.[187] As Nazzini rightly argued, 'it is necessary to distinguish between the content of the right, on the one hand, and its legal basis[188] and function,[189] on the other'.[190] Thus, the case may be that the rationale for creation of a civil liability regime is deterrence (first stage), but the nature of the damages award is compensatory (second stage).

Hence, 'full compensation as the content of the right is consistent with the objective of ensuring the effective enforcement of EU competition law'.[191] The enforcement-focused regime and the compensation-focused regime are not incompatible.[192] As aforementioned, private law has been transformed into a "hybrid" regime in which not only questions of enforceability but also remedies must embrace the demands of EU competition law.[193] If law-making is hybridised, remedies should respond to that.

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187 See Nazzini, 'The objective' (n 21).

188 By 'legal basis of the right' in this context, it is meant the Treaty provision or principle that confers a particular right. E.g., the principle of full effectiveness of EU competition law and the principle of effective judicial protection.

189 By 'function of the right', it is meant the objective for which the right is conferred.

190 See Nazzini, 'The objective' (n 21) 139.

191 ibid.

192 Cf. Weinrib, *The Idea of Private Law* (n 11) 38; Leczykiewicz, 'Enforcement or Compensation?' (n 11). She suggests that a damages actions regime based on the idea of enforcement is a more suitable approach for EU law, also in the private law context.

193 Weatherill, *Contract Law* (n 28) 38. Weatherill refers to 'national contract law'.

(b) Keywords

In this subsection, I will present working definitions of the keywords divided in two groups around the principle of effectiveness of EU competition law and the principle of effective judicial protection, since the Court relies on the ambit of these two intertwined concerns in establishing and interpreting the right to damages for EU competition law infringements.[194] These two principles could be seen as theoretical expressions of the "dual vigilance" enforcement model that is characteristic for EU law enforcement.

The Principle of Effectiveness and the Principle/Right of Effective Judicial Protection: Interpretatio Cessat in Claris?

Though intertwined, the thesis rests on the premise that the principle of effective judicial protection and the principle of effectiveness are distinct principles and are not one and the same, although their content might sometimes overlap. Their apparent intertwinement could be seen as a manifestation of the "dual vigilance" remedial system typical for the EU and the ensuing binary nature of EU remedies.[195]

It is argued by the thesis that the language used in relation to the principle of full effectiveness of EU law uncovers predominantly enforcement-based concerns, whereas the language used in relation to the principle of effective judicial protection primarily refers to

194 See Ch III.

195 On dual vigilance in EU competition law, see O Odudu and A Sanchez-Graells, 'The Interface of EU and National Tort Law: Competition Law' in P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar, 2017).

the vindication of individual rights conferred by EU law (compensation-based concerns).[196] I explain this further in the remainder of this section.

There is a lot of confusion and ambiguity regarding the exact content of these principles, the context in which they are used, and the relation between different principles that entail "effectiveness" in EU law – both in the Court's case law and in the legal scholarship. Two situations are distinguished for their examination. In the first situation, the two principles are employed in the national procedural autonomy context. The thesis focusses on the second situation, in which the principles are employed in the context of a creation and/or development of remedies for infringements of EU law. Now I turn to the explanation of these two analytical tools used by the theoretical framework of the thesis.

The principle/ right to effective judicial protection

The principle of effective judicial protection concerns 'the effectiveness of subjective rights enjoyed by individuals under the Treaty as they are enforced against Member States or private parties'.[197] It is arguably the most powerful principle which justifies the involvement of EU law in private law liability.[198] It refers to a broad concept, which generally encompasses various core elements, including access to justice, the right to an effective remedy and the principles of fair trial and due process of law.[199] Pursuant to the

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196 Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) fn 59, 419; Nazzini, 'The objective' (n 21) 132, 142.

197 Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 404 fn 17; Dougan, *National Remedies* (n 20) 38-45.

198 D Leczykiewicz, 'The Constitutional Dimension of Private Law Liability Rules in the EU' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 214.

199 L M Ravo, 'The role of the Principle of Effective Judicial Protection in the EU and its Impact on National Jurisdictions' in *Sources of Law and Legal Protection* (EUT Edizioni Università di Trieste 2012) 103.

Court's jurisprudence, the right to an effective remedy encompasses also the right to full and adequate compensation. The principle of effective judicial protection applies not only to actions brought by individuals against the Member States but also in purely horizontal situations.[200] Today, it is embodied in the second subparagraph of Article 19(1) of the TEU and in Article 47 of the Charter, which has become a binding legal source with the Lisbon Treaty's entry into force, arguably elevating effective judicial protection to a general principle and a fundamental right in the EU legal order.[201] Article 47 of the Charter provides that 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'.

In applying or creating the appropriate remedy for the violation of the right granted by the EU, national judges have to construe remedies in a way that does not curb the effectiveness of the rights conferred on individuals by EU law. This is a crucial requirement that greatly affects the Court's reasoning in cases interpreting actions for damages and exposes the intertwinement of the principle of effectiveness and the right to effective judicial protection in the national procedural autonomy context.

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200 D Leczykiewicz, 'Where Angels Fear to Tread': The EU Law of Remedies and Codification of European Private Law' (2012) 8 European Review of Contract Law 1 8.

201 See Article 6(1) TEU. Reich, *General Principles of EU Civil Law* (n 81) 90. For a brief account on the possible significance of the evolution of the right to effective judicial protection from a 'general principle of EU law' to a right under the Charter, see C Mak, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in H-W Micklitz (ed), *Constitutionalization of European Private Law* (OUP 2014) 236.

The stepping stones of the principle of effective judicial protection can be found in *Von Colson*, in which the Court construed Article 6 of the Equal Treatment Directive[202] in such a way that the sanction chosen by a Member State must guarantee real and effective judicial protection.[203] The Court later explicitly recognized the principle of effective judicial protection in the landmark judgment in the case of *Johnston.*[204]

As far as the creation of a remedy for EU law infringements is concerned, in the famous *Factortame* judgment, Court 'made a somewhat unclear allusion to "the legal protection which persons derive from the direct effect of provisions of Community law"'.[205] Two decades later, in the case of *Unibet*, the Court reaffirmed the *Factortame* judgment and 'added a clear and explicit new element to its argument, namely the need for effective judicial protection of an individual's rights under Community law'.[206] Thus, as the Court held in the free movement of workers case *Heylens*, the primary rationale for the effective judicial protection is to secure effective protection of individual rights:

> the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right [free access to

202 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39 (Equal Treatment Directive).

203 *Von Colson* (n 16). This is a landmark judgment also as regards 'the development of a new and important general requirement of EU law, namely that sanctions for breaches of EU rules must be effective, proportionate and dissuasive'. S Prechal and R Widdershoven (n 16) 34 fn 15.

204 Case 222/84 *Johnston* ECLI:EU:C:1986:206.

205 Prechal and Widdershoven (n 16) 33.

206 ibid.

employment] is essential in order *to secure for the individual effective protection of his right*.[207]

The principle of effectiveness (the full effectiveness of EU competition law)

The principle of effectiveness is the central principle for private enforcement of Union law.[208] It can carry several different meanings, albeit related and sometimes overlapping.[209] Over recent decades, a considerable amount of case law and scholarship has built up to develop, adapt and refine it. Two meanings are relevant for the present discussion.

(i) First meaning: *Rewe* effectiveness

Pursuant to the first meaning or perspective, the principle of effectiveness may be understood as embedding the idea that individuals must be able to obtain redress when their rights are infringed by a breach of EU law.[210] It was advanced with the existing EU *acquis* on the national procedural autonomy of Member States to enforce Union rights. This embodiment of effectiveness was first developed in the *Comet/REWE* cases in 1976 as a limitation to the procedural autonomy of Member States in the absence of detailed EU rules of administrative and judicial procedures governing individuals' actions to safeguard their

207 Case 222/86 *Heylens* ECLI:EU:C:1987:442, para 14. Emphasis added.

208 For its impact on private law relationships, see P Rott, 'The Court of Justice's Principle of Effectiveness and its Unforeseeable Impact on Private Law Relationships' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013).

209 K Lenaerts, 'Effective judicial protection in the EU' (2013) available at http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf 3; Nebbia (n 11) 28-35. See also I Lianos, P Davis, and P Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 20.

210 Lianos, Davis, Nebbia (n 209) 20.

rights on the basis of EU law.[211] They therefore, in Arnull's words, 'add flesh to the skeleton of primacy, direct effect and state liability, helping to bring it to life'.[212]

Thus, here, the principle of effectiveness is one of the twin principles under the umbrella of the national procedural autonomy (the principles of effectiveness and equivalence[213]).[214] It is sometimes referred to as "*Rewe* effectiveness".[215] Advocate General Maduro submitted that it

> entails that *the conferral of rights by Community law must be meaningful* in practice. It essentially expresses, as regards rights conferred by Community law, the familiar precept that *where there is a right, there must be a remedy*. In the words of Advocate General Jacobs: 'an individual who considers himself wronged by a measure which deprives him of a right or advantage under Community law must have access to a remedy against that measure and be able to obtain complete judicial protection. The principle of effectiveness accordingly *precludes procedural rules that render the*

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211 Case C-33/76 *Rewe-Zentralfinanze* EU:C:1976:188, para. 5

212 A Arnull, 'The principle of effective judicial protection in EU law: an unruly horse?' (2011) 36 ELRev 1 51.

213 The principle of equivalence requires that the same procedural rules apply to claims based on EU law as to comparable claims based on national law. See, e.g., Case 33/76 *Rewe‑Zentralfinanze* ECLI:EU:C:1976:188, para 6.

214 The essence of the national procedural autonomy is that unless EU law provides otherwise, national procedural rules apply. Yet, the national rules or their application must satisfy the following conditions: 1) The rules that govern a dispute with a EU law dimension may not be less favourable than those governing similar domestic actions (*principle of equivalence*); 2) The rules must not render virtually impossible or, at the very least, excessively difficult the exercise of rights conferred by the EU legal order (*principle of effectiveness*).

215 See, e.g., Prechal and Widdershoven (n 16) 31; J Krommendijk, 'Is There Light on the Horizon? The Distinction between "Rewe Effectiveness" and the Principle of Effective Judicial Protection in Article 47 of the Charter after *Orizzonte*' (2016) 53 CMLRev 1395.

> *exercise of rights conferred by Community law practically impossible or excessively difficult*.[216]

Thus, the principle of effectiveness appears to ensure that rights of private parties vested in EU law can be effectively enforced.[217] It can be said that the right to effective judicial protection is its specific expression.[218] Many consider the right to effective judicial protection as the over-arching principle.[219] Here, the notion "effectiveness" is linked to the assessment of a national remedy intended primarily for individual rights vindication, and thus to *effectiveness of judicial protection*. Therefore, it is only in this limited context that one can argue that the principle of effectiveness and the right to effective judicial protection (sometimes) overlap.

Advocate General Jääskinen expressly *equated* these two principles by stating that

> [t]he principle of effectiveness, or effective judicial protection, obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law impossible in practice or excessively difficult to enforce.[220]

In a more recent case, the same Advocate General reiterated that the principles of equivalence and effectiveness (i.e. *Rewe* effectiveness) 'should be considered beneath the

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216 Opinion of AG Maduro in Joined Cases C-222/05 to C-225/05 *Van der Weerd* ECLI:EU:C:2007:124, para 16. Emphasis added.

217 ibid.

218 See e.g. Opinion of AG Kokott in Case C-75/08 *Mellor* ECLI:EU:C:2009:32, para 28.

219 See Wilman (n 44) 39; W Van Gerven, 'Harmonization of private law: Do we need it?' (2004) 41 CMLRev 2 515; Dougan, *National Remedies* (n 20) 4; S Drake 'Scope of *Courage* and the Principle of 'Individual Liability' for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice' (2006) 31 *European Law Review* 6 84.

220 Opinion of AG Jääskinen in Case C-536/11 *Donau Chemie* ECLI:EU:C:2013:67, para 3. See also Reich, *General Principles of EU Civil Law* (n 81) 90. Reich states that the of principle of effectiveness is written into Article 47(1) of the Charter.

umbrella of Article 47 of the Charter'.[221] At the same time, however, he acknowledged that the principle of effective judicial protection and *Rewe* effectiveness are *different*, since the former was developed within fundamental rights law, whereas the latter functions as a limit to the procedural autonomy of the Member States.[222] Also from the "post-Lisbon" case law, it can be derived that both principles continue to fulfil an independent role, in the sense that the Court assesses them separately. For example, in *Mono Car Styling*, the Court stated that

> Community law nevertheless requires, *in addition to observance* of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection.[223]

Prechal and Widdershoven righty argue that a separate application of the principles is desirable, because they serve different purposes and are driven by different rationales:[224]

> While the effectiveness principle (and also the principle of equivalence) primarily aims to guarantee an effective application of substantive EU law, the principle of effective judicial protection is intimately linked to the fundamental right of access to the court and, ultimately, to the idea of the '*Rechtsstaat*'.
>
> In EU law, judicial protection often happens to coincide with this concern of effective application and enforcement, but judicial protection is not the leading idea behind the *Rewe* principles. Their main focus is the effective application of Union law. This is indeed different in the case of the principle of effective judicial protection. The primary considerations behind this

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221 Opinion of AG Jääskinen in Case C-61/14 *Orizzonte* ECLI:EU:C:2015:307, para 24. See also Opinion of AG Jääskinen in Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:155; and Opinion of AG Bot in Case C-93/12 *ET-Agrokonsulting-04* EU:C:2013:172.

222 Opinion of AG Jääskinen in Case C-61/14 *Orizzonte* ECLI:EU:C:2015:307, para 33. See also Prechal and Widdershoven (n 16); Wilman (n 44) 40.

223 Case C-12/08 *Mono Car Styling* ECLI:EU:C:2009:466, para 49. Emphasis added. See also Joined Cases C-317/08 to C-320/08 *Alassini* ECLI:EU:C:2010:146, para 52-66.

224 Prechal and Widdershoven (n 16) 50.

> principle are intimately linked to fundamental rights and, ultimately, to the idea of the '*Rechtsstaat*'.[225]

In this vein, also Krommendijk argues that

> *Rewe* effectiveness is thus above all instrumental to the objectives of the Union and the enforcement of EU law, while [the principle of effective judicial protection] should (also) be seen as a distinctive goal in itself.[226]

Thus, although the content of the *Rewe* effectiveness and of the right to effective judicial protection sometimes overlap, their underpinning rationale differs. While the former is linked to the enforcement-based model, the latter is rights-based, and thus linked to the compensation-based model. As aforementioned, the effectiveness that this thesis focuses upon in the context of the enforcement-based rhetoric is the effectiveness under the second meaning, i.e. in the context of the creation/development of the right to damages for breaches of Articles 101 and 102 TFEU.[227]

(ii) Second meaning: full effectiveness of EU (competition) law

Pursuant to its second meaning or perspective, the principle of effectiveness can be understood as "effective enforcement", i.e. effective compliance by Member States with their EU obligations (the principle of effectiveness *stricto sensu*)[228]. It encapsulates the

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225 Prechal and Widdershoven (n 16) 46.

226 Krommendijk (n 215) 1406.

227 See Wilman (n 44) 456. The Court still employs "effectiveness" in the national procedural autonomy context when it deals with aspects of the right to antitrust damages that are not harmonised at EU level (e.g. causation in the case of *Kone*). As Nazzini rightly argues, there is a distinction between constitutive elements of the rights, subject to EU law only, and executive elements, governed by national law subject to the scrutiny (e.g. causal relationship). See Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 408. Cf. this division with the Reich's account on the principle of effectiveness. He understands the principle of effectiveness as an 'elimination rule' (similar to *Rewe* effectiveness), as a 'hermeneutical interpretative principle' and as a 'remedial' principle upgrading national remedies into 'hybrid' EU remedies (these two meanings are similar to the second meaning of full effectiveness). Reich, *General Principles of EU Civil Law* (n 81) Ch 4.

228 Lenaerts (n 209) 3.

idea of obedience, sanction, and enforcement.[229] Thus, the main concern underlying the principle of effectiveness is in essence the effective application and enforcement of EU law *per se*[230] – thus, it can be referred to as "the principle of full effectiveness of EU law". Articles 101 and 102 TFEU are addressed to private parties, thus in this context "effective enforcement" means that also private parties have to comply with their EU law obligations.

Under this meaning, the judicial protection of the individuals concerned, rather than being a *per se* aim, is an *instrument* to ensure the effective compliance by the States (and private individuals in the EU competition law and other contexts) with their obligations or, to use Advocate General Jacobs's words, it may generate a 'windfall benefit' to the individual.[231] Thus, the principle of full effectiveness of EU law concerns the enforcement of Treaty norms in the public interest.[232]

If pursuant to the first meaning sketched above one could argue that the principle of effectiveness sometimes becomes instrumental to the principle of effective judicial protection, here it appears that the situation is reversed. The protection of individual rights appears to be instrumental to achieve effective compliance with EU law - at least in the initial stages of a remedy creation.[233]

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229 Lianos, Davis, and Nebbia (n 209) 19.

230 Prechal and Widdershoven (n 16) 46.

231 Opinion of AG Jacobs in Case C-443/98 *Unilever* ECLI:EU:C:2000:57, para 39. Lianos, Davis, and Nebbia (n 209) 20.

232 Nazzini, 'Potency and Act of the Principle of Effectiveness' (n 39) 404 fn 17; Dougan, *National Remedies* (n 20) 38-45.

233 See U Šadl, 'The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8 European Journal of Legal Studies 1 43 43.

This can be illustrated with the case of *Muñoz*.[234] In this case the Court held that a regulation which imposes standards for the marketing of a product entitles a competitor to bring civil proceedings against a trader who fails to comply with those standards. The Court ruled that

> *the full effectiveness of the rules* on quality standards and, in particular, the *practical effect of the obligation* laid down by Article 3(1) of both Regulation No 1035/72 and Regulation No 2200/96 imply that it must be possible to enforce that obligation by means of civil proceedings instituted by a trader against a competitor.
>
> The possibility of bringing such proceedings *strengthens the practical working of the Community rules* on quality standards. *As a supplement to the action of the authorities* designated by the Member States to make the checks required by those rules *it helps to discourage practices, often difficult to detect, which distort competition*. In that context actions brought before the national courts by competing operators are particularly suited to *contributing substantially to ensuring fair trading and transparency of markets in the Community*.[235]

It follows that the full effectiveness in this case does not concern the protection of an individual right of competitors, but rather the achievement of compliance with EU rules. Private enforcement in this context works as a supplement to public action with the aim to *discourage* – and thus, to *deter* – practices that distort competition. The full effectiveness relates to enforcement of EU rules on quality standards and not to access to justice or the right to the effective remedy. Access to justice which is granted to competitors is instrumental to achieve effective compliance with EU law. The same argumentative pattern

234 Case C-253/00 *Muñoz* ECLI:EU:C:2002:497.

235 ibid, paras 30-31. Emphasis added.

is used to create the right to damages for EU competition law infringements in the case of *Courage*.[236]

Thus, it is argued that the second meaning of the principle of effectiveness refers to the principle of (full) *effectiveness of EU law*. The rationale behind this effectiveness is mostly the proper functioning of the internal market, for example 'effective competition' (in *Courage*) or 'fair trading' (in *Muñoz*). Hence, the effectiveness in this context is distinct from the principle of effective judicial protection. Its primary rationale is deterrence (or discouragement). Consequently, the thesis argues that the principle of (full) effectiveness (of EU law) and the effective judicial protection are two distinct principles based on enforcement-based and rights-based rhetoric, respectively. In the right to damages context, the former underpins the enforcement-based model and the later underpins the rights-based compensation model.

"Enforcement rationale, deterrence, punishment" vs "loss compensation, protection of rights, harm"

Deterrence and enforcement have a prospective character, whereas compensation has a retrospective character.[237] In the case of deterrence and enforcement, the emphasis is not on the claimant and his harm but on the defendant and his conduct. It is a common understanding that compensation (inherent in the rights-based rhetoric) and deterrence (inherent in the enforcement-based rhetoric) are both aims of damages awards, albeit to a different extent. In the national legal systems under scrutiny in the comparative part of this

236 This is discussed at length in Ch III, s 3.

237 Leczykiewicz, 'Enforcement or Compensation?' (n 11) fn. 1; Nebbia (n 11) 23.

thesis, compensation is usually at the forefront or the main aim of the damages awards, while deterrence is often understood as their (positive) side effect.

Part of the justification for a tort is that it *identifies* what actions should be avoided and deters people from engaging in them.[238] Thus, one of the functions of damages is deterrence, which can be to some degree implicitly ascribed to compensatory damages, as one can argue that the threat of an award of damages has at least to a certain extent a deterrent effect on wrongdoers. However, a tort action may over-deter or under-deter.[239] On the one hand, as Kidner stated, it may over-deter where the perception of the chance of liability is exaggerated. It is argued that fear of liability ('the compensation culture') often prevents people from engaging in perfectly sensible activities.[240] On the other hand, the tort action may under-deter where either the chances of somebody suing to enforce their rights are small (e.g. small claims) or where the consequences to the individual tortfeasor may be slight (e.g. insurance).[241]

Deterrence is understood by the thesis as a synonym for prevention. One of the generally applicable preventive measures in national legal systems is injunctive relief. The aim of injunctive relief is that the defendant ceases a specific ongoing behaviour. Thus, it is not effective when harm is inflicted in a single act, or when it is inflicted before the injunctive relief is issued. In some cases, the availability of non-compensatory damages

238 R Kidner, *Casebook on Torts* (OUO 2012) 4.

239 ibid.

240 ibid. However, others argue that, to the contrary, the tort system's biggest shortcoming is that too few tort victims choose to enforce their rights at all. See, e.g., D M Engel, *The Myth of the Litigious Society: Why We Don't Sue* (University of Chicago Press 2016).

241 Kidner (n 238) 5.

might serve the deterrent function better – in some instances through restitutionary damages, whereas in other cases punitive damages might be more suitable for this task.

Those that oppose punitive damages based on the public/private divide arguments often put forward an argument that if deterrence is the objective 'it may be that the criminal law is a more effective way of doing this'.[242] However, it should be noted that criminal enforcement is totally absent in the domains of EU competition law (and also in EU consumer law[243]),[244] and thus this argument does not hold water in this context. In this field, the EU legislature relies on administrative enforcement and encourages the use of private enforcement, but is against the criminalization of breaches of EU competition law, although there is a strong theoretical argument in favour of criminalizing competition law.[245] On the other hand, in some other policy areas where the reasoning for criminalization is rather weak – for example, insider trading and in the environmental area – the EU comes to opposite results, having forced the Member States to criminalize strongly.[246] As one of the possible explanation for an incoherent EU approach, Faure and Weber put forward interest group politics, which could be a factor explaining why

242 ibid.

243 The striking difference in the US and the EU approaches is visible in the handling of the *Dieselgate* scandal. While in the US, consumers have been awarded punitive damages and crucial actors were imprisoned, in the EU no damages have been awarded so far, while criminalization at EU level is altogether out of the question.

244 F Weber and M Faure, 'The Diversity of the EU Approach to Law Enforcement – Towards a Coherent Model Inspired by a Law and Economics Approach' (2017) 18 German Law Journal 4 824.

245 ibid 824, 874.

246 ibid. The authors believe that there is a theoretical justification for criminalization only for few incidents of rogue traders or for particular cases of concrete endangerment of the environment.

particular efficient instruments have not been introduced at EU level.[247] This argument is further dealt with in Chs VI and V.

An important question is whether deterrence (prevention) and punishment are different concepts. It is argued that this is indeed the case. The latter sanctions the degree of culpability of the wrongdoer and the seriousness of his actions and it is based on retribution, looking back at his conduct. Deterrence, on the other hand, is concerned with influencing the future behaviour of the wrongdoer and others.[248] Wagner argues that effective sanctions for breaches of EU law for purposes of deterrence are not tantamount to punitive damages, and that consequently the deterrence function of liability in damages must be distinguished from the penal function in the technical sense of retribution for wrongs. In his view, the case law of the Court and the legislative acts of the EU do not correspond to the classical view of the dual function of punitive damages, but embrace the deterrence function only. He goes as far as proposing a new term for this European institution, for example "preventive damages", for the sake of conceptual clarity.[249] It seems that Advocate General Jääskinen and the Court in the case of *Geistbeck*[250] adopted Wagner's distinction between a punitive and a preventive function of damages and embraced the latter as a function that might have beneficial effects.[251] Still, also the

247 ibid.

248 V Behr, Punitive damages in American and German law- Tendencies towards approximation of apparently irreconcilable concepts (2013) 78 Chi.-Kent L. Rev. 105.

249 G Wagner, 'Punitive Damages in European Private Law' in K J Hopt, J Basedow and R Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012).

250 Case C-509/10 *Geistbeck* ECLI:EU:C:2012:416, para 39.

251 See Ch III.

preventive function embraces a prospective character and, thus, forms part of the enforcement-based regime of damages.

Deterrence, as understood by the thesis, encompasses two elements – both "victims' incentives to sue" and "infringers' incentive to comply with EU competition law". Incentives to sue aim at more claims, and thus contribute to the overall deterrent effect of private enforcement of EU competition law.

In the Court's reasoning and in policy documents, the enforcement rationale can be straightforwardly recognized by the emphasis on the notions "deterrence", "dissuasiveness", "discouragement" and "prevention".[252] More implicitly, the Court refers to it by discourses describing a remedy with its practical effect of ensuring enforcement of an objective standard (e.g. effective competition, fair trading, proper functioning of the internal market).

On the other hand, compensation-based reasoning can be recognized by the emphasis on the notions "harm", "loss", "protection of rights". To fit into the compensation-model, these notions should not be employed instrumentally to establish the link between a breach of EU law norm and the liability in damages. It is assumed that in all the jurisdictions under scrutiny in the thesis the compensation-based model is a general rule, and the deterrence-based model is an exception. Thus, in examining the "European legal tradition" argument, I will focus on those narratives that depart from the compensation-based model.

252 See, eg, G Wagner, 'Private Law Enforcement Through ADR: Wonder Drug or Snake Oil' (2014) CMLRev 1 169; Weber and Faure (n 247).

(c) The importance of a clear framework for the effective judicial protection

This thesis argues that there is a semantic, conceptual and theoretical confusion accompanying the compensation and sanctions/penalties debate in the EU context, resulting from the dual vigilance system of enforcement, resulting in blurred and overlapping rationales for damages and the ensuing binary nature of damages actions.[253] Not only is it hoped that the analytical framework proposed in the thesis will expand the understanding of the rationale for antitrust damages, but it is also expected to bring more clarity into the area of remedies for EU law infringements in general. The Court's and the Commission's identification of the rationale would strengthen the legitimacy of these measures, curb arbitrariness and ambiguity, and help national judges in applying civil liability rules developed at the EU level. This in turn contributes to the effective judicial protection.

At present, the Court's and the Commission's language creates confusion over the rationale for damages which is reflected also in preliminary references under Article 267 TFEU. National courts have no clear answer regarding the requirements that the EU legal framework imposes on damages actions. What does the need for "dissuasiveness" or "a real deterrent effect" of damages entail? The magnitude of this confusion and uncertainties in the application of rules on damages actions for EU law infringements can best be described by the detailed question for a preliminary ruling in the case *Arjona Camacho* in the labour law context.[254] In at least two other fields of law, following the Court's judgment, national courts awarded punitive damages (in the field of competition law and

253 This is discussed at length in Ch III.

254 *Arjona Camacho* (n 32).

in the field of freedom to provide services – trade unions' liability).[255] Referring courts in these cases were from Spain, Italy and Sweden, countries with legal systems which are allegedly (traditionally) not receptive to overcompensation by means of punitive damages.

The confusion is exacerbated by the fact that different concepts and principles have been cross-fertilized by the Court between different fields of law. In this context, the prohibition of overcompensation in the ADD can lead to incoherence in the Court's case law. For example, the *Arjona Camacho* case relied on *Manfredi*'s reasoning. The ADD derogates from the approach in *Manfredi* regarding punitive damages, while the labour law context still "permits" this head of damages. Thus, the additional degree of inconsistency pertaining to the rationale for damages for EU law infringements has been created. The thesis thus seeks to address the obvious need to clarify this confusion.

255 In the competition law context, punitive damages were awarded in Italy based on the case of *Manfredi* (n 32). See P Nebbia, '...so what happened to Mr Manfredi? The Italian decision following the ruling of the European Court of Justice' (2007) 28 ECLR 11 591. In the freedom to provide services context, punitive damages were awarded in Sweden based on the Case C-341/05 *Laval un Partneri Ltd* ECLI:EU:C:2007:809. See M Rönnmar, 'Laval returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms' (2010) 39 Industrial Law Journal 3 280.

3 Overview and the Scope of the Thesis

The thesis is set to examine the quest to prohibit overcompensation in the ADD in terms of its legitimacy, normative desirability and justifiability. Broadly, this entails two tasks which correspond to two parts in which the thesis is divided.

The first part of my research is *descriptive* and *analytical* in its character. It has two components. First, to analyse the rationale for damages in a number of European jurisdictions (England, Germany, France) (Chapter II), and, second, to analyse the approach adopted by the EU institutions, especially the Court and the Commission, in the EU competition law context (Chapter III). The analysis in the first part of the thesis provides the background showing that there is a blurred (and fragmented) picture painted by EU law when the rationale for damages is dissected, focussing on EU competition law but looking also at other relevant fields of EU law. Conversely, it seems that actions for damages in different fields of EU law are mostly grounded in the "enforcement-based regime". Thus, there is space, in principle, for overcompensation.

The thesis examines the rationale in the selected national legal systems (Chapter II) to refute the assumption that non-compensatory elements are alien to "European legal culture and tradition". Moreover, findings from this chapter can inform solutions adopted at the EU level. To this end, the thesis is pragmatic in choosing the relevant materials for the analysis. Since it starts from the assumption that the compensatory rationale is dominant in the national context, the focus is on those documents and cases that depart from this assumption.

In the EU context, primary materials for the study have been limited to case law of the Court and the Commission's policy documents in the field of EU competition law. These are materials that the thesis aims to analyse to determine the rationale of antitrust damages actions. Therefore, their arguments are in the focus of analysis. To inform and broaden the understanding, however, secondary materials are also needed for comparison and discussion. These will be Opinions of Advocate Generals and case law of the Court and the Commission's policy documents and legislation in other areas, in particular State liability for infringements of EU law, EU labour law, IP and EU public procurement. The choice of areas beyond EU competition law is guided only by the extent to which these are relevant to, and shed light upon, the legal issues being discussed.

The thesis also examines the semantic, conceptual and theoretical confusion accompanying the compensation and sanctions/penalties debate in the EU context, reflected in the language employed both by the Court and the Commission. It points at the perplexed functions and rationales for damages and argues that they result from the fact that these functions are not 'strictly separated'.[256] To the contrary, the lines are blurred and overlapping. Thus, the "full compensation model" advanced by the ADD is seriously challenged in the EU context.

The second part is *normative* in its character. It is based on the identified rationale for antitrust damages actions in the first part of the thesis and on its implications in the light of the EU's constitutional framework based on the principle of conferral, the EU's

[256] See, e.g., H Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana Law Review 741.

purposive competences[257] and the market-building rationality[258] (Chapters IV and V). According to the functionalist method, the underpinning objectives are pertinent for the quality of a proposed measure and should be reflected in a proposed instrument. It is claimed that if consumer protection is at the forefront in the overall quest for better enforcement of EU law, the Commission should not encourage the prohibition of overcompensation in this setting, as it does not contribute to closing the enforcement gap and undermines the principle of effective judicial protection. Against this background, the rationale for the pursuit to prohibit overcompensation should be revamped.

Chapter VI is the conclusion.

257 Davies, 'Democracy and Legitimacy' (n 37).

258 Bartl (n 38).

PART I: RATIONALE FOR DAMAGES IN SELECTED JURISDICTIONS AND IN EU LAW

II RATIONALE FOR DAMAGES IN SELECTED JURISDICTIONS

1 Introduction

The main legal policy justification for the quest to prohibit overcompensation in the EU competition law context is based on the premise that they are incompatible with the "European legal tradition". It is grounded in the public/private divide discussed in the introductory part of the thesis. The aim of this chapter is to put this assumption into perspective. Against this background, this chapter identifies the rationales for damages in the three selected European jurisdictions (England, France, and Germany)[1] and establishes how these jurisdictions deal independently with the issues of deterrence and overcompensation.

There are two main aims of this chapter. First, it embarks on an examination of the existence of potential non-compensatory elements in damages, focusing especially on deterrence, in these jurisdictions. In so doing, the chapter challenges the claim that overcompensation, especially punitive damages, is incompatible with European legal tradition. Second, these findings serve as a springboard for development at EU level as the theoretical basis and as a reference point when discussing legitimacy questions in the

[1] The chapter focusses on England, France, and Germany, because they represent three major legal traditions that have influenced a considerable number of other legal systems in the EU.

second part of the thesis. To this end, the discussion in this chapter is confined to those issues that support the main argument of the thesis.

This chapter does not provide an orthodox description of the law of damages in different Member States. Others have done that in more detail. The crux of this chapter is to deal with the selected Member States' approaches to deterrence in their laws of obligations. It shall be argued that all three jurisdictions under consideration – though to a different extent and with different means – recognize that in certain contexts something more than pure compensation is needed to deter wrongful conduct, particularly in so-called lucrative faults cases which are especially pertinent to the competition law context.

Different jurisdictions use procedural devices that can affect different conditions for liability, and make the exercise of the right to damages more or less burdensome (e.g. burden of proof for damage and causation, presumption of fault, etc.). The thesis does not specifically address these aspects, unless they are deemed to be particularly relevant for the deterrent effect of damages (e.g. gradation of fault).

Although the French term "*la responisibilte civile*", the German term "*Schadenersatzrecht*" and the common law term "law of torts" are not to be equated, as they do not cover the same substance in the entirety, and are believed to be based on different concepts,[2] I intend to use the term "tort" as a synonym for non-contractual liability. I have opted for this choice to ensure consistency in the use of terminology and to prevent confusion, as the term "tort" is used throughout the thesis.

[2] See, e.g., also H Koziol, 'Schadenersatzrecht and the Law of Torts: Different terms and different ways of thinking' (2014) 5 JETL 3 257.

2 Function of Damages in the English Law of Obligations

(a) Introduction

The present section focusses on the rationale for damages in the English law of obligations. In examining this rationale, I pursue two goals. Firstly, this chapter will provide an overview of compensation as rationale for damages in principle, and then examine non-compensatory elements in case law and to a certain extent in the legislation. In particular, the so-called exemplary or punitive damages[3] will be discussed, as well as the aggravated damages and their convoluted nature. Secondly, the implementation of the ADD into English legal system and its implications for the availability of punitive damages before the English courts will be addressed. Prior to the adoption of the Directive, punitive damages were available for breaches of competition law. However, new implementing legislation based on Article 3 ADD expressly transposes the prohibition of overcompensation in the competition law context. Thus, in the wake of Brexit, this leads to a paradoxical situation.

(b) Compensation for Loss as a Rationale for Damages and its Manifold Exceptions

England has a common law system, and its basis is decisions in court cases, supplemented or amended in certain areas by legislation.[4] Remedies have played a crucial role in the

[3] In the UK, the terms "punitive" and "exemplary" damages are used interchangeably by both legal scholars and judges. [T]he terms are synonymous': *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 (Lord Nicholls).

[4] See, e.g., D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001).

development of the common law.[5] However, the concept of a remedy has rarely been subjected to rigorous analysis in the English law of obligations.[6] There is no general statutory definition of contract or tort, nor any provision covering tort liability in general.[7] The English law of tort is in fact a law of torts – there is no general principle for what constitutes a wrong actionable in the law of tort, but there is a whole series of wrongs which have their own separate rules.[8]

In formal terms, tort is defined as a civil wrong which gives rise to an action for damages, other than one which is exclusively a breach of contract or breach of trust or other equitable obligation.[9] The range of torts recognized under English law expands over time, to reflect changing social notions as to what basic rights should people have against other people.[10] Concurrent liability in contract and tort has been fully accepted in England since *Henderson v Merrett Syndicates Ltd*.[11] This means that a claim in tort is not precluded merely because the parties were in a relevant contractual relationship. However, it remains perfectly possible for the parties in their contract to exclude or limit, expressly or impliedly,

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5 S A Smith, *Contract Theory* (OUP 1993) 387.

6 A Burrows, 'Judicial Remedies' in Andrew Burrows, *English Private Law* (OUP 2013) 1253. There is only a handful of monographs dealing with this issue, see for example F H Lawson and H Teff, *Remedies of English Law*, 2nd edition (Butterworth 1980); H Beale, *Remedies for breach of contract* (Sweet & Maxwell 1980); D Harris, D Campbell, and R Halson, *Remedies in Contract and Tort* (CUP 2005); A S Burrows, *Remedies for Torts and Breach of Contract* (OUP 2004); G Samuel, *Law of Obligations & Legal Remedies* (Routledge-Cavendish 2001) 11.

7 J Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2007) 18.

8 ibid 35.

9 D Nolan and J Davies, 'Torts and Equitable Wrongs' in A Burrows, *English Private Law* (OUP 2013) 927.

10 N J McBride and R Bagshaw, *Tort Law* (Pearson 2015) 7.

11 A Burrows, 'Comparing Compensatory Damages in Tort and Contract: Some Problematic Issues' in S Degeling, J Edelman and J Goudkamp (eds), *Torts in Commercial Law* (Law Book Co 2011) 367-390; Burrows, *Remedies* (n 6) 5-7.

liability in tort just as they can exclude or limit liability in contract.[12] The acceptance of concurrent liability allows a claimant to choose whichever cause of action is the more advantageous.[13]

There is also no categorical definition of damages in English law. Academics maintain that also the issue of the nature and the essence of the law of damages is a relatively underexplored, even neglected, topic.[14] The general aim of the 'normal sort of damages'[15] for a tort, as well as of damages for breach of contract, is to put the claimant into as good a position as he would have been in if no tort or breach of contract had been committed. Thus, the compensation is their principal function, and the innocent party can recover only for his actual loss.[16] According to Lord Denning, an election must be made between recovering expectation and reliance loss.[17]

In addition to the claimant's pecuniary losses the claimant is also entitled to damages for his or her non-pecuniary loss. Damages may be available for pain and suffering, distress or loss of reputation. [18] As Smith argued, harms of this sort cannot be

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12 Burrows, 'Comparing' (n 11).

13 ibid.

14 See, e.g., H McGregor, *McGregor on Damages* (Sweet & Maxwell 2017, 19th ed) 3; D Saidov and R Cunnington, 'Current Themes in the Law of Contract Damages: Introductory Remarks' in D Saidov and R Cunnington (eds.), *Current Themes in the Law of Contract Damages* (Hart Publishing 2008) 9.

15 Burrows, 'Comparing' (n 11).

16 *Robinson v Harman* [1848] 1 Exch 850, 855 (for contract); *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 (for tort). See, for example, J Poole, *Casebook on Contract Law* (OUP 2006) 363.

17 *Anglia Television Ltd v Reed* [1972] 1 QB 60 (CA). Where expectation under the contract is too speculative to establish, an injured party will be forced to claim for his reliance interest damages. Poole (n 16) 373; D Friedmann, 'The Performance Interest in Contract Damages' [1995] 111 *LQR* 628.

18 The rationale for pain and suffering awards is not obvious, but it appears that they serve a kind of symbolic or declaratory purpose. They symbolically recognize that, even if it be corrected or compensated by money, unlawfully causing pain and suffering is a serious wrong, bringing these damages close to punitive and nominal awards. S A Smith, 'The Law of Damages: Rules for Citizens

directly valued in money, or for that matter repaired by it.[19] The amount of damages is awarded in accordance with a tariff system whereby the courts are guided by awards made in past cases for similar personal injuries, adjusted flexibly by the judge to take account of the claimant's particular circumstances.[20] As regards the breach of contract, compensation is generally not available for non-pecuniary losses.[21] No such limit is applied to tort claims.[22] As Bingham LJ stated in the case of *Watts v Morrow*, this rule is not absolute, as they can be awarded in exceptional cases of breach of contract in which the purpose of the contract is, precisely, non-pecuniary – to provide enjoyment or pleasure.[23] This limitation necessarily resulted in the exclusion of commercial contracts from the scope of the exception.[24]

Compensation is generally achieved for the common law civil wrongs comprising torts and breach of contract through the remedy of compensatory damages. For all civil wrongs, there is also the notion of equitable damages, which are awarded in addition to, or in substitution for, specific performance or an injunction under section 50 of the Supreme Court Act 1981. There is one major advantage of these damages – they may be awarded even though there is no cause of action at common law and hence no possible award of

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or Rules for Courts?' in R Cunnington and D Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 59.

19 Smith, 'The Law of Damages' (n 18) 56-57.

20 Burrows, 'Judicial Remedies' (n 6) 1283.

21 *Addis v Gramophone Co Ltd* [1909] AC 488; *Johnson v Gore Wood* [2002] 2 AC 1.

22 Smith, *Contract Theory* (n 5) 429.

23 *Watts v Morrow* [1991] 1 WLR 1421; *Jarvis v Swan Tours* [1973] QB 233; Smith, *Contract Theory* (n 5) 429-430; E McKendrick and M Graham, 'The Sky's the Limit: Contractual Damages for Non-Pecuniary Loss' [2002] LMCLQ 161.

24 Poole (n 16) 395.

common law damages.[25] Equitable compensation is not in the focus of the present discussion.[26]

The commitment to the full compensation principle can be seen to be less than whole-hearted. There are a number of principles which limit compensatory damages for breach of contract and mean that the claimant is not put fully into as good a position as if the contract had been performed. As McKendrick argued, the aim of these principles is for the law to place some limits on the liability of the defendant, 'otherwise liability could prove to be endless'.[27] Most of these principles, albeit sometimes with differences, apply also to compensatory damages for torts.[28] In a nutshell, these principles are, *inter alia*, remoteness, the duty to mitigate, and contributory negligence.

Nominal Damages

In the case where the claimant has not suffered any loss as a result of the breach or tort being committed, he or she is still entitled to recover damages, however only nominal damages. This is possible in cases when a person is a victim of the tort actionable *per se* – actionable without the victim having to prove that he or she has suffered any loss.[29] Such orders are similar to punitive awards in that the order itself does not appear to compel the

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25 Burrows, 'Judicial Remedies' (n 6) 1293.

26 The courts have recently recognized that, in general terms, there is little difference between equitable compensation and compensatory damages. See, e.g., A Burrows, 'We Do This At Common Law But That In Equity' (2002) 22 Oxford Journal of Legal Studies 1 1-16; A S Burrows, *Fusing common law and equity: remedies, restitution and reform* (Sweet & Maxwell Asia 2002); Cartwright, *Contract Law* (n 7) 7.

27 E McKendrick, *Contract Law* (OUP 2010) 812.

28 Burrows, 'Judicial Remedies' (n 6) 1263; A Burrows, 'Limitations on Compensation' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) 27 et seq.

29 McBride and Bagshaw (n 10) 769.

defendant to do what he should have done already: the claimant's right is to an order that the defendant do something different — pay nominal damages. An award of nominal damages is symbolic, to convey the message that the claimant's rights were infringed.[30] Thus, this is another example of an exception to the full compensation principle.

Aggravated and Punitive Damages

There is another special category of damages that appear to be non-compensatory – aggravated damages, which may be awarded to the victim of the tort if the wrongdoer had behaved in 'an arrogant and high-handed way', either in committing the tort, or in his or her treatment of the victim after the tort was committed.[31] As Chen-Wishart and Magnus argued, this 'head of damages has been controversial and unstable as to its basis (compensation or deterrence), relevant considerations, and the proportions of gains to be awarded'.[32] In principle, case law takes the view that aggravated damages are compensatory in nature, and they are designed to compensate the victim of a tort for any distress as a result of the defendant's conduct.[33] The trend in English law to regard these damages as compensatory is arguably depriving the expression of 'compensatory damages' of any sensible meaning, since punitive considerations cannot be entirely excluded.[34] Indeed, as Lord Devlin held, 'when one examines the cases in which large damages have

30 Smith, 'The Law of Damages' (n 18) 57.

31 McBride and Bagshaw (n 10) 808.

32 M Chen-Wishart and U Magnus, 'Termination, Price Reduction, and Damages' in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 673.

33 *Rookes v Barnard* [1964] AC 1129 (*Rookes v Barnard*).

34 Chen-Wishart and Magnus (n 32) 673-674.

been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed'.[35]

Regarding the requirements that need to be fulfilled for the award of aggravated damages, the claimant does not need to show that he or she was distressed due to the defendant's conduct to be entitled to receive aggravated damages. It suffices for the award of aggravated damages that the claimant was merely indignant or outraged, however, 'outrage is not the same as distress'.[36]

There is another exception to the full compensation principle in addition to nominal and aggravated damages – punitive damages can be awarded for any tort, albeit that the facts must fall within the restrictive categories identified in the case of *Rookes v Barnard*, which will be addressed below.[37] However, punitive damages cannot be awarded for breach of contract.[38]

Gain-based Remedies

English law recognizes also remedies designed for stripping away gains made by the wrongdoer. The courts distinguish between, on the one hand, restitutionary damages and, on the other hand, an account of profits.[39] They can be awarded in limited cases – for some

35 Lord Devlin in *Rookes v Barnard* (n 33).

36 McBride and Bagshaw (n 10) 811. In England, there is a special tort of intentional infliction of emotional distress. The court can award a separate award for the distress and a separate award of aggravated damages.

37 Burrows, 'Comparing' (n 11).

38 See, e.g., S Rowan, *Remedies for Breach of Contract. A Comparative Analysis of the Protection of Performance* (OUP 2012) 172. See also S Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 Oxford Journal of Legal Studies 3 495.

39 A Burrows, 'Are 'Damages on the Wrotham Park Basis' Compensatory, Restitutionary, or Neither?' in D Saidov and R Cunnington (eds.), *Current Themes in the Law of Contract Damages* (Hart

torts only (the intellectual property torts and for some other torts, for example trespass to land) and exceptionally for breach of contract.[40] According to Cartwright, the effect of an award of damages calculated to deprive the defendant of a profit from his breach of contract, as decided in the *Attorney-General v Blake*, may be punitive.[41]

As Burrows explained in his analysis of the case of *Wrotham Park*,[42] the relationship between restitutionary damages and an account of profits is that, while they are both restitutionary, damages can award an expense saved or a fair proportion of profits made, but not all profits made. Yet, an account of profits can award all the profits made or, through the technique of making an allowance for the wrongdoer's skill time and effort, a fair proportion of profits made, but cannot award expenses saved.[43] Burrows maintains that some are simply unconvinced that there is ever a good reason to strip gain for a wrong as opposed to compensating the claimant.[44]

Concerning the agreed damages clauses, a distinction has been drawn between 'liquidated damages clauses', which are enforceable, and 'penalty clauses', which are not enforceable beyond the amount of the injured party's actual loss.[45] It seems that such

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Publishing 2008) 165-185; M Chen-Wishart, 'Restitutionary Damages for Breach of Contract' (1998) 114 Law Quarterly Review 363.

40 Burrows, 'Comparing' (n 11). The account of profits remedy was accepted in the context of a breach of contract in the case of *Attorney General v Blake* [2001] 1 AC 268; E McKendrick, 'Breach of Contract, Restitution for Wrongs and Punishment' in A S Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003).

41 J Cartwright, 'Compensatory Damages: Central Issues of Assessment' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) 7.

42 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

43 Burrows, 'Wrotham Park' (n 39).

44 ibid.

45 Poole (n 16) 415.

classification lacks logic and consistency, as the actual loss proves to be an arbitrary factor in deciding whether damages will be awarded.

Against this background, it seems that the English law of obligations embraces the idea of non-compensatory considerations to a considerable extent and is by and large designed to accommodate them. In what follows, punitive damages will be sketched, as developed through case law, and a brief outline of non-compensatory elements found in the legislation will be provided. The section focusses on punitive damages, because the examination of their express prohibition in the ADD based on the "European legal tradition argument" is the central focus of the thesis.

(c) Punitive Damages

Case Law Developments on Punitive Damages

England is the only jurisdiction among the three selected European jurisdictions that openly accepts punitive damages. Academic and judicial opinion has been deeply divided on their future. The Law Commission has advocated in favour of their retention and expansion, rather than abolition. This account has been primarily influenced by the consideration that they fulfil a practical need as they do or could have a useful role to play in filling the gaps in the law - areas in which other remedies or sanctions are inadequate, in practice, to punish and to deter seriously wrongful behaviour.[46] Moreover, the Law Commission argued that provided that 'exemplary damages are a "last resort" remedy which are subject to significant limitations, and provided that the availability and assessment of exemplary

[46] Law Commission, 'Aggravated, Exemplary and Restitutionary Damages' (1997) Law Com. No. 247.

damages are determined by judges and not juries, exemplary damages are a legitimate way of meeting that practical need'.[47]

An award of punitive damages may be made in appropriate cases even though such an award is inconsistent with the full compensation principle.[48] They are intended to make an example of an individual so as to deter others from acting similarly.[49] Thus, one of their main functions is deterrence. Moreover, McGregor argued that their ascribed function is also punishment for infliction of harm where the conduct complained of discloses malice, fraud, cruelty, and insolence.[50] Accordingly, they are often described as 'exceptional'[51] monetary remedies for wrong, arguably being 'an anomaly from the law of England'.[52]

The doctrine of punitive damages emerged in the eighteen-century England in response to claims of excessive damage verdicts.[53] They originated in the famous case of *John Wilkes and the North Briton* in which the legality of a general warrant was successfully challenged.[54] In this case, the view had been expressed, without using the term "exemplary damages", that a jury was not limited to awarding damages for compensatory purposes. Formally, the term "exemplary damages" appears to have originated in the case

47 Law Commission (n 46) para. 1.15.

48 Lord Slynn of Hadley, *Kuddus* (n 55).

49 Law Commission (n 46) para. 1.15; R Calzavara, 'Deterring unlawful eviction: a plea to district judges' (2015) 18(4) J. H. L. 68.

50 Their justification is punishment for disregard of the law. McGregor (n 14) paras 13–011 and 13–021.

51 Burrows, 'Judicial Remedies' (n 6) 1294.

52 Lord Devlin in *Rookes v Barnard* (n 33).

53 L E John 'Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort' (1986) 74 California Law Review 2037.

54 Lord Devlin in *Rookes v Barnard* (n 33).

of *Huckley v Money*.[55] In this case the court held that punitive awards not only compensated the plaintiff for harms such as mental suffering, wounded dignity, and injured feelings, but also served the purpose of punishing the defendant for egregious misconduct. Thus, the punitive element was emphasised.

The House of Lords in the case of *Rookes v Barnard* in 1964 laid down that punitive damages can be awarded in only three categories of cases. Lord Devlin held that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to criminal law.[56] Thus, the law enforcement function of punitive damages was stressed. These categories are, firstly, where there has been oppressive, arbitrary or unconstitutional wrongdoing by a servant of government; secondly, conduct (by the defendant) cynically calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff; and, thirdly, where expressly authorized by statute. Hitherto, they are not available for breach of contract or equitable wrongs (such as breach of fiduciary duty or breach of confidence).[57]

The Court of Appeal in *AB v South West Water Services Ltd* added another restriction to the aforementioned categories, namely that punitive damages could only be awarded if they were awarded for that particular wrong prior to 1964, the date of the decision in *Rookes v Barnard* (the 'cause of action' test). This meant that such awards were

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55 *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768.

56 Lord Devlin in *Rookes v Barnard* (n 33). See also McBride and Bagshaw (n 10) 821-822.

57 Burrows, 'Judicial Remedies' (n 6) 1300.

not based on principle but on the accidents of the past litigation.[58] In 1997, the Law Commission in its aforementioned report recommended that the availability of punitive damages be extended for most torts, which would entail the rejection of 'the rationally indefensible position which the common law reached' in deciding claims on the basis of the existence or absence of pre-1964 precedents.[59] In fact, only a few years later the House of Lords removed this 'cause of action' test in the case of *Kuddus*.[60] Both academic literature and Law Commission's report were cited in this case.[61] It was noted that the need to search through old authorities to find a pre-1964 award of punitive damages was unfortunate, especially since aggravated and punitive damages have only been clearly distinguished since *Rookes v Barnard* itself, and it may well be difficult to determine the characterization of an award of damages in an older case.[62] The removal of the 'cause of action' test in *Kuddus* means that punitive damages can be awarded for any tort provided the facts fall within the *Rookes v Barnard* categories.[63]

The second category specified by Lord Devlin is of special significance for the purpose of the thesis. This category, with a view to material gain, and thus lucrative faults, is the broadest.[64] Punitive damages were awarded for breaches of competition law

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58 *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29 (*Kuddus*); E Peel and J Goudkamp, *Winfield and Jolowicz on Tort* (Sweet&Maxwell 2014) 695.

59 Law Commission (n 46) para 5.49.

60 *Kuddus* (n 58).

61 *Inter alia*, Winfield and Jolowicz on Tort (n 58) was cited.

62 Burrows, 'Judicial Remedies' (n 6) 1301.

63 ibid.

64 J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart Publishing 2002).

(statutory competition torts) under this category.[65] Lord Devlin explained the need for this category in the following words:

> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay [...].

Further requirements for the award of punitive damages are '(i) knowledge that what is proposed to be done is against the law or a reckless disregard as to whether what is proposed to be done is illegal or legal; and (ii) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss'.[66]

One of the factors in considering whether exemplary damages are available under this category for breaches of statutory competition torts is whether the undertaking has already been fined for its actions. In *Devenish*, the infringing company had been fined, which was a contributing reason for not awarding punitive damages in that case.[67] However, in the more recent case *Cardiff City Transport*, the infringing company's turnover was too low for it to be fined, thus it did face punitive damages.[68] If the three-stage model is applied, it seems that judges assess on a case by case basis whether

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65 See, e.g., *2 Travel Group Plc (in liq) v Cardiff City Transport Services Ltd* [2012] CAT 19, [2012] Comp AR 211 (*Cardiff City Transport)*. Cf with older *Devenish Nutrition Limited v Sanofi-Aventis SA* [2008] EWCA Civ 1086 (*Devenish*).

66 *Cassell & Co v Broome* [1972] AC 1027.

67 *Devenish* (n 65).

68 *Cardiff City Transport* (n 65)

compensatory damages serve sufficient deterrent effect – in combination with other factors, e.g. fines – and if they deem that this is not the case, the transformative stage is triggered, transforming the damages award into non-compensatory one.

It might be apparent that this category is not really designed to deter and punish the defendant for his or her behaviour but is really a form of disgorgement damages, designed to strip the defendant of the profits he or she has made from committing a tort. For example, Burrows claims that it is strongly arguable that restitutionary damages would adequately fulfil the function of Lord Devlin's second category of exemplary damages.[69] However, a closer look might reveal that these damages do not seem to be a form of disgorgement damages.[70] This follows from the fact that a defendant does not actually have to have made a gain from his or her tort for exemplary damages to be awarded under this category. It has to be shown that he or she 'aimed to make a gain'.[71]

Even if a claimant can show that the defendant's wrong falls within one of the three categories, punitive damages may not be awarded for a number of reasons. Lord Devlin set out three basic principles for the assessment of quantum in punitive damages cases. He held, first, that in order to recover damages, the plaintiff must have been the victim of the punishable behaviour involved. This stipulation was necessary since 'the anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.'[72]

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69 A Burrows, 'Reforming Exemplary Damages: Expansion or Abolition?' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996) 156170.

70 McBride and Bagshaw (n 10) 818-819.

71 ibid 819.

72 Lord Devlin in *Rookes v Barnard* (n 33).

Secondly, Lord Devlin specified that exemplary damages should be assessed with restraint and, thirdly, that the means of the parties should be taken into consideration.[73] Thus, judges need to respect the principle of proportionality in awarding punitive damages. In this vein, it stems from the case law that punitive awards should be moderate.[74] For instance, the means of the defendant and all mitigating circumstances should be taken into account when assessing the size of the award.[75] The principle that the award should be moderate finds its root in the judgment of *John v MGN Ltd* where Sir Thomas Bingham MR held that 'exemplary damages should never exceed the minimum necessary to meet the public purpose underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others.'[76] In *Design Progression* it was held that 'what is moderate depends on each particular case'.[77]

Moreover, Lord Devlin also stipulated that exemplary damages should be awarded 'if, but only if' the sum of compensatory damages to be awarded had an insufficient punitive or deterrent effect.[78] This is consistent with the three-stage model developed by the analytical framework in the introductory chapter. The third stage of assessment, the transformative stage, is triggered only as a last resort when compensatory damages do not act as a sufficient deterrent. In general, punitive damages will also not be awarded where a defendant has already been punished by the criminal law in respect of the facts upon which

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73 See Law Commission (n 46).

74 *Rookes v Barnard* (n 33); *John v MGN Ltd* [1997] QB 586, CA; *Thompson v MPC* [1998] QB 498.

75 *Rookes v Barnard* (n 33).

76 *John v MGN Ltd* [1997] Q.B. 586.

77 *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch).

78 Lord Devlin in *Rookes v Barnard* (n 33).

the claimant now founds his or her tortious action according to the *ne bis in idem* principle.[79] This is also consistent with the three-stage model of assessment. In certain cases, e.g. when the wrongdoer has been punished by the criminal law or he or she is a leniency recipient, national judges should carefully assess the "effective, dissuasive and proportionate" effect of damages awards.[80]

As concerns the assessment of punitive damages, in principle, the position of English law is that the choice to award punitive damages and the amount of the award is at the discretion of the judge. This means that the claimant has no right to punitive damages.[81] This is again consistent with the proposed three-stage model, since the overcompensation is awarded only when the judge concludes that this is in accordance with the triad of principles – effectiveness, dissuasiveness and proportionality. In a recent empirical study conducted by Goudkamp and Katsampouka, most significant findings include

> (1) that punitive damages (when claimed) are awarded reasonably regularly, (2) that the average award of punitive damages is relatively modest, (3) that there is considerable uniformity in terms of the size of punitive damages awards /…/.[82]

They find that 'punitive damages are awarded rather more frequently than appears to be conventionally thought' – punitive damages were awarded on 39.7 per cent of the

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79 See *Archer v Brown* [1985] QB 401. Punitive damages may also be denied where the claimant has provoked the wrongful action by his or her own conduct. *Holden v Chief Constable of Lancashire* [1987] QB 380; Burrows, 'Judicial Remedies' (n 6) 1301

80 See Ch I, s 1. See also Ch III.

81 *AB v South West Water Services Ltd.* AB v South West Water Services Ltd [1993] QB 507, [1993] 1 All ER 609.

82 J Goudkamp and E Katsampouka, 'An Empirical Study of Punitive Damages' (2017) Oxford Legal Studies Research Paper No. 58/2017 (2018, forthcoming in Oxford Journal of Legal Studies) 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991714.

occasions when they were sought in sampled cases.[83] Moreover, based on their research, they claim that 'punitive damages awards in the UK are anything but excessive'.[84]

Many find punitive damages simply inconsistent with the correlative nature of tort law.[85] Cane dismisses such claims, arguing that such line of arguments rests on a faulty assumption that compensation for loss is the only function of tort law.[86] As he argues, tort law is not just about making good losses, but is also concerned to protect certain rights irrespective of whether interference with the right causes damage. Moreover, tort law is concerned to sanction conduct as well as to protect interests.[87] Such binary nature of damages actions is a typical characteristic of regulatory private law and is attributed also to damages in the EU competition law context, which is discussed at length in the Introduction.

Punitive damages are not precluded by the fact that aggravated damages may be awarded. In theory and practice, there has been a conceptual and terminological confusion regarding these two heads of damages. The difficulty impeding a clear delineation between exemplary and aggravated damages lies in the fact that the nature of the defendant's conduct is regarded as a necessary element for both.[88] The significance of the defendant's conduct for the award of aggravated damages risks introducing a punitive element in

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83 ibid 2.

84 ibid. They found that the mean award of punitive damages was £12,625 (£18,181), while the median was £7,630 (£7,376). The smallest award was £588 (£588) and the largest £70,600 (£140,896).

85 P Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 116.

86 Cane (n 85) 116. Birks shared Cane's view and claimed that standard awards of compensatory damages already punish defendants, so there can be no objections to punitive damages. P Birks, 'Civil Wrongs: A New World' in *Butterworths Lectures 1990-1991* (Butterworths 1992). Cf. Burrows, 'Reforming Exemplary Damages' (n 69) 156.

87 Cane (n 85) 116.

88 D K Allen, J T Hartshorne, and R M Martin, *Damages in Tort* (Sweet & Maxwell 2000) 116.

accordance with the enforcement-based model in the alleged purely compensatory award, or at least 'the appearance of a punitive aspect unless the court is careful'.[89] As Goudkamp and Katsampouka found in their study, '[t]here seems to be a relationship between the decision to award punitive damages and the decision to award aggravated damages. When punitive damages were awarded, the courts often awarded aggravated damages in tandem'.[90]

Concerning breach of contract, with rare exceptions, a contract breaker will not be made to pay punitive damages, nor to face any other form of punishment – even when the breach was deliberate.[91] As Smith maintained, this rule raises a theoretical puzzle.[92] England has the most restrictive approach to awarding punitive damages among common law jurisdictions with the specific requirements laid down in the case of *Rookes v Barnard* and some other requirements discussed above. As Smith pointed out, these requirements 'may be consistent with the law's refusal to punish *all* deliberate breaches of contract, but they do not explain why the law *never* punishes breach of contract since it is clear that many such breaches satisfy all the requirements for an award of punitive damages in tort'.[93] As he explains, the law, like morality, normally regards intentional wrongdoing differently from unintentional wrongdoing; specifically, intentional wrongdoing is normally punished – either through the criminal law or by punitive damages. The puzzle, then, is to explain

89 Allen, Hartshorne, and Martin (n 88) 116.

90 Goudkamp and Katsampouka (n 82) 2.

91 Smith, *Contract Theory* (n 5) 417.

92 ibid 417-418.

93 A S Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (1997) 60 MLR 3 362 fn 12.

why breaches of contractual duties are treated differently in this regard.[94] As Burrows pointed out, an explanation for different treatment might be that, being based on a voluntary undertaking, the courts ought to tailor the remedy in contract to what was voluntarily undertaken and should therefore be reluctant to invoke non-compensatory remedies, such as punitive and restitutionary damages, for breach of contract.[95] Smith disagreed with such reasoning and explained that, 'more generally, the ability of contracting parties to define their primary obligations says nothing about the appropriate legal response to a breach of those obligations'.[96]

One of the justifications that has been put forward for the law's refusal to punish breach of contract is that awarding punitive damages confuses the roles of the criminal and civil law. This justification is put forward also in the EU competition law context, where it is voiced as the "European legal tradition argument".[97] As emphasized in Winfield & Jolowicz on Tort Law, consistently with the account taken by the thesis and explained in the Introduction, 'one should not too readily assume that the boundaries between the civil and the criminal law are either rigid or immutable or that the criminal law alone is an adequate mechanism to deter wilful wrongdoing'.[98] As Lord Wilberforce said in *Cassell v Broome*:

> For particularly over the range of torts for which punitive damages may be given /…/ there is much to be said before one can safely assert that the true or basic principle of the law of damages in tort is compensation, or, if it is, what the compensation is for (if one says that a plaintiff is given

94 Smith, *Contract Theory* (n 5).

95 A Burrows, *Understanding the Law of Obligations* (Hart Publishing 1998) 13.

96 Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (n 93) 365.

97 See Ch I, s 1.

98 Peel and Goudkamp (n 58) 697.

> compensation because he has been injured, one is really denying the word its true meaning) or, if there is compensation, whether there is not in all cases, or at least in some, of which defamation may be an example, also a delictual element which contemplates some penalty for the defendant.[99]

Although punitive damages are not available for breach of contract, there is a number of academics that propose a role for punitive damages in certain exceptional cases.[100] For example, some suggest that punitive damages should be awarded in cases where the breach of contract is intentional and in bad faith in order to provide full compensation to aggrieved party. Others suggest that their role should be more limited, restricted to cases where the party in breach deliberately attempted to conceal the breach, or in other words to 'cover up the breach' – as it is the case in Canada[101] – or evade its contractual liability.[102] As Burrows maintained, the recent case law developments suggest that the rule in *Addis* that punitive damages can never be awarded for breach of contract may require reconsideration in the near future.[103] However, the adoption of punitive damages, without wider reform of the existing remedial regime, may lead to inconsistencies. As Rowan explained, the reason for such inconsistencies is that 'English contract law has generally shown reluctance to view

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99 *Cassell & Co Ltd v Broome* [1972] AC 1027.

100 Saidov and Cunnington (n 14) 10; R Cunnington, 'Should punitive damages be part of the judicial arsenal in contract cases?' (2006) 26 Legal Studies 3 369 et seq.; J A Sebert, 'Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation' (1986) 33 UCLA Law Review 6 1565 et seq; S Rowan, *Remedies for Breach of Contract. A Comparative Analysis of the Protection of Performance* (OUP 2012) 172. See also S Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 Oxford Journal of Legal Studies 3 495-517.

101 See a recent decision of the Supreme Court of Canada in the case of *Whiten v Pilot Insurance Co* 2002 SCC 18, [2002] 1 S.C.R. 595 para 113.

102 A Ogus, 'The Economic Basis of Damages for Breach of Contract: Inducement and Expectation' in R Cunnington and D Saidov (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing 2008) 130; Smith, 'Performance, Punishment and the Nature of Contractual Obligation' (n 93) 360, 375.

103 Burrows, *Remedies* (n 6) 409. See also E McKendrick, 'Breach of Contract, Restitution for Wrongs, and Punishment' in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) 93 et seq.

contractual default as being reprehensible or the motive for breach as materially relevant'.[104]

Punitive Damages in Legislation

In England, there are two instances where statutes purportedly prescribe punitive damages. Punitive damages expressly authorized by statute fall into the third category specified by Lord Devlin in *Rookes v Barnard*, who thought that they could properly be awarded in instances foreseen by parliament.

The first statute that ostensibly authorizes such an award is the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951. The Act protects individuals who serve in the armed forces by restricting the enforcement of various civil judgments against them, except with the leave of an appropriate court. Under its s.13, exemplary damages may be awarded to the disadvantage of anyone who omits to obtain such leave. Lord Devlin specifically cited this provision as an example of express statutory authorisation. However, Lord Klibrandon in the case of *Cassell v Broome* concluded that 'exemplary' really means 'aggravated' in this Act.[105] He held that

> Section 13 (2) applies, by virtue of section 13 (6), to Scotland, and since I can hardly believe that this Act introduced for the first time, as it were by a

104 Rowan, 'Reflections' (n 100) 495.

105 Lord Klibrandon in *Cassell & Co. Ltd. v Broome* [1972] AC 1027.

> side-wind, the doctrine of punitive damages into the law of Scotland, I conclude again that 'exemplary' really means 'aggravated'.[106]

Moreover, he stated that he is 'not convinced that any statutory example of the recognition of the doctrine is to be found' in England.[107]

This mirrors the conceptual and semantic confusion regarding compensation and penalties/sanctions in the EU law context, which is discussed in Chapter III. It appears that also in England there are blurred lines between different rationales for damages.

The other example of the legislative presence of exemplary damages, arguably, is in the field of the protection of copyright and related rights, where the remedy of "additional damages" is available for infringement of copyright, design right and performer's property rights by the Copyright, Designs and Patents Act 1988. As the Law Commission emphasized in its report, 'the correct analysis of additional damages has been, and remains, controversial'.[108] Additional damages are also mentioned in schedule A1 Patents Act 1977. Par. 12 of the schedule directs the court to award such additional damages as the justice of the case may require where a person knowingly provides false information relating to biotechnological innovations. Again, similarly to the confusion regarding the rationale for damages in the EU law context, the controversial nature of these damages points at the perplexed rationales and blurred lines between them.

The government stated that it does not intend any further statutory extension of exemplary damages in civil proceedings.[109] There have been proposals by the government

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106 ibid.

107 *Cassell & Co. Ltd. v Broome* [1972] AC 1027.

108 Law Commission (n 46) para. 1.105.

109 DCA, 'The Law on Damages CP 9/07' (2007) paras 211 and 216.

to replace the terminology in all these acts with 'aggravated and restitutionary damages'. Thus, it seems that for the government it is simply the matter of semantics. It suggests replacing terminology on "punitive" damages, with terminology on damages that are allegedly "compensatory and punitive" and "restitutionary and punitive", respectively, in light of the discussion above. This only adds to the aforementioned confusion regarding the rationale for damages. Though, it appears that the rationale for damages itself does not seem to be problematic for the government, but rather the terminology.

(d) Implementation of the ADD

In England, rules on competition law are governed by the Competition Act 1998 and Enterprise Act 2016. The Competition Act 1998 lays down prohibitions modelled on Articles 101 and 102, which apply to restrictive agreements and abuses of a dominant position which affect trade within the UK.[110] Importantly, section 60 of the Competition Act provides for consistency in the interpretation of its substantive provisions with corresponding principles of EU law. Relevant provisions under the Act must therefore be interpreted consistently with the principles laid down by the Treaty and the Court.[111]

The Enterprise Act 2016 allows for the investigation of markets where it appears that competition is being prevented, restricted, or distorted, but where there is no obvious breach of the Competition Act provisions. It created a criminal offence for individuals who engage in cartel agreements, which exists alongside the civil regime.[112] Although the

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110 A Jones, 'Brexit: Implications for UK Competition Law' (2017) King's College London Dickson Poon School of Law Legal Studies Research Paper Series: Paper No. 2017-21 4.

111 ibid.

112 Enterprise Act 2016, Part 6. See Jones (n 110) 4.

criminal cartel offence came into effect in 2003, Jones claims that only four individuals have been convicted and sentenced to prison under it so far, and only in relation to two different cartels.[113] This lack of criminalization seems to be consistent with the general tendency in EU competition law not to criminalize breaches of Articles 101 and 102 TFEU.[114]

In England, there had been well-established rules governing antitrust damages actions already prior to the enactment of the ADD. The Directive was implemented with the "Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017" (the Regulations 2017). It applies to all competition damages actions brought in England, including proceedings that rely solely on breaches of the Competition Act 1998.

Contrary to the aforementioned case law, the Regulations follow the requirements of the Directive and expressly prohibit the award of punitive damages in antitrust damages actions. However, this prohibition will only apply to claims relating to harm resulting from infringements of competition law which took place on or after 9 March 2017. In light of the argument put forward by the thesis, these are unfortunate developments. This prohibition appears to be a rare example of the EU's negative influence on the level of consumer protection in England. It is still hoped that the Court will clarify the compatibility of the prohibition of overcompensation in the ADD with the Court's interpretation of Articles 101 and 102 TFEU, and also with the EU legal framework as such, especially with

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113 Jones (n 110) 5. Three of these were in relation to a single cartel - the *Marine Hoses* cartel, see OFT Press Release, 'Three Imprisoned in first OFT Criminal Prosecution for Bid-rigging' (2008); *R v Whittle, Brammar & Allison* [2008] EWCA Crim 2560.

114 See Introduction, s 2.

the principles of effectiveness, dissuasiveness and proportionality. If that happens while the UK is still part of the EU, English courts would be obliged to follow the Court's interpretation in accordance with the duty of sincere cooperation,[115] which is acknowledged also by the aforementioned section 60 of the Competition Act.

(e) Conclusion

This section has dealt with the sole jurisdiction among those selected for the examination of the "European legal tradition argument" that openly accepts awarding of punitive damages. However, even in England punitive damages are not universally available. They are awarded in a restrictive manner, only in three categories of cases construed by case law, with some additional judge-made restrictions. Hitherto, the availability of punitive damages is limited only to tort. All the limitations in practice result in the law becoming confused and unprincipled.

Punitive damages were awarded for breaches of competition law under the second category related to lucrative fault in a manner compatible with the three-stage model proposed by the thesis. However, the new implementing legislation based on Article 3 ADD expressly transposes the prohibition of overcompensation in the competition law context.

[115] Article 4(3) TEU.

The English approach shows considerable sensitivity to considerations of deterrence in tort. Thus, it refutes the justification for the prohibition of overcompensation in the ADD, i.e. the "European legal tradition argument".

3 Function of Damages in the French Law of Obligations

(a) Introduction

The present section examines the rationale for damages in the French law of obligations. It shall be argued that although the principle of full compensation is the default principle governing the French civil liability, a strong emphasis on deterrence or preventive considerations has been present both in legislation and in judicial practice. Thus, it refutes the "European legal tradition argument" underpinning the prohibition of overcompensation in the ADD.

The French civil liability is governed by the 1804 Code civil that has remained basically untouched since its enactment. Several important rules have been developed by the judiciary, thus the case law supplements the Code's content. In the wake of 200th anniversary of the Code, the French have decided to modernize their Code. Since October 2016, the new French contract law, which was adopted by way of government order (*ordonnance*), applies.[116] One of the express objectives of the reform was the protection of the weaker contracting party. The process of the modernization of the Code's civil liability provisions is still ongoing. Over the years, several reform proposals were published and they were all focussing on combating "lucrative fault" practices. In March 2017, they resulted in the official government's reform proposal to introduce a civil penalty (*l'amende*

116 *Ordonnance* n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations. See, e.g., S Rowan, 'The new French law of contract' (2017) 66 International & Comparative Law Quarterly 4 805. The entire December 2017 issue of European Review of Contract Law is dedicated to the French contract law reform. See also J Cartwright and S Whittaker, *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017); S Stijns and S Jansen, *The French Contract Law Reform: a Source of Inspiration?* (Intersentia 2016).

civile).[117] The French Ministry of Justice emphasised that the introduction of the civil penalty represents an 'intermediate path between classical civil law (centered on compensation for damages) and criminal law (focusing on sanctioning behavior)'.[118]

This section is organised into three subsections. First, it analyses the rationale for damages in the French law of obligations, providing an overview of compensation as their rationale in principle, and then examining non-compensatory elements in legislation and case law. Second, the means for protection of consumers as weaker parties are briefly examined to an extent that they uncover special emphasis on deterrence. Third, the implementation of the ADD into the French legal system is briefly considered.

(b) Compensation for Loss as an Orthodox Rationale for Damages

The notion of 'civil liability' (*la responsabilité civile*) in the French law of obligations encompasses both *la responsabilité civile contractuelle* (contractual liability) and *la responsabilité civile extracontractuelle* or *délictuelle* (delictual liability or tort).[119] In the dichotomy of civil liability rules, the rule of *non-cumul des responsabilités* has developed.

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117 Projet de réforme du droit de la responsabilité civile, available at http://www.justice.gouv.fr/publication/Projet_de_reforme_de_la_responsabilite_civile_13032017.pdf. For English translation, see Reform bill on civil liability, translated by Simon Whittaker in consultation with Jean-Sébastien Borghetti, available at http://www.textes.justice.gouv.fr/art_pix/reform_bill_on_civil_liability_march_2017.pdf.

118 Ministère de la Justice, 'Projet de réforme du droit de la responsabilité civile' (2017) dossier de presse, available at http://www.presse.justice.gouv.fr/archives-communiques-10095/communiques-de-2017-12858/projet-de-reforme-de-la-responsabilite-civile-29774.html.

119 G Viney, *Traité de droit civil. Introduction à la responsabilité* (LGDJ 2008) 1; M Fabre-Magnan, *Droit des obligations. 2 – Responsabilité civile et quasi-contrats* (PUF 2013) 31; see also D Mazeaud, 'Les projets français de réforme du droit de la responsabilité civile' (2014) 52 LPA 8; P Remy and J-S Borghetti, 'Présentation du projet de réforme de la responsabilité délictuelle' in F Terré (ed), *Propositions de réforme du droit des contrats* (Dalloz 2008) 63; P Remy, 'Les dommages et intérêts' in F Terré (ed), *Propositions de réforme du droit des contrats* (Dalloz 2008) 282-283; P Remy-Corlay, 'De la réparation' in F Terré (ed), *Pour une réforme du droit de la responsabilité civile, Collection: Thèmes & commentaires* (Dalloz 2011) 91.

According to this rule, contrary to the aforementioned rule in England, a party to a contract may not sue the other party for damages in delict, as long as the facts are governed by one of the contract's obligations (primacy of contract over delict).[120]

The traditional rationale for damages in the French law of obligations, in both contract and tort, is compensation for loss. The rationale for the compensation for loss is based on the assumption *neminem laedere,* which ensures that the injured party receives full reparation (*réparation intégrale*) for her or his losses, and aims to safeguard 'equivalence between harm and damages' (*l'équivalence entre dommage et réparation*). Courts interpret the principle of full compensation as repairing the harm fully, without loss or profit for either party (*sans perte ni profit pour aucune des parties*), so the wrongdoer compensates the whole damage, but nothing more than that (*tout le dommage, mais rien que le dommage*). Therefore, the damages awarded should not exceed the harm suffered.[121] Hence, the principle of full reparation goes hand in hand with the principle of unjust enrichment (*enrichissement sans cause*) of the victim.[122]

The full reparation principle is grounded in articles Art. 1231-2 and 1240 of the Code civil (in 2016, these articles were renumbered; previously, their content was found in articles 1149 and 'iconic'[123] 1382 of the Code civil), for contract and tort respectively. Article 1231-2 applies to contract and allows recovery of both losses incurred (*damnum*

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120 Viney, *Introduction à la responsabilité* (n 119) 216; Fabre-Magnan (n 119) 32; J Bell, S Boyron, and S Whittaker, *Principles of French Law* (OUP 2008) 328; S Whittaker, 'Privity of Contract and the Law of Tort: the French Experience' (1995) 15 OJLS 330, 334.

121 Cass civ (2) 28 June 2012, D 2003, 605; G Viney and P Jourdain, *Traité de droit civil. Les effets de la responsabilité* (LGDJ 2010) 156; J-S Borghetti, 'Punitive damages in France' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 55.

122 Viney and Jourdain, *Les effets de la responsabilité* (n 121) 156.

123 Rowan (n 116).

emergens) and profits denied (*lucrum cessans*). However, the principle of full reparation in contract is not absolute, as the Code civil contains exceptions to this principle in what used to be articles 1150-1154, which is further discussed below.

In tort, hitherto the Code civil contains a short and concisely expressed general liability clause in article 1240 (ex 1382), described by van Dam as 'one of the most general tort provisions ever drafted'.[124] Article 1240 of the Code civil reads as follows:

> Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.[125]

In general, as derived from this article, all types of losses or damages can be compensated, including pure economic loss, non-pecuniary damage, values of affection, purely environmental damage and loss of a chance; thus, there is a non-exhaustive list of recoverable damages grounded in the principle of generality.[126] The victim does not have to prove that her or his interest is protected by law.[127] The full reparation principle is not explicit in its text, yet its existence has never been contested.[128]

Relying on the principle of full reparation, the core objection towards the introduction of punitive damages in the French law of obligations is – the well-known argument by now – that they are contrary to French *ordre public*, confusing the civil and

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124 C van Dam, *European Tort Law* (OUP 2013, 2nd ed) 56.

125 All the translations of the provisions of the Code civil are taken from the document accessible at www.legifrance.gouv.fr/content/download/1950/13681/.../Code_22.pdf.

126 J-S Borghetti, 'The Culture of Tort Law in France' (2012) 3 JETL 158; P Brun and C Quézel-Ambrunaz, 'French Tort Law Facing Reform' (2013) 4 JETL 82; Whittaker, 'Privity of Contract' (n 120) 331; S Whittaker, *Liability for Products: English Law, French Law, and European Harmonization* (OUP 2005) 24.

127 Brun and Quézel-Ambrunaz (n 126) 8, 80.

128 Viney and Jourdain, *Les effets de la responsabilité* (n 121) 155.

criminal functions, with the argument that penal elements should be reserved for the criminal court. Further, another common objection finds its justification in the unjust enrichment of the victim. However, not all legal scholars see punitive damages as necessarily unjustly enriching the victim. Carval thinks that punitive damages should instead be seen as remuneration for bringing the wrongdoer before the court.[129] However, Rowan warns that such a proposal is not without difficulties, due to a clearly existent risk that such a provision would both encourage and 'add to the arsenal' of abusive litigants.[130] It is argued that the proffered objections are not confined to the French law of obligations as they mirror the justification for the prohibition of overcompensation in the ADD based on the "European legal tradition argument", dealt with in greater detail elsewhere in the thesis.[131]

It will be shown in the subsequent discussion that – despite the full reparation principle – penal and other non-compensatory elements based on deterrence or preventive considerations are found in the French law of obligations – either overtly in legislation or covertly in case law. Moreover, the 2017 reform bill on civil liability expressly emphasises that its aim is to enhance the function of prevention in the Code civil. Inter alia, it contains a provision governing the civil fine for cases 'where the author of the harm has deliberately committed a fault with the view to making a gain or to saving money' (art.1266-1 proposed

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129 S Carval, La responsabilité civile dans sa fonction de peine privée (LGDJ 1995) nos 318-320.

130 S Rowan, 'Comparative Observations on the Introduction of Punitive Damages in French Law' in J Cartwright, S Vogenauer, and S Whittaker (eds), *Reforming the French Law of Obligations: Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription (the 'Avant-projet Catala')* (Hart Publishing 2009) 337. The fear of abusive litigation is also advanced as a reason for prohibition of punitive damages in the 2013 EU Commission Recommendation on Collective Redress for Consumers. See Ch III, s 3.

131 See Introduction, s 1.

provision of the Civil Code). This resembles the second category of cases in which punitive damages can be awarded under *Rookes v Barnard* in England.[132]

(c) Open and Concealed Presence of Non-compensatory Elements

At least formally, non-compensatory functions, such as punishment and deterrence, are not objectives of the French law of damages. However, French lawyers 'generally agree' that civil liability serves additional purposes, besides compensating harm, sometimes having a role of *peine privée* (private penalty) rather than of a compensatory mechanism.[133]

Part of French legal scholarship has articulated the need for an open inclusion of non-compensatory damages into the law of obligations. Already in 1947, Boris Starck developed the theory of a dual function of civil liability, the *garantie* and the private penalty (*peine privée*).[134] According to Starck's theory of the *garantie*, subjective rights to *sécurité* (human's right to life, bodily integrity, peace, property, and honour) are the foundation of social life and secure compensation to victims without the precondition of proving the wrongdoer's fault.[135] French legal scholarship frequently opines that if the *garantie* is one of the essential functions of civil liability, prevention and sanctioning of the characterized faults are equally necessary and constitute a kind of *fonction répressive*.[136] This function is, as summarised by Viney, 'natural and necessary attribute of civil liability', destined to

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132 See s 2 of this Ch.

133 Carval (n 129); Borghetti, 'Punitive damages in France' (n 121) 56 ; Fabre-Magnan (n 119) 53-62; Viney, *Introduction à la responsabilité* (n 120) 90.

134 B Starck, *Essai d'une théorie générale de la responsabilité civile considérée en sa double fonction de garantie et de peine privée* (Paris 1947). S Carval has emphasized that both legislature and judiciary in certain cases perceive civil liability as a private penalty. Carval (n 129).

135 ibid 42, 50.

136 B Starck, H Roland, and L Boyer, *Obligations. 1, Responsabilité délictuelle* (Librairies techniques 1996) para 82; Preface of G Viney in Carval (n 129).

supplant its compensatory function, when the latter proves to be impracticable.[137] Thus, if the three-stage model put forward by the thesis is applied to this reasoning, it appears that French legal scholarship advocates for the third stage to be triggered in certain instances, transforming a compensatory damages award with insufficient deterrent effect into a non-compensatory one. It will be shown that this is, at least to a certain extent, reflected both in legislation and case law. Moreover, new reform proposals, including the government's 2017 reform bill on civil liability, all focus on strengthening the preventive function of the Civil Code.

Non-compensatory Elements in Legislation

The presence of non-compensatory elements based on deterrence in French private law is generally recognised among French legal scholarship.[138] For instance, several examples are found in contract law, thus it is not surprising that Rowan argues that French contractual remedies have a strong deterrent effect.[139] According to article 1231-1 (ex 1150) of the Code civil, in the case of wilful misconduct the debtor is liable not only for foreseeable damages, which is the general rule, but also for damages that she or he could not have predicted.[140] Since the focus of this rule is on the wrongdoer's action and the gravity of its misconduct affects the measure of damages, this rule seems to fit into the enforcement-based model. Besides, in contract cases exclusion and limitation clauses (*les clauses de*

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137 Preface of G Viney in Carval (n 129).

138 Rowan, 'Comparative Observations' (n 130) 342; S Rowan, *Remedies for breach of contract: a comparative analysis of the protection of performance* (OUP 2012) 202; Y Chartier, La réparation du préjudice dans la responsabilité civile (Dalloz 1983) 506.

139 Rowan, *Remedies for breach of contract* (n 138) 204.

140 ibid. See also E Noël Martine, *L'option entre la responsabilité contractuelle et la responsabilité délictuelle* (Paris 1957) 151.

non-responsabilité) are disregarded in the presence of certain fault, and insurance premiums are increased if the insured person acts in a faulty manner.[141] This adds to the deterrent function of the civil liability rules. Moreover, under article 1231-5 (ex 1152) of the Code civil, penalty clauses are valid, and they can result in paying damages in excess of the damage caused.

In addition, French law recognizes the *astreinte*, a periodic penalty payment, whose purpose is to force the wrongdoer into compliance with court orders. Although it was initially developed via case law, today there are general rules related to the *astreinte* set out in civil procedure legislation.[142] The *astreinte,* which is in the opinion of Chartier punitive in nature,[143] can lead to a situation where the victim obtains payments in excess of the harm suffered.[144]

Thus, in the field of contract law the Code civil governs different exceptions to the principle of full reparation. All these exceptions deal with a wrongdoer's deliberate misconduct. They focus on the wrongdoer's conduct instead of the victim's harm and the gravity of the misconduct affects the measure of damages. Additionally, penalty clauses and the *astreinte* indirectly strengthen the deterrent effect of damages regime. Overall, the deterrent function has penetrated French contract law to a considerable extent.

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141 Art. L-113-1 of the *Code des assurance*; Starck, Roland, and Boyer (n 136) para 81; G Viney and P Jourdain, *Traité de droit civil. Les conditions de la responsabilité* (LGDJ 2006) 624.

142 Art. 33 to 36 of the Loi no.°91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution; Viney and Jourdain, Les effets de la responsabilité (n 121) 13-14.

143 Chartier (n 138) 766.

144 Borghetti, 'Punitive damages in France' (n 121) 58; Rowan, *Remedies for breach of contract* (n 138) 202.

Non-compensatory elements are also present in sectoral laws. For instance, in the case of an illegal reproduction of a work protected by intellectual property law, a civil court can order the confiscation of the whole or part of the revenue obtained through counterfeiting, and this revenue shall then be awarded to the aggrieved party.[145] It is noteworthy to mention also civil fine or penalty (*l'amende civil*), which is usually awarded as a sanction for avoidance of public or civic duty or for abusing one's right to sue, and is paid to the public treasury.[146]

Non-compensatory Elements in Practice

Introduction of non-compensatory elements can also be observed in practice in the assessment of damages, especially through the consideration of fault. According to the legal maxim *neminem laedere* any fault can become a source of civil liability.[147] Moreover, in certain cases, fault is not even a necessary prerequisite for civil liability to be established.[148] In principle, the amount of compensation should be based solely on harm suffered, without taking into account the culpability of the wrongdoer, the express disapproval of the debtor's conduct, the seriousness of the breach of contract or the tort and the extent of any profit accruing to the wrongdoer.[149] This is consistent with the compensation-based model, in which fault can play a role in establishing civil liability,

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145 Art. L. 331-1-3 of the *Code de la propriété intellectuelle*; see Borghetti, 'Punitive damages in France' (n 121) 58.

146 Art. L. 442-6 of the *Code de commerce*; see Borghetti, 'Punitive damages in France' (n 121) 61.

147 Borghetti, 'The Culture of Tort Law in France' (n 126) 159.

148 See Starck, Roland, and Boyer (n 136) para 31.

149 Cass civ (2) 8 May 1964, JCP 1965, II 14140; Barry Nicholas, *The French Law of Contract* (Clarendon Press Oxford 1992) 231; Rowan, 'Comparative Observations' (n 130) 342; Geneviève Viney, 'Rapport de synthèse' (2002) 232 LPA 66; Viney and Jourdain, *Les effets de la responsabilité* (n 121) 160; J-S Borghetti, '*The Definition of* la faute *in the* Avant-projet de réforme' in Cartwright, Vogenauer, and Whittaker (n 130) 273.

however, it does not affect the size of the damages award. However, some academics believe that the ascertainment of fault is not completely irrelevant, as the law should not treat in the same way the person who acted with fault and the one who did not.[150] One manifestation of different treatment in such cases is the existence of criminal sanctions. However, in tort cases, such sanctions rarely apply. Therefore, according to Starck, Roland and Boyer, it is the civil judge's task to strengthen the civil remedy with the purpose of prevention and deterrence of reprehensible conduct.[151] This could be described as *le caractère répressif de la responsabilité civile*, which in their opinion manifests itself frequently in practice.[152] For example, it is argued that judges tend to increase the compensation granted in cases of serious misconduct (*une faute grave*).[153] It is said that judges have never been of the view that the role of damages should be purely reparation, which is especially reflected in certain categories of cases, particularly in relation to the recovery of *dommage moral* and in cases of "lucrative fault" *(faute lucrative)*.

The application of the full reparation principle seems naturally incomplete in the cases of *dommage moral*, as it is hard to imagine the application of this principle in a case where non-pecuniary damage is awarded, as it is by definition non-monetised.[154] It is this instrument that French judges arguably use to increase the level of compensation, as its

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150 Starck, Roland, and Boyer (n 136) para 80.

151 ibid.

152 ibid.

153 Starck, Roland, and Boyer (n 136) para 81; G Viney and P Jourdain, *Traité de droit civil. Les conditions de la responsabilité* (LGDJ 2006) 624.

154 Viney and Jourdain, *Les effets de la responsabilité* (n 122) 158; G Viney, 'L'appréciation du préjudice' (2005) 99 LPA 90.

estimation is perceived as 'naturally arbitrary',[155] and as Viney argues, judges award damages in these cases 'very liberally'.[156]

Also, attention should be drawn to the practice of awarding damages in cases involving the violation of some subjective rights, for example, personality rights. The *Cour de cassation* held that in these cases, the mere finding of an infringement entitles the victim to be compensated,[157] so apparently damages must be awarded even if no actual damage has been realized.[158] This too exposes a non-compensatory element.

Certain French academics claim that the current legal regime with the choice between a purely compensatory civil remedy on the one hand and a criminal remedy on the other hand is not satisfactory in cases of aforementioned 'lucrative fault', as both types of remedies give wrongdoers a huge incentive to continue with their harmful activity.[159] As Viney rightly argues, in such circumstances, the application of the principle of full compensation appears to be a real '*pousse-au-crime*' ('push to crime').[160] Consequently, damages have no deterrent effect on wrongdoers, although deterrence should form part of the potential *fonction répressive* of civil liability. This is further discussed below.

Many authors suggest that judges covertly pay attention to the deterrent function of civil liability, without expressly referencing to it in their reasoning, since otherwise they

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155 ibid.

156 Viney, 'L'appréciation du préjudice' (n 154) 90.

157 Cass civ (1) 5 November 1996, D 1996, 1410.

158 Viney and Jourdain, *Les conditions* (n 153) 7; Borghetti, 'Punitive damages in France' (n 121) 65.

159 Viney, *Introduction à la responsabilité* (n 120) 67.

160 ibid.

would risk the judgment being annulled by the *Cour de cassation*.[161] The French judicial system is characterized by a special relationship between lower courts judging the merits (*juges du fond* – courts of first instance and *cours d'appel*) and the *Cour de cassation*. Issues of private law are treated either as ones of fact, for the 'sovereign power of assessment' (*pouvoir souverain d'appréciation)* of the *juges du fond,* or of law for the control of the *Cour de cassation*.[162] Findings of facts are within the uncontrolled discretion of the court that tries the case, and the role of the *Cour de cassation* is limited to ensuring the proper application of the principle of full compensation and not the quantity of damages awarded.[163] Thus, the covert consideration of elements relating to the deterrent function of civil liability is *de facto* possible by the *judges du fond*, as the process of determining the size of an award is treated as one of fact, for a person's loss is one of fact.[164]

The problem with such an arrangement lies in the fact that the boundary between law and fact in French private law practice is frequently subjected to manipulation to pursue social policy objectives, as judges not only possess a *pouvoir souverain* as to the finding of facts, but also as to their interpretation and their characterization, allowing the lower courts on occasion to disguise a decision of policy under the pretext of a finding of fact.[165]

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161 ibid, para 1333-1334; Nicholas (n 149) 231: Viney, 'L'appréciation du préjudice' (n 154) 90; Fabre-Magnan (n 119) 55. It is acknowledged in practice that the *Cour de cassation* does not hesitate to quash such judgments.

162 Bell, Boyron, and Whittaker (n 120) 3.

163 Rowan, 'Comparative Observations' (n 130) 333; P Rémy-Corlay, '*Damages, Loss and the Quantification of Damages in the* Avant-projet de réforme' in Cartwright, Vogenauer, and Whittaker (n 130) 308; Nicholas (n 149) 225; 17-18; Viney, 'L'appréciation du préjudice' (n 154) 90.

164 ibid 4.

165 See Whittaker, 'Privity of Contract' (n 120) 330.

Moreover, judges are under no obligation to specify exactly what they are compensating when awarding damages.[166] This is most probably linked to the fact that no clear distinction is made between one type of reparable loss and another in French law.[167] Hence, the lower courts are able to exercise ample discretion as to the amount of damages that should be recovered. However, given this special process of the assessment of damages, one should not be surprised that there is no direct evidence confirming such practice of the covert awarding of non-compensatory damages, often punitive damages, which is precisely due to the fact that it is concealed. Therefore, this phenomenon is, by its nature, unverifiable.[168] Among French lawyers, it is, as Borghetti asserts, a 'generally admitted fact'[169] that judges sometimes award punitive damages covertly; however, for the reasons just stated, they do not cite any case law to support this claim.

As Carval and Viney have rightly argued, such practice is problematic not only due to the fact that it is not grounded in law, but also due to the fact that the existing regime allows for the assessment of damages that are not subject to control by the higher instance, and there is also no guidance for judges how to assess such damages; therefore, they might be awarded arbitrarily, and thus can generate legal inequality and uncertainty.[170] In this vein, Laithier argued that the formalisation of the penal function of damages could provide better protection, having regard in particular to the proportionality of the remedy.[171] This

166 G Cavalier, 'Punitive Damages and French International Public Policy' in R Stürner and M Kawano, *Comparative Studies on Business Tort Litigation* (Mohr Siebeck 2011) 224; Rowan, 'Comparative Observations' (n 130) 333.

167 Rémy-Corlay (n 163) 308.

168 Bell, Boyron, and Whittaker (n 120) 4; Borghetti, 'Punitive damages in France' (n 121) 62.

169 Borghetti, 'Punitive damages in France' (n 121) 62.

170 ibid. Carval (n 129) 313; Viney, 'L'appréciation du préjudice' (n 154) 91.

171 Y-M Laithier, *Étude comparative des sanctions de l'inexécution du contrat* (LGDJ 2004) 330.

concern is reflected also in the 2017 reform bill on civil liability, which provides in article 1262(4) that '[e]ach head of loss is evaluated separately'.

Despite these arguably deterrence-oriented practices of the lower courts judges, the *Cour de cassation*'s case law still subscribes to civil liability only the function of reparation. However, it has recently delivered an interesting decision on the enforcement of an American judgment awarding punitive damages.[172] Remarkably, it ruled that punitive damages are not by themselves contrary to *ordre public*, but only in those circumstances when they are disproportionate to the loss actually suffered and to the gravity of the breach of contract. Nevertheless, being delivered in the private international law context, it remains to be seen whether the reasoning in this judgment will have any real significance upon substantive French private law. In any case, the principles applied in this case seem to be consistent with EU law principle of effectiveness, dissuasiveness and proportionality.

Lucrative Fault

Judges often depart from the principle of full reparation in cases of "lucrative fault" (*faute lucrative*). This notion originates in the maritime law; however, the idea, which it expresses, is usually seen as one of general application, although it has not been formally recognized yet by the French civil law,[173] though all French reform proposals focus on giving the expression to this idea,[174] including the 2017 reform bill on civil liability. It is

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172 Cass civ (1) 1 December 2010, 1090. For reflections on this decision see S Carval, 'Pas d'exequatur pour un jugement étranger condamnant un vendeur à verser à l'acheteur des dommages-intérêts punitifs d'un montant excessif' [2011] RDC 459; see also V Wester-Ouisse and T Thiede, 'Punitive Damages in France: A New Deal?' (2012) 3 JETL 115.

173 Starck, Roland, and Boyer (n 136) para 1335; J Méadel, 'Faut-il introduire la faute lucrative en droit français?' (2007) 77 LPA 6 para 4.

174 Art. 1374 of the *Avant-projet Catala*. Avant-projet de réforme du droit des obligations (arts. 1101 à 1386 du Code civil) et du droit de la prescription (articles 2234 à 2281 du Code civil) <

the fault that enables the wrongdoer to profit from his misconduct, despite paying damages to the victim, which are calculated in his profit. Despite the fact that it has not been formally recognised yet, judges have frequently indirectly referred to 'lucrative fault' in cases of infringement of personality rights, environmental cases, to sanction unfair competition and in cases of counterfeiting.[175]

As described by Fasquelle, due to high market pressure and competition, businesses tend to become more egoistic market players, focusing on profitability and gain and less on legal or moral considerations.[176] Some of them breach legal rules, as they calculate that it is overall cheaper for them to be ordered to pay damages rather than having to change their wrongful behaviour.[177] This can lead to the paradoxical situation if the law does not react, as market players get no deterrent signal that would give them incentives to comply with legal rules. Similarly as in the EU competition law context discussed in Introduction and in Chapter III, the principle of full compensation does not prove to be satisfactory in such instances. This situation corresponds to the second category of cases under *Rookes v Barnard* in England.

"Lucrative fault" can be both delictual and contractual.[178] The incentive might be, inter alia, the desire to gain an advantage over a competitor or gain a stronger market

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http://www.justice.gouv.fr/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf>; Art. 54 of the reform proposal *Projet Terré*. It comprises three projects: Terré, *Propositions de réforme du droit des contrats* (n 120); Terré, *Pour une réforme du droit de la responsabilité civile* (n 120); F Terré (ed), *Pour une réforme du régime général des obligations* (Dalloz 2013).

175 Méadel (n 173) para 5, see also D Fasquelle, 'L'existence de fautes lucratives en droit français' (2002) 232 LPA 31.

176 Fasquelle D, 'L'existence de fautes lucratives en droit français' (2002) 232 LPA 27.

177 ibid.

178 ibid.

position by behaving unfairly, infringing or deliberately violating the rules of competition law. Moreover, it is frequently the case also in consumer contracts, with the most common example being unfair contract terms. The imbalance between parties to the contract is also present in relations among market competitors.

"Lucrative fault" is not only morally offensive, but it also brings the effectiveness of law in question.[179] The question is whether non-compensatory damages should be limited to certain cases or contexts only. There is a risk that in prescribing non-compensatory damages only in cases of "lucrative fault", several cases are overlooked in which the "lucrative" character is not established, despite harm being caused by deliberate and reckless conduct.[180] If the fault is not particularly lucrative, but still generates some benefits to the wrongdoer and thus pure compensation would not suffice, Viney suggests that restitution might be an appropriate remedy.[181]

The legislator took these considerations into account while drafting the 2017 reform bill on civil liability. The latter introduces a new "civil penalty" for cases 'where the author of the harm has deliberately committed a fault with the view to making a gain or to saving money'.[182] In what follows, I will examine this provision, and developments that led to its introduction.

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179 ibid.

180 Viney and Jourdain, *Les effets de la responsabilité* (n 122) 20.

181 Viney, 'L'appréciation du préjudice' (n 154) (90.

182 Art.1266-1 proposed provision of the Civil Code.

The 2017 Reform Bill on Civil Liability – Strengthening the Function of Prevention

Most of the modern law of civil liability is found in newly enacted legislation and derived from the case law of the *Cour de cassation*. It is therefore not easily accessible; indeed, it can be characterized as being scattered and largely unpredictable. This is mainly the case because judges have stepped into the shoes of legislators and formulated principles to adapt civil liability to social and economic changes that have occurred in the more than two centuries since the enactment of the Code civil in 1804.[183] Hence, several attempts have been made to reform the law of obligations so that it would to a greater extent reflect the current legal landscape.

Prior to the 2016 reform of contract law and the 2017 reform bill on civil liability, there were two prominent academic proposals for the reform of the French law of obligations, the *Avant-projet Catala*[184] and the *Projet Terré.* The idea that full compensation is sometimes inadequate and the need for the development of an intermediate remedy, specifically a remedy that is more flexible than a criminal sanction and more deterrent than pure compensation,[185] has found its way into both academic proposals, although through different legal vehicles. The *Avant-projet Catala* in its Draft article 1371,[186] proposed punitive damages in the case of a premeditated act carried out

183 P Remy and J-S Borghetti, 'Présentation du projet de réforme de la responsabilité délictuelle' in F Terré (ed), *Propositions de réforme du droit des contrats* (Dalloz 2008) 65.

184 For reflections on this reform proposal, see Cartwright, Vogenauer, and Whittaker (n 130). See also B Fauvarque-Cosson and D Mazeaud, 'L'avant-projet français de réforme du droit des obligations et du droit de la prescription' [2006] Rev. dr. unif. 103.

185 ibid.

186 For an overview of Draft article 1371, see S Carval, 'Vers l'introduction en droit français des dommages-intérêts punitifs?' [2006] RDC 822. See also R Mésa, 'La faute lucrative dans le dernier projet de réforme du droit de la responsabilité civile' (2012) 41 LPA 6; see also R Mésa, 'La consécration d'une responsabilité civile punitive: une solution au problème des fautes lucratives?' (2009) 325 Gazette du Palais 15.

particularly for a lucrative purpose, and the *Projet Terré* proposes restitutionary damages in the case of intentional 'lucrative fault'.

A proposal for the introduction of punitive damages in article 1371 of the *Avant-projet Catala* in the case of manifestly deliberate fault is in line with the French "pro-victim" approach. Manifestly, the French academic literature and judiciary in tort law is in general characterized with the victim-oriented approach or *'victimophile'*.[187] French law confers an absolute priority on the compensation of claimants who French jurists systematically characterise as victims.[188] The very generous approach of French law towards victims is also reflected in the *Avant-projet Catala*, where the preferential treatment is given to personal injury victims, consistent with the '*victimophile*' objectives.[189]

On the other hand, the *Projet Terré* has a different orientation, proposing a more 'measured attitude'.[190] For example, also focusing on 'lucrative fault', it refuses to adopt punitive damages and introduces restitutionary damages in such instances. Borghetti asserts that both reform proposals, the *Avant-projet Catala* and the *Projet Terré,* converge in their common desire to consolidate most of the *acquis* of the French law on civil liability,

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187 Borghetti, 'The Culture of Tort Law in France' (n 126) 173; Rémy-Corlay (n 163) 305; P Giliker, '*The Role of* la faute *in the* Avant-projet de réforme' in Cartwright, Vogenauer, and Whittaker (n 130) 354; S Whittaker, 'La responsabilité pour fait personnel dans l'Avant- projet de réforme du droit de la responsabilité: donner voix aux silences du Code civil' [2007] RDC 89, 99.

188 Borghetti, 'The Culture of Tort Law in France' (n 126), 173-176. The French law of obligations is perceived as less commercial and to compare unfavourably on measures such as pragmatism and the promotion of transactional certainty. Common law contractual rules are thought to have greater commerciality and be more in tune with whether particular outcomes make economic sense.

189 P Giliker, 'Codifying tort law: lessons from the proposals for reform of the French Civil Code' (2008) 57 ICLQ 3 579.

190 ibid.

however, the spirit of those two reform proposals differ.[191] He rightly argues that the *Avant-projet Catala* does not radically transform the French law of obligations, as it is clearly in strong alignment with the current French academic writings and case law, as it endorses a conception in line with the ever-increasing tendency of French law to favour victims of harm.[192] Borghetti believes that the *Projet Terré* is more concerned with giving a conceptual framework to French law and to find solutions, which would generate greater predictability. [193]

Borghetti criticises the pro-victim orientation of the dominant French scholarship and argues that the central aim of tort law should be 'to strike a reasonable balance between the various interests at stake and, even if one accepts that the victim's interest is the only one that needs to be taken into account, tort law is not the best tool for doing so'.[194] There is good reason to agree with Cartwright summarising that if tort law has a normative effect on people's behaviour, regulation should not make people *too* careful, as risk-taking is desirable, as long as it is reasonable.[195] In this connection, it is not surprising that the Commercial Chamber of Paris was among those that reacted discontentedly to the proposal for the introduction of punitive damages in the *Avant-projet Catala*.[196]

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191 J-S Borghetti, 'La réforme du droit de la responsabilité civile en France' (2014) 52 LPA 16; Mazeaud (n 120) 8.

192 Borghetti, 'The Culture of Tort Law in France' (n 126) 175.

193 Borghetti, 'La réforme du droit' (n 191) 274, 275, 288.

194 ibid.

195 S Whittaker, S Vogenauer and J Cartwright, 'Summaries of the Discussions' in Cartwright, Vogenauer, and Whittaker (n 130) 410.

196 CCID, *Pour une Réforme du Droit des Contrats et de la Prescription Conforme aux Besoins de la Vie des Affaires*, <http://www.etudes.cci-paris-idf.fr/sites/www.etudes.ccip.fr/files/upload/prises-position/reforme-droit-des-contrats-kli0610.pdf> accessed 21 May 2014.

However, their proponents see punitive damages as the solution for the shortcomings of the mere reparation principle. Rowan suggests that they do have a role to play in France, especially due to their characteristic of removing malicious financial incentives in cases of 'lucrative fault'.[197] She argues that deterrence, retribution, and compensation 'are not mutually exclusive concepts in French civil law' and that, for instance, contractual remedies could assimilate punitive damages 'without any incongruity or inconsistency', and taking into account that many remedies have deterrence as their aim or are indirectly punitive.[198]

Viney considers that the objective of the court when granting punitive damages is not so much the punishment, as it is prevention and deterrence, with the aim to ensure respect for the law.[199] Their objective is essentially threatening the potential wrongdoer, quite similarly to that of the *astreinte* and penalty clause. Thus, the role of punitive damages seems to be ensuring the effectiveness of the legal rules.[200] Ensuring respect for the law is a potentially positive aspect of the normative function of civil liability, with its role traditionally being understood as 'avoiding socially harmful behaviour'.[201] However, this signifies a departure from the principle of full compensation, the aim of which is to focus on an applicant's sphere and her or his harm that needs to be recovered. This is typical of a prospective measure based in the enforcement model.

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197 Rowan, *Remedies for breach of contract* (n 138) 194.

198 ibid 204.

199 ibid.

200 ibid.

201 Viney, *Introduction à la responsabilité* (n 119) 86; N Martine (n 140) 150; Rowan, *Remedies for breach of contract* (n 138) 193.

As an alternative solution, Behar-Touchais advanced the intermediate remedy in the form of a civil penalty (*l'amende civile*), which is already present in French legislation and has a number of advantages compared to punitive damages, especially regarding unjust enrichment of the victim and arbitrariness in awarding it.[202] In this vein, in August 2015, the new Article L. 442-6, III of the *Code de commerce* was adopted, capping a civil fine at 1% of the businesses' turnover (with the initial suggestion to cap it at 5% of the turnover). Such legislative amendment, read in conjunction with the substantial alteration of the amount of the fine provided by the French Consumer Code for the abuse of weakness, discussed below, shows serious commitment of the French legislator to tackle the problem of lucrative fault with severe fines, arguably to serve as grave deterrents.

In January 2014, the government for the first time published its own legislative proposal to reform the Code civil, including the law of obligations. However, civil liability, both contractual liability and tort, were explicitly excluded from the attempt to reform the Code civil. The Senate has acknowledged the necessity for the reform of this important part of the Code civil, but questioned the legitimacy of doing so by an *ordonnance* regarding the importance of the matter. Consequently, the Senate has decided that this matter should be submitted to the parliament, and therefore, voted to delete the article proposing the reform of the law of obligations. In March 2017, the 2017 reform bill on civil liability was presented by the government.

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202 M Behar-Touchais, 'L'amende civile est-elle un substitut satisfaisant à l'absence de dommages et intérêts punitifs?' (2002) 232 LPA 36. See also M Behar-Touchais, 'L'amende civile devant le Parlement ou le vote à l'aveugle!' (2015) *Revue des contrats* 3 535.For a comment on the judicial decision imposing civil fine on a corporation, see A Couret, 'Fusion: la transmission à la société absorbante de l'amende civile sanctionnant le comportement de l'absorbée' [2014] Bulletin Joly Sociétés 180.

(d) Deterrence and Protection of Consumers

The discussion thus far has focused on issues of the presence of non-compensatory elements in the French law of obligations. The focus now shifts to the means through which French private law protects consumers as weaker parties based on the deterrence rationale.

The French law of obligations provides certain protections for consumers against abusive practices inflicted by an economically stronger party. The status of the parties is important. In France, the social dimension of contract law is much more heavily emphasized than in other jurisdictions.[203] Courts in general demonstrate generous readings of the provisions contained in the Code civil to achieve certain social goals.[204] For instance, judges have jurisdiction to reduce sums payable under penalty clauses that are "manifestly excessive" in order to protect weaker contracting parties.[205] As Vogenauer rightly argues, also the academic reform proposals show a general concern for protecting the weaker party against unfair exploitation, and sometimes they adopt principles from consumer law for the general law of contract.[206] This is the case also with the aforementioned 2016 reform of contract law.

Special provisions pertaining to consumer protection are today found in the French Consumer Code.[207] It opens with the general duty of businesses to provide information to

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203 S Vogenauer, 'The Effects of Contracts on Third Parties: The Avant-projet de réforme in a Comparative Perspective' in Cartwright, Vogenauer, and Whittaker (n 130) 237.

204 Giliker (n 187) 564; Whittaker, 'Privity of Contract' (n 120) 331.

205 S Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 OJLS 514.

206 Vogenauer (n 203) 14-15.

207 All the translations of the provisions of the Consumer Code (*Code de la consommation*) are taken from the document accessible at http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-

consumers, which is consistent with the objectives of the European consumer *acquis*. Interestingly, the French Consumer Code also contains a provision with the title "Abuse of weakness" (*Abus de faiblesse*), incriminating abusive behaviour in door step selling, namely taking advantage of a person's weakness or ignorance in order to get them to subscribe to cash or credit obligations in whatever form these may take.[208] It prescribes punishment of three years of imprisonment and/or a €375,000 fine. The content of this provision has been altered in March 2014, reducing the length of imprisonment from the original five years, and substantially increasing the fine by almost forty-two times, from the original €9,000.[209] Such a substantial increase in the prescribed fine might be explained by a belief that businesses can be more efficiently deterred from engaging in abusive practices if they are under threat to pay huge amounts of money.

(e) Implementation of the ADD

On 10 March 2017, three days prior to the 2017 reform bill publication, France implemented the ADD through Ordonnance n° 2017-303[210] and its implementing Décret n° 2017-305.[211] A new title in the French Commercial Code was created to implement most of the rules governing antitrust damages actions. The French general rules on civil liability still apply to antitrust damages actions, with the new provisions creating only marginal

translations. *loi* n°72-1137 du 22 décembre 1972 relative à la protection des consommateurs en matière de démarchage et de vente à domicile

208 Art. L-122-8 of the *Code de la consommation*.

209 Art. 130 of the *loi* n° 2014-344 du 17 mars 2014 relative à la consummation.

210 *Ordonnance* n° 2017-303 du 9 mars 2017 relative aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles.

211 *Décret* n° 2017-305 du 9 mars 2017 relatif aux actions en dommages et intérêts du fait des pratiques anticoncurrentielles.

changes. Importantly, the prohibition of overcompensation has not been expressly transposed into the French Commercial Code.

(f) Conclusion

The foregoing analysis has illustrated that the full compensation principle is not universally applied in France, either because exceptions to it are prescribed by legislation or because it is not strictly followed in practice by the French lower courts. Moreover, an account that this principle is not always satisfactory is gaining support among academics, which is reflected in all the considered reform proposals. The idea that in some instances an intermediate remedy is needed with the additional *fonction répressive*, especially in cases of "lucrative fault", is sometimes reflected in the practice of awarding damages, as in the assessment of damages these considerations play an important role through the consideration of a wrongdoer's fault. Thus, it operates through focusing on the defendant's conduct and not on the applicant's harm, which is a characteristic of an enforcement-based remedy. Therefore, the rationale for damages is not merely compensation, but to some extent also prevention, deterrence and punishment, although non-compensatory damages are (hitherto) not formally recognised in legislation.

In consideration of the above, the French experience could bring one to the conclusion that damages based on a purely compensatory rationale is an out-dated concept that needs to be adjusted when it proves to be insufficient in awarding damages, which is ostensibly the case especially with businesses, calculating damages in their profits. As a response, the academic reform proposals advance either punitive or restitutionary damages, while the 2017 reform bill on civil liability introduces the civil penalty. Although the rationale for those remedies is different, as some are concerned with deterrence and others

with striping off illicit profit, they all confirm the belief that something more than pure compensation might be needed in French law. However, one must be careful to take all interests into account when proposing damages with a normative role to regulate the behaviour in the market and society, so as not to suppress the "healthy" risk-taking in business or to base the awarding of damages too heavily on extra-legal considerations. It seems that the civil penalty introduced by the 2017 reform bill on civil liability is carefully construed by taking several of the voiced concerns into account.

To conclude, also the French approach shows considerable sensitivity to considerations of deterrence in tort. Thus, it refutes the justification for the prohibition of overcompensation in the ADD, i.e. the "European legal tradition argument".

4 Function of Damages in the German Law of Obligations

(a) Introduction

This section examines the rationale for damages in the German law of obligations to grasp whether the "European legal tradition" argument can find support in the German legal system. It shall be argued that although the German legal system is the strongest adherent of the principle of full compensation among the selected jurisdictions, non-compensatory considerations are still present in the German law of damages, especially in instances of the so-called lucrative fault.[212] However, non-compensatory considerations, and especially deterrence, do not find their way into the law of damages via an additional head of damages or a special civil sanction – as it is the case in England and France, discussed in the previous sections of this chapter. Rather, deterrence is pronounced in a more disguised manner, through the assessment of the conditions for liability, the fault requirement in particular. Thus, it is hidden under the compensatory umbrella.

This section is organised into three subsections. First, it analyses the rationale for damages in the German law of obligations, providing an overview of compensation as their rationale in principle, and then examining non-compensatory considerations in legislation and case law. Since the German law of obligations is apparently the most "overcompensation-unfriendly" jurisdiction, the tendency of German lawyers to oppose punitive damages is also examined. To this end, this section tackles this tendency by putting it into historical and political perspective. Against this background, some important parallels can be drawn between the initial German opposition to harmonisation of private

[212] For a more detailed discussion on the so-called lucrative fault, see s 3.

enforcement of EU competition law[213] and the ramifications of the recent Dieselgate scandal.[214] Further, this section provides a brief overview of the implementation of the ADD into the German legal system.

It shall be argued that the German law of obligations does not wholeheartedly support the "European legal tradition" argument which was invoked to justify the prohibition of overcompensation in the EU competition law.

(b) Full Compensation as a General Rule

The German law of obligations is primarily found in the German Civil Code, the *Bürgerliches Gesetzbuch* (BGB), which comprises five books and entered into force on 1 January 1900. Thus, it is 'a comparatively late fruit of the codification movement'.[215] It had been substantially reformed with the Modernization of the Law of Obligations Act of 26 November 2001 (*Gesetz zur Modernisierung des Schuldrechts*), entering into force in 2002, almost matching the marking of the centenary of its enactment. In the same year, a number of new provisions dealing with the law of damages were introduced into the BGB with the reform called *Schadensersatzrechtsreform*.[216]

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213 See Ch IV.

214 See, e.g., M Frigessi di Rattalma, *The Dieselgate: A Legal Perspective* (Springer 2017); W Bull, 'The Volkswagen Emissions Scandal: Will it become a matter of European contract law?' (2017) M-EPLI Blog, available at http://www.mepli.eu/2017/10/the-volkswagen-emissions-scandal-will-it-become-a-matter-of-european-contract-law/.

215 1900 German Civil Code (*Bürgerliches Gesetzbuch* - BGB). R Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (OUP 2005) 6.

216 For the discussion on the background and the substance of the reform of the BGB see for example Zimmermann, *The New German Law of Obligations* (n 216); J Fedtke, 'The Reform of German Tort Law' (2003) 11 European Review of Private Law 4 485.

General rules on damages applicable both to contractual and tortious damages are laid down in § 249-255 BGB.[217] Moreover, specific rules on the right to damages in case of liability based on tort are found in § 823 et seq. BGB. Concerning the right to claim damages for breach of contract, today any breach of a contractual duty leads to liability in damages.[218] Under the principle the concurrent liability, a victim who suffered damage may also rely on delictual liability in order to obtain compensation.[219]

The nature and extent of damages is specified in § 249(1) BGB, which provides that a 'person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred'.[220] Accordingly, the function of damages is the compensation for the loss suffered (*Ausgleichsprinzip*, *Ausgleichs- oder Kompensationsfunktion*), in accordance with the principle of full compensation (*Totalreparation*). As a general rule, non-compensatory damages with the aim to prevent, deter or punish the wrongdoer are not recognized in the German law of obligations.[221] Also,

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217 The traditional distinction in liability for damages in the German law of obligations is between fault liability – which is a general rule covering both the liability for intentional as well as negligent conduct – and strict liability.

218 Thus also "positive" breaches of contract. F Wieacker, *A history of private law in Europe: with particular reference to Germany* (trans. Tony Weir) (Oxford Clarendon Press 1995) 377. Although the BGB originally recognized only two types of breaches of a duty to perform, non-performance (impossibility) and late performance (delay), the courts expanded this concept.

219 Whittaker (n 120) 117.

220 Restitution in kind is the default option, while monetary compensation is allowed for personal injury or property damage (§ 249(2) BGB), or if reparation is objectively impossible or not sufficient (§ 251 BGB). In practice, monetary compensation is the rule and reparation in kind is the exception. All the translations of the provisions of the BGB are taken from the document accessible at http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf, provided by the Federal Ministry of Justice and Consumer Protection in cooperation with juris GmbH.

221 See, e.g., U Magnus, 'Punitive Damages and German Law' in L Meurkens and E Nordin, *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 246, 251; H Kötz and G Wagner, *Deliktsrecht* (Verlag Franz Vahlen 2013) 29; U Magnus, 'Damages under German Law' in U Magnus (ed.), *Unification of Tort Law: Damages* (Kluwer Law International 2001) 89.

the victim should not be enriched as a result of the damages awarded,[222] as this would arguably violate the principle of proportionality, one of the fundamental constitutional principles.[223] In principle, damages awards focus on the loss of the victim rather than on the wrongdoer's conduct, and thus the German system of civil liability seems to be a "compensation-focused" regime.

The rejection of non-compensatory damages in the German law of obligations is the result of the deliberate deviation from the Prussian model that had been in force in some parts of the German territories prior to the enactment of the BGB in an effort to create civil liability rules which are largely 'free of ideology'.[224] Thus, although Koziol claims that punitive damages represent 'relapse into the archaic mixture of punishment and compensation',[225] the strict divide between them had been introduced in the German legal system only a little more than a century ago.

Once the liability is established, compensation generally covers losses (*damnum emergen*) and lost profits (*lucrum cessans*).[226] Traditionally, German law has been reluctant in allowing monetary compensation for non-pecuniary losses (*Schmerzensgeld)*, which are only available since 2002.[227]

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222 See for example BGH NJW 2003, 2085; see also N Jansen and L Rademacher, 'Punitive Damages in Germany' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer-Verlag 2009) 75.

223 See Magnus, 'Punitive Damages and German Law' (n 222) 249.

224 G Wagner, *Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden: Gutachten A für den 66. Deutschen Juristentag* (Beck 2006) 15.

225 H Koziol, 'Comparative Report and Conclusions' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 302; H Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana Law Review 741.

226 Van Dam (n 124) 348.

227 Under § 253(1) BGB, it is only available where a statute so provides.

The most prominent provision for the liability in damages is § 823 I BGB. It protects life, physical integrity, health, and personal liberty, as well as property and 'other right'. If someone infringes a right protected by this provision, he or she has breached a normative rule of this provision, and thus has acted unlawfully (*rechtwidrig*), unless his or her conduct is justified.[228] Another important provision for the establishment of the liability in damages is found in § 826 BGB, holding a person liable if he or she intentionally causes damage to another person in a manner *contra bonos mores*.[229] Thus, the degree of fault of the wrongdoer and the reprehensibility of his or her conduct can play an important role in establishing civil liability, however, in principle these considerations should not affect the size of damages awards. Thus, it should not trigger the third stage of damages assessment according to the three-stage model put forward by the thesis, which transform a compensatory damages award into a non-compensatory one.

(c) Non-compensatory Considerations in Case Law and Legislation

The General Clauses as Vehicles for the Infiltration of Public Policy Considerations

The BGB provisions are generally known for their high degree of abstraction.[230] This has given the courts flexibility[231] and sufficient space to develop the law in accordance with social and economic needs.[232] Such judicial activism has been found necessary in light of

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228 See Van Dam (n 124) 81.

229 ibid 83.

230 B Markesinis, H Unberath and A Johnston, *The German Law of Contract: a Comparative Treatise* (Hart Publishing 2006) 20; Wagner, *Neue Perspektiven im Schadensersatzrecht* (n 225) 11.

231 The practical ramifications of this "flexibility" for the law of damages will be highlighted later in the text, especially when discussing the fault requirement and damages for the infringement of the personality rights.

232 Wieacker (n 218) 377, 409; K Zweigert and H Kötz, *An Introduction to Comparative Law* (Clarendon Press 1998, 3rd ed) (transl. Tony Weir) 150.

the BGB's content. Private law codifications are stamped by the particular historical situation in which they are produced.[233] As German legal scholars maintain, the BGB reflects the ideas of the nineteenth century, the time of a liberal *grande bourgeoise* co-operating with the conservative powers of authoritarian Prussia.[234] Thus, it is more 'the cadence of the nineteenth than the upbeat to the twentieth century'.[235] As aforementioned, its drafters deliberately deviated from the Prussian model in an effort to create civil liability rules which are largely 'free of ideology'.[236] Consequently, it is argued that the draftsmen of the BGB did not believe that private law had any special social function.[237] As Reich pointed out in the mid-seventies, German private law tended to protect the economically strongest, i.e. the entrepreneurs.[238] Judged by the ramifications of the recent Dieselgate scandal, discussed below, one could speculatively conclude that things have not significantly changed since then. Moreover, the thesis argues in Chapter V that also the solutions adopted in the ADD risk transforming the Directive into the businesses' sword instead of consumers' shield.

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233 K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) (transl. Tony Weir) 143.

234 Wieacker (n 219) 379, 427; Zweigert and Kötz (n 233) 144; see also B Heiderhoff, *Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts: insbesondere zur Reichweite europäischer Auslegung* (Sellier 2004) 240; J Rückert, 'Das BGB und seine Prinzipien: Aufgabe, Lösung, Erfolg' in M Schmoeckel, J Rückert, and R Zimmermann, *Historisch-kritischer Kommentar zum BGB* (Mohr Siebeck 2003) 86.

235 Radbruch and Zitelmann cited in Zweigert and Kötz (n 233) 143-144.

236 Wagner, *Neue Perspektiven im Schadensersatzrecht* (n 225) 15.

237 Wieacker (n 218) 381. As von Gierke colourfully put it, the BGB has neglected the 'social task of private law', demanding that 'a drop of socialist oil' had to seep through the fabric of private law. O von Gierke, *Die soziale Aufgabe des Privatrechts* (Mohr Siebeck 1889). See also see Zimmermann, *The New German Law of Obligations* (n 216) 162.

238 N Reich, 'Zivilrechtstheorie, Sozialwissenschaften und Verbraucherschutz', [1974] Zeitschrift für Rechtspolitik 187.

Against this background, the German courts have played an important role in the development of civil law in general, and of tort law in particular.[239] The courts have done so especially by grounding their judgments in one of the general clauses (*Generalklauseln*) of the BGB, most commonly the *contra bonos mores* (§ 138 BGB) and the good faith provision (*Treu und Glauben*, § 242 BGB). This has also enabled the creation of new remedies in certain contexts, especially when human rights have been in question.[240] The existence of these general clauses in the BGB allows for the wider political and constitutional background to infiltrate the domain of private law through the channels of good faith and public policy.[241] Thus, the regulatory function of private law[242] is thereby enhanced.

The German Supreme Court (*Bundesgerichtshof*, BGH) proclaimed in the prominent case of *Lüth* that the *Grundgesetz*, the German post-war constitution, had an indirect horizontal effect (*mittelbare Drittwirkung*) which requires the court to give due regard to the constitutional values when interpreting the BGB.[243] As the BGH held:

> occasionally, the law can be found outside the positive legal rules erected by the state; this is law which emanates from the entire constitutional order and which has as its purpose the 'correction' of written law. It is for the judge to 'discover' this law and through his opinions give it concrete effect. /…/ The insight of the judge may bring to light certain values of society /…/ which are implicitly accepted by the constitutional order but which have

239 Van Dam (n 124) 75; Wieacker (n 218) 409-410. See also Zweigert and Kötz (n 233) 150.

240 In particular the right to human dignity which has played a crucial role in the development of the German law since the Second World War. Van Dam (124) 149.

241 Markesinis, Unberath, and Johnston (n 230) 24; Wieacker (n 218) 377.

242 See the Introduction, s 1.

243 BVerfGE NJW 1958, 257; See Markesinis, Unberath, and Johnston (n 230) 37; C-W Canaris, 'Grundrechte und Privatrecht' (1984) 184 Archiv für die civilistische Praxis 3 201-246; see also T Körber, *Grundfreiheiten und Privatrecht* (Mohr Siebeck 2004); J Hager, 'Grundrechte im Privatrecht' (1994) 49 Juristen Zeitung 8 373-242

> received an insufficient expression in statutory texts. The judge's decision can help realize such ideas and give effect to such values.[244]

In this manner, referred to as the "constitutionalisation of private law" by the means of interpretation of general clauses, the human rights have served to enable the courts to develop new private law remedies, for instance for the invasion of the right to privacy.[245] As Freedland and Lehman have vividly described it, these developments were digested 'by even the most ardent civilian traditionalists'.[246] In what follows, these developments are addressed.

The Degree of Fault and Non-compensatory Considerations

Prior to the enactment of the BGB, there was a strong influence of the ideas of natural law in the German legal system, especially on tort law, which is reflected in the use of aforementioned general clauses or 'indeterminate legal concepts' (*unbestimmte Rechtsbegriffe*).[247] Under the general clauses, fault was the main criterion in the assessment of the amount of damages and it influenced the size of damages awards.[248] Thus, the system of gradation (*Gradationsystem*) was used for the assessment of damages.[249] Under this

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244 BVerfGE NJW 1973, 1221, translated in Markesinis, Unberath, and Johnston (n 230) 13.

245 Canaris, 'Grundrechte und Privatrecht' (n 243) 240 et seq.

246 See M Freedland and M Lehmann, 'Non-discrimination and the "Constitutionalization of Contract Law"', in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 167.

247 S Vogenauer, 'Drafting and Interpretation of a European Contract Law Instrument' in Dannemann and Vogenauer (n 246) 96.

248 Kötz and Wagner (n 221) 10. See also G Wagner, 'Punitive Damages' in J Basedow, K J Hopt, R Zimmermann, and Andreas Stier (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012). See also R C Meurkens, *Punitive Damages* (Kluwer 2014) 242-243, 304.

249 An example of the legislation using this system is the 1794 General State Laws for the Prussian States (*Allgemeine Landrecht für die Preußischen Staaten*). For the historical account see for example N Jansen, *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz* (Mohr Siebeck 2003) 363 et seq.; Kötz and Wagner (n 221) 7 et seq.

system, the size of the damages award did not merely reflect the loss of the victim, but took into account also the degree of fault of the wrongdoer. Accordingly, the German damages awards prior to the BGB enactment expressly served also other functions, alongside the compensation for the loss. The prominent nineteenth century German lawyer von Savigny readily acknowledged this penal character of civil liability.[250] He believed that the law of delict served also the function of deterrence and not merely compensation.[251] Such an approach corresponds to civil liability regime grounded in the enforcement-based model.

Today, the degree of fault still plays an important role in assessing the extent of damages in Austria, with the legal base in the § 1324 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* - ABGB). It is believed that this provision was influenced by the German pre-BGB system of gradation.[252] Such system of the assessment of damages allowed the introduction of reasoning based on moral considerations and public policy into the law of damages, which was explicitly rejected by the drafters of the BGB.[253]

Today the objective standard of fault means that subjective blameworthiness is disregarded. Nevertheless, although the drafters of the BGB wanted to prevent such an outcome, the degree of fault is sometimes still taken into consideration when damages awards are assessed. Thus, in practice, the compensation principle is not followed 'as

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250 See, eg, Wagner, 'Punitive Damages' (n 248) 1403.

251 ibid.

252 Meurkens (n 249) 242.

253 Wagner, 'Punitive Damages' (n 248) 1404. The preparatory documents to the BGB provided: 'Draft as to cases where damages are based on the fault of the responsible rejects the gradual system of the amount of damages according to the type or grade of fault as it is given in several codifications, namely the Prussian Civil Code. Inclusion of moral and penal aspects (into the law of damages), on which this differentiation is founded, must be kept aside in adjudicating the civil law consequences of illicit and wrongful behaviour.' This translation of the Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich § 218 799 BGB is taken from Behr's article, see V Behr, 'Myth and Reality of Punitive Damages in Germany' [2004-2005] J.L. & Com. 197

stringently as it seems'.[254] This is the case especially when non-pecuniary damages (*Nichtvermögensschaden*) are assessed. It is believed that German courts rely on non-compensatory ideas when awarding damages for pain and suffering (*Schmerzensgeld*) and in cases of violations of the victim's personality rights (*Allgemeines Persönlichkeitsrecht*), with the most prominent decision in the case of Caroline I.[255]

With respect to damages for pain and suffering (*Schmerzensgeld*), in assessing the amount of damages, the courts take all relevant aspects into consideration.[256] They consider the degree and severity of the injury, any lasting effects, and also the economic position of the defendant and any existing insurance.[257] Therefore, damages for non-pecuniary loss serve a twofold function, both compensation (*Ausgleich*) and satisfaction (*Genugtuung*).[258] Although the BGH sticks to the view that satisfaction is of an entirely of a private law nature,[259] the satisfaction function may arguably serve to punish intentional and grossly negligent conduct.[260] For example, it is argued that the courts increase the amount of damages in determining the compensation for pain and suffering if the insurance company acted *contra bonos mores*.[261]

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254 Wagner, 'Punitive Damages' (n 248) 1404.

255 BGH NJW 1995, 861. See, eg, Behr, 'Myth and Reality' (n 253) 210-211; V Behr, 'Strafschadensersatz im deutschen Recht – Wiederauferstehung eines verdrängten Phänomens' [2010] ZJS 3 296

256 B Winiger, H Koziol, B A Koch, R Zimmermann, *Digest of European Tort Law. Volume 2: Essential Cases on Damages* (De Gruyter 2011) 497.

257 Winiger, Koziol, Koch, and Zimmermann (n 256) 497.

258 BGH NJW 1955, 1675; see Van Dam (n 124) 349; Winiger, Koziol, Koch, and Zimmermann (n 256) 497.

259 BGH NJW 1995, 861, see Van Dam (n 124) 351.

260 Van Dam (n 124) 351.

261 Winiger, Koziol, Koch, and Zimmermann (n 256) 497.

Some legal scholars argue that these awards can hardly be qualified as punitive, since there are tables of amounts for pain and suffering (*Schmerzensgeldtabellen*) which the courts have granted in the past and the courts more or less follow these standardised amounts.[262] Thus, there is no actual assessment on a case by case basis whether the damages award plays a sufficiently deterrent effect in accordance with the transformative stage in the three-stage model proposed by the thesis. However, as far as the assessment of damages for an infringement of privacy is concerned, which differs from *Schmerzensgeld*, the courts openly recognise the deterrent function that they want to achieve with awards of damages.

The debate concerning the calculation of damages in cases of infringement of privacy has sparked by the line of cases concerning Princess Caroline of Monaco.[263] In these cases the BGH confirmed the principles developed by the settled case law that damages for non-pecuniary loss can be claimed under two conditions. Firstly, it is restricted to cases of 'serious injury to personality', and secondly, to cases where 'no other remedy providing adequate redress could be found', being thus the remedy of the last resort.[264] Thus, in order not to open the floodgates to claims, an insignificant infringement (*Bagatellschaden*) that could not be qualified as a serious injury does not suffice.[265]

The facts of the Caroline I case are briefly summarized as follows. The defendant, a German tabloid, had published an allegedly 'exclusive interview' with the plaintiff, Princess Caroline of Monaco. In fact, the interview was entirely fictitious. According to

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262 Magnus, 'Punitive Damages and German Law' (n 223) 252; Van Dam (n 124) 363.

263 See T U Amelung, 'Damage Awards for Infringement of Privacy-The German Approach' (1999) 14 Tul. Eur. & Civ. L. F. 18.

264 ibid 20.

265 See W van Gerven, J Lever, P Larouche, *Tort Law* (Hart Publishing 2000); Van Dam (n 124) 186.

the findings of the court, the magazine deliberately exploited the princess's private life to promote its own commercial interests. Thus, its conduct could be labelled as the so-called lucrative fault. In the Court's view, this reckless 'forced commercialisation' of her personality required a special award of damages. It stressed that the magazine's profit derived from the infringement of another person's right was a factor which could legitimately be taken into account when assessing the victim's damages. The BGH, which is the court of appeal, reconsidered the amount of non-pecuniary damages originally fixed at 30,000 DM and awarded the princess six times higher damages award for non-pecuniary loss (180,000 DM), which has been the highest amount ever awarded for the infringement of personality rights.[266] The BGH considered that the award should be higher to have a genuinely deterrent effect in order to protect the claimant against the deliberate infringement of his or her personality rights in the pursuit of its own commercial interests, i.e. with lucrative fault.[267]

In the case that followed, Caroline II, the court applied Caroline I principles and considered that the crucial factor for the assessment of damages was that the defendant had exploited the princess's personality in order to further his own commercial interests. In assessing damages, the court has taken into account several factors that are usually deemed as irrelevant considerations for the size of damages awards: the motives of the defendant, the seriousness of his or her fault, and the mode and extent of the harmful invasion.[268]

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266 Amelung (n 263) 21-22.

267 OLG Hamburg, NJW 1996, 2870.

268 See Amelung (n 263) 22.

Although the BGH expressly embraced the (self-standing) deterrent function of damages awarded for violations of personality rights, which led to the damages award that was six times higher than the award initially estimated by the court of the first instance, these damages are still awarded under the compensatory umbrella. However, if the three-stage model for assessment of damages is applied to these damages, it is obvious that they meet the requirements for the enforcement-based model. Not only is the fault of the wrongdoer relevant for establishing the liability, but it also transforms the damages award from compensatory to non-compensatory when the aforementioned two conditions are met. Thus, deterrence as a dominant rationale for damages is not entirely absent from the German law of damages.

Non-compensatory Considerations in Legislation

Non-compensatory considerations, especially the idea of deterrence, come up also in other areas of law. An important example is related to the case law concerning GEMA, an organisation that protects the intellectual property rights in the music industry.[269] The German Supreme Court held that a person who infringes an intellectual property right of one of the GEMA members has to pay double the licence fee he or she owes the organisation.[270]

Another example of the presence of the idea of deterrence in German law is found in the German employment law, however, it is by and large inspired by the influence of the

[269] See for example G Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe' [2006] Archiv für die civilistische Praxis 2-3 376-378; Behr, 'Myth and Reality' (253) 219-221; Magnus, 'Punitive Damages and German Law' (n 222) 254.

[270] Meurkens (n 248) 315.

EU legislation[271] and the case law of the Court of Justice of the EU (Court) requiring adequate compensation with the real deterrent effect for sex discrimination, with the most prominent case of *Von Colson*.[272] In this field, in 2006, the German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* - AGG) entered into force. It is based on four EU discrimination directives and prohibits discrimination on grounds of race, ethnic origin, sex, religion, disability, age, and sexual orientation. Unlike the equal protection clauses in the German *Grundgesetz*, the AGG applies to private parties.[273] The AGG draws a basic distinction between protection against discrimination in the field of employment (§§ 6‑18 AGG) and "Under Civil Law" (§§ 19‑21 AGG).

Compensation and damages for a breach of the prohibition of discrimination are governed by § 15 AGG. It provides that in the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the resulting damage. Further, it provides that the employee can claim appropriate financial compensation for non-pecuniary damage. In the event of non-recruitment, the compensation must not exceed three months' salary if the employee would not have been recruited even if the selection had been free from discrimination. It is argued that the nature

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271 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39. See, eg, G Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe' [2006] Archiv für die civilistische Praxis 2-3 400-402; Freedland and Lehmann (n 246) 173-175

272 Case C-14/83 *Von Colson* ECLI:EU:C:1984:153; see for example Behr, 'Myth and Reality' (n 253) 213-218. Damages for breaches of sex discrimination are discussed at length in Ch III.

273 See J Wiemann, 'Obligation to Contract and the German General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*)' (2010) 11 German Law Journal 10 1132; M Küster, Strafschadensersatz als Rechtsfolge nach § 15 AGG (Inaugural-Dissertation) (Würzburg 2010) 69.

of this provision could be punitive.[274] The core provisions on which the AGG is based, Directive 2000/43 (Article 15 (2)) and Directive 2004/113 (Article 14 (2)), require that the sanctions for discrimination shall be "effective, proportionate and dissuasive."[275] It is argued by the thesis that this triad of principles authorises the national judges to assess on a case by case basis – in accordance with the proposed three-stage model – whether these principles, and "dissuasiveness" in particular, require the Member States to provide punitive damages.[276]

Further example of a private law remedy which has as its aim to influence the addressee's behaviour is found in § 339 BGB, which governs the contractual penalty (*Vertragsstrafe*). However, there is a safety net laid down in § 343 BGB, which provides that the courts are entitled to reduce too extensive and disproportionate penalties, if a party so requests. Thus, privately contracted punitive sanctions are permitted only to a reasonable extent.[277] In the circumstances where parties themselves are entitled to agree on supra-compensatory penalties, Wagner canvasses why should the private law legislator be prevented from doing the same with respect to punitive damages.[278]

The wrongdoer's position is taken into account also in the field of unfair competition law, albeit not in the assessment of damages. § 10 of the Unfair Competition

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274 Küster (n 274). R Haas, *Multiple Damages – Mehrfacher Schadensersatz* (Herbert Utz Verlag 2016) 147.

275 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

276 Wiemann (n 273) 1136.

277 Magnus, 'Punitive Damages and German Law' (n 223) 253.

278 Wagner, *Neue Perspektiven im Schadensersatzrecht* (n 224) 79.

Act (*Gesetz gegen den unlauteren Wettbewerb*, UWG) governs the skimming-off the unlawful profits gained through intentional unfair competition. This deterrent is applied in a form of collective redress, as the active legitimation is given to consumer organizations; however, the profits are paid to public funds and not to consumer organisations.[279] The Act against the Restraint of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) provides for similar injunctive relief against unlawful profits for violation of EU or German competition laws, which is briefly discussed below.

Pleas for the Preventive Function of Damages

It can be stated that there has been no real substantial discussion about punitive damages and the arguments for and against their recognition in Germany so far. This could be at least partly explained with the position of German legal scholarship which is by and large in consensus about their rejection.[280] This is a relevant factor, since German legal academics play 'an equally important role in developing civil law as do the courts', which is reflected in the BHG's tradition to maintain dialogue with academics by referring to authors who are in agreement with its line of reasoning and also to those who are of a different opinion.[281]

As it is mentioned in the previous subsection, some penal elements have been introduced in the German tort law. Some German legal scholars tend to subordinate the ostensible non-compensatory elements of damages awards under the umbrella of the

279 See, for example, C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing 2008).

280 See for example Wagner, *Neue Perspektiven im Schadensersatzrecht* (n 224) 75.

281 Van Dam (n 124) 75; Markesinis, Unberath, and Johnston (n 230) 12.

compensatory function, justifying special assessment of non-pecuniary damages, satisfaction, and also doubling of fees in the intellectual property and competition cases with the argument that these parts of damages awards still reconcile with the notion of compensation. They acknowledge that some elements might resemble punishment or deterrence and in the same breath deny that the nature of these elements could truly be non-compensatory. However, drawing on the functional approach, it can be argued that this rhetoric does not represent the actual situation and that non-compensatory functions are not only present in the German law of damages, but also frequently observed in the judicial assessment of damages.[282]

It seems that the reason for hiding behind this compensatory façade lies in preserving the traditional premise of the law of damages – *restitutio in integrum*. In so doing, some German legal academics try to downplay the reality that penal elements or other non-compensatory functions are intruding into German law of damages, arguably to safeguard the public/private law divide that underpins the logic of the entire legal system. Nevertheless, it should be borne in mind that, as Kelsen has rightly pointed out, 'an essential distinction between public and private law is fundamentally based upon ideological premises'.[283]

Magnus is of the opinion that there is no clear reason why 'deeply unsocial, outrageous behaviour' should not be regulated by the civil law remedy.[284] Actually, some

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282 Behr refers to this practice of advocating for only exceptional non-compensatory elements as the "mainstream lip service". See V Behr, 'Punitive Damages in America and German Law - Tendencies towards Approximation of Apparently Irreconcilable Concepts' (2003) 78 Chicago-Kent Law Review 1 126.

283 H Kelsen, *The Pure Theory of Law* (University of California Press 1976) 280–284.

284 Magnus, 'Punitive Damages and German Law' (n 223) 250.

German legal scholars claim that this is already the case at least to a certain extent. For example, according to Ebert, deterring sanctions are a recognised part of German law of obligations.[285] She offers the examples sketched in the previous subsection to support her argument.

As Wagner argued, any discussion on punitive damages is to be fruitless as long as the functions of punishment are not questioned.[286] The open punishment is known to have a double purpose – both the retaliation as well as the prevention.[287] It is argued that the function of prevention alone might be an appropriate task of private law.[288] As Magnus argues, in case of infringement of the personality right this function may even prevail over the mere compensatory function of damages.[289] Magnus advocates for the assessment of damages related to the actual loss, however, at the same time he proposes that the level of damages in cases of violation of personality rights and other immaterial property rights and the infringement of antitrust provisions be raised until a noticeable deterrent effect is reached.[290] This is consistent with the three-stage model assessment proposed by the thesis.

The question of prevention has gained momentum in the wake of the aforementioned Dieselgate scandal. Some have argued that it could mark a turning point in the evolution of the civil liability paradigm in Germany. Moreover, the need for a

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285 I Ebert, *Pönale Elemente im deutschen Privatrecht. Von der Renaissance der Privatstrafe im deutschen Recht* (Mohr Siebeck 2004) 528.

286 Wagner, *Neue Perspektiven im Schadensersatzrecht* (n 224) 76.

287 ibid.

288 G Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe' [2006] Archiv für die civilistische Praxis 2-3 352; Wagner, *Neue Perspektiven im Schadensersatzrecht* (n 224) 78. See the Introduction, s 2.

289 Magnus, 'Punitive Damages and German Law' (n 223) 256. See also Amelung (264) 16-17; Van Dam (n 124) 184-186.

290 Magnus, 'Punitive Damages and German Law' (n 223) 257.

collective redress mechanism designed especially for consumers who lack incentives to sue is underlined in this context. Comparably to the business-friendly gist of the BGB, German legislation does not provide for consumer collective redress, however it provides for a model case procedure for shareholders, governed by the German capital market law (KapMuG). This case reveals a deep intertwinement of the interests of the German government and of German businesses.[291] Inter alia, it reveals the power of business lobbying at the expense of the consumers' interests and the drawbacks of the lack of efficient collective redress. Importantly, some correlations may be drawn with the business lobbying in the ADD context, which is discussed in Chapter IV. The introduction of punitive damages and of a collective redress mechanism in EU competition law was opposed by Germany and by business representatives that took part in the legislative process.[292] In light of the Dieselgate developments, one might speculatively assume that Germany opposed the introduction of rules that could add to the deterrent effect of consumers' antitrust damages claims to shield its businesses.

In the first judgment issued by the German courts on this matter, a case seeking compensation for Volkswagen owners was rejected.[293] As Frigessi di Rattalma argued, whereas 'Volkswagen is facing a liability for consumer damages, including punitive damages, of billions of dollars in the US, it has little to fear in Germany'.[294] On

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291 The European Parliament draft inquiry into Dieselgate has found that also the European Commission ignored evidence of emissions test cheating.

292 See Ch IV.

293 See, eg, Reuters, 'German court rejects case seeking compensation for Volkswagen owners' (2017) available at https://www.reuters.com/article/us-volkswagen-emissions-lawsuit/german-court-rejects-case-seeking-compensation-for-volkswagen-owners-idUSKCN1BB1H2.

294 Frigessi di Rattalma (n 214) 44.

the other hand, in a case brought by 1400 Volkswagen shareholders, who joined their claims together in a model case procedure under the KapMuG, a German court ruled that an independent auditor should be appointed to investigate the carmaker's emissions scandal.[295] Hopefully, these two outcomes are only incidental and do not uncover deeper systemic deficiencies.

(d) The Implementation of the ADD

The ADD was implemented in the German legal system with the modified Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB). Its implementation has not lead to any significant changes regarding the conditions for liability or the quantification of damages for competition law infringements.

Claimants may choose, depending on the circumstances, between two different monetary remedies: a damages claim or an action for unjust enrichment. It is believed that, since no culpability or damage need to be established, unjust enrichment is probably easier to prove than damages if the defendant's gain consists of a plain and reversible transfer of money.[296]

As Peyer found in an empirical study, direct customer claims dominate private antitrust enforcement in Germany, as they account for the vast majority of antitrust

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295 See, eg, Reuters, 'German court rules independent auditor should investigate VW scandal', 8.11.2017, available at https://www.reuters.com/article/us-volkswagen-emissions-court/german-court-rules-independent-auditor-should-investigate-vw-scandal-idUSKBN1D82NY.

296 S Peyer, 'Myths and untold stories – Private antitrust enforcement in Germany' (2011) 14, available at https://lra.le.ac.uk/bitstream/2381/28243/6/Peyer-Private%20Antitrust%20Enforcement%20in%20Germany2011-11-29final.pdf.

claimants.[297] In only one procedure an end user alleged the breach of competition law and only one indirect purchaser claim was identified.[298] Thus, as he found, '[i]n the absence of a class action mechanism it is unlikely that consumers will risk the substantial costs of litigation to remedy a small individual loss. A mere binding effect of public decisions does not overcome the incentive problem'.[299] Since the ADD does not contain provisions on the collective redress, and also other provisions in the Directive do not significantly add to consumers' incentives to bring claims, as it is discussed at length in Chapter V, it seems that it is not destined to enhance the protection of consumers, victims of the anticompetitive conduct.

With respect to unlawful profits gained by the wrongdoer, Section 34a GWB grants active legitimation to professional associations to request an account of unlawful profits if a multitude of buyers or sellers were harmed. The profits that are skimmed off the violator must be passed on to the federal budget. Unsurprisingly, as Peyer argued, 'professional associations have few incentives to request an account of profits because they risk bearing the opponent's cost if they lose while they only gain zero if they win'.[300] The option of requesting unlawful profits to be handed over to the federal budget has so far been of almost no practical relevance. From the functionalist perspective, this sanction could be compared to the French civil penalty, which is proposed by the 2017 reform bill, discussed in section 3 above. It can only be hoped that the French civil penalty does not follow the unfortunate

297 With 212 out of 368 proceedings or 57.6 per cent of all disputes from 2005 to 2007. Only 20% of cases dealt with pecuniary request (damages and unjust enrichment claims). Peyer (n 298) 10.

298 Peyer (n 298) 10.

299 ibid.

300 ibid 4.

fate of its German counterpart. This would mean that the persistent French pleas and search for the deterrent remedy for lucrative fault are far from over.

(e) Conclusion

This section has dealt with the German legal system, which is the strongest adherent of the principle of full compensation among the selected jurisdictions. However, the respect for the principle of full compensation is not absolute. Non-compensatory considerations are present in the German law of damages, especially in instances of the so-called lucrative fault. However, they are pronounced in a more disguised manner than in England and France, through the assessment of the conditions for liability, the fault requirement in particular. Still, this does not conceal their enforcement-based character.

Against this background, it is argued that the German law of obligations refutes the "European legal tradition" argument which was invoked to justify the prohibition of overcompensation in the EU competition law.

5 Conclusion

This chapter has shown that deterrence and overcompensation are not foreign to "European legal culture", at least not to the three selected jurisdictions. All three jurisdictions – England, France, and Germany – have made attempts to combat lucrative fault with a remedy focussing on deterrence. In England, punitive damages are expressly available. Prior to the implementation of the ADD, punitive damages were available for statutory competition torts. In France, a tendency to introduce a deterrent remedy to deal with lucrative fault cases has recently culminated in the governmental proposal to introduce a civil fine. Moreover, in Germany non-compensatory elements find their way into damages assessment through the gradation of fault, which is in some circumstances done expressly by the courts (in lucrative fault cases in the field of personality rights).

As the chapter shows, the justification given for the prohibition of overcompensation in the ADD – the "European legal tradition argument" underpinned by the public/private divide reasoning – is not convincing. The message that is conveyed is that the Member States should not be prevented from organically developing their laws on civil liability by prohibitions of overcompensation that are not buttressed by the solutions found in the Member States' legal systems.

III RATIONALE FOR DAMAGES IN EU LAW

1 Introduction

This chapter aims to examine the approach of the EU institutions to the rationale for damages in general and the availability of non-compensatory damages in the EU context in particular to refute the assumption put forward as a justification for the prohibition of overcompensation in the ADD, i.e. that non-compensatory elements, in particular deterrent elements, are alien to "European legal tradition". In examining the rationale for damages, I pursue two goals. First, this chapter will examine non-compensatory elements in case law and to a certain extent in the legislation, discussing the interpretative approaches chosen by the Court and the Commission's policy choices.

To this end, the thesis is pragmatic in choosing the relevant materials for the analysis. Primary materials for the study have been limited to case law of the Court and the Commission's policy documents in the field of EU competition law. These are materials that the thesis aims to analyse to determine the rationale for antitrust damages actions. Therefore, their arguments are in the focus of analysis. To inform and broaden the understanding, however, secondary materials are also needed for comparison and discussion. These will be Opinions of Advocate Generals and case law of the Court and the Commission's policy documents and EU legislation in other areas, in particular State liability for infringements of EU law, EU labour law, IP and EU public procurement. The choice of areas beyond EU competition law is guided only by the extent to which these are relevant to, and shed light upon, the legal issues being discussed. To this end, in other fields

of EU law, the thesis focusses on damages actions and their deterrent effect, while other remedies provided in different fields of EU law are not subjected to scrutiny.

It shall be argued that the creation of the right to damages is often dominated by the concern to establish an effective system of enforcement, having deterrence as its primary aim. Conversely, it seems that actions for damages in different fields of EU law are mostly grounded in the "enforcement-based regime". Thus, there is space, in principle, for overcompensation in EU law.

Second, and relatedly, the thesis also examines the semantic, conceptual and theoretical confusion accompanying the compensation and sanctions/penalties debate in the EU context, reflected in the language employed both by the Court and the Commission. It points at the perplexed functions and rationales for damages and argues that they result from the fact that these functions are not 'strictly separated'.[1] To the contrary, the lines are blurred and overlapping. It is argued that such confusion in the rationales can be at least partly explained with the reference to the "dual vigilance" legal system of enforcement, the regulatory character of civil liability in EU law, and the ensuing binary nature of damages, as is discussed in the Introduction of the thesis. This is manifested also in the Court's employment of the same justification and reasoning for the creation of the right to damages both in the public and in the private law contexts. Thus, the "full compensation model" underpinned by the "European legal tradition" argument and advanced by the ADD is seriously challenged in the EU context.

[1] See, eg, H Koziol, 'Punitive Damages – A European Perspective' (2008) 68 Louisiana Law Review 741.

2 In Search of the Rationale I: Case Law Analysis

(a) Starting with a "Public" Law Context

By and large, the law on damages for breaches of EU law, or EU tort law, is not harmonised in the EU and must be established under national private laws of the Member States. Nevertheless, the *acquis communautaire* is composed of a batch of EU acts and the case law of the Court affecting it, alongside the general principles and fundamental rights of the EU. This is typical of the incremental development of EU law in some areas, especially in relation to the competition law cases and the consumer protection cases.

The right to damages in EU law was initially available in the "public" law context, to individuals acting against the Union (now regulated in Article 340 TFEU) and against a Member State (the so-called *Francovich*[2] remedy). Thus, I will start the inquiry into the rationale for damages in EU law with these two remedies. Since the Court conceptually grounded the right to damages in the competition law context on the *Francovich* remedy, this "public" law analysis sets the tone for the examination of the rationale for damages in EU competition law.

Non-contractual Liability of the Union

Article 340 TFEU governs the action for damages which enables compensation to be obtained for damage for which the Union is responsible. This provision provides for the contractual liability and non-contractual liability of the Union. In the latter case, the Union shall, in accordance with the general principles common to the laws of the Member

[2] Joined cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428.

States, *make good any damage* caused by its institutions or by its servants in the performance of their duties. The same provision is repeated in the Article 41(3) of the Charter. This wording seems to limit the extent of the liability of EU institutions to pure compensation.

An equivalent Treaty provision to Article 340 TFEU has been present since the entry into force of the Treaty of Rome. The law on the non-contractual liability of EU institutions was reshaped by the *Brasserie* judgment, a case concerning State liability discussed further below, as the Court stated that the same criteria set out in that case delimiting State liability should also govern the liability of EU institutions.[3] The leading case for non-contractual liability of EU institutions is *Bergaderm*, in which the Court repeated that conditions for State liability and liability of the Union cannot, 'in the absence of a particular justification', differ.[4]

The Court held that EU law confers a right to reparation under (what is now) Article 340 TFEU where three requirements are met: 1. the rule of law infringed must be intended to confer rights on individuals; 2. the breach must be sufficiently serious; and 3. there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[5]

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3 Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79 (*Brasserie*) paras 42-5. Sufficiently serious breach requirement in order for individuals to obtain redress was applied by the Court already in its early case law in form of what later became known as *Schöppenstedt* test. The Court held that in cases where legislative action involves measures of economic policy, the Union can incur liability only if there is sufficiently flagrant violation of a superior rule of law for the protection of individual and a causal link between the two.

4 Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* ECLI:EU:C:2000:361 (*Bergarderm*) para 41. See P Aalto, *Public Liability in EU Law: Brasserie, Bergaderm and Beyond* (Hart Publishing 2011).

5 *Bergaderm* (n 4) para 42; *Brasserie* (n 3) para 51.

According to the settled case law, the conditions for the liability of the Union are: (i) the unlawfulness of the conduct alleged against the EU institution, (ii) the fact of damage and (iii) the existence of a causal link between the conduct of the institution and the damage complained of.[6] It follows that it is a precondition for the right to damages that the *damage* has actually occurred. It must be certain, special, proven, and quantifiable in order to be recoverable.[7] The burden of proof is upon applicants to show a direct causal link between the loss and the illegal act.[8] Thus, at face value, features of the liability of the Union seem to correspond to the compensation-focused regime's characteristics outlined in the analytical framework of the thesis.[9]

As to the second requirement, the Court held that the decisive test for finding that a breach of EU law is sufficiently serious is whether the Member State or the EU institution concerned *manifestly and gravely* disregarded the limits on its discretion.[10] Regarding the meaning of 'manifest and grave disregard of limits on direction' as yet, the Court has only applied a fault-based test in establishing a sufficiently serious breach.[11] The Member State or the EU institution is 'liable solely because of the egregiousness of its behaviour'.[12] Regarding substantive obligations, only the most flagrant violations of clear obligations or

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6 Case C-243/05 *Agraz and Others v Commission* [2006] ECLI:EU:C:2006:708, para 36.

7 A G Toth, 'The Concepts of Damage and Causality as Elements of Non-contractual Liability' in T Heukels and A McDonnell (eds), *The Action for Damages in Community Law* (Kluwer Law International 1997) 180.

8 ibid.

9 See the Introduction, s 2.

10 *Bergaderm* (n 4) para 43. Emphasis added.

11 D Chalmers, G Davies and G Monti, *European Union law: text and materials* (3rd edn, CUP 2014) 462.

12 ibid.

arbitrary conduct will incur liability, which is a very narrow fault test.[13] To illustrate, in a recent case concerning the Ombudsman's conduct, the Court held that only 'in very exceptional circumstances' a person may be able to demonstrate that the Ombudsman has actually committed a sufficiently serious breach of EU law.[14] The system of rules developed under Article 340(2) took account of the wide discretion possessed by the EU institutions in implementing EU policies.[15] However, where the Member State or the EU institution has only considerably reduced discretion, or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach.[16]

Although the liability is fault-based, fault plays a role only in establishing liability in a concrete case and should not influence the size of the damages award. If the three-stage model suggested by the thesis is applied to this condition, it can be established that the remedy is not over-compensatory, as the fault condition does not trigger the transformative stage of the assessment of damages. However, the application of the sufficiently serious breach requirement can lead to situations in which not all harm is compensated, thus the remedy can lead to under-compensatory outcomes. Thus, the

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13 ibid.

14 Case C-337/15 P *European Ombudsman v Claire Staelen* ECLI:EU:C:2017:256, para 33; see also Case C-234/02 P *Ombudsman v Lamberts* EU:C:2004:174, para 52.

15 P Craig, 'The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?' in J Beatson and T Tridimas, *New Directions in European Public Law* (Hart Publishing 1998) 76.

16 See, however, Case C-337/15 P *European Ombudsman v Claire Staelen* ECLI:EU:C:2017:256 para 41: 'Whilst having regard to that context, account must, to that end, be taken of all aspects characterising the situation concerned, including, in particular, the obviousness of the lack of care shown by the Ombudsman in the conduct of the investigation/…/, whether it was excusable or inexcusable /…/, or whether the conclusions drawn from the Ombudsman's examination were inappropriate and unreasonable'.

"sufficiently serious breach" condition restricts the chances of an individual who suffered damage to obtain reparation. To this end, it protects the Union and the Member States institutions from being held liable for violations of Union law. Even if the existence of liability is in favour of individuals, the way the Court has construed it makes it restrictive for individuals. As a result, most cases for damages is lost precisely due to the high threshold of the burden of proof that is necessary for the finding of a sufficiently serious breach.[17]

State liability

The liability of the Member States for loss and damage caused to individuals resulting from breach of EU law was established by the Court in the case of *Francovich*, which concerned the liability of Member States for non-implementation of directives. Already in 1976, the Court established in the case of *Russo* that a Member State is liable towards an injured party if it has caused the damage by an infringement of EU law.[18] However, this judgment never became an authority for the existence of a EU right to damages, arguably since it 'seemed too outlandish to be taken seriously'.[19] With hindsight, it is a surprise that more was not made of *Russo* at the time. Thus, the *Francovich* judgment is considered a seminal

17 Van Gerven suggested the use of a more common standard, namely that of how 'a normally (or reasonably) diligent authority would have acted under the circumstances'. He claimed that national courts are more familiar with that standard than with the standard of "serious breach". W Van Gerven, 'Taking Article 215(2) EC Seriously' in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998) 44.

18 Case 60/75 *Russo* ECLI:EU:C:1976:9, para 9.

19 T Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 CMLRev 5 1223; T Lang, 'The principle of effective protection of Community law rights' in D O'Keeffe et al (eds), *Liber Amicorum Lord Slynn of Hadley* (Kluwer Law International 2000) 245.

decision. State liability rules are 'constitutional' in character in that they affect the core of the relationship between the EU and the MS.[20]

For EU legal system to establish itself in domestic legal systems, there is a need and a perpetual challenge to 'effectively enforce' its rules.[21] Accordingly, effective enforcement of EU law and its *effet utile* have become a leitmotif in the judicial creation of several guiding principles of EU law, for example the principle of direct effect established in the case of *Van Gend en Loos,*[22] principle of supremacy established in the case of *Costa v. ENEL*[23], and also the State liability established in the case of *Francovich*. These seminal judgments of the Court established the foundations of the EU legal order. While *Van Gend en Loos* and *Costa v. ENEL* guaranteed the effective incorporation of EU in the national legal orders, *Francovich* is 'perhaps the most representative case of these developments and their link to the protection of the rights of individuals under EC law'.[24]

There is no explicit legal basis in the Treaty enabling the Court to establish the principle of State liability. However, the Court stated that EU law possessed a general principle of Member States' liability which is *inherent* in the system of the Treaty.[25]

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20 J Beatson and T Tridimas, 'Introduction' in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (Hart Publishing 1998) 4; M P Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010)

21 S Drake and M Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016).

22 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

23 Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66.

24 See, eg, Maduro and Azoulai (20) xv-xvi.

25 *Francovich* (n 2) para 35.

The 'inherent' nature of the principle was implicitly intended to explain why the Court had jurisdiction to introduce it judicially, despite the lack of any textual basis in the Treaty empowering the Court to create such a principle.[26] The principle of State liability in damages, as Craig argued, was held to be general in nature and existed irrespective of whether the EU norm which had been broken was directly effective or not.[27]

(i) Effectiveness of EU law and the protection of individual rights

As regards the conceptual basis of the State liability, in *Francovich* the Court grounded its reasoning in the principle of the "effectiveness of EU law" and the concern to "protect rights".[28] It stated that

> The *full effectiveness of Community rules* would be impaired and the *protection of the rights which they grant would be weakened* if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.[29]

Therefore, the Court grounded the justification for the State liability in both objective and subjective rationales – (objective) effectiveness of EU rules and (subjective) protection of rights. Translated into the analytical framework of the thesis, these concerns are underpinned by the principle of full effectiveness and the principle of effective judicial protection. This was instructively depicted by Advocate General Léger in the case of *Köbler*, stating that

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26 D Leczykiewicz, 'The Constitutional Dimension of Private Law Liability Rules in the EU' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 206.

27 Craig, 'The Domestic Liability' (n 15) 75.

28 *Francovich* (n 2) paras 33-35.

29 ibid, para 33. Emphasis added.

> /…/ The obligation to make reparation constitutes a fundamental principle of Community law, which is as fundamental as that of the primacy of Community law or direct effect. Like those two principles, the obligation on the State to make good the loss or damage caused to individuals by breach of Community law helps to *ensure the full effectiveness* of Community law *through effective judicial protection of the rights* which individuals derive from the Community legal order.[30]

On this view, the objective rationale (full effectiveness of EU law) is reinforced through the subjective rationale (effective judicial protection of the rights). Further, he asserted that the principle of State liability constitutes the necessary extension of the general principle of effective judicial protection or of the 'right to challenge a measure before the courts'.[31] Thus, it follows that this right to damages is actually an 'extension of effective judicial protection', and they are both used *instrumentally*[32] to fulfil their common purpose to 'ensure the full effectiveness of EU law'.

As reflected in this brief analysis, at the time of the creation of the *Francovich* action for damages, actions by individuals in national courts were considered a powerful tool to force Member States to comply with their obligations.[33] Thus, *Francovich* added to the Court's arsenal the power of sanction.[34] It is true that the State liability carries a dual function – the Court expressed concerns for effective enforcement as much as judicial

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30 Opinion of AG Léger in Case C–224/01 *Köbler* ECLI:EU:C:2003:207, paras 35, 52. Emphasis added.

31 ibid. It seems that "access to justice" is embraced.

32 A P Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and The Community Right to Damages' (2002) 32 CMLRev 3 457, 458, 469.

33 I Lianos, P Davis, and P Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP 2015) 20.

34 C Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 European Law Journal 3 205; R Caranta, 'Judicial Protection against Member States: A New Jus Commune Takes Shape' (1995) 32 CMLRev 703-726; W Van Gerven, 'Bridging the Gap Between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?' (1995) 32 CMLRev 694.

protection. However, at that initial momentum of creating the right to damages, effective judicial protection was no more than an implication of the principle of full effectiveness of EU law, 'as such to be used more to exact obedience from Member States than to protect citizens'.[35] Thus, the rationale for the principle of State liability is grounded in the enforcement-based regime and it is, subsequently, prospective in its character, encompassing deterrence as its main function.

It is argued that once the Court had safely established the principle of State liability, however, it no longer referred to its dual rationale but rather focused its attention upon the judicial protection discourse, although this shift went quite unnoticed since it still referred to the effectiveness rhetoric.[36] Yet, 'effectiveness' came to be understood as an expression of 'effective judicial protection' – the '*Rewe*-effectiveness' according to the first understanding as explained in the analytical framework of the thesis. The content of the '*Rewe*-effectiveness' sometimes overlaps with the content of the principle of effective judicial protection, as is explored more fully in the Introduction. As the Court held in *AGM-Cosmet*, 'the purpose of a Member State's liability under Community law is not deterrence or punishment but compensation for the damage suffered by individuals as a result of breaches of Community law by Member States'.[37]

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35 Caranta (n 34) 703, 710, 725.

36 Lianos, Davis and Nebbia (n 33) 20.

37 Case C-470/03 *AGM-COSMET* ECLI:EU:C:2007:213, para 88. See also para 142 of the Opinion of AG Kokott in Case C-470/03 *AGM-COSMET* ECLI:EU:C:2005:693: 'the liability of a Member State imposed by Community law serves not as a deterrent and a sanction but as compensation for loss and damage the individual suffers by reason of infringements by the Member State of Community law'. See Lianos, Davis and Nebbia (n 33) 20-21.

(ii) Conditions for liability

As regard the conditions for liability the classic legal test containing three conditions applies: illegality, causation, and damage.[38] In *Brasserie*, the Court held that the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of EU law.[39] The key factor in the assessment of activities of a public authority is the margin of discretion available to the author of the act in question.[40]

The Court drew inspiration for the conditions for liability from the non-contractual liability of the Union under Article 340 TFEU.[41] As aforementioned, it held that the conditions under which the State may incur liability for damage caused to individuals by a breach of EU law cannot, 'in the absence of particular justification', differ from those governing the liability of the EU in like circumstances, since both non-contractual liability regimes draw inspiration from the same 'general principles' and thus the two sets of rules should be identical.[42] These same conditions governing State liability were later in *Bergaderm* applied also to the non-contractual liability of the Union (see above).[43] However, as Van Gerven argued, the reference to Article 340 TFEU, as a model for

38 Case C-5/94 *Hedley Lomas* ECLI:EU:C:1996:205.

39 *Brasserie* (n 3) para 38.

40 ibid, para 43. The Court distinguishes three points: (1) the existence of the principle of state liability (paras 16 et seq); (2) the conditions for such liability to arise (paras 37 et seq); (3) the conditions under, and the extent to, which the remedy of reparation is to be put into effect (paras 67 et seq, and 81 et seq).

41 See *Francovich* (n 2); Opinion of AG Mischo in Joined cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:221, paras 71–72. However, this approach did not receive any endorsement of the Court in that case. The Court's acceptance of this idea came in *Brasserie* (n 3) paras 28-29, 40-45.

42 *Brasserie* (n 3) para 26; Walter Van Gerven, 'Harmonization of Private Law: Do We Need It?' (2004) CMLRev 41 505, 515.

43 *Bergaderm* (n 4) para 42.

defining the State liability under *Francovich*, is not taken sufficiently seriously by the Court, as it is 'too limited in scope, in breadth and in depth'.[44]

Although the Court had an intention to make uniform the condition for the State liability and liability under Article 340 TFEU, the Court does not follow that up when it deals with causation, without giving any 'particular justification' for it.[45] On the contrary, in the *Brasserie* judgment, it leaves the determination of a direct causal link to national courts.[46] Moreover, the Court does not refer to Article 340 TFEU as regards the explicit mentioning of damage or injury as a condition for liability to arise, in addition to breach and causation.[47]

Regarding the condition of sufficiently serious breach, where a Member State acted in an area in which it did have a wide discretion, the conditions for liability in damages must be the same as is the case with liability under Article 340 TFEU.[48] The exceptional nature of the State liability for legislative action was addressed by the Advocate General Léger:

> The freedom of the legislature must not be trammelled by the prospect of actions for damages. Nor should it be limited solely because catering for the public interest adversely affects private interests. The 'power to express the

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44 Van Gerven, 'Taking Article 215(2) EC Seriously' (n 17) 35. In the case of *Hedley Lomas*, Advocate General Léger was also against this idea. Opinion of AG Léger in Case C-5/94 *Hedley Lomas* ECLI:EU:C:1996:205 para 143.

45 Van Gerven, 'Taking Article 215(2) EC Seriously' (n 17) 38.

46 ibid.

47 ibid.

48 Craig, 'The Domestic Liability' (n 15) 76.

> sovereignty of the people' justifies the legislature's immunity in relation to the general rules of liability.[49]

The Court has clearly established that the sufficiently serious breach criterion applies to all *Francovich* actions, even though its application varies according to the circumstances of each case. But, as Dougan argued, 'pinning down exactly what the sufficiently serious breach test consists of can be a surprisingly difficult task. It is, in fact, possible to identify two main approaches in the case law':[50]

> [a] sufficiently serious breach may be established in one of two ways. First, where the Member State had an appreciable degree of (legislative or executive) discretion, the claimant must demonstrate a manifest and grave disregard, taking into account the various factors listed in *Brasserie*. Secondly, where the Member State had no appreciable degree of discretion, the mere breach of Community law may be considered sufficiently serious — but not necessarily so. It is still necessary to take into account the various factors listed in *Brasserie*. In other words, this case law recognises that discretion is not the only factor involved in limiting the liabilities of public authorities performing functions in the general interest.

As is the case with Union liability under 340 TFEU, not all losses are compensated under the *Francovich* liability. As Dougan argued, '*Francovich* establishes a threshold of culpability designed to balance the private interest in obtaining reparation against the public interest in limiting liability'.[51]

However, in certain situations, 'effective judicial protection requires that the claimant be entitled to a remedy simply on the basis of the public authority' s enforceable

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49 Opinion of Advocate General Léger in Case C-5/94 *Hedley Lomas* (n 44) para 96.

50 M Dougan, 'What is the Point of Francovich?' in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century: Volume 1* (Hart Publishing 2004) 249 -250.

51 ibid 242.

breach of Community law (without further requirements as to fault)'.[52] However, in other situations, the claimant is only entitled to a remedy on the basis of an infringement of EU law which is considered sufficiently serious (i.e. culpable).[53] Dougan tried to find the justification for such a different approach in the public/private divide.[54]

Against this background, it should be highlighted that *Francovich* also applies to 'vertical-yet-private-law disputes'.[55] Based on these considerations, Dougan claimed that the Court should not permit *Francovich* to be available in private law situations at all because 'to have parallel remedies in private law situations seems conceptually inappropriate'.[56] An example for that is the discriminatory dismissal of a female employee by her employer, which happens to be a public authority. The Equal Treatment Directive, addressed below in section 3, requires reparation without further proof of fault and the payment of full damages. However, the *Francovich* remedy requires the Member State to make reparation only upon proof of a sufficiently serious breach. As Dougan argued, the 'traditional view is that, although it would be theoretically possible, the claimant will usually have no practical interest in bringing a *Francovich* action in this type of situation'.[57]

As for the conditions and the extent of the remedy of compensation, the Court does not refer to Article 340 TFEU, but simply says that it is for the domestic rules on liability

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52 ibid 240. Eg, the reimbursement by Member States of taxes and other charges levied contrary to EU law.

53 ibid.

54 ibid.

55 ibid 245.

56 ibid. As Dougan explained, '[i]ndividuals who cross private law swords with a public authority may find that they have two remedies at their disposal (in private law, and under *Francovich*); whereas those who have exactly the same type of dispute with another private individual would have only a single remedy (in private law, not under *Francovich*)'.

57 Dougan, 'What is the Point of Francovich?' (n 50) 245.

to determine the extent of reparation as well as to set the criteria determining the extent of reparation, subject to the principles of effectiveness and equivalence.[58]

In this vein, with respect to punitive considerations, the Court held in *Brasserie du Pêcheur* that

> it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims for damages founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.[59]

Thus, in principle, punitive damages are not prohibited in the public law context. The analysis of the case law neither expressly prohibits nor requires non-compensatory, and thus deterrent and punitive, considerations. As depicted, despite the Court's express acknowledgement that both liabilities should be governed by the same conditions, the rationale and the conditions for the liability of the Union and the *Francovich* remedy differ. They are not anchored in the same regime for awarding damages, as the *Francovich* remedy falls under the enforcement-focused regime. Thus, it creates a favourable environment for the introduction of non-compensatory considerations.

In practice, *Francovich* is not necessarily a desirable or effective instrument.[60] Due to very low levels of litigation and low levels of success, many of the *Francovich* actions involved group actions or actions pursued by large undertakings, begging the question as to who is empowered by this remedy.[61] As Harlow noted, an overwhelming majority of

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58 Van Gerven, 'Taking Article 215(2) EC Seriously' (n 17) 38. Cf. *AGM-Cosmet* (n 37).

59 *Brasserie* (n 3) para 90.

60 Opinion of Advocate General Tesauro in *Brasserie du Pêcheur* ECLI:EU:C:1995:407: 'action for damages might be regarded as ancillary to other remedies'. See also Chalmers, Davies, Monti (n 11) 328.

61 Chalmers, Davies, Monti (n 11) 327; Harlow (n 34) 204.

actions against the EU are brought by corporations in litigation that typically involves licenses and other economic interests.[62]

As will be argued in the EU competition law context, rules in the final text of the ADD are designed in a way that reinforces a similar outcome. It does not provide sufficient incentives to consumers to bring claims for harm suffered as a consequence of an infringement of Articles 101 and 102 TFEU. This is especially problematic if one considers that the ADD governs rules dealing with standing of indirect purchasers and the passing-on defence. Thus, it breaks down claims into small consumer claims that, as aforementioned and more fully explored in Ch V, lack incentives to pursue them. It seems that the ADD operates in an undesired way in a twofold manner. First, with the passing-on defence, it takes away an opportunity to sue from competitors.[63] Second, it does not provide sufficient incentives to consumers to bring claims. In what follows, I turn to the EU competition law context to examine its rationale for the right to damages.

(b) The Civil Law Liability Context: The *Courage* Remedy

Competition law is an area in which the substantive involvement of EU law in private law has been initiated by the Court. In the seminal judgment *Courage* the Court expressly recognised that damages actions for the violation of Article 101 TFEU are also available against non-State actors, so also to individuals acting against each other.[64] The Court

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62 Harlow (n 34) 204. Claims awarded to plaintiffs are commonly awarded at the expense of other public goods and Harlow wondered whether such a distributive exercise was best done through the individual litigation.

63 In the US, the passing-on defence and standing of indirect purchasers are not permitted.

64 Case C-453/99 *Courage* ECLI:EU:C:2001:465 (*Courage*).

construed this right on the grounds of direct effect, as Article 101 TFEU in fact does not expressly grant any rights to individuals.[65] As early as in 1974, the Court held in the case of *BRT v Sabam* that the Treaty provisions on competition (Articles 101 and 102 TFEU) have direct effect.[66] This means that individuals can derive rights directly from those provisions, and they can invoke them before national courts of the Member States. The creation of individual rights was a corollary of the establishment of the principle of direct effect.[67] Accordingly, the primary purpose of the establishment of the doctrine of direct effect appears to have been the strengthening of the effectiveness of EU law itself.[68]

In *Courage*, the Court recalled the principle established in *Van Gend en Loos*[69] that the Treaty created its own legal order and that the subjects of that legal order are not only Member States but also their nationals.[70] Following the logic that a right needs to be accompanied by a means to enforce it to be an effective right, reflected in the well-known

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65 See also V Milutinović, *The 'Right to Damages' under EU Competition Law. From* Courage *v.* Crehan *to the White Paper and Beyond* (Wolters Kluwer 2010) 48-50; D Leczykiewicz, 'Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference' in M Kenny and J Devenney (eds), *The Transformation of European Private Law* (CUP 2013).

66 Case C-127/73 *BRT v Sabam* ECLI:EU:C:1974:25. This means that individuals can derive rights directly from those provisions, and they can invoke them before national courts of the Member States.

67 See Eilmansberger (n 19) 1202, who claims that the creation of subjective rights in this judgment was, arguably, a bit of an accident. Arguably, individual rights came into existence 'as sort of by-product of a provision's direct applicability'. On the link between the direct effect and the State or private party liability see, for example, S Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) 17 European Business Law Review 2 299–316; D Leczykiewicz, 'Effectiveness of EU Law Before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' in A Arnull and D Chalmers (eds), *Oxford Handbook of European Union Law* (OUP 2015).

68 C Kilpatrick, 'The Future of Remedies in Europe' in C Kilpatrick, T Novitz, and P Skidmore (eds), *The Future of Remedies in Europe* (Hart Publishing 2000) 2; Eilmansberger (n 19) 1202.

69 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

70 *Courage* (n 64) para 19.

maxim *ubi ius ibi remedium*, the Court granted the right to compensation for the violation of Article 101 TFEU to individuals in private law relationships.

The reasoning in *Courage* is allegedly 'the logical extension of the same principle that has generated *Francovich*'.[71] Already in the case of *Banks*, which set the tone for *Courage*, Advocate General Van Gerven asserted that *Francovich* liability paved the way for the development of similar rules for breach of EU competition law rules by private parties.[72] He argued that it would be 'unacceptable were similar breaches of Community law to be governed by different rules depending on the identity of the author of the breach'.[73] He supported this view also extra-judicially, stating that

> [T]he *motives* applied by the ECJ in *Francovich* for the imposition of State liability would also seem to apply to private liability. Those motives are that '[*t]he full effectiveness* of Community rules would be impaired and *the protection of the rights* which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which Member States can be held responsible'.[74]

It, then, logically follows that also the criteria for recovery under *Courage* – breach, causation and loss – mirror those for recovery under both the State liability principle and EU institutional liability under Article 340 TFEU.[75]

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71 Commission, 'Staff Working Paper: Annex to the Green Paper Damages actions for breach of the EC antitrust rules' SEC(2005) 1732 (Commission Staff Working Paper – Green Paper) 9-10; Lianos, Davis and Nebbia (n 33) 18; S Weatherill, 'The Elusive Character of Private Autonomy in EU Law' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013).

72 Opinion of AG Van Gerven in Case C-128/92 *Banks* ECLI:EU:C:1993:860 paras 26 et seq.

73 ibid, para 35. The Court used the same reasoning to import State liability principles into EU law liability. *Bergaderm* (n 4) para 41.

74 W Van Gerven, 'Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts' in in Ehlermann C-D and Atanasiu I (eds), *European Competition Law Annual 2001: Effective Private Enforcement of Competition Law* (Hart Publishing 2002) 93, 98.

75 N Dunne, 'Antitrust and the Making of European Tort Law' (2015) 36 Oxford Journal of Legal Studies 1 13.

Transplanting the idea of compensation from public law into the domain of private disputes is a manifestation of a tendency of principles of effectiveness and of effective judicial protection to blur the distinction between the public and the private law of remedies in the EU.[76] As Leczykiewicz rightly argued, this private/public divide, 'while obfuscatory and redundant in certain contexts, may play an important constitutional role in others'. For example, in the EU law of remedies context, 'the function of protecting private actors from subjecting them to standards that bind public actors, and thus protects the autonomy of private actors'.[77] In this vein, with respect to the requirements of effective judicial protection and the *Francovich* remedy, Dougan argued that the Court should develop a clearer distinction as regards public law and private law situations.[78]

(i) The prominence of the full effectiveness of EU competition law

In a way similar to *Francovich*, also in *Courage* the Court justified the imposition of liability on a private defendant for a competition law violation by the full effectiveness principle. It emphasised the fact that liability in damages would make a 'substantial contribution to the maintenance of effective competition in the Community'.[79] Thus, ensuring the "effectiveness" of EU law is of central importance in both lines of cases. Effectiveness as a justification for the involvement of the Court in private law liability is very problematic.[80] The main problem is that it is impossible to determine its limits and

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76 Leczykiewicz, 'The Constitutional Dimension' (n 26) 214.

77 ibid.

78 Dougan, 'What is the Point of Francovich?' (n 50) 239. See (a) above.

79 Leczykiewicz, 'The Constitutional Dimension' (n 26) 212. See also Eilmansberger (n 19) 1226, arguing that 'the Court chose the principle of *effet utile* as the central legal foundation for the finding of liability' in *Courage*.

80 Leczykiewicz, 'The Constitutional Dimension' (n 26) 212.

therefore also the limits of the Court's involvement in a particular issue. It is also argued that effectiveness is 'devoid of any normative content, as its normative potency stems only from the rule or policy which it makes effective'.[81]

While putting forward the 'enforcement-based' argument grounded in the principle of effectiveness of EU competition law, the Court held that

> the full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[82]

Moreover, the Court acknowledged that

> [t]he existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.[83]

These two passages show that the Court strongly relied on the deterrent function of the right to antitrust damages at the point of its creation. The analysis in this section refers to these two passages as the "enforcement-based argument". The extensiveness of this principle can be further demonstrated by the fact that the infringed party in *Courage* was a contracting party of the defendant, a company bound under an exclusive supply agreement allegedly illegal under (then) Article 81 EC. As Eilmansberger argued, even if the case could be made that competition law also protects parties bound under an exclusive purchasing arrangement, 'most national torts laws would still consider these traders to fall

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81 ibid.

82 Courage (n 64) para 26; Case C-295/04 *Manfredi* ECLI:EU:C:2006:461 (*Manfredi*) para 60.

83 *Courage* (n 64) para 27.

outside their protective scope, for the simple reason that the nullity stemming from the illegality of the agreement afforded sufficient protection'.[84] The foregoing analysis again points to the enforcement-based regime of damages. With a use of a vivid metaphor, it tries 'to strengthen the '*effet utile de l'effet direct*', with individual rights protection remaining an ancillary benefit'.[85]

The concern to ensure effective enforcement served as a legal basis also for establishment of other rights, apart from the right to damages. To illustrate briefly, in the case of *Muñoz*, dealing with a horizontal provision, a labelling rule contained in a regulation, the Court was asked whether EU law endowed competitors with a remedy to enforce compliance with these rules, i.e. to seek injunctive relief.[86] The basis for the establishment of this right again appears to be predominantly the *effet utile* of the rules in question, although the Court also refers to the necessity of individual rights protection. However, the Court refers to the latter to support its argument that the grant of remedies for competitors is particularly apt to strengthen the compliance with these quality standards.[87]

The Court constructs the same argumentative pattern both to create the right to damages for EU competition law infringements in the case of *Courage* and to grant competitors a remedy to enforce compliance with EU law, i.e. to seek injunctive relief, in the case of *Muñoz*. This argumentative pattern has the following features. First, the Court

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84 Eilmansberger (n 19) 1227.

85 ibid., borrowing this 'catchy phrase' from Mertens de Wilmars, 'L'efficacité des differents tech iques nationales de protection juridique contre les violations du droit communautaire par les autorités nationales et les particuliers' (1981) CDE 381.

86 Case C-253/00 *Muñoz* ECLI:EU:C:2002:497.

87 Eilmansberger (n 19) 1228.

refers to the full effectiveness of EU competition law that would be compromised in the absence of private enforcement. Thus, the exact field of law that is to be effective is specified, i.e. in *Muñoz* rules on quality standards and in *Courage* EU competition law. Second, the Court emphasizes that the practical effect of the prohibitions/obligations laid down by these rules would be compromised in the absence of private enforcement. Third, the Court reasons that private enforcement helps strengthening the practical working of EU rules and contributes to the effective competition/fair trading. To this end, the "discouraging" effect of private enforcement is expressly mentioned. Vindication of individual rights is not underlined in this argumentative pattern creating the right to private remedy underpinned by the principle of full effectiveness, except for providing the link between the breach of a regulatory standard and the civil liability. The thesis argues that in the EU competition law context the Court initially – in the stages of the creation of the right to damages – focussed on the full effectiveness of EU law, and only later when the rules were sufficiently settled the Court paid more attention to the principle of effective judicial protection.[88] In the same vein, Šadl argues that

> the role of *effet utile* is to stabilise the law (the formulation remains linguistically stable over time regardless of individual case outcomes) and

[88] See Ch III. This makes sense if it is looked at through the historical context. Initially, the Court focussed on the enforcement of EU law in the Member States (via creation of principles of primacy, direct effect, State liability), and only later started showing more sensitivity to fundamental rights issues. See also T Tridimas, *The General Principles of EU Law* (OUP 2006, 2nd ed) 419, who claims that '[a]s the Community legal order matured, the Court placed more emphasis on the affinity of the principle to the fundamental right of judicial protection'. See also U Šadl, 'The Role of *Effet Utile* in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8 European Journal of Legal Studies 1 43.

> also to convey an impression of doctrinal continuity, effectiveness and relevance.[89]

The same argumentative pattern is reiterated also in the subsequent cases on the right to damages in EU competition law. However, just as in the State liability setting, the Court appeared to be ready to drop a primary emphasis on the "effective enforcement argument" once it felt that the basis for the remedy was sufficiently solid.[90] This can be illustrated with the *Manfredi* judgment, another ruling on damages claims in competition law issued a few years after *Courage*, this time with consumers as infringed parties bringing damages claims. In this case, an action for damages was brought against several insurance companies in order to obtain an order against those insurance companies for repayment of the increase in the cost of premiums for compulsory 'civil liability auto insurance', paid due to increases implemented by those companies under an agreement declared unlawful by the national competition authority.[91] In its reasoning, the Court initially invoked only the part of the *Courage* judgment that dealt with judicial protection, but did not at first refer to the enforcement-based argument in *Courage* presented above.[92] In this first part of the judgment, the Court clarified the conditions for the right to damages: 'any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm'.[93]

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89 Šadl (n 88) 43.

90 Lianos, Davis and Nebbia (n 33) 21.

91 *Manfredi* (n 82) para 62.

92 ibid.

93 ibid, para 63.

The crux of the "enforcement-based argument" – which focusses on a significant contribution of the right to damages actions to the maintenance of effective competition in the EU – can only be found much later in the *Manfredi* judgment, where the Court deals with the question of whether punitive damages should be awarded.[94] There, the Court constructs the following argumentative pattern to show that punitive damages are not incompatible with EU competition law requirements. First, it repeats the "enforcement-based argument" from the *Courage* judgment.[95] Second, as regard the availability of punitive damages, it held that in the absence of EU rules on this matter, it is for national law to determine the extent of the damages, subject to principles of equivalence and effectiveness.[96] Third, it acknowledges that it is 'settled case-law' that national courts can take steps 'to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them'.[97] However, as explained below, this settled-case law does not refer to the unjust enrichment in relation to punitive damages.

This passage on the unjust enrichment was included already in *Courage*, which did not deal with punitive damages. Importantly, also in *Courage* the same argumentative pattern was employed (1. "enforcement-based argument; 2. "principles of equivalence and effectiveness argument"; 3. "the unjust enrichment argument"). In *Manfredi*, the Court simply inserted the wording '[a]s to the award of damages and the possibility of an award of punitive damages' in the passage dealing with the principles of equivalence and

94 ibid, para 91.

95 ibid, para 89-91.

96 ibid, para 92.

97 *Manfredi* (n 82) para 92.

effectiveness. Thus, the unjust enrichment argument should not be read as a limitation on the availability of punitive damages for EU competition law infringements.

The "enforcement-based argument" was reiterated and further developed in the subsequent judgments in cases *Pfleiderer*, *Donau Chemie* and *Kone*. Since the argumentative pattern is similar in all three cases, I will focus on the most recent case of *Kone*. While the first two judgments deal with the right to access files in leniency programmes, *Kone* deals with the question of the availability of so-called "umbrella damages". In granting the right to compensation in private law relationships, the Court has not specified the circle of beneficiaries that are entitled to rely on this right. The Court merely held that 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU'.[98] However, how wide does this formulation cast the net? In *Kone*, the Court clarified that the victim, who suffered harm due to higher prices inflicted by the undertaking not party to the cartel ("umbrella pricing"), may claim compensation for the harm sustained from the members of the cartel even in the absence of any contractual link with the latter. This is today expressly governed by the ADD.

In *Kone*, the Court employs the same argumentative pattern based on the "enforcement-based argument" as is employed in *Courage,* and develops it further. Following "the principles of effectiveness and equivalence argument" that should govern rules on the causal relationship in the absence of harmonization, the Court held that '[i]n that regard, and specifically in the context of competition law, those rules must not

[98] ibid, para 61. See also Case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECLI:EU:C:2011:389 (*Pfleiderer*); and Case C-199/11 *Otis* ECLI:EU:C:2012:684.

jeopardise the effective application of Articles 101 TFEU and 102 TFEU'.[99] It repeats this reasoning a few paragraphs later, adding that

> national legislation must ensure that European Union competition law is fully effective /…/. Those rules must therefore specifically take into account *the objective pursued by Article 101 TFEU*, which aims to guarantee *effective and undistorted competition in the internal market*, and, accordingly, prices set on the basis of free competition.[100]

Thus, as the Court held in the same paragraph, it is 'in those circumstances' – in light of the objective pursued by Article 101 TFEU – 'that national legislation must recognize the right of any individual to claim compensation for loss sustained'.[101] This is then used as a justification for granting standing to victims of "umbrella pricing", as otherwise the full effectiveness of Article 101 TFEU would be put at risk.[102] In granting this standing, the Court does not refer to the need to compensate loss that these victims sustained. It seems that the existence of harm plays an instrumental role, as it transforms consumers into "private attorney generals" for the sake of the effective and undistorted competition. The "enforcement-based" rhetorics reaches its peak here.

Although this decision is not "ground-breaking" due to the formal recognition of the umbrella effect as the possible consequence of the existence of the cartel, as it is by and large in line with the Court's earlier jurisprudence, it is notable for the Court's demonstration of how far the principle of effectiveness can be stretched. Although the Court has articulated a theoretically expansive right to damages in the line of cases

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99 Case C-557/12 *Kone* ECLI:EU:C:2014:1317 (*Kone*) para 26.

100 ibid, para 32.

101 ibid.

102 ibid, para 33.

examined above, the bifurcated judicial structure in the EU means that it has limited control over its interpretation and application at national level.[103] Moreover, as Dunne rightly asserts, constitutional structures constrain the ability of the Court 'to define its parameters and application, while political realities limit the ability of the EU legislator (or its driving force, the Commission) to fill these gaps'.[104] However, the judgment in the case of *Kone* shows how the Court can break through the established legal concepts, relying on the full effectiveness rhetoric and thus with special emphasis on deterrence, in this case the causal link and the closely related question of standing.

(ii) The extent of the right to damages in EU competition law

The Court established in the case of *Manfredi* that 'injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.[105] The position with regard to damages that go beyond actual loss and lost profits is not clear. The Court explicitly recognised a right to restitution of unlawful overcharges, collected by a dominant undertaking under Article 102 in the case of *GT-Link A/S*.[106] Thus, it follows from this that the right to compensation under EU law is not limited merely to 'loss-based damages'.[107] It should be borne in mind, however, that the defendant in this case was not a private individual, but a state-owned company. In this

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103 Dunne, 'Antitrust and the Making of European Tort Law' (n 75) 19; Leczykiewicz, 'Effectiveness of EU Law Before National Courts' (n 67) 244.

104 ibid 18.

105 *Manfredi* (n 82) para 95.

106 Case C-242/95 *GT-Link A/S* ECLI:EU:C:1997:376. The case law on the restitution for a breach of EU competition law is almost non-existent. See, generally, M Strand, *The Passing-On Problem in Damages and Restitution under EU Law* (Edward Elgar 2017).

107 Milutinović (n 65) 120. Milutinović uses the term "loss-based damages" as opposed to the "gain-based damages".

context, the action in this case was for the repayment of illegal charges levied by (an emanation of) a Member State contrary to EU law, which is a distinct action under EU law.[108] Thus, as Strand argued, it makes it difficult to draw conclusions for the purposes of action for restitution from private parties for a breach of competition law.[109]

As regards punitive considerations in the competition law context, as aforementioned, the Court has not excluded the possibility of awarding exemplary or punitive damages in the case of *Manfredi*, relying on the enforcement argument again – similarly as in *Brasserie* case in the public law context. At the same time, the Court held that national courts are not prevented from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them.[110] It is not immediately clear what this means on the facts of that case. If one reads this phrase broadly, it may be argued that a modification of a national rule which would raise the damages payable could be challenged for enriching the claimant beyond what is necessary to compensate him. But this reading has to be qualified by the statement in *Manfredi* that a Member State may decide to award punitive damages.

It should be emphasised that the Court did not include this unjust enrichment dictum with the purpose of excluding overcompensation resulting from awarding punitive damages. In fact, the Court included this unjust enrichment dictum already in the judgment

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108 M Strand, 'Beyond the Competition Damages Directive: What Room for Competition Law Restitution?' in M Bergström, M Iacovides and M Strand, *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing 2016) 280.

109 Ibid.

110 *Manfredi* (n 82) para 99. Also Advocate General Geelhoed in *Manfredi* suggested that the award of punitive damages is to be left under the competency of national legislators. Opinion of AG Geelhoed in Case C-295/04 *Manfredi* ECLI:EU:C:2006:67 para 70.

of *Courage*, which did not concern punitive damages, and cited cases *Ireks-Arkady, Just,* and *Michaïlidis* in the relevant paragraph.[111] These three cases actually deal with the passing on the loss problem, in the context of compensation for the damage arising from the abolition of refunds (*Ireks-Arkady*) and the recovery of charges improperly levied (*Just* and *Michaïlidis*). Thus, it seems that, originally, the Court had in mind the passing-on defence when it held that a national court is not prevented from ensuring that the protection of the rights guaranteed by EU law 'does not entail the unjust enrichment of those who enjoy them'.[112] In *Manfredi*, as aforementioned, the Court repeated the same passages almost *verbatim* from the *Courage* judgment, but added also a passage referring to punitive damages. Thus, some scholars read the punitive damages dictum in light of the unjust enrichment dictum, especially as the Court itself repeats them both bound together towards the end of the judgment. However, looking at the Court's construction of the argument, such an interpretation is not at all obvious. It is a plausible interpretation that the Court indeed wanted to limit the size of the award of damages with this dictum, however, only when this would lead to a situation when claimed damages are not proven in its entirety, i.e. in that part which has been passed on. The question whether such limitation should be put in place also in a case of punitive damages should be answered in the negative, since the Court itself held that such damages do not violate EU law. It would be an oxymoron to claim that punitive damages are not contrary to EU law, but in the next breath exclude such a possibility – since every award of punitive damages is in itself going beyond the actual harm suffered and thus amounts to enrichment to a certain extent.

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111 Case 238/78 *Ireks-Arkady* ECLI:EU:C:1979:226, para 14; Case 68/79 *Just* ECLI:EU:C:1980:57, para 26, and Joined Cases C-441/98 and C-442/98 *Michaïlidis* ECLI:EU:C:2000:479, para 31.

112 Strand, *The Passing-On Problem* (n 106) 339 et seq.

However, what seems to be crucial to qualify the unjust enrichment dictum is in particular the notion "unjust". In this context, it could be interpreted as meaning that although punitive damages "enrich" the claimant, such enrichment is not necessarily "unjust". Moreover, the unjust enrichment dictum is in any case a simple acknowledgment of such a possibility, however, the Court does not impose a duty on the national court to prevent unjust enrichment. Interestingly, following the Court's judgment in *Manfredi*, the national judge in that case doubled the amount of awarded damages in accordance with the alleged discretionary power under the Italian Code of Civil Procedure.[113]

Another competition law case in which the question of punitive damages was brought up is the aforementioned case *Kone*. Advocate General Kokott repeated *Manfredi*'s reasoning by stating that EU law 'does not in principle prohibit the award of exemplary or punitive damage'.[114] The Court did not really engage with the question of availability of this type of damages. It briefly dismissed claims that damages for "umbrella pricing" constitute punitive damages as the cartel members have not been enriched in the case at hand. The Court held that the rules on non-contractual liability do not make the amount of loss that may be compensated by way of damages dependent on the profit achieved by the person whose misconduct caused that loss.[115]

Thus, also in the competition law context damages actions seem to be predominantly justified with reference to the principle of full effectiveness of EU law, and

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113 *Giudice di Pace di Bitonto*, Judgment of 21 May 2007, *Manfredi v. Lloyd Adriatico*, cited in Milutinović (n 65) 121. See also P Nebbia, '...so what happened to Mr Manfredi? The Italian decision following the ruling of the European Court of Justice' (2007) 28 E.C.L.R. 11 591.

114 Opinion of AG Kokott in Case C-557/12 *Kone* ECLI:EU:C:2014:45 para 80.

115 *Kone* (n 99) para 35.

thus are enforcement-based. Consequently, the EU competition law framework does not prevent non-compensatory considerations in awarding damages. In fact, the environment seems to be favourable for their introduction. In this vein, the Court has recently held that EU law does not preclude punitive damages for infringements of EU law in the labour law context and for IP infringements.[116] This finding is in stark contrast with the proclaimed objectives of the ADD and the consequent prohibition of overcompensation based on the "European legal tradition" argument.

(c) *Courage* Establishing an EU Law Right to Compensation?

The Commission put forward that the divergences in national tort law jeopardize the effectiveness of a privately enforced competition system. Some fear that these efforts for the harmonization of antitrust damages actions constitute a 'backdoor harmonization' of fundamental aspects of tort law and civil-procedure regulations with much broader implications and effects in fields of law other than antitrust.[117] ,

The existence of an EU law remedy of damages against individuals for breach of EU competition law follows from the same principles as those that give rise to such a remedy against Member States for breaches of other provisions of EU law.[118] It is open to discussion whether there is a possibility of extending the logic of violations of competition

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116 In both fields of EU law, the Court referred to *Manfredi* in those parts of the judgments that deal with punitive damages. For the labour law context, see Case C-407/14 *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA*, ECLI:EU:C:2015:831 (*Arjona Camacho*); for the IP see Case C-367/15, *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36.

117 F Marcos and A Sánchez Graells, 'Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?' (2008) European Review of Private Law 3 469.

118 Commission Staff Working Paper – Green Paper (n 71) 10.

law to all EU primary rules with direct effect. It is argued that such reasoning 'extracts too much from a judgment' in the case of *Courage*, as its principle of liability incurred by private parties is 'carefully construed around the particular context of competition law'.[119] Thus, Leczykiewicz argues that the *Courage* remedy should be seen as restricted to competition law, and not as introducing a general principle of private party liability into EU law.[120] It is also doubtful that the Court has in fact jurisdiction to develop a general regime of private party liability in damages.[121] However, some argue that such extension is possible and, as Reich argued, that this is particularly true with regard to free movement of workers and the freedom to provide services.[122]

I agree that as the Court's case law stands at the moment, we do not yet have a general regime of private party liability analogous to the principle of Member States' liability, although one could argue that we have a "conditional model of a general principle" of private party liability. Leczykiewicz argued that

> [t]he specialized nature of the *Courage* remedy means that in contexts other than competition law national courts may rely upon domestic remedial rules to provide redress in cases where an individual conduct is non-compliant with EU law. And this redress, while it has to achieve effective judicial

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119 D Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies* 257; S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2013) 289; see also Dunne, 'Antitrust and the Making of European Tort Law' (n 103) 13.

120 See, for example, A Albors-Llorens, '*Courage* v *Crehan*: Judicial Activism or Consistent Approach?' (2002) 61 *CLJ* 1 38; W van Gerven, '*Crehan* and the Way Ahead' (2006) 17 European Business Law Review 2 269; Leczykiewicz, 'The Constitutional Dimension of Private Law Liability Rules in the EU' (n 85) 203; Leczykiewicz, 'Private Party Liability in EU Law' (n 121) 257.

121 Leczykiewicz, 'Private Party Liability in EU Law' (n 121). It is argued that such debates have normative overtones, because 'they presuppose the need and the feasibility and the jurisdiction' of the Court to introduce the principle of private party liability in damages.

122 N Reich, *General Principles of EU Civil Law* (Intersentia 2013) 117; S Drake, 'Scope of *Courage* and the Principle of 'Individual Liability' for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice' (2006) 31 European Law Review 6 84. See also S Weatherill, 'Article 38 Consumer Protection' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1024.

> protection of any individual EU law rights involved, does not necessarily have to consist in the right to damages.[123]

However, if this EU law non-compliant conduct inflicts harm on an individual, what other remedy – apart from the right to damages – could achieve effective judicial protection of any individual EU law rights involved? Should not the principles of effectiveness of EU law and the right to effective judicial protection step in and – in accordance with the well-established "triad of principles", i.e. effectiveness, proportionality, and dissuasiveness – lead to the same conclusion, the creation of the right to damages for infringements of directly effective EU law rules, as in the competition law context? And if the answer is in the negative – what justifies such preferential treatment of antitrust damages claims?

Either way, 'the judicial introduction of the *Courage* remedy constitutes a model of how future private law liability rules are most likely to be incorporated into the realm of EU law'.[124] In this vein, it is argued that it would be undesirable to further extend the prohibition of overcompensation to other fields of EU law, as the Commission in fact attempts with the non-binding Recommendation on Collective Redress. The issue of (un)justifiability and (un)desirability of this prohibition is discussed at length in Chs IV and V.

3 In Search of the Rationale II: Legislation

As regards non-compensatory considerations that lead to damages awards that go beyond mere compensation, it has to be noted at the outset that, so far, none of the valid legal EU

123 D Leczykiewicz, 'Compensatory Remedies in EU Law: The Relationship Between EU Law and National Law' in P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017).

124 Leczykiewicz, 'The Constitutional Dimension' (n 26) 204.

acts expressly makes provision authorising the award of this type of damages. However, deterrence is gradually becoming part of a discussion on the functions of damages in the EU, largely in the competition law context, and is reflected also in some academic projects, for example in the Principles of European Tort Law (PETL), prepared by the European Group on Tort Law, provide in Art. 10.101 (with the title 'Nature and purpose of damages') that damages aim at compensation as well as prevention of harm. Thus, the preventive function of damages, being a characteristic of deterrence and having a prospective character, is an openly acknowledged aim of damages in PETL, together with the compensatory function. The question is: in what way is the aim of prevention to be understood in this context? One could argue that the wording of this provision highlights only the side-effect function of prevention. Nevertheless, it should be noted that such wording is, at least, unusual, and points to the interpretation that it carries a different meaning.

Another academic project, the Draft Common Frame of Reference (DCFR)[125] at the first glance seems to be inspired to a great extent by the compensatory function. However, as Leczykiewicz showed, at the deeper level it hides many features which would enable the non-contractual liability regime in the DCFR to act as a mechanism of enforcement.[126] There is also growing European interest in punitive damages. One of the causes is the concept of private enforcement that finds its origins in the field of competition law.[127]

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125 C von Bar, E Clive, and H Schulte-Nölke (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. (Sellier 2009).

126 Leczykiewicz, 'Enforcement or Compensation?' (n 65) 1.

127 See the Introduction, s 1. See also R C Meurkens, *Punitive Damages* (Kluwer 2014) 207.

In what follows, I will first examine the non-compensatory considerations in the EU competition law context. In doing so, I will address (a) the ADD and (b) the policy shifts in the Commission legislative programme in EU competition law. Second, (c) I will sketch the deterrence-based considerations in other fields of EU law.

(a) Mapping Non-compensatory Considerations in the ADD Context

Starting an inquiry into rationales for damages in EU legislation, I will first turn to the competition law context. The few cases on actions for damages for competition law infringement discussed above, together with principles on liability for violations of EU law, constituted the foundation stone on which the Commission built its legislative initiatives to establish a common approach on antitrust damages actions. In 2005, the Commission published a Green Paper on damages actions for breach of the EC antitrust rules.[128] The Commission's 'follow-up' White Paper on Damages actions for breach of the EC antitrust rules[129] was published in 2008. Against this backdrop, the Commission adopted a proposal for a Directive on antitrust damages actions for breaches of EU competition law in 2013. The Directive was adopted in 2014 and it needs to be implemented in the national legal systems by 27 December 2016. Private enforcement of EU competition law is thus arguably becoming 'a European tort in the most complete

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128 Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' SEC(2005) 1732, COM(2005) 0672 final (Green Paper). R Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 401-435.

129 Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM(2008) 165 final (White Paper).

sense', where both substance and procedure are dictated, broadly, by harmonising EU law.[130]

Broadly speaking, the ADD has two main objectives. The first objective is to facilitate damages claims and in this vein to safeguard the effective private enforcement of EU competition law. The second objective is the coordination of public and private enforcement of EU competition law.[131] The second objective places limits on the first one.[132] The conflict or tension between the two objectives is obvious; however, it will not be explored further within the confines of this chapter. It is discussed at length in Chapter V.

As Margrethe Vestager, the Commissioner for Competition, put it: 'I am very pleased that it will be easier for European citizens and companies to receive *effective compensation* for harm caused by antitrust violations'.[133] What is meant by "effective compensation"? Is the emphasise on "effective", with an objective of generating more damages claims to support public enforcement and in so doing to strengthen enforcement of competition law? It seems that the Commissioner employs the law enforcement rhetoric, having in mind more damages claims as a result of the ADD. The White Paper's Impact Assessment clarifies what is meant by more effective enforcement: 'More effective

130 Dunne, 'Antitrust and the Making of European Tort Law' (n 103) 12.

131 This is discussed in more detail in Ch IV and V, also put into historical and political context. See recital 54 of the preamble to the ADD, explaining how the Directive meets the requirements of the principles of subsidiarity and proportionality: 'the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers'.

132 S Peyer, 'Compensation and the Damages Directive' (2016) CCP Working Paper 15-10 2.

133 Commission, 'Press Release of the European Commission, Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions' (Brussels, 10 November 2014).

antitrust damages actions implies more cases.'[134] Then, the primary underpinning rationale for antitrust damages seems to be deterrence of anticompetitive behaviour.

However, Article 3(1) of the ADD provides that any harmed individual is entitled to claim *full compensation*. Although the right to damages in the ADD is based on the enforcement-based case law of the Court, the ADD rhetorically focusses on "full compensation" and conceals the regulatory character of the right to damages. Article 3(3) provides that full compensation *shall not lead to overcompensation*, whether by means of *punitive, multiple or other types of damages*. There are several means to avoid overcompensation in the ADD, for example through the passing-on defence.[135]

What does overcompensation mean? The Directive spells out not only that punitive damages lead to undesirable consequences – it is hostile to any type of damages that can violate the principle of full compensation. It is interesting to note that both expressly mentioned types of damages in Article 3(3) ADD, punitive and multiple damages, used to be viable options contemplated by the Commission in the documents setting the scene for the adoption of the ADD. This issue is further discussed below (b). It is often difficult to

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134 Commission, 'Commission staff working document accompanying document to the White paper on damages actions for breach of the EC antitrust rules - Impact assessment' COM(2008) 165 final, para 46; See also Commission, 'Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions' MEMO/14/310 of 17 April 2014; see also D Leczykiewicz, 'Contract and Regulation: Private Regulation, Compliance and Reviewability of Contracts' in R Brownsword, R van Gestel and H-W Micklitz (eds), *Research Handbook on Contract and Regulation* (Edward Elgar 2017). In relation to Article 7(1) of Regulation 1/2003, the word "effective" appears in the sense that the remedies should bring the infringements effectively to an end, and thus the enforcement rationale is paramount. See the transcript of the speech of Ioannis Lianos in P Lowe, M Marquis and G Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart Publishing 2016) 59.

135 Article 12 of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349 (ADD).

estimate the extent of the loss suffered in the competition law context, so the question of overcompensation is dubious.

The ADD was accompanied by the Commission Recommendation on Collective Redress.[136] This Recommendation on Collective Redress, aiming to enhance consumer protection, proposes that Member States prohibit punitive damages in order to prevent abusive litigation.[137] The Recommendation provides that the 'compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions. In particular, punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, should be prohibited'.[138]

Thus, the Recommendation expressly targets solely punitive damages. In so doing, the Commission has undergone criticism that proposals and conceptions elaborated by scholars and experts have been torpedoed by intensive economic lobbying and fail to get through the political filter 'based on arguments peculiar to phobia of foreign legal solutions, using legal traditionalism as a successful marketing weapon'.[139] This is further discussed in the second part of the thesis, in Chapters IV and V. In what follows, shifts in the promoted rationale in the Commission's competition legal policy documents – based

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136 Commission, 'Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms' [2013] OJ L 201 (Recommendation on Collective Redress).

137 See recital 15 of the preamble and point 31 of the Recommendation on Collective Redress (n 136).

138 Point 31 of the Recommendation on Collective Redress (n 136).

139 C Istvan Nagy, 'The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?' (2015) 22 Maastricht Journal of European and Comparative Law 4 531-532, 552; M A Sittenreich, 'The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions' (2010) 78 Fordham Law Review 5 2708.

on the "European legal tradition" argument – are sketched. These shifts are especially important for the argument advanced in the second part of the thesis.

(b) Addressing the Policy Shifts in the Commission's Competition Law Repertoire

Private enforcement has become a significant concern in EU competition law enforcement and policy-making, triggering significant tensions between the compensation and the deterrence rationales, as is exposed by the Introduction to the thesis.[140] Such tensions are unknown in the US, where deterrence has 'emerged as paramount'.[141] There, private actions outstripped public enforcement proceedings already by the late 1960s – the ratio is roughly ten private federal cases for every case brought by the Department of Justice or Federal Trade Commission.[142] Thus, private litigation is the 'predominant means of antitrust enforcement' in the US[143] and a plaintiff in a private antitrust case is seen as a 'private attorney-general' who has the role to close the enforcement gap generated by the 'perceived inability of public enforcement authorities' to deal with all the relevant cases.[144]

Debate on private enforcement of EU competition law was sparked off by the decision of the Court in *Courage* and by the subsequent initiatives taken by the

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140 See, for example, Marcos and Sánchez Graells (n 117) 469; P Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?' (2008) 33 European Law Review 36 36-39. See also Leczykiewicz, 'Enforcement or Compensation' (n 65).

141 H Buxbaum, 'Private Enforcement of Competition law in the United States — of Optimal Deterrence and Social Costs' in J Basedow (ed), *Private Antitrust Enforcement* (Kluwer 2007) 44.

142 D A Crane, 'Optimizing Private Antitrust Enforcement' (2010) 63 *Vanderbilt Law Review* 3 675; Buxbaum (n 166) 44.

143 Crane (n 142) 675.

144 Sittenreich (n 139); N Bucan Gutta, *The Enforcement of EU Competition Rules by Civil Law* (Maklu 2014) 26.

Commission. The decision in *Courage* has established the obligation for national courts to provide a remedy in damages, 'yet, during its migration from the Luxembourg to the Brussels arena, the debate seems to have become oblivious to its own roots, and the focus of discussion has shifted from 'damages claims' to 'private enforcement'.'[145] Although these expressions are used interchangeably in the context of competition law, there is allegedly 'a subtle difference between them, as 'private enforcement' is semantically biased towards the idea of ensuring compliance with the law, rather than compensating the victim of a wrong.'[146]

Some claim that these two main functions (compensation and deterrence) should not be considered completely equal, as the only function of private antitrust actions should be compensating victims of the anticompetitive behaviour, whereas the deterrent function should only be considered a positive 'collateral' effect or a secondary function.[147]

However, a different reading is possible, suggesting that the *Courage* judgment appears to place on an equal footing the compensation and deterrence rationales.[148] Even more, it seems that enforcement was the objective, whereas compensation served as an instrumental[149] tool to achieve it. The Court stressed in the case of *Courage* that 'actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community'.[150]

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145 Nebbia (n 140) 24.

146 ibid.

147 Marcos and Sánchez Graells (n 117) 474.

148 Lianos, Davis and Nebbia (n 33) 17.

149 Komninos (n 32) 457, 458, 469.

150 *Courage* (n 64) para 27.

It is interesting to note that the focus of the damages actions reform changed from compensation and deterrence in the Green Paper towards a more compensation-centred perspective in subsequent documents. The Green Paper did not take a clear position as to whether it prioritises the compensation or the deterrence rationale. It shows the willingness to pursue both objectives, by setting up a system that would be able to accommodate them both.[151] However, the subsequent White Paper reflects some tendencies to embrace the compensation rationale as 'the first and foremost guiding principle', although acknowledging the importance of deterrence as well.[152] The ambition to achieve both rationales surfaces again in the Impact Assessment Report.[153] However, in the 2013 proposal for the ADD a different narrative appeared to underpin the initiative, denoting a clear shift in the Commission's approach.[154] This narrative then found its way into the adopted version of the Directive, which introduced the prohibition of overcompensation. These developments are further discussed in Chapters IV and V.

The Commission emphasized in the Green Paper:

> Damages actions for infringement of antitrust law *serve several purposes*, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour,

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151 Commission Staff Working Paper – Green Paper (n 71) para 179; Lianos, Davis and Nebbia (n 33) 25.

152 Commission, 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules' (n 80) para 15.

153 Commission, 'Commission Staff Working Document Impact Assessment Report: Damages actions for breach of the EU antitrust rules. Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union {COM(2013) 404 final' SWD(2013) 204 final.

154 Milutinović (n 74) 127; Lianos, Davis and Nebbia (n 33) 26-27; M Hazelhorst, 'Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far' (2010) 18 European Review of Private Law 4 759, 765-766. See Ch V.

> thus contributing significantly to the maintenance of effective competition in the Community (deterrence).[155]

Thus, the recognised aims of the antitrust damages seem to be both compensation and deterrence. As the Commission explained in the Staff Working Paper, 'facilitating private enforcement will add more frequently than before to the fines imposed by public competition authorities the possibility for the victim of the anti-competitive behaviour to recover his losses. Both damages awards and the imposition of fines contribute to the maintenance of effective competition and deter anticompetitive behaviour.'[156] Further, the Commission emphasised the law enforcement function, claiming that facilitating and increasing private enforcement 'would further add to the efficiency of competition law enforcement, and make an important contribution to the key objective of ensuring open and competitive markets in the EU's internal market'.[157] The Commission claimed that a higher level of private enforcement of competition law is 'fully in keeping with the wider objectives of the renewed Lisbon Strategy to help Europe become more competitive to the ultimate benefit of European citizens and business alike'.[158]

Touching on the definition of damages in the Green Paper, under Question E of the Green Paper, the Commission asked: 'How should damages be defined?'.[159] The following four choices were proposed: compensatory damages, recovery of the illegal gain (punitive elements), double damages and prejudgment interest.

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155 Green Paper (n 128) 4.

156 Commission Staff Working Paper – Green Paper (n 71) 7.

157 ibid.

158 ibid.

159 Green Paper (n 128) 7.

Regarding the amount of the award of damages, the Commission admitted that the quantification of damages in competition litigation can be particularly complex given the economic nature of the illegality and the difficulty of reconstructing what the situation of the claimant would have been absent the infringement, as usually required under tort rules.[160] At that time, the Commission was of the opinion that doubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements.[161] The accompanying Staff Working Paper highlighted findings that disincentives created by *restrictions on the amounts* that can be awarded, such as the *unavailability of punitive damages*, can also constitute *an obstacle to private actions*.[162]

The Commission Staff Working Document pointed out that 'pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. As a result, thought should be given to other methods of approaching damages'.[163] The Commission emphasised that it should be borne in mind that most Member States exclude exemplary or punitive damages as contrary to their public policy. Despite this situation, the Commission was of the opinion that one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim.

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160 Commission Staff Working Paper – Green Paper (n 71) 37.

161 Green Paper (n 128) 7.

162 Commission Staff Working Document – Green Paper (n 71) 14, referring to the Ashurst study.

163 ibid 34.

After a few years, the White Paper followed.[164] The measures that it put forward were 'designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement'.[165] In contrast to the Green Paper, the White Paper does not mention punitive damages as a possible measure. However, a deterrence function is still acknowledged, albeit this time only as a 'secondary' function of damages.[166] The Commission emphasised that the policy choices proposed in the White Paper therefore 'consist of balanced measures that are rooted in European legal culture and traditions.'[167]

Although this already represented a clear shift in the Commission's rhetoric, the proposal for the ADD took this much further with the express prohibition of punitive damages.

One argument to explain this shift in policy concerns puts forward the idea that there were concerns to promote equal conditions for companies that are potential infringers of antitrust law and, also, to discharge the Commission from certain enforcement duties.[168] Thus, arguably, efforts for harmonisation in this field do not lie in the anxious concern to enable victims to obtain compensation, but rather to level the playing field for businesses. This is discussed in more detail in Chapters IV and V.

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164 White Paper (n 129) 2-3. For the discussion, see P Nebbia and E Szyszczak, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (2009) 20 EBLR 5 635.

165 White Paper (n 129) 3.

166 ibid 3.

167 ibid 3.

168 Marcos and Sánchez Graells (n 117) 481.

(c) Deterrence in Other Fields of EU Law

Moving to other fields in EU law, it should be noted that in the past, it was not at all unusual for the Commission to contemplate the idea of damages having a punitive character, for example while drafting the Rome II Regulation, which lays down rules on the law applicable to non-contractual obligations.[169] In the adopted version, Recital 32 states that non-compensatory exemplary or punitive damages of an *excessive* nature may, depending on the circumstances of the case and the legal order of the Member State, be regarded as contrary to public policy (*ordre public*) of the forum, justified by the considerations of the public interest. Thus, it seems that punitive damages that are *not* excessive should be in line with Rome II Regulation and its public interest consideration exceptions. Such reasoning could be supported to an extent by Article 26 of this Regulation, which provides that the application of a provision of the law of any country specified may be refused only if such application is *manifestly incompatible* with the *ordre public* of the forum. It is argued that this concern could be reconciled with the three-stage model proposed by the thesis.

Another example is the Commission Regulation implementing rules on the agricultural exemption provided for in the Council Regulation on Community plant variety rights.[170] Article 18 of this Regulation deals with special civil law claims. It reads:

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169 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) [2007] OJ L 199/40.

170 Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No 2100/94 on Community plant variety rights [1995] OJ L 173.

> 1. A person referred to in Article 17 may be sued by the holder to fulfil his obligations pursuant to Article 14(3) of the basic Regulation as specified in this Regulation.
>
> 2. If such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14(3) 4th indent of the basic Regulation, in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage pursuant to Article 94(2) of the basic Regulation shall cover at least *a lump sum calculated on the basis of the quadruple average amount charged for the licensed production* of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage.

Under this provision of the Regulation the right-holder is thus awarded a multiple of the actual loss incurred. This overcompensation of the victim therefore seems to be punitive in nature.[171] Advocate General Jääskinen stated in the case of *Geistbeck* that

> even though the obligation to pay reasonable compensation within the meaning of Article 94(1) of the basic regulation, when calculated on the basis of the fee for licensed production, results in a higher level of compensation than that provided for in the case of authorised planting under Article 14 of the basic regulation, the compensation cannot, for all that, be described as punitive damages, which also include an element of sanction. However, this method of calculation enables the cost of licensed production of the propagating material to be imposed where planting has constituted an infringement and, by virtue of that fact, it has a *preventive function*.[172]

The Court followed the reasoning of the Advocate General in this case as regards the rejection of the punitive nature of the latter damages.[173] It seems that Advocate General Jääskinen adopted Wagner's distinction between a punitive and a preventive function of damages and embraced the latter as a function that might have beneficial effects.[174] Still,

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171 C Vanleenhove, 'Punitive Damages and European Law: *Quo Vademus*?' in L Meurkens and E Nordin (eds), *The Power of Punitive Damages - Is Europe Missing Out?* (Intersentia 2012) 337.

172 Opinion of AG Jääskinen in Case C-509/10 *Geistbeck* ECLI:EU:C:2012:187. Emphasis added.

173 Case C-509/10 *Geistbeck* ECLI:EU:C:2012:416, para 39.

174 See the Introduction, s 2. Wagner argues that the case law of the Court and the legislative acts of the EU do not correspond to the classical view of dual function of punitive damages, but embrace

the preventive function also embraces the prospective character and, thus, forms part of the enforcement-based regime of damages.

Further, Recital 26 of the preamble to the IP Enforcement Directive[175] states that the 'aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion (...)'. This Directive also prescribes the conditions of liability and the manner in which damages should be calculated. It includes a provision which obligates the Member States 'to ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages *appropriate* to the *actual* prejudice suffered by him/her as a result of the infringement'.[176] Thus, revealing remarkably evasive legislative drafting, two words immediately catch the attention – "appropriate" and "actual". What does it mean that damages are "appropriate" to the "actual" prejudice? Some argue that the use of the adjective "actual" in Article 13(1) of the IP Enforcement Directive suggests that the principle of full compensation is enshrined in the Directive.[177] However, it seems that the notion "appropriate" gives some ample opportunities for interpretation. The second

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the deterrence function only. He goes as far as proposing a new term for this European institution, for example 'preventive damages', for the sake of conceptual clarity. G Wagner, 'Punitive Damages in European Private Law' in K J Hopt, J Basedow and R Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (OUP 2012) 5.

175 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

176 ibid, Article 13(1).

177 However, it is interesting to refer to the comparative method and to note that the word 'actual' does not appear in the Danish, Estonian, Latvian or Dutch versions of the text of Article 13(1) of the IP Enforcement Directive. See Opinion of AG Wathelet in Case C-99/15 *Liffers* ECLI:EU:C:2015:768 fn. 7.

subparagraph of this Article lays down the methods which may be used to achieve the result laid down in the first subparagraph.[178] It reads as follows:

> When the judicial authorities set the damages:
>
> (a) they shall *take into account all appropriate aspects*, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;
>
> or
>
> (b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as *at least* the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

It must be observed that the wording of that provision expressly permits factors to be taken into account other than solely the 'royalties or fees' which would normally be due. Advocate General Wathelet was of an opinion that it is clear from the words "at least", used in the English version of the text, that this factor represents a minimum.[179] While the term used by the directive indicates only that the prejudice actually suffered is to be taken as a measure in calculating damages, the calculation need 'not necessarily be limited to that'.[180] It does not preclude Member States from going beyond the mere compensation principle. It is suggested that the three-stage model proposed by the thesis is an appropriate mechanism to determine what constitutes "appropriate" on a case by case basis.

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178 ibid, para 26.

179 ibid, para 22.

180 J-C Galloux, 'La directive relative au respect des droits de propriété intellectuelle' (2004) Revue trimestrielle de droit communautaire 698; Y Benhamou, 'Compensation of damage for infringements of intellectual property rights in France, under Directive 2004/48/EC and its transposition law — new notions?' (2009) 40 International Review of Intellectual Property and Competition Law 2 125, 140, 143.

As the Commission stated in its 2003 proposal for this Directive, the idea behind these rules is to provide *a deterrent* against, for example, intentional infringements perpetrated on a commercial scale.[181] Thus, also in this field damages seem to be based on deterrence and grounded in the enforcement-based regime. It follows that the rationale behind these damages is not pure compensation.[182] However, there seems to be some doctrinal controversy as to whether it is possible to award punitive damages. Advocate General Wathelet in his Opinion in the case of *Liffers* briefly engaged with this question.[183]

Another example is the Procurement Remedies Directives, which is very curt as regards damages, providing simply that 'Member States should ensure that damages can be awarded to persons harmed by an infringement of the substantive rules at issue'.[184] The approach chosen to the available heads of damages is unspecific, as it does not contain any qualification of the term 'damage'.[185] When the Procurement Remedies Directives were revised in 2007, it was expressly decided not to concentrate on actions for damages.[186] Instead, a new contractual remedy was introduced. The Commission explained this choice by claiming that damages awards are not deterrent enough, stating that they had

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181 Commission, 'Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights' COM(2003) 46 final.

182 Cf. Leczykiewicz, 'Enforcement or Compensation?' (n 65), arguing that rules included in the Directive point to the compensatory and occasionally restitutionary nature of damages actions in intellectual property cases.

183 AG Wathelet in *Liffers* (n 177) fn. 9.

184 Article 2(c) Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395; Article 2(d) Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [1992] OJ L 76.

185 F Wilman, *Private Enforcement of EU Law Before National Courts* (Edward Elgar 2015) 279.

186 See further ibid 262.

> '*little deterrent effect* on awarding authorities, especially because enterprises who feel that their interests have been harmed must prove that they had serious chances of being awarded the contract. Thus, even though the Court of Justice has called illegal direct awards of contracts "the most serious breach of Community law in the field of public procurement" (*Stadt Halle*, case C-26/03, paragraph 37), the current Remedies Directives do not make it possible *to prevent or correct in an effective way* the consequences of such illegal action.'[187]

This reasoning highlights that the Commission openly ascribes the deterrent function to damages actions in this context, putting at the forefront that their objective is primarily law enforcement and not compensation.[188] Again, damages in this field are also grounded in the enforcement-based regime.

At this point, the striking contrast between the shortcomings observed and legislative attempts and responses across different fields in EU law should be highlighted.[189] While it seems that the Commission is not facilitating damages claims in other fields of EU law, it has undertaken intense legislative activities in the field of competition law based on the same reasons as those employed to justify the absence of any further activities in other fields, in particular public procurement law. As Wilman pointed out, the Commission referred to the obstacles related to actions for damages (costs, burden of proof, quantification, etc.) as reasons not to take legislative action on this point (public procurement law), and in other fields the more recent legislative responses are muted

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187 Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts' COM(2006) 195 final 2. Emphasis added.

188 See also H Schebesta, *Damages in EU Public Procurement Law* (Springer 2016).

189 Wilman (n 185) 261.

(product liability law, intellectual property law), whereas essentially the same obstacles were seen precisely as reason to act in cases of competition law infringements.[190]

The question is: what are the underpinning reasons for such a strikingly different approach? The policy choices made by the Commission can to a certain extent be explained by the particularities of a given field of EU law.[191] Moreover, it is suggested that there is a case to be made that the fact that the ADD was eventually adopted 'can be ascribed as much to a desire to protect the existing public enforcement mechanisms from possible negative consequences from increased private enforcement as to the ambition to facilitate private enforcement'.[192]

The Commission argues in its aforementioned Impact Assessment Report that the situation in the field of public procurement law is substantially different from the one existing in relation to competition law, because in the former case the damages are paid from the public purse whereas in the latter case compensation is paid by an undertaking.[193] In this context, the Commission claims that in other fields of EU law, for example in competition law, '*damages can be adequate remedies to deter and sanction anticompetitive behaviour by undertakings*'.[194]

Nevertheless, the General Court is not reluctant to award compensation for the loss of opportunity to be awarded the framework contract in procurement cases in which claims

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190 ibid 262.

191 ibid.

192 ibid 259. See Ch V.

193 Commission, 'Staff working document - Impact assessment report – Remedies in the field of public procurement' COM(2006) 195 fn 32.

194 ibid. Emphasis added.

are made against EU bodies for infringing the principles of equal treatment and transparency. The General Court held that the infringement of the principle of equal treatment of tenderers and the manifest errors of assessment made by the contracting authority 'necessarily affected the latter's chance of being ranked higher in the cascade procedure and of becoming, at least, the third successful tenderer'.[195] The General Court held that 'even taking account of the contracting authority's broad discretion with respect to the award of the contract at issue', the loss of opportunity constitutes an 'actual and certain damage'.[196] As it highlighted,

> in a situation such as the present case, in which, at the end of the proceedings before the Court, there is a significant risk that the contract at issue has already been implemented in full, the very lack of acknowledgment by the EU judicature of the loss of such an opportunity and the need to grant compensation in that regard is contrary to the principle of effective judicial protection enshrined in Article 47 of the Charter of Fundamental Rights. In such a situation, the retroactive annulment of an award decision does not provide the unsuccessful tenderer with any advantage, with the result that it is apparent that the loss of opportunity is irremediable.[197]

This approach accentuates the need to ensure that the criteria for awarding contracts are properly applied. Damages for the loss of opportunity in this context have the potential to act as a deterrent on awarding authorities.

Staying in the public procurement law context, there is an interesting example of non-compensatory considerations found in the Commission's Green Paper on public

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195 Case T-556/11 *European Dynamics Luxembourg and Others v EUIPO* ECLI:EU:T:2016:248, para 269 (*European Dynamics v EUIPO*).

196 ibid, para 270; T-299/11 *European Dynamics Luxembourg and Others v OHIM* ECLI:EU:T:2015:757 para 144.

197 *European Dynamics v EUIPO* (n 195) para 271.

procurement in the EU from 1996.[198] In this Green Paper, the Commission welcomed 'reactions to the desirability of the award consisting of liquidated damages of a sufficiently dissuasive sum, exceeding the damage suffered' and thus impliedly suggested that it contemplated introducing such a provision next to the full compensation principle found in the Procurement Remedies Directive.[199]

Moreover, the Regulation 261/2004 concerning air passengers' rights[200] establishes a system of fixed compensation regardless of actual damage, providing a further example of EU law's openness to non-compensatory considerations and, thus, non-compensatory damages. This measure has been quite interestingly developed by the Court in its case law.

In the case of *Sturgeon*,[201] the Court applied the "full effectiveness test" in the context of consumer *acquis* and extended liability provided for by the Regulation 261/2004 to cases not explicitly mentioned therein.[202] According to the Court's reasoning in this case, in light of the EU principle of equal treatment, the Regulation 261/2004 should be interpreted to cover compensation not only for passengers on cancelled flights, but also those on delayed flights, although this is not expressly foreseen by the Regulation. It did

198 Commission, 'Green Paper: Public Procurement in the European Union: Exploring The Way Forward' COM(96) 583.

199 ibid 15.

200 Regulation No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance) - Commission Statement [2004] OJ L 46.

201 Case C-402/07 *Sturgeon* ECLI:EU:C:2009:716; for its summary, see, eg, H-W Micklitz and B Kas, 'Overview of cases before the CJEU on European Consumer Contract Law (2008–2013) – Part II' (2014) 10 European Review of Contract Law 2 189-257.

202 O O Cherednychenko, 'Editorial: Public and Private Enforcement of European Private Law: Perspectives and Challenges' (2015) 23 European Review of Private Law 4 484-485.

so with regard to the objectives and the context of the Regulation 261/2004, including the recitals and the principle of equal treatment that it found in primary EU law.

Advocate General Sharpston did not share the Court's enthusiasm. She stated in her Opinion:

> It is because I do not think that the underlying problem can be 'fixed' by interpretation, however constructive, that I suggest that the Court should reopen the oral procedure pursuant to Article 61 of the Rules of Procedure of the Court of Justice and invite submissions from the Member States, the Commission, the European Parliament, and the Council on whether Articles 5 and 7 of the Regulation and Article 6 of the Regulation, and specifically the distinction they introduce between cancellation and delay, are invalid in the light of the principle of equal treatment.[203]

In this vein, Weatherill noted that in this case the Court 'is readily accused of choosing a preferred policy outcome rather than genuinely interpreting the existing legislative text', relying on a 'worryingly tenuous' reasoning.[204] However, Lenaerts, extra-judicially, and Gutiérrez-Fons defended the Court's reasoning relying on the effectiveness argument by stating that 'where a provision of EU law is open to several interpretations, preference must be given to that interpretation that ensures that the provision retains its effectiveness' and offered the ruling in *Sturgeon* as an illustration of such an exercise.[205]

In the field of the gender equality or sex discrimination in employment law, the Equal Treatment Directives explicitly require the availability of 'compensation'.[206]

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203 Opinion of AG Sharpston in Case C-402/07 *Sturgeon* ECLI:EU:C:2009:416, para 97.

204 S Weatherill, *Contract Law of the Internal Market* (Intersentia 2016) 146-147.

205 K Lenaerts and J A Gutiérrez-Fons, 'To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice' (2013-2014) 20 Colum. J. Eur. L. 3 20.

206 Article 8 of Directive 2004/113/EC on equal treatment of men and women in the access and supply of goods and services [2004] OJ L 373/37; Article 18 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23.

Provisions which prescribe damages actions as a matter of EU law appear in sections entitled 'Defence of Rights', rather than 'Penalties'. This would suggest that the EU legislator treats damages in equal treatment cases as compensatory, rather than punitive. However, the Court specified in cases *Dekker* and *Draehmpaehl* that liability for acts of discrimination should not be restricted by the condition of fault, as in that case the practical effect of those principles would be weakened considerably and it would undermine the Equal Treatment Directive.[207] The Court held that 'any infringement of the prohibition of discrimination suffices in itself to make the person guilty of it fully liable'.[208] This can be interpreted as a strengthening of the compensatory function of damages actions at the expense of their regulatory benefits, but can be also seen as inspired by incentive and deterrence arguments.[209] Moreover, as Leczykiewicz rightly suggests, ''damage' suffered by the victim of discrimination is often perceived as non-material and its quantification based largely on the gravity of defendant's conduct, further suggesting that it is in fact quite difficult to speak of purely compensatory nature of discrimination damages'.[210]

In the seminal judgment in *Von Colson*,[211] regarding compensation as sanction for unlawful discrimination in access to employment, the Court held that

> Although, as has been stated in the reply to Question 1, full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover, it must also have a real deterrent effect on the employer. It follows that where a Member State chooses to

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207 Case C-177/88 *Dekker* ECLI:EU:C:1990:383, paras 24-26 (*Dekker)*; Case C-180/95 *Draehmpaehl* ECLI:EU:C:1997:208, para 19; on the requirement of fault, see for example M Dougan, *National Remedies Before the Court of Justice* (Hart Publishing 2004) 36.

208 *Dekker* (n 207) para 26.

209 Leczykiewicz, 'Enforcement or Compensation?' (n 65).

210 ibid.

211 Case 14/83 *Von Colson* ECLI:EU:C:1984:153, para 23.

> penalize the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.

It must therefore amount to more than merely nominal compensation.[212] Accordingly, Article 18 of the recast Equal Treatment Directive, essentially trying to codify the *Von Colson* and the following case law, provides that compensation for discrimination must be *real, effective and dissuasive and proportionate to the damage suffered*. The pressing question is whether it can be "effective" if it is not "dissuasive" at the same time? And in this vein – what is required by the concern for "the genuine deterrent effect"? The Court had the chance to rule on the question whether this formulation, and thus EU law, requires punitive damages in sex discrimination cases in the case of *Arjona Camacho.*[213] The case concerns the award of punitive damages to Ms Arjona Camacho following her dismissal constituting discrimination on grounds of sex. It was referred by a Spanish court which asked whether EU law enables the national court 'to award the victim reasonable punitive damages that are truly additional'.

According to Advocate General Mengozzi, the Equal Treatment Directive does not require, nor oppose, Member States to award punitive damages to the victim.[214] The Court agreed with Advocate General Mengozzi that 'there has been no substantive change in EU law' which might lead to an interpretation that the concern for genuine deterrent effect requires awarding of punitive damages.[215] It stressed that Article 25 of the Directive 2006/54, dealing with penalties, '*allows, but does not require*, Member States to take

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212 *Von Colson* (n 211) para 24.

213 *Arjona Camacho* (n 116).

214 Opinion of AG Mengozzi in Case C-407/14 *Arjona Camacho* ECLI:EU:C:2015:534, para 36.

215 *Arjona Camacho* (n 145).

measures providing for the payment of punitive damages to the person who has suffered discrimination on grounds of sex'.[216] Thus, the legal framework of this Directive "enables" punitive damages. Therefore, the legal landscape is arguably favourable for such an introduction – the provisions are at least not discouraging. However, this applies only if a Member State chooses to provide such a measure. A national court does not have powers to impose punitive damages of its own motion. *Arjona Camacho* is further discussed in the following section to expose the conceptual, theoretical and semantic confusion behind the relevant concepts in EU law. It is argued that this confusion results from the nature of the EU's "dual vigilance" system of enforcement and the ensuing binary nature of damages actions in EU competition law and in other fields discussed in this Chapter. Thus, damages for EU law infringements in several fields of EU law have a strong regulatory character.

4 "European Legal Tradition" and Damages: Dissuasive, but not Deterrent?

(a) "European Legal Tradition" and Damages

"European Legal Tradition" as "Legal Tradition Common to the Member States"

The prohibition of overcompensation in the ADD and the accompanying Recommendation on Collective Redress was justified by the fear that overcompensation could 'increase the risk of abusive litigation to an extent which is not compatible with the European legal

[216] ibid, para 40.

tradition'.[217] Thus, incompatibility with the "European legal tradition"[218] is the main rationale for the prohibition of overcompensation. It is widely accepted that the deterrence rationale underpinning punitive damages is against public policy in the majority of Member States. However, the examination of the rationale for damages in the selected jurisdictions (England, France and Germany) and in the EU, in Chapter II and in this Chapter, refutes this assumption by showing that there are instances of deterrent considerations in damages both in the selected Member States and at EU level – in competition law in particular and also more generally. These findings cast considerable doubt upon the persuasiveness of the "European legal tradition argument" used as a justification for the prohibition of overcompensation in the ADD.

In fact, it shall be argued that this prohibition of overcompensation itself could be inconsistent with the so-called "European legal tradition", and thus incompatible with the EU legal framework.[219] As developed by the Court and reiterated by several pieces of EU secondary legislation, sanctions for EU law infringements must meet the requirements of the "triad of principles" – effectiveness, proportionality and dissuasiveness.[220] This

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217 This explanation was given in Commission, 'Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress' Redress' SEC(2011)173 final. Similar narrative is found in the Recommendation on Collective Redress (n 136), which was published together with the ADD (n 135).

218 Throughout the thesis, I use the term "European legal tradition", as the expression "legal tradition" is more commonly used in EU law than "legal culture" (eg, "legal tradition common to the Member States").

219 This is discussed in subsection C of this section below.

220 This 'important general requirement of EU law' was developed by the Court in Case 14/83 *Von Colson* ECLI:EU:C:1984:153. S Prechal and R Widdershoven, 'Redefining the Relationship between "*Rewe*-Effectiveness" and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 3134 fn 15. See also F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 European Review of Private Law 3 575.

formula is generally applied in EU law – in the civil, administrative, and criminal law contexts.[221] The thesis argues that it should also apply to antitrust damages actions, as is discussed in subsection C below.

The fact that the "triad of principles" generally applies in EU law, and thus the same justification and reasoning is used for criminal, administrative and private law sanctions, sheds light on the binary nature of damages actions for EU competition law infringements. Before I embark on an examination of the "triad of principles" and its application to EU competition law, the "European legal tradition" concept needs to be briefly addressed.

What is meant by "European legal tradition" and is there more than one such tradition? So far, the Court or its Advocates General have not referred to this concept.[222] In EU legal and policy documents, it is referred to only a handful of times – almost exclusively in the contexts of antitrust damages actions and collective redress.[223] In what

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221 According to the settled case law of the Court, remedies, penalties and sanctions all need to be 'effective, proportionate and dissuasive'. Eg, Case C-42/15 *Home Credit Slovakia* ECLI:EU:C:2016:842; Case C-377/14 *Radlinger and Radlingerova* ECLI:EU:C:2016:283 (penalties in consumer protection cases). Case C-218/15 *Paoletti* ECLI:EU:C:2016:748 (criminal penalties).

222 Apart from one reference by an Advocate General in the description of facts and procedure in the main proceedings, and thus plausibly repeating the formulation used by the referring court. See Opinion of AG Geelhoed in Case C-25/02 *Katharina Rinke* ECLI:EU:C:2003:77, para 19. Moreover, in the application of Case C-459/13 *Milica Široká* ECLI:EU:C:2014:2120, the referring Court asked whether Article 35 of the Charter should be interpreted in a particular way "in the spirit of the European legal tradition". However, the Court declared itself manifestly incompetent to give a ruling in this case.

223 Twice by the Commission (in the context of antitrust damages actions and the framework for collective redress), once by EESC (in the context of antitrust damages actions – European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the White paper on damages actions for breach of the EC antitrust rules' [2013] OJ C 228), and once by the Committee of the Regions (in the context of rule of law and fundamental rights in the EU – Opinion of the European Committee of the Regions, 'Local and regional authorities and the multilevel protection of the rule of law and fundamental rights in the EU' [2015] OJ C 140).

follows, I will examine how this concept is employed in different contexts with an attempt to deconstruct its scope and function.

To start with the scope of the concept "European legal tradition", as employed by the Commission, it mainly denotes the "legal tradition common to the Member States". While in both initiatives, i.e. regarding antitrust damages actions and horizontal framework for collective redress, the Commission initially referred to "European" legal tradition, it later changed the wording of (what still seems to be) the same concept and focussed on legal tradition "common to the Member States". Inspired by the European Parliament's Resolution on the Green Paper on antitrust damages actions, the Commission stated in the 2008 White Paper on antitrust damages actions, which already indicated the shift in the promoted rationales for antitrust damages actions,[224] that it

> followed the further guiding principle that the legal framework for more effective antitrust damages actions should be based on *a genuinely European approach*. The policy choices proposed in this White Paper therefore consist of balanced measures that are rooted in *European legal culture and traditions*.[225]

Thus, in the antitrust damages context, the Commission initially referred to 'a genuinely European approach' and 'European legal culture and traditions'. However, the 2013 Proposal for the ADD refers to "the tradition of the great majority of Member States".[226]

Both these documents refer to plurality of traditions. In the horizontal framework on collective redress, however, in the Commission's view tradition seems to be only one,

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224 This is explained in section 2 above.

225 White Paper (n 129) 3. Emphasis added.

226 Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union', COM(2013) 404 final (2013). Emphasis added.

though there is a similar shift in the Commission's focus from "European legal tradition" to "legal tradition of the Member States".[227] This rhetorical focus on only one legal tradition in the collective redress context is perhaps a mere coincidence. However, not only is there no unified legal tradition, but, on closer inspection, the accompanying Recommendation on Collective Redress contains rules that actually run contrary to "the different legal orders of the Member States".[228] For example, while several Member States that adopted collective redress mechanisms prior to the adoption of the Recommendation on Collective Redress decided for opt-out mechanisms (the same choice was made by the Commission in the 2009 leaked proposal of a directive on antitrust damages actions),[229] the Recommendation on Collective Redress recommends opt-in collective redress mechanisms.

Thus, the Commission employs the concept of a single legal tradition common to the Member States to legitimise its proposals and at the same time opts for policy choices that detract from choices made by the Member States, which are at the same time also preferred choices among legal scholars.[230] This normative preference for opt-in models seems 'to conflict with national experiences of the efficacy of various models of collective redress to date as well as the very rationale for their adoption'.[231] Thus, by invoking the

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227 While the 2011 Commission Staff Working Paper on collective redress referred to "European legal tradition", the subsequent 2013 Recommendation on Collective Redress changes the narrative and focusses on "legal tradition of the Member States". Recommendation on Collective Redress (n 136) recital 13.

228 See the quote above.

229 This issue is more fully explored in Ch V.

230 See, eg, B J Rodger, 'Why not court? A study of follow-on actions in the UK' (2012) 1 Journal of Antitrust Enforcement 1 104.

231 M Dawson and E Muir, 'One for All and All for One? The Collective Enforcement of EU Law' (2014) 41 Legal Issues of Economic Integration 4 219.

concept "European legal tradition", the Commission seems to pay lip service to respect of national legal orders.[232]

Two further points will be exposed in relation to the context in which "European legal tradition" (in its initial or its modified version) is invoked. First, the Commission invokes this concept to legitimise reliance on certain procedural safeguards that are deemed to be common across different Member States. Second, and relatedly, these safeguards are put in place to shield infringing businesses from "abusive litigation". Thus, in both these initiatives which are in essence consumer protection measures, the "European legal tradition" argument is invoked to shield businesses from too extensive liability, and in so doing tips the balance in favour of infringing businesses, as is discussed at length in Ch V. In what follows, these two points are jointly explained.

In both aforementioned initiatives, the "European legal tradition" concept is employed to underpin certain procedural safeguards to "prevent abuse".[233] From the Commission's explanation, it seems that the main reason for invoking these principles is to shield infringing businesses from "abusive litigation":

> Stakeholders' positions on many issues are known: most consumer organisations are in favour of EU-wide judicial compensatory collective

[232] Ch II and this Ch, s 2 above, also refute the "European legal tradition" argument in the antitrust damages actions context.

[233] Recommendation on Collective Redress (n 136) recital 13.

> redress schemes, whereas *many representatives of industry fear the risks of abusive litigation*.[234]

In this vein, the Commission further states that many stakeholders – i.e. business representatives –

> have expressed concern that they wish to avoid certain abuses that have occurred in the US with its "class actions" system. This system contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not necessarily well founded.[235]

Thus, abusive litigation boils down to unmeritorious claims. Two years later, the 2013 Recommendation on Collective Redress stated that

> [I]n order to avoid the development of an abusive litigation culture in mass harm situations, the national collective redress mechanisms should contain the fundamental safeguards identified in this Recommendation. Elements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.[236]

As is well known by now, also the final text of the adopted ADD contains express prohibition of punitive damages.

In the antitrust damages actions context, the 2013 Proposal "follows the tradition of the great majority of Member States" to rely

> on *the central function* of the court seized with an action for damages: *disclosure of evidence* held by the opposing party or a third party can only

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234 Commission, 'Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress' Redress' SEC(2011)173 final 11. Emphasis added.

235 ibid, para 21.

236 Recommendation on Collective Redress (n 136) recital 15.

> be ordered by judges and is subject to strict and active judicial control as to its *necessity, scope and proportionality*.[237]

Thus, the Commission puts forward that the central function of the court dealing with an action for damages is 'disclosure of evidence', which needs to be subject to 'strict and active judicial control'. As the Commission states,

> [i]n the absence of legally binding action at the EU level, the effectiveness of the leniency programmes – which constitute a very important instrument in the public enforcement of the EU competition rules – could thus be seriously undermined by the risk of disclosure of certain documents in damages.[238]

On the basis of this narrative, the Commission proposed '*absolute* protection' from disclosure for the leniency corporate statements and settlement submissions.[239] Contrary to the Court's judgments in *Pfleiderer* and *Donau Chemie*,[240] the Commission decided for an unusual dictum, especially if seen from the perspective of the Court's preference for a case by case analysis: 'a national court can *never* order disclosure of such documents in an action for damages'.[241] Thus, it introduces 'a quite unusual limitation of the civil liability of immunity recipients'.[242] Thereby, the Directive 'modifies general principles of private law to strengthen public enforcement.'[243] This modification is paradoxical in the light of the Commission's rhetorical emphasis on preserving the "European legal tradition" or

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237 ibid. Emphasis added.

238 ibid. Emphasis added.

239 ibid 12. Emphasis added.

240 Case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECLI:EU:C:2011:389 (*Pfleiderer*); Case C-536/11 *Donau Chemie* ECLI:EU:C:2013:366. See Ch V.

241 2013 Proposal for a Directive (n 226) 12. Emphasis added.

242 P Van Nuffel, 'Institutional Report' in *Private Enforcement and Collective Redress in European Competition Law - Congress Proceedings FIDE 2016* (Wolters Kluwer 2016) 257.

243 P-C Müller-Graff, 'General Report' in *Private Enforcement and Collective Redress in European Competition Law - Congress Proceedings FIDE 2016* (Wolters Kluwer 2016) 180.

"legal tradition common to the Member States". Again, just as in relation to the question of opt-in/opt-out collective redress mechanism, the Commission employs the "European legal tradition" argument to shield businesses by justifying rules that have little to do with solutions adopted in the Member States' legal orders.

In the light of the enforcement gap identified in the Introduction, it is argued that both these initiatives should aim to enhance competition culture and compensatory justice, and thus should design their measures in a way that provides incentives to victims to actually bring claims before the court. Instead, the Commission relies on the "European legal tradition argument" to justify unusual blanket prohibitions in favour of infringing businesses. It is argued that any unmeritorious claim could be dealt with in a more proportionate manner with the application of the three-stage model proposed by the thesis.[244]

"European Legal Tradition" as "EU Legal Tradition"

As is argued above, the concept "European legal tradition" employed by the Commission in its documents on antitrust damages actions and on the horizontal framework for collective redress mainly denotes the "legal tradition common to the Member States". In this context, the Commission does not refer to "EU law tradition". Considering that the Court has come to diametrically opposite conclusions in relation to both aforementioned striking prohibitions – overcompensation and disclosure of leniency documents – such neglect of "EU legal tradition" seems to be deliberate.[245] The thesis argues that the Court's

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244 See Introduction, s 2.

245 The Court has repeatedly reiterated that in principle punitive damages are compatible with EU law. In the competition law context, see e.g. *Manfredi* (n 82); *Kone* (n 99). In the labour law context, see

approach is better suited to close the enforcement gap in private enforcement of EU competition law, which should be the primary objective of all EU initiatives in this context.[246]

The right to damages for EU competition law infringements, which was developed by the Court, should respect both principles that underpin its creation – the principle of full effectiveness of EU law and the principle of effective judicial protection.[247] Moreover, and relatedly, the right to damages for EU competition law infringements should also meet the requirements of other damages-related EU principles of general application, most notably the "triad of principles" – principles of effectiveness, proportionality and dissuasiveness. Along these lines, the Commission stated in its only reference to the "EU legal tradition" in the aforementioned initiatives (in fact, this is the only Commission's reference to the "EU legal tradition" in any of its policy documents or legislative proposals in any field of EU law) that:

> The objective is to ensure from the outset that any possible proposal in this field, while serving the purpose of ensuring a more effective enforcement of EU law, fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law.[248]

However, the thesis argues that this prohibition of overcompensation – and also other rules[249] – in the ADD could be inconsistent with the so-called "European legal tradition",

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Arjona Camacho (n 116). In the IP context, see Case C-367/15, *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich* ECLI:EU:C:2017:36.

246 This is more fully explored in Ch V.

247 See Introduction, s 2, and the first part of this Chapter.

248 Commission, 'Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress' Redress' SEC(2011)173 final para 10.

249 See the examination of "four steps" in Ch V.

encompassing also "EU legal tradition", and thus incompatible with the EU legal framework, especially the aforementioned "triad of principles". In so doing, the binary nature of the right to damages for EU competition law infringements – conflating both deterrence and compensation rationales – and their regulatory character are disguised and rendered ineffective.[250] This is addressed in the following two subsections.

(b) Elusive Language and Semantic Confusion – Compensation or Penalties?

The extent of controversies about the underlying rationales of damages in EU law is best illuminated by a closer look at the elusive language used to describe different functions and the semantic confusion lurking behind the terms "sanction", "penalties", and "compensation". In EU law, for all these terms similar or even the same rhetoric is used in the case law and in legislation, pointing at the imprecise concepts and inexplicit language used. It is argued that this imprecision results from the nature of the EU's "dual vigilance" system of enforcement and the ensuing binary nature of damages actions in EU competition law and in other fields discussed above in section 2.

To take the aforementioned case of *Arjona Camacho* as an illustrative example, only skimming the judgment illustrates how intertwined the underpinning ideas behind "compensation" and "penalties" and the interplay of notions "effective", "dissuasive", "deterrent", "proportionate", and "adequate" are in the EU law context.

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[250] The thesis employs a concept of effectiveness which refers to the potential of the new rules to facilitate private damages actions, and thus to contribute to closing the identified enforcement gap, and to promote compliance with EU competition law. See Ch V. Cf. C Petrucci, 'Effective Private Enforcement of EU Competition Law: An Input and Output Legitimacy Analysis of Collective Redress' in S Drake and M Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016) 233. Along these lines, in the collective redress context Dawson and Muir argued that 'Commission's most recent 2013 Recommendation fails to significantly advance the development of collective remedies at EU level'. Dawson and Muir (n 231) 215.

First, the relevant provisions in the Equal Treatment Directive 2006/54 should be set out. Two provisions are crucial – Article 18 dealing with 'Compensation or reparation' and Article 25 dealing with 'Penalties'. The wording of Article 18 (Compensation or reparation) is as follows:

> Member States shall introduce into their national legal systems such measures as are necessary to ensure *real and effective compensation or reparation* as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is *dissuasive* and *proportionate* to the damage suffered.

Thus, compensation in sex discrimination cases under Article 18 should be "real", "effective", "dissuasive" and "proportionate". Thus, it comprises all aspects of the "triad of principles".

Further, Article 25 (Penalties) provides:

> Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The *penalties*, which *may comprise the payment of compensation* to the victim, must be *effective, proportionate and dissuasive* /…/.

Again, all three aspects of the "triad of principles" are embraced. The same confusion can be found in other language versions too. For example, in the German version, Articles 18 and 25 both employ notions '*wirksam'*, '*abschreckend*', and '*verhältnismäßig*'. Also in the French version, both respective articles use the same language – *'effective'*, *'proportionnée'*, and *'dissuasive'*. What is more, in both the German and the French

version, the same adjective ('*abschreckend*' or *'dissuasive'*, respectively) is used for adjectives 'deterrent' and 'dissuasive'.[251]

Thus, if these two provisions are compared, (at least) double perplexity arises. First, the same requirements apply to "compensation" and "penalties", despite different functions that they typically serve in the national legal systems, since the former function is ascribed to private law (and thus to civil sanctions) and the latter is ascribed to public law (and thus to administrative and criminal sanctions). However, as is discussed in the Introduction, in the EU there is no strict private/public divide. Damages actions have a strong regulatory character and are predominantly enforcement-based.[252] Against this background, it is not surprising – although it is problematic – that the same language is used for criminal/administrative and civil sanctions.

Advocate General Mengozzi addressed this interplay with the following words:

> Article 18 of Directive 2006/54 cannot be analysed without having some regard to Article 25 of that directive, which *borrows from the terminology* of Article 18 in that the legislature affirms that the penalties that the Member States are to impose 'may comprise the payment of compensation to the victim' and, like the compensation or reparation referred to in Article 18, must be 'effective, proportionate and dissuasive'.[253]

Advocate Mengozzi argues that the fact that Article 25 borrows from the terminology of Article 18 arises from *a semantic confusion* that originated in the case-law of the Court.[254]

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251 See the German and the French version of the judgment in the case of *Arjona Camacho* (n) paras 31 and 38.

252 See s 1 and s 2 above.

253 AG Mengozzi in *Arjona Camacho* (n 214) para 24. Emphasis added. Also Van Gerven argued that the Court sometimes 'regards 'the remedy of compensation as a "sanction" (incorrectly in my view)', referring to *Von Colson* case.

254 ibid, fn 19.

It is respectfully submitted that this is clearly more than just a semantic confusion; it has been codified in several areas of EU law, as shown below, and the Court continues to use the same "confusing" language. It seems to me that this "mess" also amounts to *a confusion in the rationales* that are ascribed to these concepts. It does not seem convincing to describe crucial characteristics of two different things to be the same – 'effective, proportionate, dissuasive, deterrent' – and at the same time claim that they do not possess at least similar, if not the same, functions.

It is argued that such confusion in the rationales can be at least partly explained with reference to the "dual vigilance" legal system of enforcement, the regulatory character of civil liability in EU law, and the ensuing binary nature of damages, as is discussed in the Introduction.

As to the further perplexity, Advocate General Mengozzi believes that Article 18

> goes no further than to require that the reparation or compensation be effective, proportionate and dissuasive. On the face of that article, it seems clear that the legislature does not regard compensation or reparation, as such, as a penalty. The punitive dimension of the measures which the Member States are required to adopt is expressly provided for only in Article 25.[255]

However, a penalty under Article 25 may as well be 'the payment of compensation'. What then is the difference in rationales of one and the other compensatory remedy under Article 18 (compensation) or Article 25 (penalties) of the Equal Treatment Directive 2006/54, *i.e.* of a civil sanction and of a public law sanction? In the fields of EU law in which there is no "EU remedy", it is for the Member States to choose an appropriate penalty for infringements of EU law, just as is the case with Article 25 of the Equal Treatment

[255] ibid, para 25.

Directive 2006/54. Looking at Articles 18 and 25 of this Directive, one can hardly envisage what is the role of the payment of compensation under Article 25? I pinpoint at least four possible readings.

First, surely, when the victim is injured, he or she will rely on Article 18 to obtain compensation. The Member States "shall" introduce measures to guarantee it. Could "the payment of compensation or reparation" in Article 25 be read as a hint that in certain cases compensation under Article 18 suffices to ensure "effective, proportionate and dissuasive" sanction? This would in any case be compatible with the three-stage model proposed by the thesis. In accordance with this model, national courts must assess on a case by case basis whether compensatory damages achieve the desired deterrent effect, taking into account all other factors, for example any fines imposed on the infringing party. This logic works also for the authorities that impose fines. Thus, in certain instances they could come to the conclusion that no penalty under Article 25 is required, since compensation under Article 18 ensures "effective, proportionate and dissuasive" penalty.

Further, another reading of Articles 18 and 25 of the Equal Treatment Directive 2006/54 refers to a hypothetical situation in which conditions are not fulfilled for damages to be awarded on the basis of Article 18 (for example, because no harm was inflicted on the victim), however, a Member State can still choose to sanction the infringer with "the payment of compensation or reparation". If this provision referred only to "reparation" – which is a broader concept than compensation, since it encompasses also, inter alia, restitution and satisfaction – this could plausibly be read as "restitution", "account of profits" or "disgorgement of profits". Thus, on this account, if no harm was inflicted on the victim of sex discrimination (and thus Article 18 would not apply), the infringer that

profited from breaching sex discrimination rules could still be obliged to pay "restitutionary damages" under Article 25.

Third, a more problematic reading of Articles 18 and 25 of the Equal Treatment Directive 2006/54 refers to a hypothetical situation in which conditions are not fulfilled for damages to be awarded on the basis of Article 18 (for example, no harm), however, a Member State can still choose to sanction the infringer with compensatory damages, to which Article 25 explicitly refers. Otherwise, what is the purpose of referring to "the payment of compensation" in Article 25, if not to apply it in cases in which Article 18 does not apply, i.e. because harm has not been inflicted on victims? Provided that harm is inflicted on them, Article 18 applies. This account renders "compensation" referred to under Article 25 a non-compensatory nature.

Fourth, and seemingly endorsed by both the Advocate General Mengozzi and the Court in *Arjona Camacho*, is the account that the Member States, or national judges for this matter, can choose whether they wish to award compensation for harm suffered on the basis of either Article 18 (Compensation or reparation) or Article 25 (Penalties). The Advocate General Mengozzi and the Court suggested that damages under Article 25 can indeed lead to a non-compensatory award, in particular punitive damages, as is discussed below. Another article that could bear importance in this context is Article 27 the Equal Treatment Directive 2006/54, 'Minimum requirements', providing that 'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.'

The Advocate General's Opinion offers a lot of food for thought. He claims that 'although it has described a compensatory measure as a 'sanction', the Court has never

required such a measure to go beyond 'adequate' compensation'.[256] While this might be perfectly true, it is also true that it has never defined 'adequate compensation' either, and adequacy is another concept prone to elastic interpretation fit for instrumental use. Moreover, if the three-stage model suggested by the thesis is applied to this statement, it can well be that the Court still has a deterrent remedy in mind, although it does not explicitly refer to it in that way. Perhaps the Court describes a compensatory measure as a 'sanction' in the first stage of assessment of damages. Thus, its predominant rationale is deterrence. Requirement of "adequate compensation" than leads us to the second stage of assessment of the rationale for damages. It may well be that in a certain case the Court finds that a compensatory remedy in a certain context is not "adequate", and triggers the application of the third level of assessment, which transforms a compensatory remedy in a non-compensatory one. This reading could be supported by the fact that the text of Article 18 of this recast Directive has been developed by adding a reference to the *dissuasive* effect of the reparation or compensation for which the national legal systems are to provide, whereas there was no express reference to dissuasion in Article 6 of Equal Treatment Directive 76/207.[257] It seems that by expressly adding the notion "dissuasive", the legislator wanted to stress that the function of compensation does not need to be purely compensation if a judge deems so appropriate.

Advocate General Mengozzi explains this "extra" word by saying that 'it was already present in the Court's mind when it interpreted that provision',[258] thus there is no

256 AG Mengozzi in *Arjona Camacho* (n 214) para 28.

257 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39 (Equal Treatment Directive 76/207).

258 AG Mengozzi in *Arjona Camacho* (n 214) para 34.

substantive change in EU law even if it seems so by comparing the old and the new provision. He argues that 'the Court has taken a case-by-case approach to assessing the sufficiency of measures taken by Member States'.[259] This view is fully compatible with the three-stage model of assessment of damages. A few paragraphs later, he adds that 'in relation to reparation or compensation, dissuasive effect is *not necessarily dependent*, under the case-law of the Court, on the inclusion of a direct punitive element'.[260] What does 'not necessarily dependent' mean? Does it mean that dissuasive effect could still be dependent on 'a direct punitive element' under certain circumstances? For example, when a purely compensatory remedy would not achieve a sufficient deterrent effect?

The Advocate General concluded – consistently with the account of this thesis – that as the law currently stands, it is for the Member States to decide what are the rationales for damages in the absence of any harmonisation. As he stated,

> In my view, to hold that Member States are required, under Article 18 of Directive 2006/54, to provide for the award of punitive damages would result in a judicial harmonisation of the conditions of reparation or compensation in cases of discrimination on grounds of sex, which I do not believe was the intention of the EU legislature, at least not at this level of detail.[261]

As the Advocate General wrote, the absence of any punitive element in this case 'may well be regrettable, conscious as I am that the system of liability described above is far from fulfilling its compensatory function in a systematically satisfactory way'.[262] He added that deficiencies in the system of liability have been compensated for by Article 25 of Directive

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259 ibid, para 36.

260 ibid, para 39.

261 ibid, para 51.

262 ibid, para 52.

2006/54, which requires the Member States to adopt a system of penalties. Here, he then goes on to claim that under this Article – which allows Member States to award compensation as a form of penalty – 'the imposition of punitive damages relates more closely to this second stage'.[263]

Could this be read as an implicit invitation to impose damages under Article 25, rather than Article 18, which would then allow the inclusion of the punitive element? Not only is such a reading possible, it is also expressly supported by the Court in this case:

> Moreover, Article 25 of Directive 2006/54 provides that Member States are to lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to that directive, and are to take all measures necessary to ensure that they are applied. That article also provides that the penalties, which 'may comprise the payment of compensation to the victim', must be effective, proportionate and dissuasive.
>
> Consequently, although Article 18 of Directive 2006/54 seeks to impose compensation or reparation for the loss and damage sustained by the person injured, it follows from the wording of Article 25 of that directive that that article grants Member States the option of adopting measures which seek to penalise discrimination on grounds of sex in the form of compensation paid to the victim.
>
> Thus, *Article 25* of Directive 2006/54 *allows*, but does not require, Member States to take measures providing for the payment of *punitive damages* to the person who has suffered discrimination on grounds of sex.[264]

Thus, the Court employs this 'carefree use of boiler-plate language'[265] with phrases such as 'effective, proportionate and dissuasive' to justify awarding punitive damages under Article 25 (penalties). In this vein, it should be borne in mind that exactly the same wording

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263 ibid, para 53.

264 *Arjona Camacho* (n 116) paras 38-40.

265 B A Koch, 'Punitive Damages in European Law' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 200.

– the "triad of principles" – is also used in Article 18 (compensation or reparation) and the Court uses the same language to interpret it – although reaching a different interpretative outcome.

Accordingly, the elusiveness of the language employed by the legislator and the Court in its case law sheds light on the underpinning confusion in rationales for damages and the semantic confusion behind the relevant concepts in EU law. This conceptual and semantic conundrum permeates different fields of EU law, as is briefly discussed in the following subsection, and seems to accentuate a systemic perplexity intrinsic to the enforcement-based EU legal framework.

(c) Application of the Triad of Principles to Damages in EU Competition Law

It is argued that the "triad of principles" – effective, proportionate, and dissuasive – applies also to EU competition law. This is expressly the case with respect to penalties. Article 8(2) of the ADD provides that 'Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive'. However, since this "triad of principles" mirrors requirements of the two principles that underpin the creation of the right to damages for EU competition law infringements – the principle of effectiveness of EU law and the principle of effective judicial protection – it applies also to damages in EU competition law. In this vein, Lianos argued that the distinction that is made between remedies and fines is artificial, since remedies are related to a concept of bringing infringement to an end.[266] Thus, harm resulting from breaches of Articles 101 and

[266] See the transcript of the speech of Ioannis Lianos in P Lowe, M Marquis and G Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart Publishing 2016) 60. Cf. T Ottervanger, 'Designing a balanced system: damages, deterrence, leniency and litigants' rights' in P Lowe and M Marquis (eds), *European competition*

102 TFEU must be compensated with an "effective, proportionate and dissuasive" damages award.

As a brief detour, I will sketch the use of the same language in some other contexts. In July 2014, the Commission adopted the Communication 'Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan'.[267] As the Commission asserts, it 'aims to propose new enforcement policy tools, such as a so-called 'follow the money' approach seeking to deprive commercial scale infringers of the revenue flows that draw them into such activities'.[268] In the Action Plan, the Commission uses all the well-known 'catchwords' – measures taken need to be 'dissuasive', 'preventive', and, of course 'proportionate'.[269] This time, these catchwords are used in the purely enforcement-centred context.

Also, it is stated in Recital 13 in the preamble to the Procurement Remedies Directive 2007/66:

> In order to combat the unlawful direct award of contracts, which the Court of Justice /…/ has called the most serious breach of [EU] law in the field of public procurement on the part of a contracting authority or contracting

law annual 2011: integrating public and private enforcement of competition law – implications for courts and agencies (Hart Publishing 2014) 21. He argues that antitrust damages actions are not 'some form of policy instrument for attaining general interest objectives through further deterrence. They are simply tort actions.'

267 Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan' COM (2014) 392 final (An EU Action Plan).

268 An EU Action Plan (n 267) 1.

269 ibid 2.

entity, there should be provision for effective, proportionate and dissuasive sanctions.'

According to the case law of the Court in the road transport context, 'the Member States have a broad discretion regarding the nature of the applicable penalties' and it may result in a choice of 'penal,[270] civil or administrative penalties'.[271] Though this wording is used only in the road transport context so far, the Equal Treatment Directive shows that in employment law penalties can be in a form of compensation, i.e. civil sanction, too.

This list of examples is not exhaustive, as this is the language employed across various fields of EU law. The question is – what does this triad of principles entail? For example, does dissuasiveness equal deterrence or is this a different concept? The thesis is based on the premise that dissuasiveness and deterrence have the same normative content. They are both prospective and aim to deter 'from engaging in the future in conduct similar to the conduct sanctioned by the remedy'.[272] To this end, the Court has stated that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality.[273]

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270 This awkward wording, "penal penalties", invites a question whether penalties can be devoid of penal function?

271 See, eg, Recital 27 of Regulation No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 [2006] OJ L 102. See Case C-501/14 *EL-EM-2001* EU:C:2016:777.

272 P Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 207. See Opinion of AG Bot in Case C-42/17 *M. A. S.* ECLI:EU:C:2017:564, para 12: 'the necessary dissuasive effect to prevent the commission of further offences'.

273 Case C-81/12 *Asociația Accept* EU:C:2013:275, para 63; Case C-565/12 *LCL Le Crédit Lyonnais* EU:C:2014:190, para 45.

For this reason, the thesis argues that in certain instances the awarding of overcompensation with the aim of achieving the "effective" level of "dissuasiveness" could be legitimate and compatible with the requirements of "proportionality". Such an account is compatible with the three-stage model suggested by the thesis. In fact, the Court has acknowledged that punitive damages are capable of meeting the requirements of proportionality in different fields of EU law (competition law, IP, labour law). Thus, a blanket prohibition of overcompensation appears to be incompatible with the "European legal tradition".

5 Conclusion

There is a blurred picture painted by EU law when the rationale for damages is dissected. However, it seems that actions for damages in different fields of EU law are mostly grounded in the enforcement-based regime. This regime is, in principle, favourable for the introduction of non-compensatory considerations, such as deterrence.

At the beginning, EU law neither required nor prohibited non-compensatory damages, in particular punitive damages. The Commission seemed to be pretty receptive towards this type of damages and actively sought Member States' opinions on this issue in several contexts, both in the context of public and private enforcement. There is an apparent switch in the Commission's activities, now going even as far as actively suggesting prohibiting punitive damages.[274]

Despite the obvious shift in the policy choices made by the Commission, which is further examined in Chapters IV and V, this does not reflect the reality. As has been already

[274] The ADD (135); the Recommendation on Collective Redress (136).

briefly mentioned, 'an inclination towards punitive damages'[275] exists in some directives. Thus, this chapter refutes the "European legal tradition" argument invoked to justify the prohibition of overcompensation in the ADD.

In fact, the thesis found that this prohibition of overcompensation itself could be inconsistent with the so-called European legal tradition, and thus incompatible with the EU legal framework. As developed by the Court and reiterated by several pieces of EU secondary legislation, remedies for EU law infringements must meet the requirements of the "triad of principles" – effectiveness, proportionality and dissuasiveness. Since this "triad of principles" mirrors requirements of the two principles that underpin the creation of the right to damages for EU competition law infringements, the thesis suggested that it should apply also to antitrust damages actions. Thus, European legal tradition points in favour of allowing overcompensation in EU competition law in certain defined circumstances.

Koziol claims that punitive damages 'stir up memories of very ancient times when legal systems did not make a strict difference between penalty and compensation'.[276] However, what is apparent from this analysis is that the 'relapse into the archaic mixture of punishment and compensation'[277] is not at all a characteristic of 'very ancient times', but a modern day reality. There is a semantic, conceptual and theoretical confusion in EU law, reflected in the language employed both by the Court and the Commission. It points

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275 Koziol (n 1) 749.

276 ibid 741.

277 H Koziol, 'Comparative Report and Conclusions' in H Koziol and V Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 302.

at the perplexed functions and rationales for damages – precisely because functions are not so ‘strictly separated’. On the contrary, the lines are blurred and overlapping.

PART II: CONSUMER PROTECTION AS A NORMATIVE JUSTIFICATION FOR THE DETERRENT EFFECT OF DAMAGES IN EU LAW

The first part of the thesis provided the background showing that there are instances of non-compensatory considerations in damages both in the selected Member States (Chapter II) and at EU level (Chapter III) – in competition law in particular and also more generally. Thus, it refuted the main underpinning justification for the prohibition of overcompensation in the ADD, namely that overcompensation is against "European legal tradition". Chapter IV of the thesis examines broader constitutional complexities pertaining to such considerations in damages and explores whether the EU has legitimacy and competence – taking into account the rationale for antitrust damages actions and the related choice of the appropriate legal basis – to prohibit overcompensation in the ADD. Chapter V builds on these findings and explores whether consumer protection, a high constitutional priority in EU law[1] might be a normative argument for the need for better enforcement through reliance on the deterrent function of damages – and thus allowing overcompensation in accordance with the three-stage model proposed in the Introduction – in light of the tenacious enforcement gap in EU competition law.

While the first part of the thesis shows that overcompensation fits into the existing legal framework from the conceptual perspective, the second part of the thesis aims to show that, if carefully constructed according to the three-stage model proposed by the thesis and limited to exceptional cases, it fits also in the normative framework of enforcement of EU

[1] See, eg, Article 12 TFEU and Article 38 of the Charter of Fundamental Rights of the European Union [2010] UL C 83/389 (Charter).

law and the protection of consumer rights. It offers an account that in the environment which is to a considerable extent *in favorem mercatura*, the emphasis on deterrence in private enforcement of EU competition law could serve as a useful tool to, at least partly, neutralise the market-biased effects in balancing businesses' and consumers' interests. Deterrence in this context focusses on both parties – it encompasses incentives to comply with the law and incentives to sue. Incentives to sue are essential for the EU private enforcement framework which centres around small claims (via indirect purchasers and the passing-on defence).[2] However, it shall be argued that the rules in the ADD fail to provide incentives to consumers to sue, and thus they do not contribute to the effectiveness of EU competition law enforcement. Rules that should protect consumers have in practice been translated into the businesses' shield.

Against this background, the rationale for the pursuit to prohibit overcompensation should be revamped. One idea that has surfaced as an alternative option in this context is that of a pluralist understanding of European private law.[3]

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2 See Ch V, s 3, c.

3 See, eg, E Büyüksagis, I Ebert, D Fairgrieve, R C Meurkens and F Quarta, 'Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism' (2016) 27 European Business Law Review 1 137. They 'advise' the Commission to 'reconsider its position in the course of its 2017 review of the Recommendation's implementation to ascertain whether or not it remains consistent with the law in Europe. Indeed, the organic legal development of the European national laws should not be stifled by the unjustified policy changes imposed or recommended by Brussels. Until a possible revision of the Recommendation, national courts should retain the freedom to choose whether, and under what conditions, they recognise punitive damages.' For a more general discussion on legal pluralism in European Private Law, see, eg, L Niglia (ed), *Pluralism and European Private Law* (Hart Publishing 2013).

IV CONSTITUTIONAL IMPLICATIONS

The crucial question that the thesis seeks to address is the desirability and justifiability – and thus legitimacy[1] – of the pursuit to prohibit overcompensation in the EU competition law context, but also more broadly at EU level,[2] in light of the EU's constitutional framework based on the principle of conferral, the EU's functional or purposive competences[3] and the market-building rationality[4]. Building on the analysis conducted in the previous chapters dealing with the rationale for damages in the selected national legal systems (Chapter II) and in EU law (Chapter III), this chapter addresses broader constitutional complexities and implications that underpin the debate on the desirability and justifiability of the pursuit to prohibit overcompensation in the EU. These entail questions pertaining to the adoption of such measures, and thus exploring whether the EU has the legitimacy to legislate and the related questions of competence and the choice of the appropriate legal basis.

Further, this chapter also addresses an institutional issue concerning judge made private law through interpretative principles and the legitimacy for the Court to judicially overrule some of the ADD's rules. It is argued that 'the political factors that have driven the Commission to drop deterrence as a goal of private enforcement undercut the need to

1 This is how legitimacy is understood by the thesis. See the Introduction and s 1 in this Ch.

2 See Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms' [2013] OJ L 201 (Recommendation on Collective Redress).

3 G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 ELJ 1.

4 M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 EJL 5 572.

reform the current system'.[5] Some scholars rightly argue that courts sometimes are in a better position than legislators to effectively achieve certain EU policy goals and to contribute to the democratic legitimation of rules of private law.[6] Hence, this chapter represents a link between the first part of the thesis, which is more descriptive and analytical, and the second part of the thesis with more normative undertones.

The current chapter focusses on the *formal* side of the legitimacy debate – it addresses the question of competence and the implications of the choice of legal basis for the Directive's legitimacy. It is based on an assumption that rules in the ADD are not designed in a manner that would enable it to successfully close or at least notably contribute to closing the enforcement gap in the EU competition law context. This assumption is more fully examined in the following chapter (Chapter V). However, it is impossible to discuss questions regarding input legitimacy, explained in the following subsection, and the possible institutional rivalry over the law-making in this context without also considering, at least to a certain extent, the substance of the Directive. In what follows, it is first sketched how the thesis understands the multifaceted concept of legitimacy, before I embark on the examination of the formal legitimacy of the ADD, focussing on the respect for the principle of conferral and related issues of competence and the choice of the appropriate legal basis.

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5 M A Sittenreich, 'The Rocky Path for Private Directors General: Procedure, Politics, and the Uncertain Future of EU Antitrust Damages Actions' (2010) 78 Fordham Law Review 5 2708.

6 C Mak, 'First or second best? Judicial law-making in European private law' (2016) Centre for the Study of European Contract Law Working Paper Series No. 2016-12 1 14-15; C Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights', (2011) 4 EUI Working Paper Series Law 2. Cf. S Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 European Constitutional Law Review 1 23.

1 Excursus: Legitimacy

The question whether the EU as such and its legislation in different policy areas are democratically legitimate has been vehemently debated over the past decades among legal and political science scholars alike.[7] The democratic legitimacy of the rules of EU law depends on the process of the coming into being of these rules and on law-making institutions' explanations and justifications for policies and rules.[8] This entails both the EU's competence to act and the choice of the proper legal basis, which are examined in the remainder of this chapter. However, before the thesis engages with this task, the question that merits attention is: what is meant by "legitimacy"? It is not my aim to deal with this issue at length, thus this section presents only a brief explanation of how I use the term "legitimacy" in the examination of the desirability and justifiability – and thus legitimacy – of the pursuit to prohibit overcompensation in the ADD.

The concept of legitimacy refers to the acceptability of a social or political order.[9] In theory, a distinction is often made between formal (legal) legitimacy and social (empirical) legitimacy.[10] The notion of "formal legitimacy", as Weiler posits, 'implies that

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7 See, eg, G Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 EJL 1 5; A Moravcsik, 'Reassessing Legitimacy in the European Union' (2002) 40 JCMS 4; F W Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999) 7; C Fasone, 'European economic governance and parliamentary representation: What place for the European Parliament?' (2014) 20 (2) European Law Journal 164.

8 Mak (n 6) 5.

9 K-O Lindgren and T Persson**,** 'Input and output legitimacy: synergy or trade-off? Empirical evidence from an EU survey' (2010) 17 Journal of European Public Policy 4 450.

10 See, eg, J H H Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (CUP 1999) 80; S Weatherill, 'Competence and Legitimacy' in C Barnard and O Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing 2009) 17.

all requirements of the law are observed in the creation of the institution or system'.[11] On the other hand, "social legitimacy" is understood as the acceptance of laws and institutions by the public. It is believed that in most cases an institution or system must enjoy formal legitimacy to enjoy social legitimacy.[12]

There are different approaches and normative criteria to assess legitimacy of law-making in a certain area. In examining the quest to prohibit overcompensation in EU competition law context, I rely on terminology and framework developed by Scharpf. He analyses the EU's legitimacy mainly in terms of two normative criteria – *input* (process) and *output* (result) legitimacy.[13] Democracy, as Scharpf explained, aims at collective self-determination. Thus, it is understood as a two-dimensional concept, relating to the inputs and to the outputs of the political system at the same time.[14] Scharpf referred to these two concepts in terms of *input* participation *by* the people (input-oriented authenticity) and *output* effectiveness *for* the people (output-oriented effectiveness).[15]

Democratic constitutions vary in the relative emphasis they place on structures and procedures supporting input-oriented and output-oriented legitimating arguments and narratives for their policies and legislation.[16] Typically, as maintained also by Scharpf, the

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11 Weiler, The Constitution of Europe (n 10) 80.

12 Weiler, The Constitution of Europe (n 10) 81.

13 F W Scharpf, 'Problem-Solving Effectiveness and Democratic Accountability in the EU' (2003) MPIfG Working Paper 03/1 7; J H H Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 Journal of European Integration 7 825. Schmidt has added *throughput* legitimacy as a third normative criteria. V Schmidt, 'Democracy and Legitimacy in the European Union Revisited' (2010) KFG Working Paper 21 2.

14 F W Scharpf, 'Economic integration, democracy and the welfare state' (1997) 4 Journal of European Public Policy 1 18.

15 ibid.

16 Scharpf, 'Problem-Solving' (n 13).

powers vested in the EU have been justified by reference to its output legitimacy – on the presumption that the legitimacy of the EU emanates from its capacity to deliver the desired results (i.e. economic integration), even if suffering from deficiencies when judged against the benchmark of orthodox state-level democracy.[17] Majone argues that the Union represents and should represent a 'regulatory state', and thus it is wholly appropriate that it relies largely on output legitimation.[18]

The emphasis on output legitimacy in the EU has been described as 'functional constitutionalism', 'the legitimacy of efficiency',[19] and somewhat ironically by Weiler as 'a latter day *Panem et circenses* approach to democracy'.[20] This "teleological legitimation" behind the European project sits in tension with liberal and democratic principles that generally lie behind state constitutional systems, most notably the principle of accountability and the principle of representation. It has been widely argued that these principles are compromised in the very structure and process of the Union.[21] Since the EU cannot replicate or adequately translate the habits and practices of statal democratic governance, there is a need to look beyond traditional models of legitimacy largely derived from national democratic experience.[22] Input legitimacy must be seen as one important

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17 In the economic, social and, ultimately, political realms. Lindgren and Persson (n 11) 449; Weiler (n 17) 830; Scharpf, 'Economic integration' (n 14) 6–9.

18 G Majone, 'Europe's 'Democratic Deficit': The Question of Standards' (1998) 4 EJL 1 5.

19 A Menon and S Weatherill, 'Democratic Politics in a Globalising World: Supranationalism and Legitimacy in the European Union' (2007) LSE Law, Society and Economy Working Papers 13/2007.

20 Weiler (n 10) 830.

21 ibid.

22 A Menon and S Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues its States' (2008) 31 West European Politics 3 401; Weiler (n 10) 831.

element in assessing the legitimacy of the EU, but it should be assessed in combination with an unavoidable appreciation of the virtues of output legitimacy.[23]

As a result of the deepening legitimacy crisis of the EU, reflected also in the problems with the ratification of the Lisbon Treaty, and various crises that the EU has faced since (the Euro crisis and the refugee crisis are the most recent examples) – the focus in the debate on EU legitimacy has shifted from the output side of the political process to its input side.[24] Regarding a time frame, this shift stirred almost concurrently with the fresh impetus to promote private enforcement of EU competition law. Many scholars, and also the Commission itself, have begun to advocate the 'stakeholder-participation model of input legitimacy' or 'deliberative democracy'.[25] This model suggests that 'the best way of lessening the legitimacy gap of the EU is by enhancing its input legitimacy through encouraging participation and deliberation among *organized* stakeholders around *important* European issues'.[26]

Most advocates of transnational deliberative democracy do not see direct citizen deliberation at the EU level as a feasible alternative. Rather, they focus on a more pragmatic form of deliberative democracy which assigns a key role to various organised stakeholders that act as intermediary agents between European institutions and the wider public.[27] However, this is problematic since stakeholders do not hold the same power. It is widely

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23 A Menon and S Weatherill, 'Legitimacy, Accountability, and Delegation in the European Union' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 116.

24 Lindgren and Persson (n 9) 449.

25 ibid.

26 ibid. Emphasis added.

27 ibid 451.

believed that 'strong business interests have proven to be very effective in lobbying the legislative process in Brussels, much better than the representatives of weaker interests such as consumer protection'.[28]

Many scholars see attempts to 'enhance input legitimacy as likely to interfere with output legitimacy'.[29] Indeed, the thesis argues that in the ADD context, the arguably enhanced input legitimacy achieved through the European Parliament's involvement in the legislative process via additional legal basis and the stakeholders' involvement in the consultative stage contributed to less efficient rules on private enforcement – measured by their capacity to close the enforcement gap[30] – and thus to lower output legitimacy. As a comparison, rules created by the Court score better in this regard. Consequently, as regards the question of permissibility of overcompensation, the *status quo* based on the Court's case law could prove a better option from the perspective of output legitimacy than rules adopted by the European Parliament (see further Chapter V). Since the final content of the Directive – by and large dictated by the European Parliament and inspired by business interests, as is further discussed in this Chapter and in Chapter V – seems to be incompatible with the Court's interpretation of Articles 101 and 102 TFEU, section 3 of

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28 M W Hesselink, *CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law - What Roles for Fairness and Social Justice?* (Sellier 2008) 11; see also U Mattei, 'The Nile Perch in European Private Law' in HW Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 177; U Mattei and F Nicola, 'A "Social Dimension" in European Private Law?: The Call for Setting a Progressive Agenda" (2006) 41 New Eng. L. Rev. 1. Cf. Alliance for Lobbying Transparency and Ethics Regulation in the European Union (ALTER-EU), Secrecy and Corporate Dominance - a Study on the Composition and Transparency of European Commission Expert Groups (March 2008).

29 Lindgren and Persson (n 9) 452.

30 This is explained in Ch V.

this Chapter suggests that the Court should reinterpret provisions of the Directive in accordance with its settled case-law.

In the EU context, legal scholars usually explore the question whether *the Court* has shown too much judicial activism by using the instrument of teleological interpretation and whether it crossed the boundaries into the realm of illegitimacy.[31] The thesis, however, looks at the question of legitimacy from the opposite angle – it asks whether the *secondary legislation* crossed the boundaries into the realm of illegitimacy by enacting rules that are incompatible with the Treaty, in particular with the Court's interpretation of the Treaty provisions.

2 Competence Saga and its Implications for the Legitimacy of the ADD

Private enforcement of EU competition law occurs through litigation between private parties, and thus horizontal relationships, before the national courts. Thus, it represents an area of intersection of EU competition law[32] and (EU and national) tort law.[33] The aim of this chapter is not to engage with questions concerning the legitimacy of regulating private relationships at the EU level *per se*,[34] but rather to address the issue of competence – and

31 See, eg, M Adams, H de Waele, J Meeusen, and G Straetmans, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

32 The ADD governs also certain national competition law rules.

33 See, eg, O Odudu and A Sanchez-Graells, 'The Interface of EU and National Tort Law: Competition Law' in P Giliker (ed), *Research Handbook on EU Tort Law* (Edward Elgar 2017). For illuminating essays on the relationship between private law relationships and EU law, see D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013)

34 An enquiry into the legitimacy of EU law involvement in horizontal relationships between private parties raises a number of questions which are essentially constitutional in nature. See, eg, M Claes, 'The EU, its MS and their Citizens' in S Weatherill and D Leczykiewicz, *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 45-46.

the related question of the choice of legal basis – as 'the formal element'[35] of such legitimacy in the EU competition law context.

Based on the functionalist method, the key premise of the thesis is that the rationale for a civil liability regime should determine the legal basis and – consequently – the content of a (legislative or judicial) measure governing that civil liability regime.[36] The preceding Chapter III exposed the confusion in the EU regarding the rationale for damages, in EU law in general and in EU competition law in particular. This confusion is manifested and exacerbated by the choice of legal basis for the ADD and the implications of this choice for the final content of the Directive, as is described partly in this Chapter and partly in Chapter V.

The ADD is based on a dual legal basis – on both Articles 103 and 114 TFEU. These two legal bases, the former falling under the EU's exclusive competence and the latter falling under shared competence between the EU and its Member States, are governed by two different legislative procedures. Article 103 TFEU provides a legal basis for EU competition policy, which is in exclusive competence of the EU. Article 114 TFEU is a so-called harmonisation clause, which is not tied to a sector-specific competence laid down in the Treaty, but is functionally driven to achieve the market-building objectives. The initial Commission's policy documents and the 2009 leaked proposal were based on Article 103 TFEU. This article prescribes a special legislative procedure that grants the European Parliament only a consultative role. On the insistence of the European

35 Claes (n 34) 45.

36 See R Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' in C Barnard and O Odudu, *The Outer Limits of European Union Law* (Hart Publishing 2009). "Legal basis" has a twofold meaning here. See the Introduction.

Parliament, the functionally driven Article 114 TFEU was inserted as an additional legal basis that enabled the European Parliament to be involved in the process of the Directive's adoption through the co-decision procedure. This, then, led to several changes to the policy orientation in this field, and also to the 2013 proposal's text, that were suggested by the European Parliament – the prohibition of overcompensation being one of those changes. Thus, using both Articles 103 and 114 TFEU as legal bases for the ADD seems to have significant constitutional, institutional and substantive implications. Against this background, the pattern of the developments regarding the choice of legal basis for the ADD requires close examination.

EU legislative measures are only exceptionally based on a dual legal basis. Using a dual legal basis for the ADD is unsettling in light of Treaty provisions that unambiguously place constitutional constraints on the so-called majoritarian law-making in the field of competition law. First, Article 3 TFEU grants the EU exclusive competence for 'the establishing of the competition rules necessary for the functioning of the internal market'. Remarkably, there are only five areas in which the EU has exclusive competence.

Besides the EU's exclusive competence in this field, Article 103 TFEU (which is a legal basis for the 'regulations or directives to give effect to the principles set out in Articles 101 and 102', i.e. legal basis in the area of competition law), governs a special legislative procedure in which the European Parliament is granted only a consultative role. Thus, the Member States have created a special competition law and policy regime in the Treaty, with an unusual[37] separation of powers both vertically (via the EU's exclusive competence)

[37] With the Lisbon Treaty, the ordinary legislative procedure is normally used in the legislative process.

and horizontally (via the special legislative procedure). However, these two constitutional constraints imposed by the Treaty were circumvented in the legislative process leading to the adoption of the ADD by the insertion of an additional, market-building legal basis. The ADD was adopted pursuant to the legislative procedure governed by this additional legal basis (Article 114 TFEU).

Thus, by using a dual legal basis for the ADD, the Commission did not only conflate two areas that fall under different competence regimes in the Treaty, but also two different legislative procedures. It shall be argued that this conflation, firstly, does not find support in the Treaty articles, and secondly, leads to the content of the Directive that enjoys less outcome legitimacy than, for example, the Commission's 2009 proposal (output legitimacy is examined at length in Chapter V).

This section of the chapter argues that the Commission's justification for the use of a dual legal basis is unpersuasive and can be seen as a pretext for the European Parliament's involvement in the legislative process. It seems that the Commission invoked this legal basis since no other avenue was at its disposal for granting the European Parliament a more prominent role in the legislative process. This involvement is constitutionally questionable from the competence and legitimacy perspective. Moreover, it should be borne in mind that it was on the insistence of the European Parliament that the prohibition of overcompensation was included in the Directive. The Commission's 2013 proposal, on which the final ADD is based, did not include such prohibition, nor did it mention "punitive damages" or "overcompensation". Against this background, the thesis explores the implications of the European Parliament's involvement both for the Directive's input and output legitimacy (in this Chapter and in Chapter V, respectively).

In the following subsections, the historic development of the choice of legal basis for the ADD and accompanying justifications are examined.

(a) On the Importance of the Correct Legal Basis

(i) The Principles of Conferral, Subsidiarity, and Proportionality

Article 5 of the Treaty on European Union (TEU)[38] identifies three constitutional principles that govern Union competences: the principle of conferral, the principle of subsidiarity, and the principle of proportionality. In line with the principle of conferral, the EU may regulate a given field of law only when explicitly provided for in the Treaties. TEU explicitly stresses twice that 'competences not conferred upon the Union in the Treaties remain with the Member States', and this is reiterated in Declaration 18 attached to the Treaty.[39] The principle of conferral, thus, 'represents the source of EU's claim to exercise power on a legitimate basis'.[40]

The principle of conferral governs the *existence* of Union competences, which are further classified under Arts. 2–6 TFEU into exclusive, shared, and supplementary. Once it is established that a Union shared competence exists, for example Article 114 TFEU in the case of the ADD, its *use or exercise* is governed by the principles of subsidiarity and proportionality. Apart from their importance for legality of the EU's exercise of power,

38 Consolidated version of the Treaty on European Union [2012] OJ C 326 (TEU).

39 Article 4(1) TEU.

40 S Weatherill, *Contract Law of the Internal Market* (Intersentia 2016) 3.

both these principles play a role also in the wider political debate about the proper scope and intensity of EU regulation.[41]

Under the principle of subsidiarity, 'the Union shall act *only if* and *in so far as* the *objectives of the proposed action* cannot be sufficiently achieved by the Member States'.[42] Hence, it requires that the EU justifies why it is in a better position than the Member States to legislate on an issue. To properly assess whether a Union action meets the requirements of the principle of subsidiarity, 'objectives of the proposed action' need to be properly defined. These objectives, then, influence the choice of legal basis, and consequently also the legislative process through which a measure it to be enacted and, notably, its content.[43]

Objectives of the proposed action are inseparable from the rationale for the proposed action. In other words, as the thesis argues, the rationale for antitrust damages actions should influence the objectives of a proposed directive in the field of private antitrust enforcement and, consequently, inform the final Directive's content. Thus, from the functionalist perspective adopted by the thesis, there is a strong link between the legal basis of the right to damages and its content. In this vein, the Court held that 'in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue *in fact pursues the objectives stated by the Community legislature'*.[44] From the vertical division of powers perspective, in light of Article 114

41 Weatherill, *Contract Law* (n 40) 82.

42 Either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Art. 5(3) TEU. Emphasis added.

43 This is discussed in the Introduction.

44 Case C-376/98 *Germany v Parliament and Council* ECLI:EU:C:2000:544, para 85.

TFEU, this link is crucial for the assessment of the ADD's compatibility with the principle of conferral. This is further discussed in the remainder of this Chapter.

Under the principle of proportionality, 'the *content* and *form* of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'[45] This is especially important in cases that involve a so-called blanket ban, as is the case with the prohibition of overcompensation in the ADD. This is another constitutionally important principle and the compatibility of the rejection of overcompensation in the Antitrust Damaged Directive with this principle is further examined below.

(ii) On the use of a dual legal basis

The Court held that 'the choice of the appropriate legal basis has constitutional significance' – both for the vertical and horizontal division (or 'the principle of institutional balance'[46]) of powers in the EU.[47] It has often said that the choice of legal basis 'must rest on objective factors that are amenable to judicial review, including in particular the aim and the content of the measure'.[48] As the Court held, the procedures established by the Treaty should not be disregarded 'on the basis of considerations relating to the politically sensitive nature of the issue concerned or to a concern to ensure the effectiveness of a [EU] action'.[49] Thus, a mere wish of the European Parliament to co-decide on a par with the Council in the field of private enforcement of competition law is not enough to justify the

45 Art. 5(4) TEU. Emphasis added.

46 Case C-133/06 *Parliament v Council*ECLI:EU:C:2008:257, para 57.

47 Case C-370/07 *Commission v Council* ECLI:EU:C:2009:590, paras 47-49.

48 Case C-178/03 *Commission v Parliament and Council* ECLI:EU:C:2006:4, para 41, and Case C‑155/07 *Parliament v Council* ECLI:EU:C:2008:605, para 34.

49 Case C-133/06 *Parliament v Council* ECLI:EU:C:2008:257, para 59.

choice of a legal basis that enables such co-decision if the default legal basis prescribes a different procedure.[50] Something more is needed, or a legislative act faces threat of being declared invalid by the Court.

If an EU measure pursues a twofold purpose or it has a twofold component, the Court held that in principle, an act must be based on the single legal basis most concerned with the predominant purpose or component of the act.[51] Only exceptionally, when an act pursues several distinct objectives which are indissociably linked, without any objective being secondary to the other, must it be based on a combination of different legal bases.[52] A conclusion regarding the question whether one or the other objective is predominant should be 'corroborated by an analysis of the legislative context of the contested regulation'.[53]

The question of the recourse to a dual legal basis is especially pertinent in the context of the different nature of competences conferred on the EU by legal bases in question. This is the case regarding the ADD, since Articles 103 confers an exclusive competence on the EU and Article 114 TFEU confers shared competences between the EU and its Member States. Moreover, the choice of legal basis plays an important role also in the context of the horizontal organization of the powers of the EU among the EU's institutions.[54] The chosen legal basis of a measure determines also the legislative

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50 The default legal basis for the competition law enforcement measures is Article 103 TFEU.

51 C-411/06 *Commission v. Parliament and Council* ECLI:EU:C:2009:518.

52 ibid. See S Weatherill, *Law and Values in the European Union* (OUP 2016) 79, who claims that this is the case 'save only where procedures laid down for each legal basis are incompatible with each other'.

53 C-411/06 *Commission v. Parliament and Council* ECLI:EU:C:2009:518, para 64.

54 Case C‑187/93 *Parliament v Council* ECLI:EU:C:1994:265, para 17.

procedure, and thus the role of the European Parliament in that process. This aspect is especially pertinent in the ADD context since the European Parliament instigated the quest to prohibit overcompensation. The Court has not ruled on the question dealing with a case concerning a dual legal basis in the field of competition law yet.[55]

An important question in this context is whether a legislative measure should be based on a dual legal basis when there is a specific legal basis for the measure found in the Treaty (e.g. competition policy), but the measure also has a bearing on the functioning of the internal market, and thus could potentially be based also on Article 114 TFEU. The Court dealt with this question in the context of the Regulation on shipments of waste. It held that the measure shall be based on a legal basis required by the main or predominant purpose and that 'conclusion is not invalidated by the fact that, by harmonizing the conditions in which movements of waste take place, the Regulation affects such movements and thus has a bearing on the functioning of the internal market'.[56] It stressed that 'the mere fact that the establishment or functioning of the internal market is involved is not enough to render Article 100a of the Treaty [now Article 114 TFEU] applicable and recourse to that article is not justified where the act to be adopted has only the ancillary effect of harmonizing market conditions within the Community'.[57]

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55 An example of a "clash" of competences of different nature – exclusive and shared – conferred on the EU and of different legal bases is the Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals [2003] OJ L 63/1. See Case C-178/03 *Commission v Parliament and Council* ECLI:EU:C:2006:4. In this case, the Court dealt with environmental policy (shared competence, the co-decision procedure) and common commercial policy (exclusive competence, EU acts are adopted by the Council).

56 Case C−187/93 *Parliament v Council* ECLI:EU:C:1994:265, para 24.

57 ibid, para 25.

Thus, for the Article 114 TFEU to be used as a legal basis – together with a more specific legal basis – the functioning of the internal market has to be among predominant objectives of the measure. The use of Article 114 TFEU as an additional legal basis for the ADD is examined in the following subsection, especially in light of the inherently instrumental nature of competition policy for the functioning of the internal market, since all measures adopted in the area of competition policy are *per se* enacted to improve the functioning of the internal market. Thus, judged by the EU's institutions' approach in the ADD context, is the threshold for the use of Article 114 TEU as a legal basis automatically reached as soon as a measure falls in the area of competition policy? The question is, then, why did the Member States decide to include the competition policy among the EU's exclusive competences and to use a special legislative procedure laid down in Article 103 TFEU to enact acts in this area, if this procedure can be circumvented by the insertion of Article 114 TFEU as an additional legal basis at any time? These questions are explored in the following subsection.

(iii) Why exclusive competence?

The important question in this context is what are the underlying rationales advanced to justify the EU's claim for exclusive competence and power to act in a certain field. The Court held in its Opinion on *Lugano Convention* that the 'purpose of the exclusive competence of the Community is primarily to preserve the effectiveness of Community law.'[58]

Article 2(1) TFEU provides that when

[58] Opinion 1/03 *Lugano Convention* ECLI:EU:C:2006:81, para 131.

> the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Thus, exclusive powers are constitutionally guaranteed monopolies, for only one governmental level is entitled to act autonomously and the Member States are banned from enacting any legislation in that field, save for an express authorisation by the competent Union institution or for the mere implementation of Union acts– 'a constitutional logic that inverts that of shared powers'.[59]

The concept of exclusive competences was introduced by the Court in the field of common commercial policy in 1970s and has since been explicitly recognised in the Maastricht Treaty with the introduction of the principle of subsidiarity. The latter was based on a competence typology that distinguished between exclusive and non-exclusive competences.[60] The first suggestions that competition should be the EU's exclusive competence appear to have been made in a 1992 Communication on subsidiarity.[61] In the Constitutional Treaty, five areas of the EU's exclusive competence were listed for the first time, described as 'a rather odd assortment of areas for which the EU is entitled to assert exclusive competence',[62] and they were identical to those later laid down by the Lisbon Treaty. Except for the inclusion of 'the competition rules necessary for the functioning of

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59 R Schutze, 'Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order' (2007) 32 ELRev 1 4. Joined Cases 3/76, 4/76 and 6/76 *Kramer* ECLI:EU:C:1976:114, paras 30–33; Case 804/79 *Commission v UK* ECLI:EU:C:1981:93, paras 17 et seq.; Case C-405/92 *Mondiet* ECLI:EU:C:1993:906, para 12, all referring to the conservation of biological resources of the sea.

60 Schutze (n 59) 16.

61 Commission, 'The Principle of Subsidiarity' (Communication) SEC (92) 1990, Final Annex 7. G Monti, 'New Directions in EC Competition Law', in T Tridimas and P Nebbia (eds.), *European Union Law for the Twenty-First Century* (Hart Publishing 2004) 107;

62 Weatherill, *Law and Values* (n 52) 23.

the internal market', '[t]he four listed instances of exclusive Union competence existing *a priori* have long been recognized in the case law'.[63]

Admittedly, shared competence *per se* would not change much regarding the process of adoption and the content of the ADD. What matters is the appropriate legal basis and the resultant legislative procedure that should be followed to adopt a legislative measure. These questions are explored in the following subsection.

(b) EU Competence and Legal Basis to Regulate Antitrust Damages Actions

There is no general competence authorising the EU to regulate private law, or in particular private damages actions in the field of EU competition law. Absence of the express general competence to regulate private law matters has not prevented the EU from legislating in this area. As stated in the introduction to the thesis, the private/public divide is not of major importance in EU law, where EU legislative competences are structured according to a functionalist paradigm.[64] Civil law matters – so-called horizontal relations – became part of the EU agenda mostly after the adoption of the Maastricht Treaty. Two themes can be recognised as the main vehicles for the EU's gradual involvement in civil law matters – the principle of non-discrimination and protection of the weaker (of employees, consumers, and also protection of SMEs (late payments)).[65] It shall be argued in the thesis (subsection c below and Chapter V) that the latter theme, i.e. consumer protection in particular, should be a guiding principle for private enforcement of EU competition law, however, in practice

63 A Dashwood, 'The Draft EU Constitution--First Impressions' (2002-3) 5 CYELS 408.

64 R Mańko, 'EU Competence in Private Law' (2015) European Parliamentary Research Service 1.

65 N Reich, *General Principles of Civil Law* (Intersentia 2014) 5.

it has been diluted – mainly with changes to the 2013 proposal that were introduced by the European Parliament and were aligned with business representatives' preferences.

There was only one provision directly concerned with relationships between individuals in the founding Treaties – and this provision was laid down precisely in the field of competition law (now Article 101(2) TFEU) – the sanction of nullity. This nullity provision has an impact on commercial contracts, but without any express remedy of compensation.[66] A right to damages in this context was established and developed by the Court on the grounds of direct effect of Article 101 TFEU.[67] It was *justified* by reliance on the principle of full effectiveness of EU competition law ('the full effectiveness of Article 101 TFEU'[68]) and the principle of effective judicial protection.[69] Once the rules were judicially created and developed, the Commission used the Court's case law to legitimise its legislative proposal(s)[70] in this field. These developments are discussed at length in Chapter III. In what follows, I will examine whether Article 114 is an appropriate legal basis for the ADD. To this end, in accordance with the Court's approach, historical developments in the legislative context of the ADD will be scrutinized.[71]

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66 Then Art. 85 EEC. Another provision dealt with equal pay for men and women (then Art. 119 EEC). Weatherill, *Contract Law* (n 46) 34.

67 See Ch III.

68 'The full effectiveness of Article 101 TFEU'. See, e.g. Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317 (*Kone*), paras 21, 33.

69 R Nazzini, 'The objective of private remedies in EU competition law' (2011) 4 Global Competition Litigation Review 132. He rightly argues that the principle of effective judicial protection focusses on the exercise of the individual right while the full effectiveness of EU competition law considers the individual right as an instrument for the attainment of the objectives of the EU.

70 2009 Leaked Proposal.

71 C-411/06 *Commission v. Parliament and Council* ECLI:EU:C:2009:518, para 64.

(i) Article 103 TFEU: Policy Documents, the 2009 Leaked Proposal, and the Prominence of the Deterrence Rationale

Article 103 TFEU provides in its first paragraph:

> The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

Two important issues need to be highlighted here. First, measures adopted on the basis of this Article should have as their aim 'to give effect to the principles set out in Articles 101 and 102', i.e. the EU competition policy. The EU competition policy is in the exclusive competence of the EU. Thus, this provision generates important implications for the vertical division of powers in the EU. Second, the chosen legal basis for a secondary EU act also bears importance for the horizontal or institutional division of powers in the EU. It determines which legislative procedure is to be followed when adopting that act, and therefore the degree of involvement of the European Parliament in that procedure.[72] Under article 103, the European Parliament has only a consultative role.

A procedure in which the European Parliament has only a consultative role is applicable only in a limited number of legislative areas, competition law being one of them.[73] Accordingly, the Regulation No. 17[74] and the Regulation 1/2003 were adopted on the basis of Article 103 only (then Article 83 EC).

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72 F Wilman, *Private Enforcement of EU Law Before National Courts* (Edward Elgar Publishing 2015) 225.

73 The European Parliament's consultation is also required for certain internal market exemptions and, as a non-legislative procedure, where international agreements are being adopted under the Common Foreign and Security Policy (CFSP).

74 Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13.

Neither the Green Paper nor the White Paper expressly discussed a legal basis for a potential legislative measure in the field of private enforcement of EU competition law. However, it seems clear from their content that any such measure would fall under the competition policy, and thus under the exclusive competence of the EU. Both papers share the same title: 'Damages actions for breach of the EC antitrust rules'. As such, they discuss damages actions for breaches of Articles 101 and 102 TFEU (then Articles 81 and 82 EC) and by doing so they do not – contrary to the ADD – refer to 'the functioning of the internal market'. In fact, they do not even refer to the "internal market", except for one trivial mentioning per paper.[75] Thus, it can be concluded that the Commission did not contemplate using Article 114 TFEU as a legal basis of any legislative measure governing private enforcement of EU competition law at the time.

The Green Paper emphasised that the 'antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement' and that

> both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused

[75] Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' SEC(2005) 1732, COM(2005) 0672 final 3 (Green Paper): 'Vigorous competition on an open internal market provides the best guarantee that European companies will increase their productivity and innovative potential'. White Paper: 'Safeguarding undistorted competition is an integral part of the internal market and important for implementing the Lisbon strategy'. Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM(2008) 165 final (White Paper) 3.

> by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.[76]

Since both private and public enforcement are part of a common enforcement system, and this system is enforced in accordance with the EU's exclusive competence, Article 103 TFEU as a legal basis seems to be a sound choice.

Although Article 103 TFEU grants only a consultative role to the European Parliament, it insisted on its enhanced involvement in in the antitrust actions for damages' legislative process through the co-decision procedure at an early stage. In its Resolution on the Green Paper, it stated that it 'should play a co-legislative role in the field of competition law and that it should be kept regularly informed on the bringing of private legal actions'.[77] Thus, the European Parliament had aspirations to be involved in the legislative process in EU competition law through co-decision procedure as a matter of principle. Such involvement would be incompatible with EU primary law.

In the Resolution on the White Paper, the European Parliament's appetite regarding its enhanced role was suppressed to a certain extent. The Resolution was adopted in late March 2009, when the contours of the Lisbon Treaty were already known – in fact, the Lisbon Treaty was signed more than a year prior to the publication of the Resolution, although it entered into force only in December 2009. Thus, the European Parliament was familiar with the EU's exclusive competence in the field of competition law and the Lisbon Treaty's confirmation of the European Parliament's consultative role. It seems that this was the reason for the European Parliament decision not to insist on its co-decision involvement

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76 Green Paper (n 75) 3.

77 European Parliament, 'Competition: damages actions for breach of the EC antitrust rules. Green paper Resolution Green Paper' 2006/2207(INI) (EP Resolution Green Paper) point 32.

in competition law generally. Nevertheless, the European Parliament made clear that it 'insists' that it 'must be involved, in the framework of the codecision procedure, in any legislative initiative in the area of collective redress'.[78] Accordingly, it can be concluded that at the time the European Parliament implicitly acknowledged that the appropriate legal basis for a legislative measure is, indeed, Article 103 TFEU.

As far as reactions of individual Member States to the initial Green Paper are concerned, the German and French governments contested the need for EU legislation, raised questions as to its legal basis and submitted that, in accordance with the principles of national procedural autonomy and subsidiarity, the aforementioned issues should be left to be regulated by the Member States.[79] It was argued that, if any legislative action were to be taken, those issues would fall under Article 81 TFEU, i.e. the rules of the EU Treaties on judicial cooperation in civil matters.[80] Moreover, the German government held that in light of 'the manifold intrusions upon general civil law and the principle of subsidiarity', use of the instrument of recommendation should also be contemplated as to the rules regarding damages actions in cases of antitrust law violations.[81]

The reactions from the side of the business community on the policy documents in the field of private enforcement of EU competition law were largely negative.[82] On the

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78 European Parliament, 'Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules' 2008/2154(INI) (EP Resolution White Paper) point 23.

79 Wilman (n 72) 213.

80 At the time being part of the "third pillar".

81 The Federal Ministry of Economics and Technology and the Federal Cartel Office, 'Comments on the Green Paper of the EU Commission "Damages actions for breach of the EC antitrust rules"', available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/bundesministerium_fur_wtb_en.pdf 3.

82 Wilman (n 72) 212.

other hand, most consumer organisations supported taking action at EU level.[83] However, neither of them expressly criticised EU competence or commented on a potential legal basis for the proposed action in this field.

It follows from the foregoing that in the years before the adoption of the ADD, Article 103 TFEU was seen as the most appropriate legal basis, also among legal scholars,[84] for a directive on private antitrust enforcement. As aforementioned, the Commission chose this legal basis for the 2009 leaked proposal, however, the latter was never formally adopted by the College of Commissioners as a legislative proposal.[85] Nevertheless, this "2009 informal proposal" leaked and circulated outside the Commission.[86] Its content offers an interesting insight into the Commission's orientation prior to the European Parliament's (and stakeholders') input that contributed to the shift in the pursued rationale for antitrust damages actions.

Content-wise, the approach in this 2009 leaked proposal was by and large in line with the 2008 White Paper.[87] The draft proposal was abandoned in the autumn of 2009, shortly before it was due to be adopted by the Commission.[88] This is important for the present analysis, to put the historical developments that led to the final text of the Antirust Damages Directive into wider, also political, context. Although reasons for such an

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83 See comments on the Green Paper submitted by BEUC and the UK-based consumer organisation.

84 Wilman (n 72) 224 fn 179; T Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 CMLRev 5 1199; M Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015); V Milutinović, *The 'Right to Damages' under EU Competition Law: from* Courage v. Crehan *to the White Paper and Beyond* (Wolters Kluwer 2010).

85 Wilman (n 72) 214.

86 Monti (n 61).

87 See further Ch V.

88 Wilman (n 72) 215.

abandonment of the 2009 leaked proposal remain unclear, it is widely believed that reasons lie in the opposition expressed by stakeholders – business organisations and certain Member States, in particular Germany.[89] Moreover, it is believed that reasons for the withdrawal of the legislative proposal lie also in the potential inter-institutional conflict relating to the choice of legal basis, i.e. Article 103 TFEU, which grants the European Parliament only a consultative role within the legislative process.[90]

(ii) Legislative Inertia after the Withdrawn 2009 Leaked Proposal and New Impetus Amid the Pfleiderer *and* Donau Chemie *Judgments*

A consequence of this abandonment of the 2009 leaked proposal was a legislative inertia in this field. The project was arguably given a fresh impetus amid the Court's case law developments regarding the leniency programmes, especially the cases of *Pfleiderer* and *Donau Chemie* delivered in 2011 and 2013.[91] Thus, both legislative attempts, the first one resulting in the "2009 leaked proposal" and the second one resulting in the "2013 proposal", were given momentum by the Court's case law – *Courage/Manfredi* and *Pfleiderer/Donau Chemie*, respectively. However, there is a notable difference in their legal and political underpinning, as explained in the following paragraphs.

The first legislative momentum was boosted by the 2001 *Courage* judgment. This judgment confirmed the right to damages for infringements of EU competition law. The Commission carried this further by the 2005 Green Paper with the aim to strengthen private

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89 Milutinović (n 84) 324-327; Wilman (n 72) 215; fn 119. The close connection between businesses and the German government has been briefly discussed in Chapter II, in the section dealing with the rationale for damages in the German law of obligations.

90 Wilman (n 72) 215.

91 Case C-536/11 *Donau Chemie* ECLI:EU:C:2013:366. Wilman (n 72) 216.

enforcement of EU competition law, and thus to facilitate private damages claims. The sole focus of this first "legislative wave" was the facilitation of antitrust damages actions.

On the other hand, the 2011 *Pfleiderer* judgment concerned the hierarchical relationship between antitrust damages actions – at that time already well-established in the Court's case law – and the Commission's leniency programmes, or more generally between private and public enforcement. More precisely, this case dealt with the third-party access to documents and information provided under a national leniency programme in order to prepare a civil action for damages against a leniency participant. The Court prioritised the right to damages over the infringing businesses' interests, and held that

> the provisions of European Union law on cartels, and in particular Regulation No 1/2003, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement.[92]

The Court confirmed this ruling and built upon it in the 2013 case of *Donau Chemie*. Only a few days later, 5 days later to be precise, the 2013 proposal for a directive was published with a U-turn in the policy's priorities, objectives, and content, although it did not contain rules on prohibiting punitive damages yet – those were added later on the insistence of the European Parliament.[93] While both the Green Paper and the White Paper, as well as the 2009 leaked proposal, focused solely on the facilitation of antitrust damages actions, the main objective of the 2013 legislative proposal became 'the relationship between public and private enforcement'. The detailed assessment of its content conducted in Chapter V

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92 Case C-360/09 *Pfleiderer AG v Bundeskartellamt* ECLI:EU:C:2011:389 (*Pfleiderer*); para 32.

93 This is discussed at length in Ch III and Ch V.

shows that the result of such an objective is to shield businesses that participate in the leniency programme from liability in damages for their anticompetitive conduct.

Thus, while the first legislative wave's objectives, given impetus by *Courage*, focussed on the facilitation of the right to damages for EU competition law infringements, the second legislative wave focussed on shielding public enforcement from private enforcement and businesses' liability.[94] Paradoxically, such developments undermine the proclaimed aim of "more effective compensation" in light of 'a clear deficit in terms of compensatory justice'.[95]

The 2013 proposal did not only introduce new objectives, but it also added a new legal basis to Article 103 TFEU, i.e. Article 114 TFEU. In what follows, the justification for the use of a dual legal basis is examined.

(iii) Article 114 TFEU as a Vehicle for the European Parliament's Enhanced Involvement in the Legislative Process

The 2013 proposal is full of contradictory statements regarding the objectives of the proposed directive and the consequent choice of legal basis, which need to be examined closely to grasp the real intentions behind the invocation of Article 114 as an additional legal basis.

The 2013 proposal sets out the following objectives:

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94 P Van Nuffel, 'Institutional Report' in Private Enforcement and Collective Redress in European Competition Law - Congress Proceedings FIDE 2016 (Wolters Kluwer 2016).

95 Commission, 'Commission staff working document – Impact assessment report: Damages actions for breach of the EU antitrust rules' SWD(2013) 203 15.

(i) optimising the interaction between the public and private enforcement of competition law; and

(ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.[96]

The proposal stresses that obtaining compensation is only the 'second main objective' of the proposed measure.[97] Thus, in the aftermath of the Court's judgments in *Pfleiderer* and *Donau Chemie*, in which the Court prioritised the right to damages over the interests of leniency participants, 'the first main objective of the present proposal is thus to optimise the interaction between public and private enforcement of the EU competition rules'.[98]

When talking about the objectives of the 2013 proposal, the Commission did not mention the need to harmonise certain rules of national competition laws. It only made a remark that 'there is wide diversity as regards the national legal rules governing antitrust damages actions and that the diversity has actually grown over recent years'. Moreover, the Commission stated that this 'diversity may cause legal uncertainty for all parties involved in actions for antitrust damages, which in turn leads to ineffective private enforcement of the competition rules, especially in cross-border cases'.[99] According to the settled case law, mere diversity among national rules is not enough to harmonize these rules based on Article 114 TFEU. Also, the Commission clarifies that these disparities

96 Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union', COM(2013) 404 final (2013) (2013 Proposal for a Directive) 4.

97 ibid.

98 ibid.

99 ibid.

become problematic in the cross-border context, in which EU competition rules – and not national competition rules – apply.

However, despite this mentioning *en passant*, the aforementioned disparities among national competition laws become a prime justification for the insertion of Article 114 TFEU as an additional legal basis later in the proposal. The Commission justified the use of a dual legal basis with the following words:

> The current proposal is based on both Articles 103 and 114 of the Treaty, because it pursues *two equally important goals* which are *inextricably linked*, namely (a) to give effect to the principles set out in *Articles 101 and 102* of the Treaty and (b) to ensure *a more level playing field for undertakings operating in the internal market*, and to make it easier for citizens and businesses to make use of the rights they derive from the internal market.[100]

Hence, the proposal did not aim only to facilitate private enforcement ('to shift the costs away for the victims and to act as an incentive for better compliance'),[101] but it also seeks to contribute to a more level playing field for undertakings – although this is not explicitly mentioned under the proposal's section dealing with objectives of the proposed directive.

The Commission has mastered using the Court's case law as its 'drafting guide',[102] and thus to formulate its proposals in a way that at least in principle satisfies the Court's demands. Therefore, the Commission justifies the use of a dual legal basis by replicating the Court's case law: the proposal 'pursues two equally important goals which are

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100 2013 Proposal for a Directive (n 96) 8. Under the preceding title 'Grounds for and objectives of the proposal', the Commission reversed the order of these two objectives and stated that '*The second main objective* is to ensure that victims of infringements of EU competition rules can effectively obtain compensation for the harm they have suffered.' Page 4. This is relevant for the analysis conducted in Ch V.

101 Wilman (n 72) 219.

102 S Weatherill, 'The Limits of Legislative Harmonisation Ten Years After Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 GLJ 3.

inextricably linked'. However, paying closer attention to the text of the 2013 proposal reveals that there is little merit to this claim.

The Commission identifies two objectives of the proposal being 'facilitating actions for damages in seeking to improve the conditions under which injured parties can claim damages and to optimise the interaction between the public and private enforcement of Articles 101 and 102 TFEU'. Further, it claims that in pursuing these two objectives, 'the present proposal clearly gives effect to these provisions. This means that the proposed Directive must be based on Article 103 of the Treaty'.[103] Thus, both initially identified[104] objectives of the proposal are tied to a legal basis in Article 103 TFEU. This approach follows the approach adopted in the Commission's policy documents and in the 2009 leaked proposal.

However, the Commission does not stop here. Both these *two objectives* are tied only to the first of the two allegedly 'equally important' and 'inextricably linked' *goals* of the proposal, i.e. (a) 'to give effect to the principles set out in Articles 101 and 102 of the Treaty'. But the Commission added another goal of the proposal in justifying the choice of legal basis: (b) 'to ensure a more level playing field for undertakings operating in the internal market, and to make it easier for citizens and businesses to make use of the rights they derive from the internal market'. This goal is not mentioned under the title dealing with the objectives of the proposal. What does the Commission even mean with "the first and the second main *objectives*" (which are both tied to the first "*goal*") and with "two

103 2013 Proposal for a Directive (n 96) 8.

104 These two objectives are identified under the section dealing with the objectives of the 2013 Proposal for a Directive (n 96).

equally important *goals*"? Are the words "objectives" and "goals" used interchangeably? And why is the Commission invoking the goal of leveling playing field only in the section of the proposal which deals with justifying the choice of a dual legal basis and not already in the section dealing with the objectives of the proposal? As the Court held, and the Commission repeated in the 2013 proposal, legal basis must be based on objective factors, which 'include the aim and content of the measure'. Thus, one would expect that the "goal" justifying the insertion of Article 114 TFEU as a legal basis for the proposed directive would appear already under the "objectives" of the proposal.

Although the Commission used two and a half pages for explaining the choice of a dual legal basis, the content of these pages seems to be poorly reasoned and incoherent. Nevertheless, it offers some justification for its position that Article 103 TFEU as a legal basis 'in itself does not suffice, because both the aim and the content of the proposed Directive transcend this legal basis'. This is allegedly because 'the current divergence of national rules governing damages actions for infringements of the EU competition rules, including the interaction of such actions with the public enforcement of those rules, has created a markedly uneven playing field in the internal market'.[105] The Commission goes on to claim that

> To ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for injured parties to exercise the rights they derive from the internal market, it is therefore appropriate to

[105] 2013 Proposal for a Directive (n 96) 8.

> increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for antitrust damages.
>
> The extent to which the approximation of national rules is pursued is not limited to damages actions for breaches of the EU competition rules, but also of national competition rules when they are applied in parallel.[106]

Of course, in principle, one cannot disagree with these observations. If there are disparities among national rules, the playing field is uneven. However, the Court has held that mere disparities are not enough for using Article 114 TFEU as a legal basis. There must be 'appreciable distortions to competition' to justify the use of Article 114 TFEU.[107] However, it is hard to imagine such 'appreciable distortions to competition' resulting from different national rules governing antitrust damages actions when they are applied in parallel with EU law, since in that case they need to be applied consistently with EU law. The Commission focusses on national competition rules in cases that have 'an effect on trade between Member States and to which EU competition law thus equally applies'.[108] Thus, the Commission tries to justify the use of Article 114 TFEU as a legal basis by claiming that disparities among national competition rules are problematic in cases in which EU competition law applies.

Article 3 of the Regulation 1/2003 provides that national courts shall apply EU competition law (now Articles 101 and 102 TFEU) to anticompetitive behaviour which

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106 2013 Proposal for a Directive (n 96) 10. See also recital 7 of the preamble to the ADD. Similarly, Similarly, recital 9 of the preamble to the ADD reads as follows: It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases.

107 Case C-376/98 *Germany v Parliament and Council ECLI:EU:C:2000:544*, para 85.

108 2013 Proposal for a Directive (n 96) 10.

may affect trade between Member States where they apply national competition law to such behaviour. In this system of parallel competences, the space for national law is constrained – it must be applied consistently with EU competition law in the identified thorny cases anyway.[109] In this vein, the first sentence of Article 3(2) of the Regulation 1/2003, and the Court's interpretation in the seminal judgment in *Walt Wilhelm*, provides that, in applying national competition law, national courts and competition authorities must not reach a result contrary to that under EU law.[110] Accordingly, the justification provided for invoking Article 114 TFEU as an additional legal basis is not convincing. It should moreover be expressly highlighted that this is the only justification given for the use of Article 114 TFEU.

Even if one accepts that these differences among national competition laws are such as to justify the use of Article 114 TFEU, it needs to be stressed that the Directive does not remedy this situation. The Directive harmonises only limited aspects of the right to damages, and thus it does not eliminate disparities among national rules.

But the Commission does not stop here. It makes sure that 'these interdependent, though distinct, aims of the proposed Directive cannot be pursued separately, through the adoption of two different instruments', for substantive and procedural reasons.[111] As it claims, from a substantive point of view, 'the indissociable link between the two

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109 Monti (n 61) 112; A Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 CMLRev 355, 371–2. Case C-198/01 *Consorzio Industrie Fiammiferi v AGCM* ECLI:EU:C:2003:430. See also Case C-375/09 *Tele2 Polska* ECLI:EU:C:2011:270, para 33. The Member States have a duty to disapply national antitrust legislation that is incompatible with EU competition law because they have a duty not to enforce laws that undermine the *effet utile* of Articles 101 and 102, on the basis of Article 4(3) TEU.

110 Monti (n 61) 111.

111 2013 Proposal for a Directive (n 96) 10.

independent objectives underpins the concrete measures that pursue them'. A semantic confusion created by the Commission's unpersuasive explanation reaches its peak here. Which 'interdependent, though distinct, aims' and which 'two objectives' is the Commission referring to here?

Leaving the semantic confusion aside, the Commission further explains these substantive and procedural reasons that prevent the adoption of two separate instruments with the following words:

> because of the need for legal certainty and a level playing field in the internal market, the same rules must apply to breaches of EU competition rules and of national competition law (where these are applied in parallel to the EU rules). From a procedural point of view, and to avoid impairing the institutional balance within the EU legislature, the only way of achieving uniform rules for the two situations is to adopt a single legal instrument in the same procedure.[112]

However, is not this 'single legal instrument' precisely the impairment of the institutional balance that the Commission is allegedly trying to avoid? As aforementioned, when applied in parallel to the EU rules, breaches of national competition law need to be treated in the same manner as breaches of EU competition law. Thus, one would assume that the need for legal certainty in this context is at most an ancillary, but certainly not predominant, aim of the ADD. Thus, it does not justify the use of a dual legal basis. It is argued that by inserting Article 114 TFEU as a legal basis, underpinned by poor and unpersuasive justification, the special competition law regime introduced by the Lisbon Treaty is improperly circumvented.

[112] 2013 Proposal for a Directive (n 96) 10.

The approach adopted by the 2013 proposal was followed by the ADD. The final text in the Directive is less awkwardly worded than the text in the 2013 proposal regarding the objectives. The preamble to the Directive provides that its objectives are

> to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers.[113]

Thus, establishing rules concerning actions for damages is instrumental in order to ensure, firstly, 'the full effect of Articles 101 and 102 TFEU' and, secondly, 'the proper functioning of the internal market for undertakings and consumers'. This is in stark contrast to the Green Paper's objectives:[114]

> The purpose of this Green Paper and of the Commission Staff Working Paper is to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions /…/ and for stand-alone actions /…/.

The reason for initiating the legislative process in the field of private enforcement of EU competition law – i.e. the facilitation of private damages claims – has become instrumental to the wider competition law and internal market objectives.

Even if one believes that proper justification for the invocation of Article 114 TFEU is given, is the EU competition policy not designed, and thus instrumental *per se*, to achieve the proper functioning of the internal market? In its 1999 White Paper, paving the way for the adoption of the Regulation 1/2003, the Commission stressed that the challenge lying

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113 Recital 54 of the preamble to the ADD. Emphasis added.

114 Green Paper (n 75) 4.

ahead of 1962 Regulation No. 17 – which marks the beginning of the Commission's implementation of EU competition policy – was

> to create a completely new policy on a continental scale, without any direct point of reference in most of the then Member States, in order to meet two needs: the integration of national markets into a single economic area and the development of competition as the driving force of the economy.[115]

Today, Article 3 TFEU states that the 'Union shall have exclusive competence in […] the establishing of the *competition rules necessary for the functioning of the internal market*'. Thus, although the enforcement of EU competition law has changed significantly with the Regulation 1/2003 – from centralised to decentralised enforcement – the instrumental role of the EU competition policy for the functioning of the internal market has remained intact since the beginning. Thus, it seems that justifying the choice of a dual legal basis for the Directive by differentiating the aims of EU competition policy on the one hand and of the internal market on the other hand is rather artificial and arbitrary, even despite the new decentralised enforcement strategy and new powers that are delegated to national competition authorities and courts.

Nevertheless, there is some logic in the claim that if the enforcement of the EU competition law provisions is decentralised – as it is the case since the adoption of the Regulation 1/2003 –, the procedural and institutional aspects appear to require harmonization. Thus, some might find this as a justification for adding Article 114 TFEU as a legal basis for the ADD.

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115 Commission, 'White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty' (1999) COM99(027).

If this argument is accepted, as it seems to be the case in the EU competition law context, then Article 3(3) TFEU – providing that the competition policy falls under exclusive competence of the EU – appears to be pointless, at least as regards private enforcement of EU competition law. However, the pattern of the use of a dual legal basis – thus disregarding the exclusive competence of the EU –, is being repeated also in the field of *public* enforcement of EU competition law.[116] In 2017, the Commission published a proposal for a directive empowering the national competition authorities (2017 proposal). In its explanatory part, the Commission first confirmed the instrumental nature of EU competition law and its embedment in the internal market:

> The EU competition rules are one of the defining features of the internal market: where competition is distorted, the internal market cannot deliver on its full potential and create the right conditions for sustained economic growth. A key aspect of making the internal market deeper and fairer is ensuring that the internal market rules are effectively enforced so that they deliver close to the citizen. Enforcement of the EU competition rules is now taking place on a scale which the Commission could never have achieved on its own.

Thus, this passage confirms that EU competition rules are part of the internal market rules, which has been made clear also by the Court and expressly confirmed by the Protocol No. 27 on the internal market and competition.[117] As aforementioned, also Protocol 27 deals with the internal market and competition simultaneously. As the Commissioner for Competition, Neelie Kroes stated:

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116 Proposal for a directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market COM/2017/0142 final.

117 Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, para 20. The Court held that 'it must be observed at the outset that Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon ([2008] OJ C 115), is to include a system ensuring that competition is not distorted'.

> The Internal Market and Competition Protocol is a legally binding confirmation that a system of ensuring undistorted competition is an integral part of the Internal Market. The Protocol paraphrases the current Treaty provisions: *competition is not an end in itself*—but it is the best means anyone has found to create the conditions for growth and jobs. Integrating competition into the very concept of the 'Internal Market' clarifies that the one simply cannot exist without the other—which is a fact.[118]

Nevertheless, already the title of the proposed directive states that it empowers national competition authorities 'to be more effective enforcers and *to ensure the proper functioning of the internal market'*. The proclaimed objectives are thus the same as in the case of the ADD: effective enforcement of EU competition law and the proper functioning of the internal market. However, is the latter really an equally important goal of a legislative measure in the context of EU competition law, or is it simply ancillary? Should it not be an inherent objective of all EU competition rules falling under the EU's exclusive competence to contribute to the proper functioning of the internal market?

This is, indeed, confirmed also by the Court which held that the rules of procedure set out first in Regulation 17/62 and then in Regulation 1/2003 were '*part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence* conferred on the Union by virtue of Article 3(1), lit (b) TFEU'.[119] Moreover, the Court held – albeit in the abuse of dominant position context – that 'Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market'.[120] Thus, despite the acknowledgment that

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118 N Kroes, 'Competition Policy: Achievements in 2006, Work Program in 2007; Priorities for 2008', European Parliament Economic and Monetary Affairs Committee, Speech/07/425 (26 June 2008), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/425&format=HTML&aged=0 &language=EN&guiLanguage=en (accessed on 20 November 2008). Emphasis added.

119 Case C-516/15P *Akzo Nobel* ECLI:EU:C:2017:314, para 116. Emphasis added.

120 Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, para 21.

competition policy is instrumental for the functioning of the internal market, competition rules should still be based on a sector-specific exclusive competence.

Following the approach adopted in the ADD context, it seems that this would mean that any measure enacted in the field of competition policy can be seen as falling also under Article 114 TFEU – and, consequently, the role of the exclusive competence of the EU in this field is diminished. What, then, is the point of granting the EU the exclusive competence in the field of competition law? And what is the point of granting only a consultative role to the European Parliament in the legislative process in the field of competition law, if that can be overridden by such banal justifications as "having implications for the functioning of the internal market'?

(c) Article 114 TFEU and the Principle of Proportionality: How About the Pro-consumer Interpretative Approach?

If one assumes that the questions concerning competence and the choice of legal basis are, in spite of the aforementioned critical considerations and objections, resolved in favour of the application of a dual legal basis for the ADD, application of Article 114 TFEU still requires compatibility with the principles of subsidiarity and proportionality.[121] It shall be argued that the prohibition of overcompensation in the ADD is a disproportionate measure to achieve the objectives of the Directive.

The ADD's rejection of overcompensation leaves no margin of appreciation to Member States – overcompensation 'shall be prohibited'. This begs the question whether

[121] While subsidiarity applies only to shared competences, proportionality applies to all EU acts, even if based on the EU's exclusive competence. See 5(3) and (4) TEU.

such approach is in conformity with the principle of proportionality, which is recognised as one of the general principles of EU law by the Court since the 1950s.[122] Like the principle of subsidiarity, the principle of proportionality regulates the exercise of powers by the EU. Thus, it does not concern assertions of EU level competence, but the limitation thereof and the balancing between different rights and principles recognised in EU law.[123] It seeks to set actions taken by EU institutions within specified bounds. Under this rule, 'the *content* and *form* of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'[124]

The principle of proportionality has been used as a limitation to the legislative competence of the EU, as a ground for review of EU measures, and as a ground for review of national measures affecting fundamental freedoms.[125] As conventionally understood, it requires the compatibility with EU law of both the end in view and the means chosen to achieve that end – or, in other words, it requires that a measure is both appropriate and necessary. It goes to the quality of that intervention – it is concerned with the density and intrusiveness of EU law.[126] Thus, under this principle the Court reviews both the legality of a measure and also, at least to a certain extent, the merit of a measure in question. The

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122 See, eg, Reich (n 65); D Chalmers, G Davies, G Monti, *European Union law: text and materials* (CUP 2014, 3rd ed) 393. The principle of proportionality is a well-recognised element in national administrative and constitutional law. The EU's principle was particularly inspired by German law.

123 W Sauter, 'Proportionality in EU law: a balancing act?' (2013) 15 CYELS 464.

124 Art. 5(4) TEU. Emphasis added. Case C-491/01 *British American Tobacco* ECLI:EU:C:2002:741, para 122: 'the principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it'.

125 F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 European Review of Private Law 3 594; See also T Tridimas, *General Principles of EU Law* (OUP 2006) 137.

126 Chalmers, Monti and Davies (122) 393.

principle of proportionality has three tenets that were set out most clearly in *Fedesa*, a case regarding an EU prohibition of the use of hormonal substances in livestock farming:

> The Court has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[127]

Accordingly, compliance with the principle of proportionality is a condition of the legality of EU measures. Measures that violate it are disproportionate and therefore invalid.[128] However, examples of the Court finding EU acts to be invalid for this reason are rare.[129] Some scholars argue that 'its likely impact appears limited or at least secondary to that of the principle of subsidiarity'.[130] This can be rather problematic in light of Weatherill's claim that 'it is highly improbable that the Court will ever find that that dictates of the subsidiarity principle have not been met.'[131]

Application of the principle of proportionality raises questions of justiciability, as well as questions about the degree of scrutiny to which a court should subject the justification offered for a measure which is challenged.[132] Typically, the Court concedes a

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127 Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health ex parte Fedesa et al* ECLI:EU:C:1990:391.

128 S Weatherill, 'Justification, Proportionality and Consumer Protection' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016) 252.

129 ibid 252.

130 Sauter (n 123) 439-466.

131 Weatherill, *Law and Values* (n 52) 60.

132 G de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105.

broad discretion to the EU legislature in areas involving political, economic and social choices in which it is called upon to undertake complex assessments and evaluations.[133] Consequently, as the Court held, 'the legality of a measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue'.[134] However, it is argued that the Court applies different tests of proportionality in different context. De Búrca argued that

> The way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from a very deferential approach to quite a rigorous and searching examination of the justification for a measure which has been challenged.[135]

While EU measures are generally judged sympathetically under the "manifestly disproportionate test", as Tridimas argues, Member State measures are subjected to the less lenient "least restrictive measure test".[136] Similarly, Weatherill claims that 'EU measures tend to escape invalidation, whereas national measures are commonly found to lack justification'. However, as he argues, 'the main reason is not the standard of review but rather the context'.[137] In fact, several EU legal scholars suggest that the Court varies its test according to the nature of the interests involved and the perceived severity of the imputed breach.[138]

The question is whether the rejection of overcompensation in the ADD meets the test of proportionality. Usually, the Court does not endorse blanket bans and favours a case

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133 Case C-491/01 *British American Tobacco* ECLI:EU:C:2002:741, para 123.

134 ibid, para 123. Emphasis added.

135 De Búrca, 'The Principle of Proportionality' (n 132) 111.

136 Tridimas (125) 138.

137 Weatherill, 'Justification, Proportionality and Consumer Protection' (n 128) 258.

138 Sauter (n 123) 465-466; see also De Búrca, 'The Principle of Proportionality' (n 132) 109.

by case balancing exercise of interests involved. For example, the Court concluded in *Commission v Portugal*, a case concerning a measure which prohibited affixing tinted film which is transparent to the windscreen and the windows alongside the passenger seat in motor vehicles, that the 'ban must be regarded as being excessive and, therefore, disproportionate with respect to the objectives pursued'.[139] Similarly, in a case concerning a lifetime ban on gay men giving blood donations, the Court ruled that the blanket ban is not a proportionate response if there are other methods of ensuring the objectives pursued, in that case a high-level of health protection for the recipients of blood products.[140] After all, in the seminal free movement of goods case, *Cassis de Dijon*, the Court found the ban on the sale of drinks was disproportionate.[141] In the competition law context, the Court in the case of *Kone*, dealing with the umbrella pricing, held that the full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law which 'categorically and regardless of the particular circumstances of the case' excludes the right to damages because the individual concerned had no contractual links with a member of the cartel.[142]

All these cases, however, deal with national measures. An illustrative example of a case dealing with the proportionality of an EU measure is the case *Swedish Match*.[143] In this case, the Court applied the 'least restrictive measure test'. However, an absolute prohibition on tobacco for oral use included in the Directive 2001/37/EC of the European

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139 Case C-265/06 *Commission v Portugal* ECLI:EU:C:2008:210, para 47.

140 Case C-528/13 *Léger* ECLI:EU:C:2015:288.

141 Case-120/78 *Cassis de Dijon* ECLI:EU:C:1979:42.

142 *Kone* (n 71) para 33.

143 Case C-210/03 *Swedish Match* ECLI:EU:C:2004:802, paras 56-58.

Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products was nevertheless found to be proportionate. At issue were the rights to property and the freedom to pursue a trade or profession. In exchange, the EU objective of ensuring a high level of protection of human health was invoked. The Court held that the EU legislature 'did not overstep the bounds of its discretion when it considered that such a prohibition nevertheless constitutes a measure likely to make an effective contribution to limiting the risk of growth in the illegal trafficking of cigarettes and to preventing the consequent undermining of the internal market'.[144] The Court held that ban is justified since other measures – such as imposing technical standards on manufacturers or regulating labelling – could not have had an equal preventive effect as removing the product from the market. Sauter argued that it is implied in this analysis that 'such a far-reaching remedy was in fact necessary given the importance of the policy goal (as a high level of health protection was an objective of harmonisation)'.[145]

It needs to be stressed that in the case of *Swedish Match* the contested EU measure in question prohibited certain economic activity that could undermine the internal market. Thus, prohibition is directed towards an (unhealthy) economic activity. However, in the case of the ADD, the contested prohibition is directed towards a special aspect of private enforcement of EU competition law, and thus towards something that helps vindicating

144 Case C-491/01 *British American Tobacco* ECLI:EU:C:2002:741, para 129.

145 Sauter (n 123) 449.

rights that are infringed by anti-competition conduct which, similarly as in the *Swedish Match* context, undermines the internal market.

Thus, while both Directives wish to contribute to the proper functioning of the internal market, the two prohibitions have contrasting underpinning rationales – while the prohibition in the directive in the case of *Swedish Match* constraints business activity for the sake of a high level of health protection, the ADD prohibits an aspect of private antitrust enforcement that could contribute to facilitation of antitrust damages actions, and thus also to a high level of consumer protection.[146] Instead, this prohibition works by tipping the scales in favour of infringing businesses.

It is argued that in the case of the ADD, the Court's reasoning in *Swedish Match* should work the other way around and lead to a finding that the prohibition of overcompensation is disproportionate since it places far too much weight on the protection of business against abusive litigation – instead of on achieving a high level of consumer protection in light of the fact that the ADD is a consumer protection measure.[147] Such business protection is underpinned by the "European legal tradition" argument, which is refuted in Chapters II and III. Moreover, there are several constitutional impulses which require that consumer-oriented interpretation prevails over competing concerns such as abusive litigation.[148] For example, Article 114(3) TFEU, which is one of the legal basis of the ADD, provides that the legislature shall take as a base a high level of consumer protection in setting harmonized standards. Moreover, Article 12 TFEU and Article 38 of

146 This is discussed in Ch V.

147 See, eg, Council, 'New rules to facilitate damage claims for antitrust law violations' 8136/14 (OR. en) PRESSE 182. Emphasis added. This is further discussed in Ch, s 2(b).

148 This is further discussed in Ch, s 2(b).

the Charter might be seen as 'an increasingly prominent frame for the pro-consumer interpretative approach'.[149] Article 12 TFEU provides that consumer protection requirements shall be taken into account in defining and implementing Union policies and activities. Similarly, Article 38 of the Charter states that 'Union policies shall ensure a high level of consumer protection'.[150]

The objective of the ADD is effective enforcement of EU competition law. In this context, the prohibition of overcompensation is justified by invoking the fear of abusive litigation and the protection of European legal tradition.[151] As aforementioned, the "European legal tradition" argument is refuted in Chapters II and III. Moreover, the fear of abusive litigation could be overcome with the three-stage model for assessment of damages proposed by the thesis.[152] However, even if the fear of abusive litigation and the preservation of the European legal tradition[153] were justified ends, the pressing question is whether a blanket ban is necessary to achieve these objectives, taking into account the fact that there is almost no antitrust litigation? Actually, the prime reason for encouraging private enforcement of EU competition law is the enforcement gap in this field on which this thesis is premised (see Introduction). Accordingly, Johannes Laitenberger, Director-General of DG Competition, has recently argued:

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149 Weatherill, 'Justification, Proportionality and Consumer Protection' (n 128) 252.

150 Charter (n 1). See Ch V.

151 See the Introduction, s 1.

152 See the Introduction, s 2. See also Ch V, s 3.

153 Though, see findings of Chs II and III of the thesis which refute the "European legal tradition" argument.

> Over the last decades, we have often debated the perils of over-enforcement – quite regularly, in fact. /…/ If we are serious about protecting consumers, we should of course also be wary of under-enforcement.[154]

Moreover, in light of the European legal tradition argument, it should be recalled that there is no national legal system that would include such a ban, at least not expressly. Against this backdrop, it seems safe to conclude that the means used to prevent abusive litigation were unnecessarily restrictive and violate the principle of proportionality.

The essence of the principle of proportionality is interestingly described by De Búrca with the following question: 'what is it that is wrong, to use a more colourful expression of the proportionality concept, with using a sledgehammer to crack a nut?[155] The thesis suggests that, instead of a sledgehammer in the form of prohibition of overcompensation, the three-stage model for assessment of damages actions proposed by the thesis[156] is a far better alternative to police abusive litigation. It would leave a margin of appreciation to national judges adjudicating in concrete cases. This would be compatible with the crux of the principle of proportionality, which 'offers a means to confine the intensity of EU intervention, and in this sense, it shares with subsidiarity the potential to preserve some degree of national and local autonomy against the centralizing tendencies of EU law-making.'[157] Instead, however, the prohibition of overcompensation in the ADD serves as an unscrupulous role model for other fields, for example consumer policy in general. One such example is the Recommendation on Collective Redress.

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154 J Laitenberger, Director-General of DG Competition, Commission, 'Enforcing EU competition law: Principles, strategy and objectives' (2017) 7.

155 De Búrca, 'The Principle of Proportionality' (n 132) 109.

156 See the Introduction and Ch V.

157 Weatherill, *Law and Values* (n 52) 59.

3 Democracy and the Institutional (Im)balance: the Role of the Court in Private Enforcement of EU law

The right to damages for EU competition law infringements was established by the Court by granting direct effect to Article 101 TFEU, as was depicted in Chapter III. The Commission relied on the Court's case law to legitimise its legislative proposals to strengthen private enforcement in this field which culminated in adoption of the ADD. However, as is explored more fully in Chapter V, the European Parliament's enhanced involvement and the involvement of business stakeholders in the legislative process led to provisions of the ADD that are incompatible with the Court's interpretation of Articles 101 and 102 TFEU and are not aligned with the principles establishing the right to damages, the principle of effectiveness of EU law, the principle of effective judicial protection, and the related "triad of principles". The question that is addressed here is how to resolve the conflict between the Court's interpretation of the Treaty and the secondary legislation that unfaithfully codifies it.

The preamble expressly acknowledges that the Directive codifies the Court's case law and does not pre-empt any further developments therein:

> This Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the

> case-law of the Court of Justice, and does not pre-empt any further development thereof.[158]

Two key points can be derived from this recital, though they seem to be constitutionally pretty much straightforward. First, the Directive 'reaffirms the *acquis communautaire*', and second, it 'does not pre-empt any further development thereof'.

By expressly acknowledging that the Directive reaffirms the *acquis communautaire*, the legislator wanted to eliminate any doubt as to whether the Directive follows the approach established by the case law of the Court. The Court's diet encompasses principles laid down in the foundational case of *Courage* and bolstered and evolved in subsequent rulings in cases of *Manfredi*, *Pfleiderer*, *Otis*, *Donau Chemie* and *Kone*, as discussed in Chapter III. In a nutshell, while *Courage* establishes the right to damages and *Manfredi* develops it further regarding the conditions for liability, *Pfleiderer* and *Donau Chemie* deal with the contentious issues of leniency, whereas *Otis* and *Kone* concern questions of standing. From the wording of the recital one would assume that the Directive codifies and further develops principles established in this case law.

However, some crucial provisions of the ADD detract from the settled Court's approach, especially from principles laid down in *Manfredi* (regarding the availability of punitive damages), *Pfleiderer* and *Donau Chemie* (regarding access to leniency documents).[159] Against this background, the pressing question is whether it is legitimate for the Court to judicially override the rejection of overcompensation and other contested rules laid down by the ADD. The thesis argues in the Conclusion that status quo or the

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158 Recital 12 of the ADD.

159 See Ch III and Ch V, s 3.

Court's judicial override of the Directive's content in accordance with the settled case-law is a better option for consumers – the ultimate beneficiaries of the right to damages for EU competition law infringements.

Traditionally, the judiciary's main role is to interpret and apply rules enacted by the legislator, respecting a principle of democracy that divides authority to make and to apply laws into two branches of government.[160] At the national level of the Member States, rules of private law are enacted in legislation and enforced through court systems, where common law countries traditionally leave courts in civil cases more leeway to develop new rules than civil law countries.[161] However, it has become almost universally acknowledged that also courts in civil law countries exercise law making powers at least to a certain extent. However, their law-making capacity is not unrestrained. To limit judicial excess, different controls are put in place, an important example being methodology.[162] Thus, judicial decisions may have political implications, but that does not make them political – they are decided on legal argument and a legal basis.[163] Moreover, in both common law and civil law jurisdictions, the legislature normally retains the power to reverse or confirm judicial decisions.

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160 J Habermas, *Between Facts and Norms: Contributions to a Discourse theory of Law and Democracy* (MIT 1996) 172.

161 C Mak, 'First or second best? Judicial law-making in European private law' (2016) Centre for the Study of European Contract Law Working Paper Series No. 2016-12 143.

162 Lord Mance, 'The Role of Judges in a Representative Democracy' (2017) lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas, https://www.supremecourt.uk/docs/speech-170224.pdf 4. Other two examples given by Lord Mance are loyalty and precedent.

163 ibid 5.

At EU level, legislative tasks have been assigned to the Commission, the European Parliament and the Council, whereas the Court has the exclusive right to interpret EU law.[164] The Treaty has created an institutional architecture in which the Court enjoys a high level of autonomous power which has been delegated to it by the Member States and by the EU's legislative institutions.[165] It was argued that the Court 'operates in an unusually permissive strategic environment. When it interprets the treaties, for instance, its zone of discretion is virtually unlimited'.[166] This is contrary to traditional understanding of the law-making in a democratic constellation. Although the Court also legitimises its decisions with methodology, just as national courts do, it is often subjected to criticism for delivering judgments that are too "activist" precisely because of the Court's main method of interpretation – teleological or purposive interpretation.[167]

Following orthodox international law on treaties (especially the Vienna Convention on the Law of Treaties), it is not at all surprising that the Court looks to the purpose of the Treaty in interpreting its rules. However, the really awkward questions are whether sometimes it exaggerates the importance of what it thinks are the EU's purposes in delivering ambitious rulings that lack textual support in the Treaties. These questions are

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164 Article 344 TFEU provides that 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'.

165 Weatherill, *Contract Law* (n 40) 186.

166 A Stone Sweet, 'The European Court of Justice' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd ed. (OUP 2011) 127.

167 Though the teleological approach is only one of a range of methods employed by the Court to resolve questions of interpretation. A Albors Llorens, 'The European Court of Justice, More than a Teleological Court' (1999) 2 Cambridge Yearbook of European Legal Studies 373. There is no fixed hierarchy among the range of interpretative methods available to the Court: the Court simply selects those it considers most appropriate in the circumstances. A Arnull, *The European Union and its Court of Justice* (OUP 2006) 617.

not further explored by the Thesis. The right to damages in the EU competition law context, which was established by the Court, has been endorsed by the Commission and also codified with the ADD – though with the aforementioned "modifications". The Directive proclaims that it basically concretises the right established in *Courage*, but it actually detracts from it. For pragmatic reasons, the thesis focusses on the legitimacy of these modifications.

As found in Chapter III, the *Courage* damages in EU competition law have a strong regulatory character and a binary nature, encompassing both deterrence and compensation rationales. However, the final ADD focusses on compensation and conceals the regulatory character with the prohibition of overcompensation. It is argued that 'the political factors that have driven the Commission to drop deterrence as a goal of private enforcement undercut the need to reform the current system'.[168] Could the Court intervene? Some scholars rightly argue that courts sometimes are in a better position than legislators to effectively achieve certain EU policy goals and to contribute to the democratic legitimation of rules of private law.[169] The Court seems to be less prone to the lobbyist influence than the European Parliament. Moreover, the preliminary reference procedure can open space for deliberations in which consumer interests are actually heard.[170] Thus, the Court's judgments can sometimes enjoy more input and throughput legitimacy compared to EU secondary legislation.

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168 Sittenreich (n 5) 2708.

169 Mak (n 161) 14-15; C Kilpatrick, 'Internal Market Architecture and the Accommodation of Labour Rights', (2011) 4 EUI Working Paper Series Law 2. Cf. S Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 European Constitutional Law Review 1 23.

170 Mak (n 161).

Assuming that the Court could be better placed to remedy the situation, the question is what should it do? Although it is argued that the ADD violates the principle of conferral and lacks output legitimacy,[171] it seems both unrealistic and undesirable to invalidate the whole Directive. So far, the Court has only very exceptionally invalidated EU secondary legislation. Moreover, several provisions in the ADD provide rules with positive implications for antitrust damages actions and could serve as the blueprint for further developments in this field. Thus, a more plausible solution is for the Court to find some alternative way to "re-interpret" the text of the Article 3 ADD to eliminate the provision of overcompensation. It is suggested that the Court should simply interpret the wording of this provision in light of its case law on Article 101 and 102 TFEU and the "triad of principles", which is in accordance with the three-stage model for assessment of damages awards. In so doing, the Court would empower the national courts to decide on a case by case basis whether overcompensation is needed to achieve a sufficiently deterrent (or dissuasive)[172] effect.

4 Conclusion

Although the European Parliament should not be involved in the legislative process as a co-legislator – since the choice of a dual legal basis is not convincingly justified –, but should be merely consulted in accordance with Article 103 TFEU, its enhanced involvement via Article 114 TFEU caused substantial changes to the content of the 2013 proposal – largely at the expense of consumers, as is discussed at length in Chapter V.

171 See s 2 and Ch V.

172 See Ch III, s 4.

Thus, this involvement contributed to breaking the link between the rationale for the right to damages for EU competition law infringements, the legal basis and the content of the Directive.

However, the justification provided for invoking Article 114 TFEU as an additional legal basis is not convincing. Even if one accepts that differences among national rules on antitrust damages actions – which in any case need to be applied consistently with EU law rules when applied in parallel – are such as to justify the use of Article 114 TFEU, it needs to be stressed that the Directive does not remedy this situation. The Directive harmonises only limited aspects of the right to damages, and does not eliminate disparities among national rules. Thus, the Directive possibly violates the principle of conferral and, consequently, lacks formal legitimacy.

The thesis suggests that, instead of a sledgehammer in the form of prohibition of overcompensation, the three-stage model for assessment of damages actions proposed by the thesis[173] is a far better – and more proportionate – alternative to police abusive litigation. It would leave a margin of appreciation to national judges adjudicating in concrete cases. This would be compatible with the crux of the principle of proportionality, which 'offers a means to confine the intensity of EU intervention, and in this sense, it shares with subsidiarity the potential to preserve some degree of national and local autonomy against the centralizing tendencies of EU law-making.'[174] Instead, however, the prohibition of overcompensation in the ADD serves as an unscrupulous role model for other fields, for example consumer policy in general.

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173 See the Introduction and Ch V.

174 Weatherill, *Law and Values* (n 52) 59.

The involvement of the European Parliament in the legislative process contributed to the business-biased gist of the Antirust Damages Directive, which is in its essence a consumer protection measure.[175] As is further developed in Chapter V, the European Parliament's and business representatives' involvement in the legislative process of the ADD led to four crucial steps that resulted in rules which are aligned to businesses' interests and by and large suppress interests of consumers, at least in light of the persistent enforcement gap in the field of EU competition law.

[175] See Ch V.

V CONSUMER PROTECTION AS A NORMATIVE JUSTIFICATION FOR DETERRENCE

1 Introduction

Hitherto, with the contested exception of EU competition law, overcompensation has not been ruled out by EU law.[1] As the thesis demonstrates in Chapter III, there is a blurred (and fragmented) picture painted by EU law when the rationale for damages is dissected. However, actions for damages in different fields of EU law are mostly grounded in the enforcement-based regime. There is still space, in principle, for non-compensatory considerations in awarding damages. Recently, this space for non-compensatory considerations has been put in jeopardy in the EU context, which is discernible especially in the field of competition law.

In its initial policy documents in the field of private enforcement of competition law, and also in the proposal for the ADD, the Commission prioritised neither the compensation nor the deterrence rationale for damages. It showed the willingness to pursue and accommodate both. However, the ADD[2] denotes a clear shift in the approach.[3] It adopts the full compensation principle, which should 'not lead to overcompensation, whether by

1 On the attempts to prohibit it also with a horizontal framework on collective redress, see below s 3.

2 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349 (ADD).

3 For a detailed analysis, see Ch III. See also C Petrucci, 'Effective Private Enforcement of EU Competition Law: An Input and Output Legitimacy Analysis of Collective Redress' in S Drake and M Smith (eds), *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016) 244-245. Petrucci explains this shift in a table.

means of punitive, multiple or other types of damages'.[4] This concern is at odds with the Commission's previous approach and the underpinning rationales of several binding instruments discussed in Chapter III, and finds no sustenance in the Court's case law.[5] The Commission supported this shift with the "European legal tradition argument", however, the thesis refutes this justification in Chapters II and III. Thus, the Commission fails to offer a convincing explanation for this policy shift.

Chapter IV shows that it was the European Parliament's enhanced involvement – by using a dual legal basis, Articles 103 and 114 TFEU – and the involvement of business representatives in the legislative process that by and large induced this shift. The thesis claims in Chapter IV that insufficient justification was given for the use of Article 114 TFEU as a legal basis of the Directive, and thus it possibly violates the principle of conferral and, consequently, lacks formal legitimacy.[6] However, this disputed role of the European Parliament in the legislative process led to the inclusion of the prohibition of overcompensation, and of other rules that undermine the deterrent potential of damages actions,[7] in the ADD. Thus, it is relevant also for the Directive's "output" legitimacy.[8]

It is argued that the European Parliament's involvement in the legislative process, based on additional Article 114 TFEU as a legal basis for the Directive, if at all justified, should lead to enhancement of consumer protection, referred to in Articles 12 and 114(3)

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4 Article 3(3) of the ADD.

5 Cf. E Büyüksagis, I Ebert, D Fairgrieve, R C Meurkens and F Quarta, 'Punitive Damages in Europe and Plea for the Recognition of Legal Pluralism' (2016) 27 European Business Law Review 1 139.

6 See Ch IV.

7 Eg, prioritising leniency programmes and the absence of rules on collective redress. See s 3 below.

8 Output legitimacy is assessed 'in terms of the effectiveness of a policy to solve the problem for which it was promoted'. Petrucci, 'Effective Private Enforcement' (n 3) 233.

TFEU and in Article 38 of the EU Charter of Fundamental Rights[9] (hereinafter Charter). Article 114 TFEU is a functionally driven competence which in theory squares well with the functionalist perspective adopted by the thesis. However, this provision 'speaks *marketes*'[10] and has an inbuilt market rationality.[11] A it shall be argued, in the environment embedded in the market rationality, rules that should protect consumers transmuted into rules that in practice shield businesses from liability for EU (competition) law violations – including the rule governing the prohibition of overcompensation.

This chapter examines the implications of the disputed European Parliament's and business representatives' enhanced role in the legislative process for the effectiveness of the Directive – measured in terms of its capacity to effectively close the identified enforcement gap in EU competition law.[12] To this end, the analysis draws upon the political theory of input and output legitimacy discussed in Chapter IV combined with the legal notion of effectiveness. The thesis employs a concept of effectiveness which refers to the potential of the new rules to facilitate private damages actions, and thus to contribute to closing the identified enforcement gap, and to promote compliance with EU competition law.[13] Thus, the employed concept of effectiveness encompasses two elements – both "victims' incentives to sue" and "infringers' incentive to comply with EU competition

9 Charter of Fundamental Rights of the European Union [2010] OJ C 83/389 (Charter).

10 Borrowing this catchword from D Caruso, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law' in G de Búrca, D Kochenov and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2014).

11 M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 EJL 5 572.

12 Petrucci has employed similar methodology for the assessment of rules on collective redress. Petrucci, 'Effective Private Enforcement' (n 3).

13 Cf. Petrucci, 'Effective Private Enforcement' (n 3) 233.

law". Therefore, it reflects the deterrence/compensation dichotomy surrounding the ADD. The thesis argues that fused objectives and rationales for a civil liability regime merit fused objectives underpinning the enforcement policy too.[14] It is based on the premise that punitive damages and the existence of collective redress indeed contribute to both these aspects of effectiveness.[15] Thus, the ADD prohibits an aspect of private antitrust enforcement that could contribute to facilitation of antitrust damages actions, and thus also to a high level of consumer protection. Instead, this prohibition tips the scales in favour of infringing businesses, as further discussed below.

In assessing the overall effectiveness of the Directive in terms of its capacity to close the enforcement gap, the prohibition of overcompensation cannot be seen in isolation, disentangled from other procedural features of private enforcement of EU competition law governed by the Directive. Thus, to assess output legitimacy of the Directive this chapter examines four crucial "steps" in the ADD that bear importance for the quest to improve enforcement of EU competition law. The first two steps are, broadly speaking, related to one of the two proclaimed objectives of the ADD – 'optimising the interaction between the public and private enforcement of competition law'.[16] In a nutshell, the first step is degrading the right to damages from the main reason for legislative initiative in this area to 'the second main objective' of the Directive.[17] The second step, which is closely

14 See the Introduction, s 1.

15 ibid.

16 Commission, 'Proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' COM(2013) 404 final (2013 Proposal for a Directive) 3. For the discussion on the objectives of the ADD, see Ch IV.

17 ibid 4. The proposal emphasises twice that the right to damages is 'the second main objective'.

connected to the first one, is the prioritising or 'preferring to protect' the leniency programme over the right to damages.[18] Further, the third step is the shift in the promoted rationales for antitrust damages actions and the related express prohibition of overcompensation. The fourth step is the lack of provisions governing collective redress. The Commission's legislative initiative, also the leaked and withdrawn 2009 proposal for a Directive, included such rules.[19] However, the final legislative proposal did not introduce them. Rather, the Commission released a non-binding recommendation on a horizontal framework for collective redress.[20]

2 Private Enforcement of EU Competition Law and the Internal Market Logic: The Role of Deterrence in The Quest to Improve Enforcement of Consumer Rights

(a) The Private Enforcement Potential to Close the Enforcement Gap in EU Competition Law – the Role of Consumers

The EU with its *sui generis* status is a 'new legal order', not modelled on the Member States' legal systems. For such a legal system to establish itself in domestic legal systems,

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18 More precisely, 'over the rights of access to the file for purposes of informing individual damages claims at national level'. W Sauter, *Coherence in EU Competition Law* (OUP 2016) 140. Cf. D Leczykiewicz, '*Contract and Regulation:* Private Regulation, Compliance and Reviewability of Contracts' in R Brownsword, R van Gestel and H-W Micklitz (eds), *Research Handbook on Contract and Regulation* (Edward Elgar 2017) fn 12.

19 Petrucci, 'Effective Private Enforcement' (n 3) 237. The thesis discusses this leaked 2009 draft proposal in Ch IV, s 2.

20 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) (Recommendation on Collective Redress).

there is a need and a perpetual challenge to 'effectively enforce' its rules.[21] Accordingly, effective enforcement of EU law and its *effet utile* have become a leitmotif in the judicial creation of several guiding principles of EU law, for example the principle of supremacy established in the case of *Costa v. ENEL*[22] and the principle of direct effect established in the case of *Van Gend en Loos*,[23] as well as of legislative initiatives. It is claimed that also the establishment of private party liability in EU competition law was primarily a means to improve enforcement of EU rules.[24]

As portrayed in the Introduction, the thesis rests on the premise that there is an enforcement (or a deterrence)[25] gap in EU competition law enforcement. Ever since the Court planted the seeds for private enforcement in competition law in the case of *Courage*[26] in 2001, the Commission has actively tried to improve enforcement of EU law through emphasis on private enforcement which is expected to complement public enforcement. This section explores whether the deterrence function may be beneficial in the context of private enforcement of consumer rights, apart from its role in public enforcement, taking into account the existing EU legal framework (permeated with the internal market rationality and enforcement-based).

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21 S Drake and M Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Edward Elgar 2016).

22 Case 6/64 *Costa v. ENEL* ECLI:EU:C:1964:66.

23 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

24 This is discussed at length in Ch III.

25 W P J Wils, 'Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 World Competition 1 2.

26 Case C-453/99 *Courage and Crehan* (*Courage*) ECLI:EU:C:2001:465.

While private enforcement of competition law is to encourage the direct participation of consumers in the enforcement of EU competition law, this participation is hindered by the consumer's limited (legal and economic) incentives to sue the infringer due to the normally low value of individual harm.[27] This is where the principle of effectiveness plays an important role, by removing the obstacles opposing to the effective exercise of consumer rights to claim damages.[28] In doing so, it at the same time contributes to the respect of the principle of effective judicial protection which is given expression by an effective remedy.

Weber and Faure, who compared different enforcement regimes in the EU by adopting the economic approach,[29] identified the following criteria that may point in favour of facilitating private enforcement in a certain policy field: (1) there are private victims and individual losses are large; (2) victims can easily obtain information on legal violations and regarding the wrongdoer; (3) victims have easy and cheap access to justice – the more important, the lower the individual loss; (4) compensation is a desirable goal.[30]

The situations where public enforcement may be preferred are the mirror image: (1) losses are widespread or scattered or no individual victim can be identified; (2) victims

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27 K J Cseres, 'Towards a European Model of economic justice: the role of competition law' in H-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 438; F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 European Review of Private Law 3 591. On the victims' incentives to sue, see F Weber and M Faure, 'The Interplay Between Public and Private Enforcement in European Private Law: Law and Economics Perspective' (2015) 23 ERPL 4 525, 533.

28 Cafaggi and Iamiceli (n 27) 592.

29 They choose to use law and economics approach 'not least because the EU institutions themselves are eager to refer to concepts of effectiveness and efficiency'. Weber and Fauer (n 27) 825. See also, eg, A C Witt, *The More Economic Approach to EU Antitrust Law* (Hart Publishing 2016) 123; M Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP 2015) 24.

30 Weber and Fauer (n 27) 861.

may lack information on legal violations or regarding the wrongdoer – low probabilities of detection and conviction in private law; (3) a legal violation may only come to light when substantial harm has occurred.[31]

Thus, in principle, private enforcement is not an optimal[32] method of enforcement in cases where, *inter alia*, individual losses are small and access to justice is low because of rational apathy and other factors described in the Introduction – as is the case in EU competition law – unless extra "cures" are introduced which have a potential to strengthen private enforcement. These cures, according to Weber and Faure, are: (i) the availability of collective redress mechanisms and alternative dispute resolution mechanisms, (ii) funding of claims, and (iii) the availability of punitive damages.[33]

However, all these identified "cures" for improving the working of private enforcement are excluded by the ADD, although the Commission considered their introduction in its policy documents. Moreover, the 2009 leaked proposal contained rules on collective redress and it did not expressly prohibit punitive damages. However, the final ADD 'fails to deliver',[34] as is examined by the remainder of this chapter through the assessment of the Directive's output legitimacy. By not giving incentives to consumers for

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31 Weber and Fauer (n 27) 861.

32 Economic approach is inherent in the effectiveness narrative. From an economic perspective, the primary goal of enforcement measures does not consist in punishment and compensation, but in preventing the individual from violating the law. Due to the principle of full effectiveness, EU law is ideally placed to integrate an economic approach, also in the field of enforcement. J Drexl, 'Competition Law as Part of the European Constitution' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009, 2nd ed) 676-677

33 Weber and Fauer (n 27) 865. The thesis focusses on collective redress and punitive damages as "cures" for effectiveness of private enforcement of EU competition law.

34 S Peyer, 'The European Damages Directive fails to deliver, but can it be fixed?', blogpost on Competition Policy Blog, available at https://competitionpolicy.wordpress.com/2015/03/03/the-european-damages-directive-fails-to-deliver-but-can-it-be-fixed/.

bringing claims in EU antitrust violation cases, the Directive fails to properly honour both principles underpinning the creation of the right to damages in this context – the principle of effectiveness of EU law and the principle of effective judicial protection.

Against this background, designing a private enforcement regime which does not provide sufficient incentives to consumers to bring damages claim seems to be an "empty ritual" due to the ineffectiveness of the remedy itself. Consequently, the Directive fails to achieve its stated goal of compensation, as well as the (now implied) goal of deterrence.

There are several constitutional impulses which require that consumer-oriented interpretation prevails in designing antitrust damages actions over competing concerns, such as for example blocking abusive litigation and protecting "European legal tradition",[35] which on closer inspection tip the scales in favour of infringing businesses. To start with, Article 12 TFEU and Article 38 of the Charter might be seen as 'an increasingly prominent frame for the pro-consumer interpretative approach'.[36] Article 12 TFEU provides that consumer protection requirements shall be taken into account in defining and implementing Union policies and activities. Similarly, Article 38 of the Charter states that 'Union policies shall ensure a high level of consumer protection'. Moreover, Article 114(3) TFEU, which is one of the legal basis of the ADD, provides that the legislature shall take as a base a high level of consumer protection in setting harmonized standards.

Another related objective of the EU that can underpin the importance of consumer protection in EU competition law enforcement framework is the concept of a social market

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35 See the Introduction, s 1.

36 S Weatherill, 'Justification, Proportionality and Consumer Protection' in P Koutrakos, N Nic Shuibhne and P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Bloomsbury/Hart 2016) 252.

economy laid down in Article 3 TEU.[37] Social justice[38] and competition[39] are at first sight two conflicting disciplines.[40] However, an area where social justice concerns have been made more explicit and strengthened is related precisely to the participation of consumers in the enforcement framework of Articles 101 and 102 TFEU.[41]

However, as it shall be argued based on the content of the ADD, the balance turned in favour of infringing businesses under the pretext of 'the risk of abusive litigation to an extent which is not compatible with the European legal tradition'.

(b) The Role of Deterrence in The Quest to Improve Enforcement of Consumer Rights

In recent years, a new tendency towards (private) law enforcement has been gaining impetus in the field of consumer protection. The Commission claims that '[e]ffective enforcement of EU law is of utmost importance for citizens and businesses alike.'[42] Although effective redress is 'a matter of fundamental rights' in the EU,[43] access to justice is still not adequately ensured for EU consumers.[44] This is reflected in the Commission's

37 Consolidated version of the Treaty on European Union [2012] OJ C 326 (TEU).

38 Social justice is associated with values of fairness and deservingness and it applies moral criteria to the distribution of wealth and income. Cseres (n 27) 405.

39 Competition is primarily concerned with economic efficiency and it is aimed at increasing the overall welfare of society through maintaining rivalry among firms. Cseres (n 27) 405.

40 Cseres (n 27) 405.

41 ibid 406.

42 Commission, 'Staff Working Document: Towards a Coherent European Approach to Collective Redress' SEC(2011)173 2.

43 ibid 7. Article 19 TEU incorporates the principle of effective judicial protection and provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This provision is coupled with Article 47 Charter, which confirms the right to an effective remedy.

44 I Benöhr, *EU Consumer Law and Human Rights* (OUP 2013) 215.

claim that '[i]n the EU, we have achieved a high level of consumer protection, but it is still difficult for the consumers to enforce their rights.'[45]

Accordingly, it is suggested that enforcement is an area where consumer law is 'special', because the need for protection is the highest.[46] This is also reflected in Article 38 of the Charter. It relates mainly to 'access to justice'.[47] However, there are different approaches to 'access to justice'.[48] The account provided in this chapter is that an improved access to justice in its narrow sense – entailing mechanisms that allow recourse to dispute resolution and, thus, allow the relevant action to reach the courts[49] – is only one side of the story. In the current EU legal framework, truly beneficial outcomes for consumer interests can be achieved in combination with another piece of the puzzle – achieving access to justice in its broader sense, encompassing both deterrence and compensation aims.[50]

This chapter rests on the assumption that the deterrence function may be beneficial in the context of private enforcement of consumer rights, apart from its role in public enforcement. It is argued that blurred rationales and intertwined objectives underpinning the creation of the right to damages in EU competition law justify a fused approach to

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45 Commission, 'Communication: Alternative dispute resolution for consumer disputes in the Single Market' COM(2011) 791 2.

46 S Grundmann, 'Targeted Consumer Protection' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Bloomsbury/Hart 2016) 239.

47 S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2013) 283.

48 Ioannidou (n 29) 116; S Wrbka, *European Consumer Access to Justice Revisited* (CUP 2014); H-W Micklitz, 'Privatisation of Access to Justice and Soft Law - Lessons from the European Community?' in T Wilhelmsson and S Hurri (eds), *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law* (Ashgate 1999) 505.

49 See G Howells and S Weatherill, *Consumer Protection Law* (Ashgate 2005) 606.

50 Ioannidou (n 29) 116-117.

enforcement of consumer rights.[51] Such an account seems to be in line with the case of *Courage*, in which the Court positively valued and recognized the deterrent effects of private actions in the general EU context.[52] Also effective collective redress may be advantageous for stronger enforcement, and not simply for better access to justice in its narrow sense.[53] This is underlined in the following passage of the AG Trstenjak's opinion in the case of *Invitel*:[54]

> The collective action as a means of enforcing collective rights not only provides access to this legal remedy but also has characteristics that make it an effective deterrent. /…/ The successful enforcement of rights by way of a collective action creates a just balancing of the interests of consumers and undertakings, ensures fair competition and shows that collective actions are just as necessary as individual actions in order to protect the consumer.

Although this opinion was delivered in the context of collective injunctive redress, the highlighted advantages of an enhanced deterrence for consumers transcend this context and are pertinent also in the context of collective compensatory redress.

Along those lines, Maria Ioannidou made a convincing case for the increased involvement of consumers in competition law enforcement, primarily based on the deterrence principle. Ioannidou claims that

> for the protection of the consumer right to damages for competition law violations, the appropriate remedy should be based on the functional

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51 See the Introduction and Ch III.

52 A Ortega González, 'Punitive Damages for Cartel Infringements: Why Didn't the Commission Grasp the Opportunity?' in L Meurkens and E Nordin (eds.), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 436.

53 Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress"' COM(2013) 401 final (Communication on Collective Redress) 7.

54 Opinion of AG Trstenjak in Case C-472/10 *Invitel* ECLI:EU:C:2011:806, para 41.

> enforcement of this right and structured upon the deterrence principle, and pursuing compensation should be a secondary concern.[55]

As she forcefully argues, provided that a correct balance is achieved between aims of deterrence and compensation, consumer damages actions may account for wider institutional benefits, contributing to consumer empowerment and the legitimization of EU competition policy.[56] This would mean that damages actions assume an instrumental role in the enforcement architecture. It seems that in the existing EU legal framework this would bring a substantial added value to consumers. However, rules in the ADD depart from the recognised benefits of the deterrence as a self-standing aim in the enforcement framework, as is discussed below.

In the US, the enforcement of antitrust for the benefit of consumers is a well-pronounced goal.[57] However, in the EU, it is often suggested that consumers are indirect beneficiaries of the internal market based on free competition. In the early years of European integration, consumer policy *per se* was not on the EU's agenda. The original Treaty of Rome laid foundations for economic integration and is conceived as an economic neo-liberal constitution.[58] Its setting has promoted economic freedom and deregulation, while challenging national social rights.[59] In this framework consumer policy played a marginal role, as consumer interests were only *indirectly* protected by EU law.[60] The Treaty

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55 Ioannidou (n 29) 115.

56 ibid 7.

57 Federal Trade Commission, 'Guide to Antitrust Law', available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws.

58 M P Maduro, 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' in P Alston (ed.), *The EU and Human Rights* (OUP 1999) 449.

59 ibid.

60 Weatherill, *EU Consumer Law and Policy* (n 47) 4; N Reich, H-W Micklitz, P Rott and K Tonner (eds), *European Consumer Law* (Intersentia 2014) 7.

of Rome contained only five 'incidental references' to the consumer with 'no attempt to develop a sophisticated structure of consumer rights or interests'.[61] Consumer protection was an exception to the logic of the internal market.[62]

The EU action in the consumer protection field was empowered with an explicit legislative competence only with the Maastricht Treaty, which entered into force in 1993.[63] However, consumer policy has been mainly affected by the harmonisation programme based on (now) Article 114 TFEU, which was introduced by the Single European Act in 1987.[64] The harmonisation of national laws adopted pursuant to Article 114 has been conducted in the name of promoting the establishment and functioning of the EU's internal market.[65] In so far as economic integration improves the consumer's position by promoting a more efficiently functioning market, as Weatherill noted, then harmonisation is a pro-consumer policy.[66] Thus, consumer policy has often been merely the functional result of the need to promote integration and thus assumed the instrumental role in the integration process. For this reason, consumer policy is often 'trapped in a market oriented perspective'.[67]

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61 Weatherill, *EU Consumer Law and Policy* (n 47) 3.

62 J Stuyck, 'The Transformation of Consumer Law in the EU in the Last 20 Years' (2013) 20 Maastricht Journal 3 385.

63 For an account of the evolution of EU consumer policy see Weatherill, *EU Consumer Law and Policy* (n 47) 1-28.

64 The very earliest Directives, eg on Doorstep Selling, pre-date even that, and are based on what is now Article 115 TFEU.

65 Weatherill, *EU Consumer Law and Policy* (n 47); K Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (OUP 2014) 378. For a discussion on the competition law and consumer law objectives and their links with the internal market rationale, see Albertina Albors-Llorens, 'Competition and Consumer Law in the European Union: Evolution and Convergence' (2014) 33 Yearbook of European Law 1 163.

66 Weatherill, *EU Consumer Law and Policy* (n 47) 3.

67 Benöhr (n 44).

The ADD has been seen as a consumer protection measure by the EU institutions and bodies. For example, the president of the Competitiveness Council, the Greek minister for Development and Competitiveness Kostas Hatzidakis, made the following comments in light of the adoption of the ADD:

> After three months of strenuous efforts by the Hellenic Presidency, we agreed on a text that constitutes what is *possibly the most important piece of legislation aimed at protecting consumers for the current parliamentary session*. The Directive applies a coherent European set of rules for damage claims against cartel formation that will benefit the affected businesses and consumers. In this way, the right *balance between consumer interests and the market economy* is reached; and at the same time an integrated framework for the unhindered and sound function of the Internal Market in the field of Competition is put into place.[68]

However, as is argued by the thesis, this balance between consumer interests and the market economy is tipped in favour of the latter at the expense of consumer interests, and thus also at the expense of the principle of effectiveness of EU competition law and the principle of effective judicial protection. Lack of incentives for consumers to bring damages claims means less effective enforcement of EU competition law and, at the same time, leads to the deficit in compensatory justice.

As Ioannidou has rightly asserted, the Commission has made 'a rhetorical emphasis on consumer welfare and competition law's potential to promote consumer interest'.[69] This overt emphasis on consumer welfare is not matched by the substantive enforcement of competition law – thus, calls for a more 'consumer-focused' application of competition

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68 Council, 'New rules to facilitate damage claims for antitrust law violations' 8136/14 (OR. en) PRESSE 182. Emphasis added.

69 Ioannidou (n 29) 25-28.

law are advanced.[70] Also the Court makes a clear pronouncement of principle in favour of consumer welfare in competition law in the case of *GlaxoSmithKline.* [71]

This agenda of market integration was blatantly and vigorously criticised, *inter alia*, in the Manifesto by the Study Group on Social Justice in European Private Law.[72] The Manifesto was 'a reflection upon the yet undefined trajectory of EU Contract Law'[73] in the wake of the Commission's impetus to reform and bring some coherence to this field.[74] The Study Group claimed that the market integration agenda tends 'to serve the interests of business exclusively by pursuing uniform rules for the single market and excluding local measures, supported by democratic processes'.[75] Thus, the project was mainly about making life easier for *businesses* operating across borders[76] Similar accusation have been voiced in other fields of EU law and policy, also in the context of the legislative process leading to the adoption of the ADD.[77]

The EESC has been especially stern in this regard. For example, in 2012 the Commission published a communication 'Single Market Act II: Together for new

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70 Ioannidou (n 29) 44. Similarly, in consumer policy per se, eg, see S Weatherill, 'Empowerment is not the only fruit' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Bloomsbury/Hart 2016).

71 Case C-501/06 P *GlaxoSmithKline* ECLI:EU:C:2009:610.

72 Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 European Law Journal 653.

73 Caruso, 'Qu'ils mangent des contrats' (n 10).

74 Beginning with the Commission, 'On European contract law' (Communication) COM(2001) 398 final, and continuing with the Commission, 'A more coherent European Contract Law: an Action Plan' (Communication) COM(2003) 68. See, eg, S R Weatherill, 'The Consumer Rights Directive: how and why a quest for "coherence" has (largely) failed' (2012) 49 CML Rev 1279.

75 Study Group, 'Manifesto' (n 72) 661.

76 Caruso, 'Qu'ils mangent des contrats' (n 10).

77 See Ch IV.

growth'.[78] The EESC criticised the Communication and found it 'unfortunate' that only one out of the 12 is labelled a consumer measure. It argued that the focus of consumer policy should be wide and not an 'appendix to business policy'.[79] It maintained that 'the Commission could and should have placed more emphasis on prioritizing consumer-friendly initiatives'. The Commission had an opportunity to take this criticism into account in another 2012 communication, 'European Consumer Agenda – Boosting confidence and growth',[80] published in the field of consumer law and policy. It identified the key measures needed 'to *empower* consumers and boost their trust' and set out 'measures to put consumers *at the heart of all EU policies* as means to achieve the Europe 2020 goals'. Thematically, the Commission's agenda relied on empowerment. However, the EESC had criticised the 'empowerment' model as inadequate. As Weatherill argued, consumer law needs to be about *more* than empowerment:

> A vision based exclusively on empowerment is too narrow. There is much more to it. There is protection. There is concern for vulnerability. There is readiness to look beyond formal equality.[81]

In this vein, Ioannidou argued that there is 'a need to move from a liberal model of consumer protection, which emphasize information disclosure, to a "quasi-paternalistic" model, in which more active interventionist measures are employed'.[82]

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78 Commission, 'Single Market Act II Together for new growth' (Communication) COM(2012)0573 final.

79 European Economic and Social Committee, 'Opinion on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Single Market Act II — Together for new growth' COM(2012) 573 final [2013] OJ C76/24 para 2.7.

80 Commission, 'A European Consumer Agenda - Boosting confidence and growth' (Communication) COM(2012) 225 final.

81 Weatherill, 'Empowerment is not the only Fruit' (n 70). See also Bartl (n 11) 582.

82 Ioannidou (n 29) 13.

Translated into the EU competition law context, this means that mere "access to justice" does not suffice. Provisions governing the right to damages in the ADD should ensure that appropriate incentives are created for consumers to actually bring claims in practice. This, then, would ensure that the principles underpinning the creation of the right to damages – full effectiveness of EU competition law and the principle of effective judicial protection – are respected. To this end, consumer protection serves as an additional weight on the scale balancing competing interests that are juxtaposed in the quest to improve enforcement of EU competition law. As Cseres rightly argues,

> If we accept, furthermore, that consumers usually have a weaker position in the process of bargaining, lobbying and litigation, then a pro-consumer policy objective seems justified.[83] Therefore, the consumer welfare standard can be seen as a kind of 'rebalancing' measure.[84]

However, based on the content of the ADD, the balance turned in favour of infringing businesses under the pretext of 'the risk of abusive litigation to an extent which is not compatible with the European legal tradition'. Moreover, besides the prevailing internal market rationality in the EU, one of the speculative reasons for such an outcome is the influence of strong interest groups and lobbying, which is discussed in Chapter IV.

Though it is difficult to find evidence, it is widely believed that 'strong business interests have proven to be very effective in lobbying the legislative process in Brussels, much better than the representatives of weaker interests such as consumer protection'.[85]

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83 Cseres (n 27) 408-409.

84 ibid.

85 M W Hesselink, *CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law - What Roles for Fairness and Social Justice?* (Sellier 2008) 11; see also U Mattei, 'The Nile Perch in European Private Law' in HW Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011) 177; U Mattei and F Nicola, 'A "Social Dimension" in European Private Law?:

Some have argued that the EU is an ideal forum for successful lobbying by interest groups, given the complex and rather opaque decision-making at the EU level.[86] Hence, some of the changes in private enforcement of EU competition law could be explained by interest group politics. That would then especially be a factor explaining why particular efficient instruments have not been introduced at EU level.[87]

For example, in the Common Frame of Reference (CFR) negotiations context, it was argued that the composition of the network that the Commission set up for stakeholder input ('CFR-Net') had been rather unbalanced[88] and that certain rules of PECL (which inspired the content of the CFR) were 'being threatened by stakeholders influenced by the business lobby.'[89] This went so far that Hesselink cautioned that there was 'a real risk that the level of consumer protection in the optional instrument will be lower, instead of higher, than it currently is in the national laws of several Member States (or even lower than the average level in the Member States)'.[90]

In the context of EU competition law, even newspapers reported on a 'fierce backlash from business groups'[91] opposing the 2009 leaked draft, allegedly over fears of a

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The Call for Setting a Progressive Agenda" (2006) 41 New Eng. L. Rev. 1. See also Weber and Fauer (n 27) 875.

86 See M Faure, J Lefevere and R Van den Bergh, 'The Subsidiarity Principle in European Environmental Law: An Economic Analysis', in E Eide and R Van den Bergh (eds), *Law and Economics of the Environment* (Juridisk Vorlag 1996) 121.

87 Weber and Fauer (n 27) 875.

88 M W Hesselink, 'Who Has a Stake in European Contract Law?' [2005] 3 ERCL 295-296; G Wagner, 'Die soziale Frage und der Gemeinsame Referenzrahmen' (2007) Zeitschrift für Europäisches Privatrecht 180-211, 189-190.

89 O Lando, 'Liberal, Social and "Ethical" Justice in European Contract Law' (2006) 43 CMLR (2006) 817-833, 822-823.

90 Hesselink, *CFR & Social Justice* (n 85) 11-12.

91 Politico, 'Kroes hopeful of deal on compensation claims', 10.7.2009, available at http://www.politico.eu/article/kroes-hopeful-of-deal-on-compensation-claims/; Politico, 'The

wave of "US-style" class actions. Although the proposal was scheduled for adoption at the meeting of Commissioners on 7 October 2009, it was reportedly 'not allowed onto the agenda'.[92] BEUC, the European consumers' organization, wrote a letter to President Barroso a day before the scheduled meeting, and accused Barroso of 'caving in to the business lobby'. It argued that '[t]his is not the consequence of a democratic decision-making process, but rather the result of some hard, last-minute, aggressive lobbying.'

As aforementioned, the 2009 leaked proposal contained rules on collective redress and did not expressly prohibit overcompensation. According to the European Parliament's instructions given in its Resolutions, as examined at length in Chapter IV, the Commission dropped rules on collective redress in the 2013 proposal, however it (still) did not prohibit overcompensation. Such prohibition was added only in the final text of the Directive. It should be noted that the majority of stakeholders' views given by business representatives during the public consultations on the Green Paper and the White Paper broadly coincided with the European Parliament's position. This is the case relating both to the exclusion of punitive damages and to the exclusion of the binding collective redress mechanism, as well as the rejection of opt-out collective redress regime in the Recommendation on Collective Redress.[93] This is surprising, not least because the European Parliament has traditionally paid significant attention to the interests of consumers vis-à-vis European businesses.[94]

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legacy of the Iron Lady of Antitrust', 12.2.2009, available at http://www.politico.eu/article/the-legacy-of-the-iron-lady-of-antitrust.

92 Politico, 'Kroes hopeful of deal on compensation claims', 10.7.2009, available at http://www.politico.eu/article/kroes-hopeful-of-deal-on-compensation-claims/.

93 Petrucci, 'Effective Private Enforcement' (n 3) 247.

94 Eg, the lowering of consumer protection has been one of the major reasons for the refusal of the 2008 Commission's proposal of Consumer Rights Directive. Bartl (n 11) fn 86.

There is another institutionally significant aspect pointing at the prevailing internal market logic favouring businesses interest in the ADD legislative process. In the Council, the Proposal was discussed in the Competitiveness Council, implying that at working group level more often representatives of the Member States' Ministries of Economy participated than those of the Ministries of Justice.[95]

Thus, on the one hand, there is the Treaty framework – Articles 101 and 102 TFEU interpreted in light of the principle of effectiveness of EU competition law and the principle of effective judicial protection, bolstered by the concern to ensure a high level of consumer protection (Articles 12, 114(3), 169 TFEU and Article 38 of the Charter). This Treaty framework warrants solutions that facilitate actions for damages by incentivizing consumers to bring their claims before the court.

On the other hand, there is the internal market logic that is allegedly built into the Treaty and – speculatively – a strong business lobby. The outcome – the prohibition of overcompensation and other changes to the detriment of consumers in the ADD – is well known by now.

Weber and Fauer, however, posit that 'at first look the interest group explanation does not seem to be particularly powerful'.[96] They claim that it is not understandable 'why, for example, [Member States] would lobby in favour of criminal enforcement in the cases of environmental and insider trading law and not in other domains', such as competition law.[97] One explanation for such "irrational" enforcement strategies that are not designed in

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95 P Van Nuffel, 'Institutional Report' in *Private Enforcement and Collective Redress in European Competition Law - Congress Proceedings FIDE 2016* (Wolters Kluwer 2016) 191 fn 25.

96 Weber and Fauer (n 27) 875.

97 ibid 876.

accordance with their optimal models[98] is public opinion. In the wake of the "worst environmental disaster" – the Gulf or BP oil spill – and other environmental catastrophes, and in times of the raising awareness on climate change and sustainability, governments enjoy a high degree of public support in creating environmental policy measures strongly based on deterrence. The same is true regarding corporate governance rules in the aftermath of the financial crises. Perhaps the political momentum would change in favour of more deterrent private enforcement measures also in competition law if infringements would have an impact on a large number of consumers. WV Dieselgate scandal, discussed briefly in relation to the rationale for damages in German law in Chapter 2, could be the first step towards this end.[99]

It is difficult to identify the "causes" and "contributing factors" that result in a specific outcome. However, in the context of the ADD, it is plausible to say that stakeholders and the European Parliament had an impact on the final rules proposed by the Commission.[100] Although the initial Commission's rules as set out in the Green Paper were formulated vaguely, the final ones contained in the 2013 Communication and Recommendation correspond fully with the views of the selected stakeholders and the European Parliament. It is submitted that the European Parliament and stakeholders have had an impact on two aspects that are relevant to the effectiveness of this policy: the type

98 This is the finding of Weber and Fauer (n 27) for all four policy areas under examination – consumer law, competition law, environmental law and insider trading law. Policy choices in all four areas were not designed in accordance with the optimal model according to the economic approach.

99 See, eg, Commission, 'Consumer Authorities and the European Commission urge Volkswagen to finalise repairs of all cars affected by emissions scandal' (2017) press release available at http://europa.eu/rapid/press-release_IP-17-3102_en.htm.

100 See Ch IV.

of legislative act adopted to enact collective redress rules and the content of these rules (as examined below).[101]

3 Flaws in the Private Enforcement of EU Competition Law: Assessment of the "Four Steps"

Despite the Commission's proclaimed determination to address the enforcement gap in the field of EU competition law, a closer look at its subsequent output indicates that the ADD has not lived up to its promises. On the one hand, implementation of the Directive will resolve some of the issues identified in various policy documents discussed in Chapter III.[102] In a nutshell, the Directive will, for example, secure claims for indirect purchasers in all Member States. It will prevent limitation periods 'from running out before a national competition authority (NCA) infringement decision has been adopted, thereby allowing plaintiffs to wait for that decision before filing a claim'. It will mitigate the burden of proof by providing (rebuttable) presumptions of cartel harm, and of harm caused to indirect purchasers by the passing-on of overcharges, as well as by providing the courts with the power to estimate damages, and to request the NCA's assistance.[103] In follow-on proceedings, the NCA's infringement decision will be binding in all Member States. The Directive will also add to the attractiveness of ADR mechanisms, by way of a suspension

101 Petrucci, 'Effective Private Enforcement' (n 3) 247.

102 P-C Müller-Graff, 'General Report' in Private Enforcement and Collective Redress in European Competition Law - Congress Proceedings FIDE 2016 (Wolters Kluwer 2016) 179-180.

103 ibid 179-180.

of limitation periods, a suspension of judicial proceedings, and potential reduction of fines by the NCA.[104]

On the other hand, however, implementation of the Directive will not remove all obstacles for an effective private enforcement of competition law.[105] First, some issues are not addressed by the Directive, for example collective redress. Secondly, the Directive may not solve all issues effectively, for example as regards the question of overcompensation.

This section will examine the extent to which the European Parliament's input contributed to strengthening private enforcement of EU competition law, and thus to the Directive's output legitimacy. To this end, this chapter examines four crucial "steps" in the ADD that bear importance for the quest to improve enforcement of EU competition law (in particular by closing the enforcement gap). First, it will examine how these rules were framed in the Commission's policy documents (Green Paper, White Paper, the 2009 leaked proposal, the 2013 proposal). Then, it looks at the European Parliament's and other stakeholders' reactions to the Commission's policy documents and their influence on the final content of the Directive. It discusses whether the inputs have enhanced or decreased the effectiveness of these rules in relation to their capability to facilitate antitrust victims' compensation and to promote compliance with EU competition law.[106]

The assessment is premised on the assumption that (ideally opt-out) collective redress, the availability of punitive damages, and other rules designed with an emphasis on

104 ibid 179-180.

105 See s 1 of this Chapter.

106 Cf. Petrucci, 'Effective Private Enforcement' (n 3).

the facilitation of damages claims have a potential to improve private enforcement of EU competition law, and thus contribute to closing the enforcement gap.[107]

(a) Steps 1 and 2: Optimising the Interaction between the Public and Private Enforcement of Competition Law

The first two steps under examination are, broadly speaking, related to one of the two proclaimed objectives of the ADD – 'optimising the interaction between the public and private enforcement of competition law'.[108] In a nutshell, the first step is degrading the right to damages from the sole reason for legislative initiative in this area to 'the second main objective' of the Directive.[109] The second step, which is closely connected to the first one, is the prioritising or 'preferring to protect' the leniency programme over the right to damages.[110] The thesis discusses this shift in the Directive's objectives at length in Chapter IV in relation to the choice of a legal basis. Thus, only relevant points are repeated and explained here to the extent that they are pertinent to the assessment of the Directive's effectiveness.

The central focus of the enforcement policy in the Green Paper, the White Paper and the 2009 leaked proposal is to facilitate the ability of individual litigants to bring claims

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107 See s 2 above. Weber and Fauer (n 27); F G Wilman, 'The end of the absence? The growing body of EU legislation on private enforcement and the main remedies it provides for' (2016) 53 CMLRev 4 900.

108 2013 Proposal for a Directive (n 16) 3.

109 2013 Proposal for a Directive (n 16) 4.

110 Sauter (n 18) 140. Leczykiewicz, 'Contract and Regulation' (n 18) fn 12.

for damages before national courts for losses suffered as a result of breaches of Articles 101 and 102 TFEU.[111]

In this respect, the Green Paper provides:[112]

> The purpose of this Green Paper and of the Commission Staff Working Paper is to identify the main obstacles to a more efficient system of damages claims and to set out different options for further reflection and possible action to improve damages actions both for follow-on actions /…/ and for stand-alone actions /…/.

The 2005 Green Paper identifies and addresses eight main issues in the following order: access to evidence, fault requirement, damages, the passing-on defence and indirect purchaser's standing, defending consumer interests, costs of action, *coordination of public and private enforcement*, jurisdiction and applicable law.[113] The coordination of public and private enforcement is listed as the penultimate issue, thus it is far from being considered as the 'main objective' of the enforcement policy, as is the case in the final text of the Directive. The only example given to illustrate the need for such a coordination is 'coordination between leniency applications in public enforcement and damage claims'.[114] The Green Paper states that both 'leniency programmes and civil liability contribute by their effects *to the same aim: more effective deterrence* from entering into cartels.[115] Thus,

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111 Petrucci, 'Effective Private Enforcement' (n 3) 231-232.

112 Commission, 'Green Paper - Damages actions for breach of the EC antitrust rules' SEC(2005) 1732, COM(2005) 0672 final (Green Paper) 4.

113 Emphasis added.

114 Green Paper (n 112) 4.

115 Green Paper (n 112) 4. Emphasis added.

deterrence is expressly embraced by the Green Paper as the aim of damage claims. Moreover, the Green Paper continues:[116]

> Consideration should be given to the impact of damages claims on the operation of leniency programmes so as to preserve the effectiveness of the programmes. In this respect, it should be taken into account that operation of leniency programmes is generally helpful for private litigants in damages actions, as leniency programmes uncover secret cartels.

This passage could be interpreted as giving priority to damages actions, since leniency programmes are seen as instrumental to bringing damages actions before the court.

In its response to the Green Paper, the European Parliament in its Resolution also focusses on the importance to facilitate actions for damages in light of the enforcement gap in EU competition law. It mentions leniency programmes, however, and stresses that in the event of a conflict arising over access to and the processing of a confidential information available to the members of the European competition network (ECN), this 'should be settled in the light of the interpretation of [EU] law by the Court of Justice'.[117] This is a crucial point, since the Court has consistently promoted the interest of victims claiming damages in such contexts, for example in the case of *Pfleiderer*.[118]

The Commission responded with the White Paper in 2008. Here, the Commission still focussed on 'proposals for policy choices and specific measures that would ensure, more than is the case today, that all victims of infringements of [EU] competition law have access to effective redress mechanisms so that they can be fully compensated for the harm

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116 ibid. Emphasis added.

117 European Parliament, 'Competition: damages actions for breach of the EC antitrust rules. Green paper Resolution Green Paper' 2006/2207(INI) (EP Resolution Green Paper) point 16.

118 Case C‑360/09 *Pfleiderer* ECLI:EU:C:2011:389. See, eg, Sauter (n 18) 140.

they suffered'. The content of the White Paper is modelled according to the content of the Green Paper. Interaction between leniency programmes and actions for damages is the last point dealt with by the White Paper. However, the White Paper already expressly states that it has two objectives. The 'primary objective' is to 'improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules'. 'Another important guiding principle of the Commission's policy', as the White Paper states, 'is to preserve strong public enforcement of Articles [101] and [102]'.

The European Parliament responded with its Resolution in which it has not put that much emphasis on leniency programmes. However, it calls 'for the Commission to be required, in the follow-up to an investigation, to allow victims of breaches of the [EU] competition rules access to the necessary information for prosecuting actions for damages'.[119] It also adds that 'particular attention must be paid to protecting business and company secrecy of the defendant or third parties and notes that guidelines are needed regarding the treatment of leniency applications'.[120]

The Green Paper and the White Paper culminated in the 2009 leaked proposal.[121] Under the title 'Grounds for and objectives of the proposal', the proposal focusses exclusively on 'rendering more effective the right of victims of infringements' of EU competition law. Coordination of public and private enforcement is not among the 2009 leaked proposal's objectives. It deals with this issue in relation to leniency programmes

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119 European Parliament, Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) (EP Resolution White Paper) point 13.

120 ibid 3.

121 For a detailed discussion on this process, see Ch IV.

only under chapter 3, where it addresses legal elements of the proposal. Article 1(1) of the 2009 leaked proposal has a title 'Right to compensation' and it provides: 'The purpose of this Directive is to ensure that consumers and undertakings can effectively enforce their right, guaranteed by the Treaty, to full compensation for harm caused to them by an infringement of Article 81 or 81 of the Treaty'. The second paragraph then specifies full compensation, and the third paragraph sets out principles of effectiveness and equivalence.

This approach is in stark contrast with the final approach adopted by the ADD. The 2013 proposal sets out the following objectives:

> (i) optimising the interaction between the public and private enforcement of competition law; and
>
> (ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.[122]

The proposal stresses that obtaining compensation is only the 'second main objective' of the proposed measure.[123] In the wake of the *Pfleiderer* and *Donau Chemie* judgments, and contrary to the Court's judgments in these cases, 'the first main objective of the present proposal is thus to optimise the interaction between public and private enforcement of the EU competition rules'.[124]

The final text of the Directive reversed the order of these two objectives, but expressly added the – otherwise implied – internal market dimension as its Article 1 provides:

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122 2013 Proposal for a Directive (n 16) 4.

123 ibid.

124 ibid.

> 1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.
>
> 2. This Directive sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.

This "additional" internal market dimension serves as a justification for using Article 114 TFEU as a legal basis, and thus granting the European Parliament the co-decision role. This is examined more fully and critically in Chapter IV.

Moreover, adding the objective of coordination of public and private enforcement as an express objective of the Directive – and not merely one of the issues that the Directive addresses – serves as a legitimization for hampering the effectiveness of damages actions in certain contexts, and consequently also of the principle of effective judicial protection.[125] To this end, the Directive 'extends the privileged treatment of leniency applicants into private law – a change that is novel for almost all Member States by providing for exceptions from disclosure obligations, and – for immunity recipients – from the rules on joint and several liability.'[126] Thus, it introduces 'a quite unusual limitation of the civil liability of immunity recipients'.[127] Thereby, the Directive 'modifies general principles of

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125 R Nazzini, 'The objective of private remedies in EU competition law' (2011) 4 Global Competition Litigation Review 132 143. This is the case when damages actions may 'impair the full effectiveness of EU competition law'.

126 Müller-Graff (n 102) 180.

127 Van Nuffel (n 95) 257; see also A K Komninos, 'The Relationship between Public and Private Enforcement: *Quod Dei Deo, Quod Caesaris Caesari*' in P Lowe and M Marquis (eds), *European*

private law to strengthen public enforcement.'[128] This is paradoxical in the light of the Commission's rhetorical emphasis on preserving the "European legal tradition", which also serves as a justification for the prohibition of overcompensation in the Directive. As it is shown below, also the Recommendation on Collective Redress' emphasis on the opt-out collective redress runs against the preferred choices of several Member States.

It was noted by Van Nuffel that:

> instead of organising access to that file, the Union legislator rather dissuades it. It is almost a paradox that the element of private enforcement for which the co-legislators expressly ask the Commission and the NCAs to assist national courts dealing with damages actions – the quantification of harm – is not the one for which their public enforcement activities provide them with useful information.[129]

As Komninos rightly argued, the limitations of an immunity beneficiary's liability are difficult to justify if the paramount objective of antitrust damages actions is compensation. However, as he argued, 'if deterrence and effectiveness of enforcement is also an objective, then it will be easier to protect the integrity and attractiveness of the leniency programmes by limiting civil liability'.[130]

This approach runs against the Court's approach undertaken in its case law, for example in the aforementioned case *Pfleiderer*.[131] Whereas the Court has so far called for

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competition law annual 2011: integrating public and private enforcement of competition law – implications for courts and agencies (Hart Publishing 2014) 149.

128 Müller-Graff (n 104) 180.

129 Van Nuffel (n 97) 257.

130 Komninos, 'The Relationship between Public and Private Enforcement' (n 127) 149. He rightly argues that 'de-trebling of antitrust damages for corporate amnesty applicants in the US does not call this into question, because de-trebling does not mean protection from single damages liability'.

131 *Pfleiderer* (n 118). See also Komninos, 'The Relationship between Public and Private Enforcement' (n 127) 150.

a case-by-case weighing of interests regarding the disclosure of leniency documents, including leniency statements, the Directive now excludes leniency statements (and settlement submissions) from any disclosure. It is argued that such exclusion is disproportionate, as is discussed at length in Chapter IV. Moreover, regarding the fear that punitive damages could provide disincentives to businesses to apply for leniency, the Directive could add another exception for leniency recipients, excluding punitive damages in these cases only. In any case, it is suggested that the possible friction between antitrust damages actions and leniency programmes may be overstated to some degree. This apparent friction can be overcome with the three-stage model that is suggested by the thesis and seems to be compatible with the Court's approach. National courts should be empowered to assess on a case by case basis whether certain documents merit disclosure or not. In this vein, national courts should also assess on a case by case basis – taking into account the principles of effectiveness, proportionality, and dissuasiveness[132] – whether the fact that certain infringer decided to take part in leniency proceedings shows that additional deterrence in form of punitive damages is necessary or not, i.e. whether the transformative stage of the three-stage model should be triggered. Thus, both ideas – absence of the prohibition of overcompensation and the leniency programmes – could be reconciled.

It follows from the objective of 'coordinating public and private enforcement' that, as Wilman rightly argued, 'the directive does not wholeheartedly seek to facilitate private enforcement, but that it also restricts the possibilities to do so in some respects'.[133] Against

132 See the Introduction and Ch III.

133 Wilman, 'The end of the absence? (n 107) 223.

this background, the efforts put into this legislative process do not seem to be primarily justified by the need to guarantee the effectiveness of Articles 101 and 102 TFEU regarding consumers' (and companies') right to obtain compensation for antitrust infringements. Rather, 'they seem to promote equal conditions for companies active in the EU (i.e., for potential infringers of antitrust law)'.[134] This can be especially problematic from the principle of conferral perspective and is in stark contrast with the Commissioner Almunia's statement that the Commission took the legislative initiative in this field 'to make it easier for the victims of competition-law infringements to seek compensation for the harm they suffered'.[135]

One might argue that this re-focus in aims and objectives of antitrust private enforcement still meets the overall objective of EU competition policy – 'full effectiveness of EU competition law' – since the leniency programme is arguably a successful tool in fighting cartels. If this is the case, perhaps the entire idea to legislate in the field of private enforcement should be abandoned, rather than to design it in a way that is essentially pro-businesses at the expense of consumer interests, despite being adopted to 'defend consumers'.[136]

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134 F Marcos and A Sánchez Graells, 'Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?' (2008) European Review of Private Law 3 482.

135 Speech of the Commissioner Joaquín Almunia, 7.11.2013, http://europa.eu/rapid/press-release_SPEECH-13-887_en.htm.

136 Speech of the Commissioner Margrethe Vestager, Competition and the rule of law, 18.5.2017, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-and-rule-law_e.

(b) Step 3: The Prohibition of Overcompensation

The third "step" examined to assess implications of the European Parliament's and stakeholders' involvement in the legislative process on the effectiveness of the Directive's rules is the shift in the promoted rationales for antitrust damages actions and the related express prohibition of overcompensation. This approach runs against the Court's approach undertaken in its case law, especially in the case *Manfredi*.[137]

The thesis puts forward that in the light of the dual vigilance enforcement system in the EU and the ensuing binary nature of antitrust damages actions, both deterrence and compensation are their aims.[138] The Commission emphasized in the Green Paper:

> "Damages actions for infringement of antitrust law *serve several purposes*, namely to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence). By being able effectively to bring a damages claim, individual firms or consumers in Europe are brought closer to competition rules and will be more actively involved in enforcement of the rules."[139]

Thus, the recognised aims of the antitrust damages are both compensation and deterrence. As the Commission explained in the Staff Working Paper, 'both damages awards and the imposition of fines contribute to the maintenance of effective competition and deter anticompetitive behaviour.'[140] Further, the Commission emphasised the law enforcement function, claiming that facilitating and increasing private enforcement 'would further add

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137 Petrucci, 'Effective Private Enforcement' (n 3) 248.

138 See the Introduction, s 2, and Ch III.

139 Green Paper (n 114) 4.

140 Commission, 'Staff Working Paper: Annex to the Green Paper Damages actions for breach of the EC antitrust rules' SEC(2005) 1732 (Commission Staff Working Paper – Green Paper) 7.

to the efficiency of competition law enforcement, and make an important contribution to the key objective of ensuring open and competitive markets in the EU's internal market'.[141]

In this vein, the thesis rests on the premise that punitive damages can provide incentives for private enforcement and add to its deterrent effect.[142] This was acknowledged also by the Commission. To this end, the Commission Staff Working Document stresses that 'pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. As a result, thought should be given to other methods of approaching damages'.[143] The Commission was of an opinion that one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim.[144] This view is consistent with the account of the thesis regarding the concept of effectiveness – providing incentives to sue is crucial for any attempt to close the enforcement gap in EU competition law.

Touching on the definition of damages in the Green Paper, under Question E of the Green Paper, the Commission asked the question 'How should damages be defined?'.[145]

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141 ibid.

142 This rationale is closely linked to the theory of "optimal deterrence" and implies that multiplying damage awards serves a primary purpose of providing would-be wrongdoers with optimal incentives to avoid imposing harm on society. A Renda et al, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios. Report for the European Commission Contract DG Comp/2006/A3/012' (Renda Report).

143 Commission Staff Working Paper – Green Paper (n 140) para 34.

144 A M Polinsky and S Shavell, 'Punitive Damages: An Economic Analysis' (1998) 111 Harvard Law Review 4 869. They acknowledged that there is increased scope for punitive damages even when the conduct is likely to be detected, if litigation costs are high.

145 Green Paper (n 112) 7.

The following four choices have been proposed: compensatory damages, recovery of the illegal gain (punitive elements), double damages and prejudgment interest.

Regarding the amount of the award of damages, the Commission admitted that the quantification of damages in competition litigation can be particularly complex given the economic nature of the illegality and the difficulty of reconstructing what the situation of the claimant would have been absent the infringement, as usually required under tort rules.[146] At that time, the Commission was of the opinion that doubling of damages at the discretion of the court, automatic or conditional, could be considered for horizontal cartel infringements.[147] The accompanying Staff Working Paper highlighted findings that disincentives created by *restrictions on the amounts* that can be awarded, such as the *unavailability of punitive damages*, can also constitute *an obstacle to private actions*.[148]

In its Resolution, the European Parliament responded to this Commission's suggestion regarding punitive damages by stating that 'any proposed measure must fully respect the public policy of the Member States, in particular with regard to punitive damages'.[149] This can be read as a warning against punitive damages, since they allegedly violate the Member States' *ordre public*.

After a few years, the White Paper followed.[150] The measures that it puts forward are 'designed to create an effective system of private enforcement by means of damages

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146 Commission Staff Working Paper – Green Paper (n 140) 37.

147 Green Paper (n 112) 7.

148 Commission Staff Working Document – Green Paper (n 140) 14.

149 EP Resolution Green Paper (n 117) point 18.

150 Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' COM(2008) 165 final (White Paper) 2-3. For the discussion, see P Nebbia and E Szyszczak, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (2009) 20 EBLR 5 635.

actions that complements, but does not replace or jeopardise, public enforcement'.[151] In contrast to the Green Paper, seemingly inspired by the European Parliament's Resolution, the White Paper does not mention punitive damages as a possible measure. However, a deterrence function is still acknowledged, albeit this time only as a 'secondary' function of damages. It states that

> Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.[152]

The Commission emphasised that the policy choices proposed in the White Paper therefore 'consist of balanced measures that are rooted in European legal culture and traditions.'[153]

In its Resolution, the European Parliament went further regarding its aversion towards punitive damages by stating that

> whereas the aim of private-law actions for damages must be to compensate the victim fully for the harm suffered and whereas the principles of non-contractual liability that prohibit unjust enrichment and multiple recovery of compensation on the one hand, and that avoid punitive damages on the other must be respected.[154]

Neither the 2009 leaked proposal nor the 2013 proposal for a directive included the prohibition of overcompensation. However, the European Parliament did not perceive such exclusion of a provision dealing with punitive damages as a sufficient safeguard against

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151 White Paper (n 150) 3.

152 ibid.

153 ibid.

154 EP Resolution White Paper (n 119) F.

overcompensation – despite the express provision dealing with the definition of "full compensation" which normally suffices in the Member States. On its insistence, such an express prohibition is now included in the final text of the ADD.

The ADD was accompanied by the Recommendation on Collective Redress.[155] The latter proposes a series of non-binding principles, aiming to ensure a coherent horizontal approach to collective redress in the EU, especially in fields of consumer protection, competition, environmental protection, and financial services. One of the suggested principles is a prohibition of punitive damages. Although it is a non-binding instrument, it shows that the anxiety to rule out punitive damages is not confined to the antitrust litigation.

While some experts have welcomed such developments,[156] others have proposed the introduction of some form of punitive damages as a means to encourage private enforcement.[157] Hazelhorst endorsed dropping the proposal for the introduction of punitive damages based on the conclusion that differences in law and in practice between the US and the EU are too substantial to allow punitive damages to be transposed into EU law.[158] She claims that in the US, punitive damages in antitrust law were introduced primarily as a deterrence factor, while in the EU, damages are seen to be nothing but compensation for the harm actually suffered.'[159] While there is no reason to dispute her claims about the

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155 Recommendation on Collective Redress (n 20).

156 M Hazelhorst, 'Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far' (2010) 18 European Review of Private Law 4 757.

157 See, eg, R C Meurkens, *Punitive Damages* (Kluwer 2014); W Van Gerven, 'Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts' in C-D Ehlermann and I Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of Competition Law* (Hart Publishing 2002); Grundmann, 'Targeted' (n 46) 240.

158 Hazelhorst (n 156).

159 ibid 477. For a discussion on this subject, see, eg, J Stuyck, 'Public and Private Enforcement in Consumer Protection: General Comparison EU-USA' in F Cafaggi and H-W Micklitz, *New*

differences in law and in practices between the US and the EU, her account fails to acknowledge the transformative nature of private laws in Europe and, moreover, may be criticised for its overly narrow law enforcement approach by overlooking penal elements in European private laws that already play a useful deterrent function. Her account seems to be premised on the idea that private enforcement in the EU is primarily designed to vindicate subjective consumer rights.

However, the prevailing view is that private enforcement is designed also, or even in some circumstances primarily, to deter violations of EU law and to ensure better compliance with legal rules.[160] Effective enforcement does not aim solely at protecting individual consumer rights but also, and just as importantly, at general deterrence, reducing the risk for future disregard of consumers' rights.[161]

In this vein, some experts underline the potential benefits of the introduction of punitive damages, especially in cases in which it is highly likely that businesses try 'to make strategic use of consumer apathy'[162] and in cases where the threat of compensatory damages may not be sufficient to deter undertakings from breaching competition law.[163] The imposition of punitive damages may offset both the gap between illegal gains and compensatory awards and the would-be violator's estimate that it may not be caught. Thus, punitive damages increase the deterrent effect of antitrust litigation. In addition, the

Frontiers of Consumer Protection – the Interplay between Private and Public Enforcement (Intersentia 2009).

160 Ioannidou (n 29).

161 Grundmann, 'Targeted' (n 46) 240.

162 ibid.

163 Petrucci, 'Effective Private Enforcement' (n 3) 243.

prospect for claimants to be awarded compensation greater than the incurred loss encourages them to make a claim.[164]

Providing "incentives to comply" with EU competition law is only one side of the underpinning rationale for allowing overcompensation. Another rationale implies that overcompensation also provides "incentives to sue", since it encourages reluctant victims to overcome the problem of significant upfront legal expenses and bring a claim before the court.[165] This aspect – focusing on achieving compensatory justice by incentivizing victims to claim damages – concomitantly also contributes to the "incentives to comply" rationale, and thus furthers the deterrent effect of private enforcement. This reflects the deterrence/compensation dichotomy and is consistent with the concept of effectiveness employed by the thesis to assess the output legitimacy of the ADD.

Against this background, the prohibition of overcompensation does not contribute to closing the enforcement gap and plays out to the detriment of both the principle of effectiveness of EU law and of the principle of effective judicial protection. Findings in Chapters II and III support the argument that if punitive damages are awarded on the basis of the three-stage model proposed by the thesis – by respecting the EU remedial framework, inter alia, the principles of effectiveness, proportionality, and dissuasiveness – they do not necessarily open floodgates to unmeritorious claims and can be compatible with the "European legal tradition". The three-stage model gives judges tools to filter out such unmeritorious claims, since punitive damages can be awarded only exceptionally, if full compensation does not provide sufficient deterrence on a case by case basis.

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164 ibid 247.

165 See, eg, Renda Report (n 142) 192-193.

The award of damages in Europe is likely to be coupled with prejudgment interest.[166] Some scholars see this as problematic in the case of potential double damages award, since the award of double damages plus prejudgment interest may lead to a final award that is higher than treble damages awarded in the US.[167] In the case that the three-stage model proposed by the thesis is used to assess damages, this problem can be overcome by granting discretion to judges in estimating the proper amount of overcompensation – one that would not lead to over-deterrence.

Some legal scholars who object to punitive damages claim that instead of introducing penal elements in tort laws, public enforcement (administrative and criminal) should be improved. However, this appears to be unlikely in the EU competition law context. Regarding administrative enforcement, the insufficient resources of the Commission and the NCAs are precisely the reason for the encouragement of the use of private enforcement. Regarding criminal enforcement, the EU legislature is traditionally against the criminalization of breaches of European competition law.[168] This position might find justification in the economic approach – looking at the US situation, it is acknowledged that private law enforcement has a stronger deterrent effect than criminal law enforcement of antitrust laws.[169] Last but not least, competition law enforcement is underpinned by two objectives – deterrence and compensation. The thesis argues that their

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166 Interestingly, also interest can lead to overcompensation. For example, in Germany, statutory interest is higher than market rates, and thus may lead to overcompensation. Müller-Graff (n 102) 109.

167 Renda Report (n 142) 196.

168 Contrary to other areas, for example environmental policy and insider trading law. Weber and Fauer (n 27) 824.

169 R H Lande and J P Davis, 'Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws' (2011) BYU L. REV. 315, 317.

panacea should be designed in a fused manner too – encompassing both deterrence and compensation aims, and, in this vein, permitting the awards of punitive damages in certain cases. [170] Private enforcement is better suited to accommodate both these considerations through the three-stage model proposed by the thesis.

Despite the potential of punitive damages to increase the deterrent effect of antitrust damages actions,[171] several concerns are voiced regarding their introduction – ranging from those that are concerned with the European legal culture to those that warn of the risk of over-deterrence with a chilling effect on some socially desirable behaviour.[172] Thus, it is believed that such a strong and contested remedy as punitive damages should not be awarded hastily. This seems to be in line with a general trend in European regulatory private law to distinguish between minor and major infringements and to link them to the level of intervention.[173] The thesis argues that the proposed three-stage model can successfully overcome these concerns.

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170 As Cherednychenko stated: 'Instead of separating a regulatory function and a compensatory function from each other, the two functions can also be combined within one particular enforcement mechanism in order to increase its effectiveness. As a result, a hybrid form of enforcement can emerge whereby deterrence and compensation can be pursued by the same authority'. O O Cherednychenko, 'Editorial: Public and Private Enforcement of European Private Law: Perspectives and Challenges' (2015) 23 European Review of Private Law 4 488.

171 Petrucci, 'Effective private enforcement' (n 3) 243.

172 See, eg, Polinsky and Shavell (n 146) 869.

173 H-W Micklitz, 'The Transformation of Enforcement in European Private Law: Preliminary Considerations' (2015) 23 European Review of Private Law 4 505. Grundmann suggests that punitive damages should be limited to clear cases of abuse – ideally containing an indicative list. Grundmann, 'Targeted' (n 46) 240.

(c) Step 4: Collective Redress

The fourth "step" in the assessment of the implications of the European Parliament's and stakeholders' involvement for the effectiveness of the ADD is the withdrawal of the draft provisions governing collective redress from the final text of the Directive. The Commission's legislative initiative, and also the leaked and withdrawn 2009 proposal for a Directive, included such rules.[174] However, the final legislative proposal did not introduce them. Rather, the Commission released a non-binding recommendation on a horizontal framework for collective redress, the Recommendation on Collective Redress.[175]

It is universally acknowledged that 'the first pillar of an effective private actions regime is a robust legal framework for collective actions'.[176] If one accepts that competition law is ultimately designed to promote consumer welfare, the law has to grant actions especially to the final consumer as a consequence. Thus, in its White Paper, the Commission intends to promote consumer actions by presuming that higher prices have actually been passed on to the consumers and by introducing opt-in collective redress.[177] The Parliament itself acknowledged in its Resolution to the Green Paper that 'Member States that make provision for actions for indirect losses should grant the defendant the possibility of asserting a passing-on defence in order to avoid the possibility of unjust enrichment' and that 'it is therefore essential to have a mechanism for dealing with multiple

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174 Petrucci, 'Effective Private Enforcement' (n 3) 237. The thesis discusses this leaked draft proposal from 2009 in Chapter IV.

175 Recommendation on Collective Redress (n 20).

176 R Nazzini and A Nikpay, 'Private Actions in EC Competition Law' (2008) 4 Competition Policy International 120; Cseres (n 27) 440; Petrucci, 'Effective private enforcement' (n 3) 232; Müller-Graff (n 102) 87; Peyer (n 34).

177 Drexl (n 32) 678-679.

small claims'. Thus, the European Parliament linked the necessity of the collective redress mechanism to standing for indirect purchasers and to the passing-on defence. Given the size of each individual claim relative to the costs of bringing the claim, individual claimants may be effectively deterred from bringing proceedings even if they have a well-founded case.[178]

Both these elements (standing for indirect purchasers and the passing-on defence) are governed by the ADD,[179] however, the necessary cure for the resultant multiple small claims – i.e. the collective redress mechanism – is regrettably not, although it helps ensuring access to justice and the effective enforcement of the law, and may be essential to enforce competition law in mass harm situations, and especially when an infringement causes small losses to a large number of persons.[180]

In the Consumer Policy Strategy 2007-2013 the Commission wrote that it will 'consider action on collective redress mechanisms for consumers both for infringements of consumer protection rules and for breaches of EU antitrust rules in line with its 2005 Green Paper on private damages actions'.[181] So far, there is no such legislative proposal. As aforementioned, the ADD does not contain any provision on collective redress, and its accompanying Recommendation on Collective Redress is only a non-binding document.

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178 Nazzini and Nikpay (n 176) 121.

179 In the US, courts do not accept the passing-on defence, thereby enabling direct purchasers to go to court; see *Hanover Shoe, Inc v United Shoe Machinery Corp* 392 US 481 (1968). In addition, the Supreme Court excludes actions by indirect purchasers; see *Illinois Brick Co v Illinois* 431 US 720 (1977).

180 Nazzini and Nikpay (n 176) 120; Müller-Graff (n 102) 87; Van Nuffel (n 95) 250; Green Paper (n 112) points 8–9; Commission Staff Working Paper – Green Paper (n 140) points 188–201.

181 Commission, 'EU Consumer Policy strategy 2007-2013: Empowering consumers, enhancing their welfare, effectively protecting them' COM(2007) 99 11.

The Recommendation's objectives are to secure greater access to justice in private damages claims whilst mitigating the perceived risk of 'abusive' litigation.[182] As Reich noted, the latter contains 'surprisingly, a prohibition on punitive damages and contingency fees'.[183] He added that

> Unfortunately, the Recommendation does not show any sincere concern for collective redress for violations of consumer law and may even discourage Member States from advancing legal reform; instead it seems to aim only at rejecting any US class-action initiative.

The Commission indicated underlying reasons for such an approach by stating:

> Stakeholders' positions on many issues are known: most consumer organisations are in favour of EU-wide judicial compensatory collective redress schemes, whereas many representatives of industry fear the risks of abusive litigation.[184]

If these stakeholders are analysed,[185] it can be seen that 62% of stakeholders replying to the Consultation on Consumer Collective Redress in 2009 were industry representatives. Out of these industry representatives, 21% came from Germany (13 entities). On the other hand, only one consumer representative from Germany contributed to the consultation. Overall, this statistic is quite indicative of the interests that reinforced the shift in the Commission's policy choices. Indeed, business representatives even opposed the system of collective redress as such.[186]

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182 Recommendation on Collective Redress (n 20) para 1.

183 Reich, Micklitz, Rott and Tonner (n 60) 392.

184 Commission, 'Staff Working Document: Towards a Coherent European Approach to Collective Redress' SEC(2011)173 5.

185 Overview of the results of the Consultation on Consumer Collective Redress, available at http://ec.europa.eu/consumers/archive/redress_cons/docs/overview_results_coll_redress_en.pdf.

186 ibid 5.

The Commission's balancing exercise of interests of consumers and businesses in the Recommendation on Consumer Collective Redress is to a certain extent reflected in the dichotomy of 'incentives' and 'safeguards' – on the one hand, the Commission is trying to address and accommodate consumer interests by addressing their (low) incentives to bring claims; on the other hand, it is trying to address and accommodate businesses' fear of abusive litigation, or in other words, fear of unmeritorious claims, by addressing the needed safeguards in the overall framework. This balancing resulted in the prohibition of overcompensation. However, such prohibition seems to be at odds with the Court's ruling in *Manfredi* in which the Court established that awards of punitive damages are a matter of national law.[187] Petrucci suggests a way to reconcile these two positions so that Member States should not award punitive damages only in collective redress cases.[188] However, this thesis argues that this would lessen the potential of the collective redress mechanisms to contribute to better enforcement of consumer rights. The three-stage model proposed by the thesis should help to avoid the risks of abusive litigation by awarding more than full compensation only on a case by case basis.

A few remarks should be added regarding the fear of abusive litigation and the "European legal tradition" argument in this context. As Müller-Graff noted in the General Report prepared for the FIDE 2016 Congress, 'no national report names a successful collective action for damages in antitrust law, partially due to a lack of data'.[189] He adds

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187 Petrucci, 'Effective Private Enforcement' (n 3) 249 fn 59. See also Response of the Law Society of England and Wales to the White Paper (2008) 9: 'we believe it should be for Member States' legal systems, and possibly the [Court], to determine the availability of exemplary or punitive damages in accordance with their domestic rules'. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/lawsoc_en.pdf 9.

188 Petrucci, 'Effective Private Enforcement' (n 3) 249 fn 59.

189 Müller-Graff (n 102) 129.

that the reasons that the national reports give for this lack of collective damages claims in antitrust law – where such claims are admissible – are in part the same as the obstacles for individual damages claims, for example a lack of incentives to bring small claims.[190] Thus, '[m]ost Member States consider that introducing a competition-specific regime of collective actions would improve the situation of private enforcement'.[191] However, contrary to the Member States hopes, the Commission decided for a horizontal and non-binding approach.

As Müller-Graff rightly underlines, 'if indirect purchasers do not (successfully) bring their claims, this is unfortunate not only from their individual point of view and with a view to the objective of full compensation, but also with respect to the realisation of the public objective of avoiding the absence of liability of the infringer'.[192] As he claims,

> there is a general tension between the mechanism of individual claims for compensation and the objectives of the Directive that any person can successfully obtain full compensation and any absence of liability of the infringer is to be avoided'. Unless every single person that has been harmed by an antitrust infringement brings an individual claim – which is unlikely in mass harm situations –, these objectives can probably not be abided by at the same time using individual proceedings.[193]

In the Recommendation on Collective Redress, the Commission proposed the opt-in approach, although it initially contemplated introducing opt-out collective redress mechanism. An opt-out regime was rejected by the European Parliament and the

190 ibid 130.

191 ibid.

192 Müller-Graff (n 102) 182-183.

193 ibid.

stakeholders representing business based on the "European legal tradition" argument.[194] However, it must be stressed that a number of Member States have adopted opt-out collective redress systems, including Denmark, Portugal, Spain, the Netherlands, and Norway.[195] As these examples demonstrate, it is clearly possible to design an opt-out collective action model which is compatible with the legal systems of the Member States, and thus with the "European legal tradition".[196]

The rejection of the opt-out regime is a missed opportunity to maximize the effectiveness of the rules given that the automatic inclusion of a class of claimants would have increased the amount of compensation, thus exerting more pressure upon undertakings to comply with the competition law provisions.[197] Arguably, the absence of these rules means that the deterrent effect of the rules on collective redress in relation to infringements of the antitrust rules has not been optimized.[198]

4 Conclusion: Enforcement of Consumer Law – Consumers' Sword or Businesses' Shield?

Against this background, it seems plain that the involvement of the European Parliament and stakeholders reduced the output legitimacy of the ADD, and also of the Recommendation on Collective Redress. Petrucci has come to similar conclusions

194 Nazzini and Nikpay (n 176) 125. As Nazzini and Nipkay righty argued, this argument rests on a strong path-dependence assumption, essentially denying the possibility of any legal reform which is not an incremental change to the existing legal framework.

195 ibid 125.

196 ibid.

197 Petrucci, 'Effective Private Enforcement' (n 3) 251.

198 ibid.

regarding the collective redress mechanism's output legitimacy. However, he opines that this does not necessarily lead to lower output legitimacy, because also other factors need to be taken into consideration.[199] He argues that whilst

> the Commission may not have been able to pass collective redress rules consistent with a strong deterrent perspective, the democratic process in which these rules were debated has resulted in a greater consensus among the addressees of this policy. It is submitted that this is a precondition to ensuring that such rules will be properly applied, rendering them more effective.[200]

Petrucci based his conclusions on the premise that the new rules are aligned to the stakeholders' preferences. However, the pressing question is – which stakeholders? It seems that the consensus that he mentions refers to the consensus among the European Parliament and businesses. However, it should be borne in mind that both the ADD and the Recommendation on Collective Redress are consumer protection measures.

If the stakeholders that participated in the Commission's consultation on collective redress in 2009 are analysed, it can be seen that out of 100 replies, 62 came from industry and only 12 from consumers representatives. The fact that consumers are so underrepresented in the consultation process only adds to the necessity to protect them. As it can be concluded based on this statistic, consumer organizations are not particularly active in the legislative process. One would certainly expect more replies on a topic that is so important for consumers' access to justice and the overall level of compensatory justice.

Once business and consumers representatives are analysed separately, it can be seen that stakeholders that represented consumers did not object to damages with the deterrent

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199 ibid 255.

200 ibid.

effect. Rather, as is confirmed by the Commission's summary, business representatives expressed concerns regarding the punitive nature of damages in this context.[201] How industry representatives feared punitive damages is seen also through statements like: 'Other industry representatives and legal practitioners were in favour of including the "proportionality" principle in the general objective.' Moreover,

> several industry representatives and legal practitioners emphasised the need to introduce safeguards to prevent abusive claims. In response to this objective, some consumer representatives criticized the fact that businesses have overstated their fears of abuse of the collective redress mechanisms. According to various consumer representatives ensuring that only meritorious claims are pursued could be done in several ways as a "safety net" in the system, including selection criteria for representative bodies, rigorous management of cases by judges and giving standing to consumer representatives.[202]

Indeed, the three-stage model proposed by the thesis has a potential to act as such safety net, by giving discretion to judges to assess on a case by case basis whether the third stage of damages assessment should be triggered, which transforms a compensatory damages award into a non-compensatory one.[203]

Although according to some theories the European Parliament should add to the legitimacy and democratisation of the legislative process, sometimes the Court adopts a better approach that is more aligned with the principle of effective judicial protection and the principle of effectiveness of EU competition law that underpin the creation of the right

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201 Overview of the results of the Consultation on Consumer Collective Redress (n 185) 4.

202 ibid.

203 I Lianos, 'Effective Enforcement of Competition Law' in P Lowe, M Marquis and G Monti (eds), *European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law* (Hart Publishing 2016) 61. He claims: 'My view would then be that competition authorities and courts should have discretion to define the appropriate remedy in individual cases rather than being limited to specific predefined remedies.'

to damages for EU competition law infringements. The Court seems to be less prone to the lobbyist influence than the European Parliament. Moreover, the preliminary reference procedure can open space for deliberations in which consumer interests are actually heard. It is undisputed that through the legislative process, which often takes years before the final acts are adopted, priorities and policy objectives can change. This is true also for the ADD. However, it is never desirable for a measure aimed at enhancing consumer protection to become businesses' shield instead of consumers' sword.

VI CONCLUSION

Building on the examination of the rationale for damages in the three selected national jurisdictions and in EU law, this thesis sought to determine whether the prohibition of overcompensation in the Antitrust Damages Directive is compatible with the EU legal and normative framework. To this end, I have relied on two key premises. First, in accordance with the constitutional constraints imposed on EU law-making, the rationale for a civil liability regime should determine the legal basis and the content of a legislative or judicial measure governing that civil liability regime. Second, private enforcement centred around consumers plays an important role in closing the enforcement gap in EU competition law.

The analysis has been carried out on two levels. First, in Chapters II and III, I examined the main underpinning justification for the prohibition of overcompensation in the Antitrust Damages Directive, i.e. the "European legal tradition argument". Second, in Chapters IV and V, I addressed broader constitutional implications that underpin the debate on the desirability of the pursuit to prohibit overcompensation in the EU. These entail questions pertaining to the adoption of such measures and, thus, exploring whether the EU has the legitimacy to legislate and the related question of competence and the choice of the appropriate legal basis. In what follows, I will summarise the main findings of the thesis.

The examination of the rationale for damages in the first part of the thesis has shown that deterrence and overcompensation are not foreign to "European legal culture", at least not to the three selected jurisdictions and to EU law. All these jurisdictions recognize that in certain contexts something more than pure compensation is needed to deter wrongful

conduct, particularly in so-called lucrative fault cases which are especially pertinent to the competition law context.

Moreover, the examination of the rationale for damages in the EU – in competition law and also in some other fields of EU law – has shown that private damages actions in EU law have a strong regulatory character and the ensuing binary nature, which results in comprising both compensatory and deterrence rationales. This binary nature is buttressed by the principles of effectiveness of EU law and the principle of effective judicial protection which underpinned the creation of private damages actions for EU competition law infringements through the Court's case law. It is reflected also in a semantic, conceptual and theoretical confusion in EU law which was underlined by the thesis. This confusion points at the perplexed functions and rationales for damages in EU law.

These findings cast considerable doubt upon the persuasiveness of the "European legal tradition argument" underpinned by the public/private divide reasoning employed as a justification for the prohibition of overcompensation in the Antitrust Damages Directive. In fact, the thesis found that this prohibition of overcompensation itself could be inconsistent with the so-called European legal tradition, and thus incompatible with the EU legal framework. As developed by the Court and reiterated by several pieces of EU secondary legislation, remedies for EU law infringements must meet the requirements of the "triad of principles" – effectiveness, proportionality and dissuasiveness. Since this "triad of principles" mirrors requirements of the two principles that underpin the creation of the right to damages for EU competition law infringements, the thesis suggested that it should apply also to antitrust damages actions.

Consequently, the aim of achieving a sufficient level of deterrence with awarding damages for EU competition law infringements stems from the very conceptual basis in which the right to damages is grounded. Thus, the prohibition of overcompensation is inconsistent with the EU legal framework, as it jeopardises the deterrent or dissuasive function of antitrust damages actions.

The second part of the thesis explored whether the EU has legitimacy and competence – taking into account the binary nature of the antitrust damages actions – to prohibit overcompensation in the Antitrust Damages Directive. The prohibition of overcompensation appeared only in the final text of the Directive on the insistence of the European Parliament. This is paradoxical in light of the finding that the involvement of the European Parliament in the legislative process through the co-decision procedure was itself constitutionally questionable, based on additional Article 114 TFEU as a legal basis for the Directive. The thesis found that the justification for the use of the dual legal basis for the Antitrust Damages Directive was not convincing, since the Directive harmonises only certain aspects of the right to damages, and thus it does not eliminate disparities among national rules.

Generally, the enhanced involvement of the European Parliament in the legislative process is not problematic *per se*. Yet, taking into account the constitutional commitment to a high level of consumer protection in the EU, and considering that the Antitrust Damages Directive is a consumer protection measure which focusses on the facilitation of small claims, the European Parliament's involvement should lead to enhancement of consumer protection. In the light of the enforcement gap in EU competition law, it is argued that the Antitrust Damages Directive aims to enhance competition culture and

compensatory justice, and thus should design their measures in a way that provides incentives to consumers to actually bring claims before the court. Incentives to sue aim at increasing the number of potential claims, and thus contribute to the overall deterrent effect of the EU competition law enforcement. Instead, the "European legal tradition argument" was employed to justify unusual blanket prohibitions in favour of infringing businesses.

Therefore, the prohibition of overcompensation has significantly contributed to the business-biased gist of the Directive, and thus to breaking the link between the rationale for the right to damages for EU competition law infringements, the legal basis and the content of the Directive. Hence, the Directive is incompatible with the principles of conferral, subsidiarity and proportionality, and to a considerable extent inconsistent with the EU's normative framework. For this reason, the thesis concludes that the prohibition of overcompensation in the Antitrust Damages Directive is neither normatively desirable nor justifiable.

The Antitrust Damages Directive allegedly 'reaffirms' the Court's case law on the right to damages in EU competition law. However, some of its provisions – also the prohibition of overcompensation – are incompatible with the Court's interpretation of Articles 101 and 102 TFEU and are not aligned with the principles establishing the right to damages, the principle of effectiveness of EU law, the principle of effective judicial protection, and the related "triad of principles". To this end, the thesis addressed the question how to resolve the conflict between the Court's interpretation of the Treaty and the secondary legislation that unfaithfully codifies it. The thesis invited the Court to re-interpret the prohibition of overcompensation in light of its settled case law and in accordance with the three-stage model for the assessment of damages actions in EU

competition law developed by the analytical framework of the thesis. This model is better suited for closing the enforcement gap than the blanket ban in Article 3(3) of the Antitrust Damages Directive.

At the first stage, the rationale for creating the right to damages is examined. It can be either deterrence or compensation. Since the lines between these two rationales are not always clear-cut, but may be blurred, the thesis understands these considerations as opposite ends of the spectrum. At the second stage, the rationale for establishing liability in an actual case is examined. This entails the assessment of conditions of liability for EU law infringements, which are autonomous of national legal concepts (e.g. conferral of a right, damage, fault, sufficiently serious breach, causation). The third stage of assessment, the transformative stage, has a binary nature. It is implicitly engaged already at the second stage of assessment. If a compensatory remedy at the second stage does not serve objectives for the creation of the right to damages identified at the first level (i.e. deterrence), the third level of assessment is triggered and punitive damages are awarded. Thus, the third stage transforms the compensatory award into a non-compensatory one. This stage is triggered only occasionally (e.g. intentional lucrative faults).

This three-stage model empowers national judges to decide on a case by case basis whether in a certain situation overcompensation is required to achieve sufficient level of deterrence. In so doing, it is capable of accommodating all the principles underpinning antitrust damages actions, and also all the competing interests involved. It has a potential to prevent instances of abusive litigation, whilst there is sufficient discretion granted to national judges to maintain flexibility and responsiveness.

The EU does not have unlimited competence to legislate. The message that is conveyed through the examination of the prohibition of overcompensation in the Antitrust Damages Directive is that in law-making at EU level the link between the objectives of a measure and the content of that measure should be taken seriously – the proclaimed objectives should not serve as a pretext for some other legal policy goals. The findings of the thesis are not confined only to EU competition law. Other fields of EU law are also prone to danger that an objective that justifies a legislative programme – e.g. a high level of consumer protection – is employed as a pretext to enact legislation that generates rules with disparate objectives. This is already the case with the – so far non-binding – horizontal framework for collective redress.

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