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Semi-Final C: International Judicial Cooperation in Civil Matters

European Civil Procedure

**Paving the Way Towards a Harmonised Civil Procedure  
in Antitrust Damages Actions**



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## 1. Introduction

In order to regulate civil law enforcement of claims arising under EU and domestic competition rules<sup>1</sup>, the EU adopted *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions<sup>2</sup> of the Member States and of the European Union<sup>3</sup>* (hereinafter referred to as Directive), which is a sector-specific legal act on civil procedure.<sup>4</sup> This piece of EU legislation recognizes the importance of supporting private enforcement actions for damages based on infringements of antitrust rules. To ensure the maximum effectiveness of competition rules, there is a need for interaction between effective private enforcement actions under civil law and effective public enforcement by competition authorities. The adoption of the Directive was not unexpected: the European Commission (hereinafter referred to as Commission) issued a Green Paper in 2005 entitled “Damages actions for breach of the EC antitrust rules”<sup>5</sup> and to address the issues raised in the wake of the document it published its White Paper<sup>6</sup> in 2008 that put forward a set of specific legislative tools.

The main trigger of the adoption of the Directive was the case law of the EU courts, especially the Pfleiderer judgment<sup>7</sup> after which Joaquin Almunia<sup>8</sup> said that the situation caused by this judgment (particularly the protection of leniency programme) requires the EU to take steps.<sup>9</sup> The outcome of the Pfleiderer-case made it clear that there was a need for an overall legislative alignment concerning the procedural rules of antitrust actions for damages.

According to Almunia, the Directive is “the most important legal initiative” in his term, while Margrethe Vestager<sup>10</sup> said that the adoption of the Directive would make “it easier for European citizens and companies to receive effective compensation for harm caused by antitrust violations.”<sup>11</sup> The merit of the Directive is that it specifies procedural rules to be applied effectively when compensating for damages suffered as a result of

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<sup>1</sup> [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/559499/EPRS\\_IDA%282015%29559499\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/559499/EPRS_IDA%282015%29559499_EN.pdf) 21.

<sup>2</sup> The notion of „infringements of competition law provisions” hereinafter means only behaviours prohibited by TFEU 101 and 102.

<sup>3</sup> OJ L 349., 05.12.2014, p. 1

<sup>4</sup> Ibid. 1.

<sup>5</sup> COM(2005)672 final, Green Paper - on Damages actions for breach of the EC antitrust rules

<sup>6</sup> COM(2008) 165 final, White Paper - on Damages actions for breach of the EC antitrust rules

<sup>7</sup> C-360/09 Pfleiderer AG v Bundeskartellamt, ECLI:EU:C:2011:389

<sup>8</sup> European Commissioner for Competition at the time (2009-2014)

<sup>9</sup> Miks, A., Az engedékenységi iratok kezelésével kapcsolatos legújabb fejlemények, Versenytükök, 2012/1. 8.

<sup>10</sup> current European Commissioner for Competition(2014-)

<sup>11</sup> De Sousa e Alvim., M., The new EU directive on antitrust damages – a giant step forward? = European Competition Law Review (A4/15.444), 6/2015. 248.

antitrust practices, and by doing so, the Directive enhances legal certainty and attempts to gap the bridge between the various Member States. This paper addresses issues that the authors consider to be the major civil procedural elements of the Directive, including the binding effect of decisions of national competition authorities, quantifying the harm, disclosure of evidence and the problem of class actions.

## **2. Provisions of the Directive facilitate the enforcement of injured parties' rights**

The Directive offers two options in case of damages suffered as a result of infringements of competition law. One can either choose alternative dispute resolution (ADR<sup>12</sup>) such as out-of-court settlements (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation,<sup>13</sup> or opt for the traditional litigation. It is important to note that there are two types of antitrust damages actions. Follow-on actions are brought following a decision of a competition authority, while stand-alone actions are not preceded by such a decision, therefore infringements of competition law must be proved during the civil procedure.

It should be examined who is entitled to bring a case. According to the Directive, the locus standi is based on the suffered harm by infringement of EU antitrust law. It is not necessary to be direct purchaser as in that case companies would refer to the pass-on effect, and a significant quantity of real injured parties would remain undiscovered. In the USA for example the indirect purchasers are not entitled to bring a case to the court in such cases, because they could negate the method of private enforcement, it would be less effective.<sup>14</sup> Despite this, in the EU law, this kind of restriction is not affordable, since this is not in compliance with its general standards.<sup>15</sup> Art. 12 (1) of the Directive addresses the case where the infringer causes harm not only to its direct purchasers but to the indirect purchasers too by through the practice where direct purchasers pass on price increases down the supply chain.<sup>16</sup> This means that any indirect purchaser to whom actual loss has thus been passed on has suffered harm caused by an infringer, therefore, such harm should be compensated for by the

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<sup>12</sup> Art. 2(21) of the Directive

<sup>13</sup> Art. 18-19. of the Directive

<sup>14</sup> Illinois Brick Co. v Illinois, 431 US 720 (1977)

<sup>15</sup> Horváth, A., Versenyjogi kártérítési igények egyes kérdéseiről, kitekintéssel az iratokhoz való hozzáférésre, doktori értekezés, Budapest, 2015.

[https://edit.elte.hu/xmlui/bitstream/handle/10831/32777/DI\\_Tezisek\\_HorvathAndras\\_EDIT.pdf?sequence=2&isAllowed=y](https://edit.elte.hu/xmlui/bitstream/handle/10831/32777/DI_Tezisek_HorvathAndras_EDIT.pdf?sequence=2&isAllowed=y) Accessed April 18 2018. 17.

<sup>16</sup> Kopácsi, I., A magánjogi és közjogi jogérvényesítés viszonya, Versenytükr, 2017/2. 45.

infringer.<sup>17</sup> Thus, this rule provides a clear situation and an effective way of litigation for the indirect purchasers since they have the capacity to bring a case.<sup>18</sup>

## **2.1. Binding effect of decisions of national competition authorities**

In order to ensure a common approach across the Union, the Directive provides that the finding of an infringement of Art. 101 or 102 TFEU in a final decision by a national competition authority (hereinafter referred to as NCA) or a review court should not be relitigated in subsequent actions for damages.<sup>19</sup> This means that the decision's finding on the nature of the infringement and its material, personal, temporal and territorial scope should not be questioned in the actions for damages. The Directive clearly facilitates the effective exercise of the injured parties' rights, enhances legal certainty to avoid inconsistency in the application of the TFEU as well as unnecessary financial and administrative burdens.<sup>20</sup> Therefore, this level of EU coordination not only can prevent competition law infringement,<sup>21</sup> but it can also avoid the divergence of applicable rules, which could jeopardise the proper functioning of the internal market.<sup>22</sup> Despite the fact that binding effect has already been ensured in the EU – the decisions of the Commission were already binding for the national courts on the basis of Art. (16) of Regulation (EC) No 1/2003 and the national laws already attached binding effect to the decisions of their own NCAs – the Directive is a significant improvement as it held the binding effect on other national courts.<sup>23</sup> In this context, the Member States' practice was fragmented, there were a number of countries ensured this kind of binding effect, meanwhile other countries regarded the decisions as an element that judges could take into account.<sup>24</sup>

The Directive provides that where an action for damages is brought in a Member State other than the Member State of a NCA or a review court that found the infringement of Art. 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the NCA or the review court to a national court as at least *prima facie*

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<sup>17</sup> Kopácsi *supra* note 15. at 45.

<sup>18</sup> Szabó P., A versenyjog megsértésén alapuló kártérítési igények magánjogi érvényesítésének néhány időszerű kérdése, *Versenytükör*, 2015/2. 56.

<sup>19</sup> Recital (34) of the Directive

<sup>20</sup> Recital (34) of the Directive

<sup>21</sup> *Ibid.*

<sup>22</sup> Recital (6) of the Directive

<sup>23</sup> Hegymegi-Barakonyi Z. - Horányi M.: A Bizottság versenyjogi jogsértéseken alapuló kártérítési perekre vonatkozó irányelvtervezete, *Versenytükör*, 2013/2. 11.

<sup>24</sup> For a complete review of the previous practice of the Member States, see Franck, Kroes, Negri, Prieto, Wagner-von Papp, Binding effect of decisions of national authorities, *Concurrences*, 2017/3. 37-46.

evidence of the fact that an infringement of competition law has occurred.<sup>25</sup> It states that Member States should ensure the enforcement of the competition rules in damages actions before national courts.<sup>26</sup>

When a Member State complies with this obligation laid down in the Directive, the expensive and demanding evidentiary procedure becomes more efficient and also easier.<sup>27</sup> This procedural requirement serves the *reparation aim* from the main purposes of the law of tort, but with the support of the public law enforcement's *prevention aim*, because the action for damages follows the competition authority's proceedings.<sup>28</sup> The maximum effectiveness of the private enforcement actions and public enforcement can only be ensured this way, it is necessary to regulate the coordination of these two forms of enforcement in a coherent manner.<sup>29</sup>

In cross-border cases private law enforcement is in a better position contrary to public law enforcement because seeking legal redress for damage resulting from alleged infringements of EU competition law comes within the notion of 'civil and commercial matters' within the meaning of that provision and, therefore, falls within the scope of the Brussels Ia Regulation.<sup>30</sup> This means that the judgment of a Member State must be recognised in the other Member States. In contrast, an action which has its origin in the repayment of a fine imposed in competition law proceedings does not fall within 'civil and commercial matters' within the meaning of the Regulation.<sup>31</sup>

## 2.2. Presumptions established by the Directive

As mentioned above, the infringers can cause harm not only to their direct purchasers, but to the indirect purchasers too. In order to avoid overcompensation, the Directive provides that the passed-on overcharge should not be seen as a harm refundable for the party to whom it has been passed to, thus Member States shall ensure that the defendant in an action for antitrust damages can invoke this fact of passings-on as a defence against a claim for

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<sup>25</sup> Tóth, A., *Versenyszabályozás jogági kapcsolatai*, Budapest, HVG, 2016. 197. and Recital (35)

<sup>26</sup> Art 1(2) and Art. 9. of the Directive

<sup>27</sup> Kopácsi supra note 15. at 44.

<sup>28</sup> Zavodnyik, J., *Egyensúlyemelés, A versenyszabályozás kártérítési irányelv átültetésének egyes kérdései*, Versenytükör, 2016/Különszám, 63.

<sup>29</sup> Recital (6) of the Directive

<sup>30</sup> Art. 1(1) of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) and Case C-302/13., *flyLAL-Lithuanian Airlines AS v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*. EU:C:2014:2319.

<sup>31</sup> Tóth, supra note 24. at 207., and C-102/15., *Gazdasági Versenyhivatal v Siemens Aktiengesellschaft Österreich*, EU:C:2016:607.

damages.<sup>32</sup> In this case the burden of proof regarding the passing-on of the overcharge shall be on the defendant.<sup>33</sup> The national court should consider the fact that in situations where the passing-on resulted in reduced sales and thus caused harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.<sup>34</sup> In order to avoid procedural problems, the Directive provides that the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.<sup>35</sup> Due to the fact that it may be particularly difficult for purchasers to prove the extent of the harm, based on the rule of effective enforcement, it is appropriate to provide the following rebuttable presumption: when the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show prima facie that such passing-on has occurred.<sup>36</sup> However, in case the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser, this presumption will not apply.<sup>37</sup>

The Directive also specifies that in the event of the presumption of a passing-on, national courts shall have the power to estimate to what extent and in what proportion the overcharge was passed on to indirect purchasers,<sup>38</sup> and in what proportion these extra charges were borne by direct and indirect purchasers.<sup>39</sup> The Commission issued a study on 25 October 2016 that focuses on calculating the passing-on of overcharges, and provides a 39-item list that national courts can use to be able to do their estimation.<sup>40</sup> This study serves as a

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<sup>32</sup> Recital (39) of the Directive

<sup>33</sup> Ibid.

<sup>34</sup> Recital (40) of the Directive

<sup>35</sup> Art. 14 (2) of the Directive

<sup>36</sup> Ibid.

<sup>37</sup> Recital (41) of the Directive

<sup>38</sup> Ibid.

<sup>39</sup> Recital (44) of the Directive

<sup>40</sup> European Commission, Study on the Passing-on of Overcharges. <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf> Accessed April 16 2018.

guideline for national judges when they assess the extent of the damages of the litigating parties, and when they are required to weigh up expert opinions.<sup>41</sup>

National courts will also need to consider other damages actions submitted by various claimants at different levels of the supply chain and the subsequent judgments in all these cases that are clearly relevant for the same competition infringement.<sup>42</sup> This also means that if a national court at any other Member State deals with such actions for damages, these cases should be viewed as related pursuant to Article 30 of the Brussels Ia Regulation<sup>43</sup>, therefore the national court, who deals with its own action at a later date, may suspend its proceedings or may even decline jurisdiction.<sup>44</sup>

Considering the difficulty of claimants' burden of proof, as well as the clandestine nature of cartels that seem to reinforce an information asymmetry, the Directive introduced another rebuttable presumption with a view to enhancing the efficiency of antitrust damages actions.<sup>45</sup> It stipulates that in the event of competition infringement committed in the form of cartels, it shall be presumed that such infringements cause harm.<sup>46</sup> This might mean that cartels may result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred had the cartel not been established.<sup>47</sup> This presumption is based on a study prepared for the Commission, which claims that 93% of cartels generate some sort of unnecessary cost increase.<sup>48</sup>

### 2.3. Quantifying harm

The injured party will have to prove not only the fact the harm has been inflicted and the causal connection but also the extent of the harm. In order to prove this he might have to consider a large number of circumstantial evidence and apply different economic models which may prove costly and tedious to some of the claimants. In the absence of specific rules on the measurement of damages under EU law and to enhance the efficiency of compensation of damages the Directive stipulates that it is the national courts task to quantify the extent of

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<sup>41</sup> Horváth M. András: Versenyjogi kárszámítási útikalauz bíróknak.

[http://tulnagya-verseny.blog.hu/2017/03/08/versenyjogi\\_karszamitasi\\_utikalauz\\_biroknak](http://tulnagya-verseny.blog.hu/2017/03/08/versenyjogi_karszamitasi_utikalauz_biroknak)

Accessed April 23 2018.

<sup>42</sup> Art. 15. of the Directive

<sup>43</sup> supra note 30

<sup>44</sup> Recital (44) of the Directive

<sup>45</sup> Recital (47) of the Directive

<sup>46</sup> Recital (47) and Art. 17(2) of the Directive

<sup>47</sup> Recital (47) of the Directive

<sup>48</sup> Szabó, supra note 17. at 56.

the damage caused.<sup>49</sup> When assessing the harm caused they may have to apply two principles: those of equivalence and effectiveness. The former guarantees that the national legislation applied in these European cases is not less favourable than the legislation applied in relation to national cases, while the latter ensures that national courts should not render the exercise of EU law impossible or excessively difficult.<sup>50</sup>

Both the judgment passed in the Manfredi case and the Directive lay down what type of damages may be compensated: actual damages (*damnum emergens*), loss of profit (*lucrum cessans*) and costs/interests.<sup>51</sup> The actual economic loss is the difference between the sums actually paid and the sum payable in case of non-infringement.<sup>52</sup> In light of the fact that the quantification of the damages relies on a hypothetical situation (how the market would have looked like in the case of non-infringement), the Directive allows scope for national courts to estimate the damages themselves.<sup>53</sup> When it comes to the actual application of this rule judges may run into serious difficulties.<sup>54</sup> To resolve such problems the Directive offers an alternative solution, whereby national courts may request national competition authorities to determine the extent (the actual sum) of the damages<sup>55</sup> but judges are also permitted to involve experts such as auditors or economists.<sup>56</sup> The Commission has also published a communication<sup>57</sup> to serve as a guideline for quantifying damages (supplemented with a practical guide).<sup>58</sup> The aim of this document was to offer specific economic guidelines for national courts and all litigating parties involved and to assist them in calculating damages resulting from infringement of competition.<sup>59</sup> This guideline also offers some assistance in quantifying the costs of the passings-on of overcharges.

In Hungary there is a rebuttable legal presumption available to estimate the extent of the damages which stipulates that in case of cartel infringement one must presume – in the absence of proof to the contrary – that the infringement influenced the price generally applied

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<sup>49</sup> Recital (46) of the Directive

<sup>50</sup> Recital (46) of the Directive

<sup>51</sup> Recital (12) of the Directive

<sup>52</sup> Recital (39) of the Directive

<sup>53</sup> Recital (46) of the Directive

<sup>54</sup> Szabó, *supra* note 46. at 56.

<sup>55</sup> Art. 17 (3) of the Directive

<sup>56</sup> Horváth, *supra* note 14. at 12.

<sup>57</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:HU:PDF> Accessed April 20 2018.

<sup>58</sup> European Commission: Commission staff working document. Practical Guide. Quantifying harm in actions for damages based on breaches of article 101 or 102 of the treaty on the functioning of the European Union [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_guide\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf) Accessed April 20 2018.

<sup>59</sup> *Ibid.* 9.

by the company to the extent of 10%.<sup>60</sup> This rule is very strict but the impact of infringement refers to the price only and disregards any other facts that may influence the sum of the damages.<sup>61</sup>

### 3. The disclosure of evidence

#### 3.1. Importance of rules on disclosure of evidence

According to the general view, disclosure of evidence was one of the most debated topics<sup>62</sup> during the legislative procedure leading to the adoption of the Directive.<sup>63</sup> Until its enactment private claimants - victims of infringements - in the EU relied on Regulation 1/2003 or the Transparency Regulation<sup>64</sup> in order to access the files of the Commission, both with limited success.<sup>65</sup> Regarding NCAs, private litigants had to rely on various national procedural rules on the disclosure of evidence, which differ greatly among Member States.<sup>66</sup>

To understand the origin of disclosure of evidence it is worth noting that discovery rules have been an integral part of civil justice for a long time in the common law procedural model. In this ‘cards face up on the table’ approach parties should, as early as possible, place advance notice of all relevant documents - not just the documents supporting them but also those which affect them adversely and even the ones which support the case of their opponent. But why should someone help the opponent to defeat them? The answer is that litigation is designed to do real justice and courts need all the relevant information to achieve this end.<sup>67</sup> However, jurisdictions following continental law traditions usually have a completely different approach. As Galič stresses, these countries’ civil procedures tended to apply the principle of “no one is obliged to help his adversary” (*nemo tenetur edere contra se*) or put weapons in the hand of its opponent to win the case.<sup>68</sup> These differences in Member

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<sup>60</sup> Art. 88/G.(6) of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices

<sup>61</sup> Hegymegi-Barakonyi *supra* note 22. at 17.

<sup>62</sup> De Sousa e Alvim, *supra* note 10. at 246.

<sup>63</sup> The Directive is not the first EU law instrument to deal with the EU-wide litigation disclosure mechanism. Directive 2004/48/EC on the enforcement of intellectual property rights also contains extended disclosure obligations. See for more: Aleš Galič: Disclosure of Documents in Private Antitrust Enforcement Litigation. In: Yearbook of Antitrust and Regulatory Studies, Vol.2015 8 (12). 103.

<sup>64</sup> Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 , 31.5.2001., p. 43

<sup>65</sup> For a review of access under Regulation 1/2003 or the Transparency Regulation see: Vlatka Butorac Malnar: Access to Documents in Antitrust Litigation – EU and Croatian Perspective. In: Yearbook of Antitrust and Regulatory Studies vol. 2015, 8(12), 137-142.

<sup>66</sup> *Ibid.* 142.

<sup>67</sup> Galič, *supra* note 61. at 101.

<sup>68</sup> *Ibid.* 102.

States' civil procedures are conducive to forum shopping which is an anathema of the principles underpinning the single market.<sup>69</sup>

Difficulties of proving by claimants emerge in several aspects. Relevant information is usually kept secret by the opposing party or by third parties and is not sufficiently known by or accessible to the claimant.<sup>70</sup> Therefore, there is an information asymmetry between claimants and defendants. To establish 'damage' claimants have to build a counterfactual scenario (comparing the anti-competitive situation to a situation which would have existed in the absence of infringement of competition law) which requires evidence such as notes on overcharges, infringers' internal documents on analysis of market conditions, etc. The same problem applies to proving causation when, for example, claimants try to identify the elements of an infringer's anticompetitive behaviour, which caused the damage, or the extent to which several infringers had individually contributed to the damages caused.<sup>71</sup> Even competition authorities often put a lot of time and effort into having a successful public enforcement case.<sup>72</sup> Thus, access to information is crucial for the effectiveness of private antitrust enforcement litigation.

### **3.2. The rules on disclosure of evidence in the Directive**

As the Commission's White Paper lays down, much of the key evidence necessary for proving a case for antitrust damages is often concealed and, being held by the defendant or by third parties, is usually not known in sufficient detail to the claimant. Hence, beside victims' access to relevant evidence, it was also important to avoid the negative effects of overly broad and burdensome disclosure obligations, including the risk of abuse.<sup>73</sup> Therefore, balancing the rights of claimants and defendants demanded due foresight. That is why the Commission imposed reasonable limits on the disclosure of evidence.

The Directive belongs to the minimum harmonisation instruments. It sets a threshold to national legislation when stating that the Directive does not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.<sup>74</sup>

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<sup>69</sup> Butorac Malnar supra note 63. at 142.

<sup>70</sup> Recital 14 of the Directive

<sup>71</sup> Gulińska A., Collecting Evidence Through Access to Competition Authorities' Files – Interplay or Potential Conflicts between Private and Public Enforcement Proceedings? (December 31, 2015). Yearbook of Antitrust and Regulatory Studies vol. 2015, 8(12), 163.

<sup>72</sup> Ibid.

<sup>73</sup> COM (2008) 165 final, White Paper on Damages actions for breach of the EC antitrust rules, 5.

<sup>74</sup> Art. 5 (8) of the Directive

The Directive rejects full-scale US-style discovery, but it also rejects the strict continental civil law requirement, which states that a request for disclosure must precisely identify and describe the document sought, and that all material facts relevant to the case must be asserted prior to the disclosure order. The Directive hence adopts a ‘mid-way’ solution.<sup>75</sup>

According to the Directive, Member States shall ensure that in proceedings relating to an action for damages, upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts are able to order the defendant or a third party to disclose relevant evidence which lies in their control.<sup>76</sup> This rule is particularly useful in the point of stand-alone actions which are, however, extremely rare<sup>77</sup> because proving by claimants in this kind of actions in absence of materials of the investigation of a competition authority is almost impossible. National judges’ obligation to order defendants and third parties to disclose relevant evidence can make stand-alone cases a real chance of effective remedy, especially because victims of infringement of EU competition law do not have a right to initiate the investigation of the Commission or an NCA.<sup>78</sup> In order to ensure the principle of equality of arms,<sup>79</sup> access to evidence is not only important for the claimants but for defendants as well, namely, when the burden of proof is on the defendant. Thus, national judges must be able, upon request of the defendant, to order even the claimant or a third party to disclose relevant evidence.<sup>80</sup>

### 3.3. Proportionality of disclosure

Non-specific or overly broad searches for information not relevant during the proceedings should be avoided. It is an important duty of parties to specify the items of evidence or the categories of evidence as precisely and narrowly as possible in order to avoid ‘fishing expeditions’ - non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings.<sup>81</sup> National courts should only disclose

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<sup>75</sup> Galič supra note 61. at 105.

<sup>76</sup> Art. 5(1) of the Directive

<sup>77</sup> Thiede T., Fine to follow-on? Private anti-trust actions in European law, *China-EU Law J* (2017), 236. <https://link.springer.com/content/pdf/10.1007%2Fs12689-016-0074-7.pdf> Accessed April 20 2018.

<sup>78</sup> Hegymegi-Barakonyi Z. - Horányi M., *Közjogi kontra magánjogi jogérvényesítés* In: Boytha Györgyné: *Versenyjogi jogsértések esetén érvényesíthető magánjogi igények*, HVG-ORAC, Budapest, 2008. 184.

<sup>79</sup> Galič supra note 61. at 99.

<sup>80</sup> Hegymegi-Barakonyi - Horányi supra note 22 at. 7.

<sup>81</sup> Recital 23 of the Directive

evidence on the basis of reasonably available facts in the reasoned justification.<sup>82</sup> National judges have a significant role in insuring the proportionality of disclosure, and, in order to fulfil this objective, they have wide discretion in deciding on the proportionality of disclosure. They must consider the legitimate interests of all parties and third parties concerned, so the principle of civil law jurisdictions ‘nemo contra se edere tenetur’ is completely rejected. The Directive specifies this obligation when it stipulates that courts shall, in particular, consider:

- (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;
- (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.<sup>83</sup>

National courts should protect confidential information appropriately. However, this protection is not absolute. Courts should order the disclosure of evidence containing confidential information where they consider it relevant but they must take effective measures to protect them.<sup>84</sup> They can fulfil this obligation by redacting sensitive passages in documents, restricting the persons allowed to see the evidence or instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.<sup>85</sup>

Contrary to confidential information, the Directive provides absolute protection for legal privilege when it states that national courts should give full effect to applicable legal professional privilege when ordering the disclosure of evidence,<sup>86</sup> which means that neither any communication between lawyer and party nor documents prepared in connection with this communication can be disclosed under any conditions. The right to be heard is another important safeguard of the Directive. Since the court deciding on the disclosure request must carefully weigh the interests of the parties involved and because a disclosure order can significantly affect legitimate interests of the person from whom disclosure is sought, Art. 5

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<sup>82</sup> Art. 5 (2) of the Directive

<sup>83</sup> Art. 5 (3) of the Directive

<sup>84</sup> Art. 5 (4) of the Directive

<sup>85</sup> Recital 18 of the Directive

<sup>86</sup> Art. 5 (6) of the Directive

(7) offers the opportunity to be heard before deciding about disclosure.<sup>87</sup> In order to avoid trading of evidence disclosure is limited to the person that was originally granted access and also to its legal successors.<sup>88</sup>

### **3.4. Limits of disclosure aiming at insuring effective public enforcement**

According to the case law of the Court of Justice of the European Union (hereinafter referred to as CJEU), especially its judgments in *Pfleiderer*<sup>89</sup> and *Donau Chemie*<sup>90</sup> cases, disclosure of evidence in antitrust damages actions is burdened by the collision of interests of public and private enforcement of competition law. The Directive highlights that undertakings might be deterred from cooperating with the competition authorities under leniency programmes and settlement procedures if self-incriminating statements, such as leniency statements<sup>91</sup> and settlement submissions,<sup>92</sup> were to be disclosed. The General Court of EU (hereinafter referred to as GCEU) stated in its *Timab* judgment<sup>93</sup> that the purpose of the leniency policy is to reveal the existence of cartels and to facilitate the Commission's work in that regard, while the purpose of the settlement policy is to serve the effectiveness of the procedure in dealing with cartels<sup>94</sup> by simplifying the procedure. Such disclosure would pose a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the competition authorities.<sup>95</sup>

In their Resolution,<sup>96</sup> the Heads of the European NCAs emphasized - as an answer to the *Pfleiderer* judgment - the importance of protection of leniency material which is fundamental for the effectiveness of anti-cartel enforcement. They recognised the importance of civil damages actions as well but only as a complementary tool of public enforcement instruments.<sup>97</sup> This paper, however, cannot support this opinion. On the one hand, the *Courage v Crehan* judgment stated that any individual can rely directly on a breach of Art. 85

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<sup>87</sup> Galič supra note 61. at 106.

<sup>88</sup> Recital 32 of the Directive

<sup>89</sup> C-360/09 *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389 (hereinafter referred to as *Pfleiderer* judgment)

<sup>90</sup> C-536/11 *Bundeswettbewerbshbehörde v Donau Chemie AG*, ECLI:EU:C:2013:366 (hereinafter referred to as *Donau Chemie* judgment)

<sup>91</sup> For the definition see: Art. 2(16) of the Directive

<sup>92</sup> For the definition see: Art. 2(18) of the Directive

<sup>93</sup> T-456/10 *Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission*, ECLI:EU:T:2015:296

<sup>94</sup> *Ibid.* 65.

<sup>95</sup> Recital 26 of the Directive

<sup>96</sup> Resolution of Meeting of Heads of the European Competition Authorities of 23 May 2012, [http://ec.europa.eu/competition/ecn/leniency\\_material\\_protection\\_en.pdf](http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf) Accessed April 26 2018.

<sup>97</sup> *Ibid.* 1.

(1) of the EC Treaty (now it is Art. 101 TFEU) before a national court. The Pfleiderer judgment confirmed that interests of public enforcement do not prevent the interests of victims of cartels. Therefore, especially after the adoption of the Directive [Art. 3(1)], civil damages actions shall have an equal status with public instruments in enforcing EU competition law.

On the other hand, it is true that most of the antitrust damages claims are follow-on actions. Thus, if the protection of leniency materials is not ensured and members of cartels do not participate in leniency programmes, the victims of cartels are unlikely to learn about them and would be deprived of exercising their right to an effective remedy.<sup>98</sup> It may be paradoxical but it is the interest of claimants to protect leniency materials from them.

Art. 6 divides documents into categories which are subject to different disclosure conditions. Wright refers to these categories as a black, grey and white list.<sup>99</sup> The Directive provides for absolute protection of leniency statements and settlement submissions (black list). National courts can order a party or a third party to disclose these kinds of documents under no circumstances,<sup>100</sup> furthermore, not only actual statements are protected, but also any quotes from them that are included in other documents.<sup>101</sup> This is a rule of maximum harmonisation that Member States are not allowed to deviate from.<sup>102</sup> Furthermore, this protection is not just a guarantee of non-disclosure of these kinds of documents by the court, but - to ensure the full effect of the limits - these materials are also inadmissible in actions for damages.<sup>103</sup>

This approach does not follow the case law of the CJEU. Both the Pfleiderer<sup>104</sup> and the Donau Chemie<sup>105</sup> judgments underlined the need for judicial discretion regarding the disclosure of every kind of evidence. Nevertheless, these judgments were reached in the absence of EU rules governing the matter, as the Donau Chemie judgment noted.<sup>106</sup> The latter can be regarded as a call to the legislator to adopt legislation concerning the issue. It is,

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<sup>98</sup> Ibid. 2.

<sup>99</sup> Kathryn Wright: The Ambit of Judicial Competence After the EU Antitrust Damages Directive. 2016, Legal Issues of Economic Integration. 14-15

<sup>100</sup> Art. 6 (6) of the Directive

<sup>101</sup> Gulińska supra note 69. at 172.

<sup>102</sup> Butorac Malnar supra note 63. at 145.

<sup>103</sup> Art. 7 (1) of the Directive

<sup>104</sup> CJEU ruled that EU law does not preclude a damages claimant from access to leniency documents, and made a case-by-case based test for national courts taking into account all the relevant factors in the case. Pfleiderer judgment 31.

<sup>105</sup> CJEU confirmed its Pfleiderer principle and ruled that national law's blanket ban on access to documents in competition proceedings was not compatible with EU law. Timab judgment 46.

<sup>106</sup> Donau Chemie judgment 25.

however quite obvious that this limit of the Directive significantly decreases national judges' scope of discretion.

According to Gulińska, EU legislation followed the strictest possible approach meant to maximise the protection of public enforcement.<sup>107</sup> On the contrary, Hegymegi-Barakonyi and Horányi are of the opinion that the level of the Directive's limit is not enough for the maintenance of successful leniency programmes. The protection only covers leniency statements and settlement submissions but the so-called contemporary documents are out of its range. These are pre-existing documents submitted by a leniency applicant in the course of a leniency procedure. The lack of protection of contemporary documents can prevent leniency applicants from submitting such documents.<sup>108</sup>

The Directive ensures temporary protection for some categories of evidence which could only be disclosed after a competition authority has closed its proceedings (grey list).<sup>109</sup> This rule strengthens the effect of this limit by stating that these categories of evidence are inadmissible in actions for damages and are otherwise protected.<sup>110</sup> Granting limitless access to these kinds of evidence would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of Union or national competition law<sup>111</sup> and this could make even the claimants' chances worse in a follow-on damages action. This kinds of evidence, however, can easily be deemed unnecessary because an infringements decision usually contains all relevant information about the violation.<sup>112</sup>

Documents prepared 'for' or 'in the course' of a competition authority's proceedings are not the same as those documents that exist independently of these proceedings.<sup>113</sup> This is the so-called pre-existing information which is fully disclosable and can be regarded as a compensation for the absolute ban of the black list.<sup>114</sup> The Commission is of the opinion that evidence needed by claimants will typically be contained in pre-existing information.<sup>115</sup> Butorac Malnar has doubts about the usability of such information. Firstly, claimants will have difficulties in exactly pinpointing these documents because asking for disclosure of 'pre-existing documents' would be considered too broad and regarded as fishing expedition

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<sup>107</sup> Gulińska supra note 69. at 171.

<sup>108</sup> Hegymegi-Barakonyi - Horányi supra note 22. at. 8.

<sup>109</sup> See for the categories: Art. 6(5) of the Directive

<sup>110</sup> Art. 7(2) of the Directive

<sup>111</sup> Recital 25 of the Directive

<sup>112</sup> Gulińska supra note 69. at, 173.

<sup>113</sup> Galič, A., supra not 61. at 109.

<sup>114</sup> Butorac Malnar, supra note 63. at 146.

<sup>115</sup> European Commission MEMO: Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions, Brussels, 17 April 2014  
[http://europa.eu/rapid/press-release MEMO-14-310\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-310_en.htm) Accessed April 14 2018.

and the judge would reject the request. Secondly, such documents are also encrypted and useless, unless placed in an overall context. This context is usually provided in leniency statements, in which defendants explained it, so these statements are sometimes necessary for proving the causality link between damage and violation. Thirdly, leniency programmes and settlement procedures were introduced because it was very difficult - even for competition authorities - to prove cartels. Private claimants will have the same difficulties, unless they know exactly what to look for in pre-existing documents.<sup>116</sup>

All other documents in the file of a competition authority are free to disclose (white list).<sup>117</sup>

It is important to emphasize that evidence is to be obtained from a competition authority only when it cannot reasonably be obtained from another party or a third party, thus, the party should first demonstrate that it is reasonably unable to obtain documents from other sources.<sup>118</sup>

### **3.5. Sanctions of infringement of disclosure rules**

For the sake of efficient functioning of disclosure rules, Member States must ensure that national courts are able to impose effective, proportionate and dissuasive penalties on parties, third parties and their legal representatives.<sup>119</sup> Judges can impose fines and order payment of costs but there is a risk that the addressee finds it more profitable to pay and refuse to disclose.<sup>120</sup> Therefore, a more relevant sanction could be drawing adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part.<sup>121</sup>

## **4. Class actions**

### **4.1. What is collective redress?**

Although the Directive lays down that it is not reasonable to require Member States to introduce collective redress mechanisms for the enforcement of the Art. 101 and 102 of the

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<sup>116</sup> Butorac Malnar supra note 63. at 147.

<sup>117</sup> Art. 6(9) of the Directive

<sup>118</sup> Butorac Malnar supra note 63. at 144.

<sup>119</sup> Art. 8(1) of the Directive

<sup>120</sup> Bien, Florian and Negri, Marcella and Idot, Laurence and Petrasincu, Alex and Kroes, Frank and Franck, Jens-Uwe and Osti, Cristoforo and Prieto, Catherine and Wagner-von Papp, Florian and Remien, Oliver and Bernhard, Jochen and Paul, Thomas, Implementation of the EU Damages Directive into Member State Law (September 12, 2017). Concurrences N°3-2017, Conference, 20.

<sup>121</sup> Art. 8(2) of the Directive

TFEU,<sup>122</sup> in 2013, the Commission adopted a Recommendation<sup>123</sup> on common principles for injunctive and compensatory collective redress mechanisms concerning violations of rights granted under Union law (hereinafter referred to as “Recommendation”). First of all, collective redress helps the purchasers to enforce their demand for compensation. Exactly because of this it would be reasonable if the Directive regulated this legal solution.

The mechanisms of collective redress can be divided into two groups according to the aim of the legal institution. This aim can be an injunction about the termination of the infringement or to acquire compensation for the harm caused by the infringement.

We can distinguish the groups by the policy of their organisation too. Some of them are based on the participation of the members of the group (opt-in system) and others are independent from the members’ participation (opt-out system).<sup>124</sup> The essence of the opt-in system is that , one must explicitly contribute to the lawsuit and empower the social organization or representative parties in order to become a member of the group. This makes it possible that the outcome of the trial or the settlement concluded will bind or assign rights or obligations to the contributory party. On the contrary, in the opt-out system, if a court allows with an injunction the formation of the class action, then all members of the group will become part of the lawsuit and the judgment will bind all the parties, therefore, there is no need for explicit permission to representation and each member can leave the group with an explicit declaration about this intention. In such cases the locus standi is based on implicit mandate of the members constituted by the fact that they were informed about the procedure by the leader of the group, unless they have specific object of this before the sentence or the agreement.

A distinction shall be made between collective redress mechanisms on the basis of the fact whether the group consists of certain persons or not defined persons.<sup>125</sup> Moreover the group can be represented by a member of the group or an independent organization as well<sup>126</sup> (public interest/representative, group/collective action).<sup>127</sup>

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<sup>122</sup> Recital (13) of the Directive 2014/104/EU

<sup>123</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN> Accessed April 10 2018.

<sup>124</sup> [http://ec.europa.eu/competition/antitrust/actionsdamages/study\\_legislative\\_action\\_collective\\_redress.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/study_legislative_action_collective_redress.pdf) 65-67. Accessed April 14 2018.

<sup>125</sup> Directorate general for internal policies, policy department c.: Citizens’ rights and constitutional affairs legal affairs. Standing up for your right(s) in Europe A Comparative study on Legal Standing (Locus Standi) before the EU and Member States’ Courts Study Brussels, 2012. 116-118.

<sup>126</sup> Horváth supra note 14. at 17-18.

<sup>127</sup> Bencsik, K., A class action eredete és kialakulása a polgári perjogi kodifikáció tükrében Budapest, 2014. 657-658.

## 4.2. Class action in the EU, pro and contra

The EU has created a White Paper,<sup>128</sup> which promotes civil collective redress mechanisms based on both representative actions through qualified entities such as purchaser associations, state bodies or trade associations and group actions bringing individual claims together (opt-in),<sup>129</sup> because victims of antitrust infringements often do not claim compensation due to the scattered and relatively low-value damage suffered.<sup>130</sup> Compared to this, the Recommendation suggests expressively restrictive rules.<sup>131</sup> The representative actions can be filed by only those organizations which are matched to the predetermined specific conditions in Section 4, Art. III of the Recommendation, and can accept limited external financing. The court can require a declaration from the claimant party about the origin of the funds that he is intending to use to support the legal action.<sup>132</sup> There are strict provisions about the damages actions as well, for example they cannot contain lawyer's success fee,<sup>133</sup> the remuneration of the financier party is depending only on the amount of compensation and they cannot be extended to include punitive damages.

Class action is an institution of the common law system, thus in continental legal environment this instrument of law has different impacts. The US class action can lead to over-litigation and the bringing of unmeritorious claims, therefore the EU tried to polish it so that it would suit the different expectations.<sup>134</sup> After the rules of the organisation of these groups<sup>135</sup> the issue of admissibility is to be mentioned here: the Recommendation provides that Member States should provide for verification at the earliest possible stage of litigation that cases in which conditions for collective actions are not met, and manifestly unfounded cases, are not continued.<sup>136</sup> This means that the number of unmeritorious claims is likely to be more limited than it is in the United States. Beside this, there is a main difference in the funding of collective actions. In the EU Member States should not permit contingency fees, which would risk creating an incentive to litigation that is unnecessary from the point of view

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<sup>128</sup> White Paper of 2 April 2008 on damages actions for breach of the EC antitrust rules

<sup>129</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:126124&from=HU> Accessed April 18 2018.

<sup>130</sup> Summary of the White Paper

<sup>131</sup> Horváth supra note 14. at 17.

<sup>132</sup> Section III. point 14 of the Recommendation

<sup>133</sup> Unlike in the USA. Edited by.:Gombos, K., A versenyjog legújabb fejleményei Európai Unió kitekintéssel Budapest, Dialog Campus Kiadó, 2017. 22, 46.

<sup>134</sup> Geradin, D., Collective Redress for Antitrust Damages in the European Union: Is this a Reality Now? Forthcoming in George Mason University Law Review 2015. 10.

<sup>135</sup> Section III. (point 4., representative action, point 21. opt-in) of the Recommendation

<sup>136</sup> Ibid. (8)

of the interest of any of the parties.<sup>137</sup> The Recommendation allows third-party funding for representative actions under strict conditions.<sup>138</sup> Unlike in the USA, where the main principle of financing a legal case is that everyone covers their own costs, in the continental legal systems usually the unsuccessful party is obliged to pay these expenses (loser pays principle).<sup>139</sup>

Regarding the lack of collective redress mechanisms, in the EU there are more initiatives based on the idea of creating organizations which acquire the claims of injured parties in the form of assignments and are entitled to launch cases to enforce them. On the one hand, implementation of collective redress based on civil substantive instruments would not be a weird solution from the aspect of continental law. On the other hand, the Düsseldorf District Court dismissed follow-on damage claims by a special purpose vehicle, Cartel Damage Claims (“CDC”), which had brought damages claims against various German cement producers following an infringement decision by the German Federal Cartel Office.<sup>140</sup> The decision highlighted that using an assignment for group enforcement may be qualified against law or good faith. The difference between national legislations on assignment may lead to unreasonable force of claims or as a fraudulent transaction it may ensure to the injured parties a more favourable position.<sup>141</sup> So even if this method is not the best way to enforce the claims based on competition infringements courts should apply extensive interpretation, while a well-constructed collective redress is not regulated in the EU’s legal system.<sup>142</sup> In our opinion the lack of group actions is a failure of the law of European Union. The basic legal reason to introduce collective redress is that without this possibility, minor claims cannot be enforced at all. Also, an advantage of private enforcement is, on the one hand, that it promotes the preventive effect of private law, and on the other hand, that it may lead to compensation for the victims, and this way it improves legal certainty at the same time.<sup>143</sup> Group actions serve this with reducing the number of parallel cases before the courts as well and ensure a more unified and clear case law of jurisdiction. If they were applied in ADR mechanisms, it would ease the caseload of the courts even more.<sup>144</sup>

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<sup>137</sup> Ibid. (30)

<sup>138</sup> Ibid. (15-16)

<sup>139</sup> Ibid. (13)

<sup>140</sup> LG Düsseldorf, Urteil vom 17.12.2013 - 37 O (Kart) 200/09,

<sup>141</sup> Horváth supra note 14. at 18.

<sup>142</sup> Ibid. 17-19.

<sup>143</sup> Nagy, Cs. I., *Versenyjogsértés és kártérítés: a magánjogi jogérvényesítés meghonosításának lehetőségei a magyar jogban* (Doktori értekezés) Budapest, 2008. 30-31.

<sup>144</sup> Moisejevas, R., *The Damages Directive and Consensual Approach to Antitrust Enforcement in Yearbook of Antitrust and Regulatory Studies* Vol. 2015, 8 (12) 183.

The effective, fast and consistent solution of these claims is beneficial not only to the injured parties but also to the jurisdiction's operation. Beside these arguments the representative character of a group action should also be considered. It may have general preventive effect against further competition law infringements. In addition, it should be noted, that not only the administrative costs and the price of appearances before the court would be less, but the reasonable fees for the lawyers would also decrease.<sup>145</sup> Furthermore, there are several non-financial benefits of the methods of collective redress. On the one hand, collective redress encourages the entrepreneurship of the infringements' victims since they are supported with information about the whole procedure. This more advantageous situation would make it possible for the injured parties to focus on the economic benefit of engaging in a procedure for their compensation. This benefit means that the advantage of a successful litigation or alternative dispute resolution shall be bigger than the costs of the entire procedure.<sup>146</sup> Why would anyone engage in a process if they had no chance to earn full compensation for the harm they have suffered?<sup>147</sup> On the other hand, the regional legislation of the EU on group actions has a patch-work style at the moment. The integrated regulation of this mechanism<sup>148</sup> would serve the equal access to jurisdiction and would not question the smooth operation of the internal market.<sup>149</sup>

There are also several basic issues of the uniform introduction of this common law institution. We shall be aware of the difficulty to seek for all the victims who suffered damages by only one infringement of competition law.<sup>150</sup> Courts may have to make a more rigorous analysis of the claims presented to them. In addition, by choosing an "opt-in" regime and the "loser pays" principle, while not authorizing contingency fees and punitive damages, the Recommendation may have made it harder for victims with small claims to obtain full compensation personally for the harm suffered. Additionally, with this method victims or not co-infringer parties may be able to blackmail the infringer companies or threat them with causing insolvency.<sup>151</sup>

## 5. Conclusions

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<sup>145</sup> Geradin supra note 132. at 13-17.

<sup>146</sup> Bencsik supra note 125. at 655-657.

<sup>147</sup> Nagy supra note 141. at 22-30.

<sup>148</sup> [http://ec.europa.eu/competition/antitrust/actionsdamages/collective\\_redress\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html)

<sup>149</sup> Harsági, V., A kollektív igényérvényesítés fejlesztési lehetőségei Acta Univ. Sapientiae, Legal Studies, 4, 2 (2015) 217–238.

<sup>150</sup> Nagy supra note 141. at 32-36.

<sup>151</sup> Horváth supra note 14. at 18.

In view of the above, the Directive tends to facilitate the harmonisation of civil procedures in the Member States regarding antitrust damages actions. It is obvious that the Directive put an end to the uncertain situation which emerged after the Pfleiderer judgment by closing the opportunity of national judges to balance the effectiveness of public enforcement of competition law with the right to claim damages. Courts now have the power to order disclosure of evidence under the Directive as well but this power has its reasonable limits. Rules of disclosure can accelerate the spreading of antitrust damages actions across the EU. This is particularly true for stand-alone actions, in which proving by claimants is almost impossible in the absence of information held by defendants.

The huge divergences between Member States' law have been the key factor in the popularity of some Member States where claimants seek to bring damages actions.<sup>152</sup> The United Kingdom is a good example because of common law jurisdictions' traditional disclosure opportunities, this is what happened in National Grid case<sup>153</sup>, or Germany where the binding effect of the decisions of a NCA was ensured even before.<sup>154</sup> By harmonizing the above, the Directive could prevent forum shopping, although, as the Directive is a minimum harmonisation instrument, Member States can implement for example wider disclosure of evidence. For this reason, harmonisation will not be sufficient to completely annul forum shopping incentives on account of disclosure rules.<sup>155</sup>

A broad political compromise has emerged in the EU that the American class action model leaves many undesirable detrimental effects, so the reception without amendments is unacceptable. The EU legislation shall make further steps towards the harmonization of civil procedure laws to improve its own approach of class action in accordance with the Member States' legal traditions.

Some Member States (for example the United Kingdom) have specialized courts or at least chambers for antitrust damages cases<sup>156</sup> but in the EU in general these actions are heard before regular courts. Balancing the interests of the parties or quantifying harm requires not only legal but economic knowledge as well. Since national judges presiding in damages

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<sup>152</sup> Galič supra note 61. at 104.

<sup>153</sup> [2012] EWHC 869 (Ch) In the High Court of Justice Chancery Division. In this case, the English High Court ordered the disclosure of leniency materials and confirmed the increased opportunity of claimants to obtain access to this kind of documents.

<sup>154</sup> Franck, Kroes, Negri, Prieto, Wagner-von Papp supra note 23. at 37.

<sup>155</sup> Butorac Malnar supra note 63. at 144.

<sup>156</sup> Morfey A., Hausfeld M. D., Petrasincu A., Private Enforcement: An overview of the leading cases and opinions, 25 January 2018, e-Competitions Bulletin Private enforcement, Art. N° 85639, 3.

actions have an extremely important role in putting the provisions of the Directive i practice judges should be trained regarding its application.

The system established with the help of the Directive gave considerable momentum to uniform law enforcement in antitrust damages actions. Consequently, further such actions are likely to be brought in the future, triggering an efficient implementation of Art. 101 and 102 TFEU and thereby fostering the principle of fair competition and contributing to the legal protection of the single market.