35 The CJEU and the Interpretative Principles as Vehicles for Development of Damages Actions in EU (Competition) Law

Any Room for Overcompensation?

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35.1 Introduction

This paper will deal with the role of the Court of Justice of the EU (CJEU or Court) in building the architecture for the effective private enforcement of EU (competition) law through the interpretative principles and its potential to embrace non-compensatory considerations in certain contexts. It will set out the current legal framework for private enforcement of EU competition law. In this context, this article aims to examine the approach of the EU institutions towards the nature and functions of damages, discussing primarily the interpretative approaches chosen by the Court in its case law, and also the Commission's policy choices made (focusing on the Directive 2014/104 on antitrust damages actions (Antitrust Damages Directive)).

Debate on 'private enforcement' of competition law was sparked off by the decision of the Court in *Courage*[1] and by the subsequent initiatives taken by the 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 focus of discussion has shifted from 'damages claims' to 'private enforcement'.[2] 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

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1 Judgment of 20 September 2001 in Case C-453/99, *Courage and Crehan (Courage)*, ECLI:EU:C:2001:465.

2 P. Nebbia, 'Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?' (2008) 33 *European Law Review*, p. 24.

of a wrong.'[3] Thus, while becoming a significant concern in EU competition law enforcement and policy making, private enforcement has triggered significant tensions between the compensation and the deterrence rationales.[4]

For the purposes of this article, non-compensatory considerations and non-compensatory damages encompass all types of damages that are not purely compensatory in nature. However, the article will focus on deterrence and punitive considerations in particular. Here, punishment is understood as an instrument of deterrence whose purpose is not only to exact retribution but also to modify future behaviour.[5]

To this end, I will address the interplay of the principle of effectiveness and the principle of effective judicial protection through the analysis of the use of and shifts in the enforcement-based and the rights-based rhetoric both by the Court and the Commission in relation to damages actions for breaches of EU (competition) law. I will show 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. Such system creates a favourable environment for the introduction of non-compensatory considerations in awarding damages.

35.2 Framing the Debate: The Interplay of Enforcement and Compensation

The reasoning of the Court in establishing and interpreting the civil liability rules, and also the justification of the policy choices made by the Commission, relies to a large extent on the ambit of two intertwined concerns – the full effectiveness and the principle of effective judicial protection. The aim of this article is to address the interplay of these two principles in building and developing the damages regime in EU law. This section of the chapter serves as a 'quasi-theoretical framework' for the analysis of the use of and shifts in the enforcement-based and the rights-based rhetoric, in particular the shifts in the narrative employed by the Court and the Commission, to depict their attitude towards rationales for damages actions.

The principle of effectiveness is the central principle for private enforcement of Union law. It was advanced with the existing EU *acquis* on the 'national procedural autonomy'

3 Id.

4 See, for example, F. Marcos & 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, p. 469; Nebbia 2008, pp. 36-39. See also D. Leczykiewicz, 'Enforcement or Compensation? Damages Actions in EU Law after the Draft Common Frame of Reference', *in* M. Kenny & J. Devenney (Eds.), *The Transformation of European Private Law*, Cambridge, Cambridge University Press, 2013a, p. 279, n. 11.

5 Leczykiewicz 2013a, p. 278, n. 6.

of Member States to enforce Union rights. It can carry several different meanings, albeit related and sometimes overlapping.[6] 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.

On the one hand, 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 *strictu senso*).[7] It encapsulates the idea of obedience, sanction, and enforcement.[8] In this context, 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 with their obligations or, to use Advocate General Jacob's words, it may generate a 'windfall benefit' to the individual.[9]

Pursuant to the second meaning or perspective, the principle of effectiveness gives expression to the right to effective judicial protection. In this sense, it 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.[10]

The right to effective judicial protection refers to a broad concept. Pursuant to the 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.[11] Today, it is embodied in the second subparagraph of Article 19(1) of the TEU and in Article 47 of the EU Charter of Fundamental Rights[12] (hereinafter 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.[13]

Article 47 of the Charter provides that

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6 K. Lenaerts, 'Effective judicial protection in the EU' http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf; Nebbia 2008, pp. 28-35. See also I. Lianos, P. Davis, and P. Nebbia, *Damages Claims for the Infringement of EU Competition Law*, Oxford, Oxford University Press, 2015, p. 20.

7 Lenaerts, p. 3.

8 Lianos, Davis, Nebbia 2015, p. 19.

9 Opinion of Advocate General Jacobs in Case C-443/98, *Unilever*, ECLI:EU:C:2000:57, para. 39. Lianos, Davis, Nebbia 2015, p. 20.

10 Lianos, Davis, Nebbia 2015, p. 20.

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

12 Charter of Fundamental Rights of the European Union, UL C 83/389, 30 March 2010.

13 See Art. 6(1) Treaty on the EU. N. Reich, *General Principles of EU Civil Law*, Intersentia, Cambridge, 2014, p. 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*, Oxford, Oxford University Press, 2014, p. 236.

> 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 EU law. This is a crucial requirement that greatly affects the Court's reasoning in cases interpreting actions for damages.

It is a common understanding that compensation (inherent primarily in the rights-based rhetoric) and deterrence (inherent primarily in the enforcement-based rhetoric) are both aims of damages awards, albeit to a different extent.[14] Deterrence and enforcement have a prospective character, whereas compensation has a retrospective character.[15] In the case of deterrence and enforcement, the emphasis is not on the claimant and his harm but on the defendant and his conduct. For the purposes of this inquiry, the dissuasive and punitive considerations are understood as giving an expression to the aim of deterrence to a certain extent, as both these considerations have a prospective character with an aim to modify future behaviour.[16] Some argue that an enforcement-focused regime and a compensation-focused regime are incompatible.[17]

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.[18]

On the other hand, the enforcement-focused regime has the following features: 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

14 This is based on an instrumental approach to private law, 'which is alien to the traditional conception of private law'. As Hesselink argued, 'as a result of the emerging new European private law a new European legal culture is developing which is much less formal-dogmatic and much more substantive-pragmatic than the national legal cultures have been in Europe.' Private law has become an instrument for private ordering (regulation) and serves to achieve certain social, political, and economic aims. M. Hesselink, *The New European Legal Culture*, Kluwer, Deventer, 2002.

15 Leczykiewicz 2013a, p. 276, n. 1; Nebbia 2008, p. 23.

16 Leczykiewicz 2013a, p. 277, n. 6.

17 E.J. Weinrib, *The Idea of Private Law*, Oxford University Press, Oxford, 2012, p. 38; Leczykiewicz 2013a, p. 278, 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.

18 Id., p. 277, n. 2.

measure of damages (directly or at least indirectly); slight violation of a norm may be left unsanctioned; and 5) punitive damages are not excluded.[19]

In what follows, this brief 'quasi-theoretical framework' will be used to analyse the Court's and the Commission's attitude towards rationales for damages actions. It will serve to dissect whether EU (competition) law in certain contexts requires or prohibits non-compensatory considerations, or perhaps allows Member States to choose (contrary to the Antitrust Damages Directive's pursuit to prohibit overcompensation, see below).

35.3 In Search of the Rationale I: Case Law Analysis

35.3.1 Starting with a Public Law Context

The right to damages in EU law was initially available in the public[20] law context, to individuals acting against the Union (now regulated in Article 340 TFEU) and against a Member State (the so-called *Francovich*[21] remedy).

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 States, *make good any damage* caused by its institutions or by its servants in the performance of their duties. This wording seems to limit the extent of the liability of EU institutions to strict compensation. The Court shall recognise the liability of the Union when three conditions are met: (i) the claimant has suffered damage; (ii) the EU institutions or their agents have acted illegally under EU law; and (iii) there is a direct causal link between the damage suffered by the claimant and the illegal act of the EU institutions or their agents. Thus, 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.[22] Thus, at face value, features of the liability of the Union seem to correspond to the compensation-focused regime's characteristics outlined above.

19 Id.

20 I acknowledge here that this putative public/private law divide familiar to national legal systems might not be simply translated to EU law. In fact, EU law might challenge that divide. However, I will not explore this question further at this stage and will use this division for pragmatic reasons.

21 Judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic (Francovich)*, ECLI:EU:C:1991:428.

22 A. G. Toth, 'The Concepts of Damage and Causality as Elements of Non-contractual Liability' *in* T. Heukels & A. McDonnell (Eds.), *The Action for Damages in Community Law*, Kluwer Law International, London, 1997, p. 180.

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 Community law.[23] 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'.[24] With hindsight, it is a surprise that more was not made of *Russo* at the time. Thus, the *Francovich* judgment is considered as a seminal decision. There is no explicit legal basis in the Treaty enabling the Court to do so. However, the Court stated that EU law possessed a general principle of Member States' liability:

It follows that *the principle whereby a State must be liable for loss and damage* caused to individuals as a result of breaches of Community law for which the State can be held responsible is *inherent* in the system of the Treaty.[25]

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 Court drew the inspiration from non-contractual liability of the Union under Article 340 TFEU.[27] 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.[28]

However, in *Francovich* the Court also grounded its reasoning in the principle of the 'effectiveness' of EU law and the concern to protect rights.[29] It stated that

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23 Judgment of 22 January 1976 in Case 60/75, *Russo v. AIMA (Russo)*, ECLI:EU:C:1976:9, para. 9.

24 T. Eilmansberger, 'The Relationship Between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 *Common Market Law Review*, p. 1223; J. Temple Lang, 'The principle of effective protection of Community law rights', *in* David O'Keeffe et al. (Eds.), *Liber Amicorum Lord Slynn of Hadley*, Kluwer Law International, the Hague, 2000, p. 245.

25 Joined Cases C-6/90 and C-9/90, *Francovich*, para. 35.

26 D. Leczykiewicz, 'The Constitutional Dimension of Private Law Liability Rules in the EU', *in* Dorota Leczykiewicz & Stephen Weatherill (Eds.), *The Involvement of EU Law in Private Law Relationships*, Oxford, Hart Publishing, 2013b, p. 206.

27 See Opinion of Advocate General Mischo in Joined Cases C-6/90 and C-9/90, *Francovich*, ECLI:EU:C:1991:221, paras. 71-72; Judgment of 5 March 1996 in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others (Brasserie du Pêcheur)*, ECLI:EU:C:1996:79, paras. 28-29, 40-45.

28 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 26; W. Van Gerven, 'Harmonization of Private Law: Do We Need It?' (2004) *Common Market Law Review* 41, pp. 505, 515.

29 Joined Cases C-6/90 and C-9/90, *Francovich*, paras. 33-35.

> 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.[30]

This reasoning was instructively depicted by Advocate General Léger in the case of *Köbler*, stating that

> …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.[31]

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'.[32] Thus, it follows that this right to damages is actually an 'extension of the effective judicial protection', and they are both used *instrumentally*[33] to fulfil their common purpose to 'ensure the full effectiveness of EU law'.

As is 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.[34] Thus, *Francovich* added to the Court's arsenal the power of sanction.[35] As Harlow noted, it is probable that French administrative law provided the pattern for the Court's sanctions theory of liability.[36] It is true that the State liability carries a dual function – the Court expressed concerns both for the effective enforcement as much as judicial protection. However, at that initial momentum of creating the right to damages, effective judicial protection was no more than an impli-

30 Id., para. 33.
31 Opinion of Advocate General Léger in Case C-224/01, *Köbler*, ECLI:EU:C:2003:207, paras. 35, 52.
32 Id.
33 A.P. Komninos, 'New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and The Community Right To Damages' (2002) 32 *Common Market Law Review*, pp. 457, 458, 469.
34 Lianos, Davis, Nebbia 2015, p. 20.
35 C. Harlow, 'Francovich and the Problem of the Disobedient State' (1996) 2 *European Law Journal* 3, p. 205; R. Caranta, 'Judicial Protection against Member States: A New Jus Commune Takes Shape' (1995) 32 *Common Market Law Review*, pp. 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 *Common Market Law Review*, p. 694.
36 Harlow 1996, p. 206.

cation 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'.[37] Thus, 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.[38] Yet, 'effectiveness' came to be understood as an expression of 'effective judicial protection' – the 'effectiveness' according to the second understanding as explained above. 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'.[39]

With respect to punitive considerations, the Court held in *Brasserie du Pêcheur* that

> [i]n the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. /…/ Moreover, 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.[40]

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, it seems that the liability of the Union and the *Francovich* remedy 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.

37 Caranta 1995, pp. 703, 710, 725.

38 Lianos, Davis, Nebbia 2015, p. 20.

39 Judgment of 17 April 2007 in Case C-470/03, *A.G.M.-COS.MET Srl v. Suomen valtio and Tarmo Lehtinen (AGM-COSMET)*, ECLI:EU:C:2007:213, para. 88. See also para. 142 of the Opinion of Advocate General Kokott in this case: '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'. Lianos, Davis, Nebbia 2015, pp. 20-21.

40 Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur*, para. 90.

35.3.2 The Civil Law Liability Context – Competition Law

Competition law is an area in which the substantive involvement of EU law in private law liability has been initially in its entirety the consequence of the case law of 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.[41] The Court construed this right on the grounds of direct effect, as Article 101 TFEU in fact does not grant any rights to individuals.[42] 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.[43] This means that individuals can derive rights directly from those provisions, and they can invoke them before national courts of the Member States.

In *Courage*, the Court recalled the principle established in *Van Gend en Loos*[44] 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.[45] 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 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*'.[46] 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.[47] He argued that it would be 'unacceptable were similar breaches of Community law to be

41 Case C-453/99, *Courage*.

42 See also V. Milutinović, *The 'Right to Damages' under EU Competition Law. From Courage v. Crehan to the White Paper and Beyond*, Wolters Kluwer, Alphen aan den Rijn, 2010, pp. 48-50; Leczykiewicz 2013, n. 11.

43 Judgment of 27 March 1974 in Case C-127/73, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior (BRT v. Sabam)*, ECLI:EU:C:1974:25.

44 Judgment of 5 February 1963 in Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration (Van Gend en Loos)*, ECLI:EU:C:1963:1.

45 Case C-453/99, *Courage*, para. 19.

46 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 2005), pp. 9-10; Lianos, Davis, and Nebbia 2015, p. 18.

47 Opinion of Advocate General Van Gerven in Case C-12/92, *Banks*, ECLI:EU:C:1993:860, para. 26 et seq.; A. Ward, *Judicial Review and the Rights of Private Parties in EU Law*, Oxford University Press, Oxford, 2007, p. 249.

governed by different rules depending on the identity of the author of the breach'.[48, 49] 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.[50]

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.[51]

In transplanting the idea of compensation into the domain of private disputes, which is not entirely uncontroversial,[52] the dualism of effectiveness-based rhetoric and rights-based rhetoric surfaced again. 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 and by emphasising the fact that liability in damages would make a 'substantial contribution to the maintenance of the effective competition in the Community'.[53]

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.[54] The main problem is that it is impossible to determine its limits and therefore also the limits of the Court's involvement in a particular issue. It is also argued

48 Van Gerven in Case C-12/92, *Banks*, para. 35. The Court used the same reasoning to import State liability principles into EU law liability: 'The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage'. Judgment of 4 July 2000 in Case C-352/98 P, *Laboratoires Pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission*, ECLI:EU:C:2000:361, para. 41.

49 Van Gerven in Case C-12/92, *Banks*, paras. 42-44. In the *Banks* case, the articles involved were Arts. 65 and 66 ECSC, of which the Court held, contrary to its Advocate General, that they had no direct effect. Van Gerven 2004, p. 520, n. 51.

50 W. Van Gerven, 'Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts' *in* J. Stuyck & H. Gilliams, *Modernisation of European Competition Law*, Antwerp, Intersentia, 2002, pp. 93, 98.

51 N. Dunne, 'Antitrust and the Making of European Tort Law' (2015) *Oxford Journal of Legal Studies*, p. 13.

52 Leczykiewicz 2013b.

53 Id., p. 212. See also Eilmansberger 2004, p. 1226, arguing that 'the Court chose the principle of *effet utile* as the central legal foundation for the finding of liability' in Case C-453/99, *Courage*.

54 Ibid.

that effectiveness is devoid of any normative content, as its normative potency stems only from the rule or policy which it makes effective.[55]

While putting forward the 'enforcement' argument, the Court acknowledged that

> …the 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.[56]

The extensiveness of this principle can be 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 outside their protective scope, for the simple reason that the nullity stemming from the illegality of the agreement afforded sufficient protection'.[57] 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'.[58]

Subsequently, just as in the State liability setting, the Court appeared to be ready to drop a primary emphasis on 'effective enforcement' once it felt that the basis for the remedy was sufficiently solid.[59] In *Manfredi*, another ruling on damages claims in competition law issued a few years after *Courage*, the Court initially evoked 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.[60] The 'enforcement' argument can only be found much later in the *Manfredi* judgment, where the Court deals with the question of whether punitive damages should be awarded.[61]

This brief account of how the notion of effectiveness changed in the Court's case law suggests that, while *prima facie* granting equal status to compensating individual harm

55 Leczykiewicz 2013b, p. 212.
56 Case C-453/99, *Courage*, para. 27.
57 Eilmansberger 2004, p. 1227.
58 Id., p. 1207, 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', *CDE*, 1981, p. 381.
59 Lianos, Davis, Nebbia 2015, p. 21.
60 Judgment of 13 July 2006 in Case C-295/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA (Manfredi)*, ECLI:EU:C:2006:461.
61 Case C-453/99, *Courage*, para. 91.

and deterring anticompetitive conduct,[62] if not even letting deterrence to triumph over compensation, the Court later appeared to be moving towards the compensation rationale. However, the Court showed in the case of *Kone* that effectiveness reasoning is still very much useful and, to a large extent, an instrumental tool ready to be employed also when the right to damages is already well-established in EU law. This will be briefly sketched.

The right to damages articulated in *Courage* is remarkably extensive in principle. As Leczykiewicz asserted, *Courage* is 'a remedial rule suspended between national private law and the standards set out by the Court in the judgment'.[63] Thus, although the Court has articulated a theoretically expansive right to damages, the bifurcated judicial structure in the EU means that it has limited control over its interpretation and application at national level.[64] 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'.[65] 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, in this case the causal link and the closely related question of standing. It derives from the Court's ruling in the latter case 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. 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.[66] Despite being remarkably short, it might be significant for the future of national private laws, as well as for the development of European private law. It represents a model of reasoning which the Court could employ in the future when interpreting other aspects of the civil liability, or even other private law concepts.[67]

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. It has partly ascertained the issue of standing in *Manfredi*, a case in which an action for damages was

62 Lianos, Davis, Nebbia 2015, p. 21.

63 D. Leczykiewicz, 'Effectiveness of EU Law Before National Courts: Direct Effect, Effective Judicial Protection, and State Liability' *in* A. Arnull & D. Chalmers (Eds.), *Oxford Handbook of European Union Law*, Oxford University Press, Oxford, 2015, p. 244.

64 Dunne 2015, p. 19.

65 Id., 18.

66 P. Weingerl, 'Civil Liability in the EU: Exploring the Implications of the Recent Case Law and Legislation on Causal Link' (2014) *European Journal of Commercial Contract Law* 3-4, p. 62.

67 For essays on the relationship between private law relationships and EU law see D. Leczykiewicz & S. Weatherill (Eds.), *The Involvement of EU Law in Private Law Relationships*, Oxford, Hart Publishing, 2013.

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.[68] The Court was asked to interpret whether Article 101 TFEU, then Article 81 EC, entitles any individual to rely on the invalidity of an agreement or practice prohibited under that article. In its judgment, the Court 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'.[69] As the Court held, again relying on the full effectiveness rhetoric,

> the full effectiveness of Article 101 of the 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.[70]

This shows again that it seems that granting the right to damages to any harmed individual does not lie in the Court's genuine concern to ensure that every victim is adequately compensated, but rather to ensure effective enforcement.

The concern to ensure effective enforcement served as a legal basis also for establishment of other rights, apart from the right of damages. To briefly illustrate, 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. an injunctive relief.[71] 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.[72]

As regards punitive considerations in the competition law context, the Court has not excluded the possibility of awarding exemplary or punitive damages in the case of *Manfredi*, relying on the enforcement argument again, while at the same time it held that national courts are not prevented from taking steps to ensure that the protection of the rights

68 C-295/04, *Manfredi* (n. 46) para. 2.

69 Ibid., para. 61. See also Judgment of 14 June 2011 in Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, ECLI:EU:C:2011:389; and Judgment of 6 November 2012 in Case C-199/11, *Europese Gemeenschap v. Otis NV and Others (Otis)*, ECLI:EU:C:2012:684.

70 Case C-453/99, *Courage*, para. 26; C-295/04, *Manfredi*, para. 60.

71 Judgment of 17 September 2002 in Case C-253/00, *Antonio Muñoz y Cia SA and Superior Fruiticola SA v. Frumar Ltd and Redbridge Produce Marketing Ltd. (Muñoz)*, ECLI:EU:C:2002:497.

72 Eilmansberger 2004, p. 1228.

guaranteed by EU law does not entail the unjust enrichment of those who enjoy them.[73] It is not exactly 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. Interestingly, following the Court's judgment in *Manfredi*, the national judge in that case doubled that amount in accordance with the alleged discretionary power under the Italian Code of Civil Procedure.[74]

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'.[75] The Court briefly dismissed claims that damages for 'umbrella pricing' constitute punitive damages as the cartel members have not been enriched in the case at hand and did not really engage with the question of availability of this type of damages. It 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.[76]

Thus, also in the competition law context damages actions seem to be enforcement-based and, consequently, the legal landscape is not preventing the non-compensatory considerations. In fact, the environment seems to be favourable for their introduction – in contrast to the objectives of the Antitrust Damages Directive, which is discussed below. Similarly, the Court has recently held that EU law does not preclude punitive damages for infringements in the labour law context and for the IP infringements.[77]

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73 C-295/04, *Manfredi*, 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 Advocate General Geelhoed in Case C-295/04, *Manfredi*, ECLI:EU:C:2006:67, para. 70.

74 *Giudice di Pace di Bitonto*, Judgment of 21 May 2007, *Manfredi v. Lloyd Adriatico*, cited by Milutinović 2010, p. 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, p. 591.

75 Opinion of Advocate General Kokott in Case C-557/12, *Kone AG and Others v. ÖBB-Infrastruktur AG (Kone)*, ECLI:EU:C:2014:45, para. 80.

76 Judgment of 5 June 2014 in Case C-557/12, *Kone AG and Others v. ÖBB-Infrastruktur AG (Kone)*, ECLI:EU:C:2014:1317, para. 35.

77 For the labour law context, see Judgment of 17 December 2015 in Case C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA*, ECLI:EU:C:2015:831; for the IP see Judgment of 25 January 2017 in Case C-367/15, *Stowarzyszenie 'Oławska Telewizja Kablowa' v Stowarzyszenie Filmowców Polskich*, ECLI:EU:C:2017:36.

35.3.3 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.[78]

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.[79] It is open to discussion whether there is a possibility of extending the logic of violations of competition 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'.[80] Thus, 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.[81] It is also doubtful that the Court has in fact jurisdiction to develop a general regime of private party liability in damages.

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.[82] Weatherill noted that this is perhaps possible in principle, 'though not uncontroversially', where there is a causal relationship between that harm and a practice prohibited by other Treaty rules.[83] 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.[84]

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. Nevertheless, 'the judicial introduction of the *Courage* remedy constitutes a model of how

78 Marcos & Sánchez Graells 2008, p. 469.

79 Commission Staff Working Paper – Green Paper 2005, p. 10.

80 S. Weatherill, *EU Consumer Law and Policy*, Edward Elgar, Cheltenham, 2013, p. 289; also Dunne 2015, p. 13.

81 See, for example, A. Albors-Llorens, 'Courage v Crehan: Judicial Activism or Consistent Approach?' 61 *CLJ* 38 (2002); W. van Gerven, 'Crehan and the Way Ahead' (2006) 17 *European Business Law Review*, p. 269; Leczykiewicz 2013b, p. 203; Dorota Leczykiewicz, 'Private Party Liability in EU Law: In Search of the General Regime' (2009-2010) 12 *Cambridge Yearbook of European Legal Studies*, p. 257.

82 Reich 2014, p. 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*, p. 84.

83 S. Weatherill, 'Article 38 Consumer Protection' *in* S. Peers, T. Hervey, J. Kenner and A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford, Hart Publishing, 2014, p. 1024.

84 Leczykiewicz 2009-2010.

future private law liability rules are most likely to be incorporated into the realm of EU law'.[85]

35.4 In Search of Rationale II: Legislation

35.4.1 Mapping Non-Compensatory Considerations in the Antitrust Damages Directive

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 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 damages actions for breach of the EC antitrust rules.[86] The Commission's 'follow-up' White Paper on Damages actions for breach of the EC antitrust rules[87] 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 sense', where both substance and procedure are dictated, broadly, by harmonising EU law.[88]

Broadly speaking, the Antitrust Damages Directive 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. The second objective is placing limits on the first one.[89] The conflict or tension between the two objectives is obvious, however, it will not be explored further within the confines of this article which focuses on the rationale for damages.

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*

85 Leczykiewicz 2013b, p. 204.

86 Green Paper – Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}, COM/2005/0672 final (Green Paper 2005). R. Nazzini, 'Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law' *in* C. Barnard & O. Odudu (Eds.), *The Outer Limits of European Union Law*, Oxford, Hart Publishing, 2009, pp. 401-435.

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

88 Dunne 2005, p. 12.

89 S. Peyer, 'Compensation and the Damages Directive' (2016) CCP Working Paper 15-10, p. 2.

for harm caused by antitrust violations'.[90] 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 Antitrust Damages Directive. The White Paper's Impact Assessment clarifies what is meant by more effective enforcement: 'More effective antitrust damages actions implies more cases.'[91] Then, the primary underpinning rationale for antitrust damages seems to be deterrence of anticompetitive behaviour.

However, Article 3(1) of the Antitrust Damages Directive provides that any harmed individual is entitled to claim *full compensation*. 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 Antitrust Damages Directive, for example through the passing-on defence.

What does overcompensation mean? The Directive spells out that not only 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, punitive and multiple damages, used to be viable options contemplated by the Commission in the documents setting the scene for the adoption of the Antitrust Damages Directive. This issue is further discussed below. It is often difficult to estimate the extent of the loss suffered in the competition law context, so the question of overcompensation is dubious.

The Antitrust Damages Directive was accompanied by the Commission Recommendation on Consumer Collective Redress.[92] This Recommendation on Consumer Collective Redress, aiming to enhance consumer protection, proposes that Member States prohibit punitive damages in order to prevent abusive litigation.[93] 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'.[94] 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 are torpedoed by intensive economic lobbying and fail to get through

90 Press Release of the European Commission, Antitrust: Commission welcomes Council adoption of Directive on antitrust damages actions (Brussels, 10 November 2014).

91 See also European 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).

92 The Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms, OJ L 201, 26.7.2013 (Recommendation on collective redress).

93 See recital 15 of the preamble and point 31 of the Recommendation on collective redress.

94 Point 31 of the Recommendation on collective redress.

the political filter 'based on arguments peculiar to phobia of foreign legal solutions, using legal traditionalism as a successful marketing weapon'.[95]

35.4.2 *Addressing the Policy Shifts in the Commission's Competition Law Repertoire*

The Commission's focus 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.[96] 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.[97] The ambition to achieve both rationales surfaces again in the IAR. In the first draft of the Antitrust Damages Directive in June 2013 a different narrative appeared to underpin the initiative, denoting a clear shift in the Commission's approach.[98] This narrative then found its way into the adopted version of the Directive.

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.[99]

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 compe-

95 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, pp. 531-532, 552.

96 Commission Staff Working Paper – Green Paper 2005, para. 179; Lianos, Davis, and Nebbia 2015, p. 25.

97 Commission Staff Working Paper – White Paper 2008, para. 15.

98 Milutinović 2010, p. 127; Lianos, Davis, and Nebbia 2015, pp. 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, pp. 765-766.

99 Green Paper 2005, p. 4.

tition authorities the possibility for the victim of the anti-competitive behaviour to recover his losses. Both damages awards and the imposition of fines contribute the maintenance of effective competition and deter anticompetitive behaviour.'[100] 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'.[101] 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'.[102]

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?'.[103] 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.[104] 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.[105] The accompanying Staff Working Paper highlighted findings of the Study 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*.[106]

The Commission Staff Working Document points 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'.[107] 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 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.

100 Commission Staff Working Paper – Green Paper 2005, p. 7.
101 Id.
102 Id.
103 Green Paper 2005, p. 7.
104 Commission Staff Working Paper – Green Paper 2005, p. 37.
105 Green Paper 2005, p. 7.
106 Commission Staff Working Document – Green Paper 2005, p. 14.
107 Id., p. 34.

After a few years, the White Paper followed.[108] The measures that it puts forward are 'designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement'.[109] 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. 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.[110]

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.'[111]

Although already this represented a clear shift in the Commission's rhetoric, the proposal for the Antitrust Damages Directive took this way further with the express prohibition of punitive damages.

One argument to explain this shift in policy concerns puts forward the idea that this shift is explained with concerns to promote equal conditions for companies that are potential infringers of antitrust law and, also, to discharge the Commission from certain enforcement duties.[112] Thus, arguably, efforts for harmonisation in this field do not lie (primarily) in the anxious concern to enable victims to obtain compensation, but rather to level the playing field for businesses. In doing so, the Commission has decided for a policy shift that is at odds with its own previous approach to achieve enforcement and compliance and with the Court's case law in the field of competition law, and also in the Court's case law more broadly, for example in the labour law context and in the IP context.[113]

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108 White Paper 2008, pp. 2-3. For the discussion, see P. Nebbia & E. Szyszczak, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' (2009) *European Business Law Review*, p. 635.

109 Id., p. 3.

110 Id.

111 Id.

112 Marcos & Sánchez Graells 2008, p. 481.

113 It must be admitted that such prohibition could help increase compliance in the competition law context – in the context of the leniency programme. However, since it seems that the Antitrust Damages Directive's framework in practice undermines the leniency programme, this underpinning rationale is put in question.

35.5 Conclusion

There is a blurred picture painted by EU competition law when the rationale for damages is dissected. Conversely, it seems that actions for damages are mostly grounded in the enforcement-based regime. This regime is, in principle, favourable for the introduction of non-compensatory considerations, such as deterrence and punishment.

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. There is an apparent switch in the Commission's activities, now going even as far as actively suggesting prohibiting overcompensation and punitive damages (the Antitrust Damages Directive, The Commission Recommendation on Collective Redress). In doing so, the Commission has decided for a policy shift that is at odds with its own previous approach to achieve enforcement and compliance and with the Court's case law in the field of competition law, and also with the Court's case law more broadly, for example in the labour law context and in the IP context. It seems that the Commission has taken the rationale for rejection of overcompensation too far.