Antitrust Damages Actions in National Courts: Trends in the Case-Law of the European Court of Justice

Ass. Prof. Lena HORNKHOL

Tenure Track Professor for European Law, University of Vienna, and postdoctoral researcher (Habilitandin), Heidelberg University, lena.hornkohl@univie.ac.at

Nils IMGARTEN

Research Fellow and PhD Student, Göttingen University, nils.imgarten@jura.uni-goettingen.de

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Abstract

This paper examines the current state of case law of the European Court of Justice on private enforcement of competition law in the European Union, highlighting the ongoing debates and challenges. Despite an overall consolidation of private enforcement, significant divergence persists among Member States regarding the facilitation of private enforcement and the application of the EU Cartel Damages Directive. The ECJ continues to strengthen private enforcement through a general claimant-friendly interpretation of the Damages Directive and the traditional application of Articles 101 and 102 TFEU in conjunction with the principle of effectiveness. Recent decisions in the discussed cases of *Volvo*, *Sumal*, *PACCAR*, *RegioJet*, *Tráficos Manuel Ferrer*, and *Repsol* cover pivotal questions of the temporal application of the Damages Directive, disclosure of evidence, quantification of harm, and international jurisdiction, as well as the ever-persistent issue of the relationship between public and private enforcement. In an outlook, the paper argues that principles and mechanisms of private enforcement developed in EU competition law can be effectively utilized in various other areas of EU law enforcement. The dual role of private enforcement, compensating victims and ensuring compliance with EU competition law, presents potential for broader application in areas such as data protection and financial law.

Keywords

Competition Law; Private Enforcement; Damages; Disclosure; Judicial Estimation; Temporal Application; Jurisdiction; Public Enforcement; Compensation; Deterrence.

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1. Introduction*

Antitrust damages actions have been guided by the ground-breaking case law of the European Court of Justice (ECJ) since *Courage*[1] and *Manfredi*[2]. In these cases, the ECJ laid the foundation for later legislative developments in the EU Damages Directive[3] and its national implementation laws. Roughly ten years have passed since the adoption of the EU Damages Directive in 2014. The Damages Directive has substantially changed the landscape for antitrust damages actions in the Member States of the European Union.[4] There has been a considerable surge in the number of antitrust damages actions being brought before the national courts of the Member States.[5] Recently, the first cases on the Damages Directive have reached the ECJ, which can certainly be described as a new wave of judgments on antitrust damages law.[6] In its judgments, the ECJ played a crucial role in interpreting the modernised framework for antitrust damages actions based on the Damages Directive, but also made significant statements on the principle of effective enforcement of competition law enshrined in primary law and which remains the central principle for effective damages actions in the EU even after the Damages Directive.

This paper analyses this new wave of judgments of the ECJ on antitrust damages actions and works out five current trends in the jurisprudence of the ECJ. First, it illustrates that we are currently in a transitional phase where certain proceedings can already be based *ratione temporis* on the Damages Directive, while others must solely rely on primary law, *i.e.* effective enforcement of Union competition law. At the same time, the ECJ emphasises the continuous fundamental importance of the principle of effectiveness, which applies in the context of the Damages Directive guiding its interpretation. It can also be applied independently in cases that lie outside the scope of the Damages Directive. Second, it demonstrates that disclosure of evidence introduced with Chapter II of the Damages Directive is certainly a novel instrument in the procedural traditions of many Member States and therefore raises doubts in need of clarification by the ECJ. Yet, it can rightfully be seen as a crucial procedural instrument and, accordingly, the rules on disclosure of evidence in the Damages Directive are an important evolution for antitrust damages proceedings. Third, it shows that quantification of harm remains the decisive challenge in antitrust damages actions, putting a focus on the problems national courts have with adjudicating concrete cases, e.g., by judicial estimation of harm. In this area, the jurisprudence of the ECJ again highlights an

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

[2] Case C-295/04, *Manfredi*, Judgment (13 July 2006) ECLI:EU:C:2006:461.

[3] 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 of the Member States and of the European Union (Damages Directive), OJ L 349/1.

[4] For a comprehensive overview, see BJ Rodger, M Sousa Ferro and F Marcos (eds), *Research Handbook on Private Enforcement of Competition Law in the EU* (Elgar 2023); A Biondi, G Muscolo and R Nazzini, *After the Damages Directive: Policy and Practice in the EU Member States and the United Kingdom* (Wolters Kluwer 2022) passim; BJ Rodger, M Sousa Ferro and F Marcos (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (OUP 2018) passim.

[5] See JF Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges' (2021) 3 Concurrences, Art. N° 102086.

[6] Cf, in particular, on the applicability of the directive as well as on certain questions of interpretation: Case C-267/20, *Volvo and DAF Trucks*, Judgment (22 June 2022) ECLI:EU:C:2022:494; Case C-163/21, *PACCAR*, Judgment (10 November 2022) ECLI:EU:C:2022:863; Case C-57/21, *RegioJet*, Judgment (12 January 2023) ECLI:EU:C:2023:6; Case C-312/21, *Tráficos Manuel Ferrer*, Judgment (16 February 2023) ECLI:EU:C:2023:99; Case C-25/21, *Repsol*, Judgment (20 April 2023) ECLI:EU:C:2023:298.

interpretation through the lens of the principle of effectiveness. Fourth, the paper presents the growing potential for forum shopping through the jurisprudence of the ECJ, particularly on the notion of undertaking. Fifth, it presents the increasing role of private enforcement as a true second pillar next to public enforcement and the relationship between public and private enforcement in the view of the ECJ. The paper closes with an outlook on future developments and challenges for private damages actions.

2. Transitional Phase for Antitrust Damages Actions

The current status of antitrust damages law can certainly be described as a transitional or intermediate phase for antitrust damages actions where cases at the national and ECJ level concern both pre- and post-Damages Directive law. On the one hand, this transitional state dates back to the overall transposition deadline of the Damages Directive. Although the Damages Directive was adopted on 26 November 2014 and was supposed to be transposed into Member State law by 27 December 2016,[7] the rules of the Damages Directive are not yet fully applicable in many cases before national courts. In practice, companies would typically avoid initiating antitrust damages actions before the respective Member State had incorporated the Directive into national law due to the strengthening of private enforcement through the Damages Directive. In addition, a number of damages actions, which still occupy the courts of the Member States to this day, above all the trucks cartel,[8] are based on competition law infringements pre-dating the Damages Directive.[9] Accordingly, several cases that reach the ECJ equally still completely or partially need to deal with the law prior to the application of the Damages Directive, where EU law only played a role through the guidance of the principles of effectiveness and equivalence of EU competition law.

On the other hand, the Damages Directive itself has special rules on its application *ratione temporis*, which also contributes to the fact that the antitrust damages law is in transition.[10] This nuanced system is most relevant for cases that were brought before national courts after the Directive and the laws transposing it got into force but still based upon facts predating the Directive's transposition deadline. For those cases, Article 22 of the Damages Directive foresees a transitional period of application (at least) for its substantive provisions. Article 22(1) prohibits the retroactive application of national rules adopted to implement substantive provisions of the Damages Directive. Such provisions cannot apply to cases pre-dating the actual transposition of the directive, i.e. potential anticompetitive behaviour that occurred before 26 December 2016.[11] Yet, Article 22(2) leaves it to the discretion of Member States whether to apply procedural provisions to such proceedings based on facts pre-dating the Directive but being initiated after 26 December 2014. Thus, procedural provisions can potentially apply much earlier than the substantive provisions. As most Member States simply transposed the Directive without further limiting the temporal

[7] Damages Directive (n 3) art 21(1). Some Member States, such as in Spain, however missed the transposition deadline, cf Case C-267/20 (n 6) para 48.

[8] Cf F Marcos, 'Trucks cartel damages claims: Thousand and odd judgments issued by Spanish Appeal Courts' (2023) 31(1) Zeitschrift für Europäisches Privatrecht 178ff.

[9] For Germany, see for example Bundesgerichtshof (Federal Court of Justice) KZR 35/19, *Trucks I*, Judgment (23 September 2020) ECLI:DE:BGH:2020:230920UKZR35.19.0; KZR 19/20, *Trucks II*, Judgment (13 April 2021) ECLI:DE:BGH:2021:130421UKZR19.20.0.

[10] N Imgarten, 'Temporal applicability of the Cartel Damages Directive 2014/104/EU revisited – recent jurisprudential developments' (2023) 16(1) Global Competition Litigation Review 57; Ph Kirst, 'The Temporal Scope of the Damages Directive: A Comparative Analysis of the Applicability of the New Rules on Competition Infringements in Europe' (2019) 16(1) European Competition Journal 97.

[11] Assuming that transposition of the directive was assured by the respective Member State in accordance with the deadline set out in Art. 21 of the Directive, to which Art. 22 makes explicit reference.

application beyond what is foreseen in Art. 22 of the Directive, procedural norms already applied in these Member States for all proceedings initiated from the transposition date of the Directive.

Nevertheless, since Articles 21 and 22 of the Damages Directive do not explicitly define which provisions of the Damages Directive are of a procedural and which are of a substantive nature, the majority of cases that have reached the ECJ partly deal with this distinction. Naturally, since Articles 21 and 22 of the Damages Directive belong to EU law, the ECJ held in *Volvo* that the question 'in the absence of a reference to national law in Article 22 [Damages Directive], be assessed in the light of EU law and not in the light of the applicable national law.'[12] Member States have discretion to establish that national procedural rules implementing the Damages Directive may be applicable to legal actions initiated after 26 December 2014, but before its transposition.[13] However, Member States have no power to interpret EU law and have no discretion to determine whether the provisions of the Damages Directive are substantive or procedural. The discretion of the Member States in that regard 'could undermine the effective, consistent and uniform application of those provisions throughout the European Union.'[14]

According to the ECJ, a provision is procedural if it contains only procedural measures, for example a provision that is relating to the particular powers in order to establish the facts[15] or that is having another evidentiary purpose[16]. A provision is substantive if it directly affects the legal situation of the parties to the dispute and relates to the constituent elements of non-contractual civil liability,[17] particularly if the rule is closely linked to the emergence, incurrence, and scope of the non-contractual civil liability[18]. In the further row of judgments up to date, the ECJ established the following provisions of the Damages Directive to be procedural and open to retroactive effect: Articles 5 and 6 on disclosure of evidence[19] and Article 17(1) on judicial damages estimation[20]. The following provisions are substantive and without retroactive effect: Article 9 on the effect of the decisions of national competition authorities[21], Article 10 on limitation periods[22] and Article 17(2) on the presumption of harm[23].

In connection with the transitional phase and the question of the applicability of the Damages Directive, the role of the principle of effectiveness is given particular emphasis in the new wave of judgments. Above all, the continuing role of the principle of effectiveness becomes apparent, despite the applicability of the Damages Directive and the general interconnectedness of the rules of the Damages Directive with the principle of effectiveness. Naturally, in case the Damages

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[12] Case C-267/20 (n 6) para 39.

[13] C-637/17, *Cogeco Communications*, Judgment (28 March 2019) ECLI:EU:C:2019:263, para 28

[14] Case C-267/20 (n 6) para 41.

[15] Case C-57/21 (n 6) para 42.

[16] Case C-267/20 (n 6) para 92.

[17] Case C-163/21 (n 6) para 33; Case C-57/21 (n 6) para 42; see in more detail Imgarten (n 10) 58f.

[18] cf Case C-267/20 (n 6) para 96.

[19] Case C-163/21 (n 6) para 33; Case C-57/21 (n 6) para 42.

[20] Cf Case C-267/20 (n 6) para 85; Case C-312/21 (n 6) para 51.

[21] Case C-25/21 (n 6) paras 38-39.

[22] Cf Case C-267/20 (n 6) para 79; see also Case C-605/21, *Heureka*, Opinion of Advocate General Kokott (21 September 2023) ECLI:EU:C:2023:695, para 73. Nonetheless, in specific cases, if the limitation period had not elapsed at the time of transposition of the directive, even the substantive provision can apply as this would not constitute a true case of retroactivity, cf N Imgarten 'Temporal Applicability of the Cartel Damages Directive: Case C-267/20 Volvo and DAF Trucks' (2023) 14 Journal of European Competition Law & Practice 95.

[23] Cf Case C-267/20 (n 6) para 98; on possibilities for a more differentiated interpretation see Imgarten (n 22) and Imgarten (n 10) 59f.

Directive is not applicable, the ECJ reiterates the old mantra[24] that Member States have procedural autonomy to determine the rules governing antitrust damages actions for violation of Union competition rules, provided that they abide with the principles of equivalence and – most importantly in private enforcement of competition law[25] – effectiveness.[26] The question of whether and when the Damages Directive is applicable, however, may also be related to the effectiveness principle. In *Volvo*, for example, the applicability of the Damages Directive depended on whether limitation periods had elapsed, which raised the question of when they start to run.[27] This is determined, *inter alia*, by the principle of effectiveness.[28]

The judgment in *Tráficos* most clearly demonstrates the continuing relevance of the principle of effectiveness alongside and intertwined with the provisions of the Damages Directive. Although Article 22 of the Damages Directive provides special rules on the temporal application of the Directive, the Directive does not change the validity of the previous case law on the principle of effectiveness in connection with primary EU competition law.[29] The ECJ held that the Damages Directive contains provisions that merely declaratorily confirm the existing case law, such as the right to full compensation in Article 3[30] and the general joint and several liability of all undertakings that committed the infringement in Article 11(1)[31]. Those rules apply immediately.[32] However, more precisely, these rules had already been established case-law long before the Damages Directive itself had even been written. In case of (temporal) inapplicability of certain rules of the directive, the case-law on the principle of effectiveness of Art. 101 TFEU continues to apply without any modification. The same must be true for possible legal lacunas in the system of the directive, i.e. certain questions that were explicitly or implicitly not harmonised. Such an approach is valid because a possible inapplicability of the Damages Directive cannot lead to the inapplicability of the Treaties, which are superior to the Directive in the hierarchy of norms. Private enforcement of competition law was already carried out before the adoption of the Damages Directive solely on the basis of the Union competition rules in conjunction with the principle of effectiveness.[33] The Damages Directive only acquires legal effects through Article 288 TFEU. A blocking effect of the Damages Directive vis-à-vis the Treaties would virtually reverse this principle. This entails that even if a provision of the Damages Directive was classified as substantive norm in view of Article 22 of the Damages Directive, the case law on Articles 101 and 102 TFEU and the principle of effectiveness continue to apply.

However, this jurisprudence raises several follow-up questions. First of all, it remains unclear which rules of the Damages Directive simply reaffirm existing case law and therefore apply with immediate effect. Secondly, even if there is no previous case law on a given provision of the Damages Directive, the question arises, which provisions of the Damages Directive can just be interpreted as written-out, although not yet established, examples of the principle of effectiveness, and therefore simply declaratorily reaffirm primary law. Given that the ECJ established new procedural instruments for

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[24] Case C-33/76, *Rewe v Landwirtschaftskammer für das Saarland*, Judgment (16 December 1976) ECLI:EU:C:1976:188, para 5.

[25] Cl Zois, 'The Protean Nature of the Effectiveness Principle in the Private Enforcement of EU Competition Law' (*EU Law Live*, 19 July 2023) <https://eulawlive.com/competition-corner/the-protean-nature-of-the-effectiveness-principle-in-the-private-enforcement-of-eu-competition-law-by-clio-zois/> accessed 25 March 2024.

[26] C-637/17 (n 13) para 47; Case C-25/21 (n 6) paras 58ff.

[27] Cf Case C-267/20 (n 6) paras 48-49; for details, see Imgarten (n 22).

[28] Cf Case C-267/20 (n 6) para 50.

[29] Case C-312/21 (n 6) paras 35, 61.

[30] *ibid*, para 35; see also Damages Directive (n 3) recital 12.

[31] Case C-312/21 (n 6) para 61.

[32] *ibid*, paras 35, 61.

[33] Case C-453/99 (n 1).

antitrust damages actions under Articles 101 and 102 TFEU and the principle of effectiveness before the adoption of the Damages Directive,[34] few provisions of the Damages Directive remain that do not seem to reaffirm primary law.[35] The Damages Directive certainly introduces (new) substantive requirements for antitrust liability that go beyond the standards previously developed in the case law on Articles 101 and 102 TFEU and the principle of effectiveness, such as the limitation of joint and several liability of small and medium-sized undertakings and of leniency applicants in Articles 11 (2)-(4). Yet, especially for the latter, arguments that leniency applications play a decisive role in detecting cartels and consequently that the partial protection of leniency applicants against damages actions is vital to guarantee an effective (public) enforcement of Article 101 TFEU, is a well-known limitation in the jurisprudence of the ECJ.[36] Therefore, any such exceptions could also be based on primary competition law and the principle of effectiveness directly in a careful balancing of the objectives of public and private enforcement of competition law.[37]

In sum, while the current status of litigation on antitrust damages actions in front of the ECJ can certainly be described as a transitional phase when it comes to the applicability of the Damages Directive *ratione temporis*, the jurisprudence of the ECJ has demonstrated that one thing is here to stay: the principle of effectiveness as the guiding principle for antitrust damages actions.

3. Focus on Disclosure of Evidence

The rules on disclosure of evidence have been described as the key procedural evolution for antitrust damages actions.[38] This is supported by the new wave of judgments from the ECJ, which largely focus on the novel disclosure rules under the Damages Directive and highlight the importance of disclosure by requiring a broad EU-autonomous interpretation of the novel rules but also by underlining the limitations of disclosure provided by the rules of the Damages Directive.

Overall, these new judgments place a functional on the disclosure rules: the purpose of the disclosure obligations is to overcome the information asymmetry in antitrust damages actions and to foster effective private damages actions.[39] This information asymmetry stems from a multitude of circumstances coming together in the usual settings of antitrust damages actions.[40] Usually, the injured party holds the burden of proof for the existence of the infringement, the causal link and the harm suffered, including – most importantly – its quantum, but the necessary evidence is mostly located with the infringer or third parties. Furthermore, infringements are often secret and damages quantification is technically complicated and usually requires a large set of data, which does not lie in the hands of the injured party. Given this information asymmetry, the ECJ judgments underline the central role of disclosure for successful damages actions. For example, in the first judgment on the central provision of Article 5 of the Damages Directive in *PACCAR*, the ECJ held that

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[34] See, e.g., for access to evidence, Case C-360/09, *Pfleiderer*, Judgment (14 June 2011) ECLI:EU:C:2011:389, paras 24-26; Case C-536/11, *Donau Chemie*, Judgment (6 June 2013) ECLI:EU:C:2013:366, paras 33, 41.

[35] Imgarten (n 10) 59.

[36] Case C-360/09 (n 34); Case T-437/08, *CDC Hydrogene Peroxide v Commission*, Judgment (15 December 2011) ECLI:EU:T:2011:752; Amtsgericht Bonn (District Court, Bonn, Germany) Case 51 Gs 53/09, Judgment (18 January 2012); Case T-344/08, *EnBW Energie Baden-Württemberg v Commission*, Judgment (22 May 2012) ECLI:EU:T:2012:242; Case C-536/11 (n 34); Case C-365/12 P, *Commission v EnBW*, Judgment (27 February 2014) ECLI:EU:C:2014:112; Case C-162/15 P, *Evonik Degussa v Commission*, Judgment (14 March 2017) ECLI:EU:C:2017:205; Case C-517/15 P, *AGC Glass Europe and Others v Commission*, Judgment (26 July 2017) ECLI:EU:C:2017:598.

[37] See on this below.

[38] See, D Calisti, L Haasbeek and F Kubik, 'The Directive on Antitrust Damages Actions: Towards a stronger competition culture in Europe, founded on the combined power of public and private enforcement of the EU competition rules' (2014) 2(12) Neue Zeitschrift für Kartellrecht 466, 467f.

[39] Damages Directive (n 3) Recitals 14-15.

[40] See, in detail, L Hornkohl, *Geschäftsgeheimnisschutz im Kartellschadensersatzprozess* (Mohr Siebeck 2021) 59ff.

the provision does not only relate to documents in their control which already exist but can also include those documents that the party to whom the request to disclose evidence is addressed must create *ex novo* by compiling or classifying information, knowledge or data in its possession.[41] The ECJ argues with the function of disclosure to remedy the information asymmetry and the overall function of disclosure obligations for the effective private enforcement of EU competition law.[42] Noteworthy, the ECJ again maintains a broad, EU-autonomous interpretation also of the disclosure rules where the principle of effectiveness plays a central role: the disclosure rules should be applied effectively so as to provide injured parties with tools that are capable of compensating for the information asymmetry between the parties to a dispute.

At the same time, the new wave of cases highlights the key role of the conditions of the disclosure test, in particular the proportionality requirement and the rules on disclosure of documents in the hands of competition authorities. In *PACCAR*, the ECJ ruled that in order to decide if in the case at hand evidence would need to be produced *ex novo*, the conditions of disclosure, most notably proportionality, needs to be taken into account in order to prevent the excessive and investigative usage of disclosure in that context.[43] As the ECJ emphasised, the proportionality test is not a mere formality but a true balancing exercise of the legitimate interest of all parties and third parties involved for the referring court. This balancing is particularly important in situations such as in *PACCAR*, but must also apply for general disclosure requests regarding already existing documents. Naturally, as the intervention in such cases is less rigorous, it is more likely for such requests to be proportionate.

Similarly, the ECJ takes a conciliatory approach in *RegioJet* when it comes to the further conditions for disclosure of documents in the hands of competition authorities of Article 6 of the Damages Directive. It follows a very structured test by differentiating three groups of documents to which the documents must be clearly assigned. The so-called 'grey list' of Article 6(5) of the Damages Directive at dispute in *RegioJet* limits disclosure of certain categories of documents (mainly files that were prepared by the defendant for the authority's investigation) until the competition authority has closed its proceedings. As a limiting exemption provision, the ECJ autonomously interprets the grey list narrowly,[44] which can likely also be transposed to the so-called 'black list' limiting disclosure altogether for leniency statements and settlement submission of Article 6(6) of the Damages Directive.[45] In particular, national rules on the list of documents that may be classified in the grey (or black) list may not be extended by the transposing laws of the Member States.[46] Thus, disclosure in private enforcement proceedings was in this case not *per se* excluded for the duration of parallel administrative proceedings, but the general proportionality test of Article 5 of the Damages Directive continues to apply and must be taken into account in addition to the provisions of Article 6 of the Damages Directive in cases involving disclosure of documents in the hands of competition authorities.[47] Consequently, *PACCAR* and *Regiojet* show one of the typical dichotomies in antitrust damages actions: while disclosure should remedy the information asymmetry, conditions and proportionality serve to strike a balance and prevent fishing expeditions. With the overall emphasis of the conditions and limits to disclosure in its case law, the ECJ follows a balanced approach that

[41] Case C-163/21 (n 6) paras 41-64.

[42] ibid, paras 59, 61.

[43] ibid, paras 64, 68.

[44] Case C-57/21 (n 6) paras 101-109.

[45] See to that regard also the pending case C-2/23, *FL und KM Baugesellschaft*.

[46] Case C-57/21 (n 6) paras 108f.

[47] ibid, paras 72-78.

avoids an Americanization[48] of traditional civil law systems in the EU towards *discovery* instead of *disclosure*.

Lastly, the judgment in *Tráficos* underlined the central role of disclosure in the overall system of measures of the Damages Directive that should remedy the information asymmetry in antitrust damages actions. The ECJ emphasises that the various measures interact with each other and that there can be a hierarchy in certain situations. Article 17(1) of the Damages Directive allows for judicial estimation of the amount of harm, when it is 'practically impossible or excessively difficult precisely to quantify the harm suffered'.[49] The ECJ held that Article 17(1) of the Damages Directive is a measure intended to remedy the asymmetry of information concerning the relevant data for quantifying the damage.[50] Thus, the difficulty to quantify a concrete amount of harm could stem from the claimants' lack of information, which, according to the ECJ, should first be addressed by using the Directive's disclosure rules in order to obtain the necessary data for an accurate quantification.[51] Only if an exact quantification is still practically impossible or excessively difficult after disclosure, for example when there are particularly great difficulties in interpreting the documents submitted with regard to the price mark-up, a recourse to judicial estimation is possible.[52] Yet, according to the ECJ, a claimant's inaction with regard to disclosure cannot be remedied by means of judicial estimation.[53] The exact relationship of the various measures to one another will certainly remain a question of each individual case. Moreover, there might be cases where it is already foreseeable from the outset that disclosure cannot remedy the difficulties of quantification due to other grounds than pure information asymmetry.[54] Such situations require further discussion as the relationship between objective economic complexity on the one hand and information asymmetry on the other hand is not fully clear from the current jurisprudence. Yet, *Tráficos* shows the interplay of the various measures but, at the same time, the important role of the procedural instrument of disclosure. Even if it represents a completely new procedural instrument for many of the continental EU Member States, the ECJ clearly brings it to the forefront of civil (antitrust) proceedings.

This central role of disclosure also connects the measure to the crucial principle of effectiveness mentioned. Advocate General *Szpunar* has already lined out in his opinion on *PACCAR* that disclosure of documents contributes to the effectiveness of EU competition law.[55] His argumentation that disclosure might be necessary in order to initiate such an action altogether illustrates that (pre-trial) disclosure of evidence may be necessary for EU primary law reasons. An ever-growing number of EU law instruments already includes disclosure obligations, such as the IP Enforcement Directive,[56] the Collective Consumer Redress Directive[57]. With an additional look at disclosure from the perspective of the effective enforcement of EU law, a general principle of EU law might emerge. In that context, antitrust damages actions play an important role in promoting such a procedural instrument and the ECJ's interpretation on it.

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[48] See on this R Becker, 'Kartellrechtliche Schadenersatzklagen à l'américaine' in W Möschel and FI Bien (eds), *Kartellrechtsdurchsetzung durch private Schadenersatzklagen?* (Nomos 2010).

[49] See on damages quantification also below.

[50] Case C-312/21 (n 6) paras 54f; see also Damages Directive (n 3) recital 47.

[51] Case C-312/21 (n 6) paras 56f.

[52] See, for example, ibid, para 53.

[53] ibid, para 57.

[54] See, to this regard, ibid, para 54.

[55] Case C-163/21, *PACCAR*, Opinion of Advocate General Szpunar (7 April 2022) ECLI:EU:C:2022:286, para 50.

[56] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195/16, Art. 6.

[57] Directive 2020/1828/EU of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers, OJ L 409/1, Art. 18.

4. Quantification of Harm as the Key Challenge

Initial analyses have shown that, on the whole, damages are still reluctantly awarded in the EU.[58] The reason for this is above all the challenging quantification of damages in antitrust damages actions. The required counterfactual analysis builds on the hypothetical and thus speculative scenario typical for damages claims, which is more complex in the case of cartel infringements due to the necessary reconstruction of entire market structures compared to the typical differential hypothesis.[59] Quantifying damages is fact-intensive, requires complicated economic models, and is costly.[60] In principle, the Damages Directive foresees alleviating measures, such as the mentioned disclosure rules to provide claimants with the necessary data for quantification. The other central provision to foster damage quantification is Article 17 of the Damages Directive. While Article 17(1) allows for judicial estimation, Article 17(3) of the Damages Directive incentivises the involvement of competition authorities to assist the national court with quantifying damages.

The *Tráficos* case law was the first judgment of the ECJ dealing with damages quantification itself, given that procedures in the EU Member States often have not reached the stage of damages quantification yet, let alone lead to a referral to the ECJ. Therefore, *Tráficos* certainly serves as a leading judgment in determining the legal boundaries for the quantification and estimation of damages. As mentioned above, the case dealt with an interpretation of Article 17(1) of the Damages Directive and the conditions for judicial estimation, *i.e.* when precise damages quantification is 'practically impossible or excessively difficult'. While the ECJ clarified the mentioned hierarchy of the judicial estimation provision in relation to the disclosure rules,[61] it also laid out a hierarchy between the goal of precise damages quantification and the (only) exceptional judicial estimation. The wording of Article 17(1) of the Damages Directive alone demonstrates that precise damage quantification always takes precedence, and that judicial damages estimation is a supporting measure of an exceptional nature. The ECJ underlines this approach once again.[62] *Tráficos* dampens the role of damages estimation next to precise damages quantification but paints an overall stringent picture from an overall EU liability law perspective. Like in actions for civil liability in general, antitrust damages actions aim to compensate damages as precisely as possible.[63] Any overcompensation, even indirectly through damages estimation, should be avoided.[64] Full and correct compensation is at the core of antitrust damages law; alleviating measures play an (important) second role.

This balanced approach between rule and exception serves as guidance to further examination when precise damages quantification is 'practically impossible or excessively difficult' in the sense of Article 17(1) of the Damages Directive. Apart from the mentioned understanding of the ECJ in terms of hierarchy of the judicial estimation provision in relation to the disclosure rules, the ECJ also hinted that judicial estimation is possible without prior disclosure in cases where the quantification difficulties do not stem from the lack of data.[65] However, 'the mere existence of those uncertainties, inherent in proceedings concerning liability and which arise, in actual fact, from the

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[58] See Laborde (n 5); Marcos (n 8).

[59] European Commission, 'Practical Guide 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', SWD(2013) 205 <https://perma.cc/BR25-WGF5>, para 16.

[60] Damages Directive (n 3) Recitals 45-46.

[61] See n 6.

[62] Case C-312/21 (n 6) paras 52ff.

[63] ibid, para 52.

[64] See also Damages Directive (n 3) art 3(3).

[65] Case C-312/21 (n 6) paras 53f.

confrontation of arguments and expert reports in the exchange of arguments' is not sufficient.[66] Contradictory expert opinions alone do not seem to be enough. As interpreted by national courts following *Tráficos* but interpreting the ECJ rather liberally, other difficulties could arise from problems interpreting the documents submitted through disclosure because of the language of the documents,[67] challenges in the selection of the applicable quantification methods, the nature of the damaging event, or the factual unquantifiability of an exact amount due to the great complexity or due to the heterogeneity of the products.[68] The possibilities of making use of judicial estimation are therefore manifold.

Even if the trend in the case law of the Court of Justice initially appears restrictive here, *Tráficos* only underlines the role of judicial estimation as a manifestation of the principle of effectiveness. The wording of the provision on judicial estimation in Article 17(1) of the Damages Directive repeats the usual wording of the ECJ concretising the principle of effectiveness ('render practically impossible or excessively difficult'[69]). The principle of effectiveness in EU law fundamentally serves as a limitation and thus as a deviation from ordinary procedural rules. In this respect, it is dogmatically correct to treat damages estimation as an exception to exact quantification through evidence, potentially obtained through disclosure. Nevertheless, the manifestation of the effectiveness principle in the wording of Article 17(1) of the Damages Directive also shows that the effectiveness of EU competition is in the foreground of the provision, and thus also the fundamentally broad understanding of the ECJ's effectiveness principle is to be taken as a basis.

In practice, the exceptional rule of judicial damages estimation will likely play an increasingly important role in adjudicating concrete cases. Keeping in mind the high degree of complexity of cartel damages, it is an illusion to believe that just through disclosure of information and potentially economic expert opinions, one could uncover and determine the actual damage. Due to the hypothetical nature of damages calculation and complex counterfactuals in often dynamic market structures, absolute precision is unattainable. In principle, this does not contradict the ECJ's case-law in *Tráficos* as long as the judicial estimation serves the principle of effectiveness, which remains the reason for its existence. Towards national courts, the ECJ's case-law could therefore be interpreted as a reminder to strive for precision even if it will not be fully reached. After all, the relationship between proof and judicial estimation is not black and white, but comprises many shades of grey. For example, actual evidence, potentially obtained through disclosure, can be used as a basis for judicial estimation if this evidence makes a certain overcharge plausible even if it may not be able to prove a concrete percentage of overcharge due to the outlined uncertainties connected with the counterfactual examination.[70] Another example may be the extrapolation of damages from a representative sample.[71] The Court of Justice therefore incentivises its national counterparts to reflect carefully on the different options. Although limiting the length of proceedings has a high value itself, the quick and easy route of judicial estimation should, in the view of the ECJ, not become the automatic default choice.

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[66] ibid, para 52.

[67] Tribunal Supremo (Supreme Court, Spain) case 923/2023, Judgment (12 June 2023) ECLI:ES:TS:2023:2492, para 6.21

[68] Landgericht Berlin (Regional Court of Berlin, Germany) 16a O 1/20 Kart, Judgment (19 June 2023) ECLI:DE:LGBE:2023:0619.16AO1.20KART.0A; Landgericht Mannheim (Regional Court of Mannheim, Germany) 14 O 61/18 und 14 O 103/18 Kart, Judgment (23 June 2023) ECLI:DE:LGMANNH:2023:0623.14O103.18KART.00; Juzgado de lo Mercantil nº3 de Valencia (Commercial Court, Valencia, Spain) case 24/2023, Judgment (10 March 2023); Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain) case 231/2023, Judgment (9 March 2023); Audiencia Provincial de Valencia (Provincial Court, Valencia, Spain) case 185/2023, Judgment (23 February 2023); Tribunal Supremo (Supreme Court, Spain) case 923/2023, Judgment (12 June 2023) ES:TS:2023:2492, paras 6.15 and 6.24.

[69] Case C-453/99 (n 1) para 29.

[70] Ch Thole, 'Beweisrecht und Kartellschadensprozess – aktuelle Fragen und Entwicklungen' (2023) 11(9) Neue Zeitschrift für Kartellrecht 447, 449ff.

[71] Cf Landgericht Mannheim (n 68) para 183.

5. A Forum for Forum Shopping

The jurisdiction and the applicable law for antitrust damages actions are decisive for successful antitrust damages claims. The jurisprudence of the ECJ shows a trend towards giving claimants a greater freedom as to where to file a damages action. Claimants can therefore increasingly choose a forum, i.e. divert to forum shopping. Such forum shopping may be based on different influencing factors that may establish jurisdiction. In principle, a distinction can be made between factors relating to the claimant's seat or market activity (1.) and factors related to the defendants' legal entity, group structure and economic activity under the single economic entity doctrine (2.). Both can have a significant impact on the claimants' ability to engage in forum shopping (3.).

5.1. Forums Related to the Claimant's Seat and Behaviour

First, the vast possibility for forum shopping stems from the generous interpretation of Article 7(2) Brussels Ibis Regulation on matters relating to tort, delict or quasi-delict, in the ECJ's recent case law on antitrust damages actions.[72] Generally, Article 7(2) Brussels Ibis Regulation covers both 'the place where the damage occurred' and 'the place of the event giving rise to it' for antitrust damages actions and determines not only the international but also the local jurisdiction.[73] In the much criticised[74] *CDC* case, the ECJ ruled that the place of the event giving rise to it was the place of the conclusion of the founding agreement of that respective cartel.[75] Should several places come into consideration for complex factual cases, only the damage resulting from an isolated agreement, not the total damage, could be claimed in the court of that place.[76] Whether other acts can also be considered as the place of the event giving rise to it has not yet been clarified by the ECJ. The literature suggested above all the place of the acts of implementation of the agreement on the market,[77] which would give claimants an even broader possibility to pick the forum for actions involving large EU-wide cartels.

In a number of recent judgments, the ECJ has also further interpreted the place where the damage occurred.[78] A synopsis of these decisions results in a market-based approach. According to the ECJ, there are two places where the damage occurred. In case the claimant acquired the cartelised goods or services only in one place, this place determines the place of the court where the damage occurred.[79] In case the claimant acquired the cartelised goods or services in several places, to avoid any fragmentation of jurisdiction within a Member State to create predictability, the place where the

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[72] See, in particular, Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi v DAF Trucks*, Judgment (29 July 2019) ECLI:EU:C:2019:635.

[73] Case C-882/19, *Sumal v Mercedes Benz Trucks España*, Judgment (6 October 2019) ECLI:EU:C:2021:800, para 65.

[74] R Harms, J Sanner and J Schmidt, 'EuGVVO: Gerichtsstand bei Kartellschadensersatzklagen' (2015) 26(15) Europäische Zeitschrift für Wirtschaftsrecht 584; A Stadler, 'Schadensersatzklagen im Kartellrecht – Forum shopping welcome! – Zugleich Besprechung von EuGH, Urteil v. 21.5.2015 – C-352/13' (2015) 70(23) Juristenzeitung 1138; W Wurmnest, 'International jurisdiction in competition damages cases under the Brussels I Regulation: CDC Hydrogen Peroxide' (2016) 53(1) Common Market Law Review 225.

[75] Case C-352/13, *CDC Hydrogen Peroxide v Akzo Nobel*, Judgment (21 May 2015) ECLI:EU:C:2015:335, para 44.

[76] ibid, para 45.

[77] M Danov, Jurisdiction and Judgments in Relation to EU Competition Law Claims (Bloomsbury 2011) 94.

[78] Case C-352/13 (n 75); C-451/18, Case C-451/18 (n 72); Case C-30/20, *RH v AB Volvo*, Judgment (15 July 2021) ECLI:EU:C:2021:604.

[79] ibid, paras 39f.

damage occurred is the seat of the aggrieved buyer.[80] At this court, the claimant can file an antitrust damages action involving the entire or total damage, not just the one resulting from that place.[81] With this approach, the ECJ departs from the so-called mosaic theory otherwise applicable for Article 7(2) Brussels Ibis Regulation.[82] However, both the place of acquisition and the seat of the injured party must, respectively, be in a Member State 'in which the affected market is located'[83], hence fostering a market-based approach. Yet, the cross-border distribution of cartelised goods through subsidiaries easily opens another market for cartelised goods. This approach already allows quite far-reaching forum shopping as the harmed buyer can claim the entire damage at his seat as long as his seat is in an affected market. More generally, with the overall extensive interpretation of Article 7(2) Brussels Ibis Regulation, the claimant already has a wide choice of possible jurisdictions.

5.2. Forums Related to the Defendants – Single Economic Entity Doctrine

Second, the recent transfer of the single economic entity doctrine in *Skanksa*[84] and *Sumal*[85] from public to private enforcement of competition law has many implications for antitrust damages actions overall and also opened the door for further jurisdictional possibilities for claimants. Early on, the ECJ established the so-called single economic entity doctrine to interpret the concept of undertaking for public enforcement of EU competition law. The ECJ has consistently held that an undertaking within the meaning of Articles 101 and 102 TFEU is 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'.[86] EU competition law addresses the undertaking as a single economic entity: Instead of being based on legal entities, the concept of undertaking in EU competition law is functional and underpinned by an understanding from an effectiveness perspective. Several distinct legal entities can constitute a single economic entity. Subsidiaries, sister and parent companies in one group can therefore be held liable for infringements of competition law by any of them. Not all companies in a group automatically belong to one economic entity. According to the case law of the ECJ, two points are decisive for determining the economic entity: a connection of the legal entities to a unit and a uniform economic activity of these.[87] The first point concerns the decisive question of which natural or legal persons can form an (economic) entity. According to the ECJ the entity requires a unified organisation of personal, material, or immaterial resources and economic, organisational or legal ties.[88] This can take place, for example, through control agreements under company law in legal terms. The second point requires, as a consequence of the activity-based functional interpretation, a uniform economic market behaviour of the individual legal entities, for example, through decisive influence

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[80] ibid, paras 41f; Case C-352/13 (n 75) paras 52f.

[81] ibid, para 54.

[82] P Mankowski 'Article 7' in U Magnus and P Mankowski (eds), *Brussels I bis Regulation: European Commentaries on Private International Law*, Vol. I (Otto Schmidt 2016) paras 207ff.

[83] Case C-451/18 (n 72) para 34.

[84] Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions*, Judgment (24 March 2019) ECLI:EU:C:2019:204.

[85] Case C-882/19 (n 73).

[86] Constant jurisprudence, see Case C-41/90, *Klaus Höfner and Fritz Elser v Macroton*, Judgment (23 April 1991) ECLI:EU:C:1991:161.

[87] Summarizing the jurisprudence: E Fischer and P Zickgraf, 'Zur Reichweite der wirtschaftlichen Einheit im Kartellrecht' (2022) 186 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 125, 133.

[88] Case C-407/08 P, *Knauf Gips v Europäische Kommission*, Judgment (1 July 2010) EU:C:2010:389, paras 84 and 86: Case C-155/14 P, *Evonik Degussa GmbH und AlzChem AG gegen Europäische Kommission*, Judgment (16 June 2016) ECLI:EU:C:2016:446, para 27; Case C-97/08 P, *Akzo Nobel v Europäische Kommission*, Judgment (10 September 2009) ECLI:EU:C:2009:536, para 58.

over the subsidiary[89] or due to the fact that the subsidiary is distributing cartelised goods[90]. In *Skanksa* and most notably *Sumal*, the ECJ transferred its jurisprudence to private damages actions, required by a uniform application of EU competition law and the principle of effectiveness;[91] competition law is effectively enforced through an enforcement system comprising of public and private enforcement.[92]

Applying the single economic entity doctrine in *Skanksa* and *Sumal* for antitrust damages actions offers a wide variety of forum shopping. Via the general head of jurisdiction under Article 4(1) Brussels Ibis Regulation, a person domiciled in a member state can be sued at their domicile or seat. Since the different members of a cartel are jointly and severally liable,[93] the claimant can already choose which cartel member to sue for the entire damage at their seat. Applying the single economic entity doctrine to antitrust damages actions opens the door for a double joint and several liability: between the members of the cartel and within different legal entities of a cartel member, which constitutes the single economic entity. According to *Sumal,* the different legal entities of a single economic entity are jointly and severally liable for the damage.[94] Under Article 4(1) Brussels Ibis Regulation, in case of joint and several liability, the claimant can choose from all the seats of the legal entities belonging to that single economic entity and can sue for the entire damage. Therefore, ultimately, the injured party may, at its discretion, sue any entity belonging to a single economic entity involved in the cartel infringement for the entire damage at the seat of that entity. Depending on the size of the cartel and the group companies involved in the cartel, the single economic entity doctrine could open a general jurisdiction against a legal entity, be it the mother company or a subsidiary, in each Member State. Depending on the structure of the group, the single economic entity even has extraterritorial dimensions.[95]

Furthermore, even though the ECJ has not explicitly decided this matter yet,[96] Article 8 No 1 Brussels Ibis Regulation applies in the context of the single economic entity doctrine. According to Article 8 No 1 Brussels Ibis Regulation, several persons domiciled in an EU Member State may be sued in the court of the place where one of the defendants is domiciled, the so-called anchor defendant, provided the claims are closely connected. Joint and several liability is generally recognised as such a close connection[97] and must therefore also apply in the context of the mentioned double joint and several liability. In *CDC*, the ECJ recognised it in the context of joint and several liability of cartel members.[98] There is no reason to interpret Article 8 No 1 Brussels Ibis Regulation differently in the case of joint and several liability of the legal entities belonging to one single economic entity.[99] Via Article 8 No 1 Brussels Ibis Regulation, the claimant can then designate one of the liable entities as an anchor defendant and file a joint and several claim for damages at that seat against any entity of

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[89] Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. und Commercial Solvents Corporation v Europäische Kommission*, Judgment (6 March 1974) ECLI:EU:C:1974:18, paras 132f.

[90] Case C-882/19 (n 73) para 52.

[91] ibid, paras 33, 35.

[92] See also on this the following section.

[93] See Damages Directive (n 3) art 11(1).

[94] Case C-882/19 (n 73) para 44.

[95] See L Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) 1 MPILux Research Paper http://dx.doi.org/10.2139/ssrn.4036688.

[96] See, however, the questions on this matter in pending case C-393/23, *Athenian Brewery and Heineken.*

[97] P Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (Signed at Brussels, 27 September 1968), OJ C 59/1, 26; see also D Paulus, 'Art. 8 EuGVVO' in R Geimer and R Schütze (eds), *Internationaler Rechtsverkehr in Zivil- und Handelssachen* (66 edn, CH Beck 2023) paras 32ff; R Thode, 'Art. 8 EuGVVO' in *BeckOK ZPO* (51 edn, CH Beck 2023) para 27.

[98] Case C-352/13 (n 75) para 33.

[99] Precisely on this question, cf the pending case C-393/23, *Athenian Brewery and Heineken.*

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