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Private enforcement and punitive damages: are they necessary to provide sufficient incentives for victims of competition infringements to claim damages?

A critic analysis taking into consideration the *Damages Directive* approach and the (lack of) inspiration from the USA

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1- Introduction

Private enforcement has been slowly developing in Europe at a different pace amongst Member States. But, with the new *Damages Directive*[1], it seems like it will become more cohesive and find its spot alongside the extremely developed US's private enforcement, where an astounding 95% of antitrust cases are made of private actions[2].

With this dissertation I attempt to analyze if introducing damages multipliers, such as punitive damages, in the European private enforcement system, much like they exist in the US[3], is something that should be considered.

Enhancing damages can comprise, for example, double or treble damages, which multiply the actual monetary damages suffered by the plaintiffs, punishing the perpetrators and acting as a strong deterrence factor. There are actually many forms of punitive or exemplary damages, the most famous of which are perhaps the "American" treble damages. But in reality, punitive damages are all damages intended to punish the defendant, thus exceeding what is necessary for simple compensation of the plaintiff. These damage multipliers can be distinguished in: punitive damages, which can be awarded separately and exceed the actual harm, since the calculation is independent from it; or statutory damages, which are a specific sum awarded either in alternative or in addition to actual damages.

Punitive damages are one part of private enforcement that I believe is essential to provide sufficient incentives for victims of competition infringements to sue, thus achieving compensation for victims and deterrence purposes. And the reason for that is that only the victims with the highest amount of damages feel that it's worth it to go to court, given the prospect of having to pay high costs in lawyers, economists and court fees, with uncertain results.

Even so, the *Damages Directive*'s legislators chose to clearly prohibit any form of overcompensation and punitive damages, even though that isn't against EU law. In fact,

[1] *Directive 2014/104/EU on certain rules governing actions for damages under national laws for infringements of the competition law provisions of the Member States and of the European Union*, of 26 November 2014
[2] Wouter P.J. Wils, *Private enforcement of EU antitrust law and its relationship with public enforcement: past, present and future*, pp. 14-16
[3] United States of America

this prohibition is an approach which contradicts the one adopted in the *Manfredi case*[4], which will be approached. The *Directive*'s prohibition also differs from the *Green Paper's* approach[5], which proposed that for cartel damages, compensation could be doubled (automatically, conditionally or at the discretion of the court), if single damages were not sufficient to incentivize victims to bring damages actions. This option followed the US approach to punitive damages, but was later abandoned.[6] Thus, the *Directive´*s prohibition of punitive damages was undeniably a political choice, led by the fact that many Member States' regimes are against them. This leads to the problem of European private enforcement's capacity to provide incentives for all victims that should be compensated.

I will briefly analyze the European and the American systems, focusing on the subject of punitive damages. This comparison will lead to the understanding of the contested value and necessity of damages multipliers and if its implementation could be useful in Europe.

I will begin, after the introduction in chapter 1, by providing the necessary background knowledge on the topics of the dissertation, in chapter 2. I will start with a general overview of the meaning of private enforcement and its complementarity with public enforcement, notwithstanding the different purposes they serve. It will also be explained how these different purposes reflect themselves in punitive damages and the fact that the American system allows them, whereas the European system does not.

In chapter 3, I will specifically approach the American legal regime, starting by providing a brief historical background, in section 3.1. Afterwards, in section 3.2, the focal point will be on the current American legal regime, concentrating on the specific roles of private vs public enforcement and the key part that punitive damages play in that country's private enforcement.

In comparison, chapter 4 will focus on the European regime. A concise historical background will be exposed in section 4.1, where the development of private

[4] Judgment of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04, *Antonio Cannito v Fondiaria Sai SpA*, C-296/04, *Nicolò Tricarico v Assitalia SpA*, C-297/04 and *Pasqualina Murgolo*, C-298/04 *v Assitalia SpA*, EU:C:2006:461

[5] *Green Paper- Damages actions for breach of the EC antitrust rules*, (SEC(2005) 1732, /*COM/2005/0672*/, of 19 December 2005

[6] Zegrean, Ivona-Elena, *Consumer welfare and private actions for damages in European Union competition law*, pp. 90-91

enforcement and the background to the *Damages Directive* will also be explained, in section 4.1.1. Brief mention will be made to important case-law and legislation that led the way to the *Directive*. Furthermore, section 4.2 will give practical examples of some Member States' regimes prior to the *Directive*, highlighting some countries where private enforcement has a considerable tradition and punitive damages are actually accepted, although that is not the case for most Member States. Finally, section 4.3 will critically consider the *Damages Directive* framework, in the sense that it does provide some alternative options to punitive damages, but they might not be enough.

The core part of the dissertation will be finished in chapter 5, with a critical assessment of both systems and the value of punitive damages. The background questions here are: are punitive damages essential or are the other methods to provide incentives for victims to sue efficient enough?

Lastly, the conclusion in chapter 6 will try to reach an outcome regarding the necessity of punitive damages in Europe and whether or not they are a prerequisite of an efficient private enforcement system.

2- Private enforcement and punitive damages: overview

Competition law enforcement can be public or private. They both have, in general, the same purposes: to bring the infringement to an end; to compensate; and to punish the infringer and deter him (specific deterrence) and others (general deterrence-socialization of the harm and damage) in the future.[7] The difference lies in the importance of each purpose. For instance, private enforcement focuses more on the deterrence and compensation aspects, as it allows damages to be awarded to private plaintiffs for damages suffered from competition infringements; whereas public enforcement's main goal is to bring the infringement to an end. It also helps to clarify and develop legislative prohibitions. If punitive damages are accepted in private enforcement, then the punishment purpose is exacerbated.

Regarding the relationship between public and private enforcement, in my opinion, the most sensible approach is that they should complement each other, independently of their weight in the society, so as to avoid any conflict or overlap between them, as each has inextricably interrelated goals that can work for the same purposes.[8]

Private enforcement can indeed bring about many positive things. Firstly, it's the main way of compensating victims for their suffered losses. It allows for a multiplication of resources and a kind of "*safety net*" in case there is subversion of the public system, thus reducing the need of state intervention (namely in stand-alone actions), and also reducing the costs of the governmental budget, allocating costs to the private sector. Moreover, private information is sometimes the best placed to detect violations.[9] As Myriam E. Gilles wrote, *"(…) the massive governmental expenditures required to detect and investigate misconduct are no match for the millions of 'eyes on the ground' that bear witness to (…) violations."* [10]

[7] Assimakis, Komninos, *Private antitrust damages actions in the EU: second generation questions,* in *Revista de Concorrência e Regulação*, number 9, January to March 2012, pp. 21-72
[8] Buccirossi, Paolo, Carpagnano, Michele, *Is it time for the European Union to legislate in the field of collective redress in antitrust (and how*)?, Journal of European Competition Law & Practice 2013; 4 (1): 3-15, p.13
[9] Burbank, Stephen B., Farhang, Sean & Kritzer, Herbert M., *Private enforcement*, pp. 662-666
[10]E. Gilles, Myriam, *Reinventing structural reform litigation: deputizing private citizens in the enforcement of civil rights*, pp. 1384-1410

Furthermore, private enforcement encourages legal and policy innovation and participatory and democratic governance, through the creation of a culture of competition that can have an overall positive macroeconomic impact.[11]

Nonetheless, some drawbacks to private enforcement cannot be ignored.

Firstly, some scholars fear that private enforcement can reduce public enforcement's efficiency, which is dependent, in many cases, on leniency agreements. It is a fact that whistleblowers provide key information to competition authorities, which allows them to prosecute many cases. The biggest advantage for whistleblowers is that they are, many times, not required to pay any penalty (or see their penalty considerably reduced). However, if after these public charges, companies have to deal with private damages (and even more so if there are multiple damages), the incentives for whistleblowers are reduced. This is, indeed, a complicated issue and something that requires a lot of balance. Completely deny victims their compensation just because the infringing company used leniency is not fair for them; but making companies pay makes it less worth it for them to use leniency. The best solution, in my opinion, is to get inspiration from the American *de-trebling* mechanism, and allow for reduced private enforcement liability in case of leniency agreements. In fact, the *Directive* already does that to some extent, in its 38th presumption. Immunity recipients are excluded from joint and several liability, thus they are only liable for the harm they caused.

Furthermore, another issue is that follow-on actions are the most common type of actions, due to the fact that private parties don't have the investigative powers necessary to uncover cartels, so competition authorities usually still have to bring an action first. Moreover, in stand-alone proceedings, i.e., suits initiated independently of a public investigation, which require a separate determination of liability, the burden of proof usually rests on the plaintiff and, even in follow-on actions, the plaintiff has to show its individual loss and the direct causal link[12] between the infringement and the loss incurred, with little access to evidence.

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[11] Migani, Caterina, *Directive 2014/104/EU: in search of a balance between the protection of leniency corporate statements and an effective private competition law enforcement*, Global Antitrust Review 2014, p. 92

[12] See e.g. Judgment of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined Cases C-46 & 48/93, EU:C:1996:79, paragraph 51; and Judgment of 9 June 2010, *European Commission v Schneider Electric SA*, C-440/07 P, EU:C:2009:459, paragraphs 186 and seq.

In addition, some scholars fear the possibility of an abusive litigation culture. Regimes where private enforcement has a predominant role can end up excessively empowering judges, who many times lack policy and competition law expertise, thus potentially resulting in inconsistent and contradictory jurisprudence. The Administration should be the entity responsible for policy making, but private enforcement can change this separation of powers to some extent.

It can also be argued that private enforcement discourages cooperation with regulators and voluntary compliance and lacks democratic legitimacy and accountability, in the sense that, unlike administrators, who do not have personal economic interests at stake, private litigants act precisely based on these interests that may be in conflict with the public interest and regulatory regime.

Furthermore, private litigation is fragmented and uncoordinated and for it to be efficient adequate incentives need to exist, otherwise there will be under-enforcement. Incentives can be: admissibility of class actions, contingency (percentage-based) fees, or the use of damages multipliers, such as punitive damages.

In the EU, article 2(3) and recital 12 of the *Damages Directive,* albeit with no legal ground from the Treaties, prohibit victims' overcompensation, thus limiting the ability of EU Member States to provide for any kind of multiple damages.[13] This is a clear rejection of the US's approach, where the award of treble damages is the central feature of private antitrust enforcement.

The *Damages Directive* implies that full compensation, i.e. the restoration of the harm suffered by the victims, is limited by the fact that damages can only serve compensation rather than deterrence purposes, excluding all punitive reasons. Simple damages that aim to compensate victims strictly for the losses they suffered are considered sufficient to provide incentives for victims to sue and achieve compensation. In case the parties have contractually agreed upon a fixed amount of compensation, and that leads to overcompensation, the amount must be officially reduced.

Deterrence is not the main concern in Europe, where this goal is sacrificed for the sake of just compensation. Public enforcement remains centered in the European Commission and the national competition authorities (cooperating in the European

[13] Funke, Thomas, Clarke, Osborne, *The EU damages actions directive,* p. 1

Competition Network), whereas private actions for damages simply have a supplementary and compensatory role.[14] In fact, the European Commission and the competition authorities of the EU Member States have a large capacity to deter and punish infringements of articles 101 and 102 TFEU[15] by imposing high fines (up to 10% of the yearly revenue of a company).
On the contrary, in the US, the introduction of damages multipliers is considered to serve corrective justice and, primarily, deterrence purposes, providing possible offenders with incentives to avoid harm.

The strict prohibition of overcompensation is a missed opportunity, because punitive damages could be very useful. On the one hand, using a damages multiplier such as trebling, like in the US, is indeed a very efficient tool to induce victims to seek reimbursement for the damages they suffered, as the perspective of being overcompensated acts as bait and makes the expected benefits exceed the expenses of going to court. On the other hand, the fact that more victims actively seek compensation, leads enterprises to take into account this very high extra potential cost when they infringe competition laws, creating a very significant deterrence effect.

All these "*bounty*" options are very effective in enhancing incentives for individuals to litigate, acting as *"private attorney generals"*, but they are not without some controversy.[16]
Firstly, punitive damages always need to be subject to effective limits, and should not be used in all civil cases, or at least without adequate constitutional procedural safeguards. In fact, punishment is not a purpose of private law, so this can be considered against the separation of criminal and private law.
Punitive damages are also dangerous in the sense that there is a risk of unfair application and over deterrence.[17] Furthermore, if there is a long prejudgment interest, it's difficult to add punitive damages to the damages award without leading to extreme overcompensation and to a disproportionate burden on the infringing enterprises. In particular, in non-cartel cases, especially if contingency fees are available, enhancing

[14] Wouter P.J. Wils, *Private enforcement of EU antitrust law and its relationship with public enforcement: past, present and future*, p. 39
[15] *Treaty on the Functioning of the European Union*, of 13 December 2007
[16] Burbank, Stephen B., Farhang, Sean & Kritzer, Herbert M., *Private enforcement*, pp. 667-678
[17] Koziol, Helmut, *Punitive damages- a European perspective,* p. 744, p. 751

the expected reward through punitive damages is not necessary and can indeed lead to excessive overcompensation and frivolous suits.
Another problem is the potential for abuse, as there might *"(...) not be the consumers who have been harmed by an antitrust infringement who bring claims but competitors (who have more information), whose incentive to sue varies directly with the competitive threat posed by the defendant."* [18] This completely overturns the system and leaves a huge burden on the defendants.

Furthermore, it's not clear whether punitive damages, with its strong penal sanction connotation, entail a punishment for the full scope of the wrong to society or just the wrong done to the plaintiff. If the first option is the purpose of punitive damages, it's illogical to require a proportional balance between the amount of punitive damages and the amount of the individual plaintiffs' damages award. Actually, they are usually not dependent on each other, although in some legal systems, a *ratio* between compensation and punitive damages may exist. [19]
It could also be argued that it does not make sense to allow the plaintiff to keep the punitive damages award, as the harm was done to all the society.[20] The counterargument is that the plaintiff suffered a loss, which needs to be compensated and punitive damages are sometimes the only solution available.

Moreover, there is no reason to assume that trebling, like in the US, is the right multiplication number. It's an attempt to incorporate the probability of detection and punishment into the final damage award, as single damages are clearly insufficient. As we have seen, the social benefit (in terms of deterrence, education and clarification of the law) of a damages action far exceeds the damages awarded to private plaintiffs, who, in turn, have insufficient incentives to sue. But why does the American regime use 3 as the multiplier? If we think about it, trebling, which means awarding the plaintiff three times the amount of damages actually suffered, is an inaccurate indiscriminate measure, and while it does increase the incentives to pursue meritorious

[18] Milutinović, Veljko, *The antitrust damages directive: the ideal of just compensation and the primacy of public enforcement*, CPI Antitrust Chronicle, January 2015, p. 768
[19] Milutinović, Veljko, *The antitrust damages directive: the ideal of just compensation and the primacy of public enforcement*, CPI Antitrust Chronicle, January 2015, p. 764
[20] Koziol, Helmut, *Punitive damages- a European perspective,* p. 745, p. 754

cases, it can also increase unmeritorious ones.[21] Hence, why is the multiplier not variable? The obvious answer is that it would certainly be too casuistic and a nightmare to judges, but the reality is variable too.

Partly due to all these reasons, with a few exceptions, such as the United Kingdom and the Netherlands, for example, few of these mechanisms are sufficiently developed in the EU[22]. With lack of incentives, asymmetry of information, high costs and risks in litigation, due to the need of complex economic analysis and lack of experience from national judges, it's difficult to make private enforcement thrive in Europe. Even with the new *Damages Directive* it's not clear whether much will change, as access to overcompensation is still denied.[23] Legal uncertainty and disparity between national legislations in the EU will most likely at least partially remain, as the *Damages Directive*, even if it is indeed a step in the right direction, still leaves leeway for a lot of differences in its transposition. The negative outcomes could be ineffective private enforcement and avoidance, conflicts in the interaction between private and public enforcement, unequal access to justice and a deficit in compensatory justice, as the differences between Member States' transpositions lead to forum shopping, which albeit at least allowing overcompensation in some countries, leads to an unequal treatment of victims.[24]

Notwithstanding, in general, albeit belatedly, private enforcement has been steadily growing in Europe, propped by the emergence of funding sources, such as Cartel Damages Claims ("CDC"); the establishment of American law firms in Europe; an increasingly vigorous antitrust enforcement activity; better acknowledgement of the possibility of pursuing private enforcement; and legislative reforms, both on a national[25] and European level, with the *Damages Directive*.[26]

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[21] Wils, Wouter P. J., *Should private antitrust enforcement be encouraged in Europe?,* March 28, 2003, *World Competition: Law and Economics Review*, Vol. 26, No. 3, 2003., pp. 13-14
[22] European Union
[23] Migani, Caterina, *Directive 2014/104/EU: in search of a balance between the protection of leniency corporate statements and an effective private competition law enforcement,* Global Antitrust Review 2014, pp. 88-107
[24] Howard, Anneli, *Too little, too late? The European Commission's legislative proposals on anti-trust damages actions*, Journal of European Competition Law & Practice 2013, 4 (6): 455-464, p. 456
[25] Such as the United Kingdom's *Consumer Rights Act of 2015*
[26] Goldsmith, Aren, *Arbitration and EU antitrust follow-on damages actions,* pp. 17-18

3- The American regime

- **3.1. Brief historical background**

In general, antitrust law in the US emerged with the *Sherman Act of 1890*[27]. It was the first federal law to outlaw competition practices that are harmful for consumers, such as monopolies, cartels and trusts.
In 1914, the Congress passed two additional antitrust laws: the *Federal Trade Commission Act*[28], which created the Federal Trade Commission; and the *Clayton Act*[29]. The *Clayton Act* addressed specific practices that the *Sherman Act* did not clearly prohibit, and its presumptions have been interpreted by the US courts, particularly the Supreme Court.

Albeit revised, these are the three core federal antitrust laws that still apply nowadays. In addition to these federal statutes, most States have state antitrust laws. Nevertheless, the majority of private cases are brought under federal laws. Most antitrust violations are persecuted in civil actions, but the *Sherman Act* is also a criminal law, so individuals and businesses that violate it may be prosecuted by the Department of Justice and punished with fines and imprisonment (although imprisonment is generally limited to intentional and clear violations).

Punitive damages had first been recognized in England in the *1623 Statute of Monopolies*[30], based on the *Darcy v. Allein* case[31], known as the case of the monopolies. *Darcy v. Allein* concerned a license to import and export playing cards, given by the Queen, and was the first judgment that considered state-established monopolies to be harmful and against the law. Darcy, an officer of the Queen's household, claimed damages for the defendant's infringement.
The English common law tradition was transposed to the UK's colonies, namely the US[32], where additional case law followed and punitive damages ended up becoming part of the American private enforcement system.

[27] *Sherman Act*, 26 Stat. 209, 15 U.S.C. §§ 1–7, of 2 July 1890
[28] *Federal Trade Commission Act of 1914*
[29] *Clayton Antitrust Act of 1914*, Pub.L. 63–212, 38 Stat. 730, of 15 October 1914
[30] *English Statute of Monopolies*, of 1623
[31] Judgment of 1 January 1599, *Edward Darcy Esquire v Thomas Allein of London Haberdasher* (1602)
[32] Milutinović, Veljko, *The antitrust damages directive: the ideal of just compensation and the primacy of public enforcement*, CPI Antitrust Chronicle, January 2015, p. 767

The first relevant American private follow-on suit happened after the public prosecution of a price fixing cartel of electrical equipment manufacturers in the late 1950s.[33] A decade later, there was an increase in private enforcement actions under American federal law, due to: the enactment of federal statutes that authorized private enforcement; changes in the legal profession; and, most importantly, the proliferation of financing means, such as state-funded legal services' programs, the growth of private nonprofit advocacy organizations (with favorable tax treatment), contingency fees, statutory attorney fee shifting presumptions favorable to prevailing plaintiffs, and the possibility of class actions.[34]

Later on, and until 1974, even when criminal enforcement by the Department of Justice was much more developed, fines were limited to $50,000, leaving a deterrence gap to be filled by follow-on treble damages actions. Nowadays, the penalties' maximum limit has been increased up to $100,000,000 for corporate fines, $1,000,000 for individual fines and 10 years of jail term. [35] But even that is still not high enough. According to Wouter P.J. Wils: "*Still today, while the Department of Justice has statutory authority to prosecute all violations of sections 1 and 2 of the Sherman Act criminally, the scope of criminal enforcement has in fact been narrowed over time to 'hard-core' price-fixing, bid rigging or market allocation cartels. For other antitrust violations, US public enforcement is in practice limited to prospective injunctive relief, leaving a deterrence gap to be filled by follow-on treble damages actions."* [36]

In 1989, the Supreme Court considered, for the first time, the constitutionality of punitive damages, in *Browning-Ferris v. Kelco*[37]. Browning-Ferris, faced with paying $51,146 in compensatory damages and $6 million in punitive damages, appealed, based on allegedly excessive fines that violated the Eight Amendment of the Constitution. However, it didn't raise this issue specifically under the Due Process Clause of the Fourteenth Amendment. Thus, the U.S. Supreme Court did not consider the effect of

[33] Rüggeberg, Jakob and Schinkel, Maarten Pieter, *Consolidating antitrust damages in Europe: a proposal for standing in line with efficient private enforcement,* World Competition 29(3): 395-420, 2006, p. 399
[34] Burbank, Stephen B., Farhang, Sean & Kritzer, Herbert M., *Private enforcement,* p. 647
[35] *Antitrust criminal penalty enhancement and reform act of 2004*, Pub. L. No. 108-237, §215, 118 Stat. 665, 666
[36] Wouter P.J. Wils, *Private enforcement of EU antitrust law and its relationship with public enforcement: past, present and future,* p. 16
[37] *BFI, Inc. v. Kelco Disposal, Inc*., 492 U.S. 257 (1989)

due process on the award, but it stated that *"(…) on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties*." [38], where the government has no share in the recovery. And even if the Amendment was applicable, the punitive damages awarded were not so disproportionate as to be constitutionally excessive.

From then on, punitive damages became widely accepted.[39] [40]

[38] *BFI, Inc. v. Kelco Disposal, Inc*., 492 U.S. 257 (1989), P. 492 U. S. 261

[39] Subsequent relevant case law includes: *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)

[40] https://verdict.justia.com/2013/04/08/the-constitution-and-punitive-damages

- **3.2. The current American legal regime regarding punitive damages**

Currently, in the US, the public competition law sector is headed by public entities[41] that have relatively limited resources[42] and fewer enforcement rights than competition authorities in Europe. Namely, they have no power to impose fines and have to regulate through litigation in court, in order to impose criminal or civil law sanctions.
That is not to say public enforcement is not relevant, particularly in the field of immunities and criminal sanctions, such as imprisonments and fines, which are available in the US, but not for private enforcement.[43] Moreover, undertakings that cooperate with the authorities can receive immunity from criminal sanctions, see their civil liability reduced from treble to single damages ("*de-trebling*") and only be liable for the damage caused by their own actions.[44]

Still, American private plaintiffs have a much stronger legal position than their European peers and are relied upon as "*private prosecutors*"[45]. In fact, private suits, with the possibility of damages overcompensation resulting thereof, provide a significant supplement to public antitrust enforcement in the US. Private enforcement and actions for damages are very well established.
Some other factors that induce this supremacy of private enforcement include the fact that: there are jury trials, broad pre-trial discovery, an asymmetric loser-pays rule (only in favor of the plaintiff), and an aggressive litigation culture.

Particularly regarding punitive damages, article §4 of the *Clayton Act* states that claimants can be awarded threefold the damages they suffered (treble damages), if they were injured by "(…) *reason of anything forbidden in the antitrust laws"*. The plaintiff

[41] The Department of Justice, which comprises an Antitrust Division; and the Federal Trade Commission, created by the Congress
[42] Noronha, João Espírito Santo, *Litigância jurídico-privada no direito da concorrência- a diretiva nº2014/104/UE de 26 de novembro de 2014: divulgação de elementos de prova, efeitos das decisões nacionais, prazos de prescrição e resp. solidária*, in *Revista de Concorrência e Regulação*, number 19, pp. 53-82, July to September 2014
[43] Canenbley, Cornelis, Steinvorth, Till, *Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?*, Journal of European Competition Law & Practice 2011, 2 (4): 315-326, p. 323
[44] *Antitrust criminal penalty enhancement and reform act of 2004*, Pub. L. No. 108-237, §213, 118 Stat. 665, 666
[45] Canenbley, Cornelis, Steinvorth, Till, *Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?*, Journal of European Competition Law & Practice 2011, 2 (4): 315-326, p. 322

simply must prove that the defendant committed a violation of antitrust law, which resulted in damage to him. There is an antitrust injury requirement, developed by the US Supreme Court, under which the plaintiff has to show that the injury flows from the defendant's unlawful act, so a *prima facie* existence of a causal link.

For example, in *Zenith Radio Corp. v. Hazeltine Research*, Inc.[46], concerning patent infringements and license agreements, upon the expiration of Zenith's license agreement with Hazeltine Research, Inc., Zenith refused to renew it, asserting that it no longer required a license. Hazeltine brought a patent infringement suit, whereas Zenith counterclaimed for damages and injunctive relief, alleging *Sherman Act* violations by misuse of patents and conspiracy, and ended up being awarded around $35,000,000 in treble damages, together with injunctive relief.[47]

Later, in the case *Brunswick Corp. v. Pueblo Bowl-O-Mat*, Inc.[48], regarding bowling alleys, one manufacturer, Brunswick Corp, acquired several defaulted bowling centers, but only operated some. Pueblo Bowl-O-Mat, a competitor, sued for treble damages for loss of profits under the *Clayton Act*, arguing that these acquisitions might lessen competition or create a monopoly. Pueblo obtained a jury verdict of over $7 million dollars in damages, but Brunswick appealed to the Court of Appeals, which remanded back to the trial court, based on an error in charging the jury. Brunswick and Pueblo both petitioned the United States Supreme Court for review, which rejected the *Clayton Act* claim for lack of antitrust injury, based on the fact that Pueblo was harmed by the acquisition, but this actually increased competition, as the bowling alleys would have gone out of business, so there was no antitrust injury.[49]

All things considered, punitive damages in the US serve four interrelated goals: compensation for victims; and loss of illicit gains, punishment and deterrence (by far, the most important) for the infringers.[50] This is demonstrated by the fact that the amount of damages that the infringing party must pay can be much higher than the actual harm

[46] *Zenith Radio Corp. v. Hazeltine Research*, Inc., 395 U.S. 100 (1969)
[47] https://supreme.justia.com/cases/federal/us/395/100/case.html
[48] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 US 477* (1997)
[49] https://supreme.justia.com/cases/federal/us/429/477/case.html
[50] Fabbio, Philipp, *Private actions for damages,* p. 6

suffered by the plaintiff, making him more than whole.[51] In fact, the final amount of compensation can comprise treble damages, plus judicial costs and reasonable lawyer fees and sometimes even interest. If interest is considered, this may constitute a significant increase in the amount of damages awarded, given that there is often a long delay before the judgement or the settlement. In addition, damages can potentially coexist with claims by direct and indirect purchasers and even with civil and criminal fines ("*cluster bomb effect*"), although that is not the norm in the US.

In the US, there are also "*piggy-back*" private treble damages actions, based on the presumption that issues that have already been decided in a civil or criminal judgment in favor of the Government don't need to be litigated again by private parties. Thus, they can rely upon these judgments, which facilitate proof and reduce costs and time.

All these incentives are actually necessary to protect private enforcement in this country, as the litigation system is very developed and plaintiff-friendly, but at the cost of extremely high fees and long procedures.[52]

Despite all its good intentions and results, a real problem with the American regime is that there is a risk that several claims for damages may overlap, resulting in an overloading of compensation for victims. There can also be too many incentives for the private parties to claim damages, leading to an excessive flow of unmeritorious cases. Injured competitor companies, for instance, often bring these types of suits. Such an overflow of cases might be good for greedy lawyers and economists, but it ends up putting too much pressure on the judicial system and brings on a huge expense to the economy, as it can chill vigorous competition, if companies start fearing being unfairly sued by their competitors.

Yet another issue lies with the excessive amount of settlements, namely in class actions, where often defendants feel pressured to settle, instead of risking going to court.[53]

[51] Hazelhorst, Monique, *Private enforcement of EU competition law: why punitive damages are a step too far,* European Review of Private Law 4-2010 [757-772], pp. 761-766
[52] Dunne, Niamh, *The role of private enforcement within EU competition law*, p. 5
[53] Mircea, Valentin, *The private enforcement of the competition rules in the European Union – a new starting line?,* p.2

Notwithstanding the possibility of excessive overcompensation, the American system has some limits that help prevent it to some extent. For example, generally, interest is not considered in the final amount of damages, which ends up undermining the value of treble damages, in the end making them more like "*single damages*", thus closer to the damage that the plaintiff actually suffered. In essence, the American private enforcement system, which heavily relies on punitive damages, has indeed many advantages for private plaintiffs, but disregards some important issues that the European legislator kept in mind while drafting the *Damages Directive*, and will now be approached.

4- The European regime

- **4.1. Brief historical background**

4.1.1. Development of private enforcement and background to the *Damages Directive*

In the EU, competition law is enforced by the European Commission, the national competition authorities and national courts.

Enforcement of competition law entails many alternative remedies available, from contractual remedies, like restitution, to fines and even penal sanctions[54]. Despite having the same goal of compensating parties, restitution and damages actions have very different purposes. In fact, contractual and restitutionary damages can simultaneously prevent unjust enrichment and trigger compliance with competition rules, but there is no flexibility: the restitution is either granted or not. [55] These remedies are: nullity, which is automatic; and voidness, which has retroactive effects and is absolute, that is, it does not require confirmation and has *erga omnes* effects. But these are defensive instruments, so not enough to compensate victims of exploitative or exclusionary practices by cartels or dominant firms.

Public enforcement is, without a doubt, the most important instrument in the EU, as it can be used following a public authority's own initiative or following a private complaint. Notwithstanding, there has been a constant attempt to make private enforcement develop more, since it can indeed be a very helpful tool to improve consumer welfare.

Private enforcement is grounded in the direct effect of articles 101 and 102 TFEU and the principle of adequate protection of EU law rights. Other key principles are the principle of effectiveness[56] and the principle of equivalence, which establish thresholds for legal protection.[57]

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[54] Giò, Alessandro Di, *Contract and restitution law and the private enforcement of EC competition law*, p. 203

[55] Giò, Alessandro Di, *Contract and restitution law and the private enforcement of EC competition law*, pp. 203-209

[56] Enshrined in article 19(1) TEU

[57] Hjelmeng, Erling, *Competition law remedies: striving for coherence or finding new ways?*, Common Market Law Review 50: 1007–1038, 2013, pp. 1009-1036

In the past, the role of the EU in the development of private enforcement was quite limited. The principles of subsidiarity [58] and procedural autonomy [59] were utterly respected. As the EU's competences became stronger, so did the principle of procedural autonomy have an increasingly more limited interpretation, by virtue of secondary EU legislation. Damages actions were first mentioned in a European context in *Regulation 17/62*[60], which was the first EU competition enforcement regulation[61]. But it was actually the case law of the Court of Justice of the European Union that truly triggered the development of private enforcement, namely in the *Bosch*[62] and *BRT*[63] judgments, where articles 101(1) and 102 TFEU were recognized as directly applicable. In 2001, the *Courage* judgment[64] revolutionized damages actions, by stating that it must be *"(...) open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."* [65] The European Court of Justice finally recognized the individual right to damages due to the violation of articles 101 and 102 TFEU, which have direct effect and entail full compensation for victims for the harm they suffered. Moreover, damages claims were seen as means to ensure the full effectiveness of article 101 TFEU, thus strengthening effective competition and judicial protection. [66]

Regarding procedural issues of private enforcement, that was considered to be the responsibility of national courts, with the limit of the abovementioned principles of equivalence and effectiveness. [67] In 2006, in the extremely important *Manfredi*

[58] Article 5(3) TEU
[59] Article 4(2) TEU
[60] *Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty*, of 21 February 1962
[61] A *Report on civil claims in the Member States* was released in 1966; a *Notice on cooperation with national courts* in 1993; and a *White Paper on modernization* in 1999, which referred to the possibility of national courts granting damages to victims of competition law
[62] Judgment of 6 April 1962, *Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn***,** 13/61, EU:C:1962:11
[63]Judgment of 30 January 1974, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior*, 127/73, EU:C:1974:6
[64] Judgment of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, EU:C:2001:465
[65] Canenbley, Cornelis, Steinvorth, Till, *Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?*, Journal of European Competition Law & Practice 2011, 2 (4): 315-326, pp. 317-318
[66] Canenbley, Cornelis, Steinvorth, Till, *Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?*, Journal of European Competition Law & Practice 2011, 2 (4): 315-326, pp. 317-318
[67] Enshrined in Judgment of 15 May 1986, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, 222/84, EU:C:1986:206; Judgment of 14 December 1995, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, C-312/93, EU:C:1995:437; Judgment of 15 May 1986, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, 222/84, EU:C:1986:206; Judgment of 14 December

judgment[68], the Court of Justice confirmed the *Courage* ruling. This was a follow-on damages case, brought after findings of the Italian competition authority that an agreement between automotive insurers infringed the competition rules, due to unlawful exchange of information. The ruling explained the types of recoverable damages, which are actual loss and lost profits, plus interest, in order to ensure that the victims were given the real value of the loss they suffered, so that they were able to be compensated. It also made clear that, according to the principle of equivalence, if it was possible to award certain types of damages in domestic actions similar to actions based on a breach of EU competition law, it must have also been possible to award such damages in the latter damages actions. Hence, *Manfredi* made clear that the EU could theoretically adopt legislation permitting punitive damages.[69] According to paragraph 99 of the *Manfredi* ruling:

"*Therefore, first, in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them."*

Furthermore, *Pfleiderer*[70] recognized that there was a problem of balancing between judicial protection and effective enforcement. On the one hand, public enforcement was, and still is, more important, and most private actions (follow-on) depend on it. On the other hand, parties' access to information is essential, so Member States have to decide where the perfect balance lies, on a case by case analysis, according to national law, while respecting the principles of equivalence and effectiveness. Problems of lack of

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1995, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State*, C-312/93, EU:C:1995:437; Judgment of 14 December 1995, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*; Judgment of 17 July 1997, *GT-Link A/S v De Danske Statsbaner (DSB)*, C-242/95, EU:C:1997:376; Judgment of 7 March 1985, *Van Gend & Loos NV v Inspecteur der Invoerrechten en Accijnzen, Enschede*, 32/84, EU:C:1985:104; Judgment of 9 November 1995, *Andrea Francovich v Italian Republic*, C-479/93, EU:C:1995:372; and Judgment of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined cases C-46/93 and C-48/93, EU:C:1996:79

[68] Judgment of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, C-295/04, *Antonio Cannito v Fondiaria Sai SpA*, C-296/04, *Nicolò Tricarico v Assitalia SpA*, C-297/04; and *Pasqualina Murgolo*, C-298/04 *v Assitalia SpA*, EU:C:2006:461

[69] http://ec.europa.eu/competition/speeches/text/2006_3_23_en.pdf

[70] Judgment of 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, C-360/09, EU:C:2011:389

legal certainty derive from this difficult conciliation. Afterwards, *Donau Chemie*[71] and *Kone*[72] confirmed the "*Pfleiderer balancing test*", although *EnBW*[73] narrowed this idea.[74] [75]

In 2004, the Commission carried out the *Ashurst report*[76], a study on the possibilities and limitations of damages claims related to competition law in the Member States. The conclusion was that the regimes were considerably diverse amongst the countries and were in need of harmonization. Most were (and still are) quite underdeveloped, as we will see.

Later that year, damages actions were finally specifically addressed in the *2005 Green Paper on damages actions for breach of the EC antitrust rules*, in which compensation and deterrence goals of private enforcement were given the same importance. Before the *Green Paper* was published, there was a discussion on whether or not to use the American system as an inspiration and introduce double damages to increase victims' incentives to sue, but the feedback was very negative, so the European Commission abandoned this idea.[77] [78]The possibility of punitive damages and their extent remained open to the Member States' criteria, with certain boundaries: respect of the principles of equivalence and effectiveness[79].

In 2008, the Commission published the *White Paper on Damages Actions for Breach of the EC Antitrust Rules*[80], the basis of the *Damages Directive*. It definitely moved away

[71] Judgment of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, C-536/11, EU:C:2013:366
[72] Judgment of 5 June 2014, *Kone AG and Others v ÖBB-Infrastruktur AG*, C-557/12, EU:C:2014:1317
[73] Judgment of 27 February 2014, *European Commission v EnBW Energie Baden-Württemberg AG*, C-365/12 P, EU:C:2014:112
[74] Balasingham, Baskaran, 15 *years after Courage v. Crehan: the right to damages under EU competition law*, European Competition and Regulatory Law Review, 2017, pp.11-25
[75] Subsequently, *Regulation 1/2003* was published, encompassing an obligation for national courts to apply EU competition law and introducing rules regulating the relationship between public and private enforcement
[76] *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 31 August 2004
[77] Wouter P.J. Wils, *Private enforcement of EU antitrust law and its relationship with public enforcement: past, present and future,* pp. 21-23
[78] Also in 2005, there was a *Green Paper on consumer collective redress,* COM(2008) 794 final, of 27 November 2008
[79] See article 2(2) of the Damages Directive
[80] *White paper on damages actions for breach of the EC antitrust rules,* {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}, /* COM/2008/0165 final */, of 2 April 2008

from the US method, and affirmed the single damages compensation approach. Moreover, aggregation claims were (and are) seen as essential for victims, leading to the proposal of 2 mechanisms that, to some extent, have the same goal of punitive damages, which is to provide the necessary incentives for victims of competition infringements to claim the damages they suffered. These mechanisms are representative actions and opt-in collective actions. The former are brought by qualified entities, such as consumer associations, state bodies, or trade associations, on behalf of identified or identifiable victims (in rather restricted cases), whereas in the latter, victims actively have to expressly decide to combine their individual claims for the harm they suffered into one single action (opt-in). In the US, this mechanism also exists, but with an opt-out method, whereby plaintiffs who suffered damages are considered automatically part of a class action, unless they actively decide against it.

On 25 December 2014, the *Damages Directive* finally entered into force. Collective redress was addressed separately, in a *Commission recommendation*[81]. The *Damages Directive* aims to improve restitutionary justice, but it only has mandatory application when there is some effect on trade between the Member States. If only national competition law applies, Member States are free to choose whether or not to apply it. Broad application is likely to happen though, as it makes procedures easier and equal, but there is still legal uncertainty.[82] Moreover, European authorities aren't the only institutions responsible for the enforcement of articles 101 and 102 TFEU; Member States' institutions share this administrative power.

Regarding complementarity of public and private enforcement, the *Damages Directive* strengthens private enforcement at Member States' level to secure full compensation and the *acquis communautaire*, but makes deterrence secondary. Its regime, in particular regarding punitive damages will be further developed in section 4.3.

[81] *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law,* of 11 June 2013

[82] Milutinović, Veljko, *The antitrust damages directive: the ideal of just compensation and the primacy of public enforcement*, CPI Antitrust Chronicle, January 2015, pp.3-13

- **4.2. Examples of some Member States' regimes**

EU Member States still have very different private enforcement systems. What they do have in common is that the majority prefers other types of incentives for victims to seek damages, rather than punitive damages. That was one of the key reasons that led the European legislators, while drafting the *Damages Directive*, to vehemently prohibit overcompensation, as they knew Member States would not easily approve that.

The *Ashurst report* identified 159 competition law proceedings between 1999 and 2004, 119 of which led to a court decision. Damages were only awarded in nine cases, with six of these only declaring the obligation to pay damages without determining the amount. Nevertheless, these numbers' accuracy is contested by some authors and many years have passed now, so perhaps the scenario has slightly improved.

Regarding punitive damages, there are some exceptional Member States that already allow overcompensation schemes, as we will see, and that could be a sign of possible change in the future.
Germany[83], Italy[84], France[85], and especially the United Kingdom[86], were the first Member States to award damages for breach of competition rules. They are the most developed in the subject of private enforcement and act as hubs. [87] The Netherlands also has a quite developed regime and collective actions for damages are now recognized in Sweden, Finland and Denmark.

[83] Judgment of the Berlin Landgericht of 27 June 2003, *Max Boegl Bauunternehmung v. Hanson Germany*; Judgment of the Dortmund Landgericht of 1 April 2004, *Vitaminkartell III*, (WuW 2004, 1182)
[84] Corte d'Appello di Milano, 18 July 1995, *Telsystem* S.p.A. *vs*. *SIP* S.p.A. in Foro It., 1996, I, 276; Judgments of the *Giudici di Pace* following the Decision of *the Autorita garante della concorrenza e del mercato* (AGCM) No. 8546, of 28 July 2000; Corte d'Appello di Roma [2003] *Albacom v Telecom* Italia, Foro Italiano [2003] 2474; Corte d'Appello di Milano, decision of 11 July *2003*, *Bluvacanze*
[85] Judgment of the *Cour de Cassation*, Commercial Division of 1 March 1982, *Syndicat des expediteurs et exportateurs;* Judgment of the Paris Commercial Tribunal of 3 June 1992, *Mors v. Labinal and Westland Aerospace*; Judgment of the Paris Court of Appeal of 22 October 1996, Peugeot/ Ecosystem; Judgment of the *Cour de Cassation*, Commercial Division of 14 February 1995; Judgment of the Paris Court of Appeal of 13 January 1998, *UGAP v. SA CAMIF*, JCP G 1998, II-10217; and Judgment of the Paris Court of Appeal of 22 October 2001
[86] Judgment of 6 May 2003, *Provimi and Nutreco v. Aventis and others*, 2003 EWHC 961 (COMM); *Crehan v Inntrepreneur* [2007] EWHC 90081 (Costs)
[87] Lourenço, Nuno Calaim, *The European Commission directive on antitrust damages actions*, in *Revista de Concorrência e Regulação*, number 18, April to June 2014, pp. 65-87

Regarding the specific case of Portugal, private enforcement case-law is still sparse, but it's slowly growing[88]. Punitive damages are not allowed, but interest is taken into consideration. Class actions are available with an opt-in system, named "*ação popular*"[89]. Portugal's private enforcement is stepping up and trying to follow the footsteps of its European "big brothers", but many challenges will have to be overcome, as these countries are still the preferable jurisdictions for plaintiffs.

In other countries, like the Czech Republic, Slovakia, Ireland and Italy, the jurisdiction regarding claims based on national competition laws belongs to courts higher than those normally adjudicating at first instance; in others, like Germany and Sweden, there are special panels for competition issues; yet in others, such as France and Spain, only some courts have jurisdiction to adjudicate in antitrust matters. Many times there is also uncertainty of jurisdiction, namely if there is both a breach of national and European competition law, which also acts as an impediment for effective justice and compensation.

When parties are from different nationalities or when the claimant uses forum shopping to get the most favorable regime, these issues become even more adamant. The general rule of the majority of the Member States is that of the domicile of the defendant, but there are various exceptions. In my view, the only solution to get past forum shopping and create better incentives for parties to sue in every Member State is to provide for similar regimes in all Member States and to strengthen cooperation with the EU institutions, namely the European Commission.

Collective redress can also be very useful in providing incentives for victims, as they can share legal costs. The Commission recommends that all Member States should make collective redress mechanisms available (but it's not mandatory), preferring the opt-in and loser pays principles, as opposed to the US-style opt-out class actions. These last ones risk encouraging unmeritorious claims and abusive litigation tactics, in which the expected value for the plaintiff is much greater than the actual harm suffered, leading to excessive litigation and a social and judicial burden.[90]

[88] On the 20th April 2018, Portugal (finally) approved the Law that transposes the *Damages Directive*

[89] As enshrined in article 19 of the Law that transposes the *Damages Directive* and Law 83/95 of 31st August, altered by Decree Law 214-G/2015, of 20th October

[90] Howard, Anneli, *Too little, too late? The European Commission's legislative proposals on anti-trust damages actions*, Journal of European Competition Law & Practice 2013, 4 (6): 455-464, pp. 463-464

Another issue concerns costs. All Member States provide in their national legislations the rule that all costs can be recovered and that the loser pays the costs of the winner. Some countries[91], however, require the recovery to be reasonable and, as we have seen, most do not allow contingency fees, albeit some of them do allow different types of enhancement of lawyers' fees, such as a bonus in case of win. These rules clearly create a disincentive for private plaintiffs to file suits. Thus, cases are generally brought in very few Member States and usually by large law firms.

Finally, regarding the prohibition of punitive damages at an EU level, although most Member States share this rule in their systems, there are a few who actually allow them. This entails a legal problem, inasmuch if some Member States' legal orders recognize punitive damages, it can potentially lead to forum shopping, since claimants have better incentives to sue in these Member States. Namely, the 2004 *Ashurst report* revealed exemplary damages to be available in Cyprus (where any bad faith or negligence is taken into account when imposing punitive damages), the United Kingdom and Ireland, even though they were rarely awarded. For example, the UK Competition Appeal Tribunal awarded punitive damages in a follow-on damages case in 2012, in the *2 Travel v Cardiff Bus* judgment.[92] Cardiff Bus had previously been found to have abused its dominant position, leading 2 Travel to claim £50m in damages. The decision ended up awarding it £33,818.79 in lost profits plus £60,000 in exemplary damages.[93] In 2016, the UK's Competition Appeal Tribunal awarded Sainsbury's Supermarkets Ltd £68.6 million in damages, plus interest, following its successful claim against MasterCard.[94]

The civil systems, on the other hand, namely Germany, are generally against overcompensation, which usually occurs when there are excessive incentives to sue. They are based on the general principle of the balance of advantages, and *restitutio in integrum* – including both *damnum emergens* and *lucrum cessans* – is a ceiling to damage compensation. If interest is added, in particular prejudgment interest (which helps to reduce the dilution of the compensatory potential of the damages), then single

[91] Finland, Hungary, Italy, Poland, Slovenia, Sweden and the United Kingdom
[92] Judgment of 5 July 2012, *Cardiff Bus*, 1178/5/7/11
[93] https://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/The-2-Travel-v-Cardiff-Bus-ruling.pdf?ext=.pdf
[94] Judgment of 14 July 2016, *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others*, 1241/5/7/15 (T)

damages can eventually provide adequate restitution. The problem is, that is not always the case.

Nevertheless, lately, this "European ban" on punitive damages has been slightly overturned in some jurisdictions. Namely in Germany, where punitive damages have been awarded in some civil law disputes; in Spain, where the Spanish Supreme Court endorsed a US judgment awarding punitive damages, in Judgement of 13 November 2001, *Miller Import Corp. v. Alabastres Alfredo, S.L,* Tribunal Supremo, *Exequatur* no. 2039/1999, *Aedipir* 203, 914.; and even in Italy, where one very exceptional case of punitive damages was sentenced in the Judgment of 21 May 2007, *G.d.p. Bitonto, Manfredi v. Lloyd Adriatico Assicurazioni S.p.a.*, despite the strict refusal to apply US treble damages, as they are considered contrary to the public order.[95]

[95]http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441 , p. 555

- **4.3. The *Damages Directive*'s approach**

The right to an effective remedy is enshrined in article 19(1) TEU[96]; article 47(1) of the *Charter* [97] ; and articles 2, 3(1), and 12 of the *Damages Directive*. Article 2(1) of the *Directive* lays down the principle that any person must be able to obtain compensation. The principles of equivalence and effectiveness make up a dual test that curbs the principle of national autonomy, even though causation and quantification of damages remain a matter of national law. Despite the fact that the EU defined the conditions for the existence of the right to claim damages, the exercise of this right is not defined at an EU level.

The Commission tried to address some obstacles to effective compensation for victims of competition law infringements, through several legislative measures, in various areas of law. Notwithstanding, an impediment of compensation is that claims are often spread over many victims, with usually negligible losses over a long period of time. So, victims don't have enough incentives or resources to seek compensation. Collective redress is a possible solution for this problem, but it is very much dependent on the legal culture, and it's not mandatory,[98] as there was only a *Recommendation on collective redress*[99]. In a press release[100] accompanying this *Recommendation*, it was further explained that "(…) *the European approach to collective redress clearly rejects the US style system of* [opt out] *"class actions*". Contingency fees and punitive damages were also prohibited.[101]

Another issue, also important, albeit not at an *a priori* (from the claim) perspective, concerns the problem of how to quantify damages. This difficult task can, to some extent, also discourage potential claims from victims of competition infringements, as they know the harm they suffered will be extremely hard to quantify in court.

[96] Treaty of the European Union
[97] *Charter of fundamental rights of the European Union* (2000/c 364/01)
[98] Hjelmeng, Erling, *Competition law remedies: striving for coherence or finding new ways?,* Common Market Law Review 50: 1007–1038, 2013, p.1027
[99] *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law,* of 11 June 2013
[100] European Commission's press release of 11 June 2013: "*Commission recommends Member States to have collective redress mechanisms in place to ensure effective access to justice".*
[101] Wouter P.J. Wils, *Private enforcement of EU antitrust law and its relationship with public enforcement: past, present and future,* p. 23

In the 2013 *Practical Guide on Quantifying Harm in Actions for Damages*, also accompanying the *Directive*, it was admitted that the concept of loss of profit sometimes is not suitable to cover a series of potential harms deriving from breaches of competition law. The *Guide* further explained that the *Directive* allows the structuring of a compensation claim based on different methods of specific redress, other than those mentioned in its text, such as loss of chance or harm to reputation, as long as these forms are contemplated by the applicable national laws. The *Guide* also described several economic models that can be used to quantify damages caused by competition law infringements, in particular overcharges.

For example, comparison of prices over time, also known as the "*before-and-after*" method is the most commonly used and accepted by courts. It looks exclusively at the relevant market, but tries to make comparisons from the period prior and subsequent to the violation. Other methods include the "*comparison with an unaffected market, yardstick or cross-section"* [102] , the "*difference-in-differences*" [103] and the "*multiple regression analysis or econometrics"* method. There are also cost-based and financial methods, simulation and others.

The choice of method depends on the data available; there is no perfect one. But the several possibilities show that the regime is very flexible, leaving Member States with a lot of freedom to decide on how quantify damages. There is always a tradeoff between accuracy and ease of implementation, inasmuch the more certainty is required, the bigger the evidentiary burden is, thus running counter to the compensation objective.[104] And the *Practical Guide* is only soft law that essentially leaves issues of quantification to national procedural autonomy, with the limit of the abovementioned principles of effectiveness and equivalence. [105]

Nevertheless, the *Damages Directive* does showcase some important presumptions in terms of incentives for victims of competition infringements, namely recognition of

[102] Korenblit, Claire M. and Austin, Sidley, *Quantifying antitrust damages—convergence of methods recognized by U.S. Courts and the European Commission,* CPI Antitrust Chronicle March 2012 (1), pp.5-7

[103] Coninck, Raphaël De, *Estimating private antitrust damages,* New Frontiers of Antitrust Conference, Paris, 11 February 2011, in Review Concurrences, 2011-2, p. 7

[104] Coninck, Raphaël De, *Estimating private antitrust damages,* New Frontiers of Antitrust Conference, Paris, 11 February 2011, in Review Concurrences, 2011-2, pp. 8-11

[105] Howard, Anneli, *Too little, too late? The European Commission's legislative proposals on anti-trust damages actions*, Journal of European Competition Law & Practice 2013, 4 (6): 455-464, pp. 459-463

interest, indirect purchasers' claims, burden of proof and disclosure of evidence rules, the binding effect of competition authorities' decisions, joint and several liability and the encouragement of consensual dispute resolution.

Firstly, taking interest into account, when quantifying damages, means recognizing time as an important element of the damage. Overall, this period can be quite long, so calculating prejudgment interest is very relevant and can considerably increase the amount of the final damages award. [106] In its 12th presumption, the *Directive* states that the payment of interest *"(...) should be due from the time when the harm occurred until the time when compensation is paid."*

Moreover, regarding the problem of coordination, articles 14 and 15 of the *Directive* recognize the need for some coordination when claims against a defendant are filed by purchasers at different levels in the distribution chain in different courts (and even in different countries), by taking into account parallel actions. But this might not be sufficiently effective, so there is a real risk of inconsistency. [107]

The *Damages Directive* also contains measures relating to the standard and burden of proof, so that claimants only have to prove how the action negatively affected them. It empowers national courts to decide on the estimation of the extent of the harm; and establishes a rebuttable presumption that the infringement resulting from a cartel caused harm (provision 47 and article 17), thus mitigating information asymmetry, as the burden is with the defendant. He may, however, rebut this presumption; and it only refers to cartels and not infringements of abuse of a dominant position. This presumption is meant to avoid that a mere failure in assessing the exact amount of the harm would result in a dismissal of the action.

Regarding disclosure of evidence, according to presumptions 6, 15, 16, 27 and 28 and articles 5 and 6, within the limits of proportionality, national courts can, upon justified requests from the plaintiffs, order the defendant or a third party to disclose relevant evidence which lies in their control, thus facilitating the plaintiff's access to information and proof of damages.

[106] Laborde, Jean-François, *Cartel damages claims in Europe: how courts have assessed overcharges*, Concurrences nr. 4-2017, pp. 4-5

[107] Reindl, Andreas , *The 2014 Directive on private enforcement—looking back and looking forward,* January 21, 2015, p. 5

Furthermore, the *Directive* anticipates the possible assistance to courts, in the quantification of damages, by the national competition authorities (articles 9 and 17(3) - duty of sincere cooperation).[108] Final decisions of national competition authorities or courts reviewing those decisions are considered as irrefutable for the purposes of actions for damages brought in the same EU Member State; and constitute at least *prima facie* evidence when they are brought in another Member State.

Considering joint and several liability, presumption 37 and article 11 establish that co-infringers can be held joint and severally liable for the entire harm, ensuring damages compensation for victims.

Finally, regarding the encouraging of consensual dispute resolution, presumptions 48 to 51 and article 18 provide for the suspension of the limitation period for bringing an action for damages during the consensual dispute resolution process. Limitation periods, according to article 10, have to be proportionate, in order not to hamper the bringing of actions for damages. In actions for damages, national courts may suspend their proceedings for up to two years. Moreover, article 18(3) provides that competition authorities can consider compensation paid as a result of a consensual settlement as a mitigating factor.

While estimating damages, the judges' goal is to have restitution *in integrum,* on a tortuous basis - full reparation, as far as possible. This corresponds to *"(...) the difference between the assets as they are and the hypothetical state of those assets if the harmful event had not occurred."* [109] Damages for material loss are available for 3 categories of damages, including moral damages: actual loss (*damnum emergens*), loss of profit (*lucrum cessans*: article 3(2) *Directive*) and interest. Regarding *lucrum cessans,* loss of profit must be real and certain and the onus is on the claimant. A counterfactual perspective can be used, but that is difficult, as it requires economic analysis and is always hypothetical, never accurate. Another possibility is that harm is estimated by courts, instead of being quantified, but it is only accepted when it is excessively difficult or almost impossible to have evidence for quantification. The claimant only has to prove that is the case.

[108] Autoridade da Concorrência, *Enquadramento da consulta pública da proposta de anteprojeto de transposição da Diretiva Private Enforcement*, in *Revista de Concorrência e Regulaçã*o, number 22, April to June 2015, pp. 69-89

[109] Strand, Magnus, *The passing-on problem in damages and restitution under EU law*, Elgar Publishing, 2017, p. 93

In any case, there are procedural requirements for quantum, foreseeability and causation that should not render the exercise of the claimant's rights practically impossible or excessively difficult. Since precision in damages quantification is not always possible, the spirit of the *Directive* entails that quantification issues should not bar a claimant from recovering damages. [110] Nevertheless, unlike in follow-on actions, for standalone actions, claimants have to prove all the elements of the anticompetitive conduct and the effect on competition, which is an excessively difficult task (article 16(2) of the *Directive*).

Another relevant difficulty with pro damages actions' legislative measures is that they might be against national procedural and tort laws. It can even be questioned why there is a need for a special action for competition issues, as the rules of torts could be used. The counterargument to this perspective is that there is actually a need to provide incentives for private enforcement in competition law, which is a core aspect of EU law, because offensive private action against competition infringers, due to resource constraints and complexity, cannot be sufficiently enforced by national competition authorities alone. In addition, economic analysis and expertise are very useful in competition law, but they are also costly (both time-consuming and expensive) resources to use. Claims for damages further increase the complexity and expenses, inasmuch, in addition to the illegality of the conduct, one has to prove quantum, causation, direct concern and fault, with the related complex issue of the possible passing-on of overcharges and collateral damages, which can be difficult. To prove adequate causation, claimants have to establish a factual link between the damage and the illegal conduct, thus restricting the claim to injuries that were typically and foreseeably caused by the illegal conduct. If causality requirements are too strict, that does not respect the principles of equivalence, efficiency and legal certainty. [111] Finally, the value of the individual harm of each claimant may not be high enough to overcome the risk of litigating at a high cost. Private enforcement goes beyond the personal interest of private parties, as there is a collective good at stake.

[110] Korenblit, Claire M. and Austin, Sidley, *Quantifying antitrust damages—convergence of methods recognized by U.S. Courts and the European Commission,* CPI Antitrust Chronicle March 2012 (1), p.8
[111] Eilmansberger, Thomas, *The green paper on damages actions for breach of the EC Antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action,* 44: 431–478, 2007, pp. 468-469

A possible solution would be to rule out the causality requirement, only considering typical or foreseeable actions as fulfilling the causality requirement. A less extreme option would be to reverse the burden of proof, assuming that anti-competitive conducts that typically lead to expected consequences constitute a contributing factor for the damage *in loco*. However, there is no requirement of fault, which means that we have strict liability for violation of competition rules.

Eliminating the fault requirement would enormously facilitate damages actions, but shifting all the risks to the defendant would lead to over-deterrence and unfairness. Thus, lowering the level of fault required would be the best solution. If claimants have to provide evidence (many times almost impossible to have access to) against the defendants, this is in practice an obstacle to private enforcement.

Finally, another complication arises when the plaintiff contributed to the infringement. Generally, damages are reduced in proportion to the plaintiff's contribution, but more severe regimes can apply, thus reducing the incentives to sue and the sum of compensation. [112]

Besides the recognition of interest, other possible solutions for all these obstacles to private enforcement include: lowering the cost of litigation; lowering the risk/unpredictability of competition damages litigation, for example by easing the burden of proof; introducing contingency fees, thus facilitating the shift of the risk to third parties; changing the risk/reward balance in the claimant's favor; and allowing associations to acquire claims from victims.

Another option, very common in the American regime, would be the introduction of damage multipliers, such as treble damages. But, as we have seen, for as useful as they are, they are undeniably prohibited by the *Damages Directive*[113].

Regarding the other incentives for victims mentioned before, it is true that they could indeed help to provide incentives for victims to bring more claims. If they work, victims can at least rely on the fact that they will be compensated for what they lost. But are singles damages enough? If the quantification analysis tends to reach the amount of

[112] Eilmansberger, Thomas, *The green paper on damages actions for breach of the EC Antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action*, 44: 431–478, 2007, p. 471

[113] Eilmansberger, Thomas, *The green paper on damages actions for breach of the EC Antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action*, 44: 431–478, 2007, pp. 432-457

damages that is the closest to reality as possible, victims might still feel like this is not worth all the expenses of going to court. However, if there is an extra incentive in the form of punitive damages, they might think twice before letting go of the chance of being overcompensated. Moreover, enterprises, with this risk in mind, might also think twice before infringing competition laws, as they know they might have to pay, in addition to the public enforcement sanction, high private damages. So, the deterrence aspect of punitive damages is very important.

Thus, notwithstanding all its achievements, the *Directive* answers some questions wrong and leaves many others unanswered. Without clear definitions, uncertainty remains, which doesn't lead to harmonization. It is a fact that EU legal institutions do not have jurisdiction to award damages, as there is no legal presumption for that. [114] The system is decentralized, based on national courts, so there is no one-stop shop. But even if national courts are better positioned to calculate damages and decide on the adequate incentives to increase private enforcement in their countries, this situation leads to extremely diverse systems in Europe.[115]

Despite its many positive outcomes, the *Directive* doesn't seem to be enough. It's not the most efficient choice of legislative method, as it leads to lack of clarity and legal certainty.[116] That is not to say the *Directive* wasn't needed and it's not useful. All in all, it stimulates damages actions and victims' compensation, but it completely disregards punitive damages and simply should have been done sooner and been more daring. And the problem remains that Member States still have very different backgrounds. There is a need for EU law to be the strong example to follow, and not a simple guide.

[114] Niitvaeli, Evelyn, *Forum shopping in the European Union*, pp. 7-11
[115] Nervi, Andrea, *Directive 2014/104/EU on antitrust damages actions - some considerations from the perspective of Italian law essays*, Italian Law Journal 2 Italian L.J. (2016), pp. 143-146
[116] Eilmansberger, Thomas, *The Green Paper on damages actions for breach of the EC antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action*, 44: 431–478, 2007, pp. 433-442

5- Critical assessment of both systems' methods to provide victims with sufficient incentives to claim damages

In this final segment, I shall point out some key advantages and drawbacks of both systems previously referred to: the American system and the European one (post-*Damages Directive*). After all that has been said, it is now the moment to attempt an evaluation of the necessity of introducing punitive damages in the EU's private enforcement system, possibly following the American tradition.

It is undeniable that these 2 systems have opposite views regarding private damages enforcement.

On the one hand, the EU sees private enforcement as a compensation for loss, focusing on corrective justice, albeit not exclusively.

Quickly going through some key system characteristics, regarding causation, the plaintiff must prove a violation of competition law, loss, and a causal link between the violation and the loss. In terms of passing-on defense, there is no specific case law on the topic, but the ECJ's case law on unjust enrichment suggests that it is accepted, although the burden of proof remains with the defendant. In most EU Member States (with the exception of the UK), discovery is non-existent or very limited.

Public fines and private damages can be cumulated, but damages are limited to the harm caused, including lost profit and pre-judgment interest, but definitely not punitive damages. Thus, damages end up being recovered by fewer victims than what would be desirable.

It is argued in the literature that, in the EU, punitive damages are not as necessary as in the US, because public enforcement works well and is very efficient: fines can amount to as much as 10% of the infringer undertaking's last year's global turnover and both the Member States' competition authorities and the Commission are active enforcers. [117]

In addition, most private actions are follow-on actions. That might be true, but it doesn't solve the problem of stand-alone actions, nor does it lead to enough incentives for victims to claim damages.

[117] Milutinović, Veljko, *The antitrust damages directive: the ideal of just compensation and the primacy of public enforcement*, CPI Antitrust Chronicle, January 2015, p. 768

On the other hand, the US antitrust law, arguably the most developed in the world, uses private enforcement mainly to reinforce the deterrent aspect of the sanctions.[118] The purpose is not so much to achieve just compensation, which is somewhat sacrificed to promote effective enforcement. Here the causation requirement is less strict: the plaintiff must prove that the defendant committed a violation of competition law, which resulted in damage to him.

Other relevant aspects of the system are that pass-on defense and indirect purchasers are denied, discovery is very broad and contingency fees are common.

Treble damages are a core characteristic, although they do not include pre-judgment interest. This is a key aspect, because it makes the supposedly excessively high American treble damage awards become closer, in terms of amount, to the European single damages, since these generally include interest. Thus, it is defensible that perhaps these opposite systems are not as different as it first appeared, at least regarding punitive damages.[119]

The *Damages Directive*, while intending to facilitate private enforcement, has its limits and deficits and punitive damages are one of them. There is actually very little risk of over facilitating private suits in EU competition law; on the contrary. There is an excessive concern of meritless cases that is somewhat unfounded, as class-action suits are much rarer in the EU than in the United States and the cost allocation rules are different as well, since here the losing party must pay the legal expenses of the winner. Moreover, punitive damages, intrusive pre-trial discovery, class actions and contingency fees are banned from the European system, so the potential for abuses is reduced.[120]

Another strong argument against the *Directive*'s approach to punitive damages is that it tends to force some states to reinvent their legal regimes to fit its conflicting rules, sometimes even colliding with their basic principles of law, leading to difficulties in accepting the legal changes. Indeed, some European legal systems allow certain

[118] Noronha, João Espírito Santo, *Litigância jurídico-privada no direito da concorrência- a diretiva nº2014/104/UE de 26 de novembro de 2014: divulgação de elementos de prova, efeitos das decisões nacionais, prazos de prescrição e resp. solidária*, in Revista de Concorrência e Regulação, number 19, *July to September 2014*, pp. 53-82

[119] Thiede, Thomas, *Private enforcement of anti-trust damages in Europe: a Germanic perspective on directive 2014/104/EU*, ELTE Law Journal 2015 ELTE L.J. (2015), p. 15

[120] Wilman, F.G., *The end of the absence? The growing body of EU legislation on private enforcement and the main remedies it provides for*, Common Market Law Review 53: 887–936, 2016, pp. 933-934

associations, such as public authorities or social institutions, to pursue applications for injunctions and compensation claims, potentially including punitive damages, on the injured parties' behalf.

Most importantly, the main criticism to the *Directive* is that the undeniable value of punitive damages was totally disregarded. Punitive damages are essential for deterrence, as most anticompetitive conduct evades detection, so competition violations can still be profitable if violators are only liable for the amount of their overcharges. Compensation is enhanced, as these damages provide the necessary incentives for private parties to bring suits, namely in connection with class actions, when competition violations are so hard and expensive to detect and prove. Actual damages are often not enough to compensate victims, because they disregard the high costs of hiring lawyers and economists and paying court fees. Treble damages can help to reduce allocative inefficiencies resulting from market power effects and encourage even risk averse plaintiffs. *Restitutio in integrum* is sufficient for some easy cases, but most times that is not enough, namely when there are out of court settlements, legal expenses are internalized by plaintiffs (regardless of the fee allocation rule) or there is a significant time lapse between the conduct and the claim.

The EU denial of punitive damages is perhaps a matter of EU vs US supremacy. The EU's goal seems to be the development of a "strictly European" private litigation system, instead of the most efficient system, which could very well include helpful input from other countries' experiences, in particular the US.[121] The American regime is probably the most successful private enforcement system that exists, with more than a century-long experience of legislation and jurisprudence that could serve as a valuable source of inspiration. Particularly in competition law, and private enforcement, the ultimate goal is to improve the consumers' power to bring actions and receive just compensation for their losses. And the despised punitive damages could be extremely helpful in this, providing the necessary individual incentives to bring damages suits before national courts, and thus receiving compensation.[122]

[121] Reindl, Andreas, *The European Commission's package on private enforcement in competition cases: introduction to a CPI antitrust chronicle,* p. 6
[122] Rüggeberg, Jakob and Schinkel, Maarten Pieter, *Consolidating antitrust damages in Europe: a proposal for standing in line with efficient private enforcement,* World Competition 29(3): 395-420, 2006, p. 396

It is true that there are alternative means of redress available, such as restitutionary damages or unjust enrichment, where fault is not a prerequisite.[123] But they don't seem to be enough for private enforcement's complexity, and damages actions in Europe remain sparse.

Punitive damages are particularly useful, in stand-alone actions, when the unlawful conduct is difficult to detect; and when litigation costs are higher, because then the incentives for victims become more necessary. In addition, damage multipliers are a cheaper alternative to fee-shifting, as they provide incentives for plaintiffs with low litigation costs, as opposed to fee shifting, which doesn't take into account the plaintiffs' costs of litigation. [124]

Essentially, whenever the damage award is not representative of the harm that impended on society and was caused by the illegal conduct, punitive damages should be justified. If punitive damages are not applied in these cases, the fine is suboptimal and violators only have to pay single damages (that is, if victims even have enough incentives to bring a suit), so they will be inflicting more harm on consumers than they are being held responsible for, due to the disregard of the deadweight loss on society. Even if single damages are meant to achieve optimal compensation, detection is often difficult, which leads to under-deterrence.

Notwithstanding, this is not to say I defend a full transposition of the American system. Introducing punitive damages in Europe will be extremely complicated, as, as we have seen, overall, the Member States are far from accepting and applying them on a large scale. There is a fundamental difference in the European countries' views regarding the function of damages actions, but most countries' legal traditions consider private and public parties' roles to be irrevocably different, inasmuch public authorities act in the general interest, whereas private parties act selfishly. Consequently, it is believed that punishment and deterrence should be taken care of by public sanctions, not private damages claims. [125]

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[123] Truli, Emmanuela, *Will its provisions serve its goals? Directive 2014/104/EU on certain rules governing actions for damages for competition law infringements,* Journal of European Competition Law & Practice 2016; 7 (5): 299-312, pp.379-386

[124]http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441, P. 197

[125] Milutinović, Veljko, *The antitrust damages directive: the ideal of just compensation and the primacy of public enforcement*, CPI Antitrust Chronicle, January 2015, p. 768

In addition, harmonization costs are high, given that most Member States reject them as being contrary to their public policy, which only allows for the compensatory nature of damage awards. Forcing national judges to award punitive damages against their countries' legal traditions would be too great an interference from EU law, who doesn't have legitimacy to do so.
It is also true that, while without EU intervention, the introduction of punitive damages in all the Member States will likely never happen, doing so would pose too many legal problems, since, even if a legal solution is adequate in one country, it might not be in another. [126]

I believe that the transposition of the American treble damages into Europe would not be possible, at least in the near future, due to European historic and legal traditions. Despite some *"Americanization*" of European law, namely regarding private enforcement, it's absolutely clear that the EU's system is still very different from the US's and firmly wants to remain that way.[127] Introducing punitive damages, which are still seen, albeit unfairly, as simply leading to abusive claims, now, would conflict with the strictly compensatory nature of damage claims in most Member States.

But a balance could be found, starting from the *Directive* not totally prohibiting overcompensation, leaving it to the Member States' decision, with some limitations, such as maximum (but not minimum) compensation. This cap should allow punitive damages to be high enough so as to only (or at least mainly) provide a needed incentive for individuals with valid claims[128] and also permit Member States to keep applying singles damages if they see them as the best option for each case.
Of course this option has its faults, the biggest one being there is no magic number, so any multiplier would still be inaccurate for most cases. A case by case analysis is always the preferable solution, but that is not always possible.

Moreover, there is a possibility of forum shopping if the regime is not set at an EU level. Forum shopping can, in itself, be very positive for private enforcement in Europe.

[126]http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf#page=441, pp. 554-556
[127] Wilman, F.G., *The end of the absence? The growing body of EU legislation on private enforcement and the main remedies it provides for*, Common Market Law Review 53: 887–936, 2016, pp. 933-934
[128] Telfer, Robert Thomas Currie, *Forum shopping and the private enforcement of EU competition law: is forum shopping a dead letter?*, PhD thesis, University of Glasgow, 2017, pp. 149-150

It is, for the time being, the only way that plaintiffs from Member States that do not allow punitive damages can have general access to punitive damages, by using other countries' jurisdictions. However, this scheme violates the principle of equality, as not all victims of competition infringements have the financial means to do so. Even the text of the *Directive* recognizes this problem, in the last part of presumption 7. Stricter jurisdiction requisites could prevent this issue to some extent, but the ultimate solution would be to do it at an EU level. The problem is, since the EU is unwilling to move "too forward" with private enforcement and punitive damages, that is up to the Member States, who in turn are bound to have very different regimes. It's a never-ending vicious circle that only the Member States could change, by pressuring the EU to change its legislation. That is, however, too much to ask from countries where the majority has little private enforcement tradition, and even less knowledge of punitive damages.

Nevertheless, the EU is still at a stage where, in general, private enforcement is underdeveloped, so, in time, a better private enforcement system can still be designed. But perhaps the EU can only really change and become more plaintiff-friendly with the next *Directive*, or even, Regulation, as this one firmly restricts Member States' ability to award punitive damages, amongst other limitations, thus hindering the ability of many competition infringements' victims to be compensated, due to lack of incentives to sue.

6- Conclusion

So, in the European private enforcement context, are punitive damages necessary to provide sufficient incentives for victims of competition infringements to sue? I.e., are they a prerequisite of a private enforcement system that is efficient and truly compensates victims?

As we have seen, there are alternative remedies available for victims, such as restitutionary damages, the inclusion of interest in the quantification of single damage awards, the use of unjust enrichment, a beneficial burden of proof, causality requirements, indirect purchasers' claims, disclosure of evidence, the binding effect of competition authorities' decisions, passing-on of overcharges, joint and several liability and the encouragement of consensual dispute resolution. However, these remedies don't fully substitute punitive damages, which, in my opinion, are essential to provide victims with sufficient incentives to claim damages. That is not to say punitive damages, by themselves, could solve all the issues in private enforcement and provide the necessary incentives for victims. These other incentives are also essential in creating a private enforcement system where victims have enough incentives to seek compensation for the damages they suffered and they attenuate the absence of punitive damages at an EU level. However, without punitive damages, they are not enough.

Damage multipliers, whichever form they take, are a valuable tool to achieve the goals of compensation and deterrence and should not be disregarded. It is undeniable that they are one of the foundations of the US's extremely efficient private enforcement system and, despite some potential drawbacks, have plenty of advantages.

There is no legal impediment in the European Treaties that prevents the EU legislators from allowing punitive damages. It was simply a political choice. Thus, in my opinion, the *Directive* erred in simply prohibiting all forms of overcompensation. It should have, at least, allowed some exceptions, recognizing that some Member States already have punitive damages enshrined in their legal systems and others could follow them in the future.

Truthfully, the *Directive* is still very recent and only now is it starting to be fully implemented in the Member States. It does bring some very important legislative changes that can be very useful in starting the process of creating a strong European

private enforcement system that could complement its strong public enforcement. The problem is, it's not enough, so more daring legislative changes will need to be considered in the future.

One of those changes should be the introduction of some form of punitive damages, not as a fixed rule, but as a legal possibility that Member States could choose to implement, in order to give victims more incentives to bring claims and be compensated. Despite the fact that this solution can potentially increase forum shopping, as it entails more differences between Member States; the other option would be to make punitive damages mandatory, like in the US, and that appears to me to be too intrusive and something that would not be welcomed by most Member States.

In conclusion, punitive damages are, overall, a useful tool that can indeed improve consumers' chances of being adequately compensated. The introduction of damages multipliers at an EU level should be the next step to be considered. And a necessary step, despite its potential problems, because differently from other fields of law, where the general rules of damages compensation are sufficient, competition law and private enforcement are so complex that specific rules need to apply. Namely, it's extremely difficult to prove damages, to quantify them and to establish a causality nexus (even if the requirement of a direct causal link is only analyzed later on and it's not a requirement of standing), because infringements are usually spread over many years and damages can be negligent, thus extremely difficult to prove. Thus, victims need more incentives to sue, and punitive damages can be the extra stimulus they need.

In my opinion, for the sake of the development of private enforcement in Europe, the legislators need to take more risks. It is true that the Directive is much easier to implement precisely due to its commonly accepted premises; but also because of this, it doesn't bring the necessary changes, such as the allowance of overcompensation, that the European private enforcement system needed, based on the shy amount of successful private suits that we have witnessed so far. As of now, Europe is missing out and the situation will probably remain the same for the near future, until new European private enforcement legislation is adopted. But that will probably only happen when Europeans reach the conclusion that perhaps there is no better alternative to punitive damages.

As Franklin M. Fisher rightly said:

"*Despite my strong opinions here, I do not have good suggestions as to how to fix this problem. Without extra damages treble or otherwise private plaintiffs will have less incentive to sue, and damage awards may not be large enough to discourage antitrust violations.*" [129]

[129] Fisher, Franklin M., *Economic analysis and antitrust damages,* p. 392

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