DAMAGES CLAIMS FOR THE INFRINGEMENT OF EU COMPETITION LAW

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INTRODUCTION

In *Courage Ltd v Crehan*, the Court of Justice of the European Union (CJEU) expressly recognized the existence of a right to claim damages in favour of individuals acting against other individuals, on the basis of the direct effect of the provisions of EU competition law. In doing so, the CJEU planted the first seeds of what would constitute one of the most remarkable reforms in the five decades of EU competition law enforcement—introducing damages claims for the infringement of EU (and eventually) national competition law.\(^1\)

EU competition law relied since its beginnings on both a mechanism of administrative enforcement at the EU or increasingly so at the Member States level and private enforcement in front of national courts. However, the latter was perceived as a complementary mechanism of enforcement, most often taking the form of either (a) the Euro-defence as a way of escaping liability for a breach of contract\(^3\)—competition law employed as a shield to a claim, or (b) injunctive and declaratory relief—competition law employed as a sword to enforce a remedy against another party.\(^4\) The above remedies represent approximately a little less than two-thirds of private competition law enforcement in Europe.\(^5\)

Following the *Courage* judgment, claims for damages for competition law infringements came to be considered an important segment of the private enforcement of competition law; the number of cases brought in front of national courts having increased considerably the last few years. The prospects are for considerable further growth, with the reorganization

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5. See the statistics of B. Rodger, ‘The Empirical Data Part 2: Provisions Relied Upon, Remedies and Success’, in B.J. Rodger (ed.), *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (Kluwer Law International, 2014), 121–56, at 123 (noting that injunctions, defences, declarations, and pre-action disclosure represent respectively 27.4%, 24.8%, 10.3%, and 1% of all the 27 Member States [competition disputes] at the time of the publication of this study from 1 May 1999 to 1 May 2012, with the exception of Germany. To this one could add 13.9% of the reported cases which combine the above remedies with claims for damages. If German data could be taken into account, it is expected that the proportion of cases involving the above-mentioned remedies would increase, in view of the prevalence of declaratory and injunctive relief over damages claims in Germany, if one were to rely on the trends reported in S. Peyer, ‘Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence’ (2012) 8(2) *Journal of Competition Law and Economics* 331–59, at 349.
of existing institutions to facilitate actions for antitrust damages and the creation of new institutions supporting their development—in terms of the former, the introduction of collective actions as well as new evidence rules and presumptions; in terms of the latter, reforms of procedural rules and rules on litigation funding.

1.04 The number of competition damages cases has increased considerably in recent years, even as the level of public enforcement of competition law has declined relatively at the EU level and in some Member States. A comparison of the number of infringement decisions of EU and national antitrust law provisions imposing fines adopted by the UK Office of Fair Trading (OFT)6 from 2001 to 2013 with the number of judgments (at first instance) rendered by courts in England and Wales (the Chancery Division of the High Court of England and Wales and the Competition Appeal Tribunal (CAT)) on claims for actions for antitrust damages during the same period, shows that private enforcement, in particular actions for damages, constitutes the most important part of enforcement activity, in terms of the number of cases brought forward.7 Although the amount of damages awarded so far in the UK remains limited,8 and there is no data available on the amount of settlements, it seems safe to predict that this may surpass in the medium term the amount of fines imposed in the context of public enforcement, if the current levels of public enforcement are maintained.9 Certainly, the EU and the Member States made the choice not to adopt multiple damages, as is the case in the United States, although for some time multiple damages were considered as a possible option.10

1.05 Of course, the experience of other jurisdictions on the respective role of public and private enforcement (damages) may be different, as well as the reliance of private enforcement on existing levels of public enforcement. A distinction is often made between follow on actions for damages and standalone actions for damages, the latter category regrouping claims

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6 Now replaced by the Competition and Markets Authority (CMA).
7 If one takes into account the pre-trial settlement of disputes, for which there is little data available, the role of actions for damages on the level of enforcement, in terms of cases brought forward, is significant. On pre-trial settlements in the UK, see B. Rodger, ‘Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000–2005’ (2008) 29(2) European Competition Law Review 96–116.
8 For instance, the Court of Appeal, later overruled by the House of Lords, awarded damages of £131,336 in Crehan v Inntrepreneur Pub Co (CPC) [2004] EWCA Civ 637, while the CAT awarded £33,818.79 (plus interest at a rate of 2% above the Bank of England base rate from 1 August 2004) in compensatory damages in 2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19, [2012] Comp AR 211, as well as £60,000 exemplary damages.
9 The 29 infringement decisions imposing fines adopted between 1999 and 2013 led to the award of £602,857,792 post leniency and settlement fines, the value of fines post-appeal being limited to £327,188,159. In two high profile damages cases on infringements of competition law to be decided in 2014 by the Chancery Division, the claimants are asking for a significant amount of damages. In Cooper Tire & Rubber Company Europe Ltd and Others v Dow Deutschland Incorporated and Others, tyre manufacturers Pirelli, Continental, Michelin, Bridgestone, and Cooper, among others, are seeking damages of more than £170 million from the Dow Chemical Company following the finding that it was part of the synthetic rubber cartel. In National Grid Electricity Transmission Plc v ABB Ltd and Others, National Grid is seeking damages of more than £360 million from a group of companies that were involved in a cartel identified by the European Commission relating to Gas Insulated Switchgear (GIS). These two cases are listed in the ‘20 top cases in 2014’ by Lawyer magazine; available at <http://www.thelawyer.com/analysis/market-analysis/practice-areas/litigation-analysis/the-top-20-cases-of-2014-in-detail/3014065.article>.
brought where the alleged breach of competition law is not already the subject of an infringement decision by the European Commission or one of the national competition authorities (NCAs), and the former referring to actions for damages brought following an infringement decision adopted by the European Commission or an NCA and relying on this infringement decision. Table 1.2 shows the relation between follow on and standalone actions for damages in the six most important jurisdictions, in terms of the size of their economy, in Europe.

It appears that standalone actions for damages are prevalent in most of these jurisdictions, with the exception of Italy. This prevalence of follow on cases does not seem to depend on the level of public enforcement activity. Although Italy has more than five times the level of public enforcement activity than the UK, in terms of infringement

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**Table 1.1** Competition law infringement decisions in the UK and judgments (at first instance) on actions for damages for competition law infringements

<table>
<thead>
<tr>
<th>Year of the decision or judgment</th>
<th>Number of competition law infringement decisions imposing fines in the UK</th>
<th>Number of cases considering claims for damages for competition law infringements</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>2002</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>2003</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>2004</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>2005</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>2006</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>2007</td>
<td>–</td>
<td>6</td>
</tr>
<tr>
<td>2008</td>
<td>–</td>
<td>9</td>
</tr>
<tr>
<td>2009</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>2010</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>2011</td>
<td>3</td>
<td>15</td>
</tr>
<tr>
<td>2012</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>2013</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

**Table 1.2** Relation between follow on and standalone actions for damages in Europe

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Follow on actions for damages</th>
<th>Standalone actions for damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>23.5%</td>
<td>76.5%</td>
</tr>
<tr>
<td>France</td>
<td>12.9%</td>
<td>87.1%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>28%</td>
<td>72%</td>
</tr>
<tr>
<td>Italy</td>
<td>79.9%</td>
<td>20.1%</td>
</tr>
<tr>
<td>Spain</td>
<td>12.6%</td>
<td>87.4%</td>
</tr>
<tr>
<td>Netherlands</td>
<td>11%</td>
<td>89%</td>
</tr>
</tbody>
</table>

Data collected by the authors—Competition damages cases introduced in the courts of these jurisdictions from 1 January 1999 to 31 December 2013.

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decisions adopted, this does not seem to significantly affect the percentage of follow on cases in relation to standalone cases in the same ratio. Even the fact that France also has five times the level of public enforcement activity than the UK, the percentage of follow on actions is lower in France than in the UK, which is surprising if the expansion of the number of follow on actions is dependent on the levels of public enforcement activity. It may be inferred from these findings that reliance on public enforcement activity in the context of actions for damages, which may vary among jurisdictions, is not the most essential ingredient for the development of damages claims and that the relation between public and private enforcement is more complex that one would prima facie consider.

1.07 This book aims principally to provide an advanced introduction to the law and economics of competition damages actions in the EU. In view of the current interest of policy makers on this topic and the voluminous literature and commentary produced in the last few years, we take an approach to the topic which does not aim to be exhaustive, but rather seeks to carefully select the themes to examine, in order to ensure that they are covered in sufficient depth. The first two chapters of the volume aim to introduce the reader to the European acquis on damages claims, as well as to the most important notions and concepts underpinning the Directive of the European Parliament and Council on certain rules governing actions for damages under national law for infringements of the competition law provisions (‘Damages Directive’).

1.08 As will be explained in Chapter 2, this ‘Community acquis’, comprising the few cases of the CJEU on actions for damages for competition law infringement, as well as established principles on liability for violations of EU law, constituted the stepping stone on which the European Commission built its legislative initiatives to establish a core common approach seeking to ensure the minimal effectiveness of the remedy across the different legal systems of the EU Member States. These efforts culminated with the adoption of the Damages Directive in 2014. The development of this legislative initiative and the compromises reached is described in Chapter 3 of this volume.

1.09 The issue of the standing of indirect purchasers in competition law damages in Europe has been a primary focus for legal commentators, as is attested by the number of papers published on this topic. The most recent book-length studies published on competition law damages typically dedicate a chapter on standing issues. This choice may have been

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14 See, e.g. McFadden, The Private Enforcement of Competition Law in Ireland (n 12); Ashton and Henry, Competition Damages Actions in the EU (n 12).
influenced by the debate in the United States, which has focused on this issue, since the Supreme Court barred indirect purchasers from pursuing treble damage claims under Clayton Act § 4 in *Illinois Brick*, certain limited exceptions set aside.\(^{15}\) The US solution and the debate over indirect purchasers may be explained by the specific function played by private enforcement in the US, whose overall architecture aims to ‘provide a mechanism for wider public regulatory and observance goals’, in particular deterrence, thus going beyond compensation for loss, a feature that also explains the various specificities of the US system of private enforcement (e.g. cost rules), in comparison to the role of private enforcement in other parts of the world.\(^{16}\) Born in the US, economic analysis of law has taken this ‘regulatory’ objective as a given in devising an efficiency-based framework for tort law.\(^{17}\) In contrast, in European civil justice systems, the role of private enforcement has principally been that of providing compensation and operating as an instrument of corrective justice. Hence, issues of standing, as any other dimension of a tort law system, cannot be determined on the sole basis of deterrence considerations. The competition law field is no exception and the EU Courts, followed by the European Commission, have underlined the goal of compensation as the principal aim of private enforcement in EU competition law. The choice for a system of single and not multiple damages attests to that normative choice, even if there was evidence that double damages might have been a more efficient option, from a deterrence perspective but also from a mixed deterrence-corrective justice perspective (double damages only for cartel cases).\(^{18}\)

The conferral of standing in EU law to ‘anyone harmed’ by a competition law infringement, which has been confirmed by the Damages Directive, theoretically opens the gates to a flood of claims for damages initiated by non-direct purchasers or competitors, such as indirect purchasers, umbrella customers, and counterfactual customers. Yet, the analysis of all the published competition law damages cases in the four most important jurisdictions in the EU, in terms of the size of their economy, from 1999 to 2013, indicates that the overwhelming majority of damages cases has been initiated by direct purchasers and competitors, with a handful of cases being initiated by other groups of claimants and none by counterfactual customers.\(^{19}\)

\(^{15}\) *Illinois Brick Co v Illinois* 431 US 720 (1977). Indirect purchasers are not however barred from seeking injunctive relief under Clayton Act § 16, provided they meet the other requirements set in this context: *Cargill Inc v Monfort of Colorado Inc* 479 US 104 (1986). Some states have nevertheless provided standing to indirect purchasers by passing ‘Illinois Brick repealer’ statutes, a practice accepted by the Supreme Court. These statutes cover approximately 70% of the US population: E.L. Cramer and D.C. Simons, ‘Parties entitled to pursue a claim’, in A.A. Foer and R.M. Stutz (eds), *Private Enforcement of Antitrust Law in the United States* (Edward Elgar, 2012), 64–94, at 80–83. Passage of the Class Action Fairness Act (CAFA) of 2005 may direct some of this litigation where it concerns small claims multi-state, to the federal courts, if it was introduced after the implementation of CAFA. CAFA proceeds to an amendment of 28 USC §1332(d) and establishes federal jurisdiction for class actions in which there is minimal diversity between the parties and the matter disputed exceeds $5 million.


\(^{18}\) Report for the European Commission, *Making antitrust damages actions more effective in the EU* (n 10), 562–6 (scenario 1: double damages for all competition cases) and 579–94 (scenario 2: double damages only for cartel cases).

\(^{19}\) See Table 4.1 in Ch 4.
The reasons for this lack of cases may include the relative uncertainty until recently in some jurisdictions of the standing of indirect purchasers. In particular this may have affected the incentives of indirect purchasers to bring these claims. In addition, the absence of proper collective redress systems in most EU Member States has also clearly been a very significant factor. For the future, the question is whether we will see a flood of litigation. Whether we do may result from the central role played by the aim of compensation and corrective justice in the legal framework in Europe on actions for competition law damages. Such an approach requires that causation be proven and this will inevitably become a central way in which the extent of litigation will be regulated.

Surprisingly, causation has received remarkably little attention, as neither the preparatory works for the Damages Directive, nor subsequent legal commentary, have focused on it. The issue is not, as such, discussed in the Damages Directive (although it is indirectly touched upon with the establishment of a causal presumption for cartel harm) and the CJEU refused to develop a common framework on causality in Kone, although this was suggested by Advocate General Kokott, thus leaving the task to national legal systems of general tort law. The importance of the topic and the fact that it is under-studied led us to devote two chapters to its analysis. Chapter 4 explores the different views on causation in the various national tort law systems in Europe and the problems this may cause to the effectiveness of private enforcement through actions for damages, in particular in situations of causal uncertainty. The discussion provides a detailed analysis of the different causation tests applied by the courts of the EU Member States in general tort actions and how these may accommodate the specificities of competition damages actions. Chapter 5 proceeds to a comparison of the legal and the economic views on causation and causality, with the aim to improve the dialogue between lawyers and economists on a topic of crucial importance, in view of the emphasis put on economic and econometric evidence in competition law damages cases and the challenges that evidence based on statistics has faced in other areas of litigation.

Chapter 6 explores the methods employed for the quantification of damages, a crucial part of the competition law claim. Frequently, the quantification of damages also provides the opportunity for economists (and the courts) to explore issues of causation indirectly, hence the need to develop a consistent framework that would guarantee effective compensation to the victims of competition law infringements.

The most (politically) difficult and (legally) complex aspect of the development of the EU law on competition law damages actions has been the interaction between public and private enforcement. This is also a specific concern stemming from the architecture of EU
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competition law enforcement and which does not manifest itself in the US context, where the task of ensuring deterrence and the observance of the law is delegated to the ‘private attorney general’, an intrinsic characteristic of the ‘adversarial legalism’ of the US policy implementation and dispute-resolution system. The movement to ‘Eurolegalism’ is already occurring, and the institutionalization of competition law damages as an important pillar of EU competition law enforcement is a step towards that direction; yet, the complete transformation of the system of regulation and dispute-resolution in Europe will take decades and in any case may not present the same characteristics as the US system, in view of the established role of public and administrative enforcement in EU competition law and the concurrent demands of integration of national legal systems. Chapter 7 explores the various instances of interaction of public and private enforcement and their complementary or competing role, depending on the perspective taken. It also aims to provide a detailed account of the different options available to policy makers and the way mechanisms guaranteeing the effectiveness of public enforcement (e.g. leniency policy) may suffer from the advent of a rights’ rhetoric, with regard to the foundations of the EU ‘right to claim damages for competition law infringements, as well as the development of mechanisms in order to guarantee the effectiveness of private enforcement (e.g. access to evidence, joint and several liability of competition law infringers, the evidential value of infringement decisions).

The harmonization through the adoption of the Damages Directive of some important aspects of competition damages claims and the development of a common core ensuring the minimum effectiveness of the remedy across the EU should not conceal the fact that Member States still remain largely masters of important elements composing the architecture of the remedy of damages for infringements of competition law in their respective jurisdiction. Hence, the Damages Directive recognizes important space for the intervention of the national level in the design of the private enforcement system. The result is great variety in the point of equilibrium to be achieved between the competing concerns of consumers, business, competition authorities, claimants, defendants, etc. This regulatory space is still unoccupied by EU rules for Member States which highlights the relevance of inter-jurisdictional competition and forum shopping in the brave new world of multi-jurisdictional competition law enforcement. Competition between the different jurisdictions in Europe is ‘managed’ in a light touch way by private international law rules, which set the broader framework for the various dimensions of jurisdictional competition to unveil.

Chapter 8 delves deeply into this question, by exploring the EU private international law rules and more generally the way the current EU framework (including the Damages Directive, Regulation 1/2003 on the enforcement of EU competition law, and soft law on

25 Some will even doubt that this transformation is desirable, regulators disposing of important comparative advantages to judges (in particular superior expertise), as some authors argue: see A. Shleifer, The Failure of Judges and the Rise of Regulators (MIT Press, 2012).
26 Although one may note the efforts made for the development of European Rules on Transnational Civil Procedure on the basis of a compromise between the different legal cultures in Europe and the ALI/UNIDROIT Principles of Transnational Civil Procedure (2004) (see <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>), this is still work in progress.
the quantification of competition law damages) promotes inter-jurisdictional competition and organizes the different parameters of that competition.

1.16 Our selection of topics has meant that we have been unable to cover in depth some important aspects that merit careful consideration if one is to predict the success or failure of the new architecture of EU competition law enforcement regarding competition law damages. Member States have already initiated a degree of inter-jurisdictional competition, by adopting elaborate civil procedure and other reforms in order to render their legal systems more attractive to the legal industry, or more generally in order to achieve an equilibrium of competing interests that corresponds to the preferences of their citizens or of the key stakeholders.

1.17 As will be explained in Chapter 3, collective redress, either in the form of the traditional dispute-resolution system, or in the form of alternative dispute-resolution mechanisms, such as collective settlements or voluntary redress schemes, has become an effective choice in various EU Member States, and is actively favoured by the Commission.27 Some Member States, such as the UK, are moving towards a full opt-out collective redress system, providing both for collective actions and for collective settlements.28 This issue is not examined in this book, with the exception of a short section in Chapter 3.29

1.18 This issue is also intrinsically related to the funding of competition law litigation and the cost rules applying in each jurisdiction. There are various ways to fund civil litigation in general: public or voluntary sector funding, such as legal aid (which may include charity funding such as pro bono work funded by law firms), and mainly private funding solutions, such as personal funds, funds provided as a benefit of a membership to an association (e.g. trade union), legal expense insurance (which can be either before-the-event or after-the-event), funding by a lawyer (through conditional fee agreements or contingency fees/‘damages-based agreements’), or third party private investors.30 In Europe, the variety of litigation funding and the availability of legal expense insurance contrast with the prevalence of contingency fees, the virtual absence of legal expense insurance, and the increasing role of third party litigation funding in the US.31 Third-party funding in competition

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28 See Consumer Rights Act, Sch 7, cl. 82 in discussion in Parliament. Among many reforms, the Act suggests the replacement of current s 47B of the Competition Act 1998, providing the possibility for opt-out collective proceedings to any person domiciled in the UK, subject of course to certain conditions (a person who is not domiciled in the UK must still opt-in to become part of the proceedings). New ss 49A and 49B of the Competition Act provide for collective settlements, which should be approved by the CAT. Finally, s 49C gives the UK competition authority, the CMA, a new power to certify voluntary redress schemes.


litigation is, however, on the rise in Europe. Member States may make a different choice of the respective role of the components of the funding mix. For instance, recent reforms in the UK have cut down legal aid and provide for the possibility of contingency fees (‘damages-based agreements’), thus moving to a more private funding-centered model.

Of particular importance for incentives to bring actions for damages are also the local arrangements concerning costs. In contrast to the US, where the rule is that each party pays its own costs and there is no cost-shifting rule to the loser, although a prevailing plaintiff may recover reasonable lawyer fees incurred, in Europe cost shifting (the loser pays) is the general rule. The issue of funding litigation, its interaction with the availability of collective redress, and the role of cost rules were examined in the Impact Assessment Report commissioned by the European Commission, which suggested some EU intervention on these matters. The report proposed the establishment of contingency legal aid funds in order to support litigation, as well as opt-out collective actions as a way to attract third party funding in competition law disputes. It also noted the difficulties that the fee-shifting rule (loser pays) poses to actions for damages for infringements of competition law, in view of the important level of litigation costs, only some of which may be recovered. Indeed, despite the general application of the fee-shifting rule in European jurisdictions, there are significant differences with regard to the composition of litigation costs (including court fees, lawyers’ and experts’ costs, as well as the cost of discovery). In common law jurisdictions, lawyers’ fees constitute the major element of litigation costs, while the percentage of costs attributed to court fees are higher, it seems, in civil law jurisdictions. The level of lawyers’ fees also varies from jurisdiction to jurisdiction. More importantly, the categories of costs that may be shifted to the loser also vary, some jurisdictions, such as France, distinguishing between the inevitable costs of litigation (‘depens’), which are listed by statute and which shift completely to the loser, and expenses not legally necessary (‘irrépétables’), whose shifting to the loser is subject to judicial discretion. While the Commission, when preparing the Green Paper on damages actions, suggested an option under which the losing

33 Following implementation of the Jackson reforms in Pt II of the Legal Aid, Sentencing and Punishment of Offender’s Act 2012 (LASPO), which entered into force on 1 April 2013. See also The Damages-Based Agreements Regulations 2013 (SI 2013/609).
34 Hence, regardless of who prevails in the case, each party pays its own legal fees in the absence of a statutory, contractual, or common law basis for fee-shifting from the prevailing party to the loser. See J.F. Vargo, ‘The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice’ (1993) (42) The American University Law Review 1567–636. The rule is justified by the concern of US law that plaintiffs may not bring probably meritorious cases for fear of losing them and thus being liable for the defendant’s legal fees. However, r 26(c) of the Federal Rules of Civil Procedure enables US courts to share the costs of discovery ‘for good cause’.
36 See the comparative analysis in Hodges, Vogenauer, and Tulibacka, Costs and Funding (n 16), 3–186.
37 Report for the European Commission, Making antitrust damages actions more effective in the EU (n 10), Annex 1.
38 For a discussion of the impact of the cost-shifting rule on the incentives to bring competition damages actions, see Report for the European Commission, Making antitrust damages actions more effective in the EU (n 10), 176–81. This disincentive effect was also noted by the Commission in the preparatory documents for the Green Paper on damages actions: see Staff Working Paper, COM(2005) 672 final, 19 December 2005, §§215–17.
39 Hodges, Vogenauer, and Tulibacka, Costs and Funding (n 16), 3–186.
claimant would be liable to pay the defendant’s legal costs only if she acted in a manifestly unreasonable way (Option 27), the Damages Directive provides no harmonized rules on cost shifting.  

1.19 An additional element in the inter-jurisdictional competition between Member States as being the most effective forum for actions for competition damages is the quality of the judiciary and its cost, as well as the comparative cost of alternative dispute-resolution methods, such as pre-trial settlement or arbitration, which are usually cheaper than the courts. That competition may drive Member States to organize their court systems differently, for instance by entrusting to a specialized expert tribunal the task of adjudicating all standalone and follow on actions for competition damages, favouring ADR, providing courts with extensive case management duties (including the assignment of cases to designated judges with relevant expertise), limiting the costs of disclosure, introducing some judicial control over recoverable costs and cost management, or more effective rules on the assessment of evidence and expertise and the management and recovery of the costs of experts, in view of the importance of economic evidence in competition law disputes.

1.20 We would like to thank Oxford University Press and in particular Ruth Anderson and Gemma Parsons from the editorial staff for the chance to present this work and their patience throughout the long process of drafting (due in part to the long gestation of the Damages Directive). Also thanks to Santiago Roca Arribas, Lorenzo di Masi, Pablo Gonzales, Violette Grac-Aubert, Georgia Koutsoukou, Peter O’Loughlin, Edouard Ortiz, Zana Sami, and Andrea Rodriguez Redondo for their excellent research assistance and Herbert Hovenkamp, Wolfgang Kerber, Barry Rodger, Sandy Steel, Spencer Weber Waller, and the participants of a conference organized by the Forum for Law and Markets at the University

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40 Staff Working Paper (n 36), §220.
41 Article 8(2) of the Damages Directive requests the Member States to make it possible for national courts to order the payment of costs.
42 See, e.g., the reforms introduced by the recent UK Consumer Rights Bill, in discussion in Parliament, widening the types of competition cases that the CAT may hear. This widening of the role of the CAT resulted from the difficulties in delineating the scope of follow on as opposed to standalone actions for damages, following the narrow interpretation of the CAT’s ability to go beyond the findings of the initial infringement decision in English Welsh & Scottish Railway Limited v Enron Coal Services Limited [2009] EWCA Civ 647 at [1].
43 For instance, in the UK, following implementation of the Jackson reforms, CPR r 3.15 was introduced providing, in place of standard disclosure, a menu option of alternative disclosure provisions for any case where the costs of standard disclosure are likely to be disproportionate.
44 For example, in the UK, CPR Pt 44, in particular the possibility for the judge to assess the proportionality of costs, qualified one-way costs shifting, and damages-based agreements; and CPR Pt 3, rr 3.12–3.18 on costs management.
45 See, e.g., Practice Direction 35 supplementing CPR Pt 35, making it possible to use concurrent expert evidence, also known as ‘hot tubbing’. For the results of an early pilot application, see H. Genn, ‘Getting to the truth: experts and judges in the “hot tub”’ (2013) 32(2) Civil Justice Quarterly 275–99.
46 See CPR r 354 requesting that the costs of the expert evidence are justified. With regard to experts’ costs, civil law jurisdictions usually choose court-appointed experts, the costs of which may be reimbursed by the losing party; the costs of party experts eventually called by the parties are not reimbursable in general. Common law jurisdictions use party experts, whose costs are reimbursable by the loser to the extent that they are reasonable. See Hodges, Vogenauer, and Tulibacka, Costs and Funding (n 16), 3–186.
of Haifa in Spring 2014 and a UCL Faculty seminar in June 2014 for their insightful comments on some of the chapters in this volume. Finally, we would like to thank the Faculty of Laws at University College London, the Leverhulme Trust, the Alexander von Humboldt Foundation, WZB Social Science Research Center Berlin, and the Skolkovo International Laboratory for Law and Development, National Research University–Higher School of Economics (HSE) for their support of our research on this topic.