Private Enforcement of European Competition and State Aid Law

International Competition Law Series

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Private Enforcement of European Competition and State Aid Law

Current Challenges and the Way Forward

Edited by

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Wolfgang Wurmnest
Thomas M.J. Möllers

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Private Enforcement of EU Competition and State Aid Law: Comparative Analysis and the Way Forward

Ferdinand Wollenschläger & Wolfgang Wurmnest

I. PRIVATE ENFORCEMENT OF EU COMPETITION LAW AFTER DIRECTIVE 2014/104/EU

A. The Damages Directive: standard setting, frictions and (potential) impact

1. General standards

The *Damages Directive* (Directive 2014/104/EU) marks a very important step in the history of private enforcement of EU competition law. After many years of discussion, the EU legislature has etched general standards of private enforcement into the law which will form the basis of law enforcement over the years to come. When drafting the Directive, the European legislature could build upon solutions developed in other jurisdictions as well as on the case law of the European Court of Justice.

The Directive's key features can be summarised as follows:

First, the European legislature opted for the principle of compensation, and not deterrence, as the general aim of private enforcement. Putting compensation in the limelight distinguishes EU law significantly from the US approach, under which victims of antitrust law violations can, for example, claim treble damages under the Sherman Act.[1] Such an overcompensation should deter potential wrongdoers from infringing the law and give private plaintiffs incentives to sue. During the discussions about the proper model for private enforcement in Europe, the European Commission briefly flirted with the US model,[2] and the German Monopolies Commission called for the introduction of double damages.[3] Double damages (instead of treble damages) were seen as sufficient given that in US law interest runs only from the date of the judgment, whereas in European jurisdictions pre-judgement interest exists. In the end, the idea of overcoming the 'rational apathy' of private plaintiffs by granting them a windfall profit as incentive to sue was rejected by the EU legislature. Article 3(3) Damages Directive makes clear that the Directive allows only for compensation, and not for overcompensation. Given the long debate on the Directive's aims and scope, it is highly unlikely

1. On the US private enforcement system *see* Alison Jones, '*Private Enforcement of EU Competition Law: A Comparison with, and Lessons from the US*' in Maria Bergström, Marios Iacovides & Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* 15, 19–26 (Hart 2016) and the contributions to Part II in Albert A. Foer and Jonathan W. Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar 2010). For a comparative perspective *see* Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP 1999).
2. For details *see* Wouter Wils, *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future* (2017) 40 World Competition 3, 14–23.
3. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle (Sondergutachten 41)* para. 83 (Nomos 2004) on German competition law; *see also* Jürgen Basedow, *Perspektiven des Kartelldeliktsrechts* [2006] ZWeR 294, 303.

that this standard will be changed in the years to come. It can, therefore, be predicted that this marked difference from the US approach will remain.

The Damages Directive looks to ensure, however, that victims harmed by competition law infringements receive full compensation (Article 3(1) Damages Directive and Recital 12). This important second feature of the Directive was already set out by the European Court of Justice in the seminal judgments of *Courage* and *Manfredi*.[4] Insofar, the Directive reflects the *acquis communautaire*.[5] Given the lack of collective redress mechanisms at the European level and in many Member States (*see* section I.A.3., *infra*), it is, however, doubtful whether that aim can in practice truly be achieved for all victims.

The third characteristic feature of the Damages Directive is the safeguarding of effective public enforcement. Currently, private enforcement in the area of horizontal cartels rests to a large part on follow-on actions brought after a competition authority has sanctioned a cartel. The detection of cartels by competition authorities depends significantly on functioning leniency programmes. To protect these programmes, the EU legislature has limited the possibilities for private plaintiffs to gain access to sensitive information disclosed during a leniency application.[6]

2. Frictions with primary law

The Damages Directive's rules deviate to a certain extent from the case law of the European Court of Justice. The Court had developed certain standards based on the principle of effectiveness, which is a principle of European primary law. For example, in *Courage* the Court held that '[t]he full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[7] Moreover, in *Pfleiderer* and *Donau Chemie* the Court made clear that, with regard to the access of plaintiffs to documents disclosed by cartel members in leniency applications, the right to claim full compensation would be impaired if national courts could not weigh the interests of the plaintiffs to obtain information against the need for protection of that information in each individual case.[8]

The Damages Directive cut back these rights of the plaintiff. First, it limits a plaintiff's right to claim full compensation in order to protect small and medium-sized enterprises (SME) as well as leniency applicants. According to Article 11(2) and (3) Damages Directive, an SME that participated in a cartel is – under certain conditions –

4. ECJ, Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297, para. 25; ECJ, Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, para. 61.
5. Wulf-Henning Roth, *The European Perspective* III.A. and V. (note that all references to other contributions to this book refer to the numbering of the headings).
6. On the frictions between private and public enforcement *see* Roth, *supra* n. 5, at IV.A.
7. Case C-453/99 *Courage and Crehan*, *supra* n. 4, at para. 26.
8. ECJ, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161, para. 30; ECJ, Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG* [2013] ECLI:EU:C:2013:366, para. 49.

liable only to its own direct and indirect purchasers. Article 11(4) Damages Directive limits the liability of an immunity recipient to its direct or indirect purchasers/providers and allows other injured parties to claim damages from the immunity recipient only where full compensation cannot be obtained from other cartel members. The most prominent example of a deviation from the case law of the European Court of Justice is, however, Article 6(6) Damages Directive, which prohibits the disclosure of leniency statements without exception, thereby cutting back the interest-balancing approach developed by the Court.[9]

Assessing the legality of the corrections introduced by the EU legislature raises complex issues regarding the separation of powers and the interplay of primary and secondary law. The last word on the constitutionality of the changes introduced by the Damages Directive lies with the European Court of Justice. The European report in this study has argued that the corrections introduced by the Damages Directive are in conformity with the TFEU;[10] other commentators doubt that in part.[11] In the interests of legal certainty, it is therefore essential that national courts initiate preliminary proceedings to give the European Court of Justice the chance to clarify these important issues.

3. Fostering private enforcement?

Understandingly, the European Commission is keen to spread the word that the Damages Directive will foster private enforcement in Europe.[12] Indeed, there can be no doubt that over a longer time span such a positive effect will be demonstrated. It is however too early to measure the precise effects of the Directive on private enforcement given that it was only recently transposed by the Member States and given that many of its rules are not applicable *ratione temporae* to the current proceedings that often deal with cartels that were detected years ago.

A welcomed side-effect of the long and intensive discussion leading towards the adoption of the Directive is that private enforcement of competition rules received a significant amount of attention in academia and amongst practitioners. Whereas 15–20 years ago only a few articles on private enforcement were published in European competition law journals,[13] the tide has turned, and matters of private enforcement are discussed regularly today, including the important procedural aspects. At least in some jurisdictions law firms have realised that private enforcement of competition law can be a good 'business model'. Clients harmed by competition law infringements are, as

9. Roth, *supra* n. 5, at V.B.2.
10. *Ibid.*, at V.B.
11. *See* Christian Kersting and Nicola Preuß, *Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU): Ein Gesetzgebungsvorschlag aus der Wissenschaft* para. 121 (Nomos 2015) (on Article 11(2), (3) Damages Directive); Christian Kersting, *Die neue Richtlinie zur privaten Rechtsdurchsetzung im Kartellrecht* [2014] WuW 564, 566–567 (on Article 6(6) Damages Directive).
12. *See* Johannes Holzwarth, *The Commission's View* II.
13. One of the first was Jürgen Basedow, *Who will Protect Competition in Europe? From Central Enforcement to Authority Networks and Private Litigation* (2001) 2 EBOR 443, 459–468.

a consequence, regularly advised on the possibility to claim damages from infringers. Reported cases are also on the rise.[14]

B. Harmonising the law of private enforcement

It goes without saying that every directive can only partly harmonise the law. This is not different with regard to the Damages Directive for various reasons. It covers only selected issues of private enforcement, and it spares many procedural issues given the limited competence of the European Union to harmonise national rules. Moreover, even within the area of harmonised law, the Directive does not always provide the necessary clarifications,[15] so that a greater degree of harmonisation will be achieved only over time through decisions rendered by the European Court of Justice. This is also so because the Directive often operates with very general clauses, which gives courts some leeway for interpretation. Finally, the Damages Directive follows a mixed approach. Whereas most rules set forth a full harmonisation, selected provisions were submitted to a minimum harmonisation, thereby allowing Member States to enact rules that are more favourable to private plaintiffs. The limited harmonisation effect will be demonstrated by looking at three illustrative issues.

1. Entity liable for damages

An important issue that was not clarified explicitly by the Damages Directive is the question of whom damages for competition law violations can be sought from. There is unanimity that the legal entity whose representatives or staff members directly participated in the infringement (e.g., by attending price-fixing meetings) is liable for damages. In the area of public enforcement, the European Court of Justice has developed the single economic entity doctrine for sanctioning undertakings under Regulation 1/2003.[16]

Put simply, under this doctrine not only the direct infringer can be sanctioned for breach of EU competition rules but also other legal entities of the economic entity to which the direct infringer belongs to. This is so because the EU competition rules are addressed to 'undertakings', i.e., an economic unit (that is determined according to EU

14. *See* the study cited by Holzwarth, *supra* n. 12, at II.; for older empirical data *see* Barry Rodger, '*The Empirical Data Part 1: Methodology, Case-Law, Courts and Process*' and '*The Empirical Data Part 2: Provisions Relied Upon, Remedies and Success*' in Barry Rodger (ed.), Competition Law – Comparative Private Enforcement and Collective Redress across the EU, 73–120 and 121–156 (Wolters Kluwer 2014).
15. Roth, *supra* n. 5, at III.B.
16. For details of this doctrine *see* Dominik Braun and Manuel Kellerbauer, *Das Konzept der gesamtschuldnerischen Verantwortlichkeit von Konzerngesellschaften bei Zuwiderhandlungen gegen das EU-Wettbewerbsrecht* [2015] NZKart 175–181 (Teil 1), [2015] NZKart 211–216 (Teil 2); Okeoghene Odudu and David Bailey, *The Single Economic Entity Doctrine in EU Competition Law* (2014) 51 CMLRev. 1721–1757.

standards) which may consist of different legal persons.[17] It is, however, the 'undertaking' that infringes the law and that must answer for this infringement. For example, a parent company and its subsidiary can form such an economic entity if the 'subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company'.[18] If such an entity exists, the European Commission can, for example, impute the subsidiary's conduct to the parent company and impose the fine on the parent 'without having to establish the personal involvement of the latter in the infringement'.[19] According to the case law, such an influence can be presumed if the parent company holds 100% of the capital of a subsidiary which committed the infringement.[20] Less clear is the issue if and under which conditions subsidiaries and sister corporations are answerable for infringements committed by other companies of a group.[21]

Against this background, the question arises whether the economic entity doctrine also applies when private plaintiffs seek damages for infringements of EU competition law. Applying the economic entity doctrine to antitrust damages actions could flow either from primary law, as Articles 101, 102 TFEU are addressed to 'undertakings', or from the Damages Directive, which also uses this legal term.[22] A glance at the country reports in this study reveals that some jurisdictions had embraced the single economic entity doctrine even before the Damages Directive, whereas in other jurisdiction this doctrine met with much resistance – which did not fade after the Directive's transposition given that it did not provide the necessary clarity. The final push for a transference of the economic entity doctrine to the area of private law enforcement came from the recent *Skanska* judgment of the European Court of Justice, in which the Court decided for restructuring cases that EU primary law determines which entity is liable for damages. The Court held that:

> the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules.[23]

Even though the economic entity doctrine has entered the area of private enforcement, many details of its application are disputed among national courts and commentators.

17. ECJ, Case C-97/08 P *Akzo Nobel NV and Others v Commission of the European Communities* [2009] ECLI:EU:C:2009:536, paras 54–55.
18. Case C-97/08 P *Akzo Nobel and Others v Commission*, *supra* n. 17, at para. 58.
19. *Ibid.*, at para. 59.
20. *Ibid.*, at para. 60.
21. For details *see* Christian Kersting, *Haftung von Schwester- und Tochtergesellschaften im europäischen Kartellrecht* (2018) 182 ZHR 8–31.
22. Cf. Articles 1(1) and 2(2) Damages Directive.
23. ECJ, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others* [2019] ECLI:EU:C:2019:204, para. 47.

The United Kingdom adopted the single economic entity concept relatively early to establish jurisdiction. Since then it has been undisputed that a parent company with decisive influence over the market conduct of a subsidiary is jointly and severally liable for damages arising from the subsidiary's participation in a competition law infringement.[24] More controversial was the assessment of the reverse situation where a subsidiary was sued for damages flowing from unlawful conduct of the parent company. For such scenarios, courts have introduced a stricter approach. Subsidiaries can be held liable if it can be proven that they 'knowingly implemented' the competition law infringement.[25] The transposition of the Directive seems not to have altered these standards.

In Italy, the reception of the single economic entity doctrine has apparently so far not troubled the courts, but it was subject to dispute amongst scholars. The Italian report argues that at least after implementation of the Directive and the *Skanska* judgment of the European Court of Justice, parent companies are jointly and severally liable for competition law infringements of their subsidiaries if both firms form an economic entity such that no fault of the parent needs to be proven.[26]

In other jurisdictions, the reception went less smoothly. In Germany, lower courts had refused to apply the economic entity doctrine to private enforcement cases prior to the transposition of the Directive.[27] This reluctance seems to be grounded in the fact that German corporate law is based on the doctrine of separation, which usually excludes that a parent company can be held liable for violations of the law committed by a subsidiary. German scholars are divided over the matter, but the view that EU law controls the determination of which legal persons are liable for infringements of EU competition law is gaining more and more traction.[28] The German report points out that at least after the Directive was implemented, 'the legal situation under German law should be considered sufficiently clarified', and courts should, therefore, be ready to apply the economic entity doctrine as shaped by the European Court of Justice to determine the entity liable for damages for infringements of EU competition law.[29]

Also, the Netherlands had difficulties embracing the single economic entity doctrine in the area of tort law. Prior to the Directive's transposition, there was a court decision in the Elevator Cartel in which the court ruled that parent companies are not liable for competition law infringements committed by their subsidiaries unless it can be proven that the parent also actively participated in the cartel.[30] This decision resembles the approach of German courts given that also under Dutch law there is no general 'group liability' of all companies belonging to a corporate group. But the Dutch

24. Florian Wagner-von Papp, *Private Enforcement in the United Kingdom* IV.
25. *Ibid.*
26. Enrico Camilleri, *Private Enforcement in Italy* IV.A.
27. Jens-Uwe Franck, *Private Enforcement in Germany* IV.A.
28. Christian Kersting, '*Kapitel 7: Kartellschadensersatz: Haftungstatbestand – Bindungswirkung – Schadensabwälzung*' in Christian Kersting and Rupprecht Podszun (eds), *Die 9. GWB-Novelle* 115, 124–125 (C.H. Beck 2017) with further references.
29. Franck, *supra* n. 27, at IV.A.
30. Rogier Meijer and Erik-Jan Zippro, *Private Enforcement in the Netherlands* IV.

report also argues that after the *Skanska* judgment of the European Court of Justice, Dutch courts must decide differently in the future.[31]

Under French law, there seems, at least after the transposition of the Directive, to be a consensus that other entities of a group of companies can be held liable for damages. A dispute revolves, however, around the conditions for such a liability. Prior to the transposition of the Directive, French courts held that entities are liable only when it can be proven that they participated in the legal infringement and acted with fault.[32] The French report points out, however, that in light of the recent *Skanska* judgment of the European Court of Justice, it seems likely that the case law needs to be adapted given that the European Court seems to favour tort law liability for those firms which fall under competition law's single economic entity doctrine.[33]

Summing up, the case law at the national level is sparse and the existing judgments were handed down prior to the Directive's transposition. Among scholars there is, however, a trend to embrace the single economic entity doctrine in tort actions. Under this approach, a parent company is jointly liable for competition law infringements committed by a subsidiary provided that the parent company formed an economic entity with the subsidiary. Less clear is the answer regarding the circumstances under which subsidiaries are liable for damages flowing from the participation of the parent company (or other companies of the group) in a cartel.

2. Binding effect of national decisions

Whereas the Directive did not clarify the issue as to which entity is liable for damages, the European legislature explicitly incorporated a rule on the binding effect of decisions by national competition law authorities and review courts into the Directive to 'enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU [and] to increase the effectiveness and procedural efficiency of actions for damages' (Recital 34). A similar rule for infringement decisions of the European Commission can be found in Article 16(1) Regulation 1/2003 prohibiting national competition authorities and courts from taking decisions running counter to a prior Commission decision when assessing agreements, decisions, or practices under Articles 101 and 102 TFEU. The binding effect of decisions of national competition authorities helps private plaintiffs to prove a competition law infringement. The Directive distinguishes between decisions rendered by a national competition authority or review court of the same state in which the action for damages is brought ('local cases') and decisions rendered by authorities or review courts of other EU Member States ('cross-border cases').

In 'local cases' a final decision of a national competition authority or review court finding an infringement of competition law is to be deemed irrefutably established for the purposes of an action for damages brought before national courts in that state under Articles 101 and/or 102 TFEU or under national competition law, i.e., under rules

31. Meijer and Zippro, *supra* n. 30, at IV.
32. Rafael Amaro, *Private Enforcement in France* IV.A.2.
33. *Ibid.*

pursuing the same objective as the EU competition rules (Article 9(1) Damages Directive). Moreover, Recital 34 clarifies that the effect of a final decision is not binding in all regards, but only as to 'the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction'.

In 'cross-border cases' the binding effect of decisions taken in other EU Member States is not as comprehensive. Those decisions may be presented before national courts 'as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties' (Article 9(2) Damages Directive). This softer approach towards foreign decisions resulted from the fact that national administrative proceedings are not harmonised and a far-reaching binding effect might run counter to the fundamental rights of the defendants, as is particularly guaranteed by Article 47 of the EU Charter of Fundamental Rights.[34] However, the Directive follows in this regard a minimum harmonisation approach ('at least'), which allows Member States to strengthen the binding effect if they so desire. The jurisdictions that formed the basis for the present study were, however, very reluctant to introduce far-reaching changes. In addition, some jurisdictions struggle to combine the binding effect with the autonomy that is constitutionally granted to the courts.

The most sweeping rule can be found in Germany. The German legislature had already introduced a rule on the binding effect of national competition decisions in the 7th amendment of the Competition Act of 2005.[35] This provision was maintained when the Directive was transposed, apart from some minor linguistic changes (and a new section number) that did not alter its content.[36] The German transposition goes further than the Directive. As far as final decision finds a violation of European or German competition rules, this infringement is deemed to be irrefutably established not only in cases in which the decision was rendered by the German competition authority or the European Commission, but also if it was rendered by a competition authority in another Member State. The same holds true for decisions of the respective review courts. Thus, in cross-border cases concerning infringements of Articles 101 and/or 102 TFEU, Germany has extended the binding effect also to final decisions of authorities/review courts of other Member States even though the Directive demands only a prima facie evidence effect.[37] The German transposition is silent on the effect of decisions of competition authorities from other EU Member States which find an infringement of national competition rules that pursue the same aim as Articles 101 and 102 TFEU. The legislative materials reveal that German courts must consider such decisions as prima facie evidence and that the German legislature assumed that no legislative action was necessary given that this approach is already well-established in case law. As private plaintiffs might not be fully aware of their rights, the reluctance of

34. Camilleri, *supra* n. 26, at IV.B.; Franck, *supra* n. 27, at IV.B.1.
35. Franck, *supra* n. 27, at IV.B.
36. Kersting, *supra* n. 28, at 144.
37. Franck, *supra* n. 27, at IV.B.1.

the German legislature to introduce a clear-cut rule on foreign decisions dealing with breaches of national competition law is rightly criticised by the German report.[38]

All other jurisdictions analysed in this study have opted for a more literal transposition of Article 9(2) Damages Directive. In these jurisdictions, foreign decisions in cross-border cases can be presented as (ordinary) *mode de preuve* (France),[39] as (ordinary) means of proof (Italy),[40] or as prima facie evidence (Netherlands[41] and United Kingdom[42]). Under Dutch law, Article 9(2) Damages Directive was not transposed by statute as the concept of prima facie evidence was deemed to be well-established in the case law. This decision is criticised in the Dutch report as it might impair legal clarity.[43]

Details regarding the binding effect have to be clarified by the courts in the years to come. A first issue concerns the question of which parts of a decision can deploy a binding effect. The jurisdictions with 'national precursors' of Article 9(1) Damages Directive have restricted the binding effect to certain parts of the decision, namely the operative part of the decision and those parts of the reasoning that constitute the essential basis for the operative part.[44] It seems likely that this approach will meet with the approval of the European Court of Justice. Moreover, it is generally accepted that issues of causation or damage, even though they are sometimes difficult to prove for plaintiffs, are not covered by the binding effect.[45] More controversial are questions on the general reach of the binding effect under Article 9(1) Damages Directive. As general rule, due process demands that the binding effect can be invoked only against the addressees of the decision who could defend themselves in the prior administrative proceeding.[46] The crucial question is whether courts may – in exceptional cases – refuse to apply the irrebuttable presumption when finding that the concerned decision is manifestly illegal, as it is discussed in Italy.[47]

With regard to the rule enshrined in Article 9(2) Damages Directive, the years to come will show how judges interpret and apply the prima facie evidence rule. It remains to be seen whether those jurisdictions with strong constitutional reservations against rules that bind their courts might deviate from the case law that will develop in other jurisdictions.

Summing up, Article 9 Damages Directive improved the situation for the plaintiffs in that jurisdiction that had no rule on the binding effect of administrative decisions in follow-on antitrust damages actions. As a differentiated rule was necessary in light of constitutional concerns raised by some Member States, the Directive achieves a sound degree of harmonisation. Open issues will have to be clarified by the European Court of Justice in the years to come.

38. *Ibid.*
39. Amaro, *supra* n. 32, at IV.B.1.
40. Camilleri, *supra* n. 26, at IV.B.
41. Meijer and Zippro, *supra* n. 30, at V.
42. Wagner-von Papp, *supra* n. 24, at V.
43. Meijer and Zippro, *supra* n. 30, at V.
44. Wagner-von Papp, *supra* n. 24, at V.
45. Camilleri, *supra* n. 26, at IV.B.; Franck, *supra* n. 27, at IV.B.2.
46. *Ibid.*
47. *See* on this discussion Camilleri, *supra* n. 26, at IV.B.

3. Prescription (limitation of actions)

National rules on prescription (limitation of actions) for damages are complex, and often general rules apply. In practice, prescription rules that do not reflect the particularities of competition law violations may restrict the effective enforcement of antitrust damages actions considerably.[48] Against this background, the European legislature was right to enshrine rules on prescription in the Directive. The main rule is laid down in Article 10 Damages Directive, and there are additional rules for the liability of immunity recipients (Article 11(4) Damages Directive) and for the suspensive effects of consensual dispute resolution (Article 18(1) Damages Directive). Whereas most of this provisions are based on the model of full harmonisation, a prescription period of 'at least' five years was designed as a minimum harmonisation rule (Article 10(3) Damages Directive). In addition, Member States are allowed to maintain or introduce absolute limitation periods as far as they do not render the exercise of the right to full compensation practically impossible or excessively difficult (Recital 36 Damages Directive). The harmonisation approach taken by the Directive is sensible. It focuses on crucial issues (commencement of the limitation period, minimum length of this period, selected issues of suspension) and gives Member States sufficient leeway to integrate these rules into the national systems of prescription (limitation of actions).

The national reports of this study agree that the European rules were transposed in conformity with EU law, even though the rules vary in detail. In accordance with Article 10(2) Damages Directive, the short run 'subjective' limitation period is not to begin to run before the following conditions are met: the competition law infringement has come to an end, the injured claimant (understood as the person that was originally harmed by the infringement, which in assignment cases must not necessarily be the actual claimant[49]) knows or can reasonably be expected to know[50] (i) of the relevant behaviour and the fact that it constitutes an infringement of competition law, (ii) that the infringement caused harm, and (iii) the identity of the infringer.[51]

Regarding the length of the subjective period, the adopted solutions vary. France,[52] Italy,[53] and the Netherlands[54] have introduced or maintained a five-year period and the same holds true for Scotland.[55] In Germany, the limitation period is also five years, but it runs from the end of the year in which the claim arose and the

48. *See* Joined Cases C-295/04 to C-298/04 *Manfredi*, *supra* n. 4, at paras 78–82. On the interpretation of the Italian prescription rules by the Italian Supreme Court in the aftermath of this case, *see* Camilleri, *supra* n. 26, at IV.C.
49. Kersting and Preuß, *supra* n. 11, at para. 82.
50. In Germany, a defendant contending that a claimant should reasonably have known of these facts must establish that the claimant demonstrated gross negligence in not learning of the relevant facts, *see* Franck, *supra* n. 27, at IV.C.1.
51. Amaro, *supra* n. 32, at IV.C.4.; Camilleri, *supra* n. 26, at IV.C.; Meijer and Zippro, *supra* n. 30, at VI.
52. Amaro, *supra* n. 32, at IV.C.4.
53. Camilleri, *supra* n. 26, at IV.C.
54. Meijer and Zippro, *supra* n. 30, at VI.
55. Wagner-von Papp, *supra* n. 24, at VI.

conditions mentioned in the preceding paragraph are met (*Ultimoverjährung*). This approach usually discharges parties and courts from the burden of determining the exact date when the requirements for the start of the limitation period are met.[56] In England and Wales, a six-year period applies.[57]

In all jurisdictions analysed in this study, an enforcement action by a competition authority suspends the limitation period in line with Article 10(4) Damages Directive.[58]

Some Member States have maintained or introduced absolute limitation periods according to which a claim/action is time-barred if a very long time has passed after the infringement has come to an end. The Netherlands[59] and France[60] have set forth a period of twenty years. Under German law, there are two absolute limitation periods. A period of ten years applies from the date when the claim arose and the competition law infringement on which the claim is based came to an end. In addition, claims for competition damages become time-barred thirty years from the date when the infringement occurred, irrespective of the knowledge of the plaintiff or whether the infringement has come to an end.[61] Whether the ten-year period is in line with the principle of effectiveness has been called into question. The German report takes the position that the German implementation is in conformity with the principle of effectiveness.[62]

Summing up, the Directive has prolonged the hitherto existing limitation periods in many jurisdictions. It has also shaped the conditions under which the 'subjective' limitation period begins to run, which fosters legal clarity and ensures that plaintiffs can usually recover damages after the infringement has been sanctioned by a competition authority. Thus, the Directive has improved the conditions for plaintiffs considerably.[63] Nonetheless, practical problems do arise with regard to the applicability of certain national provisions *ratione temporae* in cases where the national prescription rules were altered many times over the last years.[64] This problem has, however, to be fixed at the national level.

C. The role of national courts and legislatures

The success of private competition law enforcement is not only a question of European law and its implementation. Given that the Directive only partly harmonises the law (*see* section I.B., *supra*), also national parliaments and courts will remain important

56. Franck, *supra* n. 27, at IV.C.1.
57. Wagner-von Papp, *supra* n. 24, at VI.
58. Amaro, *supra* n. 32, at IV.C.4.; Camilleri, *supra* n. 26, at IV.C.; Franck, *supra* n. 27, at IV.C.3.; Meijer and Zippro, *supra* n. 30, at VI.; Wagner-von Papp, *supra* n. 24, at VI.
59. Meijer and Zippro, *supra* n. 30, at VI.
60. Amaro, *supra* n. 32, at IV.C.4. and 5. (noting doubts on the conformity of that rule with the principle of effectiveness).
61. Franck, *supra* n. 27, at IV.C.2.
62. *Ibid*.
63. This is also the case in other jurisdictions, for example in Sweden, where the Directive's prescription rules were transposed verbatim, *see* Magnus Strand, '*Managing Transposition and Avoiding Fragmentation: The Example of Limitation Periods and Interests*' in Magnus Strand, Vladimir Batistas Venegas & Marios C. Iacovides (eds), *EU Competition Litigation: Transposition and First Experiences of the New Regime* 42, 49–50 (Hart 2019).
64. *See* Amaro, *supra* n. 32, at IV.C.2.

actors in the construction of a sound and effective system of law enforcement.[65] Many possible impediments to private enforcement – such as the lack of specialised courts,[66] high litigation cost,[67] courts with insufficient resources to handle antitrust damages actions,[68] and rules of proof that do not reflect the complexity of competition law claims[69] – must be fixed by national courts or law-makers. Regulatory competition might help to improve the legal framework at the national level.[70]

II. PRIVATE ENFORCEMENT OF EU STATE AID LAW

A. Background: EU law framework for state aid

Establishing an internal market, one of the Union's central aims, implies ensuring that competition within the European Union is not distorted (Article 3(3) TEU and Protocol No 27 on the Internal Market and Competition). To this end, the Member States have agreed on common rules on competition, including, *inter alia*, a prohibition on certain types of state aid (Article 107(1) TFEU). This rule – to which Article 107(2) and (3) formulate exceptions – is procedurally strengthened by an obligation of the Member States to inform the European Commission 'in sufficient time to enable it to submit its comments, of any plans to grant or alter aid'; moreover, '[t]he Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision' (Article 108(3) TFEU).[71]

The aforementioned provision already hints at the main form of enforcing EU state aid law, namely its public enforcement by the European Commission in cooperation with the Member States' administrations according to Article 108 TFEU and Regulation 2015/1589. Yet, in view of limited administrative capacities at the European level and the trend towards a decentralisation of state aid control, private enforcement[72] has become increasingly important.[73] Moreover, in state aid law, private

65. A comparative overview of factors influencing the success of private enforcement is provided by Barry Rodger, '*Institutions and Mechanism to Facilitate Private Enforcement*' in Rodger, *supra* n. 14, at 23–71.
66. That specialised courts, i.e., bodies that decide generally on private competition law disputes or at least on actions for damages for breaches of competition law, usually lead to a better decision practice in competition cases is argued, *inter alia*, by Franck, *supra* n. 27, at III.D.2.; Wagner-von Papp, *supra* n. 24, at III.A.2. This view is, however not universally shared, *see* Rodger, *supra* n. 65, at 23, 24–25 with further references.
67. Wagner-von Papp, *supra* n. 24, at III.B. (for litigation in the UK).
68. Meijer and Zippro, *supra* n. 30, at III. (pointing out that while in the Netherlands courts still possess sufficient resources, there are signs that courts are struggling to handle mass claims effectively).
69. *See* the critique voiced by Camilleri, *supra* n. 26, at V.
70. Jürgen Basedow, *Die kartellrechtliche Schadensersatzhaftung und der Wettbewerb der Justizstandorte* [2016] Basler Juristische Mitteilungen 217, 239.
71. For further details Fernando Pastor-Merchante, *The European Perspective* II. and III.; Simone Donzelli, *The Role of the European Commission and the Cooperation with National Courts* II.
72. For a conceptual clarification Pastor-Merchante, *supra* n. 71, at I.
73. *See* also European Commission, Notice on cooperation between national courts and the Commission in the State aid field [1995] OJ C 312/8, paras 3 (also referring to the possibility to react promptly) and 13 (referring to the possibility to award damages); European Commission,

enforcement may even be considered more important than in the area of competition law since public enforcement suffers from a structural deficit: infringements of EU state aid law do not primarily result from actions taken by private market actors, but from actions of national administrations granting state aid in violation of EU law. This dual role of national administrations may result in a certain reservedness when recovering illegal state aid.

Against this background, the importance of private enforcement for an effective enforcement of EU state aid law has been stressed continuously,[74] and one may also observe a certain increase in the number of cases before national courts, as observed in a 2006 Study of the European Commission.[75] Nonetheless, there is room for improvement both in terms of numbers and efficiency.[76]

One of the challenges to private enforcement in the area of state aid law results from the fact that this body of law has not yet been harmonised, which is also true of

State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005–2009 (Consultation document), COM(2005) 107 final (SAAP), paras 55 et seq.; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM(2012) 209 final, para. 21: 'Should the Commission decide to increase the size and scope of aid measures exempt from notification obligation, responsibilities of Member States for ensuring the correct enforcement of State aid rules would increase. With more measures exempt from the notification requirement, Member States will have to ensure the ex ante compliance with State aid rules of de minimis measures and block-exempted schemes and cases, in strict coordination with the Commission which will continue to exercise ex post control of such measures. The Commission will expect better cooperation from Member States in terms of quality and timeliness of submission of information and notifications' preparation, as well as effective national systems (including private enforcement) to ensure that State aid measures exempt from ex ante notification obligation comply with Union law. A lower administrative burden through less notification obligations can only be envisaged if it is accompanied by increased commitment and delivery on the part of the national authorities in terms of compliance. Consequently, ex post control by the Commission will have to be increased, also because the current results of the monitoring of the implementation of block-exempted measures by Member States reveal frequent lack of compliance with State aid rules. In such a way, effectiveness of enforcement can be ensured'.

74. In its Notice on the enforcement of State aid law by national courts of 9 April 2009 ([2009] OJ C 85/1, para. 1), the Commission reaffirmed its assessment of the 2005 State Aid Action Plan, emphasising 'the need for better targeted enforcement and monitoring as regards State aid granted by Member States and stress[ing] that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of State aid'. *See* further para. 5: 'In spite of the fact that, as highlighted in the Enforcement Study, genuine private enforcement before national courts has played a relatively limited role in State aid to date, the Commission considers that private enforcement actions can offer considerable benefits for State aid policy. Proceedings before national courts give third parties the opportunity to address and resolve many State aid related concerns directly at national level. In addition, based on the jurisprudence of the Court of Justice of the European Communities ('ECJ'), national courts can offer claimants very effective remedies in the event of a breach of the State aid rules. This can in turn contribute to stronger overall State aid discipline.' *See* further 1995 Notice on cooperation, *supra* n. 73, at para. 3; SAAP, *supra* n. 73, at paras 55 et seq.; SAM, *supra* n. 73, at para. 21.
75. Thomas Jestaedt, Jacques Derenne and Tom R. Ottervanger (eds), *Study on the enforcement of State aid law at national level* (2006 European Commission), 33; Jacques Derenne, Cédric Kaczmakrek and Jonathan Clovin (eds), *2009 update of the 2006 Study on the enforcement of State aid rules at national level* (2009 European Commission), 2.
76. 2009 Enforcement Notice, *supra* n. 74, at para. 4; Jestaedt and Derenne and Ottervanger, *supra* n. 75, at 42 et seq.

public enforcement (Article 16 Regulation 2015/1589).[77] Hence, obligations flowing from EU law have to be enforced according to the rules of national law. However, the European principles of effectiveness and non-discrimination apply, as the Court has put it:

> In that regard, and since there is no Community legislation on the subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness).[78]

This is why, as stated by the 2006 Study and as still true despite some advances:

> Private enforcement of EC state aid law at Member State level is still in its infancy. This is not due to shortcomings or inefficiencies in the Member States' legal systems or a lack of knowledge of EC law by Member States' judges but is, instead, due to the diversity of Member States' procedural and substantive rules applicable to situations involving the grant of state aid and the uncertainties (cost risks, uncertain outcome) resulting from the absence of uniform procedures with a clear legal basis.[79]

Against this background, a first step to strengthening private enforcement of state aid law is to analyse the mechanisms of enforcement available within the national legal orders. This analysis allows identifying challenges and best practices. On this basis and with regard to the experiences gained in competition law, the need for a harmonisation at the EU level may be explored.

B. Key issues of private enforcement

EU state aid law comprises two central stipulations with regard to the Member States, namely the substantive prohibition against granting aid incompatible with the internal market (Article 107 TFEU) and the procedural obligations to notify the European Commission 'of any plans to grant or alter aid' and not to put measures into effect until the European Commission has reached a final decision (Article 108(3) TFEU). With regard to the private enforcement of these requirements of EU state aid law, adherence to the standstill obligation has to be secured by the national judiciary. As a preliminary question, this requires assessing the compatibility of an aid measure with the internal market, an assessment which must pay due respect to a possible decision of the

77. Cf. ECJ, Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 35: 'Nevertheless, as is clear from the recital 2 in the preamble to Regulation No 659/1999 and its provisions, that regulation codifies and reinforces the Commission's practice in reviewing State aid and does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court'.
78. Case C-368/04 *Transalpine*, *supra* n. 77, at para. 45; further ECJ, Case C-34/01 *Enirisorse* [2003] ECR I-14243, para. 42.
79. Jestaedt and Derenne and Ottervanger, *supra* n. 75, at 34.

European Commission to initiate the formal examination procedure and which thus raises the issue of the extent of the binding effect of that decision, notably in view of its preliminary nature. This explains why the cooperation and coordination between national courts and the European Commission are of relevance for the private enforcement of EU state aid law. In view of a not fully decentralised system of enforcement, the final decision on the compatibility of an aid measure with the internal market falls within the exclusive competence of the European Commission, which is why the role of private enforcement at the national level is limited to securing the implementation of the Commission's decision. Finally, attention should be drawn to the distinction – as emphasised by *Pastor-Merchante* in the European report – between stand-alone actions based on the direct effect of the standstill clause and follow-on actions based on the direct effect of Commission decisions.[80]

1. Enforcement of EU state aid law

a) EU law background

aa) Standstill obligation (Article 108(3) TFEU)

As early as the groundbreaking case of *Costa v E.N.E.L.*, handed down on 15 July 1964, the European Court of Justice has held the standstill obligation contained in today's Article 108(3) sentence 3 TFEU as directly applicable and as creating individual rights.[81] This has been confirmed in the judgment in the *Lorenz* case.[82] Moreover, by stressing that 'it is for the internal legal system of every Member State to determine the legal procedure leading to this result', the Court has safeguarded the direct applicability of Article 108(3) TFEU.[83] In *SFEI*, the Court has concretised this formula:

> National courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of the last sentence of Article 93(3) of the Treaty, in accordance with their national law, as regards the

80. *See* Pastor-Merchante, *supra* n. 71, at III., IV. and V.
81. ECJ, Case 6/64 *Costa v E.N.E.L.* [1964] ECR 587, 596: 'By virtue of Article 92, the Member States have acknowledged that such aids are incompatible with the Common Market and have thus implicitly undertaken not to create any more, save as otherwise provided in the Treaty; in Article 93, on the other hand, they have merely agreed to submit themselves to appropriate procedures for the abolition of existing aids and the introduction of new ones. By so expressly undertaking to inform the Commission 'in sufficient time' of any plans for aid, and by accepting the procedures laid down in Article 93, the States have entered into an obligation with the Community, which binds them as States but creates no individual rights except in the case of the final provision of Article 93 (3), which is not in question in the present case.' *See* for further details Pastor-Merchante, *supra* n. 71, at III. and IV.
82. ECJ, Case 120/73 *Lorenz v Germany* [1973] ECR 1471, para. 8; further ECJ, Case C-39/94 *Syndicat Français de l'Express International (SFEI) v La Poste* [1996] ECR I-3547, para. 39; ECJ, Case C-354/90 *FNCEPA v France* [1991] ECR I-5505, para. 11; Case C-34/01 *Enirisorse*, *supra* n. 78, at para. 42; Case C-284/12 *Deutsche Lufthansa v Flughafen Frankfurt-Hahn* [2013] ECLI:EU:C:2013:755, para. 29; Case C-505/14 *Klausner Holz* [2015] ECLI:EU:C:2015:742, para. 23.
83. Case 120/73, *Lorenz v Germany*, *supra* n. 82, at para. 9.

> validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.[84]

And further, in the recent *Klausner Holz* judgment, the Court has held:

> The objective of the national courts' tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision (…).
>
> To that end, when national courts hold that the measure at issue constitutes state aid within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, they may decide to suspend the implementation of the measure in question and order the recovery of payments already made or to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's subsequent decision (…).[85]

The subsequent declaration of an aid as compatible with the internal market does not remedy a breach of the standstill obligation:

> It must be stated in this regard that the Commission's final decision does not have the effect of regularising ex post facto the implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of Article 93(3) of the Treaty, since otherwise the direct effect of that prohibition would be impaired and the interests of individuals, which, as stated above, are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance by the Member State concerned of the last sentence of Article 93(3) and would deprive that provision of its effectiveness.[86]

More specifically, a variety of remedies has been acknowledged in the European Court of Justice's case law,[87] notably a declaration of the aid as illegal[88] (with the

84. Case C-39/94, *SFEI*, *supra* n. 82, at para. 40; similarly and from an earlier date Case C-354/90 *FNCEPA v France*, *supra* n. 82, at para. 12; confirmed in Case C-368/04 *Transalpine*, *supra* n. 77, at para. 47; Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at para. 30; Case C-505/14, *Klausner Holz*, *supra* n. 82, at para. 24. Moreover, as Case C-368/04 *Transalpine*, *supra* n. 77, at para. 50, has underlined, remedies must be 'such as in fact to negate the effects of the aid granted in breach of Article 88(3) EC and not merely to extend it to a further class of beneficiaries.' In tax cases, this excludes an extension of unlawful tax benefits (*see ibid.*, at para. 49): 'With regard to partial rebate of a tax constituting an unlawful aid measure because it was granted in breach of the obligation of notification, it would not be compatible with the interest of the Community to order that such a rebate be applied also in favour of other undertakings if such a decision would have the effect of extending the circle of recipients, thus leading to an increase in the effects of that aid instead of their elimination'.
85. Case C-505/14, *Klausner Holz*, *supra* n. 82, at paras 25 et seq.
86. Case C-354/90 *FNCEPA v France*, *supra* n. 82, at para. 16; further Case C-368/04 *Transalpine*, *supra* n. 77, at paras 41 et seq., 54; ECJ, Case C-199/06 *Centre d'exportation du livre Français (CELF) v Société internationale de diffusion et d'édition (SIDE)* [2008] ECR I-469, para. 40.
87. For a comprehensive overview *see* also the 2009 Enforcement Notice, *supra* n. 74, at paras 24 et seq.
88. Case C-368/04 *Transalpine*, *supra* n. 77, at para. 40; Case C-672/13 *OTP Bank Nyrt v Magyar Állam* [2015] ECLI:EU:C:2015:185, para. 37.

consequence of nullity or mere illegality?),[89] the prevention of payment,[90] a suspension of the aid,[91] a repayment of the aid[92] – unless exceptional circumstances apply[93] – plus interest[94] and a mere payment of interest, particularly where there is a subsequent positive decision of the European Commission.[95]

Moreover, damages may be awarded.[96] Claims directed against the Member States may be based on the rules on state liability for breaches of EU law.[97] With regard to claims against the beneficiary of the state aid, the Court has held that EU law 'does not provide a sufficient basis for the recipient to incur liability where he has failed to verify that the aid received was duly notified to the Commission.'[98] Nevertheless, in the same case the European Court of Justice went on to stress that this finding 'does not, however, prejudice the possible application of national law concerning non-contractual liability. If, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the

89. For the latter, Wolfgang Weiß, *Rechtsschutz von Unternehmen im EU-Beihilferecht* (2016) 180 ZHR 80, 113.
90. 2009 Enforcement Notice, *supra* n. 74, at paras 28 et seq.
91. Case C-368/04 *Transalpine*, *supra* n. 77, at para. 46.
92. Case C-39/94, *SFEI*, *supra* n. 82, at paras 63 et seq.; further Case C-368/04 *Transalpine*, *supra* n. 77, at para. 56; Case C-199/06 *CELF*, *supra* n. 86, at para. 53; Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at para. 30.
93. This requirement was further fleshed out in CELF I (Case C-199/06 *CELF*, *supra* n. 86, at para. 43. *See* also ECJ, Case C-1/09 *CELF v SIDE II* [2010] ECR I-2099, paras 41 et seq.): 'a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice'.
94. Case C-199/06 *CELF*, *supra* n. 86, at para. 54: 'As regards the aid itself, it must be added that a measure which consisted only in an obligation of recovery without interest would not be appropriate, as a rule, to remedy the consequences of the unlawfulness if the Member State were to re-implement that aid after the Commission's final positive decision. Since the period between the recovery and the reimplementation would be shorter than that between the initial implementation and the final decision, the aid recipient, would bear, if it had to borrow the amount repaid, less interest than it would have paid if, from the outset, it had to borrow the equivalent of the unlawfully granted aid'.
95. *See* Case C-199/06 *CELF*, *supra* n. 86, at paras 45 et seq.: in case of a subsequent positive decision, national courts must 'order the aid recipient to pay interest in respect of the period of unlawfulness'. Before a final decision of the European Commission a mere payment of interest is not sufficient, if the aid remains in the accounts of the undertaking, *see* Case C-1/09 *CELF II*, *supra* n. 93, at para. 38: in that case 'the "standstill" obligation set out in Article 88(3) EC would not be fulfilled … It is in no way established that an undertaking which has unlawfully received State aid could, were it not for that aid, have obtained an equivalent amount by way of loan from a financial institution under normal market conditions and thus have that amount at its disposal prior to the Commission decision'.
96. Case C-199/06 *CELF*, *supra* n. 86, at para. 53. *See* for more details Pastor-Merchante, *supra* n. 71, at IV.
97. 2009 Enforcement Notice, *supra* n. 74, at para. 45.
98. Case C-39/94, *SFEI*, *supra* n. 82, at para. 74.

principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of [Article 108(3) TFEU] liable'.[99]

Furthermore, national courts are obliged, in particular if referring a case to the European Court of Justice, to consider the need for granting interim measures: 'Where it is likely that some time will elapse before it gives its final judgment, it is for the national court to decide whether it is necessary to order interim relief such as the suspension of the measures at issue in order to safeguard the interests of the parties.'[100] The choice of the remedy depends on the specific situation.[101]

Finally, it has to be noted that if a procedure is pending before the European Commission, national courts are not released from ordering a recovery of the state aid because of violations of Article 108(3) TFEU.[102] This result is not called into question by the fact that 'the Court did not find that the Commission had the power to declare aid illegal solely on the ground that the obligation to notify had not been complied with and without having to investigate whether the aid was compatible with the common market.' For, 'that finding has no effect on the obligations of national courts deriving from the direct effect which the prohibition laid down by the last sentence of Article 93(3) of the Treaty has been held to have.'[103]

bb) Substantive prohibition of state aid (Article 107 TFEU)

Unlike in EU antitrust law, there is no full decentralisation of private enforcement in EU state aid law since national courts are not entitled to declare a state aid measure in breach of Article 107 TFEU.[104] This results from the fact that the prohibition contained in Article 107(1) TFEU 'is neither absolute nor unconditional since [Article 107(2) and

99. Case C-39/94, *SFEI*, *supra* n. 82, at para. 75. Cf. further Case C-368/04 *Transalpine*, *supra* n. 77, at para. 56.
100. Case C-39/94, *SFEI*, *supra* n. 82, at para. 52. Cf. further Case C-368/04 *Transalpine*, *supra* n. 77, at para. 46; Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at para. 30.
101. *See* Pastor-Merchante, *supra* n. 71, at IV. and V., for more details.
102. Case C-39/94, *SFEI*, *supra* n. 82, at paras 41 et seq., notably at paras 44 et seq.: 'In those circumstances, the initiation by the Commission of a preliminary examination procedure under [Art. 108 (3) TFEU] or the consultative examination procedure under [Art. 108 (2) TFEU] cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification. Any other interpretation would have the effect of encouraging the Member States to disregard the prohibition on implementation of planned aid. Since the Commission can do no more than order further payments to be suspended so long as it has not adopted its final decision on the substance of the matter, the effectiveness of [Art. 108 (3) TFEU] would be weakened if the fact that the Commission was seised of the matter were to prevent the national courts from drawing all the appropriate conclusions from the infringement of that provision'; *see* further Case C-1/09, *CELF II*, *supra* n. 93, paras 29 et seq.; Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at paras 32 et seq.; ECJ, Case C-27/13 *Flughafen Lübeck* ECLI:EU:C:2014:240, paras 30 et seq.
103. Case C-354/90 *FNCEPA v France*, *supra* n. 82, at para. 13.
104. ECJ, Case C-78/76 *Steinike & Weinlig v Germany* [1977] ECR I-595, paras 5 et seq.; Case C-368/04 *Transalpine*, *supra* n. 77, at para. 38; ECJ, Case C-119/05 *Lucchini* [2007] ECR I-6199, paras 51 et seq.; Case C-672/13 *OTP Bank*, *supra* n. 88, at para. 37; Case C-505/14, *Klausner Holz*, *supra* n. 82, at paras 20 et seq.

(3) TFEU] give the Commission a wide discretion and the Council extensive power to admit aids in derogation from the general prohibition in [Article 107(1) TFEU].'[105]

Thus, 'the national courts and the Commission fulfil complementary and separate roles.'[106] Or, as the Court has put it:

> In this respect it should be noted, … that the principal and exclusive role conferred on the Commission by Articles 92 and 93 of the Treaty, which is to hold aid to be incompatible with the common market where this is appropriate, is fundamentally different from the role of national courts in safeguarding rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3) of the Treaty. Whilst the Commission must examine the compatibility of the proposed aid with the common market, even where the Member State has acted in breach of the prohibition on giving effect to aid, national courts do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by the last sentence of Article 93(3) of the Treaty. When those courts make a ruling in such a matter, they do not thereby decide on the compatibility of the aid with the common market, the final determination on that matter being the exclusive responsibility of the Commission, subject to the supervision of the Court of Justice.[107]

Consequently, EU 'law precludes the application of a provision of national law, such as Article 2909 of the Italian Civil Code, which seeks to lay down the principle of res judicata in so far as the application of that provision prevents the recovery of state aid granted in breach of Community law which has been found to be incompatible with the common market in a decision of the Commission which has become final.'[108]

b) Enforcement at the national level

Against this background, the country reports in the section on state aid in this study have analysed the situation in the respective Member States.

aa) General remarks

In terms of general relevance, many national reports have stressed that private enforcement plays only a limited role, such as in France,[109] Germany,[110] Spain,[111] and the United Kingdom.[112] By contrast, in the Netherlands, private enforcement is of a

105. Case 78/76 *Steinike v Germany*, *supra* n. 104, at para. 8; further Case C-39/94, *SFEI*, *supra* n. 82, at para. 36.
106. Case C-39/94, *SFEI*, *supra* n. 82, at para. 41; further Case C-368/04 *Transalpine*, *supra* n. 77, at para. 37; Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at paras 27 et seq.; Case C-505/14, *Klausner Holz*, *supra* n. 82, at paras 20 et seq.
107. Case C-354/90 *FNCEPA v France*, *supra* n. 82, at para. 14.
108. Case C-119/05 *Lucchini*, *supra* n. 104, at para. 63. *See* also Case C-505/14, *Klausner Holz*, *supra* n. 82, at paras 27 et seq.
109. François Lichère, *Private Enforcement in France* I.A.
110. Sebastian Unger and David Hug, *Private Enforcement in Germany* I.
111. Luis Arroyo Jiménez and Patricia Pérez, *Private Enforcement in Spain* I.A.
112. Christopher Bovis, *Private Enforcement in the United Kingdom* I.

certain importance:[113] One can count forty-two actions brought by competitors before administrative courts since 2005 and even more before ordinary courts (approx. eighty), but only rarely are they successful.[114] With regard to Spain, it is interesting to note that intra-administrative enforcement has a certain importance, such as between Autonomous Regions because of unfair competition; in this context, also private parties intervene.[115] Moreover, the Italian report notes a certain relevance in public procurement litigation with regard to the duty to reject abnormally low tenders resulting from the involvement of state aid (Article 69 Directive 2014/24/EU),[116] a finding also mentioned in the Dutch report.[117] A positive perspective (increasing importance) is presented in the Italian report.[118] Also, the report from the perspective of the Commission notes some progress despite low numbers.[119]

With regard to the legal framework, it has been generally emphasised that no specific legislation exists; rather, the general rules of national (substantive and procedural) law apply (Germany, France, Italy).[120] This usually entails a split legal regime in terms of the substantive law, meaning that depending on the subject matter, private or public law rules may apply (Germany, Spain, France, Italy).[121] This also extends to jurisdiction (civil courts, administrative courts, or further courts, such as tax courts), depending on the subject matter of the dispute, and thus potentially results in split jurisdiction (Germany, Spain, France, Netherlands).[122] For the Netherlands, two interesting points have been noted. First, splitting jurisdiction may have negative consequences for the claimant in the case of a set of acts being heard by different branches of the judiciary.[123] Second, litigation before civil courts may be disadvantageous for the claimant (vis-à-vis administrative litigation) since it is more difficult to prove the existence of state aid in view of the principle of party autonomy and the obligation to furnish facts resulting from this principle.[124] Moreover, for Italy, a certain consolidation has been observed: Jurisdiction lies with administrative courts when decisions granting aid are challenged or when recovery actions (irrespective of the nature of the aid and the entity granting it) are pursued;[125] jurisdiction for damages depends, however, on the defendant (beneficiary: ordinary courts; granting entity:

113. Jacobine van den Brink and Willemien den Ouden, *Private Enforcement in the Netherlands* I., III.B. and V.B.1.
114. *Ibid*., at VI.
115. Arroyo Jiménez and Pérez, *supra* n. 111, at I.A.
116. Roberto Caranta and Benedetta Biancardi, *Private Enforcement in Italy* VIII.
117. van den Brink and den Ouden, *supra* n. 113, at V.B.1.
118. Caranta and Biancardi, *supra* n. 116, at I. and III.
119. Donzelli, *supra* n. 71, at IV.
120. Caranta and Biancardi, *supra* n. 116, at II.A.; Lichère, *supra* n. 109, at I.B.; Unger and Hug, *supra* n. 110, at II.A.
121. Arroyo Jiménez and Pérez, *supra* n. 111, at I.B.; Caranta and Biancardi, *supra* n. 116, at II.A.; Lichère, *supra* n. 109, at I.B.; Unger and Hug, *supra* n. 110, at II.A. and II.C.
122. Arroyo Jiménez and Pérez, *supra* n. 111, at I.B.; Lichère, *supra* n. 109, at I.B.; Unger and Hug, *supra* n. 110, at II.A.; van den Brink and den Ouden, *supra* n. 113, at II. and V.
123. van den Brink and den Ouden, *supra* n. 113, at II.
124. *Ibid*., at V.D.2.
125. Caranta and Biancardi, *supra* n. 116, at II.A.

administrative courts).[126] Moreover, there is a (practically irrelevant) jurisdiction of ordinary courts for actions seeking to prohibit the receipt or expenditure of aid.[127]

bb) Remedies

The country reports observe that a full set of remedies is available in order to deal with private enforcement (Germany, Spain, France, Italy, Netherlands, UK).[128] Nonetheless, specific challenges and obstacles have been pointed out.

The availability of damages constitutes a strong incentive for competitors to embark on the route of private enforcement.[129] The 2006 Study did not identify cases involving damages, though.[130] This picture has changed only to a limited extent. No cases were reported for Germany,[131] the Netherlands,[132] or the United Kingdom,[133] but a limited relevance has been noted for Italy.[134] In France, there was one unsuccessful case,[135] but two promising cases are pending.[136] This finding can be primarily attributed to the difficulties with regard to proving causation and the existence of a damage as well as to the evaluation of the latter, as has been confirmed in the reports for France,[137] Germany,[138] Italy,[139] the Netherlands,[140] and Spain.[141,142] The French report, however, notes that the situation is different in the case of duopolies, which is also confirmed by the case law.[143]

With regard to claims addressed to the beneficiary of the aid (and not the granting authority),[144] the UK report argues that there is no standing in such cases.[145] Moreover, it is disputed whether receiving illegal state aid constitutes unfair competition and thus

126. *Ibid.*, at II.A. and VI.
127. *Ibid.*, at II.A.
128. Unger and Hug, *supra* n. 110, at II.C.2. – overly restrictive conditions for recovery have been noted; Arroyo Jiménez and Pérez, *supra* n. 111, at I.C.; Bovis, *supra* n. 112, at IV.B.; Caranta and Biancardi, *supra* n. 116; Lichère, *supra* n. 109; van den Brink and den Ouden, *supra* n. 113, at V.C.
129. Cf. Fernando Pastor-Merchante, *The Role of Competitors in the Enforcement of State Aid Law*, 15 et seq. (Hart 2017). Affirmed for France (Lichère, *supra* n. 109, at II.B.2.); questioned, though, in the German report in view of the absence of any practical significance (Unger and Hug, *supra* n. 110, at IV.).
130. Jestaedt and Derenne and Ottervanger, *supra* n. 75, at 33 et seq., 48 et seq.; Derenne and Kaczmakrek and Clovin, *supra* n. 75, at 4.
131. Unger and Hug, *supra* n. 110, at I., IV. and VI.
132. van den Brink and den Ouden, *supra* n. 113, at III.C. and V.D.3.
133. Bovis, *supra* n. 112, at IV.C.
134. Caranta and Biancardi, *supra* n. 116, at VI.
135. Lichère, *supra* n. 109, at II.B.2.
136. *Ibid.*, at II.B.2.
137. *Ibid.*
138. Unger and Hug, *supra* n. 110, at IV.B.
139. Caranta and Biancardi, *supra* n. 116, at VI.
140. van den Brink and den Ouden, *supra* n. 113, at V.D.3.
141. Arroyo Jiménez and Pérez, *supra* n. 111, at I.C.3.
142. Cf. Pastor-Merchante, *supra* n. 129, at 75 et seq.; Pastor-Merchante, *supra* n. 71, at IV. and V.
143. Lichère, *supra* n. 109, at II.B.2.
144. Cf. for the limited relevance of an action against the beneficiary Jestaedt and Derenne and Ottervanger, *supra* n. 75, at 34.
145. Bovis, *supra* n. 112, at IV.A.

gives rise to corresponding claims (Spain, Italy);[146] the Dutch report also highlights that the liability of a beneficiary is difficult to establish.[147]

Standing in private enforcement depends on the general requirements formulated in the respective national system.[148] Generally speaking, no significant obstacles have been identified.

It should be noted, though, that in Germany the invocability of a breach of the standstill obligation by competitors has been acknowledged only since 2011.[149] Moreover, access to courts is limited to competitors, with the notion of 'competitor' remaining disputed.[150] In France, no obstacles have been identified; broad access is granted for challenging administrative acts and contracts,[151] whereby in the latter case a specific harm has to be shown as resulting either from being a competitor or from a serious breach.[152] Similarly, no obstacles have been observed for access to courts in Spain since a legitimate interest is sufficient. To meet this requirement, the mere interest in respecting the legality of any state action does not suffice, but a broad understanding applies, according to which it is immaterial whether the interest is direct or indirect, individual or collective. Thus, standing is granted for competitors and also for associations, groups, and public bodies that are affected.[153] In Italy, standing for competitors has been acknowledged;[154] moreover, it is interesting to note that the competition authority has standing.[155] In the Netherlands, private enforcement initially had a certain relevance in spatial planning law because residents were entitled to challenge planning measures by invoking, *inter alia*, that illegal state aid was involved. However, following the introduction of the relativity requirement (*Schutznorm*) in 2013, the standing of local residents is excluded and that of competitors restricted.[156] Moreover, the relativity requirement has also restricted access to courts in other areas, such as social security law.[157] Although certain restrictive tendencies have manifested, a competitor generally has standing if considered an interested party,[158] but not before tax courts in tax matters; proceedings before civil courts are possible, but inexistent.[159] Furthermore, more flexibility in case of litigation before civil courts has been noted.[160]

146. Arroyo Jiménez and Pérez, *supra* n. 111, at I.D.; Caranta and Biancardi, *supra* n. 116, at VI.
147. van den Brink and den Ouden, *supra* n. 113, at V.D.3.
148. Cf. 2009 Enforcement Notice, *supra* n. 74, paras 70 et seq. Cf. on the development in Germany Jenny K. Dorn, *Private und administrative Rechtsdurchsetzung im europäischen Beihilfenrecht. Vom indirekten Vollzug zum Kooperationsprinzip*, 152 et seq. (Nomos 2017).
149. Unger and Hug, *supra* n. 110, at I. On the initial reluctance, *see* also Dorn, *supra* n. 148, at 27 et seq.
150. Unger and Hug, *supra* n. 110, at II.B.
151. Lichère, *supra* n. 109, at II.A.1.
152. *Ibid.*, at II.A.3.
153. Arroyo Jiménez and Pérez, *supra* n. 111, at I.C.2.
154. Caranta and Biancardi, *supra* n. 116, at II.B.
155. *Ibid*.
156. van den Brink and den Ouden, *supra* n. 113, at III.A.
157. *Ibid.*, at III.A.
158. *Ibid.*, at III.B. and VI.
159. *Ibid.*, at IV. and VI.
160. *Ibid.*, at V.D.1.

Finally, in the United Kingdom a sufficient interest is required, which is affirmed for competitors.[161]

With regard to interim measures, certain difficulties have been highlighted. The French report draws attention to the fact that a violation of the notification obligation as such does not establish urgency; rather, a harm to the public interest or a serious harm for the claimant has to be established.[162] A similar finding applies to Italy, which is why interim protection plays only a limited role.[163] For Germany, the absence of any practical relevance is attributed notably to information deficits.[164] The Spanish report also mentions a limited practical relevance, but it is worth noting that the Spanish Supreme Court obliges lower courts to apply the Commission's 2009 notice with regard to interim protection while an investigation by the European Commission is taking place.[165] Finally, in the Netherlands interim protection is of limited relevance before administrative courts in view of limited chances of success,[166] though a different picture is true for litigation before civil courts.[167]

cc) Information deficits

Information deficits constitute a significant obstacle for competitors with regard to pursuing private enforcement.[168] This is confirmed by the national reports drawing attention to the actual relevance of such deficits (Germany, France, Italy, Netherlands, UK).[169] It has to be added, though, that these deficits are mitigated by transparency obligations (*see* Article 9(1) General Block Exemption Regulation; further, Transparency Directive, Article 7 Regulation 1370/2007) and by competitor claims seeking access to information. In this regard, it has however been rightly stressed that, as a matter of principle, transparency obligations do not help if a measure is (incorrectly) not considered state aid within the meaning of EU law (Germany, France).[170] Nevertheless, national law partially provides for broader transparency obligations (Germany).[171] Moreover, rules on access to information are considered important in this context (Germany, UK).[172]

In view of specific difficulties in cross-border cases,[173] the Italian report highlights that cross-border litigation is not attractive vis-à-vis a complaint raised with the

161. Bovis, *supra* n. 112, at IV.A.
162. Lichère, *supra* n. 109, at II.B.1.
163. Caranta and Biancardi, *supra* n. 116, at IV.
164. Unger and Hug, *supra* n. 110, at II.D.
165. Arroyo Jiménez and Pérez, *supra* n. 111, at I.C.4.
166. van den Brink and den Ouden, *supra* n. 113, at III.B.
167. *Ibid.*, at V.C.
168. Cf. Pastor-Merchante, *supra* n. 129, at 75.
169. Bovis, *supra* n. 112, at IV.E.; Caranta and Biancardi, *supra* n. 116, at V., VIII. and IX.; Lichère, *supra* n. 109, at II.A.6. and III.; Unger and Hug, *supra* n. 110, at III.; van den Brink and den Ouden, *supra* n. 113, at VI.
170. Lichère, *supra* n. 109, at II.A.6.; Unger and Hug, *supra* n. 110, at III.A. and VI.
171. Unger and Hug, *supra* n. 110, at III.B.
172. Bovis, *supra* n. 112, at IV.E.; Unger and Hug, *supra* n. 110, at III.B.
173. Cf. Pastor-Merchante, *supra* n. 129, at 75.

European Commission; introducing representative interest litigation might help in this regard, though.[174]

2. Cooperation and coordination between national courts and the European Commission

a) EU law background

The application of the standstill obligation stipulated in Article 108(3) TFEU implies that national courts must assess whether a measure of a Member State constitutes state aid within the meaning of Article 107(1) TFEU.[175]

In view of the expertise of the European Commission[176] and information available to it, Article 29(1) Regulation 2015/1589 allows national courts to 'ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of state aid rules'.[177] Moreover, according to Article 29(2) Regulation 2015/1589, the Commission may also submit observations to national courts ex officio (*amicus curiae*).

Furthermore, if the European Commission has decided to initiate a formal examination procedure, the question arises as to whether that decision has a binding effect and if so to what extent.[178] The Court has held in its fairly recent *Lufthansa* judgment handed down on 21 November 2013 that such a decision has to be duly respected in the context of the national court's assessment:

> In a situation where the Commission has already initiated the formal examination procedure under Article 108(2) TFEU, it is necessary to consider which measures have to be taken by the national courts.
>
> While the assessments carried out in the decision to initiate the formal examination procedure are indeed preliminary in nature, that does not mean that the decision lacks legal effects.
>
> It must be pointed out in that regard that, if national courts were able to hold that a measure does not constitute aid within the meaning of Article 107(1) TFEU and, therefore, not to suspend its implementation, even though the Commission had just stated in its decision to initiate the formal examination procedure that that measure was capable of presenting aid elements, the effectiveness of Article 108(3) TFEU would be frustrated.
>
> On the one hand, if the preliminary assessment in the decision to initiate the formal examination procedure is that the measure at issue constitutes aid and that

174. Caranta and Biancardi, *supra* n. 116, at IX.
175. Case 78/76 *Steinike v Germany*, *supra* n. 104, at para. 14; further, Case C-354/90 *FNCEPA v France*, *supra* n. 82, at para. 10; Case C-39/94, *SFEI*, *supra* n. 82, at para. 49; Case C-368/04 *Transalpine*, *supra* n. 77, at para. 39; Case C-119/05 *Lucchini*, *supra* n. 104, at para. 50; Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at paras 34 et seq.; Case C-672/13 *OTP Bank*, *supra* n. 88, at para. 37; Case C-505/14, *Klausner Holz*, *supra* n. 82, at para. 22.
176. *See* for more details Donzelli, *supra* n. 71.
177. *See* also http://ec.europa.eu/competition/court/state_aid_requests.html (accessed 11 November 2019).
178. *See* also Pastor-Merchante, *supra* n. 71, at VI.

> assessment is subsequently confirmed in the final decision of the Commission, the national courts would have failed to observe their obligation under Article 108(3) TFEU and Article 3 Regulation 659/1999 to suspend the implementation of any aid proposal until the adoption of the Commission's decision on the compatibility of that proposal with the internal market.
>
> On the other hand, even if in its final decision the Commission were to conclude that there were no aid elements, the preventive aim of the state aid control system established by the TFEU and noted in paragraphs 25 and 26 of the present judgment requires that, following the doubt raised in the decision to initiate the formal examination procedure as to the aid character of that measure and its compatibility with the internal market, its implementation should be deferred until that doubt is resolved by the Commission's final decision.
>
> It is also important to note that the application of the European Union rules on state aid is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.
>
> Consequently, where the Commission has initiated the formal examination procedure with regard to a measure which is being implemented, national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.
>
> To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.
>
> Where they entertain doubts as to whether the measure at issue constitutes state aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, national courts may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, as interpreted by the Court, they may or must refer a question to the Court for a preliminary ruling.[179]

Despite this duty to respect a decision of the European Commission to initiate a formal examination procedure when qualifying national measures as state aid, the question remains whether any qualifications or exceptions apply to this duty, as for instance assumed by the German Bundesgerichtshof (Supreme Court in Civil and Commercial Matters) in a judgment handed down on 9 February 2017. For the Commission's assessment is only of a preliminary nature, and the interests of both the recipient of the state aid and the granting authority have to be considered.[180] In

179. Case C-284/12 *Deutsche Lufthansa*, *supra* n. 82, at paras 36 et seq.; further, Case C-27/13 *Flughafen Lübeck*, *supra* n. 102, at paras 19 et seq.
180. *See* BGH, 9 February 2017, I ZR 91/15, [2017] EuZW 312, paras 49 et seq.

particular, the role of the principle of proportionality has to be assessed in view of a possible recovery of the state aid (see for limitations with regard to a decision of the European Commission to provisionally recover aid, Article 13(2) Regulation 2015/1589).[181]

b) Enforcement at the national level

With regard to the binding effect of a decision of the European Commission to initiate a formal examination procedure and possible qualifications, a certain reluctance has been noted in the German report despite the *Deutsche Lufthansa* jurisprudence:[182] The Bundesverwaltungsgericht (Supreme Administrative Court) does not consider itself obliged to refer a case to the European Court of Justice when intending to deviate from the Commission's preliminary assessment; the Bundesgerichtshof (Supreme Court for Civil and Commercial Matters) does acknowledge such a duty, but it formulates a reservation with regard to a subsequent recovery of the state aid. In the United Kingdom as well, a narrow interpretation of the European Court of Justice's judgment has been highlighted.[183] Similarly, an ambivalent finding has been made for Spain[184] and for the Netherlands, where the increasing importance that can be observed[185] is nevertheless accompanied by reluctance.[186]

With regard to a cooperation between national courts and the European Commission in terms of requests for information/observations and *amicus curiae* interventions (Article 29 Regulation 2015/1589), a certain reluctance has been noted, which is also attributable to problems with involving administrative bodies in court proceedings (Germany as well as Spain and Italy).[187] The Spanish report draws, moreover, attention to the fact that an *amicus curiae* intervention is not foreseen in Spanish procedural law.[188] This evaluation is also confirmed from the perspective of the European Commission,[189] which since 2009 has counted only twenty-three requests for information and seventeen requests for opinion, as well as twenty-one *amicus curiae* submissions (since 2013).

Finally, with regard to the role of preliminary references to the European Court of Justice, a certain reluctance (Italy)[190] and a limited role (Spain)[191] have been noted.

181. *See* BGH, I ZR 91/15, *supra* n. 180, at paras 49 et seq.
182. Unger and Hug, *supra* n. 110, at V.A.
183. Bovis, *supra* n. 112, at IV.A.
184. Arroyo Jiménez and Pérez, *supra* n. 111, at II.
185. van den Brink and den Ouden, *supra* n. 113, at III.B. and V.D.2.
186. *Ibid*., at III.C.
187. Unger and Hug, *supra* n. 110, at V.; cf. further Arroyo Jiménez and Pérez, *supra* n. 111, at II.; Caranta and Biancardi, *supra* n. 116, at VII.
188. Arroyo Jiménez and Pérez, *supra* n. 111, at II.
189. Donzelli, *supra* n. 71, at III.C.
190. Caranta and Biancardi, *supra* n. 116, at VII.
191. Arroyo Jiménez and Pérez, *supra* n. 111, at II.

III. THE WAY FORWARD

A. Spill-over effects

So far, there is only a very limited cross-fertilisation between the private enforcement of EU competition and state aid law. The private enforcement of European competition rules has for many years been discussed intensively. The debate on the enforcement of EU state aid law by private actors is of more recent origin. As a consequence, in legal practice there are no spill-over effects from the area of competition law to the area of state aid law.[192] In view of the structural difficulties in obtaining damages, the idea of easing the standards of proof as established under EU competition law regarding the quantification of harm is considered as a solution for state aid law by the Italian report.[193] The German report, however, questions whether competition law may function as a model for state aid law since structural differences between the two areas of law have to be considered.[194] Notably, the application of rules established under competition law to ease a plaintiff's burden of proof is considered as questionable given that different theories of harm might apply in competition and state aid cases.[195]

B. Strengthening private enforcement of EU competition law

1. Guidance for courts

The quality of private competition law enforcement before national courts depends for a good part on the knowledge judges have about competition litigation. Given that the Damages Directive has led in some jurisdictions to significant changes in the law, private enforcement could be strengthened if courts received further guidance so as to better understand the new legal regime. Guidelines issued by the European Commission are a very important tool for providing direction to national courts in competition cases. The recently adopted 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser'[196] must therefore be welcomed. These guidelines not only explain basic legal issues but also refer to the underlying economic theory and evidential issues. In addition, the guidelines not only refer to the case law of the European Court of Justice but also take into account national court decisions. These guidelines provide a valuable first step in strengthening legal certainty. Even though they are not binding for courts, they are a valuable 'soft law instrument', as national courts regularly refer to Commission instruments in competition law disputes. Guidelines will, however, not decide questions not previously dealt with by courts or disputed issues, as the Commission does not want to create new

192. Lichère, *supra* n. 109, at II.B.2.
193. Caranta and Biancardi, *supra* n. 116, at IX.
194. Unger and Hug, *supra* n. 110, at VI.
195. *Ibid.*, at IV.C.
196. European Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (2019/C 267/07) [2019] OJ C 267/4.

rules.[197] The guiding effect of this document is thus limited. Given that the body of case law on passing-on issues will increase and more and more questions will be clarified by the European Court of Justice in the years to come, the steering effect can be improved if the guidelines are updated and fine-tuned at regular intervals. In addition, the passing-on guidelines must be regarded as a first step. More guidelines on other issues covered by the Directive, for example on the reach of the binding effect of decisions of national competition authorities, should follow.

Given that the Commission will refrain from deciding on disputes in their guidelines, other soft-law devices should be considered. One idea would be to take up a practice that has been established in the area of uniform commercial law. Larger international expert groups could elaborate opinions on how to interpret and apply certain rules. A prominent example from the commercial world is the 'CISG Advisory Council', a private initiative aiming to strengthen the uniform application of the United Nations Convention on Contracts for the International Sale of Goods ('CISG'). It is composed of scholars and (currently) one judge from different jurisdictions. This group sees itself 'as an independent body of experts, … afforded [with] the luxury of being critical of judicial or arbitral decision and of addressing issues not dealt with previously by adjudicating bodies.'[198] The CISG Advisory Council thus adopts opinions on novel or disputed questions and takes into account legal developments occurring in various jurisdictions. Even though such opinions are not binding, they provide valuable information for courts given that they are usually well-researched and documented. Similar European groups could emerge for matters regarding the private enforcement of competition law. If such a group gained a good reputation in the European competition law community, its opinions on issues not covered by guidelines issued by the European Commission could help courts when judging such questions.

2. Improving the law at the national level

A sound private enforcement system cannot be built overnight, and it cannot be only built at the European level (*see* I.C., *supra*). Given that the possibilities of a harmonisation of the law are limited – as are the competences of the European Union – national courts and legislatures also can and must contribute to a better private enforcement system within the framework that is set by EU law. It would go too far to muster all the suggestions that have been made to improve the current legal framework; some short remarks shall suffice to prove the point.

Courts must first and foremost develop a fine-tuned system in terms of the burden of proof. Without such differentiated rules, private enforcement of competition law will be impaired.[199] Moreover, courts should as far as it is possible to adapt the general procedural rules to the needs and the peculiarities of competition litigation.

Legislatures should – as far as not yet done – design specialised courts or chambers to hear damages actions for competition law infringements given that such

197. *See* Holzwarth, *supra* n. 12, at IV.
198. https://www.cisgac.com (accessed 3 September 2019).
199. *See* Camilleri, *supra* n. 26, at III.; Franck, *supra* n. 27, at III.B.1.b).

claims differ considerably from ordinary commercial litigation. The experiences in jurisdictions that have designed specialised bodies show that judges are consequently in a better position to build up solid knowledge in the area of competition law enforcement, including the economic matters that play an important role in competition litigation.[200] In addition, courts that deal with competition litigation must be equipped with the necessary resources for such cases, as they are very fact-specific, usually involve economic evidence for quantifying the harm,[201] and sometimes have the character of mass litigation where plaintiffs pool claims or bring actions against more than one defendant. If courts are not equipped with the necessary resources, a sound administration of such 'mass proceedings' will fail. A quick and effective 'digitisation' of courts will also help to administer such cases.

3. Closing gaps at the European level

Also at the European level, the legal framework could be improved. The application of the Damages Directive by Member State courts should be closely monitored and regularly evaluated by the European Commission. Moreover, attention should be given to areas that are not yet harmonised. Given that in these areas national law is a sort of 'comparative legal laboratory',[202] regulatory competition may lead to the result that a solution adopted in one jurisdiction spreads to other EU Member States. This would one day facilitate enlargement of the Damages Directive to further strengthen private enforcement across the entire European Union.

The most pressing need is, however, to introduce functioning collective redress mechanisms. The European Commission had originally planned to include such an instrument in the Damages Directive but did not prevail due to strong opposition from certain Member States, including Germany.[203] Subsequent attempts to create such an instrument have also failed. It was only a recommendation on collective redress that was issued in 2013.[204] Similar rules on collective redress throughout Europe would, however, be desirable. After the 'Diesel-gate scandal', the Commission has made a new attempt to ameliorate the situation, at least for breaches of EU consumer law, and has proposed strengthening representative actions.[205] This proposal is currently under debate.

It is however necessary to ensure that proper means of collective redress are available also in competition cases and especially for damages claims. If such an

200. Franck, *supra* n. 27, at III.D.2.; Wagner-von Papp, *supra* n. 24, at III.A.2.
201. Meijer and Zippro, *supra* n. 30, at III.
202. Basedow, *supra* n. 3, at 294, 298 ('*rechtsvergleichendes Laboratorium*').
203. Wolfgang Wurmnest, '*Schadensersatz wegen Verletzung des EU-Kartellrechts. Grundfragen und Entwicklungslinien*', in Oliver Remien (ed.), *Schadensersatz im europäischen Privat- und Wirtschaftsrecht* 27, 37 (Mohr Siebeck 2012).
204. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60.
205. Proposal of 11 April 2018 for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM(2018) 184 final.

instrument fitting the needs of parties harmed by competition law infringements cannot be adopted at the European level in the near future, action at the national level will be necessary in many Member States. The country reports of this study have revealed that many of the existing models at the national level either have a structure that does not help private plaintiffs in antitrust damages cases very much (Germany)[206] or limit the possibility to sue to very few associations, which for their part are ill-equipped for this task (France),[207] or the existing mechanisms are seen as sub-optimal for other reasons, mainly because of the opt-in mechanism (Italy).[208] Much more promising are the models that have recently been established in the Netherlands[209] and the United Kingdom,[210] which are based on an opt-out mechanism.

C. Constructing a proper framework for private enforcement of EU state aid law

As noted in the Commission's 2006 Study, it remains true that private enforcement of EU state aid law continues to have much potential to be developed, although in quantitative terms at least some progress has been highlighted in some reports. Nonetheless, it seems questionable whether a general EU-wide harmonisation of standards is the way forward since the availability of remedies as such has not been identified as the key problem. The only significant exception relates to the availability of damages, an incentive for competitors to pursue claims of private enforcement that is not to be underestimated. Here, it remains true that the difficulties with regard to proving causation and the existence of a damage constitute important obstacles to successful claims. Moreover, it is disputed whether and under which circumstances receiving illegal state aid may give rise to liability and constitute unfair competition. However, even if some alleviation of burdens (imposed on claimants) along the lines of EU competition law might help to reduce obstacles, it has also been rightly stressed that excessive liability must be avoided. Another point to be evaluated is the availability of interim measures, an area where some difficulties have been identified. In this regard it has to be carefully assessed, in view of the uncertainties associated with such measures, when and under which conditions they may be granted. Moreover, it may be considered whether standing for representative actions should be generally acknowledged (Italy)[211] and how access to information may be improved. Irrespective of these issues, factual obstacles have been identified, notably information deficits. Thus, increasing transparency by extending access to information and by creating publication obligations should be considered (Netherlands).[212]

When it comes to cooperation and coordination between national courts and the European Commission, room for improvement has been identified. Here, it can be

206. Franck, *supra* n. 27, at III.C.
207. Amaro, *supra* n. 32, at IV.D.4.
208. Camilleri, *supra* n. 26, at IV.D.
209. Meijer and Zippro, *supra* n. 30, at VII.D.
210. Wagner-von Papp, *supra* n. 24, at VII.B.
211. *See* Caranta and Biancardi, *supra* n. 116, at IX.
212. *See* also van den Brink and den Ouden, *supra* n. 113, at VI.

considered whether a certain formalisation would be helpful, to be achieved by means of a binding legal document; the Damages Directive may provide guidance in this regard. Moreover, factual barriers should also be further diminished, especially by fostering an environment beneficial to cooperation and coordination between the national and EU levels.

As private enforcement of state aid law faces many obstacles, the prospect of improving public enforcement has to be considered. In this regard, entrusting national competition authorities with the task of monitoring state aid law has been proposed (France).[213] Standing for the competition authority is already recognised in Italy,[214] but not in Spain.[215] Finally, in the Netherlands, the principle of good administration is relevant if the interests of competitors have not been taken duly into account, even where no state aid is present.[216]

213. Lichère, *supra* n. 109, at III.
214. Caranta and Biancardi, *supra* n. 116, at II.B.
215. Arroyo Jiménez and Pérez, *supra* n. 111, at I.B.
216. van den Brink and den Ouden, *supra* n. 113, at V.D.4.