Europeanisation and Compensating Harms Caused by Competition Restrictions

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We are indebted to our peer reviewers, who must remain anonymous.

FOREWORD
BY
PROFESSOR ANDREW SCOTT & DR CHAD DAMRO

It was with considerable pleasure that the Europa Institute supported our graduate students in taking forward their initiative to establish a network of young EU researchers involving the Universities of Edinburgh, Helsinki and Tilburg – what they have dubbed ETHYRN. In June 2010 the ETHYRN network convened its inaugural meeting in Edinburgh at which young researchers from the three Universities presented a range of papers under the overall theme of "Europeanisation". We were also delighted to welcome to the event Professor Kimmo Nuotio, Co-Director of the Centre of Excellence in Foundations of European Law and Polity at Helsinki University and Professor Jan Smits, Director of the Tilburg Institute of Comparative and Transnational Law both of whom are long-standing friends and colleagues of the Edinburgh fraternity of EU scholars. The workshop is the first in a series that will be supported by the three institutions involved.

We were particularly delighted that the Europa Institute hosted this inaugural gathering. Founded by Professor JDB Mitchell in 1968 as the Centre for European Governmental Studies, the Europa Institute is the UK's senior institute for inter-disciplinary teaching and research in the area of European Union studies. Although initially focused principally on European legal scholarship, in recent years the Europa Institute has developed into a research centre comprising over 40 academics drawn from the disciplines of law, political science and economics. In that sense today's Europa Institute has fulfilled the original vision of its founder, John Mitchell who, despite being one of the country's leading scholars of constitutional law, recognized the significance of the then EEC as an emerging legal and political order and, from 1968, devoted the remainder of his professional life to its study. By a happy coincidence the ETHYRN conference was convened in the University's Raeburn Room, the venue that John Mitchell favoured for a great many of the important "European" seminars and discussions he organized over the years.

The broad and inter-disciplinary philosophy adopted by the ETHYRN young researchers in their own work on European integration therefore sits very comfortably with the academic tradition of the Europa Institute, and of the partner institutes at Helsinki and Tilburg Universities. The Europa Institute has championed inter-disciplinarity in the study of European integration in both the pedagogical approach of its staff and in the research activities in which it has been involved. It is therefore entirely fitting, and professionally highly rewarding, that the ETHYRN network was the brainchild of young researchers from the University of Edinburgh.

In large part the inspiration behind the creation of the ETHYRN network was provided by Thomas Horsley, Julia Schmidt and Rebecca Zahn all of whom are Doctoral students attached to the Europa Institute. They, and their counterparts in Helsinki and Tilburg, are each to be heartily congratulated for launching this initiative and for the considerable efforts each made to ensure that the inaugural conference in Edinburgh was such a success. Already plans are underway for next year's ETHYRN conference and doubtless that will be just as successful.

Ultimately the generation of young scholars represented in the ETHYRN network will be among those who will shape the research agenda of European integration going forward. It is indeed very encouraging to know that this task is in the hands of such a capable group of young researchers.

Drew Scott and Chad Damro
Co-Directors of the Europa Institute

July 2010

EDITORIAL

Welcome to the special issue of the Edinburgh Student Law Review. This issue showcases selected papers which were presented at the Inaugural Meeting of the Edinburgh-Tilburg-Helsinki young researchers' network (ETHYRN), held in Edinburgh on 8th and 9th June 2010. The meeting was organised by PhD students based within the University of Edinburgh's Law School. Funding was generously provided by the Europa Institute and the Law School's Postgraduate Research Committee. The participants of the meeting considered the implications of the topic of Europeanisation on their individual fields of research. In particular, the legal, political and sociological driving forces behind the ongoing process of Europeanisation were discussed. Participants were also encouraged to think about the impact of Europe on their field of research and how their field of research is, in turn, influencing Europe. The meeting was attended by over 40 students and academics with 13 students from Edinburgh, Tilburg and Helsinki presenting on their work. Contributions were from the fields of law and politics and an interdisciplinary approach was strongly encouraged. Academics from Edinburgh, Tilburg and Helsinki kindly participated in the event by chairing panels and attending the individual sessions. The meeting is the first of a series of annual events, encouraging young researchers and PhD students to contribute to the building up of a network of excellence between the Universities of Edinburgh, Helsinki and Tilburg.

As the Edinburgh Student Law Review is a publication by students, for students, we are delighted to be a part of this project and we hope it will encourage students to set up and participate in such events in the future. We would like to thank our copy editors and all other students and staff who were involved in the development of this issue. Finally, we are indebted to the Europa Institute without whom production of the print version of this issue would not have been possible.

ETHYRN Organisers
Edinburgh Student Law Review

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EUROPEANISATION AND COMPENSATING HARMS CAUSED BY COMPETITION RESTRICTIONS

Katri Havu[*]

A. INTRODUCTION

In this article, the word "Europeanisation" refers in particular to the harmonisation of law within the European Union. The process of Europeanisation is studied as a development which increases the sources of applicable law, and this is considered with particular reference to the issue of compensating so-called competition damages. In addition, it is argued that the intertwined national and EU law rules currently result in a situation where the exact elements of the "right to claim compensation" are unclear, requiring us to look beyond national law.

The past decade of competition law enforcement in the EU has demonstrated a strong tendency towards decentralisation of the application of EU competition law. For years the competition authorities and the administrative courts of the Member States have played an especially significant role in the process.[1] In addition to the public enforcement of EU competition law, private

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[1] Introducing the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty was a remarkable step in the development. See also further: A Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (2008) 141–142.

enforcement – a term used mostly to refer to private actions for compensation of harms caused by forbidden competition restrictions – has attracted increasing attention. In the early discussions, the prevailing question was whether Articles 81 and 82 of the EC Treaty[2] have a horizontal effect between individuals, allowing a private party harmed by a competition restriction to sue the infringer for damages, potentially basing the claim only on the relevant EU law.

The opinion of the Advocate General van Gerven in *H. J. Banks & Co. Ltd v British Coal Corporation*[3], a case that dealt with the competition law articles of the European Coal and Steel Community (ECSC) Treaty, suggested that this was the case. However it was as late as the year 2001 when the European Court of Justice ("the ECJ")[4] finally ruled on the matter in *Courage*[5], stating that the efficacy of the prohibition against agreements restricting competition would be endangered if private parties were unable to rely on the prohibition in their mutual relations. The court held that parties had a right to claim compensation for harm caused by such agreements.[6] This preliminary ruling had been preceded by a series of cases where the ECJ had sought to reform the concept of procedural autonomy of the Member States. At the time of the *Courage* ruling, the state of affairs already encompassed the understanding that Community law as such included Community remedies available to individuals. The statement of the Court in *Courage* was renewed and developed a bit further in *Manfredi*.[7]

[2] The said articles encompassed the prohibition of contracts, either horizontal or vertical, that have as their aim or effect restricting competition on the internal market (art. 81) and the prohibition against abuse of a dominant market position on the internal market (art. 82). The contents of the articles are now found in art. 101 and art.102 of the Treaty on the Functioning of the European Union.

[3] Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-01209. See the opinion by the Advocate General. In the actual case, the ECJ did not rule on the availability of competition damages before a Member State court as the case turned on the Commission's sole jurisdiction to find that articles 65 and 66(7) of the ECSC Treaty on agreements, decisions and concerted practices and on abuse of a dominant position have been infringed. As long as the Commission had not found any infringement, the national courts were not allowed to entertain an action for damages. Hence, considering the availability of the remedy as such was irrelevant. See further the ruling para 15–19. However, the remarks by the Advocate General are well justified and even suggesting recognition of a *Community right* to damages. See the opinion by the Advocate General para 36–45.

[4] In this article, the former European Court of Justice or the ECJ is mostly referred to by its current name, the Court of Justice of the European Union. However, when discussing past events, it is suitable to use the name the Court had at the described time.

[5] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 (hereinafter "*Courage*").

[6] Case C-453/99 *Courage* [2001] ECR I-6297.

[7] Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619 (hereinafter "*Manfredi*").

The European Commission adopted the idea of harmonisation of the rules relating to actions for damages in competition law cases at the same time as these developments took place in the case law. The Commission's current suggestions for new EU legislation on private enforcement of competition law intend to significantly harmonise the law of the Member States. The harmonisation would encompass altering national rules of procedure and law on damages and actions in tort, or [developing new rules to] consider damages caused by competition law infringements. Such possible amendments would, pre-empting the national discretion on legal remedies, signify partial "interference" in the Member States' autonomy relating to protecting citizens' rights under EU law. Even at the moment, considering damages caused by competition restrictions, it is unclear how the scope of the procedural autonomy should be determined.

From the national point of view, some of the suggested secondary legislation rules themselves are rather unfit to form a part of the civil procedure or the law of obligations in the Member States. Furthermore, it is doubtful whether the EU policy considering the damages actions for the breach of competition law is based on correct principles. A major aim of the European Commission is to increase damages actions in order to have a greater deterrent effect on competition law infringers. This goal, at least when pursued at any price, contradicts the general principles of the law of obligations and the fact that damages actions should principally be used to compensate the victims.

B. THE PROCEDURAL AUTONOMY OF THE MEMBER STATES AND THE RELEVANT EU LAW

(1) The (limited) procedural autonomy

In considering the right to claim compensation for damages caused by competition restrictions, the European Commission has suggested far-reaching Union legislation that would, among other issues, strongly affect the basics of civil procedure in the Member States.[8] Having said that, harmonisation by the Commission is not intended to, or even able to, standardize the elements of the right to damages completely nor transform the procedure, even in the specific damages cases concerned.[9] Hence, the concept of the procedural autonomy of the Member States will not lose its importance in respect of actions for damages before national courts. In the future, it is extremely likely that the legal remedies and rules of procedure stating how they are used in national courts, will not be,

[8] See the Commission White paper on damages actions for breach of the EC antitrust rules COM(2008) 165 final, Brussels 2.4.2008.

[9] See also G Cumming and M Freudenthal, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* (2010) 15–17 and 333–339.

from the EU law point of view, governed only by the secondary legislation and guidelines by the European Commission, or by the mere general principles of EU law (so called ECJ-led harmonization), but both.

Traditionally, it has been the privilege of the Member States to draft and apply the legal remedies and procedural rules concerning protection of EU law based rights in national courts. The only compulsory requirements to be fulfilled by the national procedure have been formed and reformed by the general principles of EU law, found and applied by the Court of Justice.[10] However, it must be borne in mind that the concept of the procedural autonomy of the Member States relates to *the absence of EU legislation* governing the matter. This absence allows the law of the Member States to dictate the rules pertaining to specific remedies, sanctions and procedural rules governing actions intended to safeguard the EU law based rights of individuals.[11] It is not unheard of for EU legislation to include measures dealing with remedies. In particular, issues relating closely to the fundamental freedoms or highly specialized fields of law are often governed by directives that deal with enforcement or decentralized application of material EU legislation.[12] It is notable that EU law is thus able to pre-empt the national competence to decide on remedies and judicial protection before national courts where the EU law based rights of citizens are concerned.[13]

In relation to taking the EU law rights seriously, the legal principle of *effectiveness of EC law*[14] developed by the ECJ obliges the national courts of the

[10] See, however, further: M Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentation* (2004) 4–65. Dougan classifies the relevant issues relating to the effective judicial protection of EU law based rights before the national courts (and determining the procedural autonomy) into four categories: the fundamental right of access to judicial process; the national competence to determine remedies and procedural rules; the limits to that presumption applicable under EU law; and the legal basis for such EU level intervention (in the procedural autonomy).

[11] See, for instance, Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschafiskammer für das Saarland* [1976] ECR 1989 and Case 45/ 76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043.

[12] See, for instance, European Parliament and Council Directive 2004/48/EC OJ 2004 L 157 45–86 (on the enforcement of intellectual property rights) and European Parliament and Council Directive 2005/29/EC OJ 2005 L 149 22–39 (on unfair commercial practices). Also see M Dougan, *National Remedies Before the Court of Justice. Issues of Harmonisation and Differentation* (2004) 14–18, and A Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (2008) 142–144.

[13] See also: M Dougan, *National Remedies Before the Court of Justice, Issues of Harmonisation and Differentation* (2004) 18.

[14] Today the correct expression would most likely be *effectiveness of EU law*. In this article, the term "EU law" is used to refer to the EC and EU law as a whole, regardless of the repetition of the term "EC law" in various sources that pre-date the entry into force of the Lisbon Treaty.

Member States to adequately protect and give appropriate effect to EU law in cases that arise before the national courts. Over the decades the prevailing perception was that the EU law does not require the Member States to create new legal remedies in order to protect EU law based rights.[15] However, today the right to effective judicial protection arguably possesses the status of a fundamental right. Also the general principles of *effectiveness* and *equality* have become powerful tools in evaluating national legislation and procedure. When securing the efficacy of EU law the national courts are, for instance, obliged to disregard national legislation that would restrict the minimum level of protection given to EU law based rights. Also, when national remedies to protect EU law based rights are insufficient or weaker than those applied in the context of purely national rights, they must be replaced with new ones. [16]

The matter is rendered more complicated by the fact that drawing the line between material law and procedural rules on the one hand, and between the effectiveness of the EU law and respecting the procedural autonomy of the Member States on the other, has proven difficult even for the Court of Justice itself.[17] This general legal uncertainty is seen when evaluating the right to compensation for damage caused by a competition restriction. There is no EU legislation on the matter, which primarily means that the Member States are free to decide on proper legal remedies to secure the effect of the EU law based right to 'claim compensation for the harm suffered' because of a competition restriction. The main requirement of EU law is that the right to claim damages should not be restricted in a way contrary to the principles of equality and effectiveness.[18] The national procedural rules must also *guarantee access to justice*.[19]

(2) How should the "right to claim compensation" be understood?

In addition to the principles of equality and effectiveness, there are also principles that require that the national *sanctions* used in cases of infringements of the EU law must fulfil certain conditions. These principles, which were developed by the ECJ, state that the sanctions applied by the national courts must be efficient, proportional and must provide a deterrent. Right to claim damages for a harm caused by an infringement of EU law can be regarded as a parallel

[15] See, for instance, Case 158/80 *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805.

[16] See further: P Craig and G de Búrca: *EU Law, Text, Cases and Materials* (2007) 306–325. See also K Joutsamo, P Aalto, H Kaila and A Maunu, *Eurooppaoikeus* (2000) 37.

[17] A Arnull, *The European Union and its Court of Justice* (2006) 268.

[18] Case C-453/99 *Courage* [2001] ECR I-6297 and Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

[19] See (now legally binding) Charter of Fundamental Rights of the European Union art. 46.

fundamental requirement.[20] The mere *application* of *the right to damages*, however, has traditionally fallen within the scope of national rules, even though the ECJ has sometimes ruled that a national remedy, maybe even a certain type of remedy, should be available.[21] Bearing this in mind, we must question how the concepts of the *right* itself and the *application* or *protection of the right* should be defined.

Some useful observations on the determination of the right to claim compensation can be found in the case-law of the Court of Justice, as well as in the legal doctrine. For instance, Tridimas has systematized relevant judgments and has provided some analysis of the right to claim damages.[22] Furthermore, useful discussion on the relationship between actions for damages and law of the European Union exists.[23] The opinion by the Advocate General van Gerven in *H. J. Banks & Co. Ltd v British Coal Corporation* included discussion on particular issues relating to damages actions. The Advocate General referred to the judgments in *Simmenthal*[24] and *Factortame*[25] and to the primacy of Community law, stating that a national court must refrain from applying national law "where it prevents the exercise of *the right to obtain reparation under Community law*, as defined by the Court".[26]

It should be borne in mind, however, that the Court does not necessarily consider itself bound to the definitions that have been given to the expressions "right to damages" or "entitlement to compensation" over the course of time. The language used by the Court itself is not very specific or explanatory when discussing rights to damages because of a competition law infringement. It remains questionable which factors form the core or the minimum requirements of the right to claim compensation for harms caused by a competition restriction. In *Courage* the Court does not expressly use the term "right to claim damages" in a continuous or a coherent way, but sticks to other expressions. Indeed, some

[20] See P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (2007) 319, see also T Ojanen, *EU:n kilpailusääntöjen täytäntöönpanouudistuksen haasteita suomalaisille tuomioistuimille.* In Mentula (ed), *Kilpailuoikeudellinen vuosikirja 2004* (2005) 35–52 at 48–49 and M Dougan, *National Remedies Before the Court of Justice, Issues of Harmonisation and Differentation* (2004) 38–40 and 44.

[21] See Joined cases C-397/98 and C-410/98 *Metallgesellschaft & Hoechst v Inland Revenue* [2001] ECR I-1727 and Case C-253/00 *Muñoz v Fumar* [2002] ECR I-7289.

[22] T Tridimas, *The General Principles of EU Law* (2006) 456–461.

[23] See further for instance: M Dougan, *National Remedies Before the Court of Justice, Issues of Harmonisation and Differentation* (2004) 42–45, T Heukels and A McDonnel (eds), *The Action for Damages in Community Law* (1997) and E Storskrubb, *Civil Procedure and EU Law, A Policy Area Uncovered* (2008).

[24] Case 106/77 *Simmenthal* [1978] ECR 629.

[25] Case C-213/89 *Factortame* [1990] ECR 2433.

[26] Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-01209. See the opinion by the Advocate General para 46.

of the statements of the Court in *Courage* – considering whether the *right to compensation* or merely the right "to live in the EC without competition restricting contracts" exists as a matter of Community law – are rather contradictory:

> [T]he practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not *open to any individual to claim* damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the *existence of such a right* strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.[27]

But a little further on in the judgment, it states:

> However, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing *actions for safeguarding rights* which individuals derive directly from Community law[.][28]

It seems that at least momentarily the Court considers the right to claim damages as a real right in itself. However, slightly later the Court refers to claiming damages only as a remedy safeguarding a Community law based right. The ruling in *Manfredi* was more specific on the matter, differentiating the existence of the right to damages and detailed national rules governing *exercise* of the right.[29] If not before, then at least after the *Manfredi* ruling it is apparently clear

[27] See Case C-453/99 *Courage* [2001] ECR I-6297 para 26–27. Italics added.

[28] *Ibid.* para 29. Italics added.

[29] Joined Cases C-295/04 to C-298/04 [2006] ECR I-6619, see para 60-62 that are similar to the statements in *Courage*, combined especially with para 63–64: "63. Accordingly, the answer to the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04 must be that Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm. 64. In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed."

that *right to claim* compensation for harm caused by competition restrictions is an issue concerning EU law, in other words, a right directly based on EU law.[30]

In spite of its starting point being the Member States' discretion in considering the protection of rights and application of remedies, the ECJ has included in its preliminary rulings in *Courage*[31] and *Manfredi*[32] some additional requirements that the national procedures or procedural rules must fulfil to protect the EU law based entitlement to claim damages for harm caused by a competition restriction. The statements in the case-law give rise to questions about the elements of the right to compensation and how these elements are divided into those that are matters of EU law and those that are left in the scope of national law.

Hence, it is possible to dispute which of the prerequisites for a damages claim or coverable damage are governed by EU law, and thus cannot be restricted or contradicted in a case before a Member State Court, and which of them are left to be formulated by the national procedural rules. In addition, it is possible that the elements of the *right to claim compensation in a Member State court* should actually be divided into three categories: the first being of the *right* itself, the second the *remedy for a damages claim* and the third being the national *rules of civil procedure*.

Van Gerven[33] distinguishes rights, remedies and procedural rules and classifies different levels of safeguarded claims required by EU Law in relation to the demand for effective judicial protection of EU law based rights in national courts. As rights should have a uniform content throughout the EU and are derived from rules that are directly effective (as the essential competition law articles of the Treaty on the Functioning of the EU are), remedies must also exist. In other words, the above described rights give rise to the remedies. According to Van Gerven, this follows directly from the principles of access to justice and "when there is a right, there is a remedy" (*ubi ius ibi remedium*). The extent and form of the remedies are defined by national legislation, as long as EU law makes no explicit statement on the matter.[34] What is really interesting about the classification by Van Gerven, is that different EU law requirements are claimed to govern the remedies on the one hand and the procedural rules on the other. The remedies are supposed to provide adequate protection against infringements of EU law based rights. However, procedural rules must only guarantee that the

[30] See also Case C-128/98, above at the footnote 3. Interestingly, Advocate General van Gerven's suggestion, as well as the justifications, for the existence of the right to claim damages as a Community right seem to be clearer than state of affairs appeared to be after the *Courage* ruling.
[31] Case C-453/99 [2001] ECR I-6297.
[32] Joined Cases C-295/04 to C-298/04 [2006] ECR I-6619.
[33] W Van Gerven, *Of Rights, Remedies and Procedure*, Common Market Law Review 37:2000 501–536 at 502–503.
[34] *Ibid.* 503.

principles of effectiveness and equality are not contradicted in national courts, that is, provide a certain *minimum level* of protection.[35] In practice, the minimum level means that using an EU law based right must not be practically impossible.

As Graph one below demonstrates, the EU law rights and relying on them in the national courts can be pictured on a sliding scale between the EU law rules and national law. This simple model is to some extent in accordance with the analysis by Van Gerven. However, due to the conflicting statements by the ECJ, finding the correct places for the elements of the right to claim compensation for damages caused by competition law infringements is almost impossible.

Graph 1: A model of reliance on EU Law rights in court, placed on a sliding scale between EU law and its requirements and national law:

When analysing the elements of the right to claim compensation based on domestic and EU law in a national court, it should be borne in mind that in the two competition restriction related damages cases it has dealt with the ECJ has already stated that firstly, a competition restriction participant should be considered as potentially entitled to claim compensation (*Courage*).[36] Secondly, a consumer in the position of a third party should be entitled to claim compensation (*Manfredi*)[37] and that the ability to claim compensation should cover both the actual loss (*damnum emergens*) and the loss of profit (*lucrum cessans*) (*Manfredi* again).[38] As these statements impact upon essential elements of the right to compensation as a remedy, or even allegedly procedural questions such as standing to sue, one can ask where does the invisible line between the elements of *remedies and procedural rules* belonging to the legislative powers of

[35] *Ibid.* 503–504.
[36] Case C-453/99 [2001] ECR I-6297.
[37] Joined Cases C-295/04 to C-298/04 [2006] ECR I-6619.
[38] *Ibid.* The statement on what quantities the national remedies should cover is not a novelty in the EU case law; see, for instance, Joined cases C-397/98 and C-410/98 *Metallgesellschaft & Hoechst v Inland Revenue* [2001] ECR I-1727.

the Member States and the issues belonging to the *essence of the material EU law based right*, lie?

C. COMMISSION-LED HARMONISATION – AN EFFECTIVE INSTRUMENT?

Lately, a further issue has arisen in relation to the systematization of the elements of the right to competition damages in the form of a serious threat that a directive or other piece of secondary legislation on the subject shall be issued soon. The legislative suggestions by the European Commission considering the matter can be described as surprising in at least two ways. Firstly, the principal idea of the Commission seems to be that, in relation to this specific area of law, the residues of procedural autonomy should be eliminated in order to create a more effective competition law enforcement system consisting of combined public and private enforcement efforts in the whole Union. Secondly, the Commission does not find it problematic to undertake a specific, damage type centered, harmonisation, where the elements of the material rights, factors of remedies and even basics of civil procedure in the Member States would be made subject to several exceptions in comparison with national rules in other kinds of cases.[39]

Harmonisation by directives or other instruments of secondary legislation is not free of considerable dilemmas. On one hand, the diversity of procedural rules of the Member States requires the possible changes to the legal circumstances to be made carefully, taking into account all the relevant issues in the Member State in question. Thus, a directive showing the correct direction for national institutions implementing the ideas to take is a justifiable solution to the problems created by the harmonisation process.[40] However, the possible lack of correct, timely and proper implementation, as well as the varying interpretations by the national courts, are problems that weaken directives as instruments of unifying law. Implementing and interpreting secondary legislation may also be costly, a fact that affects the total impact of the new legislation on social welfare.[41]

The problems relating to directives in general are by no means solved by the suggestions by the European Commission relating to compensating harms caused by competition restrictions. In fact, the suggested principles to be adapted when dealing with damages claims dealing with competition restrictions can be

[39] See the Commission White paper COM(2008) 165.
[40] Similarly: G Cumming and M Freudenthal, *Civil Procedure in EU Competition Cases before the English and Dutch Courts* (2010) 15.
[41] See also *ibid.* 16–17. The authors also underline the fact that the existence or implementation of a directive does not automatically make the law of the field in question clear (or even clearer). This issue, too, may increase the costs of the secondary legislation to society.

described as unfamiliar to many of the Member States' legal traditions. Hence, difficulties in implementation and interpretation, as well as the significant increase in the complexity of the applicable set of rules may well be expected. The express proposals in the Commission White Paper are the following: introducing collective redress in competition damages cases, introducing the possibility of obliging the disclosure of evidence *inter partes*, the imposition of a binding effect on the final decisions by national competition authorities in civil procedure, adoption of the presumption that finding an infringement of the EU competition law provisions also implies fault in causing the related damage, allowing indirect purchasers to rely on a rebuttable assumption that an over-charge caused by a competition restriction was passed on to them in its entirety, unifying limitation periods and giving up the so called 'loser-pays' principle in trials relating to competition damages.[42] All in all, the suggestions touch many layers of the law of obligations and civil procedure of the Member States. The risk that national legal traditions will run counter to the new provisions, whether in the implementing legislation itself or otherwise, is considerable.

One of the main ideas behind increasing private competition law enforcement is the desire to create a greater deterrent effect.[43] It is possible to achieve deterrence without paying much attention to the other major question surrounding damages caused by competition restrictions: compensation of the victims. For instance, the deterrent effect is similar whether the recipient of the awarded damages actually suffered any losses or not, but the this not ensure that the bearer of the harm caused by the infringements will be compensated. Thus the legal rules relating to deterrence may have no effect in securing the right to compensation for injured parties. However national law relating to obligations and rules of civil procedure has multiple goals, and may consider the deterrent effect of actions for damages in tort a minor issue.

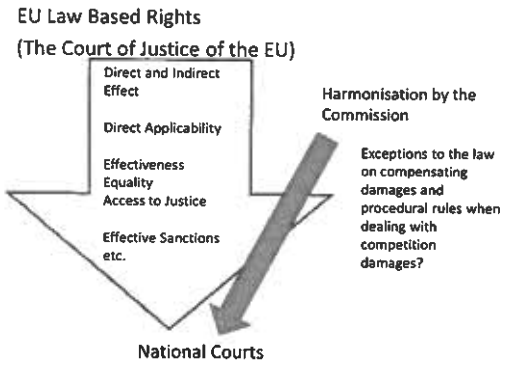
D. CONCLUDING REMARKS

It is true that the only matters that have so far been left untouched by EU legislation fall under the heading of procedural autonomy, loosely guided by the general principles of EU law. However, the principle of procedural autonomy has been in a way limited and blurred when the distinction between rights and remedies is difficult to make. The interaction between this principle and the competition law harmonisations is interesting. Even if common rules regarding standing to sue or indirect damages could be created to cover the whole Union, the non-harmonised issues would still be treated before the national courts on the

[42] See the Commission White paper COM(2008) 165.
[43] See the Commission Green paper on damages actions for breach of the EC antitrust rules COM(2005) 672 Brussels 19.12.2005, especially chapter I of the paper.

basis of procedural autonomy. As Graph 2 below demonstrates, several types of EU law sources would affect the treatment of a damages action.

Graph 2: The traditional system for protecting EU law based rights in national courts combined with the commission-led harmonisation considering damages actions for competition law infringements leads to a situation where several sources of EU law requirements must be taken into account in a trial:



The Commission's White Paper proposals include, among others, a reform of the 'loser pays' principle when considering the costs of trials, arranging a system similar to that of the U.S. for dealing with competition damages cases. At the very least, amendments will complicate the national civil procedure. Furthermore, the legal traditions of the Member States may undermine the benefits of the suggested rules due to problems in application and the national peculiarities that might not have been taken into account in drafting the EU secondary legislation. In addition, the affected law of the Member States balances the different aims of the law of obligations and the rules of civil procedure. Contradictions between the rules created through harmonisation are likely, if the secondary legislation is significantly based on achieving the goals of competition law enforcement. Difficulties in achieving aims of deterrence via the harmonisation procedure will become apparent as the meta-elements of remedies and procedural rules, such as the definitions of a party having standing to sue or

causality, continue to be applied by each Member State as in the same way as before[44], being only randomly and partly unified by the case-law of the Court of Justice of the European Union.

In short, compensation for damages caused by competition restrictions is today strongly affected by EU harmonisation. The process of Europeanisation is evidenced by the unification of law by the Court of Justice and the suggestions for secondary legislation by the European Commission. In the context of competition damages, the effects of both forms of harmonisation are combined. However, national legal traditions, especially those of the law of obligations and civil procedure, still play a significant role. Differences in the legal cultures of the Member States may mean that trying to create a European right to competition damages leads only to a certain type of quasi-coherence of law within the EU.

[44] See also K Tuori, *Critical Legal Positivism* (2002) especially at 212–213 on the effects of the sub-surface layers of law that determine how the explicit rules are understood and interpreted.