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GOVERNANCE ASPECTS OF CROSS-BORDER EU COMPETITION ACTIONS: THEORETICAL AND PRACTICAL CHALLENGES

MIHAIL DANOV AND FLORIAN BECKER*

Abstract: The authors have aimed to produce a theoretical model which considers the choice of governance design of cross-border EU competition law actions. To this end, they have analysed the current litigation pattern (and litigants' strategies). On this basis, the specific issues which arise in cross-border EU competition law actions have been identified with a view to proposing an appropriate course for any reform in the area. A mix of research methods have been used - in addition to employing traditional library based legal research methods, opinions of legal practitioners from England and Germany and policy-makers from Brussels have been considered. The article demonstrates that, given the diverse nature of the European Union, a new mode of governance should be used by the EU legislator in order to close the EU competition law enforcement gap. The authors suggest that Regulation 1/2003 should incorporate a specifically designated private international law mechanism which promotes inter-jurisdictional regulatory competition in the area of EU competition law dispute resolution, and produces efficient enforcement results in a multi-level system of governance. It has been submitted that some of the specific problems that arise may be best addressed by appropriately drafted private international rules which address inter alia the low mobility of consumers and SMEs.

A. INTRODUCTION AND SOME PRELIMINARY REMARKS

Articles 101 and 102 TFEU (ex Arts 81 and 82 TEC) are the main competition law provisions contained in the Treaty on the Functioning of the European Union. Regulation 1/2003 replaced the centralised system, which was set up by Regulation 17/1962, with a directly applicable exception system, in which the Member States' courts have the power to apply and enforce Articles 101 and 102 TFEU. Previous research has shown that, through enhanced private antitrust enforcement reform, private international law has gained a pivotal role in EU competition law disputes with an international element in Europe.[1] The important role of private international law in the context of competition law enforcement is further re-iterated in recent

* Respectively, Senior Lecturer in Law, Brunel University, London, and Professor, Kiel University, Germany.
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[1] M Danov, Jurisdiction and Judgments in relation to EU Competition Law Claims (Hart Publishing, 2010).

edited collections of papers.[2] The aim of EU competition law enforcement policy is to deter infringements and provide redress to those who have suffered harm from them.[3] However, research demonstrates that there is an enforcement gap at present.[4] The Ashurst study, which was conducted in 2004, appears to indicate that the private antitrust enforcement in Europe may be characterised by its "astonishing diversity and total underdevelopment".[5] The level of diversity in the area may be regarded as problematic because the EU relies on the individual Member States' legal orders to enforce the EU competition law provisions and the rights of the individuals derived from the TFEU. It is well established that there are "three types of Community Courts, not just two: the ECJ, the CFI, and national courts. [...] The rationale for inclusion of national courts in [the EU judicial system] is of course that they are enforcers of [EU] law in their own right [...]."[6] The problem is that even jurisdictions like England and Germany, which represent the leading competition law regimes in Europe, appear to be attracting primarily follow-on actions.[7] This is a cause for concern as public enforcers across Europe are unlikely to have the resources to investigate all the complaints they receive.[8]

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[2] J Basedow, S Francq and L Idot (eds), International Antitrust Litigation: Conflict of Laws and Coordination (Hart Publishing, 2012); M Danov, F Becker and P Beaumont (eds), Cross-Border EU Competition Law Actions (Hart Publishing, 2013).

[3] See WJ Wils, Principles of European Antitrust Enforcement, (Hart Publishing, 2005), 116-118; AP Komninos, EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts, (Hart Publishing, 2008), 7-8.

[4] See Part I in Danov, Becker and Beaumont, supra n 2. See also D Waelbroeck, D Slater and G Even-Shoshan, Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst Report) < http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf > (last visited 10 June 2013); P Buccirossi, M Carpagnano, L Ciari and others, Collective Redress in Antitrust < http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf > (last visited 10 June 2013) p 25; Department for Business Innovation & Skills, Private Actions in Competition Law: A Consultation on Options for Reform – Government Response < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf > (accessed 5 November 2014).

[5] Ashurst Report, supra n 4, 1.

[6] P Craig, "The Jurisdiction of the Community Courts Reconsidered" in G de Burca and Weiler (eds), The European Court of Justice (OUP, 2001), 177, 178. See also: J Komarek, 'Federal Elements in the Community Judicial System: Building Coherence in the Community Legal Order' (2005) 42 Common Market Law Review, 9, 10; J Komarek, 'In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure' (2007) European Law Review 467, 468.

[7] E.g. Roche Products Limited, Roche Vitamine Europe AG (Switzerland), F. Hoffmann-La Roche AG (Switzerland) v Provimi Limited [2003] EWHC 961 (Comm); Devenish Nutrition Ltd v Sanofi-Aventis SA [2007] EWHC 2394; [2008] 2 WLR 637 (Ch); Case No: 1087/7/9/07, The Consumer Association v JJB Sports PLC, [2009] CAT 2, 30 January 2009; Emerald Supplies v British Airways [2009] EWHC 741 (Ch) a'ffd Emerald Supplies v British Airways [2010] EWCA Civ 1284; Case C–360/09 Pfleiderer AG v Bundeskartellamt [2011] 5 CMLR 219; Case Number: 1178/5/7/11, 2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd [2012] CAT 19; Case Number: 1166/5/7/10, Albion Water Ltd v DWR Cymru Cyfyngedig [2013] CAT 6.

[8] See more: E Burrows and T Gilbert, "OFT Competition Act enforcement: Key developments over the first decade" (2010) Competition Law Journal 178, 182. See also: M Danov and S Dnes, "Cross-Border EU Competition Litigation: New Evidence from England and Wales" in Danov, Becker and Beaumont, supra n 2, 33-59; J Kammin and F Becker, "Cross-Border EU Competition Litigation: Qualitative Interviews from Germany" in Danov, Becker and Beaumont, supra n 2, 61-79

Moreover, even in cases where competition law infringements were established, a significant number of injured parties[9] (i.e. consumers and businesses) from across Europe would remain uncompensated as it would normally be the large purchasers suing.[10] Recent research on collective redress actions across Europe has demonstrated that "the number of actions related to antitrust infringements is still very limited."[11] The existence of an enforcement gap was recently noted by the UK Government[12] in its response to the consultation on options for reform. It was submitted that "the strong sense from the consultation was that [competition law] cases are almost exclusively between large companies, and that smaller companies and consumers still have no realistic way of challenging breaches of competition law or gaining redress."[13]

Shall the EU legislator address the existing enforcement gap? It is well established that private enforcement is intended to complement public enforcement by allowing injured parties who have suffered harm caused by a competition law infringement to bring a legal action before a court.[14] It should be noted that "the cause of action [for EU competition law damages] is a mixture of EU law and […] 'domestic' law".[15] First as a matter of EU law it must be shown that an entity is in breach of Articles 101 and 102 TFEU. Secondly, it must be shown, as a matter of domestic law, that an entity, which is recognised by a Member State's law, is liable in damages to this particular injured party for that breach.

Different Member States may adopt different solutions with regard to the appropriate measure of damages in an EU competition law claim. Although the principle of national procedural autonomy is subject to the principles of effectiveness and equivalence, the Member States would enjoy procedural autonomy to decide on the relevant procedural rules and remedies in so far as they do not make 'practically impossible or excessively difficult the exercise of rights conferred by EU law'.[16] Given the fact that the problem is not dealt with at

[9] The Directive has defined "injured party" as "anyone who suffered harm caused by an infringement of competition law" - Art 4(6) from the Directive on Antitrust Damages Actions.
[10] E.g. Provimi, supra n 7; Devenish, supra n 7; Cooper Tire & Rubber Company v Shell Chemicals UK Limited [2009] EWHC 2609 (Comm); Cooper Tire & Rubber Company Europe Limited & Others [2010] EWCA Civ 864; Toshiba Carrier UK Ltd and Other v KME Yorkshire Limited & Others [2011] EWHC 2665 (Ch); Toshiba Carrier UK Ltd and Other v KME Yorkshire Limited & Others [2012] EWCA Civ 169; National Grid Electricity Transmission PLC v ABB Ltd & Others [2012] EWHC 869 (Ch); Deutsche Bahn v Morgan Crucible Company [2012] EWCA Civ 1055; Nokia Corporation v AU Optronics Corporation [2012] EWHC 731 (Ch); Ryanair Limited v Esso Italiana Srl [2013] EWCA Civ 1450. See also: Emerson Electric Co v Morgan Crucible Company PLC and Ors – settled 11 April 2013. See more: Danov and Dnes, supra n 8.
[11] Collective Redress in Antitrust, supra n 4, 11 and 37.
[12] A Consultation on Options for Reform – Government Response, supra n 4.
[13] Ibid [3.6].
[14] Commission Staff Working Paper, Annex to the Green Paper on damages actions for breach of the EC antitrust rules SEC(2005) 1732 [1-3]. C-453/99, Courage v Crehan [2001] ECR I-6297 [26].
[15] Provimi, supra n 7, [25].
[16] Joined Cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicuriazioni [2006] 5 CMLR 17 [62]. For the principle of effectiveness, which could be used to limit Member States' procedural autonomy see

the EU level, the principle of national procedural autonomy[17] might suggest not only that it is for a national domestic system to deal with the issue of damages, but also that it is for national law to decide what would be the set of procedural rules which would be employed in this context. The lack of harmonisation may suggest that the EU competition law claims may be characterised by a high level of uncertainty[18] in so far as such claims would be often cross-border in nature which suggests that "knowledge of [several] legal systems is required".[19] It has been submitted that "[i]t is troublesome for the litigants who will have to go through the often difficult procedure of ascertaining and applying foreign law. In many cases, the variation of the substantive laws in Europe is a true non-tariff trade barrier."[20]

Previous comparative studies - revealed by the Ashurst Report[21] as well as by the Collective Antitrust Redress Report[22] – strongly suggest that harmonisation must be considered by the EU legislator.[23] The academic debate was recently renewed by the authors of the collective redress report who made a case for procedural harmonisation[24] at EU level.[25] Such a deduction can be further strengthened by noting that "it is readily apparent that inadequate national remedies and procedural rules can frustrate the effective application of [EU] law within each Member State."[26] In other words, some form of procedural harmonisation may be justified by the need to avoid anomaly allowing the different Member State courts to award different amounts of damages with regard to the same type of breach of the same EU competition law provision. Professors Weatherill and Beaumont have noted that "[a] situation where the application of [European Union] law varies significantly from member state to member state would be a denial of the rule of law and would make the [Union] untenable. However, the

more: F Becker, 'Application of Community law by Member States' public authorities: between autonomy and effectiveness' (2007) 44 Common Market Law Review 1035.

[17] Case 33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR 1989 [5]; Case C-261/95 Palmisani [1997] ECR I-4025 [27]; Manfredi, supra n 16. See also Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055 [43]–[48]. See more: Becker, supra n 16.

[18] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 9.

[19] H Collins, The European Civil Code: The Way Forward (CUP, 2008) 74.

[20] P Hay, O Lando and RD Rotunda, 'Conflict of laws as a technique for legal integration' in M Cappelletti, M Secombe and J Weiler (eds), Integration Through Law: Europe and the American Federal Experience, Vol 1, (Walter de Gruyter, 1986), 161, 258.

[21] Ashurst Report, supra n 4.

[22] Collective Redress in Antitrust, supra n 4.

[23] Ashurst Report, supra n 4, 131; Collective Redress in Antitrust, supra n 4, p 88.

[24] E Storskrubb, Civil Procedure and EU Law: A Policy Area Uncovered (OUP, 2008) 2.

[25] Collective Redress in Antitrust, supra n 4, 88.

[26] M Dougan, National Remedies Before the Court of Justice (Hart Publishing, 2004) 65.

European Court's attempt to accommodate differences in national procedural law means that some variations will occur."[27]

The European Commission has agreed upon a package of legislative proposals with a view to providing for an effective EU competition law enforcement regime in Europe.[28] More specifically, the Commission has put forward a proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.[29] The corrigendum of the text of the Directive, which was adopted by the European Parliament, was very recently formally approved by the EU Council of Ministers.[30] The Directive is complemented by a Recommendation on common principles for injunctive and compensatory collective redress in the Member States concerning violation of rights granted under Union Law[31] as well as by a Communication on quantifying harm in actions based on breaches of Articles 101 and 102 TFEU.[32] In this context, the European Commission has justified approximation of national substantive and procedure rules at EU level as follows:

> "To ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for injured parties to exercise the rights they derive from the internal market, it is therefore appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for antitrust damages"[33]

How appropriately may the level of variation with regard to the various national regimes be addressed by the Directive for antitrust damage actions? The authors demonstrate that a major challenge for the policy-makers relates to the governance aspects of EU competition law litigation[34] which must be addressed head-on with a view to closing the enforcement gap in a cross-border context. In light of the current Damages Actions Initiative,[35] this article demonstrates that the EU legislator should carefully consider what mode of "governance"[36]

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[27] S Weatherill and P Beaumont, EU Law: The Essential Guide to the Legal Workings of the European Union (Penguin, London 1999) 453.

[28] See Press Releases: The Commission proposes legislation to facilitate damage claims by victims of antitrust violations, IP/13/325; Commission recommends Member States to have collective redress mechanisms in place to ensure effective access to justice, IP/13/324.

[29] COM(2013) 404 final.

[30] See Corrigendum to the position of the Parliament, Adopted without a vote on 21 October 2014, http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_corrigendum_en.pdf >. See also: The European Commission – Press Release < http://europa.eu/rapid/press-release_IP-14-1580_en.htm >.

[31] [2013] OJ L201/60.

[32] [2013] OJ C167/19.

[33] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, p 10.

[34] The paper is concerned with the damage claims arising out of competition law infringements (cartels or abuse of dominant position).

[35] Commission Staff Working Document, Impact Assessment Report, Damage actions for breach of the EU antitrust rules, SWD(2013) 203 final.

[36] It has been submitted that "The term 'governance' is used in relation to national, European and international orders, and it crosses the public-private divide. […] Governance […] encompasses all stages of the policy chain, from drafting to enacting to implementing to enforcing rules." M de De Visser, Network-Based Governance in

should be used with a view to setting up an effective enforcement regime in Europe, and addressing the specific problems that arise in a cross-border context. The European Commission[37] has identified the five principles, which would be essential for an appropriately designed good governance system, as being *"openness, participation, accountability, effectiveness and coherence."*[38] In his analysis of the new modes of EU governance, Armstrong has noted that "[t]here is a relative agreement on 'hierarchy' or 'competition' as distinct modes of governance."[39] Furthermore, Muir-Watt and Arroyo's forthcoming edited book "explores the potential of private international law to reassert a significant governance function in respect of new forms of authority beyond the state."[40]

With this in mind, a choice of governance design of cross-border EU competition actions may be the key for closing the enforcement gap in Europe. In this context, one should make a distinction between a unified/centralised system (which might include unified/hierarchical enforcement regime), on the one hand, and a level of managed harmonisation (setting up common principles and minimum standards) which presupposes an effectively functioning private international law regime, on the other hand. Bearing in mind this distinction, one could say that a private international law regime which promotes inter-jurisdictional regulatory competition should be used as a new mode of governance, in order to complement the proposed legislative package in the area of EU competition law. Although it could be questioned to some extent whether it is relevant to refer to "regulatory competition" in the area as long as the relevant EU competition law requires a uniform interpretation as a matter of EU law, the cross-border nature of EU competition law infringements and the level of variation regarding the conditions for bringing such actions[41] as well as the important role of Member States cumulatively suggest that some Member States' courts might be better equipped (than others) to deal with such actions. Hence, a private international law regime, which promotes inter-jurisdictional regulatory competition, might be a useful mode of governance in the light of cross-border aspects of EU competition law infringements. In spite of the fact that injured

EC Law, (Hart Publishing, 2009) 4. See also: The New Modes of Governance Project – TL Brunell, C Harlow, AS Sweet, 'Litigating the Treaty of Rome: The European Court of Justice and Articles 226, 230, and 234' < http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26 > (last visited 10 June 2013); K. Armstrong, "The character of EU law and governance: From "Community method" to new modes of governance" (2011) 64 Current Legal Problems 179.

[37] The European Commission, European Governance – A White Paper, COM(2001) 428 final.

[38] Ibid. 10.

[39] Armstrong, supra n 36, 182.

[40] See the blurb, H Muir-Watt and DPF Arroyo (eds), Private International Law and Global Governance (OUP, Oxford 2014 (December-estimated)) < http://ukcatalogue.oup.com/product/9780198727620.do >. See also: H Muir-Watt, "Private International Law beyond the Schism" (2011) 2 Transnational legal theory 347.

[41] See Ashurst Report, supra n 4.

parties (i.e. consumers and business) may be suffering harm caused by EU competition law infringements in a number of Member States, a unified/centralised system (which might include unified/hierarchical enforcement regime) is hard to achieve at EU level because "the EU is characterised by a low level of division of labour, limited cognitive resources and high decisional costs."[42] A recent commentator has noted that:

> "a new school of thought […] portrays the EU as a 'multi-level system of governance.' This analysis highlights the erosion of nation-states, denies, however, their transformation into a new European super state. The concept of governance used is flexible enough both firmly to capture certain sui generis characteristics of the emerging European polity such as its lack of internal hierarchy and its reliance upon 'Law', and to leave open the question of exactly where the European system lies on a scale between the traditional nation-state and looser forms of international co-operation."[43]

The question whether an efficient EU private international law framework could be important "for the functioning of the internal market, and at the same time for the preservation of diversity in national private law"[44] should be investigated in the light of the multi-level governance system in the EU. Private international law instruments are normally seen as an appropriate legislative tool, which may be used to preserve the inherent characteristics of the diverse legal systems within the EU, but can PIL be used as a mode of governance which promotes regulatory competition[45] in cross-border competition cases? Before addressing this question, the employed research methodology will be briefly introduced. Then, the main modes of governance available will be introduced along with the challenges the EU policy-makers face when devising a policy governing the cross-border EU competition law enforcement activities.

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[42] PF Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-*National Constellation, (Hart Publishing, 2010), 37.

[43] C Joerges, "The impact of European integration on private law: Reductionist perceptions, true conflicts and a new constitutional perspective" in C Joerges and O Gerstenberg (eds), COST A7 – Private governance, democratic constitutionalism and supranationalism (Office for Official Publications of the European Community, Luxembourg 1998) 69, 79; C Joerges, "European challenges to private law: On false dichotomies, true conflicts and the need for a constitutional perspective" (1998) 18 Legal Studies 146 Compare: A Moravcsik, "Preferences and power in the European Community: A liberal intergovernmentalist approach" (1993) 31 Journal of Common Market Studies 473; G Marks, L Hooghe and K Blank, "European integration from the 1980s: State-centric v. Multi-level governance" (1996) 34 Journal of Common Market Studies 342; S Milio, From Policy to Implementation in the European Union: The Challenge of a Multi-Level Governance System (I.B. Tauris Publishers, 2010); M Dawson, New Governance and the Transformation of European Law: Co-ordinating EU Social Law and Polity (CUP, 2011); D Augenstein (ed), *'Integration through Law' Revisited: The* Making of the European Polity (Ashgate, 2013).

[44] A Furrer, "European law without peak and centre? Observations on the Europanization process in private law towards a supranational multi-level system" in Joerges and Gerstenberg, supra n 43, 167, 184.

[45] H Muir-Watt, "European integration, legal diversity and the conflict of laws" (2005) 9 Edinburgh Law Review 6, 7. See also H Muir-Watt, Aspects économiques du droit international privé (Recueil des Cours de l'Académie de la Haye, 2005); H Muir-Watt, "Integration and diversity: The Conflict of Laws as a Regulatory Tool" in F Cafaggi (ed), The Institutional Framework of European Private Law (OUP, 2006) 107; L Tichy, "A new role for private international law and procedural law in European Integration? A critical comment" in R Brownsword, H-W Micklitz, L Niglia and S Weatherill (eds), The Foundations of European Private Law (Hart Publishing, 2011) 393 – 412; A Mills, "Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws" (2010-1) 32 University of Pennsylvania Journal of International Law 369-455; D Lasok and PA Stone, Conflict of Laws in the European Community (Professional Books Limited, 1987) 144 – 145.

After that, the important issues which affect the claimants/defendants' tactics will be specified. On this basis, the authors will propose a theoretical model which may be used to govern cross-border EU competition law enforcement activities with a view to closing the enforcement gap and providing redress for those who have suffered harm as a result of an EU competition law infringement. Finally, some issues, which need to be considered in a wider European context, will be put forward.

B. RESEARCH METHODOLOGY[46]

Since the paper aims to consider the choice of governance design of cross-border EU competition law actions, it is important to use a research methodology which allows the authors to define the cross-border competition litigation pattern.[47] Indeed, the cross-border nature of many EU competition law infringements seemingly suggests that the way the current framework shapes the claimants' tactics would be important with a view to making a case for reform (and identifying an appropriate mode of governance[48]).

In addition to employing traditional library based legal research methods, the authors thought that it would be useful to have the opinions of policy-makers and legal practitioners, to consider their views on how private EU competition law actions are functioning at the moment and how they could and should be developed. Indeed, part of the problem, which is identified by some of the studies[49] so far, is that there are not many cases at present.[50] Given that the study aims to identify how the cross-border EU competition law actions should be accommodated in Europe, qualitative interviews[51] were conducted with legal practitioners in Germany and

[46] See also M Danov and F Becker, "Research Methodology" in Danov, Becker and Beaumont, supra n 2, 25-31.
[47] D Chalmers and M Chaves, "The reference points of EU judicial politics" in SK Schmidt and R D Kelemen (eds), The Power of the European Court of Justice (Routledge, 2013) 25.
[48] Armstrong, supra n 36.
[49] Ashurst Report, supra n 4; Collective Redress in Antitrust, supra n 4.
[50] Compare: the UK report delivered as a part of the Ashurst Study < http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/united_kingdom_en.pdf > (last visited 10 June 2013).
[51] The interview questions focused on six key areas: 1) General questions about competition law disputes; 2) Plaintiffs' tactics in cross-border EU competition law cases; 3) Defendants' tactics and settlement; 4) Follow-on actions and quantification of damages; 5) Procedural issues; 6) Policy issues. These provided a structure to interviews. That said, the interviewer and/or interviewee were always free to depart from the structure if the participants' viewpoints and experience were thereby better expressed. See also SA Richardson, BS Dohrenwend and D Klein, Interviewing: its forms and functions (Basic Books, 1965) 45; RK Merton and PL Kendall, "The Focused Interview", (1946) 51 American Journal of Sociology 541, 541-2; NK Denzim, The Research Act: A Theoretical Introduction to Sociological Methods (Prentice Hall, 1989) 105.

England[52] (in so far as both countries appear to be attracting EU competition law actions[53]) as well as with policy-makers in Brussels.

The inclusion of the two categories (legal practitioners and policy-makers) can be justified as follows. First, the practicing lawyers from Germany and England are well placed to be asked questions regarding both consumer claims and claims by undertakings. Given the fact that the Georgetown project on private antitrust litigation appears to suggest that 'the vast majority of cases, possibly as many as 88 percent in [their] sample, settle before trial', it seems clear that the legal practitioners would have some useful insights as to how EU competition law litigation is functioning at present.[54] Indeed, legal practitioners were well placed to provide us with information about litigation strategies.[55] Secondly, the paper examines possible proposals for the reform of the European Civil Justice system the best to accommodate the post-2003 policy of the EU favouring private law enforcement of EU competition law. The views of EU officials from Brussels are therefore very important; indeed, it has been submitted that the EU would have competence to legislate,[56] and in view of the cross-border nature of EU competition law actions any legislative reform might be most effective at the EU level.[57]

The authors randomly[58] selected participants from each class (legal practitioners and policy-makers), ensuring that the views of respondents were representative. Lawyers were randomly selected from the legal directories where they have featured on the basis of their experience in competition law. The sample of UK solicitors and barristers was drawn from the

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[52] P Legrand, "Against a European Civil Code" (1997) 62 Modern Law Review 44.

[53] Jurisdictions with low enforcement levels were not included because part of the point is that there are not many cases anywhere. (See Ashurst Report, supra n 4; Collective Redress in Antitrust, supra n 4.) Hence, there was a need to do the interviews in countries where the claimants are relatively active, assuming that, on the basis of their practical experience, legal practitioners (from jurisdictions with high enforcement levels) could have valuable insights to share with us.

[54] See S Salop and L White, "Private Antitrust Litigation: An Introduction and Framework" in L White (ed), Private Antitrust Litigation, New Evidence, New Learning (MIT Press, 1988) 1, 23. Case No 1077/5/7/07: Order of the Competition Appeal Tribunal – Withdrawn Claim – 11 April 2013. See also B Rodger, "Private enforcement of competition law, the hidden story: competition litigation settlements in the United Kingdom, 2000-2005", (2008) 29 European Competition Law Review 96; B Rodger, "Competition law litigation in the UK courts: a study of all cases 2005-2008: Part I", (2009) 2 Global Competition Litigation Review 93; B Rodger, "Competition law litigation in the UK courts: a study of all cases 2005-2008: Part II", (2009) 3 Global Competition Litigation Review 136.

[55] It is well established that 'private litigation is part of larger overall system consisting of four distinct phases: the business conduct of potential litigants, the suing decision of potential plaintiffs, the settlement offers of the litigants once a dispute has arisen, and the litigation strategies and expenditures of both parties if settlement cannot be reached.' Salop and White, supra n 54, 16.

[56] F Rizzuto, "Does the European Community have legal competence to harmonise national procedural rules governing private actions for damages for infringements of European Community antitrust rules" (2009) Global Competition Litigation Review 29. Compare From the Board, "Two steps forward and one step back: harmonizing the unharmonizable", (2011) 38 Legal Issues of Economic Integration 207-211.

[57] See Article 81 TFEU. See also: P Beaumont and P McEleavy, Private International Law, Anton (3rd ed, SULI/W Green, 2011) 16-17.

[58] WJ Goode and PK Hatt, Methods in Social Research (McGraw-Hill Book Company, 1952) 214.

relevant sections of the Legal 500[59] and Chambers and Partners.[60] The sample of German lawyers was drawn from the relevant sections of JUVE Handbuch.[61] From the European Commission, the sample was drawn from the relevant sections of the published personnel list. We included officials from the Legal Service within the European Commission as well as from both DG Competition[62] and Justice,[63] as the issues in the project concern both competition policy and cross-border civil justice. In England, this resulted in a list of 338 people working as European Commission officials or legal practitioners in the area of EU and competition law, and 192 individuals were randomly selected as potential participants. In Germany, the random selection resulted in a sample of the 35 most respected lawyers in the area of competition law selected as potential participants. Safeguards were observed to ensure the best possible data quality and compliance with good research practices and ethical norms.[64] 19 interviews involving 25 participants were conducted with legal practitioners in England and Wales, and 3 interviews involving 3 participants were conducted with policy-makers in Brussels from March to September 2011. 11 interviews involving 17 participants were conducted with legal practitioners in Germany from September 2011 to August 2012.[65]

[59] Legal 500, editorial on London solicitors' EU and Competition practice at http://www.legal500.com/c/london/corporate-and-commercial/eu-and-competition (last visited 21 March 2012).
[60] Chambers and Partners, list of London solicitors practicing in Competition/European Law at http://www.chambersandpartners.com/UK/Editorial/38977 (last visited 21 March 2012).
[61] JUVE Handbuch Führende Namen im Kartellrecht at http://www.juve.de/handbuch/de/2011/fuehrendenamen/24250 (last visited 6 August 2012).
[62] DG Comp personnel directory at http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=313&pDisplayAll=0 (last visited 21 March 2012).
[63] DG Justice personnel directory at http://ec.europa.eu/staffdir/plsql/gsys_www.branch?pLang=EN&pId=9151&pDisplayAll=0 (last visited 21 March 2012).
[64] Each potential participant was informed of the aims, methods, sources of funding and institutional affiliations of the researchers. Participants' informed consent was always sought before each interview; participants also signed a consent declaration. Participants were all over the age of 18 and engaged in a professional occupation, and were therefore in a position to decline a request for informed consent if they so wished. To ensure that participants could speak freely, they were also informed of the right to abstain from participation in the study or to withdraw consent to participate at any time without penalty. Every precaution was taken to respect and safeguard the privacy of each participant, and the confidentiality of each participant's information. All personal information was rendered anonymous as far as is possible and consistent with the needs of the study, and as early as possible in the data processing. Even though several participants were employed by large law firms, they could be expected to provide a fair account because of this anonymity, and their professionalism.
[65] Although some of the interviews involved more than one respondent, we decided that it would be only fair to count each interview as one case for data analysis purposes, although the separation of responses from different participants was always maintained.

In addition, the authors took account of the primary data available on the European Commission web site[66] as well as of the recent comparative data disclosed in the study requested by the European Parliament's Committee on Economic and Monetary Affairs.[67]

That said, it should be clearly noted that the so gathered empirical data will be only briefly presented in this paper with a view to producing a theoretical model, which does consider the choice of governance design of cross-border EU competition law actions by addressing the specific issues that affect the litigants' strategies. As a result, it is not the intention of this article to present the empirical data systematically as this has been done in an edited collection of papers produced within the project framework,[68] but it rather aims to consider the choice of governance design of cross-border EU competition law actions.

C. GOVERNANCE ASPECTS OF CROSS-BORDER EU COMPETITION LAW LITIGATION: MAIN CHALLENGES FOR POLICY-MAKERS

Before looking at the main issues which affect the suing decisions of potential litigants, the main challenges, which affect the governance aspects of cross-border competition litigation, will be presented. A difficult task for the EU policy-makers in the area of competition law (similarly, as the one for the EU[69] itself) is the process of creation of a European enforcement regime "which is based on the existing diversity of member states"'[70] legal orders.

The fact that the cause of action for EU competition law damages is a mixture of EU law and Member States' laws may be justified by the "political and legal reality" in the Union.[71] The latter aims to strike a balance between the requirement of consistent enforcement of EU competition law across Europe, on the one hand, and the Member States' competence in matters of procedure broadly defined to cover the issues of causation and remedies, on the other hand.[72]

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[66] See more: EUROPA – European Commission – Competition, "National Judgments" < http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/ > (last accessed 10 June 2013). See also: S. Peyer, 'Myths and Untold Stories - Private Antitrust Enforcement in Germany' (2010) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695& > (last accessed 1 May 2012).

[67] Collective Redress in Antitrust, supra n 4.

[68] See more: Danov, Becker and Beaumont, supra n 2.

[69] J Shaw, "Postnational constitutionalism in the European Union" (1999) Journal of European Public Policy 579, 586.

[70] Ibid. See more specifically: J Lawrence, "Seeking the Perfect Balance: Some Reflections on the Commission's Green Paper on Damages Actions for Breach of EC Antitrust Rules" in CD Ehlermann and I Atanasiu (eds.), European Competition Law Annual 2006: Enforcement of Prohibition of Cartels (Hart Publishing, 2007) 457, 460-476.

[71] W Van Gerven, "Of Rights, Remedies and Procedures" (2000) Common Market Law Review 501, 521.

[72] Ibid.

However, is such an approach not prone to undermine the consistent application of EU competition law across Europe? Should there be a special regime for cross-border EU competition law actions? What should be the new mode of governance in the area?

1. A Non-PIL Mode of Governance: Harmonisation of Substantive/Procedure Laws

One mode of governance would be more harmonisation (rather than the use of private international law instruments) in the area with a view to achieving "a degree of harmonisation of fundamental concepts of national civil law (both substantive and procedural)".[73] It is well established that '[t]he purpose of [Brussels I, Rome I and Rome II] is clearly the unification of private international law, not the harmonisation of the substantive laws of the Member States, on which it may be more difficult to reach agreement.'[74] However, Articles 101 and 102 TFEU, forming part of each Member State's legal order, are not only harmonised, but also at the heart of an EU competition law claim, so that the use of private international law in cross-border private antitrust proceedings may be questioned. Hence, a case for employing such a non-PIL mode of governance can certainly be made for cases where "cartel agreements or abuses of a dominant position affect inter-State commerce"[75] by pointing out that Articles 101 and 102 TFEU, forming part of each Member State's legal order are already unified.

The German Government and Bundeskartellamt "cannot discern any convincing reason for special private law and civil procedure rules for enforcing antitrust law. [...] Damages actions [...] are largely enforced on the basis of general provisions that are in many ways fundamentally different in the various Member States."[76] However, does the fact that EU competition law provisions are to be applied in a multi-level system of governance (which includes the European Commission, national competition authorities and national courts) not suggest that there is a need for a special legislative instrument to be used in this context?

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[73] Ashurst Report, supra n 4, 131.

[74] A Mills, The Confluence of Public and Private International Law (CUP, 2009) 185. See also Council of the European Union, 'The Hague Programme: strengthening freedom, security and justice in the European Union' http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf 31.

[75] W Van Gerven, "Bringing (private) laws closer to each other at the European level" in F Cafaggi (ed.), The Institutional Framework of European Private Law (OUP, 2006) 37, 66.

[76] Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on 'Damages actions for breach of the EC antitrust rules' (Courtesy Translation) < http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf > 3. See also J Kortmann and C Swaak, "The EC White Paper on Antitrust Damage Actions: Why the Member States are (right to be) less than Enthusiastic" (2009) European Competition Law Review 340

Indeed, the EU legislator has adopted a special Regulation 1/2003 which is meant to ensure that Articles 101 and 102 TFEU are applied effectively and uniformly across Europe.[77] It has been clearly stated that "in order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided."[78] If EU competition law provisions are at the heart of an EU competition law claim, then a harmonised instrument might be used to lay down the conditions for bringing EU competition law damages actions across Europe. The European Commission's proposed Directive "modifies the applicable national rules concerning the right to claim damages for infringements of […] competition law."[79] But, may the Union achieve harmonisation with regard to substantive and procedural rules with a view to setting up an effective enforcement regime?

Some commentators have noted that a legal regime for EU competition law damages actions adopted at EU level may potentially impact on the "internal coherence of [Member States' domestic] systems of private and procedural law."[80] Moreover, the diverse legal traditions and heritages of the countries forming the European Union[81] might suggest that the level of variation may remain unchanged after the adoption of such a harmonised regime in Europe. This is so because "common principles of interpretation and a common legal culture" take some time to develop.[82] It seems that this could be an issue in a Union which has recently enlarged to encompass 28 Member States.

More importantly, a harmonised instrument without an appropriate institutional structure might bring fresh uncertainty across Europe. It has been submitted that:

> "in the absence of a federal court system, it will not be possible to ensure consistent interpretation, application and enforcement of [any harmonised instrument].
> All these problems of consistency and effectiveness are, of course, exacerbated by the fact that Europe is multilingual territory."[83]

[77] See Recitals 1-8 of Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Arts 101 and 102 TFEU.
[78] Recital 22 of Regulation 1/2003.
[79] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 10.
[80] Kortmann and Swaak, supra n 76, 347.
[81] The delay may be a problem in some countries (e.g. Italy - Cooper Tire, supra n 10, [54-55] EWCA). The lack of experience of the judiciary could be a problem in other countries (e.g. Bulgaria and Romania - eg Commission (EC), 'Bulgaria's progress on accompanying measures following Accession' (Report) COM (2007) 377 final; Commission (EC), 'Romania's progress on accompanying measures following Accession' (Report) COM (2007) 378 final. See also: Reports on Progress in Bulgaria and Romania < http://ec.europa.eu/cvm/progress_reports_en.htm > (last visited 10 June 2013).
[82] T Andersson, "Approximation of procedural law in Europe" in M Storme (ed), Procedural Laws in Europe (Maklu, 2003) 55, 64-65.
[83] Collins, supra n 19, 183.

Furthermore, the study on Making Antitrust Damages Actions More Effective in the EU unequivocally indicates that exemplary damages[84] as well as the various collective redress mechanisms (any opt-out rule in particular)[85] that could be put into effect by legislative measures may result in significant harmonisation costs. It has been submitted by Kerber[86] that "collective decision-making implies large costs such as knowledge, rent-seeking problems, inefficiencies, or inflexibility."[87] In other words, one might question the effectiveness of more centralisation in the area of private antitrust enforcement by devising another legislative instrument which is the result of a compromise reached at EU level. Indeed, the recently proposed Directive clearly suggests that adoption of a unified/cenrtalised system (which might include a unified/hierarchical enforcement regime) is not on the agenda for anyone.

2. A PIL Mode of Governance: Inter-jurisdictional Regulatory Competition

Another mode of governance may be promoting regulatory competition. Such a mode of governance pre-supposes two elements. First, common principles may be set up by the EU policy-makers with a view to encouraging the Member States to legislate. Secondly, an efficient PIL regime must ensure that there is inter-jurisdictional regulatory competition in the area of EU antitrust law dispute resolution which, by definition, would affect claimants and businesses in a number of Member States. Indeed, a set of harmonised private international law rules[88] have been consistently employed by the EU legislator as a mode of governance which promotes judicial cooperation between the various Member States' legal systems.[89] The use of PIL mechanisms allows Member States to adopt different solutions. At the same time, claimants can show their preferences (by bringing their claim in one jurisdiction instead of another) promoting competition between legal orders, and fostering the learning process across Europe.[90] Such a "perspective would damn harmonisation itself as anti-competitive."[91] Weatherill has claimed that "in a geographically and functionally expanded European Union

[84] Report for the European Commission, Contract DG COMP/2006/A3/012, Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios < http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf > p 236.
[85] Making Antitrust Damages Actions More Effective in the EU, supra n 84, pp 311 and 316-317.
[86] W Kerber, "Interjurisdictional competition within the European Union" (1999-2000) 23 Fordham International Law Journal S217.
[87] Ibid S229
[88] Brussels I, Rome I and Rome II.
[89] See Art 81 TFEU. Compare: RH Graveson, "Problems of Private International Law in Non-Unified Legal Systems" in RH Graveson, Comparative Conflict of Laws: Selected Essays (Vol 1, North-Holand Publishing, 1977) 305, 306-7
[90] From the Board, supra n 56, 211.
[91] S Weatherill, "Why harmonise?" in T Tridimas and P Nebbia (eds), European Union Law for the Twenty-First Century: Rethinking the New Legal Order, Vol. 2, (Hart Publishing, 2004) 11, 14.

the establishment of common rules is not only increasingly difficult to achieve, it is also increasingly undesirable as a suppression of competitive and cultural diversity."[92] What are the aspects, which must be considered in this context? Are any of them addressed by the recently proposed Directive?

If the current litigation pattern suggests that "[t]he obstacles are mainly procedural"[93], then one should say that procedural matters are best addressed at national level as the EU legislator's intervention in these matters would bring fresh uncertainty. Indeed, the point was clearly noted by the European Commission:

> "A Directive requires Member States to achieve the objectives and implement the measures into their national substantive and procedural law systems. This approach gives the Member States more freedom when implementing an EU measure than does a Regulation, in that Member States are left the choice of the most appropriate means of implementing the measure in the Directive. This allows Member States to ensure that these new rules are consistent with their existing substantive and procedural framework"[94]

Hence, the Union policy-maker appears to believe that a national legislator may be best placed to "devise an institutional architecture of competition law enforcement [at national level] which encourages the claims, where there is really harm to the market and the process of competition, and creates safeguards against claims where companies might be using the system for a variety of purposes not necessarily beneficial to the market and the process of competition."[95] The impression that the issues are to be predominantly dealt with by national legislators across Europe is reinforced by the Commission Recommendation on collective redress which states:

> "The aim of this Recommendation is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse."[96]

Given the level of diversity across Europe, the Commission Recommendation and Directive may effectively encourage inter-jurisdictional regulatory competition in the area. However, it should be noted that a regulatory competition with regard to cross-border damages claims may be only promoted if injured parties can directly choose between damages regimes

[92] Weatherill, supra n 91.
[93] N Khan, 'Damages for breaches of competition law' at the Conference on 'Remedies for Breach of EU Law Revisited' held at King's College London on 18th June 2010 < http://ukael.org/past_events_24_1030208799.pdf > (last visited 10 June 2013). See also: Danov and Dnes, supra n 8; Kammin and Becker, supra n 8.
[94] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 12.
[95] M Danov and S Dnes, 'Private actions in competition law: a consultation on options for reform. Response form' submitted to the UK Government, Department for Business, Innovation and Skills on 24 July 2012.
[96] Recital 10 of the Proposed Commission Recommendation.

of different jurisdictions and bring their claims there by benefitting from procedural/substantive laws of the jurisdiction where the claim is brought by relying on the law of the forum (lex fori).[97]

The possibility for regulatory competition in Europe with regard to EU competition law damages claims was first signalled by the authors of the report Making Antitrust Damages Actions More Effective in the EU.[98] Although the authors of the report appear to be placing a significant importance on the applicable laws under Rome II, Article 1(3) states that the Regulation does not apply to evidence and procedure. Establishing jurisdiction in one forum rather than another would be important in so far as this would indicate the set of procedural rules which should apply in this context.[99] The significance of the law of the forum could be further strengthened by making reference to Art 6(3)(b) of Rome II which allows a private antitrust claimant to base his claim on lex fori in cases where the markets in several countries have been affected.[100] It should be noted that when one talks about EU competition law actions, it is not "competition between competition laws"[101] (as suggested by the authors of the report Making Antitrust Damages Actions More Effective in the EU[102]), but, since Articles 101 and 102 TFEU enjoy direct effect in all the Member States, it is rather promoting competition between the different jurisdictions for laying down conditions for bringing such actions. Such conditions might include, for example, the various rules related to the pre-trial discovery and the availability of opt-out collective redress proceedings and/or exemplary/punitive damages[103] as well as the speed of the legal proceedings and the experience of judges in the different jurisdictions.

Given the diverse nature of the European Union, it seems that inter-jurisdictional regulatory competition in the area of EU antitrust law dispute resolution may be best employed by the EU legislator as a new mode of governance which might produce efficient enforcement results in a multi-level system. In this way, strong jurisdictions for bringing cross-border EU competition law actions might emerge. An increased number of claims might be seen in some

[97] See Type (IV)-regulatory competition via free choice of law as described in W Kerber and O Budzinski, "Towards a differentiated analysis of competition of competition laws" (2003) ZWeR – Journal of Competition Law 411, 415.
[98] Making Antitrust Damages Actions More Effective in the EU, supra n 84, 555-556.
[99] M Illmer, "Neutrality matters—some thoughts about the Rome Regulations and the so-called dichotomy of substance and procedure in European private international law" (2009) Civil Justice Quarterly 237, 242.
[100] See more Danov, supra n 1, Ch 5. See also J. Fitchen, "The Applicable Law in Cross-Border Competition Law Actions and Article 6(3) of Regulation 864/2007" in Danov, Becker and Beaumont, supra n 2, 297-328; H Mercer, "Applicable Law in Cross-Border EU Competition Law Actions - Forum Shopping, Mandatory Rules and Public Policy" in Danov, Becker and Beaumont, supra n 2, 329-336; Basedow, Francq and Idot, supra n 2.
[101] Making Antitrust Damages Actions More Effective in the EU, supra n 84, p 611.
[102] Making Antitrust Damages Actions More Effective in the EU, supra n 84, p 611.
[103] Cardiff City Transport Services, supra n 7. Compare: Devenish, supra n 7; Albion Water, supra n 7.

Member States. But, what if there are market failures driven by externalities or lack of mobility of market participants?[104] Externalities could be one cause for market failure when it comes to inter-jurisdictional regulatory competition in the area of EU antitrust law dispute resolution in the European context. It is well established that:

> 'Weak enforcement of antitrust rules [...] in one nation may have a negative impact on the profits of foreign based producers whose products are thereby squeezed out of the market. To the extent that these spillover effects are not based on market-clearing effects, but rather driven by strategic behaviour, suboptimal results must be antiticipated. To avoid welfare losses and market distortions, such externalities must be corrected through some form of interjurisdictional collective action.'[105]

Hence, in addition to the proposed Directive, the EU intervention, on the basis of Article 81 TFEU, might be required as the cross-border implications of many EU competition law actions would make any national legislation less than effective in the EU context.[106] In particular, the inter-jurisdictional regulatory competition market would fail to address the current enforcement gap if there are high cross-border litigation costs and lack of information as to the various rules across Europe, and if there is no mobility of the consumers and SMEs, who have suffered damages as a result of an EU competition law infringement.[107] If these issues are not addressed, then the inter-jurisdictional regulatory competition would lead to economic externalities - giving rise to welfare losses and market distortions[108] - across Europe unless the EU legislator implements a new mode of governance, which pre-supposes an effective private international law regime, with a view to allowing for Articles 101 and 102 TFEU to be efficiently enforced across Europe.

Kerber and Budzinski have put forward that "[t]he working properties of regulatory competition seem to depend crucially on specific preconditions, the institutional framework for regulatory competition, and the kind of legal rules and regulations itself."[109] Whilst, the private international law framework (and its clarity) will certainly have an important role to play when it comes to selecting where to litigate (or even whether to litigate at all), the cross-border litigation costs may affect the mobility of the injured parties (or at least some of the injured parties). These costs/risks could be multiplied if the institutional framework is allowing for

[104] DC Esty and D Geradin, "Regulatory Co-Operation" in DC Esty and D Geradin (eds), Regulatory Competition and Economic Integration (OUP, 2001) 30, 32-40.
[105] Esty and Geradin, supra n 104, 34.
[106] M Danov, "Cross-Border Competition Law Cases: Level Playing Field for Undertakings and Redress for Consumers" (2014) 35 European Competition Law Review 487 – 498. See also Watt, supra n 45.
[107] Esty and Geradin, supra n 104, 34.
[108] Esty and Geradin, supra n 104, 34.
[109] Kerber and Budzinski, supra n 97, 413.

parallel proceedings with regard to the same infringement and/or if the regulator's decision establishing an infringement is not really useful in a subsequent follow-on damages claim.

Can the policy-makers achieve a level of managed harmonisation (setting up common principles and minimum standards) by relying on an effectively functioning private international law regime? An analysis of the litigants' strategies might be useful in identifying what the appropriate mode of governance is as well as in indicating the course of the potential reform. How does the current mode of governance shape the litigants' strategies? What are the main issues which affect the suing decisions of potential litigants?

D. THE CURRENT MODE OF GOVERNANCE: ISSUES TO BE CONSIDERED

As the current regime appears to be shaping litigants strategies, in this section, a brief summary will be provided of the qualitative interview data[110] which may be indicative as to the important issues which appear to be affecting and shaping the litigants' tactics under the current regime. An analysis of the current mode of governance of cross-border EU litigation appears to suggest that there are three main aspects which are seemingly important for the policy-makers to consider with a view to providing for the "effective enforcement of EU competition law".[111] First, the problems surrounding two-step adjudication structure, in which arguably a regulator is better placed to detect and establish an infringement and, subsequently, a court is better placed to award damages,[112] should be identified under the current competition law enforcement regime. Secondly, the problems surrounding the jurisdictional differences and litigants' strategies must be considered. Thirdly, the specific problems regarding consumer claims must be considered with a view to close the enforcement gap in Europe.

1. The Enforcement Pattern and Litigants' Strategies in the EU Context

In the Explanatory Memorandum accompanying the proposed Directive for antitrust damages actions, the European Commission has noted that "[t]he overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement. However, the existing legal framework does not properly regulate the interaction between the

[110] See more Danov and Dnes, supra n 8; Kammin and Becker, supra n 8.
[111] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 2.
[112] WPJ Wils, "The relationship between public antitrust enforcement and private actions for damages" (2009) 32 World Competition 3, 18 – accessible < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458 >. See more below.

two strands of EU competition law enforcement."[113] How does the current enforcement pattern affect litigants' strategies?

In an analysis of the current institutional architecture of EU competition law enforcement, Wils has noted:

> "public antitrust enforcement is the superior instrument to pursue the objectives of clarification and development of the law and of deterrence and punishment, whereas private actions for damages are superior for the pursuit of corrective justice through compensation, then the optimal antitrust enforcement would appear to be a system in which public antitrust enforcement aims at clarification and development of the law and at deterrence and punishment, while private actions for damages aim at compensation."[114]

Such a two-step adjudication process, which according to Wils[115] appears to be also adopted in the White Paper for damages,[116] would give rise to several problems in a cross-border context in Europe. In particular, the antitrust authorities across Europe would not have the resources to detect and pursue all EU competition law infringements, and, as a result, there may be an enforcement gap as the private litigation would follow-on the regulator's decision. That said, one might object to that by saying that there is no two-step adjudication model explicitly (or deliberately) devised by policy-makers in so far as Articles 101 and 102 TFEU have direct effect, and as a result the courts may well establish an infringement and award damages. Hence, there may be a need to consider the litigants' strategies which may indicate as to what is the prevailing enforcement pattern at present.

Although, the qualitative interview data appear to suggest that competition litigation is picking up in England as well as in Germany, a closer look at the collected data shows that the majority of the participants are of the view that the increase is only in respect of follow-on actions. This view re-appeared despite the fact that the interview questions were broadly drafted and there were no questions which were asking the participants whether the increase is in respect of follow-on or standalone actions. Despite this, the respondents from England and Brussels clearly stated on 13 occasions that the follow-on actions are the ones picking up;[117] so too was stated by four respondents from Germany.[118] The impression is reinforced by the most recent English case law[119] which clearly underlines that the private competition law claims are preceded by a finding of an infringement by a regulator.

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[113] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 3.
[114] Wils, supra n 112, 18.
[115] Wils, supra n 112.
[116] Commission (EC), 'White Paper on Damages actions for the breach of the EC antitrust rules', COM (2008) 165.
[117] See more Danov and Dnes, supra n 8.
[118] Kammin and Becker, supra n 8.
[119] Provimi, supra n 7; Devenish, supra n 7; JJB Sports, supra n 7; Cooper Tire, supra n 10; Pfleiderer, supra n 7; Toshiba Carrier, supra n 10; National Grid, supra n 10; Deutsche Bahn, supra n 10; Nokia, supra n 10;

The prevalent strategy employed by injured parties clearly indicates that the current enforcement pattern is characterised by a two-step adjudication. It should be noted that the respondents were asked if a person, who is adversely affected by an infringement, would launch a complaint with a competition authority or whether he would rather bring a private action and seek damages before national courts. It appears that the majority of the participants expresses the view that going to the competition authority first would be a normal strategy. This view was expressed on 14 occasions in England,[120] and on eight occasions in Germany.[121] Indeed, one respondent from Germany observed that *"[…] starting a civil law proceeding without any clear decision by any competition authority is almost impossible."* This participant even stated he has never been involved in a stand-alone action. Only one participant from Germany was not convinced that it is necessary to wait for a competition authority's decision as *"[…] you need to go to the court anyway"*. But the same respondent backtracked later on and emphasised that he *"[…] would certainly not advise a client to* file a stand-alone lawsuit with respect to hard core cartels."

Therefore, there is clearly a two-step adjudication, in which arguably a regulator is better placed to detect and establish an infringement and, subsequently, a court is better placed to award damages.[122] The current enforcement pattern affects litigants' tactics in a number of ways. First, the private litigation which occurs normally proceeds as a follow-on action based on a public enforcement action. Secondly, the defendants appear to be employing a number of delaying strategies raising preliminary issues in the course of private antitrust proceedings. If the two-step adjudication model is not functioning efficiently, then there would be a level of legal uncertainty and evidential hurdles which could be due to the institutional design.

The Commission Work Programme 2012[123] has identified that the interrelationship between private enforcement and public enforcement is an important area where a legislative measure would be needed.[124] In the Explanatory Memorandum of the proposal for a Directive on antitrust damages actions, the European Commission has recently noted that:

> "There is a significant risk that effective public enforcement by the Commission and NCAs would be jeopardised in the absence of EU-wide regulation of the interaction between public and private enforcement, and in particular of a common European rule on information from the file of a competition authority being available for the purposes of a damage action."[125]

Cardiff City Transport Services, supra n 7. Compare: Albion Water, supra n 7. See also: Emerson Electric Co v Morgan Crucible Company PLC and Ors – settled 15 April 2013.

[120] See more Danov and Dnes, supra n 8.

[121] See more Kammin and Becker, supra n 8.

[122] Wils, supra n 112.

[123] Commission Work Programme 2012 < http://ec.europa.eu/atwork/pdf/cwp2012_annex_en.pdf >.

[124] Ibid 3.

[125] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 11.

The Court of Justice decisions in Pfleiderer[126] and its subsequent application by the German court in Pfleiderer[127] and by the English court in National Grid[128] clearly show that there was a level of uncertainty as to whether all the evidence collected by a regulator is accessible to injured parties in support of their private damage claims. Moreover, Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Ltd[129] does suggest that it may be questionable whether the majority of evidence, which has been collected by the regulator, would be of great value in private proceedings.[130] Indeed, the decision of the English Court of Appeal indicates that, even in a follow-on action, an injured party does face numerous evidential hurdles. As Lord Justice Jacob noted, "the 'split' jurisdiction of regulator for infringement, tribunal for causation and assessment of damages also needs some reconsideration."[131] The problems would be multiplied in a cross-border context as the need for taking evidence by a competition authority located in one Member State may be needed with a view to supporting private competition law proceedings taking place in another Member State.[132]

In view of the foregoing, the Damages Actions Initiative may be seen as an opportunity for the EU legislator to look at the current two-step adjudication enforcement structure, and its cross-border implications. It should be noted that Recital 25 of the Proposed Directive moves in this direction by stating that:

> "To enhance legal certainty, to avoid inconsistency in the application of those Treaty provisions, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, it should […] not be possible to call into question a final decision by a national competition authority or a review court finding an infringement of Article 101 or 102 of the Treaty in actions for damages relating to the same infringement, regardless of whether or not the action is brought in the Member State of the authority or review court."[133]

However, there are several outstanding issues which might need to be carefully addressed. First, problems are bound to arise with regard to public antitrust enforcement proceedings

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[126] Pfleiderer, supra n 7.
[127] In the Pfleiderer case, "the German court ruled against disclosure of leniency documents". The High Court referred to the judgment of the Amstgericht Bonn of 30 January 2012 in the Pfleiderer case. See National Grid, supra n 10, [60].
[128] National Grid, supra n 10, [56 – 60].
[129] Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Ltd [2011] EWCA Civ 2.
[130] See more: KPE Lasok, "Some Procedural Aspects and How They Could/Should be Reformed" in Danov, Becker and Beaumont, supra n 2, 207-214; J Webber, "Observations on the Implications of Pfleiderer for Leniency Programmes" in Danov, Becker and Beaumont, supra n 2, 215-222. See more: Section E, infra.
[131] Enron, supra n 129, [149].
[132] See M Danov, "EU Competition Law Enforcement: Is Brussels I suited to dealing with all the challenges?" (2012) 61 International and Comparative Law Quarterly 27.
[133] Recital 25 of the Proposal for a Directive on antitrust damages actions. See also: Art 9 of the Proposed Directive. Compare the current framework: Arts 11–14 of Council Regulation 1/2003. See more: S Brammer, Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law (Hart Publishing, 2009).

before an NCA located in one Member State and parallel private proceedings related to the same breaches of Article 101 TFEU and/or Article 102 TFEU before a court in another Member State. Secondly, a recent comparative study[134] appears to suggest that an important question, in a cross-border context, is whether a Member State court is entitled to refuse the recognition of a decision taken by a foreign national competition authority that does not respect due process rules in its adoption.[135] While a national court would apply civil procedure rules that presuppose respect of due process, an NCA would apply administrative procedure rules that could potentially raise concerns as to the undertaking's right to a fair trial and hearing.[136]

Thirdly, even if the regulator had respected the due process rules in the adoption of its decision, the two-step adjudication process would create specific problems when it comes to imposing personal liability for EU competition law infringements in a cross-border context. In particular, Articles 101 and 102 TFEU are meant to prevent anti-competitive "activities of undertakings."[137] However, the concept of undertaking used by the regulator when establishing an infringement, and the fact that most multinational businesses would involve not a single legal entity, but groups of companies, suggests that there are specific problems which must be addressed with regard to private proceedings. In particular, whilst, "a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary"[138] would allow the Commission to impose fines on the ultimate parent company, problems would be bound to arise in private proceedings as it may be far from clear "which legal entities within a corporate group are liable for an infringement of Article 101(1) TFEU

[134] Collective Redress in Antitrust, supra n 4, 25.
[135] Danov, supra n 132.
[136] IS Forrester, "Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures" (2009) 34 European Law Review 817; J Killick and P Berghe, "This is Not the Time to Be Tinkering with Regulation 1/2003—It is Time for Fundamental Reform—Europe Should Have Change We Can Believe in" (2010) Competition Law Review 259; R Nazzini, "Administrative enforcement: judicial review and fundamental rights in EU competition law: A comparative contextual-functionalist perspective" (2012) 49 Common Market Law Review 971, 1005. See also P. Roth, "Ensuring the effectiveness of enforcement does not prejudice legal protection. Rights of defence. Fundamental rights concerns" in Ehlermann and Atanasiu, supra n 66, 627; C Harding, "Effectiveness of enforcement and legal protection" in Ehlermann and Atanasiu, supra n 66, 647; N Forwood, "Effective Enforcement and Legal Protection – Friends or Enemies" in Ehlermann and Atanasiu, supra n 66, 661; See Art 6(1) TEU. See also Art 6(1) ECHR and Art 47(2) of the Charter of Fundamental Rights of the European Union [2000] OJ C364/1. See further: J Kuhling, "Fundamental Rights" in A Von Bogdandy and J Bast (eds), Principles of European Constitutional Law, 2nd edn, (Hart Publishing, 2010) 479–514; P Craig, The Lisbon Treaty: Law, Politics and Treaty Reform (OUP, 2010) 193–245.
[137] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland and Others v Commission [2004] ECR I-123 [59]. See also: Case C-97/08 P, Akzo Nobel v Commission of the European Communities [2009] E.C.R. I-8237 [54-57].
[138] Akzo Nobel, supra n 137, [60].

and to what extent".[139] The following questions would be key elements in a cross-border context: Can an injured party sue in England a local subsidiary that is not named in the Commission's decision? Will there be a binding finding that there is an infringement by a local subsidiary that is a part of a group of companies which was found to be one infringing undertaking within the meaning of Articles 101 and 102 TFEU? Would such an action be a stand-alone action or a follow-on action? These are not academic questions, but very practical ones, which have been subject to heated debates before the English courts.[140] In particular, some of these issues were considered by the CAT in Emerson. In this case, the injured parties brought a cross-border EU competition law action against Carbone GB and several other defendants including Carbone SA. The claim was preceded by a decision of the European Commission establishing a single and continuous infringement of Article 101(1) TFEU.[141] As a result, the Commission imposed fines on a number of legal entities, including Carbone SA. However, Carbone GB was not mentioned at all in the operative part of the Commission decision which raised the question whether the finding that the parent company, Carbone SA, has infringed EU competition law is binding on the subsidiary, Carbone GB, so that it can be imputed with liability.[142] Most recently, Emerson Electric Co, Valeo SA, Robert Bosch CmBH as claimants settled with the defendants, Morgan Crucible Company Plc, Schunk GmBH, Schunk Kohlenstofftechnik GmBH, SGL Carbon SE, Mersen SA and Mersen UK Portslade Ltd, so that a level of uncertainty will remain in the area. That said, the Emerson litigation illustrates well how the current enforcement pattern and the existing level of uncertainty do shape litigants' strategies in a cross-border context in so far as the confidential settlement in question was reached, after the parties had been engaged in competition law proceedings for more than six years.[143]

Furthermore, Toshiba Carrier and others v KME Yorkshire and others[144] may be seen as yet another example which suggests that specific jurisdiction issues arise in follow-on actions

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[139] Cooper Tire, supra n 10, [47] EWCA. See more: M Danov, "Cross-Border Competition Law Cases: Level Playing Field for Undertakings and Redress for Consumers" (2014) 35 European Competition Law Review 487 – 498.

[140] e.g. Provimi, supra n 7; Cooper Tire, supra n 10; Toshiba Carrier, supra n 10; Nokia, supra n 10; Emerson Electric Co v Morgan Crucible Company PLC and Ors [2011] CAT 4.

[141] Case No C.38.359, Electrical and Mechanical Carbone and Graphite Products (2004) OJ L125/45. See also: Emerson Electric Co v Morgan Crucible Company PLC and Ors [2011] CAT 4 [47].

[142] See the transcript of the hearing before the CAT, 2-3 and 41.

[143] Case No 1077/5/7/07: Order of the Competition Appeal Tribunal – Withdrawn Claim – 15 April 2013.

[144] Toshiba Carrier, supra n 10. In this case, the claimants sought damages against the defendants, who were involved in a complex of anti-competitive agreements and concerted practices consisting of price fixing and market sharing in the industrial tubes sector. The infringement was detected and established by a decision of the European Commission which preceded the damages actions. Those named as undertakings and as legal entities in the Commission decision included KM Europa Metal AG, Trefimetaux SA and Europa Metalli SpA (i.e.

against subsidiaries that were not mentioned in the operative part of the Commission decision. In other words, any mode of governance must inter alia take account of the cross-border aspects of EU competition law infringements with a view to setting up an efficient enforcement regime. Indeed, the governance aspects of cross-border EU competition law enforcement activities would be important in view of the important jurisdictional differences which would be perceived as important by litigants in a cross-border context.

2. Jurisdictional Differences and Litigants' Strategies in the EU Context

Given the importance of the law of procedure for the litigants in EU competition law claims, the authors were particularly interested in the existence of procedural advantages for a claimant to bring his EU competition law action in one Member State rather than another. The issues are seemingly important in the light of the Explanatory Memorandum accompanying the recent Proposal for a Directive for Antitrust Damage Actions, in which the drafters have stated that:

> "Because of th[e] marked diversity of national legislations, the rules applicable in some Member States are considered by claimants to be much more suitable for bringing an antitrust damages action in those Member States rather than in others. These differences lead to inequalities and uncertainty concerning the conditions under which injured parties, both citizens and businesses, can exercise the right to compensation they derive from the Treaty, and effect the effectiveness of such right. Indeed, where the jurisdictional rules allow a claimant to bring its action in one of those 'favourable' Member States and where that claimant has the necessary resources and incentives to do so, it is thus far more likely to effectively exercise its EU right to compensation than when it cannot do so"[145]

The law of the forum of the country where the action is brought may play an important role because, as noted elsewhere,[146] the question 'whether certain evidence proves a certain fact … is to be determined by the law of the country where the question arises.'[147] The answer to this question in many cases would be pre-determined by establishing jurisdiction in the injured party's preferred forum.[148] Although Regulation 1/2003 stipulates that the burden of proving an infringement of Arts 101(1) and 102 TFEU rests on the party or the authority alleging the

companies in the KME group), Wieland-Werke AG (a company in the Wieland-Werke group) and Outokumpu Oyj (a company in the Outokumpu group). None of the named companies were domiciled in England. The claimants, however, decided to bring their actions in England against UK-domiciled anchor defendants, KME Yorkshire (a company in the KME group) as well as against Nemco and WW (UK) (companies in the Wieland-Werke group). This led to delay and heated debates while the court decided if it had jurisdiction to hear and determine the action.

[145] Proposal for a Directive on antitrust damages actions, 9.

[146] Danov, supra n 1, Ch 5.

[147] Bain v Whitehaven Rly Co (1850) 3 HL Cas 1, 19. See also: J Fawcett and J M Carruthers, Cheshire, North & Fawcett Private International Law, 14th edn, (OUP, 2008) 83.

[148] Illmer, supra n 99, 242.

infringement,[149] it does not set the standard of proof.[150] In fact, Recital 5 of the Regulation states that:

> "this Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of [EU] law."

This text could be interpreted as leaving the domestic legal system of each Member State to determine what the 'required legal standard' of proof is.[151] In other words, the standard of proof is to be determined by the law of the court where proceedings have been brought.[152] The answer to the question whether jurisdiction variations make a difference for an injured party bringing a cross-border EU competition law claim brought in an enlarged Europe was important in so far as it has been noted that "the age-old gap between the procedural families in Europe, especially the gap between the Civil Law and Common Law countries, has been reduced in size."[153]

The gathered data clearly illustrates that procedural differences matter with regard to cross-border EU competition law actions brought in the European context. In particular, as already noted, 29 respondents from England and Germany thought that injured parties could gain some procedural (and/or substantive law) advantages by bringing their claim in one jurisdiction rather than another.[154] This finds support in the case law[155] which clearly shows that issue of jurisdiction could be a subject of heated debates before the courts.[156] The most important procedural aspects can be summarised as: disclosure; speed of proceedings; and standard of proof. In particular, on 17 occasions in England and on 11 occasions in Germany, the disclosure rules were mentioned as a very important procedural aspect which could influence a claimant's decision where to bring an EU competition law action. The latter point may be strengthened by the Commission's observation that "the lack of adequate rules on the disclosure of documents […] means that [potential claimants may] have no effective access to

[149] See Art 2 of Regulation 1/2003.
[150] J. Faull and A. Nikpay, The EC Law of Competition, 2nd edn, (OUP, 2007) 95.
[151] Faull and Nikpay, supra n 150, p 95.
[152] Arts 1(3) and 22(1) of Rome II. See more: Danov, supra n 1, Ch 5.
[153] CH Van Rhee, 'Introduction' in C. H. van Rhee (Ed), European Traditions in Civil Procedure (Itersentia, 2005) 3, 22.
[154] See more Danov and Dnes, supra n 8.
[155] Provimi, supra n 7; SanDisk Corporation v Koninklijke Philips Electronics and others [2007] EWHC 332 (Ch), [2007] BusLR 705; Cooper Tire, supra n 10; Toshiba Carrier, supra n 10. See more: M Danov, "Jurisdiction in Cross-Border EU Competition Law Cases: Some Specific Issues Requiring Specific Solutions" in Danov, Becker and Beaumont, supra n 2, 167-196
[156] See J Lawrence and A Morfey, "Tactical Manoeuvres in UK Cartel Damages Litigation" in Danov, Becker and Beaumont, supra n 2, 149-158; T Reher, "Specific Issues in Cross-Border EU Competition Law Actions Brought by Multiple Claimants in a German Context" in Danov, Becker and Beaumont, supra n 2, 159-165; Danov, supra n 1.

evidence"[157] in some Member States. Also, the speed of the procedure (i.e. the time it takes for an award to be made, or for an injured party to force a settlement) was considered to be an important factor; this was submitted on 15 occasions (12 occasions in England and 3 occasions in Germany). Thirdly, the standard of proof was mentioned as a decisive factor by one participant from Germany, and as an important factor by one participant in England as well.

In view of the foregoing, one should say that the relative importance of the procedural rules reinforces the suggestion that a national legislator is best placed to address the problems. This could even allow for regulatory competition as it would be always open for the injured parties to bring their actions in the "jurisdiction judged most hospitable"[158] on the basis of jurisdictional rules under Brussels I.[159] However, this would be subject to the injured parties being able and being prepared to pay the cross-border litigation costs[160] which could, of course, be offset against a potential damages award.

The interview data clearly demonstrates that costs and damages would be other important factors to be considered in the European context. This is indeed submitted on 20 occasions in England and on eleven occasions in Germany, and is in line with literature suggesting that estimated damages are an important consideration.[161] Although data from England appears to suggest that damages would be dominated by procedure which would pre-determine what and when would be awarded,[162] the majority of respondents from England and Germany clearly state that availability of a passing-on defence would be an important consideration in a European context. The issue is indeed important in view of the Commission's submission that various "national rules on passing-on (where existing differences have major implications for the ability of direct/indirect purchasers to effectively claim damages and, in turn, for the defendant's chances of avoiding compensation for harm caused)"[163] may be regarded as an example of divergence which justifies legislative intervention at EU level.

It should be noted that all interview respondents from Germany stated that costs are an important issue to bear in mind when deciding where to bring a cross-border competition law claim as a cost-benefit analysis is the basic principle which shows whether an action is economically attractive. On 12 occasions in England, it was submitted that competition law

[157] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 9. See also: Arts 5-8 of the Proposed Directive.
[158] Weatherill, supra n 91, 14.
[159] Danov, supra n 1.
[160] Green Paper from the Commission, Legal Aid in Civil Matters: The Problems Confronting the Cross-border Litigant COM(2000) 51 final p. 9.
[161] B Cornell, "The Incentive to Sue: An Option-Pricing Approach" (1990) 19 Journal of Legal Studies 173.
[162] See more Danov and Dnes, supra n 8.
[163] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 9.

litigation is expensive. Costs can be very high in all litigation,[164] but may be especially high in competition law claims[165] where defendant companies tend to employ very expensive law firms, and where economic experts are frequently employed at considerable expense.[166] The litigation costs could be further increased if the defendants employ delaying strategies which are attractive in the current state of uncertainty with regard to cross-border EU competition law actions.[167] In Germany, on five out of eleven occasions, it was clearly stated that delaying is a strategy which can be employed by members of an infringing undertaking in a cross-border EU competition law action. In England, on 15 occasions, it has been submitted that delaying would be quite a common strategy to be employed by a defendant. However, not all preliminary matters raised by the defence are abusive: five participants from England noted that preliminary matters are often raised simply because liability, and therefore damages, often hinge on a preliminary matter.[168]

That said, the way the current legislative framework shapes the litigants' strategies may be further illustrated by the series of jurisdictional challenges[169] in follow-on actions before the English courts. A good example is the recent judgment of the UK Competition Appeal Tribunal in Deutsche Bahn AG v Morgan.[170] In this case, the claim was initiated in December 2010. Deutsche Bahn (and 29 other claimants) brought damage claims against Morgan (and 5 other defendants). The claim was preceded by a decision of the European Commission finding an infringement of Article 101 TFEU.[171] The cross-border nature of the claims can be easily sustained by putting forward that: on the claimant's side, there were originally 12 claimants established in Germany, six claimants from England,[172] five claimants from the Netherlands, two claimants from Portugal, two claimants from Italy, two from Sweden, one from Spain, and one from Norway; on the defendant's side there were three defendants from Germany, one from

[164] See C Hodges, M Tulibacka and S Vogenauer, "The Oxford Study on Costs and Funding of Civil Litigation," in C Hodges, M Tulibacka and S Vogenauer (eds.), The Costs and Funding of Civil Litigation (Hart Publishing, 2010) 3.
[165] Case No: 1178/5/7/11, 2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited. [2011] CAT 30, 14 October 2011 [17]. See also: Yeheshkel Arkin v Borchard Lines and Others [2005] EWCA Civ 655
[166] Danov and Dnes, supra n 8.
[167] e.g. jurisdictional challenges - Provimi, supra n 7; Cooper Tire, supra n 10; leniency documents: Pfleiderer, supra n 7; National Grid, supra n 10.
[168] Danov and Dnes, supra n 8.
[169] Provimi, supra n 7; Cooper Tire, supra n 10; Toshiba Carrier, supra n 10; National Grid, supra n 10; Nokia, supra n 10.
[170] Deutsche Bahn AG v Morgan [2013] CAT 18, 15 August 2013.
[171] Case C.38.359 – Electrical and Mechanical Carbon and Graphite Products [2004] OJ L125/45.
[172] Subsequently, by an order dated 19th April 2011, the CAT gave permission to one of the UK claimants to withdraw its claim.

the UK, one from Austria and one from France.[173] In the circumstances, the claim was brought under Article 6(1) of Brussels I, which is specifically designed for multi-defendant cases. It states that:

> "a person domiciled in a Member State may also be sued[,] where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

The rationale of Article 6(1) is to centralise litigation against all defendants in one Member State and avoid the risk of (potentially) irreconcilable judgments if the different actions were brought in different Member States. Since the EU competition law infringements in Deutsche Bahn AG v Morgan caused damages to claimants in a number of Member States, Article 5(3) of Brussels I was not originally pleaded as a basis for jurisdiction. The injured parties' strategy may be explained by the fact that it is well established by the English High Court that '[t]he jurisdiction based upon the place of the harmful event will be international, while the jurisdiction based upon the relevant harm will be restricted to England and Wales.'[174] In other words, the courts in England as being the place where damage was felt would only have jurisdiction for the damage that occurred here, and they would not have jurisdiction to award damages to the injured parties for the damage they had suffered in other Member States. The narrow interpretation of Article 5(3) leaves no doubt that "the claimants aimed for a United Kingdom jurisdiction against all defendants"[175] under Article 6(1) of Brussels I.

However, to rely on Article 6(1) an injured party has to establish a "good arguable case" that the English court has jurisdiction, and that the requirements of Article 6(1) Brussels I have been satisfied.[176] To this end, it must be shown that "there is a real issue between the Claimants and one of the Anchor Defendants, that is, an issue which cannot be struck out."[177] In Deutsche Bahn AG v Morgan, there was only one UK defendant, Morgan. Morgan defeated the claimants' strategy to centralise litigation in the UK by bringing an "application to have the claim against it struck out on the ground that it has been brought out of time."[178] The application, which succeeded before the Competition Appeal Tribunal,[179] was subsequently rejected by the English

[173] Case No: 1173/5/7/10 Notice of a Claim for Damages under Section 47A of the Competition Act 1998.
[174] SanDisk, supra n 150, [25]. See also Case C-68/93 Shevill v Presse Alliance [1995] ECR 415 and Danov, supra n 155.
[175] Deutsche Bahn, supra n 170 [90].
[176] Cooper Tire EWHC, supra n 10, [36]. See also Provimi, supra n 7, [46-49].
[177] Cooper Tire EWHC, supra n 10, [37]. See also: FKI Engineering v Dewind Holdings [2007] EWHC (Comm) [32].
[178] Deutsche Bahn AG v Morgan [2011] CAT 16 [12].
[179] Ibid [68].

Court of Appeal.[180] Nonetheless, the Supreme Court granted to Morgan a permission to appeal against the decision of the Court of Appeal.[181]

In the circumstances, the UK claimants had to change their tactics. In particular, they sought from the Competition Appeal Tribunal to lift the stay to their claims against the other five defendants.[182] They had to base their damage claims on Article 5(3) of Brussels I rather than Article 6(1). The UK claimants' application for a limited lifting of the stay was granted.[183] In this context, the CAT held that "[j]urisdiction is supposed to be determined swiftly and efficiently at the outset of proceedings […]."[184] With this in mind, one should say that the growing number of jurisdiction challenges before the UK courts does suggest that there are some important issues with respect to governance aspects of cross-border EU competition law claims which must be addressed head-on by the EU policy-makers.

3. Specific Aspects in Relation to Consumer Claims

The high costs, which could be fuelled by the high level of uncertainty in cross-border EU competition law proceedings,[185] may potentially deter claims brought by consumers and SMEs in so far as litigation costs/risks are important factors to be considered in claims brought by consumers and SMEs who may be prone to economise (unless they have a funding scheme in place) on the costs by bringing claims in their home states.[186] Six out of 11 interviewees from Germany thought that it would be beneficial for plaintiffs to sue in their home state. Many participants from England made a clear distinction between claims brought by consumers and SMEs, on the one hand, and claims brought by big companies, on the other hand. On nine occasions in England, it was submitted that it would be beneficial especially for SMEs or consumers to sue in their home states. The point was clearly outlined by the European Commission which has recently stated that:

> "As injured parties with smaller claims and/or fewer resources tend to choose the forum of their Member State of establishment to claim damages (one reason being that consumers and smaller businesses in particular cannot afford to choose a more favourable jurisdiction), the result of the

[180] Deutsche Bahn AG v Morgan EWCA, supra n 10 [121].
[181] Deutsche Bahn AG v Morgan < http://www.catribunal.org.uk/files/1173_Deutsche_Bahn_CoA_Order_211212.pdf > accessed November 2014.
[182] Deutsche Bahn, supra n 170 [10].
[183] Deutsche Bahn, supra n 170 [96].
[184] Deutsche Bahn, supra n 170 [44].
[185] Danov and Dnes, supra n 8.
[186] Ibid. See also C F Beckner III and A Katz, "The Incentive Effects of Litigation Fee Shifting When Legal Standards Are Uncertain," (1995) 15 International Review of Law and Economics 205, 207. See more: Danov and Dnes, supra n 8, 48.

> discrepancies between national rules may be uneven playing field as regards actions for damages and may affect competition on the markets in which these injured parties operate."[187]

Thus, the low mobility of consumers and SMEs suggest that an enforcement gap may remain in some Member States unless there is a legislative reform at EU level. Danov, Fairgrieve and Howells[188] have demonstrated some specific features of the collective redress antitrust damages actions by examining two litigation patterns as displayed in Emerald Supplies v British Airways[189] and In Re International Air Transportation Surcharge Antitrust Litigation.[190] They have noted that there are three important issues which need to be carefully considered by the policy-makers with a view to closing the enforcement gap. First, the fact that there would be multiple victims of EU competition law infringements in various countries is an important issue which needs to be carefully considered. Secondly, the numerous victims would have suffered different levels of damages, and, as a result, they may have different interests in so far as those affected by an EU competition law infringement may be up or down in the chain of distribution (i.e. passing on or absorbing the inflated price). Thirdly, consumers, who would normally absorb the loss, would be reluctant to bring such actions due to the negligible amount of damages suffered by them in comparison with the high litigation costs.[191] The difficulties have been clearly noted in Recital 31 of the Proposed Directive which acknowledges that "it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringing undertaking to prove the scope of that harm."[192]

Thus, there is certainly a case for reform. In particular, given that most EU competition law infringements are cross-border in nature (affecting consumers and businesses in a number of Member States), one could convincingly argue that that evidential hurdles and issues of binding effect of administrative decisions adopted at national level must be carefully considered by policy-makers along with the issues of litigants' mobility and the possibility for irreconcilable judgments/decisions across jurisdictions.

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[187] Proposal for a Directive on antitrust damages actions, p 9.
[188] M Danov, D Fairgrieve and G Howells, "Collective Redress Antitrust Proceedings: How to Close the Enforcement gap and provide redress for consumers" in Danov, Becker and Beaumont, supra n 2, 253-282.
[189] Emerald, supra n 7.
[190] Case No. M:06-cv-01793-CRB, In re: International Air Transportation Surcharge Antitrust Litigation MDL No 1793 (United States District Court for the Northern District of California, San Francisco Division). See < https://www.airpassengerrefund.co.uk/Documents.aspx >. See also: R Mulheron, "The Recognition, and Res Judicata Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivend*i"* (2012) Modern Law Review 180.
[191] See more: Danov, Fairgrieve and Howells, supra n 188, 262-9.
[192] Recital 31 of the Proposal for a Directive on antitrust damages actions.

E. THE NEW MODE: GOVERNANCE ASPECTS OF CROSS-BORDER EU COMPETITION LAW ACTIONS IN EUROPE

How should the Union exercise its competence? Art 5 TEU defines the limits of Union competences, and lays down the principles which should be used by the EU legislator when deciding how to exercise its competence.[193] The Explanatory Memorandum specifies that:

> "[the proposed Directive] is based on both Articles 103 and 114 of the Treaty, because it pursues two equally important goals which are inextricably linked, namely (a) to give effect to the principles set out in Articles 101 and 102 of the Treaty and (b) to ensure a more level playing field for undertakings operating in the internal market, and to make it easier for citizens and businesses to make use of the rights they derive from the internal market."[194]

However, given the cross-border implication of most EU competition law infringements, which would affect consumers and businesses in a number of Member States, the policy-makers should consider whether Article 81 TFEU, which confers the EU competence in all private international law matters with a cross-border element,[195] should not be used as an appropriate legislative basis for other legislative measures aiming to promote regulatory competition in the area of EU antitrust damages claims. The significant majority of our respondents are against a reform at EU level and in favour of a system of regulatory competition between procedural and substantive law regimes. In other words, the respondents appear to favour inter-jurisdictional regulatory competition in the area of EU antitrust law dispute resolution to attract claimants and produce efficient enforcement results. It is well established that "[i]n the absence of centrally drafted uniform rules, free movement enables regulatory competition between legal orders."[196] In view of that, one would have thought that the best way forward may be for the Union to encourage Member States to legislate on antitrust dispute resolution.[197] This also appears to be the spirit of the Proposed Directive in so far as it leaves the Member States a level of flexibility with a view to implementing the proposed measures, "while leaving room for individual Member States to go further, should they wish so".[198]

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[193] D Edward, "Subsidiarity as a Legal Concept" in P Cardonnel, A Rosas and N Wahl, Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh (Hart Publishing, Oxford 2012) 93, 97. See also Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 10-12.
[194] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 8.
[195] Beaumont and McEleavy, supra n 57, pp.16-17. See also P Craig, The Lisbon Treaty: Law, Politics and Treaty Reform (OUP, 2010) 343.
[196] J Snell, Goods and Services in EC Law: A Study of the Relationship between the Freedoms (OUP, 2002) 37.
[197] Department for Business, Innovation and Skills, Private Actions in Competition Law: A Consultation on Options for Reform, 24 April 2012. The BIS's proposed options for reform were discussed at a BIICL seminar, "Rapid-Response Seminar: Private Actions in UK competition law: BIS's proposed options for reform", British Institute of International and Comparative Law, London, 9 May 2012.
[198] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 12.

How should the EU "govern" cross-border EU competition actions? How should the EU legislator devise the relevant framework with a view to closing the enforcement gap and providing redress for those who have suffered harm as a result of an EU competition law infringement?

1. One Step Adjudication – Closing the Enforcement Gap While providing for Certainty and Consistency

As it was demonstrated,[199] a two-step adjudication process, in which arguably a regulator is better placed to detect and establish an infringement and, subsequently, a court is better placed to award damages[200] does affect the litigants' tactics. It leaves an enforcement gap in so far as the regulators across Europe would not have the resources to investigate all the EU competition law infringements.[201] The evidential hurdles in follow-on actions may be seen as a deterrent for some injured parties because a "problem arises where, in the infringement decision, the competition authority is using the facts found by it to drive a particular theory, which may cause difficulties in a follow-on action if it becomes necessary to link the infringement to the facts of the case and, more particularly, the facts relating to causation and loss."[202] Enron[203] clearly shows the "fact that an infringement has been established [by a regulator] does not show, as a necessary implication, that such damage has been caused.'[204] As already noted,[205] some specific issues,[206] which relate to the two-step adjudication process were put forward in Pfleiderer[207] and National Grid[208] which may be seen as yet another evidence that it may be very difficult for an injured party in a follow-on action to prove that the cartel caused him loss.[209] Although injured parties appear to believe that leniency material would be valuable to them, Webber shows that "the file of evidence held by the Commission (including the leniency material) was not compiled for this purpose and may therefore be of limited value"[210] in a follow-on action. In other words, there is a strong case that the institutional architecture of antitrust enforcement

[199] See Section D supra.
[200] Wils, supra n 112.
[201] Burrows and Gilbert, supra n 8, 182.
[202] Lasok, supra n 130, 209.
[203] Enron, supra n 129.
[204] Ibid [130].
[205] See Section D, supra.
[206] See Art 6 of the Proposed Directive.
[207] Pfleiderer, supra n 7.
[208] See National Grid, supra n 10, [56 – 60].
[209] Webber, supra n 130.
[210] Ibid 221.

may need to be revamped, in order for the EU legislator to close the enforcement gap, which appears to exist at present, and to provide for consistent and efficient enforcement of EU competition law provisions across Europe.[211]

Difficulties would often arise with regard to the parallel proceedings before a regulator, and a national court.[212] Bos and Möhlmann[213] have submitted that if a national court stays its proceedings until the decision of the European Commission (or a ruling given on it by a European Court) has become final and binding, then that national court would delay the adjudication on such a case for several years. It has been argued that a national court should aim to safeguard the rights of the litigants to have the case determined within a reasonable period of time in compliance with Article 6(1) of the European Convention on Human Rights.[214]

Also, given the cross-border nature of most EU competition law infringements, further issues are bound to arise because Regulation 1/2003 does not deal with the problem of coherent and uniform application of EU competition law in proceedings before an NCA located in one Member State and private EU antitrust law proceedings related to the same breaches of Article 101 TFEU and/or Article 102 TFEU before a court in another Member State. As noted above,[215] the Union legislator has identified some of the problems in the proposed Directive, and, as a result, Article 9 addresses some of the problems in follow-on actions. However, there are some issues which need to be carefully considered. In particular, problems are bound to arise in parallel proceedings (as opposed to follow-on actions) since potentially irreconcilable decisions on the same (or a related) EU competition law issue by an English court, for example, and a foreign competition authority should be avoided.[216] Furthermore, as already submitted,[217] proceedings before an NCA could potentially raise concerns as to the undertaking's right to a fair hearing.[218] Nazzini has argued that 'the current EU competition enforcement regime, which is characterized by an administrative decision-maker with no guarantees of independence and impartiality and deferential judicial review, is unconstitutional.'[219] In view of that, mechanisms

[211] See more: M Danov and F Becker, "The Way Forward: A Strong Case for Reform at EU Level" in Danov, Becker and Beaumont, supra n 2, 407-420.
[212] See Case C-344/98 Masterfoods v HB Ice Cream [2000] ECR I-11369; Case C-199/11 Europese Gemeenschap v Otis NV and Others, Judgment of Grand Chamber of 6 November 2012. See also: Nokia, supra n 10.
[213] P Bos and J Möhlmann, "Mastering Masterfoods: food for thought on staying civil damages litigation pending appeals before the European Courts" in Danov, Becker and Beaumont, supra n 2, 197-207.
[214] Ibid.
[215] Section D, supra
[216] Danov, supra n 127.
[217] See Section D, supra.
[218] Forrester, supra n 136; Killick and Berghe, supra n 136.
[219] Nazzini, supra n 136, 1005.

allowing for some form of consolidation of the two sets of proceedings before national courts[220] might be desirable as the national courts would be best placed to be a major venue for competition law actions, if adequately supported by the NCAs and the European Commission.

Judge Pelikánová[221] addresses the problems by suggesting that the legislator should "leave to the European Commission solely the inquiry, with the duty to introduce a criminal or civil action before the Court. The system would better fulfil the requirements of the ECHR".[222] Indeed, an one-step adjudication regime might be necessary if the EU legislator aims to provide an "effective remedy"[223] for those who have suffered harm as a result of an EU competition law infringement. As noted elsewhere,[224] it may be far from efficient to have one set of proceedings before an NCA in order to establish a breach of competition law, and another set of proceedings before Member State courts in order for a claimant to prove that damage has been caused to him.[225] The procedural inefficiencies of the current two-step adjudication (i.e. before the regulator, and before the courts) increases uncertainty, which can fuel litigation costs, and could fly in the face of Article 47(1) of the Charter of Fundamental Rights.

An one-step adjudication regime may be useful with a view to addressing the problems before the courts in follow-on actions brought against defendants, who, despite being a part of an infringing undertaking, are not named in the operative part of the Commission's infringement decision (i.e. dispositif).[226] Moreover, the consolidation of proceedings before the national courts may be necessary if the EU legislator wants to make sure that the extent to which a company has made redress is taken into account by the competent authorities when determining what level of fine to impose.[227] There is no scope for offsetting fines and damages in the current system.[228] A public enforcement action would normally precede a damages action. The level of damages would be far from certain at the stage when an authority decides on the level of fines. Similarly, in a follow-on action, the court is supposed to award damages which would compensate the victim/s irrespective of the fine imposed by the competition

[220] Compare: BIS Consultations, supra n 193, [241-243].
[221] I. Pelikánová, "The General Court and its role in EU competition law cases" in Danov, Becker and Beaumont, supra n 2, 103-107.
[222] Ibid 104.
[223] See Art 47(1) of the Charter of Fundamental Rights.
[224] See Danov and Dnes, supra n 8.
[225] See M Danov and F Becker, "Concluding Remarks: Promoting Regulatory Competition - Issues to be Addressed" in Danov, Becker and Beaumont, supra n 2, 81-93. See also: KW Dam, "Class actions: efficiency, compensation, deterrence, and conflict of interest" (1975) 4 Journal of Legal Studies 47, 48.
[226] See Emerson Electric Co v Morgan Crucible Company PLC and Ors [2011] CAT 4 [38].
[227] S Dnes, "An Economic Approach to Remedies in Private Competition Claims" in Danov, Becker and Beaumont, supra n 2, 337-355. See also: question 30 of the BIS consultations, supra n 193.
[228] Danov and Dnes, supra n 95.

authority. This clearly shows that there is limited scope for consolidation of the fines and the damages in the current system, and consolidating both procedures before the national courts might be a good way to achieve this.[229] One might question the desirability of consolidating the proceedings by putting forward that the objective of the fine (i.e. punish and deter) is different from the objective of the damages (i.e. compensation). However, in response to this, it might be suggested that an efficient enforcement policy would presuppose for all enforcement objectives (i.e. injunctive; punitive; compensatory)[230] to be adequately pursued in consolidated proceedings. In other words, there seems to be a strong case that an efficient regime, which allows for all enforcement objectives to be pursued in one set of proceedings rather than in two sets of proceedings, might be the more appropriate way forward.

The foregoing issues must be addressed head-on in Regulation 1/2003. A revised version of Regulation 1/2003 may also address the issue of taking evidence by a foreign NCA in support of private proceedings in a Member State. Indeed, the question of whether a Member State court could request evidence from another Member State's competition authority in support of private proceedings in the former would have to be addressed by the Union legislator.

However, how to provide redress for consumers in a cross-border context, bearing in mind the high litigation costs and the negligible amount of damage they may suffer across Europe?

2. Effective Remedy in a Cross-border Context: Addressing the Low Mobility of Consumers and SMEs and Centralising Litigation

The recently proposed Commission Regulation states that "[a]ll Member States should have collective redress mechanisms at national level for both injunctive and compensatory relief, which respect the basic principles set out in this Recommendation."[231] As already noted,[232] the importance of the procedural aspects of the EU competition law claims brought by consumers (or on behalf of consumers) indicates that national legislators are best placed to deal with the specific problem. In this context, "Member States should ensure that the collective redress procedures are fair, equitable, timely and not prohibitively expensive."[233] Similarly, the need for a legislative intervention had been identified already by the UK government. Following the

[229] Ibid.
[230] See more: Komninos, supra n 3, 7.
[231] See Section I(2) of the Proposed Commission Recommendation.
[232] See Section D, supra.
[233] See Section I(2) of the Proposed Commission Recommendation.

submission of the responses by members of the public, in January 2013, the UK government "decided to introduce **a limited opt-out collective actions regime, with safeguards, for competition law, with cases to be heard only in the Competition Appeal Tribunal**."[234] However, the cross-border nature of most European competition law infringements, in which damages would often be suffered by businesses and consumers in a number of jurisdictions, could complicate the picture.[235] Bearing this in mind, "[t]**he Government has therefore decided that the 'opt-out' aspect of a claim will only apply to UK-domiciled claimants** […]."[236] The Consumer Rights Bill,[237] brought forward a proposed amendment to Competition Act 1998, and went on specifying that:

> '"Opt-out collective proceedings" are collective proceedings which are brought on behalf of each class member except—
>
> (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
>
> (b) any class member who—
>
> (i) is not domiciled in the United Kingdom at a time specified, and
>
> (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings."[238]

An opt-in regime applicable to out of jurisdiction claimants might appear to be in line with the proposed Commission Recommendation which states that:

> "The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). Any exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice."[239]

However, an opt-in regime applicable to out of jurisdiction claimants may be problematic in a cross-border context because, as argued elsewhere, "the adoption of the opt-in regime in respect of a plaintiff's class domiciled in another Member State […] will inevitably lead to parallel collective redress proceedings, pending before different Member State courts, in respect of the same infringement raising similar issues of fact and law."[240] Having a number of Member State courts seised with related EU competition law actions, which raise similar issues of fact and law, would fly in the face of the aim of the Union legislator to "ensure the effective

[234] A Consultation on Options for Reform – Government Response, supra n 4, [5.13] (bold font used in the original).
[235] Danov and Dnes, supra n 95; Danov and Dnes, supra n 8.
[236] A Consultation on Options for Reform – Government Response, supra n 4, [5.57] (bold font used in the original).
[237] HL Bill 029, 2014-15.
[238] Section 47B(11) of the Proposed Amendment to the Competition Act 1998
[239] Section 21 of the proposed Commission Recommendation.
[240] M Danov, "The Brussels I Regulation: Cross-border collective redress proceedings and judgments" (2010) 6 Journal of Private International Law 359, 380.

enforcement of the EU competition rules"[241] because the high level of uncertainty, which fuels litigation costs at present, would persist in cross-border actions. Indeed, Section 17 of the proposed Commission Recommendation states that:

> "The Member States should ensure that where a dispute concerns natural or legal persons from several Member States, a single collective action in a single forum is not prevented by national rules on admissibility or standing of the foreign groups of claimants or the representative entities originating from other national legal systems."[242]

Therefore, there is a strong case that the UK government proposal introducing an opt-in regime applicable to out of jurisdiction claimants might need to be modified in the light of the proposed Recommendation. The low mobility of consumers might be an important factor to be considered when devising an effective enforcement regime with a view to promoting inter-jurisdictional regulatory competition. In particular, an opt-out regime applicable to out of jurisdiction claimants, adopted by a Member State, might be necessary to provide an "effective remedy" within the meaning of Article 47(1) of the Charter of Fundamental Rights for consumers from across Europe. Also, such a solution might create incentives for defendants to settle and achieve finality with a large number of businesses and consumers (i.e. speedy and efficient dispute resolution). In other words, an effective enforcement regime should take account of the cross-border nature of EU competition law infringements, and the fact that groups of companies engage in anti-competitive conduct through their subsidiaries in a number of Member States. How to devise an effective redress mechanism which is to be applied in the European context?

It is well established that consumers may suffer damage as direct or indirect purchasers. Danov, Fairgrieve and Howells[243] illustrate that "a gatekeeper can be a major help in organising consumers" due to the high litigation costs and negligible amount of antitrust damages suffered by the numerous individual consumers across Europe. If the consumers in question are direct purchasers, then consumer associations would be best placed to organise consumers and bring representative actions aggregating numerous relatively small damage claims on behalf of the consumers on an opt-out basis. However, even if an opt-out regime were introduced, the consumer associations may not be well placed to bring EU competition law damages claims in cases where "consumers do not buy directly from manufacturers but instead from middlemen".[244] In particular, there may be evidential hurdles in claims brought on behalf of

[241] Explanatory Memorandum - Proposal for a Directive on antitrust damages actions, 2.
[242] Section 17 of the proposed Commission Recommendation.
[243] Danov, Fairgrieve and Howells, supra n 188, 261; See also: JJB Sports, supra n 7; International Air Transportation Surcharge Antitrust Litigation, supra n 186. Emerald , supra n 7.
[244] RA Posner, Economic Analysis of Law, 8th edn (Wolters Kluwer 2010) 419 – 420. See more: Danov, Fairgrieve and Howells, supra n 188, 270.

consumers as many of them may not keep their sale receipts, for example. The "evidential difficulties (in the sense that it may be difficult to prove to the satisfaction of the court the facts that do exist, or would have existed in the 'no cartel' world)"[245] have been put forward before the High Court by counsel in Devenish[246] where the claims were brought by companies. The evidential hurdles in claims by consumers would be exacerbated by the difficulties caused by the fact that the damage suffered by an individual consumer may be very difficult to ascertain as its amount may indeed be negligible in some cases.[247] For example, this appears to be the case in Emerald.[248] If one assumes that the claimants, who were cut flowers' importers, have passed the overcharge down to the end buyer of a bouquet of cut flowers, then it would be far from easy to ascertain how much of the price of the bouquet was increased as a result of the overcharge, in order for it to be claimed back by the individual consumers. Another case which may be used to illustrate the difficulties is Devenish. If one assumes that the cartel-induced overcharge in selling a unit of vitamins to Devenish Nutrition was £40[249] and the cartelised product was purchased by them to manufacture speciality products for the intensive livestock sector, then how much of the cartel-induced overcharge contributes to the raised price which is ultimately paid by the end consumer?[250] It is beyond doubt that if a claim is brought by the end consumer, then "the non-assessable cost of responding to discovery and the like will substantially erode, if not exceed, any recovery."[251]

Bearing in mind that, due to high litigation costs, it is the large companies that generally appear to be bringing EU competition law damages actions, it has been suggested that one way of closing the enforcement gap in Europe would be to allow large purchasers, for example, to aggregate claims on behalf of purchasers down the chain of distribution (including end consumers).[252] Such a solution would not only address the passing-on problems (as identified by the Commission),[253] but it also would allow large companies to aggregate claims on behalf of consumers of a cartelised product and/or consumers who are paying a monopoly price. In such cases, a gatekeeping role will be performed by the judges who would exercise judicial control over the cases at the certification stage. The volume of sales of the large purchasers,

[245] Devenish, supra n 7, [23].
[246] Devenish, supra n 7, [23-32].
[247] M Handler, "The shift from substantive to procedural innovations in antitrust suits - the twenty-third annual antitrust review" (1971) 71 Columbia Law Review 1, 9.
[248] Emerald, supra n 7. See more: Danov, Fairgrieve and Howells, supra n 188, 267-8.
[249] See the example given by Tuckey LJ in Devenish, supra n 7, (CA) [151].
[250] These difficulties were noted by an interview respondent.
[251] Handler, supra n 240, 9. See more: Danov, Fairgrieve and Howells, supra n 188, 267-8.
[252] Danov, Fairgrieve and Howells, supra n 188, 270. See also: Danov and Dnes, supra n 95.
[253] See Recitals 30 and 31 as well as Arts 12 – 15 of the Proposed Directive.

who have opted into the collective redress proceedings, can be an objective criterion in assessing their adequacy to act as representatives of the end consumers who would be involved on an opt-out basis. Such a proposal inter alia would address some of the problems regarding the passing-on defence.[254] To this end, it would be essential to have an appropriately devised certification regime which requires a judge to identify the Member States where the businesses (or the consumer associations) that have opted in to the action operate and direct their activities to. For example, if the action was brought by a large purchaser, then the courts may certify that the opt-in direct purchasers are suitable representatives of the claimants from several Member States by identifying the volume of their sales (or the sales of their subsidiaries) in the countries in question. In other words, the volume of sales of the businesses, which have opted into the collective redress proceedings, can be an objective criterion in assessing their adequacy to act as representatives of the end consumers from the Member States in which, for example, a cartelised product has been sold.[255] How to address the low mobility of consumers and SMEs, which, due to the high cross-border litigation costs, may defeat any regime that aims to promote regulatory competition?

Once an effective redress mechanism had been implemented, the issue of mobility of large purchasers (and consumer organisations) could be addressed by an appropriately drafted private international law mechanism which would be best incorporated in Regulation 1/2003. Although it would be difficult to elaborate a special basis for jurisdiction which requires a substantial connection between the breach of Articles 101 and 102 TFEU and the effects of the anti-competitive agreement or conduct within the territory of the Member State where the action is brought and in respect of which the EU antitrust law claim is brought,[256] there is a need for a jurisdiction rule which allows an injured party to centralise litigation against a group of the same companies before the courts at his preferred jurisdiction. Where, for example, there is a corporate group with numerous subsidiaries (all of whom form a single infringing undertaking), then it should be open for an injured party by establishing jurisdiction against one of the subsidiaries to centralise litigation against the whole group of companies as well as against the other group/s of companies who were party to the same anti-competitive agreement. This could be justified by the fact that EU competition law infringements would often directly and substantially affect the markets in several countries and/or regions.[257]

[254] See more: Danov, Fairgrieve and Howells, supra n 188, 269-73. See also Danov and Dnes, supra n 8; Danov and Dnes, supra n 95.
[255] Danov, Fairgrieve and Howells, supra n 188, 278.
[256] Danov, supra n 1.
[257] See more: Danov, supra n 155; Danov, Fairgrieve and Howells, supra n 188.

Such a broad jurisdiction rule must be accompanied by appropriately drafted rules which allow the parties to avoid parallel EU competition law proceedings, and centralise litigation before the court that is clearly appropriate to deal with the case, avoiding the problem of irreconcilable or inconsistent judgments. Indeed, ensuring finality of judgments presupposes an appropriately designed mechanism which allows the parties to avoid parallel EU competition law. In view of that, Regulation 1/2003 should go a step further and allow the court first seised to stay proceedings, in cases where the agreement or practice has no substantial direct effects (whether actual or foreseeable) on competition within the Member State and where another court is better placed to deal with the case.[258] Although such a rule could work well in theory, the proposed solution in practice may bring even more uncertainty unless there are clear criteria for the courts on the basis of which they can exercise their discretion. If the Union legislator decides to promote regulatory competition, then procedural laws, experience of judges, potential delays as well as heads of damages and remedies could perhaps be considered as relevant criteria in the context of parallel proceedings with a view to closing the enforcement gap in Europe.

Another specific issue, which needs to be addressed by the EU legislator in a revised version of Regulation 1/2003, concerns the preclusive effects of opt-out collective redress judgments/settlements.[259] An appropriate solution[260] would be to hold that the recognising court should apply a presumption that the opt-out collective EU competition law redress regimes of other Member States are compliant with Article 6(1) of the Human Rights Convention as well as with Article 47(2) of the Charter of Fundamental Rights of the European Union.[261] Indeed, such an approach might find support in Article 47(1) of the Charter of Fundamental Rights of the European Union which states that "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy […]".[262] Hence, the

[258] Compare the European approach in respect of allocation of cases between the NCAs. See the Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43 [8]. See further Danov, supra n 1, 281–83.

[259] See Art 37(3) and Art 48 of the Commission Proposal for a Brussels I Regulation COM (2010) 748 final. Compare: Art 37 of the amended text of the Commission recast proposal - 10609/12 ADD 1 of 1 June 2012. See more: Danov, Fairgrieve and Howells, supra n 188, 279-80.

[260] A less appropriate solution would be to adopt the opt-in regime in respect of the claimant's class domiciled in another Member State. The latter approach would not solve all problems due to the low mobility of consumers across Europe, and the low number of collective redress proceedings in the overwhelming majority of the Member States.

[261] Compare Maronier v Larmer [2002] EWCA Civ 774, [2003] QB [25]. Criticised by JJ Fawcett, "The impact of Art 6(1) of the ECHR on private international law" (2007) 56 International and Comparative Law Quarterly 1.

[262] Regarding the implications of Art 47(1) of the Charter of Fundamental Right, see D Tzakas, "Collective Redress Proceedings: Specific Issues Regarding Jurisdiction and Choice of Law" in Danov, Becker and Beaumont, supra n 2, 223-252.

European Commission's efforts to close the enforcement gap, which would be important for Europe to achieve sustainable economic growth, as well as the policy-makers' impetus to provide redress for those, who have suffered damages as a result of an EU competition law infringement, by encouraging collective redress antitrust proceedings in Europe might be strong arguments favouring the proposed approach.[263]

Therefore, there is a strong case that an efficient EU private international law regime would be crucial to devising an appropriate governance mode and providing effective remedies for victims of EU competition law infringements in a cross-border context.

F. CONCLUSION: OTHER ISSUES TO BE ADDRESSED IN A BROADER EUROPEAN CONTEXT

The European Commission's package of legislative proposals may be regarded as an important step towards the creation of an effective EU competition law enforcement regime in Europe. Given the diverse nature of the European Union and in the light of the proposed Directive, it seems that a private international law mechanism which promotes inter-jurisdictional regulatory competition in the area of EU antitrust law dispute resolution may need to be employed by the EU legislator as a new mode of governance which might produce efficient enforcement results in a multi-level system of governance. Also, one-stop adjudication must replace the current two-step adjudication enforcement regime, in which arguably a regulator is better placed to detect and establish an infringement and, subsequently, a court is better placed to award damages.[264] Although, the proposed Directive and the relative importance of the procedural rules might suggest that a national legislator could be best placed to address the problems, the low mobility of consumers and SMEs, which may defeat any regime that aims to promote regulatory competition, must be addressed by appropriately drafted private international rules which should be incorporated in Regulation 1/2003.

Whilst Regulation 1/2003 could address the specific competition law problems, employing a private international law instrument in the context of cross-border EU competition law enforcement would suggest that an institutional reform, which might consider the role of the EU courts, would need to be considered in a wider context. The need for such a reform was first signalled by a Report by the Working Party on the Future of the European Communities'

[263] Danov, Fairgrieve and Howells, supra n 188, 279-80.
[264] Wils, supra n 108.

Court System.[265] The report clearly stated that '… the Working Party considers that preliminary questions concerning judicial cooperation should be withdrawn from the Court of Justice and assigned to a Community court with members drawn from specialist private international lawyers.'[266] Similarly, Hill has submitted that: 'The suggestion that, within the ECJ, there should be established a specialist chamber (of PIL experts) to deal with references under the Brussels I Regulation (and other PIL instruments) has been knocking around for well over 30 years. Such reform is seriously overdue.'[267] The current institutional architecture might need to be reviewed if the EU legislator decided to employ a more sophisticated private international law mechanism when allocating jurisdiction and identifying the applicable law in cross-border private EU competition law actions, which seem to pose particularly acute problems under the current system.[268]

Indeed, the increased importance of private international law for disputes in civil and commercial matters, which may affect businesses, consumers and families, raises concerns as to the costs of cross-border litigation as well as to the uniform application of the various private international law instruments across the Member States within the EU. This could potentially undermine the rule of law because the high costs and the high level of uncertainty could adversely affect cross-border claimants' litigiousness as a number of injured parties may believe that the risks of litigation outweigh the benefits.[269] Such an outcome would fly in the face of the Stockholm Programme which aims to create "a Europe of law and justice".[270] An important hypothesis, which needs to be investigated by a cross-border research consortium, is that the increased reliance on harmonised private international law instruments in the EU indicates that the preliminary references seeking their interpretation should go to a special European Court or a specialised chamber of the Court of Justice.[271]

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[265] Report by the Working Party on the Future of the European Communities' Court System' (Working Party for the European Commission, January 2000), 34-35 at http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf (accessed 5 November 2014).
[266] Ibid 33.
[267] J Hill, 'Comments on the Review of the Brussels I Regulation' at http://conflictoflaws.net/2009/brussels-i-review-jonathan-hill/ (accessed 5 November 2014).
[268] Provimi, supra n 7; SanDisk, supra n 150; Cooper Tire, supra n 10; Toshiba Carrier, supra n 10. See more Danov, supra n 121.
[269] Danov and Dnes, supra n 8. See also JA Ordover, "Costly litigation in the model of single activity accidents" (1978) 7 Journal of Legal Studies 243; See S Shavel, "Suit, settlement and trial: A theoretic analysis under alternative methods for the allocation of legal cost" (1982) 11 Journal of Legal Studies 55; S Shavel, "The social versus the private incentives to bring suit in a costly legal system" (1982) 11 Journal of Legal Studies 333; HSE Graville, "The Efficiency Implications of Cost Shifting Rules" (1993) 13 International Review of Law and Economics 3; Beckner III and Katz, supra n 182.
[270] The Stockholm Programme – An open and secure Europe serving and protecting the citizens 21.
[271] Thankfully the EU Civil Justice Programme has funded a research consortium, led by Professor Beaumont from the University of Aberdeen, to inter alia investigate these issues as a part of a broader research study which is being undertaken between 2014 and 2016.