The Case for Harmonising Fault in Private Enforcement of EU Competition Law

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Competition law; Damages; EU law; Fault; Harmonisation; Member States; Private enforcement; Right to fair trial; Strict liability; Tortious liability

Introduction

It is widely accepted that an undertaking's fault is not required to find an infringement of EU competition rules.[1] Nevertheless, having regard to the principle of *nulla poena sine culpa*,[2] the imposition of fines has been made subject to intent or negligence of an accused undertaking.[3] Overall, these circumstances for requiring fault in public enforcement cases have not been a widely discussed topic in academic literature, and fault was rarely touched upon in the case law of the Court of Justice.[4]

With the advent of private enforcement of competition law, however, has come an opportunity to re-visit the concept of fault as it travels from public to private enforcement. Competition law damage typically concerns non-contractual liability,[5] and will in such circumstances be subject to tort law. However, in tort law, the necessity to establish fault of the tortfeasor is by no means uncontroversial.[6] Discussions have been raging amongst private law scholars on whether fault should (not) be a prerequisite for extra-contractual liability since time immemorial.[7] Moreover, it has been well documented how views of fault as a requirement for tortious liability differ across countries: where French tort law for instance is oriented towards distributive justice and thus relies on strict liability, English tort law is oriented towards corrective justice and therefore reluctant towards strict liability.[8] Even on the level of semantics there are great differences in the detail of definitions of fault across countries: while the French Civil Code contains no formal definition of fault at all, the German Civil Code defines multiple formal sub-divisions of fault.[9]

The Damages Directive[10] was the first legislative step towards the harmonisation of private enforcement rules across the EU, and yet the Member States have been left with considerable room for variations in setting out detailed rules governing private claims for damages.[11]

One of the issues which was left outside the scope of the Damages Directive is the harmonisation of a fault standard for an accused party. Given the different views on fault across the EU as described above, this is altogether unsurprising. As a consequence, the Damages Directive left to the procedural autonomy of Member States whether fault of the defendant in a competition law damages suit was presumed, rebuttable or needed to be proven in order to claim damages following a competition law infringement by the defendant. This outcome has been criticised in the literature immediately following the implementation process of the Damages Directive in the Member States, as it would contribute to an unequal playing field for private enforcement of competition law across Member States.[12]

This article scrutinises the effects of not harmonising fault requirements in the Damages Directive and discusses the necessity and practical implications of harmonisation of fault in private enforcement of competition law. With the dust of the implementation of the Damages Directive settled, we address the currently diverging fault

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[1] See for example, Commission Staff Working Paper, Annex to the "Green Paper: Damages Actions for Breach of the EC Antitrust Rules" (Green Paper) COM(2005) 672 Final, p.31.

[2] Michael J. Frese, *Sanctions in EU Competition Law: Principles and Practice* (Hart Publishing, 2014), p.88.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1, art.23.

[4] See, for example, *Hoffmann-La Roche & Co AG v Commission of the European Communities* (85/76) EU:C:1979:36; [1979] 3 C.M.L.R. 211; [1980] F.S.R. 13 at [91]; *Bundeswettbewerbsbehorde v Schenker & Co AG* (C-681/11) EU:C:2013:404; [2013] Bus. L.R. 1176; [2013] 5 C.M.L.R. 25.

[5] David Ashton, *Competition Damages Actions in the EU: Law and Practice*, 2nd edn (Edward Elgar Publishing, 2018), pp.31–34; see also Sylvane Piollot-Peruzetto and Dominika Lawnicka, "Relevance of the Distinction between the Comtractual and Non-Contractual Spheres" in Jürgen Basedow, Stéphanie Francq and Laurence Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing, 2012).

[6] Janno Lahe, "Forms of Liability in the Law of Delict: Fault-Based Liability and Liability without Fault" (2005) 10 *Juridica International* 60.

[7] See, e.g. Nathan Isaacs, "Fault and Liability" (1918) 31 954.

[8] Pieter De Tavernier and Jeroen Van der Weide, "Harmonising Tort Law: Exploring the Concept of Fault" in C.G. Breedveld-de Voogd et al (eds), *Core Concepts in the Dutch Civil Code: Continuously in Motion* (Wolters Kluwer, 2016).

[9] Helmut Koziol (ed.), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag, 2015).

[10] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L349/1.

[11] Anna Piszcz, "Room to Manoeuvre for Member States: Issues for Decision on the Occasion of the Transposition of the Damages Directive" (2017) 1 *Market and Competition Law Review* 81; Magnus Strand, "Labours of Harmony: Unresolved Issues in Competition Damages" (2017) 38 *European Competition Law Review* 203.

[12] Barry Rodger, Miguel Sousa Ferro and Francisco Marcos, "Transposition: Key Issues and Controversies" in Barry Rodger, Francisco Marcos and Miguel Sousa Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2019), p.440; Giorgio Monti, "Liability Issues Not Codified by the Damages Directive: How to Fill Such Gaps?" in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Edward Elgar Publishing, 2018).

requirements for private enforcement across Member States, and demonstrate how this divergence both creates barriers to private enforcement and induces forum shopping for plaintiffs. This is particularly apparent in case of standalone private suits and follow-on claims following Commission decisions absent fines.

Given the adverse effects of diverging fault requirements across Member States, we weigh two possible options to harmonise fault in private enforcement of competition law: (1) harmonising strict liability and (2) harmonising a rebuttable presumption of fault. We conclude that harmonisation of a rebuttable presumption of fault in private enforcement of competition law is preferable, as it both affords stronger fundamental rights protection and is more in line with the case law of the Court of Justice of the European Union (CJEU).

The present research proceeds by first considering fault in public enforcement of competition law in relation to the right to a fair trial under the European Convention on Human Rights (ECHR). Second, it is investigated how the concept of fault relates to claims for damages in private enforcement proceedings. This will involve a recounting of legislative drafting of the Damages Directive vis-à-vis fault, followed by an exploration of how consequently a divergence of fault standards in private enforcement of competition law has emerged across Member States. We finally consider the two options for harmonisation of fault in private enforcement of competition law: strict liability or a rebuttable presumption of fault.

Fault in public enforcement

Public and private enforcement of Competition Law are considered an integral whole of competition law enforcement.[13] Public enforcement of competition law has long been the bedrock of competition law enforcement, and is subject to a more elaborate history than private enforcement. In order to understand how fault relates to private enforcement, it is thus worthwhile to first assess fault in public enforcement. Indeed, the fault standard in public enforcement of competition law follows from fair trail provisions under ECHR.

In *Engel*[14] and *Jussila*[15] the European Court of Human Rights (ECtHR) held that the severity of a sanction correlates with the level of fair trial protection and procedural guarantees provided by art.6 ECHR. Accordingly, since the European Commission has a power to apply different measures for infringements of art.101 and/or 102 of the Treaty on the Functioning of the European Union (TFEU) in terms of their severity, it should follow that the more severe the sanctions are, the more protection of fair trial should be provided in such proceedings.

Article 23 of Regulation 1/2003, which regulates the imposition of fines, expressly states that to do so the Commission has to determine an infringement to have been committed either intentionally or negligently. By contrast, art.7(1), which enables the Commission to impose behavioural or structural remedies, does not set a similar fault requirement. Such a difference can be explained as follows: fines for infringements of EU competition rules are of a severe and deterrent character,[16] which is one of the criminal sanctions criteria identified in *Engel*. In comparison, Recital 12 of Regulation 1/2003 expressly mentions that the purpose of the Commission's power to impose behavioural or structural remedies is to bring an infringement to an end. These provisions suggest that the legislator raised a higher proof standard for imposing a deterrent measure. Moreover, according to the presumption of innocence as well as art.2 of Regulation 1/2003, it is the prosecuting party that bears the burden of proof to prove either intention or negligence.

Nevertheless, in order to impose a fine for infringements of art.101 and/or 102 TFEU and to prove that the alleged infringement was committed intentionally and/or negligently, the Commission holds wide presumptions of fault. In its case law the Court of Justice has established two types of presumptions regarding the determination of an undertaking's fault:

a) Existence of intent and/or negligence is presumed in arts 101 and 102 TFEU proceedings if an undertaking "cannot be unaware of the anticompetitive nature of its conduct".[17] This presumption could be applied if it is apparent from the nature of the conduct that it was intended to distort competition by object or by effect.[18] The concept of "the nature of the conduct" encompasses such parameters as scale, duration and prevalence of practices, the undertaking's position in the relevant market, and the gravity of the infringement.[19] It also draws a distinction between the perception of the anti-competitive nature of the conduct and the perception of legal qualification of the conduct. If it was concluded that certain practices were of an anticompetitive nature so evident that an undertaking cannot have been unaware of it, it becomes irrelevant

[13] *Skanska Industrial Solutions* (C-724/17) [2019] EU:C:2019:100 at s.47.
[14] *Engel and Others v The Netherlands* [1976] ECHR A/22.
[15] *Jussila v Finland* ECHR [2006] XIV 7.
[16] Marco Bronckers, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) 34 *World Competition* 541.
[17] *BPB Industries Plc v Commission of the European Communities* (T-65/89) EU:T:1993:3; [1993] 5 C.M.L.R. 32 at [165]; *Tetra Pak International SA v Commission of the European Communities* (T-83/91) EU:T:1994:246; [1997] 4 C.M.L.R. 726 at [238]; *Deutsche Telekom AG v Commission of the European Communities* (T-271/03) EU:T:2008:101; [2008] 5 C.M.L.R. 9 at [295]; *Lundbeck A/S v European Commission* (T-472/13) EU:T:2016:449; [2016] 5 C.M.L.R. 18 at [762]; *Marine Harvest ASA v European Commission* (T-704/14) EU:T:2017:753; [2018] 4 C.M.L.R. 3 at [237]; *Schenker* (C-681/11) [2013] EU:C:2013:404; [2013] Bus. L.R. 1176 at [37].
[18] *BPB Industries* (T-65/89) EU:T:1993:3; [1993] 5 C.M.L.R. 32 at [165].
[19] *Tetra Pak* (T-83/91) EU:T:1994:246; [1997] 4 C.M.L.R. 726 at [238]–[239].

whether or not the undertaking was aware that it was infringing EU competition rules.[20] In the decision in *Tate & Lyle*[21] the court argued that intent and/or negligence could be derived if an accused undertaking is a large company with sufficient legal and economic knowledge enabling it to recognise that certain conduct constitutes an infringement.[22] Some scholars describe this argumentation as an individual type of presumption.[23] However, the court used these circumstances to ascertain that the undertaking could not have been unaware of anticompetitive nature of the conduct and, hence, applied the same presumption of fault.[24] Therefore, it would be more accurate to state that in its case law the Court of Justice is developing a non-exhaustive list of circumstances, which constitute a basis to presume that an undertaking could not have been aware of the anti-competitive nature of its conduct. This presumption of fault would then be applied as required under art.23 of Regulation 1/2003, if an undertaking sought to prevent, restrict or distort competition.[25]

b) The second type is applied for infringements of art.102 TFEU exclusively. This presumption stems from the concept of abuse of a dominant position, which is an objective concept, concerning the behaviour of a dominant undertaking.[26] In some instances the case law went even further and the Court of Justice ruled that the conduct of a dominant undertaking may be abusive even in the absence of any fault,[27] implicating that this presumption is conclusive. However, in none of these cases did the Court of Justice expressly state that under art.23 of Regulation 1/2003 a fine may be imposed even in absence of fault.

Summing up, when taking into consideration the provisions of Regulation 1/2003 and case law of the Court of Justice we can conclude that fault is a necessary precondition to impose a fine in public competition law enforcement. However, according to current case law, this precondition of fault is ascertained using firmly established presumptions.

Fault in private enforcement

With the advent of private enforcement of competition law, the broad presumption of fault in public enforcement travelled to the domain of tort law. After all, claiming damages for competition law violations typically amounts to extra-contractual liability. We discuss the advent of private enforcement of competition law and its relation to fault in the following section, and will point out how not harmonising fault in private enforcement of competition law has led to a variety of fault requirements across the EU.

Fault before the Damages Directive

As it is generally accepted that arts 101 and 102 TFEU have horizontal direct effect,[28] they allow for private enforcement in Member States.[29] The decision in *Courage* provided a clear answer that an individual claim for damages caused by conduct contrary to competition law is among the remedies available for the injured party.[30] Moreover, the court stated that since there (then) were no EU law rules on private claims for damages, it is for the legal systems of Member States to set procedural rules governing such claims within the boundaries of the principles of equivalence and effectiveness,[31] which is an expression of the principle of the procedural autonomy of Member States.[32]

In *Manfredi* the Court of Justice provided more guidance on the conditions upon which an individual is entitled to claim for damages. In particular, the court ruled that compensation could be claimed for damages suffered where there is a causal relationship between those damages and an agreement or practice contrary to art.101 TFEU.[33] Although this decision set the main conditions for private claims for damages, the court repeated that Member States retain the procedural autonomy as they have to lay down procedural rules governing such claims.[34]

The decision in *Manfredi* opened a discussion on whether Member States were free to set a fault requirement as an additional prerequisite for

[20] *BPB Industries* (T-65/89) EU:T:1993:3; [1993] 5 C.M.L.R. 32 at [165]; *Tetra Pak* (T-83/91) EU:T:1994:246; [1997] 4 C.M.L.R. 726 at [238]; *Deutsche Telekom* (T-271/03) EU:T:2008:101; [2008] 5 C.M.L.R. 9 at [295]; *Lundbeck* (T-472/13) EU:T:2016:449; [2016] 5 C.M.L.R. 18 at [762]; *Marine Harvest* (T-704/14) EU:T:2017:753; [2018] 4 C.M.L.R. 3 at [237]; *Schenker* (C-681/11) [2013] EU:C:2013:404; [2013] Bus. L.R. 1176 at [38].
[21] *Tate & Lyle v Commission of the European Communities* (Joined Cases T-202/98, T-204/98 and T-207/98) EU:T:2001:185; [2001] 5 C.M.L.R. 22; [2001] All E.R. (EC) 839.
[22] *Tate & Lyle* (Joined Cases T-202/98, T-204/98 and T-207/98) EU:T:2001:185; [2001] 5 C.M.L.R. 22 at [128].
[23] Cyril Ritter, "Presumptions in EU Competition Law" (2018) 6 *Journal of Antitrust Enforcement* 189.
[24] *Tate & Lyle* (Joined Cases T-202/98, T-204/98 and T-207/98) EU:T:2001:185; [2001] 5 C.M.L.R. 22 at [127].
[25] Aiste Mickonyte, *Presumption of Innocence in EU Anti-Cartel Enforcement* (Brill, 2019), p.91.
[26] Hoffmann-La Roche (85/76) EU:C:1979:36; [1979] 3 C.M.L.R. 211 at [91].
[27] *Clearstream Banking AG v Commission of the European Communities* (T-301/04) EU:T:2009:317; [2009] 5 C.M.L.R. 24 at [141].
[28] See *BRT v SABAM* (127-73) EU:C:1974:25. Veljko Milutinović, *The "right to Damages" Under EU Competition Law: From Courage V. Crehan to the White Paper and Beyond* (Kluwer Law International, 2010), p.48.
[29] *Defrenne v SA Belge de Navigation Aerienne (SABENA)* (43/75) EU:C:1976:56 | [1981] 1 All E.R. 122; [1976] 2 C.M.L.R. 98.
[30] *Courage and Crehan* (C-453/99) EU:C:2001:465; [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26].
[31] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [29].
[32] Katri Havu, "Fault in EU Competition Law Damages Claims" (2015) 8 *Global Competition Litigation Review* 1.
[33] *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) EU:C:2006:461; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [61].
[34] *Manfredi* (C-295/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [62].

compensation of damages, because, as it was emphasised by some authors, the Court of Justice did not include it along with the requirements of the causality, damages and the infringement itself[35]: the basis to submit a claim for compensation would derive directly from EU law, while not including any requirement of fault. It was therefore suggested that if the national legislation laid down any additional requirements other than provided in *Manfredi*, it would be regarded as undermining the effective enforcement of competition law. However, at the same time it was admitted that there was no clear precedent on this matter[36] and that it was a matter of Member States' procedural autonomy to regulate matters which were not expressly decided in *Manfredi* and were not prescribed by EU law.[37]

It has been observed that the decision in *Manfredi* and the subsequent decisions in *Pfleiderer*,[38] *Donau Chemie*[39] and *Kone*[40] revealed that the wide procedural autonomy of Member States created obstacles for efficient promotion of private enforcement claims.[41] That is because the court usually provides its conclusions in a negative form, i.e. obliging a certain Member State to refrain from application of specific domestic rules. At the same time, the findings of the court create corresponding procedural requirements and hereby create positive obligations for the remaining Member States. The result is a lack of legal clarity, leaving Member States unsure how to fulfil these requirements.[42]

This situation called for a more intensive legislative intervention from the EU, as procedural autonomy in inversely correlated to the EU taking over competence from the Member States.[43] This is what happened when the Damages Directive was adopted and certain aspects of private claims for damages were harmonised within the EU. Horizontal liability for EU law infringements is sometimes categorised into either (1) liability which is directly prescribed in field-specific EU legislation, or (2) liability which arises out of the substantive EU law, the general principles and the case law of the Court of Justice.[44] Adoption of the Damages Directive moved the horizontal liability for EU competition law infringements from the latter category to the former.

Fault in the Damages Directive

The legislative drafting process of the Damages Directive as regards to fault has been well documented in the literature.[45]

In the White Paper that started the prolonged legislative process of the Damages Directive, the Commission had advocated for harmonising fault such that:

> "any fault requirements under national law would have to be limited. The Commission sees no reasons to relieve infringers from liability on grounds of absence of fault other than in cases where the infringer made an excusable error".[46]

This approach however did not make the first formal proposal for a Directive in 2013,[47] and it has been argued that strong opposition from the business community during the consultation stage caused this.[48]

The eventual final version of the Damages Directive is entirely silent on to what extent civil liability in competition law enforcement should be premised on fault. Recital 11 of the Damages Directive states that Member States are capable of maintaining national law requirements of immutability, adequacy or culpability, provided that those domestic rules comply with the case law of the Court of Justice, the principles of effectiveness, equivalence and the directive itself.[49] Therefore, the capability of Member States to individually legislate fault in private enforcement of competition law remained a part of their procedural autonomy to implement EU law.

Without getting into the legislative status of recitals in EU Directives,[50] it has been argued persuasively that Recital 11 is an example of "constructive ambiguity" by the legislature.[51] By managing to insert this recital, the legislature set up an inherent conflict between procedural autonomy of the Member States and the principles of the effectiveness and equivalence concerning fault in private

[35] Nina Bučan, *The Enforcement of EU Competition Rules by Civil Law* (Maklu, 2014), p.38; Assimakis Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, 2008), p.195; Monti, "Liability Issues Not Codified by the Damages Directive: How to Fill Such Gaps?" in *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (2018), p.48.
[36] Veljko Milutinovic, *The "Right to Damages" under EU Competition Law: From Courage v. Crehan to the White Paper and Beyond* (Routledge, 2013), p.114.
[37] Havu 407, 411, 414.
[38] *Pfleiderer AG v Bundeskartellamt* (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7; [2012] C.E.C. 50.
[39] *Bundeswettbewerbsbehorde v Donau Chemie AG* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19.
[40] *Kone AG v OBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539.
[41] Pieter Van Cleynenbreugel, "Embedding Procedural Autonomy: The Directive and National Procedural Rules" in Magnus Strand, Marios C. Iacovides and Maria Bergström (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing, 2016), p.100, available at: *http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1106917&site=ehost-live* [Accessed 21 January 2021].
[42] Van Cleynenbreugel, "Embedding Procedural Autonomy: The Directive and National Procedural Rules" in *Harmonising EU Competition Litigation: The New Directive and Beyond* (2016), p.109.
[43] Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?—A Study on the 'Functionalized Procedural Competence' of EU Member States* (Springer, 2010).
[44] Havu 408.
[45] Strand, "Labours of Harmony: Unresolved Issues in Competition Damages" (2017) 38 *European Competition Law Review* 203; Piszcz, "Room to Manoeuvre for Member States: Issues for Decision on the Occasion of the Transposition of the Damages Directive" (2017) 1 *Market and Competition Law Review* 81.
[46] European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules (White Paper) 2008, p.6.
[47] Proposal for a Directive of the European Parliament and of the Council 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 COM (2013) 404 final 12.
[48] Strand, "Labours of Harmony: Unresolved Issues in Competition Damages" (2017) 38 *European Competition Law Review* 203, 205–206.
[49] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 [2014] OJ L349/1, Recital 11.
[50] Tadas Klimas and Jurate Vaiciukaite, "The Law of Recitals in European Community Legislation" 15 *ILSA Journal of International & Comparative Law* 61.
[51] Strand, "Labours of Harmony: Unresolved Issues in Competition Damages" (2017) 38 *European Competition Law Review* 203, 206.

enforcement, that is bound to end up before the European Court of Justice (ECJ) at some point. At the moment of writing, that has not yet happened. However, when interpreting the Damages Directive in relation to public competition law enforcement as stipulated by Regulation 1/2003, it can become clearer in which cases fault can actually be subject to the procedural autonomy of the Member States' judiciaries.

Article 16(1) of Regulation 1/2003 states that decisions of national courts on agreements, decisions or practices under art.101 and/or 102 TFEU cannot be running counter to decisions already adopted by the Commission. Such provisions raise the question of whether a national court is free to decide on the fault requirement if a case concerns a claim for compensation of damages, which follows a Commission decision. Notably, this question is more likely to be relevant in cases involving a claim for damages, following from a Commission decision in which fine has been imposed. That is because in such decisions the Commission is required to establish fault as per art.23(2) of Regulation 1/2003.

Article 16(1) of Regulation 1/2003 does not define what is held as "running counter to" or "conflicting with" an Commission decision, therefore some authors argued that Commission decisions do not have res judicata or estoppel effect.[52] Nevertheless, the General Court has stated that if a decision has not been appealed within the time limits, or, after such an appeal, a judicial decision confirms the decision, the decision acquires the force of res judicata and establishes an infringement definitively.[53] Speaking in procedural terms, in order to create a binding effect, an infringement has to be established in an operative part of an Commission decision, as only this part is capable of producing legal effects and it can be submitted for a judicial review by a submission of an appeal.[54]

The General Court provided some clarity in this regard as it explained that national courts cannot provide different legal classification to the anticompetitive conduct than the one provided by the Commission, and they cannot decide differently on temporal or geographic scope of the anticompetitive conduct, on liability or non-liability of persons whose liability was examined in the EC's decision.[55] In *Otis* the Court of Justice concluded that national courts are required to accept that a prohibited agreement or practice exists if it was decided so by the EC, because of the obligation not to take decisions running counter to Commission decisions. More importantly, the court added that national courts have competence to decide on other matters which are required to be established for a compensation of damages, such as amount of loss and the link between the loss and the infringement or the practice.[56]

This case law suggests that the rule set out in art.16(1) of Regulation 1/2003 involves an obligation for national courts not to decide on fault if the Commission has already decided on this matter and, as outlined above, fault is (should be) established in all decisions which impose fines. If a national court finds that there was no fault in an undertaking's actions, whereas this undertaking was found liable by a Commission decision, such a conclusion would clearly run counter to the findings of the Commission.

As a consequence, art.16(1) of Regulation 1/2003 when related to the Damages Directive calls for differentiation between three possible outcomes regarding fault in private enforcement of competition law:

a. A follow-on claim is submitted after the Commission has imposed a fine and thus has established fault. In this case the findings of the Commission have res judicata effect and national courts may not reconsider this matter.
b. A follow-on claim is submitted after the Commission had not imposed a fine and may not have established fault. Absent the establishment of fault by the Commission, national courts may consider fault independently; or
c. A stand-alone claim is submitted unrelated to a Commission decision. A national court may consider fault independently.

The Damages Directive has been criticised in general for not coherently and exhaustively harmonising rules of procedure for private enforcement of competition law.[57] Not harmonising fault in the Damages Directive has been regarded as a missed opportunity by some authors, as hurdles for successful private claims remain in some Member States where fault needs to be established in order to claim damages.[58] Others have argued that failing to harmonise fault in the Damages Directive is unlikely to lead to impediments to successful private enforcement, as private enforcement is mainly premised on public enforcement of cartels where intent is often plainly obvious and fines are likely to have been issued.[59]

[52] For more comprehensive discussion see Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (2008), pp.119–121.
[53] *Pergan Hilfsstoffe für Industrielle Prozesse v Commission of the European Communities* (T-474/04) EU:T:2007:306; [2008] Bus. L.R. 1085; [2008] 4 C.M.L.R. 4 at [76]. Notably, this General Court's decision provided that the "guilt of a person accused of an infringement" is established definitively, however the reasoning and wording thereof clearly shows that notion of "guilt" used in the decision is much broader than the one, which is object of this research.
[54] *Pergan Hilfsstoffe* (T-474/04) [2008] Bus. L.R. 1085; [2008] 4 C.M.L.R. 4 at [73]–[74].
[55] *Martinair Holland NV v European Commission* (T-67/11) [2015] EU:T:2015:984; [2016] 4 C.M.L.R. 14.
[56] *European Commission v Otis NV* (C-199/11) EU:C:2012:684; [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750.
[57] Monti, "Liability Issues Not Codified by the Damages Directive: How to Fill Such Gaps?" in *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (2018).
[58] Barry J. Rodger, Miguel Sousa Ferro and Francisco Marcos, "A Panacea for Competition Law Damages Actions in the EU? A Comparative View of the Implementation of the EU Antitrust Damages Directive in Sixteen Member States" (2019) 26 *Maastricht Journal of European and Comparative Law* 480.
[59] Dominik Wolski, "The Principle of Liability in Private Antitrust Enforcement in Selected European States in Light of the Implementation of the Damages Directive into the Polish Legal System" (2016) 9 *Yearbook of Antitrust and Regulatory Studies* (YARS) 69; Havu, "Fault in EU Competition Law Damages Claims" (2015) 8 *Global Competition Litigation Review* 1.

In the next section, we will more precisely unpack to what extent fault requirements regarding the two sub-categories described above diverge across Member States after implementation of the Damages Directive, and what effects arise from this.

Diverging fault requirements and the effects thereof

Now that the Damages Directive has been implemented across the EU and damages claims have been lodged in this new reality, it is a worthwhile endeavor to map how the dust has settled across Member States when it comes to fault in private enforcement.

Based on literature review and clarifying interviews with national competition law experts, we find significant variety regarding fault requirements across the EU. The following table is not exhaustive for all Member States—however, it was not meant to provide a complete overview of private enforcement regimes—but rather point out variance in private enforcement.

Table 1: Divergence of fault in private enforcement of competition law

	Follow-on claim without fine EC	**Follow-on claim with fine EC**	**Standalone claim**
Fault requirement in damages claim (burden of proof on claimant)	Spain Germany Netherlands Bulgaria Hungary Latvia Lithuania Romania Slovenia		Germany Italy Netherlands Sweden
Rebuttable presumption of fault in damages claim (burden of proof on defendant)	Poland Italy Czechia Sweden	Poland Italy Czechia Sweden Spain Germany Netherlands Bulgaria Hungary Latvia Lithuania Romania Slovenia	Poland
Strict liability in damages claim	France Slovakia Croatia		

When analysing the above table, a few things stand out. First, in general, two sub-categories can be excluded altogether to begin with. Any follow-on claim after a Commission decision issuing a fine can be disregarded, as a fault requirement here would undercut the res judicata of the Commission decision and thus violate the principles of effectiveness and equivalence under EU law. Blanket strict liability for standalone damages claims would similarly violate the effectiveness and equivalence of EU competition law, as intent has been strongly established as a factor demonstrating both arts 101 and 102 TFEU infringement.[60]

Second, regarding follow-on claims, three different regimes emerge. At one end of the spectrum there are countries like France,[61] Slovakia and Croatia,[62] where a strict liability regime has been implemented for competition law damages claims. In these countries, therefore, fault on the defendant is assumed and irrebuttable, both in damages claims following a Commission Decision with and without fines. Furthermore, there are countries like Italy,[63] Sweden,[64] Poland and Czechia.[65] In these regimes fault is presumed in damages claims following Commission Decisions with and without fines, but with some opportunities for the defendant to rebut this presumption of fault. Finally, a third regime stands out that differentiates between

[60] Monti, "Liability Issues Not Codified by the Damages Directive: How to Fill Such Gaps?" in *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (2018), p.47.
[61] Muriel Chagny, "France" in Barry Rodger, Francisco Marcos and Miguel Sousa Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press, 2019).
[62] Anna Piszcz and Valentin Mircea (eds), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (University of Warsaw Faculty of Management Press, 2017).
[63] Susanna Lopopolo, "Italy" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[64] Lars Henrikson, "Sweden" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[65] Piszcz and Mircea (eds), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (2017).

follow-on claims regarding Commission Decisions with and without fines. In Germany,[66] Spain,[67] the Netherlands,[68] Hungary,[69] Bulgaria, Latvia, Lithuania, Romania and Slovenia,[70] fault needs to be proven by the claimant in follow-on suits where no fines have been issued, while there is a rebuttable presumption of fault on the defendant in follow-on suits where fines have been issued.[71]

Third, concerning standalone claims, two possible regimes emerge. On the one hand, there is the standard approach with Germany,[72] Italy[73] the Netherlands[74] and Sweden[75] as examples, where fault needs to be established by the plaintiff in order to claim damages. Then, however, it turns out that in Poland fault is rebuttably assumed in standalone private competition law cases—meaning that it is upon the defendant to prove that they were not at fault.[76] Poland seems to be an anomaly here, however.

This overview demonstrates that there is a striking variety among Member States in terms of fault in private enforcement of competition law. As a consequence, some Member States (France, Slovakia, Croatia) are significantly more claimant-friendly by assuming strict liability on the defendant in all follow-on procedures. What also stands out is that the burden of proof is fixed on the defendant under all circumstances in some countries (Poland, Italy, Czechia, Sweden), also creating more favourable conditions for claimants. These dissimilar conditions for private enforcement of competition law have a two-fold effect.

First, opportunities for forum-shopping are created as a result of more favourable conditions being available for claimants in some countries—which was also suggested by (then) AG Wahl in the *Skanska* case.[77] The opportunity for claimants to file suit in a favourable jurisdiction was reinforced by the ECJ, arguing that damages claims for competition law infringement can be brought in "the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses".[78]

Forum shopping tends to illicit viscerally negative responses in the academic literature.[79] Indeed, in competition law circles, forum shopping is typically regarded as a negative side effect of diverging competition laws, even without further explanation.[80] The rationale for the negative effects of forum shopping in competition law, however, has been expressed eloquently by Ronald Cass:

> "The opportunity to select among a large set of potential competition law regimes with different standards for applying even the most similar provisions, different levels of hospitality to classical economic analysis, different evidentiary standards, and different procedures for eliciting, testing, and analyzing information significantly undermines predictability for businesses. [...] The point is not that all jurisdictions must be equally sympathetic to or skeptical of particular legal claims, nor that defendants in every jurisdiction should enjoy exactly the same rights to put the evidence to the test. [...] The problem as with other forum-shopping opportunities is that the ability of claimants to choose a jurisdiction with less close connection to the actors and conduct at issue, but with far greater probability of reaching a conclusion favorable to the complainant, undermines the predictability of legal rules."[81]

Forum shopping in private enforcement of competition law based on a fault standard, therefore, can lead to damages claims being tried in courts far removed from where the damage occurred. When the burden of proof on establishing fault incentivises claimants to file damages suits in foreign courts, these courts may be less knowledgeable and sensitive to the local circumstances under which the damage occurred. Moreover, a dichotomy may arise between follow-on damages claims that were tried nationally and abroad, even though they depart from the same Commission Decision.

Second, on more principled level, this kind of forum shopping is incompatible with the EU objective of a level playing field on the internal market. Firms with the resources to litigate internationally and sue for damages in a claimant-friendly jurisdiction can have advantages over competitors that go beyond competition on the merits.

We conclude at this point that the decision not to harmonise fault in the Damages Directive has indeed led to diverging fault requirements across the EU as has been

[66] Christian Kersting, "Germany" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[67] Francisco Marcos, "Spain" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[68] Jeroen Kortmann and Simone Mineur, "The Netherlands" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[69] Csongor István Nagy, "Hungary" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[70] Piszcz and Mircea, (eds), *Implementation of the EU Damages Directive in Central and Eastern European Countries* (2017).
[71] Hanno Schaper and Peter Stauber, "Claiming for Antitrust Damages in Germany after the Implementation of the EU Directive on Antitrust Damages" (2017) 10 *Global Competition Litigation Review* 186; Ashton, *Competition Damages Actions in the EU: Law and Practice*, 2nd edn (2018), p.35.
[72] Kersting, "Germany" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[73] Lopopolo, "Italy" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[74] Kortmann and Mineur, "The Netherlands" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[75] Henrikson, "Sweden" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[76] Maciej Bernatt and Maciej Gac, "Poland" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[77] *Skanska Industrial Solutions* (C-724/17) [2019] EU:C:2019:100, Opinion AG Wahl at [67].
[78] *AB flyLAL-Lithuanian Airlines v Starptautiska Lidosta "Riga" VAS* (C-27/17) EU:C:2018:533; [2019] 1 W.L.R. 669; [2018] I.L.Pr. 32 at [67].
[79] See, e.g. Kevin M. Clermont and Theodore Eisenberg, "Exorcising the Evil of Forum-Shopping" (1995) 80 *Cornell Law Review* 1507; Daniel Klerman and Greg Reilly, "Forum Selling" (2015) 89 *Southern California Law Review* 241; for a more positive view o the phenomenon, see Pamela K. Bookman, "The Unsung Virtues of Global Forum Shopping" (2016) 92 *Notre Dame Law Review* 579; See Erin A O'Hara and Larry E. Ribstein, *The Law Market* (Oxford University Press, 2009) for a more balanced analysis of forum shopping.
[80] See, e.g. Alison Jones, "Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US" in Maria Bergström, Marios Iacovides and Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing, 2016).
[81] Ronald A. Cass, "Competition in Antitrust Regulation: Law beyond Limits" (2010) 6 *Journal of Competition Law & Economics* 119, 148–9.

predicted by some authors.[82] Consequently there are jurisdictions that are less or more attractive to follow-on or standalone claimants, incentivising forum shopping. This private enforcement forum-shopping, in turn, undermines legal certainty within jurisdictions and disturbs competition on the internal market. The obvious remedy to this outcome is harmonisation of fault—the feasibility of which we discuss in the upcoming section.

Harmonising fault in private enforcement

Harmonisation of fault in private enforcement can be achieved through a legislative or judiciary route—in other words by revising the Damages Directive or by rulings of the ECJ.

The EU legislature has been clear on its intent to harmonise fault from the beginning, and has indicated that liability without fault and liability when fault is presumed, are models which facilitate the private enforcement of EU competition law.[83] As described in the "Fault in the Damages Directive" section above, however, the legislature failed to include a harmonised fault standard in the Damages Directive, and only managed to include in Recital 11 a reference to the principles of effectiveness and equivalence regarding all aspects of private enforcement that the Directive didn't harmonise. This in effect left the door open for the ECJ to address alleged future conflicts between the Member State's procedural autonomy and the principles of effectiveness and equivalence.

Further harmonisation of private competition law enforcement through the legislature is certainly possible in principle, but comes with practical issues. Notwithstanding the EU's competence to legislate in competition law and the limited room for judicial review thereof on matters of subsidiarity and proportionality,[84] further harmonising competition law may face obstacles as it touches upon the ongoing debate on the advent of European tort law.[85]

The establishment of the Damages Directive demonstrates the inherent compromises that follow from legislative harmonisation efforts, particularly when it concerns a long established and divergent legal field such as tort law across European jurisdictions. Given the stark differences in tort law principles across Member States,[86] and hitherto unsuccessful attempts in developing European Tort law,[87] it may be unlikely that renewed efforts towards legislative harmonisation of a fault standard for private enforcement of competition law will be successful.

Moreover, in the first evaluation of the Damages Directive, the European Commission seems reluctant to propose changes given the relative recent implementation of the Directive.[88] Moreover, harmonisation of a fault standard is neither included in the Commission's list of contentious topics, nor on the items of Commission's action list of remaining post-implementation issues in this interim evaluation.[89]

Therefore, in what follows, we focus on the alternative judiciary route for harmonisation. We will address the options for the CJEU to harmonise a fault standard through its rulings. This route would be conditional on a pre-judicial procedure reaching the CJEU, in which a Member State's court refers a question on the application of fault standards in private enforcement of competition vis-à-vis the national tort law system.

Harmonising strict liability

Settled case law of the Court of Justice provides that the national rules governing individual claims for damages for infringements of EU competition law have to inter alia pass the test of effectiveness, which requires that such rules cannot make it practically impossible or excessively difficult to exercise the right to claim for damages.[90] Besides this test, the court sometimes uses reasoning that national rules cannot jeopardise the full effectiveness of art.101.[91]

Application of the principle of full effectiveness has already narrowed down the scope of Member States' procedural autonomy to set rules for private claims for damages and therefore raises a question if any requirement of fault in national law should not be precluded on the same basis. In *Kone* the court concluded that the full effectiveness of art.101 would be put at risk if national rules, categorically and regardless of the circumstances of a case, preclude any person from submitting a claim for damages just because such damages are not in a direct causal link with an agreement or a practice prohibited by art.101 TFEU.[92]

[82] Monti, Liability Issues Not Codified by the Damages Directive: How to Fill Such Gaps?" in *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (2018); Rodger, Sousa Ferro and Marcos, "Transposition: Key Issues and Controversies" in *The EU Antitrust Damages Directive: Transposition in the Member States* (2019).
[83] Commission Staff Working Paper, Annex to the "Green Paper: Damages Actions for Breach of the EC Antitrust Rules" (Green Paper) COM(2005) 672 Final, p.31.
[84] Stephen Weatherill, "The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a 'Drafting Guide'" (2011) 12 *German Law Journal* 827.
[85] Gerhard Wagner, "The Project of Harmonizing European Tort Law" (2005) 42 *Common Market Law Review* 1269.
[86] De Tavernier and Van der Weide, "Harmonising Tort Law: Exploring the Concept of Fault" in *Core Concepts in the Dutch Civil Code: Continuously in Motion* (2016).
[87] Paula Giliker, "European Tort Law: Five Key Questions for Debate" (2009) 17 *European Review of Private Law* 285; Marta Infantino, "Making European Tort Law: The Game and Its Players" (2010) 18 *Cardozo Journal of International and Comparative Law* 45.
[88] Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (2020) SWD (2020) 338 final, p.1.
[89] Commission Staff Working Document on the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (2020) SWD (2020) 338 final, pp.5–12
[90] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26].
[91] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [26].
[92] *Kone*; Dorota Leczykiewicz, "Private Party Liability in EU Law: In Search of the General Regime" (2010) 12 *Cambridge Yearbook of European Legal Studies* 257, 272.

There are at least two arguments why the requirement of fault could be seen as preventing full effectiveness of art.101 TFEU in a similar manner to the requirement of a direct causal link. Both these arguments would alternatively suggest a regime of strict liability for follow-up claims absent a fine, and stand-alone claims.

The first argument arises from the *Manfredi* decision where the fault requirement was not included among the preconditions for horizontal liability to occur. As the Court of Justice provided an exhaustive list of conditions for a private liability to occur and, in a case of a breach of EU competition rules, no further establishment of fault was necessary.[93] It follows that *Manfredi* and *Courage* provide a minimum harmonisation of constitutive conditions for individual liability[94] and national legislation, and national courts cannot add stricter criteria than those prescribed by the Court of Justice.[95]

A second possible argument in favour of a strict liability regime follows from the doctrine of sufficiently serious infringement—admittedly with some legal dexterity. To establish this reasoning, we connect a number of landmark cases on state liability and non-contractual liability of EU institutions, and discuss the effect of these judgments on non-contractual liability in general.

Advocate General Van Gerven in his opinion in *Banks*[96] viewed *Francovich'* conditions for claiming damages from Member States for EU law infringement,[97] not as general conditions for the state liability to occur, but rather as conditions for the liability for infringements of art.189 of the Treaty of Rome (EEC Treaty),[98] to arise.[99] He further suggested that the conditions which give rise to non-contractual liability of the EU on the basis of art.215 of the EEC Treaty[100] should be applicable for private liability concerning breaches of directly effective provisions of EU law as well. These conditions were (i) existence of damages, (ii) illegality of conduct of an EU institution, and (iii) causal link between damages and such conduct.[101] More importantly, he argued that the practical effect of EU competition rules would be weakened considerably if proof of fault were required in private enforcement cases.[102] To substantiate this position, the Advocate General used the Court's decision in *Dekker*, which established that the practical effect of the provisions of Directive 76/207/EEC would be weakened if the liability for infringement were subject to proof of fault.[103] Some literature argues that the provisions of Directive 76/2007/EEC and the competition rules provided in arts 101 and 102 TFEU have many similarities, therefore it is believed that if the Court of Justice faces a direct question on whether the liability for infringements of these articles is strict, it would argue in a similar manner as it did in *Dekker*.[104]

The link between the conditions provided in *Francovich* and conditions of non-contractual liability of EU institutions was developed in the judgment of *Brasserie du Pecheur*. The court concluded that the conditions upon which a Member State could be held liable for infringements of EU law must be the same as the conditions which give rise to the liability of EU institutions, provided that such Member State has a discretion similar to the discretion of the EU institutions in developing EU policies.[105] Further, the conditions provided in *Francovich* were supplemented and generalised in *Brasserie du Pecheur*. The court indicated that EU law provides a person with a right for reparation from a Member State, which is in breach of EU law if three conditions are met, namely (i) the infringed provision must be intended to confer rights on individual; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach of obligation resting on a Member State and the damages occurred.[106] The court added that these conditions satisfy the requirements of full effectiveness of EU law and effective protection of the rights arising from EU law accordingly.[107] Crucially, the court added that Member States cannot make claims for damages conditional on any concept of fault going beyond that of a sufficiently serious breach of EU law.[108]

Although the Court of Justice has not applied the requirement of sufficiently serious infringement in a context of horizontal liability, this doctrine is sometimes seen as relevant for the horizontal liability as well.[109] Even though the doctrine of sufficiently serious infringement does not per se impose strict liability, one cannot rule out the possibility that the combination of sufficiently serious infringement criteria and the aim to ensure full

[93] Cees van Dam, *European Tort Law*, 2nd edn (Oxford University Press, 2013), p.48.
[94] Leczykiewicz 271.
[95] Komninos 195.
[96] *HJ Banks & Co Ltd v British Coal Corp* (C-128/92) EU:C:1993:860, Opinion of Advocate General Mr Van Gerven.
[97] (i) the result prescribed by directive should entail the grant of rights to individuals; (ii) it should be possible to identify the contents of such rights on the basis of provisions of a respective directive; and (iii) there should be a causal link between the infringement and the damage incurred, see *Francovich v Italy* (Joined Cases C-6/90 and C-9/90) EU:C:1991:428; [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722. For discussion regarding state liability before decision in *Francovich*, see s.6–21.
[98] Treaty Establishing the European Economic Community [1957] 298 UNTS 3, 4 EurYB 412, art.288.
[99] *Banks* (C-128/92) EU:C:1993:860, Opinion of Advocate General Mr Van Gerven at [49].
[100] Currently art.340 Treaty Establishing the European Economic Community.
[101] *Banks* (C-128/92) EU:C:1993:860, Opinion of Advocate General Mr Van Gerven at [50]. Also see Case 4/68 *Alfons Lutticke GmbH v Commission of the European Communities* [1971] ECR I- 00325 at [10]; *Zuckerfabrik Bedburg AG v Council and Commission of the European Communities* (281/84) EU:C:1987:3 at [17].
[102] *Banks* (C-128/92) EU:C:1993:860, Opinion of Advocate General Mr Van Gerven at [53] and fn.152 thereof.
[103] *Dekker v Stichting Vormingscentrum voor Jonge Volwassenen Plus* (C-177/88) EU:C:1990:383; [1992] I.C.R. 325; [1991] I.R.L.R. 27 at [21].
[104] Veljko Milutinovic, *The "Right to Damages" under EU Competition Law: From Courage v. Crehan to the White Paper and Beyond*, 3rd edn (Routledge, 2013), p.114.
[105] *Brasserie du Pêcheur SA v Germany* (Joined Cases C-46/93 and C-48/93) EU:C:1996:79; [1996] 2 W.L.R. 506; [1996] 1 C.M.L.R. 889 at [47].
[106] *Brasserie du Pêcheur* (Joined cases C-46/93 and C-48/93) [1996] 2 W.L.R. 506; [1996] 1 C.M.L.R. 889 at [51].
[107] *Brasserie du Pêcheur* (Joined cases C-46/93 and C-48/93) [1996] 2 W.L.R. 506; [1996] 1 C.M.L.R. 889 at [52].
[108] *Brasserie du Pêcheur* (Joined cases C-46/93 and C-48/93) [1996] 2 W.L.R. 506; [1996] 1 C.M.L.R. 889 at [75]–[80].
[109] Havu 9 and reference 28 thereof.

effectiveness of EU competition rules will not evolve into a principle of strict liability, as was already proposed by the Advocate General in *Banks*.

Harmonising a rebuttable presumption of fault

Alternatively, follow-on claims without fines and standalone claims could be harmonised towards a rebuttable presumption of fault. This rationale would follow two steps: Firstly, *Courage* and *Manfredi* do not necessarily rule out a fault requirement in private enforcement cases. Rather, they suggest that the level of responsibility for an infringement of EU competition rules is important in determining who is liable for the damages occurred—which would exclude strict liability as a standard. Secondly, the sufficiently serious breach criteria discussed above could evolve not only into the principle of strict liability, but also, and more plausibly, to a rebuttable presumption of fault.

First, the mere fact that the Court of Justice did not mention fault among the conditions for compensation of damages in *Manfredi*, does not necessarily mean that the court meant that liability should be strict. The ratio decidendi of the *Manfredi* case does not allow to deduce general rules applicable for stand-alone claims for damages. Instead, it is plausible that if it were necessary to establish fault in public enforcement proceedings, in a follow-on case the fault requirement would become a component of the infringement requirement—which was indeed indicated as one of the prerequisites for compensation in the *Manfredi* decision.

The court's argument in *Courage*, which concerned a stand-alone claim, suggests that the degree of fault in respect of infringement of EU competition rules is important in private enforcement cases.[110] The court admitted that the principle that "a litigant should not profit from [their] own unlawful conduct" is compatible with EU law,[111] and at the same time concluded that a party to an agreement prohibited by art.101 TFEU should not be per se precluded from submitting a claim for damages.[112] It follows that if a party to a prohibited agreement is entitled to claim for damages, the conduct of such a party is deemed not to be unlawful—or, put differently, such a party is not responsible for the infringement of EU competition rules.

The CJEU distinguished between fault with respect to competition law infringement and to civil liability for damages—rejecting the argument that distinguishing between parties' responsibility for an infringement runs counter to the case law of the court.[113] This rationale could be explained by the fact that there was no need to establish fault in order to find an infringement of art.101 or 102 TFEU, hence the court emphasised that the situation in question differed from a mere finding of an infringement.

Therefore, since the Court of Justice has not provided a straightforward answer to whether the liability in private enforcement cases should be strict, one cannot conclusively affirm that such a conclusion follows from *Manfredi*. Rather, the court's argument in *Courage* suggests that it is reasonable to think that if an undertaking is found not to be significantly responsible for an infringement of EU competition rules, such an undertaking should not be liable for damages arising out of such an infringement, and vice versa. Consequently, it would be unlikely for the CJEU to argue for strict liability in private enforcement of competition law.

Second, in contrast to the interpretation of *Brasserie du Pêcheur* towards a strict liability standard, an alternative and more plausible application of the same case could argue for a rebuttable presumption of fault in private enforcement of competition law. This interpretation of *Brasserie du Pêcheur* would be more plausible for the CJEU to take because it better factors in fair trail provisions under the ECHR and is better aligned with the principle of effectiveness as regards application of art.23(2) of Regulation 1/2003.

The Court of Justice in *Brasserie du Pêcheur* provided a list of factors which should be taken into account when evaluating whether an infringement in question is sufficiently serious. The court indicated that it is necessary to inter alia consider clarity and precision of the rule breached, if the infringement and the damage were caused intentionally, and whether there was any excusable error of law.[114] It was further concluded that these objective and subjective factors related to the concept of fault could be used in a national legal system.[115] Admissibility of genuinely excusable error defense was also suggested by AG Kokott in *Schenker*[116]; however, the court neither admitted nor conclusively denied the possibility of such a defense in competition law cases.

As was explained in "Fault in public enforcement" above, the *Engel* criteria determine that a sanction is more likely to be of a criminal nature in a sense of art.6 ECHR, if it is of a deterrent character.[117] As emphasised by AG Wahl and upheld by the Court of Justice, next to the compensatory function of private claims for damages, another objective of such claims is to punish anticompetitive behaviour and to deter undertakings from engaging in such conduct.[118] Therefore, with private and

[110] Komninos, 194.
[111] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].
[112] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [24].
[113] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [35].
[114] *Brasserie du Pêcheur* (Joined Cases C-46/93 and C-48/93) [1996] 2 W.L.R. 506; [1996] 1 C.M.L.R. 889 at [56].
[115] *Brasserie du Pêcheur* (Joined Cases C-46/93 and C-48/93) [1996] 2 W.L.R. 506; [1996] 1 C.M.L.R. 889 at [78].
[116] *Schenker & Co* (C-681/11), Opinion of AG Kokott at [38]–[48].
[117] *Engel v The Netherlands* (A/22) (1976); Bronckers, "No Longer Presumed Guilty? The Impact of Fundamental Rights on Certain Dogmas of EU Competition Law" (2011) 34 *World Competition* 541, 539.
[118] *Skanska Industrial Solutions* (C-724/17) at [45], Opinion of AG Wahl at [31], [80].

public enforcement proceedings being a unified system of enforcement of EU competition rules,[119] this implies that defendants should be protected by art.6 ECHR to a similar extent in both kinds of proceedings. When awarding damages in private enforcement of competition law is considered a punitive sanction, then this should be subject to a rebuttable presumption of fault—analogous to the way it is in public enforcement.

Moreover, harmonising towards strict liability in private enforcement cases may run counter to the full effectiveness of art.23(2) of Regulation 1/2003. Although Regulation 1/2003 is not applicable in private enforcement cases, the court's judgment in *Skanska* suggests that the building blocks of competition law are autonomous concepts, regardless of whether competition law is enforced publicly or privately. When, as established in *Skanska*, the concept of undertaking is an autonomous concept across public and private enforcement "with regard to the imposition of fines by the Commission under *Article 23* (2) of Regulation No 1/2003",[120] the necessity for intent and negligence to be established before issuing a fine in the same article of the regulation can be considered a similarly autonomous concept. The aforementioned fault standard in public enforcement (see "Fault in public enforcement", above) would similarly travel over to private enforcement with a presumption of fault. Therefore, it is plausible that full effectiveness of art.23(2) would be undermined if the fault requirement in private enforcement cases were to be approached differently than in public enforcement cases. The degree to which this presumption of fault in private enforcement cases would be rebuttable by the defendant, depends on the extent to which fault (intent or negligence) is rebuttable in public enforcement of competition law.

Conclusion

This article has set out to rigorously explore fault as it has travelled from public enforcement to private enforcement of EU competition law and beyond the implementation of the Damages Directive. This way, we have pointed out different fault standards across Member States in private enforcement of competition law, leading to adverse effects. We have argued for judiciary harmonisation of a fault standard on the EU level, and explored harmonising towards either strict liability or a rebuttable presumption of fault.

In public enforcement, fault is generally presumed and has been little contested in litigation. However, with the advent of private enforcement, EU competition law has entered the realm of extra contractual (tortious) liability—where Member States' legal systems approach fault standards in various ways. It is not altogether unsurprising that the Damages Directive—the first legislative act to harmonise private enforcement of EU competition law—has not succeeded to unify this variety of fault standards across the EU into a common standard.

Now that the Damages Directive has been implemented, however, we find a plethora of fault standards for standalone and follow-on claims, ranging from strict liability, to a rebuttable fault presumption, to a fault requirement. This creates opportunities for forum shopping, and affects the level playing field of firms on the internal market.

Given these two adverse effects, we argue that harmonisation of a fault standard on the EU level is warranted. When assessing the two routes towards harmonisation—legislative or judiciary—we pose that judiciary harmonisation is the more practical option, given the many obstacles involved in streamlining tort law across Member States. We then discuss harmonising towards strict liability and a rebuttable presumption of fault—both of which could be developed, premised on the existing case law of the CJEU. However, our analysis suggests that harmonising towards a rebuttable presumption of fault in private enforcement of EU competition law is both more in line with fair trial protection under the ECHR and the Charter, and better ensures the full effectiveness of public enforcement of EU competition law.

Until efforts are made to develop a common fault standard in private enforcement of competition law, it is likely that the trend of (emerging) claimant- or defendant friendly jurisdictions across the EU will continue to develop. We hope the present article has clarified this development, has explained its causes, and has proposed a practical response.

[119] *Skanska* (C-724/17) para 45. See generally Niamh Dunne, "The Role of Private Enforcement within EU Competition Law" (2014) 16 *Cambridge Yearbook of European Legal Studies* 143.
[120] Skanska at [47]