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ASSESSMENT OF THE IMPACT OF DAMAGES ACTIONS ON LENIENCY

Master thesis

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ABBREVIATIONS

Commission — the Commission of the European Union

Damages Directive — 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

CJEU — Court of Justice of the European Union

EU — the European Union

TFEU — Consolidated version of the Treaty on the Functioning of the European Union

INTRODUCTION

Competition law is enforceable by both public and private enforcement means[1]. However when implemented into the unified enforcement system, the collision of public and private enforcement arise, which may lead to negative impact on overall enforcement effectiveness. Particularly such collision creates problem to enforcement of cartels — agreements or concerted practices aimed at coordinating competitive behaviour of undertakings or influencing competition through anticompetitive practices[2] — one of the most serious[3] infringements of competition law prohibited by Article 101 of TFEU.

Cartel enforcement has two main goals: *ex ante* aim to prevent and deter formation of cartels, and *ex post* aim to ensure effective compensation of damages for victims of anticompetitive behaviour[4]. However these goals may collide, particularly where public enforcement based on leniency and private enforcement by damages actions interact, as in the case analysed in this master thesis. Therefore the necessity to establish proper balance between public and private enforcement, and subsequently between leniency and damages actions, exists. Legal regulation in such case must ensure overall effectiveness of cartel enforcement.

The relevance of this problem is context specific: for a long time the EU cartel enforcement has been discouraging private enforcement in favour of public enforcement[5]. Until recently damages actions for breach of competition law in the EU has been, and still are

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1 Wils, W. P. J. *The Relationship between Public Antitrust Enforcement and Private Actions for Damages* [interactive], World Competition. 2009, 31(1), [accessed on 08-09-2014]. <http://ssrn.com/abstract=1296458 >, p. 4-5.

2 E.g. “[...] anticompetitive practices includes the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors [...]”, etc. See Article 2(14) of Damaged Directive.

3 E.g. “[...] cartels waste society’s resources, create inefficiency, and cause billions of dollars of overcharges to consumers around the world. It is likely that prices on cartelised markets are 15 to 20 % higher than they should be [...]”. See Wils, W. P. J. *op. cit.*, p. 1; “The Commission has estimated that the damage inflicted by the cartels investigated during 2005-2007 was EUR 7.6 billion. Other research shows that during 2001-2012 the value destroyed by uncovered cartels lay between EUR 18.7 and EUR 33.1 billion.” See European Commission. Staff Working Document. Impact assessment report. Damages actions for breach of the EU antitrust rules accompanying the 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. [2013]. SWD (2013) 203 final., p. 70.; “The Commission estimates that harm to consumers and SMEs from hardcore cartels during 2006-2012 was in the range of EUR 25–69 billion, and that amount equates to approximately 0.2–0.55 % of the EU GDP”. See European Commission, Staff Working Paper. Annex to the Green Paper on Damages actions for breach of the EC antitrust rules. [2005] (SEC (2005) 1732), para 64–65.

4 Wardhaugh, B. *Cartel Leniency and Effective Compensation in Europe: The Aftermath of Pfleiderer.* [interactive], Queen's University Belfast Law Research Paper. 2013, 33. [accessed 30-11-2014]. <http://ssrn.com/abstract=2330243>, p. 1.

5 MacAfee, R. P.; Mialon, H. M.; Mialon S. H. Private v. Public Antitrust Enforcement: A Strategic Analysis. *Journal of Public Economics*. 2008, 92, p. 1864.

"[…] of astonishing diversity and total underdevelopment […]"[6]. During 2006-2012 less than a quarter of the Commission's decisions were followed by damages actions[7]. During 2008-2012 more than two thirds of Member States reported no damages actions at all.[8] Awarding of damages is governed exclusively by the national courts (complying with the CJEU case law and principles of EU law) and national civil and civil procedure laws[9], which significantly varies among the Member States, and despite of several attempts[10], are still not subject to harmonization on the EU level.

However, recently the policy of dominance of public enforcement has been shifted towards the initiatives strengthening private enforcement. The EU has stressed importance of damages actions, as contributing to the overall maintenance of the EU competition regime[11]. It has been calculated that increase of damages actions would lead to collection of annual compensation from both EU and national level infringers in the amount of EUR 23.3 billion[12], also increase of compensatory justice and other positive effects. Consequently Damages Directive was adopted. It indicates the aim to foster private damages actions and "[…] regulate the coordination of those two forms [private and public] of enforcement in a coherent manner […]" in order to "[…] ensure effective private enforcement actions and effective public enforcement […]" as "[…] both tools are required to interact to ensure maximum effectiveness of the competition rules […]"[13]. The Member States must transpose provisions of Damages Directive into their national legislation until 27 December 2016.

The problem that anticipated increase of damages actions may lead to negative impact on the effectiveness of leniency is strengthened by its key role in public enforcement.

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6 Waelbroeck, D.; Slater, D; Even-Shoshan, G. *Study on the conditions of claims for damages in case of infringement of EC competition rules*. Comparative report. [interactive], Ashurst. Brusells: 2004. [accessed on 07-06-2014] <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf>, p. 1.

7 These damage actions were mostly filed in the UK, Germany and the Netherlands. See European Parliament Briefing on facilitating damage claims by victims of anti-competitive practices. [accessed on 02 11 2014] <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130598/LDM_BRI(2013)130598_REV1_EN.pdf>.

8 Renda, A., et al., *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*. [interactive], Report by Centre for European Policy Studies. Rotterdam: 2007, [accessed on 06-12-2014], <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf>, p. 9.

9 See European Parliament Briefing on facilitating damage claims by victims of anti-competitive practices., *op. cit.*

10 E.g. approaches of harmonization of civil law sphere mainly in the field of contract and consumer law (DCFR, CESL, etc).

11 Wardhaugh, B. *supra* note 4, p. 9.

12 See European Parliament Briefing on facilitating damage claims by victims of anti-competitive practices. *op. cit.*

13 See Recital 6 of Damages Directive.

Currently leniency has been named as "[...] one of the most effective weapons [...]"[14] used by the Commission to detect and sanction cartels; thus providing an effective deterrence against cartelisation[15]. The existence of negative threat of potential damages awards is accurately illustrated by example of the recent case where on 1 December 2014 Deutsche Bahn sued Lufthansa, the immunity recipient under leniency, for subsequent damages compensation in the amount of approximately EUR 1.76 billion arising from cartel in airline freight. Whereas the total amount of fines imposed on other cartel members was approximately merely EUR 800 million. [16] Therefore this example inevitably shows problematic situation where the legislative approach to foster damages actions creates threat to be assessed as the disincentive for undertakings to cooperate with competition authorities. For this reason legal regulation must be properly balanced in order to ensure that operation of cartel enforcement system would not be hindered. This problem as regards the proper balance in case of collision of damages actions and leniency remains open for both academics and legal practitioners. In addition the question of whether the Damages Directive carries out to solve this problem, defined as one of its main goals, also arises. Particularly when taking into account that Damages Directive subsequently alters legal regulation at the national Member States level.

Therefore this master thesis will provide analysis concerned with the assessment of interaction of public and private enforcement where private enforcement is being introduced into system dominated by public enforcement. Analysis will focus on specific points of collision of damages actions and leniency and also assess regulation provided by the Damages Directive on the basis of findings obtained.

Object of this thesis is a systematic analysis of the impact on leniency, and subsequently on overall cartel enforcement, caused by anticipated increase of damages actions.

Research problem of this thesis is the question of how the impact of anticipated increase of damages actions on leniency shall be effectively regulated in order to ensure effective cartel enforcement. This problem itself contains multiple related aspects. For

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[14] See [interactive] <http://ec.europa.eu/competition/cartels/leniency/leniency.html> [accessed on 03-01-2015].

[15] Protection of leniency material in the context of civil damages actions. *Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012*. [interactive] European Competition Network. 2012. [accessed on 15-09-2014]. <http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf>, p. 2.

[16] In 2010 the Commission fined 11 airlines in a total of EUR 800 million for a price fixing cartel. After damage claims were made Deutsche Bahn proceeded to sue the other airlines, including Lufthansa, for damage claims, although the largest portion of the damages is being claimed from the latter. A total fine of EUR 1.59 billion was also set by the competition authority on 16 firms involved in the same cartel. See Buccirossi, P.; Marvão, C.; Spagnolo, G. *Leniency and Damages* [interactive], Stockholm Institute of Transition Economics, 2015, [accessed on 05-04-2015]. <http://ssrn.com/abstract=2566774>, p. 1.

instance research problem requires assessment of the general interaction of public and private enforcement, and identification of hierarchy (if any) in case of collision of those enforcement means, so as to create starting point for further analysis. Furthermore the assessment of impact and identification of main collision points of damages actions and leniency is required, as well as subsequent application of the findings to assess how the particular regulation adopted by the Damages Directive may affect leniency, also identifying arising problems, if any.

Relevance of this thesis appears due to the context of the EU where current legislative approach is aimed at the increase of damages actions in the cartel enforcement system. This shift of policy towards creation of new European approach requires understanding of these changes and respective adaptation of legal regulation. The Damages Directive must be implemented by the Member States until 2016; therefore it is necessary to evaluate possible effects of anticipated increase of damages action, due to such regulation, on the effectiveness of leniency. As well as to identify guidelines allowing policy makers (legislators) on both the EU and national level to evaluate and direct their future legislative approaches.

Novelty of this thesis. Currently the academic works on the subject matter of this thesis have been mainly based on the separate issues (e.g. private, public enforcement, leniency, damages actions, etc.) rather than being analysed in a systematic manner as provided in this thesis. Moreover the conclusions made by scholarly works are still various and do not provide unanimous consent; thus research work in the area is not settled and complete yet. Particularly considering the recent adoption of Damages Directive there is a lack of comprehensive systematic scholar works.

Literature review. As noted the separate aspects of the subject matter of this thesis are being analysed by the following academic works. As regards research area of relationship of private and public enforcement the scholarly works of Wils[17] are worth to be mentioned. Furthermore the analysis on aspects related to effectiveness of enforcement means has been made by Peyer and Hüschelrath[18]. As regards analysis on leniency the noteworthy scholarly works have been made by McAfee et al.[19], Buccirossi, P.; Marvão, C.; Spagnolo, G.[20]. As

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[17] Wils, W. P. J. *Efficiency and Justice in European Antitrust Enforcement*. Portland: Hart Publishing, 2008., etc.

[18] Hüschelrath, K.; Peyer, S. *Public and Private Enforcement of Competition Law – A Differentiated Approach* [interactive], Centre for European Research, 2013, [accessed on 13-08-2014]. <http://ftp.zew.de/pub/zew-docs/dp/dp13029.pdf>.

[19] MacAfee, R. P.; Mialon, H. M.; Mialon S. H., *supra* note 5.

regards assessment of regulation adopted by the Damages Directive analysis have been made by Cauffman[21]. As regards scholarly works of Lithuanian authors particularly, it is noteworthy to mention works made by Civilka[22], Moisejevas[23] in the area of private enforcement. In order to perform analysis of this thesis, scholar works relevant for this subject matter will be used, together with related legal acts and case law of the CJEU.

Significance of this thesis. This master thesis is aimed at thoroughly analysing and comparing the different approaches of currently published research works on various aspects, so as to create a novel standpoint that will later be advantageous for the use of both academia and legal practitioners in this field of the chosen subject matter. Particularly analysis is significant as it will provide guidelines allowing policy makers (legislators) on both the EU and national level to evaluate and direct future legislative approaches.

Aim of this thesis is to assess the impact of the current legal approach aimed at increase of damages actions on leniency, in order to identify how to avoid negative effects on leniency and subsequently on the effectiveness of cartel enforcement in general.

The aim of this thesis will be achieved by **the following objectives** that are interconnected within the structure of this thesis:

1) Evaluate general interaction of public and private enforcement as a starting point of further analysis by (i) identifying how these enforcement means shall be coordinated in overall enforcement system; (ii) evaluating existence of hierarchy between these enforcement means in case of collision.
2) Analyse impact of anticipated increase of damages actions on leniency by (i) focusing on main collision points; (ii) identifying recommended regulation model to solve collision problems.
3) Evaluate regulation of Damages Directive by (i) assessing its effectiveness to increase amount of damages actions; (ii) focusing on effects of regulation on identified collision points with leniency, and identifying arising problems, if any.
4) Identify guidelines for policy makers (legislators) allowing to evaluate and direct their future legislative approaches both on the EU and Member States so as to properly coordinate impact of the increase of damages actions on leniency.

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[20] Buccirossi, P.; Marvão, C.; Spagnolo, G., *supra* note 16.

[21] Cauffman, C. *The European Commission Proposal for a Directive on Antitrust Damages: A First Assessment* [interactive], Maastrich European Private Law Institute, 2013, [accessed on 10-10-2014]. <http://ssrn.com/abstract=2339938>.

[22] Civilka, M. Konkurencijos teisės normų privatus įgyvendinimas. *Juristas*. 2005, 7-8: 3-11; 9: 35-39.

[23] Moisejevas, R. Development of Private Enforcement of Competition Law in Lithuania. Y*earbook of Antitrust and Regulatory Studies*. 2015, 8(11): 35-52.

Methods of this thesis. The goals of this thesis are reached by using the following methods (indicated methods in general are used in complexity so as to provide substantial analysis of the research problem):

1) Systemic — used to analyse various aspects related to assessment of the impact of damages actions to leniency in the overall relation to cartel enforcement. In particular this method is used when identifying general relationship of public and private enforcement, as well as later analysing specific collision points and their reflection in regulation of Damages Directive.

2) Logical-analytical — used to identify nature, interrelation, also structuring of various aspects related, for instance, to differentiation and hierarchy within private and public enforcement, consequential application of the findings to the collision of damages actions and leniency, and later to the assessment of Damages Directive; thus it ensures logical structure of the analysis, and is also used to make generalizations and formulate conclusions.

3) Comparative — used to evaluate problematic issues within different legal systems, for instance, certain regulatory or doctrinal approaches of the EU are analysed in comparison with the examples of analogous subject matter already implemented in the US; also used to compare and evaluate argumentation of various researchers analysed herein.

4) Historic — used to identify evolution of cartel enforcement as particularly regards settled dominance of leniency and recent introduction of legislative approaches fostering private enforcement.

Structure of this thesis. The analysis performed in this thesis is structured into general and special parts that are divided into three main chapters (each chapter is further detailed in sub-chapters):

General part: *Interaction of private and public enforcement.* This part provides general insight on how different means of enforcement interact and must be coordinated in case of collision; thus it reveals grounds of the research problem and creates starting point for the further analysis on collision of particular instruments of enforcement.

Special part: *(i) Interaction of leniency and damages actions.* This part, by considering findings of the general part, provides specific analysis of the impact of damages actions on leniency, particularly on the main identified collision points; it is focused on evaluation of various theoretical approaches on this issue and accordingly produces findings on guidelines for regulation evaluation and recommended regulation model to solve collision problems. *(ii) Assessment of Damages Directive regulation.* This part finalizes the analysis by applying theoretical findings of previous part so as to evaluate effectiveness of regulation of

Damages Directive and identify problems regarding collision of leniency and damages actions, if any.

Defended statements: The anticipated increase of private damages actions may have negative impact on effectiveness of leniency. The problem might be solved by regulation, which prioritises effectiveness of public enforcement, and introduces additional incentives for undertakings to cooperate. Additional incentives might be reached by coordinating the scope of the rules on limitation of immunity recipient's liability and disclosure of leniency material.

1. INTERACTION OF PRIVATE AND PUBLIC ENFORCEMENT

Interaction of private and public enforcement — the two pillars of competition law enforcement system[24] — is the debated question through academic literature. Establishment of this relationship is particularly significant when analysing the current legislative approach of the European Union aimed at strengthening private enforcement by introducing increased damages actions into enforcement system dominated by the public enforcement. Thus it may impact the effectiveness of overall competition enforcement, and shall be accordingly balanced. Consequently questions on whether and how public and private enforcement shall be coordinated in case of collision are analysed in the following subchapters of this thesis.

1.1. Differences between private and public enforcement

Public enforcement is performed by public authorities investigating suspected infringements of competition law that are entitled to impose various measures and sanctions such as fines on infringing undertakings.[25] In the EU public enforcement is performed by the Commission or by the national competition authorities at the Member States level. Main concerns of public enforcement are the punishment of existing infringements and the deterrence of future infringements.[26]

Private enforcement[27] on the other hand refers to the enforcement by means of legal action brought by the infringed parties (natural or legal persons — competitors, suppliers, end customers) of anti-competitive behaviour before national courts.[28] Private enforcement could entail several different actions, such as action for nullity of contracts, imposition of interim measures to prevent anticompetitive behaviour, or actions for damages.[29] Damages actions

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[24] In general relationship between private and public enforcement of competition law varies according to different legal traditions. For instance in the United States enforcement is predominately private as in practice approximately 90 % of antitrust cases are private actions. See Wils, W.P.J. *supra* note 17, p. 480; In Europe competition enforcement system traditionally has been mainly dominated by public enforcement. See Saavedra, A. *The Relationship Between the Leniency Programme and Private Actions for Damages at EU Level* [interactive], Revista de Concorrência e Regulação, 2010. [accessed 11-10-2014]. <http://ssrn.com/abstract=2292575>, p. 2.

[25] European Commission, Staff Working Paper, *supra* note 3, p. 6.

[26] Cauffman, C.; Philipsen, N. *Who Does What in Competition Law: Harmonizing the Rules on Damages for Infringements of the EU Competition Rules?* [interactive], Maastricht European Private Law Institute, 2014, [accessed 18 12 2014]. <http://ssrn.com/abstract=2520381>, p. 32.

[27] The current EU legal framework related to private enforcement consists of: Regulation No 1/2003; Regulation No 44/2001; Regulation No 1206/2001; Regulation No 864/2007; Regulation No 861/2007; Directive No 2008/52/EC; Regulation No 773/2004; recently adopted Damages Directive.

[28] European Commission, Staff Working Paper., *op. cit.,* p. 45.

[29] *Ibid*., p. 8.

may be filed as stand-alone or follow-on actions.[30] The damages occur as infringes parties may be harmed by higher prices being inflated by undertakings engaged in anti-competitive behaviour.[31] The primary objective of private enforcement therefore is compensation, i.e. repair of the damages caused.[32]

1.1.1. Separate fundamental grounds of enforcement means

Public and private enforcement could be associated with different interests, which competition rules are intended to protect. Public enforcement focuses on public interests such as deterrence, protection and restoration of competitive process. Whereas private enforcement focuses on private interests in compensation of the harm suffered. [33] Accordingly these two enforcement means separates from each other as reflecting different fundamental grounds and relating to the different ways on how the competition prohibitions may be evaluated.

First of all competition infringements may be distinguished into private wrongs as performed against specific individuals and public wrongs as performed against the society as a whole. Definition of competition infringements as public wrongs is based on the fact that breach of competition rules leads to the overall decrease in market competition and accordingly leads to the suffering of all related parties due to the higher prices, lower output, and decreased innovation or product choice.[34] The focus here is based on the infringing behaviour and not merely on the damages occurred. Therefore it requires a public response to such anticompetitive behaviour, and public enforcement is used to demonstrate the societal interest in maintaining competitive markets by punishing infringements and thereby deterring future infringements.[35]

Furthermore competition infringements could be seen as the particular disadvantage of specific market players. This consideration provides rationale for private enforcement which empowers individual parties to obtain compensation for the damages incurred due to competition infringement. In this case private enforcement reflects individual rather than

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[30] Particularly the follow-on damages actions where infringed party claim damages incurred as a result of infringement from the cartel members will be analysed further in this master thesis.

[31] See European Parliament Briefing on facilitating damage claims by victims of anti-competitive practices, *supra* note 9.

[32] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. [2013]. C 167/19.

[33] Kirst, P.; Bergh R. Van den. The European Directive on Damages Actions – How to Protect Leniency Incentives Without Jeopardising the Victim's Right of Compensation. *European Association of Law and Economics*. [interactive] 2014. [accessed on 08 09 2014]., p 2.

[34] Dunne, N. *The Role of Private Enforcement within EU Competition Law* [interactive], University of Cambridge, 2014, [accessed 05-01-2015]. <http://ssrn.com/abstract=2457838>, p. 8

[35] *Ibid.*, p. 4.

societal approach and prioritizes compensation of damages over the punishment of the infringer.[36]

1.1.2. Distinction of enforcement means by separate-tasks approach

Relationship between private and public enforcement could be analysed not only from the point of different fundamental grounds and interests protected. Further analysis extends to the contribution of private and public enforcement to the main goals of competition enforcement in general[37]:

1) Ensuring that competition regulations are not violated and that anticompetitive behaviour is avoided — achievable through deterrence (as *ex ante* mean). In this case deterrence may be defined as the credible threat of a negative consequence that serves the purpose to discourage an undertaking from breaching the law.[38]

2) Pursuing corrective justice — achievable through compensation (as *ex post* mean). It requires restoring the infringed party's position, as if the breach of competition law not occurred[39].

Analysing contribution of public and private enforcement to each of the indicated goals Wils makes the conclusion that public antitrust enforcement shall the superior instrument to pursue the objectives of clarification and development of the law, and also of deterrence and punishment (i.e. it is more effective in performance of deterrence function). Whereas private enforcement, particularly by actions for damages, is found to be superior in the pursuit of corrective justice through compensation (i.e. it is more effective in performance of compensation function). Therefore Wils comes out to a concept, which he calls a separate-tasks approach, and which corresponds to the classic conception of the different roles of public enforcement and private enforcement used in the general legal theory.[40] The separate-tasks approach adheres to economic principles according to which the rational and effective pursuit of separate goals requires the employment of separate instruments, one instrument being assigned to each separate goal (Tinbergen rule) and that each policy instrument should be assigned to the policy target on which it has greatest relative effect (Mundell rule).[41]

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[36] Dunne, N., *supra* note 34, p. 4.
[37] Wils, W. P. J., *supra* note 1, p. 10.
[38] Petrucci, C. F. *The Harmonisation of the Law of Damages and Its Procedural Rules for Breach of European Competition Law: A Critical Analysis*. Thesis of the doctor of philosophy. Birmingham: University of Birmingham, 2013., p. 272.
[39] *Ibid*.
[40] Wils, W. P. J., *op.cit*., p. 15-16.
[41] *Ibid.*, p. 17.

Therefore after identifying that different enforcement means are better contributing to the performance of separate tasks, a following question, particularly from an economic point of view, might arise on whether a pure public or pure private enforcement system could be used in an isolated manner in order to achieve welfare optimal, i.e. the most effective enforcement system.[42] In this case academics agree that pure solutions are considered as possible only in a rather theoretical nature[43]. Particularly speaking of private enforcement as an isolated enforcement mean in cartel enforcement, the leading approach is that private actions should not, and even cannot, replace public enforcement, because of the key role of public authorities in cases where a full economic analysis is necessary.[44] Although private enforcement could in general be used in these cases also, the costs of enforcement would be too high and thus it will not be welfare optimal.

Strategic model on competition infringements and enforcement have been created by McAfee and others which showed results for the possible use to policy makers[45]. The model analysed different enforcement mechanisms, including pure private, pure public, and public combined with private enforcement, and compared them in the terms of social welfare[46]. Social welfare here was comprised of various elements, including probability that an illegal action is deterred, the probability that an illegal action is taken but withdrawn by legal proceedings, the probability that a legal action is deterred, the probability that a legal action is withdrawn, and the expected proceedings costs.[47] The authors found out that pure private enforcement is never strictly optimal. It yields lower welfare than public enforcement, whether or not public enforcement is combined with private enforcement, as long as society prefers some public enforcement instead of no enforcement at all.[48]

Considering the above it is generally accepted that neither public enforcement nor private enforcement used separately are sufficient to create effective enforcement system. In any case strengthening of private enforcement shall not mean reduced significance of public enforcement.[49] Development of private enforcement may be seen as mechanism to enhance the effectiveness of the existing regime. As noted by the Commission "[...] if competition law is to better reach consumers and undertakings and enhance their access to forms of legal

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42 Hüschelrath, K.; Peyer, S., *supra* note, p. 16.
43 *Ibid*. p. 9, 13.
44 European Commission, Staff Working Paper., *supra* note 3, p. 9.
45 MacAfee, R. P.; Mialon, H. M.; Mialon S. H., *supra* note 5, p. 1871.
46 *Ibid*, p. 1864.
47 *Ibid*, p. 1869.
48 *Ibid*, p. 1864.
49 E.g. Wardhaugh notes that judgement in Pfleiderer, by refusing to recognise or establish a hierarchy between public and private enforcement goals, has opened difficulties with disclosure of leniency materials. See Wardhaugh, B., *supra* note 4, p. 31.

action to protect their rights, it is desirable that victims of competition law violations are able to recover damages for loss suffered [...]".[50] Therefore public enforcement and private enforcement should be used as complementary tools to enforce competition law and deter further infringements.[51] Therefore balanced legal regulation shall be used, instead of creating models and fostering enforcement means in an isolated approach.

1.2. Complementarity of public and private enforcement

The doctrine of complementarity provides that effective competition enforcement shall be established by considering private and public enforcement means as intrinsically interlinked rather than as independent mechanisms.[52] The doctrine of complementarity is currently predominant and is even considered being "[…] the orthodoxy within the EU law […]"[53]. Complementarity may therefore be used to both compensate victims of infringements and also to deter undertakings from breaching competition law. Complementarity in the EU enforcement was also established by CJEU judgements in *Courage and Crehan* and subsequent case law[54] where the court acknowledged that the efficiency of the EU competition law requires supplementary right to compensation for loss suffered due to anticompetitive behaviour. The court stated that "[…] the existence of (a right to damages) strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."[55] The Commission by more recent approach has also noted that "[…] the overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement […]"[56].

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[50] European Commission, Staff Working Paper., *supra* note 3, p. 9.

[51] See Protection of leniency material in the context of civil damages actions. *Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012*., supra note 15.

[52] Wardhaugh, B., *supra* note 4, p. 26.

[53] Dunne, N., *supra* note 34, p. 2.

[54] See Case C-453/99, Courage and Crehan [2001] ECR I-6297; Case C-295/04, Manfredi v Lloyd Adriatico Assicurazioni [2006] ECR I-6619; Case C-360/09, Pfleiderer AG v Bundeskartellamt [2011] ECR I-5161; Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1.

[55] Case C-453/99, Courage and Crehan [2001] ECR I-6297, para 27.

[56] 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. [2013] COM(2013) 404 final 2013/0185 (COD)., p. 3.

1.2.1. Effects of introduction of private enforcement into enforcement system

Mutual interaction of public and private enforcement determines that introduction of any changes on balance of enforcement by fostering one of the means consequently have corresponding implications on the other.[57] The following positive and negative effects could be identified as the main aspects relevant to be considered when introducing enhanced private enforcement into the overall enforcement system.

- **Positive effects on overall enforcement system**

Private enforcement could be used to complement overall enforcement in the following aspects[58]:

1) *Compensation*. It is fundamental to the idea of private enforcement that damages caused by anticompetitive behaviour are entitled be compensated. If competition law is aimed at better reaching consumers and undertakings, and enhance their access to legal means aimed at protecting their rights, it is desirable that infringed parties of anticompetitive behaviour shall be able to recover damages suffered by the use of private enforcement. Thus amount of compensation may be increased.

2) *Deterrence*. The CJEU ruled in *Courage and Crehan*[59] that the right to compensation of losses relates to both corrective justice and deterrence goals. Private enforcement enhanced in addition to public enforcement will maximise the amount of enforcement in general. Therefore added level of enforcement will increase the incentives of undertakings to comply with the law[60], thus providing more guarantee that markets remain open and competitive.[61] As a consequence the higher amount of compliance will be created due to enhanced deterrence, and that serves the general interest.[62]

3) *Indication of infringements*. Relatively limited resources of competition authorities are in general concentrated on cases which are of general significance for competitive market. Therefore some of these cases may be considered as being of secondary importance for the competition authority. However it may have particular importance for an individual infringed party that is willing to deal with such infringement. Private enforcers

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[57] Saavedra, A., *supra* note 24, p. 7.
[58] European Commission, Staff Working Paper, *supra* note 3, p. 6-8.
[59] Case C-453/99, Courage and Crehan [2001] ECR I-6297., para 25-28.
[60] Particularly, there is empirical evidence showing that private enforcement event might deter more than public enforcement. See Petrucci, C. F., *supra* note 38, p. 50.
[61] European Commission, Staff Working Paper, *supra* note 3, p. 8.
[62] Cauffman, C.; Philipsen, N., *supra* note 26, p 32.

among higher incentives may be aware of particular information, as well as sufficient resources to take on infringements in particular cases.[63] Accordingly the higher amount of indicated infringements may be achieved. In this way private enforcement proceedings may fulfil an indicator function.[64]

4) *Increased effectiveness of enforcement.* Costs for detecting possible infringements and gathering evidence are lower when performed by public enforcement. However public enforcers regulate various market areas, and cannot detect anticompetitive behaviour as easily as private parties that regularly act within their particular industry. As noted by Shavell "[...] private parties should generally enjoy an inherent advantage in knowledge [...]" over public regulators.[65] Accordingly increased efficiency of allocation of resources between public and private enforcement may lead to increased effectiveness of proceedings in general.

5) *Bringing competition law closer to the citizen.* Increased opportunities to directly enforce rights in the competition area, will brought competition rules closer to the undertakings and citizens of the EU. Increased awareness of competition rules make private parties more actively involved in their enforcement. Therefore successful damages actions will identify to market participants that competition rules must be observed and infringements may be stopped and prevented on their own initiative.[66] It may consequently have positive impact on general compliance with competition law.

6) *Strengthening competition*. Facilitating and increasing private enforcement may be also important in the wider context of enhancing competitiveness of the EU. Private enforcement will further increase efficiency of competition law enforcement. Therefore it will provide for an important contribution to guarantee of open and competitive market, i.e. to performance of competition law goals not in regards with infringes parties, but also as a whole.

- **Negative effects on overall enforcement system**

Introduction of private enforcement may also collide with overall enforcement system in a negative manner. In such case the following negative effects may arise[67]*:*

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[63] Hüschelrath, K.; Peyer, S., *supra* note 18, p. 11.

[64] Interaction of Public and Private Enforcement in Cartel Cases. *Report to the ICN annual conference, Moscow, May 2007.* [interactive] International Competition Network. Cartels Working Group. General Framework. 2007. [accessed on 15-09-2014]. <http://www.internationalcompetitionnetwork.org/uploads/library/doc349.pdf>, p. 33.

[65] MacAfee, R. P.; Mialon, H. M.; Mialon S., *supra* note 5, p. 1864.

[66] Interaction of Public and Private Enforcement in Cartel Cases, *op. cit.*, p 33.

[67] Cauffman, C.; Philipsen, N., *supra* note 26, p. 7.

1) Over-deterrence or under-deterrence. The problem of correct level of deterrence is discussed within the academic literature. Rubinfeld argues that – as soon as both enforcement systems are implemented in a certain jurisdiction – the key question is how to balance both systems in order to minimise costs and avoid problems of under-deterrence or over-deterrence[68]. Cauffman and Philipsen[69] argue that relying on private parties interests in law enforcement may lead to over-deterrence as the correct probability of detection and the appropriate amount of fines cannot be established. Increase of private enforcement may lead to over-deterrence, overburdening infringers, provoking unmeritorious claims, or even claims aimed at harming certain undertakings.

2) Increased detrimental litigation. Private parties may have higher incentives to take enforcement actions than public enforcers, but this could be defined as a "*double-edged sword*".[70] Private parties also have greater incentives to use competition laws strategically, i.e. exploit the laws to win in the legal proceedings rather than in the honest competition with their competitive. Strategic use of competition law may also have detriment effect on consumers, and may not lead to promotion of efficiency.[71] Therefore adding private enforcement system may increase social welfare only if the court will be sufficiently accurate. Otherwise welfare may be increased only if the public authorities are not efficient in legal proceedings.[72]

3) Increased costs of enforcement. Although increase of private enforcement may provide for a greater deterrence or compensation effect, on the other hand more costs may be spent on enforcement proceedings. The amount of damages awarded makes claimants more willing to increase their spending on detection and litigation. Therefore the increased amount of damages awarded may deter the infringements, but with an extended use of resources, and thus it creates so called "*lock-step*" effect of slowdown progress.[73]

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[68] Hüschelrath K and Peyer S, *supra* note 18, p. 8.
[69] Cauffman, C.; Philipsen, N. *supra* note 26, p. 28.
[70] MacAfee, R. P.; Mialon, H. M.; Mialon S. H, *supra* note 5, p. 1864.
[71] See *Ibid* p. 1864. Example of the US antitrust enforcement shows that firms may use competition law so as to prevent potential competitors from entering the market, as in the case of *Utah Pie Co. v. Continental Baking*. Utah Pie was a small firm that produced fresh pies in Salt Lake City, Utah. To counter the arrival of three much larger competitors that were attempting to penetrate the market, Utah Pie initiated an antitrust suit, arguing that the arrival of the new entrants was an attempt to monopolize the market. The Supreme Court of the US ruled in favour of Utah Pie. The smaller Utah Pie successfully used the competitions laws to prevent three potential competitors from entering its market. Competition law alone would not likely have produced this outcome.
[72] *Ibid*, p. 1870.
[73] Peyer, S. Cartel Members Only — Revisiting Private Antitrust Policy in Europe. *International and Comparative Law Quarterly*. 2011, 60(3), p. 635.

4) Discouraged potential leniency applicants. Increase of private enforcement, particularly by damages actions, may discourage potential leniency applicants from coming forward[74]. This problem will be covered by deeper analysis in the following chapters of this thesis.

Considering the above the divergence of enforcement means could have negative impact on the competition enforcement and internal market as a whole[75]. Therefore advantageous effects of introduction of private enforcement must be weighed against negative effects.[76] Complementary system of enforcement must optimally combine the benefits and costs of both private and public enforcement. The introduction of hierarchical approach, analysed in the following subchapter, may be one of possible solutions.

1.2.2. Hierarchy between private and public enforcement

For a long time it has been settled in the EU that public and private enforcement of competition law remain institutionally independent from each other in the sense that there is no primacy established. Advocate General Mazák in *Pfleiderer* judgement, when considering tension between private and public enforcement, noted that "[...] the case-law of the Court have not established any *de jure* hierarchy or order of priority between public enforcement of EU competition law and private actions for damages [...]".[77] Also the Commission may be seen as not believing in "[...] a superiority of either private or public enforcement over the other [...]"[78].

Complementarity of public and private enforcement in general does not create any kind of hierarchy between these separate enforcement means, i.e. it does not provide an answer on how private and public enforcement should be ordered when implemented in unified system, i.e. in case of collision. This problem is particularly clear in cases when interests of public and private enforcement diverse. For instance when considering regulation of rules on disclosure of leniency material to the infringed parties seeking to file damages actions.[79] Therefore when amendments to legal regulation are considered, the relative

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74 Cauffman, C.; Philipsen, N., *supra* note 26, p 33.

75 Recital 8 of Damages Directive.

76 Hüschelrath, K.; Peyer, S., *supra* note 18, p. 9.

77 Opinion of Advocate General Mazák delivered on 16 December 2010 in Case C‑360/09, Pfleiderer AG v Bundeskartellamt. [interactive], 2010. [accessed on 08-10-2014] <http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CC0360:EN:HTML>, para 61.

78 Kirst, P.; Bergh R. Van den., *supra* note 33, p. 4.

79 MacCulloch, A., Wardhaugh, B. *The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy*. [interactive], A Paper Prepared for the CCP Conference, 2012 [accessed on 07-08-2014]. <http://ssrn.com/abstract=2089369>, p. 12.

hierarchy or in other words order of priority between public and private enforcement must be also considered[80].

The following argumentation shows that the hierarchy between public and private enforcement shall be established in a way where public enforcement is considered to be higher, i.e. prioritized over private enforcement[81]. The basis for such argumentation arises from the emphasis of the weak points of private enforcement, and consideration that it does not equally contribute to the effectiveness of the competition enforcement.[82]

Wils derives superiority of public enforcement from its contribution to the general goal of competition enforcement, which is to ensure that the competition prohibitions are not violated.[83] Therefore the superiority of public enforcement is found because of three main reasons[84] :

1) more effective investigative and sanctioning powers;

2) because private enforcement is driven by individual profit incentives that diverge from the general public interests;

3) higher costs of private enforcement.

It has to be noted that Wills does not even find a case for a supplementary role of private enforcement, arguing that adequate level of sanctions as well as a number and variety of prosecutions can be ensured more effectively and at a lower cost through public enforcement.[85] Accordingly as noted by Wils deterrence is "*almost doomed*" to be the enforcement approach, because the alternatives, such as prevention (e.g. changes in the competitive environment) or stimulation by moral commitment (e.g. standard setting), might be able to add value as additional strategies so as to achieve compliance but are, however, too expensive to administer. Therefore it could not constitute a substitute for the deterrence-based approach.[86]

The role of the public authorities also could not be denied as being of critical importance. For instance in detecting anticompetitive behaviour where the special investigation powers are needed it is better provided by the public authorities, e.g. where full

[80] Wardhaugh, B., *supra* note 4, p. 23.
[81] Nielen, M. G. *Leniency Material Unveiled? Access by Cartel Victims to Commission and NMa Files from a Perspective of EU Fundamental Rights and Cartel Enforcement*. Kennispunt Recht, Economie, Bestuur en Organisatie, Universiteit Utrecht, 2012, p. 9.
[82] MacCulloch, A., Wardhaugh, B., *supra* note 78, p. 21.
[83] Wils, W. P. J., *supra* note 1, p. 9.
[84] *Ibid*, p. 4
[85] *Ibid*.
[86] Hüschelrath, K.; Peyer, S., *supra* note 3, p. 8.

economic analysis is necessary.[87] Particularly importance of public enforcement is seen in leniency where cartels are detected and put to an end. Consequently it prevents further damage in general and assist infringed parties to file their damage actions. Possible formation of future cartels is also deterred due to the risk that cartel member may apply for leniency.[88]

MacCulloch and Wardhaugh also suggest that superiority in competition enforcement should be focused on effective public enforcement rather than private enforcement. Public enforcement provides for the deterrent effect seeking to prevent the occurrence of conduct before it has a chance to do harm. It is particularly clear in cartel enforcement where the general goal should be to prevent possible harm by deterrence: it is preferable to prevent parties from becoming victims rather than providing them means to receive compensation afterwards.[89] Public enforcer has the advantage of choosing the level of sanctions, the resources designated for proceedings, whereas the private parties are only seeking to redress damages after the infringement has already occurred. Therefore private parties tend to be motivated by narrow private interests whereas public enforcers are typically viewed as motivated by broader social concerns.[90] Accordingly, there are strong reasons to prioritize public enforcement over the private enforcement in the event of a conflict between these enforcement means[91] and in cases where approaches of legal regulation are being evaluated.

Considering the above potential conflicts between public and private enforcement must be resolved in a manner which does not make harm to effectiveness of public enforcement, which aims at deterrence and prevention of the occurrence of infringements in advance. Accordingly as regards specific case of potential collision between public and private enforcement, for instance, in cases of interaction between leniency and damages actions, the conflict shall be solved by taking into account effectiveness of public enforcement in the first place.

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[87] European Commission, Staff Working Paper, *supra* note 3, p. 8.

[88] Protection of leniency material in the context of civil damages actions. Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012. [interactive] European Competition Network. 2012. [accessed 15 09 2014]. <http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf>.

[89] MacCulloch, A., Wardhaugh, B., *supra* note 78, p. 22.

[90] Hüschelrath, K.; Peyer, S., *supra* note 18, p. 12.

[91] Wardhaugh, B., *supra* note 4, p. 23.

2. INTERACTION OF LENIENCY AND DAMAGES ACTIONS

As regards cartel enforcement relationship between private and public enforcement is reflected by the interaction of leniency[92] and damages actions. According to Wardhaugh the effective anti-cartel regime shall be comprised of three elements: public enforcement, private enforcement and leniency, where public enforcement deters, private enforcement compensates, and leniency is used to extract information, i.e. assisting to uncover cartels that otherwise might be left undetected, and make the subsequent investigation more efficient.[93] However the extraction of information may have effect of enhancing cartel members' exposure to subsequent damages actions. It may negatively impact leniency itself. Therefore the interaction among such tripartite enforcement system must be appropriately balanced in order to ensure that none of the elements hinder the effectiveness of another.[94] The impact of recent legislative approach to increase amount of damages actions and its impact on leniency are analysed further in this thesis. Respectively answers of how and on what particular points the interaction between leniency and damages actions occurs, and by what means it shall be balanced, will be provided.

2.1. Evolution of the EU cartel enforcement

Within the past decades the CJEU and the Commission established an aim to "[...] encourage a culture of private enforcement of European Competition law [...]".[95] This aim particularly was to develop a "[...] genuinely European approach [...]" different from the legal tools used, for instance, in the US, including treble damages, collective redress mechanisms, criminal liability, and others.[96] The initiative first of all has been implemented by the settled case law of the CJEU and the further administrative efforts of the Commission fostering exceptions of rights to compensation of damages at Member States level.[97]

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92 The definition of the term "leniency" varies within different jurisdictions. In the US together with "amnesty" it means full immunity from any sanctions. In Canada and the EU the term "leniency" is used to describe any lenient treatment (immunity, reduction of sanctions), as well as only a reduction in sanctions for subsequent applicants. (See Leniency for Subsequent Applicants. *OECD Policy Roundtables*. [interactive], 2012 [accessed on 02-03-2015]. <http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf>. p. 1.). In this thesis the term "leniency" is used to refer to leniency programme in general, covering both immunity or any reduction in sanctions that otherwise may be imposed.

93 Using Leniency to Fight Hard Core Cartels. OECD Policy Brief. [interactive], 2001. [accessed on 02-04-2015] < http://www.oecd.org/competition/cartels/21554908.pdf>.

94 Wardhaugh, B., *supra* note 4, p. 1.

95 White paper on damages actions for breach of the EC antitrust rules [2008] (SEC(2008) 404).

96 Dunne, N., *supra* note 34, p. 18.

97 *Ibid.,* p. 19.

2.1.1. Settled dominance of enforcement by leniency

Introduced in the EU enforcement system in 1996, leniency has become the main tool for public authorities to detect cartels. Cartels by their nature are secretive infringements and for this reason hard to detect. As noted, the "[…] difficulty in stopping cartels is secrecy"[98]. Therefore leniency provides enforcers the tools to uncover cartels that may have otherwise gone undetected for a long time and continued to make harm.[99] Leniency has been "[…] the single most important reason for the fact that an unprecedented number of cartels has been prosecuted in […] the European Union since the introduction of these programs"[100]. Until recently leniency was related to over 70 % of all cartel investigations in the EU. Although amount of leniency usage among national level of various Member States differs, it's effectiveness on the EU level proves to be the most effective tool to uncover cartel infringements. Still there are also authors that argue cartels being inherently unstable and inevitably dissolving without even taking of active enforcement[101]; however the more reasoned consent relies on aggressive approach[102] and supports benefits of leniency.

During leniency the immunity or fine reduction is provided in exchange for the voluntary disclosure of significant information related to the cartel that satisfies specific criteria, prior to or during the investigative stage[103], as well as voluntary cartel member's continuous cooperation with the competition authority during the following investigation[104]. The Commission has noted that interests of consumers in ensuring that cartels are detected and punished outweigh the interest of imposing fines at a level proportionate with the illegal conduct of those undertakings[105]. When an undertaking does not qualify for the full immunity (e.g. is not the first to submit an application or the presented evidence are insufficient), it could obtain reduction of the fine, which amounts to 30 to 50 % of the fine which would have been imposed.[106]

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98 See Using Leniency to Fight Hard Core Cartels. *OECD Policy Brief.*, *supra* note 90., p. 1.
99 Wardhaugh, B. *supra* note 4, p. 6.
100 Silbye, F. A Note on Antitrust Damages and Leniency Programs. *European Journal of Law and Economics*. 2011, 33(3), p. 691.
101 Leslie, C. R. Antitrust Amnesty, Game Theory, and Cartel Stability. *Journal of Corporation Law*. 2006, 31, p. 454.
102 *Ibid.*
103 Commission Notice on cooperation within the Network of Competition Authorities. [2004] C 101, p. 37.
104 Using Leniency to Fight Hard Core Cartels., *op. cit.*
105 *Ibid.*
106 European Commission. Staff Working Document. Impact assessment report., *supra* note 104, p. 70.

Decision to grant immunity or reduction of the fine to the applicant "[…] must reflect an undertaking's actual contribution, in terms of quality and timing, to the Commission's establishment of the infringement."[107] Thus evidence provided must be a decisive contribution (so-called "*smoking-gun*" evidence[108]) in order to be useful and grant benefit for the applying undertaking. The standard for evidence provided by Leniency Notice[109] states that it shall enable the Commission to carry out a targeted inspection or find an infringement in connection with the alleged cartel (i.e. leniency statement and other evidence relating to the cartel in possession or available to the applicant).[110] The genuine, full, continuous and expeditious further cooperation of the applicant during subsequent investigation proceedings is also a necessary condition for leniency.[111]

Contrary to the leniency policy of the US, the Leniency Notice of the EU does not provide any kind of absence to the applicant for the consequent prosecution. The Leniency Notice states that the fact that immunity or reduction of fine is being granted to the cooperating applicant "[…] cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 101 TFEU […]"[112]. Therefore the Commission will still adopt a decision finding an infringement under Article 101 TFEU (although the fine will reduced to zero[113]), and only indicating the fact that the undertaking has cooperated with the Commission during the procedure.[114]

Considering the above leniency not only works as an instrument for detection of cartels, but also itself creates advantages that enhance follow-on damages actions and compensation of infringes parties.[115] In case where would be no leniency applications, there would be consequently less detection of anticompetitive behaviour. Particularly it is evidential when due to the fact that cartel infringements are being secured between its members and thus particularly hard to detect.[116] Therefore there would be fewer chances for infringed parties to

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[107] Commission Notice on immunity from fines and reduction of fines in cartel cases. [2006] OJ C 298, p. 5.
[108] Renda, A., et al., *supra* note 8, p. 361.
[109] Commission Notice on Immunity from fines and reduction of fines in cartel cases. *op. cit*., p. 7.
[110] *Ibid*, p. 8-9.
[111] *Ibid*, p. 12.
[112] *Ibid*, p. 14.
[113] Leniency for Subsequent Applicants. *supra* note 90., p. 1.
[114] Commission Notice on Immunity from fines and reduction of fines in cartel cases, *op. cit.*
[115] Leniency for Subsequent Applicants. *op. cit.*
[116] E.g. conspiracy meetings might occur in a hotel room during a trade show, for example, or simply over the phone, evidence is hidden away. See Using Leniency to Fight Hard Core Cartels. *OECD Policy Brief., supra* note 91, p. 2.

obtain compensation[117]. Accordingly the causal link between keeping up the effectiveness of leniency and fostering of damages is created. Therefore it supports the reasoning to secure effectiveness of currently operating enforcement system based on leniency, when introducing any legislative amendments.

2.1.2. Introduction of damages actions into enforcement system

Damages actions theoretically were always available for infringed parties seeking compensation from cartel infringers. However the practical amount of damages actions in the EU has been so negligent that it consequently led to particular regulatory initiatives. Since 1973 the Commission has repeatedly expressed the view that private actions can provide a useful complementary role to public enforcement[118]. In 1983 the Commission noted the possibility of the introduction of the role of private enforcement stating that "[…] it is desirable that the judicial enforcement of Article 85 and 86 [101 and 102 of TFEU] should also include the award of damages to injured parties, because this would render Community law more effective"[119]. It was specified that the Commission is "[…] looking in particular at what steps could be taken to facilitate damages actions […]"[120]. However for a long time private enforcement has remained at almost non-existent and totally undeveloped level in the EU.

In the case law of CJEU the indication that EU law provides for private enforcement was established in *Van Gend en Loos*[121] judgement where the court assigned private parties direct and enforceable rights *vis-à-vis* respective state authorities and authorized national courts to protect those rights[122]. In *Courage and Crehan*[123] the CJEU analysed a question whether a party can obtain compensation for loss which it alleges to result from a contractual clause contrary to Article 85 [Article 105 of TFEU] and whether EU law precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages. The court noted that as the EU law imposes burdens on individuals, it is also

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[117] Schwab, A. Finding the Right Balance – the Deliberations of the European Parliament on the Draft Legislation Regarding Damage Claims. *Journal of European Competition Law and Practice*. 2014, 5(2), p. 65.

[118] Renda, A., et al., *supra* note 8, p 43.

[119] Thirteenth Report on Competition Policy of the European Commission. Seventeenth General Report on the Activities of the European Communities. Brussels, Luxembourgh: 1983.

[120] *Ibid*.

[121] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1.

[122] Benvenisti, E.; Downs, G. W. The Premises, Assumptions, and Implications of Van Gend En Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions. *The European Journal of International Law*. 2014, 25(1), p. 8.

[123] Case C-453/99, Courage and Crehan [2001] ECR I-6297.

intended to give rise to rights which become part of their legal assets. In particular, the practical effect of the prohibition laid down in Article 85(1) [Article 105(1) of TFEU] would be put at risk if it was not open to any individual to claim damages for loss caused by a contract or by conduct liable to restrict or distort competition. Indeed the existence of such a right strengthens the competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the EU.

Later the existence of a right to recover damages as a result of competition infringement was confirmed by the CJEU in *Manfredi*[124] judgement. The court followed, as in the previous judgements as well, that in the absence of the EU rules governing this matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the EU competition rules and to prescribe the detailed procedural rules governing damages actions, provided that the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules and that those national provisions do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC [Article 101 TFEU].

Considering the case law of CJEU any individual had the right to claim damages caused by anticompetitive behaviour, to be heard by national courts. However despite of case law confirming right to compensation, the number of private claims has not substantially increased through the time[125]. In 2004 after the Commission request to identify obstacles for private actions the Ashurst Report was prepared. It revealed that since the adoption of the EU and national competition laws there were only approximately 60 cases for damages actions (12 on the basis of EU law, approximately 32 on the basis of national law, and 6 on both). Among these judgments 28 of it have resulted in an award being made (8 on the basis of EU competition law, 16 on national law, and 4 on both).[126] More recent studies have shown that currently in some Member States damages actions are flourishing[127], whereas in others there

[124] Case C-295/04, Manfredi v Lloyd Adriatico Assicurazioni [2006] ECR I-6619., para 62-64.
[125] Saavedra, A., *supra* note 24, p. 8.
[126] Waelbroeck, D.; Slater, D; Even-Shoshan, G., *supra* note 6, p. 1.
[127] "Out of the 54 prohibition decisions adopted by the Commission between 2006 and 2012, only 15 led to follow-on actions for damages and the vast majority of them were brought in three Member States alone, namely the UK, Germany, and the Netherlands. In 21 Member States, there have been no follow-on damages actions at all. Almost all of the follow-on damages actions have been brought by large well-resourced

are very few successful cases, or in some hardly any claims are brought at all.[128] For instance in 2013 only 16 European Union Member States allowed victims to sue for damages of competition infringements.[129]

As possible cause of such negligent level Ashurst Report noted that although case law of the CJEU lays down the general principle of national procedural autonomy, it also places certain limits on it. Therefore general uncertainty as to the scope of autonomy and the fact that national law may not be compatible with this scope is created. Therefore difficulties for national courts that decide on application of the law arise, and thus uncertainties are created for the parties as to how their claim will be handled.[130] The Ashurst Report has also indicated the key areas where private enforcement could be facilitated, including: problems related to access to courts, reducing risks, facilitating proof, reducing costs, transparency and publicity, and interaction between national and EU law.[131] Furthermore the Green Paper in 2005 also identified obstacles to a more effective system of damages actions. Following White paper[132] of 2008 focused on a selective mix of procedural and substantive problems to overcome both legal and procedural hurdles in the Member States in order to remedy ineffective compensation.[133] It was declared that "[…] improving compensatory justice would inherently produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules".[134]

Finally in 2013 the Commission published a proposal for a Damages Directive[135] constituting reform related to private enforcement. The aim of Damages Directive was to found the way in which damages actions before national courts may be facilitated so as to

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undertakings and not by consumers or SMEs." See Howard, A. The Draft Directive on Competition Law Damages – What does it mean for Infringers and Victims? [interactive], 2013. [accessed on 15-01-2015] <http://www.monckton.com/wp-content/uploads/2013/09/AH-Article-Final.pdf>, p. 18.

[128] Cauffman, C., Philipsen. N.J., *supra* note 26, p. 7.

[129] Including Germany, France, UK, Spain, Italy, Poland, Netherlands, Belgium, Austria, Finland, etc. See Facilitating damage claims by victims of anti-competitive practices. European Parliament Briefing, *supra* note 6., p 1.

[130] Waelbroeck, D.; Slater, D; Even-Shoshan, G., *supra* note 6, p. 131.

[131] *Ibid*, p. 9.

[132] The White Paper triggered a large number of submissions of public consultation (more than 170) by governments of several Member States, national parliaments, national competition authorities, judges, businesses and business associations, law firms, consumer associations, academics and individuals. In terms of geographical spread, comments were issued by public authorities or stakeholders from almost all Member States.

[133] Peyer, S., *supra* note 72, p. 631.

[134] White paper on damages actions for breach of the EC antitrust rules [2008] (SEC(2008) 404), p. 7.

[135] 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. [2013] COM(2013) 404 final 2013/0185 (COD).

better compensate victims and complement the enforcement of public authorities. Also the aim was to find optimal balance in the interaction of the public and private enforcement[136].

2.2. Collision of leniency and damages actions

Interaction of leniency and damages actions has been investigated in Ashurst report[137]. The interaction was distinguished into factual and legal. It was noted that there has been no specific provisions on the legal interaction between leniency programmes and damages actions in legislation of the Member States. However factual interaction could not be rejected as "[…] leniency policies do not operate in a vacuum […]"[138]. For instance, among other aspects leniency applicants take into account the possibility of subsequent damages claims when considering whether to apply for leniency. Therefore there is a risk that increased amount of damages actions may negatively affect public enforcement system based on leniency.[139] It proves that regulatory approaches fostering execution of right to claim compensation possess a threat to jeopardise the effectiveness of public enforcement[140] by negatively affecting incentives to apply. Therefore the impact of damages actions on leniency in general and the specific points of collision will be analysed further in this thesis.

2.2.1. Impact of damages actions on effectiveness of leniency

Wills defines leniency as "[…] a game played between the competition authorities on the one hand and the cartel participants and their lawyers on the other hand where cartel participants applying for leniency will try to obtain higher immunity or reduction from penalties as possible, while giving as little evidence as possible of the antitrust violations, as otherwise their liability in follow-on private actions for damages might be increased".[141] Traditionally law and economics studies on leniency are performed by analysing game theoretic approach emerging in collusive agreements, and the pay-off structure needed to sustain such collusive agreements.[142] When deciding on cooperation under leniency, undertakings as potential applicants consider related risks compared in contrast with the situation when they decide not to cooperate and apply for leniency. Also taking into

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[136] European Commission, Staff Working Paper. *supra* note 3, p. 3.
[137] Waelbroeck, D.; Slater, D; Even-Shoshan, G., *supra* note 6, p. 15.
[138] Main three regulatory aspects: criminal liability of individuals, early case termination policies, private damage actions. See Leniency for Subsequent Applicants. *OECD Policy Roundtables., supra* note 90.
[139] European Commission. Staff Working Document. Impact assessment report, *supra* note 104, p. 25.
[140] Commission of the European Communities. Green Paper. *supra* note 3.
[141] Wils, W. P. J., *supra* note 1, p. 16.
[142] Renda, A., et al., *supra* note 8, p. 493.

consideration related benefits granted in case of successful application. Thus the optimal design of leniency is crucial for its success[143].

The incentive compatibility constraint used by Renda, A., et al. shows that collusive setting may be possible only if the players (cartel members) find it worthwhile, i.e. only in cases where collusive pay-off overturns risks of participation in a cartel. It means that cartel is sustainable only unless the cheating strategy is less profitable than the collusive one and the discount (benefit) rate or future profits from collusion are sufficiently high for the expected pay-off from collusion to be greater than the pay-off from defection.[144] Thus the balanced regulation of "*carrot and stick*" incentives[145] must be established for infringers to reveal cartel by applying for leniency[146].

- **Situation of prisoner's dilemma**

It is settled that leniency provides optimal incentives to blow the whistle in case where situation of prisoner's dilemma is created[147]. It means that leniency must be based on a model where a dominant strategy is for each cartel member to confess, irrespective of whether the other cartelists confesses or denies[148]. In general the concept of prisoner's dilemma exists when two parties pursue their own individual interests and act in a rationally selfish manner, which results in both parties ending up in a worse position in comparison as if they had cooperated and pursued the group's interests instead of their own[149].

In the classic model of prisoner's dilemma two suspects have committed both a major crime and a minor crime. Although there are sufficient evidence to convict both of them for the minor crime, but not enough to sustain convictions for the major crime. Both of suspects are being interrogated about their role in the major crime, but none of them has confessed. However the confession of either of the suspects would be enough to convict the other of the major crime. Therefore in this situation both prisoners are offered the same deal:

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[143] Leniency for Subsequent Applicants. OECD Policy Roundtables. *supra* note 90, p. 12.
[144] Renda, A., et al., *supra* note 8, p. 495.
[145] Using Leniency to Fight Hard Core Cartels. *OECD Policy Brief.*, *supra* note 91, p.1.
[146] Wils notes that "[...] not only is particularly effective in the area of antitrust, since antitrust violations generally result from business decisions. Indeed, corporate managers are not necessarily just maximizers of profits for themselves and their principals. They may feel a moral responsibility to live within the law whether or not they are likely to be caught, and this normative commitment could trump their interest calculus. Indeed, psychological research suggests that normative commitment is generally an important factor explaining compliance with the law. To reduce the number of antitrust violations, one may thus, apart from organizing deterrence, try to find ways to increase business people's normative commitment to the antitrust rules. See Wils, W. P. J. *supra* note 1., p. 5.
[147] Kirst, P.; Bergh R. Van den., *supra* note 33, p. 7.
[148] Ibid., p. 8.
[149] Leslie, C. R., *supra* note 99, p. 455.

"If you confess and provide evidence against your partner, then you'll get no jail time for either the minor or major crime and he'll get a three-year sentence. However, if he confesses and you don't, you'll get the three-year sentence and he'll walk. But, if both of you confess, we won't need your testimony and both of you will get a two-year sentence. Finally, if neither of you confesses, then you'll each get one year in prison on the minor crime. Your partner is being offered the same deal." According to this model each suspect pursuing his own short-term self-interest should aim to confess.[150]

Respectively in cartel enforcement the model of prisoner's dilemma is revealed when the competition authorities are attempting to secure confessions from cartel members offering each potential applicant a deal to cooperate in exchange for leniency.[151] It is also being announced that every suspect is being offered the same deal.[152] Thus in practice business decision makers acts the same way as suspects in prisoner's dilemma by considering incentives to cooperate with the authorities, i.e. evaluating opportunity of minimizing risk of possible prosecution against the aim to maximize profits of continuous participation in cartel.

- **Evaluation of deterrence and incentives to apply for leniency**

First of all the constraint which creates general deterrence and which each cartelist faces includes the likelihood that the cartel will be detected and calculation of the expected amount of fine imposed The higher the expected fine, or the probability of detection, the higher the future collusive profits must be in order to temp the prospective cartelist to perform the infringement. Therefore in order to affect collusive incentives, the increased amount of fines may be established. If fines are too weak or applied too infrequently, the undertakings may disregard an offer to relax them in exchange for participation in leniency[153]. Higher rate of detection of cartels may also provide for sufficient amount of deterrence, needed for the cartel members to think of the possibility to apply for leniency. Particularly in low private enforcement systems the probability of detection is the main factor taken into account by the undertakings when deciding whether to apply[154]. Thus by modifying these constraints, it is possible to significantly enhance the deterrence impact on cartelists.[155]

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[150] Leslie, C. R. *supra* note 99, p. 455.

[151] For instance example of the US shows that even promising amnesty to a party who can provide a critical link in obtaining decisive documentary evidence has made it possible to disclose some cartels. See Using Leniency to Fight Hard Core Cartels. *OECD Policy Brief.*, *supra* note 91, p. 3.)

[152] Leslie, C. R. *op.cit.*, p. 456.

[153] Using Leniency to Fight Hard Core Cartels. OECD Policy Brief., *op. cit.*, p. 3.

[154] Renda, A., et al., *supra* note 8, p. 494.

[155] *Ibid.*

In addition fines and disclosure risk cartel members also considers the following aspects[156].

First of all, it must be noted that the benefits of staying with the cartel may appear larger and more certain than anticipated benefits from cooperating with competition authorities[157]. Undertakings generally join cartels with the aim to maximize profits. For instance price-fixing may result in significant amounts in surplus profits for cartel members, depending on the market. Accordingly application for leniency would necessarily lead to the end of the cartel together with the estimated wealth. Also it eliminates possible future participation in other cartels as undertaking that had exposed cartel may not be trusted for participation in future cartels, even in different product markets. For this reason the decision to confess may cost significant amounts in profits for the applicant.[158]

Secondly beyond the lost opportunity costs, confessing will expose cartel members to subsequent damages actions. As example of the US shows, the Sherman Act in 1890 and the Clayton Act in 1914 entitled parties to bring lawsuits against infringers for three times the damages suffered from any violation of the antitrust laws[159]. Still even single amount of damages may come into significant amount of compensation awarded[160]. Furthermore as successful leniency applicants are less likely to appeal an infringement decision (as it would definitely conflict with their voluntary intention to cooperate with competition authority), such decision will often become final earlier than for the other members of the same cartel. This may result in making successful leniency applicant the primary target for damages actions.[161] As a note, in the context of international cartels, confessing to one competition authority may induce investigations of cartel activities in others and expose cartel members to liability in several jurisdictions.[162]

Finally, there are other disincentives to apply for leniency apart from a simple calculation of lost profits and amount of damages compensation. It is a need for valuable time, staff and other resources, required in order to prepare relevant evidence and continuously cooperate with competition authority during investigation. Moreover potential the harm to

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[156] Leslie, C. R. *supra* note 99, p. 458-459.
[157] Using Leniency to Fight Hard Core Cartels. *OECD Policy Brief.*, *supra* note 91, p. 2.
[158] Leslie, C. R. *op.cit.*, p. 458-459.
[159] McAfee, *supra* note, p. 1864.
[160] Leslie, C. R. *op.cit.*, p. 458-459.
[161] *Ibid.*
[162] *Ibid.*

reputation where the decision to confess will reflect on both the undertaking and the individuals who were involved in the participation in the cartel is taken into account.[163]

Considering the above the effectiveness of leniency heavily depends not only on deterrence aspect of indicated risks, but also on the incentives (benefits) which leniency programme offers to potential applicants for confession and following cooperating. Definitely the most important of benefits here is the immunity or reduction from fines that would otherwise have been imposed.[164] However if considering that currently operating EU scheme of leniency has properly balances deterrence and incentives, the recent approaches to increase amount of private damages actions, if effectively regulated and implemented, may act as an additional deterrent, and thus add to the disincentives to confess.[165] While a potential leniency applicant may still benefit from immunity or a reduction of fines, that benefit will be more clearly perceived as outweighed by an increased risk of liability for damages.[166] For instance evidence show that larger damage compensations imply lower incentives to self-report if amount of damages is not fully encompassed by the leniency program[167]. Accordingly only a general offer to reduce fine in exchange for confession may not be enough in order to encourage undertakings to come forward in the future[168].

Based on Renda A. et al. model of general changes of incentive compatibility constraint in relation to limitation of subsequent liability the following models may be created[169]:

1) the collusive pay-off rather than collaborative pay-off will increase, as the colluding undertaking will be more exposed to damages actions;

2) the collaborative pay-off rather than collusive pay-off will increase, due to the prospective limitation (rebate) on damages.

Furthermore game theoretic framework used by Silbye demonstrates that an increase in damages actions could not only reduce attractiveness of leniency, but might be even pro-

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[163] Leslie, C. R. *supra* note 99, p. 458-459.

[164] Protection of leniency material in the context of civil damages actions. Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012. *supra* note 15, p. 2.

[165] Leniency for Subsequent Applicants. OECD Policy Roundtables. *supra* note 91, p. 11.

[166] Opinion of Advocate General Mazák., *supra* note 77, para 38.

[167] Silbye, F., *supra* note 98, p. 691.

[168] "For instance the original US leniency program made only a relatively general offer to reduce fines and thus produced only about one case per year. After changes in1993 under which prosecutorial discretion to decide on reward was removed from the granting of immunity; second, immunity was also made available after the start of an investigation; third, immunity was extended to include employees and directors coming forward along with the cooperating corporation, it credited with a dramatic increase in the number of cartelists coming forward to take advantage of the policy". See Leniency for Subsequent Applicants. OECD Policy Roundtables., *op. cit.*, p. 2.

[169] Renda, A., et al., *supra* note 8, p. 501.

collusive, particularly in a system where leniency program is already in place[170] — as it is in the context of the EU, where dominant role in cartel enforcement is played by leniency, and where is recent approach is to foster damages actions.[171] Silbye argues that such problem may be overcome if successful leniency applicant will be allowed higher reward, or even be exempted fully from subsequent liability. However proposed solution may still properly evaluated, because as a result infringed parties may not find it worthwhile to file actions for damages, or it might violate fundamental right to compensation. It may also lead to moral concerns about rewarding infringers. Therefore the bottom line here may be that policy makers should be highly aware of the impact of damages actions to leniency as possibly facilitating collusion, unless the incentives to collaborate are balanced.[172]

Considering the above the task for cartel enforcement policy makers is decide on such regulation that would create a prisoner's dilemma for each player to shares the same strategy — to confess participation in the cartel and turn evidence against other cartel members. As regards interaction of leniency and damage actions it is "[…] necessary to pay close attention to the interaction when designing antitrust policy".[173] Therefore when damages actions are being introduced in a system based on leniency, the additional incentives in order to re-balance effectiveness of leniency must be introduced.

In general the following types of instruments may be used by policy makers to properly balance incentives and risks considered by the cartel members when deciding on cooperation may be distinguished. In its essence it works as a kind of system of brakes and counterbalances:

1) ***Limitations*** — the first way of ensuring right balance of incentives is to set sufficient limitations that restrict possible negative effects (risks) for leniency applicant. Limitations thus are directed to the impact of the rights of the third parties rather than to the rights leniency applicant itself. In general it provides passive restriction by which negative impact on leniency applicant is prevented.

For instance, the example of limitations could be limits on the disclosure of leniency material provided by the leniency applicant in the following cases for damages actions. Limitations may be distinguished by the scope of disclosable documents: firstly the most important information — leniency statements; secondly — information prepared for the sole purpose to be presented in proceedings of competition authority; thirdly — pre-existing

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[170] Silbye, F., *supra* note 98, p. 692.
[171] Buccirossi, P.; Marvão, C.; Spagnolo, G., *supra* note 16, p. 4.
[172] Silbye, F., *op. cit*., p. 694.
[173] *Ibid*.

information. Restrictions of the disclosure of such documents, limit the rights of the private parties that file actions for damages, and accordingly prevents possible negative effects on the successful leniency applicant. Accordingly the chosen scope (type of) disclosable documents allow balancing effectiveness of implemented limitation.

2) ***Benefits*** — the second way of ensuring right balance of incentives is to provide considerable benefits (rewards) to undertaking that confess its participation in a cartel. Benefits thus in the first place are more directed at the rights (obligations) of the leniency applicant itself rather that the rights of the third parties. In general it provides active benefits that create additional incentives for the undertaking to apply for leniency.

For instance, the example of benefits could be limitations on the liability of the successful leniency applicant towards the parties infringed by the anticompetitive actions of a cartel. Limitation of subsequent liability creates particular financial benefit (reward) for the cooperating undertaking (as the amount of damages that otherwise would have to be compensated is being reduced), and accordingly creates additional incentive for the undertaking to seek cooperation under leniency. It shall be noted that benefits may create ambiguity of question whether and to what level infringers of competition law may be rewarded in general. As regards right of the third parties, for instance parties that claim for damages, the potential impact on their rights may be cancelled by transferring obligation to compensate damages to other non-cooperating members of cartel.

Therefore when deciding on particular legal regulation and evaluating its impact on the balance of incentives to participate in the leniency, the described general types on instruments shall be used within an established order, i.e. first of all limitations may be set as providing less of consequences (as in general setting only passive limitation on right of third parties), and afterwards benefit may be introduced (as active instrument thus providing more significant consequences for related parties). As a note it must be mentioned that inevitably usage of both of these instruments will interact with related rights (obligations) of the third parties (such as right to compensation), that must be also assessed by the legislative policy makers.

In addition to the abovementioned general types of instruments as limitations and benefits, the third aspect of ensuring legal certainty must be also taken into account. In order to maximise the incentive for defection, it is important for policy makers not only to provide that the first one undertaking to confess receives the best deal, but also that the terms of the

deal be as clear as possible[174], i.e. by increasing awareness of the infringers about the applicable rules and clarifying the conditions for their liability.[175]

The abovementioned general types on instruments balancing incentives of the undertaking to apply for leniency may be used to create guidelines for policy makers to evaluate and direct their future legislative amendments so as to avoid negative effects on leniency and consequently on overall cartel enforcement. These guidelines will be more deeply analysed in relation with the particular points of collision between leniency and damages actions, as well as implemented regulation of the Damages Directive further in this thesis.

2.2.2. Specific points of collision between leniency and damages actions

As regards interaction of damages actions and leniency the main points of collision could be defined as non-disclosure of evidence provided to the competition authority and limited liability for successful applicants[176]. These two collision points as well as possible approach on their proper balancing are analysed below in this thesis.

- **Disclosure of leniency material as evidence**

First point of collision of leniency and damages actions is the disclosure of leniency material to private parties seeking award of compensation of damages. Access to evidence in Green Paper of Damages Directive has been identified as one of the main impediments for efficient development of private enforcement.[177] Limited scope of documents available for the infringed parties create most difficulties in proving various elements required for successful damages actions[178].[179]

Disclosure of documents provided by applicants to competition authorities may be used to increase the effectiveness of damages actions, but at the same time it must not deter cartel members from making leniency applications. Therefore it raises the problem which

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[174] "Clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear". See Using Leniency to Fight Hard Core Cartels. OECD Policy Brief., *supra* note 91, p. 2.

[175] European Commission. Staff Working Document. Impact assessment report., *supra* note 104, p. 27.

[176] Saavedra, A., *supra* note 24, p. 4.

[177] Commission of the European Communities. Green Paper., *supra* note 138, p. 12.

[178] Waelbroeck, D.; Slater, D; Even-Shoshan, G., *supra* note 6, p. 23.

[179] Legal practitioners note that rules on disclosure have been key aspect for certain jurisdictions (e.g. UK) to become considered as more favourable for damages actions (See 7. Impact of the EU Directive on Antitrust Damages Actions – Competition Litigation 2015. *International Comparative Legal Guides*. [interactive], 2015. [accessed on 01-03-2015] <http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2015/impact-of-the-eu-directive-on-antitrust-damages-actions>).

types of documents shall be protected and which shall be disclosed[180], as the rules on *inter partes* disclosure should equally work for both claimants and defendants in order not to imbalance their procedural position.[181] As the disclosure of documents increases exposure of cooperating undertakings to damages actions and thus adds further disincentives not to cooperate, the balanced regulation requires clearly define availability of "[...] documents that need to be disclosed, as they are indispensable for supporting a victim's claim [...]"[182] and documents that are needed to be secured in order to preserve effectiveness of leniency.

The term leniency material in general refers to the documents created specifically for the purpose of participation in leniency proceedings[183]. Example is leniency statement that is a voluntary submission containing information such as a thorough description of the cartel, its scope, duration, functioning, the identity of the participant undertakings and of individuals who have been involved in the cartel, and other information together with proving evidence[184]. Leniency statements are sensitive documents not only because they contain confidential information, but also because they contain the acknowledgement of an undertaking's participation in a cartel itself[185]. Leniency material may also contain witness statements made by employees and directors of the undertakings (whether oral or written), as well as another information prepared specifically for the proceedings.[186] Different type of documents is defined as "*pre-existing information*". Pre-existing information has not been created with a sole purpose of participation in leniency procedure, i.e. it exists irrespective of the proceedings, whether or not such information is in the file of a competition authority[187]. Thus it also proves cartel not being created for the mere purpose of applying for leniency.[188]

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[180] Kersting, C. Removing the Tension Between Public and Private Enforcement : Disclosure and Privileges for Successful Leniency Applicants. *Briefing Session Private Enforcement Directive.* [interactive] Brussels: 2012. [accessed on 11 11 2014]. <http://ssrn.com/abstract=2328126>, p. 12.

[181] European Commission. Staff Working Document. Impact assessment report. *supra* note 104, p. 86.

[182] Schwab, A., *supra* note 115, p. 64.

[183] Nordlander, K.; Abenhaïm, M. *The "Discoverability" of Leniency Documents and the Proposed Directive on Damages Actions for Antitrust Infringements Infringements* [interactive], CPI Antitrust Chronicle, 2012, [accessed 13-11-2014]. <https://www.competitionpolicyinternational.com/the discoverability of leniency documents-and-the-proposed-directive-on-damages-actions-for-antitrust infringements/>, p. 4.

[184] *Ibid*.

[185] As regards leniency statements, particular forms of protectionism being envisaged by Leniency Notice. For instance, the leniency statement can be provided orally by the undertakings and recorded at the Commission's premises. Access to the leniency statements is also restricted to the addressees of a statement of objections (i.e. alleged co-infringers), that cannot obtain copies of the statements, and can only use the information for the purposes of judicial and administrative proceedings for the application of the EU competition rules. See European Commission. Staff Working Document. Impact assessment report. *supra* note 104, p. 71.

[186] Protection of leniency material in the context of civil damages actions. Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, *supra* note 15., p. 2.

[187] Recital 17 of Damages Directive.

[188] González, P. *Disclosure of Leniency Materials: A Bridge between Public and Private Enforcement of Antitrust Law* [interactive], College of Europe, 2013, [accessed on 13-10-2014]. <http://aei.pitt.edu/47511/>, p. 5.

Example of pre-existing information may be various written agreements, minutes of meetings, e-mails and receipts, etc.[189]. Pre-existing information may be submitted together with leniency material as supporting evidence (e.g. as a particular annex to the leniency statement). Although in theory pre-existing information is usually not included into the concept of leniency material, in such case it may be reasonable to consider it as constituting a part of leniency material. It must be noted that "[...] the selection of pre-existing documents that are submitted to a competition authority for the purposes of the proceedings is in itself relevant, as undertakings are invited to supply targeted evidence in view of their cooperation [...]"[190]. Thus not only leniency statement, but also pre-existing information has a very high value for claimants for successful damages actions.[191]

The importance of disclosure of evidence for bringing private actions for damages is based on the fact that preparation of damages actions typically requires complex factual and economic analysis[192], i.e. includes provision of evidence on the anticompetitive behaviour (in particular establishment of causal link, amount of damages, existence of an infringement (more in stand-alone actions))[193], including various economic elements such as the effect of anticompetitive behaviour on the market. However, usually all this information is held in the hands of infringers, secured, and could not be accessed through the use other sources.[194] Accordingly it creates situation of information asymmetry. Therefore access to leniency material, including self-incriminating leniency statements, would become a powerful tool for infringed parties to overcome such information asymmetry.[195]

Nonetheless different types of information creates different amount of risk of exposure to subsequent liability. For instance the disclosure of leniency statements creates a higher risk than, for instance, subsequent information provided during proceedings. Therefore disclosure of leniency statement will makes the relevant leniency applicant certainly worse-

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[189] Nielen, M. G., *supra* note 80, p. 13.

[190] 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. [2013] COM(2013) 404 final 2013/0185 (COD)., p. 15.

[191] As a side note "[...] various evidence may be valued in particular case, e.g. infringement decision itself, which even binds all national courts as to the existence of a wrongful conduct, also all the evidence annexed to a leniency submission, as well as the raw evidence and statements collected in the course of the investigation, the documents specifically prepared for the purpose of public enforcement proceedings would become discoverable, once the competition authority has closed its proceedings. See Nordlander, K.; Abenhaïm, M. *supra* note 181, p. 83.

[192] Recital 14 of Damages Directive.

[193] Waelbroeck, D.; Slater, D; Even-Shoshan, G., *supra* note 6, p. 24.

[194] Migani, C. Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement. *Global Antitrust Review*. 2014, 7, p. 4.

[195] *Ibid*.

off than if it had chosen not to cooperate.[196] Accordingly limitations on the right of access to leniency material must be limited in scope accordingly so as to prevent possible negative consequences on the incentives of undertaking to cooperate[197]. However the possible approach on the scope of protection is various, for example, the heads of the national competition authorities have expressed consent on intention to "[...] protect all material submitted under a leniency programme from disclosure [...]"[198].

As regards distinction of protection of leniency statements and pre-existing information, Gonzalez proposes that distinction in the set rules on disclosure must be made between leniency statements (as not disclosable) and pre-existing documents (as disclosable on general basis) due to three reasons. First of all, disclosure of leniency statements entails a deterrent effect for leniency as these documents only exists solely for the participation in leniency. Whereas, pre-existing information may be obtained, for instance, through dawn raids of competition authorities. Secondly, disclosure of leniency statements may jeopardize the right against self-incrimination, whereas pre-existing does not. Finally, disclosure of leniency statements is likely to create substantial disadvantage for leniency applicant *vis à vis* the rest cartel members, whereas disclosure of pre-existing information in general only foster damages actions.[199] Furthermore in practice protection of pre-existing information may be secured by general rules on proportionality and necessity on documents requested to be disclosed. Also in theory there are opinions that separation between leniency statements and pre-existing information in practise does not exist and it would be particularly difficult to trace pre-existing information without the indications of its existence in leniency statements[200].

However there are also different opinions that pre-existing information provided as annex to leniency statements shall not be disclosed for the use in actions for damages. Although documents of pre-existing information are not directly prepared for the proceedings, they still form the part of submissions and must be accordingly protected.[201] It was also argued in the Green Paper that disclosure of documents selectively submitted by leniency applicants (e.g. attached to leniency statements) shall not be disclosed. Otherwise, it would most likely have an impact on the undertakings' willingness to submit sufficient amount of

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[196] Leniency for Subsequent Applicants. *OECD Policy Roundtables*., supra note 90, p. 11.
[197] Renda, A., et al., *supra* note 8, p. 500.
[198] Protection of leniency material in the context of civil damages actions. Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012., supra note 15., p. 3.
[199] González, P., *supra* note 186, p. 5.
[200] Kersting, C., *supra* note 178, p. 12.
[201] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/fbd_en.pdf> [accessed on 04-04-2015].

evidence as such selected pre-existing documents and therefore it may ultimately impact effectiveness of the investigation.[202]

On the other hand importance of leniency material in general may be also argued. Buccirossi, Marvão and Spagnolo indicates the problem whether leniency statements truly are the most damaging information for leniency applicant in case of disclosure. First of all leniency statement submitted in leniency proceedings may prove helpful for claimant of damages action because it structures the presentation and understanding of the evidence contained in the case file. Therefore it may be used as a tool to make analysis of other evidence in entirety in order to sufficiently ground the damages action in court. However such the extent to which leniency statement actually assists is extremely variable and depends on all the other discoverable elements: the length and detailed nature of the infringement decision, the type of evidence, etc.[203] Therefore without denying that leniency statements may help victims prove their damages claims in courts, it is also possible to argue whether such documents, if systematically taken into account all evidence required to be properly provided as a ground for damages claim, is so crucial that the absence of this material would render the claim "[...] practically impossible or excessively difficult [...]"[204] as defined by the effectiveness principle defined in *Pfleiderer* and *Donau Chemie* judgements and other settled case law of the CJEU further analysed below.[205]

To sum up the general consent is that rules on disclosure of various types of leniency material and related evidence must be balanced as it on the one hand fosters effectiveness of damages actions, but on the other may put leniency applicant in a worse-off situation as regards other cartelist, in this way decreasing incentives to apply for leniency. As the importance of different types of disclosable evidence varies, it is argued to what scope they shall be protected. However, if disclosed differentiated rules on different types may be used to find a properly balanced regulation.

- **Approach to disclosure of evidence in the case law of CJEU**

Under recent, i.e. prior to the adoption of Damages Directive, legislation of the EU an undertaking considering to apply for leniency could not know at the time of its cooperation with authorities whether victims of the infringement will have access to the information it has

[202] Caruso. A, Leniency Programmes and Protection of Confidentiality: The Experience of the European Commission. *The European Journal of International Law*. 2010, 1(6), p. 475.
[203] Buccirossi, P.; Marvão, C.; Spagnolo, G., *supra* note 16, p. 2.
[204] Case C-360/09, Pfleiderer AG v Bundeskartellamt [2011] ECR I-5161; Case C-536/11, Donau Chemie and Others [2013] ECR 5 CMLR 19.
[205] Nordlander, K.; Abenhaïm, M. *supra* note 181, p. 3.

voluntarily supplied during cooperation.[206] Provisions of applicable EU regulations[207] did not laid down any common rules on leniency or common rules on the right of access to documents submitted during leniency procedure.[208] Accordingly litigants have repeatedly attempted to access leniency documents, relying either on national law, Regulation 1/2003, or the Transparency Regulation.[209]

Therefore the case law of CJEU was settled in a way that opened up the possibility for disclosure of leniency statements and other leniency material.[210] Protection of such documents was granted, but nonetheless leaving the possibility for the courts of the Member States to disclose evidence when a claimant has presented sufficient facts justifying that evidence specified in a narrow manner are indispensable to support the claim.[211]

The landmark and controversial[212] was *Pfleiderer* judgment[213] of CJEU adopted in 2009. It was the first preliminary ruling specifically focusing on the interaction of damages actions as a mean of private enforcement and leniency as a mean of public enforcement. In *Pfleiderer* the German competition authority (*Bundeskartellamt*) imposed fines amounting in total to EUR 62 million on three European manufacturers of decor paper and on five individuals who were personally liable for participation in a cartel (agreements on prices and capacity closure). Those decisions were based inter alia on information and documents which the Bundeskartellamt had received during procedure of its leniency programme. The question for preliminary ruling concerned application for full access to the file relating to the imposition of a fine. The application for access which extends to the documents relating to the leniency procedure, was made by Pfleiderer, a customer of the fined undertakings (value of purchased goods exceeded EUR 60 million) in order to prepare a civil action for damages. In general the CJEU in this case has ruled on establishment of balancing exercise on a case by case basis for the national courts.

[206] 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. [2013] COM(2013) 404 final 2013/0185 (COD).
[207] E.g. Treaty, Regulation 1/2003 or the Transparency Regulation, etc.
[208] Case C-360/09, Pfleiderer AG v Bundeskartellamt [2011] ECR I-5161., para 29.
[209] Nordlander, K.; Abenhaïm, M., *supra* note 181, p. 6.
[210] Migani, C., *supra* note 192, p. 4.
[211] 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. [2013] COM(2013) 404 final 2013/0185 (COD).
[212] Migani, C., *op.cit*.
[213] Case C-360/09, Pfleiderer AG v Bundeskartellamt [2011] ECR I-5161.

The CJEU having underlined the significant contribution of civil actions to the maintenance of effective competition in the EU and their deterrent effect[214], held that in the absence of EU law it is for the national courts on a national law basis, and by weighing the respective interests in favour of disclosure of information and in favour of protection of documents provided voluntarily by the applicant for leniency, as well as taking into account all the relevant factors, to decide whether to allow the disclosure of leniency material. Therefore no specific criteria were set out by the court, leaving for the national courts to balance arising interests on a case by case basis.

Opinion of Advocate General Mazák in *Pfleiderer* however diverged from the decision of the CJEU. The general advocate noted that access to self-incriminating statements should be denied, emphasizing the effectiveness of leniency programmes, because "[…] while the denial of such access may create obstacles to or hinder to some extent an allegedly injured party's fundamental right to an effective remedy and a fair trial […], the interference with that right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by national competition authorities and private interests in detecting and punishing cartels".[215] General Advocate also distinguished between incriminating leniency statements of applicant, and pre-existing information provided together. General Advocate proposed to secure from disclosure leniency statements and disclose pre-existing information so as not to violate fundamental right of the infringed parties to compensation of damages.

In 2013 the approach of CJEU was once again confirmed in *Donau Chemie* judgement where the court was requested to rule regarding disclosure to third parties of the judicial case file without the consent of all parties to the proceedings. In this case the court relied extensively on the balancing exercise for national courts established by *Pfleiderer,* and considered that "[…] any rule that is rigid, either by providing for absolute refusal to grant access to the documents in question or for granting access to those documents as matter of course, is liable to undermine the effective application of, inter alia, Article 101 TFEU and the rights that provision confers on individuals" [216]. As regards importance of leniency the court noted that "[…] the argument that there is a risk that access to evidence contained in a file in competition proceedings […] may undermine the effectiveness of a leniency programme in which those documents were disclosed to the competent competition authority cannot justify a

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[214] Morais, L. S. *Integrating Public and Private Enforcement in Europe – Legal and Jurisdictional Issues*. Revista da Faculdade de Direito [interactive], 2014 (2): 53-85. [accessed on 03-15-2015]. < http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at800175_morais_luis_silva.authcheckdam.pdf >, p. 65.

[215] Opinion of Advocate General Mazák, *supra* note 76, para 65.

[216] Case C-536/11, Donau Chemie and Others [2013] ECR 5 CMLR 19., para 31.

refusal to grant access to that evidence" [217]. Accordingly the possibility to restrict disclosure was allowed only in very specific circumstances.

The rulings of CJEU in Pfleiderer and subsequent case law[218] created much controversy[219]. The CJEU may have been seen as evaded from putting forward "[…] a specific parameter to determine what should and should not be discoverable based on a crucial distinction between corporate statements and other materials produced in the course of a leniency procedure".[220] The position of CJEU faced criticism stating that it endangered the effectiveness of various leniency programmes existing at European Union and Member State levels.[221] There have been opinions that "[…] neither Pfleiderer nor the subsequent case law really clarified whether, as a matter of EU law, leniency documents should be disclosed or protected [...]".[222] It was noted that settled case law left the Member States with an "[…] excessively broad margin of discretion [...]"[223] that could lead to differences in subsequent national courts' decisions. The Commission stressed that it could "[…] lead to discrepancies between practice of Member States and result in uncertainty as to the disclosability that is likely to influence an undertaking's choice whether or not to cooperate under leniency programme [...]". Thus it was also emphasized that settled case law challenge the assumption of "*peaceful co-existence*" between public and private enforcement mechanisms in general.[224]

Based on the judgement of Pfleiderer and others national courts on the one hand were not willing to disclose leniency material, whereas on the other hand there have been cases were "[...] more claimant-friendly approach [...]" was taken.[225] Therefore the legal regulation and case law settled prior to the adoption of Damages Directive could be

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[217] Case C-536/11, Donau Chemie and Others [2013] ECR 5 CMLR 19., para 46.

[218] See T-437/08, CDC Hydrogene Peroxide v Commission, NYR [2011]; T-344/08, En BW Energie Baden-Württemberg AG v Commission, NYR [2012], etc.

[219] One of the first applications of Pfleiderer at the domestic level took place before the High Court of the United Kingdom in 2012. In National Grid v. ABB [2011] EWHC 1717 (Ch), [2012] EWHC 869 (Ch), the High Court carried out the balancing exercise, therefore ordering disclosure of some of the leniency documents submitted on the basis of factors like the defendants' legitimate expectations, proportionality and possible prejudice to applicants and to the deterrent effect. See Morais, L. S. *supra* note 202, p. 68.

[220] *Ibid.*, p. 66.

[221] Dunne, N., *supra* note 34, p. 18.

[222] Nordlander, K.; Abenhaïm, M., *supra* note 181, p. 4.

[223] Kowalik-Bańczyk, K. *Ways of Harmonising Polish Competition Law with the Competition Law of the EU*. Yearbook of Antitrust and Regulatory Studies. 2014, 7(9): 151-159, p. 144.

[224] 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. [2013] COM(2013) 404 final 2013/0185 (COD).

[225] E.g. limited disclosure - Cf. German AG Bonn, 18.1.2012, 51 Gs 53/09; German OLG Düsseldorf, 22.8.2012, 4 Kart 5/11; more open disclosure - Cf. English High Court, 4.4.2012, EWHC 869 (Ch); German OLG Hamm, 26.11.2013, 1 VAs 116/13. (See [interactive] <http://irjs.univ-paris1.fr/labo/departement-de-recherche-justice-et-proces/revuelectroniqueliensprocessu/directiveprivateenforcement/> [accessed on 04-04-2015]).

characterised by "[…] unpredictability, that follows from the fact that each national court decides on an ad hoc basis and according to the applicable national rules whether or not to grant access to leniency-related information [...]"[226]. The problem here was that CJEU have "[…] avoided the problem by […] kicking the ball to the Member States and their national courts [...]".[227]

- **Limitation of liability for successful leniency applicant**

Second point of collision between leniency and damages actions is the liability of successful leniency applicant towards the claimants of damages actions. According to the case law of CJEU settled by *Courage v Crehan*[228], *Manfredi*[229] and other judgments, it is generally acceptable that any individual can claim compensation for harm suffered from an infringement of the EU competition rules. Also "[…] it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest"[230]. Therefore a legal system which does not allow for an effective exercise of the right to full compensation of the entire harm would be considered being contradictive against the EU law as well as violating the principle of effectiveness.

In cartels where several undertakings infringe competition rules jointly, a general rule applies, under which it is appropriate that these undertakings be jointly and severally liable for the entire harm caused by the infringement.[231] Therefore a victim could sue any or all of the infringers for the compensation of the harm suffered. Eventually each infringer pays more or less of its share of damages, under the rules of contribution that regulate how the paid infringer could contribute from other cartelists.[232]

Considering the approach to increase amount of damages actions, regulation on liability may be analysed in regard with its possible effects on collusive incentives for the undertakings applying for leniency. As leniency is a tool of public enforcement, the benefits

[226] 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. [2013] COM(2013) 404 final 2013/0185 (COD)., p. 15.
[227] Wardhaugh, B., *supra* note 4, p. 12.
[228] Case C-453/99, Courage and Crehan [2001] ECR I-6297.
[229] Case C-295/04, Manfredi v Lloyd Adriatico Assicurazioni [2006] ECR I-6619.
[230] *Ibid*. para 95.
[231] 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. *op. cit*., p. 16.
[232] Renda, A., et al., *supra* note 8, p. 516.

granted to successful leniency applicants are usually limited to limitation of scope of public fines. However the benefits are not related to the subsequent liability arising from the awards of damages. Still these effects of private enforcement inevitably interact within the incentives of leniency and thus must to be taken into account. Subsequent liability of successful leniency applicant becomes particularly significant as cartel members decide on confession by calculating possible risks and benefits of cooperation.[233] Therefore not balanced regulation of liability may strengthen the collusive agreement, by reducing the collaboration pay-off in comparison within the collusive pay-off.[234] Therefore when enhancing possibilities for the parties to file damages actions, benefits to apply for leniency by limiting or reducing subsequent liability must be additionally increased, in order to provide higher cooperation pay-off to the undertaking.[235]

Based on the analysis performed by Renda A., et. al. the effects of damages limitation (rebate) may be achieved through the following tools[236]:

1) ***A fixed rate of rebate*** — established by statute, under certain well defined conditions, to be ascertained by the public enforcer in granting leniency or by the court deciding on the amount damages. It entails greater legal certainty and control by the enforcing authority, with increasingly homogeneous interpretations of the collaboration clause. Thus this consequently may exert a positive impact on deterrence, since the *ex ante* cooperation pay-off becomes more predictable for the applying undertaking.

2) ***A case by case rebate*** — granted by specific decision in accordance to the extent of cooperation and the overall effect on the fairness of the case. It may have a lower deterrence potential, and may be disposed to inconsistent interpretations, thus increasing related litigation costs.

3) ***An asymmetrical removal of joint and several liability for leniency applicants*** — if implemented together with related rules on settlements, it allows the amounts of damages paid under the settlements between leniency applicant and the claimant to be subsequently rewarded from the non-cooperating cartel members, who may be found liable for the whole amount of damages caused, minus the amount settled. Thus applying undertaking may achieve greater flexibility at lower costs, since the size of the rebate is left to the bargaining process of the parties. The most likely outcome would be similar to full cooperation with total

[233] 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., p. 16.
[234] Renda, A., et al., *supra* note 8, p. 501.
[235] Kirst, P.; Bergh R. Van den., *supra* note 33, p. 5.
[236] Renda, A., et al., *op. cit.*, p. 505.

rebate, unless the expected probability of insolvency of other infringers is particularly high. However the outcome is surrounded by higher uncertainty compared to the first instrument (fixed rebate)[237].

It may be noted that according to Renda A., et al. from infringed party's point of view the options proposed would not entail any negative impact on corrective justice. On the contrary since the probability of detection may increase, private parties will enjoy greater chances of compensation, especially since the rebate would be conditioned to the applicant‘s full cooperation.[238] Moreover knowing that the applicant may be held liable only for a limited amount, claimants would be unlikely to directly target their suits against the applicant. On the contrary, compensation will be sought against other cartel members, who will act for contribution against the applicant. The burden of proof on allocation of damages will lie on the other cartel members. This effect would eliminate the risk that leniency applicants are targeted by lawsuits claiming compensation for the entire harm suffered.[239] Accordingly when analysing possibilities limit liability for successful immunity applicants indicated rules needs to be adapted within the specific scope to reduce the leniency applicant's disadvantage due to confession, whereas at the same time increasing sanctions for non-cooperating undertakings.

As regards risk of failure of the jointly liable firms, which do not qualify for leniency, an example of the US may be taken, where the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) adopted in 2004 eliminated the trebling of damages in follow-on private damages claims, decoupled joint and several liability, and secured amnesty from the authorities for successful leniency applicants. The risk was pointed out regarding the US approach that such regulation may negatively affects the likelihood of compensation for the parties, due to assumption that bigger undertaking, liable for a higher share of damages, will be the first beneficiaries of leniency and will more likely to apply. This may shift most liability for damages towards smaller undertakings, which could not be able to repay the victims. However similar risks regarding limitation of liability for successful leniency applicant appears to be negligible in the current context of the EU. First of all, cartelised markets generally show a certain degree of symmetry among participants. Furthermore punitive damages are not provided in any EU Member State[240] and also joint liability with no right of contribution does not exist in the EU legal system. Thus the US

[237] Nonetheless it must be noted that ultimate impact on collaborative incentives also depends on the amount of the rebate granted.
[238] Renda, A., et al. *supra* note 8, p. 508.
[239] *Ibid*, p. 520.
[240] With exceptional cases of punitive damages in common law countries, e.g. the UK.

system of rebates on liability has a much greater impact than they would have in the EU legal framework, without multiple damages and with the right to contribution.[241] Accordingly the overall effects of possible limitation of liability for successful leniency applicants must be considered as positive.[242]

In any case any limitation on liability shall be balanced with the possibilities for injured parties to obtain full compensation for the loss suffered.[243] There must be no event of overcompensation or under-compensation, where injured party receives less or more compensation than the harm actually suffered.[244]

- **Recommended regulatory model solving collision problems**

The regulatory model solving collision problemms of damages actions on leniency is provided further. First of all Renda, A., et al. proposes positive reward approach where the benefits of leniency application are extended to the private enforcement sphere, through grant of the rebate on the applicant‘s exposure to damages[245]. This option may bring two different effects:

1) on the one hand, it aims at compensating the likely difficulties that a leniency applicant may face in subsequent damages actions;

2) on the other, it may exploit the potential of more effective private enforcement to strengthen the incentive to apply for leniency; therefore increasing the difference between applicants and other cartelists, and, consequently, further enhancing the effectiveness of leniency[246].

Latest research by Buccirossi, Marvão and Spagnolo also provides a theoretical analysis where compares different legal systems in the EU and the US and show that a compromise between private and public enforcement – or between the objective of cartel deterrence and the right of infringes parties to be compensated is not even needed. It indicates that in order to maximize the attractiveness of leniency it is optimal to[247]:

[241] Renda, A., et al., *supra* note 8, p. 507.
[242] *Ibid*., p. 508.
[243] 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. [2013] COM(2013) 404 final 2013/0185 (COD), p. 16.
[244] European Commission. Staff Working Document. Impact assessment report., *supra* note 104, p. 37.
[245] Renda, A., et al., *op. cit.*, p. 502.
[246] Wardhaugh, *supra* note 4, p. 6.
[247] Buccirossi, P.; Marvão, C.; Spagnolo, G., *supra* note 16, p. 3.

1) maximize the share of information collected by the competition authority and made accessible by the infringed parties (including leniency statements and pre-existing information);

2) minimize the amount of damages the leniency applicant is liable for in the subsequent damages actions.

In other words it is argued that the beneficial legal regime requires that the immunity recipient's liability is reduced as much as possible (or even eliminated) and full access to leniency material is granted for the claimants in the subsequent damages actions.[248] The performed analysis shows that any compromise in protecting the effectiveness of leniency programmes prevention of discovery of leniency material is not required.[249]

As regards disclosure of leniency material Cauffman notes that the reason why the leniency applicant fears disclosure of leniency statement is the fear to be held liable for the damages caused. By removing possibility to be held liable for damages, the reason for refusing access to leniency statements disappears.[250] On the other hand deprivation of infringed party from access to leniency material may deprive it from information that may significantly facilitate grounds for damage action. This may even undermine the right to full compensation.[251] Moreover deprivation of the infringed parties' access to leniency material may benefit the non-cooperating cartelists who are jointly and severally liable for the entire damage caused by the cartel. Accordingly the problem here is whether the key aspect to the conflict between the interests of leniency applicant and the infringed party should not lie in the limitation of the leniency applicant's liability, while granting the infringed party disclosure to all information need to obtain full compensation cartelists.[252]

However, as established by the CJEU in *DonauChemie*[253], it is problematic to privilege successful leniency applicants at the expense of the injured parties. The possibility here may be to limit liability of leniency applicant merely to the circumstances where recovery of damages from the other cartel members is not possible. Therefore regulation may provide for absolute limitation of liability of leniency applicant, only unless the infringed parties would be unable to obtain compensation from the other cartelists.[254] Accordingly such regulation may also widen the asymmetry between the risks of non-cooperation and benefits

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[248] Buccirossi, P.; Marvão, C.; Spagnolo, G., *supra* note 16, p. 3.
[249] *Ibid*., p. 2.
[250] Cauffman, C., *supra* note 21, p. 14.
[251] *Ibid*., p. 15
[252] *Ibid*., p. 14.
[253] Case C-536/11, Donau Chemie and Others [2013] ECR 5 CMLR 19.
[254] Cauffman, C., *op. cit*., p 254.

of participating in leniency since the non-cooperating cartel members will remain fully jointly liable.[255]

As regards benefits of increased limitation of liability the following example may be taken. The US authorities had recognized that the grant of full immunity is necessary to induce cartel participants to turn on each other and confess, resulting in the discovery and termination of the infringement. As an analogue, analysis of Leslie may be provided. It argues that conventional wisdom holds that imposing higher fines should deter anticompetitive behaviour, whereas rewarding minor players who confess their role in a cartel can help unravel a cartel. Thus it is consequently not rational to expect that policies making it easier even for the worst cartel members to escape of the most of liability would enhance deterrence and destabilize cartels. However application of game theory model suggests that even extension of immunity to cartel leaders, who have often profited the most from the illegal activity, sometimes for decades, makes cartels more fragile. Particularly theory shows that leniency would have a greater destabilizing effect on cartels if the first firm to confess receives full amnesty even in a case where antitrust prosecutors through their own investigation had already acquired sufficient evidence to convict the undertaking.[256] While conferring immunity in such circumstances may appear counterintuitive or unnecessary, such policies should increase distrust among actual and potential cartelists. The long-term effects of extending immunity should be deterrence of future cartels and the destabilization of existing ones.[257] Accordingly increased benefits for leniency applicant may even have possible effect on deterrence of cartelization.

[255] Renda, A., et al., *supra* note 8, p. 519.
[256] Leslie, C. R. *supra* note 99, p. 455.
[257] *Ibid*., p. 488.

3. ASSESSMENT OF DAMAGES DIRECTIVE REGULATION

Adoption of Damages Directive is aimed at two main goals: 1) optimising the interaction between public and private enforcement of competition law; and 2) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm suffered.[258] Therefore despite the need to improve effectiveness of private damages actions, Damages Directive is also concerned with balancing impact made by damages on the efficiency of leniency. However it is a question of debates whether Damages Directive has chosen the most desirable option to ensure proper balance between public and private enforcement[259], thus the assessment of adopted regulation as regards previously identified two points of collisions with leniency is made within the following subchapters of this thesis.

3.1. Effectiveness of regulation introduced by Damages Directive

First of all in order to evaluate impact on leniency made by the regulation of Damages Directive, the general effectiveness of the Damages Directive in increasing the amount of damages actions shall be evaluated. Accordingly the chosen level of harmonization and the main instruments that will be transposed into the legal systems of Member States are analysed below.

3.1.1. Level of harmonization provided by Damages Directive

For the first time Damages Directive establishes a common EU level litigation platform consisting of substantive and procedural rules.[260] According to the Commission the transposition of the Damages Directive shall make it a lot easier for victims of antitrust violations to claim for compensation.[261] The stakeholders expect that Damages Directive will result in a higher number of civil antitrust cases and increase in the overall amount of damages awarded.[262]

The main justification for adoption of Damages Directive[263] was the perceived shortcomings in the legal systems of Member States. The diversity in legal regulation and

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[258] Recital 4 and 6 of Damages Directive.

[259] Cauffman, C., Philipsen. N.J., *supra* note 26, p. 12.

[260] Nordlander, K.; Abenhaïm, M. *supra* note 181, p. 7.

[261] The Damages Directive - Towards More Effective Enforcement of the EU Competition Rules. European Commission. Competition policy brief. [interactive], 2015. [accessed on 12 09 2001] <http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf>, p. 2.

[262] Facilitating damage claims by victims of anti-competitive practices. European Parliament Briefing, *supra* note 7., p. 2.

[263] European Commission. Staff Working Document. Impact assessment report. *supra* note 104, p. 14.

consequential legal uncertainty has resulted in a low proportion of successful damages actions, especially by consumers and small and medium enterprises.[264] Therefore the aim was to ensure legal certainty within all jurisdictions of the Member States by reduction of the differences between national regulations governing actions for damages.[265]

The Commission noted that currently "[…] the vast majority of large antitrust damages actions […]" were brought jurisdictions of the UK, Germany and the Netherlands[266] that are considered as having more favourable[267] legal rules[268]. However many authors also raise concerns whether the regulation of Damages Directive is needful[269] and will be effective. For instance history shows that the prior approach of the Commission of unofficial draft Directive on competition law damages in 2009 was abandoned due to the political opposition from the European Parliament. In the current case the critique is also made from the point that the taken approach may not be appropriate as it promotes a "[…] one-improved-damages-remedy-fits-all-infringements […]" policy rather than applying "[…] claim-facilitating rules to all types of infringements […]"[270]. There are also opinions that Damages Directive appears to be a "[…] random selection of minimum procedural requirements that lack coherence or structure […]", not being a "[…] set of rules that govern damages actions from start to finish […]", and that "[…] the Commission has "cherry-picked" the best procedural initiatives from the UK, Germany, and the Netherlands […]"[271]. However the public consultations in general have showed the support for the Commission's approach fostering antitrust damages actions by the Damages Directive.[272]

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[264] Howard, A., *supra* note 125, p. 455.
[265] 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. [2013] COM(2013) 404 final 2013/0185 (COD), p. 10.
[266] Finland is also sometimes considered as having legal regulation more favourable to launching damages claims. See e.g. [interactive] <http://www.osborneclarke.com/connected-insights/publications/cartel-damages-actions-directive/> [accessed on 39-02-2015].
[267] However such view is criticized as might be due to bundling of civil proceedings that Damages Directive does not even cover.
[268] European Commission. Staff Working Document. Impact assessment report., *supra* note 104, p. 10.
[269] Kortmann, J.; Wesseling, R. *Two Concerns Regarding the European Draft Directive on Antitrust Damage Actions* [interactive], Competition Policy International Antitrust Chronicle, 2013 [accessed 2014 09 16]. <https://www.competitionpolicyinternational.com/two-concerns-regarding-the-european-draft-directive-on-antitrust-damage-actions/>., p. 8.
[270] Peyer, S., *supra* note 72, p. 628.
[271] Howard, A., *op. cit*., p. 456.
[272] 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., *op. cit*. p. 13.

As regards level of harmonization, it must be noted that finally the Commission has chosen to implement regulation through the instrument of directive[273]. Therefore it means only minimum standard of harmonization. Damages Directive sets as minimum standard substantial and procedural rules to be transposed into national regulations. Member States would be allowed to introduce legal rules that go beyond the ones proposed by the Damages Directive. Moreover as the instrument of directive provides for the harmonization and not the unification of national regulations, accordingly the Damages Directive leaves the Member States freedom of choice as to the means and manner of implementation.[274] Thus there is a probability that differences of the national regimes will most probably still remain due to different approaches taken on implementation of the Damages Directive through the Member States. Also subsequent interpretation of transposed legal rules of Damages Directive by the national courts may also inevitably diverge. Occurrence of future differences here becomes more predictable due to the general differences of the national civil law systems.[275] Also Damages Directive leaves some areas that legal practitioners emphasize (e.g. as jurisdiction, collective damages actions, costs and funding, interim injunctions in stand-alone actions, etc.) unregulated at all.[276] Thus the scope of the adopted regulation is also limited.

3.1.2. Main instruments implemented by Damages Directive

According to the analysis of Ashurst Report the strengthening of private enforcement could be reflected by various ways, including: by ensuring access to courts, reducing risks, facilitating proof, reducing costs, increasing transparency and publicity, etc.[277] The Damages Directive introduces the following instruments that are related to reduce of impediments to damages actions: rebuttable presumption that cartels caused harm; rules on access to key documents in the files of competition authorities and in control of the defendant; rules on the joint and several liability, with additional rules regarding leniency applicants as well as small and medium enterprises; indication that both direct and indirect purchasers are entitled to

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[273] Still some authors criticize that the "[...] directive is nevertheless so precise that it is hardly a directive. Rather, it is more akin to a regulation". See [interactive] <http://irjs.univ-paris1.fr/labo/departement-de-recherche-justice-et-proces/revuelectroniqueliensprocessu/directiveprivateenforcement/> [accessed on 03-08-2015].

[274] Howard, A. *supra* note 125, p. 646.

[275] For instance legal practitioners note that aims of the Damages Directive seeking to reduce differences between the national rules of the Member States governing actions for damages are "[...] laudable but very ambitious [...]" due to the "[...] mixture of common and civil law systems in the 28 EU Member States [...]". See Impact of the EU Directive on Antitrust Damages Actions - Competition Litigation 2015., *supra* note 177., p. 5.

[276] See [interactive] <http://www.iclg.co.uk/practice-areas/competition-litigation/competition-litigation-2015/impact-of-the-eu-directive-on-antitrust-damages-actions> [access on 25-04-2015].

[277] Waelbroeck, D.; Slater, D; Even-Shoshan, G., *supra* note 6, p. 32.

compensation for loss, setting of minimum limitation periods, encouragements to settle, etc. The level of changes of regulation within the various Member States will greatly differ. For instance jurisdictions that are already considered to be damages-actions-friendly (e.g. the UK, Germany, the Netherlands) in essence already contains regulation proposed by the Damages Directive. For instance similar disclosure regime has been implemented in the UK[278]. Therefore significant variations would not be brought there. Other jurisdictions may face more substantial regulatory changes when transposing minimum standards of Damages Directive.

Considering the regulation proposed by the Damages Directive in complexity the following hypothesis may be done: in general adopted regulation may have effective in increasing private damages actions. However such increase will probably be more efficient in those jurisdictions that have not been favourable for filling damages claims until the adoption of Damages Directive.[279] It means that in general the amount of damages claims may reach only the current level already established in so called damages-actions-friendly jurisdictions as the UK, Germany and the Netherlands. However, as noted, the real increase of damages claims may also be lesser than anticipated, due to the differences of the implementation of Damages Directive within the national legal systems. It will be caused by variations of the subsequent interpretation of transposed rules by national courts, as well as general differences and traditions within the specifics of the civil law area that consists between the Member States. Moreover as particularly regards impact on leniency the impact of damages actions is also debatable even in case where the number of damages claims reaches amount of claims, for instance filed in Germany[280], and as it is still not considerable[281].

To sum up the regulation of the Damages Directive could be evaluated as an "[…] interim step along the meandering path to effective justice [...]"[282]. First of all it sets a minimum standard for the Member States to comply and may result in limited increase of damages actions up to the higher level of damages actions currently existing in the EU.

278 See [interactive] <http://www.kwm.com/en/uk/knowledge/insights/eu-damages-directive-approved-by-european-parliament-20140501> [accessed on 03-03-2015].

279 *Ibid.,* such position is confirmed by legal practitioners.

280 "Between 2005 and 2007 German courts decided 368 private antitrust cases, i.e approximately more than 100 cases annually. However only eight cases, i.e. 2.2 % followed a prior decision of a competition authority. For four cases, i.e. 1.1 % of total, it could not be established whether the plaintiffs referred to a decision of a competition authority. In three proceedings, the plaintiffs followed cartel related investigations: Concrete cartel, the Vitamins cartel, and the Carbonless Paper cartel. The low number of actually litigated follow-on actions also hints towards a settlement practice". See Peyer, S., *supra* note 72, p. 338-342.

281 As a note the risk of disincentives to apply still arise as the number of claims shall not influence amount of damages required to be compensated.

282 Howard, A., *supra* note 125, p. 643.

Accordingly further legislative approaches aimed at fostering damages actions most probably will be required and taken both at a national and the EU level.

3.2. Assessment of implemented regulation on collision points with leniency

As regards particular collision points the Damages Directive did not went the full way as analysed previously in this thesis to fully disclose leniency material and completely limit liability of successful leniency applicants. The Damages Directive therefore seeks to overcome possible problems of such interaction by using two techniques[283]: 1) first of all it protects the effectiveness of a leniency by limiting the use of leniency material in the follow-on actions for damages. It provides that disclosure of leniency material is subject to established rules and may not be ordered at any time; 2) secondly it limits the liability of the successful immunity recipient to its direct and indirect purchasers.[284] These techniques are analysed in details below in this thesis.

3.2.1. First collision point — disclosure of evidence

The main of Damages Directive concerns has been to regulate disclosure of documents contained in competition authorities' case files to damages actions claimants in such way that it would not jeopardise the effectiveness of leniency.[285] Thus the Damages Directive sets the following requirements.

- **Differentiated list of disclosable evidence**

Article 5 of the Damages Directive provides general obligation for the Member States to ensure that in proceedings relating to action for damages national courts could be entitled to order, under request of the claimant, to disclose evidence that lies in control of the defendant or a third party. Disclosure of evidence, for the purpose of actions for damages, that are included in the file of a competition authority (i.e. leniency material) are regulated under Article 6 of the Damages Directive, which applies in addition of the general rules noted above. General condition that disclosure from a competition authority's file shall be requested only where no party or third party is reasonably able to provide that evidence is provided as noted under Article 6(10) of the Damages Directive. This rule provides additional safeguard so as not to grant access to commission file where it may not be proportionate, however

[283] European Commission. Staff Working Document. Impact assessment report., *supra* note 104, p. 30, 81.
[284] Buccirossi, P.; Marvão, C.; Spagnolo, G., *supra* note 16, p. 1.
[285] Cauffman C, *supra* note 21, p. 3.

without clarification on what does it mean to "[...] reasonably able to provide that evidence [...]" it may lead to ambiguity or time-consuming procedures.

The Damages Directive sets differentiated list that divides disclosable documents into the following categories[286]:

1) the "***white list***"[287] — comprises of all the documents included into the file of competition authority that does not fall into any of the categories listed. For instance evidence that does not fall within the scope of the proceedings of competition authority (pre-existing information falls under this list[288]). These documents may be disclosed at any time in a damages action (**no protection provided**). The general rules of Article 5 of the Damages Directive still apply in this case.

2) the "***grey list***"[289] — comprises of 1) information and documents prepared by the parties specifically for the proceedings of a competition authority (e.g. replies to the request of information or witness statements); and 2) information that the competition authority has drawn up and sent to the parties in the course of its proceedings (e.g. statements of objections). These documents may be disclosed only after the competition authority has concluded its proceedings (**temporary protection provided**), with the exception of decisions on interim measures.[290]

3) the "***black list***"[291] — comprises of voluntary and self-incriminating leniency statements (including verbatim quotations from leniency statements) — produced for the sole purpose of cooperating with the competition authorities. These documents can never be ordered to disclose, i.e. completely falls under exemption from the disclosure of evidence (**absolute protection provided**)[292]. The proper scope of information safeguarded under absolute protection is ensured under Article 6(7) of the Damages Directive that allows access to evidence by the court assisted by the competition authority, if needed, for the sole purpose of ensuring the correct scope of its content. Moreover some flexibility is allowed under

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[286] Nordlander, K.; Abenhaïm, M., *supra* note 181, p. 4.

[287] Article 6 of Damages Directive.

[288] Recital 28 of Damages Directive provides that national courts should be able, at any time, to order, in the context of an action for damages, the disclosure of evidence that exists independently of the proceedings of a competition authority (pre-existing information).

[289] Article 6(5) of Damages Directive.

[290] Must be noted that voluntarily produced or submitted leniency documents that falls under the grey list for disclosure are particularly important, because, for instance, leniency application must generally contain an admission of guilt and a thorough description of the cartel, its scope, duration, functioning, etc, together with the related evidence. See Nordlander, K.; Abenhaïm, M. *supra* note 181, p. 6.

[291] Article 6(1) of Damages Directive.

[292] However given this formalised scope of protection the Commission has indicated that it will adopt a stricter approach as to the type of information that can be contained in a leniency statement. See [interactive] <http://www.kwm.com/en/uk/knowledge/insights/eu-damages-directive-approved-by-european-parliament-20140501> [accessed on 04-04-2015].

Article 6(8) of the Damages Directive that allows dividing and evaluating different parts of the leniency statements in regard with the category under which they fall.

General requirement of proportionality of disclosure is provided under Article 5(3) of the Damages Directive. It states that under in determining on proportionality of disclosure requested by a party "[...] national courts shall consider the legitimate interests of all parties and third parties concerned [...]", including: 1) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; 2) the scope and cost of disclosure; 3) whether the evidence the disclosure of which is sought contains confidential information. Under Article 6(4) of the Damages Directive in regard with documents contained in the case file of competition authority additional problem shall be considered: 1) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority; 2) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and 3) the need to safeguard the effectiveness of the public enforcement of competition law. Recital 23 of the Damages Directive provides that principle of proportionality must be particularly assessed in case of interaction with leniency so as to prevent "[...] "*fishing expeditions*", i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be deemed to be proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case".

Moreover evidence obtained from a competition authority should not become "*an object of trade*"[293]. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors.[294] Considering the above disclosure requests would not be deemed to be proportionate where they refer to the generic disclosure of documents in the file or the generic disclosure of documents submitted by a party in the context of a particular case.[295]

Finally to the extent that a competition authority is willing to state its views on the proportionality of disclosure requests, it may, acting on its own initiative, submit observations

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[293] Recital 32 of Damages Directive.
[294] *Ibid*.
[295] Recital 44 of Damages Directive.

to the national court before which a disclosure order is sought. By this option the possibility to consider the interests of competition law more significantly is strengthened.[296]

- **Assessment of implemented regulation**

From the positive side the differentiated list of disclosable documents may be found easily and effectively applicable in the proceedings, because it does not involve balancing exercise of interests on case-by-case basis. Accordingly it shall increase legal certainty and prevent possible delays.[297]

However the main problem of regulation of Damages Directive is the compatibility of it with CJEU case law settled by *Pfleidered, Donau Chemie* and following judgements, which was based on conclusion that rigid rules on disclosure of evidence are not eligible. The CJEU has underlined that it was for the national courts to determine, on the basis of their national law, the conditions under which such access must be permitted or refused by weighing the interests protected by EU law.[298] Therefore any rigid rule absolutely prohibiting *a priori* the disclosure of leniency materials would be considered as against the principle of effectiveness of the EU law. However the Damages Directive establishes a contrary approach.

On the one hand the Damages Directive provides national courts with the wide discretion to order the disclosure of evidence under general rules, but at the same time provides absolute protection ("*black-list*") for certain type of leniency material. Therefore the problem arises whether the absolute rigid per se protection provided for leniency statements may be seen as inappropriately limiting the possibilities to for private parties to obtain effective redress or otherwise creating "[...] a too far-reaching level of protection [...]"[299]. Particularly the Damages Directive does not provide any exceptions from this per *se* rule.[300] Exclusion of the ability for the national courts to conduct the balancing exercises of interests of leniency applicants and claimants of damages actions may be even seen as restriction of the procedural autonomy of national courts[301]. Moreover the absolute prohibition to access documents contained in the "*black-list*" may enable cartel members to unfairly provide extensive leniency statements in order to conceal relevant information and secure the illegal

[296] Article 6(11) of Damages Directive.
[297] González, P., *supra* note 186, p. 18.
[298] Cauffman, C., *supra* note 21, p. 5.
[299] Impact of the EU Directive on Antitrust Damages Actions - Competition Litigation 2015. International Comparative Legal Guides., *supra* note 104, p. 23
[300] Kersting, C, *supra* note 178, p. 3.
[301] Cauffman, C., *op. cit*., p. 7.

gain.[302] Although Recital 27 of Damages Directive provides for national courts themselves to be "[…] able, upon request by a claimant, to access documents in respect of which the exemption is invoked in order to verify whether the contents thereof fall outside the definitions of leniency statements […]" it may be additionally clarified and harmonized when adopting regulation of Damages Directive into the national laws.

Morais[303] notes that the adopted solution in general tries to resemble the opinion of the Advocate General Mazák in *Pfleiderer* providing that "[…] in order to protect both the public and indeed private interests in detecting and punishing cartels, it is necessary to preserve as much as possible the attractiveness of [leniency programs] without unduly restricting a civil litigant's right of access to information and ultimately an effective remedy."[304]

However in order to oppose this opinion it may be considered that the existing case law of the CJEU first of all is only a benchmark and therefore it is not a legal constraint, which would in any way limit the choices of the EU legislature.[305] It is particularly clear when taking into account the fact that the position of CJEU was based on the context of the absence of EU law in this area. Therefore it may be considered as the necessary condition for application of rule under which the national courts must engage in balancing exercise on case by case basis. Moreover the balancing rule in a Damages Directive approach may be seen as still implemented within the regulation of access within different types of leniency material, i.e. within the scope of differentiated list. It differentiates material from granted the absolute protection to only the partial limitation. Recital 24 of the Damages Directive notes that it "[…] does not affect the right of courts to consider, under Union or national law, the interests of the effective public enforcement of competition law when ordering the disclosure of any type of evidence with the exception of leniency statements […]". Therefore the essences of the balancing exercise become actually entrenched into the legal regulation.

Considering the above the Damages Directive establishes a hierarchy where public enforcement has higher privilege over private enforcement.[306] As Wardhaugh, analysing this aspect, notes "[…] the judgement in Pfleiderer, by refusing to recognise or establish a hierarchy between public and private enforcement goals, has opened difficulties with disclosure of leniency materials, the Proposed Directive goes part of the way to resolve these

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[302] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/cdc_en.pdf> [accessed on 03-04-2015].
[303] Morais, L. S., *supra* note 202, p. 67.
[304] Opinion of Advocate General Mazák, *supra* note 76, para 65.
[305] Nordlander, K.; Abenhaïm, M., *supra* note 181, p. 4.
[306] Wardhaugh, B., *supra* note 4, p. 30.

difficulties". However Wardhaugh still concludes that approach made by the Damages Directive might be evaluated as "[...] two steps forward and one step back [...]" in the EU cartel enforcement. The Damages Directive does not go further enough accordingly creating risk of repetition of the scenario which developed in *Pfleiderer*. Thus the further legislative approaches will still necessary.[307] Therefore it also complies with the above mentioned conclusion that further legislative approaches will also be necessary due to limited increase of damages actions due to adopted regulation.

To sum up of the Damages Directive might be seen as not sufficient enough and to eliminate uncertainty created by the *Pfleiderer* and subsequent CJEU case law, and is also being too restrictive. Recital 27 of the Damages Directive notes that such regulation "[…] ensure that injured parties retain sufficient alternative means by which to obtain access to the relevant evidence that they need in order to prepare their actions for damages". However the question whether in general the opening of other documents (i.e. pre-existing information) is "[...] sufficient to substantiate civil law claims [...]"[308] remains debatable. As analysed previously in this thesis, mere provision of differentiated list of documents for disclosure does not fully reaches the aim to enhance private enforcement (as the substantial documents are being absolutely protected from disclosure), nor the aim to balance interaction with leniency (as the most efficient solution may be to provide full disclosure of leniency material[309] together with the full limitation on liability for successful leniency applicant).

3.2.2. Second collision point — limitation of liability

Damages Directive contains provision for a limitation of the leniency applicant's liability. Under general rule victims of cartels are entitled to full compensation for the damages suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid.[310] Without prejudice to compensation for loss of opportunity, full compensation under the Damages Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.[311] Article 11(1) of Damages Directive introduces general rule of joint and several liability providing that each infringing undertaking shall be bound to compensate the

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[307] Wardhaugh, B., *supra* note 4, p. 30.
[308] See [interactive] <http://irjs.univ-paris1.fr/labo/departement-de-recherche-justice-et-proces/revuelectroniqueliensprocessu/directiveprivateenforcement/> [accessed on 03-04-2015].
[309] Such approach will be also consistent with CJEU case law that requires balancing examination on a case by case basis.
[310] Recital 12 of Damages Directive.
[311] Article 3(3) of Damages Directive.

harm in full, whereas the injured parties has the right to require full compensation from any of the infringing undertakings until the infringed party has been fully compensated. The decision of how the share of successful leniency applicant shall be determined as the relative responsibility of a given infringer (i.e. the relevant criteria such as turnover, market share, role in the cartel, etc.) is a matter of applicable national law, while still respecting the principles of effectiveness and equivalence.[312]

In order to safeguard the effectiveness of leniency the Damages Directive introduces certain modifications to the liability regime applicable for successful immunity recipients.[313] General rule of joint and several liability will not apply for infringers, which obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation. Article 11(4(a)) of the Damages Directive provides that immunity recipient is jointly and severally liable to its direct or indirect purchasers or providers[314]. Damages Directive identifies that it is appropriate that the immunity recipient be relieved in principle from joint and several liability for the entire harm and that any contribution it must make *vis-à-vis* co-infringers not exceed the amount of harm caused to its own direct or indirect purchasers or, in the case of a buying cartel, its direct or indirect providers. Such provision ensures that civil exposure of an immunity recipient is limited.

However such limitation on the immunity recipient's liability is not absolute. Under Article 11(4(b)) of the Damages Directive immunity recipient should remain fully liable to other injured parties other than its direct or indirect purchasers or providers only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. The contribution of the immunity recipient in this case should not exceed its relative responsibility for the harm caused by the cartel. That share should be determined in accordance with the same rules used to determine the contributions between infringers. This rule means that immunity recipient remains fully liable as a last-resort debtor if the injured parties are unable to obtain full compensation from the other cartelists. As other injured parties can only claim damages from the successful immunity recipient if they show inability to obtain full compensation from the other undertakings, in order to guarantee the *effet utile* of this exception, Member States have to make sure that

[312] Recital 37 of Damages Directive.

[313] 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. [2013] COM(2013) 404 final 2013/0185 (COD)., p. 16.

[314] Actions for damages in general can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain as noted in the Damages Directive.

injured parties can still claim compensation from the immunity recipient at the time they have become aware that they cannot obtain full compensation from the other cartelist.[315]

- **Assessment of implemented regulation**

Considering the approach of the Damages Directive limiting the liability of the immunity recipient to its direct and indirect purchasers (unless the other cartelists are unable to fully compensate the victims) in relation with regulation adopted on rules for disclosure of leniency material, in general it sets a compromise between public and private enforcement. Therefore regulation of Damages Directive may be seen as a small step forward, considering at least the following aspects[316]:

1) first of all the value of being a successful leniency applicant is enhanced. Leniency applicant is rewarded by having possible damages limited in scope for what it would otherwise be liable to pay. Such regime enhances the incentives to confess as it provides for an enhanced benefit as a result from the higher risk of subsequent damages actions;

2) secondly the knowledge of the amount of damages caused remains within the knowledge of the infringer. Therefore making leniency applicant in a good place to evaluate necessary information and perform calculation on the estimated damages caused to its direct and indirect purchasers, i.e. to the scope its liability is limited under general rule;

3) thirdly the infringed parties will still be compensated, even if some cartel members will insolvent or the parties would become otherwise unable to obtain full compensation from these undertakings.

However despite on the positive view of identified aspects, there are still a few problems related to the regulation of Damages Directive.

It is questionable whether the scope of limitation of leniency applicant's liability is sufficient to ensure effective interaction with leniency, i.e. without creating unbalanced disincentives for the undertakings to confess. As already noted, under Damages Directive successful leniency applicant remains to be last-resort debtor in case the injured parties are unable to obtain full compensation from the other cartelists. In this context it must be noted that such rule requires potential leniency applicant to evaluate possibility of the insolvency of other cartel members, prior to applying for leniency.

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[315] 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. [2013] COM(2013) 404 final 2013/0185 (COD). p. 17.

[316] Wardhaugh, B., *supra* note 4, p. 12.

Usually potential leniency applicant would not be in a good position to calculate such possibility by not having the appropriate information[317]. Also in case the amount of damages awarded for the anticompetitive behaviour would be higher, consequently also higher will be the risk of insolvency. At least the possibility of fraudulent insolvency shall also not be denied. Accordingly it raises a further question whether limitation on disclosure of evidence provided by the Damages Directive is balanced with the considerable risk of increased liability of compensation for damages caused. Taking into account the final amount of damages that leniency applicant may be found to be liable to compensate in case of insolvency of other cartelist, the possible increase of safeguard limitation applicable to disclosable documents (e.g. including pre-existing information) may be considered to be added.

To sum up regulation of Damages Directive does not properly balance the incentives and risks considered by to potential leniency applicant. Therefore as well creating legal uncertainty as regards evaluation of potential insolvency of other cartelists.

3.3. Direction for following legislation arising from Damages Directive

Currently the Commission is aimed to align present legislation with the Damages Directive in order to ensure that required provisions also apply to the Commission proceedings[318]. This legislation is particularly relevant as regard the use of information of the file of Commission as the current rules are not totally compliant with the regulation of Damages Directive. In order to ensure an effective protection of leniency material in Commission investigations, it is proposed to modify relevant provisions of procedural Regulation No 773/2004 and other related texts (modification package): the notice on access to the Commission's file, the Leniency Notice, and the notice on cooperation with national courts[319]. Intention is to adopt modification package within the second or third quarter of 2015.

The proposals to these documents as first legal acts are significant as it may consequently affect the following transposition of the Damages Directive into national laws. The main of proposed changes are aimed at protection of the use of leniency statements.

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[317] Cauffman, C., *supra* note 21, p. 8.
[318] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/index_en.html> [accessed on 29-04-2015].
[319] Settlements notice also, but it falls out of the scope of analysis of this thesis.

However legal practitioners that have submitted responses to public consultation[320] also noted the following controversial problems related to the modification package or points were it has went beyond the regulation of the Damages Directive:

1) Under Article 16a(1) of proposal for Regulation No 773/2004: “Information obtained pursuant to this Regulation shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 of the Treaty”.

This provision safeguards “*black-list*” documents from disclosure in the follow-on damages actions. Still the proposal would be, for the sake of clarity and certainty, to define expressly that indicated proceedings does not include private damages actions.[321]

2) Under Article 16a(2) of proposal for Regulation No 773/2004:

“Access to leniency corporate statements […] shall be granted only for the purposes of exercising the rights of defence in proceedings before the Commission. Information taken from such statements […] may be used by the party having obtained access to the file only where necessary for the exercise of its rights of defence in proceedings before the European Union courts reviewing Commission decisions or before the courts of the Member States in cases that are directly related to the case in which access has been granted, and which concern: a) the allocation between cartel participants of a fine imposed jointly and severally on them by the Commission; or b) the review of a decision by which a competition authority of a Member State has found an infringement of Article 101 TFEU”.

First of all it refers to extension of “[…] information taken from such statements […]” that has not been provided by the Damages Directive. Furthermore it does not seem to cover the allocation of damages awarded between cartel participants in private proceedings.[322] Also if access is granted, disclosed information from leniency statements could be use before the EU and national courts. Therefore the concern arises that it creates a risk of such information becoming public (as proceedings are mostly public).[323] Also the clarification may be required whether conditions defined by 16a(2) a) and b) provisions narrows the scope of circumstances to be disclosed, or it is broaden to other related cases. To sum up this provision

[320] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/index_en.html> [accessed on 29-04-2015].
[321] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/fbd_en.pdf> [accessed on 29-04-2015].
[322] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/aedc_en.pdf> [accessed on 29-04-2015].
[323] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/fbd_en.pdf> [accessed on 29-04-2015].

still causes legal uncertainty and lacks adequate procedural safeguards on how information obtained through access to file may be used.[324]

3) Under point 35a of the proposed Notice on Leniency: "[...] the Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of those Treaty provisions [...]".

It is possible that despite such provision, information from leniency statements (also quotations) may be included in other documents that consist as a part of the Commission file. Thus it may be useful to clarify those references (extracts, quotations or summaries) to leniency statements are also protected from disclosure.[325]

To sum up the need to balance impact of increased amount of damages actions on leniency will remain significant within the limited scope of the effectiveness of Damages Directive. Despite the limited effectiveness of Damages Directive to increase amount of damages actions the need to balance impact on leniency still remains to be significant. First of all, within the scope of regulation to be transposed into the legal systems of Member States. Furthermore all future legislative approaches on both the EU and national level must be balanced with the leniency (by providing proper limitations, benefits and ensuring legal certainty). Considering the potentially limited scope of effectiveness of Damages Directive, and already indicated problematic issues on interaction of leniency, the following legislative approaches may be taken in the nearest future.

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[324] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/fbd_en.pdf> [accessed on 29-04-2015].

[325] See [interactive] <http://ec.europa.eu/competition/consultations/2014_regulation_773_2004/aedc_en.pdf> [accessed on 29-04-2015].

CONCLUSIONS AND RECOMMENDATIONS

1) Private enforcement introduced or enhanced towards the enforcement system dominated by public enforcement has negative effects on overall enforcement system, such as increase of risks of over-deterrence, detrimental litigation, costs of enforcement, discouraged potential leniency applicants.

2) Private and public enforcement must be implemented into the unified system based on the complementarity in order to achieve main goals of enforcement: ensuring that competition regulations are not violated and pursuing corrective justice. Also hierarchy must be established in a way, which prioritizes public enforcement over private enforcement.

3) Anticipated increase of damages actions acts as an additional disincentive for undertakings to cooperate under leniency; thereby increasing the collusive pay-off. To avoid negative impact legal regulation on disclosure of leniency material limitation of liability for immunity recipient must introduce additional incentives allowing to re-balance incentives to cooperate.

4) Recommended regulation model solving collision problems consist of reduction of the immunity recipient's liability in a highest scope (even elimination) and full access to leniency material for the use in damages actions.

5) Damages Directive does not implement identified recommendable regulation model solving collision problems. The effectiveness of Damages Directive on increase of damages actions, and subsequently of impact on leniency, will not be substantial.

6) Regulation of Damages Directive on disclosure of leniency material may be considered as too restrictive and raising concerns of non-compliance with CJEU case law due to implementation of absolute protection rules on leniency statements. Regulation on immunity recipient's liability creates legal uncertainty in case of insolvency of co-infringers.

7) Due to limited effectiveness of Damages Directive, future legislative approaches are highly prospective. Reasonably it shall follow direction of recommended regulation model solving collision problems.

8) Policy makers (legislators) shall evaluate and direct future legislative approaches both on the EU and Member States based on following aspects: (i) limitations that provide passive restrictions by which negative impact on leniency applicant is prevented; (ii) benefits that create additional incentives for the undertaking to apply for leniency; (iii) guaranteeing legal certainty.

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Dapkutė M. *Assessment of the Impact of Damages Actions on Leniency.* Supervisor: Doc. dr. Raimundas Moisejevas – Vilnius: Mykolo Romeris Universitety, Faculty of Law, 2015. – 65 p.

ANNOTATION

The aim of this master thesis is to analyse the impact of damages actions on the effectiveness of leniency. Recently the European Union cartel enforcement policy has shifted towards strengthening of private enforcement, particularly as regards aim to increase amount of damages action filed for competition infringements. However such policy may lead to negative impact on the effectiveness of public enforcement, currently dominated by leniency. Analysis provided in this master thesis explains how in essence interaction of private and public enforcement has to be regulated, subsequently analyse how main collision points of damages actions and leniency (disclosure of evidence, limitation of liability) have to be regulated, and also evaluates impact and effectiveness of regulation provided by adopted Damages Directive on these issues. Consequently the performed analysis establishes guidelines for policy makers (legislators) allowing to evaluate and direct future regulatory approaches both on EU and Member States level in a manner that avoids negative impact of damages actions on leniency and cartel enforcement in general.

Keywords: leniency, damages actions, disclosure of evidence, limitation of liability

Dapkutė M. *Ieškinių dėl žalos atlyginimo poveikio atleidimo nuo baudos institutui vertinimas*. Vadovas: doc. dr. Raimundas Moisejevas – Vilnius: Mykolo Romerio Universitetas, Teisės fakultetas, 2015. 65 p.

ANOTACIJA

Šio magistro baigiamojo darbo tikslas yra išanalizuoti ieškinių dėl žalos atlyginimo poveikį atleidimo nuo baudos instituto veiksmingumui. Neseniai Europos Sąjungos teisės vykdymo kartelių srityje politika perėjo prie siekio stiprinti privatųjį teisės vykdymą, ypač turint tikslą didinti ieškinių dėl žalos atlyginimo už konkurencijos pažeidimus kiekį. Tačiau tokia politikos kryptis gali sukelti neigiamą poveikį viešojo teisės vykdymo, kuriame šiuo metu dominuoja atleidimo nuo baudos institutas, veiksmingumui. Atliekama analizė aiškina kaip iš esmės turi būti reguliuojama sąveika tarp privataus ir viešojo teisės vykdymo, kaip atitinkamai turi būti reguliuojami pagrindiniai susikirtimo taškai (įrodymų atskleidimas ir atsakomybės apribojimas) tarp ieškinių dėl žalos atlyginimo ir atleidimo nuo baudos instituto, taip pat vertinamas Direktyvos dėl nuostolių atlyginimo veiksmingumas ir poveikis reguliuojant šiuos klausimus. Iš esmės, atlikta analizė nustato gaires politikos formuotojams (teisės aktų leidėjams), leidžiančias įvertinti ir nukreipti ateities teisinį reguliavimą tiek ES, tiek valstybių narių lygmeniu, tokiu būdu, kad būtų išvengta neigiamo ieškinių dėl žalos atlyginimo poveikio atleidimo nuo baudų instituto ir teisės vykdymo kartelių srityje veiksmingumui apskritai.

Raktiniai žodžiai: atleidimo nuo baudos institutas, ieškiniai dėl žalos atlyginimo, įrodymų atskleidimas, atsakomybės apribojimas

ASSESSMENT OF THE IMPACT OF DAMAGES ACTIONS ON LENIENCY

Monika Dapkutė

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SUMMARY

This master thesis analyse impact of anticipated increase of damages actions on the effectiveness of leniency, and accordingly on the overall cartel enforcement. The significance of this problem is context specific: the EU cartel enforcement system for a long time has discouraged private enforcement, in favour of public enforcement. However, recently this policy has been shifted towards the strengthening of private enforcement. Particularly by adopting Damages Directive, which must be transposed into national legislation until the end of 2016. It raises a problematic question on how impact of damages actions on leniency shall be regulated in order to ensure effectiveness of cartel enforcement.

The author of this master thesis aims at solving research problem by systematic analysis of various scholarly researches related to the subject matter that currently does not provide unanimous opinion. The analysis is based on the following aspects. First of all, in the general part of this thesis the evaluation of the general interaction of public and private enforcement is provided, and accordingly it leads to identification of hierarchy of public enforcement towards private enforcement means in case of their collision. Furthermore the special part of this thesis is based on detailed assessment of impact of the increase of damages actions on leniency within the focus on main collision points that are disclosure of leniency material to third parties and limitation of liability for successful leniency applicant. Recommended regulation model solving collision problems is being identified. Finally the assessment on how the particular regulation adopted by the Damages Directive may affect leniency is also performed.

The analysis performed in this master thesis provides thorough research on the different approaches of currently published research works, and creates a novel standpoint that will be advantageous for both academia and legal practitioners in this field of the chosen subject matter. Performed analysis provides guidelines for policy makers (legislators allowing to evaluate and direct future regulatory approaches both on EU and Member States level in a manner that avoids negative impact of damages actions on leniency and cartel enforcement in general.

IEŠKINIŲ DĖL ŽALOS ATLYGINIMO POVEIKIO ATLEIDIMO NUO BAUDOS INSTITUTUI VERTINIMAS

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SANTRAUKA

Šiame magistro darbe analizuojamas tikėtino ieškinių dėl žalos atlyginimo padidėjimo poveikis atleidimo nuo baudų instituto bei teisės vykdymo kartelių srityje vykdymo veiksmingumui apskritai. Šios problemos reikšmė atsiskleidžia dėl specifinio konteksto: ES teisės vykdymo kartelių srityje sistema ilgą laiką neskatino privačiojo teisės vykdymo ir rėmėsi viešuoju teisės vykdymu. Tačiau pastaruoju metu ši politika perėjo prie privačiojo teisės vykdymo stiprinimo. Atitinkamai, priimant Direktyvą dėl nuostolių atlyginimo, kuri turi būti perkelta į nacionalinę teisę iki 2016 m. pabaigos. Šioje vietoje iškyla probleminis klausimas, kaip ieškinių dėl žalos atlyginimo daromas poveikis atleidimo nuo baudos institutui turi būti reguliuojamas, siekiant užtikrinti teisės vykdymo kartelių srityje veiksmingumą.

Šiame darbe iškeltą probleminį klausimą siekiama išspręsti sistemingai analizuojant įvairius mokslinius tyrimus, susijusių su darbo dalyku, kurie šiuo metu nepateikia vieningo sutarimo. Atliekama analizė remiama šiais aspektais. Visų pirma, bendrojoje darbo dalyje yra vertinama sąveika tarp viešojo ir privačiojo teisės vykdymo, atitinkamai nustatant, jog esant šių teisės vykdymo būdų kolizijai, turi būti nustatoma hierarchija, kuria užtikrinama viešojo teisės vykdymo pirmenybė. Toliau, specialiojoje darbo dalyje, detaliai vertinamas ieškinių dėl žalos atlyginimo poveikis atleidimo nuo baudos institutui, akcentuojant pagrindinius susikirtimo taškus: įrodymų atskleidimą ir atsakomybės apribojimą. Taip pat nustatomas rekomenduojamas reguliavimo sprendžiant kolizijos problemas modelis. Be to, atliekamas Direktyvos dėl žalos atlyginimo nustatyto reguliavimo poveikis atleidimo nuo baudos instituto veiksmingumui.

Šiame darbe atlikta analizė pateikia išsamų šiuo metu publikuotų mokslinių darbų skirtingų požiūrių tyrimą ir sukuria naują šio darbo dalyko nagrinėjimo pagrindą, kuriuo galės naudotis tiek akademinė bendruomenė, tiek praktikuojantys teisininkai. Atlikta analizė nustato gaires politikos formuotojams (teisės aktų leidėjams), leidžiančias įvertinti ir nukreipti ateities teisinį reguliavimą tiek ES, tiek valstybių narių lygmeniu, tokiu būdu, kad būtų išvengta neigiamo ieškinių dėl žalos atlyginimo poveikio atleidimo nuo baudų instituto ir teisės vykdymo kartelių srityje veiksmingumui apskritai.

Form approved by Resolution No. 1SN-10 of
the Senate of Mykolas Romeris University of
20 November 2012

CONFIRMATION OF INDEPENDENCE OF THE WRITTEN WORK

22-05-2015
Vilnius

I, Mykolas Romeris University (hereinafter referred to as the University),

Faculty of Law, Department of Business Law, European and International Business Law programme
(Faculty/ Institute, study programme)

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