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„Private enforcement of the EU Competition Law in Greece: An analysis of the procedural provisions of the Damages Directive “

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Table of abbreviations

AE	SA
AEVE	Anonimi Emporiki kai Viomichaniki Etaireia, SA
CC	Greek Civil Code
CJEU	Court of Justice of the European Union
EC	European Commission
EU	European Union
HCC	Hellenic Competition Commission
NCA	National Competition Authority
TFEU	Treaty for the Functioning of the European Union
ΑΠ	Άρειος Πάγος (Supreme Court of Greece)
ΔΕΕ	Δίκαιο Επιχειρήσεων και Εταιρειών (Journal of Business and Company Law)
ΔΕφΑθ	Διοικητικό Εφετείο Αθηνών (Administrative Court of Appeal, Athens)
ΕΕμπΔ	Επιθεώρηση Εμπορικού Δικαίου (Commercial Law Review)
ΕΕΝ	Εφημερίς των Ελλήνων Νομικών (Journal of Greek Lawyers)
ΕλλΔνη	Ελληνική Δικαιοσύνη (Law Journal 'Greek Justice')
ΕφΑΔ	Εφαρμογές Αστικού Δικαίου (Journal of Applications of Civil Law)
ΕφΑθ	Εφετείο Αθηνών (Court of Appeal, Athens)
ΕφΠατρ	Εφετείο Πατρών (Court of Appeal, Patras)
ΝοΒ	Νομικό Βήμα (Nomiko Vima Law Journal)
ΠΠρΑθ	Πολυμελές Πρωτοδικείο Αθηνών (Court of First Instance, Athens)

ΟλΑΠ	Ολομέλεια Αρείου Πάγου (Judgement of the Supreme Court – Plenary Session)
ΣτΕ	Συμβούλιο της Επικρατείας (Council of State)
ΤΝΠ ΝΟΜΟΣ	Τράπεζα Νομικών Πληροφοριών ΝΟΜΟΣ (Legal Information Database, NOMOS)
ΧρονΙΔ	Χρονικά Ιδιωτικού Δικαίου (Chronicles of Private Law)

I. Introduction

The main objective of the European Competition rules is to achieve the proper and effective functioning of the EU internal market in order to ensure equal business terms for all enterprises, the protection of consumers' rights, and the well-being of society as a whole.[1] These rules are key instruments for a free and dynamic market as they allow economic growth through the amelioration of production methods, the expansion of research tools, and the overall welfare of both consumers and businesses. For that reason, competition policy rules aim to prevent infringements and distortions of the market. EU's primary law includes rules in articles 101 and 102 TFEU that advocate for the importance of protecting the competition and the internal market. In Greek legislation, Articles 1 and 2 of Greek Law 3959/2011 delimit competition law at a national level.

For many years, competition rules were applied solely by the European Commission or the Competition Authorities in each member state as part of their public legislation and not through civil courts.[2] The civil courts were considered unfit to judge violations of competition rules. This affirmation is supported by the fact that there were not, and still are not, legal provisions in civil legislation that could be used as a legal base for claiming damages in case of competition law infringements. The doctrine of the effectiveness of EU primary law, of which competition law provisions are integral, provides that the Treaties conferred rights directly to individuals, which they could invoke before national courts.[3] However, the Court of Justice of the European Union (CJEU), through numerous cases, has stated that the Commission does not have exclusive competence to apply articles 101 and 102 TFEU, but it shares it with the national courts. The articles mentioned above '*produce direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must*

[1] Factsheets of the European Union, "Competition policy" [2022] <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> accessed 1 May 2023.
[2] Wouter P. J. Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' [2017] 40 (1) World Competition <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2865728> accessed 22 June 2023.
[3] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

safeguard.'[4] Moreover, the fact that the competition rules constitute a matter of public policy[5] has naturally given rise to the private enforcement of competition law. Thereby, private enforcement of the European Competition law could be defined as the application and invocation of competition rules by individuals through private litigation before Member State courts, typically claiming damages.[6]

Traditionally, competition within the internal market was safeguarded by rules 101 and 102 TFEU, which prohibit, on the one hand, agreements and concerted practices between undertakings and, on the other hand, the abuse of undertakings' dominant position in the market, as they pose impediments, restrict and distort competition within the European Union. Although Member States had complied with these provisions as they are part of the EU's primary law, neither the EU nor the Member States had taken serious steps towards harmonizing procedures for private competition litigation by legislating on the right to damage claims by individuals due to competition law infringements. After long negotiation procedures between Member States, on November 26, 2014, Directive 2014/104/EU ('the Damages Directive') was adopted.

The Directive recognized the need to enforce competition rules through civil law mechanisms, as the importance of private enforcement of competition rules and the individuals' right to full compensation in case of harm was highlighted by the Court's case law.[7] In article 1 para. 2 of the Damages Directive emphasizes that it 'sets out rules coordinating the enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.'[8] The main objective of the Directive is the efficient enforcement of EU Competition law and the subsequent prevention of the internal market's distortion. The Directive 2014/104/EU

[4] Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECR 314; Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-977; Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [1998] ECR I-11412.
[5] Joined cases C-295/04 to C298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA* [2006] ECR I-06619, para 31.
[6] Dunne N, 'The Role of Private Enforcement within EU Competition Law' [2014] 16 Cambridge Yearbook of European Legal Studies 143.
[7] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.
[8] DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/01, art. 1(2) (Damages Directive)

was transposed into Greek legislation by law 4529/2018. In the first article of the Explanatory Memorandum of the law, it is mentioned that the main focus and aim of the Directive is to enable individuals to bring damages actions against undertakings that have infringed competition law through the utilization of 'advantages' provided by substantive and procedural law[9].

It is prescribed that damages actions may be raised by anyone who has suffered harm because of competition law infringements by one or an association of undertakings.[10] In Art. 2 para. 1 of the Directive, 'infringements of competition law' are defined as the infringements of articles 101 and 102 TFEU or of national competition law provisions. According to para. 3 of the same article, national competition law means the 'provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced'. This means that if the infringements above have a national effect solely and do not distort the competition in the internal market but only within a Member State's borders, Directive 2014/104/EU does not apply. Nevertheless, when transposing the Directive, Member States have the power to regulate that its provisions would be applicable in purely national infringements insofar as this is not prohibited by the Directive.[11]

Extending the Directive's scope of application ensures a 'level playing field' for undertakings operating in Greek territory and equal protection of anyone harmed by competition law infringements. Besides, taking into account the spirit of the Directive, it shall be deemed necessary that its provisions would apply to infringements whose effect is limited to the national market and does not extend to trade between the Member States.[12] It should not be disregarded that the scope of competition law is to protect

[9] Explanatory Memorandum of Greek Law 4529/2018, art. 1 (Explanatory Memorandum).
[10] Damages Directive, art. 1
[11] Damages Directive, recital 10.
[12] Explanatory Memorandum, article 2; Ilias Soufleros 'Η Οδηγία 2014/104/ΕΕ για τις αγωγές αποζημίωσης λόγω παράβασης της νομοθεσίας ανταγωνισμού και η σχέση της με τον Κανονισμό (ΕΚ) 1/2003 (εκτελεστικό Κανονισμό των άρθρων 101 και 102 ΣΛΕΕ) και άλλα σχετικά με την εφαρμογή του ενωσιακά κείμενα' [2016] NoB 926.

against and take action against any potential distortions. These infringements can disrupt competition, which is considered the cornerstone of the economy.[13] Accordingly, in Article 2, paragraph 1 of the Greek law 4529/2018, 'competition law infringement' is defined as the infringement either of Art. 101 and 102 TFEU or of articles 1 and 2 of Greek law 3959/2011, while paragraph 3 of the same article defines as 'national competition law' the provisions of articles 1 and 2 of l. 3959/2011. It is stipulated that these provisions apply either in the same case or in parallel with European competition law, according to Art. 1 of the Regulation (EC) No 1/2003, or without implementing EU competition rules.

It is evident that the Greek legislators made a deliberate decision to extend the application of the Directive's provisions to infringements that have an impact solely on the Greek market.[14] The aforementioned decision aligns with the latest jurisprudence of the General Court, specifically in the Agria Polska case.[15] More specifically, the national courts are responsible for ensuring the effective implementation of competition rules and safeguarding the rights they confer upon individuals. Furthermore, natural persons and legal entities have the right to seek compensation for damages resulting from a prohibited concerted practice or abuse of dominance under Articles 101 and 102 TFEU, provided there is a causal link between the practice and the damages suffered. As a result, even if the Commission or National Competition Authorities abstain from taking any action against competition law violations, individuals still have the right to bring damages claims deriving from these infringements before the civil courts.

It should be stated that the enforcement of competition law involves both public and private enforcement mechanisms, which are complementary rather than solely supplementary to each other. While public enforcement is carried out by regulatory agencies, as previously mentioned, private enforcement allows individuals or companies to seek compensation for harm caused by anti-competitive behavior. In recent years, private enforcement has become increasingly important, and even though the relevant case law

[13] Dimitrios Avgitidis 'Αγωγές αποζημίωσης για παραβάσεις δικαίου ανταγωνισμού, Η Οδηγία 2014/104/ΕΕ υπό το πρίσμα προστασίας των καταναλωτών' [2015] ΔΕΕ 673.
[14] Evaggelia Asimakopoulou "*Οι αγωγές αποζημίωσης λόγω παραβίασης του δικαίου του ελεύθερου ανταγωνισμού*" (1st edn, Sakkoulas Publications 2018).
[15] Case T-480/15 *Agria Polska sp. z o.o. and Others v European Commission* [2017] ECR II-339 paras 78-84.

is still limited, the implementation of the Damages Directive aims to facilitate this across the EU.

While recognizing the significance of the substantive legal provisions contained in the Directive, this Thesis primarily focuses on addressing the principal procedural obstacles that emerge from implementing the Directive and Greek law 4529/2018. More specifically, the next chapter will briefly deal with the relationship between public and private, the objectives the Directive aims to achieve, and the case law that led to its adoption and implementation. In the third chapter, the binding effect of decisions on competition law infringements will be discussed, while the fourth chapter will address the passing-on defense and the quantification of damages. Lastly, the final chapter will include a general evaluation of the Directive's success in regard to its aims, ie, the effective protection of individuals harmed by competition law infringements and striking a balance between public and private enforcement.

II. The enforcement of competition law and Directive 2014/104/EU

1. Public and private enforcement of European competition law

As mentioned above, the legal provisions that delimit European competition law are articles 101 and 102 TFEU. The former prohibits, as incompatible with the internal market, 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market,'[16] while the latter prohibits 'any abuse by one or more undertakings of a dominant position within the internal market.'[17] The enforcement of these provisions could be either public or private.

[16] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, Art. 101 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF> accessed 21 June 2023 (TFEU).
[17] ibid, art. 102.

The term 'public competition law enforcement' encompasses the assessment of competition law infringements and the procedure for the imposition of fines from the Commission or National Competition Authorities to undertakings that have breached the law. Public authorities, through their expertise and resources, are able to thoroughly investigate and prosecute instances of anti-competitive behavior, thereby ensuring a reliable determination of whether a violation has occurred and the effective enforcement of competition law.[18] The fundamental legal text governing public enforcement is Regulation (EC) 1/2003. It is noteworthy that competition law provisions enshrined in both the Treaty on the Functioning of the European Union and the Regulation above do not prescribe clear regulatory rules but rather a regulatory standard,[19] which decisions of the Commission and National Competition Authorities specify.

Although Regulation EC 1/2003[20] primarily deals with public enforcement, its provisions relating to private enforcement underscore the need to strike a balance between the two. In article 16 par. 1 it is mentioned that 'when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated'. This provision is reflected in the Masterfoods case, where the European Court of Justice held, except for the abovementioned, that in case the addressee of a Commission's decision brings an action for annulment against that decision, it is at the discretion of the national court to decide whether to suspend the proceedings until the final judgment on the motion for annulment or to refer a question to the Court for a preliminary ruling.[21] Moreover, article 13 par. 3 of the Regulation clearly states that the Commission and National Competition Authorities, at their discretion, may submit written or oral observations on cases of competition law infringements pending before national courts.[22]

[18] Asimakopoulou (n 14), 12.
[19] Isaac Ehrlich/Richard A. Posner 'An economic analysis of Legal Rulemaking' [1974] 3 (1) Journal of Legal Studies 257.
[20] Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1.
[21] *Masterfoods* (n 4).
[22] Regulation (EC) No 1/2003, art. 15(3) "Competition authorities of the Member States, acting on their own initiative, may submit written observations to the national courts of their Member State on issues relating to the application of Article 81 or Article 82 of the Treaty. With the permission of the court in

Accordingly, paragraphs 2 and 3 of article 35 of Greek law 3959/2011 relate to enforcing competition law by civil courts. More specifically, paragraph 2 mentions that the HCC (Hellenic Competition Commission), the Council of State (Simvoulio tis Epikrateias, the highest Greek administrative court), and the Doikitiko Efetio of Athens (second instance administrative of Athens) are not bound by decisions of civil or criminal courts on infringements of Art. 1 and 2 of that law or Art. 101 and 102 TFEU. On the other hand, the 3rd paragraph of the same article states that domestic courts, irrespective of their jurisdiction, have the right to ask the Commission or the HCC to transmit to them information or their opinion on questions concerning the application of the Community or national competition rules accordingly.

On the other hand, private enforcement pertains to invoking the rules described above by individuals before national courts. In most cases, this involves individual claims made before civil courts for violations of articles 101 and 102 TFEU, which commonly involve damage claims in pursuit of compensation. These claims could be used as a 'shield,' as a defense against a claim for the performance of a contract, which constitutes the prohibited concerted practice, or for damages because of non-performance. They could also be used as a 'sword,' as a basis for injunctive relief, interim relief, or damages claims against the undertaking that infringed competition rules and caused harm.[23]

It is apparent that public and private enforcement are not in a rival relationship but rather complement each other in order to protect competition law against infringements. The objectives of the two different enforcement types confirm their complementary relationship and prove that competition law is most effectively shielded if and when combined. Public enforcement aims to promote and protect competition in the market by preventing anti-competitive practices while promoting consumer welfare at the same time. On the flip side, private enforcement has a more restorative nature regarding private legal interests, as it seeks to provide compensation and restore competition. While

question, they may also submit oral observations to the national courts of their Member State. Where the coherent application of Article 81 or Article 82 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to courts of the Member States. With the permission of the court in question, it may also make oral observations".

[23] Wils (n 2) 4; Francis G. Jacobs/Thomas Deisenhofer, 'Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective' in Claus- Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003) 187-228.

some argue that the compensatory nature of private enforcement in cases where private actors have suffered harm from anticompetitive practices takes precedence over the preventive and enforcement function of competition law, this perspective is not supported by the holistic approach to combating anticompetitive actions, which has prevailed in Europe.[24] The philosophy and approach of private enforcement incorporate several features and principles of public enforcement, resulting in a mutually reinforcing relationship between the two forms of enforcement. This reinforces the idea that they should not be seen as opposing forces but rather as complementary tools to achieve effective competition law enforcement.

2. The evolution of private enforcement of competition law

2.1. The EU legislation that led to the Damages Directive

Until the adoption of the Damages Directive, legal provisions concerning private enforcement of competition law did not exist. European primary law did not include clear statutory provisions, which individuals harmed by anti-competitive behaviors could use as the legal basis for tort claims seeking compensation.[25] Nonetheless, it became quickly obvious that the principle of the direct effectiveness[26] of European law was also applicable in cases of competition law infringements.[27] Later, two CJEU cases, Courage v. Crehan[28] and Manfredi,[29] highlighted the importance of private enforcement of competition law, as it emphasized the Court's intention to strengthen the 'victims' legal

[24] International Competition Network, Cartels Working Group "Interaction of Public and Private Enforcement in Cartel Cases" (Report to the ICN Annual Conference, Moscow 2007) <https://www.fne.gob.cl/wp-content/uploads/2014/03/ICN-2007-Interaction-of-Public-and-Private-Enforcement-in-Cartel-Cases.pdf> accessed 22 June 2023.
[25] Antonia R. Papadelli 'Αγωγές αποζημίωσης λόγω παράβασης της αντιμονοπωλιακής νομοθεσίας της ΕΕ – Από τη Λευκή Βίβλο στην Ανεπίσημη Πρόταση Οδηγίας' [2010] ΔΕΕ 662.
[26] *Van Gend & Loos* (n 3).
[27] *Belgische Radio* (n 4).
[28] *Courage* (n 7).
[29] *Manfredi* (n 5).

position by ensuring the establishment of tort liability of undertakings violating these provisions.[30]

In the first case, the British Court of Appeal referred questions to the CJEU for a preliminary ruling that derived from the legal dispute between Bernard Crehan and the brewery Courage. More specifically, a company named Inntrepreneur Estates Ltd (IEL), founded by Courage Brewery and Grand Metropolitan (Grand Met – a hotel company), owned pubs that were transferred to IEL after the two companies merged. Their lease agreements obliged them to buy their beer exclusively from Courage. In 1991, Crehan concluded two 20-year leases with IEL that included the aforementioned condition. Two years later, in 1993, when IEL brought an action for the recovery from Crehan of the sum of GBP 15.266 for unpaid deliveries of beer, Crehan argued that this condition was contrary to Art. 85 of the Treaty and countersued for damages. He claimed that Courage sold its beer to independent tenants of pubs at substantially lower prices than those in the price list imposed on IEL tenants, which led to reduced profits and, ultimately, business extinction. The Court of Appeal stayed proceedings and referred four questions for a preliminary ruling to the CJEU. The questions concerned whether a contractual party to the anti-competitive behavior could rely upon Art. 81 EC and recover damages based on the violation of that same provision. Moreover, the CJEU had to rule on whether a national provision that prohibits an individual from claiming damages relying upon his own illegal actions as a necessary step to that recovery is consistent with the European legislation and under which circumstances this should be allowed.[31] The CJEU ruled that the full effectiveness of Art. 81 EC (now Art. 101 TFEU) 'would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'[32] Furthermore, in the absence of Community rules governing the matter at hand, the Court concluded that it is the Member States' responsibility to designate both the courts and tribunals that have jurisdiction and the procedural rules on which individuals

[30] Aggeliki Delikostopoulou, 'Η μεταρρύθμιση του Ευρωπαϊκού και Ελληνικού Δικαίου του Ελεύθερου Ανταγωνισμού' [2018] 429.
[31] *Courage* (n 7) art. 16.
[32] ibid, art. 26

could rely when claiming damages.[33] Nevertheless, the power of Member States to determine each their own rules and tribunals with respect to individuals seeking compensation is limited by the principles of equivalence and effectiveness.[34]

In the Manfredi case, the Court dealt for the first time with a "follow-on claim," a term which will be elaborated on later.[35] Once again, the Court found that any agreement or practice, which is capable of affecting trade between Member States and leading to the non-attainment of the objectives of the European single market, by sealing off national markets or by affecting the structure of competition within the common market, is covered by Community law.[36] Thus, any individual harmed by infringements of the Community competition law is able to seek compensation. Nonetheless, procedural and substantive law issues, such as the concept of "causal relationship"[37] between the invalidity of an agreement prohibited under Community competition law provisions and the criteria for determining the extent of the damages,[38] are to be determined by the domestic law of Member States, provided that the principles of equivalence and effectiveness are followed.

Despite these rulings of the Court, the damages actions because of competition law infringements were, in fact, very limited. The Ashurst Study,[39] published in 2005, highlighted the regressive legislation that was in place in the Member States, except for those relatively progressive ones in Germany and the Netherlands. Later the same year, the Commission published the Green Paper on Damages actions for breach of the EC antitrust rules,[40] in which 'the main obstacles to an efficient system of damages actions' were identified. According to the Green Paper, both public and private enforcement

[33] Dimitris-Panagiotis Tzakas 'Αξιώσεις αποζημίωσης λόγω παράβασης του Κοινοτικού Δικαίου Ανταγωνισμού υπό το φως της νομολογίας Courage/Crehan' [2006] ΔΕΕ 42.
[34] According to the principle of equivalence, Member States should not rule (governing damages claims) less favorable than those governing similar domestic actions. At the same time, they should make sure that these rules do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness); *Courage* (n 7), para.29.
[35] Text to n 95.
[36] *Manfredi* (n 5), para.41.
[37] ibid, paras 62-64
[38] ibid, para 92.
[39] European Commission, Directorate-General for Competition, 'Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative and Economics Reports', Directorate-General for Competition [2004] < https://op.europa.eu/en/publication-detail/-/publication/38de282a-fdda-4f30-91be-2a2ef2019a59> accessed 21 June 2023.
[40] European Commission 'Green Paper on Damages actions for breach of the EC antitrust rules' COM [2005] 672 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0672> accessed 21 June 2023 (Green Paper).

were considered parts of a common system, and their objectives are the prevention of anti-competitive actions and the protection of consumers and undertakings from the consequences of these actions.[41] For the first time, the Commission attempted to codify the issues deriving from the private enforcement of competition law. Among others, the Green Paper established the need for regulations on access to evidence, the passing-on defense, the damages that would be awarded, and the coordination of public and private enforcement.

In 2008, the Commission published the White Paper,[42] the main objective of which was to guarantee the victims' right to full compensation[43] through the proposed by it legislative measures. Beyond that, the White Paper intended to establish minimum common standards[44] that would allow victims to claim damages and seek compensation to the maximum extent possible.[45] The Commission proposed ways of calculating the damages more accurately[46] and of protecting customers and indirect purchasers against the invocation of passing-on defense by the infringers of competition law.[47] It was emphasized that private enforcement should combine the objectives of prevention of infringements of competition law on the one hand and the restoration of damages on the other. Last but not least, the White Paper confirmed what was already established by the Courage/Crehan and Manfredi cases that 'any individual who has suffered harm caused by an antitrust infringement must be allowed to claim damages before national courts'[48] constitutes 'acquis communautaire.'[49]

2.2. The Greek legislation before Directive 2014/104/EU

[41] Avgitidis (n 13) 677.
[42] European Commission 'White Paper on damages actions for breach of the EC antitrust rules' COM [2008] 165 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008DC0165> accessed 21 June 2023 (White Paper).
[43] ibid, para 1.1.
[44] Papadelli (n 25), 663.
[45] Commission Staff Working paper accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules, COM (2008) 165 final, para. 57 <https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX:52008SC0404> accessed 21 June 2023.
[46] White Paper, para 2.5.
[47] ibid, para 2.6.
[48] ibid, para 2.1.
[49] Papadelli (n 25) 664.

Directive 2014/104/EU was transposed into the Greek legal order by law 4529/2018. Nonetheless, even before its transposition, individuals could raise damages claims for competition law infringements before national courts. These claims could be based on a combination of provisions found both in European and domestic legislative texts. Article 81 EC dealt in its second paragraph solely with the automatic invalidity ('automatically void') of the agreements or decisions that were described in the same article,[50] while other claims, such as claims for the omission of an infringement or compensatory claims, were regulated under national laws on the basis of principles of equivalence and effectiveness.[51] Arguments supporting the opinion that the Court, with its ruling on the Courage case, intended to create a special community law claim for compensation were overruled. According to the one that prevailed, the Court, by interpreting and implementing the principle of effectiveness, ordered national courts to determine, based on their domestic law, provisions on which claims for damages because of infringements of articles 81 and 82 EC would be found.[52] The legal basis, the conditions, and the extent of such claims would be determined by domestic courts on the basis of the principles of equivalence and effectiveness, unlike the opposite opinion, which suggested that damages claims from Community competition law violations would directly be rooted on community law, according to the jurisprudence and principles that were established by the Francovich case.[53] Later, the case Atlantic Container Line reaffirmed that the civil law consequences that derived from competition law infringements would be determined by national courts.[54]

[50] Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community [2002] 2002/C 325/01, art. 81 <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF> accessed 21 June 2023 (TEU).

[51] Theodoros Iliopoulos, "Απαίτηση αποζημίωσης κατά το ελληνικό δίκαιο για παράβαση των άρθρων 85, 86 ΣυνθΕΟΚ" [1986] ΕΕΝ 229, Tzakas (no 33) 46.

[52] Efthimia Kikini, 'Ζητήματα από την αλλαγή συστήματος στο κοινοτικό δίκαιο ανταγωνισμού για τα εθνικά δικαστήρια' [2005] ΕΕμπΔ, 220.

[53] Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357, para 37, 41; Tzakas (n 33) 44.

[54] Case T-395/94 *Atlantic Container Line AB and Others v Commission of the European Communities* [2002] ECR II-885, para 414 "… apart from the penalty of nullity expressly provided for in Article 85(2) of the Treaty, the case-law establishes that the consequences in civil law attaching to an infringement of Article 85 of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract, are to be determined under national law, (…) subject, however, to not undermining the effectiveness of the Treaty".

In the Greek legal framework, damages actions were based on article 914[55] of the Civil Code (CC) combined with articles 81 and 82 EC. It is worth mentioning that, in order to determine which Member States legislation would apply, it is necessary to examine private international law and especially the lex fori. The relevant Greek provision is Art. 26 CC[56] which refers to Article 914 CC. The circumstances under which Art. 914 CC would apply should be interpreted in conjunction with the findings and the jurisprudence that the Courage decision established.

First of all, in order to establish tortious liability, it was necessary to determine whether there was human behavior, either an act or omission,[57] which would appear as agreements between undertakings, decisions by associations of undertakings, and concerted practices (Art. 101 TFEU) or as an abuse of an undertaking's dominant position in the market (Art. 102 TFEU). The second condition to be fulfilled was the fact that the behavior in question was against the law. That was established by checking the general protective purpose of Community law, its special protective purpose towards specific persons, and the degree this protection was expanded to.[58] It is crucial to mention that damages actions could be raised by persons that were part of the prohibited agreement or cartel between undertakings, by persons at the subsequent levels in the relevant market, or by competitors, provided that all were objectively harmed by these actions. Furthermore, it is of high importance that the same compensation or damages would not be paid multiple times to several injured parties. The third condition concerned the existence of liability, either intent or negligence, of the undertaking that committed the prohibited by competition law action. Following that, the causal link between the legal ground of liability[59] and the damages that occurred needed to be ascertained. A common issue that arose while examining the aforementioned causal link was the fact that the consequences and subsequent damages of an anti-competitive behavior could be detected not only among actors in the same market position as the infringing undertaking but also among actors in different market positions, as well as among consumers, through the passing-on effect. Last but not least, it is worth noting that, according to

[55] Greek Civil Code, art. 914: "Whoever illicitly and with fault causes prejudice to another person is liable to [pay] compensation.
[56] Iliopoulos (n 51).
[57] Apostolos Georgiadis, 'Άρθρο 914', in Georgiadis/Stathopoulos (eds), *Αστικός Κώδιξ (ΑΚ)* (4th edn, Sakkoulas Publications 1982) 697-698.
[58] Tzakas (n 33) 47.
[59] Michalis Stathopoulos, *Γενικό Ενοχικό* (5th edn, Sakkoulas Publications 2018) 468-9.

Art. 914 CC, the damage had a dual meaning. On the one hand, it was a condition that, if fulfilled, the claim could be raised, and on the other, it was the subject of that claim.[60] The compensation that was to be awarded includes both the positive damages and the lost profits.[61] The issue of the passing-on effect was relevant in calculating the damages owed, as it affected all actors at every level of the supply chain. This effect allowed each actor to pass on any increased costs or prices to the next level, ultimately resulting in the potential impact on the end consumer. This resulted in the possibility of all supply chain level entities, including the consumers, to raise damages claims against undertakings that had infringed competition law. The claims were based on the financial situation that the claimant would have been in had the prohibited action not taken place. The damages incurred by entities at different levels of the supply chain ultimately passed on to the end consumer were calculated based on the difference in price resulting from the resale of the products.[62]

2.3. The Greek case law prior to the Damages Directive

In a research study included in 'The International Comparative Legal Guide to: Enforcement of Competition Law 2009', the Greek rapporteurs were asked whether there had been any successful claims for damages or other remedies arising from competition law infringements. In response, they reported that no data were available on this topic.[63] The report was published one year after the publication of the Commission's White Paper. In the Greek legal database, 'NOMOS' could be found little to no cases of private enforcement of competition law. Most cases pertained to disputes over the termination of agency or distribution agreements or refusal to deal. Both stand-alone claims and follow-on actions were observed; however, not many included damages claims, but rather claimants sought relief through restitutio in natura. Another observation that could

[60] Ioannis Spyridakis, *Ενοχικό Δίκαιο (Γενικό Μέρος)* (2nd edn, Sakkoulas Publications 2018) 225.
[61] ibid page 230-232.
[62] Tzakas (n 33) 52.
[63] Maria Totsika/ Katerina Patsantara, 'Greece' in Lesley Farrell & Melanie Collier (eds), *The International Comparative Legal Guide to: Enforcement of Competition Law 2009* (Global Legal Group 2009) 80 <http://ndl.ethernet.edu.et/bitstream/123456789/78131/1/4.pdf> accessed 22 June 2023.

be made is that the majority of cases that came before the civil courts had no success before the Hellenic Competition Commission.[64]

In the most known group of cases[65] that reached the CJEU, it was to be determined by the Court whether the refusal to deal was, in fact, infringing Art. 82 EC. The aforementioned group of cases concerned the refusal of GKS AEVE (a pharmaceutical company) to sell certain pharmaceutical products to wholesalers who engaged in parallel trade. The applicants claimed that GKS's refusal was an abuse of its dominant position in the Greek market and asked the Polimeles Protodikio Athinon (Court of First Instance, Athens) to order the defendant not only to continue supplying them with a pre-determined quantity of medicines but also to pay them for damages and compensate them for loss of profits.[66] The defendant appealed this decision, and both the HCC and Efetio Athinon (Court of Second Instance, Athens) referred questions for a preliminary ruling to the CJEU concerning the applicability of Art. 82 EC. On the one hand, the Court rejected the HCC questions ruling that it is out of its jurisdiction to answer questions by the HCC. On the other, the Court answered Efetio Athinon that there was an abuse of dominance, as it is described in Art. 82 EC, and it was 'for the national court to ascertain whether the orders are ordinary in the light of both the size of those orders in relation to the requirements of the market in the first Member State and the previous business relations between that undertaking and the wholesalers concerned.'[67] Following this decision, Dioikitiko Efetio Athinon (Athens Administrative Court of Appeal) allowed the appeal of the wholesalers against the HCC's decision 318/2006, which had partly rejected their claims. Additionally, by reversing the HCC's decision, it found that the complaint was valid on all accounts but on narrower grounds than those alleged by the wholesalers in their complaint. Subsequently, all parties lodged a pourvois a cassation before the Council of State, which were all declared inadmissible on technical grounds.[68]

[64] Iannis Symplis 'Damages Action in Private Antitrust Enforcement: Greek Report in Bernardo Cortese (ed), *EU Competition Law: Between Public and Private Enforcement* (International Competition Law series, 55 Wolters Kluwer 2013) 269.
[65] Case C-53/03 *Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE* [2005] ECR I-4638; Joined cases C-468/06 to 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-504.
[66] Lelos kai Sia, para. 18.
[67] ibid ruling of the Court.
[68] Council of State (Simvoulio tis Epikrateias -ΣτΕ) Joined cases 1921-1925/2012.

In other cases, concerning complaints against exclusive distribution agreements[69] or against the claimant's upstream supplier for wrongful termination of a commercial agency contract[70] did not yield any results attesting to the efficiency of private litigation on competition law infringements. In the first case, both the HCC and the Council of State rejected the claims and held that there had been no infringements of competition law rules, while in the second one, the Supreme Court (Areios Pagos) concluded that the termination of the contract was considered a general business decision and no abuse was detected. In a more recent case,[71] the abuse of dominance in the Market (Art. 102 TFEU) was only the alternative claim of the lawsuit, which was also rejected by the Court of First Instance of Athens (Polimeles Protodikio Athinon) as manifestly lacking any foundation in law.

Nevertheless, the case of OPAP AE against a prospective local agent[72] is worth mentioning as an example of successful litigation relating to the private enforcement of competition law before the Damages Directive. The claimant was a local agent for the Horse Racing Organization of Greece and wanted to enter into an agency contract with OPAP AE, a company with exclusive rights to organize and promote lotteries, games of chance, and betting on sports. More than a year after having fulfilled the necessary requirements in order to enter the selective network of OPAP agents and while he had not yet received an answer to his application, he discovered that a third party, which applied a year later, had been immediately accepted and had already started his operations. The case finally reached the Supreme Court of Greece, which found that, based on the facts of the case and the behavior of OPAP, there was constituted both an abuse of dominant position and civil tort liability based on Art. 919 CC.[73] Therefore, it awarded damages to the plaintiff, which were equal to what the third party who was offered the agency contract instead of the claimant had earned.

Taking the above-mentioned into consideration, it is apparent that, especially before the Directive, Greek plaintiffs were particularly hesitant to bring damages claims to civil

[69] ΣτΕ 3123/2014, HCC 364/2007.
[70] ΑΠ 683/2010, HCC 237/III/2003.
[71] ΠΠρΑθ 4188/2018.
[72] ΑΠ 1497/2009.
[73] Civil Code, art. 919: "Whoever willfully causes prejudice to another person in a manner contrary to principles of morality is liable to [pay] compensation".

courts. The complaints, even though they were found to be valid, were minor, and priority was not given to their correlation with competition law provisions. Their reliance solely on civil law provisions, Art. 914[74], 919,[75] and 281[76] of the Civil Code, would be enough, and competition law would not be found at all relevant. Many cases that were brought before the HCC could potentially constitute follow-on claims but were settled outside civil courts or are still pending. Nonetheless, the Damages Directive and Law 4529/2018 were designed to facilitate the pursuit of damages actions before civil courts and to increase the likelihood of a favorable outcome for claimants.

2.4. Directive EU/2014/14 or the Damages Directive

After deliberations between the Member States that lasted approximately ten years, on 26 November 2014, the Damages Directive was adopted, which laid down procedural and substantive rules for damages claims against competition law infringements. Articles 103 and 114 TFEU constitute the Directive's legal basis. As mentioned before,[77] the main purpose of the Directive is to ensure the effectiveness of the Art. 101 and 102 TFEU[78] by complementing public enforcement with private enforcement of competition law. Given that the Damages Directive covers not only infringements of European competition law but also infringements of European and national competition law at the same time, relying solely on Article 103 of the Treaty on the Functioning of the European Union as a legal basis would be insufficient.[79] This would lead to discrepancies between national rules and subsequently to an uneven playing field as regards damage actions, which, thus, would affect competition inside the internal market, as it is set out in Art. 26(2) TFEU. Therefore, it is deemed necessary to base the Directive on the dual legal bases of Art. 103 and 114 TFEU, in order to ensure a level playing field for undertakings operating in the internal market, increase legal certainty and reduce the differences in national competition legislation governing damages actions among

[74] Text to n 55.
[75] ΑΠ 1497/2009.
[76] Civil Code, art. 281: "The exercise of a right is forbidden, if it manifestly transgresses the limits imposed by good faith, the principles of morality, or the economic and social ends of the right".
[77] Text to n 9.
[78] Damages Directive, recital 3.
[79] Dr. Albertina Albors-Llorens "Antitrust Damages in EU Law: The Complex Interface of Multifarious Harmonization and National Procedural Autonomy" [2018] 7(1) University of Queensland Law Journal 137.

Member States.[80] Additionally, with a view to protecting the rights of individuals and especially their right to effective legal protection, the Directive refers directly to Art. 19(1) TEU and to 47(1) of Charter of Fundamental Rights of the European Union.[81]

Based on the existing case law and legislation predating the implementation of the Directive, it was determined that the principles of equivalence and effectiveness alone were insufficient to ensure the efficacy of private claims in civil courts regarding infringements of competition law.[82] However, concerns were raised that the Directive constitutes an indirect interference with the procedural autonomy of Member States. The broad wording of its provisions and the wide margin it leaves for interpretation and application by the Member States serves as evidence that such interference was not the case.[83] The purpose of the Directive is to ensure that private enforcement of competition law would be effective, and from the provisions of the Directive, it is ascertained that it addressed only the shortcomings in the legal framework and provided rules to govern previously unregulated aspects. The fact, also, that the Directive only deals with claims for compensation because of infringements of Art. 101 and 102 TFEU further supports the above-mentioned argument.

On the other hand, the provisions of the Damages Directive shall apply in cases of infringements of national competition law when the domestic legislation applies in parallel with the European laws, and there is a cross-border element in the disputes that arise. This means that the violation should be capable of affecting and distorting intra-state competition.[84] If the competition between Member States is not affected by the prohibited behavior, then each Member State has the right to implement and enforce only its national provisions to deal with the violation. In spite of that, based on Art. 3(1) of Regulation 1/2003 and Art. 2 of the Explanatory Memorandum of Law 4529/2018,

[80] Damages Directive, recitals 7-9.
[81] Damages Directive, recital 4.
[82] Asimakopoulou (n 14), 22.
[83] Emmanouela Truli, 'Will Its Provisions Serve Its Goals? Directive 2014/104/EU on Certain rules governing actions for damages for competition law infringements' [2016] 7(5) Journal of European Competition Law and Practice 299.
[84] Konstantina Koutsoumpidou 'The Direcitve 2014/104/EU on antitrust damages actions: The relationship between public and private enforcement of competition law. [In the light of the procedural provisions of the Directive' (LL.M. Thesis, Aristotle University of Thessaloniki 2021).

Greece has opted to enforce the provisions of the Directive also in pure national infringements.[85]

Article 3 of the Damages Directive establishes and guarantees the right of any natural or legal person to full compensation.[86] This right, indeed, constitutes an integral part of the acquis communautaire.[87] The article generally refers to the obligation of Member States to ensure that the victims will be wholly compensated[88] and does not establish either specific actions to be taken or the compulsory introduction of new legislation by Greece or other Member States.[89] Furthermore, in the Directive's recitals,[90] it is highlighted that the right to damages is irrespective of the existence of a direct contractual relationship between the claimant and the infringing undertaking. In addition to that, damages claims do not depend on prior findings of infringements by national competition authorities or the Commission or on the initiation of proceedings before them. This means that claims cannot only be follow-on claims but also stand-alone actions. The damages that are to be awarded in the event of a successful outcome of private litigation will include compensation for the actual loss, the loss of profit, plus interest, which 'should be due from the time when the harm occurred until the time when compensation is paid.'[91] Nonetheless, the compensation should not be excessive through punitive, multiple, or other damages.[92] In order to ensure the effectiveness of the right to full compensation, the Directive closely associated it with the principles of effectiveness and equivalence.[93] On the one hand, Member States should make sure that the exercise of this right is not made practically impossible or excessively difficult by national legislation and procedural frameworks. On the other, the domestic legal framework governing actions against competition law infringements on the European level should not be less favorable than that which pertains to similar damages actions stemming from national law infringements.

[85] Text to n 14.
[86] Damages Directive, art. 3.
[87] Damages Directive, recital 12.
[88] Damages Directive, art. 3(1).
[89] Tzakas (n 33).
[90] Damages Directive, recital 13.
[91] ibid, recital 12.
[92] ibid, recital 13.
[93] ibid, art. 4.

Once again, it should be stated that the Damages Directive encompassed provisions that are crucial in protecting individuals' rights effectively while also safeguarding the competition in the internal market. It is crucial to acknowledge that this Thesis endeavors to analyze select provisions without ascribing undue significance to them over those that will not be elaborated upon. Below, one can find an analysis of the binding effect of national decisions, on the passing-on defense, as well as a brief address of the issue of the quantification of damages based on both the Directive and Greek law 4529/2018.

III. The binding effect of national decisions

1. Introductory remarks

The binding effect of national competition authorities or review courts is established in Art. 9 of the Damages Directive. Prior to analyzing the theoretical and practical aspects of the binding effect, it is deemed necessary to make a significant distinction between 'follow-on' and 'stand-alone' actions. In a follow-on action, the claimant relies upon a prior decision of the Commission or the National Competition Authority (NCA) which establishes the infringement. On the other hand, a claim for damages can be raised irrespective of any prior decisions that derive from public enforcement of competition law ('stand-alone action'). However crucial that distinction might be, natural and legal persons are able to bring damages actions before civil courts regardless of whether the infringement was found by a competition authority or not. The right to seek compensation for the harm suffered from competition law infringements is 'independent of the prior finding of such an infringement by a competition authority.'[94] As mentioned before, one of the main purposes of the Damages Directive is the effective cooperation and correlation between public and private enforcement. Thus, the majority of the Directive's provisions concern the procedural issues that accompany follow-on actions so

[94] Case C-595/17 *Apple Sales International and Others v MJA* [2017] ECR I-854, para. 35.

that the scope and aims of the Directive would be served most efficiently.[95] These preceding decisions have already established that there has occurred a prohibited and illegitimate, according to Art. 914 CC, behavior on which base the damages will be claimed. This means that the infringement of Art. 101 and 102 TFEU does not need to be ascertained again. On the basis of the decision of the NCA, the claimant enjoys evidentiary advantages concerning the damage that has been suffered and its proof, such as the disclosure of and access to evidence that is included in the competition authority file (Art. 7 of the Damages Directive). On the other hand, in stand-alone actions, the claimant is in a challenging predicament due to the almost insurmountable evidentiary obstacles they face, including the establishment of the competition law infringement and the causal link between the infringing behavior and the damages that occurred. The only legal tool to be utilized is the one described in Art. 5 of the Damages Directive. Nevertheless, bearing in mind the confidential and secret nature of vertical or horizontal agreements, the possibility of proving the illicit behavior is inherently constrained, which demonstrates the extent of the information asymmetry in stand-alone actions.[96]

The CJEU, in its case law, had already highlighted the necessity of the binding effect of the Commission's decisions in order to protect the effectiveness of competition law and the overall protection of the internal market. Art. 16 of Regulation (EC) 1/2003 had established that civil courts would be bound by decisions of the Commission when ruling on follow-on damages claims in order to avoid conflicting decisions. The Court's jurisprudence, on the Masterfoods case,[97] is clearly reflected in that provision. Consequently, national courts should have stayed proceedings until the Commission reached a decision on the dispute or referred a question for a preliminary ruling to the Court. These provisions demonstrate the significance of public enforcement of competition law in relation to private enforcement as well as the emphasis that is given to the interpretation of competition law by the Commission and the Court. That spirit is also incorporated in the Damages Directive. The Athenian Appellate court (ΕφΑθ) in case 6848/2008 had already highlighted that point, adjudicating that HCC decisions bind civil courts, provided that a final decision on that dispute has been rendered either by

[95] Michail – Theodoros Marinos 'Η δέσμευση των πολιτικών δικαστηρίων από απόφαση της Επιτροπής Ανταγωνισμού σε αγωγή αποζημιώσεως λόγω παραβάσεως των κανόνων ανταγωνισμού' [2020] 2 ΕλλΔνη, 321.
[96] ibid, 322.
[97] *Masterfoods* (n 4), para 52.

the HCC or the administrative court. In that judgment, as well as in the 1286/2011 decision of the Supreme Court, it is further stated that the civil courts are not obliged to stay proceedings in case the dispute is still pending before the administrative courts. Accordingly, Greek law 3959/2011 provides that HCC decisions are subject to appeal before Dioikitiko Efetio Athinon, which can be further appealed before the Council of State. Decisions that are adopted on appeal have the force of res judicata, meaning that civil courts are precluded from relitigating the matters already settled by these decisions in the context of public enforcement proceedings.

According to the Regulation, decisions of Competition Authorities in Member States did not produce a binding effect for civil courts. The Damages Directive introduced, in Art. 9 (see also Art. 9 of law 4529/2018), the binding effect of national decisions; from either national courts, specifically review courts or NCAs. In order for a national decision to be binding, it has to be irrefutably established.[98] Irrefutably established are the decisions of NCAs ascertaining competition law infringements that are final or decisions of civil courts that are also final and validate the findings of the Competition Authority.[99] Final NCA decisions are, in fact, binding for civil courts only in case the damages action is brought before the courts of the same Member State where public enforcement took place.

The second paragraph of Art. 9 establishes that decisions by courts of other Member States should be considered as 'at least prima facie evidence.' This provision triggered an intense debate between Member States, as the Commission's Proposal for a Directive[100] on damages actions stipulated that decisions of any Competition Authority would have a binding effect within courts of another Member State before which damages claims for competition law violations are brought. Given the variances in procedural and substantive legal provisions across Member States pertaining to such actions, concerns arose regarding the adequacy of the procedural measures in ensuring compre-

[98] Damages Directive, art. 9(1).
[99] Law 4529/2018, art. 9; Asimakopoulou (n 14), 85.
[100] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM (2013) 404 final) [2013] OJ C 2013/0185 (COD), para 4.3.1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013PC0404> accessed 21 June 2023.

hensive protection of the fundamental rights to a fair hearing and a defense for undertakings.[101] As a result, a compromise was reached among Member States, leading to the provision of Art. 9 of the Damages Directive, which establishes that the binding effect of national decisions applies exclusively within the borders of the respective Member State. On the contrary, decisions issued by Competition Authorities and courts of other Member States would not possess the same binding effect.

2. The objectives of the binding effect

Art. 9 embodies the interaction and cooperation between public and private enforcement of competition law that is deemed necessary for the effectiveness of competition law within the internal market.[102] It establishes a linkage between the fines that are imposed by public authorities and the damages that are awarded during private litigation while ensuring that the latter remains independent from the former. Simultaneously, the binding effect of competition authorities' decisions could be perceived as a motive for individuals to raise damages claims in civil courts because of its advantages concerning the evidentiary process in follow-on actions, which were elaborated on above. Additionally, it could be contended that it serves both supra-individual and individual interests, as, on the one hand, it increases the legal certainty that derives from the harmonized implementation of public and private enforcement. On the other hand, individual interests are served by the binding effect described in Art. 9, which facilitates the effectiveness and favorable outcomes of the damages claims, both in terms of factual results and its legal basis. Furthermore, the information asymmetry between the claimant and the defendant is nullified as the former is relieved from the burden to gather evidence and prove that the occurrence of competition law infringements or assess crucial information about the dispute that is exclusively possessed by the other party.[103]

[101] Marinos (n 95), 323.
[102] Damages Directive, recital 6.
[103] Marinos (n 95), 324.

Simultaneously, through the binding effect, it is sought to avoid the adoption of conflicting decisions and the relitigation[104], which could be described as the 'duplication of the factual and legal assessment.'[105] The result is consistent and effective enforcement of competition law, procedural efficiency, and subsequent legal certainty. Accordingly, the main purposes of the binding effect were described in the White Paper as consistent application, legal certainty, effectiveness, and procedural efficiency.[106]

Although the binding effect of Competition Authorities and review courts decisions constitutes the pivotal nexus between public and private enforcement, it was argued that judicial independence is significantly compromised.[107] It was additionally contended that it contravened the fundamental doctrine of the principle of separation of powers. The judicial authority is precluded from assessing the factual basis of the case, as they are bound by the preceding decision and unequivocally barred from reevaluating the foundational facts underlying the claim, while the judicial discretion of the court is significantly limited. The latter is demonstrated by the fact that civil courts may solely refer a question for a preliminary ruling to the CJEU concerning the decision of the NCA or the review court. Apart from the above-mentioned arguments, there was a perceived apprehension of the potential emergence of errors inherent in the preceding decisions during the course of civil court proceedings.[108] Nevertheless, these risks could be considered minor, and the binding effect is not considered unconstitutional, as the proceedings and the decision of the NCA could subsequently undergo judicial review, and there is the possibility of a referral for a preliminary ruling to the CJEU. These assurances constitute a legal guarantee for the compatibility between Art. 9 of the Damages Directive on the one hand and the European Convention on Human Rights and the Charter of Fundamental Human Rights of the EU on the other.

3. The binding effect of national decisions within a Member State

[104] Damages Directive, recital 34.
[105] White Paper, para 2.3.
[106] ibid.
[107] Ioannis Lianos, Peter Davis, Paolisa Nebbia *Damages Claims for the Infringement of EU Competition Law* (1st edn, Oxford University Press 2015).
[108] Marinos (n 95), 325.

As was previously highlighted, the binding effect derives from an irrefutably established decision of NCAs and review courts, which finds the competition law infringement, only in case the damages claim is brought before civil courts of that Member State. However, prior to determining the full extent of the binding effect and its essential elements, it is worth specifying what is not encompassed within its scope.

Firstly, the Damages Directive does not constitute a legal basis for National Competition Authorities to be bound by civil courts' decisions, which find that there has occurred a competition law infringement and subsequently award damages. Under European legislation, it is left to the Member States' discretion to determine whether Competition Authorities would be obligated to abide by the finding, by a civil court, of competition law violations as the basis for claiming compensation. In Greek legislation, it is crucial whether the determination of infringement of Art. 1 and 2 of law 3959/2011 would bind the HCC. Paragraph 2 of Art. 35 of that law stipulates that this is not the case, and the HCC, Athens Administrative Court of Appeal (Dioikitiko Efetio Athinon), and the Council of State (Simvoulio tis Epikrateias) when ruling based on these provisions, are not bound by civil courts' decisions attesting to competition law infringements. The same applies to stand-alone actions for compensation before civil courts.[109]

Furthermore, should the NCA determine that there is an absence of compelling evidence supporting violations of Articles 101 and 102 TFEU, the subsequent judgment rendered by civil courts in a stand-alone claim for damages pertaining to the alleged infringement is not constrained by the NCA's ruling. The absence of any finding of infringing conduct by the Competition Authority constitutes persuasive evidence suggesting the absence of any breach of competition law altogether.[110] Conversely, if the NCA concludes that an undertaking has not infringed competition law, the civil court is obliged to abide by that judgment when adjudicating claims for damages.[111] It is clear that Art. 9 of the Damages Directive (and Art. 9 of law 4529/2018) does not intend to impede or restrict follow-on claims for damages arising from competition law infringements before civil courts but rather facilitate them. In this manner, the objectives of the

[109] ibid.
[110] ibid 326.
[111] The same applies under Art. 16 of Regulation (EC) No 1/2003, Soufleros (n 12).

interaction and collaboration between public and private enforcement of competition law are more effectively fulfilled, leading to enhanced efficacy in their implementation.

In order for a decision to be binding, it should establish that an undertaking has infringed on competition law, meaning that the conditions of Art. 101 or 102 (or 1 and 2 of Greek law 3959/2011) are fulfilled, and an infringing behavior is determined. An attempt of infringement is not enough to constitute a violation of the aforementioned legal provisions.[112] The penalty shall take effect on the conclusion of the prohibited agreement or cartel or through the abuse of its dominant position in the market by an undertaking. Neither the implementation of the prohibited cartel nor the realization of the economic effects of that abuse on other undertakings is a necessary element for the constitution of the infringement.

Furthermore, the final decision of NCA or a review court that finds the infringement should be irrefutably established in order to produce its binding effect. The White Paper stipulates that a decision is binding when the defendant 'has exhausted all appeal avenues.'[113] In practical terms, this refers to either the expiration of the time limits for bringing an action or the exhaustion of any available remedy. In theory, it was argued that a judgment was irrefutably established in case both ordinary and extraordinary appeals have been exhausted. Thus, legal certainty would be enhanced, and there would be a total alignment with the irrebuttable presumption that is formed. The Court, in its jurisprudence, has corroborated this viewpoint.[114] So, irrefutably established are judgments that cannot be subject to appeal in cassation. That is not the prevailing scenario as per the Damages Directive. In Art. 2(12), the term 'final infringement decision' is interpreted as the decision that 'cannot be or, that can no longer be, appealed by ordinary means,' thereby disregarding extraordinary appeals. Accordingly, Art. 9 (1) and 9(2) of Law 4529/2018 have adopted the latter opinion, despite potentially giving rise to inherent complexities within the Greek legal order, where res judicata does not include the facts of the dispute but rather the legal relationship at issue.[115] The infringement itself is part of the factual basis of the case to which a legal classification is given.

[112] Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities* [2002] ECR II-1498, para 206.
[113] White Paper 2008, para 2.3.
[114] Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-858, para 52.
[115] Asimakopoulou (n 14) 94.

Under no circumstances are national courts precluded from referring a question for a preliminary ruling to the CJEU in case they intend to diverge from the decision rendered by the NCA or review court. Hence, the evidentiary use of res judicata is considered to be closer to the spirit and the scope of the Directive.[116]

In the Greek legal order, and according to the Greek jurisprudence in case ΕφΑθ 4636/2021, among others, awarding decisions issued by administrative courts the force of res judicata in order to bind before civil courts, possesses fundamental intricacies. Civil courts are not able to review under any circumstance administrative acts. Furthermore, judgments rendered by administrative courts produce precedence only if the administrative issue resolved by the latter is raised as a preliminary issue before the former. However, that precedence is binding merely with respect to the administrative issue resolved by the court, primarily or incidentally, in order to establish its judgment on the validity of the administrative act, provided that the parties are, of course, identical. That judgment will be the basis of the decision of the civil court with regard to that matter. The ambiguity that derives is whether the binding effect of Art. 9(1) of law 4529/2018 possesses the force of res judicata. Considering the aforementioned, the court concluded that the binding effect retains the character of an evidentiary commitment. That signifies that it refers to the evidentiary utilization of an administrative decision, which has become res judicata, or of an NCA decision, that cannot be appealed, but not to a res judicata commitment in the formal sense.

Bearing in mind the aforementioned arguments regarding what falls outside the scope of the binding effect and its practical implications, it is crucial to determine what it encompasses within its purview. According to Recital 34 of the Damages Directive, the effect covers 'only the nature of the infringement and its material, personal, temporal and territorial scope,'[117] which the NCA or review court has determined. It encompasses the factual elements which constitute the infringement of Art. 101 and 102 TFEU, provided that the NCA has clearly delineated in its judgment the specific conduct that was adjudicated as infringing and their legal assessment[118] subsequent to their subsumption under the relevant provisions ('nature of the infringement'). This means

[116] Damages Directive, recitals 34-35.
[117] Stefanos Karameros, "Το νόμιμο τεκμήριο ως νομοτεχνικό μέσο της ελληνικής και ευρωπαϊκής νομοθεσίας" [2020] Sakkoulas Publications 384.
[118] Explanatory Memorandum, art. 9.

that the infringing undertakings, the time, and the territory of the infringement cannot be adjudicated by the civil court, as they are established by the NCA in a manner that precludes the civil court from ruling upon them. It is not permissible to adopt a different factual foundation for the infringement nor conduct a separate legal assessment based on the facts that the NCA has already adopted,[119] for instance, ruling that the infringement is covered under the exception of Art. 101(3) TEFU. It is worth mentioning that the aforementioned factual basis includes price-fixing agreements, unjustified limitation of output by undertakings, and the determination that an undertaking possesses a dominant position in the market by object or by effect restrictions that distort the internal market.[120] The binding effect derives not only from the operative part of the judgment but also from its grounds. The Commission, based on the Court's case law[121], has adopted that 'the obligation of national courts not to run counter to a Commission decision concerns the operative part of the decision which "must be construed in the light of the statement of the reasons upon which it is based."'[122] It has not yet been determined by the Court whether all the facts that constitute the factual foundation of the NCA decision are binding or solely those that are essential for establishing the infringing behavior, the absence of which would lead to the annulment of that decision.[123] Nevertheless, it is clear that the facts irrelevant to the constitution of the infringement, such as earlier actions by the undertakings or alleged violations, are not covered by the binding effect of the judgment. Consequently, the principle of the free assessment of evidence applicability is restricted during proceedings on follow-on damages claims before civil courts concerning the facts that constitute the prohibited behavior.[124] The submission of rebuttal evidence on those matters is also excluded.[125]

With regard to the individuals or entities, whether legal or natural, who were subject to the decision of the Competition Authority, which produces its binding effect, it is evident that it pertains to the undertakings found to have violated competition law. These undertakings have participated as defendants in public enforcement proceedings and

[119] ibid page 7, Karameros (n 117) 384.
[120] Marinos (n 95) 329.
[121] Case T-266/97 *Vlaamse Televisie Maatschapij NV v Commission of the European Communities* [1999] ECR II-2334.
[122] Commission Staff Working Paper accompanying the WHITE PAPER, para 140.
[123] Marinos (n 95) 330.
[124] ibid.
[125] "Binding proof" according to the White Paper 6.

have been afforded the opportunity to exercise their right to a hearing and defend themselves.[126] The Commission maintains the prevailing opinion that the claimant of damages before civil courts is not covered by the binding effect.[127] And that is due to the fact that, on the one hand, 'claimant' can be any natural or legal person that has suffered harm because of the infringing behavior,[128] and on the other, persons indirectly harmed are able to file damages claims before civil courts and calculate their damages only after the recognition of infringement of competition law provision by NCAs.[129] Accordingly, individuals are not required to participate in any way in the proceedings before Competition Authorities for their decision to be determined as irrefutably established. It is also irrelevant, and thus not covered by the binding effect, whether the Competition Authority has imposed a fine on the infringing undertaking and its amount. Last but not least, in case an undertaking is deemed to have participated in or concluded a prohibited agreement, but that has not been included in the operative part of the judgment, that undertaking is not bound under Art. 9(1) of the Damages Directive (and accordingly Art. 9(1) of law 4529/2018).[130]

As it is already established, the binding effect covers the same agreements, decisions, or practices that the NCA found to infringe Art. 101 and 102 TFEU (Art. 1 and 2 of law 3959/2011 accordingly), and the same individuals, companies or groups of companies which the NCA found to have committed this infringement, and which are normally, the addressee(s) of the decision.[131] Nevertheless, it is not sufficient for the infringing behavior, which gives rise to and is at the origin of the damage, and the legal issue at hand before the civil court to be merely related or similar to the issue that was adjudicated during public enforcement proceedings. The infringing agreement that was established by the NCA should be, in fact, the circumstance which gives rise to and is the origin of the damage.[132] Consequently, at least one of the undertakings that were a party to the infringing conduct should be the defendant during civil proceedings. The binding effect shall not cover undertakings that were not parties to the dispute before Competition Authorities.

[126] Marinos (n 95) 331.
[127] Commission Staff Working Paper accompanying the WHITE PAPER, para 154.
[128] Damages Directive, art. 3(1).
[129] Marinos (n 95) 331.
[130] ibid 332.
[131] Commission Staff Working Paper accompanying the WHITE PAPER, para 154.
[132] Marinos (n 95) 332.

On the contrary, the damage incurred and the causal link are not covered under the binding effect,[133] provided that regarding horizontal agreements, the rebuttable presumption of Art. 17(1) of the Directive is not in effect. These elements are not crucial for the establishment of the infringement, and, as a result, the principle of the free assessment of evidence shall apply. Possible references or considerations by the NCA on the resulting harm, as incorporated within the operative clauses of its decision, do not possess a binding effect.[134] The adjudication of such issues lies within the purview of the civil court's jurisdiction.[135] Furthermore, the binding effect is established irrespective of the infringing undertakings' liability, either negligence or intent. While it is an indispensable component in establishing tortious liability under Article 914 of the Greek Civil Code, it is not encompassed by Article 9 of the Directive, thereby confirming the objective establishment of the infringement of European and national competition law provisions.[136] The Directive leaves the matter of whether liability is crucial for the award of damages to be regulated at the Member States' discretion. Accordingly, for the Greek civil courts, and particularly under Greek law 4529/2018, to award damages in follow-on actions, liability is crucial due to its inherent tortuous nature.[137] Nevertheless, it is firmly established that if the NCA determines liability, such as an undertaking's deliberate intention to exploit its dominant position in the market, the binding effect shall extend to encompass that specific aspect of the decision.[138]

Moreover, the identification of the relevant market is pivotal in establishing both the violation of competition law and the resulting damages incurred. The claimant seeking damages must be situated within the market where the infringement occurred and where its adverse effects were experienced. In contrast to Article 102 of the TFEU, the establishment of damages under Article 101 does not necessitate the explicit identification of the relevant market. Consequently, if the Competition Authority has yet to undertake such market analysis, the burden of proof would rest upon the claimant, who would

[133] Commission Staff Working Paper accompanying the WHITE PAPER, para 154.
[134] Marinos (n 95) 333.
[135] Commission Staff Working Paper accompanying the WHITE PAPER para 156 "such effect would normally only alleviate the claimant's proof of the existence and the scope of the antitrust infringement"; Alexandra Mikroulea *Δίκαιο του ελεύθερου ανταγωνισμού* in Tzouganatos (ed) (Νομική Βιβλιοθήκη, 2013) 1054.
[136] Marinos (n 95) 333.
[137] Explanatory Memorandum 1; Marinos (n 95) 333 and especially footnote 84; text to n 55-56.
[138] Marinos (n 95) 334.

arguably face the aforementioned[139] challenges. However, provided that the Competition Authority or review court explicitly define the relevant market, the civil court shall be bound by that definition.[140]

Last but not least, it is worth mentioning that all NCA decisions that find infringements of competition law, ie, Art. 101 and 102 TFEU, and 1 and 2 of Greek law 3959/2011, are binding. The provisions of Article 16 of Regulation 1/2003, decisions rendered by the Commission are deemed binding for national courts when the subject matter of such decisions aligns with that of the national courts.[141] Accordingly, NCA decisions shall not be binding in case the civil court action refers merely to a similar legal matter founded merely on analogous factual circumstances.[142] Furthermore, the fine imposed during public enforcement proceedings neither reflects nor is considered to be equal to the damages the civil court might award. The former has a dissuasive effect, while the latter's objectives are restorative. Thus, in both stand-alone and follow-on actions, it is under the civil court's purview to adjudicate, calculate and award the damages.

4. The binding effect of final decisions rendered in other Member States

According to Art. 9(2) of the Damages Directive 'Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties'. Prior to the adopted provision in the Directive, which emerged as a result of negotiated compromises among Member States, various proposals were put forth regarding this issue. Firstly, the Green Paper proposed as an alternative the reversal of the burden of proof in case there is a preceding decision by a competition authority.[143] Later, the White Paper proposed that NCA decisions that find infringements of competition law constitute irrebuttable proof of that infringement in follow-on actions before

[139] Text to n 96.
[140] Marinos (n 95) 334.
[141] ibid 335.
[142] Mikroulea (n 135) 1036.
[143] Green Paper page 6, question C, option 8.

civil courts, adjudicating claims for civil damages of the victims of such infringement. Thus, it was established that the binding effect would not cover the entire NCA decision but rather only the part that finds the infringement.[144] Contrary to the above-mentioned, the Proposal for a Directive in 2013 suggested in Art. 9 that NCA and review court judgments finding infringements would be binding to all Member States irrespective of the State in which they were taken.[145]

Ultimately, the Damages Directive incorporated the provision that decisions rendered by Competition Authorities or appellate courts in other Member States are to be presented as at least 'prima facie' evidence and should be evaluated alongside any additional evidence presented by the parties. The Commission has highlighted the fact that prima facie evidence possesses a higher evidentiary value than common evidence that is brought by the parties before the court.[146] However, the claimant is not in any way precluded from invoking or producing contradictory evidence.[147]

The term 'prima facie' is considered nebulous and ambiguous, given the absence of a specific definition within the Directive.[148] Consequently, Member States embrace disparate interpretations of the term, both in its substantive meaning and procedural application. It is apparent that, under Art. 9(3) of the Directive, civil courts may refer questions for a preliminary ruling to the CJEU regarding ambiguities on procedural or substantive issues and the interpretation of the Directive, a right which derives directly from Art. 267 TFEU.[149] Greek law 4529/2018, in Article 9(3), endows Greek civil courts with an analogous prerogative. Therefore, with no prejudice to the submission of a preliminary question to the Court, the NCA or review court decisions are binding. It is worth mentioning that the admissibility of that question is judged solely according to Art. 267 TFEU.

[144] Emmanouela Truli, 'Damages Actions for Breach of the EC Antitrust Rules WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES: THE BINDING EFFECT OF DECISIONS ADOPTED BY NATIONAL COMPETITION AUTHORITIES' [2009] European Competition Journal 975.
[145] Proposal for a Directive 2013, Art. 9 page 36.
[146] Marinos (n 95) 336; Questions of Member States asked after the Implementation Meeting of 11/12/2014, Effects of national decisions.
[147] Marinos (n 95) 337.
[148] Karameros (n 117) 385.
[149] Damages Directive, recital 35; Commission Staff Working Paper accompanying the WHITE PAPER No 150; Marinos (n 95) 337.

As it was previously mentioned, each Member State had adopted varying definitions for the 'prima facie' evidence and also for the nature of the binding effect in general. In this regard, Greek law takes the position that the binding effect resulting from decisions by the HCC or the Dioikitiko Efetio Athinon does not possess the force of res judicata in its formal sense. Such an interpretation is deemed impermissible under Greek legislation due to its conflict with other legal provisions. The relevant German competition law provision served as a point of reference.[150] According to this provision, full probative value is accorded to the part of the decision that establishes the infringing behavior, which constitutes an essential element for the determination of damage. In line with the adopted provisions regarding HCC decisions,[151] the Greek legislator has chosen to grant 'irrefutably established decisions' issued in other EU member states full probative value while also conferring upon the claimant the right to present contradictory evidence.[152] Consequently, it is evident that the Greek legislation surpasses the minimum harmonization approach stipulated by the Directive. Lastly, it is important to note that Article 9 of the Directive exclusively pertains to damages actions. Since the Directive adopts the minimum harmonization approach, Member States retain jurisdiction over including claims related to the cessation of the infringing behavior within its scope. However, it is worth mentioning that such claims are not covered by the provisions of Greek law 4529/2018.[153]

Art. 9, which confers binding force to NCA and review court decisions, serves most effectively the objectives of the Directive. The binding effect is considered an 'inherent European special means of evidence'[154] and precludes civil courts from adjudicating on whether there occurred competition law infringements. The cooperation and interaction between private and public enforcement become more effective while individuals' rights are adequately protected.

[150] Asimakopoulou (n 14) 96.
[151] Text to n 109.
[152] Asimakopoulou (n 14) 96.
[153] Marinos (n 95) 339.
[154] Karameros (n 117) 390-391.

IV. The passing-on defense and the quantification of harm

1. The passing-on defense (Art. 12-14 of the Damages Directive)

1.1. Direct and indirect purchasers

In practice, prohibited agreements between undertakings and the abuse of dominance in the market by an undertaking can result in an artificial increase in prices upon which these undertakings sell products or provide services.[155] Even in case that was not intended, the escalation of prices takes place by effect, generally by an intentional limitation of supply, an artificial division of the market, and an artificial increase in prices,[156] as the infringements of competition law are designed to maximize the profits of the undertakings that commit them. As mentioned earlier, the infringements ultimately give rise to positive damages and loss of profits for the direct or indirect purchasers of the products, thereby entitling them to raise claims for compensation. Although any person harmed has a right to be fully compensated, the overcompensation, ie, punitive, multiple, or other types of damages, is expressly prohibited by the Directive's provisions.[157]

According to Art. 3 in conjunction with Art. 12, 13, and 14 of the Damages Directive, which also reflect the Court's jurisprudence in the Courage v. Crehan case, every individual is entitled to claim damages for loss that was caused by infringements of competition law irrespective of whether they were party to the contract that led to the restriction or distortion of competition.[158] It is the direct purchaser who primarily bears the negative financial consequences of the infringements of competition rules.[159] As the counterpart of the infringing undertaking, they incur the elevated costs of goods and services. In Art. 2(23) of the Damages Directive, the 'direct purchaser' is defined as

[155] Nikolaos Zaprianos, "Η ένσταση μετακύλισης της ζημίας στις αγωγές αποζημίωσης λόγω παράβασης του δικαίου ελεύθερου ανταγωνισμού (passing-on defense) – οδηγία 2014/104 και αστικό δίκαιο" [2016] ΕλλΔνη 1012.
[156] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-403, preamble 53.
[157] Damages Directive, art. 3(3).
[158] *Courage* (n 7), para 2.
[159] Zaprianos (n 155) 1014.

'the natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law.'[160] Nevertheless, in an attempt to mitigate their losses and secure their own gains, the direct purchaser revalues the products acquired by the infringer and further sells them at the subsequent market level, their own customers, with an even greater price markup.[161] Therefore, the resulting charge is passed on, either entirely or solely partially, to their own customers, ie the indirect purchasers[162] or to the final consumer. It is evident that the positive damage caused by the infringement is shared among various legal and natural persons within the market.[163] The questions that immediately arise concern whether the direct purchaser is entitled to raise damages claims provided that they passed on the surcharge to their customers, the indirect purchasers. In case of a negative answer to that query, do indirect purchasers possess the legal capacity to assert such claims? And finally, does the law provide a defense mechanism for the infringing undertakings to safeguard themselves from such claims?

The answer to the aforementioned questions is provided by Art. 12 of the Damages Directive, which stipulates that anyone who has suffered damages caused by the infringing behavior has a claim to full compensation, regardless of whether they are direct or indirect purchasers.[164] By doing so, the efficacy of the right to full compensation is better upheld and served. Simultaneously, as per the Directive,[165] the victims of anticompetitive conduct should not be overcompensated.

To ensure equal and efficient fulfillment of both objectives, the passing-on defense serves to restrict or eliminate the infringer's accountability entirely while simultaneously establishing the infringer's liability towards indirect purchasers.[166] In the first scenario, the passing-on defense can function as a defense mechanism (passing-on as a

[160] Damages Directive, Art 2(23).
[161] Karameros (n 117) 360, Avgitidis (n 13) 673.
[162] Damages Directive, art. 2(24): 'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom".
[163] Nikolaos Zaprianos, 'Αποζημίωση άμεσων και έμμεσων αγοραστών επί παραβάσεως του δικαίου ελεύθερου ανταγωνισμού' [2019] Επιθεώρηση Εμπορικού Δικαίου 290.
[164] Damages Directive, art 12(1).
[165] Damages Directive, recital 13, art. 3.
[166] Pedro Caro de Sousa, 'EU and national approaches to passing on and causation in competition damages cases: A doctrine in search of balance' [2018] 25 (5) Common Market Law Review 1751; Zaprianos (n 163) 292.

shield) employed by the defendant-infringer against the claimant-victim of the anti-competitive behavior, who has transferred the resulting damages to the next level of the production chain.[167] However, in the second scenario, the claimant–indirect purchaser can leverage the passing-on defense as a means to assert their own claims for compensation against the infringing undertakings (passing-on as a sword). Hence, the unjustified and wrongful enrichment of the victims is prevented while, accordingly to the principles established by the Courage jurisprudence, damages can be claimed irrespective of the existence of any contractual relationship between the claimant and the defendant in the dispute.[168] In case the indirect purchasers were precluded from raising damages claims before civil courts, it was feared that this would give rise to collusion between the cartels and their direct purchasers in concluding agreements, which would allow the latter to profit from the illicit and prohibited by competition law behaviors, and thus undermining the deterrent efficacy of the right to compensation.[169] Besides, one should keep in mind that direct purchasers rarely would bring such claims before civil courts. Despite having a more comprehensive understanding of competition law infringements, they tend to refrain from initiating legal disputes against the infringing undertakings with which they might still have business connections. It is apparent that their motivation to seek restitution for the harm they have suffered is diminished since preserving ongoing business relationships may take precedence.[170] Conversely, indirect purchasers would also tend to abstain from pursuing damages claims due to the considerable diffusion of the surcharge across the market, resulting in a substantial reduction in the actual extent of harm they have endured.

Subsequently, an examination of both aspects of the passing-on defense (as a shield and as a sword) will be conducted in conjunction with the legal tools provided by the Greek Civil Code for parties involved in such disputes before the civil courts. The effectiveness of competition law and the protection of the internal market are the main objectives

[167] Marco Botta, 'The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive' [2017], 25 (5), European Review of Private Law, 881-907; Martin F. HELLWIG, 'Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist's Perspective' [2006] Working Paper of the Max Planck Institute for Collective Goods <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=936153> accessed 22 June 2023.
[168] Kikini (n 52); Karameros (no 117) 362.
[169] Papadelli (n 25) 668; Maarten Pieter Schinkel, Jan Tuinstra, Jakob Ruggeberg, 'Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion' <http://ssrn.com/abstract=730384> accessed 2 June 2023.
[170] Papadelli (n 25) 668.

of the legal provisions that would be elaborated on, as well as the balance within the market.

1.2. The passing-on defense as a shield

1.2.1. The objection of contributory negligence

As mentioned above, the passing-on of the surcharges can be utilized by the defendant, being the infringing undertaking, as a defense mechanism in order to limit or eradicate the damages that they are liable to pay to the victims of their anti-competitive behavior. It is evident that if the direct purchasers have indeed passed on the surcharges, awarding damages to them would contradict the principles of fair compensation and competition law, as they would not have suffered any actual harm. Art. 13 of the Damages Directive stipulates that the defendant, who invokes the above-mentioned objection, also bears the burden of proof, having, however, the possibility to request disclosure accordingly to Art. 5-8 of the Directive.

The Greek Civil Code, in Art. 300, prescribes that compensation may be reduced or not be awarded at all either if the person who suffered has contributed through their own fault to the damage or its extent or if the person has failed to prevent or limit the damage. Therefore, in conjunction with Art. 13 of the Directive, it can be assumed that if the direct purchaser, who claims compensation for injuries suffered because of competition law infringement, has passed on the surcharge, that compensation would be limited or eradicated in case contributory negligence from their side is proved. This signifies that the victim of the infringement bears the burden to take measures before, during, or after the occurrence of the infringing behavior for the prevention and mitigation of the injury. In case they fail to adopt such measures, the compensation that is to be awarded by civil courts would be reduced or excluded, as the claimant would contribute with their actions to the damage or its extent.[171] Furthermore, to establish the implementation of the

[171] Zaprianos (n 155) 1016.

objection of contributory negligence, there should be determined the causal link between the non-adoption of measures and the damage incurred. On the other hand, the court may exempt the defendant from the payment of compensation, may order him to pay reduced compensation, or may find that, despite the contribution of the injured party, he is liable to pay full compensation.

In instances of competition law infringements, the purchaser incurs damages resulting from the acquisition of overpriced products. These damages are quantified by the disparity between the actual payment made and the hypothetical payment that would have been made had the infringement not occurred.[172] According to Art. 300(1) of the Greek Civil Code, the victim should take measures, even after the occurrence of the anti-competitive behavior has taken place, to prevent their damages. The most logical approach to accomplish this would involve transferring the surcharge burden by elevating the prices of the purchased products to a level commensurate with the extent of the incurred harm. The German Federal Court of Justice, in the ORWI case,[173] has rendered that the further increase of prices by the purchaser would not run afoul of the corresponding provision in German law, analogous to the Greek Art. 300. The increase, however, should not surpass the new price levels of the relevant market in order to limit the losses suffered by the harmed undertaking. Indeed, the burden of preventing injury necessitates such an action.[174]

Nevertheless, according to the Greek legislation, the further price hike and its passing-on to the next level of the production chain is not unconditional and favors direct purchasers in case it takes place under two circumstances. To start with, the market within which the buyer–reseller operates must exhibit a characteristic of demand inelasticity. Generally, in cases of an increase in prices, it is expected that the purchaser's counterparts would minimize their purchases as a precautionary measure to shield themselves from potential losses arising from the surge in product prices. This usually occurs in markets distinguished by elastic demand, where the demand declines due to the price hike. However, in an inelastic market, the demand cannot be reduced despite the price increase. The second scenario, according to which the price escalation is considered a

[172] Damages Directive, recital 39, art 2(20).
[173] Bundesgerichtshof, 28.6.2011 – KZR 75/10(case ORWI), JZ 2012.789, a short analysis avaible at <https://carteldamageclaims.com/2021/01/15/beyond-orwi-german-supreme-court-continues-clarifying-the-passing-on-defence-in-cartel-damages-cases/> accessed 22 June 2023 .
[174] Zaprianos (n 155) 1017.

requisite action by the purchaser, pertains to markets where agreements between the purchaser and their customers commonly incorporate the passing-on of the surcharge as a provision. These agreements, that are called 'cost-plus contracts,' directly tie the seller's payment to the actual expenses they have incurred as well as an agreed-upon profit margin, which could be a specific agreed-upon amount or a percentage of profit. Hence, if the buyer has acquired a product at a higher cost as a direct result of the negative consequences of anti-competitive practices on product prices in the relevant market, they possess the right ex officio as a seller to sell these products (to the indirect buyers of the infringing entity) at an increased price.[175]

To summarize, if the market exhibits inelasticity or if cost-plus contracts are prevalent in the relevant market and the purchaser raised the price of their products, they have done so in response to the duty to prevent or mitigate their positive damage, as prescribed by Art. 300 of the Greek CC. Thus, the compensation to be awarded by civil courts is excluded or reduced in proportion to the amount of the increased prices of the products.

1.2.2. The aggregation of losses and gains

According to the theories underpinning tort liability in Greek law (Art. 914 CC), when determining the compensation to be granted, Greek civil courts aggregate the losses and the gains while subtracting any profits gained by the injured party as a result of the wrongful act.[176] As mentioned above, the loss arises from the disparity between the current financial circumstances of the injured party and the financial circumstances they would have been in had the event causing the loss not taken place. Consequently, it is necessary to aggregate losses and profits as the profits arising from the illicit act. Failing to do so would lead to excessive compensation for the injured party, which should be avoided.

[175] ibid 1016-1017.
[176] ibid, Stathopoulos (n 59) 513.

Naturally, the aggregation of profits and losses is not unconditional but rather subject to prerequisites in accordance with Greek jurisprudence.[177] This entails that the infringing act must have the potential, in the ordinary course of events, to generate the aforementioned profit for the buyer. Conversely, if the profit stems from a distinct origin and is grounded in events unrelated to the infringing conduct, the prerequisite of a causal connection would not be established, thereby precluding aggregation. Furthermore, the profit arising from the escalation of prices ought to be a foreseeable outcome of the cartel's operations rather than originating from the autonomous actions of the purchaser. For example, if the buyer introduces an upgraded edition of the product into the market to attain greater profits, there lacks a substantial causal connection between the profit and the behavior causing financial loss.[178] In such scenarios, the profit stems from the purchaser's prerogative to raise the prices of their products, thus reaping the advantages derived from the alterations they have performed on them. Therefore, should the profit stem from the 'free and extraordinary activity'[179] of the harmed party, the above-mentioned aggregation is excluded. The same shall apply if the purchaser's burden referred to in Article 300 CC is exceeded.[180] To recapitulate, for the aggregation of profits and losses to occur and ultimately benefit the infringer of competition law, the following conditions must be cumulatively fulfilled. On the one hand, the price hike should be a predictable consequence within the ordinary course of events, and on the other, it should result from autonomous actions undertaken by the purchaser. If these conditions are satisfied, the damages payable by the infringer would be mitigated by the extent of the benefit accruing to the injured party.

Pursuant to Article 13 of the Damages Directive, if the passing-on defense is upheld by the civil courts, it may lead to a reduction or even complete exclusion of the damages payable by the infringing entity to the claimant, who suffered losses as a direct consequence to the infringement and subsequently passed them on to their counterparties. The question, deriving from that provision with regard to the necessity of an existing causal link, is whether the mere temporal link[181] between the price escalation and the infringement of competition law is sufficient or whether a direct causal link between

[177] ΟλΑΠ 807/73 NoB 22.321; ΑΠ 523/1995 ΕΕΝ 1996; ΑΠ 1116/2009 ΤΝΠ ΝΟΜΟΣ.
[178] Zaprianos (n 155) 1019.
[179] ΑΠ 523/1995 ΕΕΝ 1996; ΕφΑθ 4841/2014 ΤΠΝ ΝΟΜΟΣ.
[180] ΑΠ 523/1995 ΕΕΝ 1996; ΕφΠατρ 739/2006 ΑχΝομ 2007 98; ΕφΑθ 4841/2014 ΤΠΝ ΝΟΜΟΣ.
[181] Meaning that it is considered sufficient for the establishment of Art. 13 if the price escalation takes place after the infringement of competition law.

the two is required.[182] In case the temporal link is deemed sufficient, all price increases would be deemed as passed-on surcharges, resulting in a reduction or exclusion of the liability of the infringing entity to compensate for damages.

The Court's ruling in the 'Kone' case[183] offers valuable insight into the issue of the causal link. To be more precise, the Court ruled that the financial repercussions arising from the anti-competitive actions of the cartel, whether positive or negative and reasonably foreseeable in the normal course of events, can either mitigate or amplify the liability of the infringing entities.[184] According to the Court's jurisprudence, in case the price increase, as a direct implication of the price formation on the market under the cartel's influence ('umbrella effect' in the 'Kone' case), is considered a reasonably foreseeable consequence of the cartel's anti-competitive conduct for both cartelists and non-cartelists' customers, the necessary direct causal link is established.[185] The intent or negligence behind the damages caused under the umbrella effect is irrelevant in establishing the causal nexus. Therefore, if the causal link is established, the cartelists' obligation to compensate for the incurred harm is limited to the amount of the profit resulting from the infringement. Whether the price hike derives from the autonomous actions of the customer of the cartel is also immaterial. Its predictability under the normal course of events, as previously mentioned, is sufficient. In conclusion, it should be mentioned that the award of reduced damages is facilitated under Art. 13 of the Directive and is expected to be the prevailing practice. The 'immunity' of the injured party's gains resulting from the aforementioned price hike is contingent upon the offending undertakings lacking the ability to anticipate such gains, particularly if they arise solely from the exceptional quality of the injured party's product.[186]

Contrary to the uniformity between Art 300(1) CC and the interpretation of Art. 13(1) that was elaborated on above, the theory of aggregation of losses and profits in the Greek legal order diverges from the interpretation of the Directive's provision. Accord-

[182] Zaprianos (n 155) 1021.
[183] Case C-557/12, *Kone AG and Others v ÖBB-Infrastruktur AG* [2014].
[184] ibid, para 29-30, 34; Zaprianos (n 155) 1021.
[185] Eugenio Olmedo Peralta, 'A Legal Approach to the *Kone* Decision: Does the Private Enforcement of European Competition Law Need an Umbrella?' [2016] 47 IIC – International Review of Intellectual Property and Competition Law 697–722 <https://doi.org/10.1007/s40319-016-0498-1> accessed 8 June 2023.
[186] Zaprianos (n 155) 1022.

ing to Greek jurisprudence, the profit should not stem from the autonomous and extraordinary activity of the purchaser, while according to Art. 13(1), that condition is immaterial. Although the upholding of the passing-on defense entails the withholding or provision of diminished compensation to that specific purchaser, the infringing entities shall still remain liable and obligated to pay compensation for the positive damages that resulted from their anti-competitive actions. The interpretation of the issue that the EU legal order has adopted does not constitute a more favorable legal position for the infringing undertakings. Essentially, there is a simple substitution of the recipient for whom the damages are to be remitted without any alterations to the infringer's liability.[187]

Lastly, it is imperative to emphasize that the facilitation of profit and loss aggregation, as per the Court's jurisprudence, fully aligns with the objectives of the Directive. These objectives encompass ensuring the provision of full compensation for damages arising from competition law violations and the effective safeguarding of the right to judicial protection in this regard. Due to their long-term relationship with the infringers, the direct purchasers might be reluctant to raise damages actions against them. Thus, indirect purchasers, given the absence of any contractual relationship with the members of the cartel, would be in a more appropriate position to raise such claims. To that end, the provision of Art 14(2) of the Directive facilitates even further the success of the above-mentioned claims.[188]

1.3. The passing-on defense as a sword

It was previously analyzed that the passing-on defense can be utilized as a shield for the minimization of the damages payable by the infringing entity to their direct purchasers. In addition to that, and according to Art. 14 of the Damages Directive, the passing-on can be used as a sword from the indirect purchasers against the infringing undertakings. From what was already discussed with regard to the Courage jurisprudence, and in conjunction with the restorative nature of the compensation and the right

[187] ibid.
[188] ibid 1023.

to full compensation, a contractual relationship between the claimant of damages and the infringer of competition law is immaterial for the constitution of the right to claim such damages. Thus, Art. 14 officially establishes the right of indirect purchasers to raise claims for compensation against the infringing entities.

However, the damages actions that indirect purchasers raise are not devoid of challenges. The considerable spatial disparity between them and the infringing undertakings, as well as the substantial dispersion of the damage caused by that distance, constitute a deterrent to bringing such claims before civil courts. Furthermore, the evidentiary resources at their disposal, due to said disparity, are significantly constrained, therefore rendering it challenging to substantiate both the incurred harm to the direct purchaser and the passing-on of that damage to them.

Art. 14 of the Directive provides evidentiary facilitations to the claimant, ie, the indirect purchaser, aiming to address the inherent imbalance between the disputing parties. The first paragraph of the article stipulates that the claimant bears the burden of proving the existence and the scope of the passed-on surcharge,[189] as well as establishing the anti-competitive and illicit behavior, the damage, and the causal link between them. The passing-on of the surcharge constitutes a fundamental element of the claim for damages, obliging the indirect purchaser to establish both the harm inflicted upon the direct purchaser resulting from the anti-competitive action and the subsequent passing-on of that harm to the next levels of the production chain, ultimately impacting the indirect purchaser. Nevertheless, it is deemed proven that the overcharge has passed onto the indirect purchaser, in case they establish 'prima facie' that such passing-on has occurred.[190]

According to the Directive,[191] it is crucial to determine the conditions under which such prima facie proof is established. These conditions are described in Art. 14(2) of the Directive, which facilitates indirect purchasers in proving that the surcharge has been passed onto them. More specifically, the passing-on to the indirect purchaser is deemed proven when they show that: '(a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for

[189] Damages Directive, art. 14(1).
[190] Damages Directive, recital 41; Emmanouela Truli 'Αγωγές αποζημίωσης για παραβάσεις της αντιμονοπωλιακής νομοθεσίας – Η Οδηγία 2014/104/ΕΕ και αναμενόμενα, από την εφαρμογή της αποτελέσματα' [2016] 5 ΕφΑ 378; Asimakopoulou (n 14) 99.
[191] Damages Directive, recital 41.

the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law or has purchased goods or services derived from or containing them.'[192] It was, however, argued that the establishment of both the existence of the damage and its extent is challenging to ascertain, particularly considering the absence of explicit guidelines within the Directive to address this matter.[193]

The matter that necessitates attention at this juncture pertains to the legal nature of paragraph 2 of Article 14, as it remains ambiguous, warranting clarification regarding its status as either a rebuttable presumption or 'prima facie' evidence. The Directive on Recital 41 employs the terms interchangeably, presenting them as viable alternatives to each other. Nevertheless, it is of high importance to note that the distinction between the two is crucial, especially with regard to the evidentiary procedure and the burden of proof. On the one hand, if the 'rebuttable presumption' interpretation is accepted, the indirect purchaser is required to prove the three conditions outlined in Art. 14(2), which should be demonstrated cumulatively, thereby shifting the burden of proof to the defendant. Consequently, the defendant, namely the infringing undertaking, should substantiate the absence of anti-competitive behavior credibly to the satisfaction of the court, eliminating any potential ambiguities or doubts. On the other hand, should the 'prima facie' interpretation prevails, the burden of proof will not shift to the defendant.[194] The latter must merely erode the judge's legal certainty on the issue needing proving. Contrary to the requirement of establishing complete legal certainty in the first scenario, which corresponds to adopting the 'rebuttable presumption' interpretation, in this case, the increased probability of disproving the occurrence of the infringing action suffices.[195]

In practice, and accordingly, to those mentioned above, it has been concluded that Art. 14(2) constitutes a rebuttable legal presumption in favor of the indirect purchaser.[196] This means that they should merely prove the three cumulative elements prescribed by Art. 14(2) credibly to the satisfaction of the Court. Firstly, the indirect purchaser must

[192] ibid art. 14(2).
[193] Magnus Strand, 'Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages' [2014] 10 (2) European Competition Journal 361; Asimakopoulou (n 14) 99.
[194] Asimakopoulou (n 14) 101.
[195] Karameros (n 117) 367.
[196] ibid; M. Strand.

establish that the defendant committed the anti-competitive action. To that end, Art. 9 of the Directive, which stipulates the binding effect of Competition Authorities' decisions that identify the infringement, proves beneficial, as mentioned above. Subsequently, they must prove that the direct purchaser incurred damages resulting from the infringing behavior. The quantification of the damage is not required, and the evidentiary process at this juncture is facilitated by Art. 17(2) of the Damages Directive. According to this provision, in case the infringer-defendant was involved in the cartel, a rebuttable presumption arises that they caused harm.[197] Lastly, they should establish that they purchased goods or acquired services that were the object of the infringement or derived from or containing these goods. It is apparent that in the case of follow-on actions, indirect purchasers are facilitated by the provisions of the Directive in proving that the surcharge and damage have been passed onto them. The amount of the damage is not covered by the presumption established by Art. 14(2), so they also carry the burden of presuming the amount that was passed on.[198]

On the contrary, the defendant can challenge the evidence presented by the claimant through two means. Firstly, they can introduce rebuttal evidence to contest the fulfillment of the three conditions outlined in Art. 14(2)(b). The second approach involves presenting the primary evidence to scrutinize and undermine the conclusion derived from the aforementioned evidentiary process regarding the incurred damage.[199]

Greek legislation adopts the adoption of a rebuttable presumption of the passing on of the surcharge to indirect purchasers in Art. 11(4) of law 4529/2018, in case the passing-on defense is utilized as a sword. The Greek courts[200] had established, before the Directive came into effect, that third parties, ie, indirect purchasers, may raise claims for compensation based on Art. 914 CC as described above.[201] Furthermore, the Explanatory Memorandum of Law 4529/2018, in Art. 11 stipulates that Art. 11(4) of the law creates a rebuttable presumption of the existence of the passed-on effect of the overcharge, which is in favor of the claimant-indirect purchaser.[202] The reasons for the adoption of the 'rebuttable presumption' interpretation are elaborated on in Art. 11 of the

[197] Damages Directive, art. 17(2): 'It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption'.
[198] Zaprianos (n 163) 292.
[199] Zaprianos (n 163) 299; Karameros (n 117) 372-373.
[200] ΑΠ 1522/2013 [2014] ΧρονΙΔ 383; Asimakopoulou (n 14) 99.
[201] Text to n 55-56.
[202] Asimakopoulou (n 14) 100.

Explanatory Memorandum. More specifically, from the perspective of public enforcement of competition rules effectively, their deterrent impact is strengthened by increasing the likelihood that the infringer will be obligated to compensate all those who have suffered harm due to their infringement. On the other hand, the rebuttable presumption significantly enhances the prospects of obtaining compensation for individuals who did not have a direct contractual relationship with the infringer but purchased their product or service at a later stage in the distribution chain, thereby incurring an additional charge that ultimately represents their loss.

The article also provides that indirect purchasers, such as consumers, who are typically the final link in the distribution chain, find themselves in a challenging position due to temporal and geographical detachment from the occurrence of the infringement. That is why they often experience damages of lesser value and possess limited resources and willingness to engage in a legal battle with an uncertain outcome. Consequently, in the absence of a rebuttable presumption, the burden of proof would serve as a disincentive, discouraging individuals from pursuing individual or even collective actions.[203]

The conclusion that derives from the analysis of the nature of Art. 14(2) of the Damages Directive (and Art. 11(4) of law 4529/2018) is that the examination of its ratio and objectives will inevitably result in an accurate characterization. Although the Directive uses the terms 'rebuttable presumption' and 'prima facie evidence' interchangeably, the Greek legal order has adopted the first interpretation since it is more consistent with the prevailing legal theory in the country. Furthermore, the indirect purchaser must merely prove cumulatively the elements of Art. 14(2) and thus establish complete legal certainty for the judges, eradicating any potential ambiguities. On the other hand, pursuant to Art. 11(5) of law 4529/2018, the defendant-infringer of competition law must demonstrate credibly to the satisfaction of the Court the facts that dispute and rebut the presumption established by the claimant, as described above. Lastly, it should be noted that the article does not burden the claimant with the provision of proof for the quantification of harm as a requirement for utilizing the passing-on as a sword, which will be analyzed in the next chapter.

[203] Explanatory Memorandum, art. 11.

2. The quantification of harm (Art. 17 of the Damages Directive)

2.1. The Damages Directive's approach

As it was previously described, the primary objective of the Directive is to ensure the effective exercise of the right to full compensation for victims affected by anti-competitive actions. In pursuit of this objective, the European legislator has aimed to streamline the process of providing evidence for the occurrence of the damage suffered by the victim. However, it is important to note that establishing the occurrence of damage resulting from a violation of competition law is not the sole challenging aspect. Quantifying the extent of harm, both the positive damage and the lost profits also poses difficulties[204] due to the inherent information imbalance between the parties involved.

In that regard, Art. 17 provides some guidelines about the quantification of harm. In the first paragraph, it is stipulated that the burden of proof and the standard of proof required for that quantification must not render the exercise of the right to damages practically impossible or excessively difficult. Moreover, national courts are empowered, in accordance with national procedures, to estimate the quantum of harm in case it is established that a claimant suffered harm, but it is practically impossible or excessively difficult for them to precisely quantify it on the basis of the evidence available. The second paragraph of the same article prescribes that cartel infringements establish a rebuttable presumption of the existence of harm.[205] It should be noted that the presumption is created only in cases of cartel infringements and not in abuses of dominant position, for example, due to the information asymmetry and the difficulties associated with obtaining the necessary evidence in proving and quantifying the damage.[206] That choice of the Directive corresponds to the German jurisprudence in the

[204] Michail – Theodoros Marinos, 'Η ζημία σε δίκες με αντικείμενο αποζημίωση λόγω παραβάσεως κανόνων ανταγωνισμού – Ειδικά το τεκμήριο προκλήσεως της ζημίας (άρθρο 17 παρ. 2 Οδηγίας 2014/104/ΕΕ, άρθρο 14 παρ. 3 Ν. 4529/2018)" [2019] 4 Χρονικά Ιδιωτικού Δικαίου Τεύχος, 241.
[205] Damages Directive, art. 17(1)-(2).
[206] Damages Directive, recital 47; Truli (no 190) 392.

'Transportbeton' case,[207] while establishing the presumption was deemed necessary after the publication of the Oxera study.[208]

It should be noted that harm is identified as the disparity between the amount actually paid and the hypothetical amount that would have been paid had the infringement not taken place.[209] Furthermore, the term 'cartel'[210] in the provision includes merely the horizontal agreements between the cartel members, namely collusive agreements among competitors (e.g., price-fixing, market-sharing agreements) operating at the same level or within the same industry.

The presumption outlined in Article 17 only encompasses some of the essential elements required to establish an infringement and the resulting damages.[211] Only the occurrence of harm is presumed, while the party seeking damages must present and substantiate the required evidence regarding the legal basis of that presumption. It is obvious that once an infringement caused by a cartel's actions is proven, the existence of the condition of unlawful conduct is presumed since horizontal cartels are prohibited as they affect hard-core competition.[212] It further argued that the causal link between the anti-competitive conduct and the subsequent damage is covered under Art. 17(2), meaning that once it is established that the cartel concluded horizontal agreements, which are forbidden from a competition law standpoint, it is automatically presumed that, on the one hand, the cartel, in fact, operated and the agreements were executed,[213] and on the other that damages have occurred.[214]

The presumption outlined in Article 17(2) of the Directive facilitates the evidentiary process for the claimant due to the information disparity between the parties and the secret and confidential nature of the cartel's activities.[215] Without it, establishing not

[207] Truli (no 190) 392 and specifically reference 121.
[208] Oxera study (led by Dr. Asimakis Komninos) <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf> accessed 22 June 2023; Asimakopoulou (n 14) 103 and reference 310.
[209] Truli (n 190) 392.
[210] Damages Directive, art. 2(14).
[211] Text to n 57-62 for the conditions under which Art. 914 of the Greek Civil Code is established.
[212] Karameros (n 117) 355.
[213] Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECR I-4529 para 51.
[214] Asimakopoulou (n 14) 110.
[215] Marios Iacovides, 'The Presumption and Quantification in the Directive and the Practical Guide' in Maria Bergstrom, Marios Iacovides and Marcus Strand (eds) *Harmonising EU Competition Litigation: The New Directive and Beyond* [2016] (Hart Publishing) 295.

only the existence of harm but also the causal nexus between the damage and the actions of the undertakings involved in the cartel would have been exceedingly difficult. It is apparent that the rule stating that 'the burden of proof lies with the one making the invocation' is disrupted.[216] It can be argued that the principle of effective implementation of competition law, pursuant to the Court's jurisprudence in the Courage case, which is enshrined in Art. 4 of the Directive with regard to tackling procedural issues, could suffice for the alleviation of the burden of proof, especially in cases where proving and estimating the incurred harm is practically impossible or excessively difficult. The added value of Art. 17 lies in its recognition that the claimant's inability to precisely quantify damages resulting from competition law infringements does not automatically render a claim unsuccessful, thus elaborating on the principle of effectiveness.[217]

The subsequent legal question that arises relates to when the court is satisfied that the harm is 'practically impossible or excessively difficult' to be precisely calculated by the claimant. One possible answer would be that the court is always satisfied since the counterfactual calculation of damages is, by its nature, an unverifiable approximation of what would have happened had the infringement not taken place.[218] The calculation will inevitably vary in each case since assessing the harm occurs on an ad hoc basis tailored to the specific circumstances.[219]

The calculation of the incurred harm is one of the main issues that the Directive addresses. Any miscalculation could either negatively affect the claimant's right to full compensation or lead to overcompensation.[220] The Directives recitals[221] suggest that the required complex factual and economic analysis, along with the high costs that the claimant has to bear, would be considered a deterrent to raising such claims.[222] With regard to the method of calculation of the incurred harm, the Directive does not provide specific guidelines, but rather it is stated that it is under the national courts' discretion

[216] ibid.
[217] ibid 301.
[218] ibid.
[219] Asimakopoulou (n 14) 107.
[220] Theodoros Iliopoulos 'Ιδιωτική επιβολή του δικαίου του Ανταγωνισμού. Οι μέθοδοι ποσοτικοποίησης της ζημίας και η δικαστηριακή πρακτική' [2017] 1 Εφαρμογές Δημοσίου Δικαίου 3.
[221] Damages Directive, recital 14.
[222] Evaggelia Asimakopoulou 'Αγωγές αποζημίωσης λόγω παραβάσεων του δικαίου του ανταγωνισμού - Ν 4529/2018 – Ενσωμάτωση στην Ελληνική νομοθεσία της Οδηγίας 2014/104/ΕΕ' [2018] 11 Δίκαιο Επιχειρήσεων και Εταιρειών 1275.

to calculate the quantum of damages that are to be awarded.[223] Additionally, civil courts may request assistance from NCAs 'in the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.[224] The Directive further refers to the 'Practical Guide Quantifying harm in actions for Damages based on breaches of Article 101 or 102 of the Treaty for the Functioning of the European Union',[225] which is accompanied by the document 2013/C 167/07.[226] This Practical Guide is not binding and proposes methods and techniques for quantifying damages to civil courts. According to the aforementioned documents, and in conjunction with Art. 17(3), it is apparent that national courts will bear the responsibility of applying the methods and principles on the quantification of the harm.

2.2. The Greek legislation's approach

Art. 17 of the Directive is transposed into Greek legislation with Art. 14 of law 4529/2018. In accordance with the stipulations set forth in the Directive, Article 14 introduces a rebuttable presumption concerning the occurrence of harm in situations where collusion within a cartel has already been substantiated by irrefutable evidence. Furthermore, with regard to the calculation of damages, the Greek provision diverges from the Directive. While Art. 17 generally refers to the quantification of the harm by the court, the Greek article goes one step further and stipulates that the probability of damages is sufficient for the civil court and applies to both the lost profits and the positive loss and the judge should quantify the harm taking into account the available evidence.[227] In the case 4636/2021 ΕφΑθ, the appellate court found that Art. 14 diverges and supersedes not only the Directive's provision but also Art. 298 CC and the principle that the parties delimit the subject matter of the dispute when calculating the lost profits. This way, it reaffirms that damages actions due to competition law infringements intend

[223] Damages Directive, recital 39; Asimakopoulou (n 14) 107.
[224] Damages Directive, art. 17(3).
[225] Commission Staff Working Document published online SWD (2013)205 < https://www.ee-mc.com/fileadmin/user_upload/PRACTICAL_GUIDE_QUANTIFYING_HARM_IN_ACTIONS_FOR_DAMAGES.pdf > accessed 15 June 2023.
[226] 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 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013XC0613%2804%29> accessed 15 June 2023.
[227] Papadopoulou/Klamari-Mikroulea National Report FIDE [2016] 511.

to defend not only private but also public interests. On the other hand, although it facilitates the evidentiary process concerning the precise calculation of the damages, it does not include the causal link or other conditions for the establishment of a damage claim.[228] The Greek legislator did not take advantage of the minimum harmonization approach in order to facilitate even further the evidentiary process for the claimant with regard to the burden of proof.[229] It should be mentioned that merely a general reference to an amount and its specification by means of evidence is not sufficient, according to the procedural principles of the Greek legal order. An ad hoc assessment of each case is required on the basis of the fundamental right to effective legal protection.[230] In a recent case of Areios Pagos,[231] the court adjudicated that it should be examined on a case-by-case basis, the claimant's capacity to calculate the harm based on the information they have access to.[232]

Unequivocally the claimant has a fundamental right to cite evidence and present factual information that demonstrates the harm they experienced. Nevertheless, in order to ensure the effective implementation of EU competition law and under certain circumstances, this right and the principle that the parties delimit the subject matter of the proceedings could be forfeited. The judge should avail themselves of experts, ex officio, and financial analysts without expecting the parties to resort to such measures.[233] As mentioned above, the principle of 'one should prove anything they invoke' is disrupted but solely for the effectiveness of competition law and the safeguard of the right to full compensation.

V. Conclusions

This final chapter intends to summarize the main findings of the research conducted on Directive 2014/104/EU while also attempting to evaluate the effectiveness of its rules.

[228] Explanatory Memorandum, art. 14; Asimakopoulou (n 14) 105.
[229] Iliopoulos (n 220) 3.
[230] Asimakopoulou (n 14) 111.
[231] ΑΠ 403/2016 published in NOMOS.
[232] Asimakopoulou (n 14) 112.
[233] ibid 113.

The objective of the Directive, namely to 'establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU and the proper functioning of the internal market for undertakings and consumers,' could not be fulfilled without the cooperation and coherence between public and private rules enforcing competition law. Therefore, how successful the Directive was in that regard will be presented below.

Already from the jurisprudence set by the Courage case, it became apparent that the enforcement of competition law was not sufficient only with public rules, while at the same time, the right of every individual to raise damages claims from competition law infringements was established. Another finding was the fact that any legal or natural person may claim compensation for harm caused by violations of competition law would enhance the effectiveness of competition rules while preventing undertaking from resorting to the distortions of competition in order to maximize their profits. Subsequently, the Directive complemented and codified what was established by the Courage case laying down rules for national courts that deal with such claims, thus strengthening the cooperation between public and private enforcement and remedying the damages more effectively.

To begin with, the Directive attempted to mitigate the information disparity between the parties in order to ensure the efficient protection of individuals-victims from anti-competitive conduct through the provisions concerning the disclosure of evidence. This aspect of the Directive was not elaborated on in this Thesis, but its importance for strengthening the claimant's position should not be overlooked.

The effectiveness of the Directive in providing robust procedural and evidentiary facilitations to the victims, primarily those affected by horizontal cartel agreements, has already been demonstrated. The most representative example is Art. 17(2) (Art. 14(3) of Greek law 4529/2018), according to which if cartel infringements have been established, it is presumed that they have caused harm.[234] Nevertheless, it is important to note that this presumption is applicable solely to infringements resulting from cartel activities. The Directive, unfortunately, does not extend its provision of procedural and evidentiary facilities to victims affected by other infringements encompassed within

[234] Anneli Howard, 'Too little, too late? The European Commission's Legislative Proposals on Anti-Trust Damages Actions' [2013] 4(6) Journal of European Competition Law & Practice 455.

Articles 101 and 102 TFEU. It comes as a conclusion that combating cartels' conduct is a top priority of the European legislator, as the distortion of competition caused by that conduct should be eradicated. Conversely, the disparate treatment of victims based on the type of infringement does not escape scrutiny.[235] In fact, it is extremely difficult for the victims of the abuse of its dominance by an undertaking to successfully prove both the existence of dominance and the abuse, given the information gap between the two parties of the dispute.[236]

However, the provisions prescribed by the Directive for victims in follow-on actions are significant, particularly in light of the absence of similar provisions in stand-alone actions. More specifically, Art. 9 of the Directive (Art. 9 of Greek law 4529/2018) establishes the binding effect of NCA and review courts' decisions, thereby confirming the complementary relation of private and public enforcement of competition law. The chances of success of follow-on claims are enhanced, and it becomes obvious that the Directive was structured on the basis of that claims. Conversely, in stand-alone actions, the claimants face extreme evidentiary obstacles, for example, in quantifying the damage, as the Directive and its accompanying documents are deemed insufficient in that regard. The Directive did not encompass provisions for the precise quantification of harm, thereby conferring the matter to be addressed at the discretion of each Member State, albeit guided by overarching principles and methodologies.

On the other hand, a positive element of the Damages Directive is that any individual is able to claim compensation for harm incurred from an undertaking's anti-competitive actions. That means that a contractual relationship between the parties of the dispute is not a requirement. Not only direct and indirect purchasers but also consumers may raise such claims. Nevertheless, the high profits the undertakings gain only correspond to a small amount of damage to a consumer. Subsequently, indirect purchasers and consumers might not be motivated to engage in long and costly litigation with dubious success.[237] This issue could be solved by incorporating into the Directive the collective redress provisions that were proposed by the White Paper. Such provisions were considered an 'enemy' to the European internal market as they would lead to a 'litigation

[235] Dunne (n 6).
[236] Howard (n 237).
[237] Papadelli (n 25) 664.

industry,'[238] thereby restricting the undertakings' operations in the market in fear of collective actions against them claiming compensation.[239] It is imperative that a legal framework adjusted to all Member States' legal orders will be adopted in order for victims of anti-competitive actions to be fully compensated and for their sights to be safeguarded.

Another conclusion deriving from this dissertation is that the issues addressed were dealt with by prioritizing public enforcement mechanisms at the expense of private enforcement.[240] The fact that National Competition Authorities have the right to deny providing assistance to civil courts on quantifying the occurred harm (Art. 17(3) of the Directive) proves the shortcomings of the Directive on the effective cooperation between private and public enforcement of competition law. The superiority and the effectiveness of public enforcement are undeniable, and the Directive, in an attempt to strike a balance between the two types of enforcement, has rendered individuals decisive factors in the effective implementation of competition law rules. Thus, it is imperative to emphasize the correlation and collaboration between the two modes of enforcement in order to attain optimal outcomes when effectively addressing the aforementioned matters.

With regard to Greek law 4529/2018, the Greek legislator was late in adapting to the European legal framework. Some provisions of the Directive were transposed into Greek law without causing any conflict with pre-existing national provisions that addressed that issue, ie, the provisions concerning the binding effect, while in other circumstances, the Greek provisions diverged from the Directive. The Greek jurisprudence remains limited, and the successful outcome of damages claims is questionable. However, given that the Directive's success is highly dependent on its implementation by national courts, so far, the feedback has been positive, albeit fundamental and material changes should be performed within Member States to ensure the Directive's effectiveness.

Nevertheless, it is essential to consider that the jurisprudence of the CJEU is expected to evolve in the coming years, given the increasing number of damages claims seeking

[238] Waller A. & Popal Ol "The Fall and Rise of the Antitrust Class Action" [2016] 39(1) World Competition.
[239] Papadelli (n 25) 665.
[240] ibid 672.

compensation. Throughout requests for preliminary rulings submitted by Member Stats, the Court's interpretation of the Directive's provisions will provide invaluable guidance on achieving consistent application and resolving seemingly insurmountable issues. This evolving jurisprudence will undoubtedly shape the future implementation and effectiveness of the Damages Directive. Consequently, ongoing analysis and research will be of paramount importance in order to monitor the evolving landscape and to identify any necessary adjustments to ensure the optimal realization of the objectives the Directive intends to achieve.

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Annex

In 2014, after long negotiation and deliberation periods between the Member States, the Commission adopted the Directive 2014/104/EU, the 'Damages Directive', which governs civil claims for compensation before national courts due to competition law infringements. Prior to the adoption of the new Directive, the European Commission had made efforts to introduce legally binding instruments to address the matter, such as the Green Paper in 2005 and the White Paper in 2008. However, the handling of damages actions filed by individuals, albeit in line with EU jurisprudence, remained within the discretion of Member States under national provisions. This Thesis will focus on the provisions of the Directive in the EU level, governing the procedural aspects of the matter, while discussing the specific implications within the context of Greece.

This research initially focuses on the legislation that led to the adoption of the Damages Directive within the EU and, also, the legislation prior to the Directive in Greece. Furthermore, it delves into crucial procedural challenges deriving from the Directive, particularly pertaining to the binding effect of decisions issued by NCAs or review courts, both within and beyond the borders of Member States. Additionally, a comprehensive analysis of the 'passing-on defense' will be conducted, examining its utilization as both a protective measure (as a shield) and an offensive strategy (as a sword). Finally, the study concludes with an exploration of the intricate process of quantifying harm.

The dissertation is trying to address some of the most significant and challenging provisions of the Damages Directive for the Member States while also evaluating their effectiveness in successfully upholding and safeguarding the right to full compensation. By shedding light on these critical aspects, this research endeavors to offer valuable recommendations for enhancing the practical application and harmonization of the Damages Directive across the EU, specifically within the Greek legal order.

Keywords: Damages Directive, competition law, private enforcement, Greece, principles of equivalence and effectiveness, binding effect, passing-on defense, right to full compensation.

Deutscher Annex

Im Jahr 2014 verabschiedete die Kommission nach langen Verhandlungen und Beratungen zwischen den Mitgliedstaaten die Richtlinie 2014/104/EU, die "Schadenersatzrichtlinie", die zivilrechtliche Schadenersatzansprüche vor nationalen Gerichten aufgrund von Verstößen gegen das Wettbewerbsrecht regelt. Vor der Verabschiedung der neuen Richtlinie hatte sich die Europäische Kommission um die Einführung rechtsverbindlicher Instrumente bemüht, wie etwa das Grünbuch im Jahr 2005 und das Weißbuch im Jahr 2008. Die Behandlung von Schadenersatzklagen durch Einzelpersonen lag jedoch, wenn auch im Einklang mit der EU-Rechtsprechung, nach wie vor im Ermessen der Mitgliedstaaten im Rahmen nationaler Bestimmungen. Diese Arbeit wird sich auf die Bestimmungen der Richtlinie auf EU-Ebene konzentrieren, die die verfahrensrechtlichen Aspekte der Angelegenheit regeln, und gleichzeitig die spezifischen Auswirkungen im Kontext Griechenlands erörtern.

Die Untersuchung konzentriert sich zunächst auf die Rechtsvorschriften, die zur Verabschiedung der Schadensersatzrichtlinie in der EU geführt haben, sowie auf die der Richtlinie vorausgehenden Rechtsvorschriften in Griechenland. Darüber hinaus befasst sie sich mit den entscheidenden verfahrensrechtlichen Herausforderungen, die sich aus der Richtlinie ergeben, insbesondere in Bezug auf die Bindungswirkung von Entscheidungen der nationalen Wettbewerbsbehörden oder Nachprüfungsgerichte, sowohl innerhalb als auch außerhalb der Grenzen der Mitgliedstaaten. Darüber hinaus wird eine umfassende Analyse der "passing-on defense" durchgeführt, wobei ihre Nutzung sowohl als Schutzmaßnahme (als Schild) als auch als offensive Strategie (als Schwert) untersucht wird. Die Studie schließt mit einer Untersuchung des komplizierten Prozesses der Quantifizierung des Schadens.

Die Dissertation versucht, einige der wichtigsten und für die Mitgliedstaaten schwierigsten Bestimmungen der Schadenersatzrichtlinie zu behandeln und gleichzeitig ihre Wirksamkeit bei der erfolgreichen Wahrung und Sicherung des Rechts auf vollen Schadenersatz zu bewerten. Indem sie diese kritischen Aspekte beleuchtet, versucht diese Untersuchung, wertvolle Empfehlungen für die Verbesserung der praktischen Anwendung und Harmonisierung der Schadensersatzrichtlinie in der EU und insbesondere in der griechischen Rechtsordnung zu geben.

Stichworte: Schadensersatzrichtlinie, Wettbewerbsrecht, private Rechtsdurchsetzung, Griechenland, Äquivalenz- und Effektivitätsgrundsätze, Bindungswirkung, passing-on defense, Recht auf vollen Schadensersatz.