



School of Law

The Netherlands as a Cartel Damages Hub and Private Law Enforcement
Paradise?

Research and Thesis Trajectory Law and Economics

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1. Introduction

1.1 Background and context of the thesis: the phenomenon of forum shopping

Private enforcement of competition law is organized under non-contractual liability (tort) law, which is structured very differently across EU Member States and differs substantially on various rules and aspects.¹ Due to the differences in the substantive and procedural law of Member States, and also possibly the institutional structure of their court's system, some national regimes have emerged which allow for a more attractive setting to claim damages as a result of a competition law infringement.² Hence, the phenomenon of forum shopping is induced, in which regimes are specifically selected by claimants in order to generate the highest chance of damages compensation.³

Forum shopping has been defined in various ways and is often subject to various opinions on whether it should be regarded as "good" or "bad". An early definition of forum shopping stems from 1976, which describes forum shopping as a situation in which "the plaintiff usually shops in the forum where he is most familiar or in which he gains the greatest procedural advantage or puts the defendant to the greatest procedural disadvantage".⁴ However, forum shopping may not only include the plaintiff's choice of location to file a lawsuit. It may also consist of other factors such as both parties' selection of a certain court or arbitration procedure by contract.⁵ Furthermore, forum shopping may also incorporate the terms "forum hopping" or "duplicative litigation", in which the former refers to changing venues after a loss in the initial forum, while the latter refers to the practice of filing a suit in various other locations at the same time.⁶ A lack of uniformity between legal systems in terms of internal laws, choice-of-law and procedural rules enables forum shopping where differences in any of these three terms are able to alter the legal result.⁷ In other words, forum shopping is primarily concerned with specific elements of judicial systems and, by selecting judicial systems with the desired elements, parties could tip the scales in favour of themselves and potentially alter the outcome of a court decision.

Counsels, judges and academics are often of the opinion that altering the outcome of a lawsuit through forum shopping is exploitative and unfair.⁸ Many adversaries of forum shopping opt to deter it, while forum shopping is, especially in the US, commonly referred to with great disdain or lumped in with

¹ Commission, 'COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Damages actions for breach of the EU antitrust rules Accompanying the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' SWD (2013) 203 final, para 1.

² Tomas Balciunas and Jasper P Sluijs, 'The Case for Harmonizing Fault in Private Enforcement of EU Competition Law' (2020) <<https://ssrn.com/abstract=3750240>> accessed 2 February 2022.

³ *ibid.*

⁴ Lawrence Collins, 'Contractual Obligations: The EEC Preliminary Draft Convention on Private International Law' (1976) 25 ICLQ 35, 36.

⁵ Pamela K Bookman, 'The Unsung Virtues of Global Forum Shopping' (2017) 92 NDLR 579, 588.

⁶ *ibid.*

⁷ Robert Thomas Currie Telfer, 'Forum shopping and the private enforcement of EU competition law: is forum shopping a dead letter?' (PhD thesis, University of Glasgow 2017).

⁸ Friedrich K Juenger, 'Forum Shopping, Domestic and International' (1989) 63 TLR 553.

fraud and other “out-of-court tactics”.⁹ However, it has been argued that forum shopping does have its benefits and should not necessarily be deterred, and sometimes facilitated as it can protect access to justice, promote regulatory enforcement and drive substantive- and procedural reforms.¹⁰ Hence, it is argued that not the illegal incentives of plaintiffs to shop for the best forum should be targeted but the jurisdictional legitimacy under international law.¹¹

In the private enforcement of European competition law, antitrust damages cases often involve several defendants and claimants which may reside in a variety of different countries, while the corresponding anticompetitive behaviour frequently occurs in numerous countries as well.¹² Due to the often multi-national nature of antitrust damages cases and the rather low requirements to establish jurisdiction, multiple courts can have international jurisdiction.¹³ Therefore, choosing the appropriate jurisdiction is left (to a certain extent) to the discretion of claimants and defendants where the differences between the jurisdictions again pave the way for forum shopping.¹⁴ This can give rise to conflicts of law as disputes between parties may be resolved in the courts of different Member States without any regard to the implications that the foreign judgements may have on the legal systems of other EU Member States in terms of implementation. Even though Directive 2014/104/EU (henceforth: Damages Directive) strives towards the harmonization of private enforcement rules for damages claims resulting from competition law infringements,¹⁵ liability and tort law are usually firmly embedded in the national legal and procedural framework of every EU Member State. As a result, the path towards fully harmonizing this matter at the EU level is obscured and may possibly never be achieved. What is more, forum shopping is incentivized as a result of diverging fault standards of EU Member States stemming from the decision not to harmonize fault in the Damages Directive.¹⁶ This may create situations in which damages claims are brought before courts that are distant from where the damage is located and where courts are less knowledgeable or sensitive to the local circumstances of the damage.¹⁷ In addition, the diverging fault standards undermine the level playing field of the European internal market as more resourceful firms are given advantages over less resourceful competitors that aren’t able to shop in different jurisdictions.¹⁸ Moreover, if the home country of victims of antitrust infringements does not provide an effective remedy, the incentive to shop for the forum that is perceived as best also creates an increased risk for excessive litigation in some countries.¹⁹ Since some countries are more exposed to

⁹ Pamela K Bookman, ‘The Unsung Virtues of Global Forum Shopping’ (2017) 92 NDLR 579, 582.

¹⁰ *ibid* 583.

¹¹ *ibid* 635.

¹² Rein Wesseling and Marieke Bredenoord-Spoek, ‘Jurisdiction issues in civil litigation cases in the European union: Dutch courts readily assume jurisdiction on basis of EU framework’ in James Keyte (ed), *Annual Proceedings of the Fordham Competition Law Institute* (Chapter 12, Juris Publishing, 2016) 169.

¹³ *ibid*.

¹⁴ *ibid*.

¹⁵ Tomas Balciunas and Jasper P Sluijs, ‘The Case for Harmonizing Fault in Private Enforcement of EU Competition Law’ (2020) <<https://ssrn.com/abstract=3750240>> accessed 2 February 2022.

¹⁶ *ibid*.

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ Andrea Tkacikova and Patrick L Krauskopf, *Competition Law Violations and Private Enforcement: Forum Shopping Strategies* (2011) 4 GCLR 26.

(excessive) litigation than others, it is often assumed that countries with a higher amount of litigation are preferred forums and are categorized as such.²⁰ In this regard, three countries have frequently come forward in the literature as preferred forums for cartel damages claims. Correspondingly, these are Germany, the United Kingdom and the Netherlands.²¹

Considering the above, it would be particularly relevant to examine on what scale the phenomenon of forum shopping actually occurs in practice, and what factors determine the existence of this phenomenon. This can be investigated in the case of the Netherlands as it is often theorized and assumed that the Netherlands is a preferred hub for private competition law enforcement and damages claims. What is more, foreign investors have initiated numerous mass claims for damages in the Netherlands which have seemingly piled up before Dutch courts and, consequently, have sparked a fear of overburdening the Dutch judicial system.²² Hence, this research intends to scrutinize the Netherlands in particular and is founded on the assumption that the Netherlands is a preferred forum for cartel damages actions. In addition, since the German and English fora are also considered attractive venues by the literature, this thesis will also investigate Germany and the United Kingdom in a similar fashion, although without support from qualitative interviews. As a result, additional incentives that induce the phenomenon of forum shopping incentives in the literature may be uncovered and may provide indications on whether these incentives perhaps differ between the investigated countries or are actually similar in nature. Next to this, the findings of the qualitative interviews on the Dutch forum can then be used to construct implications on the role of Germany and the UK in the EU forum shopping trends as well.

1.2 The research question and sub-questions

As discussed above, it is claimed in the literature that the Netherlands is a preferred forum for cartel damages claims. The present research is indeed based on the thesis that the Netherlands is a preferred hub for cartel damages claims. Therefore, this research attempts to scrutinize private enforcement

²⁰ Commission, 'COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Damages actions for breach of the EU antitrust rules Accompanying the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' SWD (2013) 203 final, para 52.

²¹ Rick Cornelissen and others, 'Netherlands' in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020); Jeroen Kortmann and Simon Mineur, 'The Netherlands' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 13, Oxford University Press 2019); Alex Petrasincu, 'Private Antitrust Enforcement in Germany' (2018) 4 CLPD 14; Commission, 'COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Damages actions for breach of the EU antitrust rules Accompanying the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' SWD (2013) 203 final, para 52.

²² Stefan Vermeulen, 'Vrees voor overbelasting rechtssysteem door hausse aan massaclaims van buitenlandse investeerders' *NRC* (16 February 2022) <<https://www.nrc.nl/nieuws/2022/02/16/buitenlandse-investeerders-veroorzaken-hausse-aan-massaclaims-vrees-voor-overbelasting-rechtssysteem-2-a4090501>> accessed 3 March 2022.

under the Dutch liability law in order to distinguish why the Netherlands is, as claimed, more favourable for cartel damages claims than other EU countries. The central research question in this thesis therefore reads:

“To what extent is the Netherlands perceived as a preferred country for private enforcement of cartel damages claims in the EU and what elements of the Dutch legal and judicial system or other factors and incentives may influence and determine this preference?”

The research question will be answered with the help of the following sub-questions:

- (1) Which countries are distinguished in the literature as EU countries with preferred law systems and what features of their legal and judicial systems lead to their preferability according to the literature?
- (2) To what extent does the literature’s view of the Netherlands align with the reality and what factors in the Dutch legal and judicial system may foster private enforcement?
- (3) What are the key issues related to the transposition of the Damages Directive into Dutch private law that contribute to an uneven playing field and induce forum shopping?
- (4) To what extent is *ambulance-chasing*²³ adopted by law firms in the Netherlands and to what extent are companies aware that they have suffered damages from a cartel infringement?

1.3 The academic and practical relevance of the research

The existing literature and reports reveal a somewhat contradictory picture when it comes to the Netherlands’ role in forum shopping related to competition law damages claims. The Netherlands is, on the one hand, viewed as a preferred and suitable forum to stimulate legal proceedings, as claimed in the context and background of the thesis. On the other hand, an e-study found that a rather low amount of cases have been judged in the Netherlands compared to other countries,²⁴ which may indicate that the Netherlands is, in reality, unfavoured. Nevertheless, one of the key limitations in this e-study is the fact that there were difficulties in obtaining the relevant cases, since some cases may have received limited attention, were unpublicized or unobtainable, or have still remained unnoticed.²⁵ As a result, it is unknown to what extent the Netherlands actually plays a part in the private enforcement of competition law. Furthermore, it seems that there is no investigation in the literature about the actual suitability of the Netherlands in antitrust damages claims. It is mainly assumed that the Netherlands is a preferred hub based on the judged number of cases in the Netherlands relative to other Member States,²⁶ while

²³ In this context, ambulance-chasing is defined as an attempt to obtain work by persuading an injured party to claim money from the person or company that is responsible for the suffered damages of the injured party.

²⁴ Jean-François Laborde, ‘Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021 ed.)’ (2021) 3 *Concurrences* 232, 235.

²⁵ *ibid* 234.

²⁶ Commission, ‘COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Damages actions for breach of the EU antitrust rules Accompanying the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union’ SWD (2013) 203 final, para 52.

relevant factors that might support its preferred position have not been (credibly) confirmed or maybe not even discovered.

The foregoing indicates the existence of a certain ambiguousness regarding what is known about forum shopping in the Netherlands. This research, therefore, attempts to highlight or at least clarify a substantial part of the uncertainty surrounding this issue by taking the Netherlands as its primary focus. Thereby, this thesis may help identifying incentives and factors that contribute to forum shopping and can be especially pertinent for the EU Commission to make implications for future policies aimed at harmonizing damages claims. Likewise, it also provides useful insights into the private enforcement of cartel damages claims in the Netherlands for natural and legal persons alike, which may help them with the litigation of their claims.

1.4 The research methods and approach

This thesis employs both library-based and qualitative research. It will make use of academic articles, Commission working papers, electronic books, EU- and national legislation, and legal jurisprudence. All library-based research will be accessed through internet sources such as the EUR-Lex search tool for obtaining legislation and Curia and Kluwer for acquiring case law. Additionally, it adopts Google Scholar with UBU link and Westlaw for scientific articles and papers, while the search engine Google will be utilized to find websites or blogs that may contribute to the analysis. Furthermore, WorldCat will be utilized to search for relevant electronic books.

A legal analysis will be made to set out the literature's view of Germany and the United Kingdom and to examine which characteristics have contributed to their auspiciousness of cartel damages claims. Next, the research will specifically focus on the Netherlands and explore the elements of the Dutch legal and judicial system that facilitate private enforcement of cartel damages claims. To further inquire into the question whether and why the Netherlands is a preferred forum, semi-structured qualitative interviews with collective redress organizations, practicing lawyers and an experienced judge have been conducted. These interviews consequently form an essential element of this thesis as they will provide the means to gather information from the practical field about the relevant factors inducing forum shopping and the amount in which it occurs in the Netherlands. The findings from the qualitative interviews will then be compared to the expediting factors of the Dutch forum as put forward by the literature.

For the interviews a broad selection of lawyers have been chosen. These include a claiming lawyer (lawyer A), a defending lawyer (lawyer B), a lawyer with a history of representing both defendants and claimants (lawyer C), a lawyer from a litigation funder (lawyer D), and a judge with experience in antitrust damages claims (judge X). The lawyers and the judge have been asked a total of nine pre-determined questions about specific factors of the Dutch legal system. In addition, several broader questions are included to widen the scope of the interview so that the research can collect all the data thought to be relevant by the interviewees. The English version of the questionnaire can be found in Appendix A and the Dutch version is presented in Appendix B.

1.5 Structure of the thesis

This research consist of four chapters. In this first chapter, the research motivation and approach to examine the subject of forum shopping has been established and an introduction to subject of forum shopping has already been made. Next, chapter 2 will present a legal analysis on the EU countries that are distinguished in the literature as preferred for forum shopping, i.e. Germany, the United Kingdom and the Netherlands, where the uncovered auspicious features of their legal and judicial systems as put forward by the literature are in-depth examined. Subsequently, chapter 3 will produce the data obtained from the conducted interviews on the forum shopping inducing elements in the Netherlands and will scrutinize to what extent this data is in line with the gathered information on the Dutch forum in chapter 2. Finally, chapter 4 will conclude and discuss the findings.

2. Preferred countries for cartel damages claims: Germany, the UK and the Netherlands

As mentioned, three countries are often mentioned to be preferred forums for cartel damages claims, namely Germany, the United Kingdom and the Netherlands. Therefore, this chapter rigorously explores the German, UK and Dutch legal and judicial systems for private enforcement of antitrust damages claims.

2.1 Germany as a preferred country for antitrust damages claims

Germany is distinguished as a very attractive country for cartel damages actions with unofficial statistics showing that roughly 650 cases are pending as of 2020²⁷ and that 177 verdicts have been reached up until 2021.²⁸ Out of all the cartel damages cases, most of them are brought in front of German courts.²⁹ From 2014-2018, the success rate of antitrust cases in Germany has amounted to 78 percent and has been relatively stable within that period, while indirect purchasers' claims have succeeded at a rate of 64 percent.³⁰ The literature states that Germany owes some of its success as a preferred forum to its procedural laws as the evidentiary presumptions are in the favour of plaintiffs and trials commence relatively fast.³¹ In addition, the abundance of precedents and the German courts' experience with antitrust damages claims are also mentioned as key factors, contributing to the legal certainty that the German jurisdiction provides.³² Germany also has an active claims vehicle called the Cartel Damage Claims which has brought numerous claims in front of German courts and German courts have also adopted jurisdiction by virtue of the exception contained in articles 2 and 6 in the previous Brussels I.³³ Furthermore, there is an apparent hostility towards the passing-on defence which is also to the benefit of claimants.³⁴

German courts were generally sceptical towards claims for damages prior to 2005, while some courts required claimants to prove that the infringement specifically affected them.³⁵ This resulted in a very low success rate for claimants and, therefore, led to a general discouragement to bring cartel

²⁷ Lukas Rengier, 'Cartel Damages Actions in German Courts: What the Statistics Tell Us' (2020) 11 *Journal of European Competition Law and Practice* 72.

²⁸ Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021 ed.)' (2021) 3 *Concurrences* 232, 235.

²⁹ *ibid.*

³⁰ Lukas Rengier, 'Cartel Damages Actions in German Courts: What the Statistics Tell Us' (2020) 11 *Journal of European Competition Law and Practice* 72.

³¹ *ibid.*

³² *ibid.*

³³ Sarah Beeston and Anouk Rutten, 'The Dutch torpedo case' (2015), 14 *CLI* 14, 14-15; COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

³⁴ Andreas Weitbrecht, 'Coming of age: private enforcement in Germany' (2019) 12 *GCLR* 51.

³⁵ Alex Petrasincu, 'Private Antitrust Enforcement in Germany' (2018) 4 *CLPD* 14.

damages claims.³⁶ However, the literature argues that Germany has become an increasingly claimant-friendly jurisdiction from 2005 onwards.³⁷ This is the result of the seventh amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* (henceforth: GWB)), which was amended as a consequence of the decision of the European Court of Justice in *Courage v. Crehan* and has contributed to the facilitation of private damages actions in Germany.³⁸ For example, the amendment specified that it was no longer necessary for a claimant to be targeted specifically by an antitrust infringement, while it also “introduced, inter alia, a suspension of the statute of limitations pending investigations by competition authorities and provided for a binding effect of decisions of the European Commission as well as the German Federal Cartel Office (*Bundeskartellamt*) and the competition authorities of other EU Member States”.³⁹ As a direct result of the huge increase in cases, the German courts have also established a wide array of relevant case-law over the last two decades on numerous issues which required further clarification, while a verdict has been reached for a substantial amount of them by the German Federal Court of Justice (BGH).⁴⁰

The Damages Directive was implemented through the ninth amendment to the GWB⁴¹ and the literature states that this has strengthened a claimants position even further.⁴² Particularly three changes are most notable, namely (1) a new system of disclosure of evidence, (2) an extended knowledge-dependent limitation period from three to the current five years, and (3) a rebuttable presumption that cartels result in harm to victims.⁴³ In addition, the tenth amendment to the GWB, which is in force as of 19 January 2021, is also mentioned as beneficial to cartel victims.⁴⁴ Together with the case law guidelines provided by the BGH and the evolution of the approach towards cartel damages’ claims bundling, the effectiveness of private enforcement in Germany is expected to considerably increase from 2022 onwards.⁴⁵

³⁶ *ibid.*

³⁷ Volker Soyecz, ‘Germany: implementation of the EU Damages Directive in Germany’ (2017) 10 GCLR 37; Sebastian Jungermann and Arnecke Sibeth Dabelstein, ‘The Private Competition Enforcement Review: Germany’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022); Alex Petrasincu, ‘Private Antitrust Enforcement in Germany’ (2018) 4 CLPD 14.

³⁸ Sebastian Jungermann and Arnecke Sibeth Dabelstein, ‘The Private Competition Enforcement Review: Germany’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

³⁹ Alex Petrasincu, ‘Private Antitrust Enforcement in Germany’ (2018) 4 CLPD 14.

⁴⁰ Sebastian Jungermann and Arnecke Sibeth Dabelstein, ‘The Private Competition Enforcement Review: Germany’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

⁴¹ Alex Petrasincu, ‘Private Antitrust Enforcement in Germany’ (2018) 4 CLPD 14, 15.

⁴² Volker Soyecz, ‘Germany: implementation of the EU Damages Directive in Germany’ (2017) 10 GCLR 37.

⁴³ Sebastian Jungermann and Arnecke Sibeth Dabelstein, ‘The Private Competition Enforcement Review: Germany’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

⁴⁴ *ibid.*

⁴⁵ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 26 <<https://ssrn.com/abstract=4066102>> accessed 2 May 2022.

Below, it will be inquired into the specific provisions of the GWB, the implementation of the Damages Directive into German law and other factors mentioned in the literature that affect the attractiveness of Germany as a forum for damages claims of antitrust infringements.

2.1.1 The specialization of German courts

Actions for damages resulting from antitrust infringements are brought before regular civil courts and, more specifically, to regional courts due to the high costs of antitrust litigations, which normally exceed the limit for local courts (5000 euro). Hence, there are no specialized courts or tribunals for antitrust litigation in Germany. However, specific German courts can be designated by German federal states in order to reduce administrative burdens and, in particular, to ensure uniform case law.⁴⁶ Since the German federal states often make use of this right,⁴⁷ relatively few German courts handle antitrust cases, while the ones that do have consequently become specialized in these matters.⁴⁸ Moreover, one or a limited number of panels within these courts are assigned, while the panels that are assigned are practically specialized as a result thereof. Concludingly, this means that the German courts have a widespread knowledge and experience in cartel damages actions and the literature claims that this is reflected in the large number of antitrust litigations before German courts.⁴⁹

2.1.2 The costs of litigation in Germany

In general, the costs of the legal dispute have to be paid by the losing party under German law,⁵⁰ which include court proceedings, statutory lawyers' fees, economic experts that have been appointed by the court⁵¹ and also third party interventions.⁵² The dispute value is at a maximum of thirty million euro.⁵³ Usually, the winning party still bears costs as the actual legal fees often (largely) exceed the statutory lawyers' fees,⁵⁴ of which the excess costs need to be paid by the winning party in accordance with the

⁴⁶ GWB, Section 89(1).

⁴⁷ Martin Buntscheck and Hanna Stichweh, 'Germany: Private Antitrust Litigation' (2015) *The European Antitrust Review* 154 <<https://www.buntscheck.com/sites/default/files/downloads/european-antitrust-review-2015.pdf>> accessed 7 May 2022

⁴⁸ Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 *YARS* 115, 127.

⁴⁹ *ibid* 127-128.

⁵⁰ German Code of Civil Procedure (ZPO), Section 91(1).

⁵¹ Jannik Otto, Patrick Hauser and Simon Vande Walle, 'Private enforcement of competition law in Germany and the Netherlands' (2022) 5-6.

⁵² Jens-Uwe Franck, Chapter 5: 'Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 97.

⁵³ Jannik Otto, Patrick Hauser and Simon Vande Walle, 'Private enforcement of competition law in Germany and the Netherlands' (2022) 5.

⁵⁴ *ibid* 6.

German Lawyer's Fees Act.⁵⁵ In addition, proceedings with low dispute values are relatively more expensive, while actions for damages often involve a minimum of 100,000 euro dedicated solely to economic expertise.⁵⁶ As a result, claimants may be deterred due to the many costs that are nonetheless involved.⁵⁷

However, the findings in the literature are somewhat contradictory when it comes to the issue of costs as the overall costs of antitrust private damages claims before German courts are said to be moderate and should therefore have contributed to the substantial increase of cartel damages claims in Germany.⁵⁸ Arguments in favour of this have argued that, since the legal fees are calculated on the basis of statutory fees, the cost risk for claimants is relatively low and can be distinguished up front.⁵⁹ Additionally, it is mentioned that courts can also adjust the value of the dispute to the benefit of parties that have sufficiently demonstrated that their economic situation would be jeopardized if the costs were calculated based on the full value in dispute.⁶⁰ As a result, the court- and lawyers' fees are effectively reduced, but the practical effects of this provision have not yet materialized and are still unknown.⁶¹

The principle of 'effectiveness' is also a principle strongly adhered to by the German legislature even beyond the implementation of the Damages Directive.⁶² This can, for example, be seen in amendments to the costs involved in cases with third-party interventions. Initially, significant cost risks were bestowed onto plaintiffs since costs of third-party intervenors were also included in the costs of the losing party.⁶³ These costs are quite large and are also hard to quantify beforehand as the plaintiff does not know how many intervenors exist in total.⁶⁴ As a result of the unpredictable and significant costs, there was a significant possibility that plaintiffs would become discouraged to bring an action for damages. The German legislator took notice of this issue and consequently introduced section 89a(3) which specifies that "the reimbursement of costs shall only cover the intervenor's legal assistance costs on the basis of the value in dispute which the court determines at its own discretion. In the case of several intervenors, the total amount of the values in dispute of all individual interventions shall not

⁵⁵ Martin Buntscheck and Hanna Stichweh, 'Germany: Private Antitrust Litigation' (2015) *The European Antitrust Review* 154, 157.

⁵⁶ Jannik Otto, Patrick Hauser and Simon Vande Walle, 'Private enforcement of competition law in Germany and the Netherlands' (2022) 6.

⁵⁷ *ibid.*

⁵⁸ Martin Buntscheck and Hanna Stichweh, 'Germany: Private Antitrust Litigation' (2015) *The European Antitrust Review* 154.

⁵⁹ Sebastian Jungermann and Arnecke Sibeth Dabelstein, 'The Private Competition Enforcement Review: Germany' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

⁶⁰ GWB, Section 89a(1).

⁶¹ Jens-Uwe Franck, 'Chapter 5: Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 100.

⁶² *ibid.* 97.

⁶³ ZPO, Section 101(1) in conjunction with 91 et seq.

⁶⁴ Jens-Uwe Franck, 'Chapter 5: Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 97.

exceed the value in dispute in the main action.”⁶⁵ Hence, it is up to the court to decide the value of dispute and the maximum cost risk with respect to third-party interventions was substantially reduced,⁶⁶ which is very significant from a practical point of view,⁶⁷ and is mentioned as one of the most significant changes to German law in favour of claimants.⁶⁸

2.1.3 The lack of a collective redress mechanism in Germany

The lack of a collective redress mechanism in Germany is mentioned as a major flaw in the German legal framework because it leaves a substantial enforcement gap.⁶⁹ Since the Damages Directive facilitates a passing-on defence, this enforcement gap becomes problematic as there is now a considerable possibility that the courts will determine a passing-on to final consumers.⁷⁰ As a result, the role of cartel damages claims as an enforcement mechanism is jeopardized due to the absence of a collective redress mechanism, which is deemed essential in this scenario.⁷¹

Claimants have attempted to compensate for the lack of collective redress by using claim vehicles or bundling through the assignment model.⁷² However, there are certain requirements that must be met or else an assignment is rendered null and void, namely (1) the authorization for a special purpose vehicle to offer legal services, (2) the lawyers representing the special purpose vehicle may not hold a share in it in order to safeguard independence of lawyers, and (3) the assignment cannot be made to shift the financial risks of litigation to the defendant.⁷³ Even though the exact requirements regarding assignments are not entirely clear and meeting them does seem attainable, it does create difficulties for the bundling of claims and also adds to total costs involved.⁷⁴ Furthermore, the regional court of Munich had previously judged that it was illegal under the German Legal Services Act (*Rechtsdienstleistungsgesetz – RDG*) due to, inter alia, conflicting interests by the claim vehicle.⁷⁵

⁶⁵ GWB, Section 89a(3).

⁶⁶ Jens-Uwe Franck, ‘Chapter 5: Private Enforcement in Germany’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 97.

⁶⁷ *ibid* 100.

⁶⁸ Alex Petrasincu, ‘Kartellschadensersatz nach dem Referentenentwurf der 9. GWB-Novelle’ 66 (2016) WuW 330, 335.

⁶⁹ Jens-Uwe Franck, ‘Chapter 5: Private Enforcement in Germany’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 98.

⁷⁰ *ibid*.

⁷¹ *ibid*.

⁷² Rupert Bellinghausen and others, ‘The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive’ (2017) 10 GCLR 103, 113.

⁷³ Jens-Uwe Franck, ‘Chapter 5: Private Enforcement in Germany’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 115-116.

⁷⁴ *ibid* 116.

⁷⁵ Munich I Regional Court, judgement of 7 February 2020, 37 O 18934/17.

However, the BGH held in the recent the *Air Deal*⁷⁶ judgement that the opt-in assignment model is valid under German law and recognized that the assignment model may embody the only way for claimants to have access to justice. Accordingly, the BGH subsequently ruled that the conflicts of interested are not disproportionate for claim vehicles.⁷⁷ Moreover, it was specified that, for the purposes of the RDG, claim vehicles are allowed to accumulate and enforce cartel damages claims, provide complex legal advice, agree on contingency fees and assume litigation costs.⁷⁸ As a result, the requirements are more likely to be met and it is argued that the *Air Deal* judgement makes Germany further claimant-friendly in this respect.⁷⁹

2.1.4 The right to request disclosure of evidence under German law

Until the implementation of the Damages Directive into German law, ordering the disclosure of legal material by defendants or third parties is an area where German Courts have traditionally made little use of their competence.⁸⁰ However, German competition law now exceeds the provisions of the Damages Directive with respect to disclosure. Where the Damages Directive specified that disclosure can be mandated during proceedings,⁸¹ claimants are instead given a substantive right to request disclosure from defendants or third parties under German competition law.⁸² As a result, disclosure of evidence can be mandated even though an action for damages has not been brought, while stand-alone actions for the disclosure of evidence can also be made independently from the action for damages, which is less expensive and also suspends the limitation period.⁸³ This results in substantial benefits for claimants in terms of costs and time, and facilitates early settlement. Moreover, because time-barring is no longer an issue, it is therefore possible to collect and assess the evidence without having to file an action before the limitation period has expired, while abusive behaviour by the defendant such as delaying the disclosure past the time limit is also averted.⁸⁴ Furthermore, by virtue of section 89b(5) GWB, it is also possible for a claimant to demand disclosure of a binding decision of a competition authority through a preliminary injunction. However, even though the preliminary injunction may have the same effect in terms of disclosure, unlike an action for disclosure, it does not suspend the limitation

⁷⁶ BGH, judgement of 13 July 2021, II ZR 84/20.

⁷⁷ Volker Soyez, 'Germany: German Federal Supreme Court delivers further claimant-friendly verdicts' (2022) 15 GCLR 3.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Jens-Uwe Franck, 'Chapter 5: Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 82.

⁸¹ 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 L 349, Chapter II, Article 5(1).

⁸² GWB, Section 33g(1).

⁸³ Christian Kersting, 'Germany' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 6, Oxford University Press 2019).

⁸⁴ *ibid.*

period.⁸⁵ Concludingly, the right to claim the disclosure of evidence by claimants is considered an important factor that has increased Germany's attractiveness as a forum.⁸⁶

2.1.5 Presumptions that have lowered the burden of proof for claimants

Due to the difficulty for claimants to prove the extent to which they have suffered damages, Germany has established several presumptions in prima facie cases that have greatly lowered the burden of proof for claimants and are said to further facilitate private enforcement in Germany.⁸⁷

2.1.5.1 The liability for- and quantification of damages

German courts had already established that cartels lead to higher prices even before the implementation of the Damages Directive.⁸⁸ As a result, it was unnecessary to fully show and prove your damages as a claimant as courts found it natural that cartels would lead to damages.⁸⁹ However, the transposition of Article 17(2) of the Damages Directive brings an important change as there is now a rebuttable presumption, contained in section 33a(2) of the GWB, that a cartel results in harm. Thus, the burden of proof has shifted from claimants to defendants and, in conformity with section 292 of the ZPO, the opposite of the presumption now needs to be proven. Hence, to the benefit of plaintiffs, defendants need to prove that the cartel has not resulted in any harm or that claimants have passed-on the damages further downstream. Nevertheless, this does not mean that the plaintiff does not need to prove that his individual transaction has been affected by the cartel.⁹⁰ In this regard, Higher Regional Courts had previously established a prima facie evidence rule that would satisfy the requirement if the transaction fell within the objective, geographical and temporal scope of the cartel agreement.⁹¹ However, the Federal Court of Justice held in a more recent judgement that the prima facie evidence rule was developed by lower courts and hence did not accept it.⁹² But, the Federal Court of Justice nevertheless held that, if the transaction falls within the objective, geographical and temporal scope of

⁸⁵ GWB, Section 33h(6)(3).

⁸⁶ Christian Kersting, 'Germany' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 6, Oxford University Press 2019), 156.

⁸⁷ Alex Petrasincu, 'Private Antitrust Enforcement in Germany' (2018) 4 CLPD 14, 16.

⁸⁸ OLG Berlin, judgement of 1 October 2009, 2 U 10/03 Kart, para 37 et seq; OLG Karlsruhe, judgement of 31 July 2013, 6 U 51/12 Kart, paras 366 and 367.

⁸⁹ Christian Kersting, 'Germany' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 6, Oxford University Press 2019), 136.

⁹⁰ Jens-Uwe Franck, 'Chapter 5: Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 95.

⁹¹ OLG Karlsruhe, judgement of 31 July 2013, 6 U 51/12 Kart, para 367; Thüringer OLG, judgement of 22 February 2017, 2 U 583/15 Kart, para 206.

⁹² BGH, judgement of 11 December 2018, KZR 26/17, para 62.

the agreement, it constitutes strong circumstantial evidence that the terms of a contract are affected.⁹³ In any event, the perception is created that German courts are likely to put in place reasonable standards that do not demand a lot from the plaintiff, which is likely to give rise to positive expectations for future claimants.⁹⁴

It is only possible to claim actual loss under the German system, but lost profits and statutory interest are incorporated into the losses as well.⁹⁵ This means that a claim increasingly grows over the years, as defendants are obliged to pay interest from the date on which the damage has commenced, and can double in size after several years.⁹⁶ Under German law, claimants only need to prove on the basis of reliable facts that there is harm done to them and are not required to calculate the exact amount of damage.⁹⁷ In addition, The illegitimate profits of cartelists that were made during the infringement period may also be incorporated in the estimation of damages by German courts,⁹⁸ while the burden of proof for claiming lost profits by plaintiffs are further eased by section 252 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) which stipulates that lost profit are profits that could be expected to be made under normal circumstances.⁹⁹ Furthermore, The Federal Court of Justice and several German Courts of Appeal have acknowledged a prima facie case of cartel-after effects for at least one year after the cartel has ended,¹⁰⁰ while claimants are able to claim damages for an even longer period if they can show that the cartel effects remain in existence for more than a single year. As a result, it is argued that this prima facie case significantly aids claimants.¹⁰¹ Moreover, some German courts have also proven to be claimant friendly with respect to umbrella effects and have acknowledged that umbrella effect lead to higher prices of cartel outsiders,¹⁰² and have sometimes already awarded damages for purchases from them.¹⁰³

⁹³ *ibid* para 61.

⁹⁴ Jens-Uwe Franck, 'Chapter 5: Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 96.

⁹⁵ Sebastian Jungermann and Arnecke Sibeth Dabelstein, 'The Private Competition Enforcement Review: Germany' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

⁹⁶ GWB, Section 33a(4); BGB, Sections 288 and 289(1).

⁹⁷ Sebastian Jungermann and Arnecke Sibeth Dabelstein, 'The Private Competition Enforcement Review: Germany' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

⁹⁸ GWB, Section 33a(3).

⁹⁹ Sebastian Jungermann and Arnecke Sibeth Dabelstein, 'The Private Competition Enforcement Review: Germany' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

¹⁰⁰ BGH, judgement of 28 June 2011, KZR 75/10, para 84; OLG Karlsruhe, judgement of 9 November 2016, 6 U 204/15 Kart (2), para 66; OLG Munich, judgement of 8 March 2018, U 3497/16 Kart, para 81.

¹⁰¹ Alex Petrasincu, 'Private Antitrust Enforcement in Germany' (2018) 4 CLPD 14, 17.

¹⁰² OLG Munich, judgement of 8 March 2018, U 3497/16 Kart, para 148 et seq; OLG Karlsruhe, judgement of 9 November 2016, 6 U 204/15 Kart (2), para 67; OLG Karlsruhe, judgement of 31 July 2013, 6 U 51/12 Kart, para 57 et seq.

¹⁰³ OLG Munich, judgement of 8 March 2018, U 3497/16 Kart, para 148 et seq; OLG Hanover, judgement of 2 May 2017, 18 O 194/15, para 76 et seq.

2.1.5.2 *The passing-on of overcharges*

Before the implementation of the Damages Directive, indirect purchasers initially had to prove that there has been a pass-on of cartel overcharges to them.¹⁰⁴ However, a rebuttable presumption was introduced with the ninth amendment to the GWB where section 33c(2) stipulates that higher prices for direct purchasers are presumed to have resulted in an overcharge to indirect purchasers. This presumption is said to be detrimental to cartel participants but in favour of indirect purchasers.¹⁰⁵ Interestingly though, even though a passing-on is a major defence for defendants, the requirements for proving that there is a passing-on also rest with the cartel participants and are said to be near impossible to meet,¹⁰⁶ while almost no German courts have recognized the passing-on defence yet.¹⁰⁷ Instead, German courts have argued that there is either no downstream market, insignificant damage in a downstream market (in which recognizing a passing-on would unfairly benefit the infringer) or a passing-on by freight forwarders as seen in the trucks cartel where it was held that the trucks essentially qualify as a service and are not sold or used as input material.¹⁰⁸ Moreover, due to the presumptions of harm for direct purchasers and the presumption of a passing-on for indirect purchasers, both to their respective advantage,¹⁰⁹ there were concerns for overcompensation,¹¹⁰ which is not allowed under Article 3(3) of the Damages Directive. To deal with this issue the German legislature has refrained from adopting a presumption of a specific (minimum) amount of harm,¹¹¹ which is generally thought to be beneficial to claimants.¹¹² However, an issue that still needs to be addressed is the possibility for a double compensation when the defendant is unable to rebut the presumption of a passing-on to

¹⁰⁴ Jannik Otto, Patrick Hauser and Simon Vande Walle, 'Private enforcement of competition law in Germany and the Netherlands' (2022) 23.

¹⁰⁵ Rupert Bellinghausen and others, 'The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive' (2017) 10 GCLR 103, 111.

¹⁰⁶ Alex Petrasincu, 'Private Antitrust Enforcement in Germany' (2018) 4 CLPD 14, 20.

¹⁰⁷ Andreas Weitbrecht, 'Coming of age: private enforcement in Germany' (2019) 12 GCLR 51, 53.

¹⁰⁸ *ibid* 53-54.

¹⁰⁹ Urszula Jaremba and Laura Lalikova, 'Effectiveness of Private Enforcement of European Competition Law in Case of Passing-on of Overcharges: Implementation of Antitrust Damages Directive in Germany, France, and Ireland' (2018) 9 Journal of European Competition Law & Practice 226, 232.

¹¹⁰ C Gottlieb, 'Germany implements the EU Antitrust Damages Directive' (Memorandum, 14 March 2017) 3 <<https://www.cleargottlieb.com/news-and-insights/publication-listing/germany-implements-the-eu-antitrust-damages-directive>> accessed 10 May 2022.

¹¹¹ Lena HornKohl, 'Lump-sum Cartel Damages in Germany: Recent Developments' (Kluwer Competition Law Blog, 30 April 2021) <<http://competitionlawblog.kluwercompetitionlaw.com/2021/04/30/lump-sum-cartel-damages-in-germany-recent-developments/>> accessed 10 May 2022.

¹¹² Jurgita Malinauskaite & Caroline Cauffman, 'The Transposition of the Antitrust Damages Directive in the Small Member States of the EU – A Comparative Perspective' (2018) 9 Journal of European Competition Law & Practice 496.

indirect purchasers.¹¹³ Nevertheless, it is mentioned that the ninth amendment to the GWB with respect to the passing-on of overcharges has likely contributed to the popularity of Germany as a forum.¹¹⁴

2.1.6 The binding effect of decisions of other competition authorities

Section 33b binds the German court to the final decision of the German competition authority, the European Commission or a competition authority - or court acting as such – in another Member State when it concerns an infringement of Articles 101 and 102 TFEU or German competition law. The binding effect was implemented with the seventh amendment to the GWB, while the rationale for implementation concerned consistent application of competition law and the facilitation of follow-on actions for damages.¹¹⁵ Since decisions of national courts on Article 101 or 102 infringements are also considered as binding instead of being considered prima facie evidence under Article 9(2) of the Damages Directive, German competition law again went beyond a provision of the Damages Directive.¹¹⁶ This is mentioned to create significant advantages for Germany a forum for cartel damages actions since, if this provision did not exist, claimants would be incentivized to only bring an action for damages before courts in Member States where the breach of competition law has originally occurred, while the inclusion of this provision makes it possible to sue in Germany as well.¹¹⁷

2.1.7 Increased limitation periods under German law

Limitation periods are transposed into German law under section 33h. Due to the fact that the German legislation was already more or less in line with the requirements in the Damages Directive regarding the statute of limitation, relatively small changes were made when the Damages Directive was implemented into German law.¹¹⁸ However, this does not detract from the significant effects that the implementation had and have suggested that they increase Germany's appeal.¹¹⁹

Under German law, the knowledge dependant limitation period has been increased from three years to five years under section 33h(1) of the GWB, while the knowledge independent limitation period

¹¹³ Urszula Jaremba and Laura Lalikova, 'Effectiveness of Private Enforcement of European Competition Law in Case of Passing-on of Overcharges: Implementation of Antitrust Damages Directive in Germany, France, and Ireland' (2018) 9 *Journal of European Competition Law & Practice* 226, 233.

¹¹⁴ *ibid* 232-233.

¹¹⁵ Jens-Uwe Franck, 'Chapter 5: Private Enforcement in Germany' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 106.

¹¹⁶ Jannik Otto, Patrick Hauser and Simon Vande Walle, 'Private enforcement of competition law in Germany and the Netherlands' (2022) 17.

¹¹⁷ Christian Kersting, 'Germany' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 6, Oxford University Press 2019).

¹¹⁸ Rupert Bellinghausen and others, 'The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive' (2017) 10 *GCLR* 103, 107

¹¹⁹ *ibid*.

has been set to 10 years under section 33h(3) of the GWB. In all other instances, claims are statute-barred after 30 years starting from the date on which the damaging event has occurred.¹²⁰ In contrast to the Damages Directive, the legislator has added an additional requirement to the GWB. This refers to sections 33h(2)(3) and 33h(3)(2) which stipulate that both the knowledge dependent and knowledge independent limitation periods start to run at the end of the of the year when the infringement pursuant to section 33(1) has ceased. As a result, the important question of at which exact moment a cartel damages claim arises is resolved, while the prospects of success should be substantially increased for cartel damages claims that involve long-lasting infringements and fall under the knowledge independent limitation period.¹²¹ Hence, cartel members will tread on thin ice if they opt to simply wait until claims for damages become time-barred.¹²² Moreover, if cartel members intend to adopt the statute of limitation defence, then proving when a cartel infringement has ended is conferred onto them, which could also mean that they would have to prove that the infringement has not created any further market effects.¹²³

2.1.8 Recent case law regarding further claimant-friendly verdicts

As stated before, the large amount of case law in Germany is seen as a contributor to private enforcement of cartel damages in Germany. Very recently, further claimant-friendly verdicts are said to have been made as well, while several key questions for the purposes of private enforcement in Germany have also been answered.¹²⁴ In this respect, the BGH delivered three claimant-friendly rulings, namely the previously mentioned *Air Deal* judgement, and the *Rail II*¹²⁵ and *Trucks II*¹²⁶ judgements in 2020 and 2021 respectively.

In the *Rail II* judgement, the BGH held that a claimant is harmed if the defendant is guilty of anticompetitive conduct that is able to indirectly or directly justify that harm, which is immediately proven if the purchases fall within the objective, geographical and temporal scope of the agreement.¹²⁷ Furthermore, assessing if there is a causal link in each individual transaction in order to establish liability was also held as unnecessary, while it further clarified that courts should be able to assume a causal link between the antitrust violation and the claimed damages if it is “predominantly probable” that the antitrust violation has caused the harm.¹²⁸ As a result, it stated that the lower standards of proof

¹²⁰ GWB, Section 33h(4).

¹²¹ Rupert Bellinghausen and others, ‘The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive’ (2017) 10 GCLR 103, 107

¹²² *ibid.*

¹²³ Jochem Hoffmann and Stephan Schneider, ‘Die Verjährung unter der Kartellschadensersatzrichtlinie’ (2016) 3 WuW 102, 104

¹²⁴ Volker Soyvez, ‘Germany: German Federal Supreme Court delivers further claimant-friendly verdicts’ (2022) 15 GCLR 3.

¹²⁵ BGH, judgement of 28 January 2020, KZR 24/17.

¹²⁶ BGH, judgement of 13 April 2021, KZR 19/20.

¹²⁷ Volker Soyvez, ‘Germany: “Rail Cartel II” - German Federal Supreme Court further strengthens private enforcement in Germany’ (2020) 13 GCLR 31, 31-32.

¹²⁸ *ibid.*

pursuant to section 287 of the ZPO should be employed instead of the general standards of proof under section 286 of the ZPO, which requires plaintiffs to prove the causal connection between the damage and the infringement “beyond a reasonable doubt”.¹²⁹

In the *Trucks II* judgement, private enforcement in Germany was further facilitated as the BGH clarified some uncertainty surrounding the limitation periods, the passing-on defence and the role of economic expert opinions.¹³⁰ For the limitation periods, the BGH stated that the grace period after a concluded investigation “does not begin with the notification of the fining decision, but with the expiry of the 2-month period for filing an action for annulment pursuant to art.263(4) TFEU”.¹³¹ The BGH also recognized that private enforcement is an essential element for the complete and successful enforcement of competition law.¹³² In light of this, it concluded that the passing-on defence may be disregarded if the prospects on eventual compensation is low for indirect purchasers and further specified that, if there was uncertainty surrounding this issue, it was of the opinion that overcompensation would be the lesser evil compared to no compensation and allowing cartelists to retain some of their illicit overcharges.¹³³ Finally, it was held that “all and any circumstances of indicative value” for the purposes of investigating and determining damages pursuant to section 287 of the ZPO should be reviewed, but a court is never bound by them.¹³⁴ Hence, technically impeccable regression analyses by defendants may nevertheless be overruled by courts, even if these analyses show that there is no overcharge at all.¹³⁵

2.1.9 Interim conclusions on Germany as a preferred forum

In general, the implementation of the Damages Directive has helped facilitate antitrust damages actions in Germany. However, the provisions of the GWB that go beyond the Damages Directive or slightly deviate from it, such as for the limitation periods and the binding effect of other competition authorities, are also named to be contributing factors. Similarly, the GWB exceeds the Damages Directive and claimants are given a substantive right to request disclosure from defendants and third-parties, and even a possibility to request a decision of a competition authority, which are strong factors that help claimants litigate in the German forum. What is more, the case law regarding the *Rails II* and *Trucks II* judgements also expedite antitrust damages claims in the German forum, while the lowered burden of proof resulting from the established presumptions in prima facie cases further contribute to Germany’s appeal as well. Likewise, even though there is no specialized court in Germany, actions for damages are referred to specific courts by German federal states, while a limited number of panels are

¹²⁹ *ibid.*

¹³⁰ Volker Soye, ‘Germany: German Federal Supreme Court delivers further claimant-friendly verdicts’ (2022) 15 GCLR 3.

¹³¹ *ibid.* 4.

¹³² *ibid.* 3.

¹³³ *ibid.*

¹³⁴ *ibid.* 4.

¹³⁵ *ibid.*

assigned to these cases. Therefore, these courts have become practically specialized, which is said to incentivize litigation before such courts.

Intriguingly, there is a disagreement in the literature regarding the role of the costs of litigation as a facilitating factor of antitrust damage claims in Germany. On the one hand, the costs of litigating in Germany are viewed as expensive and detrimental to the German forum. On the other hand, they are seen as moderate as they are based on statutory fees and can be adjusted by courts under certain circumstances. What is more, the adherence to the principle of effectiveness by the German legislature are seen as a significant change that reduce the costs risks following from third-party interventions. Unsurprisingly, the lack of a collective redress mechanism in the German venue is considered a major impediment to private enforcement. However, there is a spark of hope for collective redress in Germany as the assignment model has recently been validated by the BGH in the *Air Deal* verdict and provides an alternative for claimants to litigate collectively. All-in-all, Germany is considered a very attractive forum by the literature and the statistical evidence suggest that this is reflected in the significant number of cases before its courts.

2.2 The United Kingdom as a preferred forum for cartel damages claims

The UK has seen a rise in its attractiveness for private enforcement of cartel damages claims for a substantial period now. Statistics show only two actions for damages before UK courts, but it is noted that this does not reflect the reality of the UK forum as a high number of cases are settled before any judgement is rendered.¹³⁶ The literature mentions numerous legal, procedural and institutional mechanisms that have been implemented for the purposes of facilitating private enforcement in the UK, such as the introduction of follow-on damages actions, the Competition Appeal Tribunal (CAT) and the collective proceedings mechanism.¹³⁷ Furthermore, there are various competition solicitors and barristers located in London, which include American law firms with substantial experience from the US on private antitrust litigation that can apply their experience to private antitrust claims in the UK.¹³⁸ The prominent reputation of the British legal system and the skill of the English language possessed by the legal and corporate community are also named to benefit claimants, while litigation finance was, up until recently, only at a claimant's disposal under UK jurisdiction.¹³⁹ Moreover, significant harm caused by cross-border cartels is said to often occur in the UK which may make it a more sensible place to consolidate claims,¹⁴⁰ while English courts often did not shy away from accepting jurisdiction under the Brussels regulation, making the possibility that an English court exercised jurisdiction particularly high.¹⁴¹ Finally, the UK is also mentioned to have broad obligations with respect to the disclosure of evidence,¹⁴² several implemented safeguards for privileged and confidential information during disclosure of evidence,¹⁴³ a significant amount of venues for arbitration as well as litigation,¹⁴⁴ and a high court experience with managing and tying large-scale commercial or civil disputes.¹⁴⁵ Many of the above-mentioned factors facilitating antitrust claims in the UK have also been adopted based on experiences

¹³⁶Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021 ed.)' (2021) 3 *Concurrences* 232, 235.

¹³⁷ Barry Rodger, 'Private Enforcement in the UK: Effective Redress for Consumers?' in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 3.

¹³⁸ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162.

¹³⁹ Andreas Weitbrecht, 'Coming of age: private enforcement in Germany' (2019) 12 *GCLR* 51.

¹⁴⁰ Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 *CLPD* 48, 49.

¹⁴¹ John Kwan, 'The Damages Directive: End of England's Eminence?' (2015) 36 *ECLR* 455, 461.

¹⁴² Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 *CLPD* 48, 49.

¹⁴³ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162.

¹⁴⁴ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162.

¹⁴⁵ Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 *CLPD* 48, 49.

aiding claims in the US.¹⁴⁶ Despite the relatively costly litigation of the UK regime,¹⁴⁷ such as the high costs for evidence disclosure or the legal representation by solicitors and barristers,¹⁴⁸ the benefits seemingly have outweighed the difficulties.

The UK has implemented the Damages Directive through the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (Henceforth: Competition Act 1998). Even after the Brexit on 31 January 2020, the UK's former EU membership is still very much visible. Chapters 1 and 2 of the Competition Act 1998 still fully reflect the provisions contained within Articles 101 and 102 TFEU, while UK national competition law has been shaped by EU competition law and has remained substantially affected by it.¹⁴⁹ However, the implementation of the Damages Directive is also said to likely reduce England's appeal as a forum for competition law damages claims in respect to punitive damages, disclosure of leniency materials, proportionality of disclosure and joint and several liability of leniency applicants.¹⁵⁰ As a result, many of the UK's advantages include those that are untouched by the Damages Directive or established before its implementation. These include the UK's cost rules, the availability of third party funding, its specialized and multi-disciplinary court (CAT), its efficient case management, the introduction of new collective actions regime and its accumulated judicial expertise, which are key factors that claimants will take into account when selecting a forum.¹⁵¹

The Brexit also makes for an interesting debate on its influence on private enforcement of cartel damages claims in the UK. On the one hand, the British government had no intention to change the current rules on competition, as stated in their 2018 policy paper on the future relationship between the United Kingdom and the European Union, and opted to maintain "rigorous enforcement of UK competition law alongside strong cooperation with EU authorities".¹⁵² On the other hand, some have argued that the Brexit would still threaten the attractiveness of the UK as a forum.¹⁵³ However, even

¹⁴⁶ Barry Rodger, 'Private Enforcement in the UK: Effective Redress for Consumers?' in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 26.

¹⁴⁷ Andreas Weitbrecht, 'Coming of age: private enforcement in Germany' (2019) 12 GCLR 51.

¹⁴⁸ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162.

¹⁴⁹ Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

¹⁵⁰ John Kwan, 'The Damages Directive: End of England's Eminence?' (2015) 36 ECLR 455, 456-460.

¹⁵¹ John Kwan, 'The Damages Directive: End of England's Eminence?' (2015) 36 ECLR 455, 462; Norton Rose Fulbright, 'Implementing the EU Damages Directive – will the UK retain its competitive advantage?' (2016), *Competition World* 1, 15 <<https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/competition-world-q1-2016.pdf>> accessed 16 May 2022.

¹⁵² Her Majesty's Government, *The future relationship between the United Kingdom and the European Union* (July 2018, Cm 9593) paras 105 and 108. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/786626/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf> accessed 17 May 2022.

¹⁵³ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid*

though the Brexit is nevertheless likely to have a significant impact, many of the antitrust claims in the UK during the course of 2021 were still based on European Commission decisions.¹⁵⁴

Below, a further in-depth analysis will be conducted on the specific elements of the British legal system that contribute to the UK's attractiveness as a forum for private enforcement of competition law as mentioned by the literature.

2.2.1 Specialization of UK courts and the Competition Appeal Tribunal

Overall, the courts in England and Wales are said to have substantial experience with managing large cases, which is a characteristic often found in antitrust claims.¹⁵⁵ The design of the Civil Procedure Rules, the requirement for active case management within those rules, and experience in applying these rules are the reason why English courts are able to meet the demands of complicated antitrust cases that often involve many claimants.¹⁵⁶ This has resulted in efficient litigation of complex cases and consequently has made room for effective civil procedures rules and practices and an excellent reputation.¹⁵⁷ Furthermore, the individual judges are distinguished as “commercially minded” as a result of their former careers as lawyers which may bring, although not necessarily, experiences that civil judges have not acquired.¹⁵⁸ Compared to Scottish or Northern Irish courts, more cases have been brought before English and Welsh courts as well, even though the substantive and procedural rules on competition law do not vary for the most part. For antitrust infringements either the High Court or the CAT may be chosen by a victim.¹⁵⁹ However, most claims will be handled by (or transferred to) the Competition Appeal Tribunal (CAT) as its jurisdiction extends across the entire UK.¹⁶⁰

One of the most often mentioned and attractive features of the UK is the specialized Competition Appeal Tribunal.¹⁶¹ Section 12 and Schedule 2 of the Enterprise Act of 2002 established the

Law: Current Challenges and the Way Forward (Chapter 8, Kluwer Law International 2020), 162; Barry Rodger, ‘United Kingdom’ in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019); Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 26.

¹⁵⁴ Julian Stait and others, ‘The Private Competition Enforcement Review: United Kingdom’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

¹⁵⁵ Ronit Kreisberger and Conor McCarthy, ‘Competition damages litigation in the United Kingdom: the impact of Brexit’ (2018) 4 CLPD 48.

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 172.

¹⁵⁹ Competition Act 1998 s 47A; EU Competition law Practice Direction (PD) 2.1.

¹⁶⁰ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162-163.

¹⁶¹ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid*

CAT on the 1st of April 2003, while the role of the CAT has seen extensive increases in scope following the implementations of the Consumer Rights Act 2015 (Consumer Rights Act) and the Section 16 Enterprise Act 2002 Regulations 2015. Before the implementation of the Consumer Rights Act only follow-on claims could be brought before the CAT. As a result, the High Court still remained the most popular venue for antitrust damages claims. However, the Consumer Rights Act made it possible to also pursue stand-alone acts before the CAT under section 47A of the Competition Act 1998. This way, the CAT's specialist role as a forum for antitrust cases was strengthened as claimants are not required to await an infringement decision by the European Commission or the United Kingdom's national competition authority (CMA) anymore,¹⁶² which was previously considered a major drawback of the CAT.¹⁶³ Furthermore, the Consumer Rights Act also granted the CAT the powers to hear other monetary claims and injunction requests,¹⁶⁴ while a special fast-track procedure and the availability for an opt-out claims aggregation are both in place for claims brought before the CAT.¹⁶⁵

The CAT is also mentioned to have a very outstanding feature compared to other courts, namely the structure of its court.¹⁶⁶ The CAT's court has a panel which is comprised of a President or Chairman and two Ordinary Members.¹⁶⁷ The Chairman is often a lawyer,¹⁶⁸ while Ordinary Members are appointed experts from various relevant fields which have an equal say in the decision-making process.¹⁶⁹ Together, they shape the CAT into a "special judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function it is to hear and decide cases involving competition or economic regulatory issues".¹⁷⁰ The versatility of the panel, not to mention its high amount of resolved cases, has therefore significantly contributed to the specialized and competent

Law: Current Challenges and the Way Forward (Chapter 8, Kluwer Law International 2020), 167; Barry Rodger, 'Private Enforcement in the UK: Effective Redress for Consumers?' in B. Rodger, P. Whelan and A MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming); Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 CLPD 48, 49; Samet Caliskan, 'Private enforcement of UK competition law: enhanced deterrence for whom?' (2020) 13 GCLR 20, 22; Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 124-126

¹⁶² Barry Rodger, 'Private Enforcement in the UK: Effective Redress for Consumers?' in B. Rodger, P. Whelan and A MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 12; Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 125.

¹⁶³ Mark Furse, 'Follow-On Actions in the UK: Litigating Section 47A of the Competition Act 1998' (2013) 9 ECJ 79.

¹⁶⁴ Competition Act 1998 s 47A(1)(3).

¹⁶⁵ Sebastian Peyer, 'Chapter 5: Private antitrust enforcement in England and Wales after the EU Damages Directive: where are we heading?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Chapter 5, Edward Elgar Publishing Limited, 2018), 93

¹⁶⁶ Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 124.

¹⁶⁷ Competition Appeal Tribunal, *Annual Report and Accounts 2016/2017* (27 July 2017), 5

<https://www.catribunal.org.uk/sites/default/files/2021-11/Annual%20Report%20and%20Accounts%202020-21_0.pdf> accessed 17 May 2022.

¹⁶⁸ *ibid* 6.

¹⁶⁹ *ibid* 10.

¹⁷⁰ *ibid* 2.

perception the CAT has obtained in the literature.¹⁷¹ Furthermore, since there is a great need for economic knowledge in competition litigation, judges in the CAT are thought to more likely have sufficient experience with economics related aspects when resolving antitrust claims.¹⁷² This is of considerable importance as insufficient experience may result in large inefficiencies and a low quality of judgements.¹⁷³

The number of cases before the CAT have been increasing over the years, while the Section 16(4)(5) of the Enterprise Act of 2002 has made the beforementioned transference from courts to the CAT possible and further added to the centralization for antitrust claims and the additional cases tried before the CAT.¹⁷⁴ The number of cases before the CAT are expected to see further increase as the majority of claims in the UK qualify for trial at the CAT.¹⁷⁵ As a result of the CAT's panel and its specialized rules and proceedings for antitrust claims, a higher procedural flexibility and an in-depth understanding of the issues related to antitrust claims are now created in favour of prospective claimants.¹⁷⁶ In addition, the CAT is also said to be more flexible and adhere less strictly to the law when resolving actions for damages compared to other venues.¹⁷⁷

2.2.2 The costs of litigation in the UK

The general rule before the High Court is that the losing party is required to pay the other party's legal costs.¹⁷⁸ Rule 44.3 of the Civil Procedure Rules provides several mechanisms to limit costs as it will not allow costs which have been unreasonably incurred or are unreasonable in amount, while the after-the-event insurance enables insurance against the opposing party's costs if the claim is unsuccessful.¹⁷⁹ In

¹⁷¹ Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 124; Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 CLPD 48, 49.

¹⁷² Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 172; Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 125; Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 CLPD 48, 49.

¹⁷³ Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 125-126.

¹⁷⁴ *ibid* 123.

¹⁷⁵ Competition Appeal Tribunal, *Annual Report and Accounts 2016/2017* (27 July 2017), p. 5 <https://www.catribunal.org.uk/sites/default/files/2017-12/annual_report_16_17_0.pdf> accessed 17 May 2022.

¹⁷⁶ Ronit Kreisberger and Conor McCarthy, 'Competition damages litigation in the United Kingdom: the impact of Brexit' (2018) 4 CLPD 48, 49.

¹⁷⁷ Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 124; Sebastian Peyer, 'Chapter 5: Private antitrust enforcement in England and Wales after the EU Damages Directive: where are we heading?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 5, Edward Elgar Publishing Limited, 2018), 167.

¹⁷⁸ CPR, r 44.2(2)(a).

¹⁷⁹ Barry Rodger, 'United Kingdom' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019), 404.

contrast, the CAT adopts the ability to order a payment amount at its own discretion at any stage of the proceedings¹⁸⁰ and has evidently been flexible in its approach to costs, potentially reducing cost pressures for future claimants at the CAT.¹⁸¹

Nevertheless, cost-shifting, the high potential to pay up-front costs and the possibility to be required to reimburse the opposing party's cost if the claim is unsuccessful bring great disincentives to litigate in the UK. Clearly, the costs are further amplified due to the inherently complex antitrust cases and the substantial legal and economic evidence needed to further a claim.¹⁸² Furthermore, the teams of each party often include an exaggerated amount of professionals due to the split between solicitors and barristers in the UK, which is also responsible for driving up the litigation costs.¹⁸³ The British disclosure costs are substantial as well, although the exact reason remains uncertain. It is speculated that parties may be overoptimistic, end up losing the case and are then required to pay the opposing party's costs. It is also possible that a principal-agent problem between the lawyers and clients inflates the costs when junior associates and paralegals are used to increase the hours spent on disclosure requests.¹⁸⁴ As stated before, the litigation costs in the UK are considered to be at the high end, but practice has shown that they are not impossible to overcome, for example, through litigation finance.¹⁸⁵

2.2.3 Options for collective redress and a new collective redress mechanism

Due to the lack of motivation to take action by victims of antitrust infringements,¹⁸⁶ a new collective redress mechanism featuring opt-out collective proceedings and collective settlements has been implemented following the Consumer Rights Act,¹⁸⁷ complementing the already established but rather ineffective opt-in group actions introduced by the Enterprise Act.¹⁸⁸ This collective redress mechanism is

¹⁸⁰ The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 104(2).

¹⁸¹ Barry Rodger, 'United Kingdom' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019), 404.

¹⁸² *ibid* 403.

¹⁸³ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 176.

¹⁸⁴ *ibid*.

¹⁸⁵ See section 2.2.6

¹⁸⁶ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 184; Sebastian Peyer, 'Chapter 5: Private antitrust enforcement in England and Wales after the EU Damages Directive: where are we heading?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 5, Edward Elgar Publishing Limited, 2018), 113.

¹⁸⁷ Competition Act 1998 s 47B-47E.

¹⁸⁸ Zygimantas Juska, 'The effectiveness of antitrust collective litigation in the European Union: a study of the principle of full compensation' (2018) 49 IIC 63, 81; Sebastian Peyer, 'Chapter 5: Private antitrust enforcement in England and Wales after the EU Damages Directive: where are we heading?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 5, Edward Elgar Publishing Limited, 2018), 111.

said to greatly surpass those of other EU Member States (while being closest to the Dutch mechanism), goes beyond the European Commission's advice, and has advanced the attractiveness of private enforcement in the UK.¹⁸⁹

At present, there are several requirements in order to bring collective proceedings before the CAT. Collective proceedings may only be continued if the Tribunal creates a collective proceedings order (CPO) under section 47B(4) of the Competition Act 1998, which it may only do if two requirements under section 47B(5) are met. Section 47B(5)(a) requires that collective proceedings must be brought before the CAT through an authorized representative of the class of persons, for which it is not required that that representative is a part of that class,¹⁹⁰ but the representative needs to be distinguished as "just and reasonable" by the CAT.¹⁹¹ Furthermore, these claims need to be "eligible for inclusion" under section 47B(5)(b), which is fulfilled when the CAT considers that the collective proceedings "raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings".¹⁹²

Collective proceedings were until recently only possible through the Consumers' Association and only if a decision by a competition authority had already been reached.¹⁹³ However, the reason for amendment was further explained in the UK Supreme Court's decision of *Merricks v. Mastercard* in 2020,¹⁹⁴ in which Lord Briggs specified that the collective proceedings were special form of civil procedure designed to facilitate access to justice where ordinary claims were inadequate for the vindication of private rights.¹⁹⁵ He further noted that individual claims by the approximately 46 million consumers involved would likely be practically impossible and that refusal to authorize the collective proceedings in this situation may result in no vindication at all.¹⁹⁶ It is argued that this recent judgement in *Merricks v Mastercard* has made the UK remarkably more claimant-friendly for class actions related to competition law¹⁹⁷ and has added to this by further clarifying the approach for authorization through a CPO.¹⁹⁸ Due to the UK Supreme Court's relative approach to suitability in *Merricks v Mastercard*, collective proceedings have probably become more accessible for consumers or when high costs or

¹⁸⁹ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 174.

¹⁹⁰ Competition Act 1998, s 47B(8)(a).

¹⁹¹ Competition Act 1998, s 47B(8)(b).

¹⁹² Competition Act 1998 s 47B(6).

¹⁹³ Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

¹⁹⁴ *Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2020] UKSC 51.

¹⁹⁵ *Merricks v Mastercard* [2020] UKSC 51, para 45.

¹⁹⁶ *Merricks v Mastercard* [2020] UKSC 51, para 54.

¹⁹⁷ Chris Bushell and others, 'Merricks v Mastercard: the litigation risks for the financial services sector' (2021) JIBFL 781 <<https://sites-herbertsmithfreehills.vuturvx.com/20/24346/landing-pages/merricks-v-mastercard---litigation-risks-for-the-financial-services-sector.pdf>> accessed 18 May 2022 ; Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

¹⁹⁸ Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

other related issues would make filing a claim too burdensome.¹⁹⁹ As a result, collective procedure order applications are on the rise and law firms and litigation financiers increasingly cooperate with possible class representatives to file applications,²⁰⁰ and have been successful in doing so as can be inferred from the numerous certifications that were granted in 2021.²⁰¹ Another beneficial factor may be found in the fact that claimants in a class are also not required to prove that they have individually suffered harm, instead it is sufficient to establish that there is a loss for the class altogether.²⁰² These developments are said to have encouraged collective proceedings in the UK by expediting claims that do not hold in court on an individual basis.²⁰³ However, only claimants originating from the UK are eligible for an opt-out procedure while foreign claimants are instead required to opt-in.²⁰⁴ Nevertheless, both the opt-in and opt-out collective proceedings are said to make EU plaintiffs favour the UK forum.²⁰⁵

2.2.4 The obligation to disclose evidence in the UK

It is said that the uniform implementation of the provisions on access to evidence contained in the Damages Directive will most likely not create effective disclosure mechanisms in EU Member States, even though access to evidence is regarded as a critical point for litigating “fact-intensive” damages actions.²⁰⁶ As a result, the UK’s mature disclosure regime is considered attractive for pursuing damages claims,²⁰⁷ while the disclosure mechanisms under the UK regime have historically been appealing as well.²⁰⁸ In particular, the UK’s broad obligations to disclose²⁰⁹ and its safeguards for privileged and confidential information are mentioned to contribute to this attractiveness,²¹⁰ while several rulings have additionally turned the tides in favour of claimants.

¹⁹⁹ Chris Bushell and others, ‘Merricks v Mastercard: the litigation risks for the financial services sector’ (2021) JIBFL 781, 782.

²⁰⁰ *ibid.*

²⁰¹ See for example: *Justin Le Patourel v BT Group PLC* [2021] CAT 30; *Justin Gutmann v London & South Eastern Railway Limited* [2021] CAT 31.

²⁰² Competition Act 1998 s 47C(2).

²⁰³ Julian Stait and others, ‘The Private Competition Enforcement Review: United Kingdom’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

²⁰⁴ Competition Act 1998 s 47B(11)(b)(1).

²⁰⁵ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162.

²⁰⁶ *ibid* 167.

²⁰⁷ *ibid* 172.

²⁰⁸ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 13.

²⁰⁹ Ronit Kreisberger and Conor McCarthy, ‘Competition damages litigation in the United Kingdom: the impact of Brexit’ (2018) 4 CLPD 48, 49.

²¹⁰ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 162.

For claims before both the High Court and the CAT, both parties are mandated to disclose all documents relevant to the case,²¹¹ regardless of whether or not it harms their own case or supports the opponent's case.²¹² This obligation for disclosure is already considered clearly much broader than other jurisdictions in the EU,²¹³ and is seen as an attractive feature of litigating in the UK.²¹⁴ In order to efficiently establish or agree on the scope of the disclosure, the court requires parties to cooperate with each other.²¹⁵ Importantly, rule 31.5(7) of the Civil Procedure Rules enables the High Court to limit disclosure to the amount it deems necessary, which may fall between no disclosure or a so-called "key to the warehouse" disclosure.²¹⁶ Likewise, a similar provision is contained in the Competition Appeal Tribunal Rules 2015 where the "tribunal may at any point give directions as to how disclosure is to be given"²¹⁷ and is able to decide what disclosure orders to make with "the need to limit disclosure to that which is necessary to deal with the case justly".²¹⁸ Moreover, the CAT and the High court may also summon a witness or disclose documents in the witness' possession,²¹⁹ while third-parties may also be ordered to disclose information in proceedings before both the CAT and the High Court.²²⁰ However, this might be more difficult to attain as a greater importance may be attached to the third party's interests.²²¹ Additionally, both the CAT and the High Court may also grant disclosure before the start of the proceedings,²²² while the CAT may also require clarification of and additional information on the provided information.²²³ On the topic of confidentiality, English courts are used to working with confidential information due to the substantial experience they have accumulated over time,²²⁴ while

²¹¹ CPR r 31; The Competition Appeal Tribunal Rules 2015 SI 2015/1648, rr 60-65.

²¹² CPR r 31.6; The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 63.

²¹³ Barry Rodger, 'United Kingdom' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019).

²¹⁴ Sebastian Peyer, 'Chapter 5: Private antitrust enforcement in England and Wales after the EU Damages Directive: where are we heading?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Chapter 5, Edward Elgar Publishing Limited, 2018), 99.

²¹⁵ Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

²¹⁶ Lord Justice Jackson, 'Controlling the Costs of Disclosure' (Judiciary of England and Wales, 24 November 2011) paras 4.7 and 4.8 <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/controlling-costs-disclosure.pdf>> accessed 18 May 2022; In this sense, the "key to the warehouse" basically grants access to the documents of other parties so each party can inquire what is relevant for their case instead of being required to examine their own documents to determine what is helpful for the opposing party.

²¹⁷ The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 60(3)

²¹⁸ The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 60(2)(b); In this respect, "justly" refers to the requirements under rule 4(2) of the Competition Appeal Tribunal Rules 2015.

²¹⁹ CPR, r 34; The Competition Appeal Tribunal Rules 2015 SI 2015/1648, rr 55 and 56.

²²⁰ CPR, r 31.17; The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 63.

²²¹ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 169-170; See also: *BritNed Development Ltd v ABB AB* [2019] EWCA Civ 1840, paras 36 and 37.

²²² CPR, r 31.16; The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 62.

²²³ The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 53(2)(d).

²²⁴ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 171.

both the High Court or the CAT can engage in the redaction of confidential information and can subject the information to a confidentiality ring.²²⁵

Disclosure before English courts is commonly granted after fact-pleading and on account of those fact-pleadings.²²⁶ All legal regimes experience difficulties regarding the exact specificity that these fact-pleadings have to be, but this is said to be in favour of cartel victims trialling in England.²²⁷ This is inferred from the *Nokia* judgement, which states that ‘the balance is to be struck by allowing a measure of generosity in favour of a claimant’.²²⁸ Correspondingly, several other cases in the UK have also helped claimants overcome the information asymmetry in antitrust damage claims.²²⁹ In *National Grid Electricity Transmission Plc v ABB Ltd*,²³⁰ providing the reasonable opportunity to present a case was emphasized when all the relevant information resided at a single party.²³¹ Furthermore, *Peugeot S.A. and others v NSK Ltd*²³² also underscored the importance for effective enforcement when ordering a disclosure. In addition, a parent may be requested to provide information held by subsidiaries that are not involved in the litigation where it has “sufficient practical control”.²³³ This is the case where it is evidential that the parent already had unhindered access to the subsidiary’s documents or if there is information from which the court can conclude that there is an arrangement between the parent and the subsidiary which gives it the right to access its documents.²³⁴

²²⁵ The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 53(2)(h); *National Grid Electricity Transmission plc v ABB and Others* [2012] EWHC 869 (Ch), para 58; *IPCom GmbH & Co KG v HTC and Others* [2013] EWHC 2880 (Ch), paras 47-49.

²²⁶ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 168; CPR, r 31.16; The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 63.

²²⁷ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 168.

²²⁸ *Nokia Corporation v AU Optronics Corporation* [2012] EWHC 731 (Ch), para 67.

²²⁹ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 13; Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 169-172.

²³⁰ *National Grid Electricity Transmission Plc v ABB Ltd and Others* [2014] EWHC 1555 (Ch).

²³¹ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 13; the disclosure for the single party’s evidence was eventually granted under rule 18 of the Civil Procedure Rules where the demand for the disclosure was proportionate, reasonable and necessary.

²³² *Peugeot S.A. and other v NSK Ltd* [2018] CAT 3.

²³³ *Ardila Investments NV v ENRC NV v Zamin Ferrous Ltd* [2015] EWHC 3761 (Comm), paras 13 and 14.

²³⁴ *Schlumberger Holdings Ltd v Electromagnetic Geoservices* [2008] EWHC 56 (Pat) paras 8–21; *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11, paras 26–40; See: *Pipia v BG Group Ltd* [2020] EWHC 402 (Comm); See also: Anna Pertoldi and Maura McIntosh, ‘High Court finds “control” for the purposes of disclosure includes third party documents that the litigating party can access under a standing consent short of an enforceable right’ (Herbert Smith Freehills, Litigation Notes, 11 March 2020)

<<https://hsfnotes.com/litigation/2020/03/11/high-court-finds-control-for-the-purposes-of-disclosure-includes->

Next to the discussed possibilities for disclosure, There are also safeguards to withhold sensitive information on the basis of legal professional privilege. Under UK law, legal professional privilege is comprised of legal advice privilege and litigation privilege, and is important to the parties involved as they are not allowed to withhold material merely because its confidential or commercially sensitive.²³⁵ The confidential communications between a client and his attorney are shielded from disclosure under the legal advice privilege when they are conducted for the dominant purpose to obtain or provide legal advice.²³⁶ Third parties, however, are unprotected under the legal advice privilege, but may nevertheless still be safeguarded under the litigation privilege.²³⁷ In this regard, the litigation privilege protects the communications between clients or clients' lawyers and third parties where it is primarily conducted to obtain information or advice related to an actual or considered legal action, but is nevertheless subject to conditions.²³⁸ Communications may also be shared without the loss of privilege where the interests of parties are substantially alike for the content of the shared information (common interest privilege), where a genuine attempts to settle is made (without prejudice privilege),²³⁹ or where the same lawyer is kept to act on behalf of the parties under a joint retainer (joint privilege).²⁴⁰

Strikingly, despite the UK's comprehensive disclosure regime, access to evidence is still mentioned to be the largest issue for claimants trying antitrust claims in the UK. This especially holds in relation to the quantification of damages, in which the information asymmetry makes it difficult to find a strong foundation to estimate and prove damages on.²⁴¹ The impediments to access to evidence are mainly the result of recent reform trends that rather limit disclosure to reduce litigation costs.²⁴² Furthermore, the Damages Directive's provisions for disclosure were not expected to have a significant effect on the UK regime as only limited provisions for pre-trial disclosure were included and the concept of disclosure was already firmly entrenched in the UK.²⁴³ However, it is also argued that, in addition to

third-party-documents-that-the-litigating-party-can-access-under-a-standing-consent-short-of-an-enforceable-right/> accessed 18 May 2022.

²³⁵ Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

²³⁶ Gwendoline Davies and Andrew Beck, 'Practice makes privileged' (2016) 65 CLJ, 19-21; See also: *The Civil Aviation Authority v. Jet2.Com Ltd* [2020] EWCA Civ 35 for approval of the "dominant purpose" test by the Court of Appeal.

²³⁷ *ibid.*

²³⁸ See: Elizabeth Hyde and Natascha Gaut, 'Legal professional privilege update: protections and pitfalls' (2019) 8 C&R 1, 7; See also: *Three Rivers District Council and Others v. The Governor & Company of the Bank of England (No. 6)* [2005] 1 AC 610; The conditions require that (1) communications are made for the single or dominant purpose of pursuing legal action, (2) the legal action is in progress or is taken into reasonably consideration by the client, and (3) the legal action is adversarial instead of inquisitive.

²³⁹ Gwendoline Davies and Andrew Beck, 'Practice makes privileged' (2016) 65 CLJ, 19.

²⁴⁰ Julian Stait and others, 'The Private Competition Enforcement Review: United Kingdom' in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

²⁴¹ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 174, 176

²⁴² *ibid* 176.

²⁴³ Kim Dietzel and Kristien Geeurickx, 'Action on Damages: A look at the new directive and its impact on England and Wales' (2015) CLI; Barry Rodger, 'United Kingdom' in Barry Rodger, Francisco Marcos and Miguel S. Ferro

the detrimental effect of the Damages Directive on disclosure of leniency material in the UK, the Damages Directive has reduced the scope of disclosure for claimants in the UK in general.²⁴⁴ The main argument for this is that the Damages Directive mandates claims to be supported by available facts and evidence to justify the disclosure request,²⁴⁵ which is higher than the established evidentiary burden before English courts.²⁴⁶ What is more, one of the previous contributors to the UK's attractiveness before the implementation of the Damages Directive is the English court's approach to the balancing test on the disclosure of leniency materials.²⁴⁷ Leniency materials could previously be disclosed as a result of the CJEU's ruling in *Pfleiderer AG v Bundeskartellamt*, which specifies a balancing test to be made by national courts on a case-by-case basis.²⁴⁸ However, a blanket ban on the disclosure of leniency statements was subsequently implemented through the Damages Directive under Article 6(6), and effectively takes away this advantageous characteristic of the UK.

2.2.5 The liberal approach of UK courts in adopting jurisdiction

Claimants in the UK have been successful in obtaining English jurisdiction in several cases even though none of the cartelists addressed by the Commission's decision was domiciled in the UK.²⁴⁹ As a result, it is argued that English courts have been liberal in their approach to jurisdiction²⁵⁰ under the recast Brussels I Regulation (Brussels I).²⁵¹ In general, a claim needs to be brought before the courts of the Member State in which the undertaking is domiciled,²⁵² but this is subject to exceptions. Importantly, England is established as an "international commercial hub" where almost all large undertakings will have a subsidiary or engage in business activities, which increases the likelihood that jurisdiction will be adopted under the exceptions of Brussels I.²⁵³ Moreover, it is argued that the CJEU's judgement in *CDC Hydrogen Peroxide* with respect to the exceptions in Articles 7(2) and 8(1) of Brussels I has potentially

(eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019), 391-392.

²⁴⁴ Dominik Wolski, 'Can an Ideal Court Model in Private Antitrust Enforcement Be Established?' (2018) 11 YARS 115, 106.

²⁴⁵ 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 L 349, Chapter II, Article 5(3).

²⁴⁶ John Kwan, 'The Damages Directive: End of England's Eminence?' (2015) 36 ECLR 455, 459.

²⁴⁷ *ibid.* 457.

²⁴⁸ Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-05161, paras 23-32; In this test, the incentives of cartelists to apply for leniency when the national leniency materials are disclosed should be weighed off against the role of private enforcement in retaining effective competition and a victim's rights to damages.

²⁴⁹ *Roche Products Ltd v Provimi Ltd* [2003] EWHC 961 (Comm); *Cooper Tire & Rubber Company v Dow Deutschland Inc and others* [2010] EWCA Civ 864; *KME Yorkshire Ltd v Toshiba Carrier UK Ltd* [2012] EWCA Civ 1190.

²⁵⁰ Damien Geradin and Laurie-Anne Grelier, 'Cartel damages claims in the European Union: Have we only seen the tip of the iceberg?' (2013) 1 <<https://ssrn.com/abstract=2362386>> accessed 18 May 2022.

²⁵¹ John Kwan, 'The Damages Directive: End of England's Eminence?' (2015) 36 ECLR 455, 461.

²⁵² REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1, Article 4(1).

²⁵³ John Kwan, 'The Damages Directive: End of England's Eminence?' (2015) 36 ECLR 455, 462.

further encouraged claimants to trial at English courts. This is because the CJEU held that the “so closely connected” criterium under Article 8(1) of Brussels I is fulfilled when cartel members have “participated in different places at different times”,²⁵⁴ and, “in relation to the interpretation of art.7(2), the CJEU held that “the place where the damage occurred” is in general the “victim’s registered office” and that an “undertaking” could recover “the whole of the loss inflicted upon [it]” in that place”.²⁵⁵ As a result, antitrust damages claims are facilitated as jurisdiction under Brussels I can be established with relatively little effort in the UK,²⁵⁶ but this may have become different following the Brexit.²⁵⁷

2.2.6 The availability of litigation finance in the UK

Litigation finance may shift the costs of paying legal fees and expenses from the claimant to the funder and is said to be easy to obtain in the UK compared to other jurisdictions.²⁵⁸ The characteristics of specialized litigation financing firms also have several advantages. In this respect, these firms often employ conditional fee agreements or damages based agreements,²⁵⁹ also known as “no win, no fee” agreements, where the former refers to paying a percentage of the recovered damages if the claim is successful, while the latter refers to a paying all or a part of the fees when the claim is successful.²⁶⁰ These conditional fee agreements have seen a considerable rise in popularity in the UK,²⁶¹ while the implementation of the Damages-Based Agreements Regulations 2013 is named to have incentivized lawyers to attempt more risky and demanding cases as well.²⁶² Moreover, the claimant law firms often cooperate with other claimant law firms and are particularly engaged with the concept of competition law.²⁶³ Due to the fact that the High Court, the CAT and the UK Supreme Court are all located in London, almost all of these law firms are located in or close to London. This also includes numerous US law firms that are able to apply their US expertise to the UK venue and had entered the European Union through

²⁵⁴ Case C-352/13 *CDC Hydrogen Peroxide v Evonik Degussa GmbH* [2015], para 56.

²⁵⁵ John Kwan, ‘The Damages Directive: End of England’s Eminence?’ (2015) 36 *ECLR* 455, 462.

²⁵⁶ *ibid.*

²⁵⁷ See section 2.2.7

²⁵⁸ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 174.

²⁵⁹ Barry Rodger, ‘United Kingdom’ in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019), 404; Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 174.

²⁶⁰ Barry Rodger, ‘United Kingdom’ in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019), 404.

²⁶¹ See: Christopher Hodges, John Peysner and Angus Nurse, ‘Litigation Funding: Status and Issues’ (2012) 55 *Oxford Legal Studies Research Paper* <<https://ssrn.com/abstract=2126506>> accessed 18 May 2022.

²⁶² Barry Rodger, ‘United Kingdom’ in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 18, Oxford University Press 2019), 404.

²⁶³ Florian Wagner-von Papp, Chapter 8: Private Enforcement in the United Kingdom’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 8, Kluwer Law International 2020), 174.

the UK because of its English rules and proceedings.²⁶⁴ In this respect, the use of the English language is mentioned as a “natural advantage” of the UK as all related parties will have a sufficient understanding of the legal terms and jargon, while translations are redundant as well.²⁶⁵

However, section 47c(8) of the Competition Act 1998 states that “a damages-based agreement is unenforceable if it relates to opt-out collective proceedings”, which is said to possibly create difficulties in how third party funding will be available in opt-out collective proceedings.²⁶⁶ However, the 2017 Judgement of the CAT in *Merricks v Mastercard* is said to have eased the recovery of ATE premiums and success fees from a losing defendant.²⁶⁷ Furthermore, it was recognized that third party funding was essential as it held that “many collective actions would be dependent on third party funding, and it is self-evident that this could not be achieved unless the class representative incurred a conditional liability for the funder’s costs, which could be discharged through recovery out of the unclaimed damages”.²⁶⁸ In addition, two arrangements for fees in opt-out collective proceedings have been established,²⁶⁹ while the ruling on costs in *Gibson v Pride Mobility Products* is named to be beneficial to third party funders²⁷⁰ as it declared that the ability to pay recoverable costs of the defendant is not considered a basis to refuse authorization of a class representative. Nevertheless, it may still be further considered at the renewed application for a collective proceedings order.²⁷¹

Despite the beneficial factors above, there was a concern that collective proceedings would not be primarily used by consumers depending on the UK Supreme Court’s ruling on eligibility in *Merricks v Mastercard*.²⁷² However, this may have proven to not be the case.²⁷³

2.2.7 Potential drawbacks to the UK’s appeal as a result of the Brexit

Since the UK has left the EU, European laws are treated as a foreign law, while infringements decisions from the EU no longer have a binding effect on English courts under section 58A of the Competition Act 1998. As a result, it is speculated that consumers will have more difficulties in raising collective actions based on infringement decisions from the Commission and that incentives to litigate in the UK are

²⁶⁴ *ibid* 173.

²⁶⁵ *ibid*.

²⁶⁶ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming) 22.

²⁶⁷ *ibid*.

²⁶⁸ *Merricks v Mastercard* [2017] CAT 16, para 127.

²⁶⁹ Competition Act 1998 s 47C(6); The Competition Appeal Tribunal Rules 2015 SI 2015/1648, r 93(4).

²⁷⁰ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 22-23.

²⁷¹ *Gibson v Pride Mobility Products* [2017] CAT 9, para 145.

²⁷² Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 23.

²⁷³ See section 2.2.3

reduced.²⁷⁴ Nevertheless, many claims before UK courts in 2021 have still been established on Commission infringement decisions.²⁷⁵

As a result of its automatic recognition and enforcement of judgements regarding, Brussels I has been distinguished as key in anchoring defendants in the UK and has allowed the centralized litigation of claims involving multiple defendants before the efficient and experienced UK courts, incentivizing claimants to litigate in the UK.²⁷⁶ However, Brussels I no longer governs jurisdictions as between EU and English courts. The UK has subsequently applied to re-join the Lugano Convention, which has a relatively similar framework to Brussels I,²⁷⁷ but was rejected on the 4th of May 2021 by the Commission. This is because the Commission felt that the UK is now to be regarded as a “third country without a special link to the internal market” and suggested that the Hague Conventions should now embody the framework for civil judicial cooperation between the UK and the EU.²⁷⁸ This view was non-binding, but the Commission officially blocked the UK’s access by sending a Communication to the Swiss Federal Council on the 28th of June as the Depositary of the 2007 Lugano Convention,²⁷⁹ which approved the Commission’s view on the 1st of July 2021.²⁸⁰ Instead, if proceedings fall outside of the scope of the Hague Convention, claimants are now required to request permission from the court for the service of a claim form out of the jurisdiction under rule 6.36 of the Civil Procedure Rules. This is subject to satisfying one of the requirements under paragraph 3.1 of the Practice Direction 6B, unless the requirements under rule 6.33 of the Civil Procedure Rules can be fulfilled. In particular, paragraph 3.1(3) of the Practice Direction 6B may be beneficial for claimants through the possibility to add the primary liable

²⁷⁴ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 24.

²⁷⁵ Julian Stait and others, ‘The Private Competition Enforcement Review: United Kingdom’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

²⁷⁶ Arianna Andreangeli, ‘The consequences of Brexit for competition litigation: an end to a “success story”?’ (2017) 38 ECLR 228, 235; Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 25; Grant Stirling, ‘Company group liability and extra-territorial jurisdiction: the considerable post-Brexit obstacles to the UK as a major forum for competition law damages actions’ (2021) 14 GCLR 27, 35.

²⁷⁷ Ronit Kreisberger and Conor McCarthy, ‘Competition damages litigation in the United Kingdom: the impact of Brexit’ (2018) 4 CLPD 48, 54.

²⁷⁸ Commission, ‘Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention’ COM (2021) 222 final, 4.

²⁷⁹ Commission, ‘Communication from the European Commission representing the European Union to the Swiss Federal Council as the Depositary of the 2007 Lugano Convention (concerning the application of the United Kingdom of Great Britain and Northern Ireland to accede the 2007 Lugano Convention)’ (Note Verbale 2021) <<https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG-ann-EU.pdf>> accessed 20 May 2021.

²⁸⁰ Federal Department of Foreign Affairs FDFA, ‘Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007’ (2021) <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG_en.pdf> accessed 20 May 2022.

cartel member to a claim against a party from the UK.²⁸¹ Finally, the last step for the court is then to verify if “England and Wales is the proper place in which to bring the claim”.²⁸²

Considering the above, it is mostly argued that the UK’s post-Brexit appeal is dependent on the jurisdiction, recognition and enforcement of judgements that apply either under Brussels I or the Lugano Convention.²⁸³ As it stands now, the UK will find itself under the provisions of the Hague conventions now that the UK’s efforts to re-join the Lugano Convention have been blocked by the Commission. In this regard, the literature that has argued that the UK’s attractiveness would not wane on the basis of the UK’s application to Lugano Convention and its respective implications for enforcement and jurisdiction is to be refuted.²⁸⁴ For now, though, it is still uncertain what precise impact the Brexit will have on the private enforcement of competition law in the UK. However, it remains difficult to see that the UK will persist to be a preferred forum in the future due to its lost benefits under Brussels I. Nevertheless, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters is also awaiting ratification.²⁸⁵ This convention is said to have “the potential to facilitate the worldwide recognition and enforcement of judgement in civil and commercial matters”²⁸⁶ and may therefore be helpful to future claimants suing in the UK.

2.2.8 Interim conclusions on the UK as a preferred forum

So far, the findings have indicated that the UK is certainly favoured for actions related to cartel infringements. In this regard, the literature has substantiated that the UK contains a specialized court for cartel damages claims with a three-headed panel of different professionals, while English courts are experienced in handling these type of claims and actively manage a case to achieve efficient litigation. Furthermore, even though some have argued that the Damages Directive has negatively impacted disclosure of evidence in the UK, the UK’s mature disclosure regime with the obligation to disclose all available evidence, subject to safeguards, is considered very attractive by the literature. Next to this, it is

²⁸¹ Julian Stait and others, ‘The Private Competition Enforcement Review: United Kingdom’ in Ilene Knable Gotts and Kevin S. Schwartz (eds), *The Private Competition Enforcement Review* (15th edition, The Law Reviews 2022).

²⁸² CPR, r 6.37(3).

²⁸³ Barry Rodger, ‘Private Enforcement in the UK: Effective Redress for Consumers?’ in B. Rodger, P. Whelan and A. MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Retrospective* (Chapter 12, Oxford University Press 2021, forthcoming), 25; Kim Dietzel, Stephen Wisking and Molly Herron, ‘Nothing to see here? The UK’s implementation of the EU Damages Directive’ (2017) 10 GCLR 169, 177; Ronit Kreisberger and Conor McCarthy, ‘Competition damages litigation in the United Kingdom: the impact of Brexit’ (2018) 4 CLPD 48, 53-55; Arianna Andreangeli, ‘The consequences of Brexit for competition litigation: an end to a “success story”?’ (2017) 38 ECLR 228, 235.

²⁸⁴ Ronit Kreisberger and Conor McCarthy, ‘Competition damages litigation in the United Kingdom: the impact of Brexit’ (2018) 4 CLPD 48, 53-55.

²⁸⁵ HCCH, ‘CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS’ (concluded 2 July 2019) <<https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>> accessed 20 May 2022.

²⁸⁶ Michael Wilderspin and Lenka Vysoka, ‘The 2019 Hague Judgments Convention through European lenses’ (2020) 1 NIPR <<https://www.nipr-online.eu/pdf/2020-138.pdf>> accessed 20 May 2022.

relatively easy to establish jurisdiction before British courts since many businesses are domiciled in the UK and English courts have been very liberal on this aspect. In addition, attempts to establish jurisdiction on the basis of the exceptions in Brussels I are often successful as well. However, litigation in the UK is mentioned to be considerably costly due to the loser pays rule, the split up of barristers and solicitors, and substantial disclosure costs. Nevertheless, litigation finance may help overcome high costs as it is said that litigation finance is relatively easy to obtain in the UK. Additionally, the new collective redress mechanism has incentivized claimants to litigate in the UK, while the specifications on suitability for a CPO, as provided by the UK Supreme Court in *Merricks v Mastercard*, is named to have made filing collective proceedings considerably more accessible for consumers. Unfortunately, a potentially dark cloud is cast on the English forum as a result of the Brexit, which effectively removes the aforementioned benefits under Brussels I. Although the practical effects of the Brexit are still unknown, it remains to be seen whether the UK can remain a leading country for the private enforcement of antitrust damages claims.

2.3 The Netherlands as a (potential) forum shopping hub for antitrust claims

The literature proposes several features of the Dutch system which contribute to the existence of forum shopping in relation to the Dutch forum. In line with what is suggested, the courts of the Netherlands often adopt an efficient and practical approach to complex cases, while, in general, the Dutch legal system is of high quality, has relatively cheap litigation costs and contains opt-out collective settlements under its Collective Mass Claims Settlements Act.²⁸⁷ Claim vehicles are also able to bring actions for damages under their own name, while both the claim vehicles and their funding are not subject to regulations and therefore face little resistance in initiating proceedings.²⁸⁸ Procedural advantages of the Netherlands include a broad admissibility of evidence, preliminary witness hearings, and the possibility to make use of separate proceedings,²⁸⁹ and well-developed possibilities to obtain disclosure.²⁹⁰ Several legislative developments have also occurred which have altered the Dutch forum with the aim of aiding litigators by solving issues and hurdles that naturally arise in actions for damages. These include the creation of the Netherlands Commercial Court (NCC)²⁹¹ and the newly implemented Act on the Resolution of Mass Damages in Collective Action (WAMCA),²⁹² which were expected to increase the Netherlands' appeal over the recent years. Interestingly and in contrast to Germany and the UK, it is said that there are no general impediments to private enforcement in the Netherlands.²⁹³ Similar to the UK, courts in the Netherlands also regularly adopt jurisdiction relatively easy, which historically made and still makes it an appealing place to file claims for damages.²⁹⁴ The increasing amounts of cases before the Dutch courts have led to a litigation industry and creates a "virtuous circle", while Dutch courts and policymakers allegedly capitalize on this and compete with other jurisdictions for antitrust claims.²⁹⁵

²⁸⁷ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 151.

²⁸⁸ Rick Cornelissen and others, 'Netherlands' in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 191.

²⁸⁹ Rein Wesseling and Roos Elemans, 'Cartel damages cases in the Netherlands' (2018) 4 CLPD 23.

²⁹⁰ Rick Cornelissen and others, 'Netherlands' in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 191.

²⁹¹ Rein Wesseling and Roos Elemans, 'Cartel damages cases in the Netherlands' (2018), 4 CLPD 23, 25.

²⁹² Rick Cornelissen and others, 'Netherlands' in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 191; Rein Wesseling and Roos Elemans, 'Cartel damages cases in the Netherlands' (2018) 4 CLPD 23; Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 159.

²⁹³ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 151.

²⁹⁴ Rein Wesseling and Roos Elemans, 'Cartel damages cases in the Netherlands' (2018) 4 CLPD 23.

²⁹⁵ Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 130.

However, the excessive strain resulting from the increasing claims before Dutch courts have resulted in concerns as to whether the Dutch courts are able to maintain their length of procedures and quality.²⁹⁶

The Damages Directive was implemented into Dutch national law under the Implementing Act and was effective as of 27 February 2017,²⁹⁷ which introduced a few new provisions for the Dutch Civil Code (DCC) and the Dutch Code of Civil Procedure (DCCP). The legislator implemented the provisions of the Damages Directive with a minimalistic approach due to the differences in terminology used in Dutch law,²⁹⁸ for which it is argued that the lack of clarity in the Damages Directive would lead to significant litigation in the Netherlands.²⁹⁹ However, as of now the literature has not named the implementation as particularly helpful for or detrimental to attracting new cases to the Netherlands.

The Netherlands is one of the three most popular fora, but distinguishes itself from the UK and Germany in several aspects, as will be illustrated in this section. Most of the actions for damages in the Netherlands are based on follow-on actions from the Commission or a competition authority.³⁰⁰ In addition, unofficial statistics show that only 6 actions for damages have been awarded in the Netherlands as of 2021,³⁰¹ which is significantly less than the 177 cases in the favoured jurisdiction Germany. Although it is noted that the amount of cases in the Laborde study does not fully reflect the activities in the Dutch forum since the damages actions in the Netherlands often involve several interim judgements,³⁰² it still contradicts the literature's statements on the Netherlands as a preferred forum. Hence, this section sets out to in-depth discover the literature's view on why the Netherlands is a preferred forum for cartel damages actions, for which the uncovered elements will be compared to the obtained data from the qualitative interviews in chapter 3.

²⁹⁶ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 151-152; Stefan Vermeulen, 'Vrees voor overbelasting rechtssysteem door hausse aan massaclaims van buitenlandse investeerders' *NRC* (16 February 2022) <<https://www.nrc.nl/nieuws/2022/02/16/buitenlandse-investeerders-veroorzaken-hausse-aan-massaclaims-vrees-voor-overbelasting-rechtssysteem-2-a4090501>> accessed 3 March 2022.

²⁹⁷ Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht, Staatsblad 2017, 28 (Implementing Act).

²⁹⁸ Jeroen Kortmann and Simon Mineur, 'The Netherlands' in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 13, Oxford University Press 2019), 288.

²⁹⁹ Matthijs Kuijpers and others, 'Actions for Damages in the Netherlands, the United Kingdom and Germany' (2018) 9 *Journal of European Competition Law & Practice* 55, 56.

³⁰⁰ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 143-144.

³⁰¹ Jean-François Laborde, 'Cartel damages actions in Europe: How courts have assessed cartel overcharges (2021 ed.)' (2021) 3 *Concurrences* 232, 235.

³⁰² *ibid* footnote 21.

2.3.1 The efficient and practical approach to cartel damages claims by Dutch courts

It is said that Dutch courts often adopt a very practical and efficient approach.³⁰³ One of the examples for this approach mentioned by the literature is the approach taken with respect to the “Masterfoods Defence” in the *Equilib v KLM* case.³⁰⁴ The Masterfoods defence relies on the argument that national civil proceedings should be stayed until the Commission’s decision becomes irreversible.³⁰⁵ However, the Court of Appeal of Amsterdam held that this is not necessarily the case and should be examined with respect to the division of tasks of the EU- and national courts.³⁰⁶ It further specified that the national procedure should only be stayed to the extent that there are questions of law or fact related to the national procedure that are dependent on the Commission’s decision, and if there is a reasonable doubt to question the legitimacy of that decision.³⁰⁷ As a result, the national court assesses whether to suspend the proceeding based on the defendant’s prove that there is an appeal against the Commission’s decision. This must be based on reasonable grounds and based on the defences the defendant tries to invoke so that the national court can examine if the legitimacy of the decision is relevant to the invoked defences.³⁰⁸ It is therefore argued that both delays are avoided for claimants and that the defendant’s costs are reduced as the defendant does not necessarily need to defend himself in civil proceedings before the Commission’s decision is irrevocable.³⁰⁹

It is also argued that Dutch courts (and Dutch policymakers as well) compete with other jurisdictions for cartel damages cases due to lucrative motives and the opportunity it provides to shape the law. This can be seen in the creation of the NCC, with English as its default language, as a means to pull international disputes toward the Dutch forum and strengthen it in comparison to other international courts.³¹⁰ As a specialized court for international commercial disputes, the NCC was mentioned to increase the Netherlands’ attractiveness for damages cases.³¹¹ However, the NCC has proven to attract a low amount of cases, while and is more costly, while the additional requirement that

³⁰³ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 151.

³⁰⁴ Gerechtshof Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (*Equilib v KLM*).

³⁰⁵ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 146.

³⁰⁶ Gerechtshof Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (*Equilib v KLM*), para 3.12.

³⁰⁷ Gerechtshof Amsterdam 24 September 2013, ECLI:NL:GHAMS:2013:3013 (*Equilib v KLM*), para 3.14.

³⁰⁸ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 146.

³⁰⁹ *ibid.*

³¹⁰ Simon Vande Walle, ‘Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?’ in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 133.

³¹¹ Rein Wesseling and Roos Elemans, ‘Cartel damages cases in the Netherlands’ (2018) 4 CLPD 23, 25.

parties need give their consent before a court can assume jurisdiction has made more recent literature believe that the NCC is unlikely to contribute to the Netherlands' appeal as a forum.³¹²

Even though some courts have specialized over the years, there is no specialized court structure in the Dutch courts and their experience may vary per court as each civil court is eligible to handle an antitrust damages claim.³¹³ Nevertheless, the literature mentions that there seems to be “an increasing awareness amongst the Dutch judiciary that private antitrust litigation may raise issues that require specific expertise and experience that not all judges can reasonably be expected to possess”.³¹⁴ An example for this was found in the invitation of a veteran Amsterdam judge to join a panel of another Dutch court.³¹⁵

2.3.2 The costs of litigation in the Netherlands

There are indications in the literature that cost elements have attracted claimants to the Netherlands. It is mentioned that the system for fixed compensation of legal fees is an area in which the Netherlands distinguishes itself compared to the UK and Germany and helps limit the financial risks of the proceedings.³¹⁶ Furthermore, both the costs of proceedings and adverse cost orders are based on a court-approved scale of costs and are considered low. It is argued that the costs are low because, even when a party requests a declaration of non-infringement or non-liability, the procedural cost risk will not bear any relation to the actual costs of the winning party. As a result, both claimants and defendants may benefit from it.³¹⁷ An example can be found in nominal costs orders in favour of defendants, which are generally named to be less than 20,000 and almost never higher than 50,000 euros.³¹⁸

The general rule for costs is that the court will require the losing party to pay the legal costs incurred by the winning party.³¹⁹ However, the literature argues that this is actually closer to the “each party bears its own costs” rule rather than the “loser pays” rule.³²⁰ Attorney fees and economic

³¹² Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 32-32.

³¹³ Jeroen Kortmann and Simon Mineur, ‘The Netherlands’ in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 13, Oxford University Press 2019), 287.

³¹⁴ *ibid* 287-288.

³¹⁵ Jeroen Kortmann and Simon Mineur, ‘The Netherlands’ in Barry Rodger, Francisco Marcos and Miguel S. Ferro (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Chapter 13, Oxford University Press 2019), 288; Rechtbank Oost-Brabant 29 Juni 2016, ECLI:NL:RBOBR:2016:3484 (Vestel v Philips and others)

³¹⁶ Berend Jan Drijber, ‘Privaatrechtelijke handhaving van het mededingingsrecht: nieuwe rechtspraak en nieuwe wetgeving’ (2016) 124 *Ondernemingsrecht* 620

³¹⁷ Sarah Beeston and Anouk Rutten, ‘The Dutch torpedo case’ (2015), 14 *CLI* 14.

³¹⁸ Louis Berger & Hans Bousie, ‘The Netherlands as efficient jurisdiction for cartel damages claim litigation’ (International Bar Association, Legal Practice Division 2017), 39 <<https://www.bureaubrandeis.com/wp-content/uploads/2015/10/International-Litigation-May-2017-PDF.pdf>> accessed 31 May 2022.

³¹⁹ DCCP, Article 237(1).

³²⁰ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 33.

consultancy fees are considered the most important costs in this regard.³²¹ The recoverable costs for attorneys are fixed on the basis of a point system. The amount of points awarded depends on the procedural steps undertaken by the court and are then multiplied by the fixed *liquidatietarief*, which scales for larger claimants, but is said to be very modest in amount.³²² Therefore, the actual amount that can be recovered only amounts for a small portion of the incurred costs. Furthermore, Article 6:96(2)(b) of the DCC stipulates that costs for economic experts may also be recovered if they can be attributed as “reasonable costs for the determination of the damage and liability”.³²³ Winning claimants may therefore be reimbursed for their economic consultancy fees. However, defendants on the other hand will not be able to do so as their economic consulting is based on the attempt to contest the damages rather than determine them.³²⁴

2.3.3 The extensive Dutch collective redress regime

The Netherlands has several options to accumulate multiple claims into a single proceeding, such as the assignment model, the WCAM and the new WAMCA, which have the added benefit that the costs can be shared by all victims of the cartel.³²⁵ In particular, the recent introduction of the WAMCA is a testament to the newer legislative developments for collective actions for damages that aim to facilitate private enforcement.

2.3.3.1 The assignment model

Most of the claims for damages have historically been brought by claim vehicles under the assignment model.³²⁶ The Dutch assignment model consists of a claim aggregation mechanism that makes it possible to bundle claims through cessions. Under Article 3:83(1) of the DCC, a claim may be transferred unless the law or the nature of the law precludes the assignment. Nevertheless, parties can freely exclude assignment if included in their agreement. In addition, a delivery of a claim is required in order to assign a claim, for which Article 3:94(1) and 3:94(2) of the DCC provide two options; (1) a transfer through a

³²¹ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 33.

³²² Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 33, footnote 184; Rick Cornelissen and others, ‘Netherlands’ in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 191.

³²³ DCC, Article 6:96(2)(b).

³²⁴ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 34-35.

³²⁵ B Braat and N Rosenboom, ‘Privaatrechtelijke handhaving van het mededingingsrecht en de collectieve schadeafwikkeling’ (2018) 66 *Sociaal-economische Wetgeving: Tijdschrift voor Europees en economisch recht* 10, 13.

³²⁶ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 40; Rick Cornelissen and others, ‘Netherlands’ in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 175.

notarial deed and a notification to the debtor, and (2) a transfer through only a notarial deed when the debtor is unknown at the moment the deed is drawn up. It is not necessary to notify the debtor when assigning the claim, a notification must be made with due speed after the identity of the debtor has become known in order to enforce the claim.³²⁷

2.3.3.2 Litigation funders, lawyers and lucrative business

As a result of the growing number of cases in the Netherlands, increasing amounts of lawyers are starting to engage with competition law related damages claims as well.³²⁸ It is claimed that this has brought specialization and potentially “something akin to a claimant’s bar: lawyers that specialise in bringing antitrust damages actions and that actively try to attract new cases to their portfolio”.³²⁹ Litigation funders are also considered key contributors to the Dutch forum. This is because they (and the lawyers as well) have brought numerous follow-on damages actions before Dutch courts,³³⁰ actively raise awareness that they will engage in proceedings following a cartel infringement, and invite injured parties to join,³³¹ which sometimes even happens before a final decision by the Commission.³³² In contrast to lawyers, both claim vehicles and litigation funders are also not regulated. Claim vehicles may, for example, be both profit and non-profit organizations³³³ and can aggregate individual claims and pursue collective redress in their own name.³³⁴ Furthermore, they are not restrained in adopting contingency fees and can work with a no cure, no pay guarantee, which has proven useful in many follow-on damages actions.³³⁵ Dutch courts have also not accepted any objections to the assignment model that have been made by defendants and have affirmed the legitimacy of it.³³⁶ As a result, claim

³²⁷ DCC Article 3:94(2).

³²⁸ Simon Vande Walle, ‘Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?’ in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 133.

³²⁹ *ibid* 134.

³³⁰ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 39.

³³¹ Rein Wesseling and Roos Elemans, ‘Cartel damages cases in the Netherlands’ (2018) 4 CLPD 23, 25; Simon Vande Walle, ‘Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?’ in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 134.

³³² Editorial, ‘Massaclaim tegen grote truckfabrikanten’ *Het Financieele Dagblad* (3 June 2016), <<https://fd.nl/economie-politiek/1154500/massaclaim-tegen-truckfabrikanten>> accessed 31 May 2022.

³³³ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 41.

³³⁴ Damien Geradin and Laurie-Anne Grelier, ‘Cartel damages claims in the European Union: Have we only seen the tip of the iceberg?’ (2013) 1, 6.

³³⁵ Jannik Otto, Patrick Hauser and Simon Vande Walle, ‘Private enforcement of competition law in Germany and the Netherlands’ (2022) 40.

³³⁶ Rechtbank Rotterdam 23 Oktober 2019, ECLI:NL:RBROT:2019:8230 (SECC v Kone), para 9.31; Rechtbank Amsterdam 13 September 2017, ECLI:NL:RBAMS:2017:6607 (Equilib v KLM); Gerechtshof Amsterdam 4 Februari 2020, ECLI:NL:GHAMS:2020:194 (Kemira v. CDC), paras 3.14.1-3.14.5; Gerechtshof Amsterdam 10 Maart 2020, ECLI:NL:GHAMS:2020:714 (Equilib v KLM), para 2.2.

vehicles are here to stay, have become inherent to the Dutch forum and the defendants have finally found opponents that match their own size. It is therefore argued that litigation funders and surge in lawyers on the Dutch forum play an important role for the amount of cases before the Netherlands,³³⁷ while the claim vehicles help to facilitate low-value claims that are otherwise not tried before courts as a result of their funded pockets.³³⁸

2.3.3.3 Settling collectively under the WCAM

The Netherlands was the only country in the EU with binding collective settlements for a long time. Before the implementation of the WCAM, the Dutch legislative provisions were not able legally force tort-feasors to reimburse victims and at the same time also failed in forcing victims into settlement with a sufficient amount of finality.³³⁹ As a result, the WCAM was introduced with the intention to provide collective settlements on an opt-out basis in an efficient manner. This is done through the Amsterdam Court of Appeal, which will evaluate the agreements that are reached between the representative of a class and the defendants. When the Court of Appeal approves of the agreement, it will declare it binding on all persons in the terms of the agreement that did not opt out and all persons represented by the association or foundation.³⁴⁰ The WCAM procedure is made up of four stages; (1) settlement agreement, (2) petition, (3) opt-out, and (4) the distribution of funds.³⁴¹ A part of the settlement also concerns the remuneration of the legal costs, which are usually equivalent to the actual costs incurred and are a lot higher than the *liquidatietarief* in a dispute resolution, and are beneficial for both parties.³⁴² The WCAM is also beneficial to defendants as the opt-out mechanism allows defendants to settle all current and potential future actions at once. Hence, the WCAM was considered a favourable element of the Dutch forum in the literature.³⁴³ In addition, the Amsterdam Court of Appeal has again shown to readily accept

³³⁷ Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law: The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 133.

³³⁸ Jannik Otto, Patrick Hauser and Simon Vande Walle, 'Private enforcement of competition law in Germany and the Netherlands' (2022) 2.

³³⁹ Willem H van Boom, 'Collective Settlement of Mass Claims in The Netherlands' (2009), in Matthias Casper, André Janssen, Petra Pohlmann, Reiner Schulze (eds.), *Auf dem Weg zu einer europäischen Sammelklage?* (Munich: Sellier 2009) 177.

³⁴⁰ Damien Geradin and Laurie-Anne Grelier, 'Cartel damages claims in the European Union: Have we only seen the tip of the iceberg?' (2013) 1, 6.

³⁴¹ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 156-157.

³⁴² B Braat and N Rosenboom, 'Privaatrechtelijke handhaving van het mededingingsrecht en de collectieve schadeafwikkeling' (2018) 66 *Sociaal-economische Wetgeving: Tijdschrift voor Europees en economisch recht* 10, 15.

³⁴³ Damien Geradin and Laurie-Anne Grelier, 'Cartel damages claims in the European Union: Have we only seen the tip of the iceberg?' (2013) 1, 7.

jurisdiction when it comes to collective settlements,³⁴⁴ even when no defendants were domiciled in the Netherlands and only a few potential claimants were.³⁴⁵

2.3.3.4 Claiming collectively under the WAMCA

Although very shortly discussed by the literature due to its recency, the WAMCA was expected to increase the amount of private enforcement of competition law in the Netherlands.³⁴⁶ Before the implementation of the WAMCA, only collective actions for declaratory ruling³⁴⁷ and collective settlements under the WCAM could be initiated. It was not possible to claim damages collectively. As a complementary to the WCAM, the implementation of the WAMCA into Article 3:305a of the DCC and Articles 1018b to 1018m of the DCCP now makes it possible to collectively claim damages on an opt-out basis through “a foundation or association with full legal capacity, ... which has the objection to protect specific interests”.³⁴⁸ The aim of the WAMCA was to facilitate compensation by providing the opportunity to collective claim and also to make sure that different interest groups will not start separate proceedings over the same event.³⁴⁹

In order to qualify as a representative, additional safeguards and requirements were implemented to ensure standing of the foundation or association. For example, there must have been a reasonable attempt by the representative to settle the case,³⁵⁰ the representative needs to have sufficient experience, expertise and knowhow in relation to the interests it represents, and must have a non-profit purpose.³⁵¹ A claim will then only be dealt with if it can be accepted under Article 3:305(a) of the DCC, if it has been made sufficiently clear that bringing a collective action will be more efficient and effective than an individual action, and if the claim is not without merit at the time of proceedings.³⁵² As

³⁴⁴ Gerechtshof Amsterdam 29 Mei 2009, ECLI:NL:GHAMS:2009:BI5744 (Shell v Dexia).

³⁴⁵ Gerechtshof Amsterdam 17 Januari 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium v Liechtensteinische Landesbank AG).

³⁴⁶ Rick Cornelissen and others, ‘Netherlands’ in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 191; Rein Wesseling and Roos Elemans, ‘Cartel damages cases in the Netherlands’ (2018) 4 CLPD 23; Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 159.

³⁴⁷ Rupert Bellinghausen and others, ‘The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive’ (2017) 10 GCLR 103, 112.

³⁴⁸ DCC Article 3:305a.

³⁴⁹ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 157.

³⁵⁰ DCC Article 3:305a(2).

³⁵¹ ³⁵¹ Rogier Meijer and Erik-Jan Zippo, Chapter 5: Private Enforcement in the Netherlands’ in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 157, footnote 56.

³⁵² DCCP Article 1018c(5)(b).

was seen in Germany, foreign members of the class are required to opt-in within the opt-out time period, which is set by the court at a minimum of one month.³⁵³

After an exclusive representative is appointed, a period to reach a collective settlement agreement will be provided by the court where the agreement must fulfil the requirements in Article 7:907 DCC and court approval on the agreement must be obtained.³⁵⁴ Once a settlement is reached and the court declares it as binding, another opportunity to opt-out will be provided. Lastly, the temporal scope of the WAMCA is applicable to events that occurred on or after the 15th of November 2016 and are brought on or after the 1st of January 2020.³⁵⁵

2.3.4 The adoption of jurisdiction by Dutch courts: Dutch courts rarely decline jurisdiction

There are multiple possibilities to establish jurisdiction before Dutch courts under the Brussels I regime. However, the general rule of the Dutch courts when assuming jurisdiction remains whether parties are domiciled in the Netherlands,³⁵⁶ which is the case when an undertaking is domiciled, has a statutory seat, central administration or principal place of business in the Netherlands.³⁵⁷

The threshold for Dutch courts to adopt jurisdiction is named to be low, while Dutch courts very rarely decline it.³⁵⁸ Claimants often make use of Article 8(1) of Brussels I and the Dutch courts will usually accept jurisdiction under it whenever a Dutch anchor defendant is included in the proceedings and the claims against the foreign defendants are sufficiently close connected to the claims against the Dutch defendant. Sometimes, Dutch courts did not require a Dutch anchor defendant and instead adopted jurisdiction when the infringement took place in the Netherlands or the damage had materialized in it under Article 7(2) of Brussels I.³⁵⁹ In addition, adoption on the basis of other legal

³⁵³ Rogier Meijer and Erik-Jan Zippro, Chapter 5: Private Enforcement in the Netherlands' in Ferdinand Wollenschläger, Wolfgang Wurmnest & Thomas M. J. Möllers (eds), *Private Enforcement of European Competition and State Aid Law: Current Challenges and the Way Forward* (Chapter 5, Kluwer Law International 2020), 158.

³⁵⁴ *ibid.*

³⁵⁵ Rick Cornelissen and others, 'Netherlands' in Ilene K. Gotts and Kevin S. Schwartz (eds), *Private Competition Enforcement Review* (Chapter 15, The LawReviews 2020), 176.

³⁵⁶ REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L351/1, Article 4.

³⁵⁷ *ibid* Article 63.

³⁵⁸ Rein Wesseling and Marieke Bredenoord-Spoek, 'Jurisdiction issues in civil litigation cases in the European union: Dutch courts readily assume jurisdiction on basis of EU framework' in James Keyte (ed), *Annual Proceedings of the Fordham Competition Law Institute* (Chapter 12, Juris Publishing, 2016) 184.

³⁵⁹ Rechtbank Arnhem 26 Oktober 2011, ECLI:NL:RBARN:2011:BU3548 (TenneT v Alstom); Rein Wesseling and Marieke Bredenoord-Spoek, 'Jurisdiction issues in civil litigation cases in the European union: Dutch courts readily assume jurisdiction on basis of EU framework' in James Keyte (ed), *Annual Proceedings of the Fordham Competition Law Institute* (Chapter 12, Juris Publishing, 2016) 184; Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 130.

grounds such as tort or unjust enrichment in *Tennet v ABB*³⁶⁰ or the double litigation of a previously sued defendant to serve as an anchor defendant in new proceedings were also held possible by Dutch courts.³⁶¹ This is seen as a more novel approach to adopting jurisdiction under Article 8(1) of Brussels I.³⁶² A further claimant-friendly approach of the Dutch courts can also be found in the way liability is treated when a subsidiary of a cartel is involved, but for which the subsidiary is not addressed in the European Commission decision.³⁶³

In *TenneT v Alstom*, TenneT claimed that the selling of gas-insulated switchgear by Cogelex, a subsidiary of Alstom, was to be regarded as a tortious act due to the too high prices at which they were sold to TenneT. Alstom was not domiciled in the Netherlands, so there would be no jurisdiction under Article 8(1) Brussels I. However, the District Court decided that Article 7(2) Brussels I could be applied as the agreement between Cogelex and TenneT was signed in Arnhem, which could be seen as the place in which the harmful event has occurred, and the damage occurred in Arnhem since TenneT was Domiciled there as well.³⁶⁴ Furthermore, the District Court considered that the question of whether the other defendants should also be held liable on the same facts and question of law should also be judged by the same court to avoid contradicting judgements. Hence, the District Court subsequently adopted jurisdiction.³⁶⁵

A District Court assumed jurisdiction in similar proceedings brought by TenneT against the Dutch domiciled ABB B.V. and ABB Holdings B.V., and the Swiss domiciled ABB LTD, which were also related to the gas-insulated switchgear cartel. This was done on the basis of Article 8(1) for the Dutch defendants and under Article 7(2) for the Swiss defendant.³⁶⁶ The decision was appealed, but still refuted by the Court of Appeal which held that, because the two defendant are domiciled in the Netherlands and the claims against them were sufficiently close connected with those against the Swiss defendant, assuming international jurisdiction was allowed for TenneT's tort-based claims, but also for other legal grounds.³⁶⁷ In this Appeal, the court also concluded that a subsidiary may be held liable for its parent. It held that the attribution of the unlawful cartel activities to the subsidiary could be done when subsidiary is directed by the parent, while, in this specific case, the subsidiary also did not deliver any motivation on why its subsidiary's behaviour would not be directed by its parent.³⁶⁸

³⁶⁰ Gerechtshof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6766 (*Tennet v ABB*), paras 3.8-3.9.

³⁶¹ Rechtbank Amsterdam 7 Januari 2015, ECLI:NL:RBAMS:2015:94.

³⁶² Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 130.

³⁶³ *ibid* 132.

³⁶⁴ Rechtbank Arnhem 26 Oktober 2011, ECLI:NL:RBARN:2011:BU3548 (*TenneT v Alstom*), para 4.6.

³⁶⁵ Rechtbank Arnhem 26 Oktober 2011, ECLI:NL:RBARN:2011:BU3548 (*TenneT v Alstom*), para 4.9.

³⁶⁶ Rechtbank Arnhem 26 Oktober 2011, ECLI:NL:RBARN:2011:BU3546 (*TenneT v ABB*).

³⁶⁷ Gerechtshof Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6766 (*Tennet v ABB*), para 3.8.

³⁶⁸ Gerechtshof Arnhem-Leeuwarden 2 September 2014 (*Tennet v ABB*), ECLI:NL:GHARL:2014:6766, para 3.17.

As a result, the liberal approach of Dutch courts on applying the burden of proof have mainly been in the favour of claimants.³⁶⁹ It is also argued that claimants can be relatively sure that jurisdiction will be adopted by the Dutch courts, which further facilitates the attraction for (follow-on) damages actions in the Netherlands.³⁷⁰ In addition, a large foundation of claimant-favourable case law was already laid down in the Dutch forum,³⁷¹ for which it is said to create a virtuous circle as the favourable case law has drawn more cases to the Netherlands, enabling the Dutch courts to further substantiate on and evolve the Dutch case law.³⁷²

2.3.5 Interim conclusions on the Dutch preferred forum

Like Germany and the UK, the Netherlands is an appealing forum to engage in claims related to cartel damages according to the literature and several enhancing features of the Netherlands have been underscored in this section. Notably, the Dutch courts are hailed by the literature for their efficient and practical approach as exemplified by the way they have handled the Masterfoods defence, which has subsequently created beneficial effects for both claimants and defendants. Furthermore, costs are considered low, while the costs of proceedings and adverse cost orders are calculated on the basis of the *liquidatietarief*. Hence, even though the DCCP states that the loser pays, it is rather argued that each party bears its own costs and that financial risks are subsequently reduced. Further expediting elements may be found in the extensive collective redress regime of the Netherlands, for which the one-time collective settlement under the WCAM and collective claiming under the new WAMCA have become evident as key contributors. In addition, cartel damages actions have become a hot topic in the Dutch venue and have resulted in increasing amounts of litigation funders and specialized lawyers. These actively raise awareness on the claims that they intend to file, while claim vehicles and litigation funders are further aided by the fact that they are not regulated and that the assignment model has been accepted by Dutch courts. As a final point, the literature argues that Dutch courts are very liberal in adopting jurisdiction under Brussels I and rarely decline it, while the Dutch favourable case law is mentioned to have attracted even more cases to the Dutch forum and to provide the opportunity for Dutch courts to shape the Dutch case law.

³⁶⁹ Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 133.

³⁷⁰ *ibid* 130.

³⁷¹ Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 133; Rein Wesseling and Marieke Bredenoord-Spoek, 'Jurisdiction issues in civil litigation cases in the European union: Dutch courts readily assume jurisdiction on basis of EU framework' in James Keyte (ed), *Annual Proceedings of the Fordham Competition Law Institute* (Chapter 12, Juris Publishing, 2016) 184.

³⁷² Simon Vande Walle, 'Chapter 6: Private antitrust law in Belgium and the Netherlands- is there a race to attract antitrust damages actions?' in Pier L. Parcu, Giorgio Monti & Marco Botta (eds), *Private Enforcement of EU Competition Law : The Impact of the Damages Directive* (Chapter 6, Edward Elgar Publishing Limited, 2018), 133.

3. Qualitative interviews

In this chapter, the data obtained from the qualitative interviews on the elements and factors of the Dutch forum that expedite antitrust damages claims in the Netherlands are discussed. All interviewees have indeed agreed that the Netherlands is a preferred forum for antitrust damages claims and have specified various overlapping, but also differing explanations for this phenomenon as shown below. The qualitative data is structured as follows. First, the findings on the subject of forum shopping in the Netherlands is discussed. Next, the data obtained on the preferable features of the Netherlands is presented. Subsequently, the gathered information on the subject of ambulance-chasing as a contributing element to private enforcement in the Netherlands is put forth. Finally, other contributing elements that have become evident in the interviews are listed and a comparison is made between the produced data in this chapter and section 2.3 on the Netherlands.

3.1 Forum shopping in the Netherlands: general observations regarding the phenomenon

The interviewees have displayed different views on and experiences with the phenomenon of forum shopping in the Netherlands. Lawyer B claimed to have concrete experiences with forum shopping in the Netherlands. According to lawyer B, Dutch anchor defendants are often used to bring a lawsuit before a Dutch court, even though these cases often display no characteristics that, in the opinion of lawyer B, should be able to connect them to the Netherlands. Lawyer C also claimed to have experiences with forum shopping. Lawyers C mentioned that clients often choose a forum based on where it is easy to bring a claim and where proceedings against a cartel were already in motion. For clients that have already underwent a cartel damages action, selecting a forum will also be dependent on previous experiences with that litigation where positive experiences will bring them back to the previous venue.

In contrast, lawyer A was of the opinion that choosing the appropriate forum to pursue actions for damages should not be defined as forum shopping as it concerns a claimant's right to choose. Lawyer A only considered that the phenomenon of forum shopping takes place when the action for damages is tried before the court of a country that has nothing to do with the infringement at all. Therefore, lawyer A did not have any experiences with forum shopping in the Netherlands. Similarly, lawyer D also did not think that forum shopping occurs in the Netherlands but states that it is often adopted as a defence by defendants in order to scatter the claims and make litigating more difficult. Instead, lawyer D preferred the term "forum choice" rather than forum shopping as only countries in which jurisdiction can *legally* be established under European and national law are considered. If a court is more liberal and progressive in adopting jurisdiction compared to courts in other countries and those fora are subsequently chosen, then it should not be the concern of the claimants if defendants have issues with the forum that is chosen by the claimants. Instead, lawyers D stated that defendants should take this up with the legislator or try to provoke a new judgement which would specify that choosing a specific forum is not allowed.

Strikingly, judge X was of the opinion that forum shopping regularly occurs in the Netherlands and considered it a problematic issue. According to judge X, lawyers usually go to the forum that suits them best and often succeed in international cases, and particularly in the Netherlands, because almost all large undertakings will likely have shell companies in the Netherlands. Additionally, judge X believed that forum shopping is especially illustrated in two cases where Dutch anchor defendants are tried to be established even though there are serious doubts whether these defendants are actually connected to the infringement. In the first case, the Greek competition authority had determined the infringement of a Greek brewery (AB), of which Heineken indirectly held 98.8% of the shares and was summoned as the anchor defendant. At first, the District Court concluded that it was eligible to hear claims against Heineken, but not against AB.³⁷³ However, the Court of Appeal held that the claims should nevertheless be judged together to avoid irreconcilable judgements.³⁷⁴ Since the second case³⁷⁵ was concluded just before the judgement against AB and Heineken by the Court of Appeal, judge X suspects that a similar judgement will be made on appeal in this case as well. In addition to this, Dutch tax payers pay the costs of the procedures and many cases require a substantial amount of time to evaluate. Moreover, some cases need to be judged on the basis of foreign law and do not contribute to the development of the Dutch law at all. As a result, judge X concluded that forum shopping in the Netherlands has gotten out of control and that there should be a substantive connection with the Netherlands in order to trial in it.

From the obtained qualitative data, it becomes evident that there are contradictory opinions on the phenomenon of forum shopping. The defending lawyers and judge X believed that forum shopping regularly occurs in the Netherlands since cartel damages claims are tried before Dutch courts without a sufficient connection between the claim and the Netherlands. In contrast lawyers on the claimant side were of the opinion that forum shopping is not present in the Netherlands at all. Instead, the claiming lawyers considered choosing a forum is considered a right, while only the jurisdictions are considered where a suit can be *legally* brought.

3.2 Efficiency and approach of Dutch courts as preferred elements

The qualitative interviews support the literature's view that the efficiency and practical approach of the Dutch courts is an important factor for filing a claim in the Netherlands. All interviewees expressed an opinion that the Dutch proceedings are faster compared to most EU countries. In addition, lawyers A mentioned that, even though there are many procedural delays and defences possible, most proceedings before Dutch courts only take a few years at first instance. This is in contrast to countries such as Italy where proceedings almost always take 5 years or longer. Moreover, lawyer D noted that proceedings before Dutch courts are relatively short compared to other countries as they often have less capacity, experience, or even a lower progressive attitude to deal with cartel claims. Furthermore, Lawyer C mentioned that lawyer C's law firm is involved with a database for private litigation claims from Kluwer in which English and German cases are also included. Lawyer C explained that, when

³⁷³ Rechtbank Amsterdam 9 Mei 2018, ECLI:NL:RBAMS:2018:3203 (MTB v AB and Heineken)

³⁷⁴ Gerechtshof Amsterdam 16 Februari 2021, ECLI:NL:GHAMS:2021:509 (MTB v AB and Heineken)

³⁷⁵ Rechtbank Amsterdam 25 November 2020, ECLI:NL:RBAMS:2020:5882

potential expansions of this database with French or Spanish jurisdictions were examined, it showed that proceedings in these jurisdictions almost always lag behind compared to Dutch, English or German proceedings. Hence, lawyer C thought that the Netherlands is preferred in this sense.

In addition to faster proceedings, lawyer B also noted that Dutch courts, especially in Amsterdam, have gained a lot of experience with cartel damages claims, making it possible to trial in a much more efficient way. For illustration, Lawyer B provided a “case management hearing” as an example of efficient litigation where it is first determined which subject of the procedure will be handled at which exact moment during the proceedings. Furthermore, judge X highly suspected that efficiency of the proceedings is actually the most significant factor in choosing where to litigate and stated that the Netherlands, the UK and Germany are at the top of the efficiency ladder in the EU. As an explanation, Judge X suggested that this is because the hearings in the Netherlands are shorter compared to, for example, the UK, even when not considering its beforehand disclosure obligation. Judge X believed this can be observed in the fact that the proceedings are not all handled in hearings and a large portion can be dealt with in writing, which saves both time and legal costs. According to judge X, Dutch courts also first “separate the wheat from the chaff” and do not gather all evidence beforehand. In contrast to most EU courts, Dutch courts apply a separation where liability is established first and the damages are assessed afterwards. As a result, Judge X concluded that the cases remain more “manageable”, which is an element that is often missing in other EU countries and contributes to the efficiency.

Both lawyers B and C considered it an advantage that relevant precedents currently exist and were under the impression that they are especially relevant for the procedure itself. According to lawyer B, a court can, on the basis of experience, determine that a different route should be taken with respect to the procedure. For example, it may determine that the applicable law should be discussed first or perhaps determines that the damages should be handled before anything else. Similarly, lawyer C stated that, if there already is a judgement that specifies the conditions for what evidence should be provided to qualify for a compensation and how, they may simplify and shorten the procedures and enhance the efficiency of cases. Lawyer C thought that this may be particularly relevant in the case of claim vehicles as they are mainly concerned with damages claims and, therefore, usually have a broad overview and possession of knowledge of the potential fora to litigate in. Hence, claim vehicles can make a well-informed decision and weigh off the beneficial and detrimental factors in order to determine in which forum to litigate, while the gathered evidence provides them with the means to focus on and recruit specific clients. Moreover, lawyer D added that Dutch cartel damages precedents in general and precedents on both the collective settlement and collective actions have shown that the Netherlands is a country where settlements and actions are handled very efficiently.

Interestingly, lawyer C and D both believed that the possibility to provide documents through electronic means also incentivizes to choose Dutch courts. Lawyer C elaborated on this and stated that Dutch judges often adopt a pragmatic approach when it comes to evaluating evidence, which can be seen in the fact the submission of evidence through electronic means is allowed and can be as simple as submitting an USB-stick. Lawyer C was of the opinion that providing large amounts of evidence on an USB-stick can make a large difference compared to physically handing in the relevant documents, and even more so when the evidence needs to come from other companies and need to be gathered and sent to the court before a deadline. As a result, lawyer C thought that such simple and practical

elements can certainly help in bringing the claim and are definitely a considered before selecting a court. In addition, lawyer D noted that individual claimants will usually make considerably different choices than a litigation funder because they are generally more inexperienced with procedures before Dutch courts and are more inclined to select a local lawyer. Accordingly, they often select the fora which requires the least amount of effort and is dealt with in the claimant's own language. Hence, the factors that different claimants will take into account also depends on the type of claimant according to lawyer D.

3.3 Costs of litigation in the Netherlands

All interviewees agreed that the litigation costs are generally lower in the Netherlands and constitute a strong factor why the Dutch forum is chosen. Hence, the qualitative interviews backs the literature's claims that the cost of litigation motivates claimants to litigate in the Netherlands. In this respect, Lawyer B added that, since the litigation fees are on the low end of the spectrum, bringing an action for damages is easier. According to lawyer C, Dutch lawyers' fees are also cheaper than English or German lawyers' fees, but lawyer C thought that court fees are not decisive in this matter. Lawyer D agreed with this view and stated that both court fees and lawyers' fees are relatively inexpensive, but the lawyer's fees are primarily considered as proceedings before a court may take a significant amount of time. Court fees were not considered a key factor by lawyer D since they concern a fixed, one-time payment and amount to only a small fraction of the total litigation costs. Instead, lawyer D was under the impression that the lawyers' fees and adverse party costs constitute much greater hurdles if these were to become larger in the Netherlands, but lawyer D believed that they are appealing as they are now. Furthermore, Lawyer A added that, since the costs for court-, lawyers' and bailiff's fees are smaller, the financial risk is limited. This can be seen in the fact that losing party is not required to pay all costs of the proceedings under the Dutch system, but only a fixed amount. In line with lawyer A, lawyer D also believed that there is a low adverse party cost risk in the Netherlands due to the absence of an absolute "loser pays" rule. Lawyer D further substantiated that such a rule may make litigating extremely expensive when a case is lost, which is, for example, the case in the UK.

Judge X was under the impression that claimants will check the costs for each forum, but also believed that this is likely more relevant for lawyers' fees since the court fees "pale in comparison to them". However, judge X also thought that the financial risks are lower in the Netherlands and clarified that this is illustrated in the fact that the compensation for the lawyers' fees as calculated under the *liquidatietarief* do not come close to the actual costs incurred by the opposing party. Additionally, Judge X considered that the required amount of time and work in a case is also of importance. Hence, judge X stated that the efficiency of the Dutch courts should also help to reduce the costs of litigation.

3.4 The Dutch collective redress regime

The interviews provided evidence in favour of the literature's claims that the Dutch collective actions regime expedites antitrust claims in the Netherlands. In this regard, lawyers A and D had similar opinions

as reasons. Lawyer A explained that the Netherlands' jurisprudence provides the option to bundle claims through assignments, which is not always an option in other countries. Moreover, lawyer A believed that the Netherlands is a precursor when it comes to representative actions believed that this is shown in the fact that the Directive on representative actions³⁷⁶ was accepted as of June 2020, but is yet to be implemented by many countries. Conversely, the Dutch WAMCA was already in place in the Netherlands as of the 1st of January 2020. In addition, lawyer A stated that the WAMCA is key for claimants that otherwise would have never gone to court due to the involved costs.

Lawyer D was of the opinion that, not only cartel damages claims, but collective actions in general are considered a trend that is inherent to the Dutch forum and judges have become experienced in collective actions as a result. Additionally, the possibility to collectively settle a claim for all future claimants on an opt-out basis under the WCAM was regarded as a beneficial tool for both claimants and defendants by lawyer D. Moreover, lawyer D noted that these elements of the WCAM and the WAMCA's unique feature to collectively claim compensation will likely prolong the Netherlands' status as a preferred forum. However, lawyer D reckoned that the WCAM and the WAMCA may also cause the Netherlands to succumb to its own success as the Dutch courts may become overburdened, which will increase the overall length of the proceedings.

Finally, judge X noted that claim vehicles provide a real and affordable opportunity to recover damages. Accordingly, more claims have been brought before courts and Judge X stated that the European Commission approves of this development since it adds to the principle of effectiveness. Moreover, judge X further added that the claim vehicles likely prefer the Netherlands as the assignment model is still accepted by Dutch courts and the financial risks are, especially in larger cases, lower.

3.5 The high number of companies in the Netherlands and the willingness of Dutch courts to adopt jurisdiction

As mentioned in section 3.1, judge X noted that there are a lot of shell companies in the Netherlands which generally make it possible to anchor defendants to the Netherlands, while judge X's exemplified cases show that claimants are often successful in doing so. Likewise, lawyers A and C also mentioned that many companies have at least some establishment in the Netherlands. Consequently, lawyers A and C have claimed that it is frequently possible establish jurisdiction before Dutch courts. Furthermore, in the opinion of lawyer A, the Dutch courts are very willing adopt jurisdiction in general. In line with the literature, lawyer A also remarked that a number of rulings, such as the *TenneT v ABB* ruling as named in the literature, have made the Netherlands more claimant-friendly in this regard.

³⁷⁶ DIRECTIVE (EU) 2020/1828 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L409/1

3.6 The competences and education of Dutch judges

Most interviewees were of the opinion that the experience, competence and quality of judges encourage parties to select the Dutch forum. However, the qualitative interviews disclosed a contradictory picture regarding the linguistic skills of judges. Whereas all lawyers supported that the use of English during proceedings is a relevant element, judge X's experience with the NCC claimed otherwise.

Lawyer A was under the impression that the judges of the Netherlands are very capable due to their independence, efficiency and expertise and often adopt a pragmatic approach to cases. In particular, lawyer A mentioned that independent research in the EU has found that the Dutch judiciary is highly regarded within the EU. Furthermore, lawyer A stated that the Dutch judges often have no problems in dealing with documents that are submitted in a foreign language as they usually speak English at a relatively high level and may also have a general understanding of French or German, which saves both translation costs and time.

Lawyer D was also convinced that Dutch judges are experienced, well-trained, adopt a pragmatic approach to cases and substantially read up on the proceedings at hand. In addition, lawyer D believed that Dutch judges have sufficient financial knowledge to understand complex calculations of damages as they can comprehend the involved legal and economic concepts, will ask the right questions and can determine the genuineness of the provided arguments by both parties through the experience they have accumulated. Lawyer D noted that there is also some centralization at the larger courts in the Netherlands, which is a helpful, but not necessarily contributing factor. In particular, lawyer D mentioned that court experience significantly contributes to the Netherlands' preferability. Finally, lawyer D claimed that Dutch judges are considerably linguistic as all judges speak sufficient English and some also speak German or French.

Although lawyer B was not able to make statements on the professional training of Dutch judges in comparison to foreign judges, lawyer B did believe that Dutch judges are very proficient in the English language. As a result, lawyer B claimed that this may be helpful since clients can immediately ask questions in English during hearings and receive an answer. Similarly, Lawyer C presumed that judges are at least thought to be professional, which is helpful for the image of the Dutch judiciary, but lawyer C does not have any empirical experiences with the quality of judges. However, lawyer C did add that both Dutch lawyers and judges often speak the English language very well, which may reduce the language barrier between clients, lawyers and judges.

Judge X was under the impression that claimants take into account whether the judges are adequate and Dutch courts are, in this respect, renowned for their quality as proven by international studies. In addition, judge X used to think that the fact that Dutch courts accept English documents and have no problem with speaking English during hearings was a contributing element at first. However, judge X stated that judge X's experiences with the NCC has proven that this is likely not of importance.

3.7 Ambulance-chasing and the awareness of claimants

Even though ambulance-chasing is not mentioned as a contributing factor by lawyer A, lawyer A's law firm often employs "active monitoring". Lawyer A commented that this includes visiting several firms and updating them about the recent cartels and the damages that potentially has affected them. Subsequently, the visited firms are then informed of the possibilities for going to court. As a result, lawyer A explains that companies without specific competition law departments are, to a certain extent, kept aware of the developments in competition law. Similarly, lawyer B claimed to have no experience with ambulance-chasing by companies, while lawyer D and judge X both also suspect that ambulance-chasing is not really conducted. However, lawyer D did note that there are efforts by law firms and claim vehicles to mobilise cartel victims because the unlawfulness of the act is already established and cartelists would otherwise be allowed to keep the profits that were made over the backs of their purchasers and those further downstream. Lawyer D explained that this is likely adopted more extensively by litigation funders since cartel infringements usually impact the entire internal market. As a result, there is a need to speak multiple languages, a need for awareness of the proceedings and rules in other countries, and the need for sufficient capacity to communicate with and visit claimants, which are resources not often possessed by law firms. Instead, lawyer D believed that law firms often look for litigation funders so that they have a financed proceeding, whereas individual claimants may have limited resources to litigate. In addition, lawyer D was under the impression that an ample amount of victims are aware of the suffered damage, especially in cases of large infringements as seen in for example the Trucks cartel. Nevertheless, lawyer D was of the opinion that whether victims are aware of the possibility to file a lawsuit for damages is more important and, if aware, whether they refrain from doing so due to the complexity, expensiveness, risks and time involved or any potential relationships that may be broken as a result of bringing a claim. Lawyer D further elaborated that litigation funders often raise awareness on this topic so that claimants can still litigate under a funder with a no cure, no pay, no risk policy, which make the obstacles to litigating disappear and provides all claimants that want to litigate with access to justice.

In contrast, Lawyer C was under the impression that ambulance-chasing is regularly adopted by claim vehicles because providing collective redress makes up their business model. In line with lawyer C, Judge X also felt that claim vehicles might fit under the definition of ambulance-chasing as they are professionally financed by litigation funders and make it their business model to file and advertise their claims. In addition, Lawyer C believed that many victims of cartel damages are often not aware of the harm that has been done to them. Lawyer C clarified that this is increasingly so for victims that are smaller or find themselves further downstream in the market, while the difficulty to precisely pinpoint where the damages are located makes awareness even less likely. Lawyer C also noted that there will be a very low amount of final judgements as almost all cases are delayed by the defendants that invoke every possible procedural argument until a settlement is reached. In this sense, a claim vehicle only needs to agree on the monetary value of the compensation for victims, but any emotional damage, as may be claimed in other tort cases, disappears through the bundling of claims. Hence, lawyer C concluded that reaching a settlement easier with a claim vehicle.

The gathered data from the interviews provide some evidence that ambulance-chasing is regularly conducted. However, there is a discrepancy on this subject as most other lawyers and judge X feel that this is likely untrue. Nevertheless, many interviewees have noted that there are efforts by law firms, claim vehicles and litigation funders to make potential clients more aware of the harm that they have suffered. As a result, the potential element of ambulance-chasing cannot be confirmed and is to some extent rebutted. However, raising awareness is certainly an aspect that is capitalized upon by litigation funders and law firms. Hence, the qualitative interviews do support the literature's view on this preferred element.

3.8 Other factors that contribute to the Dutch appeal

Additional factors that facilitate claims have also become apparent in the qualitative interviews. According to lawyer A, the total damages that can be claimed under the Dutch jurisdiction can significantly increase compared to other countries. This is a direct result of the possibility to seek compound statutory interest on the claimed damages, which begins to run from the day the loss is suffered. Lawyer A further substantiated that cartels often exist for an extensive period of time and, in many cases, have taken place in the distant past. Therefore, provided that the Dutch law is applicable under Rome II, the claim under compound interest may rise to substantial amounts compared to a claim based on simple interest. Moreover, lawyer A stated that many of the Dutch procedural rules, such as the limitation periods, were already relatively positive for claimants before the implementation of the Damages Directive.

Lawyer C noted that there may also be some differences in terms of substantive and procedural laws. For example, the limitation period is set at a bare minimum of 5 years under the Damage Directive, but lawyer C explained that some countries can "put their own twist" on it as well. Lawyer C believed that this alteration may be impeding in some countries, but it does not seem to raise any barriers in the Netherlands. On the notion of substantive law, judge X stated that the Dutch law as a civil law country is likely much clearer for parties compared to the common law system of the United Kingdom.

Lawyer C claimed that claimants take account of current proceedings before court, while indirect purchasers often bring proceedings later than direct purchasers as direct purchasers are likely to be more aware of the harm done to them. In addition, lawyer C stated that claims vehicles may sometimes very optimistically recruit both types of clients but these claims can be contradicting to each other as it will be difficult for the claim vehicle to act in the interest of both direct and indirect purchasers if a cartelist invokes a passing-on defence. Furthermore, the provision of information by a client to a claim vehicle is often subject to difficulties as all relevant documents need to be gathered or sometimes the administration from a certain period is missing. Hence, lawyer C believed that, before selecting a court, a claim vehicle will examine and divide the types of clients based on which batch of clients has the most value, the most amount of complete documents, the best prospects in court, and which forum has favourable precedents to connect a claim. Based on the first summons, the evidence that is allowed by the court is then compared to the evidence of other batches of clients to see if more clients can be added to the claim. Lawyer C mentioned that other practical elements such as previous

experiences with law firms and the forums in which they operate are also aspects on which law firms can establish relationships with claim vehicles and, therefore, make it more likely that claim vehicles end up in the Dutch forum. Moreover, agreements on the accumulation of evidence can also be made between claim vehicles and law firms where lawyer's fees may be substantially reduced when, for example, employing Eastern European labourers to compose the evidence. Thus, lawyer C believed that, provided that an anchor defendant allows litigation in the Netherlands, these elements are key considerations that are kept in mind before selecting a forum.

According to lawyer D, litigation funders also keep in mind the possibilities for the disclosure of evidence and the differing attitude of judges in mandating disclosure. Furthermore, lawyer D stated that choosing a forum may also depend on the relationship between a carteliser and the victim. For example, if the victim is a purchaser of the carteliser, this psychological aspect may result in the victim trialling in a different country than in which the carteliser and the victim are located.

3.9 Concluding remarks and literature review on the Netherlands

All things considered, the qualitative interviews support the proposition that the Netherlands is a preferred country for cartel damages actions and are mostly in line with the preferable elements put forth by the literature on the Dutch forum. In this sense, the literature's view that the efficiency and practical approach of the Dutch courts is an important factor for filing a claim in the Netherlands is supported. However, some features have come forward on the topic of Dutch courts that are not explicitly mentioned by the literature. These consist of practical and simple elements such as submitting evidence electronically or selecting a court in a claimant's own language, the improved efficiency of the Dutch courts as a result of court experience and relevant precedents, fewer and shorter hearings, and the separation of components of the proceedings.

Likewise, the idea that is that the threshold for adopting jurisdiction by Dutch courts is low is also supported, while the role of the *Tennet v ABB* ruling has similarly been confirmed by lawyer A. However, the fact that companies often have several firms that can be anchored to the Dutch forum is not presented in the literature. Instead, it is confirmed that cost elements have also attracted claimants to the Netherlands. In particular, the low lawyer's fees and the limited financial risks (due to the *liquidatietarief*) are seen as key factors that facilitate antitrust damages actions by all interviewees, and are in line with the literature's claims. Next to this, the argument that the Netherlands adopts an "each party bears its own costs" rule instead of a "loser pays" rule is also backed. In addition, judge X provides another argument that states that the efficiency of the Dutch courts may help reduce the corresponding time and costs, which is not explicitly mentioned by the literature.

Similarly, the qualitative interviews provide evidence in favour of the literature's claims that the Dutch collective actions regime expedites antitrust claims in the Netherlands. Particularly, both the WCAM and especially the WAMCA are believed to be significant factors in this regard, while the assignment model is also facilitated by the Dutch jurisprudence. Besides this, judge X affirms the literature's perspective that claim vehicles help in bringing a large amount of cases before Dutch courts. Indeed, they provide a real and affordable possibility to litigate and often choose the Netherlands because they are accepted under the assignment model and the financial risk is lower. However, no

indication was found that specialized lawyers stationed in the Netherlands also make the Dutch forum a more favoured jurisdiction. Conversely, the obtained data have verified that raising awareness by litigation funders, and also by law firms, is an important element that contributes to private enforcement of antitrust infringements in the Netherlands.

Intriguingly, most interviewees were of the opinion that the experience, competence and quality of judges encourage parties to select the Dutch forum, which is an aspect that is not put forward by the literature. As a result, this significant element does not align with the literature's view and is a newfound factor that facilitates antitrust claims in the Netherlands. Several additional elements that facilitate cartel damages claims in the Netherlands have become prominent in the qualitative interviews as well. These regard (1) the ability to claim damages under compound interest, (2) the fact that civil law is clearer and the substantive and procedural law do not raise issues to litigate in the Netherlands, (3) positive experiences with the Dutch forum and existing relationships between law firms and claim vehicles, (4) the possibilities to disclose evidence and the judges' attitude in mandating disclosure, (5) the relationship between victims and the infringers. Truly, none of these factors were discussed by the literature. As a result, these forum shopping inducing elements of the Netherlands are newly discovered as well.

4. Conclusion

As claimed in this thesis, private enforcement is organized under non-contractual liability (tort) law, which is structured very differently across EU Member States and varies substantially on various rules and aspects. Due to the differences in the substantive and procedural law of Member States, and also possibly the institutional structure of their court's system, some regimes have emerged which allow for a more attractive setting to claim damages as a result of a competition law infringement. Hence, the phenomenon of forum shopping is induced. This thesis has set out to rigorously explore this phenomenon and has inquired into the elements of the Dutch legal and judicial system to examine what factors determine the existence of forum shopping and on what scale it actually occurs in practice in the Netherlands. The main research question asked in this thesis was as follows:

“To what extent is the Netherlands perceived as a preferred country for private enforcement of cartel damages claims in the EU and what elements of the Dutch legal and judicial system or other factors and incentives may influence and determine this preference?”

In order to provide an extensive answer to the research question, both a literature review and qualitative interviews with legal professionals were conducted. Below, the findings from the interviews and the literature will be reflected upon and discussed so that an answer to main research question can be provided.

The analysis has disclosed that the Netherlands, Germany and the United Kingdom have preferred law systems according to the literature for a number of reasons. In this respect, several appealing features of these fora have come forward that make them auspicious. Both German and English courts are named to be specialized and experienced in cartel damages actions, although only the UK has a specialized court structure in the form of the CAT and the British courts are said to litigate more efficiently. In contrast, the Dutch courts are hailed by the literature for their efficient and practical approach as exemplified by the way they have handled the Masterfoods defence. Furthermore, due to the liberal approach of both Dutch and English courts, jurisdiction can be established relatively easy before them under Articles 8(1) and 7(2) of Brussels I. Evidently, collective redress is a significant factor in both the Netherlands and the UK. In addition to the opt-in group actions, the UK has recently introduced opt-out collective proceedings and settlements, while *Merricks v Mastercard* has made the option to collectively litigate more probable to succeed. In comparison, the Netherlands provides many possibilities to convert claims into a single proceeding. In particular, the efficient collective settlements under the WCAM and the possibility to collectively claim under the WAMCA are considered facilitating factors. Furthermore, litigation funders, claim vehicles and law firms also engage in actively raising awareness on the claims they will file. Conversely, the absence of a collective redress mechanism is regarded as Germany's greatest flaw. However, claimants have been creative to compensate for the lack of collective redress in Germany through the assignment model or claim vehicles. Next to these factors, claim vehicles and lawyers also contribute to the Dutch forum since lawyers in the Netherlands have become specialized in antitrust claims, while claim vehicles are not regulated and are accepted under

the assignment model. Likewise, specialized US and UK lawyers in London are also mentioned to explain an increasing number of cases before English courts.

The preference of Germany and the UK depends on the way disclosure of evidence can be mandated as well. Especially, the broad obligations to disclose in the UK and the substantive right to request disclosure of evidence in Germany are considered favourable aspects in this regard. Although a single source also mentions disclosure as a possible contributor to the Dutch forum, reasons for this are not further substantiated upon. Instead, low costs of litigation are primarily mentioned to be a relevant feature in the Netherlands. In contrast, the UK is seen as costly in general which disincentivizes claimants, while the literature contradicts itself on the benefits of the German cost regime. In addition, Germany seems to be the only country that benefits from the implementation of the Damages Directive, whereas the English forum seems to experience mostly harmful effects to its private enforcement regime for antitrust infringements. Meanwhile, The literature is neutral on the impact of the Damages Directive on the preferability of the Netherlands. However, to make matters worse for the UK, there is a strong presumption in the literature that the Brexit will likely harm private enforcement of cartel damages actions in the UK, although this is still uncertain. Lastly, other contributing elements of Germany included several presumptions that lowered the burden of proof for claimants, the binding effect of decisions of competition authorities other than those of the German Federal Cartel Office, the suspension of the limitation periods when a competition authority is still investigating or when an infringement has not yet ceased, and the large amount of precedents and recent claimant-friendly verdicts that have been established in the German case law.

Strikingly, neither the literature nor the qualitative interviews have revealed any issues with the transposition of the Damages Directive into Dutch private law that contribute to the uneven playing field and induce forum shopping. The literature mentions that the Dutch legislature has applied a minimalistic approach to the implementation of the Damages Directive, which does not necessarily contribute to forum shopping. Nevertheless, lawyer C mentioned that some countries “put their own twist” on their substantive and procedural rules, as can, for example, be observed in the provisions of the GWB in Germany. Nevertheless, C substantiated that it has not raised any issues in the Netherlands.

Remarkably, several re-occurring elements in the preferred countries have been put forward by the literature. For the Netherlands, most of these contributing factors have been confirmed by the qualitative interviews. Most notably, the need for effective collective redress options, the characteristics of courts such as their increased experience with claims for antitrust infringements, and the willingness of courts to adopt jurisdiction are similar elements that are confirmed as preferred features of the Netherlands. As a result, the evidence proposes that the corresponding elements are likely very important in facilitating damages claims before the respective English- and German venues as well. However, it is beyond the scope of this thesis to examine whether and to what extent these factors actually facilitate antitrust damages claims in these preferred countries. Hence, further research is required to examine the favourable elements that induce forum shopping in Germany and the United Kingdom. Contrastingly, this thesis has refrained from analysing the EU countries that have a very low amount of antitrust damages actions before their courts and determine why they have so little claims in

their fora. Consequently, future research may further help to identify which elements of their legal and judicial systems disincentivize claiming cartel damages in these countries.

Indeed, the qualitative interviews have mostly revealed a picture of the more general elements of the Dutch legal and judicial system. Although some lawyers went quite in-depth in their interview, the literature often goes much further into the technical details of the preferred elements of the Netherlands. As a result, there is a bit of a discrepancy here. In addition, the qualitative interviews were essential for this thesis, but have proven to be challenging at times. Hence, this thesis is not the regular run-off-the-mill research as it also involved talking to legal professionals, while recording the interview was not always an option either.

All-in-all, The literature and the findings from the qualitative interviews support that the Netherlands is perceived as a very preferred forum for private enforcement of cartel damages claims in the EU. This has become evident due to the fact that almost all of the literature's arguments have been confirmed to a certain extent, while additional arguments that support the Netherlands' preferability have been provided by the interviewees as well. Concludingly, the analysis of this thesis has shown that Netherlands' preference is primarily influenced and determined by (1) its extensive regime for collective redress, (2) its low costs of litigation and limited financial risk, (3) the high number of companies in the Netherlands and the willingness of Dutch courts to adopt jurisdiction, (4) the experience, competence and quality of judges, (5) the role of lawyers, claim vehicles and litigation funders in bringing cases to Dutch courts, (6) the efficient and practical approach of Dutch courts, and (7) practical aspects such as submitting evidence electronically.

Appendix A

1. Do you have any experiences with forum shopping in the Netherlands? If so, do they include any particular or extraordinary experiences in that sense?
2. Would you agree that the Netherlands is a preferred country for private enforcement (of cartel damages claims) and why (not)?
3. Do you think that there are particular elements of the Dutch legislation (substantive or procedural) which makes the Netherlands more attractive or unattractive for private enforcement compared to other countries and, if so, which element(s) and why? (WAMCA)
4. In your opinion, what factors will claimants take into account before selecting a court and why? (length of proceedings)
5. Would you agree that the quality of judges in terms of for instance education, professional training or language knowledge plays a role in forum shopping in the Netherlands and why (not)? (language knowledge, objectivity, capability, reputation)
6. In your opinion, do you consider the amount of relevant case-law in the Netherlands as a key element for forum shopping in the Netherlands, for example, due to the legal certainty that it provides, and why (not)?
7. To what extent are the relatively cheap court fees an important factor for claimants to select Dutch courts in your opinion?
8. To what degree is *ambulance-chasing** regularly adopted by law firms in the Netherlands, and to what extent are injured parties usually aware that they have suffered damages from a cartel infringement?

**Ambulance-chasing*: an attempt to obtain work by persuading an injured party to claim money from the person or company that is responsible for the suffered damages of the injured party.

9. Would you consider any other contributing factors of importance other than the ones previously discussed and, if so, which and why?

Appendix B

1. Heeft u enige ervaringen met forum shopping in Nederland? Zo ja, vallen daar enige specifieke of buitengewone ervaringen onder?
2. Bent u het er mee eens dat Nederland een geprefereerd land is voor privaatrechtelijke handhaving van kartelschadeclaims en waarom (niet)?
3. Denkt u dat er specifieke elementen van de Nederlandse wetgeving zijn (zowel materieel als formeel) die de aantrekkingskracht van Nederland als forum verhogen of verlagen vergeleken met andere landen en, zo ja, welke elementen en waarom? (WAMCA)
4. Met welke factoren zullen schuldeisers naar uw mening rekening houden voordat ze een rechtbank kiezen en waarom? (length of procedure)
5. Bent u het ermee eens dat de kwaliteit van rechters op het gebied van bijvoorbeeld onderwijs, professionele training of talenkennis een rol speelt bij het forum shoppen in Nederland en waarom (niet)? (language knowledge, objectivity, capability, reputation)
6. Vind u dat de hoeveelheid aan relevante precedents in Nederland een belangrijk element vormt voor forum shopping in Nederland, bijvoorbeeld, vanwege de hogere rechtszekerheid die het creëert, en waarom (niet)?
7. In hoeverre zijn de relatief goedkope griffierechten naar uw mening een belangrijke factor voor schuldeisers om voor een Nederlandse rechtbank te kiezen?
8. In hoeverre wordt *ambulance-chasing** regelmatig toegepast door advocatenkantoren in Nederland, en in hoeverre zijn benadeelde partijen zich er doorgaans van bewust dat zij schade hebben geleden door een kartelinbreuk?

**Ambulance-chasing*: een poging om werk te krijgen door een benadeelde te overtuigen om geld te vorderen van een persoon of bedrijf dat verantwoordelijk is voor de geleden schade van de benadeelde.

9. Denkt u dat er, naast de reeds besproken factoren, nog andere contribuerende factoren van belang zijn en, zo ja, welke en waarom?

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