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**‘Subsidiarity in Directive 2014/104 EU on damages actions
for breach of EU competition law’**

Definitive version accepted for publication in *European Public Law* 2017, 23(2).

Abstract

The article is concerned with subsidiarity in Directive 2014/104 EU on actions for antitrust damages. After providing an overview of private enforcement of competition law and subsidiarity in EU law, it examines the arguments presented by the Commission in the relevant Impact Assessments. While most of the arguments were based on the need to prevent adverse cross-border effects, of particular interest was the argument that Member States were slow or unresponsive in providing effective measures designed to compensate antitrust victims. Subsequently, it shows that the Commission’s assessment of the underlying problems was discretionary and played a pivotal role before the considerations on subsidiarity were made. On this basis, this article makes the case for subsidiarity to be understood as Member States’ constructive engagement in EU action, rather than constraint on EU action.

Introduction

This article examines the application of the principle of subsidiarity in Directive 2014/104 EU on actions for antitrust damages (Directive on damages actions).¹ This Directive introduced common provisions in substantive and procedural law applicable to antitrust claims made before Member States’ courts whose cause of action lies in the breach of Article 101 or 102 TFEU (hereinafter, ‘private enforcement’). In particular, this article shows the policy rationale presented by the Commission underpinning such harmonization. Before proceeding, it should be reminded that competition policy is one of the exclusive competences of the EU,² which means that the principle of subsidiarity does not apply.³ Nonetheless, exclusive competence does not confer unlimited legal powers to take EU measures as a distinction should be made between a certain policy, which may be an exclusive competence of the Union, and its enforcement aimed at implementing the relevant rules.⁴ Indeed, the legal bases of the Directive are Articles 103 and 114 TFEU and not Article 3 TFEU. It would be out of scope of this article to examine the appropriateness of such legal bases. For the present purposes, suffice it to say that private enforcement relies on contract and tort law on which the Union does not have competences.⁵ However, as it will be seen later, the application of diverse national private laws is likely to give rise to adverse effects on the internal market, which prompt the legal basis of Article 114 TFEU. Subsidiarity is a constitutional requirement that must be met by EU legislation.⁶ Its application involves an assessment concerning the vertical allocation of the matter to be regulated (EU level rather than Member States). The literature on subsidiarity is extensive. From a political viewpoint, it is commonly accepted that subsidiarity was conceived as a means to constrain EU legislative

¹ 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. O.J. 2014, L 349/1.

² Article 3.1(b) TFEU.

³ Article 5(3) TEU.

⁴ See for example Craig who argues that one thing is exclusive competence, quite another is the enforcement of a policy implementing such competence. Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, 160 (OUP 2010).

⁵ For a comment on the relationship between tort law, legal basis and private enforcement, see Francisco Marcos and Alberto Sánchez Graells, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?*, 16 *European Private Law Review* 469 (2008)

⁶ Article 5 TEU.

action.⁷ It has also been suggested that it could limit the interpretative functions of the Court of Justice.⁸ From an operative viewpoint, subsidiarity involves a control of rationality in policy-making whereby the choice whether a matter should be regulated at the EU rather than national level should be made on the basis of its effectiveness, which has to do with how best to achieve a certain policy goal. Nonetheless this assessment is not value free since it presupposes the recognition of the problems to be addressed, the underpinning evidence, the way the issues at stake are framed and investigated, how various solutions are interpreted, and how decisions are taken under situations of uncertainty, the trade-offs involved in regulating the matter at national rather than EU level, and so forth.

Generally speaking, legal scholars did not question the case for harmonization of procedural and substantive rules applicable to antitrust damages actions.¹⁰ However, some dissenting views highlighted the risks of abuses of collective actions, which would be inevitably part of the harmonisation programme,¹¹ the adequacy of tort law to effectively cover all aspects of antitrust harm as well as the undesirability of a sectoral regulation of antitrust tortious liability,¹² the superiority of public enforcement and the misalignment of private parties' interest (as pursued in damages actions) with the general interest (as pursued by competition authorities).¹³ In addition, a legal scholar disagreed with harmonisation of such rules precisely on the basis of the subsidiarity principle arguing that national legal systems were better placed to enable consumers to claim antitrust damages.¹⁴

In any case, the European Parliament¹⁵ and Member States¹⁶ did not raise any concerns about subsidiarity.

⁷ Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 JCMS 72 (2012). The Author identifies three rationales behind subsidiarity among which he mentions the goal to avoid excessive centralization' 72-73. Since the introduction of subsidiarity in the EU, it was argued that its goal was to limit the power imbalance between Community and Member States. George Bermann, *Taking subsidiarity seriously: federalism in the European Community and the United States*, 94 Columbia Law Review 331, 335 (1994).

⁸ Thomas Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 JCMS 267 (2012).

¹⁰ See for example, Michael Dougan, *National remedies before the Court of Justice*, 202 (Hart 2004). Thomas Eilmansberger, *The Green Paper on damages actions for breach of the EC antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action*, 44 CML Rev. 431, 438-439 (2007). Assimakis Komninou, *New prospects for private enforcement of EC Competition Law: Courage v. Crehan and the community right to damages*, 39 CML Rev. 447 (2002).

¹¹ Christopher Hodges, *Competition enforcement, regulation and civil justice: what is the case?*, 43 CML Rev. 1381 (2006). The Author wrote at the time of the Green Paper and disagreed on the Commission's harmonization programme on the basis that antitrust litigation inevitably relies on collective actions, whose impact on the economy was deemed to be pernicious.

¹² Francisco Marcos and Alberto Sánchez Graells, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?*, 16 European Private Law Review 469 (2008).

¹³ Wouter Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26 World Competition 473 (2003).

¹⁴ Jesús Alfaro Águila-Real, *Contra la armonización positiva: la Propuesta de la Comisión para reforzar el private enforcement del Derecho de la Competencia*, 3 Rivista Para el Análisis del Derecho 1 (2009).

¹⁵ The debate among the Members of the European Parliament was centred around the proposed rules. Some references were made to the principle of subsidiarity. See for example, Opinion of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs of the European Parliament on the Green Paper: Damages actions for breach of the EC antitrust rules (2006/2207(INI) of 27.2.2007). There, the Committee asked the Commission to draft an Impact Assessment that would evaluate the legal basis and the compliance with the principles of subsidiarity and proportionality (point 3)). In another debate at committee level, when discussing the 2005 Green Paper, the Committee on Legal Affairs made reference to the principle by asking the Commission to prepare an impact assessment (Point 27 of the motion of the European Parliament Resolution on Damages actions for breach of the EC antitrust rules (2006/2207(INI)).

At <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2007-0133+0+DOC+XML+V0//EN&language=ga#title1> (accessed 28 May 2015). In the resulting resolution, the European Parliament asked the Commission to prepare an impact assessment; however, it did not mention the principle of subsidiarity. Rather, it emphasised that the European Parliament should play a co-legislative role in competition law and that it should be kept informed on the bringing of such actions (European Parliament

Nonetheless, analysis of subsidiarity in Directive 2014/104 EU is still worthwhile for two reasons. First, private enforcement will result in important changes of domestic substantive and procedural law for damages actions. Thus both national policy-makers, in charge with the transposition of the directive, and domestic institutional actors, in charge with the application of the resulting rules (judges and lawyers), need to have a clear understanding of the reasons why EU action is appropriate. Second, analysis of the policy-documents and evidence underpinning the relevant legislative proposal show a new aspect relating to the application of subsidiarity (i.e., legislative inertia of Member States) that is not generally treated in EU literature on subsidiarity. This paper is structured as follows. First, it provides an overview of private enforcement of EU competition law and subsidiarity. Second, it critically examines the arguments about subsidiarity made by the Commission in the impact assessment accompanying Directive 2014/104 EU. Third it discusses the theory of regulatory competition in the context of private enforcement. Finally, it explores how the Commission treated the policy issues underpinning private enforcement and some aspects relating to the relationship between subsidiarity and proportionality. The findings of this paper confirm the view that if subsidiarity is seen as a principle to limit EU regulatory measures, then the principle is of limited utility. The Commission's discretion in identifying the policy issues is unavoidable, which frames the terms within which the assessments required in the subsidiarity check are made. Rather, subsidiarity could exercise a more useful role by enabling Member States to provide factual evidence and contribute to identifying the most effective solution to deal with the problem identified by the Commission. Put differently, the article suggests an understanding of subsidiarity not simply as 'constraint on EU action', but also as 'engagement in the EU action' to determine the optimal level of regulatory intervention.

1. Background to private enforcement and its regulatory goals

The Commission's policy to encourage private enforcement dates back to the reform of public enforcement as set out in Council Regulation 1/2003. Although that Regulation was primarily concerned with public enforcement, it also conferred on the courts the power to apply Articles 101 and 102 TFEU.¹⁷ In *Courage v Crehan*¹⁸ the Court contributed to the development of private enforcement by recognising the EU right of any individual to claim damages for losses caused by contract or conduct liable to restrict competition.¹⁹ Since *Courage* arose from a dispute between the contracting parties to an agreement contrary to Article 101 TFEU, it could have been argued that only contracting parties, not third parties, were entitled to compensation. The scope of the right to compensation was then clarified in *Manfredi*,²⁰ which held that also third parties could claim compensation for the harm they suffered from an agreement or practice prohibited by Article 101 TFEU.²¹ With regard to the enforcement of the right to compensation, both judgements confirmed the principle of procedural autonomy according to which the domestic legal system has to provide the procedural rules for the enforcement of the right to compensation

resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)). At <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0152+0+DOC+XML+V0//EN>> (accessed 28 May 2015). The fact that the European Parliament expressed the intention to be involved in the legislative process suggests that it believed that private enforcement rules had to be provided at the European level.

¹⁶ COM/2015/0315 final, "Report from the Commission. Annual Report 2014 on Subsidiarity and Proportionality". In such a report, the Commission the antitrust damages directive was not mentioned.

¹⁷ Article 6, Regulation No 1/2003. O.J. 2003, L1/1.

¹⁸ Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

¹⁹ Para 26.

²⁰ Joined Cases C-295/04, C-296/04, C-297/04 and C-298/04 *Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619.

²¹ Para 61.

subject to the requirements of effectiveness and equivalence.²² Although the recognition of the EU right to antitrust compensation paved the way to more private enforcement, few antitrust claims were brought.²³ The Commission attributed the low number of claims to the inadequacy of national law to ensure an effective enforcement of the right to antitrust compensation.²⁴ On this basis, it undertook a programme of harmonization of some key rules on law of damages and procedural law, the outcome of which is the above-mentioned Directive on damages actions²⁵ and a Recommendation and Communication on Collective redress.²⁶

From *Courage and Crehan*, two main regulatory goals may be inferred. The first is the compensation of antitrust victims, expressed in the passage which held that any individual could claim damages for losses caused by a contract or conduct liable to distort competition.²⁷ The second is deterrence, which was seen as an additional benefit of the right to compensation, where the Court held that the right to compensation discourages agreements and practices that are liable to distort competition.²⁸ In this respect, the Court held that damages actions contribute to the maintenance of effective competition in the Union.²⁹ Finally, the Court closely related this goal to guarantee the effectiveness of Article 101 TFEU, which promotes the working of competition law.³⁰ This reasoning hinges on the assumption that the prospect of paying damages for the wrongdoer is an effective incentive to comply with EU law.

The principle of effectiveness, with the two connected regulatory goals of compensation and deterrence, was relied on in *Kone*.³¹ In that case, some companies had entered into a cartel that resulted in higher prices for installation and maintenance of elevators in various Member States. Other companies, which were not party to such a cartel, relied on the cartellists' prices to set their own prices above normal competitive conditions, a situation which is referred to as an 'umbrella effect'. The referring court asked whether a claim could be made against the members of the cartel in respect of losses incurred when buying products from a non-member of the cartel. The legal issue at stake was the causal link, in particular whether it could be said that an anticompetitive agreement causes higher prices of the products subject to the agreement, or also causes higher prices of similar products sold by non-cartellists. The Court of Justice opted for the

²² *Courage* para 29 and *Manfredi* para 62. Even before *Courage* the Court held the application of the principle of national procedural autonomy for the enforcement of EU rights deriving from provisions having direct effect: Case C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)* [1997] ECR I-4449, para 27.

²³ Denis Waelbroeck, Donald Slater and Gil Even-Shoshan (Ashrust), 'Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report' (2004) <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html> (accessed 28 May 2015). "Ashrust Report". The study reported a low number of claims, at p. 1. (accessed 28 May 2015).

²⁴ COM (2005) 672 final, Commission Staff Working Paper. Annex to the Green Paper, "Damages Actions for breach of the EC antitrust rules", at p. 12. <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html> (accessed 28 May 2015).

²⁵ Numerous policy documents were enacted since 2005. It would be out of the scope of this article to illustrate them. Suffice it to mention the above-mentioned Green Paper, COM (2005) 672 final, "Green Paper, Damages actions for breach of the EU antitrust rules" and COM (2008) 165 final, "White paper on damages actions for breach of the EC antitrust rules" and O.J. 2013 C167/19, "Commission Communication, Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union"

²⁶ COM (2013) 401 final, "Commission Communication, Towards a European Horizontal Framework for Collective Redress" and O.J. 2013 L201/60, "Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law". O.J. [2014] L349/1, "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".

²⁷ Case C-453/99 *Courage and Crehan*, para 26.

²⁸ At para 27.

²⁹ *ibid*

³⁰ At para 27.

³¹ Case C-557/12 *Kone and Others v ÖBB-Infrastruktur* [2014] ECLI:EU:C:2014:1317.

latter by relying on the principle of effectiveness of Article 101 TFEU.³² In broadening the basis of the economic relationships giving rise to antitrust compensation, the Court attributed the right to compensation to a wider class of claimants thus increasing the deterrent effect of damages claims.

2. Subsidiarity in EU Law

The TEU provides that ‘the use of Union competences is governed by the principles of subsidiarity and proportionality’.³³ The principle of subsidiarity applies in areas that do not fall within the Union’s exclusive competences and requires an assessment of comparative efficiency between European and national measures in pursuing a certain objective; an EU measure should be adopted if its objective can be better attained at European level by reason of the scale or effects of the proposed actions.³⁴ Protocol n. 2 of the Treaty of Lisbon provides that such an assessment must be supported by qualitative and quantitative indicators.³⁵ Unlike the previous Protocol on the Treaty of Amsterdam, which provided some guidelines on how to interpret the principle of subsidiarity,³⁶ the current protocol does not add any further criterion other than a reference to greater effectiveness of EU action due to its scale or effects. It has been argued that the Treaty text about the principle of subsidiarity contains two criteria: sufficiency and added-value.³⁷ The former provides that EU action is justified if its objectives cannot be achieved by the Member States. The latter holds that EU action is justified because it better achieves its objectives than the Member States. It has been suggested that the added-value criterion should be preferred.³⁸ Nonetheless, the interpretation and application of the principle of subsidiarity remains a difficult task. In general, subsidiarity has been interpreted as a constraint to EU intervention.³⁹ This is consistent with the account that subsidiarity was introduced in the Maastricht Treaty to balance possible federalist shifts.⁴⁰

Some EU legal scholars are sceptical about the ability of subsidiarity to determine who should accomplish a certain goal. On this basis, it has been proposed that the principle of proportionality is better suited than subsidiarity to allocate the level of regulatory intervention. In particular, it should be assessed whether the EU measure would result in a disproportionate intrusion into the Member States’ interests.⁴¹ To this view, it has been replied that the policy-making process leading to the proposal of an EU measure *de facto* takes into account the impact on the Member States’ legal systems and autonomy. In addition, establishing when an EU measure is disproportionate in relation to Member States’ values is not an easy task.⁴²

³² Para 33.

³³ Article 5.1 TEU.

³⁴ Article 5.3 TEU.

³⁵ Article 5 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007.

³⁶ For example, the Amsterdam Protocol mentioned the issue of cross-border effects: ‘The issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States’; it also made reference to the Treaty objectives: ‘Actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests’. The last guideline resembles what is now contained in Article 5 TEU: ‘Action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.’

³⁷ Antonio Estrella, *The EU Principle of Subsidiarity and Its Critique*, 93 (OUP 2002).

³⁸ Antonio Estrella, *The EU Principle of Subsidiarity and Its Critique*, 94 (OUP 2002).

³⁹ For a review of academic literature on subsidiarity, T. Horsley, *Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?*, 50 JCMS, 267 (2012).

⁴⁰ Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 JCMS 72, 73 (2012).

⁴¹ Gareth Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, 43 CML Rev. 63, 71 (2006).

⁴² Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 JCMS 72, 83 (2012).

2.1 Selected recent case law of the Court of Justice on subsidiarity

The Court of Justice is sometimes called upon to decide whether a certain EU measure breaches the principle of subsidiarity.

In *Vodafone*⁴³ the validity of Regulation (EC) No 717/2007 was disputed because of the lack of a legal basis and breaches of the principles of proportionality and subsidiarity. When deciding about subsidiarity, the Court took notice that a common approach to roaming charges was a contribution to the smooth working of the internal market. In particular, it took the view that the interdependence of retail and wholesale charges for roaming charges required a regulatory intervention at EU level in order to protect consumers.⁴⁴ The Court did not dwell on considerations about whether the Member States could achieve on their own the objective of protecting consumers from excessive roaming charges. Rather, the interconnectedness of markets seemed to be a sufficient factor to determine the appropriateness of an EU measure.

The principle of subsidiarity is respected also in situations where the matter has a European dimension but there is no interdependence of the issues to be addressed. This is the case of administrative co-operation in the field of value added tax as provided by Regulation No 1798/2003. In *Commission v Germany*,⁴⁵ the Court held that the effective administrative co-operation for national authorities to combat tax evasion and tax avoidance was guaranteed if audits were carried out at the Union level. In other words, administrative co-operation among national authorities had a cross-border dimension, and in order to make it more effective, some EU rules were necessary.⁴⁶

Finally, an opinion of AG Jääskinen delivered in *United Kingdom v Parliament*⁴⁷ seems to suggest a new justification of subsidiarity. The United Kingdom sought the annulment of some provisions of Directive 2013/36/EU relating to the setting of ratios between the fixed and variable components of the remuneration payable to employees of credit institutions and investment firms. One of the alleged grounds for annulment was breach of the principle of subsidiarity. In that respect, the AG took the view that if that matter had been left to the Member States, they would not have adopted proper remuneration policies against excessive risk taking. That would have created a risk of detrimental regulatory competition, which justified action at EU level.

In summary, the above cases show that an important precondition for taking EU measures is the existence of a cross-border situation. It is not enough, though; as shown in *Commission v Germany*, it is still necessary to prove that EU action is more effective than national action. *Vodafone* shows that interdependence of economic factors makes a strong case for subsidiarity since what happens in one Member State affects other Member States. *United Kingdom v Parliament* was removed from the Register of the Court of Justice,⁴⁸ but it is possible that the Advocate General's argument on detrimental regulatory competition may be used in future cases to provide a justification of EU measures on the grounds that low national regulatory standards may lead other Member States not to take action.

The Court of Justice has never invalidated an EU legislative act on the grounds of breach of subsidiarity, which can be explained as reluctance in interfering with the political judgement of the Union's legislature.⁴⁹ This has had likely repercussions on the interpretation of the criteria for

⁴³ Case C-58/2008 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

⁴⁴ Paras 76 and 77.

⁴⁵ Case C-539/09, *Commission v Federal Republic of Germany* [2011] ECR I-11235.

⁴⁶ Para 84.

⁴⁷ Opinion of Advocate General Jääskinen delivered on 20 November 2014 in Case C-507/13 *United Kingdom v European Parliament*.

⁴⁸ Order of the President of the Court of 9 December 2014. <
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=163769&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=457278> (Access 04 April 2016).

⁴⁹ See for example, the concern expressed by Tim Koopmans, a former judge of the Court of Justice. Tim Koopmans, *Subsidiarity, Politics and the Judiciary*, 1 EuConst 112, 116 (2005).

the application of subsidiarity: as the above three cases show, the Court of Justice has not adopted a principled approach to subsidiarity, especially in relation to the comparative efficiency calculus. Case law on subsidiarity does not mention the qualitative and quantitative indicators that must justify a draft legislative act.⁵⁰ Rather, the Court's assessment of the 'added value' of EU action has been made on a case-by-case basis. It is interesting to note that in *Vodafone* the Court of Justice expressly recognised the discretionary power of the Commission when making the assessments required in the principle of proportionality⁵¹ (suitability of the measure to achieve its goal, adoption of the least restrictive means, and so forth), with the limit that the Union legislature must base its choice on objective criteria. However, when the Court dealt with the principle of subsidiarity, it did not mention any discretionary power underpinning the assessment of the subsidiarity criteria. This omission is understandable (such discretionary powers would make the subsidiarity check meaningless), but it also implies that the comparative efficiency calculus should be based on objectively ascertainable criteria, which is consistent with the Protocol No. 3, which refers to quantitative and qualitative indicators. To some extent, this is also consistent with the view that the Court of Justice should become more involved in the assessments underpinning the subsidiarity check.⁵² Prof Biondi rejected the objection that this would mean a substitution of the Court's judgement with that expressed by the EU political institutions. Rather, the Court could assess the evidence brought by the Commission to support the case for an EU regulatory measure. This is already possible as it is well established that while the Commission has a margin of discretion in complex economic matters, the Union Courts must establish that the evidence relied on is factually accurate, reliable, and consistent, and contains information capable of substantiating the conclusions concerning the assessment of such complex economic matters.⁵³ Greater reliance on qualitative and quantitative indicators and 'minimization' of Commission's discretion would certainly make the subsidiarity check more vigorous; however many problems would remain unsolved. While it is possible to challenge the evidence relied on by the Commission to prove breach of the subsidiarity principle, the fact remains that on many occasions, the assessment of such evidence is still discretionary. In addition this would not solve the problem of inaction by the Member States to tackle a problem that has EU cross-border effects. This was precisely one of the issues concerning private enforcement, which will be examined later when dealing with the topic of the effectiveness of private enforcement.

3. Overview of the Commission's arguments on subsidiarity in private enforcement

Compliance with the principle of subsidiarity is structured in such a way as to be ensured by the Commission at the earliest stage. The 2009 Impact Assessment Guidelines provide that one of the purposes of the Commission's impact assessment is to check whether the principle of subsidiarity is respected.⁵⁴

In both the 2008⁵⁵ and 2013⁵⁶ Impact Assessment relating to private enforcement, the case for EU action was based on adverse consequences resulting from the diversity of the laws of

⁵⁰ Article 8 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

⁵¹ Case C-58/2008 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999, paras 52-53.

⁵² Andrea Biondi, *Subsidiarity in the Courtroom*, 213 (Biondi, Eeckhout and Ripley, *EU Law After Lisbon*, OUP, 2012).

⁵³ This is a standard passage formulated in many cases concerning judicial review of complex economic matters. The Author refers to Case C-12/03 P *Commission v Tetra Laval*, [2005] ECR I-987, para 39.

⁵⁴ SEC(2009) 92, Commission Impact Assessment Guidelines 2009, p. 6. Ideally, the principle of subsidiarity should be addressed in a section of the Impact Assessment Report together with the policy context and problem definition.

⁵⁵ COM(2008) 165 final, "Commission Staff Working Document Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment". At pp. 63-64.

⁵⁶ COM(2013) 404 final, "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". At pp. 66-67. Hereinafter: 2013 Impact Assessment.

damages and procedural frameworks. The argument was that such diversity created a disparity of judicial protection for antitrust victims, where some would benefit more and others less depending on the national legal framework applicable to an antitrust damages claim. Such diversity could also enable prospective defendants to engage in forum shopping thus minimising their liability and altering the level playing field of undertakings. In addition, the Commission highlighted the need to co-ordinate public and private enforcement, which could not have been achieved if each Member State had maintained their own rules. Finally, the Commission pointed out that Member States had been slow in providing an effective system of private enforcement, which made EU action desirable.

Disparity of judicial protection

The first argument for harmonization is that a diversity of legal systems leads to a disparity of judicial protection, which results in discrimination against some EU citizens. This claim is partly convincing as this outcome is the result of the application of the principle of national procedural autonomy. Let us recall that unless EU statutory law lays down procedural and remedial rules, the enforcement of EU rights before national courts is governed by national remedial and procedural rules. This division of tasks now has a constitutional recognition as it is established that ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.⁵⁷ Different procedural rules lead to different degrees of access to court. Similarly, different remedial rules lead to different substantive protection. In both situations, individuals who enforce an EU right before different national courts are likely to receive different judicial protection. Arguably, this situation may be criticised because different levels of judicial protection may result in discrimination against some EU citizens. However, EU law accepts such an outcome when it is the result of the application of national procedural and remedial rules. EU law’s response has not been to prescribe equal enforcement outcomes, but rather to establish a minimum standard of protection when individuals enforce EU rights before national courts, which is fulfilled by the requirements of effectiveness and equivalence. The effectiveness requirement provides that national law must not make the exercise of European rights impossible in practice or excessively difficult; whereas the equivalence requirement provides that national law applicable to enforce national rights shall also apply, in the same manner, to enforce EU rights of similar nature.⁵⁸ The argument based on disparity of judicial protection would have more strength if the Commission had asserted that in the field of private enforcement, diversity of national procedural law would give rise to significant differences among EU citizens; however, given the low number of antitrust claims, there was little evidence to support this concern.

Forum shopping

Antitrust litigation is often complex. A constitutive requirement for an infringement of Article 101 and 102 TFEU is the effect on trade, which means that anticompetitive agreements or abuses of dominant position must affect trade between Member States.⁶⁰ Such a cross-border element makes it possible for a claim to be made in different Member States, a situation which gives rise to the opportunity to engage in forum shopping. Broadly speaking, forum shopping refers to a

⁵⁷ Article 19 TEU.

⁵⁸ Both requirements were established in *Reve* where the Court of Justice held that national rules must not make ‘impossible in practice’ the exercise of EU right (effectiveness requirement) and be less favourable than those relating to similar actions of a domestic nature (equivalence requirement). Case 33/76 *Reve-Zentralfinanz eG et Reve-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989. Subsequently, in *Palmisani*, the effectiveness requirement was worded as ‘virtually impossible or excessively difficult’. See Case C-261/95 *Palmisani v INPS* [1997] ECR I-4025, para 27.

⁶⁰ O.J. 2004, C101/81, “Commission Notice, Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty”. For early cases, Cases 56/64 and 58/84 *Consten and Grundig v Commission* [1966] ECR 299 and Case 6/73 and 7/73, *Commercial Solvents v Commission*, [1974] ECR 223 for anticompetitive agreement and abuse of dominant position respectively.

situation in which a claim can be made alternatively before courts located in different jurisdictions, the choice of which is motivated by a possible advantage conferred by the legal system over another.⁶¹ The ‘strategic’ choice of the jurisdiction may also be determined by the likely duration of civil proceedings. In this case, a defendant may attempt to seize a court in those states where proceedings are lengthy and many years elapse before a ruling is given. According to Regulation No 44/2001, the competent court is the one where the defendant has its domicile⁶² or the one located in the place where the harmful event occurs.⁶³ Given that competition law infringements often result in widespread losses that materialise in different countries, the place of occurrence of the harmful event entails that many Member States’ national courts might be competent to deal with an antitrust claim. In addition, an anti-competitive agreement necessarily requires two or more undertakings, which gives rise to a joint liability of the concerned undertakings. As a result a claim may be made against multiple defendants, which can be sued in the place of the domicile of any of the defendants.⁶⁴

Different jurisdictions may also come into play in relation to contractual obligations. In such cases, Regulation No 44/2001 provides that the forum is the place of performance of the obligation.⁶⁵ Vertical agreements and some abuses of dominant position involve a contract between undertakings, which operate at different levels of the production or distribution process. In particular, a distribution agreement provides obligations for the manufacturer (sale of its products) and distributor (purchase of the manufacturer’s products and sale in a designated territory), which are often to be performed in different countries. Accordingly, different courts may be seized. As for the determination of the substantive law applicable to non-contractual obligations, the general rule is that the law applicable is that of the country where damage occurs.⁶⁶ Specific rules apply in relation to non-contractual obligations arising out of an act of unfair competition. In this case, the applicable law will be that of the country where competitive relations of the collective interest of consumers are, or are likely to be, affected.⁶⁷ Particular provisions are also laid down for non-contractual obligations resulting from a restriction of competition.⁶⁸ In this case, the applicable law is that of the country where the market is, or is likely to be, affected.⁶⁹

Competition law practitioners have recognised that forum shopping has become an inherent part of competition litigation.⁷⁰ It is also submitted that claimants may put in place strategies to counter pre-emptive litigation by defendants.⁷¹ However, given the possibility of multiple fora, it

⁶¹ Forum shopping has been defined as ‘the process of attempting to have an action tried in a particular jurisdiction where it is felt that one will receive the most favourable judgement or verdict’. Franco Ferrari, *“Forum shopping” despite international uniform contract law conventions*, 51 I.C.L.Q. 689, 706 (2002).

⁶² O.J. 2001, L12/1, “Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters”, art 2.1.

⁶³ Council Regulation 44/2001, art 5.3.

⁶⁴ Council Regulation 44/2001, art 6.

⁶⁵ Council Regulation 44/2001, art 5.1.

⁶⁶ O.J. 2007, L199/40, “Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II)” art 4.1.

⁶⁷ Regulation (EC) 864/2007, art 6.1.

⁶⁸ Restriction of competition refers to Article 101 and 102 TFEU. James Fawcett, Janeen Carruthers & Peter North, *Cheshire, North & Fawcett, Private International Law*, 811 (14th ed., OUP 2008).

⁶⁹ Regulation (EC) 864/2007, art 6.3(a).

⁷⁰ Stothers, Gardner, and Hinchliffe, *Forum shopping and “Italian torpedoes” in competition litigation in the English court*, 4 (2011) *Global Competition Litigation Review*, 67-73.

⁷¹ Charles Balmain and Vera Coughlan, *More haste less speed: the evolving practice in competition damages actions in the UK*, 4 *Global Competition Litigation Review* 147 (2011). A typical example of pre-emptive litigation is the so-called ‘torpedo action’ whereby a prospective defendant brings an action in a favourable jurisdiction seeking for a declaration that it did not breach competition law or its conduct did not cause any damages (negative declaratory relief).

is plausible to assume that defendants will continue to put in place successful strategies to escape, minimise or delay a finding of liability.⁷²

Forum shopping gives rise to a number of undesirable consequences. The first is the risk of minimization of liability. If a company has business operations in different Member States and is going to face multiple lawsuits, it will attempt to seize a court in a jurisdiction whose legal system would reduce liability compared to other countries in which it could equally be sued and incur higher liability. As a result, the company increases the chance of minimising its liability. This outcome is undesirable because it reduces the deterrent effect of antitrust litigation, which is one of the goals of private enforcement. Harmonization of private enforcement reduces such risk, though it has some limits in cases where undertakings seek to seize a jurisdiction whose civil justice system is slow and inefficient in order to delay a finding of antitrust liability. Harmonised rules would not be able to prevent this outcome.

A second undesirable consequence is the alteration of the level playing field. Level playing field refers to a legal environment in which competitors may compete under the same conditions. An important factor affecting the level playing field is the diversity of legal systems, which results in different regulatory duties, liability standards, etc. Rules regulating antitrust litigation contribute to the equality of competitive conditions. For example, different rules on determination and quantification of antitrust damages give rise to different amounts of compensation, which has an impact on the financial capability of a company to compete in the future. The achievement of a perfect regulatory level playing field is illusory as this would require applying identical rules on taxation, labour law, etc. However, achieving a minimum level playing field in antitrust enforcement is still desirable especially when harmonization costs are not excessive.⁷³

Co-ordination of public and private enforcement

Public and private enforcement do not necessarily interact with each other, but the reality is that they often do. Regulation No 1/2003 laid down some rules concerning private enforcement,⁷⁴ but did not make detailed provisions for all possible aspects. Indeed, a particular issue that arose during the policy-making of private enforcement was when third parties (i.e. would-be claimants) asked to access information held by antitrust agencies and that had been obtained through the execution of leniency programmes. Sometimes public authorities refused such a request because it might deter other undertakings from applying for such programmes as it would ultimately provide their victims with evidence to be used in civil liability actions. In *Hydrogene Peroxide*,⁷⁵ the General Court seemed open to allowing disclosure of such evidence as it argued that prohibiting access to such information on the grounds that it jeopardises leniency applications would lead to the conclusion that any document held by the Commission should not be disclosed.⁷⁶ However, on similar facts, the decision was different. In *Pfleiderer*⁷⁷ the applicant requested to the German competition authority for access of documents, which had been obtained through a leniency

⁷² For an example of an action seeking a negative declaratory relief: *Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd* [2010] EWCA Civ 864; [2010] Bus. L.R. 1697 (CA (Civ Div)).

⁷³ The Final Report indicates the costs resulting from the adoption of common rules (e.g. group litigation). Although it does not quantify such costs, they would occur only once, that is to say when national rules are reformed or introduced in order to implement the Damages Directive. Renda, Peysner, Riley, Rodger, Van Den Bergh, Keske, Pardolesi, Camilli, and Caprile, “Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios. Final Report” (2007). <<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>> (last visited: 28 May 2015). Hereinafter “the Final Report”.

⁷⁴ For example, Article 6 provides that national courts shall have the power to apply Article 101 and 102 TFEU. Article 15 makes provisions for co-operation between national courts and the Commission or competition authorities. Article 16 prohibits national courts to take decisions running counter a Commission’s decision and avoid giving decisions that would conflict with a Commission’s decision to be taken in pending proceedings.

⁷⁵ Case T-437/08 *CDC Hydrogene Peroxide Cartel Damage Claims v Commission* [2011] ECR II-8251.

⁷⁶ Para 70.

⁷⁷ Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-05161.

procedure. The Court of Justice held that a balance between the effectiveness of leniency programmes and the effectiveness of the right to compensation had to be struck on a case-by-case basis, according to national law.⁷⁸ As the assessment had to be made on a case-by-case basis, the Commission was concerned about the resulting legal uncertainty,⁷⁹ which justified EU rules on this matter.⁸⁰

As the Commission pointed out, *Pfleiderer* was already creating divergent solutions among Member States' courts.⁸¹ Allowing a situation where some Member States permit disclosure and others do not would have jeopardised a coherent strategy of public enforcement carried out by national competition authorities. Thus, uniform EU rules were necessary to avoid this outcome. Different treatments of access to information obtained in the execution of leniency programmes was not the only problem. At a deeper level what was at stake was the priority to be given when in some instances the needs of public and private enforcement conflict with each other. In particular, effective private enforcement would have made desirable to allow would-be claimants to have access to the files of competition authorities as the information therein contained might provide compelling evidence on infringements of competition law. However, this solution would have jeopardised the working of two sensitive areas of public enforcement, such as leniency programmes and settlement procedures. As mentioned above, prospective applicants would be reluctant to submit sensitive documents to a competition authority if they know that such documents may be disclosed and used in civil proceedings. Directive 2014/104 EU rejected this solution and strikes a balance by distinguishing between two types of evidence.⁸² The first relates to leniency applications and settlement submissions, which cannot at any time be disclosed; the second relates to other information prepared by a natural or legal person for the proceedings of a competition authority, information drawn up by a competition authority and sent to the parties in the course of the proceedings, and settlements submissions that have been withdrawn. This second type of information may be disclosed after the competition authority has closed its proceedings.

Effectiveness of private enforcement

The last argument presented by the Commission was that Member States had been slow to reform their system of private enforcement to ensure the victims' right to antitrust compensation. Effectiveness has different meanings, but in this context it is plausible to refer to the requirement that national law must not make the exercise of Union rights virtually impossible or excessively difficult.⁸³ This reading is confirmed by the fact that Directive 104/2014 also refers to this type of effectiveness.⁸⁴ The assertion that Member States have been slow in putting in place effective private enforcement rules seems to be justified: *Courage and Crehan* was issued in September 2001 and in 2013 the Commission noticed that many Member States did not yet have effective rules on private enforcement.⁸⁵ While in the previous Commission's policy documents the main rationale behind harmonization was the adverse effects resulting from diversity of the national legal systems, in the 2013 Impact Assessment the Commission's focus was on the ineffectiveness of the Member States' domestic laws. From a quantitative viewpoint, the 2004 Ashurst Report found that only 60 judgments on competition law had been decided, of which 28 judgements resulted in an award.⁸⁶ This provided support for the Commission's claim that

⁷⁸ Paras 31 and 32.

⁷⁹ 2013 Impact Assessment at p. 14.

⁸⁰ Directive 104/2014 now provides that national courts cannot at any time order a party or third party to disclose leniency statements and settlement submissions (Article 6.6).

⁸¹ 2013 Impact Assessment at p. 14.

⁸² Article 6.

⁸³ See above footnote 59.

⁸⁴ Article 4.

⁸⁵ 2013 Impact Assessment, at p. 43, paras 129-130.

⁸⁶ "Ashurst Report" at p. 1.

Member States' laws were not effective. However, empirical research covering the period 1999 to 2009 found a mixed picture of competition law cases, where there was more litigation in some Member States than others.⁸⁷ From a qualitative viewpoint, the assessment is more difficult but the existence of more cases brought in some jurisdictions than others seems to confirm that diversity of legal rules created a situation of unequal enforcement across the Member States. In addition, the research highlighted that there had been almost no small-value mass consumer claims based on competition law,⁸⁸ which lends support to the Commission's claim that the law of some Member States was not effective. The above findings confirm the Commission's assertion that Member States did not have an effective system of private enforcement. The point is however whether Member States' inaction justifies EU measures. Put differently: is Member States' slowness in their regulatory intervention sufficient to justify the EU added value or is it simply an extra argument that reinforces the case for EU action established on the basis of other arguments?

The issue may be rephrased in terms of the basis of assessment for the comparative efficiency calculus. Should it be based on past national regulatory failures or is it sufficient to make an ex-ante assessment of the likelihood of Member States to provide effective enforcement policies? Arguing that national regulatory delay is itself sufficient to justify EU action seems excessive: given the constitutional centrality of subsidiarity, more arguments for EU action are probably desirable. Nonetheless, waiting for national policies to be ineffective before taking action at EU level is also undesirable. First, the Commission should provide an input to the Member States, asking them to put in place new measures, or amend existing national rules, in order to accomplish a certain goal. Then Member States' action should be assessed. In the case of negative assessment or Member States' inaction, EU measures would finally be justified. This latter way of proceeding has the shortcoming that during this process some adverse effects of national regulatory failure might materialise and affect other Member States. Thus, one may wonder why wait for national regulatory failures, when it can be reasonably foreseen that EU action is likely to be more effective and such failures are likely to affect other Member States. After all, effectiveness may also be assessed not only in terms of the ability of a policy to achieve a specific goal, but also in terms of how expeditious a regulatory response is. To some extent, this was the Commission's way of proceeding in relation to collective redress, where the Commission has enacted some soft law and will assess the Member States' implementation in 2017. On that basis, it will consider whether to enact further measures.⁸⁹ While this strategy is respectful of Member States' regulatory autonomy, one may wonder about the adverse consequences that consumers will suffer meanwhile from the lack of adequate national legislation.

In the case of private enforcement of competition law, the goals of avoiding forum shopping and co-ordination of public and private enforcement show the added-value of EU rules. Nonetheless, it cannot be ruled out that in the future there might be some instances where Member States may themselves be able to provide rules that accomplish a certain European policy goal, but be too slow in doing so. The above-mentioned case, *United Kingdom v Parliament* seems to be a good example where the Member State does not have the incentive to carry out reforms, which in turn dissuades other Member States from carrying out reforms in the fear that if they regulate a certain matter, then those adversely affected by such regulation will move to a jurisdiction which had not regulated it. This point will be elaborated in the next section.

⁸⁷ Competition Law Comparative Private Enforcement & Consumer Redress in the EU. The research was led by Professor Barry Rodger and funded by the Art and Humanities Research Council. The reports are available at: <http://www.clcpecreu.co.uk/default.htm> (accessed 28 May 2015).

⁸⁸ Findings presented at Conference 15 September 2012 at LSE, London, at <http://www.clcpecreu.co.uk/default.htm> (accessed 28 May 2015).

⁸⁹ O.J. 2013 L201/60, "Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law", para 41.

4. Regulatory competition in private enforcement?

The previous paragraph showed that EU private enforcement rules were introduced also to overcome Member States' legislative inertia. However, this motivation could be challenged on the basis that harmonization is undesirable because it prevents Member States from experimenting with new legal solutions that could make private enforcement more effective than that resulting from EU harmonization. Indeed, the introduction of substantive and procedural rules applicable to antitrust damages actions will constrain national courts' jurisdiction.⁹⁰ Directive 2014/104/EU provides some rules regulating the effects of national competition authorities' findings on national courts,⁹¹ or limiting national courts' power to disclosure evidence held by competition authorities obtained from leniency applications or settlement submissions.⁹² While the rationale behind these rules is to co-ordinate national competition authorities and national courts, they will also limit national policy-makers' room for manoeuvre to introduce more effective rules that could facilitate damages claims.

This challenge may be conceptualised through the theory of regulatory competition, which was elaborated by US scholarship.⁹³ Broadly speaking, it holds that local policy-makers compete to attract businesses, investments, and other productive factors by offering a favourable jurisdiction characterised by minimum legal requirements for businesses. Such a competition forces policy-makers to devise a legal system devoid of unnecessary regulatory burdens, which makes their jurisdiction hospitable to businesses and whose outcome is the creation of an efficient legal environment. It follows that not only is the introduction of uniform rules across all jurisdictions unnecessary, but it is also undesirable because it prevents local policy-makers from experimenting with new rules leading to the creation of an efficient legal system. This theory is controversial on different grounds. First, it can be questioned whether policy-makers engage in such regulatory competition. After all, legal traditions still play an important role. Second, it can be questioned whether such regulatory competition leads to an efficient legal system (race to the top) or, rather, gives rise to regulatory failures that adversely affect some stakeholders (race to the bottom).⁹⁴ In the US a great deal of literature on regulatory competition has been developed in the field of corporate law, but there have been attempts to apply it also in relation to antitrust.

The theory of regulatory competition has never been fully embraced by EU legal scholars,⁹⁵ perhaps because in the EU the most pressing need was to build the internal market, which also required levelling different national rules and legal standards that would hinder the freedom of movement of goods and services. However, it is worth asking whether regulatory competition would be desirable in the field of private enforcement of competition law in order to facilitate victims of breach of competition law making a claim. It is difficult to make an accurate prediction of what Member States would do; however, some scepticism is warranted.

First of all, it is doubtful that all EU national policy-makers engage in a competition to offer the most favourable jurisdiction to make antitrust claims. In some Member States antitrust litigation

⁹⁰ Kathryn Wright, *The Ambit of Judicial Competence after the EU Antitrust Damages Directive*, 43 *Legal Issues of Economic Integration* 15 (2016).

⁹¹ Article 9.

⁹² Article 6(6). See above on the co-ordination between public and private enforcement.

⁹³ US literature on regulatory competition is extensive. The seminal contribution to this theory was Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *Journal of Political Economy* 416 (1956).

⁹⁴ Lucian Bebchuk, *Federalism and the Corporation: the Desirable Limits of Competition in Corporate Law*, 105 *Harv.L.Rev.* 1435 (1992); Mark Roe, *Delaware's Competition*, 117 *Harv.L.Rev.* 588 (2003); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 *Journal of Law, Economics, and Organization* 225 (1985); Marcel Kahan and Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 *Stan.L.Rev.* 679 (2002).

⁹⁵ For some exceptions, Anthony Ogus, *Competition between national legal systems: a contribution of economic analysis to comparative law*, 48 *ICLQ*, 405 (1999), or Damien Geradin, *Competition between rules and rules of competition: a legal and economic analysis of the proposed modernization of the enforcement of EC competition law*, 9 *Colum. J. Eur. L.* 1 (2002).

seems more present,⁹⁶ but this does not necessarily mean that policy-makers reformed some procedural rules in order to create an efficient legal system or to encourage antitrust litigation. A second critical point concerns whether national policy-makers are better suited to enact effective rules on private enforcement. In theory it could be argued that Member States' policy-makers could benefit from the positive experience developed by some Member States, or from regulatory failures that have occurred in other Member States, or from their experiments with new legal solutions. However, as shown above, past experience shows that that has not been the case.⁹⁷ Empirical research on private enforcement⁹⁸ found that competition law litigation took place among businesses in commercial disputes and in which violations of competition law were used as a defence rather than cause of action to claim compensation. The research also found that civil procedure national rules and national cultures affect litigation rates. Finally, there were almost no small-value mass consumer claims based on competition law.⁹⁹ This calls into question that policy-makers make legal reforms to offer a jurisdiction hospitable to competition law claims. In fact the opposite risk should be highlighted. Antitrust litigation is costly both for the civil justice system and for undertakings condemned to pay damages and legal costs. The risk is that policy-makers may prefer to put in place unfavourable litigation rules for consumers for the fear of exposing companies to significant antitrust liability. This may be the case when policy-makers are lobbied by big corporations who are able to exert greater pressure than consumers. Put differently, instead of protecting consumers, the category most adversely affected by antitrust violations, policy-makers may adopt a 'pro-business' attitude by not encouraging antitrust litigation or other forms of consumer redress. This possibility underlines the flawed assumption of the theory of regulatory competition, which holds that policy-makers are rational actors where 'rationality' consists in the goal of creating an efficient legal system for the benefits of antitrust victims. This is ultimately an empirical matter and it depends on cultural, social and political factors.

Finally, with regard to the argument that the preservation of Member States' diversity in their systems of private enforcement enables some Member States to experiment with new solutions¹⁰⁰ by learning from the experience of 'successful' Member States, it can be countered that the EU rules provided in Directive 104/2014 and the soft law on collective redress were not formulated in a vacuum, rather they are the outcome of a numerous stakeholder consultations in which the limitations of domestic procedural and substantive laws of damages were discussed. The current legal framework of private enforcement is not the result of a 'market approach' to policy-making, which underlies the theory of regulatory competition; rather it is the outcome of a wide consultation process, which also saw the participation of expert stakeholders who will be affected by private enforcement.¹⁰¹ In such consultations, both open and targeted, stakeholders provided a

⁹⁶ The Commission reported that United Kingdom, Germany and the Netherlands were the jurisdictions where the vast majority of antitrust actions were brought. 2013 Impact Assessment, at p. 19. Other findings were presented in a conference in 2012 at the London School of Economics, London, which showed that in Germany, Spain, France, UK, Netherlands, Belgium, Italy, Portugal and Sweden more actions than previously thought had been brought. <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf> (accessed 1 July 2015).

⁹⁷ 2013 Impact Assessment, at p. 66.

⁹⁸ The research is called 'Comparative private enforcement & consumer redress in the EU' and was carried out by a team led by principal investigator Professor Barry Rodger. It was funded by the Arts and Humanities Research Council.

⁹⁹ <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf> (accessed 1 July 2015).

¹⁰⁰ With regard to collective redress, Hodges took a similar stance as in 2008 he noted that Member States were experimenting and evaluating their collective redress mechanisms thus making harmonization undesirable. Christopher Hodges, *The Reform of Class and Representative Actions in the European Legal Systems*, 181 (Hart 2008).

¹⁰¹ Consultations on Green Paper on Damages actions for breach of the EC antitrust rules, held from 20 December 2005 to 21 April 2006 http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html and on the White Paper on Damages actions for breach of the EC antitrust rules held from 3 April to 15 July 2008 http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html (accessed 28 May 2015). In addition, in 2007 targeted consultations were held with experts from Member States representing ministries of

great deal of evidence about national civil proceedings, national procedural rules, problems encountered in the enforcement of the right to antitrust compensation, and so forth. The amount and quality of the information provided in those consultations are equally valuable to creating an effective system of private enforcement. There is no reason to think that transplanting successful rules from other Member States was better than the current EU framework on private enforcement, which is the outcome of a collaborative effort shared among a great number of stakeholders.

5. Subsidiarity and the Commission's policy discretion

The previous sections examined separately the arguments for subsidiarity. This section attempts to broaden the view on the whole policy issues at stake in private enforcement. In particular, the argument presented here is that in competition law there are some policy considerations that should be made prior to the subsidiarity analysis. On the surface subsidiarity requires determining the most effective level of regulatory intervention. However, the answer to this question depends on the policy goals assigned to private enforcement and on the best type of regulatory intervention to achieve such goals. These considerations affect the framing of the issues and how to address them. Only once these problems are defined, does subsidiarity come into play in order to identify the best level of intervention. Put simply: before deciding who should do it, first it must be decided what should be done.¹⁰²

As expounded above, the two primary goals of private enforcement are compensation of antitrust victims and deterrence. While the Court of Justice recognised the existence of these two goals in *Courage*, the Commission took the initiative to implement them in such a way as to make private enforcement consistent with the Commission's enforcement action. The Commission was entitled to take such an initiative given that competition policy is one of the exclusive competences of the EU. On this basis, the Commission decided how best to pursue compensation and deterrence by detecting the problem to be addressed (antitrust victims remained largely uncompensated), the sources of the problem (inadequacy of the national procedural framework in relation to the peculiarities of antitrust damages actions) and the extent of the problem (quantification of antitrust losses suffered by antitrust victims).¹⁰³ With regard to this latter aspect, in the 2013 Impact Assessment the Commission estimated that the welfare losses resulting from price-fixing agreements ranged between €13 billion and €37 billion and their detection rate was 15%. In addition, price-fixing agreements producing effects on national markets were estimated to be between €25 billion and €69 billion.¹⁰⁴ Such figures were drawn from an expert report, which provided a great number of estimates in relation to both anti-competitive agreements and abuse of dominant position.¹⁰⁵ These figures showed the magnitude of the infringements of EU competition law, which in turn justified the need to increase the deterrent impact of private enforcement. It is submitted that these aspects were pivotal in the design of private enforcement and it is where the Commission could exercise discretion in its broadest form by deciding that private enforcement was the best available policy to accomplish such goals.

justice, ministries of economic affairs, of national competition authorities. A delegation of national judges was also heard. 2013 Impact Assessment, at p. 6.

¹⁰² However, the Better Regulation Guidelines 2015, set out the order differently as the first step is the identification of the problem, the second is why the EU should act, and the third is what should be achieved. COM(2015) 215 final, "Commission Staff Working Document. Better Regulation Guidelines", pp. 18-21.

¹⁰³ Indeed, these operations must be carried out in the preparation of the Impact Assessment. See COM(2015) 215 final, "Commission Staff Working Document. Better Regulation Guidelines", pp. 16-17.

¹⁰⁴ 2013 Impact Assessment, at p. 22. Welfare losses included the overcharge (i.e. higher prices paid by consumers as a result of the price-fixing agreements) and deadweight losses (consumers' forgone benefits or inefficient substitutions incurred due to such agreements).

¹⁰⁵ The Final Report 71-127.

After this first stage of ‘broad policy discretion’, the aspect of the most suitable rules to achieve such goals had to be dealt with. Directive 2014/104 made provisions for *inter alia* disclosure of evidence,¹⁰⁶ including that held by a competition authority,¹⁰⁷ joint and several liability,¹⁰⁸ passing-on defence,¹⁰⁹ indirect purchaser standing,¹¹⁰ and quantification of harm.¹¹¹ Rules on collective redress have been deliberately excluded from the Directive and are contained in the above-mentioned Recommendation and Communication on collective redress¹¹² and have been laid down as general principles rather than specific rules. All these rules have been formulated with a view to addressing the problems typical of antitrust litigation (e.g. hidden evidence, overcharge passed on down to the distribution chain, and so forth). As such, they may be understood in light of their ability to provide a legal framework facilitating antitrust litigation, which amounts to the limb of the test of the proportionality principle, which examines the suitability of a measure to achieve its end. It would be out of the scope of this paper to analyse the contents of these rules and whether they are adequate to promote antitrust compensation and deterrence; however, reference to proportionality brings us back to the argument presented by Davies,¹¹³ who argued that this principle is better suited than subsidiarity to deal with the division of competences between EU and Member States. Craig disagreed arguing, *inter alia*, that this approach alters the role of the principle of proportionality and creates the same problems encountered by the Court of Justice when adjudicating on subsidiarity.¹¹⁴

The aspects concerning the best policy tool to promote compensation and deterrence (i.e. private enforcement) and the relevant rules set out in Directive 2014/14 and the soft-law on collective redress have to do with ‘what should be done’. It was only after these aspects were decided that it was possible to identify who should put in place such rules. The fact that the EU was better suited to putting in place such measures was the consequence of how the Commission framed the above-mentioned policy issues concerning the problems to be addressed, the evidence concerning such problems, and so forth. Inevitably, a great deal of discretion underpinned the elaboration of such issues. If this reading is correct, then the view that subsidiarity raises too many expectations is confirmed. As Davies submitted, subsidiarity does not provide any indication about the broad policy goal to be achieved and the relative means. Not surprisingly the Commission’s Regulatory Scrutiny Board (previously, the ‘Impact Assessment Board’) often refrains from offering legal interpretations of subsidiarity on the Commission’s legislative proposals, and instead it asks to better specify why EU action is needed.¹¹⁵ With regard to the legislative proposal leading to Directive 2014/104 EU, the Impact Assessment Board did not express any concerns about subsidiarity.¹¹⁶

It may be tempting to be sceptical about the utility of subsidiarity. Against this view, two arguments may be made. First, the Commission’s new Better Regulation programme provides that the added value of EU measures will be subject to evaluation,¹¹⁷ which will focus on a

¹⁰⁶ Article 5

¹⁰⁷ Articles 6 and 7

¹⁰⁸ Article 11

¹⁰⁹ Article 13

¹¹⁰ Article 14

¹¹¹ Article 17.

¹¹² COM (2013) 401 final, “Commission Communication, Towards a European Horizontal Framework for Collective Redress” and O.J. 2013 L201/60, “Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”.

¹¹³ Gareth Davies, *Subsidiarity: the wrong idea, in the wrong place, at the wrong time*, 43 CML Rev. 63, 71 (2006).

¹¹⁴ Paul Craig, *Subsidiarity: A Political and Legal Analysis*, 50 JCMS 72, 82-83 (2012).

¹¹⁵ Anne Meuwese and Suren Gomtsian, *Regulatory Scrutiny of Subsidiarity and Proportionality*, 22 MJ, 483 (2015).

¹¹⁶ European Commission, Impact Assessment Board, Opinions 2012 and 2013 on ‘DG Comp – Impact Assessment for the legislative proposal on Antitrust Damages Actions. At: http://ec.europa.eu/smart-regulation/impact/ia_carried_out/cia_2013_en.htm#comp (accessed 6 January 2016).

¹¹⁷ COM(2015) 215 final, “Commission Staff Working Document. Better Regulation Guidelines”, p 60.

qualitative analysis of the change brought about by the EU measures. The Commission is aware that the analysis of the added value is problematic due to the difficulties in identifying a counterfactual.¹¹⁸ Evaluating EU measures of private enforcement will be made on the basis of empirical data comparing competition law damages actions pre-Directive with post-implementation of the Directive to determine what changes the Directive has brought.¹¹⁹ It is difficult to predict the impact of such evaluation exercise on subsidiarity and in particular whether it will result in the Commission proposing to transfer back some aspects currently regulated by the Directive on damages actions.¹²⁰ However, whatever the outcome, the epistemic basis for the assessment of subsidiarity will be comprehensive. Previously, the assessments underpinning subsidiarity were prospective: the starting point was the inadequacy of Member States to achieve a certain goal and the EU regulatory measures were formulated with the expectation that they would achieve such goal. From now, the subsidiarity assessment will be prospective and retrospective. The expectation of the enhanced effectiveness of EU regulatory measures will be tested against the concrete effects brought about by such measures. In this latter respect, Member States will be able to provide important information on whether an EU measure had added-value.

The second argument maintaining the significance of subsidiarity is that the Commission still has an obligation to present arguments and evidence that the EU measures have added-value. The fact that this is done in the impact assessment, that is to say in the early stage of the legislative process, enables the European and national Parliaments to exercise control. In fact, these political institutions are better placed to carry out the subsidiarity check than the Court of Justice, which, as seen above, seems to be reluctant to call into questions the Commission's policy considerations concerning the most appropriate level of regulatory effectiveness. As mentioned above, national Parliaments are already entitled to raise concerns over the lack of subsidiarity.¹²¹ It is precisely in this context that they could present other evidence complementing that produced by the Commission. Both arguments show that Member States' involvement may be significant, which promotes a richer understanding of subsidiarity. Although national Parliaments have broad and differing views of the meaning of subsidiarity,¹²² the common element is the concern that the Commission is encroaching on national competences. Instead, a constructive approach is that rather than considering subsidiarity as a means to retain domestic regulatory powers, it could be seen as an opportunity for Member States to engage in the legislative process by bringing their own evidence and expertise and identifying the most effective solution to a specific problem. To some extent, this was the case during the preparatory works for the Directive on damages actions, when the Commission met with ministerial and competition authorities' experts of the Member States.¹²³ Member States also submitted their observations during the online consultations on the Green Paper¹²⁴ and the White Paper.¹²⁵ Although the Commission did not report how such informational input was used, it is plausible that Member States provided important information that enhanced the quality of the legislation on private enforcement, thus contributing to give added-value to the Directive on damages actions. Yet, such Member State engagement was incomplete, as national Parliaments limited themselves to not raising concerns on breach of subsidiarity under above-mentioned Protocol No 1. This

¹¹⁸ *Ibid.*

¹¹⁹ Indeed, this was already provided by the Directive on damages actions, which prescribes the Commission to produce a report on the working of these rules and, if appropriate, to present a legislative proposal (Article 20).

¹²⁰ The 'Commission Staff Working Document. Better Regulation Guidelines' state that where there is little evidence of the EU added value of an intervention, consideration should be given to its repeal, at p 60.

¹²¹ O.J. 2004, C/310/204. "Protocol (No 1) on the role of national Parliaments in the European Union".

¹²² COM(2013) 566 final, "Report from the Commission, Annual Report 2012 on Subsidiarity and Proportionality".

¹²³ IA 2013 p 6.

¹²⁴ http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html (accessed 22 September 2015).

¹²⁵ http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html (accessed 22 September 2015).

should prompt an important reflection. EU policy-making can no longer be seen as a top-down approach: evidence-based policy-making requires information of domestic legislation. As the 2008 and 2013 IA on damages action shows, such information was provided by representatives of the executives of the Member States, national competition authorities, some judges and private stakeholders, the latter predominantly represented by businesses. In other words, the advocated engagement in the legislative process came from many actors, public and private, but not from national Parliaments, the closest representatives of EU citizens. Arguably, the understanding of subsidiarity as a constraint of EU action was partly to blame, which shows the appropriateness of moving towards a broader conception of subsidiarity, which also includes a positive engagement with the Commission.

6. Conclusion

This paper made an analytical assessment of the Commission's arguments about subsidiarity on private enforcement and how the Commission framed the policy issues underlying private enforcement. The argument to limit forum shopping and ensure some degree of a level playing field can be understood within the traditional rationale of internal market governance. The need to ensure proper co-ordination between public and private enforcement has to do with the fact that the Commission and, in some instances, national competition authorities enforce EU competition law. In this respect, of particular importance is the disclosure of evidence held by a competition authority for the purposes of bringing damages actions. Directive 2014/104 provides absolute protection from disclosure of leniency applications and settlement submissions, and temporary protection of other information produced in the course of antitrust administrative proceedings. These provisions show the Commission's intention to repeal *Pfleiderer*¹²⁶ and in particular to preserve two areas of public enforcement (leniency statements and settlement submissions) as fully operative and attractive for potential applicants. However, apart from these two exceptions, private parties will be able to obtain other evidence held by a competition authority after the closure of its proceedings. Regardless of whether the balance between effectiveness of public enforcement and effectiveness of private enforcement has been struck at the optimal point, co-ordination between public and private enforcement is necessary. Finally, this paper has identified a further Commission's argument that could become a new justification for EU regulatory measures: overcoming some Member States' legislative inertia in pursuing a certain policy (private enforcement, in the present case). This justification poses various problems. On the one hand, it is reasonable to allow Member States to develop new legal solutions in order to implement EU policies. This would be desirable in those technical areas like procedural law, which are difficult to harmonise. On the other hand, experience shows that not all Member States were prompt in putting in place measures designed to make effective the right to antitrust compensation.

Striking a balance between these two aspects is a difficult exercise. How long should legislative inertia last before the Commission is entitled to take action? What if some Member States have already put in place measures designed to enforce a certain EU policy whereas others have not? Is it better to leave Member States their regulatory autonomy and to take EU measures at a later stage in order to deal with national regulatory failures that have been experienced and that impair the very EU policy that Member States were asked to enforce? It is submitted that the answers to such questions should be made on a case-by-case basis where the Commission should enjoy broad discretion.

It has also been showed that subsidiarity presupposes a decision on the policy goals to be achieved and the relevant regulatory tools to achieve them. It has been argued that in areas related to an exclusive competence of the Union, these two assessments entail a high degree of policy discretion that should precede the identification of the level of regulatory intervention (European rather than national). Although the 2015 Better Regulation Guidelines hold that the

¹²⁶ Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-05161.

Commission should ask first why the EU should act and then what should be achieved, the opposite seems more appropriate: the first question is what policy goals should be accomplished and then whether an EU measure would bring an added-value.

This paper confirmed that if the purpose of subsidiarity is to constrain the Commission's action, then it raises too many expectations. Subsidiarity can call into question EU measures where it is evident that there is no EU added value and the Member States are already adequately addressing the problem identified by the Commission. Beyond this point, the assessments involved in the subsidiarity check remain largely discretionary. Finally, a more complete understanding of subsidiarity has been suggested. Rather than a principle designed to protect Member States' regulatory autonomy, it should also be seen as an opportunity for the Member States to engage in the legislative process since the outset.