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"THE ASSESSMENT OF THE LOSS IN FOLLOW ON PROCEDURES (legal presumptions, proof, valuation)".

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INTRODUCTION:

In two recent judgments of March 1er 2023[1], the Commercial Chamber of the Court of Cassation was confronted with the question of the heads of damage in matters of private enforcement. This case concerned the investment damage linked to the unavailability of capital following an anti-competitive practice. This decision illustrates the stakes of the evaluation of the loss in private enforcement matters.

In order to understand correctly all these issues, we will study the following topic: "The assessment of the loss in follow on procedures". This approach of the subject will be centered around the notions of proof, legal presumptions and quantification (also named valuation). It is a complex subject mixing legal and economic issues.

This topic raises many interesting questions whose answers will shape the development of private enforcement in Europe. One of the main questions is regarding the demonstration of damage. It is mainly an issue of how to access evidence. In order to demonstrate the existence of a prejudice, it is obviously necessary to prove it. This proof can be very difficult to provide. There is also a problem relating to the quantification of the various losses, which is a matter of complex economic analysis. There is a real need for a legal translation of all these economic concepts.

In addition to these issues, there is a broader and more important issue, which is the effectiveness of private actions. The European Union, and France in particular, is lagging far behind in this area. The challenge is to find the right balance between private and public actions. While public actions are the most important, private actions are an effective means of enforcing competition law. Competition authorities have limited resources, and competition law is a long and complex law. Therefore, it is absolutely necessary that private actions can complement public actions. For example, more than 90% of competition law actions in the United States are private actions. Public actions, commonly referred to as

[1] Cass. Com, 1st March 2023 No 20-18.356

"public enforcement", are designed to stop anti-competitive practices and to fine violators. In addition, private actions are the only means by which parties can obtain redress for their harm resulting from an anticompetitive practice. The sole purpose of public action is to protect the market. It is not the responsibility of competition authorities, in public actions, to compensate victims of anticompetitive infringements.

This subject is not entirely recent, but it has been the subject of more and more concerns the last few years. The development of private enforcement through European initiatives has encouraged legal writers and professionals to define more precisely this evaluation of damages. Private enforcement is becoming an increasingly important part of the activity of law firms, and there is a real need for both legal and economic experts. Some of the questions that will be addressed in this report are somewhat older. We can find them during the first debates on the implementation of private enforcement. It is notably a question of the articulation of private enforcement with certain fundamental rights, and certain procedures relating to public actions.

In order to fully understand the following reflection, it is important to master the essential notions.

Private actions, also known as "private enforcement", take place when *"damages resulting from infringements of national or Community competition law may be the subject of actions for compensation and/or cessation brought before the courts of the Member States, on the basis of the rules of civil liability in tort and quasi-delict. (...) The common law of such liability in the Member States usually requires proof, provided by the plaintiff, of a fault, of a loss and of a causal link between the two"*[2] .

Among these private actions, there are two different types of actions. On one hand, there are "follow-on" actions, i.e. actions for compensation following a decision rendered by a competition authority. On the other hand, there are "stand alone actions". That is to say, spontaneous actions before a specialized court, without waiting for a decision or proceedings by a Competition Authority. In this paper, we will focus only on follow-on proceedings.

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[2] *Jacqueline Riffault-Silk, Action et recours privés, Dictionnaire de droit de la concurrence, Concurrences, Art. N° 86754*

It is also important to define the concept of prejudice, which is often assimilated with the concept of damage in civil liability. The term "prejudice" is used to designate an injury suffered by a person through the act of a third party. There are different kinds of damage which, in order to be legally reparable, must meet a certain number of conditions"[3] . This damage can be physical, material or moral. There are several nomenclatures of these prejudices. For a prejudice to be characterized, it must meet three conditions: it must be certain, direct and affect a legally protected interest. If the certainty of the prejudice prevents the compensation of a possible prejudice, it does not prevent the compensation of a future prejudice.

The notion of proof is also an essential notion for the reflection that will follow. Quite intuitively, proof is the "demonstration of the existence of a fact (materiality of damage) or of an act (contract, will) in the forms admitted or required by law"[4] . With this notion of proof, we find that of the burden of proof. *"It is defined as the duty incumbent on a party to allege a fact and, if it is contested, to prove it, on pain of having his claim dismissed. This definition covers two dimensions. On the one hand, the objective burden of proof invariably falls on one and the same party, who bears the risk of proof: the impossibility of proving an allegation is to his detriment. On the other hand, the subjective burden of proof refers to the duty to provide evidence in support of a contested allegation."*[5].

Of course, the notion of burden of proof refers to presumptions, which is the fact of deducing from a known fact an unknown fact or a legal conclusion. These presumptions can be irrebuttable or simple. In the first case, it is impossible to prove the contrary, while in the second case the presumption can be contradicted by evidence to the contrary.
In order to conclude this explanation regarding the key terms of the subject, it is appropriate to look at the notion of estimating the damage. Estimation is "the action of determining the value, the price of something"[6] . It is also referred to as quantifying the harm, which comes down to the idea of putting a figure and value on the harm suffered.

[3] Fact sheets, Civil liability, Dalloz, January 2023

[4] Gérard Cornu, Vocabulaire Juridique, Association Henri Capitant, 14 ème édition, n. preuve

[5] Sven Frisch, Burden of proof, Dictionary of Competition Law, Concurrences, Art. No. 85883

[6] Larousse, website, "estimation"

The interest of this subject is to trace the evolution of the evaluation of the damage, the difficulties of this evaluation, and thus to study the solutions proposed to mitigate these difficulties. The goal is to have a better approach of this crucial level of reasoning, in order to see what are the solutions in the long run to facilitate it. Therefore, a new classification of damages in the field of anti-competitive practices will have to be studied. The interest will also be to analyze the insufficiency of the proposed solutions, and to explain which legal policy choices justify these insufficiencies.

At this point, it is important to delineate the boundaries of this topic. It is true that such a subject lends itself well to a comparative study. The question of the evaluation of the prejudice may vary from one State to another, particularly with regard to the quantification of these prejudices. However, this is not the place for such a study. In order to better understand this subject, we will study the general difficulties relating to private enforcement within the European Union, and therefore focus on the sources of this law. To illustrate the reflection, we will study the case of France. It will then be appropriate to look at certain French particularities as well as certain proposals from French doctrine. It will not be appropriate here to study the effectiveness of private enforcement in other countries of the European Union, nor even in countries outside the European Union.

Moreover, this is a legal analysis of the question of the evaluation of the damage. It is true that this subject leads to numerous economic analyses. However, we will not focus on these economic questions, but rather on their legal translation. The precise mathematical techniques for calculating the loss will not be analyzed and criticized here. It will simply address some of these techniques in the simplest possible way, to give the reader an idea of how they are done. A more detailed analysis must be based on concrete economic expertise, which is also not necessary. The notion of prejudice will only be discussed here in the context of private actions, and more precisely in follow-on proceedings. The assessment of damages before the competition authorities or in stand-alone proceedings will not be addressed in this paper.

Finally, this reflection is not an analysis or a criticism of private actions in general, but rather a criticism of the evaluation of the prejudice during follow on actions. It is true that certain difficulties relating to this evaluation can be an obstacle to the development of private enforcement in Europe. However, there are other obstacles, of different natures, which could

be the object of a separate reflection. The perfect illustration of one of these is the ineffectiveness of collective redress.

Throughout this reflection, it will then be necessary to ask ourselves in what way the evaluation of prejudice in follow-on procedures still requires a framework and harmonization at the European Union level? And more precisely, we will ask ourselves what are the obstacles and what proposals could simplify this evaluation of the prejudice?

In order to respond, we will first see that, faced with the difficulties of assessing the damage, certain European initiatives for supervision and harmonization have emerged (PART 1). Then, it will appear that these initiatives are still insufficient and that new regulation proposals are emerging (PART 2).

PART 1: THE DIFFICULTIES OF ASSESSING DAMAGE IN PRIVATE ACTIONS, A NEED FOR A EUROPEAN FRAMEWORK AND HARMONIZATION

In this first part, it will be appropriate to set out the numerous difficulties that arise in the assessment of damages in private actions following an infringement of competition law (chapter 1). Then, it will be appropriate to expose the European solutions put in place to frame and harmonize private actions as a whole, in particular through the question of the evaluation of the damage (chapter 2).

Chapter 1: Difficulties in apprehending the damage resulting from an infringement of competition law

The first difficulty in assessing damages in a "follow-on" procedure is the economic aspect of its evaluation, which requires a complex expertise (Section 1). Then, the second difficulty is that there is a multitude of possible prejudices in competition law (Section 2).

Section 1: A complex demonstration and economic evaluation of the loss framed by the rules of tort liability

In French law, private actions in competition law are subject to the general regime of tort liability (§1), which requires proof of the damage suffered and therefore a complex economic evaluation of the latter (§2).

§ 1 - The application of the rules of tort liability to private actions for compensation

This paper discusses the difficulties of assessing damages and implementing private actions prior to the adoption of the 2014 Damages Directive[7]and its transposition into French law in 2017[8] .

Private actions following an infringement of competition law are brought by the victims of these infringements in order to obtain compensation for the damage they have suffered. The goal is to obtain compensation. It is not a question here of obtaining the pronouncement of a fine against the company that committed the infringement. It is therefore a liability action.

Prior to the adoption of the Damages Directive in 2014[9]by the European Commission, the textual basis for this liability action in French law was s Article 1240 of the Civil Code. This article provides that *"Any act of man, which causes damage to another, obliges the person by whose fault it occurred to repair it"*[10] . From this fundamental article, the case law has set up a whole set of rules. The case law has defined the limits of this liability and laid down the the conditions necessary to obtain compensation for the damage.

In French liability law, it is necessary to apply the principle of full reparation. This means that *"the damage resulting from an offence must be repaired in its entirety, without loss or profit for any of the parties"*[11] . This principle of full reparation of damages marks a profound difference with certain foreign legal systems in this area. In particular, with the United States, where punitive damages are allowed, notably with the technique of "treble punitive damages". French law refuses to admit such damages until now, even if certain decisions sometimes seem to come close. The principle of full reparation remains. Consequently, "compensation for damage, which must be full, cannot exceed the amount of the loss"[12] .

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[7] 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 349/1.

[8] Ordinance n°217/303 of 9 March 2017

[9] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014; op-cit.

[10] Art. 1240 Civil Code

[11] Cass. Crim. 1st September 2015, No 14-84.353

[12] Cass. Civ. 1 ère, 9 November 2004, No 02-12.506

This principle has been restated by the Court of Justice of the European Union (hereafter "CJEU"). in two fundamental judgments in the field of private enforcement. These are the "Courage"[13] and "Manfredi"[14] decisions. It is now enshrined in Article 1er of the Damages Directive[15].

In order to obtain compensation for damage under article 1240 of the Civil Code, it is necessary to demonstrate the existence of a fault, a loss, and a causal link between both. These three conditions have been taken up by the Court of Justice of the European Union. It specifies that a civil action for damages implies *"not only a finding that a harmful event has occurred, but also the existence of damage and a direct link between that damage and the harmful event"*[16] .

These conditions will raise a number of problems in competition matters. The first one relates to the proof of the fault. While it is not the main issue, it is important to note that this condition is far from obvious in competition law. Especially if we follow the general rule which provide that the burden of proof rests on the plaintiff. Indeed, competition law is a complex law, where most infringements are committed in secret, and where access to information is often difficult. However, we are dealing here with "follow on" actions, i.e. actions following a Competition Authority. This procedure makes it easier to characterize a fault. Indeed, all the difficult work to provide the proof will be carried out during the investigations of the Competition Authorities. There is a crucial balance to be find between the right to secrecy of the investigation (especially in leniency cases) and the right to evidence. Then, the main question is the access to these documents. This question will be studied later in this report.

The second issue is the proof the damage. It is true that in French case law (prior to the adoption of the Damages Directive[17]), there was a desire to lighten the requirement of proof

[13] CJEU, Courage and Crehan, C-463/99, EU:C:2001:466

[14] CJEU, Manfredi, C-295/04, EU:C:2006:461

[15] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit

[16] CJEU, 6 November 2012, C-199/11, Europese Gemeenschap v. Otis, ECLI:EU:C:2012:684, pts 65

[17] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit

of damage in competition matters[18]. It was the case in matters of unfair competition, where the Commercial Chamber of the Court of Cassation indicated that *"a commercial disturbance constituting damage, even if only moral, is necessarily inferred from an act of unfair competition"*[19] . While this case law already demonstrated a desire to simplify the actions of victims, it is still necessary for the victim to quantify his prejudice[20] . However, *"no Union rule specifically addresses this point, even though it is recalled that national rules must not contradict the principle of effectiveness and the principle of equivalence enshrined by the Court"*[21] . It is on this precise point of the quantification that a thorough and complex economic analysis is necessary.

§2 - A complex and uncertain economic evaluation of the damage

The demonstration of proof of the prejudice implies the obligation for the victim to quantify this prejudice in order to ask for the right amount of compensation. The step of quantification still remains a real test for the parties. As it will be seen in the next chapter, there is no provision in the Damages Directive specifying how to quantify this damage[22] . This is a difficult task for the parties but also for the competent judges. This quantification of the damage is essentially an economic analysis conducted by experts, not by lawyers. It is therefore very difficult for a lawyer to understand this quantification with legal criteria, since it results almost exclusively from the work of economists.

In order to quantify the damage, it is necessary to establish a counterfactual scenario. Indeed, *"the purpose of compensation is to place the injured party in the situation in which he would have been if the infringement of Article 101 or 102 TFEU had not been committed: the actual situation of the injured party must be compared to the situation in which that party would have been in the absence of the infringement"*[23] .

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[18] D. Bosco, C. Prieto "European Competition Law", Op. Cit p.1446.

[19] Cass. Com. 1st July 2003, No 01-13.052

[20] D. Bosco, C. Prieto "European Competition Law", Op. Cit p.1446.

[21] *Ibid,* p.1446

[22] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit

[23] Practical guide on the quantification of damage in actions for damages based on infringements of article 101 or 102 of the treaty on the functioning of the European Union - by the European Commission

This analysis is purely economic since it requires a market forecast in which the infringement did not occurred. However, the effects of an infringement of competition law on the market are multiple. An infringement may last for several years and impact a large number of operators. Therefore it is very difficult to establish a market hypothesis in which this infringement did not occur. Moreover, it is even more difficult to distinguish which developments in the market are the direct or indirect result of the infringement. The market is by nature uncertain, with many variables to take into account. For example, if a wheat cartel took place from 2020 to 2023, the price evolution over these years will not only be the result of the infringement. It is necessary to include contextual elements such as the war in Ukraine, whose effects have been considerable on this market.

It is also necessary to quantify not only the direct damage, but also the indirect damage caused by the infringement. This quantification of the indirect damage requires an even more advanced expertise, with even more precise data. As Rafael Amaro explains, *"evaluation mobilizes economic knowledge with which lawyers are unfamiliar, it involves the collection and analysis of considerable quantities of data and, despite the significant resources often devoted to it, it never completely dispels the uncertainty consubstantial to the counterfactual scenarios that make it possible to measure the harmful effects of anti-competitive practices."*[24] .

This difficulty in assessing the amount of the loss suffered is a major obstacle to the development of private enforcement in Europe, and particularly in France. Economic expertises are very costly for the parties. From one expert opinion to another, the estimated amount may vary considerably, and therefore there is no certainty as to the amount that may be awarded by the judge. It can be very dissuasive.

These difficulties in quantifying the loss are all even more important since there are a variety of possible loss and a variety of possible victims **(Section 2)**.

[24] Rafael Amaro, January 2022, "Proposal for a nomenclature of damages caused by anti-competitive practices"

Section 2: A multitude of possible harms and victims

In addition to the complex economic analysis and the classic conditions of tort liability, the difficulties of evaluation are also explained by the multitude of possible losses (§1) and victims (§2).

§1 - A multitude of offences and victims

The whole point of a follow-on procedure is to be able to rely on a decision previously rendered by a Competition Authority. This is why they are called follow-on proceedings. These proceedings can be consecutive to all infringements of competition law. It relates to the infringements provided for in articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter "TFEU").

Article 101[25] prohibits agreements that have for object or effect the prevention, restriction or distortion of competition within the internal market. This infringement covers a multitude of practices, some of which are listed directly in the first paragraph of the article. This is the case for practices involving price fixing; limiting or controlling production, outlets, technical development or investment; or sharing markets or sources of supply.

Article 102 prohibits *"the abuse by one or more undertakings of a dominant position in the internal market or in a substantial part thereof"*[26] . The article also specifies some of the practices that fall within the scope of this offence, such as the imposition of purchase or sale prices and the imposition of unfair transactions; the discriminatory treatment of partners in an equivalent situation, or tying practices. These few examples are by no means exhaustive[27]. Litigation on abuse of dominance has evolved considerably since the adoption of Article 102 (formerly Article 86). Several major categories of abuse have emerged from the practice of the authorities and the courts, with first of all eviction abuse, then abuse of exploitation and finally, more recently, the development of the concept of autonomous abuse.

[25] Article 101 of the Treaty on the Functioning of the European Union

[26] Article 102 of the Treaty on the Functioning of the European Union

[27] CJEU, Hoffman La Roche, 13 February 1979 , ECLI:EU:C:1979:36

In addition to these two articles of primary law, there is also Regulation 139/2004[28] on merger law. The case law accepts that civil actions can take place following an infringement of this regulation. It is particularly the case in matter of non-compliance with commitments. First, the CJEU stated that these *"commitments cannot create a legitimate expectation on the part of the undertakings concerned that their conduct would comply with Article 101 TFEU"*[29] . Then, in a more recent decision, the Court of Cassation stated that the failure to comply with these commitments presumes a civil fault which necessarily includes a prejudice, even if only moral[30] .

The difficulty lies not only in the diversity of these practices and the harm they cause, but also in the fact that there are several possible victims for each of these offences and practices. A practice constituting an infringement of competition law will have different effects depending on the victim concerned. The victim may be the direct buyer or seller, or an indirect buyer or seller. The victim can be the final consumer as well as a company in the production chain. The victim can also be the competitor who suffers losses because he cannot compete because of the infringement. It can also be the operators of an ancillary market, in which the product of the main infringement plays an important role. If we take the example of a cartel in the wheat sector, the victims will be multiple. All the players using wheat in their economic model, and in particular wheat flour, will be affected by this cartel. Among the victims, there will be large agri-business groups of processed products, bakers, mass distribution operators, restaurant owners, public authorities through their catering activity, operators specialized in livestock feed, and above all the final consumer.

This example clearly demonstrates the complexity of understanding an infringement in its entirety. It is very difficult to identify all the effects of the practice at first glance, which is why it is necessary to focus on the categories of harm retained until the 2014 Directive (§2).

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[28] Council regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

[29] CJEU, 23 November 2017, C-547/16, Gasorba, ECLI:EU:C:2017:891, RTD eur. 2018. 817, obs. L. Idot

[30] CJEU, 23 November 2017, C-547/16, Gasorba, ECLI:EU:C:2017:891, RTD eur. 2018. 817, obs. L. Idot

§2 - The first damages admitted until the Damages Directive

On reading the European articles and texts set out in the previous paragraph, it can be seen that there is a multitude of infringements, and more precisely a multitude of practices constituting these infringements of competition law. Each of these practices can then be the subject of a private action before a national court to obtain compensation. The difficulty lies in the fact that each of these practices gives rise to different damages with varying effects. While the harm linked to an anticompetitive agreement is generally an increase of market prices, the harm suffered by a victim in the case of tying is quite different. These two harms are completely different. The victim of an abuse of exclusion by a dominant digital platform suffers a very different harm than the victim of abusive prices.

From abuses to cartels, as well as non-compliance with merger commitments, it appears that these infringements constituted by multiple practices give rise to all sorts of damages. It is therefore important to be able to list these damages in order to better understand them.

The question of the nomenclature of prejudices is a real issue in liability law, whether it concerns tangible or intangible prejudice. To understand this, it is necessary to look at the decision-making practice of the courts. In the area of anti-competitive practices, it is necessary to look at the case law of the CJEU. In the Manfredi judgment[31] of 2006, CJEU clarified the categories of compensable damages. This judgment states *"it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest"*[32] . This judgment specifies that it is not possible to exclude loss of profit from the compensable loss. Indeed*, a "total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible"*[33] .

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[31] CJEU, Manfredi, C-295/04, EU:C:2006:461

[32] *Ibid*, p. 95

[33] *Ibid*, p. 96

From this ruling, two main damages arise. The loss made and the loss of profit. As the Court of Justice explained earlier, the loss of profit is essential in matters of anti-competitive practices. Anticompetitive practices will generally aim at squeezing out competition. These exclusionary practices will have a long-term impact on economic operators. It is therefore necessary to be able to anticipate the future effects, and the lost profits caused by the infringement in the compensation of the damage. For example, if an abuse of a dominant position leads to the eviction of a competitor from a secondary market in the coming years, it is necessary to look at the gain that this operator should have received from this market and integrate it into the calculation of the compensation. Once again, this calculation of the loss complicates the private enforcement procedure. The Manfredi judgment gives particular attention to "interest". This corresponds to the payment of "interest accrued between the time when the damage occurred and the time when the compensation for that damage was actually paid"[34] .

In order to face all these difficulties, the European Union authorities have intervened to adopt a directive and several other texts. This is known as the private enforcement package. The "Damage" directive, adopted in 2014, came to respond to several of these difficulties by clarifying certain points discussed previously (Chapter 2).

Chapter 2: European initiatives to overcome these difficulties and promote the development of private enforcement

This paper will focus on the objectives set by the European Union in the private enforcement package and the solutions provided to achieve these objectives. In order to do so, we will first look at the process of adoption and elaboration of these texts (Section 1). Then, in a second step, we will develop this remedy attempt, based essentially on the question of proof, to face the difficulties of the evaluation of the damage (Section 2).

[34] Art. 2, Proposal for a European 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, June 2013

Section 1: The adoption of European texts motivated by the objectives of harmonization and simplification

Successively, the adoption of the damages directive will be discussed here (§1), followed by the adoption of soft law with a Communication and a Practical Guide regarding the quantification of damage (§2).

§1 - The adoption of a European directive on actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union

In order to properly understand these objectives, it will be necessary to look at the process by which these texts were developed (A), and then at the objectives set out in the final texts (B).

A - The process of adoption and development of the damages directive

The will of the European institutions to promote private enforcement in Europe is not new. Indeed, for several years it has appeared that private enforcement had fallen considerably behind other countries. We can think of the United States in particular, where private enforcement has become the norm. It represents the vast majority of antitrust prosecutions and is much more dissuasive than public enforcement.

Quite early on, faced with the difficulties set out in the first chapter, the Commission decided to be in favour of private enforcement. To this end, The Commission *"tried to make victims of anti-competitive practices aware of the advisability of coming to the judge for redress by publishing a green paper in 2005 and then a white paper in 2008".) A draft directive covering the main difficulties posed by victims' actions for damages (obstacles linked to the costs of the procedure, the disclosure of evidence, the organization of collective actions, etc.) was even in preparation"*[35] .

[35] D. Bosco, C. Prieto "European Competition Law", Op. Cit p.1424

As soon as the Green Paper[36] was adopted in 2005, all the difficulties relating to private enforcement and in particular to the assessment of damages became apparent. *"The breadth of issues covered by the Green Paper testified of the complexity of the task: access to evidence, fault requirement, determination of damages, passing-on defense and indirect purchaser's standing, defense of consumer interests, costs of actions, coordination of public and private enforcement, jurisdiction and applicable law, were among the many topics discussed at the time"*[37] .

The White Paper marks a major step towards the adoption of a directive. Once again, many of the current difficulties in the field of private enforcement are reflected in the White Paper. *"The White Paper took great care in emphasizing the balanced nature of the proposals contained therein, "rooted in European legal culture and traditions", with the primary aim to ensure the full (but not over-) compensation of victims of EU competition law infringements."*[38].

This development movement was slowed down in 2009, with the refusal to adopt a first proposal for a directive. Finally, in 2013, a new proposal for a directive[39] will come to light. Finally, after a year of intense negotiations, the Damages Actions Directive 2014/104 was adopted on 26 November 2014, *"as the culmination of a policy-making process that had started a decade earlier and with the overall aim "to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association" (Article 1)"*[40].

[36] Green Paper - Damages actions for breach of the EC antitrust rules, 19 December 2005

[37] Rafael Amaro, "Private Enforcement of Competition Law in Europe: Directive 2014/104/EU and Beyond", Bruylant, 2021, p. 10

[38] Rafael Amaro, Damien Gérard, Patrizia Pérez Fernandez, "Private Enforcement of Competition Law in Europe: Directive 2014/104/EU and Beyond" , Bruylant, 2021, p. 11-12

[39] Proposal for a European 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, June 2013, op-cit

[40] Rafael Amaro, "Private Enforcement of Competition Law in Europe", op-cit 13

B - A strong harmonization objective

The Damages Directive has the clear objective of making Articles 101 and 102 TFEU effective through private enforcement. It is recalled that *"it is essential that any person, whether a consumer or a business, or any public authority, be able to seek redress for damage caused by an infringement of these provisions before the national courts "*[41].

In order to simplify private enforcement, it is necessary that the rules in different Member States be harmonized and simplified. As stated in the Directive, *"there are marked differences between the rules in the Member States governing actions for damages for infringements of Union or national competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU and affect the substantive effectiveness of such right. As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate"*[42] .

This desire for harmonization goes beyond mere harmonization between EU Member States. It is necessary that the rules for infringements of national antitrust law be the same as the rules applicable to infringements of European antitrust law. *"Applying differing rules on civil liability in respect of infringements of Article 101 or 102 TFEU and in respect of infringements of rules of national competition law which must be applied in the same cases in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and would constitute an obstacle to the proper functioning of the internal market."*[43].

[41] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit, pts 3

[42] *Ibid,* page 2

[43] *Ibid,* page 3

C - A quasi-transparent transposition into French law

As with any European directive, it is the responsibility of the Member States to transpose them to give them binding force. In France, the transposition of the Damages Directive was done by an order[44] and a decree[45] in March 2017. The rules relating to this transposition were included in Book IV of the French Commercial Code[46] , with the creation of a Title VIII entitled *"Actions for damages due to anti-competitive practices (Articles L481-1 to L483-11)".*

As pointed out by Rafael Amaro*, "the entry into force of the texts transposing Directive 2014/14 - an Ordinance and a Decree does not profoundly change the situation. Obviously, these texts derogate from the general rule for the matters they govern and added new special rules in the Commercial Code and the Code of Administrative Justice. However, many issues are not dealt with by the Directive and its transposition texts."*[47] .

Admittedly, this transposition is essentially limited to reproducing the provisions of the Damages Directive. However, we welcome the clarification of the compensable loss in Article L. 481-3 of the Commercial Code[48] . This article now provides for four heads of damage : the loss made, lost profit, loss of opportunity, and moral prejudice. It is therefore clearly accepted that compensation for loss of opportunity and moral prejudice may be awarded. Contrary to the loss made and the missed gains, these two prejudices are not defined, so it leaves a significant flexibility to the jurisdictions.

As regards the loss made, it is indicated that it results either *"from the additional cost corresponding to the difference between the price of the goods or services that he actually paid and the price that would have been paid in the absence of the commission of the infringement, subject to the total or partial passing on of this additional cost that he may*

[44] Ordinance n°217/303 of 9 March 2017

[45] Decree n°2017-305 of 9 March 2017

[46] Commercial Code, article L. 481-1

[47] Rafael Amaro, "Private Enforcement of Competition Law in Europe", op-cit p.386

[48] Article L. 481-3, Commercial Code

have made to his subsequent direct contractor", or "from the reduction resulting from a lower price paid to him by the perpetrator of the infringement"[49] . As for the lost profit, it results "*in particular from the reduction in the volume of sales linked to the partial or total passing on of the extra cost that he was led to make to his direct contractors or from the certain and direct extension of the effects of the price reduction that he had to make"*[50] .

In addition to this directive, the European Commission has also adopted a Communication followed by a practical guide on the quantification of damages in anti-competitive practices (§2).

§2 - The adoption of soft law to simplify the difficulties of quantifying harm.

One of the most complex points regarding the evaluation of the damage is its quantification. On this point, the directive did not wish to harmonize the rules of the Member States. It therefore leaves Member States to apply their national legislation to quantify the various losses. However, in view of the importance of quantifying damages in the implementation of private enforcement, the Commission wished to adopt soft law rules. To this end, it first adopted a Communication on the quantification of damages in actions for infringements of Article 101 or 102 of the Treaty on the Functioning of the European Union[51] .

This Communication from the European Commission states that *"on the question of quantifying harm, to the extent that such exercise is not governed by EU law, the legal rules of the Member States determine the appropriate standard of proof and the required degree of precision in showing the amount of harm suffered"*[52]. In reality, this Communication serves as an introduction to another soft law text adopted by the Commission at the same time. It is a Practical Guide[53] , which has the value of a "working document of the Commission services". The aim of the practical guide *"is to offer assistance to national courts and parties*

[49] *Ibid, 1° a)b)*

[50] *Ibid 2°.*

[51] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013/C 167/07

[52] *Ibid, 8*

[53] Practical Guide to the quantification of damages in actions for infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union, European Commission 2013, op-cit

involved in actions for damages by making information on quantifying harm caused by infringements of the EU competition rules more widely available. It therefore provides insights into various forms of harm typically caused by anticompetitive practices and, in particular, sets out information on the methods and techniques available to quantify such harm. Giving such information wider circulation will enhance the effectiveness of actions for damages. It should also make such actions more foreseeable, thereby increasing legal certainty for all parties involved. The practical guide can also help parties find a consensual resolution of their disputes, be it within or outside the context of judicial or alternative dispute resolution proceedings."[54] This Guide is very much the illustration of the need for a complex economic expertise[55] in order to quantify a loss. This document reminds the need to establish a counterfactual scenario. Without going into an overly economic analysis, the Guide highlights two main methods of quantifying harm.

The first method is the comparative method. The Practical Guide indicates how to collect and establish a counterfactual scenario. It identifies four possible comparisons: a comparison over time in the same market, a comparison with data from other geographic markets, a comparison with data from other markets for related products, or a combination of comparisons over time and between markets. With regard to the choice of the comparative method, it is specified that this choice *"depends on the specific circumstances of the case and the applicable legal rules and will be made taking into account the different advantages and disadvantages of these techniques, for example with regard to their accuracy and precision as well as the data requirements they imply"*[56] . Once the comparison method has been chosen, and the data collected, economic and statistical techniques for processing the data should be used: individual observations, averaging, interpolation and simple adjustments. This allows adjustments to be made to the data, even if this is not always necessary according to the requirements of national law. Second, the data collected for the purposes of this comparative method are subject to further processing, including regression analysis[57], which allows us to study the nature of the relationships between economic

[54] Communication from the Commission on quantifying harm, 2013, *op-cit* 11

[55] See, infra, page 9

[56] See, infra, page 9

[57] *Ibid, 69*

variables and to establish the extent to which a given variable of interest is influenced by the offence, as well as by other variables that are not affected by the offence.

The second one, more complex, is based on simulation models. There are two possibilities: either the model is cost-based or it is based on financial methods. *"The cost-based method consists of starting with an estimate of the unit cost of production and adding a profit margin that would have been "reasonable" in the counterfactual scenario. The resulting counterfactual unit price estimate can then be compared to the actual unit price charged by the infringer(s) to obtain an estimate of the extra cost"*[58]. Whereas *"financial analysis methods use the financial results of the plaintiff or defendant to determine whether the plaintiff has suffered injury and to estimate the amount of injury."* [59]

In both cases, it is a question of complex economics, which will require the intervention of economic experts. This Practical Guide allows a better understanding of quantification, but it still remains difficult for lawyers to understand. The method of quantification of the prejudice still remains under the exclusivity of the economists, which can give rise to some issues.

In order to facilitate the victims' actions, the directive provides a framework at different levels for the question of proof (Section 2).

Section 2 : An attempt to address the complex issue of evidence in competition law

The notion of proof is essential to the evaluation of prejudice before the courts, and this at several levels. This is why it is appropriate to first study how the directive has framed the question of access to evidence (§1), before looking at the presumptions that reduce the burden of proof for victims (§2).

[58] *Ibid,*107

[59] *Ibid*, 114

§ 1 - The establishment of a European framework regarding the access to evidence

First of all, let's study the necessity of the right of access to evidence (A), before seeing the transposition of these rules into French law (B).

A / The need for a right of access to evidence

This study deals with follow-on proceedings, i.e. proceedings following a decision of a Competition Authority. This may be a national authority or the European Commission. When a victim wants to take action before a national court on the basis of a decision rendered by one of these authorities, the question of access to evidence will arise. If victims are categorically refused access to this evidence, it will be very difficult for them to prove the infringement and obtain compensation. Competition law infringements are complex and often secret. The perfect illustration is the cartel. It is very difficult for the Authorities to discover it, despite the fact that they have important investigative services. So, it is obvious that such a task is even more difficult for the average victim of an infringement. The Damages Directive recognizes this in its recitals. "*Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterized by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence."*[60] . To solve this problem, the Directive indicates that *"National courts should also be able to order that evidence be disclosed by third parties, including public authorities"*[61] .

However, access to evidence must respect the fundamental principle of proportionality. *"It follows from the requirement of proportionality that disclosure can be ordered only where a claimant has made a plausible assertion, on the basis of facts which are reasonably available to that claimant, that the claimant has suffered harm that was caused by the*

[60] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit page 3

[61] *Ibid,* p 3

defendant."[62] . To that end, any request for production of evidence must concern strictly defined categories of evidence. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts. The other concern is the protection of trade secrets and confidential information. This should not prevent the right to compensation.

The recitals of the Directive also state that such a request for access to evidence must not undermine the authorities' investigation strategy or cooperation strategy. "*The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or risks having a negative effect on the way in which undertakings cooperate with the competition authorities.*[63] . The issue here is the settlement and leniency procedures, which are crucial for the authorities. These balancing issues will be discussed in the second part of this report.

B / Application in French law

The question of the production of evidence is dealt with in articles 5 to 8 of the Damages Directive. These articles have been transposed into articles L. 483-1 and following of the Commercial Code. It is provided that in French law the applicable rules are those of the Code of Civil Procedure and the Code of Administrative Justice.

Among the rules of the Code of Civil Procedure that are important in this regard there is article 145 concerning expertise in futurum. This article provides that *"If there is a legitimate reason to preserve or establish before any trial the proof of facts on which the solution of a dispute may depend, legally admissible measures of inquiry may be ordered at the request of any interested party, on application or in summary proceedings."*[64] . It is also important to specify the classic rules of civil procedure for pre-transposition law. There are also Articles 138 and following of the Code of Civil Procedure. This article provides that *"if, in the course of proceedings, a party wishes to refer to an authenticated or private document to which he*

[62] *Ibid*

[63] *Ibid*

[64] Art. 145 Code of Civil Procedure

has not been a party or to a document held by a third party, he may request the court hearing the case to order the issue of a copy or the production of the document"[65].

However, article L. 483-1 of the French Commercial Code already contains the difficulties discussed in the previous paragraph. *"When ruling on an application made pursuant to the first paragraph, the judge shall assess the justification for it, taking into account the legitimate interests of the parties and third parties. In particular, he shall take care to reconcile the effective implementation of the right to compensation, taking into account the usefulness of the evidence whose communication or production is requested, and the protection of the confidential nature of such evidence, as well as the preservation of the effectiveness of the application of competition law by the competent authorities."*[66] . This is why Articles L. 483-4 et seq. will provide a framework for this right of access to evidence in accordance with Articles 6 and 7 of the Damages Directive.

Article L. 483-4 prohibits a judge from ordering a competition authority to produce evidence contained in its file, if a third party is able to provide such evidence[67] . The following article prohibits the judge from ordering the communication or production of a document containing written statements or the transcript of oral statements made during leniency or non-contestation proceedings[68] . In the event that one of the parties challenges the injunction of certain evidence contained in the Authority's files, the judge may obtain disclosure of the evidence, take sole cognizance of it, and then rule on it[69] . He then decides alone whether the evidence falls within the prohibitions of article L.483-5. He will then give reasons for his decision while respecting the requirements of confidentiality.

Article L. 483-8 concerns the secrecy of the investigation. This article lists several types of information that may not be disclosed until the case is closed. These include information prepared by a natural or legal person for the purposes of an investigation or inquiry by a competition authority; and information prepared by a competition authority and

[65] Art 138 Code of Civil Procedure

[66] Art. L. 483-1 Commercial Code

[67] Art. L. 483-4 Commercial Code

[68] Art. L. 483-5 Commercial Code

[69] Art. L. 483-6 Commercial Code

communicated to the natural or legal person in the course of the proceedings[70] . It is then specified that *"Articles L. 483-5 and L. 483-8 do not apply to a document that exists independently of the proceedings before a competition authority, whether or not it is in the file of the said authority."*[71].

Finally, a last protection is granted to documents obtained through access to the Competition Authorities' files. These documents can only be used in the context of a private action following an anti-competitive practice.[72] The purpose here is to limit the use of the documents and to ensure that it is limited to private enforcement. The purpose of all these rules is to allow access to evidence in order to assess the damage suffered by a victim. In the second part of this report, it will be necessary to study how these rules limit the effectiveness of private enforcement today. For the moment, it is necessary to focus on the presumptions that have been put in place to lighten the burden of proof for victims (§2).

§2 - The establishment of presumptions to lighten the burden of proof for victims

The establishment of presumptions to lighten the burden of proof concerns the proof of anticompetitive conduct (A) and the proof of harm (B).

A) The presumption of fault following decisions of the competition authorities

As explained in the Directive, the effective application of Articles 101 and 102 TFEU *"requires a common approach within the Union as regards the effect of final decisions finding an infringement by national competition authorities on subsequent actions for damages."*[73] . The European Commission considers that *"the finding of an infringement of*

[70] Art. L. 483-8 Commercial Code

[71] Art. L. 483-9 Commercial Code

[72] Art. L. 483-10 Commercial Code

[73] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit 34

Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages"[74].

To address this concern, the Commission has opted for the adoption of an irrebuttable presumption of fault. This presumption is set out in Article 9 of the Directive[75] . It was then transposed into Article L. 481-2 of the Commercial Code. The first contribution of this article is the establishment of an irrebuttable presumption of fault in the event of a decision by the Competition Authority of the national jurisdiction. More specifically, the first paragraph of this article states that *"An anticompetitive practice referred to in Article L. 481-1 is irrevocably presumed to have been established with respect to the natural or legal person referred to in the same article once its existence and its attribution to that person have been established by a decision which may no longer be the subject of an ordinary appeal in respect of the part relating to this finding, pronounced by the Competition Authority or by the appeal court"*[76] .

With respect to decisions rendered by the competition authorities of another Member State, the solution adopted is more measured. This decision (which should no longer be subject to an ordinary appeal) *"constitutes evidence of the commission of the practice"*[77] . As for the Commission's decisions, the solution is obvious. The principle of primacy of Union law must be applied, and therefore the national court cannot *"take a decision that would run counter to the decision adopted by the Commission"*[78] .

B - Presumptions regarding proof of injury, including the issue of excess costs

The first presumption that is found in French law concerning harm is the one relating to cartels. Indeed, this practice prohibited by article 101 of the TFEU is very secret. Therefore, it can be difficult for a victim to demonstrate a causal link between its injury and the cartel condemned by an authority. The Ordinance of 2017, in charge of transposing the directive, therefore provided for the establishment of a simple presumption for cartels between

[74] *Ibid*

[75] *Ibid,* art 9

[76] Art L. 481-2 Commercial Code

[77] *Ibid,* para 2

[78] *Ibid*, para 3

competitors. Article L. 481-7 provides that *"it is presumed until proven otherwise that an agreement between competitors causes damage."*[79] . Here we find a desire to simplify the demonstration of the harm suffered by victims.

The question of prejudice leads to another question regarding the passing on of extra costs. They are defined in the Directive as *"the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law"*[80] . This concept is essential since the principle of reparation adopted is the one of full reparation. This means that compensation must not exceed the harm suffered. Punitive damages are prohibited. In order to correctly evaluate the prejudice, it is therefore necessary to know if the extra cost linked to the offence committed has been passed on. Let's take the example of the wheat cartel again: our baker had to pay more for his flour, so we have to see if he passed on this extra cost to the final price of his bread, and thus to his consumers. The proof of the passing on of the extra cost is difficult to prove and requires access to precise internal company data, which is often confidential. This is why the Directive and its transposition into French law have attempted to provide solutions to this problem.

The first solution[81] , is to say that the direct or indirect purchaser is not deemed to have passed on the extra costs to its direct contractors. This presumption can then be rebutted by the defendant, i.e. the perpetrator of the anticompetitive practice. The defendant will then have to prove the existence of a total or partial pass-on. This solution makes it possible to lighten the burden of proof for the victimized buyer, who no longer has to prove that he did not pass on the extra cost.

The second solution[82] concerns the direct or indirect purchaser who, this time, believes that he is the victim of the application or passing on of an extra cost. The principle laid down in the first paragraph is classic: the buyer must prove the existence and extent of the overcharge. However, this solution becomes interesting in that it is tempered in the rest of the article for the indirect purchaser. Indeed, the latter will be presumed to have proven this excess cost if

[79] Art. L. 481-7 Commercial Code

[80] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014, op-cit, art. 2

[81] Art. L. 481-4 Commercial Code

[82] Art. L. 481-5 Commercial Code

he reports three cumulative elements. First, he must prove that the defendant committed an anticompetitive practice, which is relatively simple in follow-on proceedings. Second, it must prove that the practice resulted in additional costs for the defendant's direct contractor. Finally, the defendant must show that *it "purchased goods or used services affected by the anticompetitive practice, or purchased goods or used services derived from or containing them."* It is always possible for the defendant to prove otherwise.

Article L. 481-6 provides for an extension of the solutions set out above. It provides that these presumptions "*are applicable to the direct or indirect suppliers of the perpetrator of the anticompetitive practice who claim prejudice resulting from a reduction in the price of the goods or services concerned by the practice"*[83] .

All of these presumptions are intended to address the difficulties of assessing damages in private enforcement. Simplifying the evidence is a necessary way to encourage victims to act and obtain compensation for their damages. However, the complexity of the evaluation of the prejudice, and of private enforcement in general, still remains an obstacle to the efficiency of private enforcement. (PART 2).

[83] Art. L. 481-6 Commercial Code

PART II: NEW PROPOSALS FOR A FRAMEWORK TO ADDRESS THE INADEQUACY OF EUROPEAN REMEDIES

Nearly 10 years after the adoption of the Damages Directive and the private enforcement package, the development of private actions following an anti-competitive practice is not as desired. European initiatives in the field of damage assessment are limited, and even insufficient (Chapter 1). As a result, new proposals, mainly from the academic world, are emerging (Chapter 2).

Chapter 1: The inadequacy of European initiatives in the field of damage assessment

The inadequacy of European initiatives is reflected in the complexity of the issues related to the right of access to evidence **(Section 1)**, as well as the ineffectiveness of new measures due to the "slowness" of antitrust law and the lack of clarity of regulation **(Section 2)**.

Section 1: The strong preference for the effectiveness of a leniency procedure over private enforcement

Leniency proceedings have become an indispensable tool of public enforcement in the fight against anticompetitive agreements (§1) to the detriment of the effectiveness of private enforcement (§2).

§1 - The importance of leniency proceedings in public enforcement

The European Commission's desire to promote the development of private enforcement in Europe has been demonstrated so far. This will have been translated into numerous texts, including the Damages Directive. However, some of the difficulties relating to the evaluation of damages concerns the articulation with public enforcement. Among these difficulties; there is the question of the right of access to evidence, and in particular to the files of the

competition authorities[84] . It should be remembered that the assessment of the harm, and in particular its quantification, depends to a large extent on the evidence to which the judge and the parties have access.

The Damages Directive, as discussed in Part I[85] , attempts to strike a balance between the right of access to evidence and the rights of business secrets and instructions. In fact, the right of access to evidence impacts a procedure that has become absolutely essential for competition authorities. This procedure is the leniency procedure. This procedure is used in the context of infringements of Article 101 of the TFEU, namely cartels. It was established by a Commission Notice in 2008[86] , and transposed into Article L. 464-2 of the French Commercial Code[87] . The purpose of this leniency procedure for perpetrators of an infringement of Article L. 420-1 of the French Commercial Code is to obtain a total or partial exemption from financial penalties. In order to do so, the article specifies that it is necessary to *"contribute to establishing the reality of the prohibited practice and to identifying its perpetrators, by providing information that was not previously available to the Authority or the administration*"[88] . This is a method of denunciation. A company involved in a cartel decides to denounce the existence of the cartel to the competent competition authority. The company must then provide new information (participants, effects of the cartel, details of the agreement, duration, leader of the cartel, etc.) to allow for a targeted inspection, or to establish an infringement

The leniency procedure has become a must for competition authorities. It turns out that the vast majority of cartels prosecuted by the Commission are the result of leniency proceedings. "*Since 2006, leniency applicants have seen their fines reduced by €16 billion (€10 billion for immunity applicants and €6 billion for fine reduction applicants), while at the same time the total amount of fines imposed has risen to €15 billion"*[89] . This success is also reflected in the figures given by the Commission in a 2022 press release. *"Since the introduction of*

[84] See supra

[85] See supra Part 1

[86] Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2008

[87] Art. L. 464-2 IV Commercial Code

[88] Ibid

[89] Alain Ronzano, Leniency : European Commission issues guidance clarifying the application of the 2006 Notice to revive leniency programs, 25 October 2022, Concurrences N° 1-2023, Art. N° 109645,

the currently applicable Leniency Notice in 2006, the Commission has received more than 550 leniency applications and adopted 54 cartel decisions in proceedings that were initiated on the basis of leniency applications."[90]

This procedure is a real success, particularly within the European Union. However, this success of leniency is unfortunately explained to the detriment of the effectiveness of private enforcement (§2).

§2 - The difficult articulation between private enforcement and leniency proceedings

The effectiveness of the leniency procedure within the European Union is closely linked to that of private enforcement. Here we find the idea of a negative correlation. Indeed, the easier it is to implement private enforcement, the less advantageous the leniency procedure will be. The explanation for this negative correlation is simple. The leniency procedure grants partial or total exemption from financial penalties imposed under public enforcement. On the other hand, it does not provide any exemption or immunity under private enforcement. Therefore, if a company acts to denounce a cartel of which it is a member, it will be able to benefit from a total or partial exemption of the fine from the competition authorities. Nevertheless, the infringement will be subject to a decision by these authorities, which will be made public. Thus, all potential victims of the cartel will be informed of the existence of an infringement and will be able to claim damages under private enforcement. The damages awarded multiplied by the number of victims can considerably exceed the amount of the fine exempted by leniency.

For example, a 2016 press release stated that *"The European Commission has found that MAN, Volvo/Renault, Daimler, Iveco, and DAF broke EU antitrust rules. These truck makers colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules. The Commission has imposed a record fine of € 2 926 499 000."*[91] . Although the amount of the fines is still a record, it is much lower than the total amount of damages awarded by judges against the cartel companies under private enforcement. Even today,

[90] Press release: Anticompetitive practices: Commission provides guidance on its leniency policy and practice, Brussels, 25 October 2022

[91] Press release : Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel, 19 july 2016

many cases are still underway throughout Europe, before national courts, to obtain compensation for the extra costs paid by buyers as a result of this cartel.

This negative correlation is one of the main explanations for the lack of attraction of the leniency procedure in the United States. The United States is one of the most developed countries in the world for private enforcement. This is due to the favorable regulation of class actions, the possibility for judges to award punitive damages, and the possibility for lawyers to charge success fees.

The effectiveness of the leniency process regarding private enforcement depends critically on how victims and national judges are able to access leniency files. If it is possible for a victim to obtain access to all the information given to the authorities by a company in leniency proceedings, then it will be much easier for victims to seek redress. It will also be possible for victims to take action against other perpetrators of the infringement of which they would not have been aware without access to these files. The issue of access to evidence is again critical.

The CJEU already insisted on this issue in 2011, *"as maintained by the Commission and the Member States which have submitted observations, leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, even if the national competition authorities were to grant to the applicant for leniency exemption, in whole or in part, from the fine which they could have imposed. The view can reasonably be taken that a person involved in an infringement of competition law, faced with the possibility of such disclosure, would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation No 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided "*[92].

When the Damages Directive was adopted, the European Commission therefore attempted to strike a balance between the right to obtain compensation for victims (through access to

[92] CJEU, Pfleiderer AG v. Bundeskartellamt, case C-360/09, ECLI:EU:C:2011:389, n. 25, 26, 27

leniency files) and the effectiveness of the leniency procedure. Article L. 483-5 of the French Commercial Code[93], transposing article 6 of the Damages Directive, provides that *"the judge may not order the communication or production of a document comprising: 1°A written statement or a transcript of oral statements voluntarily submitted to a competition authority by a person referred to in article Article L. 481-1, and contributing to establishing the reality of an anticompetitive practice provided for in Articles L. 420-1 and 101 of the Treaty on the Functioning of the European Union and to identifying its perpetrators, with a view to benefiting from a total or partial exemption from penalties pursuant to a leniency procedure".*

Of course, finding the balance between leniency and private enforcement is a complex task. However, it seems that the Commission has easily decided in favor of the effectiveness of the leniency procedure at the expense of private enforcement. The inability of the judge to order the communication of certain documents to the authorities obtain through leniency is a considerable obstacle to the action of victims. However, the importance of leniency proceedings, and in particular the savings in time and money that they bring, have become too essential to the Commission. It is important to note, however, that despite this choice of evidence, the effectiveness of leniency proceedings has been diminished as a result of European regulations favoring private actions.

In addition to this difficult articulation with the leniency procedure, the inadequacy of European initiatives concerning the assessment of harm is also reflected in the lack of effectiveness of certain rules (Section 2).

Section 2: Between ineffectiveness of presumptions and lack of clarity of the heads of damages admitted (to be reviewed).

Until now, the assessment of the damage remains a complex step. This can be explained by the late entry into force of the presumptions in the face of a very slow competition law (§1), and by a lack of clarity of certain provisions (§2).

[93] Art. L. 483-5 Commercial Code

§1 - Insufficient presumptions in the face of an excessively long follow on procedure

We note that *" more than 5 years after the transposition of these presumptions into French law, it appears that their objective of facilitating follow-on actions has not been fully achieved. Indeed, the first post-transposition litigation of the "damages" directive essentially concerned the question of their scope of application, in order to limit their material and temporal scope. The demonstration by the plaintiff in the follow-on action of his or her prejudice therefore remains a difficult exercise."*[94] .

Several presumptions have been introduced by the Damages Directive in order to facilitate the assessment of damages[95] . In particular, there is the presumption of fault for the decisions of the competition authorities and the Commission. There are also presumptions relating to the passing on of extra costs. In theory, as indicated in the first part, these presumptions are beneficial to the victims and should eventually allow for a better efficiency of private enforcement. In practice, it appears that these presumptions are rarely applicable.

In order to understand why these presumptions are still difficult to use, we must keep in mind one of the problems of public enforcement. The duration of the procedures. Competition law is a complex legal field that involves the application of highly technical rules and the consideration of numerous economic factors. In addition, violations of competition rules are often difficult to detect and prove. When a violation of competition rules is suspected, competition authorities must conduct a thorough investigation to collect evidence, analyze data and determine whether an infringement has actually occurred. This investigation can take a long time. Then, if a violation of the competition rules is identified, the authorities must prosecute the offenders. These proceedings can also be time-consuming and are often contested by the parties involved, who have the right to defend themselves and appeal the decisions.

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[94] Presumptions of prejudice in the "damages" directive: have they facilitated follow-on actions? - Watch by Julie Catala Marty and Rémi Beydon, La semaine juridique - entreprise et affaires - n° 13 - 30 March 2023

[95] See. Supra. "The establishment of presumptions lightening the burden of proof for victims"

Once again, the truck cartel[96] is a good example of this competition law problem. The illegal cartel lasted nearly 14 years, from 1997 to 2011. The first unannounced inspections by the Commission took place in 2011. The public was alerted for the first time of the practice until 2014. Finally, it took another two years, before a settlement agreement was reached between the parties. Even today, numerous consecutive private enforcement actions are pending before European national courts. Almost 26 years after the practice started, cases are still pending.

The whole issue therefore lies in the date of applicability of the presumptions arising from the Directive. In an important judgment in 2019, the CJEU distinguished between *"substantive provisions applicable only to infringements committed after the transposition of the Directive*"[97] and *"procedural provisions applicable to actions brought after the transposition of the Directive*"[98] . In view of the length of competition law proceedings, the issue was to know if the rules on presumptions were procedural rules. In this sense, they would therefore be directly applicable to all actions brought after the adoption of the directive. While this would have been the most favorable solution to alleviate the burden of proof of damage on victims, the European Supreme Court decided otherwise. Indeed, the CJEU held that the presumptions of harm were not merely for evidentiary purposes, but were a substantial rule[99] . Therefore, the presumptions are only applicable to offences committed after the transposition of the Directive. The Court of Cassation follows this reasoning with regard to the presumption of failure to pass on extra costs[100] .

This has the consequence that presumptions with the objective of facilitating proof of injury are only applicable to facts after December 27, 2016. This decision had very important practical consequences, since the vast majority of pending cases concern facts prior to December 27, 2016. *"It must be noted that this objective has not been fully achieved, due to the inapplicability rationae temporis of the said presumptions for a large part of the follow-on actions judged until then. The demonstration of a prejudice and its quantum thus remains*

[96] See. Supra Press release : Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel, 19 july 2016

[97] Presumptions of prejudice of the " damages " directive, Julie Catala Marty, op-cit ; *CJEU, 28 march 2019, aff. C-637/17, Cogeco c/ Sport TV*

[98] Ibid

[99] CJEU, 27 december 2019, aff. C-637/17, Cogeco c/ Sport TV

[100] Cass. com., Oct. 19, 2022, n° 21-19.197

a prerequisite that requires building a solid case, if necessary with the help of economists."[101].

§2 - A lack of effectiveness of certain provisions

Some provisions would have deserved a broader scope of application (A), while others would have deserved more precise definitions (B). The drawbacks of soft law will also be discussed (C).

A - The narrowness of the presumption of harm in

Article L. 481-7 of the French Commercial Code, following the transposition of the Damages Directive, provides that *"It is presumed until proven otherwise that an agreement between competitors causes damage"*[102] . On reading this article, it becomes clear that its application is limited. It mentions "agreements between competitors". This wording refers to a specific type of agreement, namely horizontal agreements.

It was therefore legitimate to ask whether this presumption could be extended to vertical agreements. In a recent decision, the Court of Cassation also excluded victims of vertical agreements from the benefit of this evidentiary facility. It thus censured the Court of Appeal for having retained a presumption of damage in the case of a price fixing practice between a licensor and its concessionaire, by holding that it is up to the plaintiff to establish the damage caused by the practice in question since the latter[103] "*was not a cartel between competitors*"[104] . Some victims have also tried to extend the scope of this presumption to abuses of a dominant position. The Paris Court of Appeal recently ruled out this possibility[105].

[101] Presumptions of prejudice of the "damages" directive, Julie Catala Marty, op-cit

[102] Art. L. 481-7

[103] Presumptions of prejudice of the "damages" directive, Julie Catala Marty, op-cit

[104] *Cass. com., Sept. 28, 2022, n° 21-20.731, F-B : JurisData n° 2022-015610*

[105] CA Paris, ch. 4, Feb. 23, 2022, n° 19/19239

It is unfortunate that this presumption does not also apply to vertical agreements. In both cases, the burden of proof for the victim is complex. Reducing this presumption to horizontal agreements only makes the burden of proof more complex for certain victims.

B - The absence of a clear definition of loss of chance leaves room for uncertainty in case law

Among the criticisms that have been made of the Damages Directive and its transposition is the question of the heads of damage. As explained in the first part of this paper, the transposition order sets out the various heads of damage that can be compensated for under anti-competitive practices. Among these damages, we find the loss made and the lost profit. These two losses were already provided for in the Directive and are therefore defined in the Commercial Code. This provides legal certainty for both victims and offenders. It is also a way of simplifying the work of the judge. However, article L. 481-3 of the French Commercial Code also provides for two other types of damages: loss of opportunity and moral prejudice. These two prejudices are not defined in this article. In reality, they are not new heads of damage, since they are found in a fairly classic manner on the French case law. Nevertheless, this does not prevent the contours of these losses from being difficult to define. The distinction between loss of chance and lost profit does not seem so obvious. However, according to the principle of full reparation, one should not compensate beyond the loss, and therefore there must be separate losses.

The confusion as to the principle of loss of opportunity is a real problem for judges. This is why Irene Luc, former President of Chamber 5-4 of the Paris Court of Appeal, and now Vice-President of the French Competition Authority, stated : *"It would also be useful to define in the law the items of economic loss, and in particular, the loss of opportunity and compensatory interest. Indeed, the notion of loss of opportunity is a source of confusion; a limitation may be necessary"* [106].

Today, one of the major debates surrounding the concept of loss of opportunity is that of admitting the loss of unavailability of capital. The aim of the plaintiffs is to obtain compensation for the returns on their investments that they could have obtained if their cash

106 Actions for damages for anti-competitive practice , State of play in France and in the European Union, 28 march 2018, Interview Irene Luc, Paris Court of appeal

flow wasn't unavailable as a result of the anti-competitive practice. This loss probably corresponds to a loss of opportunity, but it is difficult to assess. Case law is gradually beginning to recognize it, but it is difficult to define its outlines. This is why the evidential requirement remains very important. An illustration of this prejudice has appeared in recent years in case law[107] . "*On the principle, the Paris Court of Appeal rightly considers that this prejudice is compensable: "If the victim company demonstrates that the non-availability of the sums of money of which it was deprived led it either to restrict its activity without being able to find alternative financing through loans or equity, or to abandon duly identified investment projects that were likely to bring in the equivalent of the average cost of capital*"[108] . Proving this loss remains difficult, and it turns out that in this case, *"although the plaintiff had demonstrated that investment projects did exist during the period under consideration, he did not convince us that he had to give them up because of the unavailability of capital"*[109] .

C / The disadvantages of the soft law in terms of quantifying harm

For several years now, soft law has become a very important tool of law. It makes it possible to influence behavior without imposing it. It is the choice of soft law that has been retained concerning the quantification of damages. The Damages Directive has chosen not to regulate this stage, and to leave the regulation of this quantification to the Member States. Nevertheless, in view of the complexity of the question, and as we have seen previously, the Commission has adopted a Communication and a Practical Guide on the subject. These texts have no binding force, and are merely advice to help judges and victims in the quantification process. As stated in the Communication *"The practical guide is of a purely informative nature and is in no way binding on national courts or the parties. It therefore does not affect the rules of law of the Member States governing actions for damages and is without prejudice to the rights and obligations conferred by EU law on Member States or on natural or legal persons.*"[110]. It is therefore possible not to follow its rules. Thus, there is a significant risk of divergence between jurisdictions, and therefore of legal uncertainty as to quantification.

[107] CA Paris, Pôle 5, Ch. 4, June 17, 2020, No. 17/23041, SA Orange, SA Orange Caraïbe c/ SA Digicel Antilles

[108] David Bosco, Affaire Orange Caraïbe : le succès de l'action indemnitaire confirmé en appel, Contrats Concurrence Consommation n° 8-9, Août 2020, comm. 129

[109] Ibid

[110] Communication from the Commission on quantifying harm, 2013, op-cit 12.

Among the shortcomings of the European initiatives, we can rightly emphasize the lack of uniformity in the practice of the jurisdictions.

A more precise intervention of the legislator (European or national) could have been desirable and allow to avoid all the uncertainty in case law. In the end, this uncertainty as to the extent of the loss of chance forces the courts to impose a very high evidential requirement. This considerably reduces the opportunities for victims to be compensated. This is why the legal literature argues for a new and better framework for this damage (Chapter 2).

Chapter 2: The emergence of new doctrinal proposals

In order to conclude this study, it is appropriate to look at certain doctrinal proposals. In particular, the introduction of a new nomenclature (Section 1) and a better framework for the evaluation of the prejudice by experts (Section 2).

Section 1: The proposal of a new nomenclature of prejudices

Among the most interesting proposals is that of Professor Rafael Amaro, specialized in private actions in competition law. Therefore, we will analyze his proposal of nomenclature. To do so, we must look at the proposal of the damage of overcost and eviction (§1), before looking at the new damages of investment and loss of value of intangible property (§2).

According to the doctrine, it is necessary to propose a new nomenclature of damages specific to competition law infringements. This nomenclature will then better correspond to the complexity of these infringements. Rafael Amaro explains that with the rise of private enforcement litigation, there is a greater risk of disparate decisions emerging and it is therefore necessary to propose a new nomenclature. The objectives of this nomenclature are simple *: " : it aims at guaranteeing legal security and equality of treatment to the litigants by standardizing the practice of the jurisdictions but also of the counsels. "*[111] . This nomenclature is based on four main types of property damage, corresponding to the four economic effects for which compensation has already been admitted. Of course, the moral

[111] Proposal for a nomenclature of damages caused by anti-competitive practices, Rafael Amaro, January 2022

prejudice, well known, is also included in the nomenclature. This last prejudice will not be discussed in the rest of the reasoning because it does not really bring anything new.

§1 - The establishment of a prejudice of excess cost and a prejudice of eviction, quite classical

In his nomenclature, Professor Amaro first proposes two types of damages, that of extra cost (A) and that of eviction (B).

A - Classical cost damage

The first proposed harm is the harm of excess cost. It is divided into two types of harm, that of overpricing and indirect overcost.

The harm of overpricing is perhaps the most obvious harm when it comes to anti-competitive infringements. It is defined in the Proposed Nomenclature *as "*the *unlawful increase in the price of the service or good in the affected market, directly caused by the anticompetitive practice"*[112] . This harm results from a cartel or an exploitation abuse that would specifically aim at increasing the price of a product or service.

This illegal increase can then be to the detriment of several people. First, to the expanse of the direct purchaser in the absence of pass-through, which is direct overpricing. Secondly, to the expanse of the indirect purchaser in the event of pass-through, which is referred to as post-pass-through overpricing. Or to the expanse of a buyer who is not in the chain of contracts of the offender but who suffers an increase in the selling price of a product or service sold by a company outside the anti-competitive practice made possible by the general increase in prices on the market affected by the anti-competitive practice (shadow effect).

This prejudice of overpricing is the one that emerges in an obvious way from the Damages Directive, with all the presumptions regarding repercussion. The harm here refers to the notion of loss made.

[112] *Ibid*

The second harm mentioned by Rafael Amaro is that of indirect overcost. It may seem less obvious, but it is essential for the calculation of compensation. Indirect overcosts are not caused by pass-through, but by *"any costs that increase the operating and production costs of the victim of the anticompetitive practice that are directly related to the infringement."*[113] . This category can cover a multitude of costs that one might not think of at first glance, and yet they have a considerable cost for the company. These damages can be assimilated to the loss made. One can think of the extra costs caused by the need to use a more expensive supplier, the additional insurance costs proportionate to the extra price of the good or service or the legal fees incurred in the context of the proceedings before the competition authorities.

It is important to keep in mind that the extra costs paid as a result of an infringement are not only those that consist in paying more for the product or service. There is a whole set of additional costs to be taken into account when repairing the damage.

B - A prejudice of eviction

The second harm addressed is the harm of eviction. This term is new, yet it is a good response to certain anti-competitive practices whose sole purpose is to foreclose competition. As can be imagined, this harm is defined as that "resulting from the partial or total eviction from the market or from the prevention of entering the market"[114] . This eviction may arise from several effects of the anticompetitive practice. Of course, it can be the cause of extra costs. It can also be the effect of a strategy of self-preference, predation or refusal to deal.

Within this category, Professor Amaro identifies three kinds of harm. The first is the most obvious, it is a volume effect caused by the passing on of the extra price. That is, there is a loss of turnover due to the increase in the resale price because of the passing on of the surcharge in the markets for services or products directly affected by the anticompetitive practice. This specific eviction loss can be considered as a lost profit or a loss of opportunity. The second type of effects are those caused by eviction on the market for services or products directly affected. That is to say, this time the loss of turnover due to foreclosure results from *"all negative consequences other than the passing on of any additional price"*[115] . Here again,

[113] *Ibid* p.6
[114] *Ibid*
[115] *Ibid* p.4

this loss can be likened to a lost profit or a loss of opportunity. The third type of effect is very similar to those described above, but it concerns indirectly affected product or service markets. It is important not to forget these markets, as there are a large number of indirect victims of an anti-competitive practice.

The purpose of this harm is to capture all the effects of a market foreclosure. It is a complex injury that requires a framework because it must be possible to demonstrate that the foreclosure is solely the result of the anti-competitive practice. It must not be related to other factors of competitiveness.

In addition to these harms, the nomenclature provides for two other more innovative harms (§2).

§2 - The appearance of new prejudices : the investment prejudice and the prejudice of the loss of a tangible property

Among these innovative damages proposed by the nomenclature, we find the investment damage (A), and the loss of intangible property (B).

A - Investment damage

The investment loss, and in particular its name, is the one that is most debated in the literature. "*This expression has also been preferred to those of 'discounting', 'cash flow loss', 'compensatory interest' or 'financial loss', which are sometimes used to refer to the same reality*" [116] . This loss, which is difficult to apprehend, is nevertheless very important in the business world, where investments are commonplace. As mentioned above, this prejudice has already been accepted in case law, through the notion of unavailability of capital. Nevertheless, the evidentiary requirement to which it is attached limits the cases of compensation[117] .

This damage corresponds to the investment that could not be made because of the deprivation of a sum of money, which prevents the victim from gaining market share. Of course, it is

[116] *Ibid* p. 4
[117] See. Supra 39

necessary that this deprivation results from an anti-competitive practice. It is important to distinguish between the effects of this loss and the loss of market share, as specified in the nomenclature. One of the examples given in the nomenclature is the fact that a victim argues that, with equal market shares, he would have been able to offer a product or service that was less expensive because of these investments. Of course, this loss can be considered as a loss of opportunity.

The difficulty with this loss is that it must not be random. However, investments always have a degree of randomness and risk. It is difficult to estimate with certainty the results of these investments. The evidential requirements of the courts are therefore very high.

B - Loss of Intangible Property

The last patrimonial prejudice put forward in the nomenclature is the loss of an intangible property. Please note that we are talking about intangible property and not tangible property. As underlined in the nomenclature, *"if the loss of value of a tangible asset seems to be a textbook case for competition litigation, the loss of value of an intangible asset has already been discussed before the courts without leading to substantial reparations"*[118] . The typical example for understanding the substance of this loss is the loss of value of company shares or of a business following an anti-competitive practice.

The nomenclature distinguishes between the permanent loss of value of an intangible asset and the temporary loss of value of an intangible asset. The permanent loss can be equated with a loss made, while the temporary loss can be equated with a loss of chance. In the first case, there must be a definitive loss of the property with a disposal or disappearance of the property. In the second case, it is more precisely a *"loss of opportunity resulting from the impairment of the ability to arbitrate or the limitation of the room for maneuvers"*[119] .

This second sub-prejudice is subtle, one cannot compensate as such the temporary loss, since this would amount to a compensation of a possible prejudice. This is impossible under French law. This is why the nomenclature advocates the idea of compensating the alteration

[118] Proposal for a nomenclature of damages , Amaro, op-cit

[119] Ibid

of the capacity to arbitrate or the limitation of the room for maneuvers. We must be careful with this proposal of prejudice since it is a question of a loss of chance, and not of a loss made. Therefore, one should not look at the depreciation of the value of the property, which is a loss made. Instead, one must look at *"the expected margin of the projects that the owner had to give up or the cost of alternative financing that he had to resort to"*[120] . It appears here that this loss is very similar to the investment loss. If the objective of facilitating the apprehension of prejudices by the nomenclature seems to be fulfilled, it still necessary to specify the frame of some of them in order to avoid any risk of accumulation.

Section 2: The proposal for a better framework for the evaluation of the damage by experts

The evaluation of the prejudice by the economic experts and the judges must be weighted by certain elements according to the proposed nomenclature (§1). It would also be interesting to exercise stricter control over the evaluation of prejudices by experts (§2).

§1 - A weighting by common criteria of the evaluation of this damage

The damages mentioned above are economic damages, the evaluation of which is based on economic analysis. The categories mentioned above are the main categories of damages that can be compensated in the event of an anti-competitive practice. The precise evaluation of the damage items requires weightings in order to respect the principle of full compensation. It is necessary to analyze different variables that may accentuate or attenuate certain data in the calculation of the damage, but which in reality are not related to the anti-competitive practice. This objective of weighting was already found in the Practical Guide to Quantification published by the Commission[121] .

In his proposal for a nomenclature, Professor Amaro briefly summarizes these variables, which make it possible to revise the number of damages upwards or downwards. These

[120] Ibid

[121] Practical Guide to the quantification of damages in actions for infringement of Article 101 or, European Commission 2013, op-cit

variables are not really new and are already used in case law. However, the fact that these different variables are provided for and included in a nomenclature is beneficial. It is a source of legal certainty for all, thus reducing the risk of differences in evaluation between jurisdictions. Once again, we find this desire to standardize the assessment of injury.

The first criterion is the persistent effect. It is defined as the persistence of the effects of the infringement over time, in the event that the damage is suffered beyond the period of the infringement. Here we distinguish between the duration of the infringement and the duration of its effects. Indeed, some practices will have medium and long-term effects even though the practice is no longer implemented. One can think, for example, of predatory practices.

The second criterion is monetary erosion. Quite simply, the purpose of this criterion is to take inflation into account in the quantification of the loss and the compensation. For this purpose, it will be possible to impose a rate that compensates precisely for this monetary erosion. However, it must be ensured that this inflation has not already been taken into account in the various items of damage.

The last criterion relates to the passing on of additional costs. This idea is found in Article L. 483-1 of the French Commercial Code, which states that the calculation of the extra cost is made *"subject to the total or partial passing on of this extra cost that he may have made to his subsequent direct contractor*"[122] . Indeed, in the presence of a repercussion of the overcost, it is necessary to look if this one is total or partial. We always find this idea of full reparation which consists in repairing the prejudice but only the prejudice.

§2 - Strict control of economic expertises

As it has been mentioned many times, the problem with the evaluation of damages in private enforcement is the complexity of the economic analysis. Economists have become indispensable, and it is often difficult to control their expertise. The complexity of the matter prevents lawyers from really taking ownership of this stage of the evaluation of the prejudice,

[122] Art. L. 481-3 Commercial Code

which is nevertheless decisive. The purpose of the nomenclature is not to replace the economic tools used. These tools are certainly the most relevant in this field. The goal is to obtain a translation of these tools to allow a better understanding by lawyers. Rafael Amaro explains that *"its contribution will be rather to standardize the translation by the judge into legal concepts of the measurement of economic effects carried out by experts"* [123].

In addition to this legal translation of economic expertise to allow for better control by lawyers, some advocate for a better supervision of experts during litigation. It is true that in practice, each party has experts producing economic analyses. Depending on the party that mandates them, they will choose the data and calculation methods that seem most favorable. This can result in considerable differences in expert opinions before the judge. This forces the judge to make the best possible analysis on his own. This is why Olivier Fréget recommends, in addition to the guidelines and the proposed nomenclature, the implementation of a "methodological bridge"[124] . According to him, *"This methodological bridge involves, in particular, the organization of the trial in order to know how it can succeed in allowing the elaboration of a "judicial truth" on the reality of the prejudice, when the latter proceeds from a very complex hypothetical-deductive reconstruction"*[125] . He then proposes two interesting ideas for establishing this judicial truth. The first is to reflect on and review the *"rules of admissibility for expert testimony in order to ensure that they respect a scientific approach"*[126] . We understand the idea here. The aim is to avoid as much as possible biased expert testimony before the judge. The second proposal, which is more difficult to implement and for which more thought should be given to the consequences, *"is to ensure that as much data as possible describing transactions on the market is made accessible"*[127] .

He wishes, in particular thanks to this methodological bridge, to ensure that the overlapping of losses is avoided as much as possible. This may still seem complex when reading the nomenclature. Olivier Fréget wonders about the delimitation of certain losses in the nomenclature, and he opens "*the debate on how to verify the internal consistency (absence of overlap between categories) and external consistency (consistency with the data) of the*

[123] Panel Discussion : Nomenclature of damages caused by anti-competitive practices, Webinar, Rafael Amaro, January 26, 2022
[124] Panel Discussion : Nomenclature of damages caused by anti-competitive practices, op-cit Olivier Fréget
[125] Ibid
[126] Ibid
[127] Ibid

claims for losses"[128] . Certain clarifications will therefore prove indispensable for the proper implementation of this nomenclature.

[128] Ibid

CONCLUSION

It appears from this research report that the assessment of harm in private actions in follow on proceedings has evolved considerably. Nevertheless, the need for development and harmonization persists.

First, the major difficulties in assessing this loss were examined. From then on, it was necessary to look at competition law and its infringements. The aim is then to show that the diversity of practices likely to constitute an infringement leads to a diversity of possible prejudices. One of the difficulties exposed concerns the pre-Directive period, where only the rules of tort liability allowed to frame this diversity of prejudice. The other difficulty addressed is that of the essentially economic nature of the analysis, and therefore the difficulty for lawyers to apprehend these economic assessments.

Faced with all these difficulties, several European initiatives were set up. The objective of these initiatives was to promote the development of private enforcement. For this purpose, there is a will to harmonize and standardize the different procedures throughout the European Union by establishing a common framework. From the analysis of this text, we see a will to simplify access by facilitating access to evidence. The question of proof, whether of damage or fault, is inherent to the Damages Directive. It can be found at different stages, each time with complex issues. One thinks, for example, of its articulation with fundamental rights, including the secrecy of instructions. This attempt at simplification has resulted in the introduction of several presumptions favorable to victims. To this end, particular attention has been paid to the transposition of the Directive into French law. In addition to the Damages Directive, soft law texts have also been adopted to facilitate the difficult task of quantifying the loss. Here again, we find this European desire for harmonization with the objective of promoting private enforcement.

Then, we had to step back from these European and sometimes national initiatives to make a sad observation. Although the texts have allowed a certain evolution of litigation in the framework of follow-on procedures, the fact remains that these European texts remain insufficient. This can be explained by the difficult balance to be found between the right to access evidence, and in particular the files of the competition authorities, and the effectiveness of the leniency procedure. The analysis of the texts shows a choice of legal policy in favor of the leniency procedure to the detriment of private enforcement. This choice

complicates the proof of the damage suffered and its evaluation. The inadequacy of these texts is also reflected in the fact that certain provisions are applied too late, as well as in the lack of clarity regarding the definition of certain damages mentioned in the texts. In addition to this, there is the criticism that can generally be made of soft law in that it is only optional and does not allow for true harmonization. This concerns the quantification of the harm. The divergences between the various jurisdictions of the different Member States on this point encourage forum shopping. It is therefore a brake on the development of private enforcement.

In view of these shortcomings, it was important to look to the future and to possible developments in the evaluation of damages in follow-on procedures. For this purpose, the proposal for a nomenclature by Rafael Amaro seems to be one of the most important. It proposes to redefine the different types of damages in order to respond to the complexity of their evaluation. It defines each head of prejudice by explaining to which of the more classic heads of prejudice it refers to. This nomenclature is the beginning of a response to the insufficiency of European initiatives, with new prejudices appearing in the decision-making practice of the courts. However, this nomenclature still presents some difficulties, and requires further clarification on the delimitation of the different damages. In addition to this nomenclature, certain doctrinal ideas tend to establish a better control of legal expertise on the quantification of the prejudice, while giving access to more data for these expertises.

Finally, the assessment of harm in follow one proceedings is still evolving. Certain limitations continue and will continue to hinder its development. It is necessary to continue the search for the best possible balance between the different issues. Other limits should gradually disappear with a better application of the Damages Directive in the coming years and a more developed soft law. There is still a crucial lack of hindsight on the Directive to fully grasp its successes and failures.

The question of the evaluation of the damage is not the only obstacle to the development of private enforcement. Other problems will continue to arise, and certain developments may become indispensable in order to obtain a fully effective law of private actions. Among these issues is the tricky question of class action and their ineffectiveness, particularly in French law. There is also the question of punitive damages, for which there is less and less reluctance. If the full effectiveness of private enforcement has not yet been achieved and will probably never be, we can already be pleased with the recent developments.

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