



# Proposal for Antitrust Damages Directive: Ends and Means of Harmonised Rules

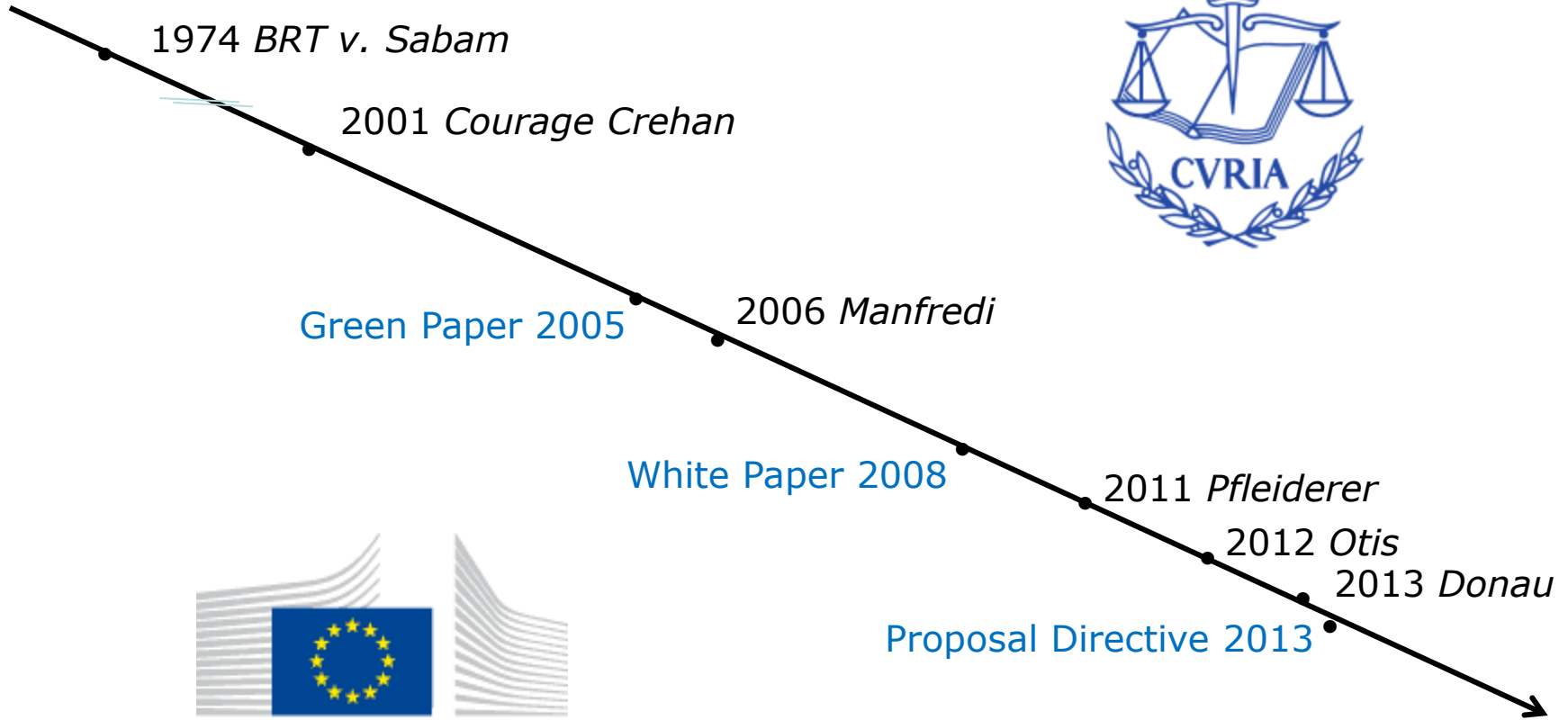
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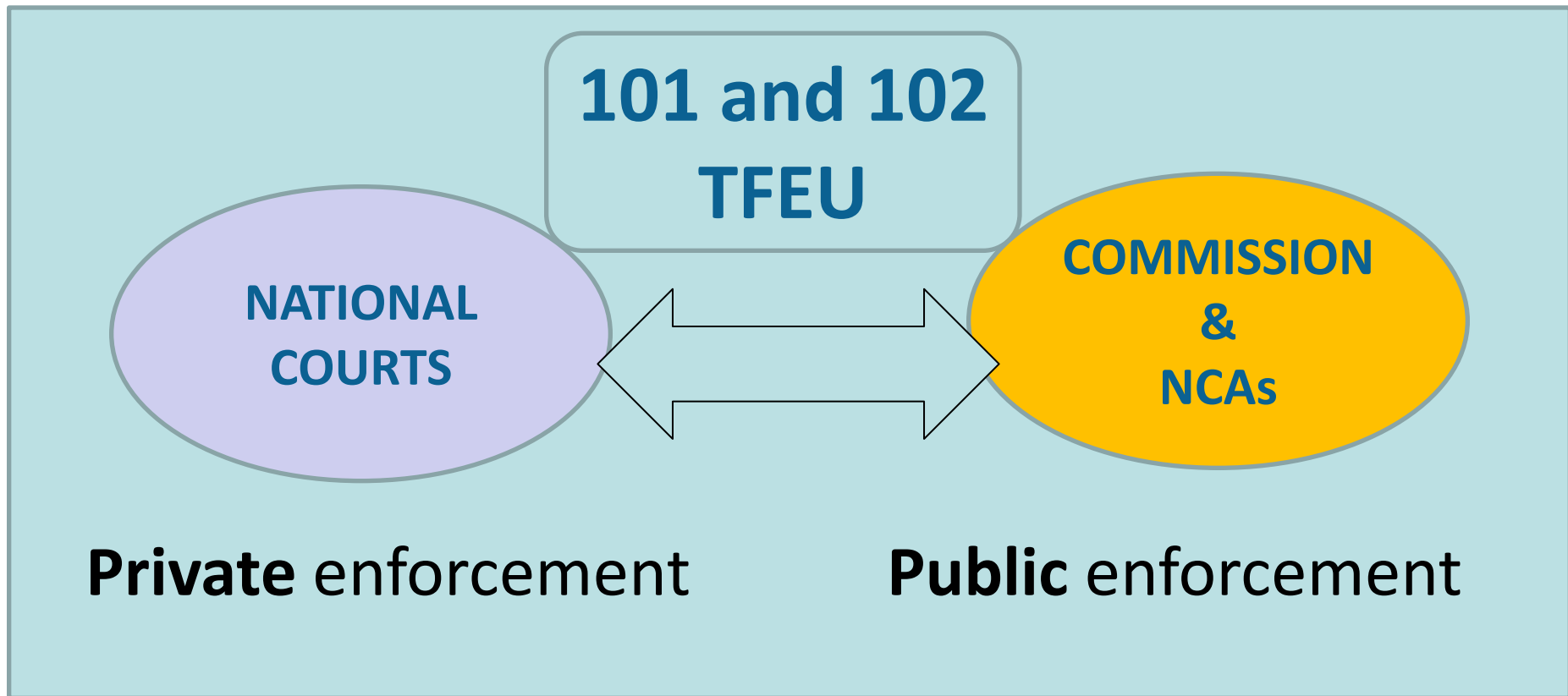
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# Ends:

## 2 main objectives:

- to give injured parties a realistic chance of effectively claiming antitrust damages in all Member States
- to harmonise essential rules on the interaction between private and public enforcement, including the protection of leniency programmes

# Overall effective enforcement



# Complementarity / Conflicts

- Public and private enforcement largely **complementary**
- **Follow-on damages claims** are based on findings by public enforcers
- Nevertheless, the private interest of a claimant may **sometimes conflict** with the public interest
- Thus, it is desirable to:
  - **maximise efficiencies** resulting from the complementarity
  - **minimise conflicts** and protect the effectiveness of investigations by public enforcers

# The EU right to compensation

- **National courts must protect the rights** which EU competition rules confer on individuals.
- **Any individual who suffered harm** through an infringement of these rules **has a right to full compensation**. This includes:
  - actual loss
  - loss of profit
  - interest from the time the harm occurred



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# Means:



# Facilitating compensation

- ***inter partes* disclosure of evidence** under court's control
- **finding of an infringement** in a final NCA's decision **cannot be re-litigated**
- **limitation periods**
- **joint and several liability**
- **clear rules on passing-on of overcharges** / indirect purchasers benefit from a (rebuttable) pass-on presumption
- **court's power to estimate harm** / rebuttable presumption of cartel harm
- **out-of-court settlements** stimulated

# Public/Private conflicts

- **Weighing-up of interests** (*Pfleiderer & Donau Chemie*):
  - Limits on the disclosure of evidence from CA's files
  - Immunity recipient conditionally exempted from joint and several liability

# Disclosure of evidence

- court can order a party to the proceedings or a third party to disclose evidence
- conditions:
  - **plausible grounds** for suspecting that harm was suffered
  - evidence must be **relevant for substantiating the claim**
  - **pieces or categories of evidence** must be **defined as precisely and narrowly as possible**
  - disclosure scope must be **proportionate**
- confidential information can be disclosed, but court is obliged to ensure effective protection

# Protecting effective public enforcement

*Problem: uncertainty regarding the access to documents (also) in the file of a competition authority*

- "**Black list**" – leniency corporate statements and settlement submissions are never disclosable
- "**Grey list**" – documents produced for the purpose of the public proceedings are only disclosable once the investigation of the competition authority is closed

# Disclosure of leniency documents

- **The effectiveness of leniency programmes could be compromised** if documents relating to leniency proceedings were disclosed to persons wishing to bring an action for damages.
- Although those considerations **may justify a refusal to grant access to certain documents**, they do not necessarily mean that access may be systematically refused.
- Taking account of the fact that access to the documents in question may be **the only opportunity** claimants have **to obtain the evidence needed** on which to base their damages claim.

# Victims can benefit from the decisions of competition authorities

*Problem: victims may be time-barred when the competition authority finds the infringement and the effect of its decisions is unclear*

- The proposal regulates **limitation periods to allow victims to wait until the decision is adopted**
- Victims can **rely on decisions of competition authorities** as proof of the infringement

# Joint and several liability

- **Standard rule:** Injured party can claim compensation for the **entire harm from any of the co-infringers**

*Problem: parties that don't appeal are an easy first target of litigation*

- **Immunity recipient is exempted from joint and several liability:**
  1. liable to his own customers
  2. liable to others only if they cannot obtain full compensation from the co-cartelists

# Passing-on of overcharges



## Legal Certainty on the Passing-on Defence

*Problem: price increase may be passed-on in the supply/ distribution chain*

- When **Direct Purchaser claims** compensation, the infringer can raise the 'passing-on defence'



# Passing-on of overcharges



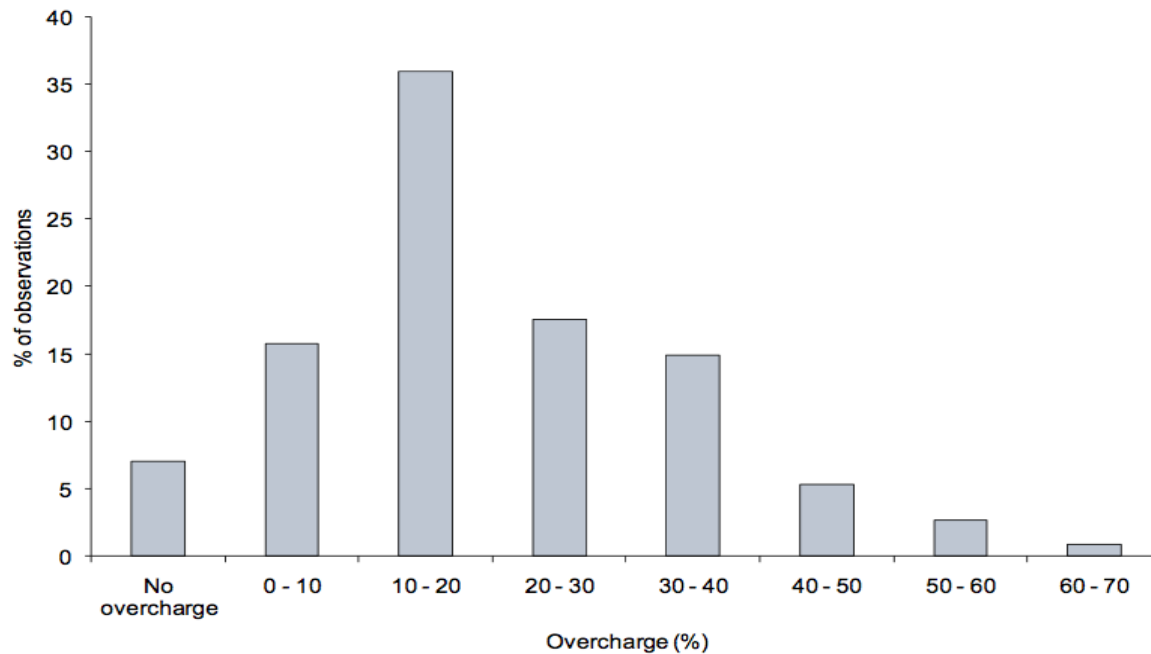
## Facilitating Passing-on Claims

*Problem: price increase may be passed on, but it is difficult to prove for indirect purchasers*

- **Indirect Purchaser** profits from a **rebuttable presumption of passing-on**
- Court's **power to estimate the share of overcharge passed on**

# Cartel harm presumed (rebuttable)

**Figure 4.1** Distribution of cartel overcharges in empirical studies of past cartels: indicative results from new sample selected by Oxera, based on Connor and Lande (2008)

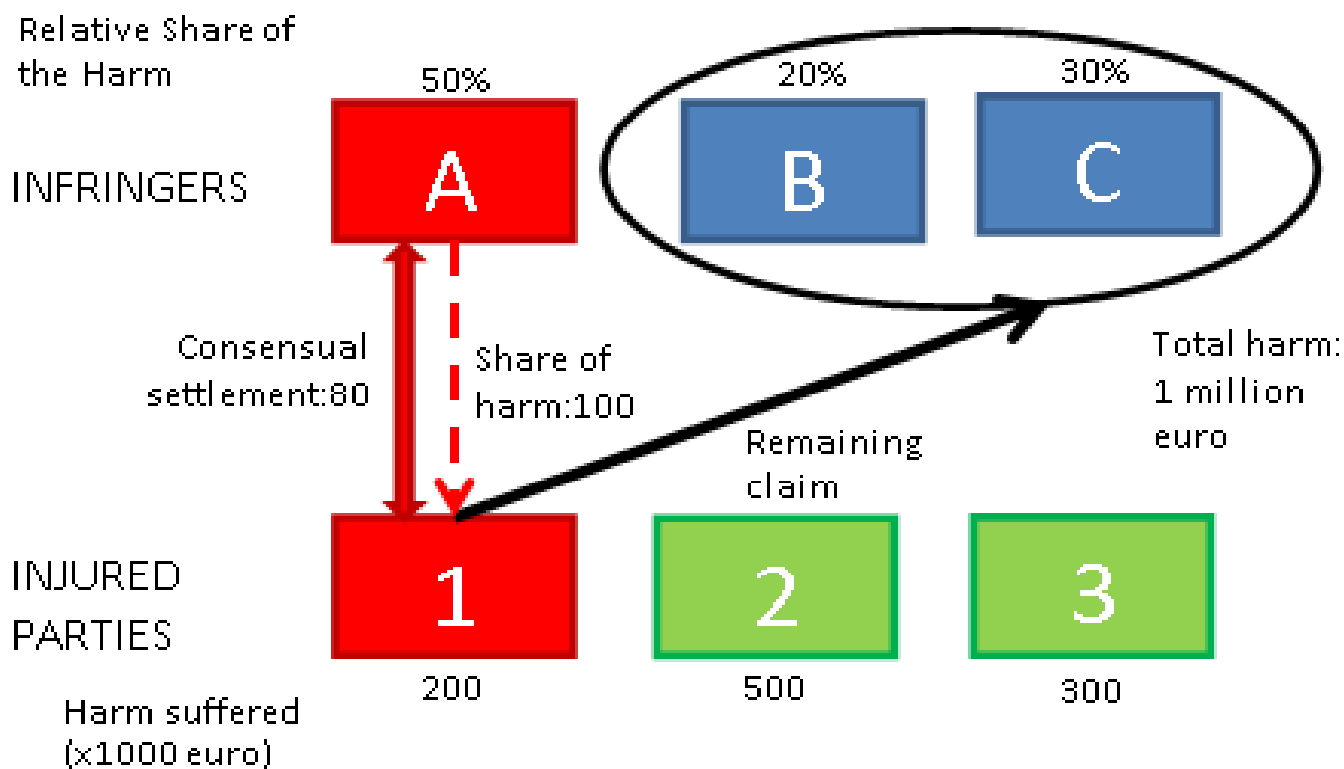


# Consensual dispute resolution (Art. 17-18)

*Problem: unclear or unfavorable rules may prevent parties from engaging in consensual dispute resolution*

- **Suspensive effect:** limitation periods, power to stay pending court proceedings
- **Regulation of the effect of partial settlements on subsequent damages actions**

# Partial Settlements





## Next Steps

- The **Proposal for a Directive** has been submitted to the **European Parliament and the Council** (ordinary legislative procedure). Once adopted, **Member States will have two years to implement** the provisions of the Directive.
- **Collective redress Recommendation:** Commission invites Member States to take measures in 2 years. It will then reassess the situation.