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Challenges in Private Enforcement against Big Tech Companies in Europe: Access to Evidence and Quantification of Harm

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Abstract

The thesis analyses the challenges encountered by claimants in private enforcement of competition law damages actions against Big Tech companies with special focus on the issues of access to evidence and quantification of harm. It reviews the current legal framework in the European Union regarding these subjects, especially Directive 2014/104/EU, case law of the Court of Justice of the European Union, and the national procedural rules implementing it. A particular emphasis is placed in the thesis on analysis of recent damages cases in national courts against Big Tech companies and their interaction with the disclosure mechanism and the issue of quantification of harm. Ultimately, the thesis argues that generally the legal framework concerning the two central issues is capable of addressing challenges arising in damages actions against Big Tech. However, the effectiveness of private enforcement depends largely on the practical application of the disclosure scheme and the ability of national courts to adapt traditional methods of quantifying harm to the economic characteristics of digital markets, including but not limited to information asymmetries, network effects and the complex counterfactual analysis.

Zusammenfassung

Die vorliegende Arbeit untersucht die Herausforderungen, denen Kläger bei der privaten Rechtsdurchsetzung wettbewerbsrechtlicher Schadensersatzansprüche gegen Big-Tech-Unternehmen begegnen, wobei der Schwerpunkt auf dem Zugang zu Beweismitteln sowie der Schadensquantifizierung liegt. Sie analysiert den derzeitigen Rechtsrahmen der Europäischen Union in diesen Bereichen, insbesondere die Richtlinie 2014/104/EU (Kartellschadensersatzrichtlinie), die Rechtsprechung des Gerichtshofs der Europäischen Union sowie die nationalen Verfahrensvorschriften zu deren Umsetzung. Ein besonderer Schwerpunkt der Arbeit liegt auf der Analyse jüngster Schadensersatzverfahren gegen Big-Tech-Unternehmen vor nationalen Gerichten sowie auf deren Zusammenspiel mit dem Offenlegungsmechanismus und der Schadensquantifizierung. Die Arbeit gelangt zu dem Ergebnis, dass der geltende Rechtsrahmen hinsichtlich dieser beiden zentralen Fragestellungen grundsätzlich geeignet ist, die Herausforderungen von Schadensersatzklagen gegen Big-Tech-Unternehmen zu bewältigen. Die Wirksamkeit der privaten Rechtsdurchsetzung hängt jedoch maßgeblich von der praktischen Anwendung der Offenlegungsvorschriften sowie von der Fähigkeit der nationalen Gerichte ab, traditionelle Methoden der Schadensquantifizierung an die wirtschaftlichen Besonderheiten digitaler Märkte anzupassen. Hierzu zählen insbesondere Informationsasymmetrien, Netzwerkeffekte sowie die Komplexität der Erstellung kontrafaktischer Szenarien.

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Table of Abbreviations

Directive 2014/104/EU 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 [2014] OJ L349/1	Damages Directive
European Union	EU
Member States of European Union	Member States
Organisation for Economic Co-operation and Developments	OECD
Competition Authority	CA
Treaty on Functioning of European Union	TFEU
National Competition Authority	NCA
Advocate General	AG
European Commission	EC
CAT	Competition Appeal Tribunal (UK)

Introduction

Competition law in recent years has become instrumental in regulating conduct in digital markets across the European Union. Big Tech companies and digital markets in which they operate have changed the landscape of competition law in Europe in recent years. Undertakings such as Google, Apple, Amazon or Microsoft being the key players in digital markets provide services that have become central for many undertakings and consumers alike, which in turn created new challenges in the field of competition law. The business models of Big Tech companies are characterised by network effects, economies of scope and complex digital ecosystems, which make assessment of conduct and, importantly for private enforcement, its effects considerably more challenging than in traditional markets[1]. At the same time, the number of decisions of competition authorities addressing the Big Tech companies is increasing[2] and by effect fueling damages actions against them, increasing the importance of private enforcement, as a mechanism ensuring effective compensation for victims of competition law infringements.

Directive 2014/104/EU on anticompetitive damages (Damages Directive) sought to facilitate private enforcement by harmonising certain aspects of competition law damages actions across the EU. While the Damages Directive significantly improved the procedural position of claimants, its application in the context of claims against Big Tech raises a number of questions. The complexity of infringements, the structure of digital markets, extensive use of confidential information and issues connected with quantum of harm may potentially limit the practical applicability of the mechanisms devised in Damages Directive.

The topics chosen for analysis focus on access to evidence framework and quantification of harm. These two issues have been identified, as potentially challenging to the claimants given the characteristics of digital markets, in which Big Tech companies operate. The Damages Directive provides for a framework to access evidence in damages cases of competition law and a limited framework in terms of quantification of harm. These matters are interconnected, as claimants are often unable to quantify damages without access to the evidence from the defendant or third parties. Simultaneously, digital markets present unique challenges in both

[1] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, *Competition Policy for the Digital Era* (European Commission, 2019) 31–41.
[2] European Commission, *Report on Competition Policy 2024* COM(2025) 181 final, 32.

respects, including information asymmetries, confidential nature of evidence and the difficulty in constructing reliable counterfactual scenarios among others. Thus, these two issues may potentially constitute significant procedural obstacles faced by claimants seeking compensation from Big Tech.

Against this background, the thesis aims to answer the question: **How far do current legal frameworks in the EU and its Member States enable effective access to evidence and quantification of harm in private damage claims against Big Tech?**

The thesis argues that the legal framework established by the Damages Directive in principle is able to address challenges posed by claims against Big Tech companies. Nevertheless, the effectiveness of that framework depends largely on its practical application by national courts. In particular, appropriate use of the disclosure mechanism, confidentiality safeguards and tools used for estimation of damages are essential to ensuring that the right to full compensation is effective in the context of digital markets.

The methodology followed in the thesis primarily follows the doctrinal legal research by analysing recent national case-law of Member States of the EU, CJEU cases, certain cases out of EU jurisdiction and academic literature. A special emphasis in the thesis is put on analysis of the recent litigation against Big Tech companies, especially the ones considering damages, in order to assess whether the procedural mechanisms currently available to claimants provide an adequate framework to counter challenges present within digital markets. In addition to that, to a lesser extent the paper involves the comparative method to showcase differences in approaches being adopted by Member States within the two central issues of the thesis. Using both of these methods will enable us to effectively explore the research question.

The thesis is structured as follows. Chapter 1 focuses on the legal framework in the EU with introduction of the relevant principles, the Damages Directive and showing the connection between public and private enforcement. Chapter 2 undertakes to introduce the concept of Big Tech companies and examines characteristics of digital markets, within which they operate to showcase the complexity of analysing them under the lens of competition law. Chapter 3 aims at analysing the existing framework for access to evidence in the EU, how far does it afford effective access in claims against Big Tech and how such access is connected to

quantification of harm. Finally, Chapter 4 examines different methods of quantification that are employed to quantify the harm and the legal framework in the EU in connection to quantum.

Chapter 1: Legal Framework for Private Enforcement in the EU

In order to explore the issues connected with particular challenges of private enforcement against Big Tech companies, one needs first to establish the basis for legal liability of such companies and differentiate between public and private enforcement in the context of competition law. This section of the paper will show how the Treaty on the Functioning of the European Union and the relevant principles discovered by the Court of Justice enable individuals to claim their rights in respect to competition law, thus developing private enforcement of competition law within the legal order of the European Union.

1.1. Art. 101 and 102 TFEU as basis for legal liability

Art. 101 and Art. 102 of TFEU are the foundation of competition law in the European Union and have a very wide and flexible scope, which impacts both the public and private spheres of law. The former is concerned with the illegality of anticompetitive agreements, which means agreements between undertakings that prevent, restrict, or distort competition within the European Union. The latter, however, is concerned with unilateral conduct of companies, which abuse their dominant position for the sake of distorting the competition on the market. The two are most often associated with their ex-post applications, concentrated within public law enforcement, meaning investigations followed by decisions of the European Commission or the respective national competition authorities, which are subject to a judicial review. Thus, the articles serve to regulate market behaviour, as they give certain obligations to companies on the market, which are monitored by appropriate authorities. National authorities or the European Commission monitor the compliance with the Treaty articles. They detect and may impose fines and/or remedies in their decisions, therefore intervening in behaviour deemed contradictory to the Treaty articles. The motive for such type of enforcement is mainly to achieve a deterrent effect[3], so that companies will not engage in any kind of anticompetitive conduct, as it might be a futile endeavor to do so. In addition to that, it has been remarked that the detection of anticompetitive behaviour on the market is one of the primary goals of competition authorities, considering the often secretive nature of the infringements and the use of leniency programmes[4].

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[3] Kai Hüschelrath and Sebastian Peyer, *Public and Private Enforcement of Competition Law - A Differentiated Approach* (ZEW - Centre for European Economics, Research Discussion Paper No. 29, 2013) 3.
[4] Wouter J.Wills *The Relationship between Public Antitrust Enforcement and Private Actions for Damages* (Volume 32, World Competition, 2009) 10.

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However, another aspect of these articles is that they not only impose obligations, but also indirectly give rights to individuals, which can be used in court, when companies engaging in anticompetitive conduct cause harm to individuals, as it has been discovered by the CJEU in the case of Courage v. Crehan[5]. In this English case, the court was asked whether a party tied to an anticompetitive agreement may seek relief from such an agreement and whether it is possible to seek compensation on the basis of the art. 81EC (currently art. 101 TFEU) from such agreement. The court answered these two questions affirmatively. In regard to the first question, the court recalled the famous cases of *Francovich*[6] and *Van Gend en Loo*s[7], explaining that subjects of the Treaty are not only Member States of the European Union, but also their nationals[8]. Therefore, the Community Law must be viewed as a source of rights of the nationals, even if the rights are not directly expressed but are derived from obligations. Secondly, the court emphasized that Article 85 EC is essential for the accomplishment of the Community tasks and held that agreements, which contravene Article 85 EC, are automatically null and void[9]. Lastly, it was underlined that the Article produces a direct effect "in relations between individuals and creates rights for the individuals concerned which the national courts must safeguard"[10]. Synthesizing the above considerations led to the conclusion that individuals may rely on Article 85 EC to seek relief from an anticompetitive agreement. With respect to the second question, the court has used the principle of full effectiveness to argue that a party to which loss was caused by a contract or conduct may seek compensation on the basis of Article 85, as the unavailability of such a right would restrict the full effectiveness of the said Article[11]. This means that restriction of such right by domestic law would restrict the treaty obligation that Member States need to abide by.

Further, the case of Manfredi[12] widened the scope of persons entitled to use Article 101 to third persons, who suffered a loss as a consequence of an anticompetitive agreement. Similarly, to Courage v. Crehan, the court used the principle of *effet utile* to ascertain that if

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[5] Case C-453/99 *Courage Ltd v Crehan*, ECR I-6297, Judgment of 20 September 2001.
[6] Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, ECR I-5357, Judgment of 19 November 1991.
[7] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* ECR 1, Judgement of 5 February 2005.
[8] Case C-453/99 *Courage Ltd v Crehan*, ECR I-6297, Judgment of 20 September 2001, paras 19–20.
[9] ibid. para 22.
[10] ibid. para 23.
[11] ibid. paras 26-27.
[12] Joined Cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* ECR I-6619, Judgment of 13 July 2006.

there is a causal link found between an agreement and the loss suffered, an individual shall be able to seek compensation. *Effet utile* was used to capture the full scope of rights derived from Article 101 and confirmed that any individual, to whom harm was caused by an anticompetitive agreement, may rely on it to seek compensation in order for Article 101 to be fully effective and applied[13]. Additionally, the court underlined that in absence of community rules on the matter, it is for the legal systems of the Member States to lay down the detailed procedural rules in accordance with principle of equivalence, so that their nationals can exercise their right to compensation. The principle of equivalence holds that such domestic laws, which concern EU law, shall not be treated worse than other similar domestic laws. The case has rightly been described by future commentators as the cornerstone of private enforcement, as it opened the way for seeking compensation, even if the claimant would not have a direct link with the defendant, but rather suffered a loss as a consequence of the anticompetitive behaviour of the defendant[14]. Such a scenario in private claims is currently very common, with the vast majority of claims in the Big Tech sector being claimed by companies that are indirectly suffering a loss.

It needs to be underlined that the above-mentioned case law is not restricted to Article 101, but extends to matters related to Article 102 as well. The interpretation of Article 101 in the judgments can by analogy be transposed to Article 102, but with the difference being that it refers to the prohibition of unilateral anticompetitive behaviour[15]. Therefore, the aforementioned argumentation connected with direct effect can be extended, as the right to be protected from anticompetitive behaviour is indirectly enshrined in Article 102. This is tremendously important to the development of private enforcement, as it accounts for the full range of anticompetitive behaviour, which can possibly harm individuals or companies. The right to be protected from abuse of dominant position is particularly important in the context of Big Tech, as digital markets are often characterised by entrenched market power, network effect and other factors increasing risks of abuses of dominance[16]. With this, it can be seen how the TFEU assures the rights directly derived from it and gives a wide form of protection to companies and individuals alike.

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[13] ibid. paras 60-61.
[14] Bureau Brandeis, *The principle of effectiveness in cartel damages litigation*, https://bureaubrandeis.com/the-principle-of-effectiveness-in-cartel-damages-litigation/ accessed 8 May 2026
[15] Joined Cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* ECR I-6619, Judgment of 13 July 2006, para 39.
[16] Jeanne Mouton, *The Challenges for Private Competition Law Enforcement concerning Anticompetitive Conducts in Digital Markets* (15(26) *Yearbook of Antitrust and Regulatory Studies* 15(26), 2022) 9, 13.

Article 101 and Article 102 of TFEU serve a dual function, both deterring companies from engaging in anticompetitive conduct, while ensuring that once such conduct has happened, an individual may claim compensation by exercising their rights. It has been underlined by Renda that private enforcement is superior in achieving corrective justice. In addition to that, such a function is attributed by the European Commission itself. More importantly, the two types of enforcement pursue simply different goals: deterrence and detection in cases of public enforcement; and compensation in case of private enforcement. However, while the CJEU established the existence of a right to compensation, the procedural conditions governing its exercise remained within the competence of the Member States prior to the adoption of harmonising legislation.

1.2. Directive 2014/104/EU - Scope of application and harmonisation

The cases of Courage and Manfredi, established that Article 101, and by analogy Article 102, confer rights on individuals, thus opening the way to private enforcement and damages claims. However, the judgements were limited to clarifying the existence of the rights, while leaving the procedural framework governing their exercise to the Member States. Such a situation revealed a gap in law, whereby the undertakings and individuals received protection from Treaty Articles but in practice could not properly realise this protection. This lack of harmonization of law was to be addressed by Directive 2014/104/EU, also known as the Damages Directive, which was the first "single EU legal instrument addressing how competition claims could be brought in practice"[17]. The legislation is central to examining the current standards in private enforcement assessment within the EU, as it finally gave a certain direction to the place and functioning of private enforcement, within enforcement of competition law in the EU.

The directive pursues two central objectives "(i) optimising the interaction between public and private enforcement of competition law; and (ii) ensuring that victims of infringements of EU competition rules can obtain full compensation for the harm they have suffered"[18] as

[17] William Tuttle and Camilla Sanger, *The Legislative Framework for Private Antitrust Enforcement in the European Union* in Ilene Knable Gotts (ed), *The Private Competition Enforcement Review* (14th edn, Law Business Research 2021), 2.
[18] Philipp Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law A Law and Economics Analysis,* (2021), 2.

noted by Kirst. These goals are clearly reflected in Article 1 of the Damages Directive, which ensures 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. It sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning, by ensuring equivalent protection throughout the Union for anyone who has suffered such harm". This provision demonstrates that the directive takes a step forward in achieving effective compensatory measures across the Member States, which will include compensation for the actual loss, loss of profit, and interest, thereby restoring the injured party to the position prior to an infringement. The reason for this is that many of the Member States before the directive did not have specific rules for damages derived from competition law infringements, and the claims could only be pursued based on general civil law, with no regard for specific issues characteristic to competition law claims leading to inconsistent practices across Member States[19]. Another reason, although not explicitly stated by the directive, for this legislation was to limit forum shopping. The claimants were limited to certain jurisdictions, in which private enforcement was well-established and they could not realise their rights effectively in their home jurisdiction, due to lack of procedural laws.

The Directive was introduced on the basis of Article 103 TFEU and Article 114 TFEU. Inclusion of Article 114 is important to the scope of application, as it shows that the directive requires Member States to approximate national laws to ensure proper functioning of the internal market. In practice, this means that the provisions of directive are to be transposed to national law and are to be applied when national courts adjudicate on matters concerning breach of European law or even on matters of breach of national competition law, where national law is applied in parallel with EU law. Therefore, the directive has a far-reaching scope, influencing national regimes of competition law. Additionally, all Member States have broadened the scope or are in the process of broadening it, to account for national infringements, with some even including infringements of other national regimes[20], which enhances the forum shopping phenomenon. In light of the above, one could consider the directive, or at least the way it was transposed by the Member States, to be broad in scope, as

[19] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU 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* (2020) 188 final, 2.
[20] ibid. 3-4.

the solutions found in it most likely will impact the procedural and substantive intricacies in private enforcement proceedings.

The objectives and scope of the Directive are ambitious. In order to achieve these aims, it introduces mostly minimum harmonisation rules concerning, inter alia, disclosure of evidence, quantification of harm, and the binding effect of infringement decisions. These mechanisms will be analysed in greater detail in the following section.

1.3. Directive 2014/104/EU - Key Objectives of the Directive

With a clear overview of the motivation behind harmonizing private enforcement within the EU and scope of the directive, it is necessary to look at the key provisions that are enshrined in the legislation. This section will provide an essential outline of the most important legal solutions presented in the directive, with special focus on the access to evidence and quantification of harm.

Articles connected with access to evidence are one of the most transformative provisions concerning Member States' legal systems. Prior to the Damages Directive, most of the Member States did not have the availability of discovery mechanisms, which would compel the defendant to release certain files for the sake of proceedings, unlike in the Common Law systems, where the process of discovery is well-established. The directive has, however, changed that introducing certain requirements to release of such files, as well as, files that respective competition authority holds, which are enshrined in Articles 5-8[21] of the Damages Directive. Such a measure was taken, due to information asymmetry[22], which is visible between claimants and defendants in antitrust damages cases. Information asymmetry refers to a situation whereby the claimant does not possess the information needed for the establishment that the harm has taken nor the documents, which would make it possible for quantification of harm or generally having a valid claim[23]. The directive itself recalls information asymmetry, providing that there is a likeliness to occurring it, as anticompetitive conduct in the context of Article 101 tends to be secretive[24]. Information asymmetry,

[21] Damages Directive, Articles 5-8.
[22] Information asymmetry in the context of digital markets will be described in detail in the Chapter 3.
[23] Damages Directive, Recital 14.
[24] ibid. Recital 15.

however, may not only be limited to secretive conduct associated with necessarily cartel infringements, as will be seen in later chapters of the thesis.

The directive deals with the information asymmetry by providing a framework for access to information from: a) the defendants; b) third parties, and c) competition authorities. Firstly, the access to information held by the defendants or third parties is governed by a general rule, which can be found in Article 5(1). Such disclosure must be granted by national courts, where the claimant has " a reasoned justification" to support the "plausibility" of a damages claim. Next, Article 5(2) identifies the range of the items that must be ordered for disclosure, these are described as "specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification". Lastly, Article 5(3) is concerned with testing the proportionality of the claim for the order of the disclosure. The proportionality test in the Directive expressly refers to matters connected with (a) how far does the claim or defence is supported by readily available facts or evidence; (b) the scope and cost of disclosure, with special focus on third parties; (c) confidential information, including confidential information of third parties. These three requirements, in the author's view, provide a balanced approach, setting a minimum standard for a disclosure process in the EU. Proportionality test combined with reasoned justification and the range of items showcase a coherent approach, which accounts for the need for the documents for the claimant, provided that the claim is founded so as to avoid "fishing expedition". Similar assessment of these measures can be seen in the writing of Kirst[25]. However, the measures taken have been described as cautious by, for example, Ashton[26], who takes contention in Article 5(3)(c) and describes that the Member States were cautious to open the way for disclosure regimes against traditional civil law practice. Considering this it can be said that although this framework opened the way for proper discovery process in the EU, but it was done so cautiously and accounting for the interests of both claimants and defendants respectively.

Furthermore, Article 17 of the Directive deals with the quantification of harm, the second central topic of the thesis. The Directive deals with the quantification of harm in three ways: a) regulating the burden and standard of proof of the damage and empowering national courts

[25] Philipp Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law A Law and Economics Analysis* (2021) 43.
[26] David Ashton and David Henry, *Competition Damages Actions in the EU: Law and Practice* (2nd edn, Edward Elgar 2018), 4.5.6.

to be able to derive their own estimate; b) presumption that cartel infringements cause harm and c) assistance of national authorities in estimating the quantum of harm.

Article 17 (1) alleviates evidentiary difficulties that claimants may face, when quantifying the harm they incurred. The prescribed measures ease exercising the right to damages by establishing that the national courts have the ability to quantify the harm, where it is "impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available"[27], while providing that the issues concerning burden and standard of proof should not render it impossible to exercise the right to damages. Therefore, Article 17(1) guarantees the right to claim damages in cases where anticompetitive harm can be established, irrespective of cases where such estimation may be impossible or excessively difficult.

Furthermore, Article 17(2) sets up a rebuttable presumption that cartel infringements cause harm. Once again, it is possible to see the shift in favour of claimants. What is interesting is that the rebuttable presumption is limited to only cartel infringement cases. The reason for that may be that the EC considers cartel infringements to be inherently causing harm and the information asymmetry, combined with the cartel's secretive nature necessitate presumption of harm. In one of its studies before the introduction of the Damages Directive, the Commission found that in 9 out of 10 cases cartel infringements cause overcharges[28], showing that the presumption in the context of cartels will most likely be accurately put in favour of the claimant. However, by virtue of its wording, such a presumption cannot be relied upon in damages cases concerning the abuse of dominant position, which might weaken the position of a claimant, but in reality, it may not change the position in any significant way. As it has been commented by Iacovides in the context of cartel damages cases, "At the end of the day, the claimant will still need to show the magnitude of the harm she has suffered."[29]. Therefore, with or without the presumption the claimant will be determined to demonstrate the harm that they have suffered to quantify the damages adequately and satisfactorily for them. Thus, while the presumption of harm can be considered beneficial to claimants in cartel damages cases, it does not change the private

[27] Damages Directive, Article 17(1).
[28] European Commission: Directorate-General for Competition and Oxera, *Quantifying antitrust damages towards non-binding guidance for courts* (Publications Office of the European Union, 2009)
[29] Marios C Iacovides *The Presumption of Harm and its Quantification in the Directive and the Practical Guide (Harmonizing EU Competition Litigation: The Damages Directive and Beyond)*, (Hart Publishing, 2016), 8.

enforcement landscape in a significant way, nor does the lack of the presumption in the context of abuse of dominance cases.

Lastly, Article 17(3) empowers national courts to seek assistance in quantifying damages from national competition authorities. The wording of this Article, however, enables the competition authorities to decline (if not otherwise indicated in national legal instruments). This solution may be helpful in certain jurisdictions, where private enforcement is judged in district courts rather than specialised courts for competition law and the courts do not have tools for appropriate quantification of harm. Nevertheless, it does not substantially change the law and should be ultimately viewed as support for the proceedings.

Moreover, the directive has introduced standards regarding passing-on of overcharges. Specifically, Articles 12-14 set up a mechanism to achieve full compensation, even if the victim of anticompetitive conduct would receive a loss indirectly at a different point of the supply chain. It holds that if an overcharge was passed on in entirety or in part, the damage is passed on as well to a consumer or another company downstream. On the other hand, defendants, against claimants that passed on an overcharge may rely on Article 13 and the so-called passing-on defence, which relies on the fact that the company claiming damages passed on an overcharge, thereby passing the damage to the entity at the end of the supply chain. Passing-on is most often encountered in a cartel setting, however, it is as well possible to observe it within exploitative abuses of dominant position.

In addition to access to the above, the Directive has introduced changes to a plethora of other aspects of private enforcement in the EU. Among these are changes to, for example: temporal scope[30], consensual dispute resolution[31] or joint and several liability[32]. Since the Thesis is not concerned with either of these, nor will it impact the assessment vis-à-vis challenges of claimants in regard to access to evidence or quantum of harm, they will not be commented further on.

Seeing the key objectives of the Damages Directive shows that the EU legislators recognised and anticipated challenges regarding access to evidence and quantification of harm in private

[30] Damages Directive, Article 10 and Article 22.
[31] ibid. Articles 18-19.
[32] ibid. Article 11.

enforcement and developed rather balanced and cautious legal solutions to them. However, it is also visible that the Directive was more focused on cartel infringements than abuse of dominance cases, often even directly commenting that the solutions made, were due to "secrecy" of cartels. The reason for this may be that at the time of creation of the directive the focus of the EC was exactly on infringements of Art. 101 TFEU, whereas at the time of writing the paper the focus has shifted to abuse of dominance cases and digital markets, which can be observed through the introduction of legislation, such as DMA. Therefore, it is important to analyse, as will be done at later stages, whether the standards of private enforcement encased in the Damages Directive sufficiently enable claimants to be fully compensated against Big Tech.

1.4 Key role of legislators and national courts

Although the directive is the main legal instrument concerning private enforcement in the EU, its true importance lies in the way it was transposed by Member States. Since 2019, the directive has been fully transposed by all Member States[33]. The directive, however, is acknowledged as a minimum harmonisation measure[34], as it leaves open the ways in which Member States introduce the objectives given in the directive. As a result, the measures adopted are different to one another and may be helpful to claimants to a varying degree. In addition to that, national courts are the ones interpreting and enforcing the transposed legislation, and in some jurisdictions, the courts may be more prepared for private enforcement cases given low activity prior to the directive in the field. The directive also gives certain discretion to judges, which may further present legal uncertainty. Therefore, despite the harmonisation of the law, private enforcement is still decentralised and procedural rules vary depending on the country, which in turn impacts the standing of claimants against Big Tech companies.

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[33] European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/104/EU 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* (2020), 3.

[34] Lena Hornkohl, *The Damages Directive 6 years later: the Commission published a report on the 2014 Damages Directive* (Kluwer Competition Law Blog, 2020). https://legalblogs.wolterskluwer.com/competition-blog/the-damages-directive-6-years-later-the-commission-published-a-report-on-the-2014-damages-directive/ last accessed 7 January 2026.

The minimum form of harmonization influenced the range of measures that were adopted by the Member States, as they had an opportunity to devise more extensive or claimant-friendly measures than the ones enshrined in the Damages Directive. Due to that, national legislators were one of the key players in shaping private enforcement, and the conditions of it may vary across the EU as a result. An example of "going beyond" what the directive has prescribed are the measures connected with access to evidence from a defendant in Portugal. They are the matter of the recent case[35] before the CJEU. The Portuguese rules prescribe that possible claimants are allowed to apply to a court before trial for a "pre-trial" disclosure,[36] which in view of AG Szpunar, is possible, as Article 5(8) of the directive directly provides for wider disclosure schemes[37]. The opinion was later confirmed in the judgement[38]. Such a measure is more claimant-friendly and enables more opportunities than in a jurisdiction where "pre-trial" disclosure is unavailable. This is only one of many examples in how Member States can fit and moderate the general principles that are to be achieved through the directive. Nevertheless, it portrays the difficulty in assessing the challenges present in private enforcement in the EU, because, despite the harmonisation, conditions will still vary . Therefore, essentially, the directive should be viewed as a set of laws governing the minimum standard of private enforcement in the EU.

Furthermore, national courts play an instrumental role in the enforcement framework, as they are responsible for applying EU competition law across the Member States. The Damages Directive grants courts a degree of flexibility in the quantification of damages, particularly in complex cases. Under Article 17(1), national courts are empowered to estimate the amount of harm where its precise calculation is practically impossible or excessively difficult. While this approach facilitates compensation by lowering evidentiary barriers for claimants, it simultaneously introduces a degree of legal uncertainty, as the Directive provides limited guidance on the methodology for such estimations. This tension is particularly evident in cases involving digital markets. Given their economic and technical complexity, claims against large digital platforms are likely to require judicial estimation of harm in many instances. An example of that can be found in the Idealo v. Google judgement, where the

[35] Case C-286/24, Meliá Hotels International SA v Associação Ius Omnibus, EU:C:2026:68, Judgment of 29 January 2026.
[36] Portuguese Law No 23/2018 of 5 June 2018 (Lei n.º 23/2018, de 5 de junho), as amended, Article 13.
[37] Opinion of Advocate General Szpunar in Case C-286/24 *Meliá Hotels International SA v Associação Ius Omnibus* EU:C:2025:436, delivered on 12 June 2025.
[38] Case C-286/24, Meliá Hotels International SA v Associação Ius Omnibus, EU:C:2026:68, Judgment of 29 January 2026.

court has used the powers to estimate that the damage should be equal to 465.2 million euros, while the parties claimed approximately 3.3 billion euros[39]. As a result, what was intended as an exceptional mechanism may, in practice, become a more common feature of private enforcement in this context.

[39] Landgericht Berlin II, *Idealo v Alphabet* (Case No 16 O 195/19 Kart(2), operative part of the judgement. The damage award consisted of 374,094,751.88 euros in damages and 91,126,641.82 euros in accrued interest.

Chapter 2: Competition Law in Digital Markets

This section will explore how competition law influences digital markets and *vice versa*. Firstly, the concept of Big Tech, what constitutes it, and how it operates on the digital markets will be analysed to determine what kind of competitive risks have been identified and associated with it. Such an overview is instrumental to the paper, as breaches of Big Tech companies directly influence the assessment of challenges in private enforcement that the claimants may encounter. Secondly, this chapter will deal with explaining the current theories of harm under Article 102 TFEU and how these theories may present challenges in respect to access to evidence and quantification of harm in private enforcement proceedings. Thirdly, the chapter will exemplify with the use of EC decisions and CJEU judgements how the Big Tech companies have already breached EU competition law. These examples will be helpful in understanding how the theories of harm impact the assessment of anticompetitive behaviour on one hand, and on the other, how they present difficulties in private enforcement. Lastly, the chapter will offer a clear understanding of the interplay between the two types of enforcement in relation to digital markets.

2.1. Definition of Big Tech and its characteristics

While there is no single academic definition of Big Tech, and one could presume what companies could encompass such a category, it is necessary to frame the companies to which this paper will refer to. For the purposes of the paper and further analysis in the next chapters, an in-depth analysis of what Big Tech consists of is not of utmost importance, and a broad interpretation of the meaning can be employed. The Cambridge Dictionary defines Big Tech as "the largest technology companies, especially when these are seen as having a powerful and probably bad influence"[40]. This definition showcases the central element of Big Tech companies, which is their large structure and being powerful; it also hints pejoratively at the character of Big Tech actions, which is not an essential feature. Another avenue for framing the Big Tech companies is to look at the list of designated Gatekeepers under the DMA[41]. Such a view would be, in the author's opinion, too restrictive, as it may not account for local

[40] Cambridge Dictionary, *Big Tech* https://dictionary.cambridge.org/dictionary/english/big-tech last accessed 14 January 2026.
[41] European Commission, *Gatekeepers* https://digital-markets-act.ec.europa.eu/gatekeepers_en last accessed 14 January 2026.

Big Tech players[42] on the market and future players. Still, most of the current EC or national authority decisions, as well as ongoing and finished private enforcement proceedings, which could be put under the blanket term of Big Tech, will concern Gatekeepers. Therefore, while no single uniform definition can be made, the paper will consider companies such as Alphabet, Meta, Amazon, Apple, and Microsoft as Big Tech, while leaving space for the inclusion of other companies, which, by their large influence, technological background and their position on the a given market have capabilities of abusing such position. In any case however, all the companies considered as Big Tech in the paper were found to hold a dominant position in digital markets relevant to the infringements discussed.

What is more important than the general framing of the companies is the characteristics of digital markets in which they operate, which make big Tech companies prone to anticompetitive behaviours. These features, among others, include multi-sided markets, lock-in effects, network effects, possession of large amounts of data, as well as worldwide reach of the markets. Some of the characteristics might be specific to certain companies or business models, however the characteristics below can be often found in most Big Tech companies ventures.

An essential feature of digital markets is the presence of multi-sided platforms, which provide services for distinct group of users and act as an intermediary between them[43]. They depend on the network effects to generate revenue[44]. Network effects refer to effects generated by users on the value and utility of the service[45]. They can be divided into different categories, which explain their influence on multi-sided platforms: within-group network effects, meaning the effects connected with number and composition of users on the same side of the market; and cross-group network effects concerned with number and composition of users on the other side of the market[46]. They are an essential part of multi-sided platforms and show interdependency between the platforms and the numbers and composition of users. Such

[42] An example of such may be the company Allegro, which holds a dominant position in Polish e-commerce, but is not included in the Gatekeepers.
[43] *Svetlana Golovanova, Eduardo Pontual Ribeiro,* Multi-sided Platform Analysis and Competition law Enforcement Practice in BRICS countries (Journal of Competition Law & Economics, Volume 18, Issue 3, 2022), 730.
[44] Francesco Decarolis, Oliver Marz, Nicola Tossini, *Quantification of Harm* in Albert A Foer Randy M Stutz, M Botta (eds), *Research Handbook on Competition Law and Private Enforcement* (Edward Elgar Publishing, 2024) 229.
[45] ibid.
[46] ibid.

network effects may contribute to market concentration, as larger platforms can potentially attract both more consumers and companies providing services.

Except for the usual multi-sided platforms, where the platform owner acts as an intermediary it is possible to distinguish a special type of them in the form of dual-role platforms. They encompass a situation whereby an owner of an online marketplace acts as well as a direct competitor on it[47]. The owner is able to regulate the marketplace and acts as an intermediary between consumers and third parties on the marketplace, while it is still a direct competition between parties. The situation reflected online can be compared to a national rail operator, which acts also as a train operator and by such a position is able to modify the market suitably for him. Dual-role platforms may be therefore a fertile ground for possible competition law infringement, because the simultaneous position of operator of the platform and a competitor, may cause an incentive to promote products with tools available only to operators of the platform using the competitive advantage of controlling the digital space.

Except for the tendency for monopoly structures, due to network effects, lock in effect was, as well, recounted as a feature of multiple Big Techs, such as Apple or Google, which was manifested through the digital ecosystems that the companies operated. Lock in effect "refers to a situation wherein customers can only consume aftermarket goods or services supplied by the original equipment manufacturer"[48]. An example of a lock in effect in use could be Apple and their iOS system, which previously disabled third-party marketplaces from existing on Apple manufactured products. With no alternatives, users of Apple products needed to use Apple's own application marketplace, which provided Apple extra fees on top of the products that have been sold already to customers. The DMA currently mitigates achieving lock-in effects for the Gatekeepers by a number of measures, such as an obligation to allow third-party applications and marketplaces to operate on Gatekeepers' products[49]. However, prior to that lock-in effects were a common feature among Big Tech companies and a part of their anticompetitive strategy.

[47] OECD, *Rethinking Antitrust Tools for Multi-Sided Platforms* (OECD, 2018), 38.
[48] OECD, *Competition Issues in Aftermarkets* (Note from BIAC" 9th June 2017) Footnote 1.
[49] Digital Markets Act, Article 6(4).

Another common feature among Big Tech companies is very high barriers to entry in the markets in which they are operating[50]. By virtue of their economic activity in the technological sector, new players may have greater difficulty in entering already concentrated markets, as it would require large investment in infrastructure, as well as research and development[51]. In addition, the aforementioned network effects make new players less attractive, as the already established platforms have the advantage of reaching a wider audience. This can be as well attributed to users behaviour and the phenomenon of single-homing and multi-homing and potential effects in form of competitive bottlenecks and in worse cases market-tipping[52]. Single homing refers to users on one side of the market using only a single platform for certain products or services, while multi-homing refers to using multiple platforms for such activities. The competitive bottleneck refers to a situation where on one side of the market exists single-homing and the other is characterised by multi-homing. If, however, a platform attracts a large number of single-homing users on one side of the market, the market might tip, meaning that users on the other side of market will lose incentive in multi-homing, as most of the users are already concentrated on one platform. Following this, the previously multi-homing side of the market may abstain from pursuing other platforms perceiving it as unbeneficial, thus leading to marginalization and higher barriers of entry for new platforms.

Moreover, it needs to be remarked that Big tech companies hold very large amounts of data. Data in turn directly influences the economies of scale and scope.[53] As an effect companies holding large amounts of data will have a competitive advantage in comparison with smaller competitors, as they can supply their algorithm with more data delivering a more curated, high-end product. In addition to that, the collected data may be used for other activities or entering new markets. This gives the Big Tech companies potential opportunities in engaging in anticompetitive conduct related to data, as they can use the data to "strong-arm" the smaller players in the market. Except that, the large amounts of data may present issues in the context of access to evidence in private enforcement, as the claimants may potentially face

[50] Kaen Birch, *Undermining competition, undermining markets? Implications of Big Tech and digital personal data for competition policy* (Sage Journals, 2025).
[51] ibid.
[52] Francesco Decarolis, Oliver Marz, Nicola Tossini, *Quantification of Harm* in Albert A Foer Randy M Stutz, M Botta (eds), *Research Handbook on Competition Law and Private Enforcement* (Edward Elgar Publishing, 2024) 229.
[53] ibid. 230.

encountering the data in order to prove or quantify the harm that was done to them. Such may be particularly difficult in collective redress cases.

Lastly, digital markets span typically at least the whole of the EU and in most cases are present worldwide. Such geographic delineation of infringements has two certain implications. Firstly, the infringements in digital markets have a very wide reach, which often affects a large amount of parties and consumers magnifying the potential damage. Secondly, such infringements do not have directly comparable markets, which influences the methods of quantification, as will be presented in Chapter 4.

Understanding the core characteristics of Big Tech companies helps to understand what kind of conduct and in what kind of environment the claimants will face. The ecosystems, large amounts of data and high barriers of entry provide and potentially worldwide reach of the markets provide a fertile ground for abuse of dominance and presents certain challenges for claimants in private enforcement.

2.2. Theories of harm under Article 102 TFEU and digital markets

In order to understand damage cases against Big Tech, one needs to first consider violations and the underlying theory behind infringements, as types of infringements will influence the assessment in relation to access to evidence and quantification of harm. Past anticompetitive practices in digital markets will almost exclusively be considered violations of Article 102. Although the Digital Markets Act might shift the landscape of antitrust in digital markets against Big Tech companies, it remains that most EC decisions considering Big Tech are ones taking under lens the unilateral anticompetitive conduct under Article 102[54]. Therefore, this sub-section will explain the theories of harm associated with abuse of dominance.

The Practical Guide to quantifying harm in damages cases[55] released by the EC distinguishes two broad categories of harm: a) harm caused by raising prices[56]; and b) harm caused through

[54] European Commission, *Practical guide quantifying harm in actions for damages based on breaches of article 101 and 102 of the Treaty of the functioning of the European Union,* (SWD 205, 2013) paras 43-47.
[55] ibid. paras 43-47.
[56] ibid. paras 43-45.

exclusionary abuses[57]. These two broad categories of harm correspond with well-established theories of harm found in literature in the context of abuse of dominance, which are exploitative abuses and exclusionary abuses, with the latter being directly called upon in the Practical Guide. Among these two, it is possible to find more specific theories of harm relating to abuse of dominance in digital markets, but what is more interesting is that most often, traditional theories of harm are applied to digital markets to ascertain their anticompetitive infringement[58].

Firstly, the exploitative abuses, as referred to in the Practical Guide consist of abuses leading to raising prices and overcharges as their effect[59]. As it has been described in the previous section, in some business models of Big Tech, data has substituted straightforward price, and as such, a part of the exploitative abuses deal with data-related abuses rather than ones that would suggest direct price influence. Botta and Wiedmann, in their paper[60], identified three exploitative abuses committed by dominant parties in the digital markets: a) excessive pricing in the form of excessive data collection; b) discriminatory pricing through algorithms; and c) unfair trading conditions, in which data and privacy policies could be seen as anticompetitive from an antitrust view. There is, at the moment, no evidence of private enforcement in these types of cases, and the number of decisions by competition authorities in these matters is rather low. However, it raises the question of whether it will be possible to derive damages or are they even needed in a zero-price economy. It has been argued that the focus in such cases should be on public enforcement, as proving harm and damages through private enforcement could be very difficult without the investigative powers that the competition authorities are holding[61].

Furthermore, OECD in its report[62] through observing anticompetitive conducts on digital markets, has identified five different theories of harm connected with exclusionary abuses.

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[57] ibid. paras 46-47
[58] Jeanne Mouton, *The Challenges for Private Competition Law Enforcement concerning Anticompetitive Conducts in Digital Markets* (15(26) *Yearbook of Antitrust and Regulatory Studies*, 2022) 14.
[59] European Commission, *Practical guide quantifying harm in actions for damages based on breaches of article 101 and 102 of the Treaty of the functioning of the European Union,* (SWD 205, 2013) paras 43-45.
[60] Marco B*otta, Klaus-Peter Wiedemann, The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey. (*64(3) Antitrust Bulletin: 428-446, 2019*).*
[61] Jeanne Mouton, *The challenges for private competition law enforcement concerning anticompetitive conducts in digital markets* (15(26) *Yearbook of Antitrust and Regulatory Studies*, 2022) 14.
[62] OECD, *Abuse of dominance in digital markets,* (2020) *www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf* last accessed 4 March 2026.

Among these are: refusal to deal, predatory pricing, margin squeeze, exclusive dealing and loyalty discounts, tying and bundling[63]. All of the mentioned practices consist of the aim of excluding the competition from the market and have been well-established in competition law case-law in the EC. Except that, the report mentions exploitative abuses (similarly to Botta and Wiedmann, but in less detail).

However, not all abuses connected with Big Tech can be fitted into one certain category; an example of such may be the self-preferencing theory of harm, which is viewed by certain academics as such a type of abuse. It concerns a situation whereby a marketplace or platform provider preferences their own products over competitors within the digital space that they are regulating. Self-preferencing is usually done on different levels of the market, with the dominant company leveraging its competitive strength downstream. With such characteristics, self-preferencing combines exploitative and exclusionary abuses. The exclusionary aspect can be derived in the form of direct algorithmic manipulation that platforms may incorporate as part of their strategy based on the data of business users that are in direct competition[64]. The products or services may be better placed in the search engine for the party operating the given platform, directly impacting visibility of them to consumers and as effect excluding other parties from the market. The exploitative aspect of employed self-preferencing strategies may be visible when business users are dependent on the dominant undertaking. The users may be forced into accepting unbalanced conditions, which could not take place if not for the distorted ecosystem in which they operate as a consequence of their dependence and lack of alternatives, due to a highly concentrated or already monopolised market[65]. Third parties operating on a given platform will often have no choice but to submit to unfair contractual terms, such as higher commissions, more restrictive contracts, or reduced access to data[66], as a mere threat of discrimination against other parties will force them to accept the terms in an exploitative manner. Therefore, it is possible to see that harm derived in such cases may not be limited to only one type, but may combine the two.

[63] ibid. 23-53.
[64] ibid. 52.
[65] Patrice Bougette, Oliver Budzinski, Frederic M. Marty, *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses (GREDEG Working Paper No. 2022-01, 2022, 15.*
[66] ibid. 16.

The variety of theories of harm within Article 102 raises certain questions and challenges to access to evidence, but more importantly, to the quantification of harm. It can be seen that the Guide of EC for dealing with quantification damages barely scratches the surface in terms of the variety of harm that an individual or a company may suffer from abuse of dominant position. In respect to evidence, even with only different theories of harm presented, it is possible to see that claimants may have the need to access a variety of evidence connected with the amount of users engaged in the digital space for example. Even larger problems loom in case of quantification of harm against the backdrop of visible theories of harm. Effects of exclusionary conduct, which is more visible in digital markets may be more difficult to estimate from an economic standpoint, as it will need to account for increased costs, loss of revenue and a variety of other factors, which will be considered at a later stage of the paper. However, despite the variety of theories of harm, the recognised effects of anticompetitive behaviour remain the same: exploitative and exclusionary. Thus, the real difficulty lies in assessing the need for certain evidence for purposes of quantification and/or construing a proper counterfactual, so that it will match the underlying theory of harm of the infringement.

2.3. Relationship between private and public enforcement in Digital Markets

Decisions of competition authorities directly influence the landscape of private enforcement in European Union by giving possible claimants the opportunity to engage in a follow-on suit. Even though the two forms of enforcement pursue different objectives, public enforcement inevitably influences incentives in the private sector and increases litigation activity. The influence in view of the author is even more visible within cases connected with digital markets and Big Tech considering the complexity of such cases and the theories of harm connected with it.

Private enforcement of competition law in the EU recognizes two forms of claims: stand-alone and follow-on cases. The former means a case in which the infringement has not yet been recognised through a decision by the competition authority or by a court (be it national or CJEU) in the case of contesting the decision. The latter means a case, where the infringement has already been established by relevant competition authority. Majority of

cases in the EU private enforcement are the ones concerned with follow-on suits[67]. The reason for that is the EU has more expanded public enforcement. It follows that the activity of competition authority is likely to impact the number of private enforcement cases. In addition to that, the claimants will have greater willingness to pursue a follow-on suit after the establishment of infringement, as decisions to pursue a case based on cost-benefit scenario and they are more likely to succeed and achieve compensation with a follow-on case. Article 9 of the Damages Directive gives additional support to the claimants in this respect, as it obliges the national courts to follow the final decisions made by the national competition authorities and the decisions, which held up after court of the same member state review through recognising the infringement, while Article 16 of Regulation 1/2003 provides the same with respect to EC decisions[68]. Additionally, Article 9(2) final decision in another member state must constitute *prima facie* evidence of infringement. Thus, the claimants need not to prove the infringement, but may rely on EC's or national competition authority decision and only indicate the harm that it has received, through showing causation between infringement and the harm itself. This relates as well to the general difficulty of proving unilateral anticompetitive conduct, which can be very hard to prove by individual claimants, as they would need to showcase the effects of the abuse of dominant position. Therefore, it seems that follow-on cases may be more beneficial to claimants and the interactions between public and private enforcement strive for the compensation goal.

The impact of public enforcement on private businesses is even more visible within cases against Big Tech, due to i) complexity of the cases and ii) new theories of harm. As seen in the previous section, the theories of harm may still develop and abuse of dominance in digital markets can take on new forms. Resources and investigative powers of the EC may uncover a previously unknown infringement to competitors and consumers alike. Proving the infringement may be a very difficult exercise by itself and shifting it towards public institutions such as EC is beneficial to claimants in this respect. Moreover, the EC, like in case of self-preferencing, is developing new theories of harm in the context of abuse of dominance, which adds opportunities for claimants, which were previously not expressly recognised. The EC and national competition authorities collect large amounts evidence of an

[67] Nada Ina Pauer, Competition Conference Report: Disclosure of Evidence in Antitrust Damages Actions in Europe (Kluwer Law Blog 2023) https://legalblogs.wolterskluwer.com/competition-blog/competition-conference-report-disclosure-of-evidence-in-antitrust-damages-actions-in-europe/ last accessed 7 March 2026.

[68] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty (2003) OJ L1/1, Article 16.

infringement, which could potentially be very difficult for claimants to access in a follow-on case, even with the availability of disclosure schemes[69].

On the other hand, stand-alone cases may as well have certain benefits attached to them, albeit lesser certainty to results of the case. The main benefit lies in the fact that stand-alone cases may produce faster results for victims of a competition law delict, as claimants do not need to depend on a CA to find an infringement. Investigations of EC take usually around four years from the time of preliminary investigation to publication of the decision[70] and the complex ones relating to abuse of dominance, digital markets or energy sector could even take up to eight years[71]. Following that thought, it must be underlined that cases against Big Tech will very often be in the higher boundary. Considering this, it may be too late for claimants to get compensation before possibility of being pushed out of the market, if they would wait for an infringement decision in order to pursue a follow-on claim, which might not even arise. Therefore, stand-alone cases fill in a gap in EU competition law, as they enable claimants to get compensation without previously recognised infringement, but the fact remains that they may be more difficult to prove in court, which may in turn fuel uncertainty towards bringing the case to courts by claimants.

Additionally, it is important to mention the limited impact that the commitments decisions will have on potential proceedings connected with a possible infringement. Commitment decisions do not confirm that an infringement has taken place, but they do not deny it as well. Companies being a subject to such a decision are only obliged to introduce changes insofar as the EC confirms. The effects of this for private enforcement are two-fold. On the one hand, the claimant does not have the benefits associated with a follow-on case. They have the added burden of proving the infringement, as they cannot depend on the commitments decision, due to lack of presumption of the infringement derived from Article 9 of the Damages Directive. On the other hand, the claimants may rely on it in order to access evidence, such as market research made by EC, in order to prove the infringement in court, provided the court enables the release with an order. The issue of commitments is especially visible within Big Tech

[69] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 13-15.

[70] Christian Ritz, Christoph Wünschmann, Florian von Schreitter, *Fixing the fix? The EU Commission's Study on Antitrust Remedies* (Hogan Lovels Cadwalder, 2025).https://www.hlc.com/en/publications/fixing-the-fix-the-eu-commission%E2%80%99s-study-on-antitrust-remedies last accessed 8 March 2026.

[71] For example *Google Shopping* lasted around 8 years from the time of first probe.

companies. In the last 5 years Big Tech companies often have been a subject commitments decisions given by the EC. The added burden of proving a complex infringement of a Big Tech company may disincentivise potential claimants from bringing a claim. A possible solution for that would be to reverse the burden of proof in proving the infringement in such a case. However, it may be unlikely for the Commission to introduce such a measure, as it may negatively impact public enforcement with lower benefits for the companies willing to end their potentially anticompetitive behaviour. With the current state of the matters Big Tech companies may abuse the commitments mechanism in order to shield themselves from both administrative fines and to limit effective private enforcement, but a commitments decision will not fully remove the risks of damages claims and may in a limited way impact the position of claimants.

The impact of EC and NCA's on private enforcement is very large and should be viewed as supportive to the claimants against Big Tech. Public enforcement not only removes the obstacle of proving the infringement by the claimant, but as well gives them confidence to put the claim forward to the court. While, stand-alone claims serve an important role of protecting the victims of anticompetitive behaviour, when the authorities do not, they are still a margin of the cases. Therefore, the activity in public enforcement undoubtedly impacts the environment of private enforcement.

2.4 Public competition law infringements in the digital markets

Having asserted that most private enforcement cases are considered to be follow-on, it is necessary to showcase the decisions made by the competition authorities, which sparked the follow-on litigation. Therefore, this section will examine decisions of the EC, which later followed-on in private enforcement with focus on the impacts of challenges that the claimants could have expected. The cases of special interest to the paper are the following: Google Shopping, Google Android and Apple (Music Services), as they have produced a number of follow-on claims and directly show the issues relevant to private enforcement in digital markets, such as type of claimants and type of harm that they have incurred.

Firstly, the EC decision in Google Shopping[72] marked the first time self-preferencing practice was identified. Google has used its dominance on the market of internet searches to leverage customers towards using their shopping comparison service by manipulating the algorithm and placing results for its own services at the top. The EC identified the abuse as an exclusionary abuse, as leveraging the dominance meant foreclosing competitors in the downstream market. It is possible to argue as well in line with Bougette[73] that Google's practice was, as well, exploitative, as foreclosing competition meant higher dependency of business users on Google's service and thus potential higher fees. From the point of private enforcement the case still will be approached from an exclusionary angle, because the exclusionary aspect was held true by the Commission and harm actually incurred by potential claimants can be seen through exclusionary lense, while the exploitative aspects are rather theoretical in the context of this decision. Potential claimants in follow-on cases of *Google Shopping* are the competitors in the downstream, who have incurred harm in form of loss of sales in the short-term and possible foreclosure in the long-term scenario. Therefore, the harm incurred will be placed within the exclusionary category rather than exploitative. The decision was followed by a number of follow-on claims in multiple jurisdictions, including: Germany[74], Sweden[75], Italy[76] or Poland[77].

Secondly, the decision in Apple (Music Services)[78] showcases the use of lock in effect and the use of anti-steering provisions, which produced later overcharges. Apple in this case obliged Music services such as Spotify to use their internal payment system for subscriptions of users, who wanted to purchase the subscription on Apple's products. It was done through anti-steering conducts, which included banning the music services from showing alternative options for payment or link, which would not include an additional service fee. With lacking

[72] European Commission, *Google Search (Shopping)* (Case AT.39740) Commission Decision C(2017) 4444 final, 27 June 2017, para 111.
[73] Patrice Bougette, Oliver Budzinski, Frederic M. Marty, *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses (GREDEG Working Paper No. 2022-01, 2022)* 13.
[74] Landgericht Berlin II, *Idealo v Alphabet* (Case No 16 O 195/19 Kart(2).
[75] Pricerunner v Google https://www.reuters.com/business/swedens-pricerunner-sues-google-21-bln-euros-2022-02-07/ last accessed 7 February 2025.
[76] Moltiply v. Google https://www.jurist.org/news/2025/05/italys-moltiply-sues-google-over-anti-competitive-practices/ accessed 7 February 2025; Court of Milan, Order of January 4, 2021, Case No. 59172/2019, *7 Pixel/Google* (The link refers to the current report on a pending case before court, while the Court Order refers to previous action before the Court of Milan, where the current subsidiary of Moltiply was a party to the proceedings.
[77] Warsaw District Court Ruling no. XXII GWO 24/244 March 2024 (The ruling refers to an injunction ruling in the pending case).
[78] European Commission, *Apple – App Store Practices (Music Streaming)* (Case AT.40437) Commission Decision C(2024) 1307 final, 4 March 2024.

information, the consumers paid the higher price unknowingly, while the music services potentially could have lost sales, due to the higher price of the services. Therefore, it is possible to see that Apple has engaged in a hybrid conduct with the harm being passed on mostly to consumers. It is possible to observe an exclusionary aspect of the conduct, by disabling the alternative payment, but the exploitative aspect can be derived from the fact that Apple has been overcharging developers, as they had no other alternative, if they wished to make their applications available for the iOS users. This decision contrasts with Google Shopping, as potential claimants will be consumers harmed, due to exploitative conduct, and not direct competition in the downstream, as in the case of Google Shopping, as the harm was passed on. However, it is as well possible that the competitors in the downstream may claim that the anticompetitive additional fees have not been passed on, thus incurring the harm. Still, it remains that the Apple case consists in exploitative damage and the party showing the harm incurred will need to essentially showcase how the harm was incurred. While the decision is not yet final, there is already an activity in private enforcement connected with it in countries with more developed collective redress systems, such as in the Netherlands. Additionally, Apple's anticompetitive conduct in relation to the iOS store more broadly has been already analysed in a collective redress case in the UK[79], which will be shown later in the chapter on quantification.

Lastly, the Android[80] case shows how already established theories of harm interact with the digital environment. Identified infringement in Android consisted in tying Google's products by pre-installing them into products, such as smartphones, which had an Android system. Precisely, Google has abused its dominant position in the worldwide market (excluding China) Android app stores and national markets for general search services through tying Google Search to Playstore Chrome Browser into the Playstore app and its search app[81]. Additionally, Google has concluded licensing agreements with manufacturers (OEMs) conditional on antifragmentation obligations, whereby manufacturers wishing to install these apps on their devices were prohibited from selling other smart mobile devices using alternate android versions, colloquially called "forks"[82]. Lastly, it entered into Revenue sharing agreements, which gave OEMs and mobile network operators financial incentives to

[79] CAT, *Kent v Apple Inc and Apple Distribution International Ltd,* 2025.
[80] European Commission, *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 final, 18 July 2018.
[81] ibid. paras 1188-1196.
[82] ibid. paras 806-810; paras 1449-1612.

pre-install Google Search across their devices[83]. The potential claimants in the follow-on proceedings will be competing search services excluded from the market, as an effect of the abusive behaviour. The claimants similarly to price comparison sites within Google Shopping will be competitors, who have been subject to a loss of profit and possible foreclosure.

Analysing the EC decisions connected with abuse of dominance enabled us to see what kind of claimants and what kind of harm they may be subject to. Both within the Google Shopping and Android case, the harm will be received by the competitors, who were excluded from the market and therefore lost profit, while the Apple case showcases that the consumers will be the ones who receive the harm. It is essential moving forward with the paper to analyse how the disclosure evidence and quantification of harm will matter for both of these groups respectively.

[83] ibid. paras. 1613-1745.

Chapter 3: Access to Evidence

The aim of the chapter is to show challenges connected with private claims against Big Tech regarding access to evidence. First and foremost, the chapter will show the issue of informational asymmetries in the context of Big Tech and by doing so will reveal the need for discovery mechanisms. Furthermore, the chapter will analyse the current framework of access to evidence in light of the Damages Directive and its introduction by Member States. The paper will look at laws governing access with respect to defendants and competition authorities, as sources of evidence in private enforcement against Big Tech will primarily concentrate on these in possession of the defendant.

3.1. Information Asymmetries in digital markets

Discussion on matters connected with evidence necessitate an explanation on information asymmetries in digital markets, i.e. the information that is necessary for a successful claim that the claimants against Big Tech do not possess, but rather is in possession of either defendant, competition authorities or third parties. As such, obtaining evidence is a crucial step both in follow-on cases, where the claimants need to prove a causal link between competition infringement and the harm caused, as well as, quantify the harm incurred as an effect and stand-alone cases, where additionally the claimant needs to prove the infringement. To prove all or at least a part of these the claimants will seek them within the disclosure scheme provided by the Damages Directive.

While traditionally the information asymmetries within competition law have been associated with cartels, due to their secretive nature, and not abuse of dominant position, it can be argued that information asymmetries are even more apparent in the context of abuse of dominant position in digital markets. Recital 47 of the Damages Directive claims that presumption of harm referred to in Article 17(2) of the directive is limited to cartel infringements, due to their secretive nature exacerbating informational asymmetry between parties. However, experience from public enforcement shows that to prove an Article 102 infringement vis a vis digital markets necessitates lengthy amounts of evidence in various forms in order to prove an infringement and the investigations themselves last for a very long time. For example in the EC decision of Google Shopping the evidence included is of high

probative value “traffic data from Google's logs, user surveys, contemporaneous internal Google documents, experimental analyses and responses to requests of information”[84], while the investigation lasted around 7 years, counting from the first probe to publishing of the decision[85]. These experiences show the difficulty that claimants may encounter in stand-alone claims, when proving an infringement, as they show that most of the evidence needed for proving the infringement lies in possession of the defendant. They may also be translated to show difficulties with follow-on claims, as much of the data needed for later quantification will as well be in possession of the defendant, such as traffic data on the site needed to establish a counter-factual. Therefore, it can be argued that the complexity and variety of data that a Big Tech defendant will hold may increase the informational asymmetry even more or at least similarly, as it will hold for cartel damages claims.

In addition to that, in case of consumer damages claims information asymmetry is clearly visible. Consumers are often unaware of the business models that the Big Tech companies operate[86] in and as a result may not acknowledge the anticompetitive harm that they are a victim of due to cognitive bias. Mouton in her work exemplifies this through showcasing different situations, in which consumers are unaware what is the price that they are actually paying and through what means[87]. Following this, the case of Apple’s overcharges straightforwardly shows how consumers may pay more money without realizing that they are being overcharged. As explained before, Apple has increased fees for developers within their in-app payment systems, which were later passed-on to customers by third parties. With the harm being rather small monthly payment, the consumers did not question the raise of prices nor could they suspect that the digital architecture and fee system caused the raise. Therefore, we can see the dismal disparity between information in cases of consumers and Big Tech.

Conversely, the knowledge behind a certain business model or even anticompetitive infringement for competitors of the Big Tech company may not be an issue. However, in a highly concentrated market, where the players may need to interact with each other, certain hesitation may be present to bring a damages claim, as the party may face certain retaliation.

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[84] European Commission, *CASE AT.39740 Google Search (Shopping), 2017,* para. 111.
[85] European Commission, Overview of decisions-making process in *CASE AT.39740 Google Search (Shopping)*https://competition-cases.ec.europa.eu/cases/AT.39740 last accessed 3 March 2026.
[86] Mariya Serafimova, *Quantification of Harm in EU Consumer Antitrust Actions for Damages (*World Competition Review Vol.47, 2024), 114.
[87] Jeanne Mouton, *The challenges for private competition law enforcement concerning anticompetitive conducts in digital markets,* 2022, 16.

On the other hand, it may be argued that the information asymmetry may not influence the damages claim, as it may be the case that documents that the defendant will be holding will not need to be used for the calculation of or the quantification of harm. As it was previously stated, most of the cases regarding private enforcement are follow-on cases, which do not require proving the infringement of the defendant. As a result, the claimant needs to indicate the quantum of harm as well as show causation between the infringement and harm. Finding the causation between the infringement and loss incurred will not generally require information from the defendant themselves, thus evidence will most often be related to quantifying the harm. The ruling of court in Berlin in a follow-on case[88] from Google Shopping[89] reveals that the claimants may in fact on the basis of their own information and public data determine the scale of the harm that they have incurred, by choosing a method of quantifying damages not necessitating access to particular data.

In light of the above information asymmetry constitutes one of structural features of Big Tech companies and should not be viewed in the limited traditional cartel rhetoric. Massive amounts of data, as well as, knowledge behind operation of the platform are being concentrated in the hands of the defendants, thus potentially constraining the ability to bringing a claim without access to such evidence. Such asymmetries may be especially crucial in stand-alone cases, but extend to follow-on claims in the context of quantification of harm. Consequently, the mechanisms described below connected to access of evidence may become central to bringing a claim against Big Tech.

3.2. Legal framework of access to evidence - Directive and national rules

The legal framework for access to evidence remains rather fragmented across the EU, creating additional challenges for claimants, however not to a point where access to evidence will be a significant obstacle to claiming damages. The directive decisively changed the landscape of accessing evidence and even with mostly minimum form of harmonisation, it has achieved introducing availability of the needed documents for claimants, which previously did not exist in most of the EU, through introduction of Articles 5-8 of the

[88] Landgericht Berlin II, *Idealo v Alphabet* (Case No 16 O 195/19 Kart(2).
[89] European Commission, *CASE AT.39740 Google Search (Shopping), 2017.*

directive. Member States either introduced the directives solution into their civil code or a separate legal acts. In addition to that, with acute information asymmetry the access to evidence from the defendant may become central for claimants both in follow-on and stand-alone claims. Therefore, it is necessary to find out the limits of disclosure posed by the Damages Directive. By analysing national laws and the judgements from the CJEU it will be shown that the judgements reflect the tendency for wide interpretation of the Damages Directive Articles in a manner favouring the practical effectiveness of private enforcement, generally enabling the access to evidence, rather than restricting, while the national laws reveal different levels of access, but not to a point of making it impossible for claimants.

The access to evidence is underpinned by two principles, namely principle of necessity and principle of proportionality[90]. Except for these two, it is necessary to mention the principle of subsidiarity, which is important in respect to access to files under Article 6 of the directive and the principle of effectiveness, which overarches in general the private enforcement actions, as recognised in early cases of CJEU.

The principle of necessity refers to the need of claimants to access evidence, in order to enable them to pursue a claim for damages, only where such claim is reasonably well-founded[91]. The principle of necessity builds on the *Manfredi* case, with the directive clearly indicating that in most antitrust private litigation, the claimants suffer from informational asymmetries. Moreover, the principle of necessity restricts the use of the disclosure scheme to situations, where the motion for request can be connected to the suspected infringement and underpins the fact that such a claim needs to be connected to a well-founded harmful infringement of competition law[92]. The principle of necessity, thus seeks to remedy informational asymmetries by allowing disclosure only where the requested evidence is necessary for the claimant to substantiate a reasonably well-founded competition damages claim. The principle of proportionality on the other hand, is reflected clearly in the proportionality test located within Article 5(3) of the Damages Directive. It refers to balancing on the one hand the necessity for access to evidence by claimants and on the other legitimate interests of the defendants for withholding the evidence[93]. While analysing the

[90] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 5.
[91] ibid. 9
[92] ibid. 9 and Damages Directive, Recital 16
[93] ibid. 9

proportionality for the claim for access to evidence the court needs to look at how far the claim is supported by readily available facts and evidence, the scope and cost of disclosure and lastly whether requested evidence contains confidential information and the arrangements that are necessary to protect them[94]. Therefore, proportionality principle seeks to prevent abuse and fishing expeditions by claimants, while ensuring that genuinely necessary evidence remains accessible. Thus, the directive's aim was to provide a balanced approach to both sides of a litigation dispute.

With these two principles and experience prior to the Damages Directive the EC devised the current legal framework for access to evidence, within private enforcement. As explained in the previous section, it was established through Articles 5-8 of the Damages Directive. Article 5 relates to disclosure of information from either the defendant or third parties; while Article 6 is connected to disclosure of files from the competition authorities; Article 7 deals with limitations to accessing the files from competition authorities; and lastly Article 8 is concerned with penalties for non-disclosure of documents. In cases of claimants against Big Tech, the most important issues are connected with accessing the defendant's data, thus Article 5 and its national counterparts will be the most pressing issues for claimants.

Firstly, to find the limits of disclosure under Article 5[95] it is necessary to examine CJEU cases, as they show limits of the directive and its correct application. The first case to consider is the *Paccar* judgement[96], where the CJEU stated that claimants may request ex novo documents from the defendant provided the proportionality requirement is sufficed[97]. Specifically, the CJEU held that the party towards which Article 5 of the Damages Directive (or rather its national transposition) is applied to disclose evidence may be required to compile and classify them in accordance with the request of claimant, provided such request is proportional[98] and the request does not relate to producing entirely new substantive evidence. By such the court has expanded on the principle of necessity, as it has stated that non-availability of such documents could hinder the possibility of an effective action for damages. This ruling may be beneficial to claimants against Big Tech, as the requested evidence may contain large amounts of data, which can be either difficult to assess on the

[94] Damages Directive, Article 5(3)
[95] Damages Directive, Article 5
[96] Case C-163/21 *AD and Others v PACCAR Inc and Others* EU:C:2022:863, Judgment of 10 November 2022.
[97] ibid. paras 64-68.
[98] ibid. paras 64-68.

basis of raw data, due to its length. Therefore, having an ability to request previously uncompiled data into certain categories may ease the burden of claimant for analysing raw data, which by itself could be beneficial, but difficult to properly assess. Thus, the *ex novo* requirement derived from *Paccar* may prevent information overload for claimants against Big Tech. Moreover, it is important to underline that the court has remarked that disclosure under Article 5 still needs to be closely inspected against the requirement of proportionality and the respective interests and fundamental rights of the parties[99]. Thus, the request cannot be too burdensome or self-implicating (due to form of request) for the party disclosing the evidence. The case of *Paccar* therefore has clearly expanded the possibilities of forms of evidence that could be requested, thus enabling claimants against Big Tech access to different forms of evidence

While the Paccar case specifies the range of forms of documents available for claimants to request for a disclosure, the case of Regiojet[100] clarifies the availability of disclosure of documents from the defendant, whilst public proceedings are underway, ie. the temporal scope of access to evidence vis a vis active public proceedings. The CJEU in this case has decided that disclosure of evidence for the purpose of a damage claim is possible during public proceedings and that such disclosure would not be running against the Commission's decision within the meaning of Article 16(1) of the Regulation No.1/2003[101]. Essentially, CJEU stated that there is no reason for automatic rejection of request at the time of the proceedings connected with the disclosure of evidence under Article 5, due to the fact that there are public proceedings underway[102]. The judgement may very well be significant for claimants against Big Tech, as previously mentioned the proceedings may last a very long time before a decision. Such disclosure, however, enables stand-alone claimants to prepare their cases and efficiently claim damages once the infringement has been confirmed. Practically, the courts should assess whether to stay the stand-alone proceedings, if there is an on-going proceeding of a competition authority, in order not to go against Article 16 of the Regulation[103]. Nevertheless, as confirmed the disclosure is not connected with the infringement decision per se, thus it should be permitted. The option to stay the proceedings has already been used in *Google Shopping* follow-on cases in Italy and Germany, thus

[99] ibid. para 68.
[100] Case C-57/21, *RegioJet a.s. v České dráhy a.s.*, Judgment of 12 January 2023, EU:C:2023:6.
[101] ibid. para. 70.
[102] ibid. para 69.
[103] Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd* EU:C:2000:689, Judgment of 14 December 2000, para 57.

showing that the clarification regarding the temporal scope may be potentially of use for the prospective claimants. The judgment once again reveals the tendency of claimant-friendly judgements from the CJEU, which facilitate disclosure of evidence rather than restrict it.

Moreover, the Regiojet judgement contains important notes on the criteria of proportionality in disclosure of evidence. It underlines judge's independent assessment of proportionality and that it should be done with rigorous examination, in order to avoid "fishing expeditions"[104], meaning overly broad requests for evidence, which are aimed at the possibility of harm rather than actual proving of an infringement. The court gives notes on applying the proportionality effectively stating that "*the extent and cost of the disclosure of evidence, the relevance of the evidence whose disclosure has been sought for substantiating the merits of the claim for damages or, in addition, of whether the request for the disclosure of evidence in the competition authority's file has been set out in specific terms as regards the nature, purpose or contents of the documents"*[105] need to be taken into account, when evaluating proportionality by the judge. Thus, the court states that for effective application of Article 5 balancing of interests of parties needs to be made. In the context of Big Tech litigation, the judgement has practical significance, as requests may consist of large and complex data sets, user metrics or traffic data, which by themselves may require resources relating to the cost of disclosure. Therefore, the claimants in such cases will need to precisely show the relevance of the data in order for them to be proportional, which may present certain challenges depending on the facts of the case.

Furthermore, the judgement in Melia Hotels[106] gives additional guidance on interpretation of plausibility requirements stated in Article 5(1) of the Damages Directive. CJEU stated in its judgement that for the claimant to show that the claim is plausible[107] the need to indicate on the basis of readily available facts that it is acceptable to assume that there might be an infringement, harm and a causal link between them. These assertions are, however only repeating the Directive, what is truly important is that for the assumption to be acceptable, it

[104] ibid. para 89.
[105] ibid. para 90
[106] Case C-286/24, Meliá Hotels International SA v Associação Ius Omnibus, EU:C:2026:68, Judgment of 29 January 2026.
[107] The plausibility referred to in *Melia* refers to the plausibility of the claim itself, not to be confused with the plausibility referred to in the previous section on Dutch law of evidence, which is connected with the legal interest of the parties relating to the proceedings.

does not need to suffice more likely than not test[108]. The reasoning behind it stems from the fact that requests for disclosure do not consider the action for the claim on its merits, but rather it leads for such an action to be effective[109] and imposing more likely than not test would unduly impede damages actions . This illustrates that the CJEU's stance on access to evidence is based in realising the principle of effectiveness and not obstructing the claimants with high thresholds of plausibility, which could potentially limit private enforcement. In the context of Big Tech, the plausibility of the claim may potentially play a role in a damages claim, as the harm may be diffused across many actors, thus establishing plausibility . As such, the tendency of the CJEU is underlined by increasing the effectiveness of the Damages Directive. Additionally, as previously mentioned the judgement confirmed that national systems allowing pre-trial disclosure are not in principle incompatible with the Damages Directive. Practical applicability of this aspect of the judgement is limited however, to the Member States, who decided to introduce it to their systems, namely: Czech Republic[110], Germany[111], Estonia[112], Portugal[113] and Spain[114] or had previously such measure like in Ireland[115]. Still, the confirmation that such form of disclosure is compliant with the Damages Directive shows again the direction of effectiveness of private enforcement actions that the CJEU holds.

Except for the possibility of seeking evidence from the defendant or third parties, a party bringing the claim may desire certain evidence, which is in the file of a CA. Contrary to other rules prescribed in the directive, the measures of Article 6 and 7 have been introduced with maximum harmonisation, meaning that it is not necessary to examine national legislation, as the relevant law will be identical, as the measures described in the directive, Having established that most of cases within private enforcement against Big Tech are follow-on cases, the evidence in the file may be of interest to parties. The threshold for attaining such evidence is however higher than in the ones described before.

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[108] Case C-286/24, Meliá Hotels International SA v Associação Ius Omnibus, EU:C:2026:68, Judgment of 29 January 2026, para 86.
[109] ibid. para 79.
[110] Czech Act No 262/2017 Coll. of 20 July 2017, on compensation for harm caused by an infringement of competition law, as amended, Section 10.
[111] German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) of 26 June 2013 (Federal Law Gazette I 2013, 1750), as amended, Article 33(g).
[112] Estonian Code of Civil Procedure (Tsiviilkohtumenetluse seadustik) of 20 April 2005 (RT I 2005, 26, 197), as amended, Section 244.
[113] Portuguese Law No 23/2018 of 5 June 2018 (Lei n.º 23/2018, de 5 de junho), as amended, Article 13.
[114] Spanish Civil Procedure Act (Ley 1/2000, de Enjuiciamiento Civil), Article 283 bis(e)(1).
[115] Rules of the Superior Courts (Chancery and Non-Jury Actions: Pre-trial Procedures) (SI No 255 of 2016), as amended, Articles 4-5.

Article 6 of the Damages Directive related to access to evidence from a competition authority's file serves as a last resort for the claimants, as it is a subject to the principle of subsidiarity[116]. This means that the disclosure can be addressed to CA, if it cannot be reasonably obtained from other sources[117]. Therefore, claimants will use the disclosure from CA's files as a last resort.

The directive introduces certain classification for files contained in the CA's file, which are: 1) Blacklisted documents; 2) Grey-listed documents; and 3) Whitelisted documents[118]. The Blacklisted documents refer to documents, which are banned from being disclosed from the CA's file. They consider leniency statements in cartel cases and settlement submissions. The reason for this is that the Commission underlines that the release of such statements would undermine the effectiveness of the leniency programme and the settlement submissions[119]. Marcos in his paper points out that such exclusion may potentially violate the principle of effectiveness, if a CA would point exclusively to a leniency statement to prove the infringement without indicating the actual infringement[120]. This in turn would disable the parties from understanding what the infringement was and whether damages are available to them. However, in Big Tech context the likeliness of such is low, as the cases are most likely to be conducted by the EC, which provides such information in the decisions and the use of blacklisted documents will likely not be used for quantification of harm.

The greylisted documents on the other hand consider documents, which are in CA's file, but can only be disclosed after the proceedings have ended[121]. Such taxonomy has been attached to these documents to safeguard the effectiveness in the public proceedings[122]. These consider documents, such as documents made by the CA in the proceedings for example Statement of

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[116] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 13 and Damages Directive, Article 6(10) and Recital 29.
[117] Damages Directive, Recital 29.
[118] László Bánk Varga, Bálint Gábor Kovács, Angéla Gábri and Blanka Szupera, 'Disclosure Rules of the Antitrust Damages Directive: Finding the Balance between Public and Private Enforcement' (20 *ERA Forum,* 141, 2019), 153 and Damages Directive, Article 6. The names for taxonomy are not expressly mentioned in the directive, but are commonly referred to in this manner.
[119] Damages Directive, Article 6(6) and Recitals 26-27.
[120] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 15.
[121] Damages Directive, Article 6(5) and Recital 25.
[122] Laurence Idot, Frank Kroes, Cristoforo Osti, Alex Petrasincu and Florian Wagner-von Papp, *Disclosure of Evidence Included in the File of a Competition Authority (Implementation of the EU Damages Directive into Member State Law – Würzburg, May 5, 2017)* (3 Concurrences 27, 2017), 28.

Objections, documents prepared by the parties to the proceedings specifically made for the proceedings[123]. It was arguable as well that proposals to close investigation under Article 9 of Regulation 1/2003, that were subsequently withdrawn may as well be in scope of the greylisted documents[124]. The proposals may be of special interest to claimants in Big Tech, as shown before commitments decisions are often addressed to Big Tech companies. Claimants may rely on them to show precisely what the conduct in question was and argue before a court that such behaviour was anticompetitive. Given the complexity of Big Tech cases and the added burden of proving an infringement following an Article 9 decision, availability of accessing the document may be potentially crucial for a given case. However, in a later soft law instrument the Commission has made it clear that settlement offers are to be considered a blacklisted document[125], Considering all of the above, it has been argued that such classification may impede the principle of effectiveness and could potentially be challenged in the future, despite its low likeliness

Finally, the whitelisted documents refer to documents which can be disclosed at any time, even during the proceedings provided that they do not impede the public proceedings[126]. The whitelisted documents include pre-existing documents, meaning documents prior to the public proceedings[127]. Such may be for example specific contracts or minutes of meetings. The practical value of the documents may be low considering the documents are a subject to principle of subsidiarity and the chances are high that they are possibly in the hands of the defendant. Especially within unilateral conduct, this may be the case, as the evidence required will be in the hands of the defendant and the whitelisted files may be duplicates.

Lastly, the notion of safeguards needs to be analysed in the disclosure scheme. Member States have in most cases introduced fines for non-disclosure of the documents ordered by a national court. The penalties transposed on the basis of Article 8 of the directive show that the risk of not disclosing documents for the sake of the proceedings may have completely different consequences depending on the jurisdiction. Article 8 necessitates that Member States "impose effective, proportionate, and dissuasive penalties for the failure or refusal of a

[123] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 15.
[124] ibid. 17
[125] ibid. 17.
[126] Damages Directive, Articles 6(9)-6(10).
[127] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 17.

party to disclose evidence or its destruction, to comply with the obligation to protect confidential information"[128]. Most of the Member States have introduced penalties in the form of monetary fines, however the amount of maximum fines that a party may receive span from very high to very low amounts. In cases of some of the Member States the fines prescribed can be described as ineffective, with the most striking example of Latvia, where the maximum fine that can be imposed is 40 euro[129]. Other examples of low fines may be France[130] and Lithuania[131], where the maximum fine can equal 10.000 euro. While, it is a significantly higher amount than the fine in Latvia, it is still low considering that the damages claims are usually counted in millions rather than thousands. This may be especially the case in cases against Big Tech, in which the final damages award are typically very high. On the other hand, it is possible to see that certain Member States have introduced appropriate fines or even measures, which are potentially disproportionate. For example penalties in Italy[132], Hungary[133], Bulgaria[134] and may range between 150,000 EUR and 255,000 EUR, while in Belgium[135] the range is between 1.000 and 10.000.000 euro. Certain jurisdictions have opted for more flexible approaches, which base the amount of fine on the basis of the undertaking's turnover. Such is the case in Romania[136] for example, where the possible fine is set between 0.1 and 1% of the turnover. The potentially disproportionate penalties may be encountered in Cyprus[137] and Denmark[138], where the penalty is imprisonment. Different ranges of penalties show the actual risk associated with non-disclosure of fines. While, there is no study currently on whether the amount of fines can be directly associated with successful enforcement of disclosure of evidence, it is reasonable to assume that in stricter jurisdictions,

[128] Damages Directive, Article 8.
[129] Julija Jerneva and Inese Druviete *Latvia* in Anna Piszcz (ed), *Implementation of the EU Damages Directive in Central and Eastern European Countries* Centre for Antitrust and Regulatory Studies, University of Warsaw, 2017, 171.
[130] French Commercial Code (Code de commerce), established by Ordonnance No 2000-912 of 18 September 2000, as amended: Article R.483-14.
[131] Law on Competition of the Republic of Lithuania (Lietuvos Respublikos konkurencijos įstatymas) No VIII-1099 of 23 March 1999, as amended, Article 52(9).
[132] Italian Legislative Decree No 3 of 19 January 2017 (Decreto Legislativo n. 3, 19 gennaio 2017), as amended Article 6.
[133] Peter Miskolczi Bodnár, *Hungary*, in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press, 2017) 148.
[134] Anton Petrov, *Implementation of the EU Damages Directive in Bulgaria* (SSRN Working Paper 2018), 20.
[135] Belgian Code of Economic Law (Code de droit économique/Wetboek van economisch recht), introduced by the Act of 28 February 2013 (Moniteur belge/Belgisch Staatsblad, 29 March 2013), as amended, Article XVII.81.
[136] Valentin Mircea, *Romania*, in Anna Piszcz (ed) *Implementation of the EU Damages Directive in Central and Eastern European Countries* (Amsterdam University Press, 2017) 243.
[137] Philipp Kirst, *The Impact of the Damages Directive on the Enforcement of EU Competition Law A Law and Economics Analysis,* (2021), 48.
[138] ibid.

the disclosure scheme may be more effectively introduced. Additionally, viewing the possible punitive measures against Big Tech companies shows that they might not be effective, as Big Tech companies having their turnover counted in billions[139] may not be particularly swayed towards disclosing the file if faced with monetary fines, as high as the one which can be encountered in Belgium. The most likely measure to succeed in swaying the Big Tech companies can be arguably the Romanian regime, as the flexible amount of fine can reflect the turnover of the companies producing potentially sufficient fines in cases of non-disclosure. Thus, the monetary fines, which are to be safeguarding the obligation to access to evidence, may not be efficient in many of the Member States against Big Tech and as such should be reformed to more flexible systems like the ones found in Romania, which are based on turnover.

Furthermore, the measures of Article 5 have been introduced with a varying degree by the Member States, but in general they can be described as cautious[140]. Member States have introduced targeted disclosure, meaning that disclosure is available to certain specific information, rather than the common law discovery process, which functions in the US[141]. The most lenient, in terms of claimants position, approach can be seen in the Netherlands, where the framework for disclosure existed prior to the directive and for many years has been regarded as one of the leading jurisdictions in terms of damages claims[142]. The dutch rules, as of 2025[143] prescribe a low bar of interest towards obtaining the evidence by referring to sufficient interest. Previously, the relevant section[144] held that the claimant needed to showcase a legitimate interest, meaning claimants needed to establish a formed legal claim or indicate the relevance of the documents that they wish to obtain. Currently, however, sufficient legal interest is necessary meaning that a claimant only needs to show that there is a plausibility[145]. Furthermore, Dutch rules have as well a broad category of evidence that claimants may request for disclosure. The wording of the civil code and use of simply

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[139] Business Statistics, *Big Tech Companies Revenue Comparison Statistics,* 2025 https://businesstats.com/big-tech-companies-revenue-comparison-statistics/ last accessed 31 May 2026.
[140] Philipp Kirst *The Impact of the Damages Directive on the Enforcement of EU Competition Law A Law and Economics Analysis,* 43.
[141] Thomas Obersteiner, *Private Antitrust Enforcement in the US and the EU*, A Comparison of Key Issues, 2019, 19.
[142] https://lawandmore.eu/evidence-rules-in-dutch-civil-litigation-whats-new-under-articles-194195-dccp/ last accessed 26 May 2026
[143] Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), as amended, Article 194 and 195.
[144] Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), as in force until 31 December 2024, Article 843a.
[145] ibid. 94.

"information"[146] is regarded to be flexible and inclusive of all types of evidence. This may be especially important in claims against Big Tech, as they will necessitate access to certain data, rather than strictly documents. Evaluating practical use of the new procedure comes with difficulty, as there are no public cases considering Big Tech damages claims with the use of the new legislation. Nevertheless, it can be speculated that the access to evidence will be easier than in other jurisdictions on the basis of flexible language being used.

The Dutch approach can be contrasted with the German one, which reveals stricter requirements to accessing evidence. Firstly, the threshold of the interest of the case is higher in case of Germany by necessitating a legitimate interest, thus a formed legal claim needs to be presented. The claim does not need to be proven at the time of request for information, but its merit needs to be sufficient enough to produce a legitimate interest for the claimant. Moreover, the German provisions are stricter within the category of evidence that needs to be provided. They require that the claimant needs to specify the requested documents as precisely as possible on the basis of readily available facts[147], thus leaving less room for general requests or requests where the claimant is unnecessary of the kind of information that they need to bringing in the claim forward. The high bar for access to evidence in the Big Tech context can be exemplified by judgement in *Idealo*[148], where the court has rejected the access to evidence, due to lack of necessity of the requested documents[149]. The claimant in this case requested access to traffic data that the defendant has incurred on monthly basis during the infringement, as well as traffic data relating to companies identified in the Commission's decision[150]. Additionally, the claimant requested revenues and profits of the defendant after the deduction of relevant costs[151]. The court evaluated the request and stated that the evidence can be disclosed if it relates to substantiation of the claim itself or for the purposes of quantum of harm[152]. The evidence requested, however would not, in the view of the court, improve the position of the claimant[153]. In regards to substantiating an article 102 TFEU infringement, the court viewed that the requested evidence would not help to establish

[146] Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), as amended, Article 194.
[147] German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) of 26 June 2013 (Federal Law Gazette I 2013, 1750), as amended, Article 33(g).
[148] Landgericht Berlin II, *Idealo v Alphabet* (Case No 16 O 195/19 Kart(2).
[149] ibid. para 345.
[150] ibid. para 347.
[151] ibid. para 347.
[152] ibid. para 343.
[153] ibid. para 349.

an infringement[154]. This is unsurprising, as the requested documents did not have the capacity to showcase an infringement, but rather show the scale of Google's operation of price comparison service. Therefore, the request was aimed at quantification of harm, but the court has rejected the validity in that respect, as it claimed that the chosen model of quantification by claimant would have produced results not reflecting the appropriate counterfactual[155] and the correct model for quantum of harm did not necessitate accessing the data under the interpretation of relevant national laws and the directive[156]. Therefore, it is possible to see with this case that access to evidence in Germany is put under strict scrutiny, as the claimants not only need to show that the evidence is necessary for calculation of quantum, but as well may need to choose the correct model to pass the bar of necessity.

While these examples are limited to only two different practical approaches to access to evidence, they show that there may be significant differences between Member States as to the position of the claimants in attaining evidence. National rules may be potentially challenged within the preliminary ruling of CJEU. Seeing the low threshold of the Dutch solutions, it is possible that they may not be proportional, as they are very claimant friendly, thus not passing the test of proportionality. Both of the legal systems however, clearly enable the claimants to access the evidence from the defendant

Although the directive has achieved the aim of introducing targeted disclosure to the Member States of the European Union, there are still substantial differences remaining between the Member States. The differences are striking within the safeguards and penalties transposed on the basis of Article 8, availability of pre-trial disclosure and to a lesser extent within the scope of range of evidence being capable to request. These differences may become particularly significant in litigation involving Big Tech undertakings, where access to technically complex and commercially sensitive information often determines the feasibility of the claim itself in stand-alone case or quantification of harm in follow-on claims. Moreover, they may influence the jurisdiction in which the claimant will try to bring in the claim against Big Tech (provided they have an option of bringing a claim in foreign jurisdiction). The judgements of the CJEU on the other hand reveal that access to evidence from the defendant is underpinned by the principle effectiveness already recognised in

[154] ibid. para 349.
[155] ibid. paras 299-300.
[156] ibid. paras 299-300 and para 349.

landmark cases of *Manfredi* and *Courage v Crehan.* The judgement in *Paccar* shows broad interpretation of evidence, while *Regiojet* specifies the broad temporal scope. *Melia* exemplifies the low plausibility threshold. At the same time the judgments reveal that proportionality remains the main limiting principle, as is visible in *Regiojet* or *Paccar*, guaranteeing that interests of the defendants are not obstructed if not necessary providing a balanced approach. The intense informational asymmetry found in Big Tech identified in the previous chapters may necessitate use of the disclosure mechanism with large data sets or other specific information available strictly to the defendant. Thus, while the general aim of introducing limited discovery was achieved, it is discussible whether it will produce appreciated effects for claimants against Big Tech and its use may largely depend on the jurisdiction, in which the claim is being brought in.

3.3 Protection of trade secrets and commercially sensitive information

With clear informational asymmetry certain problems connected with access to information may be more visible within the claims against Big Tech than in other private enforcement claims. These issues will relate to the correct approach towards the treatment of confidential information of the disclosing parties. Having established that the proportionality test needs to consider the interests of the parties, especially those connected with trade secrets it is important to analyse how they may influence a request for evidence. The topic is of special significance to Big Tech as well, as confidentiality is most often raised in regards to disclosure of evidence, as a limit towards the discovery process. The issue to consider therefore is how the confidential information are viewed in terms of disclosure of evidence under the Damages Directive in the Big Tech context and how far the solutions present enable the effective compensatory measures.

Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law gives guidance on treatment of such information. On the basis of previous CJEU judgement, it devised three cumulative conditions for the information to be considered a trade secret, which formalised the previous EU case law. The three cumulative conditions set forth are that: "(*i) it is known only to a limited number of persons; and (ii) its disclosure is liable to cause serious harm to the person who provided it or to third parties; and (iii) the interests liable to be harmed by the disclosure*

of confidential information are, objectively, worthy of protection."[157]. The information therefore in essence needs to remain within the company meaning it cannot be publicly known or widely known in a given industry, may cause harm if it were to be disclosed and the interest are worthy of protection. In addition to that, an information, which is 5 years or older will be presumed not to be confidential, as provided in *Evonik Degussa*[158]. Defendants in a private enforcement In a typical private enforcement scenario, confidential information will encompass for example internal business plans, minutes of meetings or other private information concerning financial, strategic or commercial issues of the company. In Big Tech claims, the range of evidence is likely to be wider and include information concerning network effects, algorithmic data, ranking data or analysis being made regarding users behaviour. What is important is that most often the data, which is relevant for the requesting party will be considered confidential. The courts encountered with such evidence will need to evaluate whether they meet the three cumulative conditions. It has been remarked that the national courts may possibly face certain challenges in applying the disclosure given lack of experience in handling these issues[159]. A certain remedy may be the advisory mechanism within the Damages Directive, where the courts may ask for assistance from the CA's in handling the cases, who have experience in applying the confidentiality criteria during merger procedures or in some jurisdictions when publicising their decisions on infringements of competition law.

The fact that an information is confidential does not however automatically disable it from being accessed under the disclosure scheme. The directive makes it explicit that confidential information should be made available provided it is appropriately protected[160]. The measures of the "appropriate protection" have been mentioned briefly in the directive with measures such as *"redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form*[161]". Except these mentioned explicitly in the directive other measures may be employed such as confidentiality rings or data rooms, which were indirectly mentioned by the restricting

[157] Communication from the Commission *Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law* (OJ EU C242 of 22/7/20).
[158] T-341/12 *Evonik Degussa v. Commission* (EU:T:2015:51) paras 82-84.
[159] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 24.
[160] Damages Directive, Article 5(4) and Recital 18.
[161] Damages Directive, Recital 18.

measures and more widely disseminated in the Communication. Confidentiality rings give access to documents to only a certain number of people on the basis of rules applicable. The use of confidentiality rings may be especially appreciable in the Big Tech setting, as the evidence requested may be of very large volume. Redaction of large portions of evidence may be time-exhausting and subject to multiple evaluations by the national court. Redacting certain material requires from the party indication, as to why the material is being redacted and then they are a subject to an evaluation[162]. In addition, per Guidance from the commission quantitative data relevant to a given infringement should be given with an average of the numbers.

An example of a confidentiality ring in practice can be found in the Rachael Kent collective redress case in the UK, where disclosure of repository of documents used in a trials in the US and Australia was accessed through a confidentiality ring[163]. What is interesting is that the CAT devised a two-tier access consisting of an inner-ring and outer ring. The documents from the repository were automatically designated to be confidential and within the outer ring, meaning that the access was available to higher amount of people, such as the counsel of the claimant, external economists and in general persons working for the case on both sides of the claim[164]. Although the information on persons in the inner ring was not released, it can be suspected that these would be external lawyers, who later could provide assistance. The designation of the documents has been done through a process whereby the defendants assigned the documents to a given ring. Later, the opposing party had an availability to request to move a given document to another ring, which would be evaluated by a judge[165]. While the system in the UK is wider, the way that the court dealt with disclosure can easily be transferred to the Member States.

The use of the confidentiality ring in the Rachael Kent v. Apple trial reveals two separate issues in the context of claims against Big Tech. Firstly, disclosure of evidence in such a setting enables flexibility, while affording to give access to a large portion of evidence. It is discussible, whether requests in the EU could encompass such wide evidence, however even

[162] Communication from the Commission *Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law* (OJ EU C242 of 22/7/20) paras 59-69.
[163] CAT, *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* (Amended Confidentiality Ring Order, Competition Appeal Tribunal, 23 October 2023), 3.
[164] ibid. 7-11.
[165] ibid. 8.

in smaller formats, confidentiality rings enable the widest form of disclosure, while securing the interests of the releasing party to limit the circle of people having the knowledge of confidential information. The second issue visible is the risk that the disclosure mechanism may become another "battleground" for claimants. On the basis of experience in the UK with dealing with disclosure of evidence, it is possible to say that dealing with disclosure in the EU may become an additional step in getting compensation. The process may be strenuous both for the courts and parties involved, especially given the relative inexperience of most Member States. It could be potentially harmed by parties dragging out the procedure with Big Tech companies using the asymmetry of power and tools available to shield the evidence and even if such shielding would be unsuccessful, the long time before the actual proceedings may be a success in itself[166]. Thus, it is important to devise a strict timeline in respect to disclosing parties' obligations to prevent the procedure from becoming an obstacle rather than a helpful tool. It can be seen in CAT's order that the deadline for the time to assign which files are to be designated to the inner ring was limited to 5 days[167]. Such a deadline clearly can prevent abuse of the process. In addition to what can be seen in the UK experience, it is worthy noting that the defendants as well have an opportunity to access the documents of claimants under the Directive's rules. Disclosure of evidence requested by the defendant can be meritorious, where the case involves passing-on of harm and the defendants may require disclosure of claimants documents connected with it. However, in It has been pointed out that the use of disclosure schemes by defendants may be strategic and impeding effective compensation[168]. Therefore, the mechanism, which is supposed to be only ancillary to the main proceedings, may potentially either be used strategically by defendants in terms of confidentiality or unreasonable requests for claimants' evidence with the aim of exhausting resources of the claiming parties. Academics see it as one of the most pressing obstacles of the disclosure scheme[169]. It is highly likely given the economies of scale that such strategic litigation may be encountered within litigation against Big Tech. Due to that, the mechanisms dealing with confidentiality need to take into account how companies may abuse the system of disclosure for it to be used efficiently.

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[166] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 34.
[167] CAT, *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* (Amended Confidentiality Ring Order, Competition Appeal Tribunal, 23 October 2023) 11.
[168] Francisco Marcos, *Access to evidence: the 'disclosure scheme' of the Damages Directive* (Working Paper IE Law School AJ8-275-I, 15 July 2022) 34.
[169] ibid.

The issue of confidentiality certainly can be considered a challenge for claimants against Big Tech. While there are certain precautions enabling disclosure of confidential documents, they can expose claimants to additional "battles" for the claimants. The matter of dealing with confidentiality swiftly ultimately relies on national courts ability to devise a method striking a balance between confidentiality, evidentiary value for the claimant and swiftness of the proceedings. Lack of experience and national legislation increases the uncertainty towards the treatment of confidentiality. Judges will need to carefully apply and use the methods for disclosure to satisfy the interests of both parties. Among methods described above confidentiality rings seem the most suitable method to tackling confidentiality, given possible large volumes of evidence needed to examine in a claim against Big Tech. In a way they were introduced in the CAT's Apple case, they may offer the flexibility needed to afford protection of the trade secrets, while giving the claimants the widest possible form of access to evidence.

3.4 Connection between access to evidence and quantification of harm

Material requested during disclosure proceedings in damages cases will consist of documents needed to quantify the harm caused to the defendant, as a result of an anticompetitive conduct. This applies to both stand-alone and follow-on actions, however may be more apparent in the latter. Requested documents will be used for quantification, however in order to gain access to such documents the method chosen needs to reflect the counterfactual situation. Another issue which has been raised in the CJEU case law is the interaction between Article 17(1) and Article 5(1) and whether disclosure of evidence restricts the availability of estimation.

The core of both quantification and disclosure mechanism is in finding an appropriate counterfactual. Counterfactual in competition law is used frequently for assessment of mergers to assess the state of competition in a hypothetical situation, whereby the structure of competitors changes as a result of a merger. In private enforcement however, the counterfactual should reflect the hypothetical state of competition, if an infringement would not occur. Following this, based on the counterfactual it is possible to derive damages, as the result of a situation on the market should reflect the monetary loss, which was incurred by a company subjected to an anticompetitive infringement. For example, when establishing a counterfactual for *Google Shopping*, the counterfactual would consist of a situation where the

dominant company did not use self-preferencing, as a part of its strategy and as a result competitors would not be excluded. In such cases, as it will be seen in the coming chapter, the evidence may not be as crucial, as damage will be approached from the loss of profit angle. Nevertheless, cases considering exploitative abuses against Big Tech companies will generally be a data intensive exercise considering that the harm will take the form of an observable conduct, such as overcharges. The evidence, which will be typically requested, will consider the pricing strategies or financial records and whatever information is available to assert the correct counterfactual. The matter becomes even more apparent, when encountered within collective redress cases, as it will be needed to find the scale of the infringement with the use of transactional data[170]. Thus, it is possible to see a clear connection between the counterfactual, quantification of harm and access to evidence and it is important for the damages claims to view these issues as inter-connected.

The second matter to consider is whether balancing of the information asymmetry within a given claim precludes later estimation on the basis of Article 17(1). This matter came to the forefront in the case of *Trafficos Manuel.* In this case the claimants were given the requested material, however were unable to efficiently quantify the damages[171]. The national court asked CJEU, whether the fact that evidence was disclosed meant that it no longer was impossible or excessively difficult to quantify, as it is a pre-requisite for an estimation for a national court[172]. The court answered negatively to the question stating that quantification of harm is an inherently difficult exercise and that even disclosure of evidence may not provide claimants with capabilities to it[173]. Therefore, such determination lies in the sphere of evaluation of a national court, which needs to consider the particularities of quantification. The relevance of the judgement is significant for claims against Big Tech, as the quantification may be very complex even with the evidence disclosed. Therefore, the judgement makes it clear that release of documents on the basis of the disclosure scheme does not frustrate the option to estimate damages by judges.

Access to evidence can definitely be considered important in terms of quantification of damages, as the data needed will often lie in possession of other parties. Nevertheless, the

[170] CAT, Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd (2025)
[171] Case C-312/21 *Tráficos Manuel Ferrer SL and Ignacio v Daimler AG* EU:C:2023:99 paras 31-35 and operative part of the judgement (questions).
[172] ibid.
[173] ibid. paras 50-57.

access to said data will not determine, whether it is impossible or excessively difficult to quantify, such review needs to be done individually on the basis of available facts. As will be presented in the coming chapter quantification of claims against Big Tech is a difficult exercise and the need for an estimation by a judge is very realistic.

Chapter 4: Quantification of harm

4.1 Legal framework for quantification of harm

The matter of quantification of harm from a legal perspective is challenging considering the relative lack of regulation on the matter. The solutions derived in directive are limited to only one Article, within which it is possible to find one provision relating strictly to cartel infringements. Limited regulation on the matter may be explained by the fact that quantification has been attributed with being an economic exercise rather than legal. However, while statistical or econometric models will give a precise number on the basis of evidence, the methods chosen to derive such need to correctly correspond with principles of law and the constructed counterfactual.

The main principle in damages actions, as discussed previously is the principle of restoration, which dictates that a victim of a breach of TFEU is entitled to full compensation for the harm incurred. It includes the actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), as well as the payment of interest[174]. This implies that the process of quantification of harm needs to be done accurately and carefully in order to either not amount to overcompensation or undercompensation. It is virtually impossible, however, to find with one hundred percent certainty how the market would look like, if an anticompetitive infringement would not take place, provided that the harm is not easily observable, as will be the case with loss of profit. To remedy the fact that an accurate quantification may be difficult for claimants, the Damages Directive introduced Article 17(1), which provided that neither burden of proof nor the standard of proof required for quantification can frustrate a damages action. In addition, based on this article the courts are empowered to estimate damages, where it is practically impossible or excessively difficult to estimate damages[175]. Estimation done by judges to prevent quantification being an obstacle for claimants definitely needs to be appreciated, however the methods followed by judges need as well to correspond to the legal requirement of quantification corresponding to the counterfactual. To help courts with this issue the Commission has released a practical guide to quantifying harm. The guide is mentioned in some of the legislation of Member States, as an instrument to be followed in the exercise of

[174] Valentinas Mikelėnas and Rasa Zaščiurinskaitė, *Quantification of Harm and the Damages Directive: Implementation in CEE Countries* (17(29) *Yearbook of Antitrust and Regulatory Studies*, 2024) 115.
[175] Damages Directive, Article 17(1).

quantification[176]. Considering the fact that the Practical Guide omits the issues associated with digital markets and Big Tech, it is necessary to analyse what challenges lie in applying the methods mentioned in it, in terms of quantification of exploitative and exclusionary harm committed by Big Tech.

Moreover, to help judges in assessing quantification in damages claims, the courts may seek assistance in the exercise of quantification, based on Article 17(3) of the Damages Directive. The assistance is typically only available upon the request of the court and may be especially appreciated in the context of claims against Big Tech, which are inherently more complex. Such assistance is already visible in some jurisdictions, like in Poland, where a court requested assistance from the Polish NCA for general advice on treatment of a Google Shopping follow-on damages claim[177]. These provisions clearly aim at securing justice in cases where the claimant is not able to adequately quantify the harm done to them, however they do not address how such damage is to be quantified in cases of abuse of dominance. In light of this it is necessary to review different methods of quantification against the issues, which are commonly encountered within claims against Big Tech. Prior to describing the methods, it needs to be underlined that, as argued by Decarolis, Tosini and Marz economic considerations should play a fundamental role and two fundamental principles should be followed[178]. Firstly, the damage estimate should be made by clear reference to the counterfactual scenario and secondly the outcomes in the counterfactual should be plausibly reconstructed with the data available and applicable economic theory[179]. With this the risk of grossly inaccurate damages should be minimised.

In order to effectively claim compensation the claimants need to use a certain method to quantify the harm caused to them by the infringer. The methods can be categorised into the three of the following categories: 1) Comparator based methods; 2) Financial analysis methods and; 3) Simulation based models[180]. The comparator models focus on finding a

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[176] Valentinas Mikelėnas and Rasa Zaščiurinskaitė, *Quantification of Harm and the Damages Directive: Implementation in CEE Countries* (17(29) *Yearbook of Antitrust and Regulatory Studies*, 2024) 126.
[177] President of the Office of Competition and Consumer Protection (Poland), *Stanowisko Prezesa Urzędu Ochrony Konkurencji i Konsumentów zawierające istotny pogląd dla sprawy*, DOK-3.415.1.2023, Case No XXII GWO 24/24, 22 January 2024.
[178] Francesco Decarolis, Oliver Marz, Nicola Tossini, '*Quantification of Harm'* in Albert A Foer Randy M Stutz, M Botta (eds), '*Research Handbook on Competition Law and Private Enforcement'* (Edward Elgar Publishing 2024), 271.
[179] ibid. 266
[180] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2020), 33-46.

suitable benchmark in a competitive setting for the growth of the market, in order to compare it to where the infringement has taken place. The comparator can be either based on time, product or geographic location or may combine several of these dimensions with the aim of creating the counterfactual[181]. Claimants may as well choose, when suitable, a differences-in-differences method, which compares the position of the claimant before the infringement and after the infringement with changes experienced over the same period by a comparable undertaking in an unaffected market. The difference between the two is treated as the harm caused by the infringement[182].

The comparison models can be further categorised based on the chosen benchmark. The methods include: comparison of different time periods (Diachronic Comparison)[183]; comparison of different markets or products (Yardstick or Synchronous method)[184]. The diachronic comparison is restricted to the same market, where the infringement has taken place, however it looks at the time when the infringement has not yet distorted the market. It can be arguably the most precise comparator method, given that it analyses how the same market behaved under usual state of competition. However, the method has significant weaknesses, when encountered with digital markets, as it is possible to see that claimants may have a significant challenge in form of lack of comparable period of time in the same market[185]. Such situations are visible especially in digital markets, where an infringement has been set from the outset or persisted for a very long time and covers generally at least all of the EU if not the world in most cases. For example the conduct of Google within the *Google Android*[186] case can be traced back to 2011, when the relevant market of the case was still in very early stages. With it being anticompetitive from the outset a claimant simply is disabled from using the time comparison method prior to an infringement as such time period did not exist. Moreover, using the period of the market post-infringement does not seem to be suitable, as the market has already been affected producing inaccurate results and hinging on

[181] ibid. 33-37
[182] Oxera, *Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts* (Study prepared for the European Commission, December 2009) 59.
[183] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2020) 36.
[184] ibid. 36
[185] Francesco Decarolis, Oliver Marz, Nicola Tossini, '*Quantification of Harm'* in Albert A Foer Randy M Stutz, M Botta (eds), '*Research Handbook on Competition Law and Private Enforcement'* (Edward Elgar Publishing 2024), 271.
[186] European Commission, *Google Android* (Case AT.40099) Commission Decision C(2018) 4761 final, 18 July 2018.

the fact that a certain period of time has passed before bringing a claim[187]. Similarly, claimants will not have an ability to use the geographic market comparison method (Synchronous method), as the infringements in digital markets are typically covering at least the whole EU or even the globe[188]. Therefore, it is impossible to find a suitable comparator based on a different geographic location. These challenges will typically prevent the claimants from attempting to quantify the harm in digital markets based on time or geographical comparators.

However, comparator models, which are based in comparing a different product market may be deemed especially useful considering the challenges associated with lack of comparator in the market, where the infringement has taken place. The main advantage of such a method is that it does not depend on the market, where an infringement has taken place, giving expected growth of market based in reality of another market, which proximity enables the assumption of the possible development of the market, which was affected by the infringement[189]. In addition to that, the method may be beneficial to claimants in view of the access to evidence, as in cases of loss of profit it may not be necessary to resort to requesting evidence, as the exercise of using another market growth as a benchmark will rely on projecting the growth of the harmed company in a normal state of competition[190]. In other words, the data related to an abuse will not be derived from the defendant or other third parties but can be restricted to the claimants own data on growth of the company before an infringement has taken place. Therefore, the product market comparison model seems the most suited for digital markets, especially in exclusionary abuses which are common, as it depends on data readily available, rather than

On the other hand, the same issues, which make the comparator methods attractive to claimants may cause a difficulty in finding an appropriate benchmark. To find an accurate benchmark the claimant will need to consider different factors depending on the case. These may include, but are not limited to: "*proximity (geographical and economic, among other aspects), characteristics of demand (income, population, among others) and supply (cost*

[187] Francesco Decarolis, Oliver Marz, Nicola Tossini, '*Quantification of Harm'* in Albert A Foer Randy M Stutz, M Botta (eds), '*Research Handbook on Competition Law and Private Enforcement'* (Edward Elgar Publishing 2024), 271.
[188] ibid. 271.
[189] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2020) 37.
[190] Oxera, *Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts* (Study prepared for the European Commission, December 2009) 59.

structure, nature and substitutability of products, among others), concentration and competition levels (number, characteristics and behaviour of competitors, among others), barriers to entry, regulation, maturity of the market, price-setting mechanism, or any other phenomenon"[191]. This means that finding the right benchmark will be an intensive exercise with many factors to take into account, however these do not seem to be insurmountable and can be closely associated with finding a relevant market, but with the difference in the product. Still, if an accurate comparator can be found in a different product market, it needs to be remarked that in cases of loss of profit, the result of the method will ultimately be the most possible assumption of how the market could potentially look like. As will be portrayed in a later section, finding a comparable market in digital markets is difficult, but not impossible.

Another method which can be used to quantify the harm the cost based method, which adds a competitive margin to the firms costs and the additional cost plus margin represents the counterfactual margin[192]. The cost-based method in the context of abuse of dominance may be practical to use when encountered with exploitative behaviour, such as overcharges, but not in an exclusionary setting, where the loss of profit cannot be derived strictly on the basis of a competitive margin[193]. The competitive margin will be derived, similarly as in comparator method, from another market. The method differs, however, as it uses accounting methods instead of economic methods to deduce the compensation[194]. Likewise, the financial method uses an accounting method to quantify the harm, however it can be used in cases of loss of profit, as it's aim is to approximate the financial situation of the company, if not for the infringement. In order to achieve this certain methods can be used such as: Net Present Value, different company valuation methods or the cost of capital methods[195]. These have been described as rather assisting methods of quantifying the harm, which can help to give a more exact amount[196].

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[191] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2020) 36.
[192] ibid. 38.
[193] ibid. 39
[194] Francesco Decarolis, Oliver Marz, Nicola Tossini, '*Quantification of Harm'* in Albert A Foer Randy M Stutz, M Botta (eds), '*Research Handbook on Competition Law and Private Enforcement'* (Edward Elgar Publishing 2024), 263.
[195] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2020) 39.
[196] Francesco Decarolis, Oliver Marz, Nicola Tossini, '*Quantification of Harm'* in Albert A Foer Randy M Stutz, M Botta (eds), '*Research Handbook on Competition Law and Private Enforcement'* (Edward Elgar Publishing 2024), 263.

The last category of methods, which will be mentioned are the simulation methods. In these methods the claimants aim to quantify the damage based on simulation models, which are based on macroeconomic factors[197]. The methods can be particularly useful in estimating the harm from exclusionary behaviour, as it models how the market would look like, if not for the infringement. Contrary to the comparator methods the simulation models do not use data from comparable markets, but are based on several assumptions. The main elements that need to be identified for such a model need to include characteristics of supply, such as type of competition between firms, market concentration or barriers to entry, as well as, characteristics of demand, such as price elasticities or consumer preferences[198]. Based on the characteristics of the market certain assumptions can be made to model the quantification. Such modelling may be advantageous, when data for construction of the counterfactual is missing[199], however has significant drawbacks, which are magnified even further in claims against Big Tech. The models rely mostly on assumptions, thus wrongly made assumptions will produce infeasible results[200]. The assumptions needed to simulate the market without an infringement when considering an infringement in a digital market will be significantly harder to make[201]. They would need to consider more factors, such as network effects or the traffic on the site. Considering this the simulation method may be too difficult to be implemented by the claimants, as it would be an intensive, data-reliant exercise made purely on assumptions.

Having reviewed the mechanisms in the directive and different methods of quantification certain conclusions can be deduced. Firstly, the solutions found in the directive guarantee that the quantification will not be an obstacle, if it is impossible or excessively difficult. Such provisions secure the interests of claimants in claiming compensation. What is more interesting however, is what is missing in the directive, being the methods of quantification and their relation to the counterfactual, leaving the claimants free in the way they want to quantify harm. With this in mind the claimants need to carefully choose the method, which is best suited for quantifying their damages in order to claim full compensation. As it will be

[197] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2020) 44.
[198] ibid.
[199] ibid.
[200] ibid. 46.
[201] Francesco Decarolis, Oliver Marz, Nicola Tossini, '*Quantification of Harm'* in Albert A Foer Randy M Stutz, M Botta (eds), '*Research Handbook on Competition Law and Private Enforcement'* (Edward Elgar Publishing 2024), 263.

shown in the next sections certain challenges will be encountered by claimants in using the methods appropriately in the context of claims against Big Tech companies.

4.2. Indirect purchases and quantification of harm in the context of Big Tech exploitative abuses

Exploitative abuses, as explained before, consist of practices, in which a dominant undertaking exploits other undertakings or consumers with the aim of profiting directly from an infringement, rather than by excluding competitors. Exploitative damages resulting from such conduct are arguably easier to quantify, than exclusionary conduct, as it is possible to observe the damage, contrary to an exclusionary abuse, where the damage in form of loss of profit is not possible to directly observe. Nevertheless, the issue of quantifying observable conduct does not come without its own challenges. These can take form in identifying passing-on rate in general and in digital markets claimants at the quantification stage may encounter issues associated with network effects[202]. In addition to that, despite the conduct being observable, the construction of counterfactual may necessitate choosing either a suitable comparator or assumptions for a model depending on the method chosen for quantification[203].

The first matter to consider is the issue of passing-on of overcharges. While the matter is usually connected to cartel infringements, where price fixing increases the prices, it is prevalent as well in abuse of dominance cases. Passing-on consists of passing the overcharge further to the consumer. An example of it can be found in *Rachael Kent* case[204], where the overcharge included an excessively priced fee in the distribution of applications in iOS store (App Distribution) and internal app payments (IAP) on developers was passed on further to consumers. While the case is approached both from an exclusionary and exploitative angle, the damage can be viewed from an exploitative angle, as due to these provisions application developers were subjected to higher fees. Passing-on, thus has two certain implications, which were reflected in the Damages Directive. Firstly, parties being initially overcharged cannot claim damages, if the overcharge has already been passed on. Such a rule is stated clearly in Article 13, which considers these types of situations and introduces the passing-on

[202] ibid. 259
[203] ibid. 266
[204] CAT, *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* (2025)

defence, which puts the burden of proof on the defendant to prove that the overcharges have been passed on. Secondly, a party, which has incurred an overcharge, despite being an indirect purchaser, still can claim compensation from the infringing company. This matter has been clearly communicated in Articles 12 and 14 of the Damages Directive. In order to claim compensation in case of an indirect purchase the claimant has been a subject to an anticompetitive overcharge they need to meet three cumulative conditions, as laid down in Article 14: "*1) the defendant needed to commit an infringement of competition law; 2) he infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and 3) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them"*[205]. Thus, together Articles 12-14 establish a coherent system ensuring that indirect purchasers have an opportunity to claim compensation. If this would not be the case, they would go against the principle of full effectiveness, as it would amount to disallowing compensation from an infringement of competition law.

Seeing the mechanism, enables us to see how the quantification of overcharges in case of indirect purchasers requires an additional step in the exercise of quantification. Although the overcharge can be observed clearly within the direct relationship between an infringer and the direct purchaser, the rate of passing-on in some cases cannot be clearly derived. Such situations may occur, where companies on a market were subjected by the dominant player to an overcharge, which has been passed on by only some companies, but not all of them. Such a situation may be even more difficult to handle in collective redress, as it involves a very large number of parties to consider.

Although the case of *Rachael Kent v. Apple*, is British, portrays how the courts can deal with quantification in claims against Big Tech considering overcharges[206]. Since, there is no strict legal standard to choose the method of quantification and no comparable case of overcharges in private enforcement against Big Tech companies, it is relevant to analyse how CAT

[205] Damages Directive, Article 14.

[206] Two points need to be raised on the matter of using this case as an example. Firstly, currently there is no official closed case, which considers exploitative damages in digital markets within the EU giving a unique perspective on the matter of quantification. There is currently a collective redress case in the Netherlands considering identical matter, which is still on-going: Stichting Right to Consumer Justice v Apple Distribution International Ltd and Apple Inc and Stichting App Stores Claims v Apple Distribution International Ltd and Apple Inc, Rechtbank Amsterdam, ECLI:NL:RBAMS:2026:4577 (ongoing proceedings). Secondly, the case, as well considered an exclusionary abuse, however for the sake of portraying quantum of exploitative abuse, the discussion will be limited to the exploitative section of quantum.

handled the collective redress considering Apple's overcharges. The method followed by the court involved using a product comparison combined with estimating of the overcharge in order to quantify the damage[207]. After establishing that the charge of 30% for the payments for App distribution was excessive[208], the court was tasked with finding an appropriate comparator, which would be deemed non-excessive[209]. Interestingly, the court did not restrict itself to finding only one applicable comparator for the commissions charged through App distribution system, but instead used three different commissions to establish an average rate, which would not be excessive in view of the court. Under this methodology the court used three different online stores, namely, Steam, Microsoft Store and Epic Games store to find the average rate amongst them[210]. These stores were used as a comparator, because similarly to the iOS Store that Apple operates, they act as an intermediary between the consumer and a developer providing similar market characteristics with the intermediaries setting the commission rate for payments. With Steam having 20% commission rate and other two stores having 12.5% rate CAT decided that a rate equal to 17.5%[211]. CAT also took into account various strategies and competitive structures into account using this method, such as the fact that Epic Games Store entered aggressively on the market charging lower fees and that the Microsoft Store was much smaller in comparison to others, thus charging lower fees to remain competitive[212]. Such a rate in view of CAT would be possible in the counterfactual, where Apple would charge competitive fees[213]. Importantly, the rate did not amount to a strict average, but rather took into account factors, which Apple would need to consider on the basis of other comparators. Secondly, the passing rate needed to be identified, since the case was a collective consumer redress and a certain percentage of overcharges could have been passed on to consumers by the developers. Estimating the passing-on of overcharges has been one of the biggest challenges in the case, as it involved estimating vast number of individual transactions of different groups of developers[214]. In addition to that, the response of developers to overcharges surely was not uniform and needs to account for the network effects and the issue of multi-sided platforms. It can be speculated that some of the

[207] CAT, *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* (2025) paras 229-235.
[208] The case involved as well overcharge within internal app payment (IAP), however the methodology followed within the two was similar, thus the methodology in the context of App Distribution only will be presented to showcase issues connected with quantification of harm.
[209] ibid. para 681, and paras 229-235.
[210] ibid. paras 229-235.
[211] ibid. paras 919-920.
[212] ibid. paras 229-235.
[213] ibid. paras 229-235.
[214] ibid. para 1057.

developers could have decided to absorb the commission in order to remain competitive to consumers, while others could have decided to pass it on to omit additional costs or even opt for other methods of saving costs, such as worsening the quality of applications or adding advertisements. With network effects being present, developers carefully needed to evaluate how their decision would impact the maintenance of consumers and thus decide how to react to the infringement making the analysis more complex than in traditional markets. Seemingly unable to overcome the challenges with estimating the passing-on rate, CAT opted for using a broad axe method, whereby the rate of passing on was set at exactly 50%, as it deemed precise quantification impossible and referred to the establishment of the rate, as "permitted guesswork"[215]. Once again, it is possible to see that within cases of Big Tech an infringement committed by a single company will have consequences on a very wide group of individuals. In spite of this, it is simply not possible to determine the accurate passing on rate in collective redress cases considering overcharges.

The judgement shows that methods and principles of quantifying overcharges in exploitative conduct do not change, but their implementation comes with considerably more challenges, due to the structure of digital ecosystems. Variables, which are observable, are difficult to quantify, as they may involve millions of transactions and account for network effects, making the estimation of passing on considerably more challenging. Thus, while the methods of quantification need not be novel, they will need to be adapted accordingly to face the challenges posed by digital markets.

However, if a claim by a developer were brought in a case with identical infringement, as Apple's the issue at hand would be easier to deal with, as it would amount to determining the number of transactions that have been made through the App Distribution, as well as IAP and establishing of the competitive benchmark of the commission rate using a yardstick method. Later, the overcharges would need to be compared with the benchmark commission in order to derive final damage. This shows that analysis of overcharges, when encountered by only one company, may be easier than in collective redress cases, where arriving at the final damage involves making more assumptions. As a result the exercise of quantifying overcharges in individual cases against Big Tech will be simpler, than in cases of collective redress.

[215] CAT, *Dr Rachael Kent v Apple Inc and Apple Distribution International Ltd* (2025), para 1057(15).

While the Damages Directive clearly enables claiming of harm, where a claimant was an indirect purchaser, the claimants, especially consumers in collective redress cases, may face significant barriers to appropriately quantify the harm. Although the harm may seem easier to quantify in exploitative cases, as the conduct is observable, it still necessitates using certain comparator methods and estimating the rate of passing on for establishing a sound counterfactual. Executing these inevitably will become a challenge for claimants against Big Tech, when one will consider the particularities of digital markets.

4.3. Methods of quantifying harm in the context of Big Tech exclusionary abuses

The issue of quantification of harm in exclusionary abuses committed by Big Tech is arguably one of the hardest issues to tackle, as the exercise of quantification can be described as uncertain, due to lack of a uniform legal standard of assessment of quantification of exclusionary abuses and the fact that a claimant needs to accurately describe loss of profit, which is not directly visible. The lack of a legal standard can be explained by the fact that the specific damages will be very case specific and will depend on the form in which the infringement takes place. The core of quantification however, remains the same: appropriate finding of counterfactual scenarios, in which the claimants can argue their loss of profit on the basis of exclusion of the market, as an effect of an infringement. Therefore, similarly to disclosure of evidence claimant needs to correctly choose a quantification method to match the counterfactual scenario. The method gaining most popularity within courts examination in claims against Big Tech considering exclusionary abuses is the market comparison method, as it can counter more adequately the fact that the exclusionary abuses do not provide for directly observable changes. This sub-chapter will critically examine how national courts handle the quantification of harm in exclusionary abuses, showing what kind of method will typically need to be used to effectively claim compensation.

An exclusionary abuse, as identified by the Spanish CA[216] has three phases, which can usually be observed (each abuse will have its own peculiarities and the phases may differ, but this represents a usual scenario). The phases identified were the following: 1) attrition phase; 2) recovery phase; 3) reactivation period[217]. The first phase starts the beginning of existence

[216] Comisión Nacional de los Mercados y la Competencia, *Guide for Quantifying Harm* (CNMC 2023), 54-55.
[217] ibid. 54

of an infringement and progresses into the second phase only once the competitors' shares have been reduced and stabilised or the competitors have been foreclosed. According to the theory during the attrition phase the dominant company will be aggressive in their anticompetitive strategy. This applies to some but not all observable exclusionary abuses visible in digital markets. For example the measure found in abuse of dominant position identified in Google Shopping was continuous and not a subject to different periods of intensity, while the case of Google Android shows that dominant undertaking was more aggressive at the beginning of abuse with use of revenue sharing agreements and pre-installation, which required setting up the system widely at the beginning of abuse for it to have effects[218]. In the second phase the dominant undertaking has already strengthened its position on the market by lowering the markets shares or foreclosing the competitors altogether. During that period it is possible for the dominant undertaking to recover in cases of predatory pricing. The last stage of an exclusionary conduct is the reactivation period, which occurs after the infringement has ended[219]. At this point the competition is reinstated on the market with new companies appearing or with competitors gaining more of the market share. The phases of exclusion show that loss of profit is not linear but may be different depending on a given infringement. Thus, a claimant constructing the counterfactual needs to account for the phases of exclusion to show the periods where the exclusion commenced and ended in order to quantify properly the harm.

The case of Google v. Idealo[220] shows how the comparator method, precisely comparison of a different product market, was used and raises the question whether the chosen method was the most suitable one. In the case the court rejected the methodology proposed by the claimant, which used the finance allocation model, in which the diverted traffic from competitors to Google was distributed among the competitors. In view of the court the model chosen by the claimant was infeasible, due to two reasons. Firstly, the court was unsure whether the core assumptions of the counterfactual held. These were that the overall market share would be the same size and that Google would not have captured the diverted traffic[221], if not for the infringement. Secondly, the court held that the market shares themselves were tainted by the infringement, thus it is unfeasible to project the diverted traffic among

[218] ibid. 54.
[219] ibid. 54-55.
[220] Landgericht Berlin II, *Idealo v Alphabet* (Case No 16 O 195/19 Kart(2).
[221] ibid. para 236.

competitors[222]. In the view of the author, the court rightly decided not to accept the proposed model, as relying strictly on actual diverted traffic and the current market shares omits the fact that the competitive structure could have been entirely different without the infringement[223]. Lastly, the assumption that Google would not be able to without the infringement to capture any of the diverted traffic is very hard if not impossible to prove. The fact that the model chosen by the defendant was not accepted does not mean that the court rejected the claim, but instead it opted for another model, which was in view of the court more feasible for the construction of the counterfactual.

The court chose to use the comparator market method on the basis of the growth of the e-commerce market[224]. This market was chosen as a benchmark because it was determined that it has been untainted by anticompetitive conduct, the two markets are closely associated and comparison sites largely depend on the e-commerce activity. Therefore, the e-commerce market was chosen as a macroeconomic benchmark on the basis of proximity of the two markets. After choosing this method and the appropriate benchmark five stages were followed to arrive at final damages: 1) The court started by determining the annual growth rate of the e-commerce market during the infringement and damages period[225]; 2) Secondly, the court established the baseline of the claimant by taking their actual traffic in 2008 and reduced it by the average of the annual growth during the infringement's period[226]; 3) Next, the court took the claimant's baseline and projected it with e-commerce growth rates for the subsequent years[227]; 4) Having a baseline projection with e-commerce growth, the court progressed with the calculation of hypothetical revenue by multiplying the cost per click with the hypothetical traffic that would be present and later reduced it by the revenue actually incurred by the company[228]; 5) Lastly, the court reduced the damages amount by incremental costs as submitted by the claimant[229]. The method used by the court has significant strengths in identifying an appropriate market for comparison and not basing the assumptions in a market, which during the infringement could not grow at the same pace. It is as well impressive that the court was able to find an appropriate comparator, despite difficulties that lie within the matter, as previously described. Although, it is discussible whether e-commerce

[222] ibid. para 236.
[223] ibid. para 236.
[224] ibid. para 278.
[225] ibid. paras. 280-283.
[226] ibid. para. 284.
[227] ibid. para. 285-286.
[228] ibid. para. 287.
[229] ibid. para. 298.

market growth is the best benchmark possible considering that there have been multiple infringements in that sector during the time of the *Google Shopping* infringement. On the other hand, finding a market, which would be free of infringements of undertakings and would suffice the conditions for a benchmark could amount to an impossible task. Therefore, the choice of e-commerce market as a benchmark can be seen as selecting the option that offers the closest approximation to the counterfactual. Moreover, the method does not take into account the performance of well progressing companies during the infringement, but rather penalises it because of the projection, which starts with the company's performance at the beginning of the infringement. In addition, the method would be impossible to execute for a claimant, who started their operation after the beginning of the infringement given that it depends on the performance prior to the infringement. The comparator method therefore has certain drawbacks, but seems as a reliable option in view of the other methods and the general difficulty in assessing the unobservable direct loss of profit, despite the fact that it relies on the major assumption that the market would grow in a similar way.

Except for the comparator method based on a different market, the yardstick method, it needs to be underlined that there are certain situations where the diachronic method may be more beneficial. Such cases, however, necessitate that the infringement is isolated and targeted on a competitor in a given market. Given that companies such as Google or Apple have the technological capabilities to block arbitrarily operation of another company on their site, there is a significant risk that such blocking may be used as part of an anticompetitive strategy. Provided that there is an infringement capable of being proven the diachronic method may produce more accurate results, as it is based on the same market without the need for using a benchmark in another market or assumptions, as in a simulation model. For instance, the French damages case of *Oxone*[230] against Google portrays how straightforward quantification can be in such an exclusionary setting. The facts of the case are the following: Oxone operated as a telephone directory, which advertised itself through Google Ads. Later, Google started suspending these advertisements and eventually disallowed advertising through Google Ads for telephone directories as a whole[231]. The French court decided that

[230] Cour d'appel de Paris Google Ireland Ltd and Google France SARL v Oxone Technologies SAS (RG No 21/04110, 7 September 2022).
[231] Hausfeld, *Google Ads to Pay €12.7m Antitrust Damages for Squeezing Directory Enquiry Services Provider, French Court Rules* (13 February 2024) https://www.hausfeld.com/en-us/what-we-think/perspectives-blogs/google-ads-to-pay-127m-antitrust-damages-for-squeezing-directory-enquiry-services-provider-french-court-rules last accessed 12 July 2026.

Google's action amounted to an abuse of economic dependency[232] and the quantification of harm incurred by the defendant was done by comparing the historical revenues of the firm with the period of the infringement. Based on this, it is possible to say that the diachronic method is better suited for such targeted infringements, producing more accurate results and thus enabling effective compensation for the claimants. When compared with Idealo v. Google, it can be clearly seen that a pre-condition for using diachronic comparison method is that the market prior to the infringement needed to have a phase without a distortion, which can be clearly defined. This was not possible in the case of the follow-on Google Shopping case. In addition to that, the case of Oxone consisted in a short amount of time of the infringement and with far smaller reach, since the market of telephone directories can be safely assumed to be smaller than the market of price comparison sites. These two factors in turn enable easier assertion of counterfactual scenario, which would consist in Google permitting the advertisements for Oxone and comparing it to a period of time, where it was the case. Such a method, undoubtedly will produce more accurate results than a yardstick, but can only be used under specific facts of a given case and not when encountered with a long-term, market-wide exclusion. Therefore, in cases, where the exclusionary conduct is isolated and the facts of the case enable the use of diachronic, it may be more beneficial for a claimant to do so.

In addition to that, the choice of the comparative method in cases of loss of profit in some jurisdictions, based on the case-law, seems to be the only viable method. For example in the Czech Republic the court practice shows that for a successful claim for a loss of profit, the claimant will need to use a comparator-type method, so that the claimant can prove that the harm they have incurred in form of loss of profit cannot be explained by anything else other than the infringement[233]. Similarly, in Latvia the claimant within quantification needs to prove that there was no other way, through which the company could have lost the profits[234]. Although, this issue relates more to the causality, than the quantum of harm, it still shows that courts necessitate in proving exclusionary damage a concrete quantification corresponding to the counterfactual. The signs of this are as well present with the afore-mentioned cases

[232] Although this kind of infringement is absent in European competition law and is specific to France and other countries with similar infringements in place, the exercise of quantification is essentially identical, if the case would consider the traditional abuse of dominance.
[233] Valentinas Mikelėnas and Rasa Zaščiurinskaitė, *Quantification of Harm and the Damages Directive: Implementation in CEE Countries* (17(29) *Yearbook of Antitrust and Regulatory Studies*, 2024), 116.
[234] ibid. 116.

against Big Tech, where the courts essentially accepted comparator methods, thus showing a general tendency of courts to favour them.

Above considerations show that it is possible to overcome the difficulties associated with quantification of harm against Big Tech claims by the use of comparative methods. The claimants still will have to overcome certain challenges with the use of this method in the form of identifying an appropriate benchmark, which can be especially difficult in cases against Big Tech. The case of Google v. Idealo clearly portrays this issue, where the e-commerce market was chosen, as the closest comparable market. On the other hand, the quantification may not amount to a significant barrier, when the market has been undistorted prior to the infringement providing a viable use of the diachronic method of quantification. Thus, in view of the author, quantifying harm in an exclusionary setting can definitely be considered a significant challenge for claimants, but it is possible to overcome with the appropriate use of the comparative methods, which need to be chosen adequately to the facts of the case and the counterfactual scenario of them.

4.4. Practical challenges

Except challenges connected strictly with the method of quantification in light of claims against Big Tech companies, there are certain practical challenges that claimants may encounter with bringing the claim to the court. These may include in particular the coverage of costs and the issue of appointment of experts. Both of the issues reveal large differences between the Member States and their approach or other underlying. Whilst Article 17(1) of the Damages Directive clearly states that neither burden of proof nor its standard connected with quantification can fail an otherwise well-founded claim and the national courts are empowered to estimate the harm in cases where it is impossible or excessively difficult, the fact remains that claimants will want to quantify the damages themselves in order not to "lose out" on the full compensation guaranteed. At that point the issue of which party should bear the costs of quantification may be important for the claimants, as it is costly especially in cases against Big Tech. The second matter to highlight is the issue of court appointed experts and challenges associated with them. If the court deems that an estimation by it is necessary, an expert is usually required. Therefore, it is important to analyse how such issues may influence the course of the claim.

Firstly, the issue of costs has been addressed in the case of *Trafficos Manuel Ferrer*[235]. The court was asked whether a rule, which divides the costs of the legal action upon a partly successful claim impedes the principle of effectiveness. The logic behind such a statement is that, if a claimant was at least partly successful in their claim, dividing the costs of such claims may discourage the claimants from bringing the claim, but more importantly impede on the principle of effectiveness, as it would not allow for the full compensation. The court however, answered negatively, holding that such a rule does not infringe upon the principle effectiveness. The reasoning behind it stemmed from the fact that in view of the CJEU procedural costs do not stem from the infringement themself, but are simply an effect of legal conduct[236]. The court followed this by arguing that the position of the claimant can be restored to balance with tools already present in the directive, which combat information asymmetry, therefore the initial imbalance cannot be argued to substantiate a claim that in a partially successful claim the defendant should bear the costs[237]. The decision has been critiqued by some experts and goes against the opinion of AG Kokott, who argued that costs of quantifying the harm may amount to a significant barrier and that the origin of the procedural costs stems from the infringement, contrary to how the court viewed them[238]. In addition, with the exercise of the quantification being difficult itself, the claimants will typically have a high risk of being only partially successful[239]. The summary effect of these factors is that in fact it could easily be argued that such division of costs within partially successful claims can impede on the principle of effectiveness[240]. The implications of such rules for costs for claimants against Big Tech will be identical, as for claimants in other damages scenarios, meaning they may be potentially dissuaded from bringing a complex claim to the court at the risk of losing significant amounts of money, despite the claim being partially successful. However, the costs can possibly be much higher given the complexity of the cases and need of detailed expert reports needed to quantify the damages. The complexity of quantifying incurred harm in digital markets may go beyond the typical economic expertise and will need to account for characteristics of a given infringement. Keeping that in mind, it is rational to assume that the costs for quantification of an infringement done by a Big Tech company may be higher than in cases of cartel infringements.

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[235] Case C-312/21 *Tráficos Manuel Ferrer SL and Ignacio v Daimler AG* EU:C:2023:99.
[236] ibid. paras 37-38.
[237] ibid. paras 55-59.
[238] Opinion of AG Kokott in Case C-312/21 *Tráficos Manuel Ferrer SL and Ignacio v Daimler AG* EU:C:2022:827.
[239] ibid. para 64.
[240] ibid. para 69.

The second practical challenge that claimants against Big Tech may be faced with is the issue of experts and applying the correct methodology by judges. This issue is especially visible in the Central and Eastern Europe region, where the availability of experts is limited. This phenomenon can be observed for example in Latvia, where the number of experts is limited and they are usually selected from a given list not guaranteeing appropriate expertise in some cases[241]. Such problems may be magnified further in the context of claims against Big Tech, as beside the traditional economic expertise, it needs to account for various characteristics of the digital markets. The problem of lack of experts in the field may perhaps be resolved over time, but in cases where lack of experts is an issue, certain incentives could be made for them to come forward, such as monetary incentives. In addition to that, Member States could consider employment of lay judges. Lay judges in the context of competition law are persons without (full) legal training, but with certain economic expertise, who sit on the panel of judges within a civil case[242]. The use of such a procedural tool in competition law damages cases can be seen in France, Belgium Germany or Austria, where to a varying degree the lay judges help to determine the quantum of harm[243]. While the professional judges are able to determine the legal scope of a damages claim, they may lack expertise in economic matters, which is needed when dealing with quantification of harm[244]. Given that Article 17(1) expects the judges to estimate damages, where it is impossible or excessively difficult for claimants, the help of lay judges should not be underestimated and their employment by national courts is advisable. These could definitely be a positive addition in analysing the complex quantification that is to be encountered in claims against Big Tech.

Practical challenges in form of costs and the issue of inadequate expertise at hand may be significant within claims against Big Tech and potentially dissuade claimants from bringing their claims from the outset. The decision of the court in *Traficos Manuel,* which can be described as controversial, may unnecessarily limit private enforcement with even partially successful claimants bearing the portion of the costs. The issue of experts, individual to each member state, may as well impact the timidness, which can be experienced by claimants in respect to bringing a claim. Without sufficient expertise available to courts, the estimation

[241] Valentinas Mikelėnas and Rasa Zaščiurinskaitė, *Quantification of Harm and the Damages Directive: Implementation in CEE Countries* (17(29) *Yearbook of Antitrust and Regulatory Studies*, 2024) 125.
[242] Lena Hornkohl, *Leave It to the Experts: A Call for Competition Expert Lay Judges in Private Enforcement of Competition Law* (Y*earbook of Antitrust and Regulatory Studies 15(25), 2022) 3.*
[243] ibid. 6.
[244] ibid. 7.

done by them may result in inaccurate results, which calls for inclusion of lay judges to lend their expertise. The practical challenges associated with quantification may in the end render bringing the claim against Big Tech with much more difficulty and hesitation.

Conclusion

The Damages Directive and its introduction by Member States generally provide an adequate legal framework for challenges associated with claims against Big Tech in the context of claims against Big Tech, however the true challenges for claimants lie in practical use of the tools available for claimants and courts to enable effective compensation.

The framework provided by the Damages Directive in terms of access to evidence is flexible and accounts for interests of both parties involved. CJEU case-law tends to follow a claimant-friendly trend based on the principle of effectiveness. The proportionality test, if adequately done, should provide the claimants with access to evidence needed even if such is to be done with *ex novo* documents, but does not permit the so-called 'fishing expeditions', thus giving a balanced approach. In addition to that, CJEU case-law shows that the access to evidence from parties other than CA's cannot be impeded on the basis of on-going investigation giving Big Tech claimants an opportunity to act more swiftly, which is essential considering the lengthy amount of time that the investigations last. The Damages Directive, as well, makes it clear that the access to confidential files cannot be a barrier to attaining evidence making such access practically viable. Similarly, the solutions provided in it for quantification of harm clearly show that even impossible or excessively difficult damages shall not be an obstacle in receiving full compensation. Moreover, the methods, which are at disposal of claimants and have been previously used in traditional competition law cases can, as well be used to quantify the harm in claims against Big Tech, despite certain difficulties that may be encountered. Claimants will be challenged by the issue of firstly choosing the method, which can clearly correspond to the counterfactual and later may face issues connected in applying them. However, as presented, different kinds of comparator methods are generally able to handle these tasks, both in exploitative and exclusionary conduct, despite significant difficulties in applying them.

However, claimants will still face significant challenges in both of these areas, if national courts will not use all of the tools at their disposal. This matter is exposed when faced with the issue of confidentiality in claims against Big Tech, where the courts need to be very careful in application of the proportionality principle and the treatment of confidential information. Moreover, in some of the Member States monetary fines seem to be ineffective,

especially when viewed in the context of claims against Big Tech. In terms of quantification, although quantification of harm is possible, it comes with certain difficulties stemming from characteristics of digital markets. While using the comparator methods is entirely possible, it may still be difficult to apply them by the need to find appropriate benchmarks and practical challenges in the form of high costs and lack of expertise in some of the Member States. The cost allocation especially after the case of *Traficos Manuel* can be considered an obstacle, as claimants even with partially successful claims will need to bear the costs.

Based on the findings of the thesis it is possible to derive certain recommendations. Most of them consist of the use of existing tools and methods that courts already possess and some legislative changes to a lesser extent. Firstly, it is needed by courts to account for information asymmetries in digital markets, as they certainly exist in the context of abuse of dominance in digital markets, despite the Damages Directive being silent on the matter. Secondly, judges need to use to full extent the tools dealing with confidentiality to afford claimants access to the documents needed for quantification or substantiation of the claim. This especially requires availability of mechanisms like confidentiality rings, which aim to balance flexibly the information asymmetry and thus can efficiently enable access to large portions of evidence, while not violating confidentiality. Legislative changes, which can be considered definitely include the very low monetary penalties in some of the Member States for lack of disclosure of court ordered documents. Low amounts of fines may result in the system of access to evidence being redundant, thus Member States should consider bringing legislative change, which is relatively easy to execute. In terms of quantification, it would be useful to review the guide to quantification released by the EC to account for the particularities of digital markets. Although the methods described in the guide are adequate to apply to Big Tech infringements, they do not describe how digital markets may complicate their use. Seeing that some of the Member States call upon the national courts to use the Practical Guide and the guide is the only official soft law instrument, which claimants across the EU can rely on, it would be beneficial to review it and adjust accordingly to consider challenges in digital markets. In relation to that, it should be mentioned that the creation of such a guide should be based on a report similar to the one commissioned by the EC before the Damages Directive, in order to analyse the issue of quantification more in-depth.

The thesis has certain limitations, as it focuses only on two selected issues, which can be considered a challenge for claimants against Big Tech. The other issues, which could be analysed more in-depth could include jurisdiction, availability of collective redress, causation or limitation periods. Analysing these matters would enable us to get a fuller picture of the challenges faced by claimants. In addition, although the paper analyses to a certain extent national law of Member States, it does so in a limited manner to showcase the issue of minimum harmonisation of the directive and its introduction by Member States. Each of the Member States having specific legislation would require separate works to determine with full accuracy the scope of access to evidence and quantification of harm, which was not the aim of the thesis, which aimed at showcasing the challenges in claims against Big Tech within these matters. Moreover, most of the private enforcement cases against Big Tech are still on-going and some of them could have been settled out-of-court. Therefore, the thesis only shows the current issues, which can be directly derived from judgement, while there may be further developments in the future on the matter. Lastly, digital markets and legislation around them, such as DMA, are constantly evolving. It is entirely possible that Member States will either amend the existing damages legislation or draft new ones in response to challenges posed by the digital. Thus, the thesis may call for reassessment, if its subject matter will undergo legislative changes.

Lastly, it needs to be remarked that the thesis has an original contribution to the field of competition law, as it analyses together the matters of access to evidence and quantification. While both of these matters have been previously academically addressed, they have not been analysed together and viewed as interconnected, especially in the context of claims against Big Tech. The thesis makes it clear that these issues are closely related, as claimants may need access to certain evidence for the process of quantification and base it on a counterfactual, which plays an instrumental role within both of the matters. With that in mind, the thesis has shown how both of the issues may be a challenge to claimants.

Ultimately, the challenges faced by claimants in damages actions against Big Tech companies do not primarily arise from deficiencies in the legal framework devised in Damages Directive, but rather from the practical application of that framework by national courts and inherent difficulties associated with quantifying harm in digital markets. The Damages Directive provides sufficient tools to facilitate private enforcement, provided they are correctly applied by national courts and are consistent with the principle of effectiveness,

which underpins the framework. With further development of digital markets and the steady rise of Big Tech companies, the willingness of courts to employ all of the tools at their disposal will play an instrumental role in ensuring that the right to full compensation is secured.

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