

THE COMPETITION LAW REVIEW

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THE COMPETITION LAW REVIEW

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Editorial

The intention in instituting bi-annual CLaSF workshops was to consider and reflect, primarily from an academic perspective, on current topical competition law issues and developments. It is particularly appropriate therefore that the Review is launched so shortly after the monumental reforms to Community competition law enforcement introduced by Regulation 1/2003 and that the first issue, based on the April 2004 workshop theme: 'Decentralisation: From the Idea to the Reality', contains a range of perspectives from across Europe on the modernised enforcement landscape of Community competition law. It is a crucial time to consider the extent to which the various domestic systems are prepared for the new role and tasks allocated to them under the Community modernisation package.

In his article, Dr Hans Vedder considers the question of spontaneous harmonisation of national law in the wake of modernisation of EC Competition Law. He outlines the three alternative paths to effective enforcement of competition law: criminal law, administrative law and civil law and highlights that modernisation of EC law will inevitably lead to a greater reliance on the latter path to achieving workable competition, whilst also enhancing the 'criminal' character of investigations undertaken by the Commission. Furthermore he indicates that the spontaneous harmonisation of national law with EC law means that these trends will also be reflected in domestic competition law developments, as exemplified in the Netherlands. Dr Vedder considers the difficulties which are likely to follow from the increasing 'criminalisation' on the one hand and 'civilisation' on the other and ponders a number of, as yet unresolved, questions relating to the relationship between the two enforcement paths. Finally, this absorbing article considers the extent to which spontaneous harmonisation of civil law rules is achievable without some form of actual harmonisation of the procedural rules applying to national authorities and courts. This general article, albeit drawing to an extent upon the Dutch context, sets the platform for consideration of the extent to which some of the other Member States' legal systems are adequately prepared for the post-modernisation environment.

Pat Massey writes about the position in Ireland, where the national competition legislation, like that of many EU Member States, largely mirrors the basic prohibitions on anti-competitive behaviour contained in Articles 81 and 82 of the EC Treaty. Breaches of Irish competition law constitute criminal offences and, in the case of cartels, managers and directors of offending firms may be imprisoned if convicted of such behaviour. The concept of an administrative fine, which exists in many other EU Member States, is not recognised under Irish constitutional law. However, penal sanctions may only be imposed on parties found guilty of a criminal offence and in this context the article considers arguments for and against criminal penalties for breaches of competition law. This article reviews experience of the application of national

competition legislation in Ireland and assesses the implications of such experience for decentralised application of Community law in Ireland, focusing in particular on the importance of adequate resources being afforded to the domestic competition authorities to allow them to undertake their tasks effectively, on which recent Irish experience must be judged a relative failure.

This theme of under-resourced competition authorities is continued by Professor Yves Montangie in his vivid account of recent developments in Belgian competition law where he assesses critically the extent to which Belgium is prepared for the new regime. In addition to various political crises which have impacted on the reform and modernisation of Belgian domestic competition law, Professor Montangie outlines the lack of resources and staff afforded the domestic competition authorities in order to carry out their tasks effectively. Their lack of experience in applying Community law is shared generally by the Belgian judiciary and the paper concludes that training is required to enhance judicial competence in the application of competition law in private disputes.

Professor Paolo Giudici focuses, from an Italian perspective, on the increasing emphasis on the role of national courts in European competition law. This is a fascinating account of the problems encountered by a particular domestic legal system in providing an effective system of private party redress in relation to competition law infringements. Professor Giudici highlights that although there has been fairly considerable litigation in the Italian courts in relation to dominance-based abuses, private enforcement of hard-core cartel violations has been virtually absent. Attention is given to the *Motor Insurance* case, and the outcome that consumers have basically no competition law standing under Italian law. Professor Giudici indicates that a key problem lies in the absence of adequate discovery procedures, although broader reform is also advocated on the basis that the present Italian system simply does not cater for disputes concerning the protection of consumers' diffuse interests. Sceptics would certainly argue that if this conclusion were replicated in other civil law systems, European competition law is unlikely to experience a private enforcement revolution in which litigation such as the post-Vitamins cartel claims in the USA become commonplace.

It is very early in the post-modernisation era following Regulation 1/2003 to make any sweeping conclusions about the likely success of the new decentralised framework across the European Community. There are grounds for optimism based on the apparent general consensus between the Commission and national competition authorities on working towards an effective allocation of Community cases, outlined in the Commission Notice. In addition, there is evidence, at least in the UK, of increasing resort to the courts and the Competition Appeal Tribunal by party litigants, exemplified by the ongoing post-vitamins cartel claims by a range of parties before the CAT. However, there remains scepticism about the degree of preparedness of a number of the accession Member States to handle the enforcement of Community competition law, while a number of countries, as evidenced by the articles by Massey and Montangie, may struggle to deal with the additional workload. In addition, as Vedder and Giudici indicate, effective and consistent private enforcement throughout the Community may be jeopardised in the absence of harmonised civil procedural rules,

although this is an area the Commission may seek to develop following publication of the Ashurst's report on private enforcement of Community competition law across the twenty-five Member States. Inevitably, there will be a number of parallel and overlapping developments as enforcement practice across the Community develops post-modernisation and academics will require to overview *inter alia* trends in private enforcement practice, and case-allocation, procedural and human rights issues which arise in the European Competition Network before we can make a more considered judgement on the 'success' of the modernisation project.

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Spontaneous Harmonisation of National (Competition) Laws in the Wake of the
Modernisation of EC Competition Law*Hans Vedder**

1 INTRODUCTION

Harmonisation has always been at the forefront of European integration. To this express harmonisation one can now add what may be called spontaneous harmonisation. Spontaneous harmonisation can be described as the convergence of rules of the Member States following the example of comparable rules in the European Union without any express harmonising activity of that Union. This spontaneous harmonisation has taken place in the area of competition law. The European Community's competition rules have functioned as an example for the competition rules of most Member States in that the latter have amended or adopted their national competition laws so they mirror the Community's rules on competition.¹ While a spontaneous harmonisation can already be observed with regard to the Community's competition rules, the question is how this spontaneous harmonisation relates to the so-called modernisation of the Community's competition rules.

The modernisation of EC competition law is something that has in the approximately seven years since it was initiated led to a very considerable amount of legislation, legal writing and – to a lesser extent – case law. Regulation 1/2003, 139/2004 and the new Block exemption regulations, Guidelines and myriad articles and books are the visible result of this modernisation. Under the heading of the modernisation of EC competition law, the Commission has undertaken a major reform of the provisions of EC competition law that are addressed to undertakings² as well as those addressed to the Member States.³ Moreover, the modernisation initiated by the Commission appears to be accompanied by a new interpretation of the competition rules addressed at public undertakings by the European Court of Justice (ECJ), the effect of which is to grant the Member States more leeway in conducting their national policies without violating

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¹ See on this harmonisation: Drahos, *Convergence of Competition Laws and Policies in the European Community*, The Hague, Kluwer Law International, 2001.

² White paper on the modernisation of Articles 81 and 82 EC, Commission 28 April 1999, can be found on: http://europa.eu.int/comm/competition/antitrust/wp_modern_en.pdf.

³ See the various (draft) documents published in February 2004 on the framework for lesser amounts of state aid and the framework for the assessment of State aid which has limited effects on intra-Community trade, to be found on: http://europa.eu.int/comm/competition/state_aid/others/.

Community competition law.⁴ With regard to the competition rules addressed to undertakings the Court's recent case law appears to entail an approach that involves a bifurcation between practices that are (relatively) harmless or benign and those that are harmful or malign from a competition perspective.⁵ An example of the former approach would be the Court's judgments in *Albany*⁶ and *Wouters*⁷ whereas the latter branch of the case law is reflected in the *Polypropylene* judgments.⁸ With regard to the cases where the possible harm to competition is limited the Court adopts a, not always economically or legally correct⁹, approach to Article 81(1) EC, that enables it to take the agreement outside the ambit of that provision, thus obviating the need for an assessment under Article 81(3) EC. In the cases that deal with infringement decisions, the Court has adopted a rather more "cartel-busting" approach.¹⁰

This modernisation thus covers both the substantive rules as well as the procedures used for applying these rules. With regard to the substantive provisions, the changes can be brought under the heading of a "more economic" approach to Article 81 EC. The Commission has for example clarified and extended the scope of its De minimis Notice.¹¹ Furthermore, the safe-haven principle is now found in most Block exemption Regulations¹². The inclusion of some sort of rule of reason in the Vertical and Horizontal Guidelines also provide another indication of the substantive changes in Commission policy.¹³ Moreover, the Court appears also to have embraced the more economic approach to the first paragraph of Article 81 EC in respect of the appreciability test and the application of a form of the rule of reason.¹⁴ It is also the case that the more intensive use of increasingly complex economic models within the Merger Regulation appears to be part of the economic modernisation trend.

⁴ See, *inter alia*, the judgments in Case C-53/00 *Ferring SA v Agence centrale des organismes de securite sociale (ACOSS)* [2001] ECR I-9067, [2003] 1 CMLR 34, and Case C-280/00 *Altmark Trans GmbH, Regierungsprasidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, [2003] 3 CMLR 12.

⁵ Basically, this bifurcation follows the lines of the distinction made in the text of Article 81(1) between "object" and "effect", cf. Joined Cases 56 & 58/64 *Etablissements Consten SA and Grundig GmbH v Commission* [1966] ECR 299, [1966] CMLR 418.

⁶ Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751. This is actually one of three nearly identical cases that are also referred to as the Brentjens and Drijvende Bokken cases.

⁷ Case C-309/99, *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, [2002] 4 CMLR 913.

⁸ *Eg* Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, [2001] 4 CMLR 17.

⁹ Cf. Vedder, *Competition law and environmental protection in Europe; towards sustainability?* Groningen, Europa Law Publishing 2003, p 126 *et seq.*

¹⁰ In *Anic*, see note 8 *supra*, the Court can be considered to have shifted the burden of proof in favour of the Commission in cases that involve concerted practices.

¹¹ OJ 2001, C368/13.

¹² The principle whereby an agreement falls under the block exemption as long as the market share cap is not exceeded. To a certain extent, the more economic approach inherent in this is undone by the presence of the so-called black list in these Regulations.

¹³ See, for example, paragraphs 24 and 187 of the Guidelines on horizontal agreements, OJ 2001, C3/2.

¹⁴ Cf. Joined Cases C-180/98 – C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 1, at para 91.

With regard to procedural issues, the decentralisation of the application of Article 81(3) EC through Regulation 1/2003 together with the new state aid block exemption regulations have resulted in an (at least apparent) procedural decentralisation of EC competition law. The major players in this decentralisation are the Commission, the national competition authorities (NCA's) and the national judges. The aim of procedural modernisation is to shift some of the Commission's case load to the NCA's and the national judges. The NCA's are enabled to apply Article 81 and 82 in the same manner as the Commission whereas private parties must self-assess the compatibility of their agreements with Article 81 and 82. Ultimately, these private parties can turn to a national judge to obtain a ruling over the legality of an agreement in the light of Article 81 or 82 EC. Moreover, as a form of decentralisation in the area of state aid control and services of general interest, the Commission appears also to be expecting more self-assessment by the Member States.¹⁵

Modernisation thus involves substantive and procedural changes in more than one area of Community competition law. Even though the focus appears to be on the modernisation of Articles 81 and 82 EC, the picture emerging is one of a general overhaul of Community competition law across the board with attention primarily directed to the more serious threats to competition. This conclusion is confirmed by many statements in the relevant documents¹⁶ and the simple observation underpinning the reforms that limited resources must be effectively harnessed to ensure effective application of the competition rules.

Essentially, modernisation then appears to boil down to an efficiency operation the ultimate aim of which is to ensure a more effective enforcement of EC competition law in general. This paper first considers the spontaneous harmonisation that has taken place to this date. After that it identifies and examines three ways through which effective enforcement can be achieved. On the basis of these findings, the effects of the new modernisation regime will be examined. In this regard, the focus will be on the modernisation of the rules applying to Article 81.

2 SPONTANEOUS HARMONISATION

The concept of spontaneous harmonisation has already been mentioned in the introduction and was contrasted with (intended) harmonisation. Below, the concept of spontaneous harmonisation will be examined more closely. In this respect, the level or degree of harmonisation will first be studied. After this examination of the results of the spontaneous harmonisation, the reasons for this harmonisation, or in other words: the process of spontaneous harmonisation, will be considered.

¹⁵ See the documents mentioned in fn 3 *supra* and the Draft Community framework for state aid in the form of public service compensation, notably paragraph 19, to be found on:
http://europa.eu.int/comm/competition/state_aid/others/public_service_comp/en.pdf

¹⁶ See, *eg* the draft framework for lesser amounts of state aid para 10, *op cit* fn 3 *supra*, and the White paper on the modernisation of Articles 81 and 82 EC, chapter II, *op cit* fn 2 *supra*.

2.1 The degree of spontaneous harmonisation

With regard to most Member State systems of competition law a certain degree of similarity between those systems and EC competition law can be observed. It would be outside the scope of this paper to study all systems of competition law in Europe for their similarities and differences compared to EC competition law. This examination is therefore necessarily confined to a case study of two Member States' competition laws. For practical reasons and because these are of particular interest for this study, the Netherlands and Germany will be the subject of this examination.

In the Netherlands the Act on Economic Competition (*Wet economische mededinging*) was replaced in 1998 by the Competition Act (*Mededingingswet*). This new Act resulted from the express wish to have an effective system of competition law that should be "neither more stringent nor more lenient than the European Community's competition rules". Prior to 1998 the Netherlands could be considered to be a "cartel paradise" where the authorities came close to actually encouraging cartels. Restrictions of competition were addressed in the form of abuse control rather than by a prohibition provision and enforcement was lacking. From the 1980s onward, the competition rules were given slightly sharper teeth but only in the second half of the 1990s did plans emerge to put in place an effective antitrust regime on modern European principles.

From the outset, the Community's competition rules and policy were seen as the guiding light for the Dutch legislators and in places, the Competition Act is even a direct copy of the Community's competition rules.¹⁷ Apart from literally copying the EC provisions in certain key areas, the Competition Act includes dynamic references to European concepts that result in Dutch competition law being bound by European developments.¹⁸ The concept of an undertaking, for example, is defined as "an undertaking within the meaning of Article 81, first paragraph, of the EC Treaty".¹⁹

Drahos concludes in her study that there has indeed been a remarkable degree of convergence between the competition laws and policies in Europe.²⁰ In terms of the degree of convergence, however, the "legal plagiarism" by the Netherlands legislature may be contrasted with the more autonomous reception by the German authorities of the European rules in the German Act against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). The Act against Restrictions of Competition was enacted even before the EEC Treaty came into force.²¹ Even during its progress through Parliament there was considerable debate in Germany about the restrictions contained in the new Act with industry by and large in opposition to the Act. The initial Act was subsequently amended six times. The first five times concerned amendments that were

¹⁷ Articles 81 and 82 have been transposed in the Competition Act literally with only an amendment concerning the elements that relate to the territorial scope.

¹⁸ See, Slotboom, *De Mededingingswet: niet met handen en voeten gebonden aan het EG-recht*, SEW 1999, p 42-48.

¹⁹ Article 1, (f), Competition Act.

²⁰ Drahos *op cit* fn 1, at p 202, 203.

²¹ The new competition regime was discussed by the Ordoliberals during the second world war and the Act entered into force on 27 July 1957.

driven by domestic policy requirements and principally served to make the Act more effective.²² Only in the 1990s did German competition policy take on the objective of achieving convergence with the European Community's competition policy. The sixth amendment of the original Act introduced an Article 81(3)-like exemption clause into the legislative text.²³ This departure from the enumeration principle enshrined in the Act proved controversial and the reception of an exemption clause into German competition law was much more limited than in the Netherlands. As a result Section 7 is far from a copy of Article 81(3). The text of the amendment reveals that harmonisation has taken place only insofar as this would not hamper the "strict German tradition".²⁴ This example of Section 7 of the Act against Restrictions of Competition demonstrates both convergence and divergence between EC and German competition law.

These two cases make it clear that the spontaneous harmonisation that has taken place is a far cry from the total or complete harmonisation that has been enacted on the basis of, for example, Article 95 EC. Indeed if any of the terminology relating to harmonisation is to be used the most apt terms would appear to be framework harmonisation and soft harmonisation. Spontaneous harmonisation has resulted in widely differing approaches to the incorporation of the Community's competition rules and policy. Rather than resulting in identical (minimum) rules throughout Europe,²⁵ spontaneous harmonisation has resulted in the adoption of a more or less uniform culture of competition²⁶ and an acceptance of the need to have rules that will effectively protect competition. In choosing these rules, EC competition law provided the obvious example. This, however, does not explain the harmonisation itself nor the differing levels of harmonisation.

2.2 The process of spontaneous harmonisation

To determine what the possible relation between this spontaneous harmonisation and modernisation is, we must first establish what caused the current spontaneous harmonisation. In her book, Drahos identifies a number of channels of influence through which EC competition law has had its spontaneous harmonising effect. She comes to the conclusion that there has been no explicit harmonisation and that there were only weak negative restraints on national competition laws.²⁷ What has occurred is in fact a broadening of the jurisdictional criterion according to which EC competition

²² Convergence with the EC rules was mentioned in the course of the fifth amendment but never became a reality, see further on this: WuW (1989) 3, p 226.

²³ Section 7 of the Act against Restrictions of Competition. See further with regard to this provision, Vedder, *op cit* fn 9, at p 362 *et seq.*

²⁴ *Cf* Drahos, *op cit* fn 1, p 275 *et seq* and 286.

²⁵ See, for an overview of the competition laws of the Member States of the EU, Dannecker & Jansen (eds), *Competition Law Sanctioning in the European Union*, The Hague, Kluwer Law International, 2004.

²⁶ The fact that in the Netherlands price fixing cartels were abundant after the SPO-decision, and even during the parliamentary investigation of these bid-rigging practices in the construction sector, shows how a competition culture is still far from universally accepted.

²⁷ Drahos, *op cit* note 1, p. 214.

law applies only if there is an effect on intra-community trade.²⁸ In *VCH*, this criterion was considered to be fulfilled in respect of a cartel that encompassed the entire territory of a Member State.²⁹ The effect of this ruling increased enforcement of Article 81 with regard to “purely national” cartels. Moreover, the principle of supremacy of Community law resulted in a further reduction of the freedom of national authorities to act.³⁰ On a more positive note, the increased cooperation between the European Commission and national competition authorities and national judges is a factor influencing convergence. A further factor that also facilitates convergence is the cost for business resulting from having to comply with different norms.³¹ As governments will generally want to minimise these costs, there is an incentive to arrive at common rules or at least rules that do away with the need to comply with several diverging sets of rules.

As we have seen above, spontaneous harmonisation has more than anything else resulted in a uniform culture of competition in Europe. This competition culture has consequences for the enforcement of the competition rules. The realisation that “competition mattered” was closely followed by the realisation that the competition rules in place would need to be enforced. It now almost seems as though the absence of a European competition culture was little more than an infant disease that, once it had been cured in the form of spontaneous harmonisation, the Commission was able to address the more important issues such as trying to ensure a more effective enforcement of Community competition law at the European level. Perhaps coincidentally, the scholarly interest for issues surrounding the enforcement of EC competition law appears also to be increasing.

3 THREE ROADS TO EFFECTIVE ENFORCEMENT

From a legal perspective there are three routes that can be taken to ensure effective application of a given rule. These are criminal, administrative and civil law routes. These three routes involve different intensities of state involvement in the enforcement process. Civil law leaves enforcement, in principle, to the civil parties involved in the dispute whereas the criminal law path entails a very intensive role for public authorities. Administrative law presents us with something of a middle way in between the two extremes of civil and criminal law. In these three different routes a balance must be struck between the powers, rights and duties of the three parties involved judge and public party (in administrative and criminal law procedures) and private party or the two private parties (in civil procedures).

²⁸ Joined Cases 56 & 58/64 *Etablissements Consten SA and Gründig GmbH v Commission* [1966] ECR 299, [1966] CMLR 418.

²⁹ Case 8/72 *Vereeniging van Cementhandelaren (VCH) v Commission* [1972] ECR 977, at para 29.

³⁰ Case 14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR 1, at paras 6 – 9.

³¹ This was also relied upon by the German Business Association BDI in their approval of the plans to bring German competition law in line with EC competition law.

The following very schematic and certainly simplified overview of the three procedures may serve to clarify this analysis.³² In civil law procedures the parties basically lack any power to coerce each other to give information.³³ The principle of the autonomy of parties stands in the way. Furthermore, even though the scope of the principle differs between the various legal systems, the judge will generally be bound by the dispute and facts presented to him by the parties and will mostly be unable to adduce further evidence of his own motion. This can be described as a minimal procedure where the private parties' powers, duties and rights have a correspondingly low value. In administrative law procedures, the procedure itself is already more extensive as it will often involve some form of preliminary investigation. This already increases the value of the powers, duties and rights of the public authority compared to that of the private parties in a civil case. These powers of preliminary investigation are, however, coupled to, *inter alia*, procedural restrictions on the part of the public authority and rights for the private party involved, for example the right not to incriminate oneself. The private party, also has powers, duties and rights that can be valued higher than those in a civil procedure. Finally, the judge in administrative law procedures is not necessarily bound by the facts and dispute before him. Moreover, the administrative judge can, to a larger extent than the civil judge, request further information. The total value of the powers, rights and duties of the administrative judge is thus in balance with the higher value that is attached to the powers, rights and duties of the public and private party in the administrative procedure. In criminal law procedures, the powers, rights and duties of the parties and judge have an even higher value.

It is clear that greater judicial involvement will involve higher costs that are paid by society. There are also additional costs for the private party in the case, such as the cost of being detained for questioning. These additional costs are, to a certain degree, offset by the external benefits of these procedures. For example, the fact that criminal offences are prosecuted and punished contributes to deterring other people from committing criminal offences. Secondly, it is often stated that the involvement of a highly professional body such as a public prosecutor, will help limit the number of unmeritorious cases being brought before the judge.³⁴ However, that view is likely to be true only insofar as the public prosecutor is subject to a cost-benefit analysis. As long as the costs of having a public prosecutor are borne by the public and the prosecutor is not subject to any incentives not to bring unmeritorious cases, he is likely to bring such cases before the courts.

The higher costs of greater public involvement can also be offset by the external benefits of achieving a just outcome in cases where private party interests would not have resulted in a case before a judge. This is likely to happen in cases where the parties' possible gain arising from the just outcome will not outweigh the costs incurred

³² For one, the description of the civil law procedure ignores the fact that there are methods of resolving civil disputes that do not involve judges such as mediation.

³³ This contrasts with the liberal rules on discovery in the U.S. *cf* Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?', (2003) 26(3) World Competition 473, at p 480

³⁴ See further on this, Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check', (2004) 27(1) World Competition 13, at p 20.

in bringing the case to court. This explains to a large extent why criminal offences are predominantly in the public prosecutors domain. The application of such externalities reasoning can also be used to explain why other disputes are resolved in the private domain or within the framework of administrative law.

The core of the argument is that the balance of powers, rights and duties on one side are always compensated with increased powers and rights on the other side. With an increase in powers, rights and duties procedures become less easily accessible and judicial involvement increases, along with the costs.

The question is then how this logic relates to the enforcement of competition law. Violations of competition law are seen as something of general interest to the society as a whole whilst at the same time there may be clear and quantifiable damage to a limited number of parties.³⁵ Does this place enforcement of competition law in the civil or in the more public enforcement sphere? In other words: to what extent does the presence of externalities point in the direction of a more public or private enforcement?

3.1 Enforcement paths used in competition law

In order to establish what a violation of competition law exactly entails, we must first establish what exactly competition law seeks to protect. In that respect, it must be acknowledged that the objectives of competition law may vary between the different systems of competition law.³⁶ On the whole one goal appears to be widely accepted: the optimisation of consumer welfare. Competition, whether perfect, workable or effective, is considered to lead to optimal consumer and producer welfare because of its positive effects on productive, allocative and dynamic efficiency. Distortions or restrictions of competition generally are accompanied by the phenomenon of market power.³⁷ Market power may already exist and be abused or it may actually be created by a number of companies that coordinate their behaviour on the market. In the context of EC competition law, the former is the subject of Article 82 EC whereas the latter falls within the ambit of Article 81 and the Merger Regulation.

In order to address abuses of market power, that is either created through coordination or already in the hands of dominant undertakings, most systems of competition law contain a prohibition of coordination and unilateral behaviour that restricts competition. These restrictions of competition are considered to be detrimental to society in general because of the damage they inflict on consumer welfare. In this respect there are clear external benefits to be gained from enforcing competition laws. In the case of the Netherlands, the bid-rigging cartel in the building sector provides an interesting example of damage to consumer welfare. The building industry has been involved in a wide-ranging bid-rigging cartel. As the biggest purchasers in the building industry are government agencies, the higher prices that they have paid translate into a

³⁵ See further on this, Wils, *op cit* fn 33, p 486 *et seq.*

³⁶ See further with regard to the objectives of competition law, Ehlermann & Laudati (eds), *The Objectives of Competition Policy*, Oxford, Hart, 1998.

³⁷ Distortions of competition may also result from government interference in the market (*eg* subsidisation) where, unless one is willing to endow the government with market power, market power is not necessarily present.

loss of consumer welfare across the board.³⁸ In such cases there is a clear argument to be made that there are external benefits in enforcing competition law in these cases and consequently pointing in the direction of enforcement through public bodies. However, following the first decisions by the Netherlands Competition authority a number of municipalities have started civil procedures against contractors in order to recoup the ill-gotten cartel benefits.³⁹ In these cases, a major problem will be to establish exactly what the difference was between the price paid and the market price. As a result, it remains to be seen whether these actions will be successful and to what extent the excess price will be recouped.

Competition cases can also be taken along the civil law route. Currently, however, in Europe the principal route is administrative.⁴⁰ Furthermore, the emergence of a third route may be discerned; that of criminal law enforcement.⁴¹ In this respect, competition law enforcement in Europe has followed a markedly different path from US antitrust law where private and criminal law enforcement are much more common.⁴² What, then, explains this difference? With regard to the more intensive use of civil law enforcement in the US, the more liberal rules on discovery in civil law procedures, and the availability of treble damages appear to be major factors.⁴³ The first allows for better access to documents that are relevant to the infringement, thus reducing the evidence risk on the side of the plaintiff.⁴⁴ The treble damages factor also creates a major incentive to start such procedures in the first place. Then there is the impact of criminal antitrust law. The use of criminal law in the antitrust field can probably be traced back to the belief that cartels are just white collar crime and basically boil down to theft from society in general.⁴⁵ US antitrust law appears therefore to have very consciously, albeit perhaps *avant le lettre*, incorporated the externalities reasoning in setting up its enforcement system. This also holds true with regard to the deterrent effect of sanctioning violations of competition law. Even though treble damages are considered by some not to have sufficient deterrent effect,⁴⁶ the introduction of

³⁸ These higher prices were ultimately paid by all consumers and producers in the form of taxes.

³⁹ NRC Handelsblad 12 maart 2004, "bouwfraude toch voor de rechter" (construction fraud brought before the judge nonetheless).

⁴⁰ Indeed, the Commission has recently tendered a study into the conditions for the award of damages for breach of the EC competition rules, COMP/2003/A1/22. In the background document, the Commission states that 'it is well established that private enforcement of the EC competition rules is lagging behind public enforcement'.

⁴¹ See in this respect, Section 188 of the Enterprise Act, discussed by Rodger, 'The Competition Act and the Enterprise Act Reforms: Sanctions and Deterrence in UK Competition Law', in Dannecker & Jansen, *op cit* fn 25.

⁴² See, with regard to civil law enforcement, Wils, *op cit* fn 33 and Jones, *op cit* fn 34 and with regard to criminal law enforcement in the US, Magney & Anderson, 'Recent Developments in Criminal Enforcement of US Antitrust Laws', (2004) 27(1) *World Competition*, p 101-106.

⁴³ In the case of *Empagran v Hoffmann-La Roche* the award of treble damages was considered possible even to companies not established in the US, US Court of Appeals for Columbia 17 January 2003

⁴⁴ See further on the evidence risk (bewijsrisico): Prechal & Hancher (eds), *Europees bewijsrecht: een verkenning*, Deventer, Kluwer, 2001.

⁴⁵ See for an overview of criminal law to sanction violations of US antitrust law, Wise, 'The System of Sanctions and Enforcement Co-Operation in US Antitrust Law', in Dannecker & Jansen, *op cit* fn 25, p 200.

⁴⁶ *Cf* Wils, *op cit*. fn 33.

custodial sanctions on the basis of criminal law appears to have been the result of a determination to enhance deterrence. The reasoning behind this is that the profitability of cartels in combination with the relatively small chance of detection and sanctioning would have to result in enormous fines in order to provide a sufficient deterrent.⁴⁷

In Europe most enforcement of the competition rules takes place along the administrative law route.⁴⁸ As far as the European Community is concerned, Regulation 17 as well as Regulation 1/2003, expressly rule out the criminal character of decisions taken on the basis of those Regulations. Similarly, the enforcement of the Netherlands Competition Act takes place within the framework of the General Administrative Law Act (*Algemene wet bestuursrecht*). In this respect, the convergence with the EC has not been completely followed through even though certain elements of the procedure used in the Netherlands can certainly be said to have a European counterpart.⁴⁹ Both Article 81(1) and its counterpart in the Netherlands Competition Act (Article 6), can be invoked before a civil judge but this has in fact occurred only a few times.⁵⁰ Because of the Competition Act's setting in an administrative law framework, some peculiarities relating to the enforcement of competition law in the Netherlands can be noticed here.⁵¹ Regarding the investigatory powers of the Netherlands Competition Authority, there has been considerable debate as to the exact extent of these powers. The Authority⁵² is a so-called supervisor (*toezichtbouder*) and the concept of supervision needs to be distinguished from that of investigation (*onderzoek*). Supervision involves checking to see whether or not the general norms are complied with irrespective of whether or not there has been a concrete violation. Basically, supervisors are to identify themselves and may enter business premises without the consent of the owner.⁵³ Private homes may only be entered with the consent of the occupant.⁵⁴ If the owner refuses to cooperate, a fine may be imposed⁵⁵ and the authority may call on the police to assist with the investigation.⁵⁶ No prior judicial authorisation is necessary for the exercise of any of these powers as the duty upon the supervisor to respect the proportionality

⁴⁷ Cf Wils, *op cit* fn 33.

⁴⁸ For an overview of the sanctioning systems used see, Dannecker & Jansen, *op cit* fn 25.

⁴⁹ In fact, the Netherlands Competition Authority and the Advisory Committee on Administrative Appeals do refer to caselaw of the ECJ with regard to the European equivalent of the elements of the Dutch procedure.

⁵⁰ Several hundreds of cases have already been dealt with by the authority following the entry into force of the Netherlands Competition Act.

⁵¹ For a more detailed overview the reader is referred to Jansen's contribution to Dannecker & Jansen, *op cit* fn 25, p 669 *et seq* or Vogelaar (ed), *Competition Law in the EU, its Member States and Switzerland*, Deventer, Tjeenk Ewillink, 2000.

⁵² Actually, one would have to refer to the director-general of the Authority and the civil servants of the Authority acting on his behalf. In this paper I will refer to the authority in general.

⁵³ Article 5:12 and 5:15 General Act on Administrative Law.

⁵⁴ They may also be entered in accordance with the provisions of the General Act on Entry (*Algemene wet binnentreden*). Basically, this requires prior authorisation by a judge. In this respect it may be noted that to the best of my knowledge, the power to enter without permission a part of a private home that is actually an extension of the business, has not been tested in the Netherlands.

⁵⁵ Indeed, in the course of the investigation into the construction fraud, several enterprises have refused to cooperate and this has resulted in fines for non-cooperation.

⁵⁶ Article 5:15 (2) General Act on Administrative Law.

principle⁵⁷ is already considered to entail sufficient protection of the private life. As can be expected from this legal setting, the ECHR's judgment in *Colas Est* has been deployed by those companies that do not wish to cooperate with the investigations of the Authority. In this respect, the argument is often made that the Authority is crossing the border between actual supervision which involves looking around and checking whether the business operations are in accordance with the rules and a thorough search (*buiszoeeking* in the terminology of Netherlands criminal law). This is not so strange since these supervisory powers have, until applied by the Authority, primarily been used in connection with environmental law. In this area of law, supervision involves checking whether or not a specific process, production method or product complies with the standards laid down in a permit. This situation is fundamentally different from that where the supervision relates to the rather abstract and generally formulated norms laid down in the Competition Act and leads to a broadening of investigatory powers. In this connection, the Authority has also been accused of having gone on fishing expeditions because of the vagueness of the purported object of their supervision. Of course, the Authority has the power to inspect business information and documents which may then be copied.⁵⁸ Finally, the rights of defence as they have been established with regard to EC competition law are incorporated in the Competition Act and the General Act on Administrative Law.⁵⁹

In his 2002 speech the then director-general of the Authority called for an increase of the Authority's investigatory powers. He considered it necessary to also have the power to enter private dwellings without the permission of the occupant. Secondly, he appeared to ask for a power to also conduct thorough searches, a power that at this moment only the police are able to undertake. Interestingly, these statements coincided with the publication of the Commission proposal for what we now know as Regulation 1/2003. In this proposal the Commission also sought the power to undertake investigations at private dwellings.

3.2 Effect of modernisation on the three paths

As we have seen above, modernisation consists of more than just Regulation 1/2003 and the Commission's efforts at decentralising the application of the Article 81. The ECJ has also had a hand in decentralising the application of EC competition law. In general, modernisation entails giving the national judiciary and private parties a greater role in the enforcement of EC competition law while allowing the Commission to concentrate on hard core restrictions and distortions of competition. Not only is modernisation aimed at the Commission being able to devote more of its manpower to combating hard-core cartels, it also increases the Commission's powers in the fight against cartels. The most obvious example of an increase in the Commission's powers

⁵⁷ Article 5:13 General Act on Administrative Law

⁵⁸ This includes data on computer networks, see judgment by the President of The Hague Court in the case brought by Van Hattum & Blankevoort against the State, can be found on www.rechtspraak.nl under LJN-nummer AF 7069.

⁵⁹ See for an overview of these rights, Jansen, 'Country Analysis – The Netherlands', in Dannecker & Jansen, *op cit* fn 25, p 765 *et seq.*

has been the introduction of the power to search private homes in Regulation 1/2003. Furthermore, the power to share information between the various members of the network contained in Article 12 Reg. 1/2003 is a perhaps less visible, but still very noticeable increase in the powers of the competition law enforcers. All in all, the Commission appears to have increased its powers to fight hard core cartels.⁶⁰ On the whole, the procedures used in enforcing competition law in relation to hard core cartels appear to have acquired more of a criminal law character with tougher sanctions and increased investigatory powers. This increase in investigatory and sanctions powers and the consequent reformulating of antitrust procedures in a criminal law direction is not confined to the European Commission. Across Europe there is an ongoing debate about the introduction of criminal sanctions and some Member States have already introduced criminal law enforcement of competition law suggests that this trend, at least in respect of hard core antitrust offences is only likely to strengthen. Finally, because the enforcement of EC competition law is still taking place within the framework of administrative law, it benefits from the relatively low-key administrative law procedure. Standards of proof regarding infringements appear to be more relaxed than under criminal law. For example, the very broad definition of an infringement under Article 81 as an “agreement, concerted practice or decision of a business association”, given by the ECJ would be unacceptable under most systems of criminal law.⁶¹ Furthermore, this caselaw has already resulted in the Netherlands Competition Authority not seeking to define an infringement and instead holding that there has been an agreement or a concerted practice even though the existence of an agreement could arguably have been proven. Another example of the relaxed way of dealing with burdens of proof in an administrative law setting can again be found in relation to the case law on hard core cartels and concerted practices. In *Anic* the Court appears to have shifted the burden of proof onto the parties who have to show that the assumed causal link between the concertation and the practice, that the Commission is not required to prove, does not exist. Again, this reasoning applies *in particular* to complex and long-term cartels and thus it cannot be ruled out that simpler and one-off concertations will also fall within its scope. Finally, the caselaw notably of the Court of First Instance (CFI) regarding the rule of reason and the appreciability test in combination with the Commission’s De minimis notice, render any evaluation of the agreement in its economic and factual context unnecessary. A purely legalistic reasoning will suffice for a hard core restriction.

The modernisation has some completely different effects on the enforcement of competition law with regard to non-hard core restrictions. By making Article 81 as a whole, directly effective, the Commission is basically inviting private parties to enforce this provision among themselves. In terms of the three routes identified above, this takes the enforcement of EC competition law down the civil law route. Moreover, in all the decentralisation that is taking place, it must not be forgotten that the Commission

⁶⁰ Cf Goyder, *EC Competition Law*, Oxford, Oxford University Press, 2003, p 551-553.

⁶¹ This becomes even more poignant once it is taken into account that the ECJ did not rule out that this doctrine also applies in less complex and not so long term infringements, see: Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, [2001] 4 CMLR 17, at para 131 *et seq.*

may still want to set the competition law agenda with regard to these non hard-core restrictions. In this respect, the Commission has been willing to adopt a more economic approach not only in adopting new block exemption regulations but also in new decisions in individual cases. It cannot be ruled out that the Commission will continue along this path applying EC competition law in a more economically sensible way to benign restrictions of competition. The result of this continued economisation together with the decentralisation will be that national civil judges are confronted with complex and, possibly, from a legal perspective puzzling economic dossiers.⁶² Fortunately, the Commission and National Competition Authorities are there to lend a hand pursuant to Article 15 of Regulation 1/2003. Interestingly, the position of these “Article 15 experts” is quite different from that of “normal experts” in civil procedures as the latter are appointed following common accord of the parties and either party can object to the appointment of a particular expert. This introduces a concept that is alien to, at least Netherlands, civil law.

4 MODERNISATION AND SPONTANEOUS HARMONISATION

The spontaneous harmonisation described above has already resulted in the competition laws of the Member States all to a varying degree mimicking those of the EC. Not only have the substantive competition rules converged, the general system of enforcing these rules has also been the subject of convergence. As a result, the bifurcated system of civil law and administrative law enforcement can now be found in a number of Member States, including, the Netherlands.

Modernisation may have two further consequences in terms of spontaneous harmonisation. Firstly, it is to be expected that the Member States will adopt the general system laid down in Regulation 1/2003, i.e. giving up exemption monopolies for national competition authorities and giving these authorities increased enforcement powers. In this sense, the process that is taking place is little more than an extension of spontaneous harmonisation to also include Regulation 1/2003. Secondly, the modernisation has and will continue to lead to a “cross-fertilisation” between the three enforcement routes identified above and more generally between the administrative and civil law systems of the Member States. Below, these two relations between spontaneous harmonisation and modernisation will be tentatively explored.

In the Netherlands acts are evaluated every five years and so the Competition Act that entered into force in 1998 was reviewed in 2003. This evaluation coincided with the publication of the Commission proposal and Regulation 1/2003. As a result of the evaluation, it was decided to amend the Competition Act in accordance with the new system laid down in Regulation 1/2003.⁶³ Consequently, the investigatory powers of the Netherlands Competition Authority are to be increased, by contrast the application of the exemption clause is to be left in the hands of the national civil courts. As the powers of the Authority are already at the moment controversial from the perspective of the European Convention on Human Rights and the general principles of sound

⁶² Cf. Goyder 2003, *op cit* fn 60, p 559.

⁶³ Parliament, TK 29 272, nr 1, at p 4.

administration, it is to be expected that such reinforced powers are likely to lead to more legal challenges concerning their compatibility with, notably, the Convention. In this respect it should also be taken into account that the Minister for Economic Affairs is also contemplating the introduction of a further sanction for private persons involved in infringements of competition law in the form of an exclusion of such persons from management positions. This development appears to be an example of something capable of “bubbling up”⁶⁴ through the network. This shows that the effects of spontaneous harmonisation may not only be top down but also bottom up. Moreover, it indicates the potentially powerful role of the network in bringing about spontaneous harmonisation. Moreover, if more Member States adapt their systems of competition law enforcement to the general trend that was identified above, it increases even further the chance of a spontaneous harmonisation in the form of a cross-fertilisation.

As was said above, the powers of the Netherlands Competition Authority are not uncontroversial. In particular, many lawyers argue that the investigatory powers are contrary to, among others, Article 8 of the European Convention on Human Rights and several aspects of the procedure are also held to violate Article 6 of the Convention. Similarly, arguments are deployed to support the adoption of criminal law standards of proof in competition law. Thus, in the Netherlands context, the free doctrine on proof (*vrije bewijsleer*) would have to be abandoned in favour of the criminal law standard according to which proof must be legal and convincing (*wettig en overtuigend*). Particularly with regard to the requirement that proof must be “legal” this would entail a significant departure from the existing situation in administrative law where illegally obtained evidence is not a priori inadmissible. At the moment, the applicability of Article 6 and 8 of the Convention to the administrative enforcement procedure is subject to extensive debate and discussion. However, following the increased powers of the Authority the discussion is more likely to be decided in favour of those who argue that the administrative fines imposed by the Authority do in fact constitute a criminal charge within the meaning of Article 6. Furthermore, it could be argued that, on the basis of *Bronner*,⁶⁵ a Dutch judge dealing with questions concerning the legality of a decision by the Netherlands Competition Authority can probably make a preliminary reference to the ECJ.⁶⁶ Such a ruling on the compatibility of national law moulded on the European example would have important effects for European law. Certainly, a ruling that would put an administrative sanction on the basis of the Competition act within the meaning of Article 6 of the Convention must also have an effect on Article 23(5) of Regulation 1/2003. Whether or not this criminalisation will actually lead to a different approach to evidence in competition law procedures depends in first instance on the authorities and legislatures, and in second instance on the Courts controlling the authorities. Another area that lends itself to spontaneous harmonisation is the fining and leniency policies of the Member State authorities and

⁶⁴ Wording used by Ehlermann in Ehlermann & Atanasiu (eds.), *European Competition Law Annual, The modernisation of EC antitrust policy*, Oxford, Hart, 2001.

⁶⁵ ECJ Case C-7/97 *Oscar Bronner v Mediaprint (Bronner)* [1998] ECR I-7791.

⁶⁶ Or, once this possibility has been used, the Court of First Instance.

the European Commission. In the network, the danger of forum shopping for leniency or, to a lesser extent, the smallest fine is more likely to become a reality.⁶⁷ It is to be expected that national and Community rules on, for example, limitation periods, setting of fines and leniency but also on legal privilege will converge as a result of the modernisation.

With regard to the civil law enforcement of EC competition law and national competition law a number of other effects may result from spontaneous harmonisation. In this regard the discussion about whether or not Community competition law is sufficiently well-established in order to give the national magistrates sufficient guidance and thus guarantee legal certainty will not be repeated. What will need to be dealt with is the question whether national competition laws of the Member States are sufficiently well developed. This becomes particularly interesting in view of the fact that national competition laws, even though they have converged with EC competition law, may have their own peculiarities. In the Netherlands, for example, there has been a debate as to whether or not the EC's firm stance on clauses that limit the sale of goods outside selective distribution systems need to be subject to the same rather stringent approach that the Commission has adopted in view of the need to establish the internal market. Since this internal market and parallel trade-logic does not apply to the national situation, it is rather difficult to qualify such clauses as very severe restrictions of competition.⁶⁸ Finally, the position of the national judge may be made more difficult because of the combination of so-called integration clauses in the EC Treaty and the fact that the Commission has to this date given only limited guidance on how to deal with, for example, environmental agreements. Certainly, Article 15 of Regulation 1/2003 prohibits a national judge from rendering a judgment that runs counter to a Commission decision in an earlier case. Nevertheless, it is submitted that Article 15 does not keep a national judge from integrating environmental concerns into his own judgment to a greater extent than the Commission has done.⁶⁹

Furthermore, the position of the judge and the Commission or national competition authority acting as *amicus curiae* in these matters should be carefully considered. Parties may very well be less than enthusiastic about a judge bringing in the Commission or a national competition authority to whom a copy of the documents that they have submitted, must be forwarded. This is particularly interesting in view of the fact that normally it is close to impossible, at least in the Netherlands, to obtain the procedural documents of the parties.⁷⁰ Furthermore, the position of the judge is likely to be become less passive. It cannot be ruled out that the national judiciary will be faced with constructed cases that only serve the purpose of obtaining for the parties a degree of

⁶⁷ Cf van Oers, 'Fines and the Reform of European Competition Law: The view of a national competition authority', in Dannecker & Jansen, *op cit* fn 42, p 117 *et seq.*

⁶⁸ See, *e.g.* the judgment of the Rotterdam Court in the Basilicum G-Star-case, to be found on www.rechtspraak.nl under LJN-nummer AO 3912.

⁶⁹ See in more detail: Vedder, *op cit* fn 9, p 194 *et seq.*

⁷⁰ Certainly in comparison with the situation in the US.

legal certainty.⁷¹ In these circumstances, it is unacceptable for a judge to simply have to accept the facts as they are presented to him by the parties.⁷² This holds all the more true when the facts presented to him are in fact economic opinions. Finally, the Court's qualification of Article 81 EC as a matter of public policy;⁷³ in this regard the emergence of more or less uniform rules is to be expected as a result of the *Reve-Comet*-rule.⁷⁴ The result of this could be the spontaneous emergence of common European procedural rules.

5 CONCLUSION

One of the apparent successes of EC competition law is the spontaneous harmonisation that has taken place: almost all the Member States of the EC have modelled their competition laws on EC competition law. In doing so, they have however, embedded the substantive rules and some of the procedural rules deriving from that body of law in their own national procedural rules. This spontaneous harmonisation embedded in a national procedural context can be seen very nicely in the Netherlands where the substantive rules "should be neither more supple nor more stringent than those of the EC". However, as far as the procedural side of competition law is concerned, the legislator adopted some elements from the European procedure but explicitly chose to embed these in the specifically Dutch context of the General administrative law act. This paper has sought to make visible some of the effects of this spontaneous harmonisation on national systems of competition law. Furthermore, it has tried to clarify the effects of modernisation on this spontaneous harmonisation. As far as the primarily legal changes involved in harmonisation are concerned (*i.e.* relinquishing the exemption-monopoly), spontaneous harmonisation can be said to have occurred as the Netherlands competition authority as of 1 August no longer has the power to grant an exemption.

Another and potentially more intrusive spontaneous harmonisation may be the result of the choice of enforcement paths that appears to underlie the modernisation of EC competition law. As was seen, both the Courts and the Commission appear to make a clearer distinction between harmless and harmful restrictions of competition whereby the latter are treated to an increasingly criminalised system of enforcement whereas the latter are handed over to the more low key realms of private enforcement. This bifurcation between harmful (hard core) and harmless restrictions together with the

⁷¹ Case C-379/98, *PreussenElektra AG v Schleswag AG*, [2001] ECR I-2099, [2001] 2 CMLR 36, [2001] All ER (EC) 330, is exactly such a constructed case that only served to clarify the compatibility of a particular German rule with EC law. Eventually, preliminary reference was considered admissible.

⁷² As, for example, a civil judge in the Netherlands would have to do, cf Brouwer, 'Bewijsproblemen bij de toepassing van het EG-mededingingsrecht in de nationale context', in Prechal & Hancher, *op cit* fn 44, p 103.

⁷³ Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, [2000] 5 CMLR 816, [1999] 2 All ER (Comm) 44, at, paras 35-39.

⁷⁴ According to this rule national procedural rules may not make the possibility to invoke EC law more difficult or impossible, see Cases 33/76 *Reve-Zentralfinanz eG et Reve-Zentral AG v Landwirtschaftskammer für das Saarland (Reve)* [1976] ECR 1989, and 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043, summarised in Case C-343/96 *Dilexport Srl v Amministrazione delle Finanze dello Stato* [1999] ECR I-579, [2000] 3 CMLR 791, [2000] All ER (EC) 600.

decentralisation (through the network) will have important implications for the national systems of competition law. It is predicted that there will be a spontaneous harmonisation and criminalisation of the national procedural competition laws. For example, rules on fines, leniency and time-limits are very likely to be harmonised as a result of forum shopping by cartel members. The network can certainly function as a valuable platform for such a spontaneous harmonisation.⁷⁵ The effect of the increasingly criminal character of this (spontaneously harmonised) administrative enforcement, will probably be the adoption of a high(er) standard of proof and increased applicability of Articles 6 and 8 of the European Convention on Human Rights.

With regard to the private enforcement of competition law, a spontaneous harmonisation of national civil procedural law can be expected. Apart from the arrangements that were necessitated by Regulation 1/2003, rules on, for example, the passiveness of judges in civil proceedings, will probably be the subject of a number of preliminary references. Already the *Reve-Comet*-rule,⁷⁶ has been given a very broad and interventionist interpretation in a number of ECJ judgments.⁷⁷ It is expected that the increased reliance on Article 81 EC – if it takes place of course, before civil judges will lead to a spontaneous harmonisation of the procedural laws of the Member States. This should not come as a surprise but it should rather be seen as the European way of achieving uniformity in diversity.

⁷⁵ See, for example, the Principles for Leniency Programmes, adopted 3 and 4 September 2001 by the European Competition Authorities (ECA), that can be seen a predecessor to the network.

⁷⁶ See fn 74 *supra*.

⁷⁷ Such as Cases C-224/01 *Köbler v. Austria* [2003] 3 CMLR 28, [2004] All ER (EC) 23, C-453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren*, and C-201/02 R (*on the application of Delena Wells*) v Secretary of State for Transport, Local Government and the Regions (*Wells*) [2004] 1 CMLR 31.

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Criminal Sanctions for Competition Law: A Review of Irish Experience

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Ireland's national competition legislation, like that of many EU Member States largely mirrors the basic prohibitions on anti-competitive behaviour contained in Articles 81 and 82 of the EC Treaty. Breaches of Irish competition law constitute criminal offences and, in the case of cartels, managers and directors of offending firms may be imprisoned if convicted of such behaviour. The concept of an administrative fine, which exists in many other EU Member States, is not recognised under Irish constitutional law. Penal sanctions may only be imposed on parties found guilty of a criminal offence. The Competition Act, 2002 provides that breaches of Articles 81 and 82 constitute criminal offences. This paper reviews experience of the application of national competition legislation in Ireland and assess the implications of such experience for decentralised application of EU law in Ireland. It also considers arguments for and against criminal penalties for breaches of competition law.

INTRODUCTION

The move to decentralised enforcement represents the most radical overhaul of EU competition law in over forty years. One of the interesting aspects of the new regime is the fact that, while national competition authorities will have power to apply EU competition law, they will do so using existing national enforcement procedures. Ireland's competition legislation provides that breaches of competition law constitute criminal offences and managers and directors of offending firms may face imprisonment and/or fines for such practices. The present paper argues that jail sentences are an essential deterrent in the case of cartels. There is widespread agreement that cartels constitute the most serious form of anti-competitive behaviour and the one that inflicts most harm on consumers. Arguably, therefore, dealing with cartels should be the main priority of competition agencies. It remains to be seen whether the decentralisation of EU competition law will be effective in this regard.

The new EU enforcement regime represents a welcome step forward. It continues the shift towards a competition law regime which is consistent with economic theory, a process which began with the Green Paper on Vertical Restraints.¹ This is quite important because competition law essentially attempts to implement economic policy, *i.e.* the promotion of competition, by legal means. As Whish observed:

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¹ *Green Paper on Vertical Restraints in EC Competition Policy*, Brussels, European Commission, 1997.

Competition law is about economics and economic behaviour, and it is essential for anyone involved in the subject – whether as a lawyer, regulator, civil servant or in any other capacity – to have some knowledge of the economics concerned.²

Undoubtedly the success enjoyed by the US authorities in the latter half of the 1990s in exposing and penalising international cartels in a wide range of industries such as lysine, vitamins, citric acid, and graphic electrodes highlighted serious shortcomings in the efficacy of the EU regime, namely that it allowed serious anti-competitive behaviour such as cartels to go largely undetected. Indeed comments by Commissioner Monti indicate that stepping up enforcement efforts against cartels was a major objective of the reform programme.

We are not in a position to be active on our own initiative - to go on the ground and make investigations and dawn raids and identify the really threatening hard-core cartels.³

The new regime, by freeing up resources at Commission level and enabling the Commission and the national authorities to pool their resources, has the potential to greatly increase efforts to crack down on cartels.

MAIN FEATURES OF IRISH COMPETITION LEGISLATION

Unlike the EU Commission and competition agencies in virtually all of the other Member States, the Irish Competition Authority cannot rule on whether undertakings have breached competition legislation and cannot impose fines. The Irish Constitution reserves such functions to the Courts. In effect Ireland's enforcement regime is more akin to the US than the EU. Although Irish competition law has provided for criminal penalties for breaches of competition law since mid 1996, it must be said, the results to date have been disappointing.

Article 34.1 of the Irish Constitution gives the Courts sole and exclusive power (subject to Article 37) to administer justice. In the *McDonald* case⁴ Kenny J identified the characteristic features of a judicial function as generally involving a dispute as to violation of the law, and the imposition of a legal liability or criminal penalty which the State is obliged to enforce. Article 37 allows certain bodies other than courts to perform limited types of judicial function. Limited means that the effects of the exercise of such a function should not be unduly serious in their impact. The Supreme Court has defined a non-limited power as one that:

... is calculated ordinarily to affect in the most profound and far reaching way the lives, liberties, fortunes and reputations of those against whom [it is] exercised.⁵

The net effect of these provisions is that fines may only be imposed on individuals and undertakings convicted of a criminal offence by the Courts. The Competition

² Whish, *Competition Law*, 5th ed, London, Butterworths, 2003, p 1.

³ *Financial Times*, 26 October 1999.

⁴ *McDonald v Bord na gCon (No 2)* [1965] IR 217.

⁵ *Re the Solicitors' Act 1954* [1960] IR 239.

Authority's function, therefore, is limited to investigating alleged anti-competitive behaviour. It cannot act as judge, jury and prosecutor. The power to prosecute any criminal offence on indictment is reserved to the Director of Public Prosecutions (DPP), an independent statutory officer.⁶ Thus, where the Authority decides that an offence merits prosecution it can submit a file on the case to the DPP. The Authority may prosecute less serious offences at district court level and it may also bring civil proceedings to obtain an injunction and/or declaration that behaviour constitutes a breach of the Act.⁷ The Authority may not sue for damages.

THE CRIMINAL OFFENCES

Section 6 of the Competition Act, 2002, provides that undertakings which enter into, or implement an agreement, or make or implement a decision by an association of undertakings, or engage in a concerted practice that is prohibited by section 4(1) of the Act⁸ or Article 81(1) are committing an offence subject to criminal sanctions. Section 7 creates the offences of breaching section 5(1) or Article 82.⁹ The 2002 Act thus provides that breaches of Article 81 and 82 constitute criminal offences. Such provisions were included in anticipation of the decentralisation of EU competition law. As with breaches of national law the Act also enables the Authority to bring civil proceedings for breaches of Article 81 and 82.

The Act distinguishes between what are commonly referred to as, "hard-core" competition offences and all other competition offences. Thus Section 6(2) provides that:

In proceedings for an offence under *subsection (1)*, it shall be presumed that an agreement between competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to-

- (a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice,
- (b) limit output or sales, or
- (c) share markets or customers,

⁶ Prosecution of Offences Act 1974.

⁷ Section 14, Competition Act, 2002, provides that any person aggrieved by anti-competitive behaviour may bring a private action against undertakings engaged in such behaviour and any director or manager of such an undertaking, to seek an injunction and/or damages including exemplary damages. Under Section 14(2) the Authority may also bring proceedings to obtain an injunction and/or a declaration that the behaviour is in breach of the Act but it cannot sue for damages.

⁸ Section 4(1) of the Act repeats the provisions of Article 81(1).

⁹ Section 5(1) repeats the provisions of Article 82 except that it refers to a dominant position within the State or any part of the State. Reference to a substantial part of the State was dropped during the course of the passage of the legislation through the Oireachtas. According to Department briefing notes this was to make it easier to prosecute such cases. See P. Massey and D. Daly (2003): *Competition and Regulation in Ireland The Law and Economics*, Cork: Oak Tree Press.

has as its object the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State or within the common market, as the case may be, unless the defendant proves otherwise.

Subsection (7) defines “competing undertakings” as undertakings that do or can provide goods or services to the same applicable market, that is, goods or services which are regarded by customers as interchangeable or substitutable in terms of their characteristics, price and intended use or purpose.

In the case of offences under Sections 6 and 7, other than those specified under section 6(2), a firm may be fined up to €3,000 on summary conviction, and up to €4m, or 10% of turnover, whichever is greater, on conviction on indictment. Under section 8(6) a director, manager or other similar officer or person who purports to act in such capacity, who consents to or authorises an undertaking to contravene section 6 or 7 is guilty of an offence as well and may be subject to similar penalties. Under Section 6(7), a director or key decision maker¹⁰ of an undertaking found to have committed an offence under section 6 or 7 is presumed to have consented to such behaviour unless they can prove otherwise.

In the case of the section 6(2) offences, Section 8 provides that an individual:

- (i) On summary conviction may be fined a maximum €3,000 and/or imprisonment for up to six months; and
- (ii) On conviction on indictment may be fined up to €4m or 10% of turnover and/or imprisoned for a maximum of five years.¹¹

The provision of a maximum prison term of five years means that individual company executives suspected of engaging in such behaviour may be arrested and held for questioning for up to 12 hours. This addresses a major weakness in the previous legislation where there was no effective power to question individuals.¹²

Under Regulation 1/2003 national competition authorities will apply Articles 81 and 82 using their existing national law procedures. The Irish Government has designated three agencies as the national competition authorities, namely the Competition

¹⁰ The section refers to a person whose duties “included making decisions that to a significant extent could have affected the management of the undertaking”.

¹¹ This represents a significant change compared with the previous legislation, the Competition (Amendment) Act, 1996, which provided for a maximum jail term of up to 2 years in respect of all offences. Under the 2002 Act prison sentences do not apply to the non-hard-core offences, although the Competition Authority sought the retention of imprisonment of up to two years for such offences.

¹² The decision to provide for a penalty of up to five years imprisonment for engaging in cartels under the UK Enterprise Act also appears to have been prompted, in part, by a desire to provide for a power of arrest in cartel cases. On this point see Hammond and Penrose, *Proposed Criminalisation of Cartels in the UK*, London, Office of Fair Trading, 2001.

Authority; the Courts and the DPP.¹³ It is fair to say that at the present moment in time there is some confusion as to how this will work in practice.¹⁴

IRISH EXPERIENCE OF CRIMINAL ENFORCEMENT

Although Ireland has had criminal penalties for breaches of competition law since 1996, the results to date have been extremely poor. Since mid 1996 the Authority has brought a handful of civil actions where it secured undertakings from parties to discontinue certain behaviour. There have been two successful summary prosecutions, i.e. prosecutions in the District Court where the penalties are relatively low.¹⁵ Files have been sent to the DPP in four cases but there has not been a successful prosecution on indictment to date. Such results must be set against the fact that the Authority has repeatedly stated that the pursuit of cartels is its top priority. Until recently the Authority could argue that the poor outcome was due, in large part, to weaknesses in the legislation combined with a lack of resources.

The 1996 Act, which first introduced criminal penalties, only permitted the Authority to copy documents located in the course of searches, while the “best evidence” rule normally requires original documents. A more fundamental problem is the presumption that documents do not speak for themselves. In one case, for example, investigations reportedly unearthed a document indicating that the management of a company had taken a decision to increase prices and that a named executive was “sounding out the rest of the producers this week and we should know their view of the increase early next week”.¹⁶ Such documentation of itself is normally inadmissible in the Irish courts. It is necessary to have the author of the document give evidence as to the nature and origins of the document.

Similarly the lack of powers to question individuals under the former legislation proved to be another major obstacle to the successful conduct of investigations. In one case where a file was referred to the DPP, the Gardai (police) were requested to carry out a further investigation but they reported that they received “virtually zero cooperation” from the individuals that they interviewed. Many of these difficulties have been addressed by the 2002 Act, although some weaknesses remain, a point which is considered below.

The Authority’s resource problems reached such a crisis level in 2000 that its Annual Report for that year described it as “barely operational”.¹⁷ The Tanaiste [Deputy Prime

¹³ SI 195/2004. The District Court, Circuit Court, High Court, Court of Criminal Appeal and Supreme Court are all listed as competition authorities.

¹⁴ Mackey, ‘Which Hat Should I Wear Today? Reflections on the Courts as Competition Authorities: Ireland’s Implementation of Regulation 1/2003’ (2004) 13(1) *Competition* 22-4.

¹⁵ In one case a small oil company pleaded guilty to fixing prices while in the second six farmers were convicted of a violation of Section 4(1) of the Act, i.e. engaging in an anti-competitive agreement.

¹⁶ *Sunday Business Post*, 30 June 2002. The story also reported that two producers agreed to share markets with one agreeing to withdraw from one county and the other reciprocating.

¹⁷ *Competition Authority Annual Report 2000*. In February 2000 the author requested the Tanaiste (Deputy Prime Minister) to assign responsibility for the Authority’s enforcement functions to another member of the (2004) 1(1) *CompLRev*

Minister] in response to a parliamentary question indicated that she was ‘aware that the Authority’s staffing has placed considerable constraints on its capacity to deal with new complaints.’¹⁸ One Dublin lawyer commenting on the work of the Authority observed that:

If you make a reasonable complaint to them, you have to tell your client they will probably turn around and say they’re not going to take any action. They are only taking the really high-profile cases. But if they got the budget and they got the people that would all change.¹⁹

A memo written by the Authority Chairman in March 2002 indicated that because of resource constraints, files recommending criminal prosecutions in cartel cases had lain dormant in the Authority for more than a year.²⁰ Not surprisingly no successful prosecutions were brought on foot of those investigations.

Although many of the legislative and resource problems have been addressed, the indications to date do not suggest that a dramatic upsurge in enforcement activity is likely. In one case, books of evidence were prepared and charges drafted at the direction of the DPP²¹ but, almost two years later, no prosecution has been brought and, in a recent reply to a parliamentary question, the Tanaiste indicated that a criminal prosecution was no longer being pursued.²²

The Authority’s Annual Report for 2003 states that in a full year it expects to produce:

- One full cartel investigation leading to enforcement proceedings; and
- A handful of civil actions.

This is in spite of an increase in staff of 85%, the assignment of two Garda Detective Sergeants to the Authority to assist in cartel investigations and the fact that additional Garda have been made available for participation in searches. The Report also indicates that 85% of complaints received by the Authority were closed without any further investigation.

The Authority has instituted a leniency programme but has refused to disclose any information even in respect of the number of applications received. It is not possible therefore to evaluate whether or not the programme is operating successfully or whether some reforms are necessary.²³

Authority on the grounds of inadequate resources. In April 2000 the Authority had a total of only 14 members and staff.

¹⁸ Dail Debates, 12 October 2000. Since 1997 the Tanaiste has had responsibility for the Authority.

¹⁹ Rating the Regulators, *Global Competition Review*, April/May, 2000, at 28.

²⁰ Massey & Daly, *Competition and Regulation in Ireland The Law and Economics*, Cork, Oak Tree Press, 2003.

²¹ *Ibid.*

²² *Dail Debates* 6 April 2004. The Authority Chairman subsequently informed a hearing of the Oireachtas (Parliamentary) Public Accounts Committee that the DPP had not taken any decision on the matter. Public Accounts Committee hearing of 22 July 2004.

²³ Massey & Daly, *Competition and Regulation in Ireland The Law and Economics*, Cork, Oak Tree Press, 2003, report that the Authority refused to release such information on “policy grounds”.

PRIVATE ENFORCEMENT IN IRELAND

One of the objectives of Regulation 1/2003 is to boost private enforcement of competition law. Since 1991 Irish competition legislation has provided private parties harmed by anti-competitive practices with a right of action.²⁴ Such parties may claim an injunction and/or damages and there is provision for exemplary damages. In 1996 this right of action was widened allowing parties who had suffered damage as a result of anti-competitive behaviour to sue individual directors of the undertakings concerned as well as the undertakings themselves and similar provisions are included in section 14 of the Competition Act, 2002.

The experience with private actions has been mixed. In a number of high profile cases particularly in the early years, alleged anti-competitive behaviour was only one of the grounds cited by plaintiffs. In several of these cases the courts found in the plaintiffs favour in respect of the non-competition issues and effectively concluded that they did not need to consider the competition issue. There was some feeling that judges were uncomfortable with complex economic arguments particularly in abuse of dominance cases.

Certainly parties wishing to pursue private actions face considerable difficulties. The most important of these relates to obtaining evidence. The Irish courts have seriously limited the ability of plaintiffs in competition cases to obtain necessary documentation through the discovery process. Rejecting a request by a firm alleging that it had been the victim of predatory pricing for access to documents which might indicate a general pattern of anti-competitive behaviour by the alleged predator, Herbert J held:

Even if a system of market control by the Defendants could be established by evidence it would amount in essence to a detriment to the purchasers of their products specifically and to the public generally and only incidentally, if at all, to potential competitors and then only to the extent to which the specific activities were particularly directed against them.

He went on:

In my judgement non-competitive business practices on the part of the Defendants, except where they can be alleged to have an identified and specific impact on the Plaintiffs, are a matter for the Competition Authority or the European Commission and are not matters with which this Court can be concerned in litigation *inter partes*.²⁵

The author would respectfully suggest that this is inconsistent with the Commission desire to encourage greater private actions as a mechanism for enforcement of competition law.

²⁴ The Competition Act, 1991, which first introduced prohibitions based on Articles 81 and 82 provided private rights of action to parties aggrieved by anti-competitive agreements or abuses of a dominant position but gave the Competition Authority no enforcement role.

²⁵ *Framus Limited & ors v CRH plc & ors*, High Court, Herbert J, unreported 12 April 2002. The judgement was subsequently upheld by a Supreme Court judgement of 22 April 2004.

Certain decisions by the Competition Authority have also not been overly helpful to parties wishing to pursue private actions. In 2003 the Authority settled a civil action against an association representing pubs in Dublin City on foot of undertakings by the association to discontinue certain practices. As part of the settlement the Authority agreed not to make any public comment regarding the case.²⁶ In other words it is not possible to ascertain the nature of any alleged anti-competitive behaviour or the evidence on which the Authority had relied in bringing proceedings. Such secrecy would not appear to be in the public interest and is certainly not helpful to any parties wishing to take follow on actions in the wake of actions by the Authority. Effectively in accepting undertakings the Authority has rejected the possibility of obtaining a declaration that particular behaviour is in breach of the Act.

At the time of the passage of the 2002 Act, the Authority opposed the idea of establishing a form of “small claims court” to deal with minor cases. While such a body would not overcome the difficulties involved in obtaining evidence, it might provide an avenue for individual consumers to claim damages in instances where breaches of the law had already been proven. It might therefore provide an important means of redress for individual consumers in a legal system which does not allow class actions, treble damages or contingency fees, all of which are seen as important to private actions in the United States.

WHY PRICE FIXERS SHOULD GO TO PRISON

Undoubtedly one of the more interesting aspects of the Irish legislation was the decision to introduce criminal penalties for individual company executives as well as for companies. Critics have argued that criminal penalties, particularly prison sentences are inappropriate for competition law offences. It is also claimed that the burden of proof required in criminal cases makes breaches of competition law impossible to prove. The lack of successful criminal prosecutions is cited in support of this contention.

Many areas of competition law constitute grey areas. In the case of cartels, however, there is virtually no room for debate regarding their object and effect. Cartels essentially involve managers and employees of rival businesses secretly agreeing to raise prices to their customers for the goods and services that they supply.²⁷ They are a conspiracy to defraud consumers and to deny them the benefits that should result from firms having to compete with one another to win customers or as the then head of the Antitrust Division put it less subtly “they are the equivalent of theft by well-dressed thieves.”²⁸

Cartels are organised and operated by individuals and companies who calculate that they stand to earn substantial profits from such behaviour. The people behind cartels

²⁶ Massey and Daly, ‘Authority ‘decision’ against Statoil pricing strategy poses problems’ (2004) 12(10) *Competition* 243-6.

²⁷ The US Department of Justice estimates that a cartel will raise prices on average by ten per cent. *Sentencing Guidelines Manual*, Department of Justice, 1998, p 231.

²⁸ Klein, ‘The War Against International Cartels: Lessons from the Battlefield’, in Hawk, ed, *International Antitrust Law and Policy*, New York, Juris Publications, 2000, p 14. Similarly a UK Government White Paper described hard core cartels as serious conspiracies which defrauded business customers and consumers: Department of Trade and Industry, *A World Class Competition Regime*, London, HMSO, 2001.

are not petty crooks; they are clever sophisticated business executives who have risen to senior management positions in their companies. Given that firms can earn substantial profits from engaging in cartels, serious penalties are required to deter such behaviour.²⁹

Fining only the companies involved is unlikely to be effective in preventing cartels. It is the individual human persons who run companies who actually make the decisions to engage in cartels. Such individuals frequently stand to gain directly from such decisions in the form of higher salaries, performance related bonuses, enhanced promotion prospects and other benefits as a result of higher profits generated from participating in a cartel. If only the company is subject to a fine for engaging in a cartel, it is the shareholders rather than the executives responsible who are penalised.³⁰ Fining the company in those circumstances will therefore have little deterrent effect. Such fines may simply be regarded as a “cost of doing business”.

There are other limitations on the effectiveness of fines on companies for engaging in cartels. US research indicates that, in the case of almost half of all firms found to have engaged in cartels, imposing the optimal level of fines would have bankrupted them. Such an outcome is clearly undesirable, not least because it would effectively penalise all of the firm’s employees, the vast majority of whom are not responsible for price fixing.

Effective deterrence of cartels requires that the individuals within a company responsible for the decision to participate in a cartel must face penalties. Fines for such individuals are one option. The obvious difficulty with fines is that the individual’s employer may reimburse them, thus negating the deterrent effect. In New Zealand consideration has been given to the idea of making it illegal for firms to reimburse employees fined for competition law breaches.³¹ This in turn raises the question of how such measures can be enforced. In contrast, however, individuals cannot pass a prison sentence on to their company.

There are other reasons for believing that imprisonment is likely to provide a strong deterrent to cartel behaviour. Unlike many violent crimes, participation in a cartel is not the result of a moment’s passion or transient rage. Unlike many criminal actions undertaken in the heat of the moment, those contemplating participating in a cartel are far more likely to weigh the benefits from such participation against the consequences of getting caught and, therefore, take the threat of imprisonment into account. In addition, imprisonment may be a particularly strong deterrent for white collar individuals. The D’TI reported that 83% of UK competition law experts favoured the introduction of criminal penalties for cartels.³² Hammond and Penrose expressed the opinion that there was a case for a higher maximum penalty of up to seven years.³³

²⁹ For a detailed discussion on why prison sentences are necessary in cartel cases see Werden and Simon, ‘Why Price-Fixers Should Go To Jail’ (1987) 24(4) *Antitrust Bulletin* 917-37.

³⁰ This is an example of what economists refer to as a moral hazard problem.

³¹ Department of Trade and Industry, *A World Class Competition Regime*, London, HMSO, 2001.

³² *Ibid.*

³³ Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK*, London, Office of Fair Trading, 2001.

Until the mid 1970s, price fixing was classed as a misdemeanour in the US. Over the past decade, the Department of Justice has successfully prosecuted an average of thirty five people a year. The Department's cartel immunity programme has resulted in many firms coming forward, admitting their participation in cartels and providing evidence against their co-conspirators. In recent years, roughly fifty percent of immunity applications received under the programme, involved cartels that were previously unknown to the authorities, suggesting that increased prosecutions of individual executives for participating in cartels are having a deterrent effect.

Of course if one accepts the argument that jail sentences for executives are necessary to deter cartel behaviour, then the lack of such penalties both at EU level and in many Member States suggests that EU competition law is unlikely to be wholly effective in deterring such behaviour. Undoubtedly that constitutes a serious problem. Joshua identified the lack of criminal sanctions as a serious weakness of EU competition law.³⁴

Obviously an EU criminal code is some way away as this is an area where member States guard their powers jealously. It is therefore unrealistic to expect that such provisions would be put in place to deal with cartels. This is particularly true given that in many Member States "price fixing" is just not perceived as a crime. This may be because of a benign view toward "white collar" crime, something that is not unknown in Ireland. As one junior Irish Government Minister observed:

Most people are appalled at the notion of somebody being robbed on the street and will support custodial sentences for criminals who steal just a few pounds in this direct physical manner. However, pulling a stroke and stealing millions by shuffling bits of paper and crunching numbers is regarded as, somehow, not quite criminal.³⁵

The perception that cartels are not criminal may also be attributable to the wrongful perception that it is a victimless crime. The reality is that cartels filch money out of consumers' pockets just like other fraudsters.

A third factor is the Commission's past history whereby most of its time was devoted to dealing with requests for negative clearances and exemptions. This may have fostered the perception that competition law was mainly about satisfying somewhat technical and arcane regulations rather than about preventing conspiracies that cost EU consumers large amounts of money. As Joshua put it:

No doubt in the climate then prevailing, prosecuting big cartels was not given the priority it now enjoys. Whatever the public perception of the iniquities of conspiratorial behaviour may have been, governments, officials, experts, economists and perhaps even the judiciary seriously underestimated the harm that cartels were causing to the free economy.³⁶

³⁴ Joshua, 'Flawed Thinking About Price Fixers' *Financial Times*, 2 August 2001.

³⁵ O'Dea TD, 'White Collar Criminals Are Getting Clean Away' *Sunday Independent*, 12 April 1998.

³⁶ Joshua, 'The Criminalisation of Antitrust Leniency and Enforcement: the Carrot and the Stick. A View from Europe', International Bar Association, Amsterdam, 2000, mimeo at 3.

Arguably such perceptions remain.

Regulation 1/2003 by providing for the decentralised application of EU competition law and allowing Member States to apply it using their existing national law procedures means that individual Member States may impose such sanctions. Of course having criminal sanctions in only some Member States inevitably limits the deterrent effect of such sanctions. A potentially more fundamental problem is that the Commission is likely to want to grab the biggest cases for itself and prevent those Member States that wish to from imposing criminal sanctions. As Joshua warned:

The perverse result in Britain [and Ireland] would be that double-glazing salesmen fixing prices in the local pub could go to jail, while the biggest pan-European cartels would at most risk administrative fines on companies. Clearly, justice would fall into disrepute quickly if the smallest cases were the ones receiving the stiffest penalties.³⁷

CIVIL FINES NOT THE ANSWER

The Irish Competition Authority has sought powers to impose fines on parties for breaches of Articles 81 and 82.³⁸ Such calls have been rejected by the Government. The reasons why civil fines for companies are unlikely to deter cartel behaviour have already been outlined. A system of civil fines for non cartel behaviour, however, gives rise to problems of a quite different sort. First, from an economics perspective, penalties in the form of fines are inappropriate in non-cartel cases, regardless of whether such fines are civil or criminal. Second the common law tradition is hostile to having the same agency acting as judge, jury and prosecutor, for what are arguably good reasons; although this is the regime which operates both at EU level and in other Member States.

Non-price vertical restraints, such as exclusive distribution agreements, cannot automatically be described as either pro or anti-competitive, and a detailed analysis based on the individual market circumstances in each case is required. Similarly, it is widely recognised that there is frequently a fine line between aggressive competition and abuse of dominance. As there is no consensus as to what does and does not constitute anti-competitive behaviour in such cases, penalties would appear to be inappropriate. Where investigations show such practices are anti-competitive, requiring firms to discontinue such behaviour would appear to be an appropriate remedy. Penalties may be appropriate where a firm subsequently breaches such an order.

Even where there is a high degree of unanimity that behaviour may be harmful, it is not clear that fines constitute an effective deterrent. Take predatory pricing as an example. A firm engaging in predatory pricing is prepared to incur substantial short-term losses in order to eliminate a rival. It seems unlikely that the prospect of the additional cost of a possible fine would deter it from engaging in such behaviour. Most economic models

³⁷ *Ibid.*

³⁸ If it could be shown that there was a requirement under EU law to have a system of civil fines then this would override the Constitutional prohibition on such fines.

of successful predation involve firms that are engaged in various different markets so that successful predation in one market allows a firm to earn excess profits not only in that market but in others as well, *i.e.* – it depends on building a successful reputation as a predator. Is it really likely that potential entrants, having seen a dominant firm eliminate a would-be entrant in one market through a predatory strategy, would be encouraged to try their luck by the imposition of a fine on the predator? It would still be in the dominant firm's interest to establish a reputation for predation even at the risk of a fine.³⁹

If fines have a deterrent effect, as their proponents would suggest, then, when the dividing line between what is and what is not harmful is unclear, there is a significant likelihood that firms will play safe and avoid competing too aggressively for fear of overstepping that line. In other words fines will not only discourage anti-competitive behaviour, but they will also deter firms from competing, which is obviously the opposite of what is intended. Even if it does not actually discourage competitive behaviour, the threat of fines may significantly increase compliance costs for business seeking to ensure that they do not inadvertently step over the line.

Scherer and Ross advance a further argument against imposing penalties in abuse of dominance cases. They point out that penalising firms for abuse of dominance rather than tackling the dominant position itself requires continuous monitoring of dominant firms' behaviour, if it is to be anything other than an occasional "lightening bolt". They argue that:

It is better ... to take once and (one hopes) for all whatever structural actions are needed to restore effective competition and then stand back and let market processes do their job.⁴⁰

Massey⁴¹ argued that Article 82 should be adjusted to allow for structural adjustment where appropriate, and Regulation 1/2003 gives the Commission power to impose such a remedy.⁴² Many commentators have observed that the fine recently imposed on Microsoft by the Commission, while large in absolute terms, is relatively insignificant, given that company's massive financial resources. Rather it is the potential for the

³⁹ That is not to suggest that criminal sanctions are appropriate in such circumstances. The fact that such behaviour is so difficult to identify with certainty means they would be inappropriate as they would inevitably involve a high risk of false findings of guilt.

⁴⁰ Scherer & Ross, *Industrial Market Structure and Economic Performance*, 3rd ed, New York, Houghton-Mifflin, 1990, p 486.

⁴¹ Massey, 'Reform of EC Competition Law: Substance, Procedures and Institutions', in Hawk (ed), *International Antitrust Law and Policy*, New York, Juris Publications, 1996, reproduced in Hawk (ed), *Reform of EU Competition Law*, New York, Juris Publications, 2002.

⁴² Article 7(1) provides that the Commission may impose any behavioural or structural remedies necessary to bring an infringement to an end. Section 14 of the Competition Act, 2002 provides that the Irish courts may order the break up of a firm found to have abused a dominant position.

obligations which the Commission is seeking to impose on Microsoft to allow for effective competition that is the real penalty.⁴³

There are more fundamental objections to a regime where the same agency investigates, decides and imposes sanctions for breaches of competition law, as is the case both at EU level and in most Member States. Inevitably such a regime raises the possibility of wrongful findings of anti-competitive behaviour (false positives). It is extremely difficult for someone closely involved in a matter to view the facts with a dispassionate eye. This is the rationale behind the common law principle that one should not act as prosecutor and as judge and jury. Although, from a common law perspective this appears unfair, the ECJ has rejected the suggestion that this approach is contrary to the rules of natural justice.⁴⁴

The European Commission has, on a number of occasions, made wrongful findings of anti-competitive behaviour. In *Wood Pulp*,⁴⁵ for example, the Court of First instance rejected the Commission's findings on the grounds that there was insufficient evidence to prove collusion. Similarly, in *Airtours* the Court found that the economic evidence simply did not support the Commission's decision that the merger would be anti-competitive.⁴⁶ In the UK, where the OFT has power to impose fines, the Competition Appeal Tribunal found fault with the OFT's decisions in three of the first five appeal cases referred to it.⁴⁷ In the Czech Republic cases against six oil companies have twice been overturned on appeal.⁴⁸

Kolasky has pointed out that, in the US, the FCC, which, unlike the antitrust agencies, can block mergers without having to go to court, had adopted a lesser standard of proof than would be required by a court.⁴⁹ Similarly Kovacic has argued that the EU Commission has blocked mergers on occasion on the basis of evidence that would be thrown out by a US court.⁵⁰ Kobayashi has shown that the standard and burden of proof required influence the frequency of false positive and false negative errors.⁵¹ This suggests that what is required is a more fundamental reform along the lines suggested

⁴³ Commission Decision *Microsoft*, COM(2004) 900 final. In particular the requirement under Article 5 of the decision to provide interoperability information and under Article 6 to offer a version of windows clients operating system which does not include Windows media player, at: <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>

⁴⁴ Cases 100/80 etc *Musique Diffusion Francaise SA v Commission* [1983] ECR 1825.

⁴⁵ *Ahlstrom v Commission (Wood Pulp)* [1988] ECR 5193.

⁴⁶ Case T-342/99 *AirTours/First Choice v Commission* [2002] 5 CMLR 25.

⁴⁷ *Global Competition Review*, 15 August 2003. In fairness it should be said that over time relatively few decisions have been appealed, the OFT has been overturned primarily in relation to the size of fines imposed, and the initial experience may reflect a learning process.

⁴⁸ *Global Competition Review*, 7 May 2004.

⁴⁹ Kolasky, W.J., (2001): The FCC's Review of the Bell Atlantic/NYNEX and SBC/Ameritech Mergers: Regulatory Overreach in the Name of Promoting Competition, *Antitrust Law Journal*, 68(3): 771-803.

⁵⁰ Kovacic, W.E., (2001): Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy, *Antitrust Law Journal*, 68(3): 805-73.

⁵¹ Kobayashi, B.H., (1997): Game Theory and Antitrust: A Post-Mortem, *George Mason Law Review* 5

by Montag who proposed that responsibility for initial decisions in infringement cases be transferred from the Commission to the Court of First Instance.⁵²

In Ireland's case, a system of civil fines for some offences and criminal penalties for cartel offences would provide poor incentives for the Competition Authority. In setting enforcement priorities the Authority would face a choice between pursuing serious infringements with a very high burden of proof and less serious infringements with a lower burden of proof. Faced with such choices, an agency wishing to be seen to be doing something is likely to channel resources into less serious cases because they have a higher chance of success. Over time this would create a perception that civil penalties were "working," while criminal ones were not. Pressure to substitute civil for criminal penalties for "hard core" offences would grow, although, as previously argued fining companies is unlikely to deter them from engaging in cartels.

PROBLEMS WITH THE 2002 ACT

The 2002 Act addressed many of the shortcomings that were contained in the Competition (Amendment) Act, 1996. It has strengthened the Authority's search powers, in particular enabling it to seize original documents; to enter private homes as well as company premises; and to use reasonable force to gain entry if necessary. It has also introduced a number of presumptions regarding documents which should enable them to be introduced as evidence without need to establish proof of authorship. Increasing the penalties for individual executives in cartel cases indicates a recognition that such practices cause serious harm to the community at large. It also means that individuals accused of engaging in such behaviour can be detained and questioned by the police for up to 12 hours.⁵³ Nevertheless some problems remain.

The presumption in section 6(2) of the Competition Act, 2002, that 'hard-core' activities have the object of preventing, restricting or distorting competition represents a partial move towards the US position where 'hard-core' cartel activities are regarded as illegal *per se*. Under US law, the prosecution need only prove the existence of a cartel agreement and the defence is precluded from trying to show that such conduct was justified. The position was summarised by the US Supreme Court in *Northern Pacific*.

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.⁵⁴

⁵² Montag, 'Problems and Possible Solutions from a Practitioner's Point of View', in Hawk (ed), *International Antitrust Law and Policy*, New York, Juris Publications, 1998.

⁵³ According to statements made by the Authority Chairman to the Public Accounts Committee the arrest power has not been used in the two years since the 2002 Act came into force. Public Accounts Committee Hearing of 22 July 2004.

⁵⁴ *Northern Pacific Railroad Co v US*, 356 US 1 (1958), 5.

This approach minimises the costs of enforcement and maximises deterrence, while the risk of errors can be reduced by limiting the rule to behaviour that is clearly harmful.⁵⁵ The Hilmer Report advanced similar arguments in favour of the retention of Australia's *per se* prohibition on price fixing.

The current *per se* prohibition of price fixing is warranted on the basis that the occurrence of efficiency-enhancing price fixing agreements is rare, that the benefits of identifying and permitting efficiency enhancing price fixing agreements in a court setting are outweighed by the enforcement and judicial costs of a competition test and the benefit from the certainty induced by such clear rules.⁵⁶

The Irish legislation stops short of making cartels illegal *per se* and of defining a specific cartel offence. Providing a specific definition of what constitutes the offensive behaviour reduces the scope for the defence to argue that a particular activity is not caught by the offence.⁵⁷

More importantly section 6(3) of the Irish Act provides that a defendant can claim that an agreement, which is contrary to Article 81(1) (or Section 4(1)), satisfies the four conditions contained in Article 81(3). The effect of section 6(3) is that juries may be required to assess complex economic arguments and will, at the very least, greatly increase the length and complexity of cartel cases.

The fact that Article 81 applies a bifurcated test and that the exemption requirements are part of the Treaty pose obvious difficulties in this regard. The CFI has stated that, as a matter of law, there are no anti-competitive agreements which could not be eligible for exemption.⁵⁸ In spite of this, the then head of DG Competition, argued that so-called “hard core” restrictions such as price fixing could not satisfy the requirements for exemption so that “although Community law does not formally work with *per se* prohibitions in respect of which no defence can be raised, there is no practical difference.”⁵⁹ As Joshua observed, Article 81 “is ill-suited to form the basis of a criminal charge”.⁶⁰

⁵⁵ On this point see Denis, ‘Focusing on the Characteristics of *Per Se* Unlawful Horizontal Restraints’ (1991) 36(3) *Antitrust Bulletin* 641-50 and Wood, ‘Costs and Benefits of *Per Se* Rules in Antitrust Enforcement’ (1993) 38(4) *Antitrust Bulletin* 887-902.

⁵⁶ Hilmer, *National Competition Policy: Report by the Independent Committee of Inquiry*, Canberra, Australian Government Publishing Service, 1993.

⁵⁷ For a discussion on the merits of creating a specific cartel offence see Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK*, London, Office of Fair Trading, 2001.

⁵⁸ Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para 85.

⁵⁹ Schaub, ‘Continued Focus on Reform: Recent Developments in EC Competition Policy’, in Hawk (ed), *International Antitrust Law and Policy*, New York, Juris Publications, 2001, p 76. On the other hand Wils argued that on one reading, “Article 81(3) is nothing but a codified form of the American rule of reason”, Wils, ‘The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission’s Proposal for a New Council Regulation Replacing Regulation No.17’, in Hawk (ed), *International Antitrust Law and Policy*, New York, Juris Publications, 2001.

⁶⁰ Joshua, ‘Flawed Thinking About Price Fixers’, *Financial Times*, 2 August 2001.

Before the 2002 Act was passed, the Authority Chairman criticised the failure to include a good definition of hard core cartel offences in the legislation.⁶¹ The Authority originally argued that section 6(3) should not apply to the “hard core” category of arrangements. Section 188 of the UK Enterprise Act 2002 creates a specific cartel offence. This provision was included to avoid the need to have complex economic evidence presented to juries.⁶² It would appear to provide a way around the difficulty posed by the exemption provisions in the EU Treaty.⁶³ The Competition Authority subsequently proposed including a similar provision in the Irish Act but the Department advised the Minister against this on the basis that: “The UK system is different.”⁶⁴ The failure to introduce a specific offence along the lines provided for in Section 188 of the Enterprise Act, 2002, constitutes a serious weakness in the Irish legislation. It would appear that in the case of cartels operating in both Ireland and the UK, a criminal prosecution would be easier to bring under UK legislation.

Criminal penalties also raise the question of the rights of individual suspects. As noted individuals may be arrested and detained for questioning for engaging in cartels. Such individuals have the right to refuse to answer questions. In contrast section 31 of the Act provides that the Authority may summon witnesses to appear before it and examine them on oath. An individual refusing to take an oath and to answer questions put by the Authority shall be guilty of an offence. The Supreme Court has held that evidence obtained in this way would not be admissible against such individuals.⁶⁵ Similarly evidence given on oath before the Authority would not be admissible in court against the undertakings concerned as it would constitute hearsay. Rather such individuals would have to be prepared to voluntarily give such evidence in court. In spite of these difficulties, the Authority practice has been to use the section 31 powers rather than the arrest powers in its investigations of cartels.⁶⁶

⁶¹ *Competition*, 11(1) 9.

⁶² Department of Trade and Industry, *A World Class Competition Regime*, London, HMSO, 2001.

⁶³ The Hammond and Penrose report argued that the creation of a specific cartel offence would go a considerable way to reducing the opportunity for defendants to advance Article 81(3) arguments, while not entirely eliminating the possibility of their doing so. Hammond & Penrose, *Proposed Criminalisation of Cartels in the UK*, London, Office of Fair Trading, 2001. For a detailed discussion of the cartel offence in the UK Enterprise Act 2002, see Whish, *Competition Law*, 5th ed, London, Butterworths, 2004.

⁶⁴ Department of Enterprise, Trade and Employment, Memorandum to Tanaiste Re: Amendments to Competition Bill, 2001, 11 February 2002.

⁶⁵ *In the matter of National Irish Banks Limited and the Companies Act 1990*, [1999] 1 ILRM 321. It is quite clear from the European Court of Human Rights judgement in *Heaney & McGuinness v Ireland*, 21 December 2000, that legislation requiring answers which are incriminating infringes the right to silence and thus the right against self incrimination which is implicit in Article 6 of the European Convention on Human Rights. Similar issues arose in *Saunders v United Kingdom* (1996) 23 EHRR 313.

⁶⁶ The Authority’s Annual Report for 2003 records, for example, that it issued a total of 69 summonses, while, as noted previously, no individuals have been arrested in the two years since the Act came into force. An Authority press release cited a member of the Authority as stating that it relied “heavily on the testimony and statements of persons” attending before it in investigating potential price-fixing cartels and other breaches of competition law. Competition Authority press release 4 August 2004 available at www.tca.ie

As noted previously, the Competition Authority and the DPP have instituted a leniency programme for those engaged in cartels. While the Authority has refused to disclose even the number of applications for leniency it has received, the existence of criminal penalties under Irish (and UK) law is a factor to be taking into account by parties considering making leniency applications. Where an undertaking is granted leniency by the DPP, the immunity against prosecution applies to individual executives of the undertaking.

CONCLUSIONS

Historically EU competition law has been overly bureaucratic with far too much of the Commission's resources being absorbed in dealing with notifications while serious infringements such as cartels, have gone undetected. Regulation 1/2003 should increase the effectiveness of EU Competition Law by increasing the resources available to pursue serious anti-competitive behaviour and eliminating the need to deal with innocuous behaviour. Nevertheless, the absence of criminal penalties in the form of prison sentences for individual executives responsible for engaging in cartels remains a serious weakness in EU competition law. It is important, therefore, that the Commission does not prevent those Member States that wish to do so from imposing such sanctions,⁶⁷ particularly in the most serious cases, in order to maximise deterrence.

Longer term, however, deterring cartels requires a fundamental reform along the lines proposed by Joshua involving the establishment of a single European Cartel Authority with the power to investigate and prosecute serious hard-core cartels before an independent court.⁶⁸ In this regard the failure to seriously debate such a measure represents something of a missed opportunity. As Stelzer observed:

Seriously, I believe you will find that it will be a long while before mere fines will destroy the culture of price fixing that permeates British business.⁶⁹

It seems to this author at least that such views apply with equal force throughout the EU.

It must be recognised that tough penalties, such as those contained in Ireland's Competition Act, 2002, by themselves, will not deter anti-competitive behaviour, if people believe that there is little likelihood of being caught. The prospect of the Competition Authority bringing one cartel case per year suggests that the likelihood of getting caught for engaging in such behaviour is extremely remote to say the least. Far too much of the Authority's efforts have been channelled into undertaking sectoral studies rather than enforcement, which is obviously a great comfort to those engaged in cartels. In enforcement terms its time that the Authority got off the ditch and started delivering results on the pitch.

⁶⁷ By utilising the procedure envisaged by Article 11(6) of Regulation 1/2003.

⁶⁸ Joshua, 'Flawed Thinking About Price Fixers', *Financial Times*, 2 August 2001.

⁶⁹ Lecture delivered on 15 November 2000 at No 11 Downing Street, reproduced in Stelzer, *Lectures on Regulatory and Competition Policy*, London, Institute for Economic Affairs, 2001.

The success of EU decentralisation ultimately depends on national authorities rising to the challenge of applying EU law. Obviously this requires that such agencies have adequate resources; that legislation provides for effective penalties but perhaps, most important of all, as Irish experience illustrates, there must be a desire to root out serious anti-competitive behaviour.

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The Application of EU Competition Law by the Belgian Competition Authorities and Judges: Is Belgium Prepared for the ‘New Regime’?*Yves Montangie**

1 INTRODUCTION

Regulation 1/2003 on the implementation of the competition rules laid down in the EC Treaty will undoubtedly present a revolution in the enforcement of competition law and policy in the EC. One of the main features of this regulation is that Arts 81 & 82 EC Treaty will be fully applicable by the national competition authorities and national judges. The latter will not only be able to apply the prohibition in Art 81(1), but henceforth will also have the power to apply Art 81(3).

This article will address the question: to what extent are the Belgian Competition authorities and the Belgian tribunals and courts ready for the ‘new regime’. Although it is impossible to formulate definitive conclusions, nevertheless, it is submitted that an analysis of the visible role of competition law and policy in the current competition law and policy decision-making practice of the Belgian competition authorities and judges offers interesting insights which may allow us to make tentative observations on the degree of preparedness of the Belgian administrative and judicial authorities to apply the European competition rules.

First, this article will commence with a short overview of Belgian competition law and its development during recent years. Thereafter, the application of (EC) competition law and the underlying principles by Belgian’s competition authority, the Competition Council and its supporting bodies, will be outlined. Further, the current status of (EC) competition law and policy in the jurisprudence of the Belgian commercial tribunals and courts of appeals will be discussed. The article will conclude with an attempt to predict the extent to which the Belgian competition authorities and Belgian judges are likely to be capable to effectively apply the European competition law rules, *i.e.* the rules on anticompetitive agreements and abuses of dominant positions.

This article will not consider the actual or potential incompatibilities between the new EC regime and the Belgian law as it currently stands. For example, whereas Regulation 1/2003 provides for the intervention of the national competition authorities as an *amicus curiae* in competition proceedings, current Belgian civil procedure rules do not

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clearly define the circumstances under which such intervention can take place.¹ Another possible problem is the fact that, to date, no specific measures have been taken to comply with Art 35 of Regulation 1/2003. In its current form, Art. 53 of the Competition Act states quite generally that, ‘when the Belgian authorities have to decide on the application of the principles laid down in Arts 81-82 EC Treaty, this decision is taken by the authorities described in this Act’. Since several administrative bodies are involved in the application of competition law in Belgium, it is not yet entirely clear which one(s) of them will be competent to execute the different tasks entrusted by Regulation 1/2003 to the national authorities.² Nonetheless, these interesting issues remain outside the scope of this article.

2 A BRIEF OVERVIEW OF BELGIAN COMPETITION LAW & CULTURE

Until 1991, Belgium did not really have a competition law and policy ‘culture’. Obviously, Arts 81-82 EC Treaty were applicable in a number of cases due to their direct effect and their precedence over national rules. However, Belgium did not have any effective competition legislation. An earlier Act of 1960 dealt only with abuses of a dominant position. This law, however, was scarcely applied.³

In 1991, the first fully-fledged competition Act was passed by Parliament. With this legislation, the intention was to create a Belgian competition regime which was in line with the existing EC rules. The aim of the Act was to create an environment in which a genuine and effective competition law and policy would safeguard competition in the Belgian market. The Competition Act 1991⁴ introduced a set of substantive rules which are very similar to the EC competition rules. The Act contains a prohibition of agreements restricting competition, of abuse of dominance and a prior control of mergers with a Belgian dimension.

Inevitably, the Act is different in some respects from EC law. Since the Act is primarily intended at safeguarding effective competition in the Belgian market, an interstate trade effect does not require to be demonstrated for either prohibition. Furthermore, the merger control regime applies only to concentrations with a Belgian dimension, which

¹ On these problems, see Spiritus-Dassesse, ‘Recente wijzigingen inzake de uitvoering van de Europese mededingingsregels – de rol van de rechter na de modernisering van het EG-mededingingsrecht’ [Recent changes in EC competition law – the role of judges after the modernisation of EC competition law], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 50.

² Ponet, ‘Enige beschouwingen over de moderniseringsverordening vanuit het perspectief van de Raad voor de Mededinging’ [Some thoughts on the modernisation from the perspective of the Competition Council], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 78. For other examples of possible tensions between the current Belgian legislation and the European regime, see Swennen, ‘Na tien jaar, toch opnieuw: de wet economische mededinging en de wet handelspraktijken’ [After ten years, once again: the Competition Act and the Act on Fair Trade Practices], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 234.

³ See Van de Walle de Ghelcke, ‘Actualiteit van de toepassing van de Wet van 27 mei 1960 tot bescherming tegen misbruik van economische machtspositie’ [Recent developments in the application of the Act of 27 May 1960 against abuse of dominance], (1986) *TBH*, pp 3-44.

⁴ Wet van 1 juli 1999 tot bescherming van de economische mededinging, (*Belgian Official Journal*, 1 September 1999, p 32315.

is determined in accordance with defined turnover criteria.⁵ Other technical differences concern the grounds for exemption of cartel agreements⁶ and the *de minimis* rule.⁷

It was clear from the start that, despite these minor differences, the 1991 Act should be applied and interpreted in the light of the EC rules on competition and their interpretation by the European courts and the Commission. In addition to the adoption of certain definitions directly from the European Court of Justice's case law, such as the definition of an "undertaking" and of "dominant position", Belgium's Supreme Court has also confirmed that all substantial provisions of the Act are to be interpreted in the light of existing EC competition law.⁸

The major difference between the Belgian Competition Act and the European regime lies in its institutional aspects. Whereas both European and national competition law can be applied by national judges in private actions, the administrative control of potential anti-competitive conduct and mergers is quite different. In Belgium, no less than four institutions are involved in the decision making process.

The most important institution is the Competition Council. The Council is a quasi-judicial administrative body composed of magistrates and competition law and policy experts. The Council has the primary competence in competition affairs and can take decisions in all cases relating to mergers or anti-competitive behaviour. It is currently also the national authority applying the provisions of Arts 81-82 EC Treaty.⁹ Under certain circumstances, the President of the council can grant interim measures. Decisions of the Council and of its President can be appealed against with the Brussels court of appeals.

The Council is assisted by two other bodies; the Corps of Reporters and the Competition Service. The Members of the Corps are highly qualified officials who lead and co-ordinate investigations into mergers and anticompetitive agreements or behaviour. After an investigation, they analyse the data which have been compiled and draw up an investigative report which is presented to the Competition Council. They give instructions to the members of the Competition Service, which is a part of the Ministry of Economic Affairs. Its members are civil servants who actually undertake the concrete investigative activity 'in the field' as instructed by the Corps. The Council

⁵ A merger is to be notified when the undertakings concerned realise a total turnover of at least €40 million and when at least two of them realise a turnover in Belgium of at least €15 million (Art 11 Competition Act).

⁶ In comparison to Art 81(3) EC Treaty, Art 2(3) Competition Act contains an additional ground for exemption for agreements that lead to a reinforcement of the competitive position of small and medium-sized enterprises.

⁷ Agreements the parties to which do not meet the requisite turnover criteria do not have to be notified but are not necessarily deemed automatically compatible with the prohibition on cartel agreements: see Art 5 Competition Act

⁸ See Hof van Cassatie [Supreme Court], decision of 9 June 2000 ("Trade Mart"), (2000) *Arr Cass*, p 354.

⁹ It should be stressed again that, to date, no measures have been taken to comply with Art 35 of Regulation 1/2003.

of Ministers, a purely political body, can overrule decisions of the Competition Council, in merger cases, under certain well defined circumstances.¹⁰

Apart from these administrative bodies, ‘ordinary’ judges in the Belgian civil courts can apply the European rules as well as the national Competition Act. They can invalidate agreements which are prohibited under the Act and punish abuses of dominance. Judges may also deal with the civil consequences of infringement of the prohibitions (e.g. by awarding compensation), although, currently under Belgian law, they cannot grant exemptions or negative clearances.

A considerable part of the competition-related jurisprudence in Belgium has been developed by the Presidents of the commercial tribunals. There is a clear reason for this. These judges possess a specific competence derived from the Belgian Act on Fair Trade Practices and Consumer Protection. Under this Act, any behaviour which is a breach of any law or regulation is automatically deemed to be contrary to fair trade practices. A breach of the European and/or Belgian competition rules is therefore automatically and simultaneously a breach of the Fair Trade Practices Act.

This procedure under this Act is advantageous to interested parties, as any order at the culmination of the procedure constitutes a decision on the merits. However, it is decided in a procedure which is decidedly similar to ordinary summary proceedings and thus leads to a judgment in a relatively short period of time, combining ‘the best of both worlds’. Accordingly, consumers and competitors often take recourse to this procedure to attack a potential breach of the competition rules.

Another important aspect of the enforcement of competition rules by judges concerns Art 42 of the Competition Act which provides that when the outcome of a case before any judge depends on whether conduct may be compatible with the Act, the judge can suspend the procedure and refer the case to the Brussels Court of Appeal to obtain a preliminary ruling. This procedure is similar to the preliminary rulings mechanism in European law, although referral is not required where the principle of *acte claire* applies.

3 THE BELGIAN COMPETITION AUTHORITIES AND EC COMPETITION LAW

3.1 The institutional problems in the Belgian competition regime

As indicated above, the main responsibility for the administrative enforcement of the competition rules in Belgium lies with the Competition Council and its auxiliary bodies. However, it is clear that the Council has malfunctioned from the outset. To put it bluntly, the evolution of the Competition Council as Belgium’s competition authority almost reads like the script of a very bad soap opera. Initially, the Council was composed of 20 part-time members, partly consisting of judges who at the same time remained in post as magistrates, partly of competition law experts such as professors in law and/or economics, and partly of private practitioners with experience in competition law. Following the entry into force of the Competition Act, the workload

¹⁰ The Council of Minister can overrule these decisions “for reasons of public interest, taking account of the national security, the competitiveness of the relevant sector in the light of international competition, consumer interests and employment” (Art 34bis Competition Act).

was too great a burden for the Council. The only supporting body at that time, the Competition Service, experienced similar problems, with 15 case-handlers within the Service being insufficient for this purpose. It is generally accepted that the problems were largely due to a combination of the thresholds for Belgian merger control, set too low, and the strict time-limits for merger control procedures. This led to the Council and the Service being drowned in merger notifications, leaving them with little or no time to focus on the other aspects of competition policy. In addition, the Council and Service lacked the necessary financial and physical resources to execute their tasks effectively. For example, they did not even have the most essential economic and legal literature and journals at their disposal.¹¹ Any request to the government for additional resources remained unanswered. Another more technical problem concerned the unclear division of powers between the Council and the Competition Service. The Service started appropriating certain powers which led to friction with the Council.

These issues led to a rather peculiar situation in 1997: the Council announced publicly that it would no longer be able to fulfil its tasks unless additional resources were granted. Effectively, the Council went on strike, and in the subsequent period, only a limited number of cases were dealt with. Moreover, the annual reports for the years 1996-1999 were never published. It took two years for the government and the legislator to enact new legislation to meet the concerns of the Competition Council. Finally, in 1999, a revised Belgian Competition Act was enacted. Apart from some substantive changes, the Act introduced important institutional changes. In relation to the Competition Council, it was decided that from the 20 members, four members would be appointed full time: the President and Vice-President, both judicial magistrates, and two other members. In relation to the Competition Service, the government pledged to expand the Service to a level of about 40 full time employees.

The 1999 modification of the Competition Act also introduced the Corps of Reporters which would lead and co-ordinate investigations, instruct the Competition Service to undertake specific investigative activity and, after an investigation, present a report on individual cases to the Council. Four full time members would be appointed, each with a degree in law and/or economics and experience in competition affairs and procedural matters.

However, even following modification of the Competition Act, certain problems remained. The nomination of the new, full-time president of the Council immediately caused some trouble. The person who was initially appointed, did not deliver proof that he was bilingual, as required by the Act.¹² The appointment was annulled by Belgium's supreme administrative court. The procedure was repeated and culminated with the appointment of Mrs Beatrice Ponet, who had previously acted as President of the commercial tribunal of Hasselt, a medium-sized city and commercial centre in Belgium. The appointment of the other full-time members also took a period of time.

¹¹ Bourgeois and Gerrits, 'De raad voor de mededinging stapt op: een sprong in het duister?' [The Competition Council quits: a leap into the dark?] (1998) *Vlaams Jurist Vandaag*, p 6.

¹² One has to bear in mind that Belgium has three official languages (Dutch, French and German). Most senior officials have to deliver proof of competence in the two major official languages, Dutch and French.

Furthermore, by the end of 1999, none of the four members of the Corps of Reporters had been appointed. Two civil servants fulfilled the task of the reporters temporarily, although the Act did not provide for such a temporary appointment. It was not until November 2000 that half of the reporters were officially installed, as there were only two people who passed the exams required for this appointment.

The expansion of the Competition Service promised by the Government was never really realised. In 2000-2001, only 14 case-handlers were active, as opposed to the team of 40 full-time members which was initially planned. The number of members only gradually expanded to around 30 members at the present time.

Nevertheless, Belgian competition law and policy gained momentum. The number of cases dealt with increased slightly, especially non-merger cases, and in 2000, the Competition Council published its first annual report in a number of years. The Council also started to take part more regularly in international activities. From 2002, the Council started publishing its decisions systematically in a self-managed quarterly journal. These improvements can at least partially be explained by the dynamic and ambitious role played by the President of the Council, Mrs Beatrice Ponet.

However, the soap opera of the Competition Council appears to be rather atypical: ‘not all is well that ends well’. Although the current government stated in its government programme of July 2003 that competition policy would be one of the priorities of government policy, Belgian competition policy is currently experiencing a new crisis situation.

On December 9th of 2003, Mrs Beatrice Ponet resigned as President of the Competition Council.¹³ She considered that one of the full time members of the Council had wilfully tried to impede the effective functioning of the Council, and had requested on various occasions that disciplinary measures be taken against this person. A disciplinary procedure was started, and the member was consequently suspended, but the disciplinary file “disappeared” shortly before the general elections in Belgium in 2003. In the meantime, it had become very clear that the person in question had close ties with one of Belgium’s major government parties. It is reported that, during a meeting on 3 December 2003, that member questioned the authority of Mrs Ponet and threatened to use his political contacts to prevent any disciplinary sanction being imposed.¹⁴ In addition to this problematic issue, Mrs Ponet also confirmed that, even after all these years, the Council still did not have the necessary resources to function effectively. The total budget of the Competition Council is currently estimated at about not more than €200,000. Furthermore, at the end of the 2003, one of the other full time members of the Council resigned, to work as a legal secretary in the Court of First Instance of the EC.

Accordingly, the current status of the Belgian competition authorities is as follows:

¹³ ‘Voorzitter Raad voor mededinging stapt op’ [President of Competition Council quits], *De Tijd* (Belgium’s leading business daily paper) of 9 December 2003.

¹⁴ Belgian Parliament, Parliamentary Documents, Report of the meeting of the Commission on Economic Affairs, Tuesday 16 December 2003, CRIV 51 COM 100, p 20.

- only one full time member of the Competition Council remains active, since two other members have resigned and one is suspended. The remaining one full time member now acts as interim president;
- the Corps of Reporters consists of two persons, where there should be four;
- the Competition Service is staffed by about thirty members, instead of the originally planned forty.

Therefore, currently, an estimated 33 full time professionals are dealing with the administrative enforcement of competition law and policy in a country with more than 10 million inhabitants which claims to function as a modern market economy. It is not surprising, therefore, that in a recent discussion about this topic in the Belgian Parliament, the current Minister of Economic Affairs stated that competition policy in Belgium is 'like a wasp's nest, a knot that cannot be disentangled and that I would like to look at with the peace and quiet that is needed'.¹⁵ To suggest that the administrative enforcement of competition law and policy in Belgium is suffering a severe crisis is quite clearly an understatement.

3.2 EC competition law in the Competition Council's decision-making

These unsettling but nevertheless important facts about Belgian competition law and policy raise the question whether, in these circumstances, the Belgian Competition authorities have been able to develop any jurisprudence which can demonstrate whether or not they are capable of dealing with the new challenges that Reg 1/2003 presents after 1 May 2004.

Despite the considerable problems, there is, nonetheless a body of case-law which allows one to draw certain conclusions. Looking at the existing case law of the Competition Council, one thing immediately springs to mind: although the Council is the national competition authority which is entrusted with the task of applying Arts. 81-82 of the EC Treaty, no cases have actually been decided on the basis of these rules to date. There is probably a logical explanation for this. Since the Belgian competition rules are very similar to their European counterpart, it is possible to assess the legality of certain practices or behaviour on the basis of the Belgian Act alone. The result will normally be the same, without the Council having to consider the additional requirement of an effect on trade between the member states. This does not mean that the Competition Council has no experience with, or interest in, European competition law and policy. As already noted, Belgium's Supreme Court has decided that the Belgian legal provisions have to be interpreted harmoniously EC competition law and policy.¹⁶ From the case-law, it is clear that the Council is indeed familiar with the EC rules and their interpretation by the European Courts and the Commission. For example, in deciding whether or not a health fund is an undertaking as defined in the EC

¹⁵ Belgian Parliament, Parliamentary Documents, Report of the meeting of the Commission on Economic Affairs, Tuesday 16 December 2003, CRIV 51 COM 100, p 29.

¹⁶ Hof van Cassatie [Supreme Court], decision of 9 June 2000 ("Trade Mart"), (2000) *Arr Cass*, p 354.

competition rules, the Council, making explicit reference to the European Court of Justice's interpretation of this issue, has decided that a health fund is not to be considered as an 'undertaking' but rather as a state body when it provides health services that are compulsory by law. On the other hand, when it provides additional non-compulsory insurance cover, it is to be considered as a private 'undertaking' which has to comply with the rules on anticompetitive agreements and behaviour as for any other private undertaking.¹⁷

On a more critical note, the following remarks can be made:

1. Sometimes the Council deviates from European concepts with no obvious explanation. For example, in a relatively recent case regarding decisions by professional associations, the Council suggested that such associations themselves can be considered as undertakings for the purposes of the competition rules¹⁸. However, in the European Court of Justice's case-law, these associations are considered to be associations of undertakings, not as undertakings themselves¹⁹. Although merely a theoretical point, it demonstrates that, in some respects, the Belgian authorities do not always follow the European example.
2. Until now, the Council has built up its experience mainly in the area of merger control.

The following statistics show the number of cases which have been dealt with by the Competition Council to date.²⁰

Decisions	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
On mergers	25	45	46	29	25	17	6	36	47	58	50
Mergers tacitly allowed without formal decision	0	0	4	19	37	40	31	6	1	0	0
Following notification	1	0	0	1	1	2	0	1	2	4	1
Following complaints	0	1	5	5	0	0	2	1	6	24	10
On interim measures	1	6	3	5	3	3	7	4	9	9	5
Following investigations on the Council's own initiative	0	0	0	0	0	1	0	0	1	0	2

¹⁷ Competition Council, Decision of 11 May 2001, case 2001—V/M-22, Unie der Belgische Ambulancediensten/Belgische Rode Kruis, (*Belgian Official Journal*, 28 September 2001, p 33030.

¹⁸ Competition Council, Decision of 19 June 2002, case 2002-P/K-45, De Smet/Beroepsinstituut van vastgoedmakelaars, (2002) *Driemaandelijks Tijdschrift van de Raad voor de Mededinging* 2, p 77.

¹⁹ See, for example, European Court of Justice, decision of 19 February 2002, Case C-309/99 *Wouters* [2002] ECR I-1577.

²⁰ Source: Competition Council, *Annual Report 2002*, p 54 and, for 2003, own estimates based on preliminary 2003 figures.

These figures clearly show that, to date, merger control proceedings have been at the centre of the Council's attention. A substantial proportion of these files have been closed by tacit approval by the Council, especially during its 'crisis' years. After the 're-launch' of the Council in 1999, it stated in its 2001 Annual Report that the non-merger cases would become a priority in its activity. Indeed, the figures for 2002 show a considerable increase in the number of decisions taken following complaints by third parties. However, many of these decisions dealt with cases which had already passed the statutory limitation period. Another observation is that a relatively large number of non-merger cases have been decided by the President of the Council in the procedure for interim measures initiated by competitors.

One can conclude from this that, so far, the enforcement of the rules on cartels and abuse of dominance has played a minor role in the decisional practice of the Competition Council. Furthermore, it seems that the procedure leading to interim measures is one of the most favoured instruments for complainants to ensure that competitors comply with competition law. This is likely to mean that the President (currently interim-president) will be over-burdened with interim measure cases and will have little or no time to deal with "ordinary" cartel cases.

3.3 The limited role of economic analysis in the Council's decision-making

Despite the presence of some members with an economic background, neither the Council nor its President appear to have focused their attention to the relevant economic issues in competition cases. In numerous decisions, for example, the issue of market definition was completely ignored.²¹ In other cases, the exact market definition was left aside, not because the result of that analysis would be irrelevant to the outcome of the case, as the European Commission sometimes does, but because it was considered that defining the precise relevant market would simply be 'too difficult'.²²

On other substantive issues, the Council often undertakes a rather unsophisticated approach to competition issues. Typical of the Council's approach – and this may sound familiar – is the focus on rather static data such as market shares. This may be explained by the fact that the Council adopts some of the "safe harbours" which have been developed in the decision practice of the European Commission. For example, in an abuse of dominance case, the Council stated that 'a market share of 50% is in itself sufficient, save exceptional circumstances, to prove a dominant position, a market share of 40% is a strong indication of the existence of a dominant position, and a market

²¹ See, for example, Competition Council, Decision of 26 May 1998, case 98-C/C-10, Bodycote International/HIT, Kruis, (*Belgian Official Journal*, 1 July 1998, p. 21626; the relevant geographic market was defined as 'Belgium' without any analysis or further explanation, even though the investigation had shown that the market was very open and allowed pressure to be exercised by foreign competitors. For other examples of cases demonstrating a very 'sloppy' analysis of the relevant market, see Camesasca and Ysewyn, 'Overzicht van rechtspraak van de Raad voor de Mededinging in 2001-2002' [Case-law of the Competition Council in 2001-2002], (2004) *TBH*, p 113-114.

²² See, for example, Competition Council, Decision of 11 September 2002, case 2002-C/C-49, Cadbury Denmark/Dandy Holding, (2002) *Driemaandelijks Tijdschrift van de Raad voor de Mededinging* 3, p 90.

share of less than 30% indicates that, save in exceptional circumstances, a dominant position is rather unlikely'.²³

The lack of economic analysis has led to at least one decision of the Competition Council being quashed by the Brussels Court of Appeals. In its judgment of 9 March 2001 relating to a Council Decision concerning anticompetitive practices on the market for the disposal of slaughter waste, the Court noted that it had expected a more thorough investigation into the effect of cross subsidising and very low pricing on the relevant market.²⁴ After this judgment, the Competition Council has shown, to a certain extent, the intention to engage into a more sophisticated economic analysis of competition issues, although the Competition Council sometimes still sticks to rather old-fashioned and unsophisticated views on competition law and policy.

3.4 The Belgian competition authorities and Regulation 1/2003

In the light of the foregoing, it is uncertain whether the Belgian competition authorities will be able to cope with the additional responsibilities confronting them under Regulation 1/2003.

The authorities themselves are of course fully aware of the existence of the Regulation and its impact. Mrs Beatrice Ponet, until recently President of the Competition Council, stated that the Competition Council's workload will inevitably increase significantly. She warned that the current lack of staff and resources may mean the Council and its supporting bodies are ill-prepared deal properly with all cases brought before them, and urged the Government to invest in more staff and resources, and to modify the Competition Act to allow a larger number of Competition Council members to be appointed full time. Another suggestion would be to appoint supporting staff (legal secretaries) to assist the members of the Council.²⁵

The author endorses the sceptical view that the ongoing problems of staffing and financing of the Council and its supporting bodies is a problem that will make the transition to the 'new regime' extremely difficult. However, this is not the only problem.

Another institutional problem is the fact that, to date, a considerable number of cases have been dealt with by the President of the Competition Council in procedures leading to interim measures. It may reasonably be expected that a number of the additional cases derived from Regulation 1/2003, will be dealt with under the same procedure. It is likely that the President will almost certainly have to focus exclusively on these cases and will not be able to devote sufficient time to 'ordinary' cartel cases.

Further, some substantive issues cast some doubts on the competence of the Belgian authorities to deal with the new regime. First, as indicated above, the Belgian authorities

²³ Competition Council, Decision of 11 May 2001, case 2001—V/M-22, Unie der Belgische Ambulancediensten/Belgische Rode Kruis, (*Belgian Official Journal*, 28 September 2001, p 33030.

²⁴ Court of Appeal of Brussels, decision of 12 November 2002, Rendac/Incine, *Jaarboek handelspraktijken & mededinging 2002*, (Herman De Bauw, Ed.), Kluwer, Mechelen, 2003, p 975.

²⁵ Ponet, 'Enige beschouwingen over de moderniseringsverordening vanuit het perspectief van de Raad voor de Mededinging', see fn 2, pp 86-88.

have no direct experience in applying Arts 81-82 EC Treaty and, more specifically, the complex concept of interstate trade. This may prove to be a considerable handicap. Secondly, in its case-law on Belgian competition law, the Competition Council has developed an interpretation of some concepts which diverges from their interpretation by the European Commission and/or European Courts. This may lead to inconsistencies in approach in the application of Arts 81-82 EC between the national and European institutions. Thirdly, the lack of sound economic analysis in the Council's case-law threatens to turn assessments based on Art 81(3) EC Treaty into a very difficult exercise.

4 THE BELGIAN JUDGE AND EC COMPETITION LAW

4.1 The uncertain role of competition law in Belgian jurisprudence

As indicated in the introduction, questions related to Belgian and EC competition law can also be dealt with by 'ordinary' judges. In fact, since EC competition law is deemed to be of public order nature, they are obliged to apply these rules *ex officio*, even when the parties to a dispute do not raise them in their briefs or oral arguments.²⁶

Due to the nature of the matter, in most cases the competent judge in Belgium will be the commercial tribunal and, on appeal, the Court of Appeals. As already indicated in the introduction, a number of decisions involving competition law issues have been issued by the Presidents of the commercial tribunals in cases where the application of the Act on Fair Trade Practices and Consumer Protection is linked to a competition law issue.

One might expect that parties regularly take recourse to a tribunal or a court when there is a competition law-related dispute. Compared to the procedure before the European Commission or the Belgian competition authorities, the procedure before a judge offers certain advantages. As the current President of the Brussels commercial court indicated, the independence of a judge is guaranteed by the fact that he has been appointed for life and cannot be moved to another post, even within the judiciary, without his approval. From a more practical viewpoint, rather surprisingly, a decision by a tribunal or a court may often be obtained quicker than a decision by a competition authority, especially when the case is being decided during the course of summary proceedings described above.²⁷ However, the general view among competition law practitioners in Belgium is that very few cases are decided on competition law grounds.

It is actually rather difficult to get a clear view of the role of competition law in the Belgian jurisprudence. Although all cases are decided on in a public hearing, not all cases are subsequently published. Only some courts have established a website which gives access to their decisions. The numerous legal reviews and periodicals are the only

²⁶ See European Court of Justice, decision of 14 December 1995, Joined Cases C-430/93 & C-431/93 *Van Schijndel & Van Veen/Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. However, this decision does not require the national judge to abandon the passive role assigned to him by going "beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim" (Recital 22).

²⁷ Spiritus-Dassesse, 'The new frontiers of international antitrust', (1994) *DAOR*, 32, p 55.

other source of case-law. However, these obviously focus on cases with a particular importance and do not offer a representative sample.

To a certain extent, one can consult previous studies and reports on the application of (EC) competition law by Belgian judges. Special reference can be made to the report written by Professor Jules Stuyck as a contribution to the 1998 conference on this topic of the International Federation for European Law (FIDE)²⁸ ('the Stuyck Report').

To update the position set out in this report and to ascertain the views of Belgian judges on the issue, a short informal survey was organised. The survey was undertaken by sending an elaborate questionnaire on:

- the experience of Belgian magistrates with competition law and EC law in general, as well as the underlying principles,
- the role of competition law in their case-law, in particular the number of cases and decisions that have been based on Arts 81-82 EC Treaty and the importance of economic arguments and expert evidence,
- their knowledge of Reg 1/2003, namely its contents and the expected impact on their tribunal's or court's activity.

This questionnaire was sent to all Presidents of commercial tribunals in Belgium, as well as to all Presidents of the Courts of Appeal.

32 questionnaires were distributed; 8 responses were received. Although the total number of questionnaires sent and received may be too small to obtain statistically significant data, the responses nevertheless reveal interesting facts and tendencies. The findings are discussed in the following sections.

4.2 EC Competition law in the Belgian jurisprudence

Ever since the 1980s, Belgian plaintiffs and defendants in commercial cases have frequently relied on arguments relating to Arts 81-82 EC Treaty. As Stuyck noted, no specific problems in the context of Belgian substantive and procedural law have been reported. On the contrary, the procedure for obtaining orders under the Act on Fair Trade Practices and Consumer Protection has proven to be a very effective instrument to ensure compliance with the EC competition rules.²⁹ It is not surprising that a majority of these cases concerned practices which lie at the crossroads between competition law and fair trade practices law, such as selective distribution, refusals to deal and parallel imports. Through the preliminary ruling procedure of Art 234 EC Treaty, a number of these cases became milestone cases in EC competition law.³⁰

²⁸ Stuyck, 'National application of Community Competition Law – Belgian Report', report presented to the FIDE Congress Stockholm 3-6 June 1998, 23 p.

²⁹ Stuyck Report, p 9.

³⁰ See, for example, European Court of Justice, decision of 11 December 1980, Case 31/80 *L'Oréal/De Nieuwe AMCK* [1980] ECR 3775; European Court of Justice, decision of 3 July 1985, Case 243/83 *Binon/AMP* [1985] ECR 2015.

One might have expected that, following the enactment of the Belgian Competition Act in 1993, parties would more regularly invoke the provisions of the Belgian Act. Theoretically, the burden for a complainant using competition law arguments is lower when using national competition rules, as no effect on interstate trade has to be demonstrated.

However, initially the Belgian Competition Act was only invoked in a very limited number of cases. This may be explained by the fact that both Belgian lawyers and magistrates were reluctant to apply this new legal instrument and that, in practice, it was not always difficult to show an interstate effect, given Belgium is a fairly small economy.³¹

It seems that, from 1994-1995 onwards, the Belgian legal profession became more comfortable in using the new instrument. Since then, there has been a slight shift of attention in the case law in favour of the application of the Belgian Competition Act.³² This may partly be explained by the fact that the Belgian Competition Council's activity remained rather limited due to the problems described above. This may have caused parties who wanted to initiate proceedings on the basis of the Belgian Competition Act, to opt for the 'judicial' route as a substitute for the procedure before the Council.³³

However, one cannot deny that the overall status of both European and Belgian competition law in the case-law of the Belgian tribunals and courts in the 1990s remained largely the same. The ever-growing importance of competition law, at least in terms of the public profile gained by Commission enforcement of major cartels and other infringements, has not been reflected in the number of private actions being raised. Today, the role of competition law in the Belgian jurisprudence still seems rather limited.

While there are no hard figures to support this view, the responses to the survey suggest that the number of commercial cases in which competition law issues have played a role can be estimated at between 2 and 5%.³⁴ When specifically asked about the role of the European competition rules in their case law, the majority of the respondents cite similar figures, both for the number of cases in which the parties relied on Arts 81-82 of the EC Treaty as for those cases in which the magistrate raised these provisions *ex officio*. A large percentage of these cases concern brewery contracts and practices in the automobile sector.

4.3 Economic analysis in the Belgian jurisprudence

Another striking issue which springs to attention when studying the Belgian case law, is the fact that a large majority of decisions lack basic economic analysis. Even the most

³¹ Ratliff & Wright, 'Belgian competition law. The advent of free market principles', (1993) *World Competition* 33.

³² Steenbergen, 'Drie jaar Belgische Wet mededinging' [Three years of Belgian Competition Law], (1996) *SEW*, p 325; Stuyck Report, p 8.

³³ Swennen, 'De wijziging van de Belgische Wet tot bescherming van de economische mededinging' [The modification of the Competition Act], (1999) *TBH*, p 372.

³⁴ One respondent stated that he had never faced any competition issues at all.

elementary concepts of competition analysis, such as the definition of the relevant market (substitutability of products or services) or the calculation of market shares are rarely used. In only a few of the published decisions was an attempt made to develop any economic reasoning. The absence of any sophisticated analysis may be understandable, since the courts are staffed exclusively by members who have had a purely legal training, as opposed to the Competition Council which is composed of lawyers and economists.³⁵ However, this point merits two remarks.

First, Belgian judges can appoint external experts when the need arises. An expert report may meet the – understandable - lack of knowledge relating to specific economic issues such as market analysis, the effect of oligopolies, portfolio power etc... However, apart from some isolated cases in ‘major’ jurisdictions, most of the respondents to the survey have never appointed an expert. It is not entirely clear why. One respondent states that this is due to the high costs involved in appointing such experts. Secondly, certain decisions in ‘major’ jurisdictions (i.e. commercial tribunals or courts in the larger economic centres such as the province capitals Brussels, Antwerp & Ghent) evidence a greater openness to more sophisticated economic analysis. This is quite peculiar, since magistrates in ‘major’ jurisdictions have undertaken the same training as their colleagues in ‘smaller’ jurisdictions and may thus be expected to have the same knowledge. The difference may probably be explained by the presence in those areas of major law firms which have a specialised competition division regularly developing economic arguments, thereby requiring the competent judge to deal with these matters. This appears to confirm the conclusions of Stuyck, who argued that ‘smaller’ courts in particular hear competition law cases less frequently and are therefore less familiar with this branch of the law.³⁶

From the limited number of decisions actually published, the Brussels Court of Appeal appears to be a notable exception to the main trends identified in the previous discussion.

First, the Brussels Court seems to deal with competition issues in a larger number of cases than the other courts or tribunals. It should be borne in mind that this Court decides on preliminary questions regarding the Belgian Competition Act and also decides on appeal against decisions of the Competition Council, and this undoubtedly explains the fact that this Court is more often confronted with competition issues. Secondly, another striking difference is that more decisions of this Court focus on the economic background to competition issues. The Court is clearly aware of the fact that dealing with competition cases sometimes requires an in-depth analysis of the economic rationale behind the purely legalistic competition rules. For example, in a case concerning the validity of an exclusive purchasing agreement, the Court stated that it had to assess the concrete effects of the agreement, implying a thorough analysis of ‘the relevant market, the economic context in which the undertakings are active, of the products and services covered by the agreement, of the structure of the market and the

³⁵ Wytinck, ‘Enkele ervaringen vanuit de advocatuur met de WEM na de wetwijziging van 1999’ [Lawyer’s experiences with the Competition Act after the 1999 modification], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 175.

³⁶ Stuyck Report, p 16.

circumstances in which it functions'.³⁷ While this may seem a rather broad and general statement, the Court certainly does not refrain from making more specific requirements in certain cases. In a decision quashing a previous decision by the Competition Council in an abuse of dominance case, the Court stated that it had expected more solid empirical analysis of the effects of cross-subsidising and low pricing on a neighbouring market.³⁸ This undoubtedly demonstrates familiarity with the economic reasoning behind the prohibition of the abuse of dominance, and actively requires the Competition Council to provide solid economic data in its decisions.³⁹

Several key reasons may explain the Brussels Court's greater familiarity with competition law issues. As noted, it is confronted more often with competition law questions due to its special role in the preliminary procedure and as it decides on appeal against decisions of the Competition Council. In these appeals, the Court is confronted with a number of divergent views and arguments in the briefs and reports presented by the parties and the Corps of Reporters. This forces the Court to undertake a more in-depth analysis of the relevant issues.⁴⁰ This is in part explained by the presence of a high number of large law firms with specialised competition divisions, because the European Commission is based in Brussels.

4.5 Why does competition law play such a limited role in the Belgian jurisprudence?

The question remains why, with the exception of the Brussels Court of Appeals, competition law has in recent times played only a relatively limited role in the case law of Belgian tribunals and courts. Some explanations are suggested in the responses to the survey.

It is notable that, while in theory the maxim *curia novit ius* (the court knows the law) applies, most respondents from the commercial tribunals, as opposed to those from the courts of appeal, consider that they have a limited knowledge of competition law and policy. Nevertheless, the survey indicates that most of them are familiar with the meaning and contents of the competition rules, in specific Arts 81-82 EC Treaty.

However, the knowledge on more specific aspects of competition law is weaker. With the exception of one court of appeal, the respondents display a rather fragmentary knowledge of the different block exemptions, the general notices and the notices for specific sectors (*e.g.* telecommunications, transport ...) of the European Commission. The familiarity with the crucial concept of the relevant market differs strongly from one

³⁷ Court of Appeal of Brussels, decision of 29 October 2002, Decock/Claerhout en De Ketelaere, *Jaarboek handelspraktijken & mededinging 2002*, (Herman De Bauw, Ed), Kluwer, Mechelen, 2003, p 951.

³⁸ Court of Appeal of Brussels, decision of 12 November 2002, Rendac/Incine, *Jaarboek handelspraktijken & mededinging 2002*, (Herman De Bauw, Ed), Kluwer, Mechelen, 2003, p 975.

³⁹ Camesasca & Van den Bergh, 'Economische analyse bij de toepassing van het Belgische mededingingsrecht' [Economic analysis in the application of Belgian competition law], in *De Belgische Mededingingswet anno 2003*, Kluwer, Mechelen, 2003, p 14.

⁴⁰ Wytinck, 'Enkele ervaringen vanuit de advocatuur met de WEM na de wetwijziging van 1999' (see fn 35), p 173.

tribunal/court to another. The questionnaire also aimed at gaining insight into magistrates' awareness of the economics behind competition law, such as the different schools of thought on competition, oligopoly theory and game theory. The participants were also asked to briefly explain certain concepts used in competition law and policy, such as the SSNIP-test, the Herfindahl-Hirschmann-Index, resale price maintenance, predatory pricing, vertical and horizontal agreements, homogenous and heterogeneous goods, comfort letters and intra-brand vs inter-brand competition. Only one respondent showed a thorough knowledge of the economics behind competition law and policy and some of the more specific concepts; not entirely surprisingly this respondent had enjoyed an additional economic training. Only a minority of the other respondents have undergone some form of training in competition law and/or economics, for instance at conferences or workshops. This additional training was organised either on their own initiative or by the Ministry of Justice.

In the light of the foregoing, it is not surprising that a majority of the respondents who have been confronted with competition law issues have encountered some difficulties in applying competition rules to the matter before them. Competition cases are generally seen as 'very complex'. Apart from problems in working with the more sophisticated substantive aspects of competition law and economics, most respondents reported experiencing some difficulty in dealing with certain procedural aspects, such as the co-operation with the European Commission and the effect of notifications and informal Commission action (such as the comfort letter). A few respondents argued that the primary cause for these problems is the failure of the government to pay sufficient attention to competition law and policy. The lack of effort by the government in informing magistrates of the importance of competition law and of the latest developments in this field may limit the judges' knowledge of and interest in competition issues.

Some respondents suggested that the limited role for competition law and magistrates' awareness on this subject may to a large extent be attributed to the fact that the parties themselves rarely use these arguments in their briefs and pleas. Indeed, as in most continental legal systems, the role of the judge in Belgium is a 'passive' one, which means – in short - that he can only decide on arguments that have been raised by the parties and that he has to refrain from considering legal points on his own initiative. Some commentators have supported this view, and argue that party litigants bear responsibility for the fact that competition law has not yet entered the legal 'conscience' in Belgium.⁴¹ This is partially confirmed in Stuyck's Report, indicating that many courts and tribunals are not equipped to apply the competition rules in all their complexity when the parties themselves do not present detailed economic data in support of their case.⁴²

In our view, however, this is a false argument as far as European competition law is concerned. As already mentioned above, EC competition law is considered to be of a

⁴¹ See, for example, Laura Parret, 'België heeft als kartelparadijs geen toekomst' [Belgium has no future as a cartel paradise], *De Tijd* of 10 February 2004, p 2.

⁴² Stuyck Report, p 16.

‘public order’ nature, which means that the rules have to be applied by a magistrate on his own initiative, even when the parties do not raise them in their arguments. We therefore endorse the views of Mrs Spiritus-Dassesse, currently president of the Brussels commercial tribunal, that judges should actively introduce competition law arguments in the case, even when the parties forget (or refuse) to do so. In this manner, parties will gradually be forced to introduce competition law in their arguments, and in the long term this may lead to a greater general awareness of competition law in the Belgian legal community.⁴³

4.6 The Belgian judge and Regulation 1/2003

The above certainly raises concerns about the suitability and preparedness of Belgian judges to tackle the new challenges which will be presented by Regulation 1/2003. A crucial question is whether Belgian magistrates are aware at all of the existence of this Regulation, its contents and its effect on their activities.

As noted above, the main importance of Regulation 1/2003 for national magistrates lies in the fact that they are required to apply Art 81 EC Treaty to its full extent. This means that, as of 1 May 2004, they also bear the responsibility for considering whether or not an agreement qualifies for an exemption to the cartel prohibition on the basis of Art 81(3) EC. One may expect that Belgian magistrates are to a certain level familiar with this provision. They may have some experience in assessing the compatibility of agreements with Art 81(3) to evaluate the probability of an exemption in the framework of the co-operation between the national judge and the European Commission.⁴⁴

To gain further insights, the survey conducted among the Belgian magistrates included some questions on this particular topic, answers to which can be summarized as follows. The respondents from commercial tribunals in larger jurisdictions and from Courts of Appeal confirmed their awareness of Reg 1/2003; on the contrary, the majority of their counterparts from smaller jurisdictions claim to have no knowledge of this Regulation whatsoever. These responses seem, once again, to be in line with the finding that smaller courts are generally less familiar with competition issues.⁴⁵ Those respondents who know about the existence of the Regulation, obtained this knowledge through certain training activities organised by the government, through keeping track of recent legal developments by reading legal journals or, surprisingly, through occasionally reading about the Regulation in the briefs and other documents presented by parties.

However, a large majority of the respondents stated that they had no idea at all about the extra responsibilities and workload with which they may be confronted as a result of the introduction of the Regulation. Some respondents, however, fear they may need additional support, especially in relation to economic know-how.

⁴³ Spiritus-Dassesse, ‘Recente wijzigingen inzake de uitvoering van de Europese mededingingsregels – de rol van de rechter na de modernisering van het EG-mededingingsrecht’ (see fn 1), p 44.

⁴⁴ *Ibid*, p 48.

⁴⁵ *Supra*, section 4.3.

5 CONCLUSION

It is submitted that the background to competition law application in Belgium, supported by the Stuyck Report and the more recent survey undertaken by the author, demonstrates that the Belgian competition authorities and the Belgian judges are far from ready for the 'new regime'. In 1991, the Belgian legislator enacted a 'modern' Competition Act, which entered into force in 1993. In doing so, Belgium embarked upon an ambitious project. The idea was to introduce a modern competition law to safeguard effective competition in the Belgian market.

The Belgian Competition Council and its supporting bodies were created to function as fully fledged competition authorities. However, subsequently, these authorities never received the necessary resources in order to function adequately. The Competition Council and its supporting bodies, the Competition Service and – later – the Corps of Reporters, have undertaken considerable efforts to execute their tasks as effectively as possible. However, even today, they still lack the necessary staff and resources to be able to perform their functions adequately. Furthermore, today it seems that political intervention may be preventing the Council from functioning properly. Since Regulation 1/2003 is expected to lead to an increased workload, the Belgian competition authorities will under these circumstances probably not be able to cope with their additional responsibilities after 1 May 2004. This problem is exacerbated by the fact that they have no direct experience in applying Arts 81-82 EC Treaty and that their case-law so far lacks a sophisticated economic analysis of the relevant competition issues. This will prove to be a serious handicap when applying the European competition rules to their full extent.

As far as the application of (EC) competition law by the Belgian tribunals and courts is concerned, one can only conclude that, despite its ever growing importance, (EC) competition law has been applied in a very limited number of cases only. Although most judges have some knowledge of competition law, the survey undertaken suggests that magistrates have a lack of knowledge of the more sophisticated aspects of competition law and policy. Some judges partially blame this on the fact that the parties themselves show too little commitment to involve competition law arguments in their briefs and pleas. However, the 'public order' nature of competition law requires its application by judges on their own initiative. Therefore, it seems fair to surmise that the government should assume greater responsibility and better inform the judges of the importance of and recent developments in competition law and policy.

In conclusion, it seems that neither the Belgian competition authorities, nor the Belgian judges have at their disposal the necessary knowledge and means to apply competition law effectively. Therefore, it seems rather unlikely that they will be able to assume the additional responsibilities placed on them by Regulation 1/2003 and ensure the effective application of EC competition law. It is submitted that the Belgian government bears the major responsibility for this state of affairs, as until now it has never demonstrated the willingness to invest the necessary resources for developing an adequate competition law regime. We can only endorse the view that 'Belgium may pride itself on being one of the main advocates of the European ideals, but as far as

competition law and policy is concerned, it may well be one of the weakest pupils in the European classroom⁴⁶.

⁴⁶ Parret, 'België heeft als kartelparadijs geen toekomst' (see fn 42), p 2.

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Private Antitrust Law Enforcement in Italy

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Europe's poor record in the private enforcement of antitrust law has stimulated much recent discussion, especially now that both the Court of Justice in its *Courage* decision and Regulation 1/2003 place increasing emphasis on the role of national courts in the enforcement of European antitrust.¹ In this paper I wish to contribute to the discussion from an Italian perspective. I will focus my attention on actions in which the plaintiff allegedly affected by exclusionary conduct is a business rival of the defendant or a distributor, and on purchasers' suits against the members of a cartel.² It is my view, as developed in this paper, that anti-competitive abuses of dominant position have been the subject of considerable, if not excessive, litigation, whereas private enforcement of hardcore violations such as price-fixing or market allocation cartels has been virtually absent. My argument is that claims by purchasers against members of hardcore cartels are the critical problem of private antitrust law enforcement in Italy. This problem cannot be ameliorated without revolutionary changes to the whole civil procedure system, since the present Italian system is simply not suited for disputes concerning the protection of purchasers' (consumers') diffuse interests. If this conclusion fits with the rest of the continental Europe experience (namely, the civil law part of Europe), it

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¹ Case C-453/99 *Courage Ltd. v Bernard Crehan* [2001] ECR I-6297. Council Regulation 1/2003/EC of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1. See *infra* Section I, § 3.

² Accordingly I will not follow, in the analysis of the reasons for ineffective private enforcement in European national courts, the distinction that is typically made between "use of Community competition law as a 'sword' in actions to obtain injunctive relief to prevent harm that would result from an infringement of Articles 81 or 82, or to obtain damages from a party with whom the plaintiff may not have any contractual relationship for injury suffered as a result of such infringement", and use of Community competition law "as a shield to justify non-performance of a contractual obligation on the grounds that the contractual provision in question infringes Article 81 (or Art 82)": Venit, 'Brave New World: the Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty', (2003) 40 CMLRev 545, 570-571. For the distinction see Jacobs – Deisenhofer, 'Procedural Aspect of the Effective Private Enforcement of EC Competition Rules. A Community Perspective', in Ehlermann – Atanasu (eds), *European Competition Law Annual 2001: A Community Perspective* (herebelow, *European Competition Law Annual 2001*), 2003, 187, 189-191; Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', (2003) 26(3) World Competition 473, 474. Indeed for the purpose of this paper the consequences of this distinction are not of particular significance.

becomes clear that this part of Europe will probably never experience anything like the recent American litigation in the *Vitamins* case.³

In Section I of this paper I will briefly analyse the key elements of antitrust enforcement in the US and the pros and cons of public enforcement and private enforcement in antitrust. A short discussion of the European position will conclude this introductory section and lead to Section II, where I will deal with the Italian antitrust system from the private enforcement perspective. I will consider the issue of abuse of dominance, indicating that claims in this area are brought fairly frequently. Thereafter, I will deal with cases concerning cartels. I will focus my attention on the *Motor Insurance* case, in which the Italian enforcement system risks ending its short history with the incredible judicial conclusion that consumers have no antitrust standing. In Section III I will leave this issue to one side and analyse why the Italian system offers an impossible environment to plaintiffs raising actions in cartel cases. It will become evident that at the root of all the problems lies the absence of effective discovery rules.

A terminological warning is required at the outset. I deliberately use the US term ‘antitrust law’ instead of the UK expression ‘competition law’. In fact, use of the latter creates confusion in a Continental context between the law which handles the market power problem (antitrust law) and that which regulates unfair competition problems (unfair competition law). Many of the problems of Italian law stem from the confusion between the two legal frameworks. In order to avoid this, I will separate them linguistically, following the American approach.

I PUBLIC ENFORCEMENT V PRIVATE ENFORCEMENT

1 Antitrust Enforcement in the US

Currently, US antitrust is stringently enforced.⁴ As far as public enforcers are concerned, the Antitrust Division of the Justice Department may bring either criminal or civil actions for violations of the Sherman Act. Its action is aggressive and is supported by the Corporate Leniency Programme (CLP) adopted in 1993, which has been a spectacular success.⁵ The Federal Trade Commission can issue cease and desist orders under Section 5 of the FTC Act and in competition cases it is also starting to use the remedy of disgorgement of unlawful profits under Section 13 (G) of the FTC Act. The attorney generals of the States and US dependencies vigorously enforce local antitrust laws.

³ For similar conclusions from a German perspective see Basedow, ‘Who Will Protect Competition in Europe? From central enforcement to authority networks and private litigation’, (2001) 2 EBOR 443, 461-468.

⁴ For a recent overview see Weber Waller, ‘The Incoherence of Punishment in Antitrust’, (2003) 78 Chicago-Kent LRev 207; Baker, ‘The Case for Antitrust Enforcement’ (2003) 17 J Econ Persp 27.

⁵ Riley, ‘Cartel Whistleblowing: Toward an American Model?’, (2001) 8 MJ 4; Riley, ‘Beyond Leniency: Enhancing Enforcement in EC Antitrust Law’, forthcoming.

However, the vast majority of antitrust enforcement comes through private damages suits.⁶ Frequently these suits are multiple class actions that can be consolidated in multidistrict litigation procedures and involve huge claims. States are very much involved in private litigation. They bring suit under federal antitrust laws as direct purchasers of goods or services. After the seminal *Illinois Brick* decision,⁷ many states issued antitrust rules also enabling indirect purchasers to recover damages. These rules were allowed by the Supreme Court in *ARC America*.⁸ Thus, states can also bring actions as indirect purchasers when state law allows them to do so.⁹ Moreover, they can sue on behalf of natural persons injured by antitrust violations in their territories, thanks to their *parens patriae* powers.¹⁰

Private litigation usually takes the form of: (i) purchasers' actions against hardcore price fixing, market allocation and market division cartels; (ii) distributors' actions against boycotts; and (iii) business rivals' actions concerning alleged predatory conducts. In Europe the first form of action is practically unheard of.¹¹ Third party claims, "i.e. claims made by parties who are not involved in the anti-competitive agreement and who have suffered loss as a consequence of that scheme"¹² require access to information. Frequently, but not always, these US actions follow government criminal prosecution of the defendants.¹³ But also in these cases, the possibility of third-party actions in the absence of a prior judgment disclosing the result of the public investigation and making accessible otherwise concealed information, appears a staggering achievement from a continental Europe perspective.

The success of private enforcement in the history of US antitrust has been intensely analysed. Private plaintiffs have many incentives to take action and defendants are subject to considerable pressure to settle. Foreign observers usually point to treble damages,¹⁴ class action mechanisms and aggressive discovery rules to explain why

⁶ Weber Waller, *supra* fn 4, 210; Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US', in *European Competition Law Annual 2001*, *supra* fn 2, 95, 99.

⁷ The Supreme Court held in *Illinois Brick Co vs Illinois*, 431 U.S. 720 (1977), that only direct purchasers can sue under federal antitrust law. On the indirect purchasers' issue see *infra* fn 100.

⁸ *California vs ARC Am Corp*, 490 U.S. 93 (1989).

⁹ For a recent analysis of the states' role in antitrust enforcement see First, 'Delivering Remedies: The Role of the States in Antitrust Enforcement', (2001) 69 *Geo W LRev* 1701.

¹⁰ The Hart-Scott-Rodino Antitrust Improvement Act of 1976 gave an explicit right to state attorneys to bring suit in federal courts as *parens patriae* for injuries arising out of a violation of the Sherman Act - 15 U.S.C. 15 c (2000).

¹¹ See also Basedow, *supra* fn 3, 461.

¹² *Id.* 461.

¹³ This is usually the case in rule of reason cases, where private plaintiffs face greater obstacles than in per se liability cases: Weber Waller, *supra* fn 4, 230-231.

¹⁴ Many writers point out that the lack of pre-judgment interest under the Sherman Act actually reduces treble damages to single damages or even less: Lande, 'Are Antitrust "Treble" Damages Really Single Damages', (1993) 54 *Ohio State LJ* 115, 171; accordingly, it is argued that European pre-judgement interest in antitrust cases could be more effective than treble damages without pre-judgement interest in the US: Jones, *supra* fn 6, 103-105.

private enforcement is so effective in the US.¹⁵ Further analysis stresses that US antitrust stands relatively unique also with “its rejection of *in pari delicto* defenses, the peculiar combination of joint and several liability, the lack of contribution, and the way settlements are credited against the potential liability of the remaining defendants in a case.”¹⁶ Moreover, plaintiffs can take advantage of Section 5 of the Sherman Act, which makes any verdict in a government antitrust case *prima facie* evidence in subsequent private litigation. As a consequence, “the knowledge of the existence of a federal grand jury (or FTC investigation) is virtually all that is required for the filing of a good faith class action price fixing case.”¹⁷

In a recent landmark case the full fury of the American enforcement system was unleashed against the world-wide vitamins cartel and even foreign parties tried to take advantage of the plaintiff-friendly US weaponry.¹⁸ Indeed, many non-US companies have started class actions as purchasers of vitamins abroad from the vitamin companies and for delivery outside the United States. In *F Hoffmann-La Roche Ltd, et al v Empagran* the Supreme Court will be called to decide whether or not foreign plaintiffs have standing to invoke the treble damages remedy of Section 4 of the Clayton Act.¹⁹

2 The benefits of cumulative application of public and private remedies

The enforcement level of antitrust laws in America is the subject of debate and criticism.²⁰ Many scholars think that there is too much enforcement and therefore over-deterrence.²¹ Some writers stress that it is the cumulative effect of public and private enforcement that raises deterrence over an optimal level and hence argue that antitrust private enforcement is detrimental.²² A more balanced view outlines the pros and cons of public and private enforcement respectively, and the benefits of a cumulative application of public and private remedies. The analysis is usually conducted from a welfare economics perspective, where antitrust remedies are seen in terms of deterrence more than in terms of compensation and corrective justice. Liability systems and government regulations have to establish optimal levels of deterrence. In theoretical terms public enforcement offers two advantages. First, it allows better control in setting the optimal monetary or non-monetary sanction in accordance with the theory of

¹⁵ For an overview see the contributions contained in Ehlermann – Atanasiu (eds), *European Competition Law Annual 2001: A Community Perspective*, *supra* fn 2.

¹⁶ Weber Waller, *supra* fn 4, 208.

¹⁷ *Id.* 231.

¹⁸ The Vitamins cartel has been studied by Connor, *Global Price Fixing: Our Customers are the Enemy*, Kluwer Academic Publishers, 2001.

¹⁹ See the Brief for the United States as Amicus Curiae supporting Petitioners by the Department of Justice at www.usdoj.gov/atr/cases/f202300/202397.htm. On the issue see also more recently Trenchard, *The Scope of Antitrust Jurisdiction Abroad: A Classic Conflicts-Of-Law Problem*, 2004 (the working draft of the article is published in www.ssrn.com).

²⁰ For a recent overview see American Bar Association, *Section of Antitrust Law*, Remedies Forum, 2003.

²¹ Usually this view does not contest that the benefits of antitrust appear to be greater than the enforcement costs. Thus, the debate concerns the enforcement level, not the need of antitrust law: see again Baker, *supra* fn 4, 42-43; for a different perspective, however, see Crandall – Winston, ‘Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence’, (2003) 17 *J Econ Persp* 26.

²² In Europe see Wils, *supra* fn 2.

deterrence, because a single public enforcer can take into proper consideration social cost and the probability of detection when deciding punishment. In fact, damages awarded in private litigation are unrelated both to the social cost and the *ex-ante* probability of detection of the violation, and when used together with administrative or criminal fines will usually alter the optimal level of deterrence.²³ Second, public enforcers have stronger investigative powers²⁴ and are equipped to discover information that private parties cannot usually disclose.

However, there are at least three arguments against a system that relies entirely on the public enforcement of antitrust law, considering that no public body can realistically calculate on a case-by-case basis the social cost of monopoly power²⁵ and it is in any event impossible to assert *ex ante* the probability of detection if the actual level of diffusion of wrongdoing is unknown. First, in the real world public agencies are not usually the most efficient enforcers, because they cannot have access to the widespread information that private parties naturally possess.²⁶ Second, they lack adequate financial resources to investigate all potential wrongdoers and to pursue all pending investigations with the same unrestricted vigour. Third, the public prosecutor can face agency costs. “Unable to capture the benefits of his work, he would tend to shirk. He might seek to maximize something other than allocative efficiency. He also would be amenable to payoffs, perhaps in the indirect form of future employment (the ‘revolving door’ between public and private jobs) or support for future political campaign.”²⁷

For all these reasons private parties must be provided with economic incentives to report, in the form of damages, restitution, bounties or any other form of monetary reward whatsoever.²⁸ In theory the power to sue granted to purchasers would also induce them to reduce switching to substitutes when facing higher prices due to cartels or abusive monopolization, thereby lowering the deadweight loss caused by monopoly.²⁹ Accordingly, even though the private incentive to bring suit remains “fundamentally misaligned with the social optimal incentive to do so, and the deviation between them could be in either direction”,³⁰ the enforcement pressure granted by the ‘private attorney-general’ is nevertheless needed. If one adds to these arguments considerations of corrective justice,³¹ it is clear that the problem is not whether or not private actions should have a role in antitrust enforcement. Rather, the problem is, in effect, that of reaching a balance of private and public enforcement (the most criticized

²³ In Europe see Wils, *supra* fn 2, 480-481.

²⁴ In Continental Europe we would rather say they have exclusive investigative powers: *infra*, Section III, § 15.

²⁵ For analysis of the social cost of monopoly see Viscusi – Vernon – Harrington, *Economics of Regulation and Antitrust*, The Mit Press, 2000, 75 ff.; Posner, *Economic Analysis of Law*, Aspen Publ., 2003, 272 ff.; Page, ‘Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury’, (1980) 47 U Chi LRev 467; Baker, *supra* fn 4, 44.

²⁶ Shavell, *Foundations of Economic Analysis of Law*, The Belknap Press, 2004, 578-579.

²⁷ Easterbrook, ‘Detrebling Antitrust Damage’, (1985) J Law & Ec 445, 454.

²⁸ Shavell, *supra* fn 26, 578-579.

²⁹ Easterbrook, *supra* fn 27, 451.

³⁰ Shavell, *supra* fn 26, 391.

³¹ Komninos, ‘Introduction’, 21, 23, in *European Competition Law Annual 2001*, *supra* fn 2.

factor of imbalance in the US being state activism, both through state antitrust laws and through state enforcement of federal antitrust law).³² In the end the real issue concerns the creation of formal or informal effective mechanisms for coordinating the roles of the two institutional frameworks (litigation and regulation), as is usual in fields where there is a cumulative effect of both.

3 Europe

In Europe antitrust private enforcement plays no significant role, although there is an argument that the statistics of final judgments given in antitrust matters give an understated impression due to the frequency of settlements. The general consensus is that private litigation must have a complementary function to that of public enforcement.³³ As recital 7 of Regulation 1/2003 states, “national courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements.” After many years during which the main cause for the lack of private enforcement was explained by a deficit in antitrust knowledge amongst national courts, over the last decade it has appeared clear that cultural barriers alone cannot explain the European trend. The problems are structural. Regulation 1/2003 seeks to address some of them. It abolishes the notification procedure, also with the aim of facilitating the application of competition rules by the national courts, “as plaintiffs will no longer face torpedo notifications to DG Competition aimed at suspending proceedings in the national courts.”³⁴ Moreover, Article 15 introduces a new co-operation procedure and enables the Commission to intervene as *amicus curiae* in national proceedings concerning antitrust law.³⁵ From its side, the Court of Justice in *Courage v Crehan* stated the existence of a Community right to damages. As has been written, “the possibility opens up now for prospective plaintiffs to avail themselves of the Community nature of their rights to damages and to urge national courts to offer adequate protection to their Community rights, as they are bound to do by Community law.”³⁶

However the general view is that Regulation 1/2003 and the *Courage* decision cannot alter the pattern, embedded in national laws that are naturally unfriendly to private plaintiffs in antitrust suits. The national legal factors that play against the European

³² Posner, ‘Antitrust in the New Economy’, (2001) 68 Antitrust LJ 925; see also Blair – Harrison, ‘Reexamining the Role of Illinois Brick in Modern Standing Analysis’, (1999) 68 Geo Wash LRev 1.

³³ Few voices are against this position: one comes from Wils, *supra* fn 2, 480-486.

³⁴ Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part Two: Between the Idea and the Reality: Decentralisation Under Regulation 1’, [2003] ECLR 657, 665.

³⁵ However it has been argued that the Commission’s effort is just a political masterstroke: Riley, ‘EC Antitrust Modernisation: The Commission Does Very Nicely – Thank You! Part One: Regulation 1 and the Notification Burden’, [2003] ECLR 604.

³⁶ Komninos, ‘New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right to Damages’, (2002) 39 CMLRev 447, 487. Although it is arguable, at least in England, that *Courage* is a limited breakthrough, following the Court’s ruling the Court of Appeal in *Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637 noted, in particular, at para 167, that ‘the effect of the ECJ decision was to put its imprimatur on the particular claim of Mr Crehan, holding that a right to the type of damages he claimed was conferred on him by Community law.’

plaintiff are easily identifiable through a comparison with the US plaintiffs' weaponry. I will discuss some of these factors from the perspective of Italian law in Section III. In the following section, however, I will argue that alleged exclusionary abuse is the subject of frequent litigation in Italy; accordingly, third-party claims are the real issue.

II THE ITALIAN ANTITRUST EXPERIENCE

4 The Italian competition law system

Competition law based on the EC Treaty rules was introduced in Italy by law no. 287/1990. A new independent authority (Autorità garante della concorrenza e del mercato - AGCM) was established and empowered to prohibit mergers, to investigate undertakings and abuses of dominant position and inflict sanctions in the form of monetary fines, following the EC Commission's model. However, the AGCM was substituted by the Bank of Italy as far as the banking market was concerned, by means of a much debated rule (Article 20) that is currently under discussion and will probably be amended in future through the elimination of the 'banking market exception'. The AGCM was also empowered to issue cease and desist orders and, in case of continuous violation of its own orders, to suspend any business activity of the firm for a period of up to 30 days. After considerable debate it was agreed that the AGCM's decisions had to be subject to appeal before the Administrative Court of the Rome Area ("Tribunale amministrativo regionale del Lazio"), *i.e.* a special court evaluating the decisions of independent authorities on procedural grounds and not on the basis of the factual background on which the decision relied. The AGCM was not empowered to institute civil actions.

At the same time, it was decided to give private enforcement a significant role. Under the Italian Constitution, special courts cannot be created.³⁷ Therefore the Antitrust Law attributed a special jurisdiction to Courts of Appeal as far as nullity of contracts and damages suffered by private parties were concerned in cases involving the violation of the Italian Antitrust Law (Article 33-2). Moreover, Courts of Appeal were given the power to grant interim measures. In establishing subject matter jurisdiction, the legislator wanted to make a clear statement: competition law is a serious matter to be decided quickly by higher level courts such as Courts of Appeal, thereby creating the only significant situation where these Courts act as first instance judges and one of the few areas where civil litigation offers no room for appeal on grounds of findings of facts. However, Article 33(2) proved to be very poorly drafted, as there was no reference to restraining or positive injunctions, to restitution under unjustified enrichment rules, or to the fact that subject matter jurisdiction does not cover suits concerning the violation of the EC Treaty competition rules, which remain in the jurisdiction of the low level courts in accordance with the general rule of jurisdiction given by the Civil Procedure Code.³⁸

³⁷ Special courts were used in the fascist era as a instrument to limit or suppress the general right to a due process. Accordingly, the Italian Constitution forbids their creation.

³⁸ Tesauro, 'Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues', in *European Competition Law Annual 2001*, *supra* fn 2, 269-270, who points also out that "the legislature has conferred the private (2004) 1(1) CompLRev

The legislator was aware that Italian courts had had no experience in antitrust law (litigation concerning EC antitrust rules had been very rare in the two previous decades) and was concerned about the risk of serious misunderstandings and ‘creative lawyering’. Therefore, a very straightforward interpretive rule was inserted in the Law, Article 1 (4) stating that the antitrust substantive rules contained in the Law are to be interpreted following the “principles of EC competition law”.

The Antitrust Law did not envisage any mechanism for coordinating AGCM’s actions with private actions. Even though administrative fines are subject to the principles governing criminal fines, in Italy (as in other European countries) private parties are not allowed to claim for damages in public law proceedings concerning wrongdoings punished with administrative fines (i.e. they cannot stand as *partie civile*).³⁹ This depends on the nature of the administrative bodies called on to apply administrative fines, which are not courts and can neither be considered as a type of specialized court because such courts are forbidden under the Italian Constitution. The rules adopted by the AGCM with reference to its own administrative proceedings permit the participation of interested third parties, but subject to very short time limits; this participation is permitted in order to submit arguments and not to obtain any kind of private adjudication. It is not clear whether courts have a power to grant restraining and positive injunctions concurrent to the power to issue a cease and desist order of the AGCM.⁴⁰ Finally, no rule equivalent to Section 5 of the Sherman exists (however, experience shows that courts tend to rely on the facts ascertained in the AGCM’s decision as evidence) and no mechanisms of access by private litigants to the documents obtained by the AGCM during a previous administrative procedure has been envisaged by the Antitrust Law.

5 Abuse of a dominant position: AGCM decisions versus court judgments

To date, the AGCM has opened 64 procedures concerning alleged abuses of dominance, finding an abuse in 48 cases (around 75% of cases).⁴¹ As far as private actions in court are concerned, it is impossible to rely on precise data. First, some actions are settled before judgment, even though the percentage of settled cases is certainly not as high as it is in England or in the US, since Italian procedure does not offer any discovery mechanism that can push anticipated settlement of a dispute.⁴² Second, not all the courts’ decisions are published. Third, many claims asserting abuse of market power are usually dressed as unfair competition cases (under Article 2598 n.

enforcement of competition rules on Courts of Appeal in recognition of the fact that a higher court is better equipped to deal with disputes involving complex economic assessments” and that the choice reflects “an effort to avoid judicial fragmentation.”

³⁹ For discussion concerning the *parte civile* model and its applicability to antitrust cases see Lever, ‘Effective Private Enforcement’, in *European Competition Law Annual 2001*, *supra* fn 2, 115.

⁴⁰ Tavassi, ‘Substantive Remedies for the Enforcement of National and EC Antitrust Rules before Italian Courts’, in *European Competition Law Annual 2001*, *supra* fn 2, 147. See also *infra* Section II, § 5.

⁴¹ The data is updated to 31 December 2003. In 2004 the AGCM opened a procedure concerning abuse of a dominant position that is still in progress.

⁴² See *infra*, Section III, § 15.

3 Civil Code), especially as far as predatory pricing and boycotts are concerned.⁴³ Among the published decisions which rely on Article 3 of the Antitrust Law (abuse of dominant position), courts have decided there was an abuse in 2 out of 27 cases, equivalent to around 7.5% of cases.⁴⁴

The difference between the two percentages creates the impression that the rules against abuse of dominant position are enforced primarily by the antitrust authority and not by the courts. However, this difference must not be given too much emphasis. The AGCM does not open an investigation procedure in all the cases that are reported by private parties, selecting only the most significant cases.⁴⁵ This explains the high percentage of ‘success’. On the contrary, courts do not have any screening system to enable them to dismiss openly ungrounded actions. Monopolization claims (in Europe, claims of abuse of dominant position) are usually raised in order to subvert competition.⁴⁶ Typically the plaintiff invokes the antitrust law to demand protection from a defendant’s behaviour that damages him, claiming that the protection of competition means the protection of firms operating in the market (for historical and cultural reasons, this claim finds considerable support also amongst academics).⁴⁷ Since the Italian antitrust authority is a public body which does not take decisions primarily concerned with the protection of individual rights, it is less prone to be ‘captured’ by a rival firm’s complaints and allegations. Moreover, the AGCM takes into consideration the overall situation of a market before asserting the existence of an abuse. In contrast, a court, which is also less experienced than a specialized authority, must rely on information provided by the two opponents, without a clear picture of the market reality, since it has no general power of investigation concerning the market structure. For this reason, a plaintiff can be encouraged to start an action before a court when the authority has not reacted to its complaints or when the likelihood that the AGCM will open an investigation or take a punitive decision against the accused incumbent are low. In such a situation the plaintiff may also consider that the AGCM’s decision can have a negative impact a subsequent court decision on the same factual grounds. Indeed, the correlation between the authority’s decision and the court’s judgment is also evidenced by the fact that the two cases in which the court granted damages to the plaintiff followed the AGCM’s procedures against the dominant firm and which concluded with injunctions and fines.⁴⁸

⁴³ I have considered the issue in Giudici, ‘I prezzi predatori’ (Predatory Prices), Giuffrè, Milan, 2000, 285 ff.

⁴⁴ The two cases in those the plaintiffs succeeded are Milan Court of Appeal, 24 December 1996, *Telesystem vs Telecom Italia*, Danno e responsabilità 602 (1997) with note of Bastianon, and Rome Court of Appeal, 20 January 2003, *Albacom vs Telecom Italia*, Foro it. 2474 (2003) with note of Scoditti.

⁴⁵ The AGCM is obliged to evaluate any complaint but must start an investigation only when there is sufficient evidence concerning the existence of an infringement (*fumus boni juris*). See Antonioli, ‘Riflessioni in tema di procedimento nel diritto antitrust’ (2000) Riv Ital Dir Pubbl. Comunitario 61, 81-83.

⁴⁶ Baumol - Ordoover, ‘Use of Antitrust to Subvert Competition’, (1985) 28 J L & Economics 247; Giudici, *supra* fn 43, 151 ff; for a different perspective Fox, ‘We Protect Competition, You Protect Competitors’, (2003) 26(2) World Comp 149.

⁴⁷ See *infra*, Section II, § 11.

⁴⁸ See *infra*, Section II, § 6.

In short, if you have a very strong case it seems to be advisable to complain before the antitrust authority and wait for a positive conclusion of the public enforcement mechanism, and after that start legal proceedings to recover damages, whereas if you have a weak case and you want to utilise competition law to your advantage as a law that protects competitors from fierce forms of market rivalry, it is probably more convenient to raise your action immediately before a court. This means that it is more probable for weak cases to be brought before a court than to be subject to a formal procedure and a final decision of the AGCM. This is a first explanation for the difference in the rate of ascertainment of abuses of dominance observable between courts' published judgments and AGCM official decisions. This difference, however, also shows that courts are not so ready to grant antitrust defences to competitors. The ratio between successful and unsuccessful cases offers clear evidence that Italian courts are not so naïve when abuse of dominant position is concerned.

A second explanation for the difference in the ratios of findings of abusive conduct between the AGCM and courts lies in the fact that many private enforcement cases have been decided entirely on procedural grounds. It should be remembered that Courts of Appeal are entitled to declare the nullity of agreements, to grant damages and to take interim measures, and there is no reference to restraining injunctions. Some courts and some scholars consider that, since judges have a general power to take interim measures of whatever kind (atypical measures) directed at preventing unrecoverable damages, Courts of Appeal can also take interim measures ordering the dominant firm to adopt 'positive behaviour' such as fair price clauses or the opening of a contractual relationship with the plaintiff.⁴⁹ Other Courts have stated that interim measures must be related to final judgments declaring a contract null and ordering damages, thereby preventing courts from anticipating orders that cannot be contained in the final judgment.⁵⁰

A third explanation for the difference in the ratio of findings of abusive conduct is of a 'path-dependency' type. The most significant cases of abuse discovered by the AGCM concern regulated industries. The AGCM now possesses a vast knowledge of the incumbents' behaviour in regulated markets and reacts promptly to any complaint concerning those markets. Therefore, the AGCM is building up a significant set of related decisions in the field, in which it is taking benefit of economies of scale, scope and specialization that no judge could ever develop.⁵¹ An incumbent's rivals or

⁴⁹ See Alessi, 'Legge 287/90: tutela cautelare inibitoria, mercato rilevante ed altri problemi' (1992, II) Riv Dir Comm. 283; La China, 'Commento alla legge 287/90', in Afferni (ed), *Concorrenza e mercato*, 652; Milan Court of Appeal, 19 April 1995, *Ceit vs Ciuffo Gatto*, Tavassi - Scuffi, *Diritto processuale antitrust*, Giuffrè, 1998, 631 (the court initially ordered the defendant to deal with the plaintiff, but the injunction was not confirmed on review).

⁵⁰ Rome Court of Appeal, 21 December 1993, *De Montis & Catering Roma vs Aeroporti di Roma*, Tavassi - Scuffi, *Diritto processuale antitrust*, *supra* fn 49, 534.

⁵¹ For instance, the antitrust authority has developed considerable experience in the telecommunication field: see, amongst other decisions: 3 C Communications, decision no. 412, 4 March 1992, *Bollettino* no. 5, 1992; *Ducati/Sip*, decision no. 1028, 24 March 1993, *Bollettino* no. 6, 1993; *Sistema telefonia cellulare GSM*, decision no. 1532, 28 October 1993, *Bollettino* no. 32, 1993; *Telesystem/Sip*, decision no. 2662, 10 January 1995, *Bollettino* no. 1-2, 1995; *Sign/Stet Sip*, decision no. 2970, 27 April 1995, *Bollettino* no. 17, 1995; *Assistal/Sip*, decision no. 3077, 30 May 1995, *Bollettino* no. 22, 1995; *Albacom/Telecom Italia- circuiti dedicati*, decision 5428, 30 October

distributors, more interested in preventing exclusionary practices than in obtaining damages, are therefore induced to trigger public enforcement instead of private enforcement. Both the uncertainties concerning the power of Courts of Appeal to grant restraining and positive injunctions, and the AGCM's expertise in the field of regulated industries lead one in an opposite direction from the one envisaged by those lawyers who consider that the first place to go for a plaintiff looking for interim relief is a court and not an administrative authority.

6 Damages in cases of abuse of a dominant position

In two cases, both concerning Telecom, the Court of Appeal granted damages for abuse of a dominant position.

In the first case, Telecom had denied Telesystem access to its network, the latter being a company which wanted to offer telecommunication systems to business clients. Initially Telesystem asked for interim measures from the Court of Appeal of Milan, which proved unsuccessful.⁵² After the AGCM's decision declaring that Telecom had abused its dominant position,⁵³ Telesystem claimed damages before the Court of Appeal. The Court held Telecom liable⁵⁴ and appointed a team of experts to ascertain the damages suffered by the defendant,⁵⁵ instructing them to quantify the costs faced by Telesystem in order to start its business and the lost profits due to Telecom's denial of access, considering also Telesystem's lost business opportunities as the first operator in the market.⁵⁶

The second case concerned Albacom, a company which requested, again, to be connected to Telecom's network. However, Albacom, unlike Telesystem, was not forced to wind up and, as soon as the AGCM ordered Telecom to offer its service, Albacom started a successful business. The Court of Appeal of Rome applied the 'but-for-theory'⁵⁷ and condemned Telecom to pay the damages that Albacom had suffered because of the delay in the start-up of the business.⁵⁸

1997, *Bollettino* no. 44, 1997; *Ass Ital Internet Providers/Telecom* decision no. 7978, 28 January 2000, *Bollettino* no. 4, 2000; *Tiscali-Albacom/Telecom Italia* decision no. 8481, 13 July 2000, *Bollettino* no. 28, 2000; *Infostrada/Telecom Italia- Tecnologia Adsl*, decision no. 9472, 27 April 2001, *Bollettino* no. 16-17, 2001

⁵² Interim measures were initially granted by the Milan Court of Appeal, 27 September – 8 October 1994, Tavassi - Scuffi, *Diritto processuale antitrust*, *supra* fn 49, 560; but later, on review, the interim measures were not confirmed: Milan Court of Appeal, 4th-11 November 1994, Tavassi – Scuffi, *Diritto processuale antitrust*, *supra* fn 49, 568.

⁵³ AGCM decision no. 2622 dated 10 January 1995, *supra* fn 51.

⁵⁴ Milan Court of Appeal, 18 July 1995, Tavassi - Scuffi, *Diritto processuale antitrust*, 571.

⁵⁵ Milan Court of Appeal, 24 December 1996, Tavassi - Scuffi, *Diritto processuale antitrust*, 575.

⁵⁶ Milan Court of Appeal, Tavassi - Scuffi, *Diritto processuale antitrust*, 573.

⁵⁷ Blair - Page, 'Speculative Antitrust Damages' (1995) 70 Washington LR 433.

⁵⁸ Rome Court of Appeal, *supra* fn 44. AGCM had already sanctioned Telecom: decision no 8481 dated 13 July 2000, *Bollettino* no 28, 2000.

7 Comment

Notwithstanding the obstacle concerning interim measures, alleged anti-competitive abuse of dominance (*i.e.* exclusionary abuse) is the subject of fairly frequent litigation in Italian courts. This is no surprise. Problems of incomplete and asymmetric information which, in the absence of discovery mechanisms, frustrate plaintiffs in third-party claims, are less severe in litigation settings where the two opponents are business rivals acting in the same market or, being at different vertical levels, had a previous business relationship. Unfair competition law was used before the arrival of a national antitrust law and it is still used as a substitute to exclusionary abuse of dominant position.⁵⁹ Thus, there is a consolidated background for this kind of litigation.

My analysis of predatory pricing suits in Europe and in Italy shows that in unregulated industries claims of abuse of dominant competition are usually brought in order to subvert competition. From this standpoint Easterbrook's view seems correct that a business rival is not the ideal 'private attorney general' in antitrust suits, because its incentive to sue is usually very much misaligned with social interest.⁶⁰ Accordingly, my opinion is that there is probably too much, and not too little, litigation as far as exclusionary abuses of dominant position in unregulated industries are concerned.

8 Agreements - Cases where parties use antitrust as a shield and boycott cases

In many published cases parties to an agreement have claimed that the contract was null and void under Article 81 EC Treaty or under its national equivalent, Article 2 Law no. 287/1990. Therefore, there are also reported cases in Italy in which parties have used antitrust as a shield in order to be discharged from their contractual obligations.⁶¹ Also to be considered amongst these cases are those actions in which the plaintiff, alleging that the contract entered into by him was null and void because the other party was a member of a cartel, has tried to be discharged from its obligations. Many of these actions concerned the clauses contained in the banking standard contracts drafted by the Italian Banking Association (Associazione Bancaria Italiana – ABI) and, in particular, standard bank guarantees.⁶² The interesting legal point raised by these cases is whether contracts entered into by members of a cartel and by means of which such members are performing the cartel agreements are null and void. The matter will be dealt with in following § 13. On the contrary, in Italy there are no significant published cases where the defendants torpedoed civil action by filing a notification with the Commission.⁶³ Many cases have been subject to arbitration and it has been disputed whether or not antitrust issues can be decided by arbitrators.

⁵⁹ Giudici, *supra* fn 43, 285 ff.

⁶⁰ Easterbrook, *supra* fn 27, 458-461.

⁶¹ Court of Cassation, 1st February 1999, no. 827, *Ferro e altro vs Mafin e altro*, Giur. It., 1223 (1999, II).

⁶² Court of Cassation, 4 March 1999, no. 1811, *Montanari vs Banca carige*, see *inter alia* Alba Tribunal, 12 January 1995, *Benf vs Cassa Rurale Artigiana di Gallo di Grinzale Cavour*, Giur. It., 212 (1996, II); Genoa Tribunal, 21 May 1996, *Bagnasco vs Banca Popolare Novara*, Giur. It. 167 (1997, II); Milan Tribunal, 25 May 2000, *Illarietti, Novara vs Banca Fideuram*, Banca Borsa Titoli di Credito, 88 (2001, II).

⁶³ On the issue see Riley, *supra* fn 34, 666.

A case recently published concerned a typical refusal to deal litigation, in which a travel agent was boycotted by a cartel of tour operators because of its pricing policy.⁶⁴ A rather more complex case involved the football team Juventus and raised issues concerning *in pari delicto defences* and ‘passing on’. The team had negotiated a contract with a travel operator by means of which the tickets for the Champions League final were sold to consumers with a high overcharge and bundled with travel services. Juventus had the right to 20 per cent of the turnover generated by the travel services and a huge per cent premium on the transaction value. The Court applied both Article 2 and Article 3 of the Antitrust Law. As far as the agreement was concerned, the Court ordered the restitution of the premium but denied damages, asserting that the travel agent was *in pari delicto* and had passed the overcharge to consumers.⁶⁵

Finally, two interesting cases involved lobbying activities by means of which the members of a cartel were seeking to obstacle a business rival.⁶⁶

9 The Motor Insurance case

As far as private enforcement of antitrust by third parties is concerned, the only major case is that of *Motor Insurance*, which is raising many problems, one of which seems to be an Italian peculiarity and a major obstacle to the future of private enforcement of antitrust law in Italy.

The AGCM imposed a sanction on a large number of insurance companies, on the basis that they had established a mechanism of exchange of information concerning car accident insurance.⁶⁷ The companies appealed the decision but the State Counsel, the highest administrative court, confirmed the existence of the cartel, even though it has discharged some companies because of their limited role in the cartel.⁶⁸

Motor insurance is compulsory in Italy. Every car has to be insured by the owner or by the usual driver against accident and third party risk. Accordingly, the market is immense. US litigation mechanisms would have exposed the members of the cartel to class action suits for billions of dollars. In Italy the case is proceeding very differently. In the absence of class actions, many consumers started individual legal proceedings against their insurers to recover the overcharge, relying on the AGCM’s assumption that the cartel had caused a 20 per cent increase in their premiums.⁶⁹ Two factors drove the insured to litigate before the small claims judge, the *Giudice di Pace*, instead of acting before the Court of Appeal. First, many of the plaintiff’s lawyers were indeed not aware that subject matter jurisdiction had been introduced by the antitrust law; accordingly, as the sums to be recovered were very low and thereby in the apparent jurisdiction of the

⁶⁴ Milan Court of Appeal, 11 July 2003, *Bluevacanze vs I Viaggi del Ventaglio*, Foro it. 597 (2004, I).

⁶⁵ Turin Court of Appeal, 6 July 2000, *Indaba Incentive Company vs Juventus*, Danno e responsabilità 46 (2001).

⁶⁶ Milan Court of Appeal, 13 July 1998, *Tramaplast c Macplast*, Giur. It. 1897 (1999, III).

⁶⁷ Decision dated 28 July 2000 no. 8546, *Bollettino* no. 30, 2000.

⁶⁸ State Counsel, 23 April 2002, no. 2199, Foro it. 482 (2002, III).

⁶⁹ See Giudice di Pace of Sala Consilina, 8 October 2001, *MR vs Nuova Tirrena Assicurazioni*, Arch. Giur. Circ., 72 (2003, I), Giudice di Pace of Laviano, 27 September 2002, *DGR vs Alleanza Subalpina Ass*, Arch. Giur. Circ., 72 (2003, I).

minor judge, they acted before the *Giudice di Pace*. Second, Courts of Appeal are located only in large cities and, being top-level judges, are perceived by lawyers as very demanding courts in term of quality of the legal paperwork, whereas *Giudici di Pace* are local and undemanding also because they can apply equity instead of formalized legal rules. Anglo-American lawyers must not think that they are an equity court in the English sense; nevertheless, they are not tied by strict adherence to formal legal reasoning in their decision. In the light of this last factor, it is easy to understand why insured parties tried to avoid Courts of Appeal. The approach of consumers' lawyers clearly shows that if claims are small and there is no way to aggregate suits, plaintiffs prefer small claim judges.

Needless to say, insurers raised a jurisdiction defence, claiming that small claims judges lacked subject matter jurisdiction. Nevertheless, many *Giudici di Pace* have decided in favour of the plaintiffs.⁷⁰ In order to circumvent Article 33(2) of the Antitrust Law (subject matter jurisdiction clause), they have used many different arguments as to the nature of the sum (usually, 20% of the insurance premium) awarded to the plaintiff. Some have argued that the restitution of the overcharge is a restitution grounded on the rules against unjustified enrichment (art. 2033 Civil Code).⁷¹ However, this view has little justification if one applies formal legal reasoning. Since a contract exists, in order to apply the rules against unjustified enrichment the judge should declare the contract to be null and void and thereafter order restitution as payments were made without consideration. But the *Giudici di Pace* cannot declare a contract null and void, for Article 33(2) paragraph clearly gives, on the issue, exclusive jurisdiction to Courts of Appeal. Moreover, restitution should be in full and not partial. Partial restitution is equivalent to a judicial decision concerning the fair price, a ruling for which the theory of unjustified enrichment allows no room.⁷² Other judges, supported by some writers, have argued that the overcharge is a breach of good faith rules and fairness principles.⁷³ However, a breach of contractual rules gives room to damages, not restitution; and again, damages are within the special jurisdiction of Courts of Appeal.

In the meantime insurance companies were lobbying the government in order to avoid *Giudici di Pace* equity decisions circumventing Article 33 of the Antitrust Law and being submerged by local court adjudications of the 20% in favour of the insured party. The Government issued an urgent decree that was later approved.⁷⁴ The new law states that

⁷⁰ Giudice di Pace of Casoria, 12 February 2003, *Barbato vs Lloyd Adriatico Ass.ni*, Foro it. 2192 (2003, I) with note of Colangelo, Giudice di Pace di Roma, 21 March 2003, no. 13638, *Carli vs RAS*, I contratti 900 (2003) with note of Hazan, Giudice di Pace di Bari, 13 January 2004, no. 181, *BF vs Milano Ass.ni* (unpublished).

⁷¹ Giudice di Pace di Roma, 21 March 2003, no. 13638, *Carli vs RAS*, *supra* fn 70, Giudice di Pace of Laviano, 27 September 2002, *DGR vs Alleanza Subalpina Ass*, *supra* fn 69.

⁷² Guizzi, *Mercato concorrenziale e teoria del contratto*, (1999) Riv Dir Comm, 67, 114-120, asserts that rules on severability could be applied by analogy. However also severability rules do not empower courts to modify the term of a contract.

⁷³ See Giudice di Pace of Casoria, 12 February 2003, *Barbato vs Lloyd Adriatico Ass.ni*, *supra* fn 70, Giudice di Pace of Sala Consilina, *MR vs Nuova Tirrena Assicurazioni*, *supra* fn 69, Guizzi, *supra* fn 72, 112; Guizzi, 'Struttura concorrenziale del mercato e tutela dei consumatori. Una relazione ancora da esplorare', (2004, I) Foro it. 479, 482, mentioning Article 1(e) Law no. 281/1998, as well as Scoditti, 'Il consumatore e l'antitrust' (2003, I) Foro it 1127, 1130.

⁷⁴ The decree is the no. 18 dated 8 February 2003 and became Law no. 63 dated 7 April 2003.

that Giudici di Pace can continue to apply equity if the value of a case does not exceed €1100 and if the case does not involve standard form contracts (which include *inter alia* insurance contracts).

10 The position of the Court of Cassation in the Axa case and in the Unipol case

The Court of Cassation had already held that consumers have no standing under antitrust law in a case where the plaintiff, in order to be discharged from the obligations stemming from a bank guarantee, had claimed that the text of the bank guarantee was the result of a bank cartel, and thus the guarantee he had signed was null and void.⁷⁵ The decision did not attract much attention, also because the plaintiff's attempt to use antitrust as a shield did not arouse much sympathy. However, when the first case in the Motor Insurance litigation finally reached the Court of Cassation, the judgment came as a shock. The Court held, in a decision involving the insurance company Axa, that the Giudici di Pace have jurisdiction in deciding upon insurer-insured litigation, as far as the plaintiff can establish a liability not grounded on antitrust law, i.e. a liability based on tort rules: consumers – the Courts repeated – have no standing in antitrust actions, since antitrust law goes to the direct benefit of competitors and only to the indirect benefit of consumers.⁷⁶ Therefore, consumers fall outside the class of persons whom the antitrust law is designed to protect.

It should be noted that no reference to the *Courage* case is contained in the decision. The Court simply ignored EC law and the interpretation of the Court of Justice. The Axa decision is thus in clear violation of Article 1(4) of the Antitrust Law, which states that in the interpretation of the Law the courts have to follow the EC principles of interpretation.⁷⁷ Moreover, the Court ignored the history of antitrust law, the US experience, the law and economics debate and the reasoning which shows that the best plaintiff in antitrust private actions is the buyer of the monopolized goods.⁷⁸

In a following case, however, a different section of the Court held that the issue of consumers' standing deserves careful examination and that all sections of the Court have to discuss and decide the issue.⁷⁹ Therefore, at present the market is waiting for a "Sezioni Unite" (joint) decision, that will decide whether insured parties have an action under Article 33 (therefore assessing that all cases pending before the *Giudici di Pace* are out of their jurisdiction) or whether insured parties have no action under antitrust law (thereby instructing *Giudici di Pace* to dismiss all claims or inviting them to a 'mission

⁷⁵ Court of Cassation 4 March 1999, no. 1811, *Montanari vs Banca carige*, *supra* fn 62

⁷⁶ Court of Cassation, 9 December 2002, no. 17475, *Axa vs Larato*, Foro it. 1122 (2003, I).

⁷⁷ Needless to say, if the Court of Cassation had decided in accordance with the *Courage* case (*supra* fn 1), it should have dismissed the case on procedural grounds, on the basis that the small claim judge had no jurisdiction. It must be also noted that if the action against the insurers is considered from the perspective of Article 81 EC Treaty, as in the actions concerning the standard banking contracts drafted by the Italian Banking Association (*supra*, fn 62), the position of the Court of Cassation could create potential liability for Italy under the EC Treaty rules in accordance with the *Köbler* decision: Court of Justice, Case C-224/01, 30 September 2003, *Köbler vs Republic of Austria*.

⁷⁸ Easterbrook, *supra* fn 27, 463 ff.

⁷⁹ Court of Cassation, 17 October 2003, no. 15538, *Unipol vs Ricciardelli*, Foro it. 2938 (2003, I).

impossible', *i.e.* finding a legal reasoning assessing that the presence of a cartel entitles the consumer to damages grounded on rules different from antitrust ones).

Needless to say, if the Joint Boards of the Cassation Court decide that consumers have no standing, the result will be astonishing: one of the founders of the European Community will raise, through its judiciary, a huge barrier to antitrust private enforcement, probably violating the Treaty as interpreted by the Court of Justice in the *Courage* case. Horizontal-cartels are the hard-core violations of antitrust rules. If consumers are denied any standing in antitrust litigation, the whole concept of private parties as private general attorneys acting in support of the public interest can be forgotten in Italy.

11 How the Consumer Standing Issue arose: the confusion between antitrust law and unfair competition law

It is interesting to understand how the idea that consumers have no standing in antitrust actions arose. First, in the history of Italian competition law, in the absence of antitrust law, in the sixties and the seventies there was a gradual mixing of reasoning grounded on unfair competition principles with a new legal reasoning relying, in a very naïve way, on 'market competition' principles emerging from the EC Treaty and which could find no explicit legislative equivalent in Italy.⁸⁰ The legal line of reasoning used to 'import' antitrust principles was grounded on Article 41 of the Constitution, a rule granting, in its first paragraph, the freedom of enterprise and in the following paragraph stressing that freedom of enterprise cannot conflict with social welfare. As economics was unknown to lawyers and judges, it was difficult to grasp that antitrust protects consumer welfare and not competitors. Protection of competition was therefore equalled to protection of competitors and antitrust law was partially absorbed by the law of unfair competition. Thus, the second part of Article 41 of the Constitution was ignored by many influential scholars, who focused their attention on the first paragraph and stressed that the freedom of enterprise required that incumbents could not prevent smaller rivals from growing and competing. This emphasis on the anti-exclusionary role of competition law was also strongly influenced by the construction of Article 86 (today Article 82) followed by the Commission in the late sixties and the seventies (*i.e.* a rule preventing predatory behaviour and thereby protecting competitors)⁸¹ and embraced by the Court of Justice in the *Continental Can* case.⁸² As a consequence, a considerable section of Italian courts and lawyers have developed a dogmatic idea of what constitutes competition law which is totally focused on the concept of competitor protection. It was forgotten that Article 86 (today, 82 EC Treaty) was born in the first instance as an anti-exploitative rule protecting purchasers, as the wording of its clauses clearly shows; and it is still possible to read, in the Italian literature, that cartels are

⁸⁰ I have considered the issue at length in Giudici, *supra* fn 43, 285 ff.

⁸¹ See the Memorandum of the EEC Commission concerning concentrations, dated 1 December 1965, in which the Commission expressed the idea that antitrust concerns the protection of competitors; on this point see Giudici, *supra* fn 43, 156-164 and Joliet, *Monopolization and abuse of dominant position*, 248.

⁸² Case C-6/72 *Europemballage and Continental Can* [1973] ECR 215.

prohibited in order to avoid exclusionary practices against new entrants,⁸³ even though at least the literal reference to consumer welfare contained in Article 81(3) should draw attention to the role of purchasers' protection in European antitrust law.

12 The special circumstances influencing the Motor Insurance case

It is also worth analyzing the special circumstances which made the Cassation Court decide that consumer protection fell outside the statute's scope. First, the case concerned a civil action started by a consumer against AXA in order to recover the 20 per cent overcharge. AXA raised the jurisdiction defence. The Giudice di Pace gave a first decision based on procedural issues, and asserted its jurisdiction. AXA asked the Cassation Court to decide the procedural issue on Giudice di Pace jurisdiction to adjudicate civil actions grounded on antitrust violations. The consumer did not submit defences before the Cassation Court, probably because the amount at stake was not worth the increased legal cost that litigation in Rome before the Cassation Court would involve. A US style class action lawyer would have had all the incentives to fight in favour of many aggregated claims of the same kind. An Italian local lawyer defending one or a few claims of the same kind cannot have the same incentives. It goes without saying that, on the contrary, AXA had every incentive to fight this small case as if it were a big one, since a favourable decision would have conditioned all pending and potential litigation with its insured parties.

Second, insurers claim that they have already paid the fines imposed by the AGCM and that further sanctions in the form of widespread overcharge restitutions would put their financial stability at risk. Such a claim can be very effective in an economic environment where protection of consumer welfare comes a poor second after the protection of national business champions such as (as far as insurance is concerned) Generali, Unipol, Sai-Fondiaria, Mediolanum.⁸⁴

Nevertheless, there is still hope that the joint meeting of the Cassation Court will lead to a different decision in the Unipol case as far as consumer standing is concerned, reconciling the Italian position generally with the *Courage* decision and, more in general, the scope of antitrust.

13 Damages vs restitution: the contracts entered into by the members of the cartel

As Easterbrook points out, "anything that could be accomplished by changing the rules of liability also could be done by changing the rules of damage."⁸⁵ A different and crucial issue at stake in the raft of private litigation flowing from the *Motor Insurance* case concerns the rules of damage. To start, it must be stressed that the *Motor Insurance* case is one of the most straightforward in terms of third-party actions against the members of a cartel. Consumers are the direct purchasers of the insurance services; accordingly,

⁸³ Ferro-Luzzi, 'Prolegomeni in tema di mercato concorrenziale 'aurea equitas' (ovvero delle convergenze parallele)', (2204, I) Foro it. 475, 479.

⁸⁴ Mediolanum's main shareholder is the present Prime Minister of Italy, Mr. Silvio Berlusconi, with a stake of 35,536 per cent (information published in Consob's data base and dated 19 May 2004).

⁸⁵ Easterbrook, *supra* note 27, 447.

the usual problem that consumers are not the direct purchasers is not present.⁸⁶ Moreover, in such a case there is no problem of computation of lost profits.⁸⁷ Thus the case could have been envisaged as a perfect launch pad for a favourable judicial trend to consumer suits. It has, however, become a nightmare following the unfortunate form of legal system which specifies the kind of subject matter upon which the Courts of Appeal could adjudicate, *i.e.* nullity of contract and damages. As we have seen, many consumers are attempting to circumvent the exclusive jurisdiction of the Court of Appeal by asserting that, under unjustified enrichment law, they are entitled to recover, 'restitution' being a completely different concept from 'damages'. In order to receive restitution the plaintiff should obtain a previous declaration that the contract is invalid. If we ignore the fact that the *Giudici di Pace* are not entitled to render such a declaration, it is interesting to ascertain whether or not the contract entered into by a member of a cartel is null and void. Clearly, this is a very different situation from the one decided in the *Courage* case and investigated under the national law perspective by many scholars.⁸⁸

The main view in Italy is that contracts by means of which a dominant firm abuses its clients are null and void because Articles 81 and 82 EC Treaty (as well as their Italian equivalents, Articles 2 and 3 of the Antitrust Law) are rules of 'economic public policy'⁸⁹; therefore, any contract that directly violates Article 82 is null and void. The abused client would be entitled to restitution as well to recover damages relying on the rule in Article 1338 Civil Code, which states that any party to a contract who knew or should have known that the contract was affected by invalidity and did not mention anything to the other party, is obliged to pay the other party the damages suffered as a consequence of having entered into an invalid contract.⁹⁰ The problem with Article 81 is that this rule clearly states that the contract which establishes the cartel is null and void, but says nothing about the contracts entered into by the cartel members pursuant to the cartel agreements. This omission could be interpreted as an implicit intention not to affect those contracts. On the contrary, if one should reason along the lines of Article 82, contracts entered into by the cartel members with their clients could be considered null and void,⁹¹ for there is no difference between a contract signed by a firm abusing its single market power and one signed by a firm belonging to a cartel abusing artificially created market power.⁹² Some scholars point out that consumers

⁸⁶ On the indirect purchaser problem see *infra* note 100. In the Italian literature see Toffoletto, 'Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust' 1996 *Giuffrè*, 321ff.

⁸⁷ For an overview see Page, *supra* fn 25; Blair - Page, *supra* fn 57. In the Italian literature see Bastianon, 'Violazione della normativa antitrust e risarcimento del danno', (1996) 555 *Danno e responsabilità*.

⁸⁸ See Rodger, 'The Interface Between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment' (2002) 6 *EdinLR* 217.

⁸⁹ Trimarchi, 'Istituzioni di diritto privato', 2003 *Giuffrè*, §157, 201.

⁹⁰ These damages, accordingly, only take into consideration the so called "interesse negativo".

⁹¹ See Brescia Court of Appeal, *Girelli vs Novogas*, 29 January 2000, *Foro it.*, 2679 (2000, I), but contra Court of Cassation, 11 June 2003, no. 9384, *Liquigas vs Girelli*, *Foro it.*, 466 (2004, I).

⁹² For a different line of reasoning, see now Castronovo, 'Antitrust e abuso di responsabilità civile', (2004) 5 *Danno e responsabilità* 469, 473. In the US the contract which infringes the Sherman Act, and also related transactions, are not invalidated: Jones, *supra* fn 6, 101-102. In Germany a distinction is made between "Folgeverträge" (consequential contracts) and "Ausführungsverträge" (implementing contracts). Under this distinction, contracts between cartel members and their clients are considered to be merely consequential

could be damaged by a rule declaring that all the contracts entered into by cartel members are null and void, since the firms could invoke the presence of a cartel to be discharged from their obligations or to request immediate restitution of their goods.⁹³ However, purchasers would be in any event entitled to damages by Article 1338 Civil Code.⁹⁴ If this were not sufficient to prevent cartel members from using antitrust as a defence against their clients, the fear of ensuing monetary fines from the AGCM would be a strong disincentive to opportunistic behaviour. Moreover, one could also argue that there is a general principle in the law that only consumers are entitled to ask for a contract to be declared null and void when the violated rules intend to protect their position (“*nullità relativa*”).⁹⁵

A different line of reasoning is followed by those relying on the concept of partial nullity. This concept could be applicable to the clauses influenced by the cartel presence, such as the price clauses in the insurance contracts of the *Motor Insurance* case.⁹⁶ However, partial nullity of a contract means the relevant clause has to be considered null and void and does not allow for the court to insert a different clause.⁹⁷ There is, however, an exception. Article 1339 Civil Code asserts that if the price of a product or a service is determined by law, the price clause in the contract is automatically substituted by the regulated price. Some scholars assert that, by analogy, Article 1339 could be applied to cases where the competitive price has been altered because of the influence of a cartel.⁹⁸ If this conclusion were to be followed by the *Giudici di Pace*, the special jurisdiction defence would be defeated: consumers would be entitled to recover the overcharge as restitution of a price unduly paid, and no declaration of nullity of the contract would be required, for the substitution of the price is automatic. The problem with this line of reasoning is that Article 1339 assumes that a price is fixed by law, so that the judge is simply called to substitute the price and grant the recovery. Since it is clear that the AGCM’s evaluation of the cartel influence over market prices is not equivalent to a legal indication of the due price, the ‘special’ adaptation of Article 1339 to the needs of a price-fixing antitrust case would also circumvent the scope of the subject matter jurisdiction: the minor claims judge would

contracts which cannot be affected by the ‘nullity of contract’ sanction. In the Italian literature some writers rely on this German doctrine: see for instance Libertini, ‘Autonomia privata e concorrenza nel diritto italiano’, (2202, I) Riv dir comm 451; Guizzi, *supra* fn 72, fn 9. Such contracts are nonetheless considered to be null and void, and the distinction not relied upon, by, *inter alia*, Castronovo, *supra* at p 473; Pardolesi, ‘Cartello e contratti dei consumatori: da Leibniz a Sansone’, (2004, I) Foro it 470.

⁹³ Milan Tribunal, *supra* fn 62; Bertolotti, ‘Qualche ulteriore considerazione su intese vietate, contratti a valle e sanzioni di nullità’, (2002) Giur It 1211.

⁹⁴ Even though it must be noted that damages under Article 1338 Civil Code cover only the expenses of entering into the contract. Castronovo, *supra* fn 92, 474, also mentions Article 1338 Civil Code as an applicable rule in respect of nullity of contracts entered into by purchasers.

⁹⁵ Bertolotti, *supra* fn 93.

⁹⁶ For a similar situation (concerning the uniform contractual terms of banking contracts) see Ubertazzi, ‘Ancora su norme bancarie uniformi e diritto antitrust’, (1997) Dir della banca e del mercato finanziario 415, 427-429.

⁹⁷ Trimarchi, *supra* fn 89, § 256.

⁹⁸ See Toffoletto, *supra* fn 86, 343; Scoditti *supra* fn 73, 1129.

in any event investigate the cartel's effect on prices, contravening the law's intention to put these issues in the exclusive hands of Courts of Appeal.

The discussion concerning damages in the *Motor Insurance* case is clearly contaminated by the special antitrust jurisdiction clause, as is also demonstrated by the other, convoluted line of reasoning followed by consumers' lawyers, *i.e.* the argument that an undertaking fixing its prices under the influence of a horizontal cartel breaches its duties of good faith and fairness in its contractual relationships with consumers, thereby exposing it to liability not grounded on Article 33.⁹⁹ If Article 33 of the Antitrust Law had not restricted the special jurisdiction to nullity of contracts and damages, probably the full debate concerning the true nature of the recovery action would be very different in a context like the Motor Insurance case, and attention would be focused on whether direct purchasers are entitled at least to recover overcharges (as a measure of antitrust damages) characterising the action grounded on Article 33 as an action in tort, or as restitution plus damages under Article 1338 Civil Code on the basis that the contract entered into by the purchaser is null and void.¹⁰⁰

After *Illinois Brick*, one of the most debated issues in the US concerns the pros and cons of allowing only direct purchasers to sue.¹⁰¹ It is doubtful whether Italian courts would allow indirect purchasers to recover antitrust damages. Article 1223 and Article 2056 Civil Code states that damages are recoverable if they are the immediate and direct consequence of the tort. Courts could assert that a problem of proximate causation prevents the recovery of damages suffered by indirect purchasers acting in tort. Should the direct purchasers' claim be characterised as restitutionary/unjustified enrichment based on nullity of contract, indirect purchasers would probably not be protected, since it would be difficult to claim that their contracts are also null and void. In any event, it is clear that the debate would be totally different from the American one, where the deterrence function of antitrust damages is well recognized and incorporated in the legal reasoning of the Supreme Court's landmark decision.

III THE FACTORS LIMITING PRIVATE ENFORCEMENT IN ANTITRUST CASES

14 Vindicating the public interest: collective action

The dominant impression is that, in Italy, in fields where collective interests are at stake, private enforcement is under-developed because courts are extremely slow and inefficient. This is undoubtedly true; however, the real reason why antitrust law as well as investor and consumer protection law is under-enforced lies elsewhere.

⁹⁹ *Supra*, Section II, § 9 fn 73.

¹⁰⁰ This problem is the focus of Castronovo, *supra* fn 92. On overcharge as the standard measure of damages in price-fixing case in the US and on the "but for" condition, see Blair – Harrison, *supra* fn 32, 4 ff.

¹⁰¹ Blair – Harrison, *supra* fn 32; Hovenkamp, 'The Indirect-Purchaser Rule and Cost-Plus Sale', (1990) 103 Harv LRev 1717; Landes – Posner, 'The Economics of Passing On: A Reply to Harris and Sullivan' (1980) 128 U Pa LRev 1274; Landes - Posner, 'Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*', (1979) 46 Uni Chicago LRev 602; Harris – Sullivan, 'Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis', (1979) 128 U Pa LRev 269; Berger - Bernstein, 'An Analytical Framework for Antitrust Standing', (1977) 86 Yale Law J 809.

A more reasoned view points to the absence of class-action mechanisms. This view is becoming the most influential in the wake of the Parmalat collapse, where some Italian investors are trying to recover damages by joining the various class actions started in the US in spite of joining the Italian consumer associations (in which lawyers are usually heavily involved) which are promoting their own legal services. Capital markets law is discovering what is already known to the antitrust experience: foreigners are increasingly seeking redress in the US for injuries which are sustained overseas.¹⁰² Unfortunately, class actions cannot be effective without contingency fees. However the idea that lawyers can take the lead in the vindication of the public interest and thus that an “invisible hand” (in this case, lawyers’ actions) can promote collective welfare is, again, foreign to Italian culture. Thus, the introduction of class-actions raises many doubts as it requires a revolution in the rules governing the lawyer market.

My view is that if the scope of class actions is to ignite a private enforcement mechanism which is concurrent to the antitrust authorities’ action, class actions will play a limited role if the mechanism of discovery in civil litigation remains unchanged.

15 Disclosure

Evidence is a matter of information. The plaintiff has various ways of accessing information. If he is directly involved in the deal, as in a standard breach of contract situation, he probably possesses relevant information. If he is a third party to the transaction, as in the purchaser’s example, things obviously become more complex. Potential claimants can never have a case without access to information.

Civil procedure law approaches the problem in various ways. The most radical approaches are no discovery and broad discovery. English Civil Procedure Rules 1998 (CPR 1998) and US Federal Rules of Civil Procedure (FRCP) allow extensive recourse to discovery.

Disclosure is a crucial step in the litigation process in England. Disclosure arises under Section 31 of the Civil Procedure Rules (CPR) 1998.¹⁰³ However, the broadest range of discovery measures is offered by Rule 26 FRCP.¹⁰⁴ Even after the recent amendments aimed at containing discovery,¹⁰⁵ they can still impress, if not shock, any continental European lawyer.¹⁰⁶ Parties can not only access documents held by their opponents, but they can also inspect offices with detective-like powers that are simply

¹⁰² See *supra* Section I § 2 and fn 19.

¹⁰³ This can be accessed via the Department of Constitutional affairs website www.lcd.gov.uk. On disclosure see Matthews – Malek, *Disclosure*, London, Sweet & Maxwell, 2001.

¹⁰⁴ Stürner, ‘Transnational Civil Procedure: Discovery and Sanctions Against Non-Compliance’, (2001) 4 Rev Dr Unif 871, 876.

¹⁰⁵ Marcus, ‘The 2000 Amendments to the Discovery Rules’, (2001) Fed Cts LRev 1, <http://www.fclr.org/>; Rowe, ‘A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery’, (2001) 69 Tenn LRev 13; Stempel, ‘Politics and Sociology in Federal Civil Rulemaking: Errors of Scope’, (2001) 52 Ala LRev 529; Stempel – Herr, ‘Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery’ (2001) 199 FRD 396.

¹⁰⁶ Stürner, *supra* fn 104, 877, quotes the case *VW Ag vs Superior Court*, 123 Cal. App. 3d 840, as an “impressive” example of the power of discovery.

inconceivable in continental Europe (at least, as far as Italy and Germany are concerned). The discovery phase is the core of litigation and, as Professor Hazard has pointed out, “a procedural institution perhaps of virtually constitutional foundation.”¹⁰⁷ Since roughly 95% of all civil cases are resolved without trial, pretrial discovery is ‘the trial.’¹⁰⁸

It is highlighted in the American literature that certain types of claims such as discrimination claims would not have been possible without broad discovery granted to plaintiffs.¹⁰⁹ Cases where discovery is also an essential tool in the hands of plaintiffs are negligence torts, product liability claims, environmental degradation cases, antitrust and securities regulation cases.¹¹⁰ As far as antitrust is concerned, US rules are so aggressive that “most evidence of collusion emerges in the course of discovery by attorneys who hope to collect their fees from the defendants, in an amount not governed by the size of the damage award”.¹¹¹

Italian procedural rules allow broad discovery in a very limited and defined set of marginal cases. When reading a book on Italian civil procedure it may appear that access to the documents held by the other party can be obtained through a court order. The problem is that the party does not know exactly what documents his opponent has, and the court cannot grant any disclosure order unless a document is specifically indicated. Moreover, if the party obliged to discover the document does not comply, the court can simply consider this issue when deciding on the merits. The same is true as far as German and French law are concerned. Accordingly, the easiest way to classify the Italian situation is that of a country where discovery in the Anglo-American tradition is virtually absent. Given the lack of efficient discovery rules, third-party action against hardcore violations like price fixing cartels is virtually impossible in Italy as in the rest of Europe.¹¹²

The information situation at the beginning of the “game” is also influenced by the pleading rules. Basically, two different systems of pleading exist. The first one is “fact pleading”; the second is “notice pleading”. As has been noted, “fact pleading requires a full statement of all material facts from the beginning of the pleading process; notice pleading requires only that the party against which the pleading is directed is given notice of the nature of the claim”.¹¹³ Needless to say, the former system assumes that

¹⁰⁷ Hazard, ‘From Whom No Secrets Are Kept’ (1998) 76 Tex LRev 1665, 1694.

¹⁰⁸ Taruffo, ‘Sui confini’ 2002, Il Mulino, 80.

¹⁰⁹ Marcus, ‘Discovery Containment Redux’ (1998) 39 BC LRev 747, 751.

¹¹⁰ Stempel, *supra* fn 104, (2001) 52 Ala LRev 529, 603 ff.

¹¹¹ Hovenkamp, *supra* fn 101, 1729.

¹¹² The role of discovery in private antitrust litigation is stressed by many articles in the European literature on private antitrust enforcement: see Riley, *supra* fn 34, 668; Mestmäcker, ‘The Commission’s Modernization of Competition Policy: A Challenge to the Community’s Constitutional Order’ (2000) 1 EBOR 401, 424; Wils, *supra* fn 2, 480. In the Italian literature on civil procedure law the analysis of discovery rules has been conducted by Dondi. See Dondi, *Effettività dei provvedimenti istruttori del giudice civile*, Cedam, 1985; Dondi, ‘Questioni di efficienza della fase preparatoria nel processo civile statunitense (e prospettive italiane di riforma)’ (2003) Riv Dir Proc Civ 161.

¹¹³ Priestley, ‘Transnational Civil Procedure, - Fact Pleading v. Notice Pleading: its Significance in the Development of Evidence’ (2001) 4 Rev Dr Unif 841, 842.

the plaintiff is in possession of all relevant information, while the latter expects that litigation is also a way of discovering and accessing information.¹¹⁴ The US Federal and English systems are based on notice pleading. Civil law is generally based on fact pleading mechanisms.

Common law and civil code systems are on opposing ends of the spectrum as far as pleading and discovery are concerned. This difference is based on diametrically opposite conceptions of what private civil litigation is about. In the tradition of civil code countries, civil litigation is a private matter. The idea that one should help opponents in their defences is considered distasteful or, simply, unenforceable. In common law jurisdictions civil litigation is considered under a more general perspective. The promotion of justice is seen as a value at stake.¹¹⁵ As a US court wrote in a much quoted passage referring to discovery's intrusiveness, "except for a few privileged matters, nothing is sacred in civil litigation."¹¹⁶ From a civil procedure law viewpoint, those jurisdictions traditionally associated with intense public administration and interference are certainly more eager to preserve private interests. In this context, any serious hope that third-party claims could take a significant role in the enforcement of antitrust is ungrounded.¹¹⁷

16 Treble damages, deterrence v compensation

At the very beginning of legal history in our Western tradition, a party committing a tort was exposed to revenge. The passage from revenge to compensation is rightly considered a great achievement of our culture. Accordingly, the common-law and civil law traditions are both deeply rooted in the concept that private law remedies are compensatory and not punitive. Modern law and economics scholars are redressing the way we look at private law and public enforcement. Under welfare economics, compensation is not as effective as deterrence. Private law is seen as another weapon to deter inefficient conduct *ex ante*. As always in law and economics, antitrust is the cradle

¹¹⁴ "Imposing on a plaintiff a requirement that the claim be articulated in detail means that only claimants who have access to such detail are in a position to state a claim": James – Hazard – Leubsdorf, *Civil Procedure*, Foundation Press, 2001, 181.

¹¹⁵ Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules' (1998) 39 BCLRev 691.

¹¹⁶ *Coca-Cola Bottling vs Coca-Cola Co*, 107 F.R.D. 288, 290 (D. Del. 1985).

¹¹⁷ Needless to say, introduction of discovery would raise litigation costs and, in "loser pays" systems (*i.e.* systems adopting the "English Rule", under which a prevailing party recovers all or most of its attorney's fees from the loser), that would considerably increase the risk to a plaintiff in initiating a private attorney general lawsuit against large firms with deep pockets, whereas in the US the defendant is not reimbursed by the plaintiff for the cost of the defendant's lawyers (the so called "American Rule": for a discussion see Marcus – Redish – Sherman, *Civil Procedure. A Modern Approach*, West Group, 2002, 100-106; James – Hazard – Leubsdorf, *supra* fn 114, 48-53). Moreover, among the US antitrust enforcement armory there are also "attorneys' fees to prevailing plaintiffs under section 4 of the Clayton Act, 15 U.S.C. 15 and the right to attorneys' fees under the common fund doctrine in cases where class actions settle" (Cavanagh, *Antitrust Remedies: Final Thoughts*, ABA, 2003). Accordingly, the US system also very aggressively promotes antitrust litigation through the allocation of litigation expenses. From an Italian perspective, however, the difference between the English Rule and the American Rule should not be overemphasized. Formally, Italian civil procedure law adopts the English Rule. However, in practice Italian courts quite often shift away from a rigid application of the rule and do not require the losing plaintiff to pay the defendant's litigation costs (or the full amount) when the plaintiff's action had some grounds and the defendant has "deep pockets".

of the modern concept of private remedies as punitive instead of purely compensatory. Treble damages are standardized punitive damages. Punishment is no longer associated with vengeance. It is a way to deter, *i.e.* to influence social behaviour.

Punitive private remedies are still alien to Italian civil law. In Italy private damages are seen exclusively as compensation. Our law does not conceive the idea of private damages performing a deterrence role concurrent to the role of administrative or criminal fines. Even a penalty clause inserted in a private contract can be subject to judicial scrutiny if it is set too high. Courts can reduce excessive penalties to a fair value (art. 1382), and it is disputed whether interest arrears are subject to the law against usury. The impact of the EC Directive 2000/35 on combating late payment in commercial transactions, whose interest rates are clearly punitive, is also a factor.¹¹⁸ In addition, the contractual rules by which the Italian Stock Exchange, today a private venture, is empowered to sanction through fines or other forms of punitive decisions have been the subject of intense debate, since it is clear that even a self-regulatory body cannot punish; it can only seek compensation and damages. The difference with the US legal environment where, faced with a choice between corrective justice and efficient enforcement, the Supreme Court held in *Illinois Brick* that the primary purpose of private actions in the US system is deterrence instead of compensation, is striking. This leads directly to the discussion concerning private under-enforcement of antitrust law in Italy. The simple fact is that Italian civil law is not able to work as its American counterpart because both the law of entitlement to damages and civil procedure are conceived to deal with individual relationships where the public interest is not at stake and, accordingly, not under consideration. The governing principle is that public interest is protected by public bodies, meaning criminal judges and administrative bodies such as Ministries or agencies. In short, the idea that private enforcement can be an instrument to deter inefficient conduct *ex ante* and thereby maximise social welfare is alien to Italy, and continental Europe in general.

Needless to say, you cannot compare a system that offers huge incentives to plaintiffs, thereby creating private general attorneys which can monitor the level of compliance with antitrust rules, with a system where private plaintiffs have limited scope for collecting information, little opportunity to create economies of scale in one single procedure, no prospect of inducing their lawyers to share the cost and benefits of enforcement by entering into contingency fees agreements, and finally no supplementary incentive to be rewarded for their efforts.¹¹⁹

¹¹⁸ Basedow, *supra* fn 3, 467.

¹¹⁹ Since the problem of private antitrust law enforcement is simply part of a more general problem concerning effective protection of collective interests through private litigation in Continental Europe, it is unclear whether changes in the law will come directly from antitrust or from other fields. It is suggested that they are more likely to derive from capital markets law. Indeed the social expectation is that consumers, investors and depositors have a right to be protected and the State has to offer remedies. In this situation there is at least one case where third-parties can turn their attention to the agency instead of the regulated party: insolvency of the latter. Financial distress of regulated industries involving investment firms, banks or insurance companies could be caused by mismanagement of the firm which could lead to liability claims against supervisory authorities for alleged negligence or improper conduct in the exercise of their supervisory duties. This is the obvious consequence of a situation where the private interest of diffused parties is granted by the

17 Conclusions

From the Italian perspective, the assertion that antitrust suits are not subject to litigation requires qualification. Claims concerning abuse of market power are brought both under Article 3 of the Antitrust Law, Article 82 EC Treaty or under unfair competition rules, used in alleged predatory pricing and refusal to deal cases as substitutes of antitrust rules. Claims where antitrust law is used as a shield to justify non-performance of a contractual obligation are widespread. Claims by direct or indirect purchasers against members of hard-core cartels are the real issue. Since the whole civil procedure system is unfriendly to the protection of collective interests through private litigation, should the Court of Cassation revert the Axa decision in the Unipol case, the prospects of seeing purchasers' acting effectively as private general attorneys would nevertheless remain exceedingly remote.

state in the name of the public interest and private enforcement is weak. Thus, for creditors of the bankrupted firm, an efficient plan of action could be to sue the supervisor. The issue of supervisor's liability (*i.e.* State liability) will probably shape European law in the decades to follow [see Tison, *Challenging the Prudential Supervisor: Liability versus (Regulatory) Immunity*, Financial Law Institute Working Paper 2003/2004 (www.ssrn.com)] and could strongly affect the perception about the need to improve private enforcement of collective interests. Thus, any incentive for the State to reshape the litigation framework is more likely to come from capital markets law than from antitrust.