

# THE COMPETITION LAW REVIEW

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**THE COMPETITION LAW REVIEW**

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Editorial

After the Green Paper: The Third Devolution in European Competition Law  
and Private Enforcement*Clifford A. Jones\**

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At the founding of the then-EEC in 1958, the competition enforcement system in Europe was a bit pluralistic in that national competition authorities and the Commission could enforce now-Articles 81 and 82 EC, and in particular the national authorities could declare exemptions under Article 81(3) EC and non-infringement under Article 82 EC. It was not until the adoption of the late Regulation 17 in 1962 that the Commission achieved a virtual monopoly over the enforcement of the EC Treaty competition rules. The combination of the notification system, a monopoly on exemptions, and the power to divest national competition authorities (NCAs) of jurisdiction over cases effectively funnelled nearly every policy and enforcement decision to the Commission. It is not clear exactly when the Commission began to have second thoughts about the wisdom of such policies - could it have been as early as 1962-3, when the initial nearly 40,000 notifications came in? - but the Commission expressly began to encourage private enforcement by at least 1973.

The development of Community competition law enforcement following the onset of the Commission's monopoly tends to prove the old adage that you must be careful what you ask for - you might get it! The Commission was overwhelmed with run-of-the-mill exclusive distribution agreements, individual exemptions were practically unavailable, block exemptions were rigid, formalistic straitjackets for business, NCA's had little incentive (and only eight of the fifteen even had express authority to do so) to enforce EC rules rather than national rules, and private enforcement was essentially nonexistent. Moreover, the Commission was unable to devote much quality time to the most serious offences, and every undertaking in Europe brought their complaints to the Commission almost to the exclusion of NCAs and national courts.

Following *BRT v SABAM* in 1974 and *Delimitis v Henninger Bräu* in 1991, the Commission's first *Cooperation Notice*<sup>1</sup> ushered in what I have called the 'First Devolution' of Community competition law,<sup>2</sup> in which the Commission relied on exhortation to encourage undertakings to resort to national courts (self-help, if you

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<sup>1</sup> Commission Notice on Co-operation between the Commission and the National Courts, OJ 1993, C39/06.

<sup>2</sup> Clifford A. Jones, 'The Second Devolution of European Competition Law: The Political Economy of Antitrust Enforcement Under a 'More Economic Approach,' in D. Schmidtchen, M. Albert, and S. Voight, eds., *Frontiers of EC Antitrust Enforcement: The more economic approach*, Tübingen, Germany: Mohr Siebeck, forthcoming 2007.

will), and later NCAs<sup>3</sup> with their competition complaints. After this generally failed to have the desired effect, it was clear that stronger measures were in order. The impending enlargement to 25 and now 27 Member States no doubt raised the spectre of another avalanche of notifications, not to mention the enforcement problems likely to be generated in the several new Member States for which the free market was still a voyage of discovery and in which formerly state-owned undertakings were likely to be dominant.

The ‘Second Devolution’ was of course the ‘modernised’ Regulation 1/2003 which transformed the bully pulpit of the Notices into a directly applicable Regulation, abolished notifications, almost all individual exemptions, and devolved many cases to the NCAs, while simultaneously both freeing the national courts to fully apply Art 81 EC in its entirety and ensuring the Commission had a place at the table in both the national courts (as *amicus curiae*) and in the NCAs through the European Competition Network. Armed with *Courage*, and Regulation 1/2003, national courts could finally begin to seriously entertain private actions without some of the discouraging obstacles of the past forty years.

However, other obstacles and uncertainties remain which hinder the development of private enforcement in the European Union.<sup>4</sup> Recognition of this led to the Green Paper<sup>5</sup> and has Europe poised on the brink of a Third Devolution, in which private enforcement may become a substantial factor in EU competition law enforcement. Comments on the Green Paper have closed, and we await the outcome, which may be EU legislation designed to facilitate private actions. It is unclear at this point whether there will be a Directive, notwithstanding the Commission’s clear interest. The politics of such legislation are complex, and undertakings across Europe were not too keen on the multiplying of antitrust enforcers that occurred in Regulation 1/2003; they are sure to be even less keen on turning loose a veritable army of what Americans call the ‘private attorney general’. Even Member States may be hesitant to do anything to disadvantage potential national champions, which may be strong argument for EC level action.

However, I believe the probabilities favour a Directive at EU level. Regardless, what seems clear at this point is that the Third Devolution, the unchaining of private litigation, is already happening in some Member States. The UK took some steps to enhance private enforcement in the Enterprise Act 2002, and Germany has taken some significant steps in the Seventh (2005) amendments to its national competition law. Other Member States, if not all of them, are sure to follow, even if EU-level legislation

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<sup>3</sup> Commission Notice on Co-operation between National Competition Authorities and the Commission, OJ 1997, C313/03.

<sup>4</sup> See Clifford A. Jones, ‘Nostradamus Strikes Again: A Premature U.S. Perspective on the EU’s Green Paper on Private Enforcement’ in C. Baudenbacher, ed., ‘NEUESTE ENTWICKLUNGEN IM EUROPÄISCHEN UND INTERNATIONALEN KARTELLRECHT – 12TE ST. GALLER INTERNATIONALES KARTELLRECHTSFORUM 2005’ 360 (2006). [‘NEWEST DEVELOPMENTS IN EUROPEAN AND INTERNATIONAL COMPETITION LAW—TWELFTH ST. GALLER INTERNATIONAL COMPETITION LAW FORUM 2005’ 360 (2006)].

<sup>5</sup> Commission, *Green Paper on Damages actions for breach of the EC antitrust rules*, COM(2005) 672 final (19.12.2005).

does not happen. However the Third Devolution comes about, the essays in this issue will contribute to the discussion and the implementation.

The article by Assimakis P Komninou broadly examines the complementary nature of public and private enforcement and argues for the independence of private enforcement, cautioning against possible EC legislation that could render it an inferior or dependent adjunct to public enforcement. The interaction between public and private enforcement is viewed from a different perspective in the article by Dan Wilsher, who worries that public enforcers will place too much emphasis on facilitation of private claims and devote too many public resources to promoting the public interest in private enforcement.

The other three articles are somewhat more targeted in their approach to issues arising in private enforcement. Michele Carpagnano's article on the jurisdictional problems of private enforcement in Italy is a cautionary tale that could benefit other Member States who do not adjust their legislation with private enforcement more clearly in mind. Paul Hughes' article on private enforcement through derivative actions by shareholders under English law raises interesting possibilities concerning both potential liability of company directors and officers who participate in cartels or other antitrust violations or who fail to pursue private claims against companies who do and cause injury to the corporation. The standing argument here has yet to be played out in Europe, and this possible development bears watching. As leniency programs proliferate in Europe, confessing company managers may have to reckon with their own shareholders as well as public enforcers. Finally, but not least, John Peysner's article concerning costs and financing of private litigation is well worth the attention of counsel for both prospective plaintiffs and defendants. The possible role of costs rules in discouraging private litigation in Europe compared to the USA has been discussed on a number of occasions, and this subject will grow in importance as private actions become more common. Large undertakings can fund their own private actions, but this subject is of particular interest to those who cannot.

We do not yet know the exact shape the Third Devolution will take, but there seems little doubt that more legislation at national and perhaps EU level will begin to address these issues.

These articles can help to shape these discussions.



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Public and Private Antitrust Enforcement in Europe: Complement? Overlap?

*Assimakis P Komminos\**

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The European discovery of the merits of private antitrust enforcement, and the objective to enhance private actions both at the Community and at the national level, has raised the question of the relationship between public and private enforcement. There is a common misconception that public enforcement serves the public interest while private enforcement is only driven by the private interest of litigants. Yet private actions enhance the effectiveness of the competition law prohibitions and do not vary from the basic aim of the competition rules; the protection of competition. Thus, any private interest is subsumed within the public interest in protecting effective competition. A related misconception is that public enforcement is hierarchically superior and that decisions by competition authorities should always bind civil courts. Yet public and private enforcement are two separate limbs of antitrust enforcement independent of each other. The fact that certain recent national legislation or the proposals of the Commission Green Paper on Damages Actions convey or favour a binding effect of such authorities' decisions over civil proceedings, does not bring into question the principle of independence since such measures are only intended to function as incentives for follow-on civil actions. At the same time, the current Community principle that national courts must not contradict decisions by the Commission is not indicative of a primacy of public over private antitrust enforcement but rather of Community over national measures, always under the final control of the Court of Justice.

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**1. THE NEW MODERNISED SYSTEM OF EC COMPETITION LAW ENFORCEMENT**

The past forty years of competition law enforcement, based on the old Regulation 17 of 1962,<sup>1</sup> were characterised by a centralised model where the Commission enjoyed a de facto and in some instances, notably the granting of individual exemptions under Article 81(3) EC, a de iure enforcement monopoly, while with one or two notable exceptions the role of national legal systems and courts was marginalised. The Treaty of Rome did not dictate the degree of centralisation created by Regulation 17;<sup>2</sup> indeed, the latter departed from the Community standard according to which Community law is to be enforced primarily by national administrative authorities (*administration communautaire*

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<sup>1</sup> Council Regulation No 17 of 6 February 1962 - First Regulation Implementing Articles 85 and 86 of the Treaty, JO [1962] L13/204.

<sup>2</sup> See DJ Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus*, Oxford, OUP, 1998, pp 349 & 386; Ehlermann, 'The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution', (2000) 37 CMLRev 537, pp 538-540.

*indirecte*)<sup>3</sup> and national courts (*juges communautaires de droit commun*).<sup>4</sup> However, at the time when Regulation 17 was enacted, centralisation was a conscious choice with a view to constructing a European competition law enforcement system.<sup>5</sup> Throughout the ensuing years, therefore, the Commission was the basic public enforcement authority for EC competition law purposes. National competition authorities have only recently started to enter into the field, sometimes reluctantly, since at least with regard to Article 81 EC their hands were tied by their inability to apply Article 81(3) EC and grant individual exemptions to restrictive agreements.

National courts, for their part, have had concurrent jurisdiction to enforce Articles 81(1) and 82 EC since the Court of Justice recognised these provisions as (horizontally) directly effective,<sup>6</sup> although the system of the Commission's exemption monopoly meant they could not grant individual exemptions. Nevertheless, the role of national courts in EC competition enforcement has not been particularly strong during the past forty years, and private enforcement in Europe is certainly far less well-developed than in the US. This is because the whole institutional system of antitrust enforcement in Europe has been fundamentally different, owing to the overwhelmingly central role of public enforcement. The foundational model of EC competition law centres on administrative decision-making.<sup>7</sup> In the words of Former Advocate General Tesauro, the administrative enforcement model in Europe:

is proving to be very effective and to some extent an alternative to judicial enforcement. While the protection of private complainants is not the objective of the administrative intervention, the outcome of an antitrust case conducted by the competition authority can be largely equivalent to a judge ruling.<sup>8</sup>

<sup>3</sup> On this Community transformation of national administrative authorities see in general Dubey, 'Administration indirecte et fédéralisme d'exécution en Europe', (2003) 39 CDE 87, p 87 *et seq.*

<sup>4</sup> On this *dédoublement fonctionnel* as to national authorities and courts, see in general R. Lecourt, *L'Europe des juges*, Bruxelles, 1976, pp 8-9; O Dubos, *Les juridictions nationales, juge communautaire, Contribution à l'étude des transformations de la fonction juridictionnelle dans les États-membres de l'Union européenne*, Paris, 2001; Canivet, 'Les réseaux de juges au sein de l'Union européenne : Raisons, nécessités et réalisations', in: Idot & Poillot-Peruzzetto (Eds), *Internormativité et réseaux d'autorités, L'ordre communautaire et les nouvelles formes de relations*, Toulouse, 2003, *Petites Affiches*, 5-10-2004, No 199, 45, p 46. See also case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309, para 42: 'when applying Article 86 [now 82] ... the national courts are acting as Community courts of general jurisdiction'.

<sup>5</sup> See the comprehensive historical exposé made by Tesauro, 'Some Reflections on the Commission's White Paper on the Modernisation of EC Antitrust Policy', in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford/Portland, Hart, 2001, p 259 *et seq.*

<sup>6</sup> According to the European Courts' case law, Arts 81(1) and 82 EC enjoy direct effect and grant actionable rights to individuals which national courts must protect, Case 127/73 *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Éditeurs de Musique v SV SABAM and NV Fonior* [1974] ECR 51, para 16.

<sup>7</sup> See Gerber, *op cit*, n 2, p 386. According to that author 'the lack of private suits for enforcement in Community courts and their rarity in Member State courts means that the Commission makes most decisions regarding objectives to be pursued, conduct to be challenged, resources to be used and the arguments to be employed in justifying decisions'.

<sup>8</sup> Tesauro, 'Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues', in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2001, Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland, Hart, 2003, p 278.



It should be added that the administrative authorities and certainly the Commission have extensive investigatory powers, and the procedure before them entails no costs for a complainant.<sup>9</sup>

Regulation 1/2003<sup>10</sup> and the new decentralised system of enforcement have raised high hopes of a most dramatic impact on the application of competition law by civil courts and on private antitrust enforcement, which is expected to grow from something meagre to a more complete and mature system.<sup>11</sup> National courts will no longer play a marginal role, but will soon become full players in enforcing the competition rules, although their role will complement that of public antitrust authorities, most notably the Commission. Indeed, the Commission considered that private antitrust enforcement, as part of effective decentralisation, was one of the three main objectives of the modernisation reforms.<sup>12</sup>

The direct effect of Article 81(3) EC will have a certain impact on civil litigation before national courts, as, at least in theory, the Commission exemption monopoly was undoubtedly an obstacle to more private enforcement.<sup>13</sup> In particular, with regard to timing, the abolition of the Commission's monopoly is on balance positive for national litigation, since the courts are able, 'to address the full range of competition law for the first time'.<sup>14</sup> In other words, they are no longer obliged to suspend their proceedings pending a Commission decision on the applicability of Article 81(3) EC, thus 'leaving the agreement suspended in a twilight zone between validity and nullity'.<sup>15</sup> The new

<sup>9</sup> See also Jacobs, 'Panel Discussion: EEC Enforcement Policy and Practice', (1985) 54 *Antitrust LJ* 611, p 618 *et seq.*; Venit, 'Slouching towards Bethlehem: The Rule of Reason and Notification in EEC Antitrust Law', (1987) 10 *BC Int'l Comp LRev* 17, p 19.

<sup>10</sup> Council Regulation 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, OJ 2003, L 1/1.

<sup>11</sup> See various authors in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford/Portland, 2003).

<sup>12</sup> See e.g. Schaub and Dohms, 'Das Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Artikel 81 und 82 EG-Vertrag: Die Reform der Verordnung Nr. 17', 49 *WuW* 1055 (1999), p 1060.

<sup>13</sup> This conviction is widely shared. See e.g. Department of Trade and Industry, *Modernisation - A Consultation on the Government's Proposals for Giving Effect to Regulation 1/2003 and for Re-alignment of the Competition Act 1998*, April 2003, para. 9.5. See also Slot, 'Panel Discussion: EC Competition System: Proposals for Reform', in: Hawk (Ed), *International Antitrust Law and Policy 1998, Annual Proceedings of the Fordham Corporate Law Institute*, New York, 1999, p 228; Paulweber and Kögel, 'Das europäische Wettbewerbsrecht am Schweißweg: Die Reformvorhaben der Kommission zur Modernisierung des europäischen Kartellverfahrensrechts in der Kritik', 44 *AG* 500 (1999), p 503; Montag and Rosenfeld, 'A Solution to the Problems? Regulation 1/2003 and the Modernisation of Competition Procedure', 1 *ZWeR* 107 (2003), p 132; Hirsch, 'Anwendung der Kartellverfahrensordnung (EG) Nr. 1/2003 durch nationale Gerichte', 1 *ZWeR* 233 (2003), p 237.

<sup>14</sup> Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US', in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland, Hart, 2003, p 96. See also Wißmann, 'Decentralised Enforcement of EC Competition Law and the New Policy on Cartels: The Commission White Paper of 28<sup>th</sup> of April 1999', (2000) 23(2) *World Competition* 123, p 132.

<sup>15</sup> Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty', (2003) 40 *CMLRev* 545, p 554.

role of national courts makes better economic sense as the entire analysis under Article 81 EC now takes place in one forum; but more importantly, it creates a real culture of diffuse competition law enforcement, and as one commentator rightly observes, consolidates the interpretation of the third paragraph of Article 81 EC as a 'true rule of law' and not as a 'discretionary political tool'.<sup>16</sup>

Notwithstanding the introduction of the legal exception system, it was always realised that the decentralisation brought about by the new Regulation 1/2003 should not raise disproportionately high hopes of a US-like system of private antitrust enforcement. In this sense Regulation 1/2003 was, in the words of a commentator, 'a necessary but not sufficient condition to promote private action in Europe'.<sup>17</sup> A substantial number of commentators thought that the modernisation project and the direct effect of Article 81(3) EC, though in the right direction, could not contribute significantly towards the development of a system of effective private enforcement.<sup>18</sup> Many follow-up problems remained, relating basically to the weaknesses of the framework (substantive and procedural) of civil litigation in the EU,<sup>19</sup> which is to a large extent governed by national and not Community law and is not particularly helpful for such a difficult type of litigation as civil antitrust litigation.

The Commission's recent Green Paper attempts for the first time to deal with all these questions and, through measures of harmonisation, to lead to enhanced private antitrust enforcement in Europe. The purpose of this paper is not to present and comment on the Green Paper, but rather to address the question of the relationship of public and private antitrust enforcement in Europe from a theoretical and practical point of view. References to the Green Paper will be made only in that context.

## **2. THE PAIRING OF PUBLIC-PRIVATE ANTITRUST ENFORCEMENT AND THE OBJECTIVES OF EC COMPETITION LAW**

### **Enforcement Objectives**

The pairing of public and private enforcement of legal rules is not unique to the antitrust laws. It certainly predates those laws and expresses more fundamental ideas

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<sup>16</sup> WPJ Wils, *The Optimal Enforcement of EC Antitrust Law, Essays in Law & Economics*, The Hague/London/New York, Kluwer, 2002, p 246.

<sup>17</sup> See Norberg, 'Competition Policy of the European Commission: In the Interest of Consumers?', Speech Made at Leuven, June 20<sup>th</sup> 2003, in: <http://europa.eu.int/comm/competition/speeches>, p 29. See also *Commission XXXIV<sup>th</sup> Report on Competition Policy – 2004*, Brussels/Luxembourg, 2005, p 15, speaking of Regulation 1/2003 as 'a first step in strengthening private enforcement before national courts by giving the latter the power to apply Article 81(3)'.

<sup>18</sup> See e.g. Riley, 'EC Antitrust Modernisation: The Commission Does Very Nicely - Thank you! Part One: Regulation 1 and the Notification Burden', (2003) 24 ECLR 604, pp 612-613; idem, 'EC Antitrust Modernisation: The Commission Does Very Nicely - Thank you! Part Two: Between the Idea and the Reality: Decentralisation under Regulation 1', (2003) 24 ECLR 657, p 665 et seq; Venit, 'Private Practice in the Wake of the Commission's Modernization Program', (2005) 32 LIEI 147, p 151.

<sup>19</sup> See e.g. Todino, 'Modernisation from the Perspective of National Competition Authorities: Impact of the Reform on Decentralised Application of EC Competition Law', (2000) 21 ECLR 348, pp 350-351.

about the relationship between the state and private individuals and their respective roles in the implementation of the law as such.

From a purely *competition* law perspective, antitrust enforcement pursues three systematically different, yet substantively interconnected, objectives.<sup>20</sup> The first one is *injunctive*, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that that conduct ceases in the future. The second objective is *restorative* or *compensatory*, i.e. to remedy the injury caused by the anti-competitive conduct. The third one is *punitive*,<sup>21</sup> i.e. to punish the perpetrator of the illegal acts in question and also to deter him and others from future transgressions. Ideally, these three basic objectives can be pursued inside an enforcement system that combines both public and private elements.

Private actions, in particular, may well - directly or indirectly - pursue all three objectives. The injunctive objective is served with cease and desist orders and negative or positive injunctions ordered by the civil courts and may, indeed, go further than public enforcement. For example, it may be easier to obtain a preliminary injunction from a national judge than from the European Commission, while the latter, unlike the former, cannot issue orders imposing positive measures to undertakings in Article 81 EC cases.<sup>22</sup> Private enforcement primarily serves the restorative-compensatory objective, while the role of public enforcement here can only be minimal.<sup>23</sup> Private actions ensure compensation for those harmed by anti-competitive conduct. Finally, as for the punitive objective, while public enforcement is undoubtedly predominant, here again private actions may nevertheless supplement the retributive and deterrent effect of the public sanctions by attaching punitive elements to the civil nature of the

<sup>20</sup> See C Harding and J Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency*, Oxford, OUP, 2003, p 229 *et seq.*

<sup>21</sup> The term 'punitive' is used here in its generic sense and does not necessarily correspond to criminal law.

<sup>22</sup> In case T-24/90 *Automec Srl v Commission (II)* [1992] ECR II-2223, the Commission refused to grant the complainant an injunction requiring BMW to supply it with vehicles. Freedom to contract was the basic rule according to the CFI, so the Commission could not order a party to enter into a contractual relationship 'where as a general rule the Commission has suitable means at its disposal for compelling an enterprise to end an infringement' (op cit, para 51). The other means are presumably the prohibition of an agreement, withdrawal of the benefit of an individual or block exemption and fines and/or periodic penalty payments. In the Commission's view, such purely positive measures may be more justifiable in Article 82 EC cases (*Automec II*, op cit, para 43).

<sup>23</sup> It is not correct to exclude any role for public enforcement in this area. There are cases where the public agency enforcing the competition rules may take into account the injury to specific victims of an anti-competitive practice and impose on the perpetrator the obligation to compensate those persons. Indeed, the public agency may pursue this informally, for example through an informal settlement (see *infra* for examples). In addition, some competition regimes also provide for a role for the public authority in claiming damages, acting on behalf of the victims. This is the case in French law, for example (Art L442-6 Code de commerce). For a proposal to confer powers to antitrust authorities to award civil damages to victims of anti-competitive behaviour see Igartua Arregui, 'Should the Competition Authorities Be Authorized to Intervene in Competition-related Problems, when they Are Handled in Court? If so, what Should Form the Basis of their Powers of Intervention? National Report from Spain', LIDC Questions 2001/2002, in: <http://www.ligue.org>, p 5.

remedies sought.<sup>24</sup> This is the case in legal systems that provide for punitive antitrust damages.

The pairing of public and private enforcement of legal rules is not unique to the antitrust laws. It certainly predates those laws and expresses more fundamental ideas about the relationship between the state and private individuals, and their respective roles in the implementation of the law as such.

### **b. The Complementarity between Public and Private Antitrust Enforcement**

While it is sometimes said, especially by public enforcement officials, that private enforcement cannot as such make a substantial contribution to the effectiveness of competition law enforcement,<sup>25</sup> mainstream antitrust scholarship argues that the ideal antitrust enforcement model should combine both public and private elements. Each of the two systems aims at different aspects of the same phenomenon; they are complementary and both are necessary for the effectiveness of the whole competition law enforcement.<sup>26</sup>

The advantages of private antitrust enforcement have long been stressed in the United States, where studies estimate its ratio to public antitrust suits at between 10 to 1 and 20 to 1.<sup>27</sup> The primary function of the private action is clearly compensatory. The victims of anti-competitive practices can only make up for their losses before a civil court and public enforcement cannot have any direct bearing there.<sup>28</sup> At the same time, however, private action, apart from its compensatory function, furthers the overall deterrent effect of the law. Thus, economic agents themselves become instrumental in

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<sup>24</sup> On the deterrent effect of damages awards see e.g. Mestmäcker, 'The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order', (2000) 1 EBOR 401, p 422; A Jones and B Sufirin, *EC Competition Law, Text, Cases, and Materials*, Oxford, OUP, 2004, p 1192; Erämetsä, 'Finland', in: Behrens (Ed), *EC Competition Rules in National Courts*, Vol. VI, *Denmark, Sweden, Finland and Austria*, Baden-Baden, Nomos, 2001, p 214. It should again be stressed that the term 'punitive' in this context is used in its generic sense, so the punitive element in damages awards does not make them criminal in nature. US treble damages awards have always been considered as civil not only inside but also outside the United States. On the question of characterisation of such awards see further Zekoll and Rahlf, 'US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public', 54 JZ 384 (1999), pp 384-385.

<sup>25</sup> See e.g. Paulweber, 'The End of a Success Story?: The European Commission's White Paper on the Modernisation of the European Competition Law: A Comparative Study about the Role of the Notification of Restrictive Practices within the European Competition and the American Antitrust Law', (2000) 23(2) *World Competition* 3, p 45; Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?', (2003) 26 *World Competition* 473; Fingleton, 'De-monopolising Ireland', in: Ehlermann & Atanasu (Eds), *European Competition Law Annual 2003, What Is an Abuse of a Dominant Position?*, Oxford/Portland, Hart, 2006, pp 60-61.

<sup>26</sup> See Norberg, *op cit*, n 17, p 28; Behrens, 'Comments on *Josef Drexel*: Choosing between Supranational and International Law Principles of Enforcement', in: Drexel (Ed), *The Future of Transnational Antitrust - From Comparative to Common Competition Law*, Berne/The Hague/London/New York, Kluwer, 2003, pp 344-345.

<sup>27</sup> See generally CA Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford, OUP, 1999.

<sup>28</sup> It might, however, make sense for the victim of anti-competitive conduct to seize the public enforcer in cases where he seeks injunctive relief.

implementing the regulatory policy on competition<sup>29</sup> and the general level of compliance with the law is raised.<sup>30</sup> Indeed, the private litigant in US antitrust has been considered a ‘private attorney-general’.<sup>31</sup> A further advantage is that the weaknesses of public enforcement, most notably the ‘enforcement gap’ generated by the perceived inability of public enforcement to deal with all attention-worthy cases, are counter-balanced.<sup>32</sup>

From a *Community* competition law perspective, however, there are additional arguments in favour of a system of antitrust enforcement that combines strong elements of private enforcement. First of all, the civil action constitutes in Europe the only complete means (complaints apart) for private parties and individuals to exercise the rights guaranteed by the Treaty competition provisions, which form part of the Community’s economic constitution. Pursuant to the Court of Justice’s long-standing case law, Articles 81 and 82 EC enjoy direct effect and grant individuals actionable rights which national courts must protect.<sup>33</sup> Secondly, when citizens pursue their Community rights in the national courts, apart from serving their personal interests, they also indirectly act in the Community interest and become ‘the principal ‘guardians’ of the legal integrity of Community law within Europe’.<sup>34</sup> The exercise of those rights thus becomes a question of benefiting from *general Community law*, and brings ‘the application of Community competition rules closer to citizens and undertakings’.<sup>35</sup> This

<sup>29</sup> See Canivet, ‘The Responsibility of the Judiciary in the Implementation of Competition Policy’, in: *Judicial Enforcement of Competition Law*, Committee on Competition Law and Policy, OECD, Paris, 1997, p 21; Jenny, ‘Un économiste à la Cour’, 1/2005 *Concurrences* 5, p 8.

<sup>30</sup> See KL Ritter, DW Braun and F Rawlinson, *European Competition Law: A Practitioner’s Guide*, The Hague/London/Boston, Springer, 2000, pp 925-926.

<sup>31</sup> Per J Jerome Franck in *Associated Industries of New York State, Inc. v Ickes*, 134 F.2d 694, 704 (2d Cir 1943).

<sup>32</sup> On the general advantages of private antitrust enforcement see e.g. Collins and Sunshine, ‘Is Private Enforcement Effective Antitrust Policy?’, in: Slot & McDonnell (eds), *Procedure and Enforcement in EC and US Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law*, London, Sweet & Maxwell, 1993, pp 50-52; Roach and Trebilcock, ‘Private Enforcement of Competition Laws’, (1996) 34 *Osgoode Hall Law Review* 461, p 471 et seq.; Yeung, ‘Private Enforcement of Competition Law’, in: McCrudden (Ed), *Regulation and Deregulation, Policy and Practice in the Utilities and Financial Services Industries*, Oxford, OUP, 1999, pp 40-43. See also Commission MEMO/05/489, accompanying the Green Paper on damages actions, entitled ‘What in the Commission’s view are the advantages of private actions for damages?’

<sup>33</sup> *BRT v SABAM*, op cit, n 6, para 16.

<sup>34</sup> See JHH Weiler, *The Constitution of Europe, ‘Do the New Clothes have an Emperor?’ and Other Essays on European Integration*, Cambridge, CUP, 1999, p 20.

<sup>35</sup> See Schaub, ‘Die Reform der Europäischen Wettbewerbspolitik’, in: Baudenbacher (Ed), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Achtes St. Galler Internationales Kartellrechtsforum 2001*, Basel/Genf/München, 2002, p 7; Commission Press Release IP/05/1634; Commissioner Kroes, ‘Delivering Lisbon: The Role of Competition Policy’, Speech Delivered at the European Liberal Democrat City Forum (London, 14 September 2005), in: <http://europa.eu.int/comm/competition/speeches>, p 5, explicitly referring to the enhancement of private enforcement in terms of bringing the benefits of the Commission’s fight against competition offences ‘closer to the citizen’. On the general principle of the close-to-citizens application of Community law (*Bürger-näh*) see e.g. Callies, ‘Europa als Wertgemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?’, 59 *JZ* 1033 (2004), p 1035. This objective is also enshrined in Article 1(2) TEU, which refers to decisions taken as closely as possible to the citizen (see also Schröter, in: Schröter, Jakob & Mederer (Eds), *Kommentar zum Europäischen Wettbewerbsrecht*, Baden-Baden, 2003, p 48).

constitutional element of private EC antitrust enforcement means that the conditions and limitations of private actions in the US cannot be uncritically transcribed to the European context without encroaching on individual Community rights.<sup>36</sup>

The Commission recently embarked upon an ambitious project to further private antitrust enforcement in Europe. In this task it has received the full support of the European Court of Justice, which in 2001 delivered a landmark ruling in *Courage v Crehan* that set the basis for a system of individual civil liability for breach of the EC competition rules.<sup>37</sup> According to former Commissioner Monti, in a system combining private and public enforcement, victims of anti-competitive practices, including consumers, must have the opportunity to avail themselves of effective remedies in the form of decentralised private enforcement, so as to protect their rights and obtain compensatory damages for losses suffered.<sup>38</sup> His successor, Commissioner Kroes, pursued the project enthusiastically, and this led to the publication of a Green Paper in December 2005.<sup>39</sup>

### c. The Relevance of the Goals of EC Competition Law

The question of the relationship and balance between public and private antitrust enforcement in Europe must also be seen in the context of the more substantive question of the goal of EC competition law: is it the public interest in safeguarding effective competition in the common market or the private interest in protecting one's economic freedom?<sup>40</sup> This is necessary because there is a widespread misunderstanding as to the interests protected by competition law as such in the contexts of public and private antitrust enforcement. Thus some authors distinguish between public enforcement, which pursues the public interest of protecting the competition norms through administrative or criminal sanctions, and private enforcement which pursues the private interest of protecting competitors and consumers through civil 'sanctions',

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<sup>36</sup> See e.g. Jones, *op cit*, n 27, p 81, who refers to the US limitations as to the class of prospective plaintiffs. Compensation of victims of anti-competitive practices cannot be as easily ignored in Europe as in the US. See *infra*.

<sup>37</sup> Case C-453/99 *Courage Ltd. v Bernard Crehan* [2001] ECR I-6297. On this ruling see Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v Crehan* and the Community Right to Damages' (2002) 39 CMLRev 447.

<sup>38</sup> See former Commissioner Monti, 'Opening Speech: Effective Private Enforcement of EC Antitrust Law', in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland, Hart, 2003, p 3 *et seq.*

<sup>39</sup> *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 final. The Green Paper is accompanied by a Staff Working Paper which sets out the various options more discursively: *Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC(2005) 1732.

<sup>40</sup> On the bearing of private enforcement on the goals of antitrust in the context of Greek competition law, see e.g. VG Hatzopoulos, *The Essential Facilities Doctrine in EU and Greek Competition Law*, Athens/Komotini, 2002 [in Greek], p 165 *et seq.* For an Italian point of view on the same issue see Toffoletto, 'Il risarcimento del danno', in: Toffoletto & Toffoletti (Eds), *Antitrust: le sanzioni*, Milano, 1996, pp 123-124.

most notably civil claims for damages.<sup>41</sup> The Commission has also at times followed a similar approach, with statements which seem to ignore the instrumental character of civil claims.<sup>42</sup>

Indeed, the Commission has been reproached for insisting on distinguishing between public authorities whose acts are guided by the public interest, and national courts which decide disputes pertaining to the private interest.<sup>43</sup> Such a distinction does not do justice to the role of civil courts when they enforce competition law in the context of private disputes between economic operators, since they in fact have to consider the economic public policy in their judgments when the dispute in question has a wider impact on the market. In this sense, private interest plays a complementary role to the public interest.<sup>44</sup> It is correctly recognised that the courts cannot simply confine themselves to considering the interests of the litigants, but must also have regard to the general interests of economic policy. This explains why courts in some jurisdictions must raise the competition law question even *ex proprio motu*, and may not allow an anti-competitive agreement to be performed, even if the parties have not raised the issue of its legality.<sup>45</sup> Likewise, the possibility for public competition authorities in the EC and

<sup>41</sup> See e.g. Braakman, 'The Application of the Modernised Rules Implementing Articles 81 and 82 EC Treaty in Injunction Proceedings: Problems and Possible Solutions', in: Hawk (Ed), *International Antitrust Law and Policy 1999, Annual Proceedings of the Fordham Corporate Law Institute*, New York, Juris, 2000, p 161; Harding and Joshua, *op cit*, n 20, p 239. Compare also Shaw, 'Decentralization and Law Enforcement in EC Competition Law', (1995) 15 LS 128, pp 158-159: 'Private actions will generally be favoured where competition is seen primarily as a private, market-based matter, with competition policy being correspondingly limited in scope. They will tend to be discouraged where competition policy implies the existence of some element of public interest in the maintenance of a particular type of trading structure'.

<sup>42</sup> See in this regard some Commission references to the role of national civil actions: Explanatory Memorandum of the September 2000 Regulation proposal, p 5 ('unlike national authorities or the Commission, which act in the public interest, the function of national courts is to protect the rights of individuals'); Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ 2004, C101/54, para 4 ('where a natural or legal person asks the national court to safeguard his individual rights, national courts play a specific role in the enforcement of Articles 81 and 82 EC, which is different from the enforcement in the public interest by the Commission or by national competition authorities'); Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004, C101/65, para 27 (similar language). To be fair to the Commission, these statements echo judicial pronouncements, though not by the ECJ; compare in this regard Case T-24/90 *Automec Srl v Commission (II)* [1992] ECR II-2223, para 85: '... unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations inter se, an administrative authority must act in the public interest'. Commission officials have also made the distinction between public and private interest on numerous occasions. See also former Commissioner Monti, 'Opening Statement: The Modernisation of EC Antitrust Policy', in: Ehlermann & Atanasii (Eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford/Portland, Hart, 2001, p 6.

<sup>43</sup> See Mestmäcker, 'The EC Commission's Modernization of Competition Policy: A Challenge to the Community's Constitutional Order', (2000) 1 EBOR 401, p 423; *idem*, 'The Modernisation of EC Antitrust Policy: Constitutional Challenge or Administrative Convenience?', in: Ehlermann & Atanasii (Eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford/Portland, Hart, 2001, pp 233-234.

<sup>44</sup> See Bourgeois, 'EC Competition Law and Member State Courts', in: Hawk (Ed), *Antitrust in a Global Economy 1993, Annual Proceedings of the Fordham Corporate Law Institute*, New York/Deventer, Juris, 1994, p 486; C Lucas de Leyssac and G Parleani, *Droit du marché*, Paris, 2002, p 971.

<sup>45</sup> See Canivet, *op cit*, n 29, p 24.

some national competition systems to intervene and submit observations in the course of civil proceedings is partly due to the public policy/interest nature of this kind of competition law-related litigation.<sup>46</sup> Finally, laws that attach a punitive element to civil claims for damages, as is the case of US antitrust, exist precisely because there is something more at stake than just the pursuit of private interest.

This instrumental role of private antitrust enforcement is in perfect harmony with the objectives of competition policy. The dominant and more correct view is that EC competition law aims at conditions of effective competition (protecting the institution of competition – *Institutionsschutztheorie*),<sup>47</sup> whereas economic freedom (protection of private rights – *Individualschutztheorie*) is but a reflexive and subsidiary aim of protecting competition.<sup>48</sup> Protection of private rights cannot by itself set in motion the mechanisms for the protection of free competition, since the law as it stands is indifferent to harm caused to a specific person, unless that harm is the consequence of a certain practice whose object or effect is the distortion-prevention-restriction of effective competition in the market. The law therefore does not require that a specific agreement or concerted practice should actually cause harm to a person in order to prohibit it; it is sufficient if the *object* of the agreement or practice is to restrict competition in the public interest sense. Equally, an agreement or practice might cause

<sup>46</sup> See Rinczaux, 'Les autorités de la concurrence doivent-elles être autorisées à intervenir dans les procédures relatives à des problèmes de concurrence, plus particulièrement lorsqu'elles sont menées devant les juridictions ordinaires? Dans l'affirmative, quel devrait être le fondement de leur pouvoir d'intervention? Rapport international', LIDC Questions 2001/2002, in: <http://www.ligue.org>, p 1.

<sup>47</sup> In a recent brochure for the general public, the Commission refers to the goals of competition policy in the following terms: 'The Community's competition policy pursues a precise goal, which is to defend and develop effective competition in the common market. Competition is a basic mechanism of the market economy involving supply (producers, traders) and demand (intermediate customers, consumers). Suppliers offer goods or services on the market in an endeavour to meet demand. Demand seeks the best ratio between quality and price for the products it requires. The most efficient response emerges as a result of a contest between suppliers' (European Commission, *Competition Policy in Europe and the Citizen* (Luxembourg, 2000), p 7 (emphasis in the original)). For a more succinct definition of the objective of Art 81(1) EC, see also Commission Notice - Guidelines on the Application of Article 81(3) of the Treaty, OJ 2004, C101/97, para 13: 'the objective ... is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources'. See also DG-COMP Discussion Paper on Application of Article 82 of the Treaty to Exclusionary Abuses, para 4: 'the objective of Article 82 is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation'.

<sup>48</sup> See the 'dialogue' between the Presidents of the CFI and ECJ in the *IMS Health* interim measures cases. In case T-184/01 R *IMS Health Inc v Commission*, Order of 26 October 2001, [2001] ECR II-3193, para 145, the President of the CFI stressed that the primary purpose of Article 82 EC was 'to prevent the distortion of competition, and especially to safeguard the interests of consumers, rather than to protect the position of particular competitors'. On appeal, in case C-481/01 P(R) *NDC Health Corporation and NDC Health GmbH & Co KG v IMS Health Inc*, Order of 11 April 2002, [2001] ECR I-3401, para 84, President Rodríguez Iglesias stressed that such statements could not be accepted without reservation, since they 'could be understood as excluding protection of the interests of competing undertakings from the aim pursued by Article 82 EC, even though such interests cannot be separated from the maintenance of an effective competition structure'. See further Temple Lang, 'European Community Competition Policy – How Far Does It Benefit Consumers?', 18 *Boletín Latinoamericano de competencia* 128 (February 2004), in: <http://europa.eu.int/comm/competition/international/others>, p 130.



harm to certain persons but still not be considered anti-competitive, because it may not affect appreciably competition in the market (*de minimis*).

The existence of private actions, in particular the availability of damages to the victim of anti-competitive practices, is perfectly consistent with the public interest that is inherent in competition norms, notwithstanding the confusion in some authors who see the private interest, which is the dominant motivation in a private suit, as being at variance with the public interest pursued by the competition norms.<sup>49</sup>

The Court of Justice has solemnly recognised that private antitrust suits strengthen the working of the Community competition rules and discourage practices that are liable to restrict or distort competition, thus making a significant contribution to maintaining effective competition in the Community.<sup>50</sup> In other words, this is a case where the private interest contributes to the safeguarding of the public interest, so no antinomy exists. Thus private suits do not alter the substance of EC competition law, which is the protection of the public interest, as that is expressed in the goal of maintaining effective competition in the market. Even if we suppose that in a given case a civil litigant's private interest might not be compatible with the public interest, as may be the case, for example, if inefficient competitors allege the 'anti-competitive nature' of certain practices that in reality enhance effective competition, such a private suit would still fail, because the alleged harm would not have been caused by conduct prohibited or illegal under Articles 81 and 82 EC. Consequently the private interest can never contradict the public interest. Hence the 'private attorney-general' function of the civil litigant.

In sum, an effective system of private enforcement does not alter the basic goal of the competition rules, which is to safeguard the public interest in maintaining free and undistorted competition, and should by no means be thought of as antagonistic to the public enforcement model. Ideally, the two models can work to complement each other.<sup>51</sup> The Commission may now to some extent have realised this by speaking of the

<sup>49</sup> See e.g. in the framework of Greek competition law, the rather extreme position of Schinas, 'The Greek Experience of the Protection of Free Competition: Basic Directions', in: Schinas (Ed), *Protection of Free Competition, The Practice of EPA/EA*, Athens/Komotini, 1992 [in Greek], p 28 *et seq.* The author, a former chairman of the Greek Competition Committee, excludes the possibility of private suits because of the public interest character of competition legislation, which is considered a *lex specialis* with regard to the Greek law of non-contractual liability. A similar position is held in Spain by Alonso Soto, again a former public antitrust enforcer, who argues forcefully for the application of EC and national competition law exclusively by the competition authorities. See further Creus and Fernández Vicién, 'Rapport espagnol', in: *XVIII Congrès FIDE (Stockholm, 3-6 Juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence*, Stockholm, 1999, p 96 *et seq.* See also for a similar view held by Portuguese courts, though now apparently superseded, Ruiz, 'Rapport portugais', in: *XVIII Congrès FIDE (Stockholm, 3-6 juin 1998)*, Vol. II, *Application nationale du droit européen de la concurrence*, Stockholm, 1999, p 238.

<sup>50</sup> *Courage*, *op cit*, n 37, para 27.

<sup>51</sup> See e.g. Recital 7 Regulation 1/2003: 'The role of the national courts here complements that of the competition authorities of the Member States'. Such a complementary function was advocated by the majority of the participants in the 2001 Florence EU Competition Law Workshop dealing with private enforcement. See individual contributions and discussions in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland, Hart, 2003; also Goyder, 'Providing Support for National Judges in Dealing with Competition Cases', in: (2006) 3(1) *CompLRev*

two limbs of antitrust enforcement as complementary and serving the same aim: 'to create and sustain a competitive economy'.<sup>52</sup>

### 3. THE INDEPENDENCE OF PRIVATE ANTITRUST ENFORCEMENT

#### a. Independence as a Principle

Notwithstanding their substantive complementarity, private and public enforcement remain institutionally independent of each other. The independence of the two models means that in principle there is no hierarchical relationship as between the former and the latter, or between the public authority and the 'private attorney-general'. Introducing a rule of primacy would be problematic because of the principles of separation of powers<sup>53</sup> and judicial independence and also because it would undermine the role of courts as enforcers of equal standing.<sup>54</sup> The fact that the Court of Justice appears to have entrusted the Commission with a primacy over national proceedings and courts does not contradict our analysis here.<sup>55</sup> This 'primacy' is not one of the Commission, as *competition authority*, over *civil courts*, but rather of the Commission, as *supranational Community organ*, over *national courts*.<sup>56</sup>

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Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford/Portland, Hart, 2001, pp 576-577.

<sup>52</sup> See Green Paper, under section 1.1: 'The antitrust rules in Articles 81 and 82 of the Treaty are enforced both by public and private enforcement. Both forms are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy.' See also the intervention by Emil Paulis at the ERA Conference on Private Enforcement in EC Competition Law: The Green Paper on Damages Actions (Brussels, 9 March 2006), recognising the 'public role' of national courts.

<sup>53</sup> On the principle of separation of powers as between the Commission and national courts see Paulis, 'Coherent Application of EC Competition Rules in a System of Parallel Competences', in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy*, Oxford/Portland, Hart, 2001, pp 419-422, who holds that this principle does not apply to the relationship between the Community legal order and national legal orders. See, however, the approach by Judge Edward, who contradicts this (Edward, 'Panel Three Discussion: Courts and Judges', in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2000: The Modernisation of EU Competition Law*, Oxford, Hart, 2001, p 485). The former view is very formalistic and does not do justice to the integrated nature of the Community legal order. Separation of powers obviously becomes a problem only for legal systems that entrust public enforcement decision-making to administrative authorities. When decision-making rests with the courts, as in Ireland or in the US, there is no problem of principle at stake.

<sup>54</sup> It should be stressed that the US Department of Justice has never enjoyed any kind of 'primacy' over private actions. See Jones, 'A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US', in: Ehlermann & Atanasiu (Eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford/Portland, Hart, 2003, p 99.

<sup>55</sup> Case C-344/98, *Masterfoods Ltd. v HB Ice Cream Ltd.* [2000] ECR I-11369. See *infra*.

<sup>56</sup> In the pertinent part we argue that in reality *Masterfoods* establishes no primacy of the Commission over national courts, but rather imposes duties on the latter to apply Community law in a consistent way under the final control of the Court of Justice through the Art. 234 EC procedure. See also Paulis and Gauer, 'La réforme des règles d'application des articles 81 et 82 du Traité', 11 JdT (Eur.) 65 (2003), p. 69; *contra* Kjølbbye, (2002) 39 CMLRev. 175, p 181, who seems to be seeing *Masterfoods* as establishing a primacy of the Commission over national court proceedings.

This principle is sometimes missed by public enforcement officials, who tend to take an expansive view of the ambit of public enforcement.<sup>57</sup> Such paternalistic attitudes ought to be resisted, however, not only because they blur the two distinct limbs of antitrust enforcement, but more importantly, because they demotivate market players from assuming their role as private attorneys-general, thus prejudicing the overall deterrent effect of private action. They may also estrange national judges, who may not wish to get too much involved in an area in which they will always be under the scrutiny or dominance of administrators.

A comparative analysis of national competition laws confirms the independence of private enforcement vis-à-vis public enforcement.<sup>58</sup> This is not affected by the possible deference paid on occasion by civil courts to competition authorities' decisions.<sup>59</sup> Again, such an attitude does not indicate the primacy of public over private enforcement, or of administrative over civil proceedings, but may simply reflect the principle of economy in legal proceedings, which may make it inappropriate to repeat parts of the procedure before a civil generalist court, if a specialist authority or court has already dealt with the same facts.<sup>60</sup>

<sup>57</sup> Compare the language used by former Commissioner Monti to describe the *amicus curiae* mechanism, 'These means of interactions are intended to allow the Commission ... to draw courts' attention to important issues relating to the application of EU antitrust rules and *contribute to the coherence of their rulings*' (see Monti, 'EU Competition Policy after May 2004', Speech Delivered at the Fordham Annual Conference on International Antitrust Law and Policy (New York, 24 October 2003), in: <http://europa.eu.int/comm/competition/speeches>, p. 5, emphasis added). Certainly such statements do not make much for the independence of private enforcement.

<sup>58</sup> See e.g. on the Austrian legal system Eilmansberger and Thyri, 'Austria', in: Cahill (Ed), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports*, Cambridge, CUP, 2004, p 51. According to these authors, it is doubtful whether a civil court could suspend proceedings until the Austrian Cartel Court issues a decision. This would probably not qualify as a 'prejudicial preliminary question of law' under s 190 of the Austrian Code of Civil Procedure. On French law, see Idot, 'France', in: Cahill (Ed), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports*, Cambridge, CUP, 2004, pp 179-180.

<sup>59</sup> See, for example, with reference to Italian law, Scuffi, 'Established Principles and New Perspectives in the Italian Antitrust Case Law', in: Raffaelli (Ed), *Antitrust between EC Law and National Law, Treviso 16-17 May 2002*, Bruxelles/Milano, 2003, pp 277-278, clearly distinguishing the question of autonomy and independence of private enforcement from the question of the occasional *de facto* deference paid to decisions of the Italian competition authority by civil courts.

<sup>60</sup> With regard to the UK, see Marsden and Smith, 'United Kingdom', in: Cahill (Ed), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports*, Cambridge, CUP, 2004, speaking of a certain precedence of public over private enforcement 'as a matter of practicality'. A good example is *Iberian UK v. BPB Industries plc* (Ch), ([1996] 2 CMLR 601) where the English High Court held that if parties have disputed an issue before the Commission and have had a reasonable opportunity to challenge the Commission's decision, they are estopped from pleading that issue anew and contradicting the Commission's view in civil proceedings. See further Goyder, 'Reliance on Commission Decisions in National Courts', in: Andenas & Jacobs (Eds), *European Community Law in the English Courts*, Oxford, OUP, 1998, pp 179 *et seq.*; Peretz, 'Should Competition Authorities Be Authorized to Intervene in National Competition Proceedings, Especially in the Courts? If they Should, then in what Circumstances and to What Extent Should this Be the Case? National Report from the United Kingdom', LIDC Questions 2001/2002, in: <http://www.ligue.org>, p 6. See also *British Leyland v. Wyatt* [1979] 3 CMLR 79, where the High Court treated a non-appealed Commission decision as having the same effect as a judgment by the Court of Justice; compare (2006) 3(1) CompLRev

## b. The Commission Green Paper and National Competition Laws on the Independence of Private Enforcement

The Commission's recent Green Paper is somewhat unclear as to the relationship between private and public enforcement. On the one hand, the Commission clearly sees private enforcement as in principle independent,<sup>61</sup> so that potential plaintiffs do not need to wait for a condemnation of anti-competitive conduct in a public enforcement action before seizing civil courts. The Commission has made clear that it is, 'keen to see increased private enforcement of the full range of competition infringements under EC law and not just additional enforcement in cases already dealt with by the public authorities (so called "follow-on actions")'.<sup>62</sup> In other words, the aim of the Green Paper is also to facilitate 'stand-alone' actions in cases which public enforcement agencies could not or did not wish to deal with. This certainly shows that, at least as a matter of principle, private enforcement is seen as independent of public enforcement.<sup>63</sup>

On the other hand, however, the Green Paper aims at introducing a binding effect or at least a rebuttable presumption for infringement decisions of competition authorities of the EU Member States. Thus, the finding of a competition law infringement will either bind civil courts or reverse the burden of proof as to the existence of illegal behaviour, i.e. anti-competitive conduct.<sup>64</sup> In those cases, the main task of the civil courts will be to decide whether the plaintiffs have suffered harm and to award damages. However, while these proposals create an initial impression of public enforcement "primacy", in reality they are merely meant as an incentive to encourage follow-on civil actions by making it easier for the victims of anti-competitive practices to rely on findings by the competition authorities rather than having to prove a competition law infringement anew. These proposals do not aspire to give decisions by public enforcement agencies a

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*contra Merson v Rover Group Ltd.* 22 May 1992, not reported, cited in the *Iberian* case, where the court came to the conclusion that it was not bound by the outcome of European competition proceedings. This whole issue has now been revisited in England by the *Crehan* line of cases (see *infra*). Some national competition laws also contain provisions with the aim of avoiding such a duplication of proceedings. Thus, under Art. 18 of the Greek L.703/1977 the judgments of the administrative courts that review the Competition Committee decisions have the force of *erga omnes res judicata* before the civil courts. The judgments of the latter, on the other hand, enjoy *res judicata* effect only *inter partes* and do not bind the Competition Committee.

<sup>61</sup> See e.g. Commissioner Kroes, 'More Private Antitrust Enforcement through Better Access to Damages: An Invitation for an Open Debate', Opening Speech at the Conference 'Private Enforcement in EC Competition law: The Green Paper on Damages Actions' (Brussels, 9 March 2006), in: <http://europa.eu.int/comm/competition/speeches>, p 4: 'Private actions should not be dependent on public enforcement. We need a system that allows private actions to stand on their own two feet'. See also para 3 of the Commission Staff Working Paper which refers to private and public enforcement as 'the two pillars of enforcement of EC antitrust rules', thus viewing both as of an equal footing.

<sup>62</sup> Commission MEMO/05/489, op cit, n 32, under the title 'What types of infringement does the Commission think private damage actions should enforce?'

<sup>63</sup> Compare XXXV<sup>th</sup> Report on Competition Policy – 2005, para. 31, which stresses that actions for damages should be 'an autonomous means of enforcement'. See also De Smijter, Stropp and Woods, 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules' (2006-1) *EC Competition Policy Newsletter* 1.

<sup>64</sup> Green Paper, Question C, Option 8.

binding effect over all kinds of parallel civil proceedings. Thus, it is not proposed that findings of national competition authorities should have a bearing on civil litigation when, for example, the litigants raise the nullity of a contract or when the parties seek a remedy other than damages. If the binding effect of national authorities' decisions were to be extended to such cases, then one could indeed speak of a principle of primacy of public over private antitrust enforcement. In such a case the courts would be deprived of the possibility to apply and decide the substantive competition law norms, therefore the aim of involving civil judges in antitrust enforcement in Europe would be seriously impaired.

The same can be said of those national competition laws that have recently been amended with the aim of facilitating follow-on civil actions for damages by conferring a binding effect on final decisions by public authorities declaring that there has been an infringement of competition law. Thus, section 58A of the UK Competition Act, as subsequently amended, confers a binding effect on decisions of the Office of Fair Trading (OFT), the Competition Appeal Tribunal (CAT) on appeal from the OFT, and the European Commission but this provision clearly specifies that it 'applies to proceedings before the court in which damages or any other sum of money is claimed in respect of an infringement'.<sup>65</sup> In other words, the UK Act does not provide for a general principle of law that makes findings by the public authority binding on all kinds of civil proceedings. What section 58A of the UK Act really refers to is follow-on civil actions for damages, and the aim is to facilitate such actions from an evidentiary point of view.<sup>66</sup> This does not mean that such binding effect extends to concurrent civil proceedings, in which for example the nullity of an agreement arises in the context of claims based on contract.

Similarly, section 33(4) of the recently amended German Competition Act (*7. GWB-Novelle*), which goes even further in conferring a binding effect on all Commission, *Bundeskartellamt*, and even other Member States' national competition authorities' decisions, is confined to follow-on civil litigation, basically aiming at facilitating damages claims against convicted infringers.<sup>67</sup> Indeed, a German court has recently confirmed that this provision does not entail a duty for civil courts to stay proceedings and await the adoption of a contemplated infringement decision by a competition authority or its finality. Instead, the civil court has power to adjudicate on the merits, since it enjoys parallel competence to deal with an action for damages based on the

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<sup>65</sup> This is clearer if one reads para. 87 of the *Explanatory Notes to the Enterprise Act 2002*, in: <http://www.legislation.hmso.gov.uk/acts/en2002/2002en40.htm>: 'Section 20: Findings of infringements. Subsection (1) inserts a new section 58A in CA 1998. The new section provides that certain decisions of the OFT or the CAT regarding an infringement of competition law are to bind the courts *for the purpose of a subsequent claim for damages*' (emphasis added).

<sup>66</sup> See Rodger, 'Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages?', [2003] 24 ECLR 103, pp 108-109.

<sup>67</sup> See Hempel, 'Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle', 55 WuW 362 (2004), p 371; Moch, 'Private Kartellrechtsdurchsetzung – Stand, Probleme, Perspektiven', 56 WuW 39 (2006), p 41.

competition law violation concerned. The German court, after distinguishing the spirit of s. 33(4) GWB, which is to facilitate follow-on claims, specifically stressed that the administrative proceeding leading to fines has in principle no priority or primacy over the concurrent civil proceeding.<sup>68</sup> This ruling is fully compatible with the principle of independence of private enforcement.

### **c. Practical Problems in the Interrelationship between Public and Private Enforcement: Settlements, Leniency, Amount of Fines and Damages**

The principle of independence of private antitrust enforcement has many serious practical consequences. Courts are not bound in the least by the administrative practice of antitrust authorities with regard to their discretion as to whether or not to settle a case or offer certain companies immunity with a view to obtaining useful information in their pursuit of a cartel.

Thus a possible decision by the Commission or national competition authorities to accept commitments by companies instead of proceeding to a finding of infringement, and to close the administrative proceedings by rendering the commitments binding on those companies, does not bind national civil courts as to the applicability or non-applicability of Articles 81 and 82 EC, and the courts remain free to decide whether or not there has been an infringement of Community competition law.<sup>69</sup>

Equally, national civil courts are not bound by administrative leniency schemes.<sup>70</sup> Immunity from administrative fines is totally unconnected with civil litigation claims. The recent de-trebling of antitrust damages for corporate amnesty applicants in the US does not call the above principle into question, because de-trebling will take place only if the amnesty beneficiary assists the plaintiff in his private action. Thus the 2004 *Antitrust Criminal Penalty Enhancement and Reform Act* only limits the damages recoverable from a corporate amnesty applicant to the harm actually inflicted by the applicant's conduct, i.e. to single and not treble damages, if the court makes a finding that that person has cooperated with private plaintiffs in their damage actions against the remaining cartel members. An appropriate level of cooperation as defined by the Act involves: (a) providing a full account of all facts relevant to the civil action; (b) furnishing all documents relevant to the civil action; and (c) making oneself available for interviews, depositions and testimonies in connection with the civil action.<sup>71</sup> This

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<sup>68</sup> OLG Düsseldorf, 3.5.06, VI-W (Kart) 6/06 – *Zementkartell*, 56 WuW 913 (2006).

<sup>69</sup> Art. 9 and Recital 13 Reg. 1/2003. National courts cannot however undermine the effectiveness of the Commission commitments decision or interfere with the exercise of the Commission's discretion in that decision, though they can choose to proceed to their own analysis as to the overall legality or illegality of the practice in question, thus leading to a judgment with *inter partes res judicata* effect, while the Commission's commitments remaining binding *erga omnes*.

<sup>70</sup> In the EU, see Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ 2002, C45/3.

<sup>71</sup> The new Act also limits the recovery of damages from amnesty applicants to damages attributable to the defendant, i.e. it eliminates joint and several liability for successful amnesty applicants. For critical comments see Yon, 1 *Concurrences* 102 (2004), pp 106-107.

shows that the US rule which governs the interface between the US leniency policy and private enforcement is not one-sided, but rather aims at protecting the effectiveness of both elements.

In Europe, the rather under-developed state of private enforcement was not considered to deter companies from applying for leniency, so until very recently no case had been made for imposing limitations on private actions in cases of leniency applications.<sup>72</sup> The Green Paper for the first time attempts to address this question and moves in the US direction. The policy options considered include the non-discoverability of leniency applications and the possibility to lessen the civil liability of a leniency applicant.

As to the discoverability of leniency-related evidence, essentially corporate statements by leniency applicants,<sup>73</sup> the Commission in its current cooperation Notice declares that it will only transmit such information to national courts with the leniency applicant's consent, as otherwise the accomplishment of the tasks entrusted to it would be jeopardised.<sup>74</sup> Such disclosure would prejudice the effective enforcement of Community competition law by the Commission.<sup>75</sup> In principle, public enforcement by the Commission and its intention to facilitate detection through immunity of fines should not function to the detriment of private enforcement and the compensation of cartel victims; that is why the Leniency Notice cannot interfere with such civil claims, which in any case are based on the direct effect of Treaty provisions.<sup>76</sup> There are less onerous ways for these objectives to be pursued than by disclosing documents companies have submitted to the Commission under the Leniency Notice, which would frustrate the Notice's aim of making detection of hardcore restrictions of competition easier. Private litigants will therefore basically have to rely solely on discovery in the framework of the civil proceedings, content themselves with non-leniency related evidence held by the Commission or, finally, await and rely on the final Commission infringement decision. It is noteworthy that there have recently been cases where private litigants tried to seek discovery in US courts of EC leniency "corporate

<sup>72</sup> See further Idot, 'Une question d'actualité en droit de la concurrence : Programmes de clémence et internationalisation', in: *Droit et actualité, Études offertes à Jacques Béguin* (Paris, 2005), pp 378-379; Prieto and Roda, 'Quelles évolutions pour la clémence dans l'Union européenne?', 3/2005 *Concurrences* 12, p 14. On the EC state of affairs see also former Commissioner Monti, 'Priorities for EU Competition Policy', in: Hellenic Competition Committee (Ed), *EU Competition Law and Policy, Developments and Priorities, Athens Conference, April 19<sup>th</sup> 2002* (Athens, 2002), p 12.

<sup>73</sup> See Temple Lang, 'The Implications of the Commission's Leniency Policy for National Competition Authorities' (2003) 28 *ELRev* 430, pp 432-433.

<sup>74</sup> Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, OJ 2004, C101/54, para 26. See also Leniency Notice, paras 32-33: "The Commission considers that normally disclosure, at any time, of documents received in the context of this notice would undermine the protection of the purpose of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council."

<sup>75</sup> See further D Voillemont, *Gérer la clémence*, Paris/Bruxelles, 2005, p 46.

<sup>76</sup> Leniency Notice, para 31 in fine: "The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC."

statements”, i.e. of statements submitted to the Commission in the context of a leniency application. The Commission has viewed this as a serious risk for the effectiveness of its leniency programme and has tried to assuage the fears of leniency applicants by giving them the possibility to make oral statements.<sup>77</sup> The Commission’s current practice is that oral statements made by leniency applicants are routinely recorded by the Commission,<sup>78</sup> transcribed and signed by leniency applicants.<sup>79</sup> The Commission has very recently published a draft of an amended Leniency Notice<sup>80</sup> in order to formalise this practice, which is also followed in the context of certain national leniency programmes.<sup>81</sup>

The question of reducing the civil liability of successful leniency applicants is more complex and goes to the core of the relationship of public with private enforcement. The Green Paper on damages examines two options. One would be to grant a successful leniency applicant the option to claim a rebate on any damages claim facing him, in return for helping claimants bring damages claims against all cartel members.<sup>82</sup> The claims against the other infringers jointly and severally liable for the entire harm would remain unchanged. Another option would be to remove joint and several liability

<sup>77</sup> Initially foreign plaintiffs in US courts succeeded twice in securing access to statements made by EU leniency applicants, and failed once. In all these cases the Commission had filed a brief in opposition as *amicus curiae*. Discovery was allowed in two cases in the context of the *Vitamins* cartel: *In Re Vitamins Antitrust Litigation*, Misc. No. 99-197 (D.D.C. Jan. 23, 2002 and Sept. 30, 2002); discovery was not allowed in one case: *In Re Methionine Antitrust Litigation*, No. C-99-3491-CRB (N.D.Cal.). It appears, however, that one of the parties in this case settled, while offering the plaintiffs in exchange the CD-ROM provided to it by the Commission in the EU administrative proceedings, which contained essentially the whole Commission file. On these questions, see generally Burnside and Botteman, ‘Networking amongst Competition Authorities’ (2004) 10 *Int’l L.R.* 1, p 9; Nordlander, ‘Discovering Discovery – US Discovery of EC Leniency Statements’ [2004] 25 *ECLR* 646, p 650 *et seq.*; Levy and O’Donoghue, ‘The EU Leniency Programme Comes of Age (2004) 27 *World Competition* 75, p 86 *et seq.*; Amory and Marchini Càmia, ‘La demande de ‘clémence’ auprès de la Commission européenne : Effets collatéraux dans d’autres juridictions’, Sept. 2005, Vol. II, *e-Competitions*, in: <http://www.concurrences.fr>, p. 2; Guersent, ‘Table ronde : Les conséquences civiles et pénales dans un contexte d’internationalisation des programmes de clémence’, in: *Clémence et transaction en matière de concurrence, Premières expériences et interrogations de la pratique*, 125 GP n° 287-288 7 (2005), pp 49-50. The recent judgment of the US Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241, though not directly referring to the discoverability in US courts of EU leniency corporate statements, has created further problems.

<sup>78</sup> The Commission tries to keep such statements short, and excludes business secrets and confidential information to avoid the need for editing.

<sup>79</sup> At least, the Commission requests a signature but considers it immaterial whether the transcript is signed or not; the danger of signing a transcript is that this document could potentially be seen as an admission of liability by the company.

<sup>80</sup> *Draft Amendment of the 2002 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, in: <http://europa.eu.int/comm/competition/antitrust/legislation/leniency.html>. The public consultation period expired on 20 March 2006 and a new formal text is expected soon. Compare also Option 28 of the Green Paper on damages.

<sup>81</sup> This is the case in France. See further Lasserre, ‘Propos introductifs’, in: *Clémence et transaction en matière de concurrence, Premières expériences et interrogations de la pratique*, 125 GP n° 287-288 7 (2005), p 14.

<sup>82</sup> Option 29 of the Green Paper. Someone who has been granted leniency from fines could, for example, in return for helping claimants with evidence, receive a rebate of 50% on any damages claim in a follow-on action. If there is a system of double damages for horizontal cartels, this rebate would de-double the award for the leniency applicant, thus restoring single damages as the contents of the claim he faces.



for the successful leniency applicant and limit his liability to the share of the harm corresponding to his share in the cartelised market.<sup>83</sup>

As with the US case, we see that the EC proposals do not call into question the independence of private enforcement, but rather aim at ensuring that the effectiveness of the Leniency Notice is not compromised. Victims of anti-competitive practices will still be compensated fully; indeed, if the first option of the Green Paper is preferred, they will be better off, as the leniency beneficiary will be under a duty to assist plaintiffs bring a damages claim against the other cartel members.

Finally, the imposing of an administrative fine by the Commission or a national competition authority on an undertaking has no significance in a civil trial centred on the same facts and undertakings. In other words, the *non bis in idem* principle does not apply as between administrative and private enforcement.<sup>84</sup> At the same time, private damages awards that precede administrative (public) proceedings should in principle have no bearing on the possible fines. Taking into account such damages awards as attenuating circumstances for the imposition of administrative fines would not further the overall deterrent effect of EC competition law enforcement.<sup>85</sup>

#### **d. *Masterfoods* and Article 16 of Regulation 1/2003 do not Introduce a Principle of Primacy of Public over Private Enforcement**

The proposition that private antitrust enforcement in Europe should be seen as independent of public antitrust enforcement is contradicted neither by the *Masterfoods* jurisprudence of the Court of Justice nor by Article 16 of Regulation 1/2003. *Masterfoods* and Article 16 are sometimes explained by reference to the long-held conviction in Europe that by definition public enforcement is superior to private enforcement, simply because a specialised public authority is better acquainted with the economic specificities of antitrust than generalist judges. However, apart from the fact that such a paternalistic view does not do justice to the courts, it ends by subjugating private to public enforcement. In our view, *Masterfoods* and Article 16 owe their

<sup>83</sup> Option 30 of the Green Paper.

<sup>84</sup> See Temple Lang, 'EEC Competition Actions in Member States' Courts - Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law', in: Hawk (Ed), *Antitrust and Trade Policies of the European Economic Community 1983, Annual Proceedings of the Fordham Corporate Law Institute*, New York, Juris, 1984, p 265; Jones and Sharpston, 'Beyond *Delimitis*: Pluralism, Illusions, and Narrow Constructionism in Community Antitrust Litigation' (1996-97) 3 Columbia JEL 85, p 91.

<sup>85</sup> See, however, Commission Dec. 1999/60/EC of 21 October 1998 (*Pre-Insulated Pipe Cartel*), OJ 1999, L24/1, para 172, where the Commission took into account as an 'extenuating circumstance', justifying the considerable reduction of a fine the payment of substantial damages by one of the addressees of the Commission Decision to a victim of the anti-competitive conduct. This case has been rightly criticised by S Mail-Fouilleul, *Les sanctions de la violation du droit communautaire de la concurrence*, Paris, 2002, p 482, fn 3016. In joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd. Et al. v Commission* [2004] ECR II-1181, para 348, one of the applicants had argued that the Commission had failed to consider as an attenuating circumstance the fact that it had concluded civil law settlements in the US and Canada. The Court rejected the argument because the settlements in question had no impact on the infringement committed in the EEA. This may mean that civil damages awards and settlements in the EU may be an appropriate attenuating circumstance in the imposition of administrative fines.

existence to the more 'mundane' sensitivities that are developed in the Community-national law balance, rather than to a precedence of public over private enforcement.

Indeed, prominent Commission officials argue that *Masterfoods* and the corresponding provision of Article 16 of Regulation 1/2003 do not make national courts subject to the Commission's authority, but rather to that of the Court of Justice, which through the intermediary of Article 234 EC can review the Community acts in question in an authentic way in the Community.<sup>86</sup> This correct approach relies on the fact that the Court of Justice did not hold in *Masterfoods* that national courts must always consider themselves bound by Commission decisions. Thus the Court held that when a Commission decision has been attacked before the Community Courts, a national court is not bound by that decision<sup>87</sup> but may decide to stay proceedings and await the outcome, 'unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted'. In other words, the ECJ did acknowledge that at the very end of the day, national courts cannot, strictly speaking, be bound directly by a Commission decision,<sup>88</sup> but only indirectly through the Court of Justice's intervention, to which they can always have access by means of the preliminary reference procedure. Indeed, as a Community judge stresses extrajudicially,

'Community law is interpreted and applied by the Court of Justice. It does not follow from this principle that the Commission is infallible. Whether or not an administrative decision of the Commission must be followed as embodying superior law depends not on the fact that the Commission has adopted it, so much as upon the fact that it has been upheld as valid by the Court of Justice'.<sup>89</sup>

Thus the resulting primacy is not so much of public over private enforcement, but rather of the acts of a Community organ over the decisions of national organs. This is evident in the negative nature of the duty of national courts not to take decisions running counter to Commission decisions (duty of abstention). The rationale of this provision is to ensure that no national decisions challenge a Community measure and not to require the national court positively to follow the Community solution. Besides, if there is primacy, it will only be that of the Community Courts: the Court of First Instance which reviews Commission decisions, and the Court of Justice which rules on

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<sup>86</sup> See Paulis and Gauer, *op cit*, n 56, p 69. The authors retreat from the earlier position of Paulis (*op cit*, n 53, p 420), which was expressed more in terms of a Commission primacy, because of the latter's 'special responsibility of implementing and orientating Community competition policy'.

<sup>87</sup> According to the Court, it is immaterial in this context whether the Commission decision has been suspended by the Community Courts. Acts of the Community institutions are in principle presumed to be lawful until such time as they are annulled or withdrawn (*Masterfoods*, *op cit*, n 55, para 53).

<sup>88</sup> See in this direction O'Keeffe, 'First among Equals: The Commission and the National Courts as Enforcers of EC Competition Law', (2001) 26 *ELRev* 301, p 304.

<sup>89</sup> Cooke, 'Centralised Subsidiarity: The Reform of Competition Law Enforcement', (2001) 10 *IJEL* 4, p 19.

appeal and gives preliminary rulings on the interpretation and validity of Community law.<sup>90</sup>

This line of argument also means that decisions by national competition authorities cannot, as a matter of existing Community law, bind national civil courts, even when those authorities act in the framework of Community competition law under Regulation 1/2003.<sup>91</sup> First of all, these authorities cannot be considered as ‘Community organs’ under Article 10 EC.<sup>92</sup> Article 10 EC cannot cover the cooperation between national competition authorities and national courts, although it might be tempting at first sight to argue thus in order to establish a ‘horizontal’ duty of cooperation between competition authorities and courts of different Member States.<sup>93</sup> Arguments in favour of such an implicit duty seem to confuse the theory of the *dédoublement fonctionnel*<sup>94</sup> with the ambit of Article 10 EC, which uses an organic criterion in order to arrive at a functionalist result. In other words, it would not make sense to use Article 10 EC in order to impose duties on national courts or authorities vis-à-vis other national courts or authorities. This is because both the national competition authority and the national court are indeed respectively, ‘indirect Community administration and judge’, so Article 10 EC could not resolve disputes as between two organs at the same level of the Community supranational structure (both in this case being organically national but functionally Community organs). Besides, Article 16(1) of the Regulation does not mention national competition authorities as the beneficiaries of the primacy rule and such authorities are not subject to the review of the European Courts, so the argument of the primacy of the European Court of Justice referred to above, is not transposable to this case, since a national court could never request a preliminary ruling from Luxembourg on the validity of a national act.<sup>95</sup>

<sup>90</sup> See Paulis and Gauer, *op cit*, n 56, p 69.

<sup>91</sup> This may, however, be possible under *national* law. For example, under Art 18 of the Greek Competition Act the judgments of the administrative courts that review the Competition Committee’s decisions have the force of *erga omnes res judicata* before the civil courts.

<sup>92</sup> With regard to national courts, compare AG Léger’s Opinion in case C-224/01, *Gerhard Köbler v Austria*, [2003] ECR I-10239, para 66, who sees the *dédoublement fonctionnel* more symbolically than literally: ‘That expression [juges communautaires de droit commun] must not be understood literally, but symbolically: where a national court is called upon to apply Community law, it is in its capacity as an organ of a Member State, and not as a Community organ, as a result of dual functions.’

<sup>93</sup> Some commentators doubt whether an EC Regulation can enter into such internal national procedural law questions. See in this regard, Gröning, ‘Die dezentrale Anwendung des EG-Kartellrechts gemäß dem Vorschlag der Kommission zur Ersetzung der VO 17/62’, (2001) 47 WRP 83, p 89. See also Lenaerts and Gerard, ‘Decentralisation of EC Competition Law Enforcement: Judges in the Frontline’ (2004) 27 World Competition 313, p 325, according to whom ‘the design of the relationships between national courts and their national competition authority resorts exclusively to national law’.

<sup>94</sup> See *supra* n 4.

<sup>95</sup> The national court could conceivably request a preliminary ruling on the interpretation of EC competition law, as applied by the national competition authority, but this does not change the reality that the rationale behind *Masterfoods* and Art. 16(1) Reg. 1/2003 is not present here.

The Commission should bear this rationale in mind before proposing legislation which would tip the present finely balanced independence between public and private enforcement in Europe. The Commission should indeed aim at facilitating private actions and at putting in place appropriate incentives, especially in the area of evidence. However, providing for incentives should be distinguished from totally subjugating private to public action and thus turning Europe's courts to mere damages calculators who play no creative part in the enforcement of competition law. In short, yes to facilitation of private enforcement, no to its subjugation to public enforcement.

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**The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture***Dan Wilsher\**

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Any significant growth in private damages claims for breaches of competition law will push to the fore the question: how far such actions are in the public interest? Both courts and competition regulators will have to develop new ideas and policies to ensure there is an optimal balance between private and public enforcement. For courts, there needs to be a recognition that damages litigation must not be allowed to be conducted in a manner which is at the expense of the public interest. This may mean courts adopt new rules that treat some cases as a form of public interest litigation. This would entail, for example, rules on costs being relaxed to protect weaker parties. It may require that any settlement is given closer scrutiny by courts to ensure no anti-competitive collusion has occurred. In addition, courts should allow limited intervention by competition regulators during proceedings to provide advice to the court on the public interest and to protect the regulator's wider policy goals. For competition regulators, the primary question is how much assistance to give to complaints who seek help to pursue damages claims, given limited agency resources and the potential damage to public enforcement that some forms of help may entail? Competition authorities need to establish clear and defensible guidelines on investigation of complaints, disclosure of documents, and settlement short of prosecution. Such guidelines should protect the essential functions of the agency so that it can pursue its public enforcement role. Failure to do so will lead to inconsistent decisions and maladministration. Private litigants should expect clear and predictable interactions with public enforcers so that a damages Bar can develop autonomously within Europe. Agencies also need to map out their broader policy goals and justify levels of assistance or non-assistance to private litigants by reference to them. The European Competition Network would be a good forum for developing common policies on these questions.

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**INTRODUCTION**

The European slow march towards a culture of private enforcement in competition law may have begun but the end is a long way off.<sup>1</sup> Such a move is generally seen as in the wider public interest because of it will bring the private sector in to augment under-resourced public enforcers.<sup>2</sup> The public interest will be promoted as a side-effect of creating incentives to private action. The purpose of this paper is to ask what role courts and competition authorities should take in this. If private competition

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<sup>1</sup> European Commission, Green Paper - Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final.

<sup>2</sup> Jacobs, 'Civil Enforcement of EEC Anti-trust Law' (1984) 82 Mich LR 1364 and Wils, 'Should Private Anti-trust Enforcement Be Encouraged in Europe?' (2003) 26(3) World Competition 473 provides a spirited rejection of the orthodoxy. This author expresses concerns about private enforcement from a different perspective to that of Wils and believes that the problems can be avoided by careful action by public bodies.

enforcement is generally *deemed* to be in the public interest, do public bodies thereby have a duty encourage and facilitate it? It is clear that courts and regulators have choices about what degree of assistance to give private competition litigants. The courts may have to develop new models of litigation which reflect this wider public interest in bringing private damages claims. Public interest litigation is recognized in the field of public law and some of the principles established there may be transferable to private competition claims.<sup>3</sup>

For competition authorities, as opposed to courts, the issue is more one of how to strike the right balance between pursuing their own policy goals for the whole community and aiding particular private litigants. The growth of private enforcement can be facilitated by assistance from public enforcers. Obvious examples of such assistance are disclosure of documents and issuing infringement decisions to allow follow-on actions. However, sometimes rendering such assistance will conflict with the achievement of the competition authorities' own policy goals. If a plaintiff damages bar does emerge as an interest group, there needs to be a mutually fruitful interaction between private and public enforcers. Plaintiffs (and their lawyers) are understandably likely to demand considerable help from public enforcers. This is particularly so if European systems of civil litigation remains less friendly to plaintiffs, even after any modifications arising from the Green Paper, by comparison with litigation in the United States. Securing the right balance between 'nature' of private enforcement and protection of the constitutional and policy independence of public enforcers may prove difficult. Public enforcers could become too 'plaintiff-led' in their activities to the detriment of the wider public interest. Competition authorities will therefore need strong and clear guidelines on when and how they will render assistance to plaintiffs. In the absence of these, public enforcers will find it difficult to make consistent and defensible decisions from the perspective of the administrative law that regulates their behaviour. They may also fail to devote their scarce resources to areas of the economy that they believe require particular attention. This author therefore supports the adoption of rather more detailed rules to structure the exercise of discretion by public enforcers than presently prevail in European competition authorities and the European Commission. The Federal Trade Commission provides a usefully clear and comprehensive approach to this problem through its detailed staff manual which structures decision-making in relation to complaints. This should also be complemented by broader policy plans which set out the key direction of competition agency enforcement priorities in terms of sectors and types of conduct that will attract resources. These could be pursued jointly, where appropriate, using the European Competition Network forum. This will further help to legitimize and render more transparent decisions about which private actions to support.

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<sup>3</sup> The leading English case is *R v Inland Revenue Commissioners ex p. National Federation of Self-employed and Small Businesses* [1982] AC 617. See the discussion at 691-94 in Wade and Forsyth, *Administrative Law*, Oxford, OUP, 2004.

## THE ROLE OF THE COURTS: GUARDIANS OF THE PUBLIC INTEREST?

Looking first at courts, one view would be that the best way of promoting private claims is leave them to be conducted purely by reference to the parties' interests. This laissez-faire perspective emphasizes allowing parties to enforce their rights. The courts are neutral referees in adversarial proceedings and should confine themselves to ensuring that the respective parties' cases are fairly heard. This is certainly the traditional English civil law approach to case-management although this is not shared by other European civil procedure systems.<sup>4</sup> Certainly European legal cultures reflect profoundly different views about the role of litigation in liberal societies.<sup>5</sup> Any reform of private competition law procedure must be able to be accepted and applied given the prevailing legal culture within each Member State.<sup>6</sup> The better view is that given that competition law is about preventing wrongs to the public through damage to the competitive process, procedural rules should be facilitative of such litigation. It is for this reason that the Commission Green Paper advocates various reforms to procedure law; for example, that courts remove restrictive rules on discovery.<sup>7</sup> This inherently 'public' aspect of competition law should be reflected in other aspects of courts' approach to private actions. Important public interest issues will arise within private litigation and courts must be ready to embrace these in ways which may conflict with the interests of one or even both the parties. However, they will have to exercise caution so as not to discourage litigation by introducing too much uncertainty through this wider enquiry aimed at promote the wider interests of consumers and other non-parties. Claimants will not litigate if their 'rights' are too subject to 'public interest' considerations. This section looks at two aspects of the role of courts. First, the interaction between courts and regulators in a world of increasing private enforcement. Second, the idea that courts are conducting a form of public interest litigation in competition damages claims.

### Courts v Competition Authorities – Who Should Have Primacy over Competition Policy?

In the European context, any idea that there is a parallel system of enforcement along public and private tracks is fanciful at present given the small volume of private enforcement occurring. If however a parallel system does indeed become a reality through more extensive private litigation, there are likely to be important questions regarding the relationship between national competition authorities ('NCAs') and courts. This interaction may need some careful management because up to now, national competition authorities have been able to shape policy without too much

<sup>4</sup> Foster, *German Legal System and Laws*, 3<sup>rd</sup> ed, Oxford, OUP, 2003 which shows how the 19<sup>th</sup> century laissez-faire approach of the *Zivilprozessordnung* has been modified to give greater judicial control over the conduct of litigation. Even English procedural rules have been profoundly reshaped along more court-led lines as a result of the civil justice reforms initiated by Lord Woolf in 1999.

<sup>5</sup> Caenegem, 'The Unification of European Law: a Pipedream?' (2006) 14(1) *European Review* 33.

<sup>6</sup> Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9(5) *European Law Journal* 599 for a more optimistic view about the submissiveness of national courts to EU reform of civil law.

<sup>7</sup> *Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 final at 5-6.

interference from courts. This was also true at EU level for a long time, but in recent years we have seen a more prickly relationship between the ECJ/CFI and the Commission over issues of the correct direction and interpretation of competition policy. Obvious examples are the decisions in *Oscar Bronner*,<sup>8</sup> *Delimitis*<sup>9</sup> and *Airtours*.<sup>10</sup> These cases show the courts not simply reversing decisions on narrow points of administrative due process but rather challenging the Commission's appreciation of fundamental aspects of competition theory and policy. This may be unobjectionable from a social welfare perspective if it produces better competition laws but it does present challenges to some traditional notions of the separation of powers between courts and administrators.

The move to a damages culture may lead to similar tensions at national level both because courts will hear more cases and NCAs will not be represented as parties to defend their policies. With more freedom, courts will be likely to develop their own theories of competition. This may not a bad thing because competition between agencies may produce better antitrust law. Certainly this idea chimes well with public choice theories which view regulators as often flawed and self-serving.<sup>11</sup> The possibility that companies might seek to shop around between public bodies is thus nothing to be feared. Conflict may however lead to a decline in the authority and consistency of competition law.<sup>12</sup> More importantly, at the constitutional level, NCAs are usually given the prime role of directing competition policy within each Member State. Across Europe, the traditional role of courts is to ensure that administrative bodies act within the law but not to take control of a complex area of public policy like competition.<sup>13</sup> This deference was traditionally grounded in the fact that regulators were given wide discretion by legislation.<sup>14</sup> Courts' role was confined to limited judicial review of the exercise of that discretion.<sup>15</sup> The very nature of competition policy seemed to call for deployment of a discretion that courts were ill-suited to employ.<sup>16</sup> However the growth of specialist courts and the use of more rigorous methodology in competition economics has allowed judges to bring antitrust law within the forensic method. Hitherto this new confidence has been utilized to strike down decisions by the

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<sup>8</sup> Case C-7/97 *Oscar Bronner v Mediaprint Zeitungs und Zeitschriftenverlag* [1999] 4 CMLR 112.

<sup>9</sup> Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR I-935.

<sup>10</sup> Case T-342/99 *Airtours v Commission* 5 CMLR 7.

<sup>11</sup> Olson, *The Logic of Collective Action*, Cambridge, Harvard University Press, 1965, and also Stigler, 'The Theory of Economic Regulation' (1971) 6 *Bell Journal of Economics and Management Science* 3-21 who argues that the public interest is very unlikely to be promoted by regulators because their 'clients' will tend to be large economic concerns.

<sup>12</sup> This consideration points us towards narrowing the scope of competition law towards price-fixing where there is less scope for conflict between courts and/or regulators as to the policy merits involved.

<sup>13</sup> See Schwarze, *European Administrative Law*, London, Sweet and Maxwell, 1999.

<sup>14</sup> Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, Oxford, OUP, 1986.

<sup>15</sup> Davis, *Discretionary Justice in Europe and America*, University of Illinois, 1976.

<sup>16</sup> Black, Muchlinski and Walker (eds), *Commercial Regulation and Judicial Review*, Oxford, Hart Publishing, 1998 contains a range of material charting the growth in judicialisation of economic law.



regulator.<sup>17</sup> Damages claims will cause a further shift of power towards the courts. The process of courts moving more aggressively into the field of competition policy will be interesting from this constitutional perspective. In the UK, for example, the CAT has a limited judicial review power over mergers but effectively a regulatory power over Article 81 and Article 82 decisions.<sup>18</sup> Private damages claims will further enhance this regulatory jurisdiction if there are a significant volume of cases. In all these cases courts, rather than NCAs, assume the role of, not just primary fact-finder and decision-taker, but also policy-maker. Competition courts may well develop 'policies' in terms of theories of how competition law should function. This is clearly the case in the United States where a great many key principles of anti-trust law have been laid down by the courts rather than (and sometimes in spite of) regulators.<sup>19</sup> It is of course important to note that the expertise of judges and regulators varies enormously across the EU. In some cases, judges will be highly deferent to their NCA because of this and in other cases, both judicial and executive bodies may be weak. There are a number of obvious pressure points where these conflicts will be played out which are explored below.

### Interventions by Public Enforcers: An Open Door?

The first and most basic question is the role and involvement of competition authorities in private law proceedings. Should there be a right of intervention conferred on competition bodies in private cases? If there should be, should it be automatic or limited to certain types of cases? The right of intervention would be controversial and parties might well seek to resist such interference which could prejudice their cases. There is a strong argument for a limited right of intervention because of the wider perspective and greater resources and expertise a public enforcer may bring. In the United States, there are many recent examples of intervention by public enforcers in private cases. These generally take the form of amici briefs. The Supreme Court has recently made reference to such evidence in number of cases: *Verizon Communications v Trinko*<sup>20</sup> on essential facilities where the amici brief on behalf of ten States authorities was not accepted; *Hoffman La Roche v Empagran*<sup>21</sup> on jurisdiction where the court was influenced by the argument that leniency programmes would be undermined; *Intel*<sup>22</sup> where the EU Commission itself filed a brief to explain its powers and procedures to the Court. Most recently in a case on tying *Illinois Tool Works Inc. v Independent Ink, Inc.*<sup>23</sup>

<sup>17</sup> We see examples of this at EU level in cases like Case T-5/02 *Tetra Laval v Commission (I)* [2002] 5 CMLR 28 and Case T-310/01 *Schneider Electric v Commission* [2003] 4 CMLR 17 and also in the UK in CAT decisions like *Racecourse Association v Office of Fair Trading* [2005] CAT 29.

<sup>18</sup> The judicial review jurisdiction of the CAT is limited to review of decisions by OFT not to refer mergers and market investigations to the CC. See Enterprise Act 2002 s 120 for mergers and s 179 for market investigations. Otherwise the statutory framework says that the CAT jurisdiction is appellate, see s 46 Competition Act 1998.

<sup>19</sup> *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP* 540 U.S. (2004) provides a recent example but there are many others.

<sup>20</sup> *Verizon Communications Inc. v Law Offices of Curtis V Trinko, LLP*. 540 U.S. (2004) 398.

<sup>21</sup> *F. Hoffman la Roche v Empagran S.A.* 542 U.S. (2004) 155.

<sup>22</sup> *Intel Corporation v Advanced Micro Devices, Inc.* 542 U.S. (2004) 241.

<sup>23</sup> *Illinois Tool Works Inc v Independent Ink, Inc* 547 U.S. (2006).

the Court said, 'Our review is informed by extensively scholarly comment and a change of position by the administrative agencies charged with enforcement of the anti-trust laws.'<sup>24</sup> The position in United States seems to be that amici briefs (but not full intervention) from regulators are fairly commonly accepted by the courts and they form one of the factors that influences the ultimate decision. They are not however decisive and the courts appear ready to reject opinions that they do not accept to be sound in competition law terms.<sup>25</sup>

Particularly in Member States where courts are just beginning to decide competition cases and which lack expertise, the intervention of the national regulator may be able to offer considerable assistance to judges. However there are clear dangers in terms of judicial independence if regulators exceed a narrow remit during any intervention. The ultimate decision must be one for the court and national competition authorities should not be able to dictate the outcome of cases. Thus issues like fact-finding, evaluation of evidence and appraisal of competitive harm must be left to the court. Article 15 of Regulation 1/2003 contains some useful declaratory provisions for national courts relating to interventions but these do not take matters much further. Paragraph (3) gives a *right* for NCAs to make written observations 'on issues relating to the application of Article 81 or Article 82' to their national courts. However, full intervention through oral submission is allowed only with the permission of the court. No guidance is given on when this should be done but Article 15(4) does say that the Regulation applies without prejudice to any wider powers of intervention bestowed upon NCAs under national law.

There should be clear guidelines from courts when such intervention will be permitted and what the evidential status of such material will be. A tentative view is that intervention should be confined to three kinds of case: (1) those raising important novel issues of principle where the intervention may be essential to ensure that courts do not overlook essential arguments; (2) those in which a party seeks to mount a collateral challenge to the policies or guidelines of the competition authorities and (3) those concerning significant competitive harm across the wider economy. This last one is the most difficult to define but should include cases where the litigation concerns part of a wider set of practices that do have significant competitive harm, even if the particular proceedings themselves do not alone meet this threshold. This would also include cases involving a challenge to a dominant firm controlling an essential facility or network.

#### Competition Authority Policy and Decisions: Binding on Courts?

Even if interventions are permitted, this leaves open the extent to which courts should follow the opinions and conclusions of public authorities. The public enforcers may wish to direct courts in what the public interest requires by reference to their greater knowledge of the state of the market in question. They may give views on economic science, market definition, abuse or other issues. The competition authority might have

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<sup>24</sup> Per Stevens J at 3.

<sup>25</sup> *CE Continental v GTE Sylvania* 97 S. Ct. 2549 (1977). The federal bench in the United States has no formal requirement that economic or anti-trust training be undertaken but judges can opt to do so.

reached a view of general importance on, for example, the essential facilities concept in Article 82.<sup>26</sup> Should a court seek to apply or reject such a view in a private damages claim before a national court? Or should courts respect the decisions and policies of the competition agency with their panoramic view of the competition landscape? Courts may reject such evidence but this will depend on their jurisdiction, expertise and culture. In Europe, public enforcement is the tradition and courts will without doubt be ready to defer to public enforcers more readily over some matters, particularly relating to the wider public interest, when intervention occurs. Courts in some Member States may feel that they lack the expertise to question the regulator's views. This issue will be an acid test for the relative power of courts as against regulators. The confidence and ability of judges to challenge regulators will obviously depend upon the training, resources and jurisdiction of courts. The EU is clearly attempting to ensure that the European Competition Network is a functioning reality and judicial training is a key part of that. This will have benefits but there are constitutional and practical dangers too and these interactions will have to be carefully managed. The rise of the expert judge will undermine one of the bases for competition authorities claimed primacy, namely technical skill in complex economic evaluations. However NCAs can still lay claim to more extensive knowledge of the wider public interest.

As regards adjudication, there is also an issue of consistency of decision-making between courts and the competition agencies. Where a previous relevant decision has been taken by a competition authority, how far does a court have to follow? At EU level, the well-known *Masterfoods* decision<sup>27</sup> applies. This states that national courts cannot make judgments that are contrary to decisions already taken by the Commission in respect of the same agreements or practices. This doctrine, now set out in Article 16 of Regulation 1/2003, is a narrow one as was recently confirmed by the United Kingdom House of Lords in the *Crehan* litigation. National courts are only bound by formal Commission decisions directed at a party to subsequent national litigation in relation to the same agreement or practices already ruled on by the Commission.<sup>28</sup> Informal findings contained in a comfort letter addressed to a party or formal decisions about another agreement do not fall within *Masterfoods*. At the level of principle, the House suggested that it would be an abdication of the judicial role and a breach of the right to a fair trial for a court not to make its own findings on the evidence.<sup>29</sup> The *Crehan* decision suggests that there is neither an obligation nor any justification for courts to simply accept regulators informal or general views on facts which are disputed in proceedings. The House of Lords did not appear to think that a trial court should give any particular weight to such views, especially where the court has heard more extensive evidence than was before the regulator.

The narrow *Masterfoods* approach could be followed by national courts in relation to their own competition authorities. However this hierarchy of regulator over courts

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<sup>26</sup> See the debate between the EU Commission and the ECJ in the *Oscar Bronner* case.

<sup>27</sup> C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-1369.

<sup>28</sup> *Inntrepreneur Pub Company and others v Crehan* [2006] UKHL 38

<sup>29</sup> Per Lord Bingham at para 11-12.

results only from the supremacy principle within EU law.<sup>30</sup> It does not mean that it should be applied in the context of the relationship between NCAs and courts. However there are indications that it will be followed in Member States. In the UK, infringement decisions and findings of fact made by the NCA are binding on the Competition Appeal Tribunal when a follow-on damages action is brought by one of the injured parties.<sup>31</sup> This mirrors the US Clayton Act practice of giving plaintiffs the benefit of shifting the burden of proof to the defendant in follow-on actions. In Germany this has been taken further such that a decision by any NCA among the Member States is binding on the German courts. This latter is a powerful display of comity and faith in the workings of the competition system across the EU by the most long-standing and respected competition authority in Europe.<sup>32</sup>

### **Competition Damages Claims as Public Interest Litigation**

Private damages cases will inevitably straddle both the private dispute between the parties and the wider public interest in promoting sound competition laws. As noted above courts need to go about the task of adjudicating impartially vis a vis the parties without losing sight of this wider perspective. They may need to involve public authorities to assess this question. In fact we may go further and note that, if the rhetoric is to be believed, this is really a form of public interest litigation. If so, this is wholly novel and should be treated in a much more sympathetic manner than traditional private litigation. What should this public interest litigation look like in terms of procedural rules? There are a few precedents in the UK for courts modifying their approach in recognition of the wider public benefit that a litigant may confer by litigation.<sup>33</sup> However these cases have all involved challenges to public bodies and were aimed at upholding the rule of law. The courts will have to move a considerable distance to view cases brought against private defendants as meriting such favourable treatment. Where the plaintiff is a consumer organization acting in some sense *pro bono publico*, then there is a stronger case to characterize the proceedings as public interest litigation. However where large corporate rivals are employing competition litigation to further commercial interests, it is hard to see why they should benefit from more permissive rules than any other commercial litigant just because they have invoked competition law in their pleading. Cases brought by small companies or their trade federations, of limited means, against dominant firms would fall somewhere in between this spectrum. The courts may have to evaluate the litigants' motives and also the wider public interest of the case in order to decide on how to conduct the litigation. That could lead to uncertainty but it is not beyond the courts' capacity.

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<sup>30</sup> See the classic C-14/68 *Walt Wilhelm v Bundeskartellamt* [1969] CMLR 100. See the contribution by Assimakis Komninos for further detail on this argument.

<sup>31</sup> Section 58 and section 58A of the Competition Act 1998.

<sup>32</sup> It is important to note that the UK and Germany rules on follow-on actions only apply after the time-limit for appeal against the NCA decision has expired or the decision has been up-held on appeal.

<sup>33</sup> For example, in *R v Prime Minister exp Campaign for Nuclear Disarmament* [2002] EWHC 2777(Admin) and *R v ECGD exp Cornerhouse* [2005] EWCA Civ 192 protective costs orders were made.

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## Overseeing Litigation and Settlement

The conduct and settlement of proceedings by the parties is one area where the courts may need to exercise a heterodox vigilance to uphold the public interest. Traditionally courts in UK, for example, have been very non-interventionist in relation to settlement. Only in cases of litigants under a disability have courts been required to decide on the adequacy of settlement.<sup>34</sup> If competition law is about promotion of public interests, then perhaps more rigour is required and a more inquisitorial style of litigation management. Thus for example where parties reach a compromise, it is important that the court is rigorous in reviewing the grounds for this and vigilant in rejecting suspicious deals. The potential for settlements that actually facilitate anti-competitive conduct is real. A graphic example of the kind of behaviour that will become normal was illustrated in the recent *Claymore Dairies v OFT*<sup>35</sup> case. The matter concerned a complaint against the OFT for refusal to take action against Wiseman for abuse of dominance and concertation in the milk industry in Scotland. In an attempt to settle the case, lawyers for Wiseman threatened that they would expose Claymore as a cartel-member during the final hearing and suggested that Claymore withdraw from the litigation by telling the CAT that the complainant had now accepted the correctness of the OFT decision.

The CAT ultimately found that the OFT decision should be quashed but also considered the behaviour of the lawyers. The CAT was concerned that this form of bargaining might be a contempt of court and gave guidance on the issue. It emphasized that the purpose of competition law is to protect the public interest and parties must not use threats which interfere with that end. Thus cartel allegations must be put to the authorities not used to induce settlement. As this was a first case on the matter, the CAT in the end concluded that it was improper conduct but took no further action against the solicitors concerned. This emphasizes the fact that courts should not be misled regarding settlement and reciprocal allegations must be made openly to the relevant authorities. Private litigants will find their bargaining tactics restricted in such cases. Settlements that attempt to allocate markets or lead to other forms of concertation will come under review by the court. There are serious questions about the scope of this limitation however because the courts cannot know all the factors that go into a particular settlement and assess their worth in money terms very easily. Parties may find it difficult to negotiate freely and in confidence if they believe that they will have to justify themselves to the courts. But that is the very clear aim of a decision like *Claymore Dairies*.

### Limiting Costs Risks

The approach to costs is also something that the public interest may bear upon.<sup>36</sup> Thus the traditional rule that the loser pay the winner's costs in might be seen to be too discouraging of private enforcement. The Green Paper discusses this and proposes a

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<sup>34</sup> O'Hare and Hill, *Civil Litigation*, Sweet and Maxwell (2000) Ch.35.

<sup>35</sup> *Claymore Dairies v OFT* [2006] CAT 6

<sup>36</sup> See John Peysner's contribution in this volume for a detailed analysis of the costs jurisdiction in the UK.

rule that only manifestly unreasonable plaintiffs should pay costs and that limits on costs recovery should be made at the outset of cases.<sup>37</sup> In the United Kingdom, public interest litigation has recently been given significant encouragement by a relaxation of the traditional costs rule. For example in *Campaign for Nuclear Disarmament*<sup>38</sup> the Divisional Court granted the applicant, a pressure group, a 'protective costs order'. This effectively limited the amount of costs that it would have to pay if it lost the case to a fixed sum known in advance. The defendant in that case was a government minister and the case was brought to test the legality of war in Iraq. The public interest was clear and pressing. The law was developed further in the Court of Appeal decision in *Cornerhouse*<sup>39</sup> where guidelines were laid down for when such orders would be made. These included that the action was genuinely being brought in the public interest and not for private gain and that it would be discontinued without protection against costs.

Translating this to the competition context, we can see an example of this in *Federation of Wholesale Distributors v OFT*<sup>40</sup> where the CAT adopted a more lenient approach to costs. This case concerned a refusal by OFT to refer a merger to the Competition Commission. There was a challenge brought by a third-party but this was fairly swiftly withdrawn. The OFT sought its costs of defending the matter. The CAT emphasized that, whilst there must be some costs consequences for unsuccessful parties, courts should not apply rules 'in a way that might deter applicants or would have a chilling effect on the development of this jurisdiction.'<sup>41</sup> In *GISC* the CAT said that costs rules should not be, 'seriously counter-productive, from the point of view of achieving the objectives of the Act, particularly as regards smaller companies, representative bodies and consumers.'<sup>42</sup> These cases are important and may give a clue to the approach the CAT would take in a private damages claim however it is important to note that the defendant here was a public body accused of wrongly exercising its statutory discretion. Moving to the context of litigation brought to challenge anti-competitive behaviour by private companies, perhaps a more traditional approach will be applied. A private defendant may have acted against the public interest but courts have generally drawn a sharp distinction in their treatment of challenges to conduct by private and public bodies.<sup>43</sup> Principles of public interest litigation have only applied in cases of judicial review of public bodies. The idea that private damages actions in competition cases should also merit the application of such principles is novel. If adopted, the courts will have to assess each case carefully to determine the public interest being served by the litigation and thus decide on whether a more generous approach to costs is merited.

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<sup>37</sup> At 2.6.

<sup>38</sup> *R v Prime Minister exp Campaign for Nuclear Disarmament* [2002] EWHC 2777 (Admin).

<sup>39</sup> *R v ECGD exp Cornerhouse* [2005] EWCA Civ 192 protective costs orders were made.

<sup>40</sup> *Federation of Wholesale Distributors v Office of Fair Trading* [2004] CAT 11.

<sup>41</sup> At para 38.

<sup>42</sup> At para 54.

<sup>43</sup> Although longstanding in continental legal systems, the public/private division was made clear in the United Kingdom in cases starting with *O'Reilly v Mackman* [1983] 2 AC 237 and including *R v City Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815 and *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624. The decision in *Mercury Communications v Director-General of Telecommunications* [1996] 1 WLR 48 does not change the conclusion that private bodies are immune from judicial review.

This would involve a consideration of the scale of harm to consumers caused by the practice, an assessment of the strength of the merits, the likelihood that public enforcement may be forthcoming in any event and the respective means of the plaintiff and defendant. Courts should give consideration to cases where a plaintiff can show that a prima facie well-founded action to challenge seriously damaging anti-competitive conduct cannot be brought without a protective costs order. The order might well only apply to a particular stage of the case. Thus a split trial could be ordered with a protection against costs order only applying to the liability stage of the case or up to the exchange of expert evidence. The court could then review matters at that stage to reassess the merits and thus the appropriateness of extending the protective costs order.

### **THE COMPETITION AUTHORITIES: THE IMPORTANCE OF MAINTAINING CONSTITUTIONAL INDEPENDENCE AND ADMINISTRATIVE PROPRIETY**

As regards the competition authorities, there are challenges as well as benefits presented by a rise in damages claims. The benefits are clear in terms of greater enforcement efforts and better deterrence, the challenges are less obvious. As noted above courts may come to threaten the authority of NCAs to direct competition policy. More importantly, if greater incentives to sue for damages lead to large numbers of damages claims, the public authorities may become swiftly embroiled in such cases. In a Community of 27 or more competition authorities, if one authority can be persuaded to assist a private action, then an infringement decision could be used to collect damages across the EU, assuming the *Masterfoods* decision is extended that far. If private parties begin to demand high levels of assistance from national enforcers then their constitutional independence may be undermined.<sup>44</sup> This may lead to various problems. First, diversion of scarce resources and priorities away from public enforcement actions that may produce more public benefit. Second, maladministration in the form of inconsistent or incoherent decisions about which private actions to support. Third, public enforcers may find themselves isolated by defendant firms or whistle-blowers that fear any engagement will come to be exploited by plaintiff lawyers. Co-operation and sources of information may dry up. Finally, in extreme cases, dishonest or corrupt practices by public officials in charge of investigations may emerge.<sup>45</sup> This is particularly likely in countries that already have relatively high-levels of corruption in

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<sup>44</sup> With 27 Member States and NCAs in each, the risk of interest group capture is not fanciful. NCAs may not all be robust enough to withstand the financial pressure that may come to bear upon them or their agents. The importance of interest groups in European politics is emphasized in many writings: Scharpf, 'Community and Autonomy: Multilevel Policy-making in the European Union' (1994) 1 *Journal of European Public Policy* 219. For the theoretical model see Stigler, 'The Theory of Economic Regulation' (1971) 6 *Bell Journal of Economics and Management Science* 3-21.

<sup>45</sup> The economic model is well-known and posits that regulators are utility maximizers who may seek to sell their services to competing 'clients'. Public officials face a range of incentives and disincentives to either comply with their public duties or to act corruptly. If pan-European private damages actions become lucrative then there is a possibility that public officials may seek or be offered a share of the proceeds in return for their help. The incentives to act corruptly will increase. See Becker G and Stigler G, 'Law Enforcement, Malfeasance and Compensation of Enforcers' (1974) *Journal of Legal Studies* 3:1-19.

public service.<sup>46</sup> There are a number of these in the European Union particularly the new Member States of Romania and Bulgaria, who have had to make commitments to tackle governance. The standard models of corruption in public officials emphasize that the expectation of such behaviour increases where the rewards go up without any increased risk of detection.<sup>47</sup>

The broad conclusion of the following section is that the constitutional and policy independence of executive bodies must be maintained alongside any new damages culture. This has implications for a number of aspects of competition authority policy: the types of cases that are investigated; the access given to private parties in their pursuit of claims as regards documentary evidence; and, finally, the exercise of discretion over whether to issue an enforcement decision. These all illustrate aspects of discretion held by public bodies which must be exercised in accordance with their constitutional position. They must remain independent of private parties. This requires that there be clarity and consistency about when assistance will be rendered to private parties. Failure to do this will lead to competition authorities becoming drawn too deeply into private interests leading to them being compromised in their independence. At the very least, in the absence of such policies, they will be unable to demonstrate consistent and rational administration and be open to judicial review on this ground. To avoid this there must be clear guidelines on executive action and great vigilance by courts, auditors and ethical standards agencies. These are set out in greater detail below.

### **The US Experience under the Clayton Act: A Legislative Order to Render Assistance?**

The comparison with US law is instructive in considering the relationship between public and private enforcers. US private enforcement was given some powerful encouragement by the Supreme Court in several important post-war cases. The Clayton Act gave the right to sue for treble damages but also procedural benefits from prior public enforcement. This related to the suspension of the limitation period where public enforcement was on foot and the use of judgments secured by public enforcers as prima facie proof in private damages claims. The Supreme Court interpreted these provisions widely in a purposive fashion in *Emich Motors v General Motors*<sup>48</sup> saying the provisions:

‘reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions.’<sup>49</sup>

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<sup>46</sup> See Transparency International’s Corrupt Perceptions Index 2005 which sees Poland at 70<sup>th</sup> position in terms of the most corrupt nations in the world according to this particular methodology. This is the same position as Burkina Faso. Czech Republic and Slovakia are at 47<sup>th</sup> position jointly. Italy is 40<sup>th</sup> and Romania is presently 85<sup>th</sup>. There are 161 countries surveyed.

<sup>47</sup> Rose-Ackerman S, *Corruption and Government*, Cambridge, CUP, 1999.

<sup>48</sup> 340 U.S. 558 (1951)

<sup>49</sup> At p 566.



This legislative purpose was used by the Court to justify a wide reach regarding the extent to which jury verdicts made in public prosecutions are binding during later follow-on private damages claims.

Later in *Minnesota Mining v NJ Wood Co*, a case on limitation periods, the Court made even more explicit links between private and public enforcement:

‘it is plain that in 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions ... The Government’s initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances ... Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed so useful is this service that government proceedings are recognized as a major source of evidence for private parties.’<sup>50</sup>

When the damages litigation culture began to grow in the 1960s in the United States, these views were utilized by plaintiff lawyers critical of the low level of assistance from public enforcers they were receiving in damages claims.<sup>51</sup> The Clayton Act was taken as a leitmotif justifying greater and greater assistance for plaintiffs. Although the courts never fully endorsed this, there was considerable pressure brought to bear on public authorities to change their policies in a number of respects to accommodate private damages claimants. Discovery was a particular area of dispute with the plaintiffs seeking to obtain a wide array of documents held by public enforcers following their investigations.<sup>52</sup> The problems that European competition law may face in respect of these pressures are set out below.

### **European Competition Enforcement: A Dependency Culture?**

The primacy of public enforcement in Europe was fostered by the Commission through its readiness to take action upon receipt of complaints. We can see many examples of the Commission taking up complaints that probably defied any criteria for the rational use of scarce enforcement resources.<sup>53</sup> The practical difficulties of private

<sup>50</sup> 381 U.S. 311 (1965)

<sup>51</sup> See ‘Workshop III: Government Enforcement and Private Actions.’ (1972) 42 Anti-trust LJ 208. The participants in this debate generally described the government as unhelpful and lacking enforcement zeal. See for example Mayor Joseph Alioto: ‘if there is a lawyer, for example, who has a client who comes in who thinks that he has been the victim of a price fixing conspiracy as a consumer, you have a choice. You can go to the government and say, ‘Look, I think we have a price fixing case here.’ You can then expect to be shunted around unless you actually come in with the documents in your hand like the case I just mentioned. ... Go to an identifiable plaintiff’s lawyer who you know will get at it aggressively and who is staffed to handle it aggressively.’(218-9)

<sup>52</sup> Edward W Mullinix, a defendant lawyer, said during the above debate ‘These attempts were rather audacious – offensive to traditional notions of grand jury secrecy, offensive to attorney-client privilege, offensive to the work-product doctrine and highly offensive to the dignity of our profession.’ (Ibid at 221)

<sup>53</sup> See for example Case C-22/78 *Hugin v Commission* [1979] ECR 1869 and *BBI/Boosey and Hawkes: Interim Measures*, [1987] OJ 1987, L286/36, [1988] 4 CMLR 67.

enforcement also encouraged complainants to have recourse to public enforcers.<sup>54</sup> The Commission no doubt rightly felt it necessary to build a body of practice and a culture of competition law through pursuing complaints in this manner. This has bred a climate of dependency upon competition authorities in Europe which could grow more serious through the reform of civil litigation. For example, if common rules on assessment of damages were established throughout the EU but little change occurred in relation to discovery, parties would have great incentives sue but little means of doing so themselves. They will then turn to public enforcers to demand even more assistance than they do now. At a basic level they could demand that an investigation take place. They might then seek to secure discovery of material culled by the competition authority using freedom of information laws. They would be relying upon the privileged discovery powers of public bodies so as to by-pass procedural restrictions on private litigants.<sup>55</sup> Finally, they might demand that an enforcement decision be taken against their target in order to facilitate them bringing a follow-on damages claim.

These observations take on increased significance if there were to be mutual recognition that NCA decisions have binding effect in the same way as *Masterfoods* held applies to those of the European Commission. A private party who can persuade any NCA among the 27 Member States to ensure an enforcement decision may in theory be able to secure damages across the EU subject to rules on jurisdiction. None of this is directly a cause for concern and indeed the efficient use of litigation resources in this manner will help in increasing the deterrent effect of competition law. Nevertheless, these increased incentives will lead to forum shopping to find the most congenial regulator. This will be unacceptable if it results in some regulators engaging in practices which could undermine the wider European competition system.

Regulation 1/2003 in Article 11 provides mechanisms for co-operation amongst authorities and, along with the creation of the European Competition Network, these could be used to combat some of these problems.<sup>56</sup> We have seen recent efforts to encourage consistent practices which may benefit the whole competition enforcement system. Regarding exchange and use of information held by NCAs for example, Article 12 Regulation 1/2003 allows transmission of information between authorities where it is to be used for the purpose of applying Article 81 and 82. Thus such information could also be used to help private litigants sue by providing them with discovery. The Regulation does not attempt to deal with the problem of protecting informants against such a risk. However, this is now acknowledged in the recently agreed ECN Model Leniency Programme which seeks to harmonize leniency policies. As part of this it notes that discovery in civil proceedings of statements made by leniency applicants risks 'dissuading co-operation in the CAs' leniency programmes [and] could undermine the

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<sup>54</sup> See the report prepared by Ashurst solicitors for the European Commission on private actions.

<sup>55</sup> Under Arts 18 and 20 Regulation 1/2003 the Commission is only required to show that the demands for information or inspections relate are 'necessary' in the sense that they are legitimately considered to be related to the presumed infringement. Case T-39/90 *SEP v Commission* [1991] ECR II-1497. The test in UK law for the OFT under s 25 Competition Act 1998 to justify an inspection is 'reasonable grounds for suspecting' a violation of Articles 81 or 82 which is perhaps higher but still not too burdensome.

<sup>56</sup> See Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/03.

effectiveness of the CAs' fight against cartels.<sup>57</sup> The Programme therefore provides that oral statements by leniency applicants be allowed where appropriate. However it does not require protection of records of oral statements from discovery save up to the issuing of a statement of objections by the competition authority. This was said to be impossible to achieve because of diverse national laws on disclosure of public records. There needs to be further work of this nature to ensure that national competition authorities are being mutually reinforcing in their enforcement policies. There should be development of consistent policies on disclosure of documents to third parties generally to ensure the right balance between openness and confidentiality. For example, there could be protection afforded to defendants who make informal enquiries with competition authorities about the legality of business practices. This should be confined to cases where the practices do not have as their object the restriction of competition. There could also be co-operation on the selection of those markets across several Member States that are worthy of investigation and the development of joint public enforcement policy priorities. This will mean that European competition enforcement is more coherent and less *ad hoc*.

### **Breaking the Umbilical Cord: the Need for Strict Guidelines on Public Assistance for Private Litigants**

The competition authorities must be alive to these issues and anticipate them by providing clear guidelines on which kinds of complaints will be pursued and which will not. The private sector and national courts must be encouraged to develop their own autonomous methods and resources for enforcing competition law. At EU level, we have the *Automec v Commission*<sup>58</sup> decision which gives the Commission wide discretion about which cases to investigate. The Court of First Instance said, 'in the case of an authority entrusted with a public service task, the power to take all organisational measures necessary for the performance of that task, including setting priorities within the limits prescribed by law ... is an inherent feature of administrative activity.'<sup>59</sup> As a consequence, the Court said, 'the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.'<sup>60</sup> Finally, the Court in *Automec* approved the use of the 'Community interest' as a priority criterion for deciding on whether to investigate a matter in depth. It may be assumed that NCAs will find themselves allowed similar discretion when applying EC competition law by national courts.

For NCAs and the Commission there is however a need to formalize policies on this issue in order to maintain good standards of administration embodying consistency, rationality and transparency. In the absence of these, NCAs may find themselves pursuing some complaints and refusing others without sufficient grounds to distinguish between cases. The process could become quite arbitrary. If large damages claims hinge upon prior public enforcement action, judicial review of refusals of assistance will

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<sup>57</sup> Para 47.

<sup>58</sup> Case T-24/90, [1992] ECR II-2223.

<sup>59</sup> Para 77.

<sup>60</sup> Para 77.

become more common. In addition, if the philosophy of the Commission Green Paper is followed and private damages claims are in the public interest, it may become more difficult to justify refusing to assist a willing complainant. There is the potential for extensive satellite litigation between the public authorities and parties unless the executive adopts and applies defensible policies on these matters. Indeed, the problem of complaint driven enforcement is already beginning to be questioned. Based upon his concern that public resources were being misdirected by aggressive private complainants, the Chief Executive of the OFT has recently said that his NCA will concentrate resources on cases where private enforcement is not feasible rather than continue to provide public support to investigate disputes between large rival firms.<sup>61</sup>

The basic rule should be that private litigants should stand on their own feet and bring damages claims themselves in national courts. They should bear the risks and costs of litigation and not attempt to divert public authorities from their own priorities.<sup>62</sup> There should, of course, always be flexibility in policies. Authorities must not absolutely fetter their discretion.<sup>63</sup> Where for example a complainant is clearly too impecunious to bring private proceedings but the case is one with wider benefits which are consistent with the goals of the competition authority, public enforcement might be appropriate. Similarly, where private damages actions would fail due to restrictive national limits on discovery, the public enforcer's wider powers might be appropriately deployed.

The United States example is again useful here; the FTC and Department of Justice have clear staff guidelines on which kinds of cases will be investigated and at which stage approval is required to conduct further enquiries.<sup>64</sup> The FTC guidelines look at factors like how likely private enforcement is in the absence of public action, complexity of the matter, consumer benefit and novelty. The decision to investigate must ultimately be one for the authority exercising its very wide discretion in such matters. However, the rationality of that exercise of discretion will be greatly enhanced by clear guidance. This author would strongly endorse such guidelines which combine clarity with sufficient flexibility. At the EU level, the Commission did produce guidance on its prosecution policy in the Commission Notice on handling complaints.<sup>65</sup> This was ostensibly published in order to provide clearer guidance on procedural rights of complainants. However it does not provide much in the way of illumination as to which cases the Commission will investigate and up what level. Rather it seeks to maintain maximum discretion for the Commission by providing an open-ended list of

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<sup>61</sup> Keynote speech by Phillip Collins, Chairman, OFT, IBC UK Competition Law Conference, London, 1/12/05.

<sup>62</sup> The 'free-rider' problem is real in this area with many large firms seeking to use public authorities to do the hard work of enforcement for them. This distorts the 'market' for competition enforcement because it reduces the costs that firms have to pay for enforcement without adequate justification. The risk/reward calculus that every litigant has to engage in is altered. Only where the overall social welfare benefit of a particular piece of public enforcement exceeds the opportunity cost should it be pursued.

<sup>63</sup> In English administrative law the concept of fettering discretion is a not a rigid one but depends upon the nature of the discretion given. The leading case is *British Oxygen v Ministry of Technology* [1971] AC 610.

<sup>64</sup> See FTC Operating Manual Ch.1-3, especially 3.3 on authorizing full investigations beyond initial phase. This appears to limit initial phase investigations to 100 staff hours.

<sup>65</sup> OJ 2004, C101/65.

reasons to reject a complaint. The one concrete reason for rejection of a complaint arises where a complainant ‘can bring an action to assert its rights before a national court.’<sup>66</sup> This follows from the emphasis in the Notice upon the complementary nature of public enforcement by the Commission and private enforcement before national courts.<sup>67</sup> Here the Notice notes the duties and powers of national courts to provide effective remedies, including damages, and that this is an important factor in deciding when the Commission need not take action itself.

However, the ECJ decision in *UFEX*<sup>68</sup> does impose limits upon the extent to which the Commission can reject a complaint on that basis alone. In this case, the Commission had made a decision rejecting a complaint, *inter alia*, on the grounds that an infringement decision was being sought to aid a damages claim in the national court. The ECJ annulled the decision, saying that, even if such a claim was being brought that did not allow the Commission to reject it without establishing the facts necessary to decide whether anti-competitive conduct was continuing and, if so, whether the Community interest required enforcement action be taken. The effect of this decision is to require the European Commission to make a balanced decision that takes account of a range of factors, when deciding to reject a complaint. Good administration by a competition authority requires that the menu of such factors be published and known in advance by complainants and potential defendants. The factors used by the Federal Trade Commission are indicative and should be given careful consideration by European competition agencies.

Disclosure of material held by the competition authorities to plaintiffs is also an area where great care must be taken. At EU level, the basic rules on access to documents are contained in Regulation 1049/2001<sup>69</sup> which covers all the EU institutions. This right of access to documents for EU citizens and legal persons residing a Member State is subject to Article 4(2) which states that institutions:

‘shall refuse [underlining added] access to a document where disclosure would undermine the protection of ... (1) - commercial interests ... including intellectual property; (2) - court proceedings and legal advice; (3) - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.’

There is also an exception in Article 4(3) for documents drawn up or received by the institution disclosure of which would, ‘seriously undermine the institution’s decision-making process’. This again is subject to an overriding public interest in disclosure being present. Where a document originates with a third-party they must be consulted first unless the status of a document is clear.<sup>70</sup> The mandatory injunction to refuse disclosure of these types of documents unless an overriding public interest prevails,

<sup>66</sup> Para 44.

<sup>67</sup> Paras 12-18.

<sup>68</sup> Case C-119/97 *Union Francaise de L’express (Ufex) v Commission* [1999] ECR I-1341.

<sup>69</sup> Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents.

<sup>70</sup> Article 4(4).

presents a challenge because it does not give the Commission a wide discretion to disclose.

Documents held by DG Competition as a result of investigations might well fall into some of the non-disclosable categories. Leniency applications and other documents relating to negotiations between the Commission and private parties are other obvious examples that might be excluded from disclosure.<sup>71</sup> Documents that were obtained by compulsory powers of inspection would seem to be disclosable (subject to legal privilege and business secrets exceptions) but only once the investigation had concluded. Could the Commission or an NCA argue that promotion of private damages claims was ‘an overriding public interest’ which justified disclosure of an otherwise protected document? This seems doubtful despite the strong support given to damages claims in the Green Paper. The benefits of disclosure would be too intangible when set against the harms which non-disclosure is designed to prevent. Authorities may find that co-operation from defendants is much reduced if they adopt too liberal a disclosure policy toward private plaintiffs.<sup>72</sup>

For national competition authorities, disclosure rules will fall under national freedom of information statutes at first instance. Space precludes a full survey of these but it is reasonable to suppose they contain similar exceptions as the EU regime.<sup>73</sup> NCAs will need to adopt clear policies on how these broad freedom of information rules intersect with the public interest in effective competition policy. Ideally this should occur through the European Competition Network. To the extent that national authorities have legal power to do so, disclosure to third parties should be restricted where it would substantially harm public enforcement. One example is the case of information held by an authority as a result of a company coming forward voluntarily with it. To disclose such information might lead to companies declining to approach authorities in the future which could lead to concealment of anti-competitive practices.

Similar observations can be made about the decision to close a file after an investigation. The FTC has very clear rules on what kinds of file closing procedures to adopt.<sup>74</sup> Where a settlement is reached without a formal cease and desist order, there is the publication through the Notice and Comment procedure. Affected parties may make observations but the discretion to settle rather than proceed to final decision is one for the prosecutor. However here again there must be guidance on what kinds of cases are appropriate for settlement and which are not. The debates in the 1960s and 1970s in the United States between plaintiffs and prosecutors reveal concern amongst the former that government targets to settle cases were leading to inappropriate closure of files.<sup>75</sup> The ‘slap on the hand’ approach was properly criticised by plaintiff lawyers

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<sup>71</sup> See Green Paper on Damages Actions at 2.7 which notes that leniency applications should not be discoverable.

<sup>72</sup> This is also a reason to protect whistle-blowers from joint and several damages claims as the Commission argues in the Green Paper.

<sup>73</sup> Birkinshaw, *Freedom of Information*, London, Butterworths, 2000.

<sup>74</sup> See FTC Operating Manual.

<sup>75</sup> ‘Symposium: Relationships Between Government Enforcement Actions and Private Damage Actions’ (1967) 37 *Anti-trust LJ* 823. See for example the comments of Lee A. Freeman ‘We submit that the way to a

eager to secure *res judicata* or estoppel decisions to bring follow-on actions. The plaintiffs argued that Congress intended private actions to be key weapon in the fight against anti-competitive behaviour and that public authorities had a positive duty to assist by not settling. This goes too far but it is clear that any policy on settlement must be defensible else it too could be challenged as an unlawful fetter on discretion to prosecute.

In the EU context, this issue now arises under Regulation 1/2003 because of the power to make a commitment decision pursuant to Article 9. These only arise where a Statement of Objections has been issued but the Commission no longer wishes to proceed. Similar procedures exist in some Member States and decisions to accept undertakings are clearly useful alternatives to the expense of prosecution. This author suggests that undertakings should not be taken in cases of serious violations of competition law whose object was to create widespread consumer harm. Similarly where proceeding to a formal decision would not be expensive in terms of resources then this should be done in order to provide public vindication of the competition laws. Finally, where a meritorious private plaintiff would not be able to afford to pursue a stand-alone damages action, serious consideration should be given to making a formal decision where the agency cost is not excessive. Facilitation of follow-on actions in such circumstances is a justifiable use of public resources because of the deterrent effect it produces.

### CONCLUSIONS

It is concluded that private and public enforcement are perfectly compatible but there needs to be explicit recognition of the courts' role as promoting competition in the public interest even in private cases. This requires some modifications of the tradition Anglo-American adversarial civil procedure. This should allow for controlled intervention by public authorities, less strict costs rules and more inquisitorial methods, especially regarding settlement. In their substantive adjudication courts must have careful regard to the decisions and practice of competition authorities in order to preserve the constitutional balance of the enforcement system. For competition authorities, there is a great need to produce clear and defensible guidelines on when they will render assistance to private enforcers. Thus issues such as investigation, prosecution and settlement priorities must be made more transparent. Competition authorities may wish to concentrate resources on the most serious abuses such as cartels or in particular sectors of the economy. They should devise rules which allow them to do so. Similarly rules on disclosure of material must be clear. Failure to do this may lead to inconsistency and maladministration. The policies on such matters are essential to maintain constitutional independence and integrity of enforcement agencies. The best encouragement to private litigation is to provide clearly defined but limited assistance to private plaintiffs to the extent that this is consistent with the published competition policy goals of the public enforcement agencies.

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businessman's heart and mind is through his profit and loss statement. The need to repay damages inflicted - threefold - is the only effective deterrent. But consent decrees without admission of guilt tend to circumvent the policy favouring damage claimants.'<sup>(829)</sup>





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Private Enforcement of Competition Law Arrives in Italy: Analysis of the  
Judgment of the European Court of Justice in Joined Cases C-295-289/04  
Manfredi

*Michele Carpagano\**

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In 2000 the Italian Competition Authority took action against a complex horizontal agreement in the motor-vehicle insurance market where there had been collusion for years to fix premium prices. Hundreds of follow-on civil actions were brought by consumers seeking compensation for damages they had suffered as a consequence of the anticompetitive conduct. For the first time the Italian legal system faced large scale enforcement of competition law by private parties. This paper describes the development of the *Corte di Cassazione* case-law on the controversial issue of consumer legal standing and explains why the Court's decisions act more as a disincentive to private enforcement than an incentive. Moreover, the paper analyses the Court of Justice's decision in Cases C-295-298/04. In that case the Court commented on several procedural aspects of civil actions based on violations of Article 81 EC: the entitlement to rely on the invalidity of a prohibited agreement or practice and the concomitant right to claim damages; the limitation period for seeking compensation for harm caused; and, the ability of the national courts to award punitive damages. The paper concludes that the solutions presented by the ECJ seem even better than the European Legislator's intervention because they respect the legal tradition of each Member state and do not contrast with the structure and scope of national private law remedies already in force.

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**1. PRIVATE ENFORCEMENT OF COMPETITION LAW IN ITALY: THE STATUS  
ARTIS IN LIGHT OF THE ECJ JUDGMENT IN JOINED CASES C-295-298/04**

The Italian competition law system is relatively young. For decades, anticompetitive conduct was solely examined under the *Codice Civile* provisions prohibiting unfair competition. However, at the end of 1990, after a very long drafting process, the first Italian Competition Act was adopted in strict adherence with the competition law provisions contained in the EC Treaty.<sup>1</sup> It has been pointed out that such a delay allowed the Italian competition law system to start directly from the most advanced front of competition law, thus avoiding facing a significant part of the previous troubled development.<sup>2</sup> This is true only in part. In fact, the Competition Act has been based on an old-fashioned competition culture which has been strongly influencing the interpretation and even the application of such new rules in courts. Indeed, prior to the

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<sup>1</sup> Law No. 287, dated October 10<sup>th</sup> 1990 'Norme per la tutela della concorrenza e del mercato'. The Italian Codice civile provisions prohibiting unfair competition are provided for by article 2598 and followings.

<sup>2</sup> Tesauro, 'Concorrenza e Autorità Antitrust, un bilancio a 10 anni dalla legge', speech at Autorità Garante della Concorrenza e del Mercato, Roma, October 9<sup>th</sup> -10<sup>th</sup> 2000.

enactment of Law 287/90 (the Competition Act), competition was perceived as a *business* for enterprises,<sup>3</sup> a kind of special field of law with a marked individualistic dimension in which the concept of ‘free competition’ was seen as a synonym for entrepreneurial economic freedom.<sup>4</sup> The Italian Codice Civile prohibitions of unfair competition have been intended to protect solely commercial enterprises against anti-competitive acts by direct competitors. Such an individualistic dimension, in which the public interest in a competitive market was not taken into account at all, has for decades been one of the deepest cultural barriers between the Italian competition law environment and the most developed competition law systems in the world.

In such an old-fashioned cultural environment any private enforcement rule of competition law, in which the consumers would have had a proactive role in promoting the enforcement of competition law in court, was inconceivable.<sup>5</sup> Just few years ago, in 2003, the Corte di Cassazione firmly denied consumers legal standing under Italian competition law,<sup>6</sup> only recognising such standing for the first time in 2005.<sup>7</sup>

Notwithstanding the ECJ held, more than thirty years ago, that the prohibitions laid down in Articles 81 and 82 EC are directly effective and that the national courts should safeguard the rights which litigants can derive from the prohibitions, private enforcement in Italy, as well as in other EU countries, is still in its infancy. Its use is very far from the scale known in other jurisdictions, especially the United States, where some 90% of antitrust proceedings are initiated by private parties. In the European Union, however, the emphasis has traditionally lain with public enforcement (both by the European Commission and by national authorities). This is why competition law in Italy was originally conceived as an administrative tool, a means for the State to intervene in market processes in order to achieve public goals.<sup>8</sup>

The marked administrative path was evidently in the legislator’s mind when the Italian Competition Act was adopted. In fact, the Italian legislator adopted a kind of ‘binary’

<sup>3</sup> However in Italy, at the beginning of the twentieth century some typical legal reasoning of the modern antitrust law has been anticipated, by a case-law tendency. See Ghidini, ‘I limiti negoziali alla concorrenza’, in Galgano, *Trattato di diritto commerciale*, IV, 31, 1981.

<sup>4</sup> Meli, *Autonomia Privata, Sistema delle invalidità e disciplina delle intese anticoncorrenziali*, Milano, 2001.

<sup>5</sup> For the purposes of this Paper, the expression *private enforcement* means the application of antitrust law in civil disputes before national courts. For extended discussion of these issues, see, Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford, OUP, 1999; Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, The Hague, Kluwer, 2002.

<sup>6</sup> Corte di Cassazione Decision dated February 4<sup>th</sup> 2005, No. 2207, *Foro It.*; Decision of the Corte di Cassazione dated December 9<sup>th</sup> 2002, No. 17475, *Foro it.*, 2003, I. The issue of consumer standing under Italian competition law is discussed in § 3. As noted by Palmieri and Pardolesi, the Italian competition law system ‘has been living for almost two years the nightmare of a dimidiated antitrust law system’ as a consequence of the 2003 ‘false move’ by the Corte di Cassazione ‘that has been threatening to nip private enforcement in the bud’. See Palmieri & Pardolesi, ‘L’antitrust per il benessere (e il risarcimento del danno) dei consumatori’, (2005), I 1015 *Foro It.* Here translated by the Author.

<sup>7</sup> Corte di Cassazione Decision No. 2207 dated February 4<sup>th</sup> 2005.

<sup>8</sup> Gerber, *Law and Competition in Twentieth Century Europe, Protecting Prometheus*, Oxford, Oxford University Press, 2001.

system in which the task of dealing with national competition matters was split between the civil judicial authority and the administrative one depending on the (private or public) nature of the interests needing protection.<sup>9</sup> Pursuant to Law 287/90, the administrative ‘side’ is made up of the *Autorità Garante per la concorrenza ed il mercato* (hereafter ‘AGCM’), a public agency with a structure and powers resembling those of the European Commission (the AGCM having wide powers to investigate and sanction violations of Italian competition law);<sup>10</sup> the *Tribunale Amministrativo Regionale del Lazio* (hereafter ‘TAR Lazio’), an administrative Court, which has exclusive administrative jurisdiction - in first instance - on the AGCM’s Decisions; and the *Consiglio di Stato* (Council of State) competent to hear appeals against the AGCM Decisions in the second instance.

The other side of the ‘binary’ competition law system is the civil judicial authority. Pursuant to article 33.2 of Law 287/90, the ordinary second instance court (i.e. the Corte d’Appello territorially competent) has exclusive jurisdiction on civil actions based on national competition law (i.e. actions aimed at obtaining interim relief and claims for damages arising out breach of national competition rules).<sup>11</sup> The exclusive jurisdiction provision of article 33.2 constitutes an exception to the ordinary Civil procedure rules on jurisdiction,<sup>12</sup> the legislator having conferred the private enforcement of national competition rules to Courts of Appeal, ‘in recognition of the fact that a higher court is better placed to deal with disputes involving complex economic assessments’.<sup>13</sup> This decision regarding exclusive jurisdiction also reflects an effort to avoid judicial fragmentation, and to secure uniformity and specialisation through the appointment of a small number of courts with a regional jurisdiction. Notwithstanding the legislator’s good intentions, article 33.2, has highlighted at least two serious structural weaknesses in its judicial application: a) it does not take a clear position on the issue of consumer standing; b) it is not applicable to law suits concerning violations of EC competition rules.

At first glance such an approach appears inconsistent with the EU competition law system in which private enforcement is perceived as an essential tool to create and sustain a competitive economy in the common market.<sup>14</sup> Damages actions based on

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<sup>9</sup> For an introduction to the Italian Competition Law system, see Fattori & Todino, *La disciplina della concorrenza in Italia*, Bologna, 2004.

<sup>10</sup> For a detailed description of the structure and role of the Italian Competition Authority, see *Antitrust a portata di mano*, AGCM publications, September 2002. Available in English at <http://www.agcm.it/>.

<sup>11</sup> Under the article 33.2 of Law 287/90, ‘Actions for nullity and for damages as well as actions for obtaining interim relief in connection with violation of the provisions set forth in Titles from I to IV are brought before the Corte d’Appello having territorial jurisdiction’.

<sup>12</sup> By the ordinary Civil procedure rules on jurisdiction, the Giudice di Pace or the Tribunale have jurisdiction as court of first instance, further details are provided in the § 3.

<sup>13</sup> Tesouro, ‘Private Enforcement of EC Antitrust Rules in Italy: The Procedural Issues’ (2001) European Competition Law Annual 267.

<sup>14</sup> EU Commission’s Green Paper on Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005, COM (2005) 672 final, page 3. See Jones, *Private Enforcement of Antitrust Law in the EU, UK and* (2006) 3(1) CompLRev

infringement of competition law actually serve several purposes: compensating those who suffered a loss as a consequence of anti-competitive behaviour; ensuring the full effectiveness of the antitrust rules of the Treaty; discouraging anti-competitive behaviour and contributing significantly to the maintenance of effective competition in the Community. The new regime under Regulation 1/2003<sup>15</sup> increases the likelihood of consumer actions becoming a central pillar of an effective competition law system within the European Union.<sup>16</sup>

The desirable increase in the frequency of consumers' private actions in the Common market may be jeopardised; however, by the negative influence of some cultural and legislative elements - most of them even cryptic - present in the individual legal systems of the Member States.<sup>17</sup> Remarkable differences are, in fact, still present in Member States' legislation on civil suits based on competition rules, in particular regarding legal standing, probation, class actions, limitation period, and punitive or exemplary damages.<sup>18</sup> The result of a private action based on a violation of EC competition law is therefore highly influenced, if not jeopardised, by the variety of national rules regarding civil actions. Even the compensation for the damage suffered by a customer as a consequence of an agreement that violates Article 81 EC largely depends on the compatibility of the national rules of the Member State with the EU competition law system. On this point, the *Ashurst* comparative report reveals that specific national rules on procedural aspects of civil actions adversely affect the success of the private enforcement of competition law.<sup>19</sup> There is no doubt, however, that the effectiveness of private enforcement mainly depends on the consumer's proactive attitude. *Consumers* are those who exist at the final level of the production/distribution chain and by consuming finish the whole economic process. The consumer is better placed (i.e. has economic incentives) to promote a civil action against the company which has illegally disrupted the competitive economic setting of the market. This is the case when the end buyer, for instance, has to pay an artificially increased price for a determined product or service; or he gives up a certain product/service due to the higher price imposed by the monopolist or by the cartel. Proactive consumers alone, however, are

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USA, Oxford, OUP, 1999; Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29(2) World Competition 183-208.

<sup>15</sup> Council Regulation (EC) No. 1/2003, 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.

<sup>16</sup> See Kroes, 'Damages actions for Breaches of EU Competition Rules: Realities and Potentials', Cour de Cassation, Paris, 17<sup>th</sup> October 2005; Monti, 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation', 8<sup>th</sup> Annual Competition Conference, Fiesole, Italy, September 17<sup>th</sup> 2004; Woods, Sinclair & Ashton, 'Private enforcement of Community competition law: modernisation and the road ahead' available at the web page: [http://www.europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/index\\_en.html](http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html)

<sup>17</sup> Gambaro & Sacco, *Sistemi Giuridici Comparati*, Torino, 1996.

<sup>18</sup> See Ashrust Comparative Report, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, August 31<sup>st</sup> 2004, available at: [http://www.europa.eu.int/comm/competition/antitrust/others/actions\\_for\\_damages/study.html](http://www.europa.eu.int/comm/competition/antitrust/others/actions_for_damages/study.html).

<sup>19</sup> See *Ashrust* Comparative Report, op cit, n 18.

not enough to achieve effective private enforcement of competition law. Access to National judges is also a prerequisite.

Due to the preliminary ruling, ex Article 234 EC, made by the Giudice di Pace di Bitonto (Italy), the judgment of the Court of Justice in Joined Cases C-295-298/04 focuses on four aspects of national procedure that govern private actions in the Member states (i.e. the entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages; the limitation period for seeking compensation; and, the ability of the national courts to award punitive damages). The applicants in the main proceedings brought their actions before the Giudice di Pace to seek compensation for damages suffered as a consequence of an anticompetitive practice. Each company involved, in fact, had sanctions imposed by the AGCM in 2000 for engaging in illegal practices in violation of Article 2 Law No.287/90. The Giudice di Pace decided to stay the proceedings and to refer some questions on the interpretation of Article 81 EC to the Court of Justice for a preliminary ruling. With its first question the national Court asked whether an agreement or concerted practice which infringes national rules on the protection of competition, may also constitute an infringement of Article 81 EC.<sup>20</sup> It then referred for clarification four procedural issues: the entitlement to rely on the invalidity of an agreement or practice prohibited under EC competition law and the concomitant right to claim damages;<sup>21</sup> the compatibility of the Article 33(2) of Law No 287/90 with EC law;<sup>22</sup> the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81;<sup>23</sup> and the ability of the national courts to award punitive damages.<sup>24</sup> A more in-depth analysis of the four questions submitted to the Court follows in Section 4. The next section dedicated to providing a description of the structure of the RCA's illegal agreement.

## 2. THE RCA CARTEL

By Decision No. 8546, dated July 28<sup>th</sup> 2000, the Italian Competition Authority imposed sanctions on a cartel between several insurance companies active in the motor-vehicle civil liability (hereafter 'RCA') insurance market.<sup>25</sup> The AGCM found that thirty-nine insurance companies had joined the RCA cartel from 1994 to 1999; among them were all of the top twenty insurance companies in the market. The RCA cartel was in blatant violation of competition law: the joint market share of the colluding companies reached 80% of the domestic RCA insurance market.<sup>26</sup> The AGCM investigation started in 1999 on the basis of the assumption that between 1994 and 1999, RCA insurance

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<sup>20</sup> It is the first question in Cases C-295/04 to C-298/04.

<sup>21</sup> It is the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04.

<sup>22</sup> It is the second question in Case C-298/04.

<sup>23</sup> It is the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04.

<sup>24</sup> It is the fourth question in Cases C-295/04 to C-297/04 and the fifth question in Case C-298/04.

<sup>25</sup> Decision No.8546, dated July 28<sup>th</sup> 2000, *Bollettino*, No. 30, 2000.

<sup>26</sup> AGCM Decision No.8546, par. n. 261.

premiums were significantly higher in Italy than in the other major European Union Member States. The *Eurostat* data report<sup>27</sup> shows that in 1994 (the year of RCA insurance tariff liberalisation) Italy had the lowest insurance premium prices among European Member States, and that just five years later (1999) the premium prices had grown 63% in comparison with the European average. At the end of 1999 customers in Italy were paying the highest price for RCA insurance premiums within the European Union. This artificial price increase took place in a market characterised by very rigid elasticity from the demand side.<sup>28</sup> In fact, in the Italian legal system, in order to compensate for damages suffered by third parties, insurance against motor-vehicle accidents and third party liability is compulsory.<sup>29</sup> This means that in Italy anyone owning a motor-vehicle and wanting to use it in public areas (or in other places qualified by law as public areas) has to subscribe to an RCA insurance policy. From an economic point of view this means that the Italian RCA insurance market is inelastic because customers cannot easily react to the generalised price increase of RCA insurance premiums, unless they stop using their motor-vehicle in public areas.

Through its market investigation, the AGCM found several typical elements of a non competitive market: a) stability of the undertakings' market shares;<sup>30</sup> b) the presence of a major dominant group of companies and a fringe of smaller ones; c) anomalous speeding up of the premium price increase especially in the recent period;<sup>31</sup> d) the fact that the premium price increased much more in the Italian market than the European average;<sup>32</sup> e) the companies inability to reduce production costs;<sup>33</sup> and, f) market demand elasticity very close to zero.<sup>34</sup> Although the AGCM found several elements which indicated the presence of 'strong barriers to entry',<sup>35</sup> the market affected by the horizontal cartel was defined as having a national dimension.<sup>36</sup> In the AGCM's view, the fact that several, 'foreign insurance companies joined the cartel does not weigh on the market's geographical dimension' mainly because, 'to operate in this business, foreign companies have to set up in Italy their own distribution and liquidation structures, as well as to adapt themselves to Italian law on mandatory motor-vehicle insurance'.<sup>37</sup> The cartel consisted of a complex and structured horizontal agreement aimed at the 'extended and pervading' exchange of all kinds of strategic and sensitive

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<sup>27</sup> AGCM, Decision No.8546, par. 75.

<sup>28</sup> AGCM, Decision No.8546, par. 79.

<sup>29</sup> In order to grant the restoring of damages suffered by third parties as a consequence of motor vehicle circulation, the Italian legislator adopted the Legge No. 990, dated December 24<sup>th</sup> 1969 '*Assicurazione obbligatoria della responsabilità civile derivante dalla circolazione dei veicoli a motore e dei natanti*'.

<sup>30</sup> AGCM Decision No.8546, par. n. 87 and followings.

<sup>31</sup> AGCM Decision No.8546, par. n. 71.

<sup>32</sup> AGCM Decision No.8546, paragraphs n. 70 and 75.

<sup>33</sup> AGCM Decision No.8546, par. n. 77 and followings.

<sup>34</sup> AGCM Decision No.8546, par. n. 195 and followings.

<sup>35</sup> AGCM Decision No.8546, par. n. 92.

<sup>36</sup> AGCM Decision No.8546, par. n. 64 and 65.

<sup>37</sup> AGCM Decision No.8546, par. n. 92; translated by the Author.

commercial information including: premium prices, terms and conditions of contracts, discount rates, sales takings, distribution costs, and accident costs, etc.<sup>38</sup>

*RC Log*, an Italian consulting firm specialized in the insurance business, played a central role in the exchange of information.<sup>39</sup> The cartel worked in this way: each insurance company was subscribed to the *RC Log* database; by virtue of such subscription, each company regularly sent its own commercial data (e.g. premium prices, terms and conditions of contracts, discount rates, sale takings, distribution costs, accident costs, etc.) to *RC Log* with the specific aim of receiving in exchange the competitors corresponding data. *RC Log* were periodically publishing (and distributing to all their subscribers) reports which contained all this commercial data in aggregate form. In order to improve such a complex information exchange mechanism, the colluding companies had several direct contacts between them (e.g. informal meetings, etc) with the aim of better defining the framework of their cooperation and even of choosing which new companies would be admitted to the illegal information exchange.

The AGCM demonstrated that through this information exchange mechanism, all colluding companies had artificially established (from 1994 to 1999) insurance premium prices 20% higher than the price in a competitive market.<sup>40</sup> The overall anticompetitive effect of the illegal activity was the elimination of every degree of uncertainty about the competitors' strategic behaviour in the market. The AGCM imposed sanctions on the cartel on the basis of art. 2.2 of Italian Law No. 287/90 (the equivalent of art. 81.1 EC Treaty) and imposed heavy fines on the colluding companies. In a subsequent administrative proceeding for the annulment of the AGCM's Decision, taken by the insurance companies, both the T.A.R. Lazio<sup>41</sup> - as Court of first instance - and the Consiglio di Stato - as the Court of appeal - confirmed the validity of the decision to impose sanctions on the cartel.<sup>42</sup>

### **3. HOW CAN CONSUMERS REACT TO ANTICOMPETITIVE CONDUCT? THE CONTROVERSIAL ISSUE OF CONSUMER STANDING UNDER THE ITALIAN COMPETITION ACT**

Due to the significant number of companies who had joined the illegal agreement and to the mandatory nature of the RCA insurance policy, most Italian motor vehicle drivers were damaged by the cartel.<sup>43</sup> Indeed, when they realised that 'their' insurer had joined the cartel, many of the policy subscribers, despite the relatively minor monetary damage suffered, immediately gave their lawyer a *procura litis* to sue the colluding insurer

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<sup>38</sup> AGCM Decision No.8546, par. n. 115.

<sup>39</sup> AGCM Decision No.8546, par. n. 115.

<sup>40</sup> AGCM Decision No.8546, par. n. 259.

<sup>41</sup> TAR Lazio, sez. I, July 7<sup>th</sup> 2001, No. 6139, in *Foro amm.*, 2001.

<sup>42</sup> Cons. Stato, sez. VI, April 24<sup>th</sup> 2002, No. 2199, in *Foro it.*, 2002, III, 482. The Consiglio di Stato discharged some insurance companies because of their limited role in the cartel.

<sup>43</sup> The monetary damage suffered by the policy subscribers is the price unduly paid, or better the difference between the competitive price and the price illegally fixed.

in a civil proceeding. The consumers' reaction to the illegal agreement was quite remarkable; only a few months after the publication of the AGCM Decision, a significant number of follow-on civil actions for damages had already been brought before the Italian civil courts by policy-holders against 'their' colluding insurer. In spite of article 33.2 Law 287/90, by which the Corte d'Appello has exclusive jurisdiction on civil actions based on a violation of competition law,<sup>44</sup> the majority of such claims were brought before the lower court (i.e. the Giudice di Pace) on the basis of the ordinary civil procedure rules on jurisdiction. It should be noted that according to Italian civil procedure rules, first instance jurisdiction belongs to the Giudice di Pace or to the Tribunale according to the value of the claim. In particular, while the Giudice di Pace has jurisdiction over claims with a value not exceeding €2,582.28,<sup>45</sup> all civil claims with values higher than €2,582.28 (or of indeterminable value) must be brought before the Tribunale. Moreover, under article 113 of the Code of Civil Procedure, if the value of the claim does not exceed €1,100, the Giudice di Pace shall decide the case on an equitable basis.<sup>46</sup> The 'equitable basis' provision authorises the judge to decide the case, disregarding the ordinarily applicable rules, without being bound either by the specific provisions of ordinary law applicable to the case, nor by the general principles embedded in such provisions, nor even by the general principles of the legal system.<sup>47</sup>

Maybe due to the lack of a good competition law culture among Italian attorneys, hundreds of RCA policy-holders individually sued 'their' insurer,<sup>48</sup> before the territorially competent Giudice di Pace, on the basis of the ordinary civil procedure rules on jurisdiction: that the value of the claim did not exceed the €1,100 threshold.<sup>49</sup> All the insurance companies sued before the Giudice di Pace assumed in their respective defences the lack of the Giudice di Pace's jurisdiction on the basis of the Corte d'Appello exclusive jurisdiction provision under art. 33.2 Law 287/90.

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<sup>44</sup> Art. 33.2 of Law 287/90 establishes the exclusive jurisdiction of the territorially competent Corte d'Appello on civil actions based on a violation of competition law (i.e. actions of nullity, actions aimed at obtaining interim relief and claims for damages arising out breach of national competition rules). See *supra* § 1.

<sup>45</sup> Art. 7 of the Code of Civil Procedure.

<sup>46</sup> As a consequence of the numerous successful actions brought before the Giudici di Pace by policy holders against the colluding insurance companies (described in this paragraph), the Italian Government adopted an emergency decree (i.e. Law Decree 8 February 2003 No. 18 "Disposizioni urgenti in materia di giudizio necessario secondo equità", then converted into Law No. 63 of 7 April 2003,) which amended the article 113 of the Code of Civil Procedure. By such Law, the Giudice di Pace may now decide on an equitable basis claims not exceeding €1,100 provided that they do not relate to contracts governed by uniform standard terms and conditions (so-called 'consumer contracts').

<sup>47</sup> Corte di Cassazione Sezioni Unite, decision No. 716, dated October 15<sup>th</sup> 1999. See Ashurst Italy Report, August 31<sup>st</sup> 2004, p 4.

<sup>48</sup> In Italy there is no general provision of law allowing for collective claims and class actions. It should be noted, however that under certain circumstances, representative organisations and public bodies have standing to request cease-and-desist orders and to claim damages vis-à-vis acts of unfair competition. These organisations and bodies are: professional associations (i.e. associations representative of undertakings) pursuant to Article 2601 of the Civil Code and the chambers of commerce pursuant to Article 2.5 of Law No 580/1993.

<sup>49</sup> The civil process before the Giudice di Pace is fast, cheap and not as strictly formal as the Tribunale.



In a surprising series of decisions favourable to consumers, most of the Giudici di Pace affirmed their jurisdiction and awarded to the plaintiffs monetary damages of up to 20 per cent of the insurance premiums paid, representing, in their view, the overcharge found by the AGCM. Such decisions were based on legal reasoning which differed widely from one judge to another,<sup>50</sup> but most of the Giudici di Pace who had affirmed their jurisdiction shared the opinion that those actions fall outside the scope of Italian competition law. The Giudice di Pace di Laviano, one of the first to reject an insurance company's defence, affirmed its jurisdiction on the basis of the assumption that, 'a civil action whose object is to recover a part of the premium price unduly paid to an insurance company' as a consequence of an anticompetitive conduct sanctioned by the Italian Competition Authority, 'does not fall within the scope of art. 33.2 of Law No. 287/90'.<sup>51</sup> Other Giudici di Pace shared this legal reasoning and affirmed their competence to decide the respective cases pending before them on the assumption that Competition law, 'was solely applicable to enterprises' and not to individual consumers.<sup>52</sup> However, other Giudici di Pace in the civil proceedings pending before them reached the opposite result: they denied their jurisdiction and affirmed the Corte d'Appello's exclusive competence to decide such cases.<sup>53</sup> Whether one likes it or not, the Giudice di Pace di Laviano's legal reasoning was indeed supported by a significant Corte di Cassazione precedent in the *Norme bancarie uniformi* case.<sup>54</sup> Indeed in that case the Corte di Cassazione stated that, according to the constitutional principle of 'free enterprise' established in art 41 of the Italian Constitution, national competition law is not directly concerned with consumer interests because the only interest that this law protects is free competition among commercial entities. By such a statement, the Corte di Cassazione denied consumers, as well as any other non-commercial party, standing under Italian competition law to claim the annulment of an anticompetitive agreement before the territorially competent Corte d'Appello.

Approximately three years later, in 2002, an RCA insurance case reached the Corte di Cassazione for the first time: the central question submitted to the Court related to the

<sup>50</sup> A variety of legal grounds were cited as the basis for these decisions. Some Giudici di Pace argued that the reimbursement of the overcharge was a restitution grounded in the prohibition against unjustified enrichment; others argued that the overcharge was a breach of the principle of good faith and fair dealing; others relied on the bar to unfair contractual terms in consumer contracts; while still others relied on simple tort. For a detailed analysis, see Palmieri, 'Intese restrittive della concorrenza e azione risarcitoria del consumatore finale: argomentazioni «extravagantes» per un illecito inconsistente' (2003), I, 1121, *Foro It.*; Giudici, 'Private Antitrust Law Enforcement in Italy' (2004) 1 *CompLRev* 61.

<sup>51</sup> Giudice di Pace di Laviano, decision dated September 27<sup>th</sup> 2002, *Foro it.*, 2003, n. 42.

<sup>52</sup> See the decision of the Giudice di pace Milano dated January 2<sup>nd</sup> 2004; the Decision of Giudice di pace Davoli, dated November 13<sup>th</sup> 2002, *Foro it.*, 2003, n. 41.

<sup>53</sup> See the decision of Tribunale Torre Annunziata, dated July 26<sup>th</sup> 2004; the Decision of Giudice di pace Cosenza, dated October 31<sup>st</sup> 2003, *Foro it.*, 2005, I, 259; the Decision of Giudice di pace Albano Laziale, dated September 10<sup>th</sup> 2003, *Foro it.*, 2004, I, 466, commented by Pardolesi 'Cartello e contratti dei consumatori: da Leibniz a Sansone' (2004) I 469 *Foro it.*

<sup>54</sup> *Montanari c. Cassa di Risparmio di Genova e Imperia*, Cass. civ., sez. I, decision No.1811 dated March 4<sup>th</sup> 1999, in *Foro. It.*, 1006. In this case a consumer sued its bank claiming that the bank guarantee he had been required to sign was an improper requirement imposed by a bank cartel and prayed that it be declared null and void.

determination of the competent judge to decide claims for damages brought by end consumers against the colluding companies who had joined the RCA insurance policy cartel. By judgment No. 17475 also known as the ‘*Axa decision*’ (named after the insurance company involved),<sup>55</sup> the Corte di Cassazione first section held - in perfect coherence with its previous statement in the *Norme bancarie uniformi* case - that: a) the aim of Italian competition law is to protect enterprises and the public interest in free competition in the market; b) only enterprises have standing under art. 33.2 Law 287/90; c) consumers do not have any legal standing, under national competition law, to recover damages suffered as a consequence of anticompetitive conduct; d) consumers damaged by anticompetitive conduct can promote a civil action under the general tort provision before the competent civil Court identified under the ordinary Civil procedure rules; and, e) the consumer would have been able to prove in Court that a subjective right - different from those protected by Law 287/90 - had been harmed by the colluding company. Very sure of the public nature of the Italian competition law and strongly based on a strict interpretation of article 33.2 of Law 287/90, the Corte di Cassazione *de facto* denied legal standing to consumers with regard to damages actions for breach of national competition rules.<sup>56</sup> According to this reasoning, the Corte d’Appello would have exclusive jurisdiction for damages actions for breach of national competition rules as long as such actions were brought by and between undertakings and not by consumers. It should be noted, however, that such a restrictive interpretation does not deny standing to consumers who, if damaged by an anticompetitive conduct, bring damage actions under the general tort rules (i.e. art. 2043 Codice Civile). According to ordinary civil procedure rules, such actions would have to be brought before the territorially competent judge depending on the value of the claim; indeed, due to the minimal monetary damage suffered by the plaintiffs in the RCA cases, the competent judge would have surely been the Giudice di Pace. Following the Corte di Cassazione’s reasoning, the consumer would have been able to prove in Court that a subjective right - different from those protected by Law 287/90 which relates solely to undertakings - had been harmed by the colluding company. By such a statement the Corte di Cassazione clearly skews protection under the Italian competition law on the grounds of the subjects damaged by the anticompetitive conduct. The most favourable treatment (i.e. legal standing under art. 33.2 Law 287/90) is reserved for undertakings, or better the *conspirator’s competitors*, whose harm is directly caused by the violation of competition law; consumers, whose harm is mediated by the colluding companies behaviour, fall out of the scope of the art. 33.2 and of competition law as a whole. By the Corte di Cassazione’s statement, ‘what in EC Competition law has appeared at the very borderline to the heterodoxy to the exegetes of the *Courage* case’<sup>57</sup> is pretty normal in the Italian competition law system.<sup>58</sup> In fact, while in *Courage* the ECJ stated that Art 81 EC protects not exclusively third parties but also, under

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<sup>55</sup> Decision of the Corte di Cassazione dated December 9<sup>th</sup> 2002, No. 17475, *Foro it.*, 2003, I, 1121.

<sup>56</sup> Elmi, ‘Tutele Civili e Antitrust’ in Vettori (ed.), *Concorrenza e Mercato*, Milano, 2005.

<sup>57</sup> *Courage Ltd v. Bernard Crehan*, [2001] ECR I-6297.

<sup>58</sup> Palmieri, *op cit*, n 50.

certain circumstances, a party to a contract liable to restrict or distort competition which 'can rely on the breach of [Art 81 EC] provision to obtain relief from the other contracting party', in the *Axa* case the Corte di Cassazione stated that undertakings are the only subjects protected by national competition law.

The Corte di Cassazione at the same time denied consumers access to the Corte d'Appello but threw open the doors of the Italian legal system to a significant number of *low cost* civil proceedings under tort rules. In fact, the only procedural avenue available to consumers damaged by an anticompetitive conduct was to sue colluding companies under tort rules before the territorially competent Giudice di Pace as it would have been the only court to have the competence to decide such small value civil claims. The Corte di Cassazione went further: it would not be enough for the consumer to base his tort action on the decision of the Competition Authority against the cartel, a subjective consumer right had to be violated by the colluding company to justify the successful consumer civil action. The most relevant problems arise in relation to the individuation of such a *mysteriously* subjective consumer right violated by the cartel.<sup>59</sup>

The *Axa* statement (recently overruled by the Corte di Cassazione Decision No. 2207 dated February 4<sup>th</sup> 2005) has been heavily criticized by Italian doctrine quite unanimously;<sup>60</sup> most of the critics have pointed out that, by denying legal standing to consumers, the Corte di Cassazione has completely ignored both the ECJ decision in the *Courage* case, and the entire modernisation process of EC competition law (whose primary object is to foster the private enforcement of competition law in Member States).<sup>61</sup> Moreover, it has been underlined that the *Axa* decision violates article 1.4 Law 287/90, by which the courts have to interpret Italian competition law according to EC competition law principles.<sup>62</sup>

The *Axa* statement has recently been overruled by the Corte di Cassazione Decision in the *Unipol* case.<sup>63</sup> The Court was asked to decide which was the competent court to

<sup>59</sup> Palmieri, op cit, n 50, 1221.

<sup>60</sup> See: Scoditti, 'Il consumatore e l'antitrust' (2003) I 1127 Foro it.; Bastianon, 'Antitrust e tutela civilistica: anno zero' (2003) 4 393 Danno e responsabilità; Calvo, 'Diritto antitrust e contratti esecutivi dell'intesa vietata (contributo allo studio dei Folgeverträge)' (2005) 2 181, I Contratti; Castronovo, 'Antitrust e abuso di responsabilità civile' (2004) 5 469 Danno e Responsabilità; Colangelo, 'Intese restrittive e legittimazione dei consumatori finali' (2003) 2 175 Diritto industriale; Libertini, 'Ancora sui rimedi civili conseguenti a violazioni di norme antitrust' (2004) 10 933 Danno e responsabilità; Negri, 'Risarcimento del danno da illecito antitrust e foro per la tutela del consumatore (la Cassazione non delega i dubbi nella vicenda RC auto)' (2003) 6 747 Il Corriere giuridico.

<sup>61</sup> I. Sabbatelli, 'R.c. auto: rimborsi e tutela dei consumatori' (2003) I, 684, Nuova giur. civ.; Tufarelli, 'La Corte di cassazione di fronte al danno da illecito antitrust: un'occasione persa?' (2003) I, 2144, Giust. civ.; Cameli, 'La disciplina antitrust ed il risarcimento dei danni nella giurisprudenza americana e in quella italiana' (2003) 79 Dir. comunitario scambi internaz.

<sup>62</sup> Giudici, op cit, n 50.

<sup>63</sup> See footnote n. ????. In this case, a consumer sued the colluded insurance company *Unipol*, before the Giudice di Pace di Avellino following the ordinary rules on jurisdiction; the defendant's main argument was the lack of Giudice di Pace jurisdiction on the basis of art 33.2 Law. 287/90. The Giudice di Pace rejected the *Unipol* defence, affirming that art 33.2 and its remedy of annulment, has to be referred to the upstream agreement (i.e. the cartel) and not to the downstream agreement (i.e. the contract between *Unipol* and the consumer) to (2006) 3(1) CompLRev

hear consumers' damages action under Italian competition law. This time the Third Section of the Court held that, due to its great significance, the issue of consumers' legal standing deserves careful examination and that joint sections of the Court ("Sezioni Unite") had to discuss and decide the issue.<sup>64</sup> The joint Sections of the Corte di Cassazione radically dismissed the previous restrictive interpretation of art. 33.2 and re-oriented Italian competition law in light of EC Treaty principles and the current tendencies of private enforcement of competition law in the European Union. The Cassazione stated that, 'Italian competition law is not the law of the entrepreneurs solely but the law of all market subjects'. Market subjects in the new Court's view are everyone who has a 'procedurally enforceable' legal interest related to the maintenance of the competitive character of the market. Such subjects, 'have juridical standing to the extent to which he/she can claim a specific injury deriving from the breach or the decrease of the competitive character [of the market]'. The consumer, here intended as whoever, 'closes the economic process started by the good's production', has finally been granted the legal standing to bring a damage action under art. 33.2. The Corte di Cassazione finally recognized the, 'diversity both in the scope and in functions between the Civil Code provisions on unfair competition law and the antitrust law' and affirmed 'the standing before the Court of Appeal to the consumer, third party with regard to the horizontal illegal agreement'.

Such a standing represents a kind of genetic mutation by which the *dominant element* of unfair competition law, that had significantly marked the origin and the subsequent development of the Italian anti-trust law system, has disappeared as a phenotype from the main structure. In fact, the Corte di Cassazione in the *Unipol* case affirmed that it is the territorially competent Corte d'Appello which has jurisdiction to decide in the first (and unique) instance, civil actions brought by consumers damaged by cartels. Thus it is this 'specialised' antitrust court (coherently with the original legislator's design) which has to decide in each case the validity of the policy subscriber's damage action based on the Italian competition authority decision. As aforesaid, several Giudici di Pace have already faced this delicate task and, despite the variety of the legal grounds at the base of their decisions,<sup>65</sup> in the majority of cases, the Giudici di Pace awarded policy subscribers a monetary compensation corresponding to a fraction of the insurance premium paid. This fraction in most cases had been derived from the Italian competition Authority's decision<sup>66</sup> and corresponded to 20% of the premium price

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which has to be applied the ordinary rules of tort law. *Unipol* appealed this decision to the Corte di Cassazione.

<sup>64</sup> Corte di Cassazione Ord., dated 17<sup>th</sup> October 2003, No.15538, *Foro it.*, 2938, I, 2003.

<sup>65</sup> Giudici di Pace based their respective plaintiff's favourable decisions on the basis of different legal reasoning. Some argued that the restitution of the overcharge was based on the unjustified enrichment rules (i.e. art. 2033 Civil Code); others argued that such an overcharge was a consequence of the breach of good faith rules and fairness principles; others relied on the bar to unfair contractual terms in consumer contracts; many others relied on simple tort rules. See. Palmieri, *supra*, 1221; Incardina & Poncibo, 'The Corte di Cassazione takes "Courage". A recent ruling opens limited rights for consumers in Competition cases' (2005) 26(8) ECLR 445-450.

<sup>66</sup> AGCM Decision No.8546, par. n. 80.

paid.<sup>67</sup> However, not every Giudice di Pace identified such a fraction in such a way: the Giudice di Pace di Sant'Anastasia for instance liquidated 15% of the insurance premium paid, while the Giudice di pace di Casoria liquidated only 10%.<sup>68</sup> A few months after the *Unipol* decision the Corte di Appello di Napoli decided the *Sai* case via its exclusive jurisdiction.<sup>69</sup> The Corte d'Appello was indeed asked as a court of first instance to decide the insurance policy subscriber's damage action based on the AGCM decision against *Sai*, an insurance company who had joined the RCA insurance policy cartel. The court decided the case in a somewhat similar way to the Giudici di Pace; first of all it affirmed that the insurance company's anticompetitive conduct 'had surely injured the plaintiff', then it identified the plaintiff's monetary damage as 'the difference between the RCA insurance policy price paid and the price that would have been offered to the consumer without the illegal horizontal agreement effect' (i.e. the competitive market price), and third it based the whole reasoning on the AGCM's factual findings (i.e. the stability of the undertakings market shares;<sup>70</sup> the presence of a major dominant group of companies and a fringe of smaller ones; the anomalous speeding up of the premium price increase especially in the recent period;<sup>71</sup> the fact that the premium price has increased much more in the Italian market than the European average;<sup>72</sup> the company's lack of ability to reduce the production costs<sup>73</sup> and that the market demand elasticity was very close to zero<sup>74</sup>), finally, it awarded the plaintiff a monetary compensation corresponding to 20% of the premium price paid, equivalent to €19.68. The Court said that such an amount of money has to be considered 'fair' in light of both the AGCM's decision and on the 'nozioni di comune esperienza'.<sup>75</sup> It thus demonstrated that it is not exempt from the embarrassing degree of uncertainty in the identification of the exact quantity of damage suffered by the plaintiff, 'in order to determine the quantum debeat, the equitable criteria is helpful because of the impossibility of proving the damage suffered [by the plaintiff] in its precise entity'. Such a degree of uncertainty is well known to economists, indeed, it is an extremely difficult task (if not an impossible one) to determine *a posteriori* the 'competitive price' in the market at a precise moment.<sup>76</sup>

<sup>67</sup> Giudice di pace Lecce, decision dated January 30<sup>th</sup> 2003.

<sup>68</sup> Giudice di pace Sant'Anastasia, decision dated September 12<sup>th</sup> 2003; Giudice di pace Casoria Decision dated February 12<sup>th</sup> 2003.

<sup>69</sup> Corte di Appello di Napoli, decision dated May, 3<sup>rd</sup> 2005, *Foro it.*, 2005, I, 1880. Commented by Palmieri.

<sup>70</sup> AGCM Decision No.8546, par. n. 87 and following.

<sup>71</sup> AGCM Decision No.8546, par. n. 71.

<sup>72</sup> AGCM Decision No.8546, paragraphs n. 70 and 75.

<sup>73</sup> AGCM Decision No.8546, par. n. 77 and following.

<sup>74</sup> AGCM Decision No.8546, par. n. 195 and following.

<sup>75</sup> Corte di Appello di Napoli Decision dated May, 3<sup>rd</sup> 2005.

<sup>76</sup> Prof. Pardolesi 'Analisi Economica e Diritto Antitrust' Seminario at the Trento Faculty of Law on May 21<sup>st</sup> 2005. From an economic perspective see: Fisher, 'Economic Analysis and Antitrust Damages' (March 2006), Competition Policy Discussion Paper, electronic version available at <http://www.crai.com/Showpubs.asp?Pubid=5044>; and Ray & Schwartz, 'Monopoly Overcharges, Pass-(2006) 3(1) CompLRev

Another underlying question that emerges from this case is the issue of the incentive (if any) for consumers to take private actions under the Italian competition law system. As aforesaid, art 33.2 Law 287/90 introduces an anomaly in the system because by this provision different judges are competent to decide, in first instance, private actions based on a violation of competition law depending on the dimension (national or communitarian) of the rules violated by anticompetitive conduct. Since the *Unipol* decision finally granted consumers damaged by anticompetitive conduct the right to invoke the national competition law provisions, the exclusive jurisdiction clause in favour of the territorially competent Corte d'Appello is also applicable to them.

The whole effect of this statement sounds more like a disincentive to consumers private actions than an incentive to them, mainly because of the structural and procedural characteristics of proceedings before the Corte d'Appello (the ordinary civil second instance Court). In fact, those proceedings are more formal and much more expensive than those before the Giudice di Pace, and may take on average between two and three years to reach a decision; an equivalent period of time (i.e. between two and three years) may be necessary to reach a final decision because of a possible appeal before the Corte di Cassazione. On the other hand, while civil proceedings before the Giudice di Pace may be concluded within a few months, those before the Tribunale may take between two and four years; anyway, in case of appeal, proceedings before the competent court (and then eventually before the Corte di Cassazione) will substantially increase the duration of the process.<sup>77</sup> All these factors, including the long duration of civil proceedings - this still constitutes an endemic structural element of the Italian legal system despite the fact that it has been decreasing in recent years<sup>78</sup> - clearly contribute to creating a disincentive to the domestic private enforcement of competition law. Is it a reasonable choice, for those who have suffered a small monetary damage like in the *Sai* case (€19.68), to seek protection under Italian competition law? How many consumers would be so *risk addicted* to accept the real risk that if they lose in Court (e.g. in case of the lack of or insufficient proof of the existence of the cartel, or the lack of or insufficient demonstration of the specific harm and/or the link of causality between the injury suffered and the cartel effect or other anti-competitive behaviour, or the abuse of a dominant position in the market)<sup>79</sup> they may be ordered to pay the counterparty's legal costs? The scenario for the potential plaintiff is (surprisingly) different, and rather more pleasant, if the anticompetitive conduct has violated EC competition rules. In such a case the competent judge to decide the case would be, in first instance, depending on the value of the claim, the Giudice di Pace or the

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'Through Pricing, and Economic Damages' (March/April 2006) Antitrust Insights, electronic version available at [http://www.nera.com/Newsletter.asp?n\\_ID=31](http://www.nera.com/Newsletter.asp?n_ID=31).

<sup>77</sup> See Ashurst Italy Report, *supra*.

<sup>78</sup> See Marvulli, 'Relazione sull'attività giudiziaria nell'anno 2005', January 27<sup>th</sup> 2006, available at: [http://www.giustizia.it/uffici/inaug\\_ag/ag2006/cass2006\\_index.htm#rall](http://www.giustizia.it/uffici/inaug_ag/ag2006/cass2006_index.htm#rall).

<sup>79</sup> The issue is discussed by Sánchez Graells, 'Discovery, confidentiality and disclosure of evidence under the private enforcement of EU antitrust rules' (2006), available at the web page: <http://www.kernbureau.uva.nl/acle/object.cfm/objectID=31F1A5DA-DB84-4448-BDD36D575866FDC/download=true/salsoz.pdf>.

Tribunale. As aforesaid those civil proceedings are more agile, more consumer friendly, less formal and surely cheaper. This different protection under national and EC competition rules is not in contrast with the principle of equivalence. Under this well known principle judicial actions based on EC rules must not be less favourable than those based on domestic rules.<sup>80</sup> The situation here appears to comply with this principle as a claim for damages can be filed either with the Giudice di Pace (in which case it may be argued that preferential treatment is accorded) or with the Corte d'Appello (in which case a claim based on European law is accorded the same treatment as a claim based on national law). In other words, damages actions alleging violations of EC competition rules are afforded substantially more favourable treatment than those actions brought under national competition law. It should be noted however, that private actions under EC competition law also lack adequate incentives for consumers to bring law suits before the Court. Indeed, the issue of incentives for private action has been widely discussed within the so-called *modernization process* of EC Competition Law at Communitarian level.<sup>81</sup>

It should be noted, however, as pointed out by Prof Jesus Alfaro, that in cases like *RCA* exists a concrete 'risk of competition law *isolation* from the legal system as a whole'.<sup>82</sup> In fact, under EC law victims of anticompetitive conduct do 'not have the right to recover his/her damages in the specialized Antitrust courts, but the right (and legal standing) to recover his/her damages in Court'. A civil action to recover damages suffered by anticompetitive conduct can be brought by the injured party in Civil Court under: (i) contractual rules or (ii) in tort. Indeed, in the *RCA* insurance cartel cases, policy subscribers sued 'their' colluding insurer under the general Civil code rules on the basis of the illegal price paid: in fact by becoming a member of the cartel, the insurers have cheated their customers by obliging them to pay an illegal price. Consequently the consumer's civil action can be brought under the *dolo contrattuale* rules using the Competition Authority decision to prove the actual malice.

#### **4. THE INSURANCE COMPANIES' CARTEL VIEWED FROM LUXEMBOURG: ANALYSIS OF THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN JOINED CASES C-295-289/04**

In June 2004 the Giudice di pace di Bitonto submitted to the Court of Justice four references for preliminary rulings concerning the interpretation of Article 81 EC in connection with some procedural aspects of national regulation of damages actions. As aforementioned, the first question concerned the capability of anticompetitive conduct

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<sup>80</sup> ECJ decision 33/76 December 16<sup>th</sup> 1976, *Reve* (Racc. 1989, 5) and also *Courage* case, *supra*, paragraph 29.

<sup>81</sup> For a critical view of the process of decentralization see, 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. See also Wils, 'Should private antitrust enforcement be encouraged in Europe?' (2003) 26 *World Competition* 473.

<sup>82</sup> Prof Jesus Alfaro in his speech at the Round Table, 'Private enforcement of antitrust law in Europe: perspectives from law and economics', European Association of Law and Economics, 23rd Conference, Madrid, September 14<sup>th</sup>, 2006.

which infringed national rules on competition to constitute an infringement of Article 81 EC. The other questions submitted focused on: the entitlement to rely on the invalidity of an agreement or practice prohibited under EC competition law and the concomitant right to claim damages;<sup>83</sup> the compatibility of Article 33(2) of Law No 287/90 with EC law;<sup>84</sup> the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81;<sup>85</sup> and, the ability of the national courts to award punitive damages.<sup>86</sup> Each question is further analysed in the following sub-sections in the order they were decided by the European Court of Justice.

#### **4.1 When anticompetitive conduct contrary to national rules on competition may also constitute an infringement of Article 81 EC: the parallel application of national and EC rules on competition**

The Court solved the first question on the basis of the different purposes of Community law and national competition law: ‘whereas Articles 81 EC and 82 EC regard [the anticompetitive practices] in the light of the obstacles which may result for trade between Member States, national law proceeds on the basis of considerations peculiar to it and considers restrictive practices only in that context’.<sup>87</sup> In the view of the Court, such varying aims make possible the parallel application of EC and national competition rules. Indeed, the wording of Article 81 EC necessarily stipulates that Community competition rules relate to the capability of the practice to affect trade between Member States. According to communitarian Court case-law the ability of the practice to affect trade between Member States must be ‘appreciable’.<sup>88</sup> This criterion helps to distance community and national competition law despite their naturally overlapping objects. Thus, Community law covers any agreement or any practice which is capable of affecting trade between Member States in a manner which might harm the attainment of a single market, in particular by sealing off national markets or by affecting the structure of competition within the common market.<sup>89</sup> To explain why the anticompetitive conduct challenged by the national Authority could also potentially violate EC competition rules, the Court has used the argument of the difference in

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<sup>83</sup> It is the second question in Cases C-295/04 to C-297/04 and the third question in Case C-298/04.

<sup>84</sup> It is the second question in Case C-298/04.

<sup>85</sup> It is the third question in Cases C-295/04 to C-297/04 and the fourth question in Case C-298/04.

<sup>86</sup> It is the fourth question in Cases C-295/04 to C-297/04 and the fifth question in Case C-298/04.

<sup>87</sup> Cases C-295-298/04, para 38. See also Case 14/68, *Wilhelm and Others* [1969] ECR 1, para 3; Cases 253/78, 1/79-3/79, *Giry and Guerlain and o.* [1980] ECR 2327, p. 15, and Case C-137/00, *Milk Marque and National Farmers’ Union* [2003] I-7975, p. 61.

<sup>88</sup> See *Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ 2004, C101/07, paragraphs 12 -13. See in this respect Case 22/71, *Béguelin*, [1971] ECR 949, paragraph 16; See e.g. Joined Cases 56/64 and 58/64, *Consten and Grundig*, [1966] ECR 429, and Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] ECR 223.

<sup>89</sup> See Case 22/78, *Hugin v Commission*, [1979] ECR 1869, p 17, and Case C-475/99, *Ambulanz Glöckner*, [2001] ECR I-8089, p. 47. See also *Guidelines*, *ibid*, par 35.



scope, to which the interpretation and application of the condition relating to effects on trade between Member States, has to be traced back.<sup>90</sup>

Once it clearly established the connection between the two competition law systems, the Court - adhering to its previous case law - solved the question by reminding the national judge that in order to satisfy the 'communitarian' standard, it is necessary that 'with a sufficient degree of probability' the agreement or concerted practice may have an influence, direct or indirect, actual or potential, on the commerce between Member States.<sup>91</sup> Such an influence has to be not insignificant and need to be capable of preventing the creation of the internal market within the Community.<sup>92</sup>

Maybe the most interesting part of the Court's solution is its analysis of the capability of the RCA cartel to influence commerce between Member states. The Court gave importance to the fact that the practice had been challenged by the AGCM on the basis of national law. According to communitarian case law, a concerted practice relating only to a single Member State *is* capable of affecting trade between Member States. A concerted practice covering the entire territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up economic interpenetration.<sup>93</sup> The AGCM found that the ten biggest assurance companies active in the Italian RCA assurance market joined the illegal practice, and that among them there were several foreign companies.<sup>94</sup> The cartel's widespread membership alone was not so decisive as to satisfy the criterion of trade between Member States being affected but provided, 'a clear indication that intra-Community trade may have been affected, certainly in combination with the fact that non-Italian undertakings also took part in the agreements'.<sup>95</sup> Such active participation by foreign operators clearly indicated a certain degree of market permeability open to newcomers from abroad. In that regard, according to case-law, since the market concerned was open to infiltration by operators from other Member States, the members of a national price cartel could retain their market share only if they defended themselves against foreign competition.<sup>96</sup> Although there were strong barriers to entry in the RCA market the presence of foreign companies indicates another argument as to the communitarian dimension of the illegal practice. Those barriers (in the view if the Italian Authority arisen primarily due to the need to set up an efficient distribution network and a network of centres for the settlement of accident claims throughout

<sup>90</sup> Cases C-295-298/04, par 41. See also Advocate General Opinion, Cases C-295-298/04, par 33.

<sup>91</sup> See Case 42/84, *Remia v Commissione* [1985] ECR 2545, p 22, and *Ambulanz Glöckner*, op cit, n 89, p 48.

<sup>92</sup> Case C-306/96, *Javico* [1998] ECR I-1983, p 16.

<sup>93</sup> Cases C-295-298/04, par 45. See also *Guidelines*, par 78 and Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, par 29, *Remia and Others v Commission*, op cit, n 91, par 22, and Case C-35/96 *Commission v Italy* [1998] ECR I-3851, par 48.

<sup>94</sup> AGCM Decision, No.8546, par. 126.

<sup>95</sup> Cases C-295-298/04, par. 44. See Advocate General Opinion, paragraphs 37-38.

<sup>96</sup> Cases C-295-298/04, par. 49. See also Case 246/86, *Belasco*, [1989] ECR 2117, 32-38. On the point see ALFARO, *La Prohibición De Los Acuerdos Restrictivos De La Competencia. Una Concepción Privatística Del Derecho Antimonopolio*, InDret 4/2004, 2004.

Italy) made the provision of insurance services more difficult for newcomers.<sup>97</sup> In cases like this where barriers to entry are not ‘absolute’, but are nevertheless capable of negatively impacting intra-community commerce, EC competition law is likely to be affected.

In the view of the Court, it is for the national court to decide whether the mere existence of the agreement or concerted practice is capable of having a deterrent effect on insurance companies from other Member States, in particular by enabling the coordination and fixing of civil liability auto insurance premiums at a level whereby the sale of such insurance by those companies would not be profitable (thus rendering such influence ‘appreciable’). Thus, in the RCA cartel the anticompetitive effect on commerce between Member States was hidden in the information exchange between competitors and in the subsequent effect of segmenting the internal market and restricting the freedom to provide services.

The Court has therefore answered the first question in Joined Cases C-295-298/04 by stating that an agreement or concerted practice, which infringes national rules on the protection of competition may also constitute an infringement of Article 81 EC where: there is a sufficient degree of probability that the agreement or concerted practice at issue may have an not insignificant, direct or indirect, actual or potential, influence on the sale of insurance policies in the relevant Member State by operators established in other Member States.<sup>98</sup>

#### **4.2 The entitlement to rely on the invalidity of a practice prohibited under EC competition law and the concomitant right to claim damages**

This question is of some interest because it focuses on two relevant consequences that anticompetitive conduct has on third parties. The national court asked whether Article 81 EC is to be interpreted as entitling any individual to rely on the invalidity of a practice prohibited under that article and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm. The Court answered the question in the affirmative, basing its arguments on settled case-law on the direct effect of Articles 81 and 82 EC. The European Court of Justice recognised the direct effect of Articles 81 and 82 EC on horizontal relations more than thirty years ago. National Courts in each Member state are therefore obliged to apply these rights.<sup>99</sup> According to settled case-law, the principle of invalidity established in Article 81(2) EC can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 81(1) EC are met and so long as the agreement concerned does not justify the grant of an exemption under Article 81(3) EC.<sup>100</sup> The Court of Justice answered the first part of the second question by recognising the right

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<sup>97</sup> Cases C-295-298/04, par. 50.

<sup>98</sup> Cases C-295-298/04, par. 52

<sup>99</sup> See Case 127/73, *BRT e SABAM* [1974] ECR 51, p 16; Case C-282/95P, *Guérin automobiles v Commission*, [1997] ECR I-1503, p 39, and Case C-453/99, *Courage et Crehan*, [2001] ECR I-6297, p 23. On the direct effects principle see Benacchio, *Diritto privato della Comunità europea. Fonti, modelli e regole* (III ed.), Padova, 2004.

<sup>100</sup> Cases C-295-298/04, par. 57. On this point see Case 10/69, *Portelange*, [1969] ECR 309, p 10.

of any individual to raise an action for breach of Article 81 EC before a national court (simultaneously recognising individuals' right to rely on the invalidity of an agreement or practice prohibited under that Article).<sup>101</sup>

The second part of the question focuses on the right to seek compensation for loss caused by a conduct liable to restrict or distort competition. To answer the question the Court referred to the full effectiveness of Article 81 EC and, in particular, its judgment in the *Courage* case.<sup>102</sup> In the absence of Community rules governing the matter, the Court was forced to design a remedy on the principle of full effectiveness and on the practical effect of the prohibition laid down in Article 81(1) EC. In the Court's view, the effectiveness of Article 81 EC would be limited if it were not open to any individual to claim damages for loss caused to him.<sup>103</sup> It follows that if any individual can claim compensation for harm suffered on the basis of a violation of Article 81 EC, the effectiveness of EC competition rules and the enforcement system of competition law would increase. Legal standing to seek compensation is, of course, conditional on the presence of the causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.<sup>104</sup> In the absence of Community rules governing the matter, the Court relied on the domestic legal systems of each Member State to establish the courts and tribunals having jurisdiction. However, the Court relied on its own legal culture to lay down the detailed procedural rules governing: actions for safeguarding rights which individuals derive directly from Community law, and the concept of 'causal relationship'.<sup>105</sup> When regulating domestic procedure all Member States have to respect the principles of equivalence (measures adopted would not be less favourable than those governing similar domestic actions) and effectiveness (that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law).<sup>106</sup>

The EC principles of equivalence and effectiveness are the *chiave di volta* used by the Court to answer all the other questions relating to procedure raised by the Giudice di Pace in this case.<sup>107</sup>

### 4.3 The compatibility of Article 33(2) of Italian Law No 287/90 with Article 81 EC

With this question, the national court asked whether Article 81 EC must be interpreted as precluding a national provision, such as Article 33(2) of Law No 287/90, under which third parties must bring their actions for damages for infringement of

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<sup>101</sup> Cases C-295-298/04, par. 59.

<sup>102</sup> See *Courage e Crehan*, op cit, n 99.

<sup>103</sup> Cases C-295-298/04, par. 60. See *Courage e Crehan*, op cit, n 99, par 26.

<sup>104</sup> Cases C-295-298/04, par 61-63.

<sup>105</sup> Cases C-295-298/04, par 64.

<sup>106</sup> Cases C-295-298/04, par. 62-63. See Case C-261/95, *Palmisani*, [1997] I-4025, p 27; and *Courage e Crehan*, op cit, n 99, par 29.

<sup>107</sup> On the EC principles of equivalence and effectiveness see Benacchio, op cit, n 99, p 20 and 99-144.

Community and national competition rules before a court, other than that which usually has jurisdiction in actions for damages of similar value, thereby involving a considerable increase in costs and time. As aforementioned in § 3 Italian competition Law establishes the exclusive competence of the Corte d'Appello (the ordinary second instance Court) to hear first instance civil actions based on competition law.<sup>108</sup> As recently stated by the Italian Corte di Cassazione, the Article 33(2) rule applies only to actions for damages based on infringement of national provisions protecting competition.<sup>109</sup> Conversely, actions for damages based on infringement of Articles 81 and 82 EC fall, in the absence of express legal provisions, within the competence of the ordinary courts. The fact that different judges are competent to hear first instance actions for breach of national competition law and EC competition law constitutes a structural *anomaly* of the Italian competition law system.<sup>110</sup> Under this system, when establishing the competent judge, litigants have something of a choice depending on whether his/her claim is based *solely* on an infringement of European competition law (in which case the Giudice di Pace or the Tribunale would have jurisdiction) or *partly* thereon (in which case the Corte d'Appello would have jurisdiction, given its exclusive competence to deliver judgments on claims for damages based on infringement of national competition law).<sup>111</sup>

To evaluate the compatibility of this domestic rule with EC competition law, the Court used the test of equivalence, by which the rules which apply to a claim based on European law must not be less favourable than those which govern similar claims under national law. In the Court's opinion the Italian rule establishing the exclusive competence of the Corte d'Appello did not infringe the principle. This is because a claim for damages can be filed either with the Giudice di Pace, in which case it may be argued that preferential treatment is accorded, or with the Corte d'Appello, in which case a claim based on European law is accorded the same treatment as a claim based on national law. It should be noted that civil proceedings before the Tribunale (and even more those before the Giudice di Pace) are less expensive, less complex and less formal than those before the Corte di Appello (which do not allow a second instance judgment either). This could be seen as a kind of unwilling discrimination *in melius*, or even an incentive to private enforcement of the EC competition law. In fact, as aforesaid in § 3, the structural and procedural characteristics of proceedings before the Corte d'Appello (the ordinary civil second instance Court) are more formal and much more expensive than those before the Giudice di Pace, and take on average between two and three years to reach a decision. A further equivalent period of time may also be necessary to

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<sup>108</sup>See art. 33 II comma Legge 287/90.

<sup>109</sup>See Corte di Cassazione Decision, 2005, n. 2207, cit.

<sup>110</sup>Ghidini & Falce, 'Giurisdizione antitrust: l'anomalia italiana' (1999), 317 Mercato, concorrenza e regole; this issue is analyzed by Pascuzzi, 'Commento all'art. 33 l. 297/1990' in Frignani, Pardolesi, Patroni Griffi, Ubertazzi (eds.), *La legislazione Antitrust italiana*, Bologna, 1993.

<sup>111</sup>Since Regulation No 1/2003 entered into force, where national courts, including the Corte d'Appello, apply national competition law, they should also apply Article 81 EC, at least if the criterion of 'trade being affected' has been satisfied. From this it can be deduced that that court similarly has jurisdiction where a claim is also based on the infringement of Article 81 EC.

reach a final decision due to the possibility of an appeal before the Corte di Cassazione. On the other hand, while civil proceedings before the Giudice di Pace may be concluded within a few months, those before the Tribunale may take between two and four years; anyway, in case of appeal, proceedings before the competent court (and then eventually before the Corte di Cassazione) will substantially increase the duration of the process.<sup>112</sup> All these factors, including the long duration of civil proceedings - which still constitutes an endemic structural element of the Italian legal system despite the fact that it has been decreasing in recent years<sup>113</sup> - clearly contribute to creating a disincentive effect to the domestic private enforcement of competition law. Accordingly, in light of the principle of procedural authority of Member States, if a national court was called upon to revive observance of the principles of equivalence and effectiveness in relation to Article 33 of Law No 287/90, it could not fail to observe that the legal position based on Community law is better protected, having regard to the guarantee of two levels of jurisdiction, than that based on national law.<sup>114</sup>

The Court has stated that it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on infringement of Community competition rules and to prescribe the detailed procedural rules governing those actions. Those provisions shall not be not less favourable than those governing actions for damages based on an infringement of national competition rules and shall not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC.<sup>115</sup>

#### **4.4 The limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC**

With this question the national court asked the Court whether Article 81 EC must be interpreted as precluding a national rule which provides that the limitation period for seeking compensation for harm caused by a practice prohibited under Article 81 EC begins to run from the day on which that practice was adopted. Among the procedural issues that could jeopardise the effectiveness of private enforcement of competition law within the Community, the limitation period is one of the most important because it regulates the access to courts in time. The question put to the Court was, therefore, of extreme interest because the absence of uniform regulation of the matter makes the effectiveness EC competition law enforcement highly vulnerable due to the variety of national solutions.<sup>116</sup> It is important to bear in mind that too short a limitation period would jeopardise the effectiveness of the private enforcement system. Special consideration needs to be given to the relationship between limitation periods and

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<sup>112</sup>See Ashurst Italy Report, *op cit*, n 18.

<sup>113</sup>See Marvulli, 'Relazione sull'attività giudiziaria nell'anno 2005', January 27<sup>th</sup> 2006, available at: [http://www.giustizia.it/uffici/inaug\\_ag/ag2006/cass2006\\_index.htm#rall](http://www.giustizia.it/uffici/inaug_ag/ag2006/cass2006_index.htm#rall).

<sup>114</sup>Cases C-295-298/04, par. 67.

<sup>115</sup>Cases C-295-298/04, par. 72.

<sup>116</sup>See Advocate General Opinion, par 60.

proceedings before public competition authorities. Longer time limits are favourable for follow-on claims as other parties which feel aggrieved by the impugned anti-competitive behaviour will be more inclined to bring an action if a judgment or decision has already found a breach of competition law. If limitation periods are too short, a claim might already be statute barred once a judgment or decision is finally rendered so that potential claimants are no longer able to bring a case.<sup>117</sup> The obligation in some jurisdictions to present all evidence to the court when filing a claim also has important consequences for the role played by limitation periods. A short limitation period together with an extensive need for collecting evidence could constitute a serious obstacle to the bringing of such competition-based damages cases.<sup>118</sup>

A considerable diversity exists between the Member States as to the rules concerning limitation periods;<sup>119</sup> the absence of Community rules governing the limitation period is partially made up for by the Court via the principles of equivalence (the prescription period has not to be less favourable than that applicable to similar domestic actions) and effectiveness (that it does not render practically impossible or excessively difficult the exercise of rights conferred by Community law).<sup>120</sup> These principles allow the Court of Justice to avoid the dangerous reference *tout court* to national rules which, as already noted, could make private enforcement potentially ineffective. A *tout court* reference could also foster contradictory judgments and create disparities in treatment on the basis of the territorially competent court.

To answer the question the Court scrutinised the prescription rules in Italy. It found that the limitation period would begin to run from the day on which the agreement or concerted practice was adopted. In the Court's view this rule could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposed a short limitation period not capable of suspension.<sup>121</sup> In fact, especially where there are continuous or repeated infringements, it is possible that the limitation period could expire even before the infringement is brought to an end, in which case it would be impossible for any individual who had suffered harm after the expiry of the limitation period to bring an action.<sup>122</sup> The Court answered the question by establishing that in

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<sup>117</sup>See *Working Paper* SEC(2005)1732, p 74.

<sup>118</sup>See, *Working Paper*, *ibid*, p 14.

<sup>119</sup>According to the *Ashurst* report, some Member States set their limitation periods irrespective of the knowledge of the claimant (i.e. the period starts running from the date on which the infringement occurred) while others allow for a time limit dependent on the subjective knowledge of the potential claimant (i.e. damage was detected or ought - under usual circumstances - to have been detected). Finally, in many Member States (Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, the Netherlands, Austria, Poland, Slovakia and Slovenia) both types of time limits are applied (i.e. there is a subjectively fixed time limit starting from the subjective knowledge of the claimant but also an objectively fixed longer period after the expiration of which no action can be brought irrespective of the claimant's knowledge). The length of limitation periods in general appears to differ substantially and ranges between one and thirty years.

<sup>120</sup>Cases C-295-298/04, paragraphs 76-77 and 81. See also par 62.

<sup>121</sup>Cases C-295-298/04, par. 78.

<sup>122</sup>Cases C-295-298/04, par. 79.

the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

#### 4.5 National courts and the award of punitive damages

With this question, the national court asked whether Article 81 EC should be interpreted as allowing national courts to award punitive damages. Although it focuses on a specific aspect - punitive damages - the question shines light on a *key difficulty* relating to the private enforcement of EC competition law. The quantification of damages can be particularly complex given the economic nature of the illegality and the difficulty of determining the position the claimant would have been absent the infringement, as usually required under tort rules. Within the Community, both the definition of the damage and its quantification in court lack generally recognised models. Differences of approach in relation to lost profits can result in considerably different awards, and a restriction on this could operate as a disincentive to private actions.<sup>123</sup> The choice of a potential plaintiff to bring his case to court is directly influenced by it and in a certain way private enforcement of competition law in the EC depends on the damages award.<sup>124</sup> Especially when the potential plaintiff is a consumer, incentives to bring the case to court are of crucial relevance. As such an incentive many Member States allow for a reduction in the standard of proof required when damages are difficult to quantify. In the few Member States where this reduction does not operate, if the claimant is unable to prove the exact loss, the claim fails.

In every case the amount of the award has to be defined by the national court in accordance with the national legislation and legal culture. In this respect, several definitions are founded on the idea of compensation or recovery of illegal gain. Compensatory damages, especially when the potential plaintiff is a single consumer, might not operate as a good enough incentive for him to bring his case to court even if it had a high probability of success. In the RCA cartel case, for instance, the estimated overcharge for each year of violation was twenty percent. That figure, without taking into account legal fees, was in the vast majority of cases less than €100. The introduction of award mechanisms that could go beyond mere compensation and attack the illegal gains made by the colluding companies would undoubtedly act as incentives to private enforcement of EC competition law. The European Commission's proposal regarding the introduction of double damages for the most serious antitrust infringements (i.e. horizontal cartels) clearly follows this line.<sup>125</sup> Currently, a handful of Member States go beyond the mere compensation model and recognise punitive (Cyprus) or exemplary (Cyprus, Ireland, UK) damages.<sup>126</sup>

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<sup>123</sup> See *Working Paper*, op cit, n 117, paragraphs 125-144.

<sup>124</sup> See Wils, 'Optimal Antitrust Fines: Theory and Practice', op cit, n 14, 197.

<sup>125</sup> See *Working Paper*, op cit, n 117, par 114 -124.

<sup>126</sup> Moreover, it should be noted that in Cyprus, Ireland and the UK exemplary damages, while they exist, are rarely awarded. See *Study on the conditions of claims for damages in case of infringement of EC competition rules*, op cit, n (2006) 3(1) CompLRev

The question submitted by the national court focused on the possibility of awarding punitive damages, thereby deterring the adoption of agreements or concerted practices prohibited under that article. The Court based its answer on the principles of equivalence and effectiveness. In the same way it solved the three previous questions the Court, in the absence of uniform communitarian regulation on the matter, referred the definition of concrete procedural issues to the domestic legal system. In the Court's view it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.<sup>127</sup>

In the majority of Member States, actions for damages merely compensate the victims for the loss suffered and, generally, do not assess any extra economic advantage. In Italy, punitive damages are foreign to the legal system and to the rationale behind compensation. The latter is designed to make good proven harm suffered by the victim. In no circumstances should damages have a punitive or repressive function, since that function falls within the scope of statute.<sup>128</sup> To grant the full effectiveness of Article 81(1) EC, it is not necessary, according to the Court's settled case-law, to grant to the victim compensation higher than the loss suffered.<sup>129</sup> In that respect the Court has underlined that, in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law.<sup>130</sup>

The Court's answer was based on the principle of effectiveness and the right of any individual to claim damages on the basis of a violation of competition rules. It follows that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.<sup>131</sup> In the Court's view, the total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of breach of Community law since, especially in the context of economic or commercial litigation, 'such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible'.<sup>132</sup>

The Court of Justice made an interesting final consideration: in its view Community law, 'does not prevent national courts from taking steps to ensure that the protection of

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18, p 84. See also Rodger, 'Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages' [2003] ECLR 103.

<sup>127</sup>Cases C-295-298/04, par 84. See also case C-46/93 and C-48/93, *Brasserie du pêcheur* and *Factortame*, [1996] ECR I-1029, par. 89-90.

<sup>128</sup>Cases C-295-298/04, par 85.

<sup>129</sup>See Advocate General's Opinion, par 64-70.

<sup>130</sup>Cases C-295-298/04, par. 93.

<sup>131</sup>Cases C-295-298/04, par. 95.

<sup>132</sup>Cases C-295-298/04, par. 96. See case *Brasserie du pêcheur et Factortame*, op cit, n 127, p 87, and C-397/98 and C-410/98, *Metallgesellschaft* [2001] ECR I-1727, p 91.



the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them'.<sup>133</sup> This appears to be a political suggestion aimed at the creation of a clear incentive for claimants to bring antitrust damages cases; a kind of hidden message addressed to the Commission to follow the suggestion in the *Green Paper* regarding the possibility of 'double damages automatically or conditionally or at the discretion of the court' in case of illegal horizontal cartels.<sup>134</sup>

## 5. CONCLUSIONS

In *Manfredi*, the Court of Justice solved some of the most debated procedural aspects of civil actions based on a violation of EC competition rules (i.e. the entitlement to rely on the invalidity of a prohibited agreement or practice and the concomitant right to claim damages; the limitation period for seeking compensation for harm caused, and the ability of the national courts to award punitive damages). The decision is consistent with the Court's case law on damage actions based on a violation of EC rules and confirms the judicial origins of the private enforcement of antitrust rules within the European Union. In fact, since the Court of Justice made clear (in *BRT/I* 1974) that national law had to provide remedies for the victims of antitrust infringements, neither the Treaty nor Regulation 1/2003/EC (nor the preceding Regulation 17/62/EEC) have provided any legal rule explicitly granting damages throughout the Community.<sup>135</sup> So far, any procedural and substantive problem related to the *vactio legis* has been solved from Luxemburg through the application of the effectiveness, equality and proportionality principles.

Deciding *Manfredi*, the Court of Justice does not seem discouraged by the absence of a detailed and uniform EC regulation on private actions. On the contrary, like in *Courage*, each solution seems to fit quite well into the EC competition law system. This is even more evident if one tries to compare the Court's solution of controversial procedural aspects (e.g. time limitation or damages quantification) with the EC legislator's intervention.<sup>136</sup> The virtues of the Court's decision are many: they are coherent with cultural traditions of Member States, they do not contrast with the structure and the scope of private law remedies already in force and, more importantly, they do assure the effectiveness of antitrust rules among the Community.

The decision of the Court of Justice has a great significance also from the domestic antitrust law perspective. The Giudice di Pace has to decide if the RCA cartel harmed commerce between Member States. If it decides in the way the Court clearly suggests, it will have to apply Article 81 EC and assess damages to the plaintiff. As explained

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<sup>133</sup>Cases C-295-298/04, par 94. See also Case 238/78, *Ireks-Arkady/Consiglio v Commission*, [1979] ECR 2955, p 14; and Case C-441/98 and C-442/98, *Michailidis* [2000] ECR I-7145, p 31; and *Courage v Crehan*, op cit, n 99, p 30.

<sup>134</sup>See *Green Paper*, op cit, n 14, par 2.3.

<sup>135</sup>See Case 127/73, *BRT v SABAM* [1974] ECR 313; Case C-282/95 P, *Guérin automobiles v Commission* [1997] ECR I-1503, p. 39, and Case C-453/99, *Courage v Crehan* [2001] ECR I-6297, p 23.

<sup>136</sup>See *Working Paper*, cit.

above, this mere fact shows a bizarre allocation of competition law cases among Italian Courts. On one hand the Giudice di Pace cannot hear cases based on a violation of domestic competition rules but, on the other, it has to apply EC rules due to the principle of direct applicability. This allocation, as the Court of Justice said, is not contrary to EC law, not because of its efficiency, but because it (involuntarily) favours private parties damaged under EC antitrust rules.

In *Manfredi*, the decision of the Court seems to work like an ‘updated anti-virus filter’ installed in the antitrust law enforcement system to protect the effectiveness of EC competition rules against the national procedural rules multiple attacks. But it also shows its limits especially on the domestic side of the antitrust law effectiveness. Actually, the scenario is not that ‘favourable’ to private parties damaged under the Italian antitrust rules. Pursuant to domestic law, in fact, private parties damaged under national rules have to fill their claims to the more expensive Corte d’Appello.

Sadly, without an urgent structural reform designed to make the Italian competition law system more ‘private parties friendly’, consumers and undertakings damaged under national competition law will continue to ask themselves, far from the Courts, if competition in the domestic market really matters to them.

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The Enforcement of Private Actions for Breaches of EC Competition Law -  
The Role of the Shareholder under English Law

*Paul Hughes\**

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EU law requires that individuals who have suffered loss or damage as a result of breaches of EU law should have an effective legal remedy. This article considers whether English shareholders have an effective legal remedy for harm caused to the companies in which they have invested where this loss has arisen from clear breaches of Article 81 or 82 EC Treaty in the light of the *Factortame* litigation and *Courage v Crehan*. The article focuses on the European Commission's Green and Staff Working Papers on private actions and concludes that corporate, rather than consumer, actions are the most likely source of damages claims for breaches of European competition law. It examines the position of directors' duties under both US and English law, having regard to both the Walt Disney litigation and the English law changes introduced by the Companies Bill. It reviews the issue of shareholder standing in US antitrust actions under the Sherman Act and the regulation of corporate actions under English law. Consideration is given to the issue of derivative actions for antitrust harm both in the US and in English courts. It is concluded that the English law rules which prevent direct standing for shareholders and which severely limit the possibility of bringing a shareholder derivative action mean that a shareholder does not have an effective national remedy for harm caused by breaches of Articles 81 or 82 EC.

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### 1. INTRODUCTION

Antitrust harm may have a chilling effect on equity investment in sectors where there is, for instance, a dominant player which has the capacity to deter new entry or inhibit the expansion of competitors' activities through the abuse of its market power or where undertakings seek to exclude a new entrant from an existing market.<sup>1</sup> Equity investment can take a variety of forms, with venture capitalists and private equity

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<sup>1</sup> Literature on business and competitive strategy frequently refers to the importance of conditions of entry for new entrants to a market. In ME Porter, *Competitive Strategy*, Free Press, 1980, at p 7, Michael Porter refers to the possibility of new entry as being dependent on both existing barriers such as economies of scale and the degree of anticipated retaliation from incumbent firms. In Lowes, Pass and Sanderson, *Companies and Markets*, London, Blackwells, 1994, at pp 141-146, reference is made to entry forestalling behaviour such as output increases and concomitant price reductions to unprofitable levels in order to deter new entry. The EC Commission Discussion Paper of December 2005: (<http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf> accessed on 4th May 2006) relating to the application of Article 82 to exclusionary abuses focuses heavily on the entry forestalling aspects of rebate schemes as a means of determining their legality. Deterrence of new entry has, for instance, been at the heart of the price cutting in Article 82 cases such as Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969. See also Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] II-4653 where the practice of imposing freezer exclusivity obligations, when fully enforced, resulted in Mars' impulse ice cream market share in Ireland falling from 42% to less than 20% (at paragraph 93) and was held to be a breach of both Articles 81 and 81 by Van den Bergh Foods (part of the Unilever Group).

investors making significant investments in companies on a cross-border basis within the European single market.<sup>2</sup> They frequently have finely calculated rates of return, particularly where the company in which they are investing is highly geared. These rates of return and any exit strategy for the investor could be easily disrupted if the anticipated income streams or profit levels of the company are harmed by anti-competitive practices taking place in the market in which it operates.

Venture capitalists typically take a minority shareholding and adopt a 'hands off' approach to management issues. However, such an investor clearly has an obligation to protect its equity participation where the directors of the company in which it has invested fail to do so. Whilst some investors will ensure that contractual mechanisms protect their position, this article will consider whether English law adequately protects the position of a minority shareholder in a situation where harm has been caused to the company in which it has invested due to breaches of EC competition law by a third party. It will consider the ability of a minority shareholder to bring either a direct action in relation to the loss it has suffered or a derivative action under English law on behalf of the company itself. It will examine the reforms being introduced by the Company Law Reform Bill<sup>3</sup> and how these affect the right to bring a derivative action. The legal position of the shareholder will also be assessed having regard to the well established requirement that there must be an effective remedy in respect of directly effective rights arising under EC law.

The existing and proposed position under English law will be compared with minority shareholders' rights to bring suits for antitrust injury in the US and will evaluate how the rights of investors and directors are balanced under US law.

Some consideration will also be given to the EC Commission proposals contained in its Green and Staff Working Papers on private enforcement<sup>4</sup> and the individual's right to damages. However, this article will primarily focus on the existing jurisprudence of the European Court of Justice, since this promises to offer the most immediate and effective support for corporate antitrust actions.

This article concludes that, under English law, minority shareholders do not currently have an effective remedy to make good their losses where their company has been

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<sup>2</sup> In its research paper of June 2002 the European Private Equity & Venture Capital Association concluded that capital investment in European companies that are in their start up or expansion stages has grown dramatically, from €2.6 billion in 1995 to €12.2 billion in 2001. The Internal Market Directorate General of the EC Commission recognises the need to improve the rights of shareholders of companies operating across the single market. In its Consultation Document (MARKT/16.09.2004 accessed 4<sup>th</sup> May 2006) it stresses that its focus is on empowering shareholders through the possession of voting rights and participation at company general meetings. In its Final Report of 4<sup>th</sup> November 2002 the High Level Group of Company Law Experts identified shareholder protection as a key element in ensuring good corporate governance and shareholder decision making as a factor that would help eliminate cross border obstacles to investment.

<sup>3</sup> Published on 1<sup>st</sup> November 2005. The Bill received its second reading in the House of Lords on 11<sup>th</sup> January 2006 and then entered the Parliamentary committee stage

<sup>4</sup> COM(2005)672 Final and SEC(2005)1732, both dated 19/12/05.

clearly harmed by breaches of Articles 81 or 82 EC and the directors do not pursue these claims. Should the Company Law Reform Bill be enacted,<sup>5</sup> the availability of an effective remedy will depend on how directors' duties are interpreted by the courts (and the derivative action developed) in the future.

## 2. ARTICLES 81 AND 82 – THE RIGHT OF ACTION FOR DAMAGES

Whilst Articles 81 and 82 EC create directly enforceable rights in favour of individuals affected by anti-competitive practices, it is for the national courts to determine the third parties harmed by such practices and the remedies available to them in the light of any breaches of EC competition law.<sup>6</sup> In the United Kingdom it has been accepted since the decision of the House of Lords in *Garden Cottage Foods Ltd v Milk Marketing Board*<sup>7</sup> that a remedy in damages is available to compensate those individuals who have suffered losses by virtue of a breach of EC competition law.

The European Court has confirmed in its judgment in *Courage Limited v Crehan*<sup>8</sup> (at paragraphs 26 and 27) that damages must be available for breaches of EC competition Law:

The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.<sup>9</sup>

The European Court, at paragraph 29 of its judgment in *Crehan*, noted that in the absence of Community rules, it is for the legal system of each Member State:

to lay down the detailed procedural rules governing actions or safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)

The Court held that it must be open to a party to an agreement which was in breach of Article 81 EC to obtain relief from the other party. EC competition law precluded national laws that barred a party from having a right to claim damages, save where they only affected a party which bore a significant responsibility for the distortion of competition.

The English rule in question precluded a party from seeking damages or restitution where it was obliged to rely on its own illegality to do so, a rule developed over 200

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<sup>5</sup> Op cit, n 3.

<sup>6</sup> Case 127/73 *Belgische Radio en Televisie SV SABAM* [1974] 1 ECR 51.

<sup>7</sup> [1983] 3 WLR 143.

<sup>8</sup> Case C-453/99 [2001] ECR I-6297.

<sup>9</sup> Emphasis added.

years by the judiciary.<sup>10</sup> This rule had been extended into the field of competition law by the Court of Appeal in *Gibbs Mew v Gemmel*<sup>11</sup> when Peter Gibson LJ held that Article 81 EC not only made an infringing agreement automatically void, but also made such an agreement illegal. He cited the opinion of Advocate General Jacobs in *van Schijndel v Stichting Pensioenfonds*<sup>12</sup> in which he stated that an English judicial rule which equated a breach of Article 81 EC with illegality (thus rendering it unenforceable and denying a party any right of damages) did not infringe the requirement that such national rules should be non-discriminatory in their effects. Unfortunately whilst such a rule was non-discriminatory and equivalent in its effect, it did not meet the requirement that it should also provide an effective remedy for those affected by an anti-competitive agreement.

### 3. THE APPLICATION OF NATIONAL RULES AND THE PRINCIPLE OF EFFECTIVENESS

The ability of national courts to choose procedures and remedies autonomously has been subject to the principle of effectiveness for many years in fields outside that of EC competition law. In *Von Colson and Kamann v Land Nordrhein-Westfalen*<sup>13</sup> a national law limiting compensation for discrimination to travel expenses was held not to provide an effective remedy. The European Court held in *MH Marshall v Southampton and South West Hampshire Area Health Authority*<sup>14</sup> that any national remedy for discrimination ‘must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.’ Compensation for non-discrimination must not be less than the amount necessary to make good the loss and damage actually suffered.

### 4. THE LOCUS STANDI OF SHAREHOLDERS UNDER EU LAW

In the *Queen v Secretary of State for Transport, ex parte Factortame Limited* (‘*Factortame no. 2*’)<sup>15</sup> the European Court of Justice had considered the legality of the Merchant Shipping Act 1988 having regard to the EC Treaty provisions relating to freedom of establishment.<sup>16</sup> The Act amended the regime for the registration of fishing vessels entitled to participate in the British fishing quota, imposing a British nationality requirement on owners, managers and operators if vessels were to remain on the register of British vessels. One of the nationality requirements was that 75% of the shareholders in any company owning a vessel wishing to remain on the register must be British citizens, resident and domiciled in the United Kingdom. Where existing shareholders did not meet this requirement, the company in question would have lost

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<sup>10</sup> *Holman v Johnson* (1775) 1 Cowp. 341 and upheld more recently by the House of Lords in *Boissevain v Weil* [1950] AC 327; *Kiriri Cotton Co. Ltd v Dewani* [1960] AC 192; *Tinsley v Milligan* [1994] 1 AC 340.

<sup>11</sup> [1998] Eu LR 588.

<sup>12</sup> Joined Cases C-430/93 and C-431/93 ECR, [1995] I-4705 at para 49 (the Advocate-General had dwelt at some length in earlier passages for the need for an effective remedy in other contexts).

<sup>13</sup> Case C-14/83 [1984] ECR 1891.

<sup>14</sup> Case C-271/91 [1993] ECR I-4367.

<sup>15</sup> Case C-221/89 [1991] ECR I-3905.

<sup>16</sup> Article 52 EC (now Article 43).

the benefit of its fishing licence. The European Court held that national legislation which prohibited Spanish nationals from holding shares in English companies which both owned fishing vessels and enjoyed United Kingdom fishing rights was in breach of the European Treaty provisions regarding freedom of establishment.

In *Brasserie du Pecheur SA v Bundesrepublik Deutschland* and the *Queen v Secretary of State for Transport, ex parte: Factortame Limited*<sup>17</sup> an English Divisional Court, faced with a damages claim by the companies affected by the United Kingdom legislation, referred to the European Court of Justice the question, ‘*are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by [the United Kingdom] for losses which they have suffered as a result of all or any of*<sup>18</sup> the infringements of the directly effective rights to freedom of establishment arising under the European Treaty which the Court had adjudged to have occurred in *Factortame No 2*. In its judgment the European Court held that, the United Kingdom government having exceeded its discretion in introducing the legislation:

(20) ... the full effectiveness of Community law would be impaired *if individuals* were unable to obtain redress when their rights were infringed by a breach of Community law

(67) ... the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation ...

(82) Reparation for loss or damage caused *to individuals* as a result of breaches of community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.<sup>19</sup>

The European Court held that there should be a causal link between the breaches of European law and the losses sustained, but subject to this, appears to accept that individual shareholders may claim for losses they have incurred as a result of those breaches. Here, either the non-British shareholder would be obliged to sell his shares or, if he chose to retain them, the vessel-owning company would lose valuable fishing rights. The breaches of EC law could be regarded as causing direct or indirect loss to the shareholder, however, the fact that the shareholder was capable of being harmed by the legislation is not in doubt.<sup>20</sup>

<sup>17</sup> Joined Cases C-46/93 and C-48/93 [1996] ECR I-1029.

<sup>18</sup> Emphasis added.

<sup>19</sup> Emphasis added.

<sup>20</sup> The fact that harm caused to a company can result in losses to shareholders has been acknowledged under English law. See, for instance, *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260.

Under English law any violation of Articles 81 or 82 EC will be regarded as a statutory tort,<sup>21</sup> with causation being determined according to the 'but for' test applied in tortious cases. In *Arkin v Borchard Lines (No. 4)*<sup>22</sup> the High Court considered allegations that a liner conference had operated a price fixing cartel in breach of Article 81 EC, thereby eliminating a competitor. On the issue of causation the Court concluded that, had the plaintiff been able to demonstrate that the liner conference was in breach of Article 81 EC, the issue of causation must be approached:

on the basis of commonsense, there being ... an overarching concept that the chain of causation can be broken only if it is concluded that the claimant's own conduct displaced that of the defendant as the predominant cause of the claimant's loss.<sup>23</sup>

Taken together the judgments in *Brasserie du Pecheur SA v Bundesrepublik Deutschland* and the *Queen v Secretary of State for Transport, ex parte: Factortame Limited* and *Arkin v Borchard Lines (No. 4)* would indicate that a shareholder must have standing for breaches of directly effective rights under the EC Treaty which have caused harm to that shareholder and that, where this has occurred, the issue of causation under English law facilitates the pursuit of such a right.

However, under English law a shareholder's standing in an action to recover damages where the company in which he holds shares has been harmed by a breach of Article 81 or 82 EC is far less certain. Whilst a right of action for damages is a matter for national courts, such a remedy must be available to anyone affected by breaches of Community law, even if the relevant national law denies the availability of such a remedy. Thus a company or its shareholders, must have an effective remedy where, for instance, Articles 81 or 82 EC have been breached and that corporate entity or shareholder has suffered loss. This article will consider the issue of shareholder direct standing and the right to a derivative action under US law in sections 5 and 12 and English law in sections 9 and 10.

## 5. ANTITRUST ACTIONS IN THE US – SHAREHOLDER LOCUS STANDI IN DIRECT ACTIONS

Section 1 of the Sherman Act 1890<sup>24</sup> provides that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared illegal. *Every person* who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be guilty of a felony<sup>25</sup>

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<sup>21</sup> *Garden Cottage Foods Ltd v Milk Marketing Board*, op cit, n 7.

<sup>22</sup> [2003] EWHC 687 (Comm)

<sup>23</sup> *Ibid*, at para 536.

<sup>24</sup> 15 USC § 1.

<sup>25</sup> Emphasis added in each case.



In addition to the fines which can be imposed on corporations or individuals and the prison sentences which the latter may face, such an infringement of the Sherman Act can be the subject of a private action in the US Federal Courts under Section 26 of the Act.

Section 4 of the Clayton Act 1914<sup>26</sup> provides for treble damages actions in civil courts for antitrust harm:

*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.<sup>27</sup>

Despite the references to 'every person' and 'any person' in each of the two statutes, it is not every person who can bring an action for harm caused by infringements of US antitrust law. In the US standing is determined by reference to the underlying goals of the antitrust laws. In *Brunswick Corporation v Pueblo Bowl-O-Mat Inc*<sup>28</sup> the US Supreme Court held that a plaintiff must have suffered 'antitrust injury'. A plaintiff must therefore demonstrate individual harm which is linked to an adverse effect on competition. As Jacobson and Greer have pointed out:<sup>29</sup>

Brunswick has substantially improved antitrust analysis. It has helped to ensure that the antitrust laws remain true to their essential pro-consumer underpinnings.

The civil right to treble damages conferred by Section 4 of the Clayton Act has also had a major impact on the issue of standing in the US courts. Berger and Bernstein<sup>30</sup> have remarked that although the language of Section 4 of the Clayton Act is expansive the courts have adopted a relatively narrow approach to standing:

On its face this language [Section 4 of the Clayton Act] seems to grant a private right of action to anyone who can prove an injury to his 'business or property' was caused by an antitrust violation. Yet the lower federal courts have created an antitrust standing requirement by interpreting the phrase 'by reason of' to imply not only the *fact* of causation but also the presence of *legal* causation. In Section 4 case law this legal causation requirement, like the proximate cause requirement in the law of torts, restricts the scope of the defendant's liability and a plaintiff's right to recovery. Although antitrust standing is analytically distinct from the statutory requirement of 'injury' to 'business or property' ... its precise definition remains elusive because of the inherent ambiguity of the concept of legal causation.

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<sup>26</sup> 15 USC § 15.

<sup>27</sup> Emphasis added.

<sup>28</sup> 429 US 477 (1977).

<sup>29</sup> JM Jacobson & T Greer, 'Twenty-one years of antitrust injury: Down the alley with Brunswick v Pueblo Bowl-O-Mat' (1998) 66(2) Antitrust Journal 273.

<sup>30</sup> D Berger & R Bernstein, 'An analytical framework for antitrust standing' (1977) 86(5) The Yale Law Journal 809.

The sparse legislative history of Section 4 hardly suggests a Congressional mandate for the legal causation that the courts have imposed on the seemingly all inclusive language of Section 4 ... [the] courts have created this limitation primarily out of concern about the excessive penalties that may be incurred because of the mandatory treble damages feature of the section. Despite the potential conflict with the compensatory and deterrent purposes of private antitrust litigation, many courts have denied standing on the grounds that treble damage recoveries by every person affected by an antitrust violation could exact duplicative or even ruinous recoveries from antitrust defendants<sup>31</sup>

It has been held in a number of US cases<sup>32</sup> that where antitrust injury has occurred to a company no shareholder can bring an action directly but may only do so by derivative action.<sup>33</sup> Any shareholder affected by antitrust harm which gives rise to an action for damages by the company in which he holds his investment has suffered merely an indirect loss and the proper plaintiff is the company. Any wrongful injury caused by breaches of the Federal antitrust laws must be recovered by the company and the shareholder will not be able to recover for any diminution of the value of the company's shares, no matter how extensive the resultant shareholder losses.

## 6. THE COMMISSION'S VIEW OF PRIVATE ACTIONS AND POSSIBLE CLAIMANTS

The Commission has adopted its Green and Staff Working Papers<sup>34</sup> in the light of the *Crehan* judgment and the empowerment of national regulatory authorities and courts under the Commission's modernisation programme.<sup>35</sup> The Green Paper's goal is to shift some of the burden of enforcement onto the shoulders of private litigators in national courts. Many obstacles stand in the way of a successful private action and both Commission Papers consider these problems and their possible solutions in some depth. This article does not aim to discuss these issues in any detail, but will only consider the Papers in order to assess the Commission policy goals from the perspective of a shareholder in a company affected by an agreement or a practice which is in breach of either Article 81 or 82 EC.

In its Green Paper<sup>36</sup> the Commission states that damages actions for an infringement of EC competition law serve several purposes, one of which is to compensate those who have suffered a loss as a result of anti-competitive behaviour (paragraph 1.1). In its

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<sup>31</sup> *Ibid*, at pp 811 & 812.

<sup>32</sup> For instance: *Loeb v Eastman Kodak Co.* (1910, CA3d Pa) 183 F 704; *Roseland v Phister Mfg. Co* (1942, CA 7<sup>th</sup> Ill) 125 F2d 417, 139 ALR 1013; *Peter v Western Newspaper Union* (1953, CA 5<sup>th</sup> Fla) 200 F2d 867; and, *Vermilion Foam Products Co. v General Electric Co.* (ED Mich) 386 F Supp 255.

<sup>33</sup> See particularly *Fanchon & Marco, Inc v Paramount Picture Inc* (1952, DC NY) 107 F Supp 532, and on appeal (CA2d) 202 F2d 731, 36 ALR2d 1336.

<sup>34</sup> Op cit, n 4.

<sup>35</sup> Council Regulation 1/2003/EC, OJ 2003, L1/1 which empowers courts to apply all the EC Treaty provisions relating to competition law, including Article 81(3), but does not harmonise procedures or remedies, the latter remaining a matter for the courts of each Member State.

<sup>36</sup> Op cit, n 4.

introductory paragraph to the Green Paper the Commission identifies consumers and firms who have suffered losses as a consequence of an infringement of the antitrust rules as those to whom damages should be payable. Whilst acknowledging at paragraph 2.5 that, '[i]t will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law', the Green Paper considers the possibility of collective actions by consumers.

However, in the immediate future it is likely to be corporate entities with a trading or competitive relationship with the infringer which are the parties most likely to bring a claim. The experience of consumer claims in England under the Competition Act 1998 and the Enterprise Act 2002<sup>37</sup> would suggest that even with favourable procedural conditions, consumers are only likely to 'piggy back' or follow on from existing regulatory decisions, rather than initiate stand alone actions themselves. Consumer bodies have a wide remit whilst being inadequately resourced.

The Commission therefore takes a broad view of potential claimants. Nevertheless for the reasons noted above, this policy goal of expanding competition law enforcement through private action is likely to depend on the appetite (or lack of it) which those with deeper pockets have for this role. This will in turn depend on the way in which the behaviour of the officers of a company<sup>38</sup> is regulated by the laws of the Member State in which it is incorporated or has its seat<sup>39</sup> and as to whether the investment community is likely to play a role in competition law enforcement.

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<sup>37</sup> Certain statutory provisions facilitate adopting the follow on approach, Section 47A of the Competition Act 1998 (inserted by section 18 of the Enterprise Act 2002) allows those who have suffered loss or damage as a result of the infringement of UK or EC competition law to bring a claim before the Competition Appeal Tribunal where the Office of Fair Trading or the EC Commission has ruled that an infringement has occurred. Section 47B (introduced by Section 19 of the Enterprise Act 2002) allows specified consumer bodies to bring such a claim.

<sup>38</sup> The corporate governance debate has intensified following the collapse of Enron and WorldCom. As Professor Coffee notes in JC Coffee, *Gatekeepers - The Role of the Professions in Corporate Governance*, Oxford, OUP, 2006, at p 17, '... the boards of Enron and WorldCom did strange and reckless things: the Enron board waived its conflict of interest policy so that Andrew Fastow, its chief financial officer, could run special purpose entities with Enron, reaping secret profits running into millions of dollars in the process, and the WorldCom board extended loans and guarantees to its financially strained chief executive totalling \$250 million ...'. He further notes at p 24, '... Enron's fervent desire to show immediate earnings growth and to hide problems, liabilities and money-losing transactions seem a direct consequence of how its management was compensated. They were incentivized to manage for the short-term, and not surprisingly they did.'

<sup>39</sup> In *R Smith & J O'Brien*, *Conflict of Laws*, London, Cavendish Publishing, 2<sup>nd</sup> Ed, 1999, at p 85, citing *Janson v Dreifontein Consolidated Mines Ltd* [1902] AC 484, John O'Brien states: 'In general, English law takes the view that the nationality of the company is the country of its incorporation. It is sensible to distinguish this common law approach from those in civil law countries where the nationality of the company will be determined by the real seat of the corporation. The concept of the real seat is a technical one but normally means where the board of directors meet and where the general meeting takes place and the administrative centre is located.'

## 7. THE REGULATION OF ENGLISH COMPANIES

English company law is founded on the principle that the company is a separate legal entity, distinct from its shareholders.<sup>40</sup> Its affairs are managed by its directors, acting as a board.<sup>41</sup> The directors are obliged to act in the interests of the company.<sup>42</sup> The directors owe their duties to the company, not to individual shareholders: *Percival v Wright*<sup>43</sup> and more recently *Peskin v Anderson*.<sup>44</sup>

Historically the board has had a wide discretion as to whether or not to bring legal proceedings.<sup>45</sup> Since the directors owe a duty to the company ‘an action complaining of breach of duty must be brought by the company (i.e. by the directors whose conduct is being challenged).’<sup>46</sup>

Whilst directors can be removed by a majority of the shareholders passing a resolution to this effect, control of general meetings is largely in the hands of the directors who convene and set the agenda for such meetings with one of their number chairing the proceedings.<sup>47</sup> Shareholdings are often held by a diverse number of minority shareholders (especially in the case of public companies), rather than by one shareholder with a majority of the votes. Achieving a decision of the majority of the shareholders, particularly to change the management or to commence litigation, can be difficult to achieve.<sup>48</sup>

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<sup>40</sup> *Salomon v Salomon* [1897] AC 22

<sup>41</sup> See for instance the Companies (Tables A to F) Regulations SI 1985/805, which are typically adopted by a newly formed private company as part of its Articles of Association. Article 70 provides that “the business of the company shall be managed by the directors”. Articles 88-98 regulate board proceedings.

<sup>42</sup> *Re Smith v Fawcett* [1942] Ch 304

<sup>43</sup> [1902] 2 Ch 421

<sup>44</sup> [2001] BCC 874

<sup>45</sup> *Breckland Group Holdings Ltd v London and Suffolk Properties Ltd* [1989] BCLC100.

<sup>46</sup> JE Parkinson, *Corporate Power and Responsibility*, Oxford, Clarendon Press, 1993 at p 83. See also the observations of Janet Dine in J Dine, *Company Law*, London, Palgrave MacMillan, 5<sup>th</sup> Ed, 2005, at p 202, ‘One aspect of company law that always influences the standard imposed on directors in practice is the means of enforcing the duties that are owed. There is no point in imposing a duty on someone if there are no effective means of enforcing that duty.’

<sup>47</sup> See for instance Article 37 (directors’ power to convene general meetings of shareholders) and 42 (chairman of the board of directors to chair such general meetings) of Table A of the Companies (Tables A to F) Regulations SI 1985/805.

<sup>48</sup> Based on research relating to 250 randomly selected companies listed on the London Stock Exchange over a 5 year period commencing in 1988, Barca and Becht note in F Barca & B Becht (eds), *The Control of Corporate Europe*, Oxford, OUP, 2001, at p 270 ‘... the top shareholder owns an average ultimate voting block of 14.4% (with a median of 9.9%); the second and third shareholders have average share stakes of 7.3 and 6.0% ... in the typical British company absolute control would require a coalition. On average a coalition of the top three shareholders would own 27.7%; all large shareholdings combined would come to about 40% ... lack of ownership concentration and control in British (and American) companies necessitates codes that prevent management from acting to the detriment of the shareholders.’

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## 8. THE CORPORATE DECISION TO SUE

Decisions to commence legal proceedings must therefore usually be taken by the board of directors. At this point it is necessary to consider which party might cause a company antitrust harm, whether directors may wish to bring an action for damages and if not, whether a shareholder could compel the reluctant directors to bring such an antitrust action.

Assuming that the company is not itself in breach of EC competition law, there are a number of different scenarios in which a company may be the subject of antitrust harm. A dominant supplier may engage in a commercial practice that constitutes an abuse of that dominance under Article 82 EC, for instance by tying unwanted products. Alternatively, a company may face harm from the activities of a cartel which constitutes an obvious violation of Article 81(1) EC. Finally, the company could be subject to an anti-competitive practice or agreement which neither constitutes an abuse of a dominant position nor a clear cut violation, such as a cartel, but which requires subtler analysis under Article 81(1) and (3) EC.

Any of these scenarios may involve dominant enterprises, cartellists or enterprises operating at the same or a different level in the value chain (a competitor, supplier, or customer). A company may clearly have been harmed by a price fixing cartel, for instance as a direct customer of a cartellist supplier. If the Commission's policy of encouraging enforcement by private action is to be effective, it is critical for companies in such circumstances to be subject to strong internal pressure to bring such an action. There are a number of factors which may influence the board's view of the infringement. Long drawn out and costly litigation with a competitor is one thing, destroying relationships with valuable trading partners is another. The relatively frequent and wide ranging reforms introduced by the Commission in the field of motor vehicle distribution are strongly indicative of the impressive deterrents to any complaint (let alone legal action) facing a distributor which has been treated in an anti-competitive manner by a motor vehicle manufacturer.<sup>49</sup> Certain sectors prone to cartellisation or other forms of antitrust violation often evince a culture of non-compliance with the competition laws. This may affect the attitude of board members who have developed their careers within the relevant industry. A shareholder who faces a diminution in his investment, should the directors not take action to repair the damage caused, may bring welcome objectivity and additional pressure to the board's deliberations.

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<sup>49</sup> The Motor Vehicle Block Exemption Commission Regulation 1400/2002, OJ 2002, L203/30, Article 3(4) of which requires a motor vehicle manufacturer to give detailed objective and transparent reasons for any dealership termination in order to prevent a manufacturer terminating on grounds not permitted by EC competition law. Article 3(6) of the Regulation requires a number of matters, including any dispute about whether termination is justified, to be referred to an independent expert or arbitrator.

The Confederation of British Industry recently acknowledged<sup>50</sup> that shareholder power can be a major force in promoting corporate good governance. Whilst their observations were made in response to the EC Commission's consultation on its proposal to promote cross-border voting by shareholders,<sup>51</sup> they have a more general resonance:

CBI members support shareholder engagement, which is not to say that companies and shareholders always share the same views, but rather that the exchange of views is generally seen as positive in the long run. We believe that the UK experience has been that dialogue between companies and shareholders backed up by real powers on the part of the shareholders can bring about cultural change

The difficulties inherent in bringing proceedings for breaches of competition law are highlighted at length in the Commission Green Paper<sup>52</sup> and a director may also be affected by very subjective considerations. EC competition law is often understood inadequately and there is a less litigious culture in the United Kingdom compared with the US. As indicated above, cultural and social factors and a desire not to 'rock the boat' in a particular sector which does not enjoy a tradition of competition law compliance may unduly influence director deliberations. The less prospect there is of shareholders calling directors to account, the less disciplined and rigorous the directors thinking is likely to be and, as the CBI has pointed out, the harder it will be to change the culture of the company. Whilst a shareholder in an English company can generally be assured of a right to vote and participate in matters reserved to a general meeting of shareholders,<sup>53</sup> the principle of majority rule means that disciplining the directors may not be easy.<sup>54</sup>

## 9. SCOPE OF THE SHAREHOLDER DIRECT RIGHT OF ACTION IN ENGLISH LAW

If directors do not enforce company rights then, in the light of the 'reflective loss' rule, the availability of a right to bring a derivative action is crucial. The English courts have established in *Prudential Insurance Co Ltd v Newman Industries Ltd (No.2)*,<sup>55</sup> *Johnson v Gore Wood & Co*<sup>56</sup> and in *Gardner v Parker*<sup>57</sup> that any losses suffered by a shareholder by

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<sup>50</sup> CBI response to fostering an appropriate regime for shareholders' rights July 2005 ([http://forum.europa.eu.int/irc/Download/kmeVAKJ\\_miGUbPjEH26CRWRYC3NtriCr\\_9LXRWYGe1PH1BxGoSt6IZ-cKcdJ\\_oTyV6OETUp2UxVqIIdnG/cbi\\_en.pdf](http://forum.europa.eu.int/irc/Download/kmeVAKJ_miGUbPjEH26CRWRYC3NtriCr_9LXRWYGe1PH1BxGoSt6IZ-cKcdJ_oTyV6OETUp2UxVqIIdnG/cbi_en.pdf) accessed on 4th May 2006)

<sup>51</sup> EC Commission Proposal for a directive on the exercise of shareholders' voting rights, COM(2005) 685.

<sup>52</sup> Op cit, n 4.

<sup>53</sup> Article 54 of Table A in the Companies (Tables A to F) Regulations SI 1985/805 provides members of a company with one vote for each ordinary share held on a poll (rather than a show of hands where each member present has one vote). Usually the Chairman of the meeting will demand a poll.

<sup>54</sup> Op cit, n 47.

<sup>55</sup> [1982] 1 Ch 204.

<sup>56</sup> [2001] 1 All ER 481.

<sup>57</sup> [2002] 2 AC 1.

reason of harm to the company cannot be recovered by that shareholder. In the *Prudential* case the Court of Appeal stated that:<sup>58</sup>

[A shareholder] cannot ... recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution of the net assets of the company, in which he has (say) a 3 per cent shareholding.

This 'reflective loss rule' was confirmed by the House of Lords in *Johnson v Gore Wood & Co.*<sup>59</sup> It held that a shareholder may not recover his losses where the company has a right of action and any loss suffered by the shareholder merely reflects the loss caused to the company. The shareholder may sue, either where the company suffers loss but has no right of action, or where the shareholder has an independent right, separate from any right belonging to the company, and where the loss to the shareholder is separate from that caused to the company.<sup>60</sup>

These decisions highlight the perilous position of a minority shareholder. Breaches of Articles 81 or 82 EC may cause the share value of a company to fall due to predatory pricing by a dominant competitor (resulting in lost sales by the company) or additional costs occasioned by a cartel overcharging the company. If the directors fail to act then, in the absence of a right to a derivative action on behalf of the company, the only realistic remedy available to a minority shareholder in English law would be to be bought out under s 459 of the Companies Act 1985 at the then fair (and depressed) share value.<sup>61</sup>

In what circumstances can an individual shareholder currently bring proceedings in derivative form on behalf of the company to ensure such an antitrust enforcement action is initiated? Whilst these rights are very limited at present, proposed reforms to English company law will extend the right to bring a derivative action and will expose directors to greater uncertainty about their discretion in such matters.

<sup>58</sup> Op cit, n 55 at pp 222 & 223.

<sup>59</sup> Op cit, n 56.

<sup>60</sup> Op cit, n 56, see, for instance, the judgment of Lord Bingham at pp 35E to 37A

<sup>61</sup> It is by no means clear that a minority shareholder would have such a right to be bought out in the circumstances outlined earlier in this paper, namely when the directors have failed to pursue a third party whose anti-competitive acts have caused harm to the company. In *O'Neill v Phillips* [1999] 2 All ER 961, Lord Hoffmann emphasised that unfair prejudice actions will usually need to be based on deviance from the 'legitimate expectations' of the allegedly oppressed shareholder. In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, Hoffmann LJ, as he was then, had indicated that a shareholder might in certain circumstances have a legitimate expectation that would effectively restrain the exercising of legitimate corporate powers by directors. The most usual remedy for an oppressed shareholder is the making of an order by the court that his shares be purchased by the company or another shareholder under section 461(2)(d) Companies Act 1985. The date at which the shares will be valued will be that on which the order is made (i.e. after the competition law harm has occurred): *Re London School of Electronics* [1986] Ch 211.

## 10. THE SHAREHOLDER DERIVATIVE ACTION IN ENGLISH LAW – CURRENT POSITION AND REFORMS

### 10.1. The existing common law

The basic rule under English common law is that the proper plaintiff for a wrong done to the company is the company itself and that the interests of the majority shareholder will prevail over those of the minority: *Foss v Harbottle*.<sup>62</sup> It was held in *Burland v Earle*:<sup>63</sup>

the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again it is clear law that, in order to redress a wrong done to the company or to recover money or damages alleged to be due to the company, the action prima facie should be brought by the company itself.

In *Edwards v Halliwell*<sup>64</sup> Jenkins LJ explained that exceptions to this rule arose where an act was illegal or ultra vires the company, where the matter requires the sanction of a special majority of the shareholders, where the personal and individual rights of the shareholder 'have been invaded' or where there is a fraud on the minority and the wrongdoers are in control of the company. The first of these grounds would appear to allow a derivative action by minority shareholders should the company be proposing to enter into or maintain in force an anti-competitive agreement. The fourth and principal additional exception (fraud on a minority) would seem to present an insuperable hurdle for the shareholder to overcome. If the company has been harmed by a manifest breach of EC competition law but the directors do not act, such a decision is unlikely to constitute wrongdoing which would allow a derivative action to be brought.<sup>65</sup>

### 10.2. The Company Law Reform Bill

The Law Commission Report No. 246<sup>66</sup> had proposed the relaxation of the rule in *Foss v Harbottle* and that a new form of derivative action be established on a statutory basis. This proposal is reflected in the Company Law Reform Bill currently before Parliament.<sup>67</sup> Section 239(3) of the Bill would allow a derivative action to be brought, 'in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company'.

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<sup>62</sup> (1843) 2 Hare 461.

<sup>63</sup> [1902] AC 83 (at p 93).

<sup>64</sup> [1950] 2 All ER 106.

<sup>65</sup> Fraud on the minority has been categorised by Janet Dine, op cit, n 45 at pages 258 to 260, as comprising expropriation of the company's property (*Menier v Hooper's Telegraph Works* (1874) LR 9 Ch D350), mala fides breaches of duty (*Atwool v Merryweather* (1867) 5 Eq 464), negligent acts from which the directors benefit (*Daniels v Daniels* [1978] Ch 406) and use of powers for an improper purpose (*Bamford v Bamford* [1970] Ch 212)

<sup>66</sup> 1997 Cm 3769.

<sup>67</sup> Op cit, n 3.



Moreover, the scope of the director's duties is also being codified. Section 156 of the Bill states that:

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.
- (3) In fulfilling the duty imposed by this section a director must (so far as reasonably practicable) have regard to-
  - (a) the likely consequences of any decision in the long term,
  - (b) the interests of the company's employees,
  - (c) the need to foster the company's business interests with suppliers, customers and others,
  - (d) the impact of the company's operations on the community and the environment,
  - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
  - (f) the need to act fairly as between members of the company.

Sub-section (4) of section 156 preserves existing statutory and common law obligations to consider the interests of the creditors.

The proposals heighten the degree to which directors must take into account environmental matters and trading relationships, without indicating how the various factors set out in sub-section (3) are to be balanced or prioritised in the light of the duty set out in sub-section (1). Nor is it clear how 'success' will be determined in sub-section (1). As with the obligation to have regard to the interests of employees introduced by Section 309(1) of the Companies Act 1985, the duty to discharge the obligation of good faith and to consider these interests is only enforceable by the company itself.

Under Section 157 a director must exercise independent judgment and by virtue of Section 159 is also obliged to avoid conflicts of interest.

Section 158 of the Bill provides that a director is required to exercise reasonable care, skill and diligence, meaning the skill required given the knowledge skill and experience that a director has or that which may reasonably be expected of him given the functions he carries out. Thus whilst there is a high degree of possible subjectivity in the scope of the obligations set out in Section 156, the standard of care will be measured by reference to both an objective and a subjective test. This approach was first adopted by Section 214 of the Insolvency Act 1986 when assessing whether directors should be made liable to contribute to the assets of a company in liquidation for wrongful trading.

The standard was utilised by Hoffmann LJ when deciding the general duty of care applicable to the director of a solvent company.<sup>68</sup>

Under Section 240 of the Bill the court must give permission for the bringing of a derivative claim. This procedural requirement is subject to a number of safeguards set out in Section 242. One of these is that the court will not give permission for the derivative claim to proceed unless the shareholder's claim will facilitate the promotion of the success of the company. The court will also have regard to whether the claimant is acting in good faith and as to the likelihood of a majority of the shareholders approving the directors' actions. Ratification by shareholders will be harder to achieve in future, as under Section 216 of the Bill the votes of those interested in the ratification must be disregarded. This should enhance the prospects of a shareholder being able to mount a derivative action.<sup>69</sup>

In what circumstances will a minority shareholder be able to argue that a director is, or is about to be, negligent or in breach of his duties to the company, thus enabling the shareholder to bring a derivative action on behalf of the company? Whatever the legal position, a shareholder will have to overcome significant practical difficulties, ranging from the informational to the financial,<sup>70</sup> and will still require the consent of the court to proceed. The English Attorney-General, Lord Goldsmith, pointed out in a very full statement<sup>71</sup> during the Parliamentary debate on the Bill, that the new form of derivative action:

is a fail-safe mechanism rather than a weapon of first resort. It is important to remember ... that the damages are paid not to individual shareholders but to the

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<sup>68</sup> *Re D'jan of London Ltd, Copp v D'jan* [1994] 1 BCLC 561; *Norman v Theodore Goddard* [1991] BCLC1028. Janet Dine emphasise in *Company Law* (op cit, n 46 at p 192) the problems which the courts have historically experienced in developing a standard of behaviour for directors: 'The difference in the sizes and complexity of companies and the differences in the degree of involvement of the directors in question, coupled with the unique economic circumstances surrounding each decision, make it difficult for the court to build up a body of precedents. This is unlike judging the performance of other professions where often similarly qualified persons have had similar decisions to make.' However, professionals such as accountants and lawyers often have to deploy their professional skills on matters which range widely in terms of their complexity and financial significance and are still subject to the threat of an action for negligence. The development of directors' duties away from the purely subjective approach adopted in cases such as *Re City Equitable Fire Insurance* [1925] Ch 407 is, however, helpful.

<sup>69</sup> Janet Dine, op cit, n 46 at pp 254 & 255, has suggested that the approach of allowing the majority of shareholders to ratify acts of the directors '... where shareholders' property rights are being infringed' is inappropriate, since such a vote by the majority would be '... merely an assertion that their personal interests lie in one course of action not that their derivative interests lie in that course'. This is in the light of her earlier remarks, op cit, n 46, at p 150, citing *Pender v Lushington* (1877) 6 Ch D 70, that '... a shareholder may exercise his vote as he pleases and does not have any duty to take into account the interests of others or of the company'.

<sup>70</sup> AJ Boyle in AJ Boyle, *Minority Shareholders' Remedies*, Cambridge, CUP, 2002, points out at p 9 '... that the two most significant barriers to successful shareholders' proceedings (especially in the case of derivative suits) are: (a) the difficulty of obtaining, in advance of litigation, adequate evidence to support alleged wrongdoing (even where this is strongly suspected); and (b) the difficulty posed by the great expense of such civil litigation (without any hope of direct personal benefit)'.

<sup>71</sup> Hansard 27<sup>th</sup> February 2006 Columns GC5 and 6.

company itself, and yet it is the shareholders, the members who bring the action, who may be required to bear heavy legal costs.

... a derivative action is not and will not be the same thing as an American-style shareholder class action brought in the name of a group of shareholders. Under the Companies (Audit, Investigations and Community Enterprise) Act 2004 ... companies may already indemnify directors against any liability incurred in respect of such actions, even if judgment is given against the director.

What do we expect? ... we do not expect there to be a significant increase in the number of derivative claims as a result of putting derivative action on a statutory footing ... There will continue to be tight judicial control of such cases ...

We also expect the courts to respect commercial judgments; the procedure that we impose will ensure that ...

We have to strike a careful balance between protecting directors from vexatious and frivolous claims and protecting the rights of shareholders. It would be dangerous to move too far against either of those interests. Have the Government got the balance right? We believe that we have

The Attorney-General appears to be categorising the reforms as merely clarifying the circumstances in which a claim can be brought. He envisages them as no more than a statutory replacement of the existing cumbersome common law doctrine. However, the right to bring a derivative action is now linked to any breach of a director's duties, including his duty of care.

After lobbying by industry and City law firms,<sup>72</sup> the government has belatedly realised that the prospects for derivative actions have been significantly enhanced by the Bill's provisions. It has apparently decided to reform the procedural aspects of the Bill to inhibit derivative claims. According to a Financial Times report published as this article was being written:<sup>73</sup>

The government ... [has] acted to quell fears the [Company Law Reform Bill<sup>74</sup>] would trigger mass litigation against companies. Lawyers warned that a right in the bill for minority shareholders to sue a director without board approval would unleash a flood of lawsuits.

The courts will be given powers to curb such claims. A two stage process will require judges to dismiss "non-meritorious" claims early on without a company having to mount a detailed procedural defence. The courts will also get an express power to punish undeserving litigants with cost orders.

<sup>72</sup> AJ Boyle remarks at p 13 of *Minority Shareholders' Remedies*, op cit, n 70), 'It is obviously expected that those whose function it is to represent the interests of the large public companies (e.g. the CBI and leading firms of city solicitors) will resist any change in the law which might encourage an "active" market in civil litigation by minority shareholders.'

<sup>73</sup> Financial Times, 4th May 2006, front page article, 'Companies win safer shield from lawsuits'.

<sup>74</sup> Op cit, n 3.

## 11. THE SPECTRE OF US STYLE CLAIMS – EU REACTION TO THE US MODEL

Like the Commission in its Green and Staff Working Papers, the English Attorney-General seems to regard class actions and US attorney style intervention as ‘opening the floodgates’ and involving ‘the horrendous spectacles I have seen mentioned in some places’. But it is not clear that this accurately depicts how derivative actions operate in the US. In addition the changes introduced to the duties of directors result in fiduciary obligations and a duty of care which bear striking similarities to the same obligations and duties imposed on directors in the US. If the English courts adopt the same approach as the Courts of Delaware in interpreting these duties, directors will have little to fear.

Neelie Kroes is the European Commissioner who heads the Directorate General for Competition and is in charge of European Competition Policy. She observed in an opening speech at the recent conference entitled, ‘Private enforcement in EC Competition law: the Green Paper on damages actions’:

I should respond to those who allege that we are importing alien American concepts into our pristine European system. First, I can say unashamedly that we have learnt some lessons from the US system.<sup>75</sup>

However, she went on to state that, notwithstanding this very evident influence by the US antitrust laws on EC competition law:

I do not want to cut-and-paste an American style system here ... I have the feeling that we can find our own way on this ... for example by enhancing the possibility of collective actions by consumer organisations. I am not naïve about the bear traps we need to avoid. We must avoid excessive levels of litigation. We must avoid speculative law suits prompted by ambulance-chasing lawyers. We must avoid an avalanche of unmeritorious claims.<sup>76</sup>

As Carl Baudenbacher, President of the EFTA Court, pointed out in his presentation ‘Green Paper on Private Enforcement – Some Reflections on Damages’,<sup>77</sup> the Commission faces the dilemma of ‘Fostering “a competition culture” but not “a litigation culture”’. He questions whether this self imposed conflict in regulatory goals represents ‘swimming without getting wet’? Since enforcement of the US antitrust laws is undertaken to a very high degree by private action, and it is this culture of private action which the Commission wants to help create, the position adopted by the Commission and Neelie Kroes seems inherently contradictory.<sup>78</sup> The Commission

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<sup>75</sup> 9 March 2006, ‘More private antitrust enforcement through better access to damages: an invitation for an open debate’, p 4.  
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/06/158&format=HTML&aged=0&language=EN&guiLanguage=en> accessed on 4th May 2006)

<sup>76</sup> Ibid, p 4.

<sup>77</sup> ERA Conference, Brussels, 9 March 2006:  
[http://www.era.int/web/en/resources/5\\_2341\\_2397\\_file\\_en.3238.pdf](http://www.era.int/web/en/resources/5_2341_2397_file_en.3238.pdf) accessed on 4th May 2006.

<sup>78</sup> See the observations of the panel chaired by Sir Christopher Bellamy at the British Institute of International and Comparative Law workshop held on 15<sup>th</sup> October 2004 in which it was observed that, ‘In the US, private  
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seems to want to devolve responsibility for enforcement by encouraging private litigation, but, as a powerful bureaucratic institution, also seems frightened of losing control of competition law enforcement to lawyers in the process.<sup>79</sup>

Whatever the advantages or disadvantages of US antitrust suits, there is certainly a vigorous litigation culture which underpins American antitrust enforcement. Does the role of derivative actions in the US indicate how matters might develop in England once the Company Law Reform Bill becomes law?

## 12. GUIDANCE FROM THE US – THE SHAREHOLDER DERIVATIVE ACTION

### 12.1. The Shareholder Derivative Action

Under Rule 23.1 of the US Federal Rules of Civil Procedure, one or more shareholders may bring a derivative action to enforce the right of a corporation, if that corporation has failed to do so. In order to bring such a claim the shareholders need to specify the efforts they have made to obtain that the requisite action is taken by the directors or, if necessary, the shareholders or that any such demand would be futile. The derivative action may not be maintained if the shareholders seeking to bring the claim cannot demonstrate that they fairly and adequately represent the interests of the shareholders in enforcing the rights of the corporation. Typically the derivative action is brought against directors who have not responded to the shareholders' demand that action be taken. The corporation is joined in as a defendant, but subsequently transformed into a plaintiff on whose behalf the action is being brought.

In *Fanchon & Marco, Inc v Paramount Pictures, Inc*<sup>80</sup> the plaintiff owned 50% of a joint venture company, Paramount Hollywood Theatre Corporation, which it had established with Paramount Pictures Inc. The plaintiff originally sued for individual injury to its property and business, on behalf of the joint venture company (claiming the action had director approval) and as a shareholder bringing a derivative suit on behalf of the joint venture company. All three claims were for the same antitrust injury Paramount Pictures was alleged to have caused to the joint venture company. The trial judge dismissed the plaintiff's actions, finding as regards the second of these that the action was not properly authorised and concluding that the plaintiff lacked standing to bring an action for treble damages under section 4 of the Clayton Act in respect of the individual and derivative claims. On appeal the court held that the lack of corporate authorisation made 'more apparent the need of the remedy of a stockholder's derivative

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actions account for 90% of antitrust litigation, the EU the (sic) number is closer to zero.' [http://www.biicl.org/admin/book/report\\_competition\\_litigation\\_15\\_oct\\_04\\_final.pdf](http://www.biicl.org/admin/book/report_competition_litigation_15_oct_04_final.pdf) accessed on 4th May 2006.

<sup>79</sup> It should also be borne in mind that European companies are increasingly participating in US class actions in order to deter corporate fraud and recover losses, see M Willis & R Roseman, 'Getting in on the Action' (2005) 51 *European Lawyer* 35. They note that European investors have sought appointment as lead plaintiffs (who define the class of plaintiff and hence who may recover under the action) in a number of cases and '... most notably in the shareholder class action against Parmalat – which is being led exclusively by European investors.'

<sup>80</sup> *Op cit*, n 33.

action'.<sup>81</sup> It went on to hold that the plaintiff was able to bring a derivative action, citing<sup>82</sup> Mr Justice Jackson in the earlier analogous case of *Koster v (American) Lumbermens Mutual Casualty Co.*<sup>83</sup>

The stockholder's derivative action ... is an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the derivative or secondary action by which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request.

In *Asb v International Business Machine, Inc*<sup>84</sup> the Third Circuit Court stated that the right to bring a derivative suit under the Clayton Act for antitrust breaches arose in the following circumstances:

The Supreme Court, and, following it, the Courts of Appeals have repeatedly stated and applied the doctrine that a stockholder's derivative action, whether involving corporate refusal to bring antitrust suits or some other controversial decision concerning the conduct of corporate affairs, can be maintained only if the stockholder shall allege and prove that the directors of the corporation are personally involved or interested in the alleged wrongdoing in a way calculated to impair their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way.

## 12.2. The Duties of Directors

Directors' powers and obligations are laid down by State laws, with the most crucial State law being that of Delaware, where most US incorporations occur. As in English law, the board of directors of a US corporation will be the governing body responsible for the company's management and policymaking.<sup>85</sup> Under US State laws, in general terms, those board members have a fiduciary duty to the corporation, including the duties of care, loyalty and good faith. Directors are required to act reasonably, prudently, and in the best interests of the corporation, to avoid negligence and fraud and to avoid conflicts of interest. The general duty of care obligation requires them to exercise such care, including reasonable enquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

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<sup>81</sup> Ibid, at p 733.

<sup>82</sup> Ibid at p 734.

<sup>83</sup> 330 US 518, 522, 523, 67 S.Ct. 828, 91 L.Ed. 1067.

<sup>84</sup> 353 F.2d 491, 493 (3d Cir. 1965) cert. denied, 384 US 927, 86 S.Ct. 1446, 16 L.Ed.2d 531 (1966), and see *United Copper Securities co. v Amalgamated Copper Co.*, 244 US 261, 37 S.Ct. 509, 61 L.Ed. 1119 (1917)

<sup>85</sup> See for instance Title 8 Del.C. 141(a), which provides that the business affairs of a Delaware corporation are to be managed by its board of directors.

The director's duty of care requires commitment, attendance, a need to be informed and to make enquiry.<sup>86</sup> Directors cannot rely on difficult issues being brought to their attention but must maintain adequate information and reporting systems.<sup>87</sup> Directors must act and think independently. They may be guilty of nonfeasance where they show a pattern of inattention and neglect through a failure to supervise and to monitor the activities of the company.<sup>88</sup> They can be liable for misfeasance or faulty decision making, see for instance the critical case of *Smith v Van Gorkom*.<sup>89</sup>

This duty of care is subject to the 'business judgment rule', as set out in the cases of *Van Gorkom* and the derivative litigation relating to *Walt Disney*<sup>90</sup> pursuant to which the courts have shown a reluctance to interfere with informed business decisions. As the court explained at p 872 in the *Van Gorkom* case, the business judgment rule:

is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.

Thus where the directors act in good faith, take a reasonably informed decision and do not allow a personal conflict of interest to arise, it will be difficult for a shareholder to establish that the director is in breach of his fiduciary duties. In the *Walt Disney* case shareholders brought a derivative action alleging that the board had failed to discharge their responsibilities in agreeing a severance package worth \$140 million with Michael Ovitz, who had only served a little under a year as President of Disney. Under Section 102(b)(7) of the Delaware General Corporation Law,<sup>91</sup> corporations can limit or eliminate the personal liability of a director to the corporation for breaches of his duty of care. In these circumstances the plaintiffs were left to try to establish that Mark Ovitz had breached his duty of loyalty and that the remaining directors had breached their duty of good faith. These claims were dismissed by the Chancery Court which held that:

A failure to act in good faith [would occur] ... where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the company, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties.

This is a very high threshold for a claimant to overcome. The Delaware Chancery Court's decision has been appealed to the Delaware Supreme Court.

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<sup>86</sup> *Briggs v Spaulding*, 141 US 132 (1891) and in *re Caremark International Inc Derivative Litigation* 698 A.2d 959 (Del. Ch. 1996)

<sup>87</sup> *Graham v Allis-Chalmers Manufacturing* 188 A.2d 125 (Del.1963).

<sup>88</sup> In *re Caremark International Inc.*, op cit, n 86.

<sup>89</sup> 488 A.2d 858 (Del. 1985)

<sup>90</sup> 2005 WL 1875804 (Del. Ch. Aug. 9 504)

<sup>91</sup> Title 8 Del C 102(b)(7).

So, derivative actions in the US are typically brought by shareholders in order to sue directors who are alleged to be in breach of their duties. The directors are usually insured and the Chancery Court of Delaware in the *Walt Disney* derivative litigation has erected an impressive defence for directors confronted by such an action given the width of the business judgment rule.<sup>92</sup>

### 13. CONCLUSIONS

The English Attorney General seems to regard the Company Law Reform Bill as merely codifying and clarifying the existing common law relating to directors' obligations and derivative actions. However, these law reforms appear to be more wide ranging. They impose a greater burden on directors to consider a variety of interests and to be informed and effective in protecting the company's rights. Any failure to respond to these amplified duties is likely to face greater challenge. It would be open to a shareholder to argue that any failure to give proper consideration to the prospects of an antitrust action was a breach of duty entitling the shareholder to bring a derivative action.

Much will depend on how the English courts approach these directors' duties and whether a 'business judgment rule', protecting the directors, is developed by them. English courts are generally reluctant to re-examine business decisions but greater judicial scrutiny is now possible. According to Brenda Hannigan,<sup>93</sup> the Company Law Committee of the Law Society and the Law Reform committee of the Bar Council were concerned about the codification of directors' duties. She describes their concerns as being that:

the duties are stated in new language which must be interpreted by the courts with consequential costs to business, it will encourage the courts to second-guess business decisions

She comments that:

to the extent that the duties enact the common law, the existing authorities will be capable of being invoked to explain the nature of the duties which they codify ... but given the uncertainty as to the extent to which the statutory statement does reflect the current law, it is more likely that the courts will consider themselves to be starting from a blank sheet<sup>94</sup>

Despite Lord Goldsmith's statement, it remains to be seen what balance the judiciary will strike. It also remains to be seen what use the courts will make of the enhanced procedural powers which the government apparently intends to give them to dismiss 'non-meritorious' claims.

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<sup>92</sup> See the remarks of J Macey, 'Delaware: Home of the world's most expensive raincoat' (2005) 33 Hofstra Law Review 1131 at 1132, 'The deep meaning of the Disney derivative litigation can be easily summarized ... directors, in the end, are protected from liability by the slow and steady hand of the Delaware judiciary.'

<sup>93</sup> B Hannigan, *Company Law*, London, LexisNexis Butterworths, 2003, at p 216.

<sup>94</sup> *Ibid*, at pp 217 & 218.



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Accordingly, if enacted, the Company Law Reform Bill proposals relating to directors' duties and derivative actions will need to be tested vigorously in order to assess whether the rights of shareholders are adequately safeguarded.

These reforms and the existing jurisprudence of the European Court put directors under greater pressure to enforce rights to damages under Articles 81 and 82 EC. The European Court of Justice regards shareholders as intended beneficiaries of effective national remedies<sup>95</sup> and any shareholder whose shares have been devalued by, say, a cartel operating in reach of Article 81 EC may well be able to demonstrate that the chain of causation has not been broken under English law in a subsequent civil action.<sup>96</sup> The Commission plainly wants to expand the scope of private of enforcement of competition law in the EU.

Limited standing in the US for shareholders is a direct result of the availability of a treble damages remedy. The absence of direct standing for individual shareholders and the current difficulties in bringing derivative actions under English law mean that, as the law presently stands and without a far more liberal judicial approach following the enactment of the Company Law Reform Bill, any shareholder in a company incorporated in England whose company has been injured by a clear breach of European competition law does not have an effective national remedy.

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<sup>95</sup> *Brasserie du Pecheur SA v Bundesrepublik Deutschland* and the *Queen v Secretary of State for Transport, ex parte: Factortame Limited*, op cit, n 17.

<sup>96</sup> *Arkin v Borchard Lines (No. 4)*, op cit, n 22.



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## Costs and Financing in Private Third Party Competition Damages Actions

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This article considers the prospect for third party recovery of damages arising out of anti-competitive practice. Amongst a background of a positive substantive law regime for potential claimants under section 47A of the Competition Act it focuses on one area of difficulty in bringing cases: the financing of litigation and the potential costs liabilities arising from it. It examines the cost regimes in the High Court and the Competition Appeal Tribunal and suggests the latter will be a more benign environment for prospective claimants, particularly, coupled with the procedural innovation of Specified Body proceedings.

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**1. INTRODUCTION**

The most damaging combination of blows to punish an opponent in the boxing ring is the left right combination: the most effective curb on anti-competitive behaviour is a combination of regulatory and private action. This article considers the emerging environment of costs and financing in England and Wales for those damaged by anti-competitive practice who wish to seek recompense in the High Court or in the Competition Appeal Tribunal (CAT). The focus is on actions in the High Court or the CAT claiming damages for breaches of Articles 81 and/or 82 EC or national law and, in particular, claims arising out of cartel activity.<sup>1</sup>

**2. TO SUE OR NOT TO SUE?**

Although, private action has been available to victims for some years there has been little or no activity. Cases such as *Crehan*<sup>2</sup> demonstrate that taking action, albeit with financial support, against determined opponents is not for the fainthearted. In this respect private competition damage actions will differ from many civil cases. In a typical piece of commercial litigation, such as a contract case, there is likely to be a continuing and possibly close relationship between the parties and disputes are often resolved by a pre-litigation settlement. In competition cases, particularly cartel cases, the relationship may be quite distant or even indirect and the implications of a current case for future claims against a defendant by other potential victims may be substantial. This, together with difficulties implicit in getting home in such claims, demonstrates why defendants often defend cases aggressively, exercising all their rights of appeal to *décourager les autres* rather than taking an 'economic view' and settling. *Crehan* also

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\* Lincoln Law School, University of Lincoln. Thanks are due to David Greene of Edwin Coe Solicitors and an anonymous referee for very helpful comments. Errors and omissions remain the authors.

<sup>1</sup> Such claims may be brought by individuals, in a group action, possibly in a representative action see paragraph 5 below and in the CAT by a specified body.

<sup>2</sup> *Inntrepreneur Pub Company CPC and others v Crehan* [2006] 3 WLR 148.

suggests that in this developing area of law the lawyer's words, 'this is an interesting case in a developing area of the law', will have a chilling effect on any party of limited means.

Faced with these prospects potential claimants will balance positive and negative reasons to sue before coming to a conclusion. The elements will vary from case to case but the following will be key factors; the leading factor will almost always be the costs of the litigation.

### 3. A POSITIVE ENVIRONMENT

The legal environment introduced by s 47A of the Competition Act to all intents and purposes shifts the pressure on to the defendant found to have infringed a prohibition following a decision of the OFT or European Commission. In this respect the claimant would be in a similar position to a road accident victim who can plead a conviction for careless driving against a prospective defendant: while there may be remaining difficulties in winning the case the task is made considerably easier. As the leniency programmes of the competition authorities develop claimants will 'plead a conviction' and defendants will find they start on the back foot. However, even cartel cases with a 'conviction' are not guaranteed to produce an award of damages and payment of costs. Causation must be established and damage and its extent established. There may be legal problems about causation but more often the difficulty will be of moving from the general position of being a target of anti-competitive behaviour to establishing exactly what damage that behaviour has produced for a particular claimant. Economists and forensic accountants acting as experts to quantify a claim are notoriously expensive. Experts are not allowed to charge on a 'no win no fee' basis for obvious ethical reasons<sup>3</sup> and the need for extensive investigations together with high hourly rates can produce staggering bills. Unless, their fees can be covered by a third party funder<sup>4</sup> then they represent a major bar to access to justice. While the Civil Procedural Rules (CPR), and the rules of the CAT, allow for a European style court appointed single expert this provision has been rarely used and is not certain to reduce costs as the single expert still has to investigate both side's arguments and data.

### 4. THE PROBLEM OF COSTS

While experts may be expensive the major curb on litigation in England is the cost of lawyers. Solicitors involved in competition cases will charge in excess of £300 per hour, that is, around £30 per short letter. To lose a case could mean a total bill for the claimant and defendant's costs (the winning party will recover a substantial part of its costs) of hundreds and thousands of pounds. A number of methods are available which can, in theory, alleviate this bar to action. If a case is clear on liability but quantum of

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<sup>3</sup> Section Two of the Code of Practice of the Expert Witness Institute states: 'An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses.'

<sup>4</sup> See paragraph 7(b).

damages is uncertain then both the High Court and the CAT have the power to award interim damages which can be used to pay the client's own solicitors bills (normally charged monthly). It may also be possible for the claimant to avoid paying their solicitor by entering into a 'no win no fee' agreement, a conditional fee agreement with a reward (the success fee) to the winning lawyer recoverable from the loser.<sup>5</sup> Potential costs of the other party can be insured against using an After the Event Insurance product (ATEI).<sup>6</sup> While, these conditional fee methods are available in both the High Court and the CAT<sup>7</sup> there is no sign that they are being routinely offered by lawyers or litigation insurers in competition cases. In this developing area of jurisprudence cases can still be complex and their outcome unpredictable making the lawyer or insurer reluctant to bet on the outcome. As leniency programmes develop and more 'convictions' emerge this, together with growing experience, may open up this funding route.

In the CAT the cost regime is more benign for the claimant. As discussed below it appears that the CAT may normally operate a largely neutral cost arrangement in these types of cases with both sides paying their own costs. In this situation if claimants can instruct lawyers on a conditional fee and cover their expert costs by third party funding then they will have risk managed the cost risk without litigation insurance. Consumer claims may, as explained below, benefit from the potential of being supported by a Specified Body.

## 5. CAN INSURANCE SOLVE THE COST PROBLEM?

While, in theory, ATEI solves the cost problem it is unlikely to be routinely available for these claims. ATEI works best in commoditised litigation such as road traffic cases with risk spread across a wide and homogeneous case load.<sup>8</sup> Competition claims like all commercial litigation are one off cases so litigation insurers are likely to be more risk averse and at best conservative on setting premium levels which may make them uneconomic. For example, in *BCL Old Co Ltd v Avenetis* the joint and un-particularised estimates of ATEI insurers would look to a premium of between 25% and 33% of costs at risk to offer cover in such a case<sup>9</sup> and as the case progressed the premium would increase. While, the premium is recoverable in the event that the case is

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<sup>5</sup> A variety of CFAs are possible including those with no success fee or with a discounted rate if the case is lost.

<sup>6</sup> For a premium the insurer will cover the contingent risk of both sides' costs if the case is lost, or, more commonly, the opponent's costs with 'own side' costs being covered by a CFA. If the case is won the premium can be recovered under the provisions of the Access to Justice Act 1999.

<sup>7</sup> For the latter see Hurst, *Civil Costs*, 3<sup>rd</sup> Ed, London, Thompson/Sweet & Maxwell, 2004, pp 273.

<sup>8</sup> 'Litigation Funding', Law Society, August 2006, the leading practitioner journal in this area, reports details of 30 ATEI providers. Only 10 stray beyond the confines of the personal injury market.

<sup>9</sup> [2005] CAT. The total of costs at risk would depend on whether solicitors for either party, normally the claimant, was prepared to offer a CFA on a 'no win no fee' or 'no win discounted fee' basis.

successful it has to be paid in advance<sup>10</sup> and if money is borrowed to pay it the interest is not recoverable. It is almost certain that ATEI cover in this type of case has never been placed.

## 6. PROCEDURAL PROBLEMS

In the United States there is a substantial Bar taking up claims by consumers, often after Justice Department findings of ant-trust behaviour.<sup>11</sup> These cases are conducted as ‘opt out’ class actions where lawyers acting for what may be a small group of litigants can ask the courts to establish a class to benefit a wider group and, incidentally, to engage the pressure to settle that a large class can exercise on a defendant.

In claims involving numbers of potential victims (as in the current vitamin cases) England has procedural arrangements for dealing with a number of related claims through one case. Under Civil Procedural Rule 19.6 a representative action may be brought by one or more individual claimants who have the *same* interest as a wider group against one defendant or a defendant representative of a wider group. The representative then brings the action or defends the action on behalf of the wider group who are not parties.<sup>12</sup> Any judgment could then be utilised by a member of the wider group but only with the court’s permission. This limitation, together with the difficulty of cost sharing and general case management in such an action would make them more suitable for cost sharing arrangement through a Group Litigation Order (GLO).<sup>13</sup> In a GLO the actual and potential cost of generic issues, both claimants’ and defendants, will be shared equally between members of the group with each claimant bearing his or her costs and defendants’ adverse costs, depending on the outcome.<sup>14</sup> This is an ‘opt in’ arrangement and is significantly less procedurally efficient than the US class action approach. One commentator notes: ‘The regime is therefore expensive and individual claim-based and unlikely to provide cost-effective resolution of smaller damage claims’.<sup>15</sup>

## 7. FINANCING CLASS ACTIONS AND GROUP ACTIONS

While the risk of losing is a factor the incentives for lawyers are crucial to the development of private damage actions particularly for individuals who will be reluctant to take the risk of paying their own lawyers fees in any event. In the USA class actions are intimately bound up with entrepreneurial lawyers operating on a contingency fee

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<sup>10</sup> In routine personal injury work the premium is normally not paid in advance. If the case is lost it is paid out of the policy proceeds (the ‘magic bullet’): if the case is won the loser pays the premium. See Peysner J, ‘What’s Wrong with Contingency Fees?’ (2001) 10(1) Nott LJ 30.

<sup>11</sup> For examples of typical activity see Jones, *Private Enforcement of Antitrust Law*, Oxford, OUP, 1999, p 84.

<sup>12</sup> For example, in *Ventouris v Mountain* [1990] 3 All ER 157 the claim was against a representative underwriter.

<sup>13</sup> ‘Given the limitations of representative proceedings, those contemplating litigation where a number of parties (whether claimant or defendants) share a common interest should instead consider the feasibility of a Group Litigation Order...’ Zuckerman, *Civil Proceedings*, London, Lexis Nexis, 2003.

<sup>14</sup> Mildred, ‘Cost Sharing in Group Litigation: Preserving Access to Justice’ (2002) 65 MLR 597.

<sup>15</sup> Mildred, ‘Consumer Claims Under the Enterprise Act 2002’ (2004) 3(1) Comp LJ 46.

basis where the lawyer takes a case for a share of the winnings. Contingency fees are potentially more attractive than CFAs because the reward can be much higher. For example, lawyers might look to a substantial percentage of a settlement fund rather than a simple multiplier of their hourly paid fee as in a CFA. In the event that a case is speedily settled following limited work by the successful lawyers the effective hourly rate can be astronomical.<sup>16</sup> Of course, the law firm takes all the risk as under a contingency fee arrangement the client will not normally pay and, often, the law firm will have to pay the cost of outgoings such as experts. This suggests that English law firms will be interested in taking on clear cases with prohibition findings but their reward - the CFA success premium - when set against the procedural difficulties outlined above will make them cautious.

## 8. EXTERNAL FUNDING BY THIRD PARTIES

The balance between positive and negative factors outlined above suggests that except in the clearest cases negative cost issues, including the cost of disbursements, will trump positive influences in England. Can this problem be ameliorated by external funders? In such a situation law firms might well be interested in acting because although they will not necessarily receive a reward - they may act on an hourly rate only - they could receive payment even if the case is lost.

### 8.1. Legal Aid

In theory legal aid might be available in England for some private damage actions. If available, it would offer a high degree of cost protection as legally aided individuals are wholly or partly protected against an adverse cost award. However, in practice a grant of legal aid is highly unlikely. Matters arising out of the carrying out of a business were specifically excluded from legal aid support by the Access to Justice Act 1999.<sup>17</sup> From then on those in business, like Mr Crehan, who allege that anti-competitive activity has damaged their business and may have reduced them to below the legal aid eligibility level will not be supported. However, individual consumers are not specifically excluded but they have a mountain to climb. The Legal Services Commission which administers the legal aid scheme is bound by a series of Funding Codes.<sup>18</sup> Certain areas, such as claims against public authorities and claims where human rights are engaged, are prioritised and dealt with in specific funding codes. The balance, including a consumer competition damage case, would fall into the general Funding Code.

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<sup>16</sup> For a critique of activity by class action lawyers from a liberal economic perspective see Olson, *The Rule of Lawyers*, New York, Truman Talley Books, 2003. For various academic approaches see Galanter, 'Anyone can fall down a manhole: the contingency fee and its discontents' (1998) 47 De Paul Law Review 457; Graffy, 'Conditional Fees: Key to the Courthouse or the Casino' (1998) 1(1) Legal Ethics 70; Peysner, 'What's Wrong with Contingency Fees?', (2001) 10(1) Nott LJ; and, for a specific examination of contingency fee based class action anti-trust activity in the USA together with a proposal for a Europe wide CLAF (Contingency Legal Aid Fund) see Riley and Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?' (2006) 31 ELRev 748.

<sup>17</sup> Schedule 2.

<sup>18</sup> Access to Justice Act Section Eight.

In a matter involving multiple claimants, such as consumers, the Funding Code<sup>19</sup> states that the Commission's starting point would be that a test case approach will be the most effective option. However, there is no evidence that defendants, particularly, cartelists will be prepared, having lost a test case on damages, to make a generalized offer of compensation on application using a 'product recall' approach. Most likely individual consumers would use the results of the test case to issue cases. If these were below £5,000 there would be no cost implications<sup>20</sup> if the case was lost, except for the court fee and limited expert fees, if appropriate, but the claimant would have to pay his or her own solicitors costs if instructed.<sup>21</sup> Defendants might continue to take points on a case by case basis making this route unattractive to an unrepresented claimant.

A more appropriate approach would be a group action. Indeed defendants would have a good argument that a group action that decides generic issues followed by individual cases and which incorporates a cut off point beyond which new members cannot join the group gives more certainty than a host of individual cases. However, for consumer cases the prospect for multi-party legal aid funding is quite remote and there is no evidence of any activity by legally aided claimants in this area. The Funding Code<sup>22</sup> places multi-party actions in the 'very expensive' category that requires the pressures on the overall budget to be considered and which will take into account the fact that multi-party actions have been very expensive to the legal aid fund.<sup>23</sup> In particular, the Legal Services Commission will want the great majority of those supported to be financially eligible, which at present will exclude all but the poorest.<sup>24</sup> Those who are not eligible will be expected to contribute to the costs. Further, a group action might be excluded if suitable for a CFA;<sup>25</sup> if not a strict cost benefit test is applied. High risk cases with low quantum are unlikely to pass such a test; consumer competition damage cases may well fall into this category.

Almost certainly, consumers with a common claim for damages arising out of anti-competitive activity will be directed by the Legal Services Commission to what will be seen to be the cost effective Specified Body approach outlined in section 10 below.

## 8.2. Commercial Funders

If public funding is unlikely could private funding be possible? *Arkin v Borchard Lines Ltd*<sup>26</sup> was a claim against an alleged shipping conference cartel. While it was ultimately

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<sup>19</sup> Part C Paragraph 15.7.8.

<sup>20</sup> They would be issued in the Small Claims Track (CPR 27).

<sup>21</sup> If the case is won the claimant's own solicitors costs might wipe out any damages.

<sup>22</sup> Funding Code, Legal Services Commission Manual, Volume Three Part C (Very Expensive Cases), p 130.

<sup>23</sup> Hodges, *Multi-Party Actions*, Oxford, OUP, 2001, p187. The legal aid costs of the Benzodiazapine litigation was estimated at £28.6 million in a parliamentary answer (Lord Chancellor's Department on the 16<sup>th</sup> February 1995). Shortly afterwards, Legal Aid support was withdrawn and the case collapsed.

<sup>24</sup> Legal Aid Board, *A New Approach to Funding Civil Cases* (1999) paras 12.17 and 12.18.

<sup>25</sup> Although as indicated above this is unlikely.

<sup>26</sup> [2005] EWCA Civ 655, [2005] 1 WLR 3055, [2005] 3 All ER 613.



unsuccessful - the Court of Appeal referred to it as 'disastrous litigation' - it offered guidance on the question of the liability of third party funders for costs. The funder, Managers and Processors of Claims,<sup>27</sup> had earlier been involved in the *Factortame*<sup>28</sup> saga assisting Spanish fishermen in their claims against the UK government. In both cases funds were needed to deal with expert evidence and documentary evidence. Such a funder will normally be paid on a contingency fee based on a percentage of damages recovered. The question then arose as to what was the cost position of such a funder if, as in *Arkin*, the case was lost; the claimant had no assets and there was no ATEL. Finding the jurisprudence uncertain the Court of Appeal in a policy decision balanced the interests of successful defendants to be indemnified in costs with the need to allow claimants to engage funders to allow them to access justice. For each £1 that a funder advanced to a party they would have a contingent liability of £1 towards the other party's or parties' costs if the case was lost by the funder's client. In the *Arkin* case the advance was £1.2 million and the funders contribution to the defendants' costs was capped at £1.2 million. The effect is likely to encourage third party funding in a *good* case as the down side liability is now predictable and the investment on a total loss basis is predictable. This will allow them to adjust the percentage of damages they require to fund the case according to a matrix of the amount advanced, the contingent cost liability and the predicted chance of success. Clients, particularly groups of SMEs, might be prepared to instruct a law firm on a normal hourly rate, or a discounted rate if the case is lost, with the expert costs underwritten by a funder. However, in *Arkin* the claimant's lawyer acted on a CFA and it is likely that most third party funders would prefer the lawyer to act on a CFA to indicate commitment to the cause.

## 9. COMPARISON BETWEEN THE COST REGIMES IN THE HIGH COURT AND THE CAT

While the balance to be struck between the positives and negatives mostly straddles both jurisdictions there are specific differences in the cost and procedural rules between High Court procedure in the Chancery Division where damage cases will be heard and those launched in the CAT. The following analysis considers both jurisdictions in detail and sums up their balance of advantage.

### 9.1. The High Court

The basic cost rule under the CPR clearly establishes that the loser pays but there are significant exceptions:

CPR: 44.3

(1)The court has discretion as to - (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

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<sup>27</sup> Now called Elision.

<sup>28</sup> *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) No2* [2002] EWCA Civ 932. (2006) 3(1) CompLRev

(2) If the court decides to make an order about costs - **(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party;** but (b) the court may make a different order

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including - (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).<sup>29</sup>

The level of costs paid is dependent on a number of factors:

CPR 44.5 The court must also have regard to - (a) the conduct of all the parties, including in particular - (i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute; **(b) the amount or value of any money or property involved; (c) the importance of the matter to all the parties; (d) the particular complexity of the matter or the difficulty or novelty of the questions raised; (e) the skill, effort, specialised knowledge and responsibility involved;** (f) the time spent on the case; and (g) the place where and the circumstances in which work or any part of it was done.

It is clear that competition damage case are likely to fall into (b) - even small consumer cases will be aggregated into large amounts - (c) (d) and (e); all factors which increase the rate at which costs are assessed.

The gloss on the general 'loser pays' rule is that:

a) The court may make an issues based or percentage order. It may find that the claimant advanced ten arguments but only five were successful. Rather than getting all its costs it may receive either the costs of the five winning issues and pay the other side's costs of the five issues it won or only recover 50% of its costs (which, of course, may be a different figure)

b) As mentioned above, the court may decide that conduct, that is misconduct, by a party can alter the basic cost rule. If a defendant has acted in a dilatory fashion or otherwise failed to co-operate with the court or opponent then it may suffer a reduction in the costs it can recover even though it was successful.

c) Any party can make an offer to settle the case under Part 36 of the CPR. This system which is complex in its operation enables a party to effectively shift the cost burden over and above the impact of 44.5(a)(ii). Failure to beat an offer of settlement e.g. refusing to accept an offer of £100,000 and only obtaining £90,000 at trial has the general effect of making the offerer get all its costs from the date of the offer despite losing the case. This is as very potent weapon.

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<sup>29</sup> In this and following quotes the editing and bold additions are by the author.

## 9.2. Cost Control in the High Court

Claimants embarking on High Court damage claims will hope to control both their own and other parties' expenditure so as to limit their contingent loss if they are unsuccessful. Two recent developments - estimates and cost capping - assist this objective.

### (a) Estimates of Costs

Generally speaking claimants who are the victims of anti-competitive behaviour, particularly cartel activity, will be individuals or Small and Medium Sized Enterprises (SMEs) facing defendants with deeper pockets who may put pressure on the claimant by threatening to outspend them in the litigation and face them with the prospect of having to pay a huge bill if the claim fails.

Section 6 of the Practice Direction supplementing Parts 43 to 48 of the CPR (the cost rules) introduced in October 2005 requires parties to litigation to estimate their costs and disbursements prospectively at various points in the litigation process. This would allow the court, of its own motion or at the request of a party, to consider ordering case management directions with the objective of saving costs. This section allows a claimant to watch how the other party's case develops as reflected in the estimates and ask the court to intervene to trim the proposed bill. For example, the court might reduce the number of experts that a party can have or split the liability from the quantum issue in the hope that the decision on liability will suggest a settlement or withdrawal all with the intention of saving costs. At the end of the case if costs cannot be agreed then the paying party, for example a losing claimant, may be able to use the winner's mis-estimate to reduce the cost bill on the ground that it is unreasonable or disproportionate to the 'weight' of the case, both factors which can be used by the court to reduce recoverable costs.

PD 6.6...

(2) In particular, where - (a) there is a difference of 20% or more between the base costs claimed by a receiving party and the costs shown in an estimate of costs filed by that party; and (b) it appears to the court that - (i) the receiving party has not provided a satisfactory explanation for that difference; or (ii) the paying party reasonably relied on the estimate of costs; the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.

While the requirement to submit estimates was introduced in 1999 it had no teeth, was honoured in the breach and was ineffective as a cost control measure.<sup>30</sup> It is too early to say if this new development will be more successful in controlling costs.

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<sup>30</sup> Peysner and Seneviratne, *The Management of Civil Cases: the Courts and the Post-Woolf Landscape*, (2005), Department of Constitutional Affairs, Research Department website.

## (b) Cost Capping

A developing area of cost jurisprudence is that of cost capping where a party, possibly basing their application on estimates, applies to the court for their opponent or opponents' *recoverable*<sup>31</sup> costs to be capped. The cases relevant to damage claims fall into three groups:

### (i) Group Actions

It is generally recognised that group actions for large numbers of individuals suffer from the tendency that their costs can go out of control. This was addressed in *A B & others v Leeds Teaching Hospital NHS Trust*,<sup>32</sup> where a costs capping order was made in a case where group litigation order had been made. The court reduced the prospective claim for costs by the claimants from £1,000,000 to a cap of £500,000.<sup>33</sup> In *Various Ledward claimants v Kent and Medway Health Authority*,<sup>34</sup> a cost capping order was made, again in group litigation, capping the costs of both parties. In *Various Claimants v TUI UK Limited and Others* (2005), again a group litigation case, the claimants' costs up to the date of the group litigation order totalled £1.6 million; there were further costs of £217,000 after that date and an estimate of future costs of over £1.4 million. The cost capping order made (effective only from the date it was made) was just over £880,000.

### (ii) Single Cases

Although in the leading authority of *Smart v East Cheshire NHS Trust*<sup>35</sup> the judge refused to impose a cap on the claimant's costs he did set out general guidelines that the court should consider making such an order only where the application showed:

1. That if such an order was not made there was a risk that costs would be disproportionate or unreasonable;
2. That risk could not be controlled by conventional case management and a detailed assessment at the end of the case and;
3. It was just to make such an order.

This approach has been adopted with varying results in defamation cases: *King v Telegraph Group*<sup>36</sup> and *Henry v BBC*<sup>37</sup> where the argument was that the Article 6 right of free expression was engaged and that defendant media should not be held to ransom by claimants running up huge bills without effective ATEI cover. Whether, in the different circumstances of competition damage cases caps would be imposed or not is difficult

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<sup>31</sup> Recoverable costs are often less than the fees paid to the party's own lawyer. However, a party who is successful in capping the other party's costs may have made a similar arrangement with its own lawyer.

<sup>32</sup> [2003] EWHC 1034 (QB).

<sup>33</sup> In the unlikely event that out turn costs were less than £500,000 then only actual costs would be recoverable.

<sup>34</sup> [2003] EWHC 2551 (QB).

<sup>35</sup> [2003] EWHC 2806 (QB).

<sup>36</sup> [2004] EWCA Civ 613.

<sup>37</sup> [2005] EWHC 2503 (QB).

to predict and will almost certainly depend on the court's perception of whether the litigation can broadly be characterised as in the public interest rather than having a purely commercial objective.<sup>38</sup>

### (iii) Protective Cost Caps

In two cases: *R v Secretary of State for Trade & Industry, ex parte Corner House Research* (2005) and *Weir v Secretary of State for Transport* (2005) claimants applied at or before the launch of litigation for a protective cost cap limiting the defendant's costs if the case was lost. These were public law cases and whether the principle is capable of being extended to, for example, individual victims of cartel activity is untested.<sup>39</sup>

## 9.3. Conclusions on Cost Control in the High Court

It is too early to say if the cost control measures outlined above will have the effect of curbing the huge risk of costs and encouraging claimants to bring cases. However, prospects are not encouraging. An instructive example comes from *Bernard Crehan v Inntrepreneur Pub Company*<sup>40</sup> in the Court of Appeal:

Finally, I come to the question of costs. Mr Crehan asks for the payment by Inntrepreneur of all his costs here and below, on the footing that he has been the victor in this litigation. Inntrepreneur accepts that Mr Crehan is entitled to most of his costs for the very reason that he has been successful on the more substantial issues, but it says that the court under the CPR should exercise the power which it now has to take account of the parties' respective successes and failures on the various issues. Mr Milligan says that Inntrepreneur has won on two other substantial issues, that is to say on the abuse of process point and on the date of the assessment of damages. Whilst the judge would have awarded some £1.3 million by way of damages to Mr Crehan, this court has awarded only £131,336. Accordingly, Mr Milligan says that that is a substantial success which should be taken into account ... In my judgment, to attribute only 10% of the costs of the action and of the appeal to those issues on which Inntrepreneur succeeded and on which it would be entitled to its costs, which is what an award of 80% of Mr Crehan's costs entails, is by no means to overstate the proportion of the proceedings taken up with the issues on which Mr Crehan lost. It seems to me that an award of 80% is the appropriate amount. I do not accept Mr Vaughan's submissions that a higher award should be made because of the risk that Mr Crehan's damages award will be reduced to meet those costs. We were told that there is no special agreement that the other parties, whose cases have awaited the outcome of Mr Crehan's proceedings, as the lead case, would pay any part of his costs. We have also been told that there is some overall agreement with the Legal Services Commission, whereby Mr Crehan will not necessarily have to pay out of the damages awarded to

<sup>38</sup> But see Paragraph 10 in relation to Specified Bodies.

<sup>39</sup> But see Paragraph 10 in relation to Specified Bodies.

<sup>40</sup> [2004] EWCA 637.

him all the costs, to the extent that there are issues which are common to the other cases subject to legal funding which had not yet been tried.

The *Crehan* case remains the leading case in the High Court because it is, essentially, the only case. It was only mounted with legal aid support which is now not available for money claims. It seems that after the Court of Appeal decision Mr Crehan would have received little or nothing from his long battle as the difference between damages of £131,336 and his 20% liability for his opponent's costs might be small or non-existence. In other words unless a party can recover all of his costs, which is unlikely even in a generally successful case, or unless damages are high enough to offer a cushion against 'own side costs' then it may be heads you win and the damages are absorbed by the costs; tails you lose and there are no damages. This is hardly an attractive proposition and not an exemplar that has been followed by others. In the event the House of Lords has made this argument academic<sup>41</sup> by allowing Inntrepreneur's appeal with the result that Crehan's cross appeal on damages fell. All in all it seems unlikely that the High Court will be an arena for damage claims brought by individuals, groups of individuals or SMEs. They will have to look elsewhere.

#### 9.4. The Competition Appeal Tribunal

There is more optimistic news for those able to bring cases within the jurisdiction of the CAT. Costs are not based on the loser pays principle but are within the discretion of the CAT.<sup>42</sup>

CAT Rules 55. -

(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

This discretionary cost power can be compared with that of the employment tribunal:

Employment Tribunal Procedural Rules: if a party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.<sup>43</sup>

In other words the CAT has wider powers to award costs than an employment tribunal but not on the virtually automatic basis of the CPR. This general rule can be altered by the application of an offer to settle rule which will operate like the Part 36 rule referred to above:

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<sup>41</sup> For the reference see footnote 2 above.

<sup>42</sup> Hurst, *Civil Costs*, 3<sup>rd</sup> Ed, London, Thompson/Sweet & Maxwell, 2004, pp 273.

<sup>43</sup> Rule 40(3).

43. - (1) A payment to settle is an offer made by way of payment into the Tribunal in such manner as may be prescribed by practice direction.

(2) A payment to settle the whole or part of a claim may be made by a defendant once a claim for damages has been commenced.

(6) Where a claimant accepts a defendant's payment to settle the whole or part of the proceedings, he shall be entitled to his costs of the proceedings or such costs relating to the part of the proceedings to which the offer related, up to the date of serving notice of acceptance, unless the Tribunal otherwise directs.

(7) Notwithstanding rule 55(3), where following a substantive hearing a claimant fails to better a payment to settle, the Tribunal will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted unless it considers it unjust to do so. The Tribunal may order such costs to carry interest from that date and to be paid on an indemnity basis.

(9) A payment to settle under this rule will be treated as "without prejudice" except as to costs.

(10) This rule does not preclude either party from making an offer to settle at any time or by any other means. In the event that, following a substantive hearing, a claimant recovers less than the amount offered by a defendant other than by way of a payment to settle, the Tribunal may take that fact into account on the issue of costs...

In other words there is a strong incentive for a defendant to make an offer to settle a case as the effect will be to potentially shift the CAT jurisdiction from a no cost to a cost bearing basis. However, for cases which are test cases fought by defendants to the finish, without offers of settlement, to prevent other cases being brought the cost pressures typical of the High Court are not automatic. This opens up the question as to how the CAT will exercise its discretion.

### 9.5. Straws in the Wind: The First Cases

The CAT jurisdiction in damage claims is a new one and there has been little activity yet. An analysis of how it will proceed must extrapolate from limited evidence.

*Deans Foods Limited v Roche Products Limited, F Hoffmann-La Roche AG, and Aventis SA*<sup>44</sup> and *BCL Old Co Limited, DFL Old Co Limited, PFF Old Co Limited v Aventis SA et al*<sup>45</sup> were the first damage claims arising out of the vitamin cartel. All the claims were dismissed (some mysteriously 'with prejudice') with no costs orders. What happened here?<sup>46</sup> It seems most likely in the light of previous history that these cases were settled

<sup>44</sup> Case No 1029/5/7/04.

<sup>45</sup> Case No 1028/5/7/04.

on payment of damages but behind a veil of confidentiality. Certainly the result of an earlier reported security for costs application, *BCL Old Co Ltd v Avenetis*, is strongly suggestive:<sup>47</sup>

28. More generally, the Tribunal notes that this specialised jurisdiction under section 47A has been created by Parliament with a view to facilitating claims for damages or restitution on the part of those who have suffered loss as a result of infringements of domestic or European competition law ... However, one question relevant to security of costs in the present case seems to us to be which of the parties should take the financial risk on these various issues. In the circumstances of this case and having regard to the submissions of the parties, we do not consider that the financial risk should be taken by the Claimants, as far as security for costs is concerned...the question which the Tribunal must consider on a security for costs application in any particular case is the risk of the Defendant securing a costs order in its favour, and then being exposed to an impecunious Claimant not being in a position to comply with the terms of that order. In cases under section 47A not involving a possible passing on defence that will not be the position since the Claimant will be entitled to an order of damages. The issue before the Tribunal will only be as to quantum. The Defendants will not, in those circumstances, normally be entitled to costs, subject to special factors such as to payments into court, or unreasonable or vexatious conduct in the part of the Claimants. No such considerations arise in the present case.

... There may be cases where the Defendants can show that the claim for damages is plainly vexatious or very unlikely to succeed. In those circumstances the Defendants may be able to satisfy the Tribunal that a costs order in its favour would be a likely outcome and that it would be just to make an order for security for costs. Again, this consideration does not apply here. Although the Defendants put the amount of the damage in issue, it could not be reasonably suggested that, apart from the passing on defence, the Claimants have suffered no loss ... Bearing the foregoing in mind, we are not satisfied, having regard to all the circumstances of this case, that it is just to make an order for security for costs in favour of the Defendants. The essential reason is that, at this stage of the proceedings, we are unable to be satisfied that there is a substantial likelihood that the Defendants may in due course benefit from a costs order in their favour. On the contrary, the Claimants' have, at first sight, a good claim, and the only reason for awarding costs against the Claimants would be if it were established that, in law, "passing on" was a good defence, that the defence applied to the facts of this case, and that in those circumstances the Claimants' damages were properly to be reduced to nil or a very low figure. Moreover, the Tribunal has not yet decided how its ultimate jurisdiction

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<sup>46</sup> Tantalising hints are offered by lawyers involved in the case in Randolph & Robertson, "The First Claims for Damages in the CAT" [2005] ECLR 365. As they acted in the cases they are bound by client privilege not to reveal details of the case nor, of course, any confidential settlement.

<sup>47</sup> [2005] CAT. As this is a developing area of jurisprudence debated in the cases rather longer extracts of cases have been used in this article than the writer would normally employ to illustrate the nature of the debate.



to award costs under Rule 55(2) is likely to be exercised. In these circumstances we consider it just that at this stage of the proceedings the possible risk as to costs should be borne by the Defendants, who are before the Tribunal as infringers of a public law prohibition, rather than by the Claimants in whose favour liability is, at least prima facie, established.

### 9.6. Can Other Aspects of CAT Jurisprudence Assist?

So far much of the CAT jurisprudence has dealt with its regulatory jurisdiction dealing with appeals against administrative decisions. Most cases suggest that in these cases, absent vexatious behaviour or an appeal being withdrawn,<sup>48</sup> all parties benefit from the regime being clarified and so costs should lie where they fall (For example *BT PLC v Office of Communications* [2005]) Perhaps, a closer analogy to damage claims collateral to a cartel finding might be in the treatment of interveners such as in *IIB & GISC etc.*

78. We see force in the argument that it would be in accordance with the objectives of the Act if the rule as to interveners were broadly cost-neutral. Thus, the prospect of having to pay interveners costs if unsuccessful (as in *Kish*) could deter some appellants. The prospect of having to pay some part of the appellant's (or even the Director's) costs could deter some interveners. In general, interventions properly managed assist the Tribunal and provide useful background information. ... That said, however, we would not wish to fetter our general discretion under Rule 26(2) to the effect that there may never be circumstances where costs orders will be made in favour of, or against, interveners ... As regards the present case, GISC represents substantially all major United Kingdom general insurance companies and larger insurance intermediaries. GISC supported the unsuccessful Director, and ran one supplementary argument, on the so-called "rule of reason", which the Tribunal rejected<sup>49</sup>

The same reasoning was followed in *Aquavitae (UK) Ltd v Director of Water Services*:

31. As the Tribunal's previous judgments on costs set out at paragraphs [15] to [19] above explain, there is no general rule in appeals before the Tribunal under the 1998 Act that costs should be borne by the losing party. In the Tribunal's view, such a rule would run the serious risk of frustrating the objectives of the Act by deterring appeals by smaller companies, representative bodies and consumers, as the Tribunal made clear in *GISC* costs at paragraph 54. It seems to us that these policy considerations apply in cases such as the present. In particular it seems to us that potential new entrants to regulated sectors, such as *Aquavitae*, which do not appear to command substantial financial resources, are liable to be deterred from bringing appeals if the Tribunal were regularly to order that such appellants should normally be liable for the Director's costs, as well as their own, in the absence of unreasonable conduct or some other exceptional factor ... We understand the Director's concern that in the end the costs that he incurs in such appeals have to

<sup>48</sup> *Hasbro UK Ltd v DG of Fair Trading* [2003] CAT.

<sup>49</sup> [2002] CAT.

be borne in one way or another by the industry and, ultimately, its customers. However, looked at more generally, the system of regulation in the water industry, as in other regulated sectors, exists to protect a wide range of different interests, including those of the general public. In our view, the system as a whole will function more effectively if complaints can be brought and the regulator's decision can be challenged on appeal, if necessary. The costs incurred in a case such as the present are minuscule by comparison with the total revenues of the water industry taken as a whole, whereas the burden of costs falling on a small complainant, acting reasonably, if unsuccessfully, is likely to be disproportionately heavy. We have already indicated that we consider this appeal was reasonably brought albeit not ultimately successful and in the particular circumstances of this case we consider that the Director's costs of the appeal should be regarded as part of the general costs of regulation in this sector.<sup>50</sup>

To add to the picture where the Office of Fair Trading wins a 'heavy price fixing case' such as *Umbro Holdings*<sup>51</sup> (the football shirt case) then it was awarded costs. However, this is a double edged weapon and where it withdrew a heavily contested defence to an appeal costs were awarded against it.<sup>52</sup>

### 9.7. Conclusion on Costs in CAT damage claims

While we are yet at early days in this aspect of the CAT it seems more likely than not that, absent offers to settle, claimants in actions under s 47A, particularly in cartel cases, are unlikely to face the same level of costs pressure against them as in the High Court thus opening up access to justice. Perhaps, following *Umbro* they might be regarded as 'quasi regulators' and get their own costs. All this will be further assisted by the specified body procedure outlined below.

## 10. SPECIFIED BODY

Section 19 of the Enterprise Act 2002 inserts s 47B into the Competition Act 1998 and introduces a new concept, the Specified Body to take up cudgels on behalf of consumers.<sup>53</sup>

The Consumers' Association<sup>54</sup> is the first body appointed, 'as a specified body 'to bring proceedings for claims for damages before the Competition Appeals Tribunal (CAT), on behalf of a group of two or more named individuals.'<sup>55</sup> The Specified Body has a

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<sup>50</sup> [2003] CAT.

<sup>51</sup> *Umbro Holdings Ltd v OFT* Case No. 1019/1/1/03 and associated appeals involving Manchester United and others.

<sup>52</sup> *Mastercard UK Members Forum Limited et al v OFT*, Case Nos. 1054/1/1/05; 1055/1/1/05; & 1056/1/1/05.

<sup>53</sup> See p 44, *Study on the Conditions of Claim for Damages in Case of Infringement of EC Competition Rules*, Comparative Report, August 2004. Prepared by Waelbroeck, Slater and Even-Shoshan of Ashursts for the European Commission. and also Mildred footnote 12.

<sup>54</sup> Which trades as 'Which?'

<sup>55</sup> Specified Body (Consumer Claims) Order 2005/2365.

statutory right to recover costs and damages.<sup>56</sup> It is entitled to recover its costs but what about damages? The legislation requires the Tribunal to order damages to be paid by the defendant to the claimant(s) but *the Tribunal may (with the consent of the individual and the specified body) order that the amount awarded is to be paid to the specified body on behalf of the individual.*<sup>57</sup> The Consumers' Association was granted Specified Body status because, although it has a trading arm, its central aim and objective is to act for consumers generally in the public interest. It would seem possible and appropriate for a Specified Body to offer to consumers to take up their claims, holding them harmless against costs in return for a share of damages sufficient to cover any shortfall in costs recovered *and* to support future actions. This possible hybrid approach - benefiting both individually damaged consumers and the consumer interest generally - would be procedurally novel. A comparison can be made with Germany where, under the provisions of the Act Against Restraints of Competition, Articles 81 and 82 EC, or of an order of the competition authorities, in future certain bodies may be appointed and given the right to claim the profits made by infringers of cartel authorities; provided that the infringement was committed intentionally, a large number of customers are involved, and provided these profits have not yet been claimed by the competition authority i.e. there is no double counting. However, these profits will not be awarded to the plaintiff but to the state, whilst the Federal Cartel office will ensure that plaintiffs are not out of pocket on costs. In effect the English approach steers a middle ground between an entirely private focus in the USA and the German which appears to rely entirely on altruism and collective action.

If Specified Bodies take the approach outlined above, benefiting both individual consumers and *future* injured consumers, this seems to breach the normal bar on champerty; that is the ancient prohibition against maintaining an action for a share of the proceeds.<sup>58</sup> This new statutory approach goes beyond the idea that an organization could assist actions by members on behalf of a membership as a whole (like a trade union acting in a personal injury or equal pay test case) to the idea that an organization might take up a case, no doubt brought to its attention by individual consumers, and then identify a wider group of injured consumers. Such a body is not a representative acting for a group with the same or similar interests so as to utilise either the representative action or GLO approach. It has not itself been injured (except co-incidentally) but acts vicariously, in the public interest, for a group of consumers and, as suggested above, may have a financial interest in the case either to cover a cost shortfall or to recycle damages.

No damage claim has yet been brought by the Consumers' Association on behalf of individuals so how such a case might develop is necessarily speculative. However, it can

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<sup>56</sup> Enterprise Act s 47B(6) and Competition Appeal Tribunal Rules 2003.

<sup>57</sup> Author's emphasis.

<sup>58</sup> Peysner & Walters, 'Event-triggered financing of Civil Claims: Lawyers, Insurers and the Common Law'. (1999) 8(1) Nott LJ 21. The *Arkin* case mentioned above shows that the common law is now not immune to limiting the bar against champerty. See also P Puri, 'Financing of Litigation by Third-Party Investors: A Share of Justice?' (1998) 36(3) Osgood Hall Law Journal 515.

only be a matter of time and a suitable case<sup>59</sup> before the Consumer Association takes action. As ever costs are the major problem. In order to prosecute such a case a Specified Body could employ lawyers or use its own lawyers to act for consumers on a conditional fee basis<sup>60</sup> and speculatively on a contingency fee basis.<sup>61</sup> However, in bringing such an action a Specified Body has no statutory immunity against costs and on the face of it might be at risk of an adverse cost order. However, as the CAT is likely to give the legislation and its own rules a purposive reading it is unlikely that this will constitute a major difficulty in developing this area of activity. Either the CAT might read its costs rules as holding the Specified Body harmless or the Specified Body might benefit from a *Corner House* style protective cost order or, certainly, would be able to obtain to extract a prospective cost cap when an action is case managed in the CAT so as to risk manage its financial commitment.

## 11. CONCLUSION

Costs are the key to the castle in competition damage cases. So far costs and financing problems have limited the potential for bringing cases even when there is established cartel activity. Although, measures to make costs more predictable and to control costs in the High Court are encouraging they must be set against a history of high litigation costs in England; a culture which will be hard to curb. The CAT as a new tribunal with innovative procedures and a strong European influence is less hide bound by cost rules and looks as if it is developing a cost neutral stance for most cases which will free claimants from the pressure of facing a huge bill from defendants. Certainly, in cartel cases following a finding from the regulatory authorities this approach would be entirely in keeping with access to justice.

## NOTE

Since this article was first written there has been progress by the first Specified Body - the Consumers' Association - towards the sponsorship by it of a consumer damage claim.<sup>62</sup> Under their trading name 'Which?' they are recruiting consumers to join an action against JJB Sports following that company's fine of £6.7 million by the OFT in

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<sup>59</sup> A suitable case would be clear on liability, possibly a product of the leniency programme, with sufficient individual damages so that individuals are encouraged to 'opt in' making a reasonably substantial case when aggregated.

<sup>60</sup> Probably a collective conditional fee arrangement as used by trade unions. (Collective Conditional Fee Agreement Regulations SI 2000/2988 and Conditional Fee Agreements (Miscellaneous Agreements) Regulations SI 2003/1260. The reward element of a successful CFA used by the Association's own lawyers could also be retained to support future work.

<sup>61</sup> As to whether contingency fees are available in the CAT this is quite speculative. Contingency fees are available in employment tribunals (see Peysner, 'Contingency, Compliance and Access to Justice', forthcoming) but probably not be in the CAT as it has a wider cost jurisdiction than employment tribunals; although, this in itself may not be definitive. However, as the question of costs is in development in the CAT and it has shown itself to be prepared to be procedurally innovative so nothing can be ruled out.

<sup>62</sup> See p 113 and n 59.

2003 for price fixing England and Manchester United football shirts (the delay was occasioned by the company's appeal process). Which?, represented by Clyde & Co solicitors, anticipate the first case management conference in the Competition Appeal Tribunal in April 2007.<sup>63</sup> Interestingly, they suggest that whilst a receipt for purchase would be good evidence a photograph of the consumer in the 'relevant' shirt might be enough. While the annual change of team shirts was one factor in their high price and in engendering recurrent consumer demand it is intriguing that this may be used to identify the year they were produced and, thus, form part of the case against those who sold them at what the OFT found was an excessive price.

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<sup>63</sup> See [www.which.co.uk/reports\\_and\\_campaigns/consumer\\_rights](http://www.which.co.uk/reports_and_campaigns/consumer_rights).