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### Some Considerations on the Last Developments on Antitrust Damages Actions and Collective Redress in the European Union

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The problems of defining the limits to the application of national procedural rules and the alternate emergence of public and private enforcement of EU competition law lie at the root of the strand of case law of the Court of Justice of the EU regarding antitrust damages actions. While this case-law seems to encourage private claimants and to call national judges to take on new and delicate responsibilities, the new package presented by the Commission, which should be aimed at strengthening private enforcement, is based on a rather conservative approach, privileging the role of public enforcers. It has to be admitted that in a number of cases the latter are in a better position to detect and deal with competition law infringements; moreover, the evolution of the case-law of the Court of Justice, in line with the basics of the EU legal system, paves the way for a step-by-step approach to a greater role for public enforcement, including collective litigation (thus only partially and gradually imitating the US model). Integrating public and private enforcement seems the best way forward and hopefully the draft Directive on antitrust damages actions will be amended in the course of the legislative process with a view to favouring such an integration.

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#### 1. BACKGROUND AND PRELIMINARY REMARKS

In the United States, private enforcement is the driving force of competition law, while public enforcement plays only a rather residual role. As it has been observed, the situation in the EU is exactly the opposite<sup>1</sup> and what lies at the root of this situation is probably, among other legal and cultural factors, the fact that the European competition law framework largely builds upon the ordoliberal doctrine, according to which the functioning of the market has to be supervised and governed by a strong public authority<sup>2</sup>. This has been reflected in the weakness (... and uncertainty, at least

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<sup>1</sup> See B. J. Rodger, 'Editorial – Private Enforcement and Collective Redress: the Benefits of Empirical Research and Comparative Approaches', *The Competition Law Review* 8(1), 1; C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford: OUP, 1999); J. Backhaus, A. Cassone, G. B. Ramello, *The Law and Economics of Class Actions in Europe – Lessons from America* (Cheltenham: Edward Elgar, 2012). In general on Private Enforcement in the EU, see A. Komninos, *EC private antitrust enforcement: decentralised application of EC competition law by national courts* (Oxford – Portland: Hart, 2008).

<sup>2</sup> See D. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford: Clarendon, 1998), 232 ff., espec. 254-5; V. Milutinović, 'The 'Right to Damages' under EU Competition Law – From *Courage v. Crehan* to the White Paper and Beyond (Alpen aan den Rijn: Kluwer, 2010), 355-7.

thus far) of the tools at the disposal of individuals under EU law to ask for compensation of harm suffered as a result of anticompetitive behaviours.

As quite usual in EU law, the first attempt to find a new equilibrium has been made by the Court of Justice of the EU (hereinafter, 'Court of Justice', or 'Court', or 'CJEU'), while the Commission, after a Green Paper and a White Paper, respectively published in 2005 and 2008,<sup>3</sup> has more recently come up with a package including a legislative proposal on actions for damages for infringements of competition law and a recommendation dealing with the connected issue of collective redress (but the latter is not limited to claims arising out of competition law infringements).<sup>4</sup>

In this paper, the right to bring 'antitrust damages actions' will be set in the context of EU law, and I will try to provide a response to the central question regarding the foreseeable framing of that right. In particular, the proposals of the Commission will be evaluated in the light of their consistency with the shape of the right to compensation for damages suffered as a result of anti-competitive behaviours as it emerges from the current state of evolution of EU law, and with the objective of a better integration of private and public enforcement.

Let us start with an introductory overview of the first pioneering judgments of the Court of Justice.

In the absence of a legislative framework, the Court of Justice has set, thanks to the preliminary ruling mechanism, a few basic rules governing actions for damages for breaches of antitrust law, deriving them from some general principles of EU law. Starting from the seminal judgments in the *Crehan*<sup>5</sup> and *Manfredi*<sup>6</sup> cases, the Court has firstly established the principle that breaches of antitrust rules give rise to a claim for damages, which may be brought even by one of the parties to an agreement liable to restrict or distort competition within the meaning of Article 101 TFEU. Furthermore, it has been defining some essential features of such actions, clarifying, inter alia, that, even if it is for national legal systems to establish the procedural rules governing such actions (within the classical boundaries set by the principles of equivalence and effectiveness), EU law provides some guidance as regards the limitation period for seeking compensation for harm caused by anti-competitive behaviours and the extent

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<sup>3</sup> European Commission, Green Paper, Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005, COM(2005) 672 final; European Commission, White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 02.04.2008, COM(2008) 165 final.

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final; Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a European Horizontal Framework for Collective Redress, Strasbourg, 11.06.2013, COM(2013) 401 final.

<sup>5</sup> *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd et al.* (Case C-453/99) [2001] E.C.R. I-6297.

<sup>6</sup> *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, Nicolò Tricarico and Pasqualina Murgolo v. Assitalia SpA* (Joined Cases C-295/04 to C-298/04) [2006] E.C.R. I-06619.

of the damages. In particular, the latter has to include not only actual loss but also loss of profit plus interest, and might also include exemplary or punitive damages, should domestic actions similar to actions founded on EU competition rules include such damages, too. Nevertheless, the Court has stated that, relying on the prohibition of unjust enrichment, national judges can limit resort to exemplary or punitive damages, thus underlying the mainly compensatory nature of the damages to be awarded (and, as it will be outlined, such nature of the damages has been maintained and even reinforced in the proposal delivered by the Commission).

All the summarized developments need to be set in the context of two fundamental *evolutionary lines* of EU law: the alternate emergence of the two paradigms of public and private enforcement of competition law – the former nevertheless always holding a preminent position, as just observed<sup>7</sup> – and the (ever-)growing influence of EU law on national procedural rules.<sup>8</sup>

Moreover, and from a broader perspective, these developments might appear apt to favour a further refinement in the way EU competition law has been usually conceived thus far, in particular in its relationships with other rules of EU law, like those governing freedoms of movement (in the light of the possibility for individuals of obtaining compensation for the infringement of such other rules – which is normally committed by Member States). The ‘usual’ – although not always valid – alternative between horizontal and vertical relationships (respectively inherent to competition, on the one hand, and freedoms of movement, or other sets of rules of EU law, on the other hand) appears to be reinforced as a result of the growing role of private enforcement of competition law. Indeed, a well-established case-law of the Court of Justice grants the possibility of obtaining compensation from Member States for damages caused by their infringement of EU law,<sup>9</sup> while it is against other private parties – hence within a horizontal relationship – that compensation for damages suffered as a result of anticompetitive behaviours can be asked. Nevertheless, in the context of competition law, the interplay between public and private enforcement is becoming increasingly complicated, as it is shown by the dilemmas related to disclosure

<sup>7</sup> According to an authoritative opinion, no *hierarchy* should be established between public and private enforcement of EU law: many rules which might give the impression of recognizing to public enforcement a *higher* role (like the one on the binding character of NCAs’ decisions for national courts, laid down in the proposed directive – see *infra*, par. 5), can be interpreted as incentives for individuals to explore private enforcement possibilities and as tools to ensure legal certainty and uniform application of EU law: see A. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’, *Competition Law Review*, 3(1), 5 ff. I share this view, but it cannot be denied the crucial role played by the Commission as a public enforcer of competition law in the EU, which is due to both cultural and legal factors (as said in the text). Therefore, one has to bear in mind the general cultural-legal framework within which private enforcement has to be conceived and, hopefully, stimulated in the EU. See also n 45 below.

<sup>8</sup> See P. Iannuccelli, ‘Il rinvio pregiudiziale e il *private enforcement* del diritto *antitrust* dell’UE’, in *Il Diritto dell’Unione Europea*, 4/2012, 709 ff., espec. 715 ff. For an attempt to understand *Crehan* in the context of a wider evolutionary framework of CJEU’s case-law, see S. Drake, ‘Scope of Courage and the Principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, *European Law Review* (2006), 31, 841.

<sup>9</sup> See *Andrea Francovich et al. v. Italy* (Joined Cases C-6/90 and C-9/90) [1991] E.C.R. I-535.

of documents acquired by NCAs in the context of leniency programmes.<sup>10</sup> Hence, while investigating the various problems concerning damages action, attention will be drawn on the implications for the public/private enforcement divide and for the consequences on the state of evolution of EU law.

The paper is structured as follows: after the *Crehan* and *Manfredi* cases will be analysed in the light of the general problems related to the interaction between EU law and national procedural rules in section 2, the successive developments of the case law will be examined in the following part. Section 3 is dedicated to the interpretation to be given (and actually given by the Court) to the expression ‘any individual’, used in the *Crehan* case with reference to the subjects entitled to bring an action for compensation of damages suffered for anticompetitive behaviours. In Section 4, attention will be drawn on the case-law concerning access to evidence of anti-competitive behaviours received by NCAs in the context of a leniency programme. In section 5, a general evaluation of the proposals of the Commission will be provided. Finally, in the concluding remarks, I will try to outline some elements (concerning in particular the relationships with similar means existing to obtain compensation in other sectors of EU law, as just anticipated), which might be useful for a first estimation of the impact of all the considered developments on the EU legal order in general.

## 2. *CREHAN* AND *MANFREDI*, A REAPPRAISAL

### 2.1. *Crehan*

For the sake of clarity, a first important point has to be made as regards the standpoint of the CJEU in *Crehan*.<sup>11</sup> It has to be recalled that in that judgment the Court did not state directly that anti-competitive behaviours give rise to claims for damages, but that

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<sup>10</sup> See *infra*, par. 4.

<sup>11</sup> Here I will not provide a comprehensive analysis of the judgments of the CJEU in *Crehan* and *Manfredi*, as well as of the other I will consider, but I would just like – apart from some general remarks – to highlight only the aspects in the legal reasoning followed by the Court which are useful to understand the importance in those judgments of the interrelations between EU law and national procedural rules, with a view to assessing the influence of these issues on the developments of private enforcement of EU competition law. These two judgments have been already comprehensively analysed by many scholars: apart from the writings already quoted and to which reference will be made below, on the *Crehan* judgement in general see: A. A. Alvizou, ‘Individual Tort Liability for Infringements of Community Law’, *Legal Issues of Economic Integration* 2002, 177; A. Jones and D. Beard, ‘Co-contractors, Damages and Article 81: The ECJ finally speaks’, *European Competition Law Review*, 2002, 246; A. Komninos, ‘New Prospects for Private Enforcement of EC Competition Law: ‘*Courage v. Crehan*’ and the Community Right to Damages’, *Common Market Law Review*, 3/2002, 447; G. Monti, ‘Anticompetitive Agreements: the Innocent Party’s Right to Damages’, *European Law Review* (2002), 27, 282; O. Odudu and J. Edelman, ‘Compensatory Damages for Breach of Article 81’, *European Law Review* (2002), 27, 327; A. Palmieri and R. Pardolessi, ‘Intesa illecita e risarcimento a favore di una parte: “chi è causa del suo mal ... si lagni e chiedi i danni”’, *Il Foro italiano* 2002 IV, 76; B. J. Rodger, ‘The Interface Between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment’, *The Edinburgh Law Review*, 2002, 217; G. Rossi, “‘Take Courage!’ La Corte di giustizia apre nuove frontiere per la risarcibilità del danno da illeciti antitrust”, *Il Foro italiano* 2002 IV, 90; E. Scoditti, ‘Danni da intesa anticoncorrenziale per una delle parti dell’accordo: il punto di vista del giudice italiano’, *Il Foro italiano*, 2002 IV, 84; A. Andreangeli, “‘*Courage Ltd v. Crehan*’ and the Enforcement of Article 81 EC before National Courts”, *European Competition Law Review*, 12/2004, 758.

‘a party to a contract liable to restrict or distort competition within the meaning of Article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party’, and that 85 EC Treaty (Article 101 TFEU) ‘precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract’.<sup>12</sup> Thus, the *core problem* the EU judges had to address was not the existence in EU law of a right to bring antitrust damages actions, but to establish whether a party to a contract which violates competition law can be excluded from such actions (related to that contract). In fact, the Court added that such exclusion from damages claims may be admissible in case the applicant, as a party to the contract in question, ‘bears significant responsibility for the distortion of competition’.<sup>13</sup>

Therefore, the legal problem the Court had to solve concerned essentially the limits to be imposed to the application of national procedural rules. In particular, it was the application and scope of the principle ‘*nemo auditur propriam turpitudinem allegans*’ that was at issue. It was only indirectly that the CJEU ruled on the existence of antitrust damages actions in EU law, nevertheless one may infer this was one of the objectives the Court wanted to achieve.<sup>14</sup> Should this hypothesis be true, this would be a perfect example of use of the preliminary reference procedure to grant effective application of EU law (and this appears to be the genuine aim of the question proposed, as formulated by the referring judge, therefore with reference to the concrete procedural problem emerged),<sup>15</sup> and, on the other hand, to establish (indirectly) a general principle of EU law (the right to bring an action to obtain compensation for harm suffered as a result of anticompetitive behaviours).

By having a look at the legal reasoning of the Court, it is evident the EU Judges were perfectly aware also of the second aspect and considered it as strictly linked to the first (effective application of EU competition law). The CJEU started by recalling the legal personality of individuals under EU law and the fact that Article 101 TFEU (85 EC Treaty) produces direct effects.<sup>16</sup> These elements – along with the complex legal

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<sup>12</sup> *Crehan*, para 36, first and second indents, emphasis added.

<sup>13</sup> *Crehan*, para 36, third indent.

<sup>14</sup> A restrictive interpretation of this judgments has been suggested, arguing that it has to be intended as a mere application of the principle of effectiveness to actions for breaches of Article 85 EC Treaty (Article 101 TFEU). See references in S. Drake, ‘Scope of Courage and the Principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, cit., 850 and A. Komninos, ‘New Prospects for Private Enforcement of EC Competition Law: “Courage v. Crehan” and the Community Right to Damages’, cit., 456-457 and 483.

<sup>15</sup> It has to be recalled that the *Crehan* case was not originated by a typical private enforcement litigation, as the initial application simply concerned unpaid supplies of beer, and the right to compensation was raised by way of exception. On these issues, see: P. Iannuccelli, ‘Il rinvio pregiudiziale e il *private enforcement* del diritto *antitrust* dell’UE’, cit., espec. 717-719.

<sup>16</sup> I shall come back on this point later.

reasoning of the judgement – show that the Court of Justice intended to solve the problem on the (sole) basis of the effective application of EU competition law.<sup>17</sup>

What is more, the concern for ensuring full effectiveness to Article 101 TFEU (85 EC Treaty) led the Court to a result which affects not only national procedural rules. In fact, by declaring the bar for parties to a contract infringing EU competition law to bring an action for the damages caused by that contract precluded by EU law, the Court, at the end, established a rule concerning contractual freedom. Thus, after the *Crehan* judgment, parties enjoying a stronger economic position started to be faced to increased responsibilities, as clauses substantially imposed on the weaker parties could provide grounds for liability.

In particular, as already pointed out, the Court considered the national rule not to be precluded by EU law if the barred party ‘bears significant responsibility for the distortion of competition’. To assess if an undertaking bears such a ‘significant responsibility for the distortion of competition’ – and can therefore be barred from bringing an action for damages – ‘the matters to be taken into account by the competent national court’ have to include ‘the economic and legal context’ and, as suggested by the United Kingdom government, ‘the respective bargaining power and conduct of the two parties to the contract’. The ‘markedly weaker position’ in which

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<sup>17</sup> Paras 26-28 of the judgment are very clear in this respect. Para 28 is sometimes deemed to be unclear, as it does not explicitly state if the right to damages stems from EU or national law; see: S. Drake, ‘Scope of Courage and the Principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, cit., 850. Nevertheless, para 28 cannot be read as an isolate statement, but has to be interpreted in its context. In my view, it is absolutely clear that the Court is understanding the right to damages as a consequence which necessarily stems from the need to grant full effectiveness to Article 85 EC Treaty (Article 101 TFEU), therefore in the context of the EU legal order and of the exigency to enforce it effectively. Then, the Court states that this exigency has some consequences on the application of national procedural rules (an absolute bar on a party to an anticompetitive agreement to bring an action for damages is not acceptable, because it would not grant effective application of EU law). It is worth quoting the full passage (paras 26-28 of the judgment): ‘The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(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. / Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community. / There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.’

In the absence of other explicit rules in EU law on the point, the alternative ways could have been mainly two: a) leaving (totally) to the national legal orders (and to national judges) to establish whether the applicant could also be a party to the contract causing the breach from which the alleged loss derives (however this would have clearly altered the uniform application of EU competition law) ; b) establishing that barring parties to a contract to ask for compensation for harm suffered in case that contract infringes EU competition law does not undermine the effective application of that law (however, as it will be observed in the text, the solution adopted by the Court seems more equilibrate than this last one, even if it implies a deeper intrusion into national legal orders, and namely in civil law).

Finally, it is also evident that, in order to assess the compatibility with EU law of the principle ‘*nemo auditur propriam turpitudinem allegans*’ in this case, the right to obtain compensation for harm suffered as a result of anticompetitive behaviours had to be assessed preliminary (and this assessment has been carried out, as just explained, in the context of EU law).

the party claiming for damages has to find itself (in order to be allowed to bring an action for damages) can result, for instance, from a reduced or absent ‘freedom to negotiate the terms of the contract’ and ‘capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him’.<sup>18</sup>

Besides, the Court of Justice clearly considered actions for damages as indispensable tools to bring to light what can go on within contractual relationships between undertakings, and which is liable to restrict or distort competition. In other words, the EU judges, despite being unwilling to overturn the existent equilibrium between public and private enforcement of competition law in the EU, conceptualized the latter as something the EU legal order could not do without.<sup>19</sup>

Here one may already spot a potential conflict, or just an overlap, with leniency programmes. The legal scenario set by the *Crehan* judgement can be sketched as follows: a party to an anticompetitive agreement can choose to apply for a leniency programme, or to ask for compensation for damages, or maybe even to do both things (although the insignificant responsibility for the distortion of competition required to claim compensation for damages could imply a little, if any, share of responsibility in case the Commission should decide to impose fines for the infringement considered). By founding the existence of the right to ask for damages in these cases on the need to strengthen ‘the working of competition rules’, and to unveil anticompetitive commercial practices which would otherwise remain unknown, the CJEU is acknowledging the existence of a double track – private and public enforcement – to achieve similar (but not identical) goals. In fact, leniency programmes aim at giving the possibility to know what would otherwise remain covert and thus to enforce competition law in cases in which it could not have been applied without the

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<sup>18</sup> See paras 31-33 of the judgment. Thus, stronger undertakings bear special responsibilities not only where the requirements set under (the case-law on) Article 102 TFUE are met, i.e. when they *technically* hold a dominant position, but also, in the light of the interpretation of Article 101 TFUE (85 EC Treaty) given by the Court in the *Crehan* judgment, if they do not hold such a position. This point has been criticised, as it seems to run counter the very legal foundations of competition law obligations of undertakings. In particular, it has been raised the argument that obligations for the strongest parties to an agreement are simply derived from the need to fully enforce EU competition law, without a foothold in any provision (in the Treaties, in particular), while Article 101 TFUE (81 EC) is clearly shaped to protect third parties (the consumers); see: G. Monti, ‘Anticompetitive Agreements: the Innocent Party’s Right to Damages’, espec. 294 ff. For our purposes, it has to be simply taken into account that the CJEU has – probably consciously and intentionally – triggered a shift which has not been overturned in the following case-law. On top of that, and contrary to what professor Giorgio Monti hoped, the Court has had no occasion, or has not been willing, to further elaborate on the legal and policy reasons underlying the right of the weaker party to an anticompetitive agreement to claim damages. It is nevertheless clear that the decision in *Crehan* has been inspired by the need to establish in contractual relationships *a kind of fairness which has close links to solidarity*: it is something which is more common in Civil law systems than in Common law ones (Monti refers to ‘sentimentalism’ to explain the reasons which drove the Judges). For an analysis of the problematic issues regarding the assessment of the responsibility of the parties, and the subsequent enquiry into the existence of the entitlement to bring an action for damages, see also O. Odudu and J. Edelman, ‘Compensatory Damages for Breach of Article 81’, cit., espec. 330 ff.

<sup>19</sup> Paras 27-28 of the judgment are particularly clear in this respect: see above, fn 17.

information provided by the leniency applicant. In both cases, it is one of the parties to the agreement that takes the initiative.<sup>20</sup>

However, it has to be stressed that in the Crehan scenario the tool provided by the EU legal order is suitable for the weaker parties who can demonstrate they do not bear 'a significant responsibility for the distortion of competition' (and in a number of cases these claims are likely to be brought after the public enforcer has ascertained the existence of a breach of antitrust rules: follow-on actions). Therefore, this can be intended as a competition enforcement tool with a *potentially high degree of democratic enactment*, which, as a matter of fact, aims at tempering the effects of the differences in economic power between the parties to an (anticompetitive) agreement.

Leniency programmes seem to be at the disposal of a different category of antitrust law violators: generally speaking, there should not be the protection of weaker parties,<sup>21</sup> but an additional strategic option given to undertakings parties to anticompetitive agreements, which can choose to cooperate with the public enforcers when they reckon this would turn out to be advantageous (due to the combined effects of the reduction of the risk of being fined and of the exit from the conditions of a cartel which are not deemed profitable anymore). The leniency applicant is not per se supposed to be the weaker party of a commercial agreement, therefore re-equilibrating the relationships between the parties seems not to be an aim (or at least a necessary one) of leniency programmes.

It is a matter of policy to choose under what conditions (and in what situations) each one of these two legal structures has to be privileged and by what kind of means, as well as what type of integration and coordination has to be established between them.

The Court acknowledged that private enforcement does exist in EU law, deriving it from the *effet utile* principle, and this might already be considered as a policy option adopted by the EU judges.<sup>22</sup> Short of a clear choice by the EU legislator, the destiny of the right to damages in competition law has had to be left to the interplay between EU law and national procedural rules, that is to say to a quite fuzzy area where a great role is played by (especially national) judges.<sup>23</sup>

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<sup>20</sup> O. Odudu and J. Edelman, 'Compensatory Damages for Breach of Article 81', cit., 331, text and fn 24 observe the incentive to litigate deriving from *Crehan* can be considered similar to that to 'blow the whistle' resulting from leniency programmes.

<sup>21</sup> Here I do not take into account the positive effects of leniency programmes on consumers (and purchasers in general) who can take advantage, although indirectly, of lower prices and/or better contractual conditions.

<sup>22</sup> See P. Iannuccelli, 'Il rinvio pregiudiziale e il private enforcement del diritto antitrust dell'UE', cit., 728-729.

<sup>23</sup> Furthermore, although the preliminary reference procedure provides an excellent coordination tool between national judges and the CJEU, problems and inconsistencies may nevertheless arise: see M. Carpagnano, 'Private enforcement delle regole di concorrenza: analisi comparata della giurisprudenza comunitaria e nazionale', G.A. Benacchio, M. Carpagnano, *Il Private enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali. Atti del convegno tenuto presso la Facoltà di giurisprudenza dell'Università di Trento, 15-16 giugno 2007* (Trento: Università degli studi di Trento, 2007), 185.

## 2.2. Manfredi

It was once more through a preliminary ruling that the Court of Justice went further and established some more detailed principles concerning the application of national procedural rules to ‘antitrust damages actions’. In *Manfredi*,<sup>24</sup> it was first confirmed that it is possible to bring an action for harm suffered as a result of an agreement or practice prohibited by EU competition law. Second, the Court stated the already mentioned principles concerning limitation periods and the extent of damages to be awarded.<sup>25</sup> It has to be stressed that, regarding these questions, the Court did not choose to establish a general (or almost general) preclusion, like the one, set in the *Crehan* judgment, concerning the bar to bring actions for parties to an anticompetitive agreement. The Court of Justice had to left the establishment of different rules governing those actions (application of the ‘causal relationship’ between the illicit agreement and the loss, designation of the courts and tribunals having jurisdiction, limitation periods, and, at least partly, extent of the damages to be awarded)<sup>26</sup> to the domestic legal system. In substance, the Court used a less intrusive approach, in line with a more *classical* conception of the relationships between EU law and national procedural rules: the latter regularly apply, with the limitation of the principles of equivalence and effectiveness (as just seen, in *Crehan*, the Court applied in principle the same general scheme, but the difference in the factual and legal starting points, as well as probably the way it was applied and therefore its implications were different).

One may wonder whether this was due to a self-limitation after a judgment like *Crehan*, which had been perceived by many commentators as a ground-breaking one (and even criticized),<sup>27</sup> or to a somewhat physiological need to temper the achievements of the

<sup>24</sup> On the *Manfredi* case, apart from the writings already quoted and to which reference will be made below, see in general: M. Carpagnano, ‘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*’, *Competition Law Review*, 3(1), 47; P. Iannucelli, ‘La Cour botte en touche sur la réparation civile des dommages causés par une infraction aux règles de concurrence’, *Revue Lamy de la Concurrence: droit, économie, régulation*, 9/2006, 67; O. Pallotta, ‘Consumatori e concorrenza: le questioni irrisolte nella causa Manfredi’, *Il diritto dell’Unione Europea*, 2007, 305.

<sup>25</sup> See *supra*, Background and Preliminary Remarks, in particular fn 6 and corresponding text.

<sup>26</sup> One may wonder whether the argument of the need for uniform application of EU competition law could have been used to establish some basic common rules concerning causal relationship. In substance, the Court did so as regards limitation periods and the extent of the damages to be awarded. It has to be recalled that leaving to national legal orders to regulate these aspects appears in line with the approach of the Court in other judgments regarding tort liability (of the States, like in *Francoovich*), see: S. Drake, ‘Scope of Courage and the Principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, cit., 857. However, in competition law, rules regarding causal link might have a significant impact on the *substance* of the right to obtain compensation, as they imply a delicate and sometimes sophisticated evaluation on the economic mechanisms triggering a harmful effect on the claimant’s position.

<sup>27</sup> See in particular G. Monti, ‘Anticompetitive Agreements: the Innocent Party’s Right to Damages’, cit., 282 ff., according to which parties to an anticompetitive agreement should not be entitled to ask for damages caused by it. Amongst other reasons, the author questions the policy and legal foundations of the increased responsibility of parties enjoying stronger economic power (see *supra*, para 2.1 text and footnotes).

case-law and its development.<sup>28</sup> In other words, a seminal judgment like *Crehan* can be followed by other ones which refine the first achievements of the Court, in the case in question clearly leaving ground to national judges).<sup>29</sup> It has nonetheless to be recognized that, once the big principle had been established, the other rules governing the actions could not be easily treated as the principle ‘*nemo auditur propriam turpitudinem allegans*’; otherwise, the national procedural rules should have been quite completely rewritten, which is, of course, not possible.

### 3. WHO ARE (AND WILL BE) THE APPLICANTS?

According to the *Crehan* judgment, the damages claim should be opened to ‘any individual’, in order to safeguard the full effectiveness of Article 101 TFEU.<sup>30</sup> This opening of the right to bring an action to any potential individual might prima facie be simply logical and fair, or even obvious. Of course, the first problematic situation which can be hypothesised is precisely that at issue in the *Crehan* case. The way the Court dealt with it could lead to consider that also the exclusion of other categories of claimants – just as parties to an anticompetitive agreement – would be impossible. It is true that the EU judges emphasised the role of parties to contracts and practices in unveiling infringements of competition law,<sup>31</sup> while other individuals (like consumers) could not be insiders. However no one seems to put seriously in question that consumers can bring an action for damages suffered for anticompetitive behaviours (like it has happened in *Manfredi*).

On top of that, it would be more difficult to distinguish the positions of parties to a horizontal agreement, by deciding that an applicant amongst them does not bear ‘significant responsibility for the distortion of competition’.<sup>32</sup> However, in *Crehan*, as we

<sup>28</sup> According to S. Drake, ‘Scope of Courage and the Principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, cit., 855, the Court in *Manfredi* has turned back to a softer approach, that is based on the sufficiency of a fair application of national procedural rules, which ensure ‘effective’, but probably not ‘full and complete’, judicial protection.

<sup>29</sup> This idea is expressed by A. Komninos, ‘New Prospects for Private Enforcement of EC Competition Law: “Courage v. Crehan” and the Community Right to Damages’, cit., 476, who argues that as far as tort liability of individual is concerned, there is a long standing legal elaboration on which national judges can rely upon and the CJEU could have had no reason to manifest any *méfiante* as regards the rules that have been so shaped.

<sup>30</sup> Para 26 of the judgment. For some references on the debate on the meaning of this expression, see: S. Drake, ‘Scope of Courage and the Principle of “individual liability” for damages: further development of the principle of effective judicial protection by the Court of Justice’, cit., 856.

<sup>31</sup> See supra, para 1.

<sup>32</sup> G. Monti, ‘Anticompetitive Agreements: the Innocent Party’s Right to Damages’, cit., 282 ff., espec. 292 ff. has argued that uncertainty might arise also if a comparison between the *Crehan* criteria and those used by the Commission to decide whether a party to an agreement has not to be fined had to be drawn. The *Crehan* judgment in fact does not deal with the relationship between the right to bring a claim for damages and the way the Commission has to treat the undertaking entitled to bring such a claim. According to Monti, the policy of the Commission seems to be related to the type of agreement, fines being not imposed mainly to weaker parties to vertical agreements; should analogy be possible between fining policy and damages actions, this circumstance would lead to opening also the latter only to vertical agreements’ parties. However, the author has noted that the criteria followed by the Commission (analysed in 2002, when his article has been published) are wider than those set by the Court in *Crehan* and it seems inappropriate to draw any analogies.

have seen, the Court stated that, while carrying out such evaluation, ‘the economic and legal context’ and ‘the respective bargaining power and conduct of the two parties to the contract’ have to be taken into account:<sup>33</sup> although the Court did not rule explicitly on this point, it seems that a disproportion in economic power – and thus in the responsibility for the distortion of competition – could exist also between parties to a horizontal agreement.

As to other possible cases, it has to be recalled that recently, even the Commission, acting on behalf of the (European Community and then of the) EU, has brought an action before a national judge on the basis of an anticompetitive behaviour ascertained in a decision adopted by itself. The national judge referred a preliminary ruling – *Otis*.<sup>34</sup> The judgment of the Court of Justice is interesting, in particular, as regards the consideration of due process rights.

The CJEU recalled the relevant passages of the *Crehan* and *Manfredi* cases, where it was stated that the possibility of bringing an ‘antitrust damages action’ should be granted to ‘any individual’, and we are now well acquainted with this expression. This means the reasons – ensuring full effectiveness to Article 101 – for which the Commission, on behalf of the Union, has to be granted access to the action at issue, are the same justifying access to an analogous action to parties to anticompetitive agreements (*Crehan*) and to consumers (*Manfredi*).

On the basis of the case-law of the CJEU,<sup>35</sup> national courts are bound by decisions adopted by the Commission, when ruling, inter alia, on matters disciplined by Article 101 TFUE. In *Otis*, the Court stated this is still true when an action for damages suffered as a result of the agreement or practice sanctioned in a decision adopted by the Commission – and binding for the national judge – is brought by the Commission itself. According to the Court of Justice, a different solution would run counter the exclusive jurisdiction of EU Courts on the legality of acts adopted by EU Institutions, and namely by the Commission. The decision at issue in the *Otis* case had been challenged on the basis of Article 263 TFEU (action for annulment), therefore legality review on the decision at issue had already been carried out by the General Court and the Court in preceding trials. By bringing those actions for annulment, the applicants

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<sup>33</sup> See supra, fn 18.

<sup>34</sup> *European Commission v. Otis NV et al.* (Case C-199/11) [2012] nyr. See, in general: C. Robin, ‘Préjudice causé à l’Union européenne par l’entente dans les ascenseurs’, *Revue Lamy de la Concurrence: droit, économie, régulation*, 2013 (34), 3; G. Muguet-Poullennec, ‘La Commission, victime d’une infraction qu’elle a sanctionnée, peut demander à en être indemnisée’, *Revue Lamy de la Concurrence : droit, économie, régulation* 2013 (34), 79; D. Canapa and P. Hager, *Maastricht Journal of European and Comparative Law*, 2013, 113; N. Dunne, ‘Leading by Example: Private Competition Enforcement by the European Commission’, *The Cambridge Law Journal*, 2013, 273; M. Botta, ‘Commission acting as plaintiff in cases of private enforcement of EU competition law: *Otis*’, Case C-199/11, *European Commission v. Otis NV and others*, Judgment of the Court of Justice (Grand Chamber) of 6 November 2012’, 2013 (50) 4, *Common Market Law Review*, 1105.

<sup>35</sup> See in particular: *Masterfoods Ltd v. HB Ice Cream Ltd*, (case C-344/98) [2000] E.C.R. I-11369. See now Article 16 of Regulation 1/2003. In general on the issue, see A. Komninos, ‘Effect of Commission decisions on private antitrust litigation: setting the story straight’, *Common Market Law Review*, 2007, 1387.

had had access to an impartial tribunal as required by Article 47 of the Charter of fundamental rights of the EU and Article 6 ECHR.

The applicants raised the argument that the legality review carried out by the EU Courts is not sufficient, because of the margin of discretion granted to the Commission, as regards economic matters. The EU judges responded with their usual arguments, according to which legality review carried out by them is in line with the requirements of Article 47 of the Charter and of Article 6 ECHR.<sup>36</sup>

In line with the *Crehan* and *Manfredi* judgments,<sup>37</sup> the ascertainment regarding the existence of the loss and of the causal link is left to the national court<sup>38</sup> and this would be sufficient, according to the CJEU, to exclude that the Commission is acting at the same time as party and judge in breach of the principle *nemo iudex in re sua*. Here the argumentation of the Court could have been more convincing, or, at least, more explicit. In fact, the Commission, in the two situations considered – sanctioning anticompetitive behaviours and acting on behalf of the Union to obtain compensation – was performing different duties under different provisions of the Treaties and in different capacities.<sup>39</sup> In fact, in the first case it was performing its own task related to competition law enforcement, while, once this first activity was concluded (and with all the possible judicial review carried out by EU judges), a new and different one could be started before national judges, on behalf of the Union.<sup>40</sup> As the latter are bound by the

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<sup>36</sup> See especially paras 60-63 of the judgment. Moreover, the argument that the CJEU is not an impartial judge, as it is an Institution of the EU itself, has been rejected: independence of judges is ensured by the relevant rules and it cannot be deemed to be undermined for the sole reason that they belong to a certain State or International Organisation (see para 64).

<sup>37</sup> M. Botta, 'Commission acting as plaintiff in cases of private enforcement of EU competition law: *Ottis*', cit., 1109, notes that, unlike the AG, who focused on the difference in the two roles performed by the Commission, the Court's line of reasoning built upon the importance of the need to ensure 'full effectiveness' of EU competition law, as stated in *Crehan* and *Manfredi* (para 41 of the judgement).

<sup>38</sup> See paras 65-66 of the judgment. On this issue, see: M. Botta, 'Commission acting as plaintiff in cases of private enforcement of EU competition law: *Ottis*', cit. 1110 ff., who stresses that the CJEU confirms its approach as regards respect of fair trial principles in competition law.

<sup>39</sup> Para 42 of the opinion of AG Cruz Villalón is very clear on this crucial point:

'(...) it should be pointed out that the European Union (not the Commission) is taking part in the main proceedings not as an institution holding public powers and responsible for ensuring competition in the internal market, but in its capacity as a customer, and consumer, of undertakings which are allegedly responsible for unlawful harm. The European Union does indeed implement its competition policy by means of decisions issued on the basis of the Treaty, whereas this case concerns the conduct of civil proceedings which are not part of that policy, but rather a procedure seeking financial compensation with the aim of restoring a legal situation on a private level. In the proceedings before the Rechtbank – as has been pointed out by both the Commission and the Council at the hearing – the European Union is acting as a private person, which has sustained financial loss. Therefore, contrary to what the defendants argue, there is no overlapping of roles, but two actions that are clearly separate not only in time but, above all, in methods and objectives'.

<sup>40</sup> According to the new provisions of the Lisbon Treaty (Article 335 TFEU, still not applicable in the *Ottis* case), the other Institutions could act on behalf of the Union 'in matters relating to their respective operation'. However, even if the Commission was acting in matters *relating to its own operations*, it acted always on behalf of the Union. What is more, this does not change the fact that, once the ascertainment of the anticompetitive behaviour has become definitive, bringing an action for compensation of loss suffered as a result of that behaviour has to be considered a new and separate legal activity.

ascertainment contained in decisions adopted by the Commission, there are no points of law in that litigation with reference to which the Commission is able to act at the same time as applicant and judge. The national competent judge has to carry out his legal enquiry on points of law not covered by the decision of the Commission (and this is what the CJEU seems to say). Before the national judge, the Commission, *rectius*, the Union, is therefore acting as ‘any individual’ who claims to have suffered damages as a result of an anti-competitive behaviour and who relies on the ascertainment of the illicit character of that behaviour, contained in a definitive act (of the competent authority) under EU law (thus bringing a follow-on action).

The position of the Commission in a case like *Otis* is in no way different from that of another individual who wants to bring a similar action. This is also proven by the fact that the Commission did not use any of the confidential information acquired throughout the administrative proceedings (and this is the main argument used to reject the claims of the defendants concerning an alleged violation of the principle of *égalité des armes*).<sup>41</sup>

In the *Otis* case, the Court observed that the central rule applied, according to which national judges are bound by Commission decisions in competition cases, has to be intended as a specification of the division of competences between national judges on the one hand, and EU Institutions, on the other hand. In particular, such rule aims at protecting the exclusive jurisdiction of the EU judges on the legality review of acts adopted by the Institutions (and namely the Commission, in this context), and the task of the Commission of finding and sanctioning anti-competitive behaviours.<sup>42</sup> This does not affect the competence of national judges and the application by them of national procedural rules. Such rules are therefore limited, on the one hand, by the need to apply effectively EU competition law and, on the other hand, by the exclusive competence of the EU Courts.

#### 4. ACCESS TO EVIDENCE AND LENIENCY PROGRAMMES

This paragraph is dedicated to the analysis of the problem of access to evidence of anti-competitive behaviours received by public authorities in the context of a leniency programme.<sup>43</sup> This highly debated issue has been firstly addressed by the Court of

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<sup>41</sup> See paras 69-76 of the judgment, where, however, as noted by M. Botta, ‘Commission acting as plaintiff in cases of private enforcement of EU competition law: *Otis*’, cit., 1112, no particular attention was devoted to ascertaining the effectiveness of the separation, within the Commission internal articulation, of the two activities.

<sup>42</sup> Paras 53-54 of the judgment read as follows: ‘It must be borne in mind in that regard that it is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid (see, to that effect, Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 12 to 20)./ The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts.’

<sup>43</sup> See in general: A. Beumer and A. Karpetas, ‘The Disclosure of files and Documents in EU Cartel Cases: Fairytale or Reality?’, *European Competition Journal*, 2012, 8(1), 123; B. Nascimbene, ‘L’interazione tra

Justice with reference to a national leniency programme in the judgment in *Pfleiderer*.<sup>44</sup> The Court stated that EU law does not preclude national law from granting access to an individual to this kind of documents with a view to preparing a claim for damages;<sup>45</sup> however, limits to this right have to be recognised and the Court seemed forced to leave – always because of the absence of a legislative framework – to the national judge to strike a fair balance between the protection of the effectiveness of leniency programmes and the right to bring claims for damages for breaches of competition law.

The Court paid homage again to the procedural autonomy of Member States, however national courts find themselves juggling different ‘interests protected by European Union law’ (effectiveness of leniency programmes and the right to bring an action for loss caused by anti-competitive behaviours).<sup>46</sup> At the end, the referring court decided access to the requested documents had to be denied.

On the contrary, in the UK the High Court granted access to information provided by some undertakings in the context of a European leniency programme, despite the opposite opinion expressed, as *amicus curiae*, by the European Commission – *National Grid*.<sup>47</sup>

In similar cases, the General Court granted access to documents: this happened in *Hydrogen Peroxide*,<sup>48</sup> where the applicant simply requested to have access to the table of contents of the file of an administrative proceeding, and in *EnBW*,<sup>49</sup> where access has

programmi di clemenza e azioni di risarcimento nel diritto antitrust comunitario: prospettive in tema di *collective redress*’, *Il Diritto dell’Unione Europea*, 4/2012, 730.

<sup>44</sup> *Pfleiderer AG v Bundeskartellamt* (case C-360/09), [2011] E.C.R. I-05161. On this judgement, see in general: M. Sánchez Rydelski, ‘Antitrust Enforcement: tensions between leniency programmes and civil damage actions. How immune is a leniency applicant?’, *European Law Reporter*, 6/2011, 178.; P.J. Slot, ‘Does the “Pfleiderer” judgement make the fight against international cartels more difficult?’, *European Competition Law Review*, 4/2013, 197.

<sup>45</sup> AG Mazák in its opinion took the opposite view. In essence, AG Mazák’s main point regards the effectiveness of leniency programmes. According to him, the interaction between private and public enforcement should be favoured by introducing the binding effect of NCAs’ (and not only Commission’s) decisions on infringements of competition law. Apart from promoting interaction at this particular level, AG Mazák seems to have taken a rather sceptical attitude towards private enforcement in the EU, as it emerges in particular from point 40 of his opinion:

‘I consider that Regulation No 1/2003 and the case-law of the Court have not established any *de jure* hierarchy or order of priority (...) between public enforcement of EU competition law and private actions for damages. While no *de jure* hierarchy has been established, at present the role of the Commission and national competition authorities is, in my view, of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 102 TFEU. Indeed so reduced is the current role of private actions for damages in that regard that I would hesitate in overly using the term “private enforcement”.’

<sup>46</sup> See paras 23-25, 28-30 and 32 of the judgment.

<sup>47</sup> *National Grid Electricity Transmission v ABB and Others* [2012] EWHC 869.

<sup>48</sup> *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v. European Commission* (Case T-437/08) [2011] E.C.R. II-08251.

<sup>49</sup> *EnBW Energie Baden-Württemberg AG v. European Commission* (Case T-344/08) [2012], nyr. The judgment has been appealed before the Court of Justice (case C-365/12 P) and on 3 October 2013 AG Cruz Villalón delivered his opinion, according to which the appeal should be partly allowed. At the outset, AG Cruz Villalón stated that [i]n any event, as I argued in my Opinion in *Agrofert*, (...) ‘this case has to do above all with transparency’ rather than – here – concerted practices between undertakings or cartels. As in that case,

been granted to the file of a cartel proceeding.<sup>50</sup> The day after the *EnBW* judgement, the Heads of European Competition Authorities ‘reacted’ by adopting a resolution, stressing the importance of protecting ‘leniency material’.<sup>51</sup>

Two recent cases have given the Court the chance to refine its elaboration on these issues. In *Donau Chemie*,<sup>52</sup> it has been stated that EU law, in particular the principle of effectiveness, precludes national legislation which requires the assent of all the involved parties to disclose to third parties documents lodged to a public authority in the context of a national leniency programme, ‘without leaving any possibility for the national courts of weighing up the interests involved’. Thus, the role of the judge – a sort of

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therefore, it is ‘primarily in the light of Regulation No 1049/2001 that we must address the resolution of this case’ (point 35) (Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2009 L 145, p. 43). Nevertheless, a holistic approach has to be adopted in his view as regards interpretation of the regulatory framework relating to access to documents of the institutions (points 36-39). In particular, when a subject who is not party to a cartel is seeking access to documents filed in the context of a leniency programme, a general presumption that such disclosure ‘is liable to undermine the general interest protected by the specific rules on access to the documentation generated or used in those proceedings’ should apply: this solution is achieved as a result of an application by analogy of the principles enshrined in the provisions regarding State aid and merger control (see points 49-66 of the opinion, relating to the second ground of appeal). In addition, AG Cruz Villalón maintained that the General Court erred in declining to analyse the possible existence of an actual commercial interest of the party who filed the documents (just because of their age), which could have to be protected by denying access to them (points 80-94, relating to the third ground of appeal): once more, here the AG applies by analogy rules regarding merger control. This, according to AG Cruz Villalón’s opinion, should also lead to uphold the appeal. Although the AG had to admit that the Commission relied on a purely abstract danger of undermining the effectiveness of leniency programmes – while to deny access to a document *Donau Chemie* clearly requires the emergence of an actual danger with reference to a specific programme (points 67-78, relating to the fourth ground of appeal) –, he tried to achieve the result of precluding disclosure by means of protection of commercial interests. Without putting into question the need to protect such interests, it seems to me this might be a way to circumvent the results to which *Donau Chemie* (see *infra*, in the text) should lead. What is more, the analogy with State aid and merger control rules, on which the opinion is based, appears to be not completely persuasive, as the objection raised by the applicant based on the voluntary nature of the submission of documents in leniency programmes – in contrast to what happens in the other fields considered, where undertakings are under an obligation to provide documents – has not been convincingly overcome. Finally, as regards the fifth and last ground of appeal – concerning the risk, in case of disclosure, of undermining the decision-making process where a future new decision should be adopted by the Commission in the case – the arguments put forward were certainly to be considered seriously. According to the AG, in this case a general presumption on the relevance of the documents for the future adoption of a new decision should apply (as stated in *Commission v. Éditions Odile Jacob* (Case C-404/10 P) [2012], nyr, para 130 – the judgment regarded, once more, a decision in the field of merger control). Nonetheless, the presumption could be rebutted and in this case the General Court did not omit to rule on the point, but considered that the Commission’s claims as to the existence of the need to protect its decision-making process were general and abstract, so unfounded. It will be for the Court to ascertain whether this is the case, or not, thus clarifying the way the *Éditions Odile Jacob* general presumption has to be applied.

<sup>50</sup> In *Prysmian SpA and Prysmian Cavi e Sistemi Energia Srl v. European Commission* (Case T-140/09) [2012], nyr, documents received by the Commission in the context of a leniency programme have been disclosed during the judicial procedure, however, according to the judgment, such disclosure has not been ordered by the General Court; furthermore, the purpose of the access was not the preparation of a damages claim (see paras 72-76 of the judgement).

<sup>51</sup> Protection of leniency material in the context of civil damages actions, 23 May 2013.

<sup>52</sup> *Bundeswettbewerbshilfebehörde v. Donau Chemie AG and Others* (Case C-536/11) [2013], nyr.

public enforcer in the context of private enforcement actions – remains crucial and it is up to him to strike the correct balance between the interests in question.

Thus the Court (implicitly) clarified that preference for public enforcement cannot amount to deprive the judge of the task of weighing-up the interests at issue. The CJEU also provided the national judge with quite detailed guidance as to the logical process to be followed. First, the national judge has to evaluate the existence of the interest of the applicant to have access to the requested documents. Second, the possible adverse effects of the disclosure have to be assessed.<sup>53</sup>

In particular, once an undertaking has obtained – at least – partial immunity from pecuniary penalties, it cannot be given, by allowing it to block the disclosure with a simple refusal to give its consent – without having to give any reasons –, ‘an opportunity also to circumvent [its] obligation to compensate for the harm resulting from the infringement of Article 101 TFEU, to the detriment of the injured parties’; therefore, that refusal has ‘to be based on overriding reasons relating to the protection of the interest relied on and applicable to each document to which access is refused.’<sup>54</sup>

Therefore, the core argument that access to such documents may jeopardise the effectiveness of leniency programmes, and that therefore it has to be refused on that (sole) basis, has been rejected.<sup>55</sup>

Private enforcement, one may say, cannot be so public (so conditioned by choices of the legislator), that the legislator can impose in advance a prohibition on any disclosure of documents (acquired by public authorities in the context of leniency programmes) which has not been authorised by all the involved parties. In this judgment there is a clearer protection of the right to access to evidence to be used in damages claims than that granted in *Pfeiderer*: in the latter, the CJEU could just establish some general principles and nevertheless did not provide an unconditional shield for leniency programmes. In *Donau Chemie*, thanks to the guidance provided to the referring judge at the end of the judgment, access to documents obtained by public authorities in the context of a leniency programme is now probably easier. Once more, the CJEU was ruling on the limits to the application of national procedural rules justified by the respect of the principle of effectiveness:<sup>56</sup> in that particular case, Austrian legislation seemed unreasonably strict vis-à-vis the claimant, by putting a quite absolute obstacle to access to documents, and this has certainly played a role in leading the Court to establish a limit to its application. Nevertheless, the judgment has clearly a substantial outcome, as it clarified that the judge has to be given the possibility to weigh up the interests at stake and it sets the steps of the judicial reasoning to be followed.

In *Schenker*,<sup>57</sup> the Court of Justice affirmed, inter alia, that national authorities can confine themselves to ascertain the participation in an illicit agreement of an

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<sup>53</sup> See paras 44-45 of the judgment.

<sup>54</sup> Para 47 of the judgment.

<sup>55</sup> See para 46 of the judgment.

<sup>56</sup> See, in particular, paras 27 and 39 of the judgment.

<sup>57</sup> *Bundeswettbewerbshilfebehörde and Bundeskartellamt v. Schenker & Co. AG and Others* (Case C-681/11) [2013], nyr.

undertaking, refraining from imposing a fine, where that undertaking is taking part in a leniency programme. This has to be done by way of exception and the Court was greatly concerned about possible abuses:<sup>58</sup> for instance, immunity can be accorded to an undertaking whose cooperation has proven to be decisive in unveiling and suppressing an anticompetitive behaviour.<sup>59</sup>

What is relevant is that the finding of the NCA, although no fine has been imposed, may expose the undertaking to damages claims. The underlying rationale seems to converge on that which has guided the Court in *Donau Chemie*, where it took the view that an undertaking taking part in a leniency programme cannot gain complete control over the disclosure of documents lodged to the NCA, and therefore on possible damages claims. In *Schenker*, the Court clearly expressed a preference for the imposition of a fine (maybe a reduced fine), however, even where a fine has not been actually imposed, the finding by the NCA might per se be useful for ‘any individual’ interested in bringing a claim for damages.

Hence, the CJEU seems to promote private enforcement by granting a more equitable treatment of access to documents applications and by favouring judicial ascertainment of breaches of competition law (which might be useful in possible future damages actions). In both cases, the Court seems to be setting the general stage for damages actions and to be somewhat forced to shape the relationship between them and leniency programmes, trying to establish the first elements of a framework favouring coexistence between the two. Short of guidance from the legislator, the CJEU has designed a crucial and extremely delicate role for (itself and for) national judges, the drawback being a (to a certain extent) physiological heterogeneity of outcomes throughout the EU.

## 5. THE NEW PACKAGE: A GENERAL ASSESSMENT

After a wide debate<sup>60</sup> on the possible intervention of the EU legislator regarding damages claims for breaches of competition law and in the field of collective redress, it was not clear what the Commission would have done.<sup>61</sup> Such possibility has finally become real after the presentation of the package by the Commission.<sup>62</sup>

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<sup>58</sup> It has to be recalled that Article 5 of Reg. 1/2003 does not expressly confer to NCAs the power to find an infringement of Article 101 TFUE without imposing a fine; see para 45 of the judgment.

<sup>59</sup> See para 49 of the judgment.

<sup>60</sup> See the Green Paper and the White Paper, cited supra, fn 3. See also the report published before the deliverance of the White Paper: *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*, Final Report, Brussels, Rome and Rotterdam, 21 December 2007, Report for the European Commission, CONTRACT DG COMP/2006/A3/012, [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/impact\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf). In the literature, see, amongst many others, C. A. Jones, Editorial, ‘After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement’, *Competition Law Review*, 3(1), 1; A. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’, cit., 5. and references quoted therein.

<sup>61</sup> A legislative initiative was foreseen in the Commission Work Programme 2012, COM (2011)777 final, but does not appear anymore in the Commission Work Programme 2013, COM (2012)629 final. See B.

## 5.1 The proposed Directive on Antitrust damages claims

As to the directive, at first glance it can appear – as it is intended to be – a codification of the analysed case law, but as a matter of fact, the Commission has clearly adopted a conservative approach, in line with the (early) case law, in order to preserve the existing equilibria between public and private enforcement of competition law in the EU legal order.

Let us have a look at some of the most relevant provisions.<sup>63</sup>

As to punitive damages, the Commission has been more prudent than the Court: the latter had stated such damages can be awarded if national law so provides (adding that countermeasures apt to save the compensatory character of the damages could be adopted by the national judge on the basis of the prohibition of unjust enrichment);<sup>64</sup> in the proposed directive, punitive damages are not mentioned (see Article 2).

Recently, the CJEU, as just observed,<sup>65</sup> seems to have taken a clearer and more courageous approach in promoting actions for damages, in particular as regards access to evidence. The provisions of the proposal regarding access to evidence (Articles 5-8) seem stricter and the Commission is clearly concerned to protect undertakings participating in leniency programmes.

Article 5 contains some general statements, such the opening one (par. 1) regarding the need to disclose documents to claimants which have ‘presented reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered harm caused by the defendant’s infringement of competition law’. Attention is then drawn on the proportionality assessment as regards the extent of the disclosure (par. 3), stressing in particular that careful consideration has to be devoted to confidential information and to documents at the disposal of a competition authority (in such case it has to be assessed ‘whether the request has been formulated specifically with regard to the nature, object or content of such documents’).

Moreover, the proposal classifies two main categories of documents: for the first it is established that the documents pertaining thereto<sup>66</sup> can be never disclosed (Article 6, par. 1); documents of the second category<sup>67</sup> can be disclosed ‘only after a competition authority has closed its proceedings or taken a decision referred to in Article 5 of

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Nascimbene, ‘L’interazione tra programmi di clemenza e azioni di risarcimento nel diritto antitrust comunitario: prospettive in tema di *collective redress*’, cit., 747, fn 37.

<sup>62</sup> See *supra*, Background and Preliminary Points.

<sup>63</sup> Here I intend to provide a very general overview only of the Commission’s proposal (highlighting only some general aspects which are more closely connected to the case-law just analysed in the paper) and the subsequent debate is not taken into account.

<sup>64</sup> See *supra*, Background and Preliminary Remarks.

<sup>65</sup> See 3. Access to Evidence and Leniency Programmes.

<sup>66</sup> Such documents are: ‘leniency corporate statements’ and ‘settlement submissions’.

<sup>67</sup> In the second category is included: ‘information that was prepared by a natural or legal person specifically for the proceedings of a competition authority’ and ‘information that was drawn up by a competition authority in the course of its proceedings’.

Regulation No 1/2003 or in Chapter III of Regulation 1/2003' (Article 6, par. 2).<sup>68</sup> Disclosure of evidence in the file of a NCA not falling in any of these categories can be always ordered in actions for damages, with the general limitations laid down in Article 5.

One may wonder whether this solution is too rigid and thus in contrast with the need, outlined by the CJEU in *Donau Chemie*, to leave to the national judge the task of 'weighing up' the interests at stake. In that judgment the Court was actually interpreting EU primary law, therefore the question arises as to whether these provisions of the directive, if approved with this text, could run the risk of being struck down.

It is true, as already referred, that the *Donau Chemie* judgement was conditioned by the excessive rigidity of Austrian legislation, which was in question in that case. Nevertheless, the approach of the Court and the proposed directive seem to be inspired by two different regulation models. Of course, the CJEU was forced to intervene in the absence of a legislative framework, therefore its dicta are not the outcome of a choice concerning the optimal regulatory scheme – and it is not for the Court to make such a choice, but for the legislator. For the same reason, the solutions adopted by the Court of Justice were to be derived, as just said, from primary law, thus constituting not only decisions for the cases brought before the EU Judges in Luxembourg, but also orienting parameters for the future choices of the legislator.<sup>69</sup>

In this paper I have argued that the most recent case-law of the CJEU has to be interpreted as a stimulus for a greater role for private enforcement. The way for a viable coexistence with leniency programmes has been paved, as far as access to documents is concerned, leaving to the national judge to ensure respect for the values underlying respectively such programmes and the right to bring antitrust damages actions.

The proposed directive is clearly inspired by a more conservative approach. Even if a piece of legislation, aimed at codifying an entire sector, can at first glance easily appear more rigid than the interventions of the CJEU, which are by definition tailored on specific cases, a potential clash cannot be totally excluded. Apart the different spirit – which one may find more open to private enforcement in the case-law, and more conservative in the directive – the central question as regards access to leniency

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<sup>68</sup> Article 7 establishes that documents of the first category can never be used in action for damages, while those in the second category can be used only after 'a competition authority has closed its proceedings or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation 1/2003'. These documents, if obtained by a person in exercise of rights of defence (Article 27 of Regulation No 1/2003), accessing to the file of a NCA, 'can only be used in an action for damages by that person or by the natural or legal person that succeeded in his rights, including the person that acquired his claim' (Article 7, par. 3).

<sup>69</sup> It is clear, on the other hand, that the Court could have been called to assess the validity of a piece of legislation also after this had been adopted and, in principle, the exigencies stemming from primary law – which could have led to invalidity of secondary law also in this hypothesis – should be the same. However, this has not been the case and – whether this could be considered natural, because judges are sometimes faced to new cases whose solution implies fundamental policy choices, or not, as the Court has seemed sometimes to seize the opportunity of such new cases to set some basic policy objectives (see *supra*, fn 22) – private enforcement has thus come to life and has been first shaped in the EU legal order through judicial activity.

documents will regard the interpretation of the *Donau Chemie* judgement: in so far as it has to be considered as setting rules which are per se necessary to implement primary law, the directive cannot of course provide different solutions. Otherwise, it should be considered that the EU legislator is still free to adopt on this point other policy options, different from the stance taken by the Court.

It is difficult to predict the attitude of the Court, so I would just come back to the different models favoured by the Court and the Commission: it seems clear that the Court finds to be essential an assessment on a case by case basis of the reasons brought by the applicants and the famous ‘weighing up’, which are both evidently judicial activities. Is it possible that a predetermination of accessible documents by category, with less room for manoeuvre given to the judge, meets the requirements set by the Court? Apart from the kind of documents, the phase of the proceeding considered, etc., the two models appears to be reconcilable only to the extent that the narrowing of the judge’s room does not preclude him to carry out the evaluation the Court has asked in *Donau Chemie*. While Article 5 appears to take into account this need, the categorisation of documents, as it is shaped in the proposal, seems to be effectively too rigid.

As a last point regarding the proposed directive,<sup>70</sup> I would mention the new national *Masterfoods* rule (Article 10) according to which also national final decisions (in addition to those adopted by the Commission) finding an infringement of competition law are binding for national courts in litigations regarding compensation of loss. This provision clearly intends to strengthen the legal framework of private enforcement at the national level: all possible claims against the legality of the administrative action of the NCA and of the merit of the decision are to be brought in a segment constituted by the proceedings for the adoption of the act and by the legality review to be carried out by the competent Courts. Once the decision has become final, legal actions would be possible for the assessment of the existence of the right to obtain compensation of damages only (and of other elements required for the grant of compensation, like the existence of a causal link; calling into question the decision finding the infringement itself would not be possible in this second phase).

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<sup>70</sup> As to the other main issues dealt with by the proposal, I would recall some rules on limitation periods (Article 10) and on joint and several liability (Article 11), which contribute to clarify the legal framework governing antitrust damages actions. However, protection of undertakings having obtained immunity is always strong: see Article 11(2). The Commission has tried to strike a reasonably fair balance in the provisions on passing-on defence (Article 12), indirect purchasers (Article 13), loss of profits and infringement at supply level (Article 14), and action for damages by claimants from different level of the supply chain (Article 15, where consistency between proceedings on different claims brought – one of which might have been already decided by a judgment – is sought). Article 16 establishes some rules on quantification of harm (and a separate act of the package has been dedicated to this delicate issue); see also: Oxea and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos, Quantifying antitrust damages: towards non-binding guidance for courts: study prepared for the European Commission, [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD8010184](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD8010184). Finally, Articles 17 and 18 favour consensual dispute resolution.

## 5.2. The Recommendation on collective redress mechanisms

The Commission has adopted a rather conservative approach in its instruments on collective redress too.<sup>71</sup> During the debate preceding the publication of the recommendation, doubts had been raised by the legal doctrine on various issues. In particular, some of these doubts regarded representative actions, as they are not immune from the principal-agent problem (conflict of interests between the consumer association and the represented consumers), and the opt-in solution, which is normally capable to grant only low rates of participation. On the other hand, it has to be considered that these choices were aimed at avoiding abusive litigation.<sup>72</sup>

The recommendation by the Commission envisages representative actions to be carried out by non-profit entities, certified in advance or on an *ad hoc* basis; public authorities might also carry out representative actions (Articles 4-7). The non-profit character of the entity and the direct relationship between its aims and the right deriving from EU law which should be protected (Article 4) should counterbalance the principal-agent problem.<sup>73</sup>

Furthermore, the right to disseminate information concerning the intention to bring a collective action, and its development, once it has been brought, should be granted to representative entities or public authorities (already involved or planning to bring such action) (Articles 10-12). This should favour participation in the action, as well as a faithful and correct performance of its tasks by the representative (private or public) entity.

In an endeavour to avoid abusive litigation, the 'loser pays principle' is established (Article 13) and the Recommendation tries to ensure that admissibility of collective actions is effectively and timely verified.<sup>74</sup> In addition, the provisions regarding funding of collective actions (Articles 14-16) can be regarded as guarantees against abusive litigation. A preliminary declaration on the origin of the funding is required by the claimant party. Third party funds can be used, but the proceeding can be stayed should they prove to be insufficient or in case the existence of a conflict of interest between such party and the claimant arise. Furthermore, to avoid an inappropriate use or intervention in the action of the third funding party, the latter cannot influence procedural decisions of the claimant party, or provide financing for actions against one of its competitors, or on whom it is dependant; excessive interest on the funds provided are prohibited, too. Finally, the Commission is concerned with potentially

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<sup>71</sup> See *supra*, Background and Preliminary Remarks.

<sup>72</sup> See A. Andreangeli, 'Collective redress in EU competition law : an open question with many possible solutions', *World competition : law and economics review*, 2012, 35(3), 529; R. Money-Kyrle and C. Hodges, 'European Collective Action: Towards Coherence?', *Maastricht Journal of European and Comparative Law*, 2012, 477; R. Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem', *Maastricht Journal of European and Comparative Law*, 2013, 12.

<sup>73</sup> These conditions, together with the sufficiency of the financial resources, constitute requirements which are to be always respected, otherwise Member States should deprive the entity of the status granting it to bring the representative action.

<sup>74</sup> In particular, the competent courts should have the power to verify it *ex officio* (Articles 8-9).

dangerous incentives to litigation and therefore contingency fees are not permitted; in collective redress cases they should only be used with a specific regulation ‘taking into account in particular the right to full compensation of the members of the claimant party’ (Article 30).<sup>75</sup>

The damages suffered can be dispersed amongst a wide group of individuals (e.g. consumers), hence it is difficult to obtain the consent of each one – who might have carried a very little share of the burden related to the anticompetitive behaviour in question – to enter the litigation. In its recommendation the Commission has nevertheless chosen the opt-in solution (Articles 21-24) and ‘[a]ny exception to this principle, by law or by court order, should be duly justified by reasons of sound administration of justice’ (Article 21). The Commission has thus paid homage to a well-established tradition in the European legal systems, according to which no judicial action can be started without the consent of the legal subject on behalf of which it is brought.

It has to be underlined that Member States are invited to prohibit overcompensation, and in particular punitive damages (Article 31). Therefore, in private relationships damages should remain compensatory in nature, as, according to the Commission, it is for public enforcers to ‘punish’, or impose fines. The central role of public enforcers is also preserved by the provision which prescribes that in fields where they are entrusted with the power to ascertain violations of EU law, private collective actions should start only ‘after any proceedings of the public authority, which were launched before the commencement of the private action, have been concluded definitely’; moreover, ‘[i]f the proceedings of the public authority are launched after the commencement of the collective redress action, the court should avoid giving a decision which would conflict with a decision contemplated by the public authority. To that end, the court may stay the collective redress action until the proceedings of the public authority have been concluded’ (Article 33).<sup>76</sup>

The recommendation is thus shaped to be the ideal companion of the proposed directive, the same basic principles lying at the root of the two legal instruments. As to the choice to resorting to a soft law instrument for collective redress, one has to consider that the Commission has probably conceived the Recommendation as an experimental instrument. Besides, harmonisation of different procedural systems may cause plenty of problems.<sup>77</sup> Hence, the Commission has delivered a soft law instrument, but at the same time it has presented the idea of a possible legislative

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<sup>75</sup> The Recommendation covers both injunctive and compensatory collective redress. Articles 19-20 are dedicated to the former, while Articles 21-34 regard the latter. As to funding, Article 32 establishes a particular rule regarding compensatory collective redress; it reads as follows: ‘The Member States should ensure, that, in addition to the general principles of funding, for cases of private third party funding of compensatory collective redress, it is prohibited to base remuneration given to or interest charged by the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties’.

<sup>76</sup> Furthermore, in follow-on actions, other possible time preclusions before the definitive conclusion of the proceedings by public authority should be avoided (Article 34).

<sup>77</sup> R. Money-Kyrle and C. Hodges, ‘European Collective Action: Towards Coherence?’, 477 ff.

intervention after the evaluation of the Recommendation, to be carried out four years after publication (recital 26 and Article 41).

All in all, the package seems to be aimed at inserting tools for compensation of damages suffered as a result of anticompetitive behaviours and for collective redress in the context of the current legal framework, still based, as already observed,<sup>78</sup> on the ordoliberal doctrine. This means that it will be preserved a framework in which public enforcement plays a major role and within which the Commission, in particular, still holds its crucial position.

It is true that the current state of evolution of EU law has to be taken into consideration and it would not be easy (and it might be probably even considered irrational) to overturn the basics of the EU legal order in order to achieve a single, although important, set of policy objectives. It is probably more rational, at least in the short-medium run, to try to find the most appropriate ‘mix of public and private enforcement’.<sup>79</sup>

## 6. CONCLUDING REMARKS

As stated in the introduction, the issues addressed in this paper need to be set in the context of two fundamental *evolutionary lines* of EU law: the alternate emergence of the two paradigms of public and private enforcement of competition law – with public enforcement remaining central in the EU –, and the (ever-)growing influence of EU law on national procedural rules. As to this second evolutionary line, it is clear that, in the strand of case-law analysed in this paper, it has been established – although indirectly – what kind of remedy national legal orders have to envisage for alleged damaged individuals and its essential features.

The starting point is the legal personality of individuals under EU law and the judicial protection of their rights, in an area like private enforcement of competition law where, *to the extent possible*, the American example should be followed.<sup>80</sup>

On a more general plane, it could be considered that with the *Crehan* judgment and the following ones, the design started with *Francovich* has been completed, or at least that a new, maybe also less intrusive (for national legal orders), phase for its realisation has started. As anticipated in the introduction, the judgments analysed in this paper are

<sup>78</sup> See *supra*, Background and Preliminary Remarks.

<sup>79</sup> Moreover, the role of public enforcers could be never completely replaced: according to R. Van den Bergh, ‘Private Enforcement of European Competition Law and the Persisting Collective Action Problem’, *cit.*, 13 ff. Public authorities possess information advantages; furthermore, welfare losses caused by cartels can be better internalized with fines, rather than damages actions.

<sup>80</sup> This is clear from the judgments analysed. It can be also confirmed by the sources of inspiration of the Court of Justice: in *Crehan*, the first judgments cited are, in order of appearance: Supreme Court of the United States of America: *Perma Life Mufflers Inc. v International Parts Corp.* 392 U.S. 134 (1968), where the right to claim damages of the economically weaker party to an anticompetitive agreement has been established in US competition law; *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Case 26/62) [1963] E.C.R. 1; *Flaminio Costa v E.N.E.L.* (Case 6/64) [1964] E.C.R. 585 (see paras 13 and 19 of *Crehan*).

starting to define the essential features of the remedy to be used where an infringement of EU competition law has been committed by a private party (which is the most common case in competition law). As individuals enjoy the status of legal subjects under EU law, and as Article 101 TFUE produces direct effects, it can be considered natural that the subjects suffering damages for an infringement of that provision are entitled to bring an action for compensation. It is also natural that, in the development of EU law, the right to claim compensation from Member States (subjects already in classical international law) has been established before the right to bring antitrust damages actions.<sup>81</sup>

For what concerns the legal mechanism used by the Court to intervene, the approach in *Crehan* and *Francoovich* is different, at least to a certain extent. While in *Francoovich* the Court stated that EU (EC) law requires national legal orders to envisage a particular remedy, in *Crehan* this has been said indirectly, *rectius*, incidentally, as we have seen, because this point was a logical premise to be established in order to answer to the national judge's question. The result might seem not very different: as we have noted, no real doubt can be raised on the fact that the Court considers actions for damages claims as something required by EU law. Their *necessary shape* derives from the need to fully enforce EU competition law and this leads to impose some limits on the application of national procedural rules.

On top of that, it has to be borne in mind that actions to claim compensation for damages suffered as a result of anticompetitive behaviours were already existent in the legal orders of many Member States (like the UK, the State of the judge who referred the preliminary question to the CJEU in *Crehan*), therefore the innovation brought by the Court in *Crehan* was probably less revolutionary than the introduction of the *Francoovich* remedy.

Moreover, in both strands of case-law the concept of *sanction* in EU law is at stake, too: thanks to *Francoovich*,<sup>82</sup> Member States are not only subject to the control of the Commission through infringement procedures, but also to damages actions by alleged damaged individuals. As far as antitrust damages actions are concerned, the Court has always stressed, already in *Crehan*, that the aim pursued is effective competition law enforcement, which is evidently not only in the interest of the claimant who can obtain compensation of damages. In addition to their compensatory character, these actions are clearly also intended to strengthen the dissuasive effect of public enforcement.

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<sup>81</sup> For a discussion on the relationships between the judgments in *Francoovich* and *Crehan* in the context of the evolution of the case-law of the Court of Justice, see: S. Drake, 'Scope of Courage and the Principle of "individual liability" for damages: further development of the principle of effective judicial protection by the Court of Justice', cit., 845 ff. The author notes, amongst other things, that the Court in *Crehan* does not rely on the duty of loyal cooperation (see now Article 4, par. 3 TEU) or on the inheritance of the right to damages in the system of the founding Treaties, as it did in *Francoovich*. This can be probably explained by the fact that in the latter the Court needed an additional legal base to impose a *new sanction* on Member States (other than those explicitly envisaged by the founding Treaties). Where vertical relationships (individuals-Member States) are involved, the Court has to set the whole reasoning in the framework of the rights conferred to individuals *vis-à-vis* Member States and of the duties of the latter *vis-à-vis*, on the one hand, individuals and, on the other hand, the EU.

<sup>82</sup> In addition to the judgments recalled in fn 80 above, *Francoovich*, cit. is cited in para 19 of *Crehan*.

The proposals from the Commission can make a contribution to the establishment of a clearer legal framework. Nevertheless, the potential of private enforcement cannot be considered confined to the future choices of the legislator, as the CJEU seems to have (especially recently) adopted a more innovative attitude. In particular, a new equilibrium between damages claims and leniency programmes seems to have been struck in the latest case-law (*Donau Chemie* and also *Schenker*), so that undertakings seeking immunity will clearly have to face the risk of being sued by alleged damaged individuals.

Although the US model remains very different from the one conceived by the Commission and substantially not easily reproducible in the foreseeable future in the EU context (for a variety of cultural and legal reasons), it seems that private enforcement will be and, thanks to the case-law of the CJEU, is already, based on a clearer and more favourable legal framework. Public enforcement remains essential per se, and it has to be stressed that its support to private enforcement is crucial, too: the new National *Masterfoods* rule laid down in Article 10 of the proposed directive can be taken as an example. Thus, although the general approach seems rather conservative, some elements of the Commission package clearly aim at integrating public and private enforcement. This is probably the best way forward and hopefully the draft directive will be amended further strengthening antitrust damages actions and favouring such an integration.