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

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

1. THE NEW MODERNISED SYSTEM OF EC COMPETITION LAW ENFORCEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

Regulation 1/2003¹⁰ and the new decentralised system of enforcement have raised high hopes of a most dramatic impact on the application of competition law by civil courts and on private antitrust enforcement, which is expected to grow from something meagre to a more complete and mature system.¹¹ National courts will no longer play a marginal role, but will soon become full players in enforcing the competition rules, although their role will complement that of public antitrust authorities, most notably the Commission. Indeed, the Commission considered that private antitrust enforcement, as part of effective decentralisation, was one of the three main objectives of the modernisation reforms.¹²

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

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

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

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

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

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

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

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

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

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

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

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

Enforcement Objectives

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The Complementarity between Public and Private Antitrust Enforcement

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

The advantages of private antitrust enforcement have long been stressed in the United States, where studies estimate its ratio to public antitrust suits at between 10 to 1 and 20 to 1.²⁷ The primary function of the private action is clearly compensatory. The victims of anti-competitive practices can only make up for their losses before a civil court and public enforcement cannot have any direct bearing there.²⁸ At the same time, however, private action, apart from its compensatory function, furthers the overall deterrent effect of the law. Thus, economic agents themselves become instrumental in

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

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

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

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

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

implementing the regulatory policy on competition²⁹ and the general level of compliance with the law is raised.³⁰ Indeed, the private litigant in US antitrust has been considered a ‘private attorney-general’.³¹ A further advantage is that the weaknesses of public enforcement, most notably the ‘enforcement gap’ generated by the perceived inability of public enforcement to deal with all attention-worthy cases, are counter-balanced.³²

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

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

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

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

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

³³ *BRT v SABAM*, op cit, n 6, para 16.

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

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

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

The Commission recently embarked upon an ambitious project to further private antitrust enforcement in Europe. In this task it has received the full support of the European Court of Justice, which in 2001 delivered a landmark ruling in *Courage v Crehan* that set the basis for a system of individual civil liability for breach of the EC competition rules.³⁷ According to former Commissioner Monti, in a system combining private and public enforcement, victims of anti-competitive practices, including consumers, must have the opportunity to avail themselves of effective remedies in the form of decentralised private enforcement, so as to protect their rights and obtain compensatory damages for losses suffered.³⁸ His successor, Commissioner Kroes, pursued the project enthusiastically, and this led to the publication of a Green Paper in December 2005.³⁹

c. The Relevance of the Goals of EC Competition Law

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁵ See Canivet, *op cit*, n 29, p 24.

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

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

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

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

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

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

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

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

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

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

⁵⁰ *Courage*, *op cit*, n 37, para 27.

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

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

3. THE INDEPENDENCE OF PRIVATE ANTITRUST ENFORCEMENT

a. Independence as a Principle

Notwithstanding their substantive complementarity, private and public enforcement remain institutionally independent of each other. The independence of the two models means that in principle there is no hierarchical relationship as between the former and the latter, or between the public authority and the 'private attorney-general'. Introducing a rule of primacy would be problematic because of the principles of separation of powers⁵³ and judicial independence and also because it would undermine the role of courts as enforcers of equal standing.⁵⁴ The fact that the Court of Justice appears to have entrusted the Commission with a primacy over national proceedings and courts does not contradict our analysis here.⁵⁵ This 'primacy' is not one of the Commission, as *competition authority*, over *civil courts*, but rather of the Commission, as *supranational Community organ*, over *national courts*.⁵⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁴ Green Paper, Question C, Option 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statements”, i.e. of statements submitted to the Commission in the context of a leniency application. The Commission has viewed this as a serious risk for the effectiveness of its leniency programme and has tried to assuage the fears of leniency applicants by giving them the possibility to make oral statements.⁷⁷ The Commission’s current practice is that oral statements made by leniency applicants are routinely recorded by the Commission,⁷⁸ transcribed and signed by leniency applicants.⁷⁹ The Commission has very recently published a draft of an amended Leniency Notice⁸⁰ in order to formalise this practice, which is also followed in the context of certain national leniency programmes.⁸¹

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

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

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

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

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

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

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

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

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

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

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

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

⁸³ Option 30 of the Green Paper.

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

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

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

Indeed, prominent Commission officials argue that *Masterfoods* and the corresponding provision of Article 16 of Regulation 1/2003 do not make national courts subject to the Commission's authority, but rather to that of the Court of Justice, which through the intermediary of Article 234 EC can review the Community acts in question in an authentic way in the Community.⁸⁶ This correct approach relies on the fact that the Court of Justice did not hold in *Masterfoods* that national courts must always consider themselves bound by Commission decisions. Thus the Court held that when a Commission decision has been attacked before the Community Courts, a national court is not bound by that decision⁸⁷ but may decide to stay proceedings and await the outcome, 'unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted'. In other words, the ECJ did acknowledge that at the very end of the day, national courts cannot, strictly speaking, be bound directly by a Commission decision,⁸⁸ but only indirectly through the Court of Justice's intervention, to which they can always have access by means of the preliminary reference procedure. Indeed, as a Community judge stresses extrajudicially,

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

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

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

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

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

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

appeal and gives preliminary rulings on the interpretation and validity of Community law.⁹⁰

This line of argument also means that decisions by national competition authorities cannot, as a matter of existing Community law, bind national civil courts, even when those authorities act in the framework of Community competition law under Regulation 1/2003.⁹¹ First of all, these authorities cannot be considered as ‘Community organs’ under Article 10 EC.⁹² Article 10 EC cannot cover the cooperation between national competition authorities and national courts, although it might be tempting at first sight to argue thus in order to establish a ‘horizontal’ duty of cooperation between competition authorities and courts of different Member States.⁹³ Arguments in favour of such an implicit duty seem to confuse the theory of the *dédoublement fonctionnel*⁹⁴ with the ambit of Article 10 EC, which uses an organic criterion in order to arrive at a functionalist result. In other words, it would not make sense to use Article 10 EC in order to impose duties on national courts or authorities vis-à-vis other national courts or authorities. This is because both the national competition authority and the national court are indeed respectively, ‘indirect Community administration and judge’, so Article 10 EC could not resolve disputes as between two organs at the same level of the Community supranational structure (both in this case being organically national but functionally Community organs). Besides, Article 16(1) of the Regulation does not mention national competition authorities as the beneficiaries of the primacy rule and such authorities are not subject to the review of the European Courts, so the argument of the primacy of the European Court of Justice referred to above, is not transposable to this case, since a national court could never request a preliminary ruling from Luxembourg on the validity of a national act.⁹⁵

⁹⁰ See Paulis and Gauer, *op cit*, n 56, p 69.

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

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

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

⁹⁴ See *supra* n 4.

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

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