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Editorial

After the Green Paper: The Third Devolution in European Competition Law and Private Enforcement

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

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

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

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[1] Commission Notice on Co-operation between the Commission and the National Courts, OJ 1993, C39/06.

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

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

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

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

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

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

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

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

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

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

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

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

These articles can help to shape these discussions.