THE RELATIONSHIP BETWEEN THE LENIENCY PROGRAMME AND PRIVATE ACTIONS FOR DAMAGES AT THE EU LEVEL

Alberto Saavedra[1]

Abstract: *The aim of this article is to assess the complementarity and interrelationship between public and private enforcement, on the one hand, and to discuss the several policy options put forward by the Commission that aim to find a proper balance between the leniency programme and actions for damages, on the other hand. Our thesis is that the appropriate balance is obtained by limiting the incentives in the context of private enforcement only to the successful immunity applicant as a price for his contribution in the uncovering of a cartel and the need to preserve the attractiveness of the leniency programme. The incentives can be translated in terms of non-disclosure of evidence provided to the competition authority and limited liability. By contrast, all other cartelists and leniency applicants which only benefit from a fine reduction shall not have any rewards when facing civil claims. The central role of the immunity applicant will provide the key to approach some of the problems that arise from the interrelation between leniency applications and damages claims, such as (i) the question on whether the enhancement of private actions as such will weaken the leniency mechanism and (ii) how a certain degree of protection can be guaranteed to the leniency applicant, in particular by discussing the various policies that limit the scope of the civil liability of the successful leniency applicant proposed by the Commission.*

---

1 Lawyer. LL.M – Master of Laws, University College London.

I am grateful to the tutor of my LL.M dissertation Florian Wagner-von-Papp, Assimakis Komninos, Dominik Eisenhut, Joaquim Vieira Peres, Inês Gouveia, my other colleagues at my law firm and the Editor for their insightful comments.

All views expressed in this paper are strictly personal and should not be construed as reflecting the opinion of any of the above mentioned persons. Comments are welcome at albertosaav@gmail.com.

I. BACKGROUND

Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU')[2] (ex-Articles 81 and 82 of the Treaty Establishing the European Community ('EC')) can be enforced, on the one hand, by the national competition authorities ('NCA's') and the European Commission (public enforcement) and, on the other hand, by private plaintiffs[3] seeking redress for damages inflicted on them before national courts (private enforcement).[4] By private enforcement we mean actions for damages. Such actions for damages can be brought either following a finding of infringement by a public authority ('follow-on actions') or by filing civil claims independent from public enforcement ('stand-alone actions').[5] Unless otherwise stated, all other forms of private enforcement such as actions for nullity and injunctive relief are not considered here. In any case, because the topic of the present paper is the interplay between the leniency mechanism and actions for damages, we shall only analyse infringements that fall within the scope of the leniency mechanism, i.e., secret cartels will be considered.[6]

Contrary to the United States, the current climate of enforcement of competition law in Europe has been mainly dominated by public enforcement.[7] Several Competition Commissioners long have argued in favour of the development of an efficient system of actions for damages as an important goal of competition policy.[8] Damages actions aim at compensating those who suffer from restrictive practices and simultaneously increase the deterrent effect.[9]

---

2 OJ (Oficial Journal of the European Communities) C115, 9.5.2008.

3 Public bodies can equally bring actions for damages. See Commission Decision of 21 February 2007 in Case COMP/38.823 *Elevators and escalators*, press release IP/07/209.

4 Generally on private enforcement, Jones, 1999; Ehlermann & Atanasiu, 2003; Komninos, 2008c; Bellamy & Child, 2008: paras.14.042-14.142; Whish, 2009: 290-322; Organisation for Economic Co-operation and Development ('OECD') Report on Private Remedies, DAF/COMP(2006)34, January 2008, available at http://www.oecd.org/competition (consulted on January 02, 2011).

5 See Komninos, 2008c: 6-7.

6 For a definition of hard core cartel, OECD Publication C (98) 35/FINAL, of May 1998, available at http://www.oecd.org/competition (consulted on January 02, 2011).

7 The ratio of private to public enforcement in the United States is explained in Ginsburg & Brannon, 2005: 29.

8 *V.g.*, Monti, 2004; Kroes, 2005b; Almunia, 2010a.

9 Commission XXXVth Report on Competition Policy – 2005 (Brussels/Luxembourg, 2006), para.31; *vide* Nebbia, 2008: 23; Wils, 2009: 5-15.

A step in the direction of a more efficient private enforcement has been achieved through Regulation (EC) No 1/2003, according to which national courts are empowered to apply not only Articles 101 (1) and 102 TFEU (ex-Articles 81 (1) and 82 EC), which have direct applicability by virtue of the case law of the European courts, but also Article 101 (3) (ex-Article 81 (3) EC).[10]

In fact, recital 7 states that national courts play a crucial role in applying the European Union ('EU') competition rules and that when deciding private disputes, they protect the rights of an individual, '*for example by awarding damages to the victims of infringements*'. However, the Modernization Regulation did not introduce a harmonisation of national remedies. This minimalist approach implied that the European Court of Justice ('ECJ') was the sole entity responsible for safeguarding a certain degree of harmonization of the substantive and procedural rules of the Member States.[11]

In the meantime, Advocate-General ('AG') Van Gerven in his Opinion in *Banks* convincingly suggested that the infringement of EU competition rules conferred the right to obtain reparation in respect of loss and damage.[12] Nonetheless, the ECJ did not address this crucial issue until 2001 in *Courage*:[13]

> *The full effectiveness of Article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81 (1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition*.[14]

Later, in *Manfredi*, the Court shed light on the constitutive requirements of that right to redress:

---

10 Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, last amended by Council Regulation No. 1419/2006 [2006] OJ L269. See also Ehlermann, 2000: 537; Venit, 2003: 545; Jones, 2003: 96-108; Correia, 2008: 1747; Moniz & Fonseca, 2008.

11 Komninos, 2008c: 164.

12 Case C-128/92, *HJ Banks & Co Ltd v British Coal Corporation*, (1994) ECR (European Court Reports) I-833, AG Opinion, paras.37ff.

13 On this judgment, see Komninos, 2002: 447; Albors-Llorens, 2002: 38; Woods, Sinclair & Ashton, 2004: 31; Reich, 2005: 35; Drake, 2006: 841.

14 Case C-453/99 *Courage Ltd v Bernard Crehan*, (2001) ECR I-6297, para. 26; Korah, 2006: 311-315.

> *It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.*[15]

Even though the ECJ has clarified in both *Courage* and *Manfredi* the existence of a right to recover losses as a result of an antitrust infringement, the number of private claims has not substantially increased. An external study was requested by the Commission to identify the obstacles for private actions for breach of European antitrust law (the '*Ashurst Report*').[16] *Brevitatis causa*, it suggests that there is a connection between the low number of damage actions and the 'astonishing diversity' of solutions adopted at the national level. In response to these results, in December 2005, the Commission published a Green Paper on damages actions for breach of the EC Treaty antitrust rules ('GP'), with the declared aim to foster the dialogue on private enforcement and to remove the obstacles for plaintiffs who wish to pursue damages actions before national courts.[17] Following the public consultation on the GP, the Commission published, in April 2008, a White Paper on Damages ('WP'),[18] accompanied by a Commission Staff Working Paper ('SWP to the WP') and an Impact Assessment Report ('IAR').[19] Henceforth, the WP may have the effect of enacting EU law measures.

Although not yet available in the public domain, the European Commission has issued a Proposal for a Council Directive on rules governing actions for damages for infringements of Articles 101 and 102 TFEU (ex-Articles 81 and 82 EC) ('Draft Directive').[20] This document, leaked in the typical Commission manner, follows most of the recommendations set out in the

---

15 Joined Cases C-295/04 to C-298/04, *Vicenzo Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al*, (2006) ECR I–6619, para.61.

16 Waelbroeck, Slater & Even-Shoshan, 2004.

17 Green Paper – Damages Actions for Breach of the EC Antitrust Rules, Commission of the European Communities, COM (2005) 672 final and Commission Staff Working Paper to the Green Paper ('SWP to the GP'), SEC (2005) 1732. See also Diemer, 2006: 309; De Smijter, Stropp & Woods, 2006: 1; Völcker, 2006: 1409; Pheasant, 2006: 365; Green, 2007: 15, at 18-20; Eilmansberger, 2007: 431.

18 COM (2008) 165 final, available at COM (2008) 165 final, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html. See also Report on Competition Policy 2008, Brussels, 23.7.2009, COM(2009) 374 final, paras.8, 15-18.

19 SEC(2008) 404, available at http://ec.europa.eu/comm/competition/antitrust/ actionsdamages/documents.html.

20 Reher & Hempel, 2009a; Saavedra, 2009.

White Paper. The Commission has acknowledged the absence of private enforcement in most of the Member States and the harmful costs to society of antitrust infringements. Therefore, the aim of the future Directive is to ensure 'that all victims are in a position to obtain full compensation for damage caused by an infringement of the EC competition rules'. The Draft Directive contemplates, amongst others, the following suggestions: collective redress mechanisms through group and representative actions, rules on disclosure of evidence held by the opposing party or by a third party ordered by a judge, passing-on of overcharges by the defendant, conferring a binding effect on final infringement decisions by national competition authorities or by a review court, and rules on fault and limitation periods. This will change dramatically the landscape of procedural rules on actions for damages in the EU by removing obstacles to a more efficient system of damages actions.

II. INTRODUCTION

The Commission, in the 2006 Leniency Notice, clearly states that the circumstance of granting a fine immunity or reduction does not preclude leniency applicants from actions for damages before national courts for having participated in illegal agreements under Article 101 (1) TFEU (ex-Article 81 (1) EC).[21] The Commission is aware of the problems that might result from the interplay between the leniency mechanism and private enforcement and has considered several policy options:

> *It appears appropriate to maintain the attractiveness of leniency programmes in Europe, on the one hand, by ensuring an adequate level of protection of leniency applications in a future context of an enhanced level of actions for damages, and, on the other hand, to further reflect on the possibility to further incentivise potential immunity applicants.*[22]

The aim of this paper is precisely to assess the complementarity and interrelationship between public and private enforcement, on the one hand, and to discuss the several policy options put forward by the Commission that intend to find the proper balance between the leniency programme and actions for damages, on the other hand. Our thesis is that the appropriate balance

21 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17, para.39.

22 SWP to the WP, as note 19 above, para. 286.

is obtained by limiting the incentives in the context of private enforcement only to the successful immunity applicant as a price for his contribution in the uncovering of the cartel and the need to preserve the attractiveness of the leniency programme. By contrast, all other cartelists and leniency applicants which only benefited from a fine reduction shall not have any rewards when facing civil claims.

If an appropriate trade-off between the leniency mechanism and actions for damages is not found, a decrease of both public and private enforcement might possibly occur. For instance, a reduction in leniency applications could lead to a diminishment of investigation proceedings and ultimately infringement decisions. As a result, a reduction in public enforcement and in the uncovering of cartels would imply a decrease in private enforcement, since the Commission's infringement decisions can prompt victims to bring follow-on actions. The corollary of this is that the Commission is eager to protect the leniency mechanism, which represents at least 70% of all cartel investigations.[23]

Unless otherwise referred to, this paper does not seek to examine the national legal systems.[24] Hence, national rules on access to documents, discovery and burden of proof or the leniency programmes of the different Member States are not covered in the present discussion.

In terms of the structure of this paper, after the introduction, Chapter III will consider the question of whether private and public enforcement remain institutionally independent from each other or whether there is a hierarchical relationship between the two referred models. Chapter IV explains the effects of a leniency application for potential claimants, i.e., the awareness of the cartel infringement, the establishment of facts during the administrative procedure, access to evidence by national courts and plaintiffs, and the binding effect of the decisions of public authorities in follow-on civil proceedings. In Chapter V we intend to approach some of the problems that arise from the interrelation between leniency applications and damages claims, such as (i) the question on whether the enhancement of private actions as such will weaken the leniency mechanism and (ii) how a certain degree of protection can be guaranteed to the leniency applicant, in

23 Venit, 2003: 552, fn. 26.

24 For further developments on the relevant national systems, see Möllers & Heinemann, 2007: 387-663.

particular by discussing the various policies that limit the scope of the civil liability of the successful leniency applicant proposed by the Commission. The conclusion will summarize the most important issues raised by the paper and suggest that the optimal relation between actions for damages and the leniency programme should be focused on the pivotal role of the successful immunity applicant.

III. THE COMPLEMENTARITY AND INDEPENDENCE OF PUBLIC AND PRIVATE ENFORCEMENT

It is appropriate to draw a distinction between public or administrative and private antitrust enforcement. Whereas the former is characterized by a vertical dispute between a public authority and the individual, the latter manifests itself as a horizontal dispute between litigants in the context of a civil dispute, in which the EC competition law provides the reasoning for either civil claims or counterclaims.[25]

Some authors, such as Harding (1993)[26] and Wils (2003),[27] advocate that public enforcement is superior to private enforcement, since the latter does not contribute to the effectiveness of the antitrust enforcement. The essence of their argument is that, contrary to the US law where private enforcement compensates the absence of public enforcement, in Europe there are specialized agencies to enforce the law and therefore consumers should not play a similar role.[28] Following *Courage* this view is clearly outdated and most commentators agree that the antitrust enforcement model should comprise elements of both private and public regimes.[29] Komninos (2008) further emphasizes that the public and private enforcement of EC antitrust law 'remain institutionally independent from each other', in the sense that there is no primacy between them.[30]

Fundamentally, we agree with this commentator, in particular as regards stand-alone civil antitrust claims. However, the problem with the principle

25 See para.3 of the SWP to the GP, as note 17 above.

26 V.g. Harding, 1993: 116.

27 Wils, 2003: 1-16.

28 See Micklitz, 2007: 252.

29 Jones, 2004: 13; Giudici, 2004: 64; Riley, 2005: 381-382; Epstein, 2008: 36-45; Brkan, 2005: 484--485; Komninos 2008c: 8-11ff..

30 See Komninos, 2008c: 15-17.

of independence taken to its limits is that it is likely to create confusion by suggesting that a system of enforcement may be created by not considering the contribution of both private and public enforcement elements.[31] To illustrate this point, the US system relies exclusively on private enforcement, whereas in Europe a model of public authority prevails.[32] Studies estimate a ratio of private-public antitrust actions at between ten to one and twenty to one in the US.[33] Accordingly, the independence of both models enables an interpretation that there is no complementarity or that one of the enforcement systems can live without the other.[34] We thus prefer a doctrine of complementarity, where both factors must be combined and are indispensable for the attainment of an effective antitrust regime.[35]

The complementarity can be seen, for instance, in the interaction between the leniency programme and the subsequent adoption of prohibition decisions (linked to public enforcement), on the one hand, and follow-on actions for damages (related to private enforcement), on the other hand. In this case there is reliance by private plaintiffs on the public authority's condemnatory decision in order to prove and establish certain facts in a civil action.[36] This mutual interrelationship means that the introduction of changes in one model might have implications in the other. The key point to note is that the positive discrimination in relation to the immunity applicant in public enforcement procedures – which consists in a waiver from fines, as opposed to leniency applicants in general that only benefit from a certain reduction in their fines – should be transposed to the ambit of civil actions. Hence, only the immunity applicant will benefit from additional protection when facing civil claims. The rationale for awarding protection to the immunity applicant is the need to ensure the attractiveness, certainty and predictability of the leniency mechanism, whilst rewarding the firm that has contributed the most

31 See Wils, 2003: 1–16, which asserts that private enforcement should be discouraged as undesirable. Against, see Jones, 2004.

32 Ashurst Report, as note 16 above, 11, concludes that private actions in Europe are in a state of 'total underdevelopment'.

33 See Jones, 1999: 16, fn. 89.

34 For a survey of the general economic aspects surrounding the comparison between public and private enforcement, see Segal & Whinston, 2007: 306.

35 WP, as note 18 above, section 1.2, 3; Monti, 2003: 4.

36 See below chapter IV, section 3.

for piercing the cloak of secrecy in which cartels function. To summarize, the right balance between public and private enforcement consists in conferring more protection to the immunity applicant than to the other leniency applicants.

Finally, the complementarity doctrine can also been seen in the ECJ's case law:

> *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.*[37]

IV. CONSEQUENCES OF A LENIENCY APPLICATION FOR POTENTIAL PLAINTIFFS

In Europe the Leniency Notice applies to cartel agreements between undertakings in relation to practices such as price-fixing agreements, production or sales quotas, sharing markets, restricting imports or exports, and/or anti-competitive actions against other competitors.[38] The Commission grants immunity from fines to a cartelist, provided certain conditions are met.[39] *Inter alia*, the cartelist has to be the first company to reveal its participation in the cartel and to provide evidence that permits the Commission to either pursue a targeted inspection of the cartel in question or find an infringement of Article 101 (1) TFEU (ex-Article 81 (1) EC) concerning the alleged

37 *Courage*, as note 14 above, para. 27. In the same vein, *Manfredi*, as note 15 above, para. 91.

38 2006 Leniency Notice, as note 21 above and European Competition Network Model Leniency Programme, published September 2006, available at http://ec.europa.eu/competition/ ecn/model_leniency_en.pdf (consulted on January 02, 2011). See Report on leniency convergence published by the European Competition Network http://ec.europa.eu/competition/ecn/documents.html (consulted on January 02, 2011). Generally on leniency, Reynolds & Anderson, 2006: 82; Sandhu, 2007: 148; Little, 2007: 136; Suurnakki & Centella, 2007: 7; Korah, 2007: 472-473; Arbault & Sakkers , 2007: paras. 8.105-8.257; Wils, 2007a: 25; Schwab & Steinle, 2008: 523; Walsh, 2009: 14; Billiet, 2009: 14.

39 Differently, according to the settlement procedure, the party has to recognize their liability and to agree to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003, as note 10 above, in order to benefit from a reduction of 10% of the amount of the fine. See Regulation (EC) No 622/2008 amending Regulation No 773/2004, as regards the conduct of settlement procedures in cartel cases, [2008] OJ L171/3, and Commission Notice on the conduct of settlement procedures in cartel cases, [2008] OJ C167/1. See Wils, 2008: 335.

cartel.[40] This is in line with economic literature advocating that immunity granted to the first cartelist reporting before an investigation is launched may act as a deterrent by permitting an undertaking to expose the cartel and avoid paying potential fines.[41] Those companies that do not fulfil the requirements for immunity may still be eligible for a reduced fine, if evidence with added value is disclosed to the Commission.[42]

The leniency mechanism represents the principal source of intelligence and information regarding cartel activities. In the US only the first firm to come forward receives the amnesty, whereas in the EU the other fellow cartel members can receive a fine reduction. The certainty of result for the first whistleblower implies that even minor players in the cartel can come forward and benefit from immunity, the so called 'race to the courthouse effect'.[43] This creates a huge pressure on cartelists, as there is a fear of cheating and a climate of mistrust among them.[44] The immunity is justified, because the firm's collaboration in detecting the cartel has an 'intrinsic value' and contributes decisively 'to the opening of an investigation or to the finding of an infringement'.[45] A successful leniency programme entails the unveiling of cartels and that the competition authority has sufficient evidence to adopt infringement decisions and impose fines.[46]

We shall now consider *infra* the consequences of a leniency application for potential private claimants.

40 2006 Leniency Notice, as note 21 above, paras. 8-13.

41 Spagnolo, 2000; Rey, 2003: Ch. 3; Spagnolo, 2004; Harrington, 2008: 215.

42 2006 Leniency Notice, as note 21 above, paras. 23-26.

43 Hammond, 2004.

44 Dick, 1996: 241.

45 See 2002 Leniency Notice, Commission Notice on immunity from fines and reduction of fines in cartel cases, [2002] OJ C45/3, para. 6.

46 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, as note 10 above, 2-5; see also Wils, 2006: 183; Wils, 2007b: 197.

1. Awareness of the Cartel Infringement and the Establishment of the Facts during the Administrative Procedure

Some companies are induced to enter into a cartel by raising prices on a market, restricting output, sharing markets or bid-rigging.[47] Even the most conservative antitrust authors censure cartels:

> *The subject of cartels lies at the center of anti-trust policy. The law's oldest and, properly qualified, most valuable rule states it is illegal per se for competitors to agree to limit rivalry among themselves….Its contributions to consumer welfare over the decades have been enormous.*[48]

Cartels are 'cancers on the open market economy'[49] as they deny the doctrine of the free market economy and 'serve to restrict competition without producing any objective countervailing benefits'.[50] Consequently, it is commonly acknowledged that cartels should be deterred and heavily punished by means of administrative fines, actions for damages, criminal imprisonment, etc.[51] Between 2004 and 2010 the Commission imposed fines that amounted to more than €12 billion.[52] The record fines to date were imposed on cartelists in the car glass market. They amounted to a total of €1.3 billion.[53] The fine of €896 million imposed to Saint-Gobain, which had already been the addressee of two previous Commission decisions concerning antitrust infringements, was the largest ever imposed on a company.

One of the major enforcement problems of competition policy consists in identifying and punishing cartels.[54] Although the Commission has established a powerful policy of enforcing competition rules, it seems that there is not a

47 Generally on cartels, Harding & Joshua, 2003; Ehlermann & Atanasiu , 2006; Arbault and Sakkers, 2007: chapter 8; Bellamy and Child, 2008: chapter 5; Whish, 2009: 497-543.

48 Bork, 1978: 263.

49 Monti, 2000.

50 *Ibid*.

51 Wils, 2005: 117.

52 The precise figure is €12.135.425.332 (situation as of 8 December 2010). See http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

53 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685&format=HTML&aged=0&language=EN&guiLanguage=en (consulted on January 02, 2011). For a comment on this case see Monke, Piazza & Simon, 2009: 59.

54 Kroes, 2005a.

total abandonment of cartel practices as they are 'becoming more and more frequent'.[55] In fact, cartel members continue to collude underground, so that punishment is problematical.[56]

The leniency programme is a tool that benefits both the Commission and the potential claimant as it allows them to uncover a secret cartel.[57] The Commission acquires insider evidence of the cartel infringement, which in turn enables the establishment of the facts during the investigation and eases the burden of the plaintiff in proving his claim.[58]

2. Access to Evidence by National Courts and Plaintiffs

The '*Commission Notice on Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC*' (now articles 101 and 102 TFEU) clearly denies access to information voluntarily submitted by a leniency applicant, unless the leniency applicant consents.[59]

In our view, however, this policy should only apply to the immunity applicant in order not to endanger the accomplishment of the Commission's task of enforcing competition law, but not in relation to the remaining cartelists. A leniency application is an important source of information which can be very useful in supporting potential private claims. Access to the Commission's files can be effectuated either indirectly through Article 15 (1) of Regulation (EC) No 1/2003 which provides that national courts are entitled to obtain legal and economic information from the Commission or directly through Regulation (EC) No 1049/2001 (the so called 'Transparency Regulation') which legitimates requests for information from the main institutions of the EU, such as the Commission.[60]

It is submitted that the immunity applicant should be protected in terms of access to evidence. Accordingly, the evidence and any corporate statements

55 IAR, as note 19 above, para.32.

56 Cases C-204, 205, 211, 213, 217 and 219/00, P *Aalborg Portland A/S v Commission,* (2004) ECR I-123, paras. 54 to 57.

57 For a listing of the positive effects of leniency, see Wils, 2007a: 38-45.

58 Chapter IV, section 3.

59 OJ C101/54 [2004], par. 26.

60 Council 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 [2001] OJ L 145. See Curtin, 2000: 7; Heliskoski & Leino, 2006: 735; Adamski, 2009: 521.

provided to the European Commission by the immunity recipient shall not be revealed to private plaintiffs for the purpose of private actions in order to ensure the proper functioning of the leniency mechanism and respect for the principles of legal certainty and legitimate expectations. However, access to documents provided by the other leniency applicants should be left open as it does not have the negative effect of disincentivizing leniency applications as long as some mechanisms for guaranteeing the protection of confidential information are granted.

3. The Binding Effect of the Commission's Decision in Follow-on Civil Proceedings

Article 16 (1) of Regulation (EC) No 1/2003[61] repeats the *acquis communautaire* (*rectius*, *Masterfoods* ruling)[62] by stating that:

> *When national courts rule on agreements, decisions or practices under Article 81 (1) or Article 82 EC of the Treaty* (now Article 101 or Article 102 TFEU) *which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.*

This obligation upon the national courts relates to the operative part of the decision which '*must be construed in the light of the statement of the reasons upon which it is based*'.[63] In other words, in follow-on actions for damages, the claimants can rely on the Commission's decision as irrefutable proof that the undertaking has infringed competition rules. An analogous rule was recommended in the WP and in the Draft Directive for the NCA's decisions.[64] The latter should have a legally binding effect on all civil courts across Europe for which all appeal options have been exhausted or have been precluded by the expiration of time limits, or for judicial decisions that were an infringement.[65] The application of the rules pursuant to Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in

61 As note 10 above.

62 See Case C-344/98, *Masterfoods,* (2000) ECR I-11369, para. 52.

63 See Joined Cases 40/73 to 48/73 and others, *Suiker Unie,* (1975) ECR 1663, para. 123.

64 Draft Directive, as note 20 above and Section 2.3 of the 2008 WP, as note 18 above. Against, Komninos, 2007: 1387; Truli, 2009.

65 SWP to the WP, as note 19 above, paras. 134-162.

civil and commercial matters will establish the national courts' jurisdiction.[66] Currently, in some Member States, in follow-on actions, national courts are not allowed to depart from an earlier NCA decision.[67] The exposure of cartels by public authorities is likely to contribute to an increase in private antitrust action in the domestic courts.[68]

A further point that is worth mentioning is the impact administrative decisions can have on the leniency applicant when acting as a defendant in civil claims. Most of the Commission's decisions are based on leniency applications, which in turn lead to infringement decisions and the issuance of fines. Since the applicant that has benefited from full immunity is unlikely to appeal to the General Court whereas the remaining cartelists are likely to do so, it appears that there is a foreseeable risk that all victims of the infringement will rely on the Commission's decision in national court proceedings to sue the immunity applicant. In this case, however, the immunity applicant is entitled to request that the national court stay proceedings in the antitrust suit until the EU Courts have issued a decision on the case appealed by any of the other cartelists.

Despite the fact that EU law imposes on national courts the duty not to take decisions running counter to those already adopted by the Commission (the so called 'binding effect'), it is always possible for national courts to depart from a Commission's decision which has been appealed to the EU Courts.[69] Thus, if the immunity applicant is sued for damages in national proceedings, the national court may decide to stay proceedings pending a final ruling from the EU courts in relation to the cartel practices from the other co-infringers,

> *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 is warranted.* [70]

Notwithstanding the fact that the Commission's decisions are not final and binding until there is a confirmation by the Luxembourg courts, such

66 'Brussels I' Regulation, [2001] OJ L21/1.

67 *V.g.*, sections 18 and 20 of the UK Enterprise Act 2002, inserted as sections 47A and 58A into the UK Competition Act 1998, and section 33 (4) of the German Competition Act.

68 Riley, 2005: 378.

69 Komninos, 2007: 1394.

70 *Masterfoods*, as note 62 above, para. 57.

decisions may be taken into consideration by national courts as a persuasive document.[71] Furthermore, it is not clear that the national court will stay proceedings, because in some jurisdictions interim measures cannot be ordered *ex officio* or the judge may order that the action should proceed.[72] This means that in practice victims of antitrust infringements are more likely to sue the immunity applicant who rarely appeals the Commission's decision.[73] While the immunity applicant could in theory take legal action against his fellow co-infringers, there are a number of uncertainties surrounding the aforesaid procedure, such as time constraints, financial costs, risk of insolvency, etc.

As will be examined in the next chapter, to afford some degree of protection for the successful leniency applicant, the Commission opens to discussion the possibility of granting some advantages in the context of private damages to those undertakings which cooperated in the public procedure.

V. PROTECTION OF LENIENCY APPLICANTS IN FOLLOW-ON ACTIONS FOR DAMAGES

In theory, if immunity to damage claims could also be offered to the leniency applicant, the attractiveness of the leniency programme would be enhanced at the expense of follow-on actions. At the other end of the spectrum, if leniency applicants cannot benefit from immunity (or at least a leniency) from actions for damages, the prospect of actions for damages constitutes a negative factor to consider in the decision on whether to apply to the leniency programme in the first place.[74] This trade-off is solved in different ways in the US and at the EU level. As the US Supreme Court has synthesized, while

71 If the Commission's decision is ruled invalid by the EU courts following an appeal of the remaining tortfeasors, the national court, where the immunity applicant is facing an antitrust action, can 'regard that act as void for the purposes of a judgement it has to give'. See case 66/80, *SpA International Chemical Corporation v Amministrazione delle Finanze dello Stato*, (1981) ECR I-1191, para. 13.

72 This argument can be illustrated by the recent decision of the Chancellor in *National Grid Electricity Transmission Plc v ABB Ltd* [2009] EWHC (England and Wales High Court) 1326 (Ch); [2009] U.K.C.L.R. 838. Following an infringement decision of the Commission, National Grid filed damages proceedings against ABB, the immunity applicant implicated in the cartel related to the manufacture, sale and installation of Gas Insulated Switchgear ('GIS') and the design, manufacture, sale and installation of systems involving GIS. Most of the defendants have appealed to the Court of First Instance ("CFI"), but not ABB. The Chancellor rejected the defendants' submission to stay all further proceedings in the follow-on damages action until the EU Courts have issued a decision on the case. Rather, 'he ordered that the action should proceed as far as the close of pleadings, and gave a strong indication that it is likely directions as to disclosure should also occur before a stay is ordered', Holmes, 2010: 165.

73 Bulst, 2008: 88.

74 See Wils, 2007a: 57-58.

countries agree in relation to the illegality of certain types of behaviour (e.g., cartels), there is no international consensus about 'appropriate remedies'.[75]

In the United States, after the 2004 legislative reform, companies that benefited from immunity under the leniency programme[76] and that were considered in follow-on actions to have provided appropriate cooperation to the victims of antitrust infringements are only liable for single damages on the basis of their own share of the commerce related to the violation, whereas the other cartelists remain jointly and severally liable for treble damages.[77] Under the US system companies can be required to pay more than treble damages, as it allows the existence of simultaneous treble damages claims by indirect purchasers in some states, treble damages actions by direct purchasers and civil and criminal fines (the so called 'cluster bomb' effect).[78] Other authors opine that in the US damages neither amount to treble damages nor does it adequately deter antitrust infringements.[79]

Currently in Europe, a leniency applicant does not benefit from any reduction or immunity of liability in case of follow-on actions.[80] With the goal of identifying solutions that would retain the attractiveness of the leniency mechanism in a future scenario of more civil claims, the Commission has put forward three options that benefit the leniency applicant, namely: (*1*) the granting of a conditional rebate on any civil claim, (*2*) limiting the scope of the leniency applicant's liability and (*3*) the exclusion of disclosure of the leniency application and of corporate statements.[81] As regards (*3*), this point has already been examined in our analysis.[82] We will therefore solely scrutinize policy options (*1*) and (*2*).

---

75 *F Hoffman La Roche Ltd v Empagran SA*, 542 US 155 (2004) (03-724), 315 F.3d 338.

76 US Department of Justice ('DoJ'), Corporate Leniency Policy (10 August 1993), available at http://www.usdoj.gov/atr/ public/guidelines/0091.pdf (consulted on January 02, 2011). See also Frequently Asked Questions ('FAQ'), 19 November 2008, available at http://www.usdoj.gov/atr/ public/criminal/239583.htm (consulted on January 02, 2011).

77 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108–237, §§ 201–214, 118 Stat. 661 (22 June 2004), 15 U.S.C.

78 Posner, 2001: 925, at 935.

79 Lande, 2004: 329.

80 As note 21 above, para. 39 of Leniency Notice.

81 GP, as note 17 above, options 28-30 and WP, as note 18 above, section 2.9.

82 See above, chapter IV, section 2.

1. Rebate on Damages Claim

If there was an application of double damages in civil actions in the first place,[83] a rebate for the leniency applicant in the form of a de-doubling of damages would make sense.[84] It is clear that the GP's option is similar to the US system of treble damages. The leniency applicant would be liable for single damages, whereas the other cartel members would be jointly and severally liable for double damages. However, the Commission in its proposals tries to 'strike the right balance' between effective actions for damages and unnecessary litigation.[85] For this reason it has rejected both in the WP and in the Draft Directive the option of double damages following the public consultation.[86] Hence, in the absence of double damages, any rebate granted to leniency applicants would be paid by the remaining cartelists, jointly and severally liable for the whole damage caused. This is a consequence of the observance of the principle of complete compensation of the victims. The Commission has not retained this option,[87] as it has not been shown that such an incentive is strictly necessary to maintain the attractiveness of the leniency programme.[88] We concur with the Commission, as an increase in liability for the other cartel members can be discriminatory and unfair. Furthermore, in the event where all the members of the cartel with the exception of the leniency applicant are insolvent, the victims face the risk of not receiving full compensation. Finally, it is coherent with the rejection of the possibility of granting punitive damages in the form of double damages.[89] The introduction of multiple damages in Europe would unquestionably provide a powerful stimulus to take civil actions.[90] However, it should be noted that the introduction of double damages could be incompatible with

83 GP, as note 17 above, option 16.

84 *Ibid*, option 29 and SWP to the GP, as note 17 above, para.235.

85 Kroes, 2005b; WP, as note 18 above, at 3 and 9.

86 Draft Directive, as note 20 above, SWP to WP, as note 19 above, paras.194-195.

87 GP, as note 17 above, option 29.

88 SWP to WP, as note 19 above, para.279.

89 On the issue of over-deterrence in the US, see Ginsburg and Brannon, 2005: 29; O'Donaghue & Padilla, 2006: 749-751.

90 *V.g.*, the German Monopolies Commission suggested the enactment of rules on double damages: '*Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*', Special Report of the Monopolies Commission provided in accordance with s.44(1) sentence 4 ARC, 2004, para.83, available at http://www.monopolkommission.de/sg_41/text_s41.pdf (consulted on January 02, 2011).

some national constitutions,[91] or even with fundamental principles of EU law such as the principle of *ne bis in idem*.[92] The English High Court further pointed out that the award of such damages is also prohibited by Article 16 of Regulation (EC) No 1/2003.[93] These arguments could certainly constitute a valid defence brought forward by defendants in civil actions and would delay the declared aim of introducing a competition culture. Moreover, Böge & Ost (2006) contend that the introduction of punitive damages would damage the leniency mechanism.[94] The prospect of facing multiple damages would constitute a disincentive to the cartelist to cooperate with the competition authority, as the reduction or immunity from fines under the leniency programme would not be sufficient to counterbalance those effects.[95]

2. Limiting the Scope of the Immunity Applicant's Liability

Colluding undertakings are liable for the entire damage caused by their anti-competitive agreements. The co-infringers are jointly and severally liable for the damage, which means that a victim is entitled to claim the entire harm from any member of the cartel. At a later stage, however, the cartelist who paid the total amount of damages has a right to be compensated by the others, since the liability is several.[96]

Contrary to the GP, the WP no longer discusses the option of removing the joint liability for all the leniency applicants.[97] Rather, the latter document puts forward the recommendation that the immunity applicant should not be held liable neither for the damage suffered as a result of services or products purchased from another cartel member nor for the harm caused to those victims that have not bought, indirectly or directly, cartelized

91 For instance, the German Federal Supreme Court ruled that multiple damages violates the *ordre public*, pursuant ss. 723(2), 328(1) n.º 4 of the Code of Civil Procedure (Zivilprozessordnung - 'ZPO'). See Judgment of 4 June 1992, *Neue Juristische Wochenschrift,* 1992, 3096 ff.

92 *Devenish etc.* v *Sanofi-Aventis etc.*, [2007] EWHC 2394 (Ch), 19 October 2007 (Mr Justice Lewison). See also Singla, 2008: 201; McDougall & Verzariu, 2008: 181.

93 As note 10 above.

94 See Böge & Ost, 2006: 197, at 202.

95 In sharp contrast, Komninos, 2008c: 21, fn. 100.

96 Hviid & Medvedev, 2008.

97 GP, as note 17 above, option 30.

products from him.[98] Arguably, this proposal is contrary to primary EU law, since competitors and others not falling within the concept of 'direct and indirect contractual partners' are not entitled to a right to damages against the immunity applicant. However, since the rule of joint and several liability continues to apply to the remaining cartelists, they are liable to pay any damages suffered by those harmed by the immunity applicant. Hence, there is no violation of the *Courage* and *Manfredi* judgments which state that 'any individual' has a right to damages.[99] In a similar vein, if there is agreement in the long term as regards the introduction of punitive damages, there would be no violation of the Treaty, as the right to claim single damages would still exist by all harmed individuals in relation to the immunity applicant for the part of the damages that is attributable to him.[100]

Incentives to successful leniency applicants have to be carefully considered, since the limited exposure to damages is always at the expense of the victims. Therefore, we concur with the WP's proposal, as only the first firm to come forward should be protected from being placed in a less favourable position than the other co-infringers. Regrettably, however, the Commission has not followed its own policy option in the Draft Directive in terms of restricting the immunity recipient's liability to his trading parties.

Going a step further, some commentators recommend that the immunity receiver should be protected from all civil claims.[101] We think, however, that the immunity receiver should be held responsible for having participated in an illegal cartel, as in certain circumstances the principle of full compensation can be put at risk. Indeed, a different solution is contrary to primary EU law, as *Courage* and *Manfredi* not only entitle victims to claim damages but also imposes an obligation upon infringers to compensate, including the

98 SWP to the WP, as note 19 above, paras.303-306. An original alternative is contained in Section 88/D of the Hungarian Competition Act (Act No. XIV of 2009), as amended in 23 March 2009: "*An undertaking that has been granted immunity from fines on the basis of Section 78/A* [rules on leniency] *may refuse to reimburse the damages caused by violating Section 11* [rules on prohibition of agreements or concerted practices] *of this Act or Article 81 of the EC Treaty as long as the claim can be collected from other undertakings being held liable for the same infringement*". For a comment on this legislation, see Bacher, 2010: 3. For a different approach of apportionment of liability between joint tortfeasors, see Kersting, 2008, who argues on the basis of the German law example (§ 426 I 1 BGB) *de lege ferenda* that the successful leniency applicants' liability towards the victims of the cartel should be reduced.

99 Komninos, 2008a: 84, at paras. 28-31.

100 *Ibid*, para. 29.

101 *Ibid*, para. 32.

immunity applicant.[102] Otherwise, it 'would ... appear unnecessary and unjust' in the absence of any particular public interest.[103]

To conclude, we agree with the Commission's WP, which refuses the option to grant a rebate on any damages claim and advocates a restriction of the immunity applicant's civil liability. It should be borne in mind that leniency applicants are also cartelists that have committed the most serious infringement of competition law. Therefore, they are liable for their actions before national courts and any advantages conferred to them in that respect should be considered with extreme caution. In relation to the WP's suggestion of limiting the immunity applicant's liability to his trading parties, it is in line with our thesis that only the successful immunity applicant should benefit from incentives in the context of private enforcement. Therefore, we strongly recommend that this policy option should be transposed in a future Directive. It would strengthen the effectiveness of the leniency programme and the 'race to the authority effect', in particular to the first leniency applicant. The following applicants are not only unable to obtain immunity from fines but are also liable for the entire damages in civil actions. The approach of the competition authority of waiving all fines to the immunity applicant in the context of public enforcement should be replicated in the framework of private enforcement in the sense that this firm should profit from increased protection against civil suits.

VI. CONCLUSION

The WP will not be translated into one single legislative instrument: some are recommendations for soft law instruments (quantification of damages)[104] and some for hard law EU legislation such as a Directive.[105] Both a first

102 Against Komninos, *ibid*, fn.55, arguing that 'the language in *Courage* and *Manfredi* ... is rights- and not obligations-centred'.

103 Wils, 2009: 25.

104 See 'Quantifying antitrust damages – towards non-binding guidance for courts' (19 January 2010), available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf (consulted on January 02, 2011). It is an external study drawn up by Oxera Consulting Ltd and a multi-jurisdictional team of lawyers led by Dr. Assimakis Komninos in collaboration with a team of economists. This external study is likely to constitute the cornerstone of the future non-binding guidelines of the Commission on how to quantify damages in competition cases. The study is also relevant in the sense that 'it will be interesting to see whether [the Oxera study] will influence the Commission's next steps, particularly with regard to the difficult reconciliation between leniency applications and damages actions', Reher & Wiring, 2010.

105 Chalmers & Monti, 2008: 161-162; Komninos, 2008b. Advocating the enactment of legislation, e.g., W. van Gerven , 2003: 81.

draft directive for rules on governing antitrust damages and a second one were leaked from the Commission in April and in June 2009, respectively. *Grosso modo*, both documents follow the recommendations set out in the White Paper. For instance, national courts are not entitled to order access to settlement submissions or corporate statements.[106]

In the June draft of the directive, the Commission states that Article 83 EC (now Article 103 TFEU) constitutes the legal basis of its competence which enables the implementation of regulations and directives to give effect to Articles 81 EC and 82 EC (now Articles 101 and 102 TFEU). This choice is not supported by the European Parliament since the participation of this institution in the legislative procedure is limited.[107] In order to place democratic controls on the legislative procedure we prefer Article 81 TFEU (ex-Article 65 EC) as an alternative legal basis, which contains measures in the field of judicial cooperation having cross-border implications indispensable for the proper functioning of the internal market.[108] It appears, however, that the new commissioner responsible for competition, J. Almunia, is now willing to involve the European Parliament fully in the debate.[109]

The Draft Directive is already facing considerable criticism from opponents to legislative intervention at EU level.[110] However, this position fails to acknowledge the absence of private enforcement in most of the Member States and the harmful costs to society of antitrust infringements that range from €25 to €69 billion per year.[111] Therefore, public enforcement must be strengthened by private enforcement. Similarly, the adoption of infringement decisions (mostly contributed by leniency applications) and their legal status before national courts can have the effect of incentivizing follow-on actions for damages.[112] If the leniency applicant does not appeal to the EU courts,

106 Reher & Hempel, 2009a; Saavedra, 2009.

107 See European Parliament resolution of 26.03.2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI), OJ 2010/C 117 E/27, 06.05.2010, paras. 2 and 23; and more recently, European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009 (2010/2137(INI)), para. 15; Reher & Hempel, 2009b; Boylan, 2009.

108 Komninos, 2008a: 12-14.

109 Almunia, 2010b.

110 Alfaro & Reher, 2009: 1; Reher & Hempel, 2007b; Boylan, 2009.

111 IAR, as note 19 above, paras. 42-43.

112 Above chapter IV, section 3.

this undertaking can be placed in a less favourable position in relation to the other cartelists. Hence, the Commission is willing to provide some safeguards to successful leniency applicants in the context of civil claims in order to preserve the attractiveness of the leniency programme.[113] It seems clear, however, that the exercise of the victims' rights 'should not be subjugated to exigencies of administrative efficiency'.[114] It is submitted that the immunity applicant should be held responsible for damages,[115] yet may benefit from a considerable degree of protection due to his contribution to the uncovering of the cartel, the need of legal certainty and the functioning of the leniency programme. The optimal relation consists in mirroring the primacy conferred to the whistleblower in the context of public enforcement (exemption from fines) into the legal framework of private enforcement (confer protection in terms of access to evidence and limited liability).[116]

Accordingly, the evidence and any corporate statements provided to the competition authority by the immunity recipient shall not be disclosed to parties claiming damages, neither indirectly through Article 15 (1) of Regulation (EC) No 1/2003[117] nor directly pursuant to Regulation (EC) No 1049/2001.[118] Furthermore, the successful immunity applicant deserves extra protection because of the likelihood of being sued in follow-on actions, due to the general practice of not appealing against the Commission's infringement decision.[119] Finally, contrary to the Draft Directive, the ambit of the immunity applicant's civil liability should be restricted to his indirect and direct trading partners in accordance with the WP's suggestion.[120] In

113 The Commission Notice on Co-operation within the Network of Competition Authorities, as note 61, strongly negates access to information voluntarily submitted by a leniency applicant, unless the leniency applicant consents (par 26). See also option 28 of the GP, as note 17 above and paras. 287 and 293 of the SWP to the WP, as note 19 above, where it is submitted that the protection granted to leniency applications should be conferred to applications submitted both under the EC and national leniency regimes.

114 Komninos, 2008c: 21, fn. 100.

115 See 2006 Leniency Notice, as note 21 above, para.39, and also Association of European Competition Law Judges, 'Comments on the Commission's White Paper on damages actions for breach of the EC antitrust rules' (2008), accessible at http://ec.europa.eu/comm/competition/antitrust/ actionsdamages/ white_paper_ comments/judges_en.pdf (consulted on January 02, 2011), 6-7. Against, Komninos, 2008a: at para. 32.

116 Above chapters IV and V.

117 As note 10 above.

118 Chapter IV, section 2.

119 Chapter IV, section 3.

120 Chapter V, section 2.

this respect, the effectiveness and attractiveness of the leniency programme should not be completely sacrificed at the expense of the principle of effective judicial protection and the compensation of all harmed individuals.

By contrast, the remaining cartelists (including the other leniency applicants which benefited from a mere fine reduction) facing civil claims should not have any advantages that function to the detriment of victims of antitrust infringements. With the adoption of the proposed approach, where the immunity applicant is placed in a more favourable position than the other leniency applicants, a balanced result is attained which combines elements of both public and private enforcement, whilst respecting their complementarity and interdependence.

It is foreseeable that civil claims will most likely be grounded on previous cartel enforcement by a competition authority (normally based on a leniency application).[121] The legally binding status of the public authorities' prohibition decisions concomitant with access to the leniency-related evidence will increase follow-on actions and will enable claimants to 'side-step the weaknesses of national discovery rules'.[122] Plaintiffs, in this kind of action, will have access to the complete details of the cartel, including the participants, the length and time and estimations of the amount of damage caused. These measures, combined with the fact that the remaining leniency applicants and other cartelists facing civil actions will not receive additional protection, will enhance the prospects of strong European antitrust litigation.

BIBLIOGRAPHY

Adamski, D.

2009 "How Wide is 'the Widest Possible'? Judicial Interpretation of the Exceptions to the Right of Access to Official Documents Revisited", in *Common Market Law Review,* vol. 46, pp. 521 ff.

Albors-Llorens, A.

2002 "Courage v Crehan: Judicial Activism or Consistent Approach?", in *Competition Law Journal*, vol. 61, pp. 38 ff.

121 O'Donaghue & Padilla, 2006: 752.

122 Riley, 2005: 389-390.

Alfaro, J. & Reher, T.
2009 *Towards the Directive on Private Enforcement of EC Competition Law: Is the Time Ripe?,* available in www.globalcompetitionreview.com (consulted on January 02, 2011).
Almunia, J.
2010a "The road ahead International Forum on EU Competition Law", speech n.º 10/81, Brussels.
2010b "Los nuevos retos de la política de competencia de la UE Comisión Nacional de la Competencia", speech n.º 10/95, (Madrid).
Arbault, F. & Sakkers, E. (eds. Faull & Nikpay)
2007 *The EC Law of Competition*, Oxford.
Bacher, G.
2010 "Limitation of liability of the leniency applicant and calculation of amount of damages in the new Hungarian legislation", in *Concurrences,* vol. 1.
Bellamy & Child (eds. Roth & Rose)
2008 *European Community Law of Competition,* Oxford.
Billiet, P.
2009 "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", in *European Competition Law Review,* vol. 30, pp. 14 ff.
Böge, U. & Ost, K.
2006 "Up and Running, or is it? Private enforcement – the Situation in Germany and Policy Perspectives", in *European Competition Law Review,* vol. 27, pp. 197 ff.
Bork, R.
1978 *The Antitrust Paradox: A Policy at War with Itself*, New York.
Boylan, P.
2009 "Draft Damages Directive: Off the Agenda for Now", available at http://competition.practicallaw.com/8-500-5687 (consulted on January 02, 2011).
Brkan, M.
2005 "Procedural Aspects of Private Enforcement of EC Antitrust Law: Heading Toward New Reforms", in *World Competition.* vol. 28, pp. 479 ff.
Bulst, F.
2008 "Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law", in *Bucerius Law Journal,* vol. 2, available at http://ssrn.com/abstract=1162811 (consulted on January 02, 2011).

Chalmers, D. & Monti, G.
2008 *European Union Law (updating supplement)*, Cambridge.
Correia, J.M.S.
2008 "Efectividade e Limitações do Sistema Português de Aplicação Impositiva do Direito da Concorrência através de Meios Processuais Administrativos e Civis", in *Estudos em Honra do Professor Doutor José de Oliveira Ascensão,* vol. 2, Coimbra, pp. 1747 ff.
Curtin, D.
2000 "Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?", in *Common Market Law Review*, vol. 37, pp. 7 ff.
De Smijter, E., Stropp, C. & Woods, D.
2006 "Green Paper on Damages Actions for Breach of the EC Antitrust Rules", in *Competition Policy Newsletter* 1.
Dick, A.R.
1996 "*When are Cartels Stable Contracts?*", in *Journal of Law and Economics,* vol. 39, pp. 241 ff.
Diemer, c.
2006 "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", in *European Competition Law Review*, vol. 27, pp. 309 ff.
Drake, S.
2006 "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", in *European Law Review, vol.* 31, pp. 841 ff.
Ehlermann, C.D.
2000 "The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution", in *Common Market Law Review,* vol. 37, pp. 537 ff.
Ehlermann and Atanasiu, I. (eds.)
2003 *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford.
2006 *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford.
Eilmansberger, T.
2007 "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement through Legislative Action", in *Common Market Law Review,* vol. 44, pp. 431 ff.

Epstein, R.
2008 "The Coordination of Public and Private Antitrust Actions", in *OECD Report on Private Remedies,* DAF/COMP(2006)34, available at http://www.oecd.org/competition (consulted on January 02, 2011).
Ginsburg, D.H. & Brannon, L.
2005 "Determinants of Private Antitrust Enforcement in the United States", in *Competition Policy International,* vol. 1, pp. 29 ff.
Giudici, P.
2004 "Private Antitrust Enforcement in Italy", in *Competition Law Review,* vol. 1, pp. 61 ff.
Green, N.
2007 "Recent Experiences in the High Court", in *Lawyers Europe,* pp. 15 ff.
Hammond, S.
2004 "Cornerstones of an Effective Leniency Program", presented before the ACCC Cracking Cartels: International and Australian Developments, Sydney, available at www.accc.gov.au/ (consulted on January 02, 2011).
Harding, C.
1993 *European Community Investigations and Sanctions. The Supranational Control of Business Delinquency,* Leicester/London/New York.
Harding & Joshua, J.
2003 *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency,* Oxford.
Harrington, J.
2008 "Optimal Corporate Leniency Programs", in *Journal of Industrial Economics,* vol. 56, pp. 215 ff.
Heliskoski, J. & Leino, P.
2006 "Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents", in *Common Market Law Review,* vol. 43, pp. 735 ff.
Holmes, E.
2010 "Follow-on damages claims: the CAT or the High Court? National Grid v ABB Ltd [2009] EWHC 1326", in *European Competition Law Review*, pp. 4 ff.
Hviid, M., & A. Medvedev
2008 "The Role of Contribution among Defendants in Private Antitrust Litigation", *Centre for Competition Policy*, Working Paper 08-3, available

at http://ccpweb.mgt.uea.ac. uk/publicfiles/workingpapers/CCP08-3.pdf. (consulted on January 02, 2011).

Jones, C.A.,

1999 *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford.

2003 "A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US", in Ehlermann, C.D., & Atanasiu, I. (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford.

2004 "Private Antitrust Enforcement in Europe: A Policy Analysis and a Reality Check", in *World Competition,* vol. 27, pp. 13 ff.

Kersting, C.

2008 "Perspectives for Private Enforcement in European Antitrust Law (Perspektiven der privaten Rechtsdurchsetzung im Kartellrecht)", available at http://www.ssrn.com (consulted on January 02, 2011).

Komninos, A.P.

2002 "New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right in Damages", in *Common Market Law Review,* vol. 39, pp. 447 ff.

2007 "Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight", in *Common Market Law Review,* vol. 44, pp. 1387 ff.

2008a "The EU White Paper for Damages Actions: A First Appraisal", in *Concurrences,* vol. 2, pp. 2-84.

2008b "Enter the White Paper for Damages Actions: a First Selective Appraisal", available at www.globalcompetitionpolicy.org (consulted on January 02, 2011).

2008c *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts,* Oxford.

Korah, V.C.

2006 *Cases and Materials on EC Competition Law*, Oxford.

2007 *An Introductory Guide to EC Competition Law and Practice*, Oxford.

Kroes, N.

2005a "Taking Competition Seriously – Anti-Trust Reform in Europe, International Bar Association/European Commission Conference 'Anti-trust reform in Europe: a year in practice'", Brussels.

2005b "Enhancing Actions for Damages for Breach of Competition Law in Europe", speech n. 05/533 at the Harvard Club, New York.

Lande, R.H.
2004 "Why Antitrust Damage Levels Should be Raised", in *Loyola Consumer Law Review,* vol. 16, pp. 329 ff.
Little, D.R.
2007 "The European Commission's Revised Leniency Notice for Cartel Cases", in *Trinity Common Law Review,* vol. 10, pp. 136 ff.
McDougall, A. & Verzariu, A.
2008 "Vitamins Litigation: Unavailability of Exemplary Damages", in *European Competition Law Review,* vol. 3, pp. 181 ff.
Micklitz, H-W.
2007 "Transborder Law Enforcement – Does it Exist?" in Weatherill & Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques*, Oxford.
Moellers, T. & Heinemann, A.
2007 *The Enforcement of Competition Law in Europe*, Cambridge.
Moniz, C.B. & Fonseca, M.R.
2008 "First Experiences with Regulation 1/2003", in FIDE (Fédération Internationale pour le Droit Européen) XXIII Congress *The Modernisation of the European Competition Law*, Linz.
Monke, S., Piazza, L., & Simon, S.
2009 "Commission imposes the highest-ever cartel fine (more than 1.3 billion) on four car glass manufacturers", in EC Competition Policy, Newsletter 1, pp. 59 ff.
Monti, M.
2000 "Fighting Cartels Why and How?", 3rd Nordic Competition Policy Conference Stockholm.
2003 "Opening Speech: Effective Enforcement of EC Antitrust Law", in Ehlermann, C.D., & Atanasiu, I., (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law,* Oxford, pp. 4 ff.
2004 "Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation", speech n.º 04/403, IBA-8th Annual Competition Conference, Fiesole (Italy).
Nebbia, P.
2008 "Damages Actions for the Infringement of EC Competition Law: Compensation or Deterrence?", in *European Law Review,* vol. 33, pp. 23 ff.

O'Donaghue, R. & Padilla, A.J.
2006 *The Law and Economics of Article 82 EC*, Oxford.
Pheasant, J.
2006 "Damages Actions for Breach of the EC Antitrust Rules: The European Commission's Green Paper", in *European Competition Law Review,* vol. 27, pp. 365 ff.
Posner, R.A.
2001 "Antitrust in the New Economy", in *Antitrust Law Journal,* vol. 68, pp. 925 ff.
Reher, T. & Hempel, R.
2009a "Commission Plans Private Antitrust Enforcement Directive", available at http://www.internationallawoffice.com/ Newsletters/detail.aspx?g=a322a a24-df47-4225-ae44-42bf93f9c216 (consulted on January 02, 2011).
2009b "Plans for Private Antitrust Damages Actions Suffer Setback", available at http://www.internationallawoffice.com (consulted on January 02, 2011).
Reher, T. & Wiring, R.
2010 "Commission publishes study on quantification of damages", available at http://www.internationallawoffice.com (consulted on January 02, 2011).
Reich, N.
2005 "The 'Courage' Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?", in *Common Market Law Review,* vol. 42, pp. 35 ff.
Rey, P.
2003 "Towards a Theory of Competition Policy", in Dewatripont, M., Hansen, L.P. & Turnovsky, S.J. (eds.), *Advances in Economics and Econometrics: Theory and Applications, Eight World Congress*, Cambridge.
Reynolds, M. & Anderson, D.
2006 "Immunity and Leniency in EU Cartel Cases: Current Issues", in *European Competition Law Review*, vol. 27, pp. 82 ff.
Riley, A.
2005 "Beyond Leniency: Enhancing Enforcement in EC Antitrust Law", in *World Competition,* vol. 28, pp. 377 ff.
Saavedra, A.
2009 "Non-published Proposal for a Private Antitrust Enforcement Directive", Newsletter n.º 5, available at www.mlgts.pt. (consulted on January 02, 2011).
Sandhu, J.S.
2007 "The European Commission's Leniency Policy: A Success?", in *European Competition Law Review*, vol. 28, pp. 148 ff.

Schwab, A., & Steinle, C.

2008 "Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed", in *European Competition Law Review*, vol.9, pp. 523 ff.

Segal, I., & Whinston, M.

2007 "Public vs. Private Enforcement of Antitrust Law: A Survey", in *European Competition Law Review*, vol. 5, pp. 306 ff.

Singla, T.

2008 "The Remedies (Not) Available for Breaches of Article 81 EC", in *European Competition Law Review,* vol. 3, pp. 201 ff.

Spagnolo, G.

2000 "Optimal Leniency Programs', *F.E.E.M. Nota di Lavoro No. 42.00, Fondazione ENI 'Enrico Mattei'*", available for download at http://www.ssrn.com (consulted on January 02, 2011).

2004 "Divide et Impera: Optimal Leniency Programs", in *CEPR Discussion Paper No. 4840*, available at http://www.ssrn.com (consulted on January 02, 2011).

Suurnakki, S. & Centella, M.L.

2007 "Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", (2007-1) *EC Competition Policy Newsletter* 1.

Truli, E.

2009 "White Paper on Damages Actions for Breach of the EC Antitrust Rules: The Binding Effect of Decisions Adopted by Competition Authorities", available at http://ssrn.com (consulted on January 02, 2011).

Van Gerven, W.

2003 "Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts", in Ehlermann, C.D., & Atanasiu, I. (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford.

Venit, J.S.

2003 "Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty", in *Common Market Law Review,* vol. 40, pp. 545 ff.

Voelcker, S.

2006 "Developments in EC Competition Law in 2005: An Overview", in *Common Market Law Review,* vol. 43, pp. 1409 ff.

Waelbroeck, D., Slater, D. & Even-Shoshan, G.
2004 "Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules – Comparative Report" Ashurst, accessible at: http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf. (consulted on January 02, 2011).
Walsh, D.J.
2009 "Carrots and Sticks – Leniency and Fines in EC Cartel Cases", in *European Competition Law Review* 14, vol. 30.
Whish, R.
2009 *Competition Law*, Oxford.
Wils, W.
2003 "Should Private Antitrust Enforcement be Encouraged in Europe?", in *World Competition* , vol. 26-3, pp. 1 ff.
2005 "Is Criminalization of EU Competition Law the Answer?", in *World Competition* , vol. 28, pp.117 ff.
2006 "Optimal Antitrust Fines: Theory and Practice", in *World Competition*, vol. 29, pp.183 ff.
2007a "Leniency in Antitrust Enforcement: Theory and Practice", in *World Competition,* vol. 30, pp. 25 ff.
2007b "The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis", in *World Competition,* vol. 30, pp. 197 ff.
2008 "The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles", in *World Competition,* vol. 31, pp. 335 ff.
2009 "The Relationship between Public Antitrust Enforcement and Private Actions for Damages", in *World Competition,* vol. 32-3.
Woods, D., Sinclair, A. & Ashton, D.
2004 "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead", in *EC Competition Policy Newsletter,* vol. 2, pp. 31 ff.