

**ANTITRUST MARATHON V: WHEN IN ROME
PUBLIC AND PRIVATE ENFORCEMENT OF
COMPETITION LAW**

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The Antitrust Marathon is a long-running series of roundtable discussions sponsored by the Institute for Consumer Antitrust Studies of Loyola University Chicago School of Law and the Competition Law Forum of the British Institute of International and Comparative Law, focusing on enduring issues of comparative competition law. These discussions always take place the day before or after the great marathon races of the world which some of the participants also endure. However, no running is required for the roundtable discussion itself. Past Antitrust Marathons have focused on Abuse of Dominance, Antitrust and the Rule of Law; Competition and Consumer Protection, and other topics, and have been held in Chicago, London, Boston and Dublin. We are grateful to the Italian Competition Authority and the University of Rome I (Sapienza) for hosting and being co-sponsors of the 2013 Antitrust Marathon.

Our topics this year are:

- Public–Private Partnerships for Effective Enforcement
- Effective Injunctive Relief
- Private Actions for Damages
- Criminal Enforcement

WELCOME

PROFESSOR GIOVANNI PITRUZZELLA, Chair of the Italian Competition Authority: Distinguished delegates, ladies, and gentlemen, first of all, I would like to give a warm and genuine welcome to all of you.

I am particularly thankful to the Institute for Consumer Antitrust Studies of the Loyola University Chicago School of Law, to the Competition Law Forum of the British Institute of International and Comparative Law, together with the University of Rome “La Sapienza”, for sponsoring this event, as well as to the eminent speakers who kindly agreed to join it.

Today’s agenda is particularly demanding, with interesting topics that will be covered during the four panel discussions. I would like to take just a few minutes to introduce some of the issues I consider of particular relevance and that will be discussed at greater length throughout the day.

As is well known, the scientific community is strongly aware of the central role played by the European Commission and all national authorities concerning the public enforcement of antitrust laws. Actually, this has been the very distinctive feature of the European antitrust law since its origin. However, over the last few years, the opinion that private action is also essential for the effectiveness of competition enforcement has steadily grown, starting from the two well-known decisions of the Court of Justice in *Courage* (taken in 2001) and *Manfredi* (in 2006), which state the right for anyone who has been harmed by an infringement of antitrust rules to claim compensation for that harm. I believe it is possible to say that, nowadays, there is, indeed, a prevailing consensus that private enforcement can “integrate” the work of the Commission and of the national bodies along two distinct dimensions: on the one hand, it allows the broadening of scope of the antitrust law to those cases which are not ascertained in a definitive way by the Commission or by a national authority (this is the case of the so-called stand-alone actions); and on the other hand, it allows the strengthening of the deterrent effect of the decisions made by the Commission or the national authorities (so-called follow-on actions).

In Italy, the cornerstone of the complementarity between public and private enforcement still remains the principle established by the joint body (Sezioni Unite) of the Italian Supreme Court in its 2005 decision stating that the antitrust law “is not the law of business operators only, but of all the subjects existing on the market”, therefore also consumers; stated differently, the antitrust law is to be intended as the law of “market players”. This statement clearly refers to the conclusion of the Court of Justice in its *Courage* decision, which deserves to be quoted:

“The full effectiveness of Article 101 (then 85) of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [101(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.”

In the Italian legal system, public and private enforcement are independent, in that there is no direct link between the administrative action (and its final decision) and the civil procedure. On the contrary, Article 16.1 of the Regulation 1/2003 states that, when national courts rule on agreements, decisions or practices under Article 101 or 102 of the Treaty which have already been subject to the European Commission’s evaluation, said rulings cannot run counter to the decision adopted by the Commission. However, the Italian Competition Authority’s decisions have always been an important benchmark from which the Courts have barely diverged in their autonomous judgment.

In this perspective, an important step has been marked by the Italian Supreme Court, which in a number of judgments has stated that the decisions adopted by the Italian Competition Authority ascertaining an undertaking’s liability for antitrust infringements can be regarded as “privileged evidence” of the undertaking’s liability in damaging consumers. This has been regarded as sufficient for an inversion of the burden of proof between the parties in civil court trials, save in any case the successful rebuttal of proof by the defendant.

Based on this case law, consumers should, therefore, be able to rely more heavily on the findings of the Italian Competition Authority of an infringement in order to prove a causation link between the unlawful conduct acknowledged by the authority and the damage suffered, which in any case has to be fully proved in its exact amount in the context of a civil trial.

As far as the relationship between civil courts and national competition authorities is concerned, there are still some open issues on the table, among which, I would like to briefly consider the case whether civil courts can, and, if so, to what extent, use the official documentation collected by the authority within its procedure, particularly in the case of leniency programmes.

With regard to this issue, I would like to recall the conclusions reached by the Court of Justice in the famous *Pfleiderer* decision in June 2011 (the same principles were recently evoked by the Advocate General Jääskinen in his Opinion delivered within the preliminary ruling proposed by the Austrian Court on Restrictive Practices). The Court of Justice stated that leniency programmes are useful tools if the efforts to uncover and bring infringements of competition rules to an end are to be effective, therefore serving the objective of an effective enforcement of antitrust law. The Court added that the effectiveness of these programmes, however, can be compromised if documents relating to a leniency procedure are disclosed to persons wishing to bring an action for damages. Nevertheless, the Court stated that, according to settled case law, any individual has the right to claim damages for a loss caused by a conduct which is liable to restrict or distort competition.

For this reason, national courts have to carry out a weighing exercise, case by case and according to national law, between the interests favouring the disclosure of the information and the interests protecting the information voluntarily provided by the leniency applicant. It must therefore be concluded that the needs of access to civil justice should prevail over those of confidential documents only when the judge considers that the relevant documentation is absolutely essential to prove the antitrust infringement (or even the consequent damage and its quantification).

I would like to say one last word on a recent innovation introduced by the Italian legislator which, I hope, will be able to significantly increase the level of trust of undertakings and consumers in the effectiveness of private enforcement and, thus, in its use in the Italian context. I am referring to the recent establishment of specialised sections on business at the Courts and Courts of Appeal, replacing all existing sections in the field of industrial and intellectual property. The new sections will be competent, among other things, to settle civil disputes relating to violations of Italian and European antitrust law. This has enabled the introduction of two levels of jurisdiction for all antitrust infringements, thus eliminating the previous mechanism for which only the Courts of Appeal had jurisdiction in disputes relating to breaches of Italian antitrust law.

In conclusion, I would like to re-emphasise that, in my opinion, the implementation of an effective system of repression of anticompetitive behaviours can only be based on the complementarity between traditional tools of public enforcement and those of private enforcement. Antitrust enforcement, however, must remain based on a strong and solid public enforcement carried out by the authority, capable of detecting illegal practices, putting them to an end, and achieving an effective deterrence through the enforcement of appropriate measures and sanctions.

Knowing that the issues examined today by the distinguished speakers will be taken into great consideration by the authority, I wish you all a fruitful discussion.

TOPIC 1: PUBLIC–PRIVATE PARTNERSHIPS FOR EFFECTIVE ENFORCEMENT

SPENCER WEBER WALLER: It is a real pleasure for me to be here as one of the co-sponsors of our Antitrust Marathon. As many of you know, this is our fifth Antitrust Marathon, held often in conjunction with the competition authorities of the countries and the cities where we held these events. I'm so grateful for all our co-sponsors: my friend and co-sponsor from the beginning, Philip Marsden, who is the head of the Competition Law Forum at the British Institute of International and Comparative Law, and who had a terrific day yesterday in completing the actual Roma Marathon, along with several others. We are very dependent on our co-host and co-sponsors, particularly when we do an event far from our homes. So we thank the authority for hosting us; we thank Sapienza and the faculty members who have been such gracious hosts in planning this, particularly Philipp Fabbio, who has worked as a liaison here in Rome to coordinate all the different sites and do much of the work on the ground; and also the Italian Antitrust Association, who has also been a generous co-sponsor for us.

So we welcome all of you here, and the goal of our day today is to have a conversation among friends, not necessarily a traditional conference where you only hear from us, but where we hear from you. To that end, we created the four issue papers that give you an idea of what we're going to be talking about. Each of the authors will briefly summarise their papers. We have distinguished commentators, who will have the opportunity to go first and offer their thoughts in a brief amount of time, and then the real purpose is to have a conversation among experts and friends, so that we can get many different comparative prospective to deal with the issues of private and public enforcement, which is our specific topic today.

Now we begin our Antitrust Marathon, and, like all marathon races of long duration, we need to be comfortable, so if you want to take off your jackets, that's okay. Stretch a little bit, if you wish, and we begin the race with, I guess we need the starting gun and the national anthem, but more importantly Philip Marsden has prepared a very interesting paper that begins our discussion and is perfect for beginning—public and private enforcement. He has some very interesting thoughts on public–private partnerships for effective enforcement and the notion of what a hybrid form of enforcement might be. So, Philip, welcome, thank you and it's all yours.

PUBLIC–PRIVATE PARTNERSHIPS FOR EFFECTIVE ENFORCEMENT: SOME “HYBRID” INSIGHTS?

PHILIP MARSDEN*

“A hybrid vehicle uses an on-board rechargeable energy storage system and a fuel based power source for vehicle propulsion. These vehicles use much less fuel than their counterparts and produce less emissions. Hybrid vehicles recharge their batteries by capturing kinetic energy through regenerative braking. Some hybrids use the combustion engine to generate electricity by spinning a generator to either recharge the battery or directly feed power to an electric motor that drives the vehicle.”¹

It may be a bit cheeky to base an Antitrust Marathon paper on a motoring metaphor. But bear with me. I’ve been injured for a while and need all the help I can get. When considering the interaction between a private claimant and an antitrust authority, a metaphor that I toyed with early on was that of the litigant/runner following the route laid out by the race organiser/enforcer. While this neatly links with the overall theme of our conference, it applies more in the case of follow-on actions. While these are the most common form of public–private link in this area, they are not what Spencer and I agreed that I would write about. I was to try to consider true partnerships of some sort, rather than one actor following another.

The idea of some assisted driving came to me because private enforcement of competition law has been sputtering along, particularly in Europe. Sometimes it seems like an extreme form of the “Galloway method” of marathon training: run for a mile, walk for a bit, run for a mile, walk for a bit.² Except in Europe the run/walk ratio is skewed towards “two steps forward, three steps back”, if that.

There are still political concerns about opening up too many areas to private litigation, not just with respect to competition harms. Opponents of improved mechanisms for redress conjure up images of hoards of class action attorneys racing at us brandishing unmeritorious suits that will clog our courts and delay both justice and effective redress. They note that such litigants would rely on European competition law standards that are relatively vague but stern; and argue that this would chill genuinely pro-competitive business activity and further delay a return to “growth”.

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¹ <http://saveenergy.about.com/od/fuelingyourautomobile/g/Hybrid.htm>.

² http://www.jeffgalloway.com/training/walk_breaks.html.

Most of these concerns are overblown. No serious recommendation for improving the availability of collective redress for competition harms advocates a model that would drag with it the worst excesses of other systems. Nevertheless, European mechanisms for private actions need some form of kick-start—not only to ensure that wrongs are, as much as possible, righted, but also to create a much-needed synergy between public enforcement and private redress. With dwindling enforcement, frankly both sides need all the help they can get.

Some of the difficulties of bringing private actions are well known, and are not unique to the competition law area: burden of proof, proving harm and causality, costs of litigation relative to diffuse harm, access to evidence, deep-pocketed defendants, delay, risks of adverse costs orders, etc.

These difficulties conspire to inhibit private actions in the first place. That is why private actions that follow on from successful public enforcement are such a likely form of claim. This is not enough to guarantee effective redress though. In public cases, defendants fight to ensure that only the bare minimum is left for private claimants to use. They insist on heavy redactions from authorities' decisions, and delay decisions being issued to further reduce the likelihood of a private claim.

There is a more general problem, though, with relying solely on the follow-on actions. Public budgets are shrinking and competition authorities are having to prioritise casework. Some, perhaps many, meritorious complaints are not followed up by authorities. As a result, there may never be a decision to follow on from in the first place. Similarly, even when an investigation has been started, settlements are more common, and defendants will have been careful to ensure that they do not provide admissions of liability or evidence on which a private claim can be based.

This discussion paper does not focus on improving the ability to bring stand-alone or follow-on actions, though. What I wish to explore are clever ways to link and gear private actions and public enforcement together.

First of all, let us examine whether such a linking would be appropriate. After all, we would likely agree that private actions and public enforcement have different aims. Private actions focus on the private interest in compensation. Public enforcement focuses on public interests such as deterrence, and protecting and restoring a competitive process. But they both have linked interests too. To some extent, they are both concerned about “righting a wrong”, returning players to a level playing field and working for consumers. They also complement one another in effect—their actions each adding to deterrence, for example. Similarly, they assist one another, with public enforcement often providing the evidential basis for private actions (and vice versa at times). They can also provide “relief” for one another, for example, by filling gaps where the other has not acted. They also each contribute to a growing competition culture, and recognition within society that anticompetitive conduct should not

be tolerated. This may lead to an even greater recognition within governments and sectoral ministries of the importance of competitive markets.

One can thus think of a “hybrid” enforcement model of public enforcement and private action. My tortured metaphor sees a “drive train” of two power sources which link up and feed each other and better propel a consumer-focused competition law and policy. This paper tries to identify some of those links.

In this, I am inspired by my colleague and Antitrust Marathon series co-chair, Professor Waller, who has noted that:

“some private rights of actions are a necessary complement to the public enforcement of competition law . . . Neither public nor private enforcement should ‘monopolize’ competition law, but must *work together* to deter, detect, punish, and compensate victims of unlawful anticompetitive conduct. Only then is a consumer friendly competitive economy possible.”³

Terhecht has added that

“Especially in the European Union the creation of a ‘competition culture’ is still an important task for the enforcement process and could be achieved with a balanced approach that is based on private enforcement as well as public enforcement, emphasising that the ideal situation is one of *mutual encouragement*.”⁴

This discussion paper provides some examples of how the public/private drive train can be set up so that the two different engines can work together in mutual encouragement.

I divide the examples into three groups:

- The first group—“engine-ignite”—contains examples where one engine is ignited by the other, for instance, where a private complaint will simply just not go away, and in addition to the court action the plaintiff keeps submitting more and more material and pressure and eventually causes the government to launch enforcement action. (This is not “assistance”, and is more akin to separate pressure from one side to the other.)
- The second group—“engine-assist”—contains examples where the private or public engines are actually more closely linked or aligned and do indeed help the other. The most obvious of these involves the government filing supportive or clarifying amicus briefs in private actions, but there are many other examples that are considered.
- My third group of examples—“engine-unite”—are closer to full integration. Here the drive train is truly unified, the extreme (and rather delightful)

³ SW Waller, “Towards a Constructive Public–Private Partnership to Enforce Competition Law” (2006) 29(3) *World Competition Law and Economics Review* 367, 367–68 (emphasis added).

⁴ J Terhecht, “Enforcing European Competition Law—Harmonizing Private and Public Approaches in a More Differentiated Enforcement Model” (2010), 8, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1638339 (emphasis mine).

example being where a public authority is a private claimant in a competition damages action.

A. “ENGINE-IGNITE”

My first example is typified by the *NASDAQ*⁵ case, in which the private litigation was filed long before any investigations had been undertaken by the Department of Justice (DOJ) or the Securities and Exchange Commission (SEC). Indeed, the public complaints were only issued after private plaintiffs had done extensive investigation. In fact, the private efforts and pressure kept the government investigations alive through periods of scepticism.⁶ The private counsel and economists provided the DOJ with direct and economic evidence, and benefited in return from the results of public discovery actions and the filing of the DOJ and SEC complaints and consent decrees. As one of the plaintiff’s co-lead counsel noted, such a tight cooperation was “of course, not how the government and private bar always conduct themselves”.⁷

It is perhaps a bit more common in the European administrative system however. Private complainants are much more involved in such a regime, bombarding the agencies with documents and demands, objecting to and even appealing any public inaction. As Roach has noted,

“Private enforcement can supplement public resources with private initiative and information. This is particularly compelling if the public resources devoted to enforcement are modest or diminishing and there is a need for jurisprudence to flesh out the general standards contained in the public law . . . Private enforcement can also be an effective and efficient means of holding public enforcers accountable for decisions not to prosecute.”⁸

European complainants do have such voice and influence within the public enforcement system. Oddly, though, they still only seem to have the right to be compensated, bereft of an effective private actions mechanism to back it up.⁹

More can be done to facilitate the “engine-ignite” process and private actor involvement in public cases. One device can help to address the general resource and coordination constraints on private parties, which make it difficult

⁵ *In re Nasdaq Market Makers Antitrust Litigation*, 894 F Supp 703, 706 (SDNY 1995).

⁶ See A Kaplan, “Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation” (2001) 52 *Case Western Reserve Law Review* 111, 122.

⁷ *Ibid*, 113, 116.

⁸ K Roach and M Trebilcock, “Private Enforcement of Competition Laws” (1997) 17 *Policy Options* 28.

⁹ D Baker, “Private and Public Enforcement: Complements, Substitutes and Conflicts—A Global Perspective” in A Ezrachi (ed), *Research Handbook on International Competition Law* (Oxford University Press, 2012), 239.

for them to sustain effective pressure on competition authorities. This is the provision by some governments of super-complaints processes.

In the UK, for example, the Secretary of State for Business, Innovation and Skills can designate certain bodies which represent consumers to make super-complaints to the Office of Fair Trading (OFT). Super-complaints can be made by such a body when it thinks that a feature, or combination of features, of a market is, or appears to be, significantly harming the interests of consumers.

Within 90 days of receiving the super-complaint, the OFT must consider the evidence submitted, undertake whatever work is necessary to establish the extent, if any, of the alleged problems and then publish a response stating what action, if any, it proposes to take. In some cases, it may be possible to resolve the concerns and propose remedies within the 90-day period but, in more complex cases, further work may be called for. This can be undertaken as part of a market study by the OFT, by referring the market to the Competition Commission for further investigation or by any other action available to the OFT.

In the UK, super-complaints have been made with about a range of products including the supply of cash ISAs, care homes, beer in pubs, credit card interest rates and surcharges, doorstep selling, home credit, payment protection insurance and private dentistry. More often than not these resulted in some form of enforcement action or further referral of the sector to a full competition inquiry with remedies. The EU has adopted a similar procedure enabling consumer associations to request injunctive relief in consumer protection cases in Member State courts.¹⁰

Marathon Question: How do “engine-ignite” mechanisms function in your jurisdiction? What more can be done to make use of them?

B. “ENGINE-ASSIST”

My second set of examples involves situations where the private or public “engines” do more than pressure or provoke the other side to act, but actually help each other. The assistance can have varying degrees of directness. The most indirect form of help, but one which should not be forgotten, is the issuance of clear decisions and guidance on the law and of what constitutes an infringement. More direct assistance comes from authorities ensuring that their infringement decisions, on which a litigant bases its own claim, are clearly drafted, evidentially rich and analytically robust. Direct assistance involves

¹⁰ Directive 98/27/EC on injunctions for the protection of consumer interests, [1998] OJ L166/51.

governments filing amicus briefs in support of arguments made in private actions.

In many ways, the amicus brief process is an important part of ensuring complementarity and clarity of the law itself. Many courts in the EU are required to notify their respective competition authority of any private action that cites competition law provisions, and to provide rights of audience to authorities who wish to intervene.

There are also provisions requiring national courts and tribunals to have regard to decisions and guidance of their national competition authority; indeed, these are increasing. For example, in the UK, the government has been keen to help ensure that consistency is maintained between the forthcoming Competition and Markets Authority (CMA) and the Competition Appeals Tribunal (CAT) by:

- amending the CAT Rules to require it to notify the CMA when private actions cases are initiated;
- amending the CAT Rules to empower the CMA to act as an intervener, where appropriate, in private actions cases; and
- ensuring that the CAT has the power to stay cases being investigated by a competition authority.

Many national authorities have some experience in submitting amicus briefs, though records and access to the briefs varies. Helpfully, the European Commission has made public accounts of its experiences in five cases so far. Two that are notable for having a direct impact on the private action are outlined below.

1. BIDS and Article 101(3)

The Commission submitted amicus observations to the Irish High Court in a case between the Irish Competition Authority and the Beef Industry Development Society Ltd (BIDS) regarding the latter's rationalising of the beef sector through capacity-reducing restructuring agreements which ensured the withdrawal of firms from the market in return for compensation paid by BIDS and funded by the remaining rivals.

The purpose of the Commission's observations was to clarify the application of Article 101(3) TFEU to crisis cartels in general. The Commission took the opportunity though to submit that agreements such as those at issue in BIDS amount in principle to a restriction of competition by object, for which it will be difficult to succeed with a defence under Article 101(3). Nevertheless, the Commission provided information about how three (of the four possible) Article 101(3) conditions for exemption might apply to capacity-reducing restructuring agreements.

- (i) The Commission noted that efficiencies resulting from such restructuring are due either to removal of inefficient capacity from the market or to economic benefits gained through an increased capacity utilisation rate by the remaining players.
- (ii) The Commission indicated that benefits for consumers must at least compensate for any negative impact caused by the restriction of competition.
- (iii) The Commission held that the condition requiring that the agreements be indispensable to provide benefits is only fulfilled when market forces cannot remedy over-capacity problems.

In January 2011, BIDS withdrew its claim for exemption under Article 101(3).

2. More Direct Assistance

Competition authorities can also act even more directly on behalf of private interests. Although rare, this can even amount to mandating private redress in its own public enforcement action. For example, a competition authority may extract commitments from a wrongdoer to compensate its victims. In November 2006 the OFT announced that it found that an agreement between 50 of the UK's fee-paying independent schools to exchange detailed fee information infringed competition law. The decision also imposed penalties totalling just under £500,000 on the schools. The relatively low fine for each school reflected the exceptional circumstances of the case, including the schools' charitable status and the fact that they all agreed to make payments totalling £3 million into a charitable trust to benefit the pupils who attended the schools during the relevant academic years. The OFT noted that this case "demonstrates our willingness to consider innovative solutions in appropriate cases".¹¹

A different engine-interaction is for governments to claim damages on behalf of victims. There are express procedures in France for this, and in the US.¹² The drive train can operate in the other direction too, with some regimes allowing private litigants to claim damages on behalf of governments that have been harmed.

In the US, for example, Affirmative Civil Enforcement (ACE) permits civil actions by private parties to recover government money lost to fraud or other misconduct, or to impose penalties for violations of federal health, safety or environmental laws.

Many of these cases result from *qui tam* or whistleblower lawsuits under the False Claims Act. In *qui tam* actions, individuals or entities with inside information about fraudulent conduct file suit on behalf of the US. The ACE

¹¹ <http://www.ofi.gov.uk/news-and-updates/press/2006/166-06#.UTYlj9a8Ag4>.

¹² For descriptions of each see A Komminos, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?" (2006) 3 *Competition Law Review* 5.

programme then undertakes an investigation of the allegations. Whistleblowers can then receive a percentage of the government's recovery. Nationally, ACE programmes have recovered billions of dollars for the US.

Of course, neither cycling nor performance-enhancing drugs are permitted on the Rome Antitrust Marathon course. Nevertheless, it is noteworthy that a large private lawsuit in the US brought by a former teammate of Lance Armstrong against the cyclist has been joined by the US Department of Justice, seeking return of sponsorship money provided by the US Postal Service and treble damages.¹³

Marathon Question: are the more direct “engine-assist” procedures identified above conceivable for competition violations? If so, which are the most appropriate? How would they work? What problems might they encounter? How could these be addressed?

C. “ENGINE-UNITE”

My third example is closer to full integration, by which I mean a public authority acting not for a private claimant, but as one itself. Here we see not ignition or assistance, but a truly unified hybrid drive train.

The most obvious example is the European Commission's own action for recovery of damages from the “lifts” cartel that it had already investigated and fined, the EU bureaucracy being a major purchaser of such services.¹⁴ This, in many ways delightful, case has not been without its problems, of course. Our third Antitrust Marathon in Boston focused on rule of law issues, and, as would be expected, many such issues arose in this case. Most notably, the

¹³ “Lance Armstrong faces \$95 million whistle-blower lawsuit”, *Cycling Weekly*, 22 February 2013, available at <http://www.cyclingweekly.co.uk/news/latest/537050/lance-armstrong-faces-95-million-whistle-blower-lawsuit.html#mqOhEU864JeVguyd>.

¹⁴ As background: on 21 February 2007, the European Commission announced that it had imposed fines totalling over €990 million on four groups of companies (Otis, Kone, Schindler and Thyssenkrupp) for infringing Art 101(1) of the TFEU by operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands between 1995 and 2004. In June and July 2007, the cartel members brought actions for annulment before the General Court, which appeals were largely dismissed in 2011. In November 2011, the companies within those four groups all appealed to the European Court of Justice (ECJ) seeking to have the judgments of the General Court set aside. These appeals are all pending. Separately, in June 2008, the European Commission (representing the European Union) brought proceedings before the Brussels Commercial Court against Otis, Kone, Schindler and Thyssenkrupp seeking just over €7 million in damages. The Commission argued that the EU had sustained financial loss in Belgium and Luxembourg as a result of the cartel in which the undertakings concerned had taken part. In particular, the EU had entered into a number of contracts for the installation, maintenance and renewal of elevators and escalators in various buildings of the European institutions with offices in both Belgium and Luxembourg, the price of which was allegedly higher than the market price as a consequence of the lifts and escalators cartel declared unlawful by the Commission.

Commission's right to claim damages for an infringement it had itself identified was claimed to violate the European Charter of Fundamental Rights.

In April 2011, the Brussels Commercial Court, in which the private claim was being heard, decided to refer two questions to the ECJ for a preliminary ruling, focusing on whether the defendants' rights under the Charter to a "fair trial" through access to a tribunal and "equality of arms" between the parties were being infringed due to the Commission having investigated and decided the underlying public case. One particularly thorny issue was based on the fact that, under the Treaty, national courts cannot call into question the validity of Commission decisions.¹⁵

The ECJ ruled last November.¹⁶ It began by noting that it is settled case law that any person, including the EU, can claim compensation for the harm suffered where there is a causal link between that harm and a prohibited agreement or practice. However, the fundamental rights of the parties, as safeguarded by the Charter of Fundamental Rights, must be observed.

The principle of effective judicial protection in Article 47 of the European Charter of Fundamental Rights comprises the right of access to a tribunal and the principle of equality of arms.

As regards the right of access to a tribunal, the ECJ confirmed that, where national courts rule on agreements under Article 101 of the TFEU which are already the subject of a Commission decision, they indeed cannot take decisions running counter to the decision adopted by the Commission.¹⁷ The ECJ held that this rule also applies when national courts are hearing an action for damages for loss sustained as a result of a competition violation as prohibited by decision of the Commission.

However, the ECJ found that this does not mean that the parties do not have access to a tribunal. EU law provides for a system of judicial review of Commission competition decisions which affords all the safeguards required by the Charter—those appeals by the same defendants were indeed pending before the European courts already. The ECJ added that, although it is true that national courts are bound by the Commission's findings of anticompetitive conduct, the national courts alone are competent to assess whether there is loss and a direct causal link between that conduct and the loss sustained. For these reasons, the ECJ concluded that, in the context of this case, the Commission cannot be considered judge and party in its own cause.

As regards the principle of equality of arms, the ECJ noted that each party must be afforded a reasonable opportunity to present its case, which both sides

¹⁵ Although this was being considered by the European courts due to the defendants' appeal in the main public case.

¹⁶ ECJ Press Release 138/12 and Case C-199/11—*European Union (represented by the European Commission) v Otis NV and others*, judgment of 6 November 2012.

¹⁷ Art 16(1) of Regulation 1/2003.

do still have; and that there would only be inequality if the court had information which favoured one party to the detriment of the other.

In this case, the Brussels Court was not provided with any information other than that which was available in the Commission's public decision relating to the cartel and therefore the Commission is not in an advantageous situation.

As a result, the ECJ confirmed that the Charter does not prevent the Commission from claiming compensation for cartel damages before national courts.

Marathon Question: what are your reactions to the engine-unite model? How sustainable is it? How does it contribute to the public and private engines and the general "competition environment", including the usual stakeholders of competition policy?

This discussion paper has argued for greater exploration of three ever-closer unions of private actions and public enforcement. Of course we need to be alive to situations where the drive trains might clash with one another. One such example is the vexed question noted above about access by private parties to leniency documents. Another relates to the fuel mix. If one engine is powered by the equivalent of jet fuel, then it will largely overpower the other, with perhaps odd effects. We see this in the relative differences between the US and EU, the former driven by private actions, fuelled by generous costs orders, treble damages and joint and several liability, compared to the EU, which lacks all those and more, but has a relatively well-funded administrative investigation model. Problems can arise, though, if the competition law standards are affected, either by becoming stricter, in response to over-ease of use by private litigants, or never get tested enough through lack of challenge and thus remain relatively uninterpreted and vague.

In my view, though, when looking at private actions and public enforcement, the areas of complementarity vastly outweigh those of conflict. These links are still under-explored and under-emphasised. The more we can link the engines together, the better. Thus I hope our discussion today at the Rome Antitrust Marathon and future research will help provide a more efficient and more effective "enforcement and redress" engine, which also contributes positively to the competition environment.

CRISTOFORO OSTI: Thank you. So let me start first with Philip's "engine-ignite" example, as he gives you a rather interesting twist, in the sense that it is the private parties which are igniting the administrative agency rather than the reverse, as we would be accustomed to in our country. The way agencies initiate their cases is extremely interesting, and all I can say is, from the outside, sometimes you wonder why they haven't and sometimes you wonder why they have, and basically you don't know. I'm not saying that there might be a remedy to it, I mean this is probably inbuilt in the system, but certainly this might be a problem if we rely too much on this particular kind of triggering of administrative action. And, of course, we have the problem of evidence, which I will come back to this. It's the problem in the public-private partnership. Private parties normally don't have that evidence to convince a judge, and the only way in our system, which doesn't have pre-trial discovery to find this evidence, is hoping that this agency will give you help. If they don't, you're stuck. Even in the engine-ignite system. The other problem, and, again, there might be countries where this works better—there are many countries where things tend to work better than in Italy—is relying too much on consumer associations. I think we can say in Italy this experience with consumer associations has been a complete failure, and I'm not saying that this is a good thing, I'm saying we should probably do something about it, and, of course, this will take a whole new seminar, and actually I'm not even very qualified to talk about this, but, basically, the way that incentives work—the information asymmetry problem, the way that consumer associations interact with the private bar—is in a rather perverse way and, certainly, not in a very fit way.

Then we have the "engine-assist" case, and there, first of all, a robust, clearly articulated decision helps private enforcement. I don't have much to say about it, but I think there the issue is control of this, because in order to have robust, clearly articulated decisions by agencies we need robust, clearly articulated review, and if you don't have that, you don't have the proper form. This, again, is an entirely new and very intellectually challenging area, but I think in some European countries this might be a problem and it might affect the robustness of articulation of the decision. Also, as far as *amicus curiae* is concerned, it is used in the US to create a rigid system. In contrast, in countries where, basically, 99% of enforcement is public enforcement, I don't think we want the authority to go out and get in the way of the very few private cases which are standing, because this creates a sort of monopoly of antitrust enforcement. There are examples from the second Bush administration where the use of *amicus curiae* might help us convince ourselves that this might not be a good system, especially in our systems where the preponderance of public enforcement is so evident. Commitments—we need a seminar on commitments. But, yes, I agree they might help.

Then we have the lifts case—Philip’s third, “engine-unite”, case. Yes, I mean, it would be nice, it’s very interesting, but, of course, it’s residual. If we have a situation where, we think, and I am personally convinced and not only for self-interest, that public enforcement probably could have a boost by a sort of more active enforcement, then relying on an agency to also do the private enforcement part exacerbates the problem rather than helps solve it, because the agency would have even less resources to do a satisfactory level of public enforcement, because it would be engaged in some kind of private enforcement. This maybe applies also to the amicus argument.

So let me finish by saying two things: the first one is to let’s go back, for a moment, to what would be, at least in our country, and I suspect in most European countries, the most common private–public interaction, which is follow-on actions. Surprisingly enough, I think follow-on actions in Italy, right now, are working reasonably well. I mean, there are very few cases, but we have also to say that there are very few public cases, so it would be surprising to have many private cases which are follow-on actions. We have a problem with class actions, so, clearly, the first thing that you have to do if you want really to push on this pedal is to invigorate the class action system, because that’s essential for a good functioning of follow-on actions.

Also there is this expert forum, because at the end of the day what you see is the judges, they don’t know their way out, if the situation gets too complicated. In Italy, for instance, lots of these cases have to do with utilities, and therefore with a heavy amount of regulatory law and regulatory economics. So, what judges do is they call an expert and then, of course, the plaintiff calls another expert, then the defence calls a third expert and then there is this battle of experts, which tends to confuse everyone, starting with the judge. At the end of the day, economics is a very complex science, and you can always find an economist who says exactly the opposite of another economist. If the economists are hired as experts, they tend to work as lawyers, and, as you know, lawyers say whatever the person who paid them would say. This problem, unfortunately, is transferred onto economists. Having said that, I don’t think this problem is solvable except through the education of judges, which is happening even in countries like Italy, where, be it by law or be it by practice, these kinds of cases tend to concentrate on a very limited number of judges and, of course, these judges are becoming, if they are not already, experts, and they are getting to the point where they can find their way out and analyse the regulatory law and the regulatory economics.

I finish by saying that in Italy we don’t have a satisfactory level of private enforcement and the result is serious under-enforcement. You need to have a much more active private bar. And there are other problems: political discretion with a big “P”, which is influenced by the government of the parliament, which exists in any national agencies; and you have political with a small “p”,

which is that agencies have to give some kind of direction to their enforcement, which might be good or bad, depending on what you think. I think, again, the second Bush administration direction was a bad one, I think the first Clinton administration was a good one. I mean, if you think of the US *Microsoft* case, I think that's exactly what an agency should do: go for very big, very complex new cases, which create theories which find a sounding board for these theories with a competent judge, then if the case goes through, you have a substantial amount of private litigation that will follow on. This is what I think a public agency should do, and this, I think, is the right interaction between public enforcement and private enforcement. There is also a different, more down to earth reason for wishing for much more active private enforcement, and this is that private enforcement is more democratic—it is more for a battle of the ideas. Yes, private parties might make mistakes—judges, certainly, make lots of mistakes—but it is from these mistakes that maybe something new and something interesting comes out. And also private parties are closer to the people, if I may use this expression, and so they can give antitrust the kind of political purpose that antitrust has been losing for a long time. If we take the marathon metaphor, the lack of this has been dehydrating antitrust for so many years. There are signs that this is coming back and, if this increases, you would have this kind of expansion from the bottom, which I think would be very important, again, for the purpose of revitalising enforcement. What do we need for private enforcement? Very easy! We need more class actions and we need pre trial discovery. If we don't have these two things, we will never get there, and we will never have an optimum amount of private enforcement and a good interaction between private and public enforcement. Thank you.

ALBERTO PERA: I want to comment on a very interesting suggestion in Philip Marsden's paper about the relation between public and private enforcement. In particular, I was interested in your point about how to use private information in an efficient way in order to foster public enforcement. This is a very relevant point because, basically, most of the cases which are raised by the authorities derive from complaints from private parties. For instance, the Italian authorities have pointed out that it is difficult to gather information about infringements, therefore it is difficult to start procedures. Now, a first suggestion in your paper is that you need clear decision rules: in particular, it is required that the authority makes clear decisions. Now, this also depends on the kind of decisions the authority is taking. For instance, commitment decisions do not provide much support in the case of private enforcement. Sanctioning decisions not only provide grounds for follow-on actions, but also give a clear indication about enforcement criteria, which can then be used by private parties. In turn, this may give incentives for private parties to provide information to the authority about potential infringements.

A second suggestion concerns the kind of information that these private parties may provide. Philip's paper contains two interesting points: the first one is the possibility that the authority decides that affected private parties are given some forms of compensation. In Italy there was a case closed by commitments whereby the parties offered compensation to the plaintiffs. I cannot but note, though, that this suggestion raises some issues about the role of administrative authorities and civil courts in adjudicating and evaluating damages. A second suggestion could be to provide compensation to parties which provide information about infringements: for instance, in a recent paper, Alberto Heimler suggested giving local authorities some compensation if they provide information about bid rigging. The proposal may have some shortcomings, but nevertheless could be interesting—in particular, since it allows us to obtain information about practices which are very difficult to discover.

Now two interesting points Philip put: one is to consider the possibility that the authority considers the need for some form of compensation, even during the proceedings. You are quoting a case about independent schools in the UK, and I thought that was an interesting case. We have a case in Italy where the decision to compensate affected parties was taken as a commitment, which I don't think was a good idea, but this is a different case, if you take it as a case in which you end up with an impeachment. The second case is a proposal, which Alberto Heimler has suggested separately, to give local authorities some compensation if they find some infringements, but this would imply not only legislative change, which, obviously, is different, but would also be taken by the authority itself.

MARIO SIRAGUSA: I will try to express some more optimistic considerations than those expressed by Professor Osti, pointing out what could be done to improve the current situation.

First, I would like to say a few words about the first kind of intervention that Professor Marsden mentioned in his paper, ie the “ignition” of an investigation or a proceeding of a complaint. Of course, it is well known that complaints play a very important role at both the European and national levels.

Many proceedings are opened after a complaint is filed and are thus pushed by complainants. Indeed, the European Commission has occasionally become the forum for “battles between giants” of the electronic or telecommunications industry—such as IBM, Oracle, Google and Microsoft—which filed complaints against each other. I think that the Commission is sometimes much too involved in this kind of private fights between “giants” and does not spend enough time looking at the reality of the markets in Europe, which are devastated by cartels and other anticompetitive behaviours.

Yet while it is true that complaints play an important role, I think that it could be revealing to examine the response of the competition authorities to

the complaints. Of course, if an authority opens an investigation after receiving a complaint, the complainant's purpose is partly achieved. But there are plenty of cases in which authorities do not take action after receiving a complaint, either because they think that there are no grounds in the allegation or because they have other priorities. One of the most common reasons why the authorities decide not to open a case is the lack of resources. Even where a complaint is *prima facie* well grounded, the authority may decide not to intervene because of allocation of resources.

At the European level, the issue of how to improve authorities' reaction to complaints has been discussed for many years. As you know, if the Commission rejects a complaint, it has to explain why it has decided not to act.

Therefore, I think that we should analyse whether the reaction of the authorities to complaints could assist private litigation. For instance, let us assume that an authority decides not to act after receiving a complaint, not because the complaint is totally unfounded, but because of limited resources. If the authority expresses this preliminary position in its decision rejecting the complaint, I think that its assessment could be regarded as an acknowledgement that there is some merit in the complaint, which could be a very helpful factor for starting a private action.

In my view, the first area of research we should explore is how to better understand and regulate these issues. As a practical suggestion, I think that national competition authorities should also adopt public guidelines or a communication on how they deal with complaints, as the European Commission did.

As to the "engine-assist" model mentioned by Professor Marsden, I think that we all consider *amicus curiae* the best way to link the private and public "engines" so that they can help each other. Unfortunately, we do not have so many examples of this kind in our country. I also agree that the best form of help—albeit indirect—is the issuance of clear and strong decisions by the authorities.

The Commission has often correctly described the reasons for the success of the competition policy at European level. These are: well-reasoned and strong decisions, which create vast jurisprudence on which we can base our counseling.

Moreover, pursuant to Article 16 of Regulation 1/2003, the Commission's decisions are binding on national courts, meaning that the courts cannot take decisions running counter to what has been ascertained by the Commission. This is a very important example of cooperation between public and private enforcement. Of course, this is also a delicate issue, since, as you know, from a constitutional point of view, in Italy decisions of a public authority cannot be binding on judges as long as these decisions are not subject to a full jurisdictional review.

I think that this problem has become stronger at the European level too, notwithstanding what Article 16 of Regulation No 1/2003 provides regarding the effect of the Commission's decisions. As long as judicial control of decisions is not of full jurisdiction, there might be an infringement of the European Convention of Human Rights. Therefore, it is not conceivable that these decisions be binding on judges.

I think that this is a big vulnerability of the European and the Member States' systems, including the Italian system. If we do not solve this problem, we will not have the full effect of Article 16 of Regulation 1/2003 and the cooperation between public and private enforcement will be weakened.

Finally, as to the last model of integration of public and private enforcement (ie the "engine-unite" model), the *Otis NV* case is unique, and it is difficult to think that it could frequently happen in the future. Nevertheless, in Italy there is an interesting development that demonstrates the deep integration of public and private enforcement. New powers granted to the Italian Competition Authority allow it to bring an action before the administrative judge for the annulment of administrative decisions, which may have a restrictive effect on competition. This is the best example I can think of, where the Italian Competition Authority itself has the right to take legal action against a restriction of competition.

MAURICE STUCKE: Philip Marsden's engaging paper discusses how the public and private enforcement of the competition laws can help each other, especially under Philip's "engine-assist" set of examples. These helpful examples suggest an alignment of interests between public and private enforcers. Both public and private enforcers assist each other, such as the governments filing amicus briefs in private actions. Philip also observes how a society might have to endure situations where the public and private enforcement drive trains clash with one another.

Philip's "engine-assist" examples and Cristoforo's comments reminded me of an article Irving Fisher wrote over 100 years ago. Fisher wrote how competition generally benefits society when individual interests are aligned with collective interests. One problem is when the individual interests conflict with their collective interests. So, too, I wonder whether the "engine-assist" model should include examples where the public and private interests clash. But this clash is not necessarily a bad thing. The public enforcer is simply trying to prevent a race to the bottom among private litigants that leaves the private litigants and society collectively worse off.

One example, which Philip raises, is when private parties seek access to the government's leniency documents. The competition authority and private litigants can clash over the discoverability of these leniency applications. It is often in each private litigant's interest to obtain the leniency applicant's

confidential submission. In fact, the private litigants may compete among themselves over who gets the leniency materials. But, as Spencer noted, if the public enforcers are required to disclose the leniency materials to private litigants, then this disclosure could chill the use of leniency programmes and reduce the programme's effectiveness in deterring cartels.

So here the public and private enforcement drive trains will clash. But this clash reflects a misalignment between the private litigants' individual and collective interests. It is in each private litigant's interest to obtain the leniency materials. But if all private litigants routinely obtain the leniency documents, then far fewer firms might apply for leniency. As a result, collectively, private litigants and society are worse off.

Another area where the public and private enforcement drive trains might clash is over monetary penalties and damages. It may be in the private plaintiffs' individual interests to recover the largest amount possible from the defendants. But if the private litigants competed among themselves to secure the largest possible monetary award, they collectively can be worse off. The monetary award, if too large, can cripple the defendant firms and lead to a less competitive market.

So, under Philip's "engine-assist" scenario, the private enforcement drive train at times will clash with the public enforcement drivetrain. But this clash can be a good thing for the private litigants and society. When the private litigant's individual interests are not aligned with their collective interests, then the public enforcers can prevent a competitive race to the bottom among the private litigants.

This, of course, assumes that the public enforcer is looking out for the private litigants' collective interest. As Cristoforo pointed out, how do you distinguish the benevolent enforcer from one that simply seeks to preserve its monopoly in enforcing the competition laws and the spoils it receives from the regulated industries? The national competition authority does not necessarily look out for the private litigants' or society's collective interest. The public enforcers simply do not want their power diminished.

VINCENT SMITH: I want to make, if I may, three orders of comments briefly.

First of all, to second what Mario has just said about the need for sign posts for complainants, claimants and, indeed, judges. The Commission, of course, has produced guidance notes both for complainants and for judges. The complaints notice says "yes, please, come and complain to us", as Mario said, and then spends three pages telling you why you can't, which is particularly unhelpful. I think it would be more sensible to have something which is more accessible and a bit more user-friendly, and see it coming from national competition authorities, which are generally closer to the market that they serve.

Personally, I find—and I know there are judges in the room—the guidance from the Commission for National Judges particularly impenetrable, and it would be helpful to have something which is also a bit more accessible for the use of the judiciary.

My second order of comments, following on the earlier ones, is about compensation being rewarded by national authorities. Now, I was myself heavily involved in the *Independent Schools* case in the UK, where the schools agreed to pay three million pounds in compensation via a charitable trust, and they also paid a fine, so it wasn't a commitment decision. I'd say two things about that, particularly addressing Professor Pitruzella. One is that you need willing interlocutors: there is no point in forcing this on people; it doesn't work. And secondly, it is incredibly resource intensive. It took the equivalent of bringing an enforcement decision by the resources needed to actually arrive at that settlement. So you do have to think about the knock-on effects on the rest of your agency work. It can't not be done in all cases, or, indeed, even in the majority of cases.

And there is, of course, the institutional issue of the administration effectively being turned into a law court. I think that is something which ought to be avoided at all cost. Judges are judges, they are trained for that purpose to be the most capable, whereas the administration is the administration and ought to stick to its work.

But there is one area where I think that compensation, and the encouragement of compensation, would be helpful. Most—the European Commission is an exception—but most national competition authorities at least are part of the wider administration, and it would be very helpful for them to engage in advocacy vis-à-vis the wider administration where they think cases which they have on their books have links to losses to the public purse. It does not happen, and I think it should happen more often. So, for example, let's take an electronic cartel. Any Member State's governing body must be the largest purchaser of electronics, so it would be helpful for them to bring a claim, because other claimants could then come forward and attach themselves to the government's claim.

My final comment is a word of caution, I suppose; it is one of ethics, and follows on from what I said about the administrative body not becoming a "court". The administrative body also needs to be careful not to be captured by claimants. Clearly there is a need for the body to be independent, but also to be seen to be independent, and acting in the public interest, not in the interests of claimants, however numerous or powerful they may be.

I wonder whether the advent of the class action system we have proposed in the UK to do just that might actually align the public interest with that of the class of private claims more closely, since the class necessarily represents most of the public interest, at least in claiming compensation if the class is properly

defined. That could be a good thing. But that hasn't happened in the US: we see various kinds of class actions being brought there on behalf of proposed classes by claimants who are not really representative of anybody.

Then there is the quite serious ethical issue of the public administration being captured by large groups or large individual companies when they try to integrate public with private enforcement, which also needs to be avoided. It's not immediately obvious, though, how to do that easily.

RENATO NAZZINI: A few comments about disparate matters that have been raised in the papers and during the discussion: as a preliminary point, I note that we are talking mainly—in fact, almost exclusively—about the so-called follow-actions. We are not talking about stand-alone actions, which are a very important area, but I'll come to those later. The first question, what can competition authorities do to ignite private enforcement? In my view, what goes into a decision is more important: in a sense, whether the decision is binding, like in the UK, or highly persuasive evidence, like in Italy. From this perspective, the decisions by competition authorities are always of limited assistance because, however many arguments and however many references to evidence there may be, an administrative decision will hardly ever provide, in itself, the kind of evidence that can persuade, or even bind, a judge on issues like causation and quantification of damages. Therefore, it would be a good idea to look for a mechanism, which must be clear and transparent, whereby a national competition authority and the European Commission can really facilitate private enforcement. But unless such a mechanism is designed, I think it would be most inappropriate to include in decisions more analysis or evidence simply in order to facilitate private enforcement. This could almost amount to an abuse of power in the sense of the use of a legal procedure to achieve means other than those that the law ascribes to it. There could also be issues relating to equal treatment if we were in a situation in which, depending on the case team or who is involved in the decision-making process, certain decisions are more and others are less detailed. However, what can a competition authority do to facilitate compensation? To negotiate private settlements with compensation as part of the administrative process is very resources intensive. This may be one of the reasons why competition authorities are reluctant to do this. Furthermore, to negotiate settlements on behalf of potential claimants exposes the competition authority to reputational risks if the negotiated settlement is too low. However, I wonder, in the context of cartel settlements, whether something as follows can be devised: there could be, in a settlement decision, a mechanism whereby the parties agree to a mediation or another form of ADR procedure which is, therefore, outside the remit of the authority. Mediation would be a very soft form of obligation because a duty to mediate is not a duty to pay any sum but one could conceive of a

unilateral promise to arbitrate or to be subject to summary adjudication in an Ombudsman-type of procedure. As a competition authority, with such a mechanism, you sort out the resource issue. You only have to give the parties the right incentives to agree, but you don't have to come up with the figure or even an identification of individual claimants, and you also deal with the reputational issue, because the decision on who is entitled to compensation and how much the compensation will be would be made by others or would be agreed in a form of mediated settlement between the parties and potential claimants. Undertakings that are found to be in breach of competition law may have (I underline "may") the incentive to agree to such a procedure. Do you have an incentive to do that now? By and large probably not, because, in many EU countries, it is probably better to litigate and, even if the case settles, the parties have much more control over the settlement, which, for instance, can be kept confidential. But if, like in the UK, you go towards a system of opt-out class actions, then parties actually may have the incentives to sort out their private law liability as part of the settlement with the competition authority. One last remark: in the past I used to think what the majority think, that compensation and damages and public enforcement must be kept completely separate. Today I wonder whether actually there may be very valuable synergies in combining the award of compensation and public enforcement in one procedure. The settlement example I gave goes in this direction. The UK reforms provide an example—a rather timid example, but a modest step in the right direction in really making the Competition Appeal Tribunal a forum for public and private enforcement. The Competition Appeal Tribunal already has jurisdiction on appeals against the decisions of the UK competition authorities and on follow-on actions, and will have jurisdiction on class actions, so you can see, for instance, the same panel potentially deciding first on the appeal against the administrative decision and then also on the damages claim, which clearly has synergies and advantages. The Competition Appeal Tribunal will be given jurisdiction on injunctions. This direct access to the Competition Appeal Tribunal for injunctions is a very interesting development. This sounds like a classic private law remedy, but if you think about the debate that we have in the UK and the function of injunctions, it becomes apparent that injunctions in the Competition Appeal Tribunal are seen as a substitute for complaints, whenever the applicant needs immediate and fast relief. Another example, perhaps, of the boundaries between private and public enforcement becoming less clear-cut. Thank you.

EDWARD JANGER: Philip, your "engine-assist" metaphor certainly brings to mind Fabio Cancellara, the Swiss cyclist, who was once accused of having an engine built into his bicycle, because otherwise he couldn't possibly go so fast. Now, that clearly would have been wrong, if proven. In bicycle racing, we

know, more or less, what the rules of the bicycle race are. An “engine-assist” would violate the rules.

One of the great things about competition law is it applies across many different industry platforms and many different regulatory regimes. The rules aren’t always so clear. Your presentation assumes that in these various contexts we will be able to figure out which approach to use. But the rules will not always be so clear. Choosing among your models may require us to further disaggregate and abstract the components of an enforcement regime, before we can think about them comparatively.

First, you have the functional components of an enforcement action. These, it seems to me, are (1) initiation of enforcement; (2) development of information; and (3) resolution. Because, as Philip points out, enforcement actions may be cumulative, coordinated or centralised, one also needs to think about standing. Who can bring an enforcement action: (1) individuals; (2) the competition authority; (3) other agencies? Centralisation may facilitate capture, but it may also make enforcement more effective. Choices about centralisation and decentralisation of authority are therefore crucial, but they can also be quite controversial. For example, in the US, many agencies had responsibility for consumer financial protection, but most of them were prudential banking bodies that didn’t view consumer protection as related to their principal mission—safety and soundness. In 2011, the Dodd-Frank Act consolidated enforcement power in a new Consumer Financial Protection Bureau. This centralisation has proven very controversial and is feared by the banking industry, even though, for the most part, only existing regulatory authority was involved.

In short, careful attention should be paid to the question of centralisation, decentralisation and coordination at all three of the functional stages of an enforcement action. At the initiation stage, the decentralisation may be useful because different actors have different capacities to discover wrongdoing, and because capture becomes more difficult if multiple entities can initiate action. At the intermediate stage, coordination is important, then at the resolution stage one wants to ensure that any conclusive disposition allows participation by any agency/entity that will be bound.

SUSAN BETH FARMER: I’m glad to be following Prof Janger because his recommendation of broad decentralisation in competition enforcement is really a perfect description of the multiple federal, state and private enforcement system in the US. We have two federal agencies, US DOJ (US Department of Justice) and the FTC (Federal Trade Commission), 56 state and territorial attorney generals, a wide variety of state and federal sector regulators, plus a robust private right of action that includes treble damages. Against this background, I would like to add a fourth category to Professor Marsden’s insights in modes of public–private partnership for effective competition

enforcement: rather than partnering, sometimes the enforcement agency gets in the car, takes over the wheel and drives off with it. This situation began more than 35 years ago with the Antitrust Improvements Act, which created a statutory *parens patriae* right of action and authorised the state attorney general to directly represent the natural person consumers. Courts found that the State Attorney General in these *parens* actions was a superior representative to private class action representatives asserting consumer classes. Under this theory, the state does not assist, ignite or unite with the private class action, but litigates the case on behalf of consumers and, if it prevails, either recovers damages and returns them to consumers or recommends a *cy pres* remedy for court approval, which orders distribution of any settlement fund or damages to a purpose designed to benefit, as directly as possible, those who were harmed by the anticompetitive conduct. This preference is indirectly supported in the Supreme Court's Twombly decision, where the majority evidences a distaste for the asserted costs of private class actions and questions courts' ability to control class action excesses and overreaching. At the end of the day, the court implicitly could be said to prefer this fourth category.

ALBERTO HEIMLER: I would like to refer to what Cristoforo Osti said at the beginning. In order to have private enforcement you need to have evidence, and such evidence, if you do not have pre-trial discovery, as is the case in our system, can only come from public enforcement. I would like to bring a second dimension to this issue of the evidence, and that is the issue of complaints (that are the engines of public enforcement). We have been proceeding with discussion this morning with the assumption that the number of complaints (ie the number of cases) is given. But no—the number of complaints is not given. There are lots of restrictions of competition in our system that go undetected because the victim is not aware that it is being damaged. This is well known: the victim of a cartel does not know that the cartel exists. This is the justification for the introduction of leniency programmes and for the resulting success public enforcement has had in the fight against cartels. Indeed, the problem with stand-alone private enforcement is that many restrictive practices go undetected because the victim does not exactly know what the precise content of the antitrust law provisions are. So my point is that, since the engines of enforcement, as you said, are the complaints, our effort should be directed to promote these complaints. This is important for private enforcement, but also for public enforcement. In Italy, for example, there are small and medium-sized enterprises which are usually advised by accountants, not by lawyers. Furthermore, if they ever see a lawyer, there is a high probability that he or she will not be an antitrust law expert. Here at this conference we have the international law firms. Their lawyers are very few and do not connect to the vast majority of our firms, unfortunately for all of us. This is why firms do not

complain in Italy. We don't receive enough complaints. We suffer as a system, so it's not just private enforcement but also public enforcement that suffers. We receive complaints only against public utilities, but not against private firms violating antitrust law. To improve the situation we need advocacy by the antitrust authority. I think the authority has a very important role to play to advocate to the fact that the antitrust law exists and to what a substantive restriction is. I think it's a very important objective, even after the more than 20 years that the Italian law has been in place. People don't know what the objective of the antitrust provisions are, so how can they complain? This is my first point: to promote complaints through advocacy.

The second point is to promote complaints through formal decisions. Commitment decisions, where a precise violation of the law is not found, are not very effective in promoting such an understanding of what the antitrust laws really aim at.

SPENCER WEBER WALLER: With respect to evidence, which is a key issue, let me make a suggestion: there is a provision. Even if it's difficult to get evidence under the European civil litigation system, there is a provision under which judicial assistance can be sought in the US.

This has sort of a bad reputation, because most of the time the international request has been for leniency or pre-trial discovery documents, as in the *Intel* litigation that went to the Supreme Court.

But, putting that aside, if there is a private claim, or a potential private claim, the US judicial system can be used to get some of the kind of pre-trial discovery that is common in the US but is unknown in most of the EU and other countries. I've always been a little surprised that this hasn't been utilised more in European private litigation: where there is a US party there would have been documents or testimony that would be relevant.

GABRIELLA MUSCOLO: My comment is on the second point on the agenda, the "engine-assistance", and especially on the evidence issue. From the point of view of a judge, the decision of the Commission or of the national agency, even in the case of a binding effect, can help the parties and the judge with their access to proof of the infringement, but it is of no help in collecting evidence on the link of causation and on the existence and the amount of damages in follow-on actions for compensation of damages. I agree with Cristoforo. In my opinion the best solution to the problem is a sort of mild form of discovery, a sort of European discovery, even in Continental law systems. May I also add, good practices in the use of the economic evidence, but I suppose we will come back to this point in the third section, which is about private enforcement. In 2011, during the consultation meeting of the European Competition Law Judges before the Commission, the Association of the European Competition

Law Judges expressed a unanimous opinion in favour of introducing discovery even in Continental law systems. There have been clashes of opinion on the point of the binding effect of decisions of national agencies over courts. I also take note of Spencer's suggestion about the cross-border assistance on discovery.

GINEVRA BRUZZONE: Two short remarks: one on super-complainants and the other on the role of guidance by competition authorities.

The power of representative associations to submit complaints to competition authorities in an important instrument for promoting enforcement in cases of infringements with widespread negative consequences, especially when they affect consumers or small enterprises. At the same time, in most jurisdictions competition authorities can act *ex officio* when they become aware of such a case.

On the other hand, I personally do not envisage the establishment of a preferential track for complaints submitted by collective bodies, based on the presumption that they are more meritorious than complaints submitted by individuals. In a situation of scarce resources for public enforcement, this approach might delay the investigation by competition authorities of more urgent issues. In my view, it should be for competition authorities to assess which complaints deserve priority, taking into account the substantive aspects of the case.

Under the heading of "engine-assist", Philip Marsden rightly stresses the importance of clear decisions by competition authorities on the existence of the infringement, strong enough to survive judicial review. The role of guidelines by competition authorities on the substantive criteria for the application of competition rules should also be considered. I refer in particular to the communications/guidance papers of the European Commission on the application of Articles 101 and 102 TFEU. These documents are not binding on EU and national courts; in particular, the guidance paper on exclusionary abuses formally indicates only the Commission's enforcement priorities. In practice, however, these guidelines aim at arranging the case law in a systematic framework. Therefore, as indicated by Advocate General Mazak in his opinion in the *Telia Sonera* case, the guidelines represent a useful reference also for the courts.

SALVATORE REBECCHINI: First of all, the issue of how to ignite complaints: in Italy, the number amount of cases brought to court for private redress followed the case of the insurance companies, which the Italian Competition Authority successfully litigated. I think that part of the good outcome of this case, in terms of igniting private initiatives, is to be imputed to a sort of indirect quantification of damages comprehended in the case: the indication on how price changed differently in Italy compared to other countries. This

indication was sufficient enough to kick-start at least a hundred cases of private redress. This is just to give you an idea of how important a certain kind of harm quantification form is.

My second concern is related to leniency programmes. I think that leniencies have been very successful. They have boosted cartel detection at international level, but not as much at domestic level in Italy. In May 2012, we organised a very interesting seminar on how to improve leniency's incentives and our October 2012 Advocacy Report emphasised some specific proposals. The main idea is that there may be some sort of negative feedback between the private enforcement and the leniency applications. Actually, the former can discourage leniency applicants because of the risk of criminal or private damages. The Italian Competition Authority focused on three specific proposals and it could be interesting to discuss them.

The third issue I would like to note is that of commitments, which has just been developed by Alberto Heimler. There is no doubt in my mind that commitments can discourage complaints. Now, what can we do about it? In 2012, the Italian Competition Authority started a new policy, and I think the results will show in numbers. I believe that it is very important to give a clear signal about the proper purpose of commitments. It is also important to keep in mind that the number of commitment decisions is important for deterrence, but what is much more important is the rate of commitments compared to the infringement decisions. With respect to this, Italy had been an outlier until 2011, because we treated more commitment decisions than infringement decisions, which is obviously not the case, for instance, at the EU Commission level.

LUIGI PROSPERETTI: I have three brief points: the first concerns better hybrid engines. I am unsure we should be discussing cartels and exclusionary behaviour together under this aspect. For obvious reasons, we have a strong public policy case for fostering private actions against cartels. But do we have as strong a case for fostering private Article 102 cases? Such a question, I believe, applies to private actions in general, where we tend to lump together abusive conduct cases and cartel cases, but they're different: claimants have different incentives, different levels of access to information, different resources and different—if I may say so—moral grounds. I would not like to see that, in order to foster cartel cases, we end up fostering a lot of exclusionary behaviour cases, many of which will be unmeritorious. So, I think we should keep the discussion of the two issues rather separate.

My second point concerns "engine-assist". In line with Mario Siragusa's suggestions, I have a further one concerning sector enquiries in Italy, and possibly other countries that do not have the strong UK sector enquiry model, where the Competition Commission, at the end of a market inquiry, may impose

remedies. Even where this is not the case, sector inquiries by competition authorities may have a healthy impact on the way markets operate, bringing to attention possible anticompetitive practices and making public data that would otherwise be very hard to find. This is why I think competition authorities should do a larger number of lighter sector inquiries, which take less time and resources than those it carries out at present. We would have more of them in this case, and I think it would be a good thing also from the private actions point of view, which would often find fuel in such inquiries.

On the same line of “engine-assist”, I’d like to briefly remark (trying to be prudent in doing so, because I’m an economist) on a recent decision of our Supreme Court, concerning follow-on actions of the “car insurance cartel”. As Rebecchini was reminding us, these have been very numerous, and possibly the Court grew, over time, somewhat irritated with them, and tightened the rules considerably. In light of an early 2013 decision, it now holds that, in a follow-on damage case, after an antitrust decision has been reviewed by the administrative justice, causation and damage to the claimant can be presumed. Secondly, the Court held that the presumption can be rebutted, but not on the basis of the arguments that have already been used by the defendant in front of the antitrust authority. Defence seems, therefore, to now be limited to “fresh” general arguments, but of course—unless the lawyers were really bad—in practice there are never such arguments. Thirdly, the Court held, however, that you can use company-specific or customer-specific arguments. I’m sure that these points raise a number of interesting issues from a legal perspective, which I’m glad to leave to legal experts.

In any case, it is unclear to what extent they apply specifically to this cartel, or more generally to agreements. In any case, I think we should remark that such a position of the Italian Supreme Court is a significant step in the long-standing debate about the evidentiary value in the civil courts of administrative infringement decisions.

On the other hand, in light of recent decisions of a lower court in Milan, it would seem that such a lowering of the evidentiary standards for causation and damage in cartel cases does not apply to exclusionary abuse cases.

So an interesting asymmetry seems to be arising in Italy (but I’ve seen decisions elsewhere that would seem to confirm this) between follow-on actions in the two types of cases.

VINCENZO MELI: I want to make just a couple of remarks. I totally agree with Cristoforo Osti, who concluded his report by stressing the importance of class action and discovery as the core topics in the discussion about antitrust private enforcement.

Discovery is indeed a very thorny issue, and I’m not sure it really has anything to do with the ignition of the engine, just to use the expression that

Philip Marsden introduced in this session. Let me, therefore, make a few observations about class action.

As all Italian antitrust lawyers know, class action has remained the sole instrument allowing consumers to react against antitrust violations which cause them damages. That is because in 2012 a legislative innovation has made civil actions much more expensive, dramatically increasing the taxes that every plaintiff has to pay in order to file a civil claim. If we consider that the damages suffered by every single consumer as a consequence of an antitrust violation are generally limited, we may foresee that individual private antitrust actions will become even less frequent than they have been in the past and that only groups of consumers will be able to bear the economic burden of judicial proceedings in antitrust matter. Nonetheless, it is equally well known that the law on class action which was passed by Italian Parliament in 2009 (introduced by virtue of Article 140bis in the Consumer Code) did not work at all. I do not know much about class action in other Member States, but my suspicion is that class action has also not been a real success there.

In my opinion, looking at the Italian legal system, the failure of class action has three main explanations.

The first one is the extreme weakness of consumer associations. The second one is the prohibition for lawyers to openly engage in solicitation. The third one is the way the law on class action was shaped: some obstacles and judicial filters were created, which make it very difficult to start a class action instead of facilitating it.

It is, of course, impossible to solve the first problem. The weakness of consumer associations is just the other side of the coin of the permanent fragility of the culture of competition in Italy as well as in many other EU countries: we can only hope that this will eventually take root and bear fruit.

As for the second explanation, could the lawyers officially “chase” new clients among the consumers hit by antitrust infringements, it would be easier to group all possible claims, combining through class action low costs for each member of the class and adequate economic incentive for the lawyers. Nevertheless, deep down I am not sure that would be a good choice to liberalise solicitation, giving rise to a treasure hunt, in which the treasure are new classes of potential victims of antitrust violations. The disadvantages would probably be greater than the benefits.

In the end, we may work only on the third explanation, claiming a change of the law in order to increase the number of class actions, never forgetting that, on the other side, we have to avoid class action becoming a tool for economic blackmail, which is the typical risk inherent in it.

This is not the place to analytically examine possible changes to the current system which could help to achieve this goal. I think it is more urgent for us to acquire the conviction that the only way to acknowledge the importance of

the class action in the improvement of antitrust private enforcement is to work on it at the EU level.

All we know is that in recent years the Commission has been planning the adoption of a directive on this matter. On 27 November 2008 a Green Paper on Consumer Collective Redress was adopted, a public consultation and some hearings then took place, but the project is still at the stage of obtaining expert report and opinion, and nobody knows whether or not it will really become a directive. Well, I think it is time to end it and definitively harmonise the laws of Member States on class action.

The Commission has released several proposals aimed at improving private antitrust actions. It is easy to see that many of these proposals have no chance of being agreed by Member States, because they clash with established principles of the different national legal systems. Class actions have meanwhile become a common goal of almost all EU legislators. I, then, hope that the probability that the efforts for its harmonisation soon will be crowned with success has increased and that it would really represent the right way to ignite the engine of antitrust private enforcement EU wide.

PIERLUIGI PARCU: First, it seems to me now that all cases cannot be treated in the same way in this discussion, because cases we're undertaking where there is leniency cause special problems in this discussion in my opinion. I will thus concentrate only on the normal cases. I have a feeling that if private enforcement could be more closely monitored by authorities, especially the Commission, but also national authorities, if judges would call in not only experts in economics but also the authorities themselves for clarification, that would help provide stronger decisions. I feel there is a tendency not to call in anybody, and also for the authority and the Commission not to intervene. But then I see the opposite thing in the public enforcement. And with public enforcement by authorities I get the impression that there should be an effort to make the procedure more similar to court procedures. There is no full equilibrium in the public enforcement. In public enforcement there is a complaint at the start, but after that there is a sort of duel between the public prosecutor and the defender. The complaints fade into the background, so we don't see much of the paper, much of the elements. So in the end it's not only a question of decision, I think is the question of procedure that is not fully opened, and that doesn't help then in the follow-on cases and creates lots of problems later on.

FRANCESCO MUNARI: I was considering a couple of questions and comments on the issue of "engine-ignite" from Philip Marsden's paper. The point I would like to start from is that of the alleged victims of any anticompetitive behaviour, their position within antitrust cases and in particular their role within any court proceedings where any undertakings which have

been found liable of infringing competition rules are challenging the decision adopted by any national or European cartel office in their public enforcement of such rules. My starting point is the recent order issued by the European Court of Justice (ECJ) in June 2012 in the *Schenker v Air France* litigation. The ECJ—in confirming the order already issued by the General Court—was very keen on excluding any right of the alleged victim, Schenker, to intervene in the judicial proceedings in which Air France was requesting the General Court to annul the Commission decision about the airfreight cartel. The rationale of the Court, which apparently makes sense, is that, if we open the door too far to any third party intervention in any public enforcement case, then it would affect the efficiency of the judicial control of decisions adopted by national competition authorities or the Commission applying competition rules, and the possibility of rendering a judgment in a short period of time.

I think that the same concern (ie to limit or exclude altogether the intervention of third parties) exists when an antitrust procedure is carried out before the national antitrust authority: this is the reason why, apart from the presence of the initial complainant (or complainants), in general there are no other parties intervening in public enforcement cases.

However, in my view, this has significant shortcomings in respect of what can in fact be assessed by the antitrust authority in regard, for instance, to the gravity of the alleged infringement: indeed, in many cases decided by the antitrust authorities (including the Commission) this element is presumed rather than actually being ascertained, eg by referring to the duration of the infringement, which is not necessarily symptomatic of gravity, especially in cases of abuses of a dominant position: without a factual analysis of the persons actually affected by the contested behaviour, and of the harm actually suffered by them, the use of presumptions may end up being an imprecise tool.

On the other hand, if the victim cannot take part in these kinds of proceedings, later on she may not be in the position to build her case in any follow-on litigation, having been prevented from accessing those factual elements present in the procedure carried out before the national competition authority or by the Commission.

A balance should therefore be struck between these two conflicting interests. Furthermore, and needless to say, this balance should be determined uniformly at EU level, and not at the Member State level, at least as long as we are talking about implementation of Articles 101 and 102 TFEU.

This balance, in any case, should always preserve the principle of the parity of arms, especially for defendants, as well as all rights of defence pertaining to them.

And finally, the above highlights a further caveat, ie the need that courts be very careful, in any follow-on litigation, in respect of reliance of the results of any public antitrust enforcement where gravity of an infringement has been

assessed based on presumptions and not on a concrete analysis of the facts and of the harm actually caused by the anticompetitive behaviours.

PINAR AKMAN: I have a question and a comment. The question relates, I think, mostly to the examples of the “engine-ignite” and “engine-assist” types of cases, and is this: can you make the private plaintiff so incentivised or so interested to bring a claim without providing, for example—leaving aside collective actions—the possibility of multiplied damages? It has not been mentioned so far, but I think it is quite important whether we do provide multiplied damages and, if so, who we actually incentivise: who do we want to have these cases brought by? And then we run into the big question, which is what the aim of private enforcement is. Is it deterrence or is it compensation? If you read the White Paper by the Commission, the Commission tries to achieve both deterrence and compensation by private enforcement, but this might not actually be possible, so there is a big question that has not been answered yet regarding private enforcement.

My comment is about something else. As much as substantive law is problematic and there are a lot of questions to be answered, the elephant in the room is actually procedural law. I will give the example of the UK in this regard. As we know, the prevailing principle is that of national procedural autonomy. This raises a lot of questions. A really important one relates to whether or not a court seeing a private case stays proceedings while there is an appeal of the decision. So think about the follow-on cases based on a previous decision of a competition authority. What happens when a claimant brings a case to a court? In the UK we have a distinction between the Competition Appeal Tribunal (CAT) and the High Court, which follow different rules. If one wants to bring a follow-on case before the CAT, either the CAT has to give permission to you or you have to wait until the appeal period has expired. However, you can bring the same case to the High Court; you do not need permission from the High Court, and you can have a private case while the main decision is still being challenged on appeal. Now the question is this: must the High Court stay its proceedings? We only have one decision, as far as I know, from the Court of Justice of the EU (ECJ), and that is *Masterfoods*; and if you read *Masterfoods*, what it is suggesting is actually not very clear. Regulation 1/2003 has legislated about the binding effects of a Commission decision, but it does not actually oblige the national courts to stay their proceedings. If one interprets *Masterfoods* as requiring a stay, that part of the *Masterfoods* judgment has not been implemented in legislation. And the English High Court has a very interesting interpretation of *Masterfoods*. In a recent case, the High Court picked up the more ambiguous part of *Masterfoods* and interpreted it as suggesting that the ECJ says it is up to the national court to decide whether

it should stay proceedings or not, and in that particular case the High Court actually did not stay its proceedings.

Another procedural problem that arises in follow-on cases is the period of limitations. This is an ongoing problem in the UK at the moment. In the last couple of years, the CAT has actually changed its mind about the period of limitations issue and the problem arises when you have a couple of infringers (let us say, cartelists), where some of them appeal the Commission decision and one of them does not appeal it and someone brings a private case for damages. Can you sue the one who has not appealed the Commission decision in a private case in front of the national court and seek damages while the rest of the cartelists are waiting for the appeal court's judgment on the Commission decision? The CAT in *Emerson Electric* said that there is not a separate period of limitations regarding a cartelist who has not sued, so the limitation period for bringing a follow-on case does not start to run even for cartelists who have not challenged the Commission decision until the other cartelists' appeal is over. This is despite the fact that the Commission decision is and remains binding for the cartelist who does not appeal the decision. A couple of years later, the CAT changed its mind in *Deutsche Bahn* and decided to treat the limitation periods against the cartelists separately where one of them has not and the others have appealed the infringement decision. As a result of the contradiction between these cases, there was an appeal to the Court of Appeal. The Court of Appeal disagreed with the CAT and found that it is fundamental that we know, as a national court, whether that decision of the Commission is lawful in that there was an infringement of the law (ie there was indeed a cartel); hence, the national court must actually wait until the appeal is over even if the defendant in the private case before it has not appealed the decision. However, this was then appealed to the Supreme Court. So, now in the UK we actually do not yet know the answer to such an important question regarding the period of limitations, and as long as questions like this have not been answered I am not sure that we can incentivise private claimants even if we treble or quadruple the damages.

TOPIC 2: EFFECTIVE INJUNCTIVE RELIEF

ALBERTO PERA: Good morning, my name is Alberto Pera and I'm a lawyer here in Rome. Previously, from 1990 to 2000, I was the Secretary General of the Italian Antitrust Authority. For me it was a very important experience, not only for the interest in the job and the possibility of working with exceptional professionals, but because it marked a big change in my life: before getting into the authority I was an economist and when I got out I was a lawyer!

It's a real pleasure for me to be invited to chair this session about Effective Injunctive Relief with such personalities as Professor Spencer Weber Waller and Mario Siragusa.

EFFECTIVE INJUNCTIVE RELIEF

SPENCER WEBER WALLER*

A. INTRODUCTION

This issue paper looks at the important question of injunctive remedies where either the courts or a competition agency order a firms or firms to cease unlawful conduct and/or undertake additional conduct to restore competition to the market place.¹ There are many variations on the procedures, standards, methods of enforcement and penalties for disobedience, but the goals as set forth above are quite similar: stop illegal behaviour and restore competition. This brief survey looks at the legal standards for issuing injunctions, the important distinctions between negative and positive injunctions, structural and behavioural injunctions, the increasing complexity of behavioural injunctions in competition cases, and the growing use of third parties and alternative dispute resolution techniques for resolving disputes over compliance.

B. OBTAINING INJUNCTIVE RELIEF

In the US, it is the courts which issue permanent, preliminary and temporary injunctions and related equitable orders.² In competition case, both the government and private parties in civil cases can seek injunctive relief along with other remedies.³

In order to obtain a temporary restraining order (TRO) a party must demonstrate to the court that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.⁴

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¹ See, eg *Zenith Radio Corp v Hazeltine Research*, 395 US 100, 132–33 (1969); *Ford Motor Company v United States*, 405 US 562 (1972); *California v Am Stores Co*, 495 US 271, 281 (1990). There are important relationships between injunctive and the other types of remedies discussed elsewhere in the issue papers, but are beyond the scope of this brief survey.

² In addition, the Federal Trade Commission can issue cease and desist orders, which are then appealable to the federal courts of appeals. 15 USC § 45.

³ 15 USC §§ 4, 25–26.

⁴ Federal Rules Civil Procedure 65(B). Because of the federal structure of the US courts, the standards for TROs, preliminary injunctions, and permanent injunctions will vary somewhat in the 50 state courts and the federal system.

TROs are frequently issued *ex parte* but last only a brief period of time, normally 10 days or less.

The standards for preliminary injunctions are more exacting. Preliminary injunctions may not be ordered without notice to the other side and require proof of the following elements:

1. a substantial likelihood of success on the merits;
2. a substantial likelihood (or serious threat) that failure to grant the injunction will result in irreparable injury of a kind for which money damages will not remedy;
3. that the threatened injury outweighs any damage that the injunction may cause to the opposing party; and
4. that granting an injunction will serve the public interest.⁵

If it is the government that seeks the injunction, then the fourth factor involving the public interest is presumed. The preliminary injunction will last until the conclusion of the litigation unless modified by the court. At the end of the litigation, the preliminary injunction will become permanent if the plaintiff prevails and the other factors remain applicable. The losing party would have the right of appellate review of both the merits and the relief granted by the trial judge. Failure to obey a valid injunction would be punishable by contempt of court, which could result in fines, non-monetary penalties and possible imprisonment until compliance is forthcoming.

In other legal systems, it is the competition authority that has the power to issue interim and permanent relief subject to powers conferred by treaty, statute or regulation. For example, in the EU, Article 8 of Regulation 1/2203 grants the European Commission these powers. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission may, by decision, on the basis of a *prima facie* finding of infringement, order interim measures.⁶ Article 8 further provides that an interim measure shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate. Article 5 of the same regulation grants this power to national competition authorities (NCAs) as well. At the conclusion of the case, both the NCAs and the European Commission must order the undertakings to bring all competition infringements to an end in addition to imposing any applicable fines. The Commission and the NCA decision on interim and permanent relief would be appealable to the appropriate EU or national court.

⁵ *Winter v. Natural Resources Defense Council*, 555 US 7, 19–20 (2008).

⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), [2003] OJ L001, 1–25, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0001:EN:HTML>. See generally C Kerse and N Khan, *EC Antitrust Procedure* (Sweet & Maxwell, 5th edn, 2005), 342–50.

Articles 23 and 24 of Regulation 1/2003 allow the Commission to impose fines for the failure to abide by interim measures or final decisions, depending on the gravity and the duration of the conduct. Such decisions would also be subject to appeal.

Even in negotiated settlements, consent decrees and commitments, the parties typically are bargaining in the shadow of the law, taking into account the probability of a violation being found and the scope of the anticipated relief.

C. TYPES OF INJUNCTIVE RELIEF

There are two critical distinctions among types of injunctive relief in competition matters: (i) negative versus positive injunctions; and (ii) structural versus behavioural injunctions.

1. Negative versus Positive Injunctions

A negative injunction is a legally binding order by a court or authority to cease a particular form of behaviour. It normally includes, but can go beyond, ceasing the specific behaviour found to be unlawful. Such an injunction could be combined with fines, penalties, criminal sanctions or other forms of equitable relief, such as restitution and disgorgement.

Frequently, effective negative injunctions are easy to craft. If a cartel, joint venture, exchange information, merger, etc is found to be unlawful, its continued existence and implementation should be enjoined. More commonly, careful drafting is required to describe the scope of the illegal behaviour, the permissible limits of further action by the parties, with care not to unnecessarily limit lawful procompetitive behaviour.

At the same time, conduct that would otherwise be lawful may need to be prohibited or circumscribed in order to restore competition to the affected market. One example in the US has been provisions in merger consent decrees where the defendant have been prohibited from future acquisitions or required to report all such future acquisitions in advance, even where not otherwise required by statute.

Drafting problems are exacerbated when we begin to discuss so-called positive injunctions which require the defendant to take a set of actions, rather than refrain from taking action. Examples include obligations to divest in merger and unilateral conduct cases, licensing of technology, supply obligations and access requirements. Without careful drafting and monitoring, disputes will inevitably arise as to the timing, scope, compliance and duration of the obligations.

2. Structural versus Behavioural Injunctions

The second set of issues relate to the distinction between structural and behavioural injunctions. In the US it is often said that there is a preference for structural over behavioural injunctions because of simplicity and the ease in determining whether the defendant has complied with its obligations.⁷ In reality, such structural injunctions have largely been limited to divestitures in clearly unlawful horizontal mergers and the *sui generis* agreed divestiture of the Bell System telephone monopoly in the 1980s. Tellingly, divestiture (either vertically or horizontally) was rejected by the US appellate court in the *Microsoft* litigation, even while affirming most of the violations alleged by the government.⁸

In the EU, the Commission is bound by Article 7 of Regulation 1/2003, which states that:

“It may impose on [respondents in violation of Article 101 or 102 TFEU] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.”⁹

Thus, as a practical reality in almost all successful competition cases and negotiated settlements and commitments, the issue of carefully crafting an enforceable and effective behavioural injunction will be front and center.

3. Duration of the Relief

An additional, albeit lesser, issue relates to the time limit of injunctions. Older US cases and consent decrees often had injunctive provisions that lasted indefinitely unless the defendant sought modification and termination at a later time. Starting in the 1980s, government practice in the US changed, with court injunctions and consent decrees limited to 10 years or less absent extraordinary circumstances.¹⁰

⁷ See, eg US Department of Justice, Antitrust Division, “Antitrust Division Policy Guide to Merger Remedies at IIIA” (October 2004), available at <http://www.justice.gov/atr/public/guidelines/205108.htm#3a>. The language of the more recent 2011 Guide is less definitive on this issue. See US Department of Justice, “Antitrust Division, Antitrust Division Policy Guide to Merger Remedies at II” (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

⁸ *United States v Microsoft Corp.*, 253 F 3d 34, 97–107 (DC Cir 2001).

⁹ Regulation 1/2003, *supra* n 6, Art 7. For one of the few EU competition cases with structural remedies see P Chauve, M Godfried, K Kovács, G Langus, KNS Siebert, “The E.ON Electricity Cases: An Antitrust Decision with Structural Remedies” [2009] *Competition Policy Newsletter* 51, available at http://ec.europa.eu/competition/publications/cpn/2009_1_13.pdf.

¹⁰ For example, the consent decree in the US *Microsoft* litigation expired on 12 May 2011 after two extensions.

4. Serving the Public Interest

In any system of private enforcement, there is the final issue of crafting appropriate injunctive relief that serves the public interest. In some cases, private suits will follow public enforcement; in other jurisdictions, private cases may proceed simultaneously with private enforcement, or even, in many cases, without any public enforcement at all. In some of those cases, damages are the primary or exclusive remedy being sought; in others, injunctive relief may be the sole or main form of relief being sought. Mechanisms must be worked out so that the outcomes in public and private cases are coordinated, or at a minimum that they do not conflict.¹¹ Should certain forms of relief—divestiture, for example—be limited to public enforcement or should they also be available in private cases? Should this be decided on a case-by-case basis? Should the procedures for judicial review and approval be the same or different for public and private competition claims?

All of these factors serve to mask the real issue, which is how best to design relief that ends the unlawful behaviour, restores market competition to an approximation of the state of the market prior to the violation, does not impose costs in excess of its benefits, ensures compliance by the defendants over time, and verifies that the relief is effective and procompetitive?

D. INCREASED COMPLEXITY IN RECENT COMPETITION INJUNCTIONS

Some recent decrees illustrate the increasingly complexity of injunctive relief in competition cases in the US and the EU.¹² In the US *Microsoft* litigation, the relief included eliminating certain exclusive and restrictive contractual provision in upstream and downstream contracts. The consent decree also included more complicated provisions requiring the licensing of communications protocols and the provision of voluminous technical information to ensure interoperability, as well as non-discrimination and non-retaliation provisions.¹³ In the EU, the final settlement included forced unbundling, the creation of a choice menu for internet browsers and the disclosure of substantial interface information to provide greater access to competing software developers.¹⁴

¹¹ See, eg *California v Am Stores Co*, 495 US 271, 281 (1990) (fully equitable remedies including divestiture available to successful private plaintiff in US antitrust litigation). In reality, it would be inconceivable that significant divestiture would be ordered in a private monopolisation case outside of the narrowest merger context without robust governmental support for the decree).

¹² See generally SW Waller, "Access and Information Remedies in High-Tech Antitrust" (2012) 8 *Journal of Competition Law and Economics* 575.

¹³ *Massachusetts v Microsoft Corp*, 373 F 3d 1199 (DDC 2004) (approving the consent decree).

¹⁴ Commission Decision of 24 March 2004 Relating to a Proceeding under Article 82 of the EC Treaty, Case COMP/C-3/37.793—*Microsoft*.

A number of recent US media and technology mergers have also included complicated access and information provisions to ensure non-discrimination against less integrated rivals.¹⁵ Perhaps the most complicated decree came in the Google–ITA transaction. In July 2010, Google entered into a merger agreement to acquire ITA, the provider of the QPX software, which was the leading airfare pricing and shopping system providing pricing, schedule and seat availability information to internet travel sites such as Expedia and Travelocity. QPX also was the leading software platform for so-called metasearch sites, such as Kayak and TripAdvisor, which allow customers to view results from multiple travel sites. While Google was not in the online travel space at the time of the acquisition, it planned to enter the market using the ITA software it was acquiring.

The Justice Department permitted the merger subject to a stringent consent decree.¹⁶ The consent decree required the defendants to honour all existing QPX licensing agreements, negotiate extensions of such licences with terms “substantially similar” to the existing terms at the time of the consent decree, and negotiate other terms of the extension that are “fair, reasonable and non-discriminatory”. New licences also have to contain commercial terms that are “fair, reasonable and nondiscriminatory”. The defendants must provide upgrades on fair, reasonable and non-discriminatory terms. The defendants must also license the new software product InstaSearch, which was in development by ITA at the time of the merger, on fair, reasonable and non-discriminatory terms to all interested parties. Finally, the defendants must agree to devote at least as much annual resources as the average of the past two years for the continued research, development and maintenance of both QPX and InstaSearch.

In the most recent Federal Trade Commission (FTC) Google investigation, the agency entered into a two-part settlement with the firm. In a letter agreement with the firm, Google agreed to end the practice of “scraping” data from rival websites as it entered those markets and to give advertisers greater control and portability of their own data.¹⁷ In a separate consent decree now pending for judicial approval,¹⁸ the firm also agreed to license cell phone, laptop and tablet technology it has acquired from Motorola to all interested parties on a fair, reasonable and non-discriminatory basis. As of the time of writing,

¹⁵ Final Judgment, *United States v Comcast Corp*, Case No 1:11-cv-00106 (DDC 2011); Final Judgment, *United States v Ticketmaster Entertainment, Inc*, Case No 1:10-cv-00139 (DDC 3 July 2010).

¹⁶ Final Judgment, *United States v Google Inc*, Case No 1:11-cv-00688 (DDC 2011).

¹⁷ Letter from David Drummond, Senior Vice President of Corporate Development and Chief Legal Officer of Google Inc, to The Honorable Jon Leibowitz, Chairman, Federal Trade Commission, 27 December 2012, available at <http://www.ftc.gov/os/2013/01/130103googleletterchairmanleibowitz.pdf>.

¹⁸ In the Matter of Motorola Mobility LLC, and Google, Inc, File Number 1210120 (FTC 2012), available at <http://www.ftc.gov/os/caselist/1210120/130103googlemotorolaagree.pdf>.

we still await the announcement of the commitments offered by Google in the ongoing EU investigation, which are likely to extend beyond the modest relief obtained by the FTC.

E. MONITORING AND ENFORCEMENT OF THE DECREE

As the decrees have become more complex, the need for effective compliance has become more challenging. Courts are poorly equipped to handle that process for many of the types of these long-term access, information and non-discrimination decrees. Most courts have limited resources and limited expertise in long-term administration of complex regulatory type injunctions. The typical judge in the US is not a competition specialist. The judge would have a staff of only a law clerk or two plus an administrative assistant, sometimes sharing them with other members of the same court, and a docket of hundreds of other cases. In addition, the power to hold parties in contempt of court has proven to be a limited one, best employed only in response to the most deliberate circumventions of the most sharply drawn injunctive obligations.¹⁹

A specialised competition tribunal would still only have a limited number of professional staff and a docket of equally complex matters demanding its attention. Even a large competition agency, such as the Antitrust Division of the Justice Department or DG-Comp of the EU, has finite resources and competing needs that limit the ability to assign personnel on a long-term basis to monitor compliance with existing decrees in addition to current investigations and litigation.

As a result, outside third parties have been increasingly called upon to assist courts, tribunals and agencies in enforcing long-term injunctive relief in complex competition cases.²⁰ The US and the EU used technical committees and monitoring trustees, respectively, to ensure compliance with the highly technical injunctive relief in the *Microsoft* litigation.²¹ Less extensive third-party monitoring arrangements have been used successfully to ensure compliance with information firewall provisions in vertical merger cases and to ensure timely divestiture of assets in horizontal merger cases in both the US and the EU.²²

¹⁹ See *United States v Microsoft Corp*, 147 F 3d 935 (DC Cir 1998) (holding that Microsoft did not violate the prior consent decree prohibiting bundling of new features in future operating systems based on the language of the decree rather than the scope of the antitrust laws).

²⁰ The need for effective monitors is not limited to competition cases. An outside monitor was a critical component in the negotiation and enforcement of a complex \$25–50 billion settlement between 49 states and the federal government and the five largest consumer mortgage servicing companies entered into in 2012. See generally Office of Mortgage Oversight, <https://www.mortgageoversight.com/>. The monitor has a full-time staff of three and over 300 contract employees, consisting primarily of accountants and auditors.

²¹ For more details see Waller, *supra* n 12, 588–89.

²² *Ibid*, 383–86.

The other critical issue will be how to resolve the day-to-day disputes that will inevitably arise in long-term behavioural injunctions. Courts and tribunals can resolve the largest big picture controversies, but are ill-equipped and often uninterested in the important, but mundane, issues of whether a vertically integrated firm is providing the specified level of access or is treating an unintegrated rival in a non-discriminatory manner. Such disputes can often be technical in nature and require viewing a sequence of conduct over time in order to determine whether a pattern of non-compliance is present. At the same time, firms will also have individual disputes that require resolution in a timely manner.

In the US, consent decrees in two recent merger cases have used innovative forms of alternative dispute resolution procedures where the Justice Department and the courts play virtually no role. In both the Comcast/Universal and the Google/ITA mergers, disputes over access, pricing, retransmission and other issues are submitted to expedited arbitration through the American Arbitration Association.²³ In each case, the parties to the arbitration ultimately present a final offer that the arbitrator must select between without compromise or alteration. Experience with this style of final offer arbitration suggests that such provisions often produce agreed compromises prior to the arbitrator's decision and more reasonable offers for those disputes going all the way through the process.

F. A HYPOTHETICAL SCENARIO FOR DISCUSSION

Consider the following hypothetical scenario in light of the many issues already discussed in designing effective injunctive relief and ensuring that the respondent complies with the injunction. In this scenario, the super-dominant firm "Froogle" combines the social networking capabilities of Facebook and the internet search capabilities of Google. Froogle has been found liable of having abused its dominant position in a relevant market consisting of internet "social search" through the following practices:

1. Froogle "scrapes" data from rival sites without their permission in order to use the data to start new services, like local restaurant and shopping reviews;
2. Froogle gives preference its own services over those of rivals in areas like travel and shopping so that the rival services never appear in the top 10 positions on the screen, despite meeting all the criteria of Froogle's normal search algorithm;

²³ For a detailed description of both consent decrees see Waller, *supra* n 12, 591–92.

3. Froogle uses patented software to encrypt all user data posted on its site so that the data is rendered unusable and unreadable if the user tries to move the data to a competing social search site or if a competing site tries to import that data; and
4. Froogle requires software developers to enter into exclusive contracts preventing the developer from creating competing application programs for any other social search site.

What terms should be the injunctive relief contain? How should compliance be monitored? How should disputes over compliance be resolved? What are the appropriate penalties for non-compliance? How long should the decree last? How do you know if the decree has been successful?

MARIO SIRAGUSA: In his very interesting paper, Professor Waller has already referred to injunctive orders in the EU.

Today I will first illustrate the roles of the Commission, of the national competition authorities and of civil judges with respect to interim measures and final orders. Afterwards, I will suggest alternative ways to monitor the implementation of the aforementioned orders.

INTERIM MEASURES

Situations in the EU and in the US are quite different. As you know, Article 8 of Regulation EC No 1/2003 has empowered the Commission to adopt interim measures, although the Court of Justice had previously stated that the Commission was already implicitly entrusted with these powers.

It is worth noting that Regulation No 1/2003 only provides for interim measures adopted by the Commission “on its own initiative”, thus excluding decisions adopted on the basis of complaints. This is a very important limitation, which distinguishes the powers of the Commission from those of national competition authorities, which, pursuant to Article 5 of Regulation No 1/2003, are entitled to adopt decisions “ordering interim measures” “on their own initiative or on a complaint”).

Nevertheless, the adoption of interim measures by the Commission and/or national competition authorities are subject to the same requirements: there must be a *prima facie* finding of infringement and some urgency due to the risk that competition will be seriously and irreparably damaged. These are the standard elements which are required both at the European level and by our own national laws. Moreover, the Commission and national competition authorities are also bound by the principle of proportionality, which has been strictly applied by the Court of Justice.

The Commission cannot issue interim measures *inaudita altera parte* because Article 27 of Regulation No 1/2003 provides that, even before issuing interim measures, “the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard”.

Pursuant to Article 8(2), the interim measure has to be limited in time, although it can be renewed, insofar as this is necessary and appropriate. The Commission may impose a very substantial fine of 10% of the turnover against companies that violate a decision ordering interim measures (Article 23(2)(b)).

At the Member States’ level, Article 5 of Regulation No 1/2003 gives national competition authorities the power to issue interim measures on their own initiative or on the basis of a complaint. In Italy, in 2006 the Italian Competition Authority was explicitly empowered to issue interim measures and to

impose fines up to 3% of the turnover in case of violation. The authority may also issue interim measures *inaudita altera parte*.

As we can see from its decision-making practice, the Commission has rarely adopted interim measures and, de facto, it has stopped issuing interim measures for some years now. Indeed, after the *Camera Care* case in 1980, I found eight cases at the Commission level: three pursuant to Article 101 TFEU and five pursuant to Article 102 TFEU. The last one is the famous *IMS* case of 2001, after which I did not find any other case of interim relief at the Commission's level. This can probably be explained by the fact that the *IMS* case was decided prior to the adoption of Regulation No 1/2003.

Therefore one could argue that the European legislator has limited, to a certain extent, the powers of the Commission to issue interim measures, since the Commission is allowed to act only on its own initiative and, of course, it must take into account only irreparable damages to competition, not to the individual competitor(s).

If we take a look at the decisions issued by the Italian Competition Authority, from 2005 to date I have found five cases where the authority adopted interim measures: two pursuant to Article 101 TFEU and three pursuant to Article 102 TFEU. In other eight cases complainants requested interim measures, but the authority refused to grant them.

In addition, there are several cases where interim measures have been granted in antitrust private litigation. As you know, we have a vast jurisprudence concerning interim measures before our national civil judges. This is the part of our judicial system that works well, because it is very fast and in a few weeks you may be granted an interim order. I have found approximately 20 cases where the claimant sought injunctive relief (the review is not at all complete, of course, and I am certain that other cases exist) and at least five cases in which an interim order was issued. However, there are significant limitations as to the type of order that Italian judges can issue. I will come back to this later.

In sum, neither the Commission nor the Italian Competition Authority has frequently applied interim measures. At the EU level, interim measures have been used rarely and I did not find any decision issuing interim measures after the entry into force of Regulation No 1/2003. As for the Italian Competition Authority, after a first phase where it even issued *inaudita altera parte* interim orders, the practice of adopting interim measures has basically ceased (or, at least, I have not found recent cases). Thus, even though the Italian legislator has expressly entrusted the Italian Competition Authority with the power to issue interim orders, this power has been exercised in a fairly moderate way. To conclude, I believe that in the European system it is probably fair to say that interim measures are instruments designed more for civil judges than for administrative authorities. I think that this is clearly demonstrated by the figures we have seen so far.

FINAL DECISIONS

As regards final decisions, Article 7 of Regulation No 1/2003 gives substantial powers to the Commission. Pursuant to this article, not only can the Commission order that an infringement be brought to an end, but it also can impose behavioural or structural remedies, which must be proportionate to the infringement committed by the investigated party(ies) and necessary to effectively bring the infringement to an end. At the EU level, there is a preference for behavioural remedies (as opposed to structural remedies), although structural remedies may be imposed—and this has happened in at least two cases—where there is no equally effective behavioural remedy or where the behavioural remedy is more burdensome for the company(ies) than the structural one. As we will see, the Commission has used the power to order specific remedies in a number of final decisions. Obviously, this power cannot be used in proceedings closed pursuant to Article 9 of Regulation No 1/2003, since in those cases it is up to the investigated party to propose specific remedies to bring the alleged infringement to an end, which is quite different.

Article 5 of Regulation No 1/2003 provides that national competition authorities are also empowered to order the investigated party(ies) to bring infringements of Articles 101 and 102 TFEU to an end, but it does not expressly mention the power to impose behavioural or structural remedies. However, since Article 7 of Regulation No 1/2003 has granted this power to the Commission for the purpose of bringing infringements to an end, I think it is reasonable to believe that, when acting for the same purpose, national competition authorities are also implicitly granted the power to impose behavioural or structural remedies. Indeed, Regulation No 1/2003 expressly states that it is intended to “make explicit provision for the Commission’s power to impose any remedy, whether behavioural or structural” (Recital 12), thereby clarifying, in my view, that this power is considered to be implicit in the power to order that infringements be brought to an end.

I therefore believe that it is probably fair to conclude that, in this respect, national competition authorities have the same powers as the Commission. This also makes some sense, because the EU legal framework is based on the parallel application of competition law by the Commission and national competition authorities. Therefore, it would be very odd if national competition authorities do not have the same powers (at least in this respect) as the Commission.

Somewhat similarly to what has happened in the US, at the EU level, there have been several cases in which the Commission imposed complex behavioural and structural remedies. Most of them were Article 102 TFEU cases, although there are also some interesting cases related to Article 101 TFEU infringements. The Commission imposed different kinds of remedies, depending on

the circumstances of each case (eg disclosure of information, divestiture of participations, modification of fees, reporting on costs and revenues, elimination of price differentials).

Moreover, the Italian Competition Authority has at times imposed behavioural or structural remedies. In this respect, the *Jet fuel* case is very interesting, because the Italian Competition Authority ordered the elimination of a joint participation in joint ventures which were considered to be a vehicle for the infringement of Article 101 TFEU.

However, this part of the decision has been subsequently annulled in court, since the administrative judges found that it did not comply with the principle of proportionality (that applies at the EU level as well). Further, there have been a number of other cases, mainly related to infringements of Articles 101 and 102 TFEU. The Italian Competition Authority may also impose remedies in merger cases, in addition to those proposed by the notifying party(ies). However, these remedies have another purpose and are applied a bit differently than in EU merger cases.

Civil courts have a very limited power to order specific remedies to bring competition law infringements to an end. Indeed, Article 33 of the Italian Competition Law (Law No 287/1990) provides that, where a violation of the same law occurs, civil courts are competent only with respect to actions for nullity, damages and interim measures. This provision has been interpreted strictly, as civil courts are not empowered to issue (final) injunctive relief. As regards interim measures, case law makes a distinction between negative and positive orders. While negative orders have been generally granted, there is great reluctance to grant positive orders, typically on the ground that judges cannot oblige companies to enter into new contracts, since this would violate the constitutional freedom of enterprises afforded under Article 41 of the Italian Constitution.

Nonetheless, I think there is a strong effort to improve this situation with respect to final orders. In this regard, I would like to point out two recent developments, which I believe are very important.

The first one is the very recent consolidation of civil court jurisdiction over all Italian and EU competition law disputes into the newly constituted “Company Courts”, which are specialised sections of tribunals and courts of appeals sitting in Italian regional capitals and already having jurisdiction over intellectual property rights (IPR) issues.

I believe that this is a significant step towards the strengthening of the injunctive powers of the Italian judiciary, since the specialised sections were used to issue injunctive relief orders under IPR rules. Accordingly, they might follow a less strict approach with respect to competition law disputes.

The second development is the introduction of Article 614bis of the Italian Code of Civil Procedure, which empowers civil judges to impose *astreintes*—ie

periodical fines which apply if orders are not complied with by the parties—similar to the French system. This new power is likely to strengthen the effectiveness of injunctive relief orders. I recently tried to have Article 614bis applied in a competition law case (I think it was the first time that this has happened). However, the judge refused to grant any *astreinte*, since he found that, given the specific circumstances of the case, it was not appropriate to issue any injunctive relief either. Nonetheless, the judge recognised that, in principle, Article 614bis applies to competition law disputes too.

MONITORING OF INJUNCTIVE RELIEF ORDERS

Finally, I would like to mention an interesting case with respect to the monitoring of complex injunctions, such as those that are sometimes negotiated in merger cases with the Commission or with national competition authorities. I am referring to the merger involving Sky and Stream, which was cleared by the Commission subject to a number of specific conditions. In my view, this case was very interesting because the Commission agreed that the Italian Communication Authority and a panel of private arbitrators would be competent to decide over disputes concerning the implementation of the commitments proposed by the merging parties. Accordingly, a few years later a competitor initiated an arbitration claiming that Sky had violated the clearance decision. This was one of the very few cases in Europe where a private arbitral tribunal had to interpret a Commission's decision approving a merger.

SPENCER WEBER WALLER: I just don't want to leave a misimpression if you are not familiar with US practice with injunctions. We have something similar to the rule of proportionality. We don't call it that, but it is required that the threatened injury outweigh any damage to the defendant. So, again, the same idea is that you can't impose high cost for little benefit through an injunction.

GABRIELLA MUSCOLO: I have a comment and a question. The starting point of my comment is that the traditional interpretation of Article 33, mentioned by Mario Siragusa, has been overcome by courts at least for the granting of negative injunctions, negative orders and in cases involving both competition law and IP law. I can quote a recent decision of the specialised section of the Court of Milan in the *Apple–Samsung* case.

My comment is on the equity test, comparing the Italian system to the US system. The Italian system surely provides for conditions 1 and 2 of the equity test, because we require a smoking gun of success and also irreparable injury. The Italian system also complies with the fourth condition, because in

the field of antitrust law the protection of public interests to the competitive structure of the market is also involved. The more critical issue is the third condition, because the Italian system, like most of the Continental systems, doesn't provide for a balance between the irreparable injury caused to the claimant and the injury caused to the defendant. Usually injury is considered by the side of the claimant only, even if few decisions, for instance the decision of the Court in Milan I've already quoted, have moved in the direction of unbalancing the two positions.

My question is a question to the Italian lawyers and litigators in the antitrust field. What is their opinion about case law introducing this balance, considering that the proportionality principle can take the place of a balance in the field of antitrust interim injunction?

RENATO NAZZINI: Three comments.

First, maybe I can attempt to answer the question about interim injunctions. In English law, the test of the balance of convenience is in the famous speech by Lord Diplock in the *American Cyanamid* case. I think to have a similar test in Italian law would be a welcome development in terms of interim injunctions, because with interim injunctions you are clearly looking at a situation which is evolving, a situation where there are different interests, and in the end the outcome of the case could be against the applicant for the injunction. The applicant for the injunction may well suffer irreparable damage or harm if he is right, but he may not be right.

The second comment, one more thing on interim injunctions by competition authorities: I fully agree with what Professor Siragusa said. I think that, for interim injunctions, the system of an administrative authority issuing the injunction subject to appeal or judicial review by a court is not suitable. This is exactly because you don't know on the merits who is right or who is wrong. A court is much better placed to make a decision in these circumstances, because it has to decide between two cases which are presented to it, applying its rules on the burden and standard of proof. A competition authority is in a much worse position: it is completely in the dark, without the benefit of pleadings and advocacy. It has wide-ranging investigative powers, but at the preliminary stage, where, by definition, the need for an injunction arises, it's really difficult to target the exercise of those powers without being flooded by masses of documents that require time to be analysed and more targeted follow-up inquiries. The process is essentially incompatible with the granting of interim injunctions.

The third comment is on arbitration as a monitoring system. There is a question whether this kind of monitoring system can work beyond commitments. The problem is whether the European Commission or a national competition authority can impose arbitration on an undertaking without enabling statutory

powers or even in the presence of such powers if you have constitutional constraints on mandatory arbitration or outsourcing of the administrative function. But even if arbitration is agreed by the undertakings, there are lots of complex, technical issues resulting from the peculiar nature of this “regulatory” arbitration: for instance, the role the competition authority in reviewing draft awards. Once there is a commitment to arbitrate, does this mean that the authority is completely divested of any powers concerning the monitoring of the decision? This is probably not possible, but what is the permissible interference with the arbitral award that can be accepted without compromising the impartiality of the arbitrators? Thank you.

DOUGLAS LAHNBORG: I have a couple of brief observations.

The first one is on the effect of—and let me just broaden the scope, because it would allow me refer to some more cases—settlements and remedies at the European level. The European Commission has been, of course, criticised by the limited uptake of the remedies imposed in several cases, such as Microsoft’s commitment to “unbundle” its Media Player software from its Windows operating system. This ended up being a collector’s item, for antitrust lawyers, nothing else. You had Rambus’s commitment, which I think was taken up by a couple of companies. This is not necessarily a criticism on my part. I would say remedies do play an important role. In some cases, however, the more significant impact of a Commission investigation is that large, dominant companies change their behaviour when they know they are the subject of a Commission investigation. That is, the change in conduct happens not as a direct result of the company’s commitments, but as an indirect result of the Commission’s investigation. Indeed, investigations often serve as a wake-up call for companies which may have developed from local players, or start-ups, to global leaders.

The second point I wanted to make goes to enforcement. If you put yourself in the position of a third party who has been at the receiving end of, let us say, abuse of dominance, you spend a lot of time and effort convincing the Commission to open an investigation. There is then an investigation, which takes years, and in the end there may be a settlement with some sort of remedy. What the third party really wants is to get something out of those remedies. What do you do? The terms of the remedies will almost certainly leave room for interpretation. What will a company do to enforce those remedies? Well, that is a difficult question. A company may approach the Commission for an interpretation of a disputed term in the settlement. However, this might not be effective, as the Commission, understandably, needs to be careful as to how they interpret a settlement, as this can be used against it where a settlement has been appealed to the General Court. Therefore, encouraging the Commission to enforce a settlement may not lead anywhere, unless you are dealing with a flagrant violation, in which case the Commission probably would act. Instead,

access to a court or arbitration offers parties a more robust way of enforcing settlements. This mechanism can be made available simply by stipulating a forum and applicable law in the remedies.

VINCENT SMITH: I was very struck in Professor Waller's presentation about the apparent (at least) prevalence of independent monitoring trustees to monitor final injunctions in the US. I wonder whether there is a concern that you might end up, particularly if this is replicated in Europe, with hordes of uncoordinated and feral monitoring trustees roaming across competitive landscapes, stymieing effective competition with no effective either coordination or supervision of their activities?

SPENCER WEBER WALLER: I wouldn't say hordes. It comes up in any vertical merger, at least the possibility that you might need a monitor. It's critical for enforcement. For example, the soft drink maker Pepsi bought its principal bottler. The previously independent bottler also bottled and distributed competing soft drinks. So, by owning the bottler, it had access to competitively sensitive information and control over the distribution of its competitors, and part of the settlement was the creation of firewalls and informational barriers where the half of the bottling companies that did business with Pepsi's competitors was really a separate entity from the part of the company that would bottle and distribute Pepsi products. In order to make sure that they were actually doing what they promised to do an independent monitor was selected, who happens to be a professor at Loyola, very well know in the proper compliance area.

How often does he go there? I don't know for sure, perhaps two three times a year. Instead, the firm provides regular reports on a more frequent basis. I would say in these cases maintaining competition is necessary. However, vertical mergers are less challenged than horizontal mergers. Monopolisation cases raising these issues are even fewer and farther between, but of greater importance. So I couldn't put a number on it, but we in the competition area probably came later to this and it came out of social change litigation, where outside monitors were selected to ensure that structural changes and behavioural changes would be implemented in controversial social policy cases (school desegregation, prison conditions)—which frankly raises greater democracy concerns in my mind than having a lawyer three times a year take a look at the books and make sure that people don't talk to each other improperly at Pepsi.

EDWARD JANGER: This actually picks up a little bit on the structural or behavioural injunction theme. It strikes me that there's an important question to ask when you're dealing with these issues in antitrust, securities regulation, different prosecution agreements and so on, which is: what value added is the

judicial system providing? We usually think of law as adjudicating the merit of the dispute about monopolisation or about a merger. When one of these settlements comes before the judge it's a contract with its own self-liquidated damages causes, which is basically the agency saying "we will not prosecute you if do X" and the judge really doesn't add a lot except for either the contempt remedy or just a transparency function. I guess that's the sort of key point that I wanted to make, which is: when you get to the judge in this situation, the judge now is not supervising so much the behaviour of the parties, but is actually supervising the settlement behaviour of the agency, which is fundamentally a different function. I'm not necessarily sure (a) that the judges understand that switch and (b) that the system is particularly well equipped to allow them to fulfil that function because everyone is coming to the court in agreement.

ALBERTO HEIMLER: My point here is more on the standard to be adopted. I would like to mention that recently Damien Geradin and Miguel Rato wrote a paper on fair and reasonable and not discriminatory royalties, suggesting that they should never be imposed as an antitrust remedy because they block innovation. I agree; I think that the role of antitrust is to promote innovation. So let's take two cases. The first case is *Microsoft*. You know that the Commission and the General Court agreed and imposed on Microsoft that it provides the information to interconnect with the programmes on group servers by charging a fixed fee of 10,000 EUR. The Court said that this was a fair, reasonable and not discriminatory amount. Now, does this promote innovation? In my view, 10,000 EUR would be paid by anyone except by Linux. Only a free system could compete with something that only cost 10,000 EUR to receive. Such a small fee maintains Microsoft's monopoly on the operating system. There are no incentives to invent around it.

This is a European case and I don't want to leave you with the impression that only Europe imposes FRAND-type of solutions, because, in the US, Spencer mentioned one case, but there is also another one—the Comcast NBC merger—where the FCC, with the support of the Department of Justice, imposed on the merged entity the requirement to license content to competitors at reasonable rates. Now, my point is that antitrust should not be imposing reasonable prices or rates, but should only impose non-exclusionary prices or rates, which are very different from reasonable ones. Otherwise, if you go in the direction of reasonableness, you should impose on any dominant company the requirement to have fair, reasonable and non-discriminatory prices. Why not? Innovation would be completely blocked, as we all know. The point is that antitrust is to block exclusionary conduct, not to address exploitation.

ALBERTO PERA: Well I wanted just to mention that I had done a couple of years of monitoring as a trustee on a major case in Europe, which was the

selling of some gas pipe lines. There were five companies from three different countries. How did it work? There was the first level, where there were all separate managers running the companies, then there was the monitoring trustee in the middle, so day-by-day decisions were taken by the managers, then the trustee would see when there was some competition issue. I'm talking about the ongoing control, because at the end was a sale and the Commission would say whether the buyer was ok or not, which is a little bit clearer. But even in these couple of years of ongoing control, there were several levels: there was the ongoing manager, then there was the monitoring trustee, then in the end, if there was an issue, there was the Commission. The one that has made the initial decision is the one that in the end has to control it. Somehow you are simply helping them to do something where they would need a lot more resources, a lot more time etc. I don't think there is a risk of too many differences without control. The issue, obviously, is that if the one that starts this kind of merger and has to control it, does it in the end. But it's clearly the way to help to do something that, without this kind of help, would be practically very difficult, if not impossible, and that would lead to easier and more radical solutions that probably would be worse for the industry and also for the market.

MARIO SIRAGUSA: I think we should make a distinction between the role of the monitoring trustee in the process (as you said, Luigi, this is temporary, and it's clear that is as an auxiliary to the Commission and to the national authority) and the other case where the decision is actually given by the authority, and where a number of behavioural rules are to be followed. The Commission, in that *Sky* case, gave to another authority the power to decide and to interpret. I think those are completely different situations.

ALBERTO PERA: Of course, the issue of the use of behavioural remedies has a different relevance in mergers and conduct cases. My impression is that the *Sky* case was a very peculiar one, as it involved a merger to an (inevitable) monopoly.

SALVATORE REBECCHINI: Concerning the increasing recourse to complex behavioural measures, I would like to point out a particular issue. The monitoring issue, which has been discussed here, is certainly important. However, the matter of measures definition is very important too, especially when dealing with cases that involve regulated sectors.

Concerning behavioural measures, we often face highly complex regulatory issues and we don't have enough information and we don't have enough knowledge of how things really work. My fear is, first of all, that we may risk making wrong decisions in terms of imposing specific behaviours. The second

risk is that we may end up weakening the case in the judicial review. Finally, there might be another risk: entering into an argument or quarrel with the regulator may end up forcing the legislator to merge the two activities. Why should you have a regulator separated from the antitrust authority when both take more or less the same decisions? Then the natural development could be the Dutch model that puts regulators and antitrust functions under the same roof, but I don't think this is an appropriate solution.

GINEVRA ABRUZZONE: If I understand correctly what Mario Siragusa said, the power of national courts to impose not only preliminary but also permanent injunctive relief can be viewed as necessary to ensure an effective application of EU competition rules. Therefore, national procedural rules should be interpreted or modified, if necessary, so as to allow national courts to impose permanent injunctive relief in the application of Articles 101 and 102 TFEU.

In Italy, Article 33 of Law No 287/1990, concerning the powers of national courts in the application of both EU and national competition rules, expressly contemplates only urgent injunctive relief.

As for the application of EU rules, the need to ensure consistency with EU law may allow one to acknowledge the power of the courts to adopt permanent injunctive relief by way of interpretation. For the application of national antitrust rules, however, this kind of innovative interpretation would lack a legal basis. Therefore, an amendment of Article 33 expressly providing national courts with the power to grant permanent injunctive relief in the application of both EU and national antitrust rules would be helpful. It would clarify the legal framework and ensure that national courts have the same powers for infringements of EU and national antitrust rules.

MARIO SIRAGUSA: Of course, ideally we should reform Article 33 of the Italian Competition Law. There is no doubt that this is the best way to make things clear. Nevertheless, I always prefer not to wait for the legislator to intervene. In my view, the Italian legislator has entrusted specialised sections of tribunals and court of appeals with the competence to deal with IPR and competition law disputes and, with respect to IPR, it has empowered these sections to issue final injunctions. Therefore, since the Italian system provides for this power and Regulation No 1/2003 has empowered national authorities to directly and effectively apply Articles 101 and 102 TFEU, I think it can be reasonably argued that, following the recent change in jurisdictional rules, civil courts have the power to issue final injunctions. I admit that this is only a theoretical approach and I am certain that there are several learned professors who would not agree with this interpretation. Nevertheless, it is my hope that judges will see their function as a dynamic one and that they may interpret the

present legislation in this constructive way.

FRANCESCO MUNARI: I would like to talk about two points that are very typical of the Italian antitrust environment, which I know more in terms of practice. I do not think we have many injunctions or interim reliefs issued, because our antitrust authority tends to use other enforcement tools. The first one is to increase the number of undertakings which voluntarily the firms adopt in order to avoid decisions. This is something which was analysed in a paper published in *Mercato Concorrenza Regole* a few months ago: in this paper it was highlighted that the number of cases that the Italian Antitrust Authority ends up with is strikingly higher than that of other national competition authorities belonging to the European Competition Network and to the European Commission. I think that this judicial remedy may actually weaken the judicial review of any activity done by the Italian Antitrust Authority and this is a concern I would like to point out.

The second tool is, in my view, even more concerning: in particular, and if I may, given that I am the host in the seat of our antitrust authority, I refer to a sort of “abuse” of Article 21bis of our Italian Competition Statute (Law No 287/1990 as modified). Such a provision entitles our competition authority first to adopt an opinion addressed to any public national or local administration, where a suggestion is made on how the activity of this administration should be directed in order to comply with competition rules and principles; then to challenge before the competent administrative court of law any response—or even the silence—of such a public administration if the suggestion above is not followed. The administrative court is then obliged to decide whether the reaction of the public administration concerned vis-à-vis the opinion of the antitrust authority is legitimate or not.

As correctly pointed out a few minutes ago by the Commissioner Salvatore Rebecchini, in our legal system we have plenty of so-called regulators, since very many authorities or public administration enjoy regulatory powers. This means that the potential addressees of the suggestions, and then the potential consequent judicial claims, are numerous as well.

The antitrust authority seems to have taken very seriously the new power entrusted to it by this Article 21bis, and has increasingly used such power vis-à-vis other Italian public administrations. I refer, for instance, to several opinions that have been issued recently in the port sector, where the Ministry of Transport and its local maritime administration branches have regulatory powers.

Yet, it cannot be denied that if the antitrust authority issues an opinion which the addressed public administration does not follow for any reason whatsoever, then a conflict between public bodies arises, the outcome of which is left to an administrative court. This can actually modify the structure and

allocation of powers within our legal system in a way which, again, does not seem consistent with the original role of the antitrust authority and the role of the public administrations having regulatory powers of any kind. Moreover, in the logic of the European Competition Network, and of the decentralised but uniform application of EU antitrust law that is mandated by Regulation No 1/2003, the granting of “extraordinary” competences onto our national competition authority should be limited: it is not necessarily consistent with EU competition policy goals that any of the national antitrust authorities (in our case, the Italian one) becomes a “super-authority”, instead of focusing on the decentralised application of Articles 101 and 102 TFEU, and hence contributing to the formation of a solid case law on these provisions at European level.

In other words, I humbly believe that the conferral of such a power onto the antitrust authority has potential spill-over effects in the necessary equilibrium among Italian public administrations and among the members of the European Competition Network. A cautious use of this power is therefore recommended.

ANDREA CICALA: I think that when we speak about issuance of injunctive relief, we may refer to the book *The Little Prince* of Antoine de Saint-Exupéry. In the story, a young boy asks to the king, are you a good king? And the king answers yes, so the young boy asks why are you a good king? “Because I always give orders that people can comply with.” I think that possibly, when imposing injunctive relief, an agency or a court should also consider that; a good measure is something that is possible to monitor and to assess. Therefore, as evidenced in the paper of Professor Waller—the authority in the *Google-ITA* case—it was requested and imposed that resources be dedicated to development of the software and of the platform. This may appear (and probably is) an appropriate measure, but I wonder how effectively the proper effects of this measure can be assessed. First, because we are in a very fast moving sector, and after just two years technology can become obsolete and there could be no interest to insist in the future in any further development also for the players which are the beneficiaries of the measure. Secondly, I was also wondering how it is possible to exactly determine the adequate level of resources which must be invested—as historical data can be a sound basis to determine the level of investment required but they are a static picture, which might not be sufficient—and whether, in order to assess the compliance with the relief, we must also take into account the ultimate and effective result achieved. In more general terms, I would like to point out that, in my view, an agency or a court or a judge should, when imposing a relief, strike a due balance between what could be an ideal optimum measure to prescribe and what is the real possibility to put in place a fair and correct monitoring of the effects of such measure and of its implementation and, in case of doubts, the agency or the court should opt for other measures.

SPENCER WEBER WALLER: I don't disagree with the last comment at all. I think agencies and private litigants need a theory of the case, some idea of what the relief they want and some reason to believe that the relief will be effective. We have moved very far from the notion of structural relief in the US. I don't think we are going to see it again outside of simple horizontal merger cases. I'll be surprised if we see it any time soon, because if it was going to happen, it would have happened in *Microsoft*.

The district court judge did order divestiture, but he was overturned for procedural, ethical and substantive reasons. In the end, the DC circuit didn't forbid such relief but remanded the case with instructions that made it almost impossible to impose structural relief, because the structural relief would have imposed costs probably way beyond the potential benefits.

It's true that in most situations you are limited to behaviour or other remedies that have all of the problems you pointed out. I think that the outer limit I've ever seen in the behavioural remedy, I'm not familiar with the *Sky* proceeding, but it was the Google-ITA merger where the Antitrust Division required the merged companies to invest roughly the same average resources in developing this new platform that the independent company was doing prior to the acquisition, and then make it available on terms that are fair and non-discriminatory. That's the most aggressive remedy that I've ever seen.

How do you verify that? That may be actually relatively simple accounting in this particular case, if they spend five million dollars on average in the last two years. Whether that actually accomplishes anything, I don't know.

MARIO SIRAGUSA: I would like to revisit the problem raised also by Mr Rebecchini, concerning the danger that, by issuing very detailed and penetrating orders of a behavioural nature, there would be a sort of overlap with regulatory measures. This is, of course, a very important topic currently in Italy, since we are encountering this problem in a number of cases. Indeed, in some cases, administrative judges have tried to limit the kind of measures that the Italian Competition Authority can issue and have held that it cannot exercise regulatory powers.

In this regard, I think that Article 21bis of the Italian competition law could be a way, since these kinds of conflicts could be resolved either by the authorities involved, through setting respective boundaries, or by the administrative courts, through ruling on appeals brought against decisions of the Italian Competition Authority. The latter approach was followed to limit the power of the Italian Competition Authority in the application of the rules on unfair commercial practices. Indeed, in this area, the Supreme Administrative Court has rendered very important rulings.

I also believe that very complex injunctive measures are generally issued either in merger cases—where they are offered by the parties and subsequently

negotiated to resolve antitrust concerns—or in settled cases (in the US) and commitment cases (in the EU). In these cases, the parties actively propose solutions, either before a judge (in the US) or within the commitment procedures (in the EU).

In my opinion, the most interesting injunctive measures are those issued in cases where, in addition to finding an infringement, the competition authorities also impose behavioural remedies, in order to eliminate the effects of the illegal behaviour, as you correctly stated at the beginning. These cases are different from merger and commitment cases, and, in my view, they are more crucial. However, they are generally not characterised by complex injunctive measures, but, more frequently, by few appropriate orders.

TOPIC 3: PRIVATE ACTIONS FOR DAMAGES

SALVATORE REBECCHINI: We are about to start the third session dedicated to the private actions for damages. My role will be like that of the pacer in a marathon. The pacer is someone who is in charge of running at a constant rate, making sure you get to the finish line at the exact time that you have scheduled. So, I will be ruthless in keeping the time of your intervention so that we can finish on time. I will give the floor for the introduction of the issue to Professor Philipp Fabbio, who is also one of the organisers and whose paper will be commented on by Jesse Markham. So this is the order of the scheduled speakers.

PRIVATE ACTIONS FOR DAMAGES

PHILIPP FABBIO*

A. INTRODUCTION

Private actions for damages, as most of you are probably aware, is a very broad topic, especially for a short paper. Over the past decades, it has been extensively debated both in the US and in Europe. More recently, the European Commission has put it at the center of an intensive action plan.¹ Some Member States, including Germany² and the UK,³ have initiated legislative reforms to enhance private rights of action.

This issue paper will first provide a brief overview of private damage claims as they have developed and are currently practised in the US and in Europe. It will then consider a few selected points, relating to three topics: the goals of private damage actions; the finding of an infringement; and the calculation of damages. The focus will be on less explored aspects and the perspective more of a European one, since new developments in this area are more likely to occur in Europe.

B. CURRENT PERSPECTIVES IN THE US AND IN EUROPE

1. United States

It has been observed that in many respects US antitrust law is a unique, historically determined experience that cannot be easily duplicated elsewhere.⁴ A key component of this uniqueness remains, even today in times of international

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¹ An overview of the Commission's initiatives is available at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

² The 7th Reform of the German Competition Act (7. GWB-Novelle) entered into force on 1 June 2005.

³ On 29 January 2013 the UK government announced its intention to reform private antitrust actions by adopting controversial opt-out class actions: see <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>.

⁴ DJ Gerber, *Global Competition. Law, Markets and Globalization* (Oxford University Press, 2010), 156–58.

convergence, its private rights of action and their role in shaping the system.⁵ Over the past few decades, US antitrust may have become more agency-centred,⁶ but private enforcement continues to play its historically central role.

At its origins, the choice was not made deliberately, but rather evolved naturally from existing common law principles. The importance of private damage claims is based on a variety of factors. Some are antitrust-specific, such as the trebling of damages; most are not, or are only partly so: the availability of class actions, contingency fees, jury trials, broad pre-trial discovery, an asymmetric loser-pays rule (ie no loser-pays rule in favor of the defendant) and an aggressive litigation culture.

Against this background, the idea of the private plaintiff as a “private attorney general” emerged. This idea provided a general conceptual framework and influenced a number of legal developments.⁷

The resulting enforcement system also has its shortcomings, and certain aspects are widely debated within the US legal community.⁸ In recent times, two Supreme Court decisions, *Trinko*⁹ and *Twombly*,¹⁰ have placed limits on what, in the eyes of some, could be viewed as an excessive recourse to private damage claims.

2. EU and Member States

A radically different situation has characterized the EU and the Member States. In the EU, public enforcement has always played a central role through the European Commission and the national competition authorities (NCAs), while private enforcement, especially private damage claims, has been quite rare. Furthermore, most private actions were either follow-on or shield actions. The situation was described by a study commissioned by the EU as being of “astonishing diversity and total underdevelopment”.¹¹ Today, a change seems to be under way, with an increase in the number of private damage claims,

⁵ *Ibid*, 137.

⁶ See SW Waller, “Prosecution by Regulation: The Changing Nature of Antitrust Enforcement” (1998) 77 *Oregon Law Review* 1383.

⁷ See, eg USC, *Illinois Brick Co v Illinois*, 431 US 720 (1977), denying standing to indirect purchasers. An interesting perspective on the Illinois Brick rule is offered in B Richmond and CR Murray, “Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule” (2007) 81 *Southern California Law Review* 69.

⁸ A summary can be found in RH Lande, “The Benefits of Private Enforcement: Empirical Background” in AA Foer and JW Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar, 2010), 3–4.

⁹ *Verizon Communications, Inc v Law Offices of Curtis v Trinko, LLP*, 540 US 398 (2004).

¹⁰ *Bell Atlantic Corp v Twombly*, 550 US 544 (2007), refining the “notice pleading” standard for civil complaints (not merely possible or conceivable, but plausible).

¹¹ D Waelbroeck, D Slater and G Even Shoshan, “Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules” (August 2004), available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

including stand-alone actions.¹² This may suggest an increased awareness on the part of the business community and the legal professions. Parallel to this, the European Commission has launched various public consultations that have resulted, among other things, in a White Paper that describes optimal policy options,¹³ in a draft Guidance Paper¹⁴ and in studies and resolutions on collective redress mechanisms, including class actions.¹⁵ In this atmosphere, several EU Member States have already enacted legislative reforms enhancing private rights of action, which partly anticipate the Commission's proposed legislation.

C. BEYOND COMPENSATION?

In the US, the current understanding is that private damage claims serve both compensation and deterrence. The notion of deterrence has indeed contributed to the shaping of the private enforcement system in various ways. Rather provocatively, some recent scholarship has questioned whether private damage claims, especially in stand-alone actions, are effective modes of deterrence.¹⁶

In the EU, on the other hand, the common understanding is that private damage actions should mainly serve for compensation, while deterrence is viewed only as a welcome side-effect of enhancing private rights of action. Thus, private actions for damages should only complement public enforcement.

Among the many issues that arise, there are two that I would propose for further discussion:

1. The first issue is whether it would make sense for the EU and its Member States, notwithstanding the common European legal tradition, in view of the limited resources available to competition authorities, to consider more carefully the option of shaping private damage claims more directly as a means of deterrence. A more deterrence-oriented approach could apply, for instance, to the multiple damages issue (ie the desirability of adopting a rule similar to the trebling of damages under the Clayton Act), or to the

¹² See, eg M Carpagano, "Vent'anni di applicazione giudiziale delle regole di concorrenza in Italia: 1990–2010" (2011) 15 *Concorrenza e Mercato* 283.

¹³ "Damages Actions for the Breach of EC Antitrust Rules" (2008), available at <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.

¹⁴ "Quantifying Harm in Actions for Damages Based on Breaches of Articles 101 or 102 TFEU" (2011), available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html.

¹⁵ Available at http://ec.europa.eu/competition/antitrust/actionsdamages/collective_redress_en.html.

¹⁶ DA Crane, "Optimizing Private Antitrust Enforcement" (2010) 63 *Vanderbilt Law Review* 675, 690.

- question of whether a European-style class action should also rely on an opt-out mechanism, like its US counterpart.
2. The second issue, if damage claims are also to serve the goal of deterrence, is whether the calculation of fines to be applied by the Commission or the NCAs should be coordinated with the awarding of damages before civil courts or after the outcome of private settlements,¹⁷ and to what extent this can be achieved within the existing legal framework.

D. THE FINDING OF AN INFRINGEMENT

A characteristic feature of antitrust litigation is its fact-intensiveness and its confrontation with complex assessments. This explains why even in the US, where broad pre-trial discovery is available to the plaintiff, private actions often side with public enforcement.¹⁸

In Europe, in the absence of US-style discovery, the finding of an infringement is even more likely turn in a major obstacle for private actions. Hence the reliance of private plaintiffs on public enforcement initiatives. However, the general attitude towards discovery as a means of obtaining evidence, as reflected in the Commission Green Paper, is very cautious. Therefore, issues that could be considered of particular relevance for the future development of private actions in Europe are: (i) the binding effect of Commission and NCA decisions in follow-on actions; (ii) the interplay between leniency programmes and private damage claims; and (iii) a possible differentiation of the standards of proof to be met in administrative and in civil proceedings (ie a larger recourse to presumptions and/or a more form-based approach in private actions).

1. About the Binding Effect of Commission and NCA Decisions

In the EU, established case law and Article 16 of Regulation 1/2003 provide that Commission decisions that find an infringement of Articles 101 or 102 TFEU shall be binding on national courts seized with a claim for damages. In its White Paper of 2008, the Commission strongly advocated the adoption of a similar rule for NCA decisions that apply Article 101 or 102 TFEU. The proposal met with general acceptance. More recently, several Member States, including Germany, Hungary and the UK, have taken this recommendation a step further, by providing a binding effect to final decisions by competition

¹⁷ H-J Meyer-Lindemann, "Durchsetzung des Kartellverbots durch Bußgeld und Schadenersatz" (2011) 61 *Wirtschaft und Wettbewerb* 1235.

¹⁸ KJ O'Connor, HL Renfro and AC Briggs, "Interaction of Public and Private Enforcement" in Foer and Cuneo, *supra* n 8, 240, 242ff.

and/or by regulatory authorities applying national law as well as NCA decisions from other Member States that apply EU law.¹⁹

By now, the soundness of such a mechanism should in principle be a moot point. Nonetheless, a number of issues arise when it comes to the operation of Article 16 of Regulation 1/2003 or comparable rules that are found at the Member State level.

1. What binding effect, if any, can be placed on Commission or NCA decisions such as settlements and interim measures, that is, decisions other than the final finding of an infringement? Over the past few years the recourse to settlements has increased substantially, with Italy as a notable example. These types of decisions also entail a finding of facts, and it would perhaps go too far to deem them as irrelevant for subsequent civil actions.
2. The binding effect of Commission or NCA decisions requires, as the Commission Staff Working Paper accompanying the White Paper puts it, “same infringers and same practices”. The Commission also points out that the requirement should not be applied too strictly. There can nevertheless be divergence between the finding of an infringement before the Commission or an NCA and that before a civil court in private damage actions (eg the plaintiff’s injury was not the result of the illegal business strategy, but rather a random incident). What kind of divergences may occur, and which should be considered acceptable? Should the Commission or the NCAs try to make their finding of facts also in view of future civil actions?
3. Finally, a binding effect can also be provided to NCA decisions from other Member States, as is already the case in Germany. What additional judicial scrutiny should foreign NCA decisions be subject to? Should the recognition be subject to the public order exemption, as is the case with foreign judicial decisions under Regulation 44/2001, as the Commission suggests?

2. A Different Standard of Proof for Private Damages Actions

An acknowledged trend in US antitrust law is towards a more extensive rule-of-reason approach, as opposed to traditional *per se* rules.²⁰ A key factor for this development is the fact-intensiveness of US-style antitrust litigation. American antitrust cases are highly fact-intensive, due in part to the American civil procedure and litigation culture. A motivating factor has been the extraordinary expansion of discovery rights that has taken place starting from the 1940s.

¹⁹ See D Dohrn, *Die Bindungswirkung kartellrechtlicher Entscheidungen der Kommission sowie deutscher und mitgliedstaatlicher Kartellbehörden und Gerichte im deutschen Zivilprozess* (Heymanns, 2010). For particular focus on the situation in Italy see also P Fabbio, “L’efficacia dei provvedimenti dell’Autorità Garante della Concorrenza e del Mercato nel processo civile” (2013) 17 *Concorrenza e Mercato* 193.

²⁰ M Stucke, “Does the Rule of Reason Violate the Rule of Law?” (2009) 42 *UC Davis Law Review* 101.

This wide access to facts, in turn, has led to legal doctrines that can be very nuanced and fact-specific, and, in various ways, has encouraged economics-based analysis to play the role it currently plays.²¹

In Europe there has been extensive discussion about an analogous distinction between a “form-based” and an “effects-based” approach. The discussion is strongly influenced by the American example. Being aware of the unique American legal environment, Europeans should perhaps venture more carefully, at least with respect to private enforcement actions, as the potential benefits of a more form-based approach, in terms of legal certainty and litigation costs, are quite considerable.²² A more form-based approach would also be more in line with the continental legal culture, with Germany’s historical experience in antitrust law as an interesting example.

E. CALCULATION OF DAMAGES

In 2011, the European Commission issued its draft Guidance Paper on quantifying damages.²³ As its title suggests, it should provide a basis for public discussion. Primarily, though, it is intended to provide guidance to national courts and to injured parties, and thus constitutes a form of soft law. The criteria recommended by the Commission are based on the traditional principles governing tort liability in the Member States. Here it may be appropriate to discuss two aspects unfortunately not covered in the draft Guidance Paper.

1. What Chances for a Multiple-Damages Rule in Europe?

Treble damages are a key ingredient of private rights of action under US antitrust law. Under section 4 of the Clayton Act, “any person injured in his business or property by reason of anything forbidden in the antitrust laws” may sue for recovery in federal court. Section 4 further provides that (i) the litigants are entitled to a trial by jury and (ii) any damage awarded from the jury is automatically trebled by the court (“mandatory trebling”). The merits of mandatory trebling have been extensively debated over the last century, most recently before the Antitrust Modernization Commission. In its report

²¹ Gerber, *supra* n 4, 137.

²² For an original perspective, although one with an overly formalised EAL approach, see A Christiansen and W Kerber, “Competition Policy with Optimally Differentiated Rules instead of ‘Per se Rules v Rule of Reason’”, Marburg Papers on Economics, No. 6-2006, available at http://www.uni-marburg.de/fb02/makro/forschung/gelbereihe/artikel/2006-06_Christiansen-Kerber.pdf; also published in (2006) 2(2) *Journal of Competition Law & Economics* 215.

²³ *Supra* n 14.

submitted to Congress in 2007, the Commission reaches the conclusion that the treble damages remedy should be retained in all antitrust cases.²⁴

Historically, mandatory trebling in private antitrust actions has served four interrelated goals: compensation of victims, deterrence, forfeiture of ill-gotten gains and punishment.²⁵ As to compensation, trebling may serve as a surrogate measure of actual damages, especially in cases where determining the actual damages and their exact amount can prove to be very difficult. Secondly, mandatory trebling increases the likelihood of detection, because it creates an incentive for private parties and lawyers to bring civil actions. In view of the increased likelihood of detection and the economic impact on the defender, treble damages serve to deter antitrust violations (this, however, may not always be the case with overt violations). Thirdly, the plaintiff's actual damages may not correspond to the defendant's actual illicit gains. Hence, the treble-damages rule may help secure disgorgement. Also, the treble damages remedy has a punitive component, which is not unique to antitrust (see, eg insider trading).

Should the EU or its Member States consider remedial schemes providing for multiple damages? If so, what would be an appropriate design?

Punitive damages have always been alien to European tort law, where the award of damages serves mainly or exclusively as compensation. Recently, the Italian Corte di Cassazione has, for instance, found a US court judgment awarding punitive damages to be in contradiction with the Italian public order clause, and has denied recognition.²⁶ The reason why multiple damages have not been considered an option by the EU may lie in its scepticism toward the punitive element, but also in an underestimation of their compensatory function.²⁷

In some instances, multiple damages may appear particularly harsh. This is especially the case where the illegality of the relevant conduct is not self-evident. A selective enhancement of multiple damages could potentially compensate for it. Enhanced damages could, for example, be limited to "per se" or "hard-core" restrictions. Also, enhancement of damages could be left to the discretion of the courts on a case-by-case basis. But this could result in the side-effect of lengthier and costlier litigation. Finally, the question would arise of what would be an appropriate multiplier.

²⁴ Antitrust Modernization Commission, Report and Recommendations, available at <http://govinfo.library.unt.edu/amc/index.html>. The AMC was created pursuant to the Antitrust Modernization Commission Act of 2002, and terminated on 31 May 2007.

²⁵ ED Cavanagh, "Detrebling Antitrust Damages: An Idea Whose Time Has Come?" (1987) 61 *Tulane Law Review* 777, 783.

²⁶ Cass No 1183 of 2007.

²⁷ On the compensatory function of treble damages see RH Lande, "Are Antitrust 'Treble' Damages Really Single Damages?" (1994) 54 *Ohio State Law Journal* 115, 122–24, 158–68.

2. The Role of Competition Agencies in the Calculation of Damages

An option that is of some interest from a European perspective, but that has so far been little explored, is to have competition agencies playing a role in the calculation of damages that are awarded to private plaintiffs in private actions.

The Commission and the NCAs, in determining the amount of the fine, will assess the gravity of the violation.²⁸ For this purpose, they may also consider its actual impact on potential plaintiffs, for instance in terms of overcharges paid by consumers. In 2000, the Italian *Autorità Garante* fined a large cartel in the car insurance sector. In doing so, the authority also estimated the cartel increased prices by about 20%. Consumers later relied on this finding in a large number of follow-on actions that were filed before Italian small-claims courts. The wave of civil actions that resulted therefrom prompted the insurance industry to lobby for legislative changes. It also initiated a number of references for preliminary rulings to the European Court of Justice under Article 267 TFEU.

In any case, the Commission and the NCAs have the expertise to contribute to the calculation damages, and at the same time their greater proximity to the relevant facts can put them in a better position than private plaintiffs to make these calculations.

Given this, would it be an option to consider competition agencies as a viable source in contributing to the calculation of damages in individual cases? If so, what should their involvement look like? Also, what types of case should be considered suitable? The need for this kind of support is probably higher in the case of dispersed and small damages suffered by large numbers of potential plaintiffs, like in the Italian case of the car insurance cartel.

* * *

Overall, many new developments are underway in the practice and regulation of private damage claims in Europe. This brief paper could touch upon only a few issues. But in its broaching of some of the less explored points it hopefully offers our distinguished group of highly qualified marathoners, who also happen to be antitrust experts, a starting line from which valuable insights can be won.

²⁸ For EU antitrust violations, see the Commission's "Guidelines on the Method of Setting Fines Pursuant to Article 23(2)(a) of Regulation No 1/2003" (2006), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF>.

JESSE MARKHAM: Philipp, I found your paper particularly interesting because you are focused on the purposes for introducing a private right of action in Europe: would private actions serve the purpose of deterring violations? Would it instead primarily serve to compensate victims? Or, finally, would it primarily serve the purpose of disgorgement, taking away ill-gotten gains from the violator?

I want to focus on deterrence, because that is where your paper led my thoughts to run. When we look at the US Justice Department website they have done a fabulous report on massive successes in bringing criminal cartel cases ever since the introduction of the leniency programme. They are very proud of this. What it shows is that year after year they catch more cartels and they impose different sanctions. However, if the sanctions are commensurate with the importance of the violations, then we have to assume that the violations are getting worse and the cartels are not going away and so we are not deterring what we hope to deter. I think, actually, it is not a measure of success if we continue to catch more and more cartels.

So my focus as a student of antitrust is very much on deterrence and in considering whether to introduce private litigation into the European model. It is worth considering whether doing so would serve this purpose. However, if cartel enforcement has failed to deter, which is at least arguably the case, perhaps we need to rethink and retheorise deterrence altogether. The generally accepted theory of deterrence strikes me as fanciful, so that is one point I want to discuss here. The other point I would make is that we should consider critically whether sanctions that are imposed on corporations achieve any purpose at all if we are interested in deterrence. I know what I'm going to say on this score is heresy because these enormous corporate fines are popular. If Europe adopts private remedies for antitrust violations, the result will be to impose greater economic sanctions on corporate violators. If our objective is deterrence, I would argue that imposing economic sanctions on corporations is overrated.

So let us start with the theory of deterrence: what is the theory of deterrence? The way we theorise deterrence is that we want to impose a sanction so that it will influence the *ex ante* calculation of the relevant actor. The calculation we've asked the actor to make is to calculate the expected benefits from cartelisation, for example, and subtract the expected costs to that actor. This is just utterly fanciful, of course; we are supposing, with this theory, that a potential violator has his calculator and he says:

“Well, I think the cartel would be able to raise the price of my product by \$4.37 over a million units per year; I think the cartel would endure for two-and-a-half years. The gain is \$10,925,000. The cost is my percentage of risk being caught, times the sanction that would be imposed in the event I am apprehended and successfully prosecuted”.

Folks, this calculation isn't made by anyone and no one has any of these data points. The problem is that when we use this fanciful model to set the right sanction for purposes of deterring violations we are seriously thinking this model works, and it doesn't. So I think we need to retheorise deterrence so that we impose sanctions that are not based on faulty assumptions. It may well be, as some scholarly studies suggest, that even enormous fines are inadequate because they are not high enough to recapture cartel gains. In any event, if the Justice Department continues to find cartels, they must be profitable enough to lead people to take the risks, so the risks are not sufficient to deter. It may well be that we need to impose more meaningful sanctions, and it is certainly worth considering whether our theory of deterrence is useful in this regard.

The second problem with the theory of deterrence is this: corporations do not violate laws, people do, and so it is people, not corporations, we need to deter. I teach corporations law and I open my course with an open-ended discussion about the nature of enterprise. I can throw this bottle of water at Philip Marsden, for instance, but AU Optronics cannot do that. AU Optronics cannot do anything. It certainly does not calculate, so when we speak of the "rational corporation" that may be a useful model for an economist for certain purposes, but it is not useful in deterrence theory. Deterrence is essentially an adjustment of incentives and one cannot adjust a corporation's incentives because corporations don't have incentives, people do.

When I teach corporations law, what I am teaching is basically about agency cost. The essence of a corporation is the separation between ownership (shareholders) and management (the board of directors and the managers under its direction). Whenever someone owns something and allows someone else to control it, there is an agency cost. The agent may be careless or duplicitous, and that risk translates into an economic cost for the owner. In the US we rely on the mechanism of fiduciary duties to reduce agency cost. That is, we hope to adjust the incentives of corporate managers so that they will be loyal and careful, and we do this by imposing sanctions for breaches of fiduciary duties.

We need a mechanism to deter antitrust violations that is similar to the mechanism by which fiduciary duties are intended to adjust *ex ante* incentives of corporate managers. The mechanism needs to target people rather than corporations. The people who violate antitrust laws are the ones whose incentives we need to adjust through a deterrent. When we set a fine, when we impose a sanction, when we decide to introduce a private remedy in Europe, we should be thinking about the effect of the sanction on the *ex ante* incentives of the human beings whose incentives are important. We should not be distracted into thinking that a corporation will be deterred by any particular sanction, including private remedies. Private remedies may serve other purposes, such as compensation and disgorgement, and they might even deter some people, but they cannot deter a corporation.

Now there is yet another problem with imposing fines on a corporation. We take false comfort when we slam corporations with jaw-dropping fines. This is because we ignore who really pays these fines and, again, this is caught up in our misguided thinking about deterrence. When a fine is imposed on, say, AU Optronics, who really pays that fine and is that who we want to deter by the prospect of the fine? In other words, did imposing the half-billion dollar fine on AU Optronics contribute to deterring violations? Who paid the \$500,000,000? Essentially, it was the shareholders, and the fine was not paid by the people who actually violated the law (although in this particular case some of them saw other sanctions imposed, including prison sentences). That money comes from the corporate treasury, so if it hurts anyone it is the owners of the company. The shareholders, of course, had no part in the violation, and their behaviour and *ex ante* incentives are irrelevant to antitrust enforcement. But the other thing about shareholders is that investors and capital markets do not care about fines, they care primarily about certainty. So often when one of these enormous antitrust fines is announced we see share prices actually go up. Indeed, AU Optronics shares went up quite dramatically in the wake of the announcement of its fine because the antitrust matter was then behind the company and there was no longer any uncertainty about it. Furthermore, there were nine billion shares of AU Optronics outstanding, so the half-billion dollar fine was spread to several pennies per share. So even if shareholders could affect corporate conduct, which they cannot, they have no stake in doing so. Thus, the imposition of a fine on the corporation, for which shareholders essentially bear the cost, is in no obvious and direct way advancing the cause of deterring antitrust violations.

My point is that when we consider whether Europe should adopt private remedies, we should not do so in order to advance the objective of deterrence. The damages won by plaintiffs will be paid out of corporate treasuries. This cannot deter the corporations themselves because, as we have seen, it makes no sense to talk of deterring a corporation, which cannot think or act. Nor will it likely deter management, at least not directly, since they will not bear the cost of paying damages to successful plaintiffs. The damages will be paid out of the corporate treasury, inflicting at most very modest pain on diffuse shareholders, each having a miniscule stake in the matter.

None of this should be understood as advocating against Europe adopting private remedies. Private remedies are useful for purposes other than deterrence, including compensation of victims, disgorgement of ill-gotten gains by violators and encouraging broader enforcement of the law than can be accomplished by government agencies alone. Instead, my argument should lead us towards different and more useful sanctions in the name of deterrence. In Europe, for example, criminal sanctions are the exception rather than the rule, but the threat of prison sentences is at least directed at the right actors. Corporate

governance standards also could be addressed to move corporate managers to higher standards of behaviour. In the US, corporate governance standards are notoriously weak, as evidenced by the lack of accountability we have seen in the wake of the recent scandals. So the only conclusion to draw here is that deterrence is not a good reason to adopt private remedies in Europe.

HANS JURGEN MEYER LINDEMANN: I do not believe in this deterrent effect either. I had a look at the 30 most prominent cases decided by the US and EU competition authorities respectively during the period from 2007 to 2011. While the EU imposed fines totalling about €10 billion during that period, the corresponding fines in the US amounted to the equivalent of only €2 billion, ie one-fifth of what European companies were fined.

When looking at this, one should not forget, of course, about the effects of private enforcement in the US, with class actions and the like, which play a much more important role than in the EU. I had a look at this and found out that, in the same 30 US cases mentioned before, plaintiffs were able to recover the equivalent of another €2 billion. This means that €10 billion in fines in Europe have to be compared with €4 billion in fines plus damages in the US. A cartel is thus two and a half times more expensive in Europe than in the US.

In spite of this, we seem to think that deterrence in Europe is not sufficient and that, in addition, we have to allow for a private enforcement system with far-reaching remedies. I think this is simply too much if fines remain untouched. Fines alone are already far too high in Europe.

Unlike in the US, a private enforcement system with treble damages, class actions or pre-trial discovery does not form part of the legal tradition in Europe. Why, then, should we try to copy such a system in any manner? And why should we try to do this just in the area of competition law?

I think—and that takes me back to our discussion this morning—we should rather think about how to improve our existing and traditional system. Public enforcement is the main basis for cartel enforcement in Europe. In view of that, the question for me is—and I know this is still a vision—can we improve the system in a way so that we include the idea of private enforcement in a public enforcement context? In such a model it would be the task of the competition authorities to think about the right amount of damages. Plaintiffs would have to turn to the authorities and register their claims there.

I know—and I heard this before this morning—the concern then is that competition authorities lack the necessary resources to do this job. That may be true, but we would then have to think about how we can improve the situation there. What would be the alternative? The alternative would be to go to court. You would then, however, need the resources there.

All in all, I think we should look at our legal tradition here (ie primarily rely on public enforcement but then integrate therein a private enforcement system

to whatever extent possible). Such an approach, with a realistic opportunity for plaintiffs to recover their losses, would then, of course, have to have the consequence of lowering the fines. Fines would thus take the amount of damages into account. This could be the right answer to cartel enforcement in Europe but not to a discussion about greater deterrence. Greater deterrence can only be achieved by criminal sanctions. Criminal sanctions however seem to be an impossible sell in continental Europe.

ANNA GENOVESE: Professor Philipp Fabbio submits to us, *inter alia*, the question of whether it would make sense for the EU and its Member States to consider the option of shaping more directly private damages claims as a means of deterrence, and how to do it using a multiple damages rule. He also affirmed that the European Commission Draft Guidance Paper on quantifying damages (the Draft) does not cover this issue.

The criteria recommended by the Commission should be based on the traditional principles governing tort liability in the Member States, providing guidance to national courts and to injured parties only in the techniques of compensation of harm. Therefore the Draft should be not relevant for the above-formulated question.

But, in my opinion, the issues concerning the function of antitrust liability and the method of calculation of damages are connected. Besides, the Draft can have a role in making damages actions useful beyond compensation, even if it is only a form of soft law; and we can debate about the deterrence function of antitrust liability, and on its relation with public enforcement goals, even without admission of a multiple damages rule. Of course, a multiple damages rule should stress much more the deterrence function of antitrust liability. However, even without it, we have to fix whether and how much deterrence should be realised by private antitrust enforcement.

I think that generally, and even in antitrust damages actions, the definition of specific quantification techniques concerning compensation for harm meets the purpose of liability and deterrence. In my view, compensation doesn't aim at controlling the quantification of damages *in toto* and in a "neutral" way. The judicial expression of method (based on the quantum of the compensation due) includes a variety of functions which basically reflect those reasons that consider the loss suffered (intended as unjust harm to be compensated) as the chargeable harm.

I perceive this theory as coherent with the principles governing tort liability in the EU and accurately reflected in the latest operative proposals in the Draft of the European Commission on the quantification of antitrust harm for two aspects.

First, the Draft's proposals recognise as particularly relevant the compensation function in case of antitrust harm, but consider it as a concrete pillar instead of a "boundary line" in private enforcement of antitrust law.

Secondly, the proposals also promote techniques to quantify compensation in case of imprecise calculations and these are not related, by excess or by defect, to the strictly compensative aim. The above-mentioned techniques point out the structural limits emerging in the quantification of the harm in illegal competition cases and underline the necessity to determine "only best estimates relying on assumptions and approximations . . . so that the exercise of the right to damages guaranteed by the Treaty is not made practically impossible or excessively difficult" (see Draft, II, 14). Therefore, the Draft seems to prefer an imprecise calculation by excess.

These observations on the Draft are significantly confirmed in the main preliminary document/survey of the European Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules (2 April 2008). The Final Report, "Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios", issued by the Commission on 21 December 2007, analyses the limits in determining these damages actions and the quantum of the related compensation when considering the aim of this liability and the "tension between the deterrence based view and the compensation based view". Moreover, the report also underlines the peculiar structure of the loss (principally related to the expected profits) that the suffering party claims in antitrust suits, and the difficulty of calculating it exactly.

Therefore, in the EU, consideration of the quantum of compensation of harm and the aim of antitrust liability for the same harm are related issues. As a result, even the criteria proposed in the Draft to quantify antitrust compensation are to be considered from a strictly juridical point of view and are to be intended as spurs to reach all the functions related to this liability, which can be preventive, compensatory, sanctioning or punitive ones. So they are also to be considered as items to realise the deterrence function of liability.

This way of considering antitrust compensation produces a relevant implication, as I just said, in the debate on the improvement of the deterrence function of antitrust liability and how to develop this improvement.

In particular, it suggests that the instructions included in the Draft are not only addressed to the experts appointed by the judge or by the party (as observed by the Working Staff of the Suprema Corte di Cassazione), but to the judge too. The reason is basic. In accordance with the binding rules of EU law, the protection of the infringed competitor's or of the infringed consumer's asset is remarkable. Therefore the nuclear principle ruling the functioning of this liability is represented by the quantum of the compensation agreed with the damaged party. But, if quantification of the compensation is an instrument

to regulate any antitrust liability function, only the judge can decide on it and Draft rules are even based on aims of liability.

From this point in my speech, I would like to analyse two more specific questions—the use of the concept of but-for damages and the deterrence function of antitrust liability—as well as the relationship between structure of the loss of profit caused by antitrust infringement, techniques to quantify compensation and promotion of the deterrence function of private antitrust enforcement.

The adoption of the concept of but-for damage in quantifying compensation for the harm caused by the infringer is coherent with civil damages law experience and provided in the Draft too (see paragraph 10 and following ones). However, this inclusion does not clash, in my opinion, with the theme hereby analysed for the following reasons.

Surely quantification of the harm requires the actual position of the injured party (*subtrahend*) to be compared with the position in which this party would have been but for the infringement (*minuend*): but this submission does not demonstrate that the remedy has a mere and exclusive compensatory function.

Indeed, the definition of a but-for damage is structurally complete, but incomplete as concerns its content. The but-for values are inhomogeneous (one is a real value—*subtrahend*—and one is a hypothetical value—*minuend*), but connected at the same time (because the hypothetical counterfactual scenario must be alternative to but coherent with the factual scenario). Therefore the definition reflects a specific relation between two values (difference), which, however, are difficult to identify, and are subject to the judicial activities of parties and to the discretion of the judge too. And the concept of but-for harm is persuasive for a suitable definition of chargeable harm, but it is insignificant as regards the merits or the aim of calculation of damages.

The same observation may be made in my opinion with regard to the national experience from Article 1223 Civil Code. This rule provides that compensation for property but-for damage must include the *damnum emergens* and the *lucrum cessans*, as “prompt and direct consequence” of the infringement (with the exclusion of the avoidable damage: see Article 1227 Civil Code), without other elements. But there is not a univocal criterion to identify and/or to distinguish *damnum emergens* from *lucrum cessans*. These definitions of harm are even unknown in common law codes too, while from a pure economic and financial point of view every strict distinction between actual losses and lost profits has no meaning.

The above-quoted conclusions highlight that: the same negative property dynamic can be defined in several ways, applying different methods to calculate *minuend* and *subtrahend* and adopting dissimilar options related to *damnum emergens* and *lucrum cessans*; the choice among different techniques of quantification of harm produces an expansion or a reduction of the size of harm and amount

of monetary compensation for the injured party. Therefore, when, as in antitrust cases, there is a very relevant gap between real evidence of damage and judicial representations of it, and there are many possibilities of but-for damage representation, the juridical system must define the subject (the injured party or the infringer) bearing the risk of a quantification of damage which is necessarily and largely approximate; and, if the defendant bears this risk, the rules about damages can aim at the deterrence function of liability.

Therefore, in my opinion, the but-for analysis and the complementary notions of *damnum emergens* and *lucrum cessans* are only useful schemes allowing the parties' debate on the definition of antitrust harm as refundable loss (*id quod* interest). These rules give harm to be compensated a trial definition without relevant omissions, inner contradictions or duplications, allowing, on the other hand, the judge to fix the amount in coherence with the function of liability.

The above-quoted analysis allows us to make other observations about the operative proposals of the Commission in its Draft and on the possible answers to the Marathon's questions about aims of antitrust liability.

Indeed, and first of all, as clearly highlighted in the Draft (see paragraph 104 and following ones), the injured party has the opportunity to make various references to the loss during the proceeding too. No reference is to be defined as a different loss and a different claim, but as a specific estimate—approximately calculated—of the same negative (ideal) but-for property value. After this, the judge has the discretionary power of choice among these different solutions, considering “the strengths and weaknesses of each method and its implementation in the case at hand” (Draft, paragraph 107).

Secondly, in the Draft it is clearly stated the necessity to avoid in every case the exploitation of the intrinsic weakness of the observations on harm. This exploitation could damage the injured subject, in accordance with the principle of the *onus probandi* related to damage actions (see paragraph 14 of Draft). Indeed, it could cause the refusal of the claim in contrast with the principle of effectiveness of antitrust liability, but, of course, even in contrast with the deterrence function of liability. In this field, the only potential limit, which is to be verified in every single case, concerns vexatious actions.

Therefore, the Draft rules clearly highlight, in my view, the intention of the EU to place upon the defendant the burden of a quantification of damage which is necessarily and largely approximate, and consequently to drive private damages actions towards a deterrence aim.

In the morning, Professor Marsden's paper stressed the issues of cooperation and partnership between public and private enforcement instead of the area of conflict. I would like to say something related to this problem and to Professor Marsden's questions about the best way to implement an “engine-unite” model without conflict.

Since private antitrust enforcement and the leniency programme in public antitrust enforcement can clash, in order to reduce the conflict there are several official proposals of the Commission included in the White Paper and in the latest Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, “Protection of Leniency Material in the Context of Civil Damages Actions”.

On this object, I think that a tighter relationship between private and public enforcement could be developed. But my proposal is quite extreme. In my opinion, the relationship could be improved by using administrative sanctions paid by companies claimed in order to finance a part of the compensation for the damage caused by the “penitent” company to competitors or consumers; or by creating a public fund based on the payment of antitrust administrative sanctions that the companies adopting leniency programmes can use to cover any compensation request. With this solution, on the one hand, the compensatory function of damages could be fully protected; but, on the other hand, the sanction function could be completely removed or largely weakened for the “penitent”. So the proposal combines very well the aims of the leniency programme with the needs of private damages compensation.

In my opinion, another potential clash between public and private antitrust enforcement concerns the calculation of private damages. More precisely I would like to focus the criteria adopted to quantify compensation in follow-on actions as problems of overall appropriate deterrence.

In accordance with the dispositions of the Draft, too, experts affirm that compensation can also be quantified taking into consideration the profit made by the infringer through his/her behaviour and so underlining the deterrent function of the liability. However, in my opinion, this solution seems inappropriate because it could cause an excessive deterrence level from the perspective of tight cooperation between public and private enforcement. Indeed, public enforcement should beforehand provide for more severe administrative sanctions against any profitable antitrust infringement, which is concretely more weighty. Therefore, in order to aim at an optimal deterrence level with public and private enforcement without clashing, it would be better not to weigh in follow-on actions the level of enrichment reached by the infringer as a technique of quantification harm of injured party.

The above-quoted observations allow one, in my opinion, to highlight the following answers to the Marathon’s questions on aims of private actions for antitrust damages: (i) the dispositions on the quantification of compensation for antitrust harm symbolise juridical rules aimed at fulfilling the functions concerning liability based on antitrust torts; (ii) thanks to these rules, the juridical system can define the subject (the injured party or the infringer) bearing the risk of a quantification which is necessarily and largely approximate; (iii) some of the Draft’s operative proposals on the matter define the

infringer bearing this risk and the aim at the deterrence function of liability; and (iv) in the domestic and European context, the civil liability deriving from antitrust infringement (even without adopting a multiple damages rule) can aim at stressing the deterrence function and a cooperation between private and public enforcement.

GABRIELLA MUSCOLO: I will intervene very briefly on a few points: the first point is compensation versus deterrence. In my opinion, the direct rationale of private enforcement is compensation of damages. However, an effective compensation may result in an indirect rationale of deterrents. On the contrary, punishment is against the Italian clause of public order, as ruled by the Supreme Court, and I agree on this point. Especially, on the point of calculating the amount of fines in awarding damages: in my opinion it doesn't comply with the Italian continental compensatory system because, from the point of view of a single consumer or competitor entitled to file the action for compensation of damages, it doesn't matter how much the enterprises have paid as a fine, what matters is how much she or he will be paid by companies. This issue has already been discussed by the Association of the European Competition Law Judges in the Commission meeting and the conclusion has been more or less the same as the one I've just expressed here. The second issue I would intervene on is the finding of facts and the role of decision of the Commission or of the national authorities. In my opinion, first of all, the decision may be a strong piece of evidence about infringement, but it has not to be shaped with the aim of constructing evidences for follow-on actions. We have to distinguish the rationale of public and private enforcement, and I have to add that the strongest piece of evidence is the evidence of the infringement, but the court can only find elements of proof or mere indicia on the link of causation or the amount of damages in the decision taken in a public enforcement case. I move to the third issue: relying on mere indicia or elements of proof, such as the courts have made in the case of the cartel for car insurance, means compensating damages on an equitable basis. In my opinion, the equitable compensation of damages is the lowest standard of proof, and we have to increase the standard of evidence we require for compensatory damages. In my opinion, the framework is to favour the access to proof, overcoming the information asymmetry but increasing the standard of proof, and the best way for increasing the standard of proof is a prudent use of economic evidence.

EDWARD JANGER: I want to see if I can make Professor Markham's point a bit more concrete.

There's a famous commercial law joke (and there are only a few famous commercial law jokes) that goes as follows: a young attorney is supervising the

closing of a transaction. After days of negotiating and proofing and preparing the documents, all of the parties are seated around the table, prepared to start signing documents. At that moment, the attorney's client announces, "I have a problem with the guarantee". The young attorney is dumbfounded. The document is standard, the terms of it have been previously discussed. In frustration the attorney says, "What could possibly be wrong? We've been over everything." The client looks at him, winks, and says, "The problem is that I'm good for it . . ."

There's also a slightly different version of the same joke, as told by bankers. A junior loan officer is reviewing the terms of a credit. After reviewing the file, he asks his boss, "This is \$200,000,000 loan, why are we taking a personal guarantee from the president of the company? His only significant asset is the equity in his house of about \$100,000. What good will that do us?"

"That's easy," his boss replies, "The house is not worth a lot to us, but it's worth a lot to him . . ."

The common theme here is that, when we talk about civil damages and deterrence, the damages need to be large enough to be salient. Unless you are at a damages level that would kill the company, or at least its stock price for a couple of years, it's just not salient. At the same time, once damages are at that level, courts are likely to balk at destroying that much value. Leniency programmes solve this problem, but at the cost of undercutting deterrence. As Professor Markham has pointed out, deferred prosecution agreements quantify the cost of illegality for the shareholders, and this reduced uncertainty may actually cause the value of the target's stock to go up.

So, if a threat to destroy the company is a lousy deterrent, are there any approaches that might work better? Maybe a better approach would be to incentivise the CEO directly by making the CEO personally liable. Such an approach would have to prohibit D&O insurance or corporate indemnification of the particular risk, but this might be a fruitful avenue to explore.

AMEDEO ARENA: It has been argued that judicial concerns over certain features of US private antitrust enforcement—such as mandatory trebling of damages and class actions—contributed to the progressive retrenchment of antitrust liability standards under Section 2 of the Sherman Act. As Hovenkamp put it, "Often judges respond to an overly aggressive remedies system by defining substantive violations too narrowly".

Since courts could not expunge those features from antitrust enforcement—the argument goes—they applied stricter liability standards to diminish private litigants' chances of success.

Indeed, one way to look at cases such as *Trinko*—where a telephone service customer sought to recover treble damages from a company that allegedly engaged in harmful conduct against his telephone service provider—is that the

Supreme Court was looking for ways to discourage unmeritorious individual claims against dominant firms: the existence of sectoral regulation provided a solution on a silver platter.

So far, no similar concerns have troubled EU and Member States' courts, where the enforcement of Article 102 TFEU against dominant companies has been predominantly carried out by the European Commission and by National Antitrust Authorities. Unlike private plaintiffs, public enforcers are, as Justice Stevens put it, optimally situated "to vindicate the public interest in the enforcement of antitrust laws".

Would the introduction in the EU of a US-style model of private antitrust enforcement affect the substantive scope of Article 102 TFEU? EU courts would probably not go along with the Supreme Court and hold that, when a regulatory structure exists to deter and remedy anticompetitive harm, the costs of private antitrust enforcement are likely to exceed the benefits.

Aware that private plaintiffs' attorneys are poised to file suit, however, the Court of Justice would likely be more cautious in determining, as it did in *Deutsche Telekom* and *AstraZeneca*, that dominant firms have a special responsibility not to harm their competitors that may even exceed the requirements of sector regulation.

PETER WHELAN: One of the speakers raised a very interesting point earlier, which has actually engendered quite a bit of discussion: what are the real purposes of private enforcement of competition law? After examining this issue, I have become more convinced than ever that we don't actually need to encourage private enforcement and that we should focus mainly on public enforcement. We can identify three purposes of private enforcement: deterrence, punishment (retribution) and compensation. I wish to talk about each of those in turn.

If we talk about deterrence, it seems clear to me that public enforcement is far superior to private enforcement when it comes to deterrence. When you're looking at the impact of private enforcement you can look at the deterrent effect of enforcement. In that context, one will be looking at the effect that the imposition of the financial penalty (damages) would have on potential competition law violators. With public enforcement you could impose a financial penalty: you could impose a fine. But one can also impose other sanctions with public enforcement that can help one to achieve deterrence—sanctions that are not available with private enforcement. Assuming that you have the right laws in place, you could impose custodial sentences on cartelists or have director disqualification orders placed on directors. But it's not only the actual sanction that's imposed in the context of public enforcement that is relevant: how we actually get to the point of imposing a sanction is also important. Think about the powers that we can have under public enforcement. We could use criminal

investigative techniques, operate a leniency policy or have dawn raids; we don't see these (useful) techniques operate in the context of private enforcement, quite obviously.

We can also talk about punishment. I think that if we are going to talk about punishment we should understand that—at least in the UK—there are actually constraints on the ability of private enforcement to achieve its punishment-based aims, particularly when follow-on cases are at issue.

It is true that we had a recent follow-on case in England where punitive damages were awarded. But the only reason that they were allowed in that follow-on case was because the actual decision of the relevant competition authority did not impose a fine because of the size of the company involved. So we didn't actually have the issue that had risen in an earlier case where the claimants could not actually get punitive damages, because to award such damages would have been inconsistent with Article 16 of Regulation 1/2003 or would have violated the guarantee against double jeopardy (*ne bis in idem*). So we have this constraint on the ability of private enforcement to actually achieve the aim of retribution (or punishment for its own sake); this particular constraint is not in operation when public enforcement is undertaken.

Finally, let's have a look at compensation. We can achieve compensation through public enforcement actions. Somebody mentioned *cy pres* awards earlier. I'm from the ESRC Centre for Competition Policy (CCP), and I obviously would be in favour of those sorts of awards! We at the CCP would benefit from that, but I think consumers would also benefit from that. Alternatively, we could ensure that the competition authority actually requires the competition law violator to compensate its victims. Of course, that raises issues to do with resources and prioritisation, and in actual cases causation and quantum would also need to be considered in addition to an actual violation. But I think that that could be something that could be done in a positive way. Renato Nazzini mentioned a very good point about competition authorities and their reputation in this context: what if they get it wrong? True! That's something you might want to consider when you are thinking of what to do. But think about this: what if they get it right? Consumers would quickly come to understand that the competition authority is working in their interest. We could also consider the situation where a large fine is imposed on a company that is struggling in the market. (In fact, that company could have been cartelising the market simply because it was struggling.) The imposition of the fine in that situation would cause even further difficulties for the company. Does the competition authority care about its reputation in that context? Should it care about its reputation? What about the employees of the company, in particular? Are they going to be happy with the competition authority? In fact, with the imposition of a fine on any company, we could also talk about prices going up in the relevant market if the company is going to pass on this particular fine to its

customers. Are all the consumers going to be happy again with another price rise? The point here is that reputation can be overexaggerated.

To conclude, my point is that I'm not too convinced that private enforcement is the best way forward. I think public enforcement of competition law is far superior in achieving the relevant objectives.

LUIGI PROSPERETTI: Before taking up some of the points proposed by Philipp, I'd like first to assure Jesse that several economists would strongly agree with him.

Just to elaborate a little, the existence of very different interests between shareholders and managers was a notorious point made in the 1930s by Berle and Means, but most economists working on competition issues seem to have forgotten it. Most of them were also highly influenced by the Nobel Prize to Gary Becker, and therefore are in favour of punitive damages and criminal sanctions, but seem to have overlooked the Nobel Prize in Economics to Kahnemann for his research on psychology and economics. I think his research should be deemed to be very relevant, not only to understand company behaviour, especially when it is the result of the decisions of a small number of people, but also, more broadly, to think about market definition in a world of non-fully rational decision-making. I think that many people on this side of the Atlantic would share the idea that the antitrust discourse should incorporate this type of analysis.

Turning to the point that Philipp was making, I think it is useful to discuss further the role of economic analysis in a data-poor environment, such as is certainly the case for Europe. The only area in which you really get a lot of data here is mergers, because the companies involved have rational incentives to produce enormous amounts of data, and indeed in Brussels there are true orgies of economists feeding on big data. However, this mostly happens in mergers and not in civil courts, where often the data are largely insufficient to the application of any complex econometric analysis. This often happens for the simple reason that the cumulative time taken by the administrative proceedings and the mounting of a civil case exceeds the statutory period during which companies must retain basic economic data, such as invoices or payments. As a consequence, in many cases economists may not be useful to lawyers and judges introducing "hard" [whatever that means] results. With poor data, you just don't get precise results.

This is relevant for several issues, but let me take up one which is clearly warming up in Europe, ie passing-on. If a durum wheat cartel increased the variable cost of pasta producers, in case we wished to estimate how much of the increase was passed on to pasta eaters, we would need to consider a number of factors. The first is the market structure of the pasta business. If it's a monopoly, on the basis of the relevant theory, we may reasonably have a

presumption that passing-on should be about 50%. If, on the other hand, the market were perfectly competitive, there would probably be a full passing-on. If it's an oligopoly, the honest answer is that we don't really know. Of course, we could estimate this if we had a lot of data on costs, prices, volumes and margins for the pasta producers for a number of years, plus data concerning consumer demand—then we could run a bunch of regressions. As far as I'm aware [and, please note, we are talking about pasta in Italy], most of this data do not exist. But, of course, passing-on depends also on several other variables. Let us consider only one more, ie countervailing buyer's power. Who buys pasta? Supermarkets mainly, which enjoy a very large commercial power. So—in order to estimate the passing-on between durum wheat and pasta—you would have to model the interaction between two oligopolies: that of the pasta producers and the more concentrated one of supermarket chains. Only in a science-fiction world would one have the data to do so. Of course, one could have enough data to build a simulation model, but we should expect that judges, always sceptical about the value of the evidence they consider in court, will be quite sceptical about models where the results depend largely on the hypothesis of the model-builder. In light of this example, I would conclude that it is almost impossible in most cases to make a precise calculation of passing-on.

On the other hand, I believe that economists could still be useful to lawyers and judges in order to understand, at least on a qualitative level, whether it was likely that passing-on took place or otherwise, in light of the structure of the markets involved and the available, if scant, evidence. Lawyers and judges could then build reasonable presumptions on the basis of such an analysis.

This may sound like an anticlimax, but I believe the legal professions should harbour reasonable expectations about what economists can do. They certainly cannot, and should not, turn out to be providers of snake oil.

ALBERTO HEIMLER: I would just like to follow up on the suggestion by Jesse that economists intervene. My point is that criminalisation is not really outside the scheme of an economic approach to sanctions. Deterrence with criminalisation depends on the probability of getting caught. This is what people usually do, for example, when they park their cars where they are not allowed: they calculate the probability of receiving a fine. If the probability is high, they do not park there; if it is low, they make a calculation, multiplying the fine by that probability. This is a common behaviour. However, with criminalisation of antitrust there is a second probability, which is very important, and that is the probability of being found guilty, which is extremely tricky in antitrust. Why is it tricky? First of all, our legal provisions, especially in Europe, where criminalisation has been introduced in a few countries, are very general. So, when is it that a criminal sanction can be imposed? What

triggers criminalisation? Is this objective or subjective? I think this is a very tricky issue. If you have a cartel where people abide to a common price index to increase prices, for example following a simple system where they increase the price of the product in a common way, if they agree to look at a common and specific price index would that entail a criminal case or not? I think that's a difficult question to answer, given the whole spectrum of horizontal restrictions that exist. And there is a problem in identifying the precise individual who is guilty within the firm. Also, in this case, is guilt an objective issue or is it subjective? In the UK, one of the difficulties the court faced was on how to identify the actual responsibility of those involved. What does it mean to be responsible? And finally there is an issue, especially in my country, that if you are found guilty, do you actually go to jail? Which is also something quite uncertain, so in the end you might end up in a situation where criminalisation doesn't achieve its objectives, in the sense that criminalisation actually reduces deterrence. This is why administrative fines continue to be quite effective in ensuring deterrence. Furthermore, administrative sanctions provide the right incentive for introducing compliance programmes. I think compliance programmes are important. We have to find the way to promote them. The existence of an effective compliance programme is ignored both in the EU and in the US. I don't think that's the right approach. I think there should be something more than this. For example, in the *Archer Midland* case—Mr Whiteacre did go to prison, but he colluded with the Archer Midland bosses. They all knew of the cartel. He wasn't alone. But in many cases cartels are not decided by the board. They are decided by middle managers that do not necessarily inform the board. Compliance programmes in such instances are important and necessary. They solve the agency problem, but they have to be serious and rigorous.

ALBERTO PERA: Alberto Heimler just anticipated what I was about to say. It seems to me that today's discussion follows a *fil rouge*, as each session is linked to the next one. This link is similar in the way public and private actions may interplay in order to make enforcement of competition law more effective.

For a start, I don't think that it is useful or appropriate to consider private enforcement as an instrument of deterrence. We should rather think how to structure deterrence in an effective way. From this point of view, I follow Alberto Heimler in arguing that individual criminal sanctions must not necessarily imply the use of jail, which would be very difficult to apply in legal and cultural contexts like the Italian one. There are alternative instruments which are available, in particular disqualification. A related point is that deterrence does not only depend on the level of sanctions, but also on the probability of getting caught: so the real issue is that you should have a very strong public enforcement. This is a link to the session this morning: how will you

create incentives to discover information which would lead to effective public enforcement? This is the real problem in Europe and in particular in national jurisdictions. Finally, there is the issue of compliance: I agree with Alberto, it is extremely important. I think that competition law would be better enforced if authorities gave more consideration to compliance programmes. I think that negligence in designing and supervising compliance programmes could be a standard of guilt: this would require managers and directors to prove that they have set in place procedures to prevent competition law infringements.

As for private enforcement, I think that what is relevant is how to make redress accessible. I think there are two important points in this respect: first, the reliance on well reasoned public decisions, and easy access to justice. Let's start from the first point: if the public decisions are not well reasoned, if they do not define really what infringement is, then it becomes very difficult for the private plaintiff to get some points to start from. What kind of decisions do you take (sanctions, commitments)? How recent is the decision? Which bases does it provide for a private action in terms of information and evaluation of the effects? The second issue is access to justice. Obviously here there are a number of arguments, which have been widely discussed in the Commission Green Paper. First, the existence of collective actions and the criteria governing it; then the types of damages which may be recovered. The two issues are related. *Courage* tells us that indirect damages should also be recovered. However, unless there is the possibility of an effective collective action, this may give insufficient incentives for the indirect purchaser to claim for damages. Again, consideration of what the incentives to the working of the system are becomes very important.

CRISTOFORO OSTI: There is a part of Philipp Fabbio's paper where there is a distinction between compensation, deterrence and punitive damages. From what I understand, there is no ideal distinction between punitive damages and deterrence, because the whole idea of what Professor Markham calls the orthodoxy is that punitive damages are necessary for deterrence because otherwise you would not pay more than the damage that you cause and thus you have an incentive to infringe antitrust laws. So punitive damages are needed as deterrents. So whether this deterrent works or not, I have to say, my experience is that you have the same situation where there is a separation between ownership and management and a situation where there isn't. When the owner is the manager, he or she might think "I don't care, I'll pay whatever I have to pay and go on. This is the right direction. I will stick to that." But when there is a distinction between management and ownership, what happens is that managers who get caught, and especially those who have entangled the company in serious antitrust infringement, they lose their job and it is not easy for them to find another job after that, and I can tell you they're

extremely concerned about this. And, of course, the amount of the fine has something to do with it, because if the fine that you get is a fine which makes the difference between the company being very profitable and the company being derailed for the next five years, then, of course, this is a big distinction, as you are likely going to be fired as you are involved. But I want to finish on this thing about our culture, because even the Commission says “punitive damages are not in our culture”. What does this mean? Is this really going to prevent us from doing something which we think might be right? In a way, you could say that even antitrust is not in our culture. Certainly it wasn’t part of our culture a long time ago. So, what shall we do? Shall we give antitrust up? Erase the record of this seminar? I don’t know. Secondly, if you have a system where there is an administrative agency, which can impose fines, it would be more in our culture to allow for the court to impose fines. So a court imposing damages is probably less against our culture than an agency doing it. I could take examples from contract law. Of course, if we think that the aim of damages is the same as that of deterrence or is a tool for deterrence, the reverse side of the coin is that it’s true that, when we fix punitive damages, if there is public enforcement then we should also take the fine issued by the agency into consideration. This is clear.

RENATO NAZZINI: Very briefly, also, because most of what I want to say has been said already, I just want to comment on deterrence and compensation or, as I would rather say, effectiveness or individual rights. The choice between deterrence or compensation as the objective of private enforcement is not a matter of policy, but a legal issue. My point is, therefore, a point of method. I would say that, to answer this question, we should look at the Treaties and we should look at the case law. Starting from the case law, *Manfredi* and *Crehan*, I think there are clear indications that, because direct effect and damages remedies arise under EU law, this is more about effectiveness, which you could call deterrence rather than compensation. I think that’s where the law is in *Manfredi*. This is against the background of general EU law in cases like *Marshall* or *Muñoz*. The second point is that the difference between effectiveness and individual rights makes a huge difference in certain circumstances. The EU courts have not always been consistent, EU courts never are, so if you read *Pfleiderer*, for instance, you realise that the Court of Justice changes the “mood”, so to speak, from *Manfredi* and *Crehan* and looks at compensation as an individual right. And what is the consequence of that? The consequence is that there is no clear hierarchy any longer between public and private enforcement. So *Pfleiderer* is a balancing exercise in relation to the disclosure in civil litigation of evidence consisting in leniency documents because compensation is not just part of the effectiveness of the overall regime, which would lead to the conclusion that, where there is an issue of effectiveness, clearly the right of

a claimant comes in a second place, that is different from, but on the same level as, effectiveness, which means that the two objectives must be balanced one against the other. And this creates further problems for the European Commission and national legislatures because, in my view, if the Commission, and even more so national legislatures, were to say that leniency documents are always covered by blanket immunity, there could well be a problem under EU law, because of this standing of the right to damages, an independent, self-standing right rather than a building block of the effectiveness of the EU competition law regime. Thank you.

PAOLO GIUDICI: I have been anticipated by Professor Osti in one remark at least—the one concerning deterring corporations. In Continental Europe we have controlling shareholders. So Jesse's arguments change a lot when you have controlling shareholders, because a fight against the corporation is a fight against the shareholder and it also affects managers (many of which are usually members of the controlling family).

As to the dichotomy between public enforcement and private enforcement, or between damages and deterrence, I think this dichotomy is a little bit out of date. There are other areas of law where there is the same discussion; I am referring, for instance, to security regulation. In Italy we recently had a famous case (the *Sai-Fonditaria* case) of action in concert in a mandatory takeover framework. In that case there was a failure of public enforcement. Our Cassation court accorded civil damages to the plaintiffs and expressly embraced the argument that refers to the deterrent effect of private enforcement. If the Italian Cassation court—a very old fashioned and formalistic court—agrees that civil damages are an instrument of deterrence in regulation, it seems to me that we can really consider the whole discussion questioning whether civil damages are deterrent or not a bit outdated.

VERONICA PINOTTI: Let me first thank the organisers for this opportunity to exchange our views on antitrust enforcement. I would like to give some comments from the perspective of the clients and the industry.

I heard a lot today about increasing fines and criminalising the antitrust infringements. Certainly, these would be really helpful means to reinforce the application of antitrust law. We also heard today about criminalisation not being part of the antitrust enforcement culture in Europe.

I think that we all agree that, in reality, there is no full application of antitrust rules and there should be more. This is very often under our eyes when we travel, when we go to the supermarket. Therefore, there is a need to reconsider critically the current enforcement system.

In my view, in this scenario, in addition to experimenting with new means of enforcement, it would be important to try to maximise the potential of the

existing ones. It would be for the authorities—the European Commission and the national competition authorities—to strengthen antitrust enforcement by starting more proceedings and speeding up their duration.

The industry and the complainants do not trust the current enforcement system. For example, in order to have a case started by the antitrust authorities, companies need to wait years, which makes them very rarely willing to file a complaint. Professor Heimler today said that there are not enough complainants, because lawyers do not push clients to complain. I would be interested to see the statistics about how many complaints have been filed every year, at European and national level, during the last 10 years, and how many of these cases were brought to a fining decision. In my experience, in the last 20 years I have been filing complaints with the European Commission and the national competition authorities on behalf of clients, and in most of the cases we either had to provide the relevant authority with a “package” of full evidence of the infringement (and not just what would be sufficient evidence to start a proceedings) or the authority would not open a case.

In addition, in many cases, even if the authorities decide to start formal proceedings, the cases are closed without fines, accepting the commitments offered by the parties.

Therefore, when we discuss the possibility of filing a complaint before the antitrust authorities to defend the industry or a client from an abuse or an antitrust infringement, then we also need to explain that we have to do all the work for the authority and that it will take at least two years to see the end of it. Now, my question is: who would be willing to go through all of that?

In order to ensure a higher level of antitrust enforcement, of course, criminalisation is important, as well as increasing fines, but please do not forget that a more efficient use of the existing means of enforcement would be even more important. In addition, the authorities need to communicate more. We heard lawyers saying today that clients do not know or have a culture of antitrust in many EU countries. Well, it is because we need to communicate, and the authorities and the governments need to communicate, more about antitrust law.

I have also heard that companies and corporations—even in the US—do not care much about antitrust fines. This is not my experience. I spend approximately 15 hours a day with my clients discussing these issues, and I can tell that they do care a lot about fines and are very worried about the consequences of potential antitrust infringements. Many of them are struggling to cope with the current economic crisis and its implications on the market. Therefore, they are really investing a lot in audit, compliance and monitoring in order to minimise such risks.

These discussions are really helpful, but please keep in mind also the reality in the industry, which is not represented here today.

TOPIC 4: CRIMINAL ENFORCEMENT

PETER WHELAN: I would like to start this, the final, panel discussion of the day. First of all, I would like to thank you all for staying with us to this point in the day. I'd also like to thank Philip, Spencer, Philipp, Mario and Giuliana for inviting me today and also for the dinner last night. I'm going to conduct a panel session on the criminal enforcement of competition violations. We have the same format as the other panel sessions; so we have a presenter and we have a commentator. Our presenter is Professor Susan Beth Farmer, from Dickinson School of Law at Penn State University. Professor Farmer has prepared a paper which is very interesting and brings out a number of different issues for discussion. I'm looking forward to hearing her views on those particular issues. Then we pass over to Professor Roberto Pardolesi, from LUISS Guido Carli. Professor Pardolesi is going to comment on some of the issues raised in Professor Farmer's paper. He will give a short presentation on the arguments used to justify criminal sanctions.

Before I pass over to Professor Farmer, I'd just like to give you some context to the debate. I understand that there are a number of economists here. They may not be aware of the legal debate that has gone on in Europe over the last number of years regarding the imposition of criminal antitrust sanctions. I will give a little bit of an overview of the situation and I will try my best not to pre-empt anything that is going to be said by either of our presenters.

I think the first thing that we have to understand is that traditionally within the EU (national) cartel law enforcement has tended to avoid personal criminal sanctions. The employment of administrative sanctions against undertakings has been the most common form of antitrust sanction in Europe. However, over the last number of years—let's say 10–15 years—there has been increasing debate in Europe regarding the necessity for criminal cartel punishment at the national level. These debates have been fostered at different points by different entities, both European and non-European. I could mention two of them quite briefly. One is the Competition Committee of the OECD. The Competition Committee of the OECD has not taken a formal position on whether criminal sanctions should be imposed by its members, but if you look at the actual work of the Competition Committee and if you look at the reports and the recommendations, it is clear that it acknowledges that criminal sanctions can be useful. In fact, if we look at its Second Cartel Report, we can see that the Competition Committee analyses in detail whether imposing sanctions on natural persons would be a good thing for public competition enforcement. In that report it actually states that jurisdictions should at least consider introducing and imposing criminal sanctions where such sanctions would be consistent with legal and social norms within the jurisdiction itself. We could also talk

about the Antitrust Division of the US Department of Justice. It is clear from published policy statements and speeches that the consistent message from that particular entity is that criminal sanctions are an effective deterrent of cartel activity.

Those particular claims have been examined by commentators based in Europe. If we look at the papers written by Wouter Wils and Terry Calvani—and perhaps my own work as well—you'll see that this is indeed the case. In fact, there have been quite a number of different conferences over the last number of years dedicated specifically to consideration of the imposition of criminal sanctions for cartel activity. But this is not to say that this is a merely academic exercise, because we have seen national legislators take up the debate and act upon their analyses in that debate. We could look at the UK, for example, where there is a particular provision of law which allows for the imposition of criminal sanctions on individuals: section 188 of the Enterprise Act 2002. In fact, you could face five years in prison for cartel activity under the UK regime. Other legislators have looked at this issue. Sweden, for example, has looked at it. Ultimately it decided not to go forward with criminal sanctions, due to the presence of mandatory prosecution rules within that particular jurisdiction. Specifically, the authorities were worried about the fact that they would need a criminal leniency programme for criminal sanctions to work in an effective manner. But very recently, Denmark, for its part, has actually introduced criminal sanctions for competition law violations.

The criminalisation debate, then, is in fact an ongoing debate and one that remains quite relevant. Within that debate there are a number of difficult issues that have been raised. Perhaps the most important one is whether or not criminal sanctions are necessary or indeed appropriate within Europe. Other issues include the following, to mention just three: how do we actually define a criminal cartel offence? How do we design a criminal cartel regime? Do the EU institutions have the competence to mandate the adoption of criminal antitrust sanctions within the EU Member States?

I would say to you that the debate is still relevant because there is a lack of consensus regarding a number of issues—particularly the appropriateness and necessity of criminal sanctions. That is quite an important fact. Think of the actual consequences that could face somebody who has been convicted of a criminal cartel offence. Those consequences could be quite serious. I would say to you that the fact that there is a lack of consensus is something that will inevitably lead to further debate. In fact, the lack of consensus underlines the necessity for further debate.

The final point that I want to make is that, as I have mentioned, we do actually have criminal cartel sanctions in some EU Member States. Those particular Member States must be able to justify why they have those particular criminal sanctions in place. But not only do they need to justify them, they also

need to demonstrate that in imposing criminal antitrust punishment they are actually respecting the rule of law and human rights guarantees. I think that that is a particular challenge that needs to be met. My point is that continued discussions about this issue is indeed warranted, even though we have already had a number of international conferences dedicated to this topic.

That was my attempt to give you the broad outline of the context of this particular debate. Now I'm going to hand you over to Professor Farmer and she is going to present her own ideas on this topic.

REAL CRIME: CRIMINAL COMPETITION LAW

SUSAN BETH FARMER*

Following our marathon theme, I want to compare the legislative decision to criminalise competition violations, articulation of the goals of the law, preparation for and prosecution of these cases, and finally evaluating the performance, to training for and running a race. The stages of this marathon are, first, making the decision to run; second, setting personal goals; third, identifying the specific challenges; fourth, participating in the marathon; and, finally, evaluating the experience and planning for future marathons.

A. WHETHER OR NOT TO RUN THE MARATHON: WHEN ARE CRIMINAL PENALTIES JUSTIFIED?

Gilbert and Sullivan's *Mikado* articulates the question of this paper most musically:

*My Object all sublime,
I shall achieve in time
To let the punishment fit the crime
The punishment fit the crime . . .*¹

The questions for competition legislators and policy-makers are more complex (and less melodious): what social harm does an antitrust crime represent and what precise punishment is fitting? This paper will address whether or not violations of competition law justify criminal sanctions and, if so, on what theoretical basis? Sutherland² categorises white collar crime as “real crime”³ because, fundamentally, it constitutes a violation of trust and exploitation of power. However entitled, these acts are fraud and “the double-cross”. Moreover,

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¹ Gilbert & Sullivan, *The Mikado* (first performed 14 March 1885); HL Mencken, Review of *The Mikado*, *The Baltimore Evening Sun*, 29 November 1920 (“The memorable first performance of this greatest of light musical pieces was given on March 14, 1885, at the Savoy Theater in London”).

² EH Sutherland, “White-Collar Criminality” (1940) 5 *American Psychological Review* 1.

³ A Ashworth, “Conceptions of Overcriminalisation” (2008) 5 *Ohio State Journal of Criminal Law* 407, 419 describes the core features of criminal law as both declaratory and preventative, implicating retributive just desserts and utilitarian deterrence theories. Crimes that are based on these theories are paradigmatic “real crimes” as compared to regulatory offences.

there is no doubt that white collar crimes, including but not limited to competition crimes, cause serious economic loss and harm consumers, society and institutions without justification.

Given the modern global enforcement picture, in which a minority of jurisdictions have adopted criminal remedies while the majority treat competition violations as civil or administrative violations, which may include government enforcement and private litigation, questions of efficient enforcement as well as jurisprudential theory arise. The former issues implicate accommodation of distinctions in due process rights, pre-trial procedure, and overall considerations of fair punishment. For this discussion, I will focus on a key bipolar division:⁴ the US has, and actively pursues, criminal sanctions in addition to civil penalties, damages and injunctive relief. Sanctions available to the EC under Articles 101 and 102 TFEU are limited to civil remedies that originate in an administrative context or, in recent developments discussed by Prof. Marsden, remedies in national court.

Before deciding whether or not violations of competition law should or may be prosecuted as crimes, the fundamental aims of criminal law must be understood. Of course, at the most basic level, a crime is anything that the legislature says is a crime, but such a definition merely begs the question. Hart describes the criminal law as a specific method, process or approach identifiable by four characteristics:⁵

1. the method operates by a series of directions or commands, formulated in general terms, telling people what they must or must not do;
2. the commands are taken as valid and binding upon all those who fall within their terms . . . They speak to members of the community . . . with all the power and prestige of the community behind them;
3. the commands are subject to one or more sanctions for disobedience, which the community is prepared to enforce; and
4. what distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.

The first three of these characteristics apply equally to civil and administrative methods and sanctions. It is only the final characteristic, the “formal

⁴ Other jurisdictions follow their own statutes and enforcement priorities. Those with criminal penalties include Australia (2009), Brazil (2011), Canada, France, Ireland (2006), Israel, Japan, Korea and the UK (2003). Chapter VII of the Chinese Anti-Monopoly Law, one of the most recent competition laws, which became effective in August 2008, provides for civil and administrative penalties. Monopoly agreements are subject to injunctions, confiscation of the illegal gain and fines of between 1 and 10% of the prior annual revenue, or up to 500,000 RMB for incomplete conspiracies. Criminal sanctions are available for entities that commit obstruction or fraud in connection with agency investigations (Art 52).

⁵ HA Hart, “The Aims of the Criminal Law” (1958) 23 *Law & Contemporary Problems* 401.

and solemn pronouncement of the moral condemnation of the community”, that both distinguishes criminal law and constitutes part of punishment itself. Ashworth agrees, describing the “function” of criminal law to be both declarative, that is, retributive, and preventative, that is, deterrent. Only certain types of behavior are deserving of the social and moral consequences of criminalisation, however. They must be:

1. recognised as wrongdoing;
2. serious in nature;
3. justifying public censure; and
4. subject to punishment⁶

Like Hart, Ashworth assumes that a criminal conviction carries a significant measure of stigma and constitutes punishment, whether or not additional criminal penalties are attached. Kadish agrees that a “central distinguishing aspect of the criminal sanction appears to be the stigmatization of the morally culpable”.⁷

The US Justice Department views criminal enforcement against cartels as “the core priority of antitrust law”.⁸ Since 1998, the OECD has condemned horizontal cartels in the strongest possible terms, calling hard-core cartels “the most egregious violations of competition law” because they directly harm consumers, raise prices and limit output.⁹ The Council recommended that states “ensure that their competition laws effectively halt and deter hard core cartels”, and cooperate in investigating and sharing information, but did not specifically recommend that states adopt criminal penalties for these egregious violations. The Council Recommendation merely mandates states to “ensure” that their laws halt and deter cartels by empowering enforcement agencies, providing effective procedures, and sanctions “of a kind and at a level” sufficient to deter cartels.

The expressive power of the criminal sanction begins well before the imposition of a criminal sentence,¹⁰ conviction or trial. The subjective and objective punishment arguably begins as early as the initiation of a criminal

⁶ Ashworth, *supra* n 3.

⁷ S Kadish, “The Use of Criminal Sanctions in Enforcing Economic Regulations” in S Kadish, *Blame & Punishment: Essays in the Criminal Law* (Macmillan, 1987), 40.

⁸ RH Pate, “International Anti-cartel Enforcement”, 2004 ICN Cartels Workshop (Sydney, Australia, 21 November 2004) (characterising cartels as devoid of justification and causing significant economic harm.) Mr Pate cited the US Supreme Court’s description of cartels as the “supreme evil of antitrust”, though the Court did not address whether or not criminal penalties were necessary to punish cartel behavior, *Verizon Comm, Inc. v Trinko*, 540 US 398, 408 (2004).

⁹ OECD, “Recommendation of the Council Concerning Hard Core Cartels”, OECD Document No C(98)35/final (25 March 1998), available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False>.

¹⁰ Criminal sanctions include both incarceration, for individual offenders, and fines, for individuals and corporate entities, which traditionally cannot be imprisoned.

investigation, including the uniquely intimidating grand jury proceedings.¹¹ Although modern grand jury practice varies somewhat by jurisdiction and state, the most traditional grand jury proceedings are limited to the grand jury members, a court reporter, translators if required, members of the prosecution team and the witness. Attorneys for the witnesses are not permitted to be in the grand jury room to provide advice and assistance; witnesses are permitted to request time to leave the room to consult their counsel and then return to continue testifying.

The role of the grand jury is to determine whether or not there is reasonable cause to believe that a crime has been committed and that the target individual(s) or corporation(s) committed the crime(s). For that reason, the proceedings are one-sided. Potential defendants are not authorised to present a defense or exculpatory witnesses in the most traditional version of the grand jury. Moreover, grand jury proceedings in complex cases such as antitrust may be long-drawn-out affairs.¹² Unless there is a reason to seal the indictment, indictments are typically made public when they are handed up by the grand jury.¹³

Following indictment, criminal defendants are arraigned, ordinarily in open court, with attendant publicity, and the case proceeds to limited pre-trial

¹¹ The 5th Amendment to the US Constitution requires indictment by a grand jury in certain situations, providing that “no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury”. See generally US Department of Justice Division Manual at III-81 (last updated November 2012), available at <http://www.justice.gov/atr/public/divisionmanual/index.html> (hereinafter referred to as Antitrust Division Manual), describing the procedures and approval process required to convene a grand jury.

¹² The Antitrust Division Manual directs the prosecution team to estimate the amount of time anticipated to present the case and warns that, if the “investigation will likely take a considerable number of sessions and a substantial amount of grand jury time, it is best to begin a new 18-month grand jury that will be empanelled specifically for antitrust investigations” (Antitrust Division Manual, *ibid*, III-84). Individuals and corporate representatives may be subpoenaed to testify and/or produce documents. Again, the process may be lengthy:

“Subpoena recipients typically receive significant lead time to comply with subpoenas, but in exceptional circumstances when there is a risk of flight or destruction or fabrication of evidence, subpoenas may require speedy compliance, usually within one day. Such ‘forthwith’ subpoenas should be used rarely and will likely be subject to close judicial scrutiny” (Antitrust Division Manual, *ibid*, III-85).

¹³ “After the indictment is returned, staff must notify the Office of Operations immediately and provide the docket number and the name of the judge, if available. The Office of Operations will inform the Office of Public Affairs, which will issue the press release” (Antitrust Division Manual, *ibid*, IV-63). The adverse effects of this publicisation are implicitly recognised in the Manual, which requires that

“Once the Office of Operations has been notified, it is customary for staff to call counsel for each defendant, inform them that an indictment has been returned, and give them the date of arraignment, if known. This courtesy is intended to give notice to defense counsel and defendants before they learn about the indictment from the news media” (Antitrust Division Manual, *ibid*, IV-63).

discovery, motion practice and criminal trial.¹⁴ The length and publicity of criminal proceedings have the undoubted effect of punishment of the accused individuals and even corporate entities that are subject to criminal process. Although the Constitution and cases are explicit—criminal defendants are presumed innocent and the burden of proving guilt beyond a reasonable doubt rests on the prosecution¹⁵—the adverse effects of criminal stigma begin with mere accusation of a crime and culminate with conviction and criminal sanctions. Even if a defendant is acquitted, the adverse publicity of the initial criminal accusation may continue to have the effect of a punishment, especially if the acquittal is not publicised as widely as the initial indictment.

Thus, the first issue for policy-makers recommending, and for legislatures adopting, criminal competition provisions is whether or not antitrust violations such as price fixing, market allocation or bid rigging are morally blameworthy. Does the community condemn this type of economic behaviour as blameworthy or merely as a violation?¹⁶

Marathon Question: Are hardcore cartels “real crimes” that are morally blameworthy and deserve community condemnation and social stigma as well as economic punishment?

B. GOALS OF THE MARATHON: JUSTIFICATIONS FOR PUNISHMENT

Marathoners have a variety of goals: novices just want to finish, repeat runners want to improve their times and skills, and elite runners want to win. Similarly, criminal laws, and attendant punishment, must be based on specific theoretical goals and justifications. Greenwalt points out that because “punishment” necessarily involves pain, any state that chooses to intentionally impose punishment

¹⁴ Antitrust Division Manual, *ibid*, IV-64–75.

¹⁵ US Constitution Amendments V, VI, VII; *In re Winship*, 397 US 358 (1970). Justice Harlan, concurring, stated that

“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”

Blackstone asserted that “it is better that ten guilty persons escape, than that one innocent suffer”: W Blackstone, *Commentaries on the Laws of England* (1765), *352.

¹⁶ The ALI Model Penal Code (MPC) is instructive in making this distinction. The MPC classifies crimes, from the most to the least serious, as felonies, misdemeanours, petty misdemeanours and violations, § 1.04. Felony sentences include imprisonment for more than 1 year; misdemeanour and petty misdemeanour sentences are less than a year. A violation involves a sentence of no more than a fine, forfeiture or other civil penalty. “A violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense” (§ 1.04(5)).

must justify itself.¹⁷ Hart concurs, identifying the primary question as “what is the general justifying aim of the criminal justice system?”¹⁸

There are basically only two justifications available for state-imposed punishment: the backward-looking retributive theory of just dessert and the forward-looking utilitarian deterrence justification.

1. The Utilitarian Justification of Deterrence

Economic crimes in general, and antitrust crimes in particular, are generally based on the theory of utilitarian deterrence. Bentham attributes all human action to the principle of utility, which is subject to “two sovereign masters”: the pursuit of pleasure and the avoidance of pain.¹⁹ The legislature thus may opt to use instruments of pain and pleasure to effect its social goals. Specifically, Bentham asserts that punishment should be used as an instrument to achieve maximum social utility by deterring antisocial conduct. Of course, since punishment itself is painful, it is permitted only if it deters a greater social harm. Thus, Bentham rejects punishment as a means to the beneficial social end if it is groundless, inefficacious, unprofitable or needless. The morality of a particular act is irrelevant for utilitarian consequentialist theory; the only relevant inquiry is whether the utility principle is promoted.

Punishment for prohibited acts, although it causes pain, can be justified because it incapacitates the offender, specifically deters him or her from future crimes, promotes general deterrence by restraining others from the same crimes and (may) reform the offender, who will refrain from further antisocial behavior.²⁰ Utilitarian deterrence is the explicit basis for American criminalisation of antitrust violations.²¹ Barnett called for large financial penalties and jail time for individual offenders because “nothing is a greater deterrent and nothing is a greater incentive” for cooperation and recommended increased international criminal prohibitions because “adding more jurisdictions to the list of countries with criminal enforcement also increases deterrence since it raises the cost of entering or continuing in cartels”.²² Hammond and Werden

¹⁷ K Greenwalt, “Punishment” in J Dressler (ed), *Encyclopedia of Crime and Justice*, vol 3 (Macmillan, 2nd edn, 2002), 1282.

¹⁸ HLA Hart, *Punishment and Responsibility* (Oxford University Press, 1968), 1.

¹⁹ J Bentham, *An Introduction to the Principles of Morals and Legislation*, ed J Bowring (Clarendon Press, 1843).

²⁰ Greenwalt, *supra* n 17, 1286.

²¹ Chemtob stated that the Division’s “core enforcement policy goal with respect to hard-core horizontal restraints has been the deterrence of these pernicious activities through active enforcement and heavy penalties on offenders”. SM Chemtob, “Antitrust Deterrence in the United States and Japan”, paper presented at the Competition Policy in the Global Trading System Conference, Washington, DC, 23 June 2000.

²² TO Barnett, “Criminal Enforcement of Antitrust Laws: The US Model”, paper presented at the Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy, New York, 14 September 2006.

concur, pointing out the notable increase in US criminal prosecutions, including those targeting international cartels, since the 1990s.²³ Refuting assertions of high recidivism, ie a failure of deterrence, Werden *et al* also assert that the most severe individual sanction, incarceration, have been effective specific deterrents. Their study concludes that neither convicted offenders (both corporate and individual) nor those granted conditional leniency had reoffended by participating in hardcore cartels in the US after 1999.²⁴

Despite the instrumental appeal of utilitarianism, Ashworth argues that harm prevention is a secondary function of criminal law and that punishing inchoate offenses may constitute overcriminalisation.²⁵ He warns that “criminal law, as the most intrusive and condemnatory state mechanism, should be regarded as a last resort, or as a ‘back-stop’ for other non-criminal measures of prevention”. This warning is most acute, however, when the mens rea of the “crime” does not require fault or is a strict liability regulatory offence. The US Supreme Court addressed this concern in *US Gypsum*, holding that Sherman Act prosecutions require a criminal mens rea, either that the conduct was done (i) with the purpose of causing anticompetitive effects or (ii) knowingly with respect to the likely consequences and produced anticompetitive effects.²⁶ Hart essentially agrees, arguing that reckless or negligent acts are not intrinsically blameworthy and not deserving of criminal sanctions.²⁷ The American criminal antitrust prohibitions seem to target sufficiently culpable behavior to surmount Hart and Ashworth’s concerns. In Coffee’s view, the criminal punishment for competition violations is not merely optional but necessary to achieve true deterrence of seriously harmful and antisocial acts.²⁸

Even though the European competition articles are not criminal, the European Court of Human Rights addressed related issues in several cases and held that merely labeling proceedings as “civil” or “administrative” is not

²³ SD Hammond, “From Hollywood to Hong Kong: Criminal Antitrust Enforcement is Coming to a City Near You”, paper presented at the Antitrust Beyond Borders Conference, Chicago, IL, 9 November 2001 (describing the international reach of the prosecutions, Mr Hammond stated that executives from 12 countries had been convicted in Antitrust Division and those from four countries had served prison sentences in the US. In 2000, some 70% of criminal defendants were foreign-based firms and 33% of individuals were foreign nationals, he stated. Criminal fines over the previous five years exceeded \$2 billion, an estimated 90% related to international cartels.). GJ Werden, “Sanctioning Cartel Activity: Let the Punishment Fit the Crime” (2009) 5 *European Competition Journal* 19.

²⁴ GJ Werden, SD Hammond and BA Barnett, “Recidivism Eliminated: Cartel Enforcement in the United States since 1999”, paper presented at the Georgetown Global Antitrust Symposium, Washington, DC, 22 September 2011. But see J Connor, “Recidivism Revealed: Private International Cartels, 1990–2009” (2010) 6 *Competition Policy International* 101.

²⁵ Ashworth, *supra* n 3, 414–15.

²⁶ *United States v United States Gypsum*, 438 US 422 (1989).

²⁷ *Ibid*, Henry Hart at III-B, C.

²⁸ JC Coffee Jr, “Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions” (1980) 17 *American Criminal Law Review* 420.

sufficient to evade criminal procedural safeguards. The key inquiry, the Court held, is whether the penalty was intended to be punitive or deterrent, irrespective of the labels.²⁹

2. The Retributivist Non-consequentialist Justification

Unlike utilitarian forward-looking deterrence, non-consequentialist theory is exclusively focused on just desserts punishment for antisocial acts. Offenders deserve punishment, in the retributivist view, because they are morally culpable.³⁰ Unlike utilitarianism, which uses punishment instrumentally as a means to an end, the retributivist refuses to treat individuals as means. This Kantian justification for punishment asserts that

“juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime.”³¹

Kant rejects any consequentialist justification, asserting that “the penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment”.

If the categorical imperative requires all to be treated as ends and not means, then retributive theory would utterly reject a purely utilitarian justification for criminalising antitrust violations, including hardcore cartels, market allocation and bid rigging conspiracies.

Marathon Question: What are the necessary justifications for criminal punishment? Is utilitarian deterrence sufficient to punish? If deterring hardcore cartels is the only social benefit good to be gained, how is maximum deterrence to be achieved with maximum efficiency, that is, increasing overall social utility and minimising individual pain?

²⁹ Ashworth, *supra* n 3, 422–24.

³⁰ MS Moore, “The Moral Worth of Retribution” in F Schoeman (ed), *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (Cambridge University Press, 1988), 179.

³¹ I Kant, *The Philosophy of Law*, trans W Hastie (1887), 194.

C. TRAINING FOR MARATHONS: REVIEWING CRIMINAL ENFORCEMENT POLICY

Violation of American antitrust laws has been criminal since Sherman Act §§ 1 and 2 were adopted in 1890.³² Initially misdemeanours, violations of these sections were raised to felonies in 1974, and penalties have been steadily increased under the statute and the recommendations of the federal Sentencing Guidelines.³³ In modern practice, the Antitrust Division of the US Department of Justice has limited its criminal actions to a much smaller subset of cases than are statutorily authorised. Monopolisation is not prosecuted as a crime under § 2 and it is highly unlikely that any rule of reason case under § 1 or 2 could be proved beyond a reasonable doubt. The Antitrust Division's internal standards for opting for criminal, as opposed to civil, sanctions are spelled out explicitly in the Division Manual and are highly demanding:

[T]here are some situations where the decision to proceed by criminal or civil investigation requires considerable deliberation. In general, current Division policy is to proceed by criminal investigation and prosecution in *cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations*. Civil process and, if necessary, civil prosecution is used with respect to other suspected antitrust violations, including those that require analysis under the rule of reason as well as some offenses that historically have been labeled 'per se' by the courts. *There are a number of situations where, although the conduct may appear to be a per se violation of law, criminal investigation or prosecution may not be appropriate*. These situations may include cases in which (1) the case law is unsettled or uncertain; (2) there are truly novel issues of law or fact presented; (3) confusion reasonably may have been caused by past prosecutorial decisions; or (4) there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action."³⁴

³² Section 1 (15 USC § 1) provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Section 2 (15 USC § 2) provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

³³ Antitrust Procedures and Penalties Act (1974).

³⁴ Antitrust Division Manual, *supra* n 11, III-12 (emphasis added).

It is little noted, but many of the early leading antitrust cases were, in fact, criminal prosecutions rather than civil actions, confirming the American focus on criminal prosecution of antitrust violations.³⁵ The reach of this criminal power to punish is notable. Extraterritorial criminal jurisdiction is available for antitrust conspiracies that constitute substantive violations, have the requisite effects on US commerce and meet the other jurisdictional limitations.³⁶ Criminal jurisdiction is available against foreign firms operating internationally, even if all of the conspiratorial acts took place offshore.³⁷

The Antitrust Division has a strong policy of prosecution in cases it deems appropriate and may supplement the antitrust indictment with other criminal charges such as mail or wire fraud,³⁸ federal conspiracy to defraud the US,³⁹ false claims,⁴⁰ false statements⁴¹ and criminal RICO violations,⁴² among others, if supported by the evidence. The advent of large, and potentially international, prosecutions was marked by prosecution of the *Lysine* cartel involving multiple individual and corporate defendants from the US and foreign jurisdictions, which resulted in criminal convictions and guilty pleas and criminal fines exceeding \$100 million.⁴³ The investigation began as early as 1993, and the cases were ultimately concluded in 1996. Following up on the *Lysine* prosecution, the Division prosecuted a price fixing and market allocation cartel in the \$1.2 billion per year citric acid market involving defendants from the US, Germany, Switzerland and the Netherlands. The overcharge allegations were in the 30% range and the *Citric Acid* cartel case yielded guilty pleas and fines exceeding \$725 million.⁴⁴ The Antitrust Division prioritised international criminal cartel enforcement, based on the Division's evaluation that these

³⁵ Eg *United States v Trenton Potteries Co*, 273 US 392 (1927); *United States v Socony-Vacuum Oil Co, Inc*, 310 US 150 (1940); and cases cited in *ABA Antitrust Law Developments* (ABA, 7th edn, 2011), ch 10.

³⁶ HJ Hovenkamp, "Extraterritorial Criminal Jurisdiction under the Antitrust Laws", University of Iowa, Legal Studies Research Paper Number 13–14 (February 2013).

³⁷ *United States v AU Optronics Corp*, 2012 WL 2120452 (ND Cal, 11 June 2012) (per se theory for extraterritorial conduct); *United States v Nippon Paper Ind Co, Ltd.*, 109 F 3d 1 (1st Cir 1997) (Reversing the District Court, which dismissed the indictment, the First Circuit held that indictments were proper for acts that took place outside the US when the actions were intended to have, and had, a direct, substantial and reasonably foreseeable effect in the US).

³⁸ 18 USC §§ 1341, 1343.

³⁹ 18 USC § 371.

⁴⁰ 18 USC § 287.

⁴¹ 18 USC § 1001.

⁴² 18 USC § 1962(c).

⁴³ For a detailed description of the evidence, including links to video recordings, see SD Hammond, "The Fly on the Wall Has Been Bugged", paper presented at the International Law Congress 2001—EU Competition Law, Dublin, Ireland, 15 May 2001 (available at <http://www.justice.gov/atr/public/speeches/8280.htm>). A sample information is available at <http://www.usdoj.gov/atr/cases/f0900/0965.htm>.

⁴⁴ Defendant ADM paid \$100 million in fines for the *Lysine* and *Citric Acid Cartel* cases. In the *Vitamin Cartel* case, international firms F Hoffmann-La Roche and BASF AG paid \$500 million and \$225 million, respectively, both in 1999.

global cartels tend to be larger in scale and volume of commerce affected, cause greater harm to victimised consumers and businesses in the US, and may spin off other cartels in related or adjacent markets.⁴⁵

Marathon Question: Is the threat of criminal prosecution necessary to deter cartels? If you were the legislature, what specific acts would you choose to make criminal and why?

D. RUNNING THE MARATHON: CRIMINAL PROSECUTION

The US Antitrust Division is committed to criminal prosecution for hardcore cartels on the utilitarian deterrence theory, analogising antitrust conspiracies to such traditional property crimes as burglary or larceny.⁴⁶ The Division Manual articulates standards for criminal prosecution that are consistent with the goal of actively pursuing criminal sanctions:

“In a matter where the suspected conduct appears to meet the Division’s standard for proceeding criminally, the decision whether to open an investigation will depend on two questions. The first is whether the allegations or suspicions of a criminal violation are sufficiently credible or plausible to call for a criminal investigation. This is a matter of prosecutorial discretion and is based on the experience of the approving officials; legal authorities may also provide guidance. The second question is whether the matter is significant. Determining which matters are significant is a flexible, matter-by-matter analysis that involves consideration of a number of factors, including the volume of commerce affected; the nature of the conduct; the breadth of the geographic area impacted (including whether the matter is international); the potential for expansion of the investigation or prosecution from a particular geographic area or industry to an investigation or prosecution in other areas or industries; the deterrent impact and visibility of the investigation or prosecution; the degree of culpability of the conspirators (*e.g.*, the duration of the conspiracy, the amount of overcharge, any acts of coercion or disciplining of cheaters); and whether the suspected conduct directly impacted the Federal Government. Because the Division’s mission requires it to seek redress for any criminal antitrust conspiracy that victimizes the Federal Government and, therefore, injures American taxpayers, this last factor is potentially by itself dispositive. *The Division is committed to prosecuting all matters of major significance and will ensure resources are assigned accordingly.*”⁴⁷

Werden *et al* argue that the entire range of criminal sanctions must be available for convicted antitrust offenders, from corporate and individual fines

⁴⁵ “An Antitrust Primer for Federal Law Enforcement Personnel” (April 2005), available at <http://www.justice.gov/atr/public/guidelines/209114.htm>.

⁴⁶ GJ Werden, SD Hammond and B Barnett, “Deterrence and Detection of Cartels: Using All the Tools and Sanctions”, paper presented at the 26th Annual National Institute on White Collar Crime, Miami, FL, 1 March 2012, 2.

⁴⁷ Antitrust Division Manual, *supra* n 11, III-7 and -8 (emphasis added).

to individual imprisonment. Arguing to the contrary, in the context of overall white collar crime cases, Judge Posner asserts that the optimal sanctions in white collar violations should be limited to civil fines, eliminating the criminal stigma and incarceration of prosperous individuals and firms as both unprofitable and unnecessary.⁴⁸

Judge Posner's specific objection to white collar crimes, as opposed to white collar civil violations, is that the costs of criminal prosecution outweigh the benefits. For example, assuming that the stigma of conviction has some measurable deterrent effect on individuals and corporations, the stigma should be monetised in the form of a civil fine remitted to the government. Even more seriously, there is a positive expense involved in incarcerating an individual, who will generate little if any revenue in prison but could continue to contribute to social wealth by paying a high fine and continuing to be employed. Incarceration, in other words, constitutes deadweight loss. The simple economics compel the conclusion that, "[f]or every prison sentence there is some fine equivalent; if the fine is so large that it cannot be collected, then the offender should be imprisoned".⁴⁹ A fine is less expensive and just as efficacious as a deterrent if the fine is set at the proper level. Indeed, Judge Posner concludes, civil antitrust liability may be more properly limited to corporations rather than individuals because firms are more likely to be able to pay deterrence-level fines and will have private methods to sanction and deter their rogue employees.

Moreover, the criminal process itself imposes costs that do not exist in the world of civil fines, penalties or administrative sanctions.⁵⁰ Costs associated with criminal punishment include the challenge of proving the antitrust violation beyond a reasonable doubt (BRD) since the ultimate burden of persuasion always remains on the prosecution in criminal and civil actions. Even in *per se* horizontal cartel cases requiring little or no economic analysis, juries may be reluctant to find a white collar individual or well-known firm guilty, rather than merely liable, without an overwhelming quantum of evidence and proof of the all-important immorality in behavior. Any confusion in definitions of the criminal *actus reus* and, importantly, the *mens rea*, will handicap prosecutors held to the BRD standard of proof. Moreover, the law is far from settled and continues to evolve with respect to jurisdictional requirements in cases that involve conduct that is partially or entirely extraterritorial.⁵¹ Criminal prosecutions also require strict observance of procedural protections ranging from pre-indictment Constitutional warnings and mandatory disclosures, to

⁴⁸ RA Posner, "Optimal Sentences for White Collar Criminals" (1980) 17 *American Criminal Law Review* 409.

⁴⁹ *Ibid*, 412.

⁵⁰ See generally EW Witch, "Economic Crime Theory" in SK Kadish (ed), *Encyclopedia of Crime and Justice*, vol 2 (Free Press, 1983), 670.

⁵¹ MS Popofsky and A Biagioli, "The Sherman Act's Criminal Extraterritorial Reach: Unresolved Questions Raised by *United States v AU Optronics Corp*" [2011] (2) *CPI Antitrust Chronicle*.

the cost and time investment in lengthy grand jury proceedings. Kadish tends to agree that there are “major problems” associated with white collar crimes. However, at least on the first problem, defining the proscribed conduct, he finds that the Antitrust Division’s voluntary limitation of criminal proceedings to per se horizontal cartels mitigates the objection. The other objections, defining corporate criminality and the critical requirement of moral culpability, are less tractable.⁵²

Finally, there are costs associated with prosecuting cartels in an environment dominated by civil and administrative proceedings, especially when a key counterparty is the European Commission. There is consensus that amnesty or leniency policies vastly facilitate antitrust actions, whether they are civil or criminal in nature. The 2011 International Competition Network Good Practices include the following recommendations:

“It is good practice to make leniency available both where the agency is unaware of the cartel and where the agency is aware of the cartel but the agency does not have sufficient evidence to proceed to adjudicate or prosecute.”

“Where applicable, it is good practice for agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred.”

“It is good practice for competition enforcement authorities to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, if any, have been imposed. This may assist coordination between agencies.”⁵³

The difficulties are obvious, and recognised by the ICN Good Practices, which provide that, in parallel civil and criminal systems, “it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential applicants”. The US⁵⁴ and European Commission,⁵⁵ as well as numerous other competition agencies, have robust leniency programs. They are parallel systems, never meeting when the Antitrust Division opts for criminal remedies barred to the Commission.

⁵² SH Kadish, “Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations” (1963) 30 *University of Chicago Law Review* 423 (suggesting that the community may not view economic behavior as morally blameworthy. “Moreover, in some areas, notably the antitrust laws, it is far from clear that there is consensus even by the authors and enforcers of the regulation . . . on precisely what should be prohibited and what permitted, and the reasons therefor.”).

⁵³ International Competition Network—Cartel Working Group, “Compilation of Good Practices from the Anti-Cartel Enforcement Manual” (ICN, April 2011), 5–6, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc756.pdf>.

⁵⁴ Leniency Policy for Individuals (10 August 1994), available at <http://www.justice.gov/atr/public/guidelines/0092.htm>; Corporate Leniency Policy (10 August 1993), available at <http://www.justice.gov/atr/public/guidelines/0091.htm>.

⁵⁵ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, [2006] OJ C298, 17, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC:1208\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC:1208(04):EN:NOT).

Indeed, the due process and confidentiality issues discussed above are especially acute in the amnesty/leniency context. Leniency is a recognised benefit to antitrust violators and government enforcers and American officials agree that “a major development in cartel enforcement over the past quarter century was the advent of leniency programs”.⁵⁶ Some cases may be impossible in the absence of cooperating witnesses who insist on leniency. But amnesty seekers are likely to insist on global amnesty or absolute confidentiality, especially if the leniency was procured from the Commission, where the only possible sanctions are civil, but the conduct crosses borders or affects US commerce, where prosecution is a real threat. As the number of states with criminal competition laws increases, the challenge of interagency cooperation and evidence disclosure will only increase.

Nevertheless, the US Justice Department has concluded that the commitment to criminal prosecution has paid off. The total number of criminal cases filed has increased from 41 in 2003 to 67 in 2012, with a high of 90 in 2011. Total fines and jail sentences have increased notably.⁵⁷ A comparison of the Antitrust Division statistics⁵⁸ with the European Commission statistics⁵⁹ allows for comparison of results over time and evaluation of the relative costs and benefits of an all-civil compared to criminal prosecution regime of antitrust enforcement.⁶⁰

Marathon Question: Consider the costs and benefits of the criminal and civil sanctions, including costs related to systemic diversity. What do you recommend to maximise the benefits and minimise the costs while respecting the authority of sovereign states to choose their remedy?

E. POST-MARATHON REVIEW AND HYPOTHETICALS FOR FURTHER DISCUSSION

Hypothetical No 1

Four airlines—A, B, C and D—which are partly owned by states A, B, C and D, headquartered in the respective states (for example, A Airways, B-Air, etc), have

⁵⁶ Werden, *supra* n 23.

⁵⁷ For 10-year summary charts, see <http://www.justice.gov/atr/public/criminal/264101.html>.

⁵⁸ Available at <http://www.justice.gov/atr/public/criminal/sherman10.html>.

⁵⁹ Available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

⁶⁰ See also RH Lande and JP Davis, “Comparative Deterrence from Private Enforcement and Criminal Enforcement of the US Antitrust Laws” [2011] *Brigham Young University Law Review* 315; JM Connor and RH Lande, “How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines” (2005) 80 *Tulane Law Review* 513.

illegally fixed prices on air cargo shipments by adding agreed-upon charges, including fuel surcharges and inspection fees, to the prices for shipments. The prices were set at periodic meetings of the airline executives held in state E. Air cargo shipments are global and the illegally fixed prices had direct, substantial and foreseeable effects in both the EU and the US. It can be proven that the agreement intended to raise prices in these jurisdictions and did so.⁶¹

- A. As the Commissioner of DG Comp, how would you proceed to investigate and, if supported by the facts, litigate this cartel case, taking into consideration the fact that testimony of at least one of the conspirators is crucial to prevail?
- B. As the Assistant Attorney General for Antitrust of US DOJ, would you opt to proceed with a civil investigation or a criminal grand jury? If one of the alleged conspirators sought amnesty under the DOJ corporate and individual leniency programmes, what would you do?
- C. As counsel for A Airways and its high managerial agents, how would you negotiate with both the Commission and the Antitrust Division to protect your clients most effectively?

Hypothetical No 2

Four electronics producers are under investigation for agreeing to fix prices for LCD display screens and CRT screens used in high-end televisions and other electronic products. One of the firms is headquartered in a European country, one is American and the remaining two are located in separate Asian countries.

The Commission has civil enforcement authority, and the European state may enforce Article 101 and its own national competition law but lacks a private right of action. The US DOJ has criminal and civil authority and private parties injured by the cartel may bring private actions for treble damages. Both Asian countries have government competition enforcement agencies; one authorises civil or criminal enforcement, the other only has civil enforcement power. All of the products are manufactured in the same country, which is not the location of any of the firms. The country of manufacture has a competition law that prohibits price fixing, has a new but relatively active civil enforcement government agency and also allows for private actions. All of the products are shipped in global commerce and sold to consumers worldwide.

⁶¹ This hypothesis is loosely based on the pending *Air Cargo* cartel case, in which an Israeli NGO sued El Al, British Airways, Lufthansa and Swiss International Air Lines. See https://www.competitionpolicyinternational.com/israel-antitrust-group-files-166m-case-against-airline-cartel?utm_source=February+8%2C+2013&utm_campaign=January+18%2C+2013&utm_medium=email (2 August 2013).

- A. You represent the smallest firm and your client would like to be the first to blow the whistle and obtain immunity. How do you proceed? Where?⁶²

⁶² This hypothesis combines aspects of the LCD panel and CRT cases. The Chinese competition agency fined Korean and Taiwanese producers 171 million RMB in the LCD panel case. The Commission ordered \$1.7 billion in civil penalties and the US Justice Department prosecuted criminally, obtaining \$1.4 billion in fines and prison sentences for 12 individuals in a 2001–06 price fixing cartel. In the CRT investigation, the smallest firm was the first to seek and obtain leniency from the Commission and investigation(s) are pending.

ROBERTO PARDOLESI: This presentation might be the last step of this already difficult marathon. Let us assume that, for a while at least, we agree on the fact that antitrust violations are bad. Some of them are egregiously so and really bad, and, as a matter of fact, let us assume that we also have a goal of focusing especially upon those egregious violations. Now, as you know, and you have already discussed most of this task, we have a toolkit of strategies to combat illegal practices. So civil remedies, like damages and administrative fines. Now, I'm trying to answer a couple of questions: is criminal prosecution really necessary? In fact, there is widespread opinion that this criminal regime might be the most effective way to deter cartel conduct. Now, my second question is: is this approach really possible? Do you believe that incarceration could substitute for fines and, generally speaking, the other civil remedies? Richard Posner, I was in his class. I was there. Can you believe it? He was suggesting that optimal sanctions in white collar violations should be limited to fines, since incarceration would be just a waste. Now, let me go a step further on that, since you can then think of a kind of trade-off between jail and fines. Why not? The problem is there is no objective way to compare the deterrence effect of time spent in prison to the deterrence effect of fines. Probably different people would react in different ways and an average fee would be speculative and arbitrary, but it has been done in a way. A fine in actual money value of 300,000 dollars was equated to one year of jail. This figure was extremely low, so it was revised in 1994, with another contribution by some economists. They equated one year of jail with a fine, again in money value, of one million and a half dollars. Others conservatively proposed that one year's incarceration had the same deterrent effect as a five million dollar fine. So we could really try to trade off and following the suggestion by Professor Markham and also by Alberto Heimler in a sense. But the problem is always the same, is it possible to define an optimal fine? If you want to find a deterrent, you will find it. But if you want an optimal one, you have to undertake a difficult process.

SUSAN BETH FARMER: Sherman Act Section 1 prohibits any conspiracies that unreasonably "restrain trade", including both horizontal and vertical agreements, and provides for criminal remedies. Section 2 prohibits monopolisation, and also makes violation a crime. However, it is the policy of the Antitrust Division to voluntarily recede from criminal prosecution except for per se illegal horizontal conspiracies. And frankly I think this is sound policy as well as a practical necessity. How, for example, would the government prove that an agreement is unreasonable beyond reasonable doubt?

With respect to criminal sanctions, we assume that the ultimate sanction of incarceration apply only to individuals, and that is ordinarily the case. However, the Federal Sentencing Guidelines provide that fines for corporate offenders that were operated for a criminal purpose or by criminal means should be set at a

level high enough to divest the entity of all of its assets. The Guidelines are advisory, not mandatory, and this provision seems implausible in the ordinary competition case, but it does amount to, essentially, a corporate death penalty.

And finally, we've all been talking about the Archer Daniels Midland (ADM) conspiracy and it's a wonderful example, in part, because the Justice Department did a superior job of investigating using undercover audio and video surveillance, which was presented at the criminal trial and is available for students of competition law and practice. So this case provides evidence of the deterrent value of the criminal competition remedy. In some of the taped conversations, the participants were clearly concerned about prosecution and discussed venue. The legal analysis was incorrect, of course, but the gist of the conversations reveals a concern about holding price-fixing meetings on US territory. Nobody had explained to them the direct substantial and reasonably foreseeable jurisdictional test, but they were terrified of American criminal sanctions. In other conversations, they perceived the Commission as somewhat of a threat, but not at the same level. One of the participants caught on the tape talked about the fact that he would enjoy a proposed meeting in Hawaii, but was concerned about the location being within American jurisdiction. So the ADM case, curiously enough, shows a very sophisticated appreciation of the relative potential sanctions and the risk of criminal prosecution operated as a deterrent. In fact, of course, they miscalculated the risk and were apprehended and subjected to criminal penalties.

SPENCER WEBER WALLER: I have two issues I don't recall having come up today. One is, if we are talking about optimal deterrence in fines versus criminal sanctions, it's an apples and oranges problem, in part for exactly the reason already mentioned: if it's a public corporation, then it's not their money.

So there's no way to talk about a fine that someone else pays, namely the shareholders, and the deterrent effects of individual liability, which we haven't talked about today. It may be more important to have individual liability rather than undertaking/enterprise liability, then necessarily whether the liability is criminal, civil, disqualification, debarment or fines of a non-criminal nature.

Secondly, let's go back to the need to build hybrid partnerships, which has unfortunately affected leniency in the US and in some other systems. It has made government a competitor of private enforcement for fines and collections and, as a result, you have peculiar circumstances like *Empagran*, where the government chose to file an amicus brief on behalf of a defendant that it had previously been prosecuting. The other interesting ramification is that our government is almost entirely dependent on the leniency programme, because very few non-leniency criminal prosecutions are possible, primarily for evidentiary reasons. Thus, the government pushed a subsequent piece of legislation through the US Congress that de-trebled damages for a party that receives

leniency, further increasing the incentives to apply for leniency, but further decreasing the compensatory function of private enforcement.

I would suggest, to go back to Philip's analogy, we need a hybrid model where the government is not the competitor of private enforcement but the facilitator, so that you have the combined deterrent, compensation and punishment effects of effective governmental action and an effective private suit for compensation. There are many models to do that. One of them would be including more explicit requirements for compensation, restitution and disgorgement whatever the criminal or governmental settlement is. That's one model. But it's an unfortunate consequence of criminal enforcement that government and the private parties are fighting to some extent over whatever pot of money the corporation has to resolve its antitrust issues.

EDWARD JANGER: I would like to make two very small points.

My first observation relates to the effect of lengthy sentences (or number of prosecutions) on the prevalence of cartel behaviour. Cartel behaviour may be increasing when sentences are increased, but that may not be the case. The underlying amount of cartel behaviour may be the same, but the amount of cartel behaviour detected may be increasing as a result of aggressive enforcement. For example, crime rates often go down when police departments cut the number of policemen. This is not because the amount of criminal behaviour has gone down, but instead it is because fewer crimes are detected.

My second observation relates to the definition of retributivism. There are really two distinct strands of retributive theory that need to be pulled apart. One strand determines "just deserts" by focusing on the pain subjectively felt by the *criminal*. A second strand is called expressive retributivism. The expressive retributivists focus on the way *society* experiences the act of punishment and the norm generation that occurs when particular behaviours are deemed criminal. We have been talking about both of them as if they were the same, and they are really quite different.

AMEDEO ARENA: As I read Professor Farmer's paper, I asked myself whether the imposition of criminal sanctions against individuals involved in hard-core cartels would increase the effectiveness of cartel enforcement in Italy.

Professor Farmer suggests that cartels may not necessarily be regarded as "real crimes" and hence should not be subject to criminal sanctions. That argument, however, would hardly constitute a bar to their criminalisation in Italy. Italian criminal law has long been familiar with the distinction between *mala in se* (evil in itself) and *mala quiavetita* (evil insofar as prohibited). Nonetheless, this distinction has not prevented the Italian Legislature from criminalising conduct that is not regarded as morally blameworthy or as especially deserving criminal punishment.

At the end of the day, the debate boils down to whether criminal sanctions would actually deter corporate officials from participating in or forming cartels. To that end, I employed the following gain-based deterrence formula to calculate the optimal amount of criminal sanctions:

$$S = \frac{P}{D \cdot C \cdot I}$$

According to that formula, the optimal sanction S is equal to the wrongdoer's personal profit P (eg bonuses, salary increases and other benefits) divided by the probability of detection (D) multiplied by the probability of conviction in a court of law (C) and by the sentence-serving index (I) (ie the average percentage of sentence years actually served by individuals convicted for that crime).

P can be measured in or easily converted into currency. As far as S is concerned, in spite of Posner's claim that "[f]or every prison sentence there is some fine equivalent", computing the monetary equivalent to one prison year has spurred considerable controversy among economists, as Professor Pardolesi summarised in his presentation. I will thus defer to Connor and Lande's calculation that one prison year is worth \$2 million.

The value of the other variables, however, depends on the relevant jurisdiction. In the US, for instance, the detection rate of hard-core cartels is 25%, the conviction rate is 80% and the sentence-serving index is 87%. The optimal sanction for involvement in a cartel that netted a CEO \$2 million would thus be:

$$S_u = \frac{P_u}{D_u \cdot C_u \cdot I_u} = \frac{\$2,000,000}{\frac{25}{100} \cdot \frac{80}{100} \cdot \frac{87}{100}} = \frac{\$2,000,000}{0.174} = \$11,494,252.87 = 5.7 \text{ years}$$

assuming that in Italy the cartel detection rate is the same as in the US, the Italian conviction rate and sentence serving index are, respectively, 18% and 45%. It follows that if the above CEO were tried in Italy for involvement in an analogous cartel, the optimal sanction would be:

$$S_i = \frac{P_i}{D_i \cdot C_i \cdot I_i} = \frac{\$2,000,000}{\frac{25}{100} \cdot \frac{18}{100} \cdot \frac{45}{100}} = \frac{\$2,000,000}{0.02025} = \$98,765,432.09 = 49.3 \text{ years}$$

In sum, to create sufficient deterrence, criminal sanctions in Italy should be 10 times as great as sanctions in the US. Criminalising cartels in Italy, therefore, is so unreasonable a solution that, at some stage, it may actually be implemented.

MAURICE STUCKE: I wanted to touch on several issues on general deterrence that came up in this session and the last session. When seeking general deterrence, one cannot simply rely on optimal deterrence theory. Other issues, like the antitrust legal standard and the moral wrongfulness of the antitrust violation, are important.

First, it is easier at times to deter behaviour if the behaviour violates a moral norm. People can often easily internalise moral norms. People often feel guilt or fear shame when violating certain moral norms. Also, it is often easier to justify criminal sanctions for morally wrongful conduct. So it is not surprising that competition authorities often describe the moral wrongfulness of price-fixing as stealing by well-dressed thieves. They rarely justify incarcerating price-fixers for imposing a deadweight welfare loss.

One problem is when the criminal legal standard drifts away from these moral norms to more complex, effects-based economic analyses. If my conduct's legality depends upon a highly fact-specific economic inquiry, it will be much harder for me to internalise this standard in my everyday decisions. Executives will not have the time, inclination or information to analyse their conduct under a rule-of-reason economic inquiry. I doubt many executives know when their business behaviour violates the rule-of-reason standard. I also doubt many executives would feel much guilt or shame if their behaviour violates an effects-based rule-of-reason standard. Indeed, a highly fact-specific economic inquiry makes it easier for executives to justify their behaviour, especially when they see other companies lawfully engage in the same behaviour. Consequently, the further the legal standard deviates from simple moral norms, the greater the costs and efforts to deter that conduct.

Also, it will be much harder to incarcerate people for conduct that is not widely perceived as morally wrong. Most people do not use optimal deterrence theory to judge wrongdoing and fines. In several studies, for example, the participants were given cases of wrongdoing and were told the probability of detection. But the participants did not increase the fine as the likelihood of detection decreased. The relative ease in detecting and punishing the behaviour did not affect the size of the fine. Instead, the people focused on the moral wrongfulness of the defendant's conduct. One study, in fact, involved University of Chicago students who were taught optimal deterrence theory. But these law students did not apply optimal deterrence theory when setting punitive damages.

I doubt that many judges and juries would rely on optimal deterrence theory to increase penalties if the probability of detection and punishment decreased. Instead, if the punishment is perceived as more severe than the conduct's moral wrongfulness, I suspect greater jury and judge nullification.

Another important issue in today's sessions is how to promote antitrust compliance. I doubt that firms can significantly reduce price-fixing simply by telling their workers that the conduct is illegal and by providing information

about the probability of being punished and the likely penalty. Most executives do not engage in a cost–benefit analysis in deciding whether to enter a cartel or to remain in a cartel. I also doubt that most price-fixers, when they began their careers, envisioned themselves breaking the law. Instead, various situational and dispositional factors likely played an important role in their descent into crime. Thus, a compliance programme by itself will not significantly deter corporate crime. Most cartels are not the result of renegade middle managers who deceive their innocent bosses. The empirical literature shows that many prosecuted cartels involve senior company officials. Even when senior executives are not part of the cartel, they can undermine antitrust compliance by sending mixed messages. They generally pronounce, “We want you to comply with the antitrust laws”. But then they exert tremendous pressure on the middle managers to meet ever-increasing financial goals that appear unattainable absent collusion.

So there is no easy solution or answer to deter corporate crimes like price-fixing. One cannot assume that executives necessarily behave as rational profit maximisers who regularly weigh the financial rewards of their criminal behaviour against the probability of detection and likely punishment. Instead, to deter corporate crimes, companies and enforcers will need multiple tools. They need fines that are high enough to deter criminals who behave like rational profit-maximisers. They need to remind executives why price-fixing is immoral and unethical. Enforcers should also aim to minimise the opportunities to engage in price-fixing, such as preserving competitive markets through effective merger review. They should increase the senior executives’ accountability to shareholders. Finally, enforcers and companies should proactively identify situational and dispositional factors that increase the likelihood of price-fixing, and design compliance programmes that take into account individuals’ bounded ethics.

PHILIPP FABBIO: I’m not an expert in criminal law, nor US criminal law. Nonetheless, I think there’s an aspect among others that is commonly overlooked in the debate. It looks like criminal enforcement is a viable option only with hard-core violations, such as price-fixing and the like. Hard-core cartels are, of course, bad, but they are not necessarily worse than other antitrust violations, with respect to how they affect the well-being of society. Just think of an exclusionary conduct by a dominant firm hindering innovation. So we may have an inconsistency. We criminalise only hard-core cartels, and leave out most other antitrust violations. We may end up missing the relationship between the size of the penalty and the harmfulness of the violation, at least in comparative terms.

MARIO LIBERTINI: I would like to make some brief comments about the first point in Susan Farmer’s paper, namely the social stigma or condemnation

of cartels by the community. I don't think that there is in Europe, at least in Italy, a social condemnation of cartels. The likely reason is that cartels were not forbidden until 50 years ago. On the contrary, they were considered a positive form of private regulation, that helped prevent economic cycles and so on. I will adduce an empirical argument to this assumption. Contrary to current opinion, in the Italian criminal law there is a general prohibition on cartels, and it is not just the provision on bid rigging in public procurement. In our criminal code there is an Article 501bis providing sanctions for speculative manoeuvres over prices. Its scope of application is not limited to a cartel regarding food or other products of first necessity. This legal provision has been substantially forgotten and, to my knowledge, has never been applied.

Another brief comment. The political choice in European competition law has originally been and today still is that of imposing sanctions on firms, not on individuals. In my opinion, there are good reasons supporting this approach. According to the European principles of criminal law, criminal sanctions on individuals also imply some strong legal guarantees. First of all, the presumption of innocence. In European antitrust law there are some hints of a presumption of innocence, but there is no true presumption of innocence in normal proceedings against firms, because the rules on the burden of proof in European antitrust proceedings entail a sort of *prima facie* evidence in favour of both the competition agency and the private plaintiff. It is up to the defendant to give evidence of possible causes of justification in terms of efficient gains. Instead, the rules governing criminal proceedings are very different. It is sufficient for the defendant to make a plausible allegation of some cause of justification to meet his or her burden of proof. In conclusion, I think that in Europe the criminalisation of antitrust violations would destroy the system of rebuttable presumptions on which the European antitrust system has been built over the years.

PETER WHELAN: I just want to make one final comment before we finish. It may well be true that people do not respond intuitively to cartels in the same way that they might do to a burglary, but that does not necessarily mean that cartels do not display negative moral qualities. In fact, one can argue that cartel activity can actually have some immoral qualities. Maurice Stucke has written about morality and antitrust, employing the three criteria advanced by Stuart Green: culpability; social harmfulness; and moral wrongfulness. I think that those particular criteria can be used to construct a decent, solid argument that one can find some immoral content in cartel activity. I'm not going to go in to all of that now, but I have recently published a paper on that issue.

If anybody wishes to talk to me about it I'd be happy to oblige. I think that brings us to the end of our panel discussion. I would like to thank our presenter, our commentator and all of those who have contributed.

PHILIP MARSDEN: Well, the finish line is in sight. So, I just want to say that there has been a wonderful exchange of views today. I would like to thank all the speakers and the chairs, also my co-organisers Spencer Weber Waller and Philipp Fabbio, and our host, the Italian Competition Authority and Professor Libertini and colleagues. But really, a huge congratulations and thanks to all you Antitrust Marathoners. One of the roots of the word competition (or *concorenza*) is “running together”. We have run together today to exchange views and gain ideas from one another, and I know we have had a good time during the race and at the finish as well. So, I thank you all and welcome you to future Antitrust Marathons. Thank you.