The rise of a private competition law culture: experience and visions

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Experience and Visions

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I. Introduction

There always have been certain types of private competition law enforcement in Europe, at least in some countries. The most frequent use of competition law in private actions is made on the defence side by invoking the nullity of a contract as the result of a competition law violation. Less developed is the active use of competition law by seeking injunctive relief (e.g. in refusal to deal cases) or by claiming damages. The view is wide-spread that private remedies should be strengthened. In *Courage* and *Manfredi*, the ECJ has underlined the importance of private enforcement as regards EC competition law. The European Commission has published a Green Paper[1] and a White Paper on Damages Actions for Breach of the EC Competition Rules[2] exploring the main obstacles to private damages claims and proposing different options in favour of a stronger role of private remedies. At this stage, new legal instruments are being prepared.[3] In some EU member states, the rules on private enforcement already have been considerably reformed (e.g. in Germany, Great Britain and in Hungary). In other countries, new rules will follow.

The subject of this presentation is experience and visions. In a first part, practical experience with damages claims shall be illustrated by presenting examples which show that in some cases, private enforcement works well even in the absence of specific rules. All depends on the willingness of injured parties to assert their rights and on the flexibility of courts to take into account the specific problems of competition law claims. However, much support is still be needed. Therefore, in a second part, the role of competition authorities in the field of private enforcement is explored. By cooperating with national courts, by encouraging victims to sue and by claiming damages in cases of damages to public entities they can significantly contribute to the rise of a private competition law culture.

II. Experience

The rules on substantive law, civil procedure and the relationship between private and administrative enforcement determine the attractiveness of private lawsuits. An abundant literature has analyzed all relevant questions.[4] The list is long and contains for example

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[1] European Commission, *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 19 December 2005, COM(2005) 672 final. See also European Commission, *Commission Staff Working Paper – Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 19 December 2005, SEC(2005) 1732.

[2] European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2 April 2008, COM(2008) 165 final. See also European Commission, *Commission Staff Working Paper accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC(2008) 404.

[3] On the different options see e.g. Bulst, F., Of Arms and Armor – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law, *Bucerius Law Journal*, 2008, 81, 94 et sequ.

[4] See e.g. J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn 2007; C.-D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Oxford 2003; Jones, C., *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford 1999; Komninos, A., *EC Private Antitrust Enforcement*, Oxford 2008; Th. Möllers and A. Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge 2007.

standing, passing on, the calculation of damages, access to evidence, conflict of laws, time limits, interest, litigation costs, arbitration as well as the impact of leniency policy on private enforcement. Undoubtedly, it is important to adapt the legal framework to the problems so thoroughly revealed in the studies so far submitted. On the other hand, already on the basis of existing rules, private enforcement can be successful. Often, there are "unwritten" obstacles to the success of private claims. Three practical cases shall illustrate what is meant. Each of them represents a specific enforcement type, i.e. individual, collective and "hybrid" redress.

1. Individual Redress: A Successful Damages Action in Switzerland

A The Institutional Setting

Swiss competition law (Cartel Act[5]) has in Art. 12 a specific legal basis for private antitrust claims, granting for example injunctive relief and damages. But there are no special rules on the calculation of damages or access to evidence. The general rules of the Swiss Code of Obligations (CO) apply: According to Art. 42 (2) CO, the judge has a large margin regarding the existence and the amount of damages.

B. The Case

This rule became relevant in the case "Funeral Institute" before the Commercial Court of the Canton of Aargau.[6] The Canton had concluded an exclusive agreement with the private funeral institute *Caminada AG*. According to this contract, the general hospital of the Canton of Aargau had to recommend to families of deceased persons exclusively this undertaker. A newcomer unsuccessfully requested the Canton to inform families on his services. He took legal action. The court found a violation of the cartel interdiction and the abuse of dominance prohibition in Swiss competition law and granted injunctive relief and damages.

What is relevant in our context, is the determination of quantum. The prejudice to the newcomer is the profit per contract multiplied by the number of contracts the newcomer would have acquired in the absence of a competition law violation. Whereas it is rather easy to assess the profit per contract, it is difficult to prove how many contracts the newcomer would have acquired. Many courts would dismiss the lawsuit because of the difficulties in establishing causality. However, the Aargau court resorted to the "yardstick"-method according to which the situation in comparable markets may be relied upon. There happened to be a similar scenario in the Swiss town of Olten. There, a new funeral institute had acquired a market share of 25 % in the first year. The court applied this figure to the situation in the Canton of Aargau. The damages claim was successful.

C. Comments

Most European countries provide for flexibility regarding the calculation of quantum. If through no responsibility of the aggrieved party the precise calculation presents difficulties, then courts often have the discretion to estimate the extent of losses incurred. Nevertheless, it is hard to find a case where courts exploit their discretion to the same extent the Swiss court did in this case. For this reason, the European Commission plans to draw up a framework for

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[5] Federal Act on Cartels and Other Restraints of Competition of 1995.
[6] Commercial Court of the Canton of Aargau, 13 February 2003, General Funeral Institute/Canton of Aargau, *Recht und Politik des Wettbewerbs*, 2003, 451.

quantification of damages in antitrust cases.[7] Guidelines in this field could indeed diminish uncertainty in a question which by many practitioners is assessed as crucial. In addition, more guidance would reduce the costs for economic expertise. All this is to be welcomed. However, the absence of guidelines is no excuse for not making use of the possibilities which already exist today.

2. Collective Redress: The French Consumer Code

A. The Institutional Setting

In the White Paper, the European Commission has proposed two mechanisms of collective redress, on the one hand representative actions, on the other hand collective actions. In representative actions, qualified entities – like for example consumer or trade associations – take legal action on behalf of the victims. In collective actions, by contrast, victims combine their individual claims. Whereas representative actions might have *opt out*-elements, collective actions are *opt in*.[8] In France, such forms of redress already exist. Consumer associations have standing and may sue for damages.[9] However, not only collective, but also representative actions follow the opt-in-principle. It is not possible for an association to represent consumers which did not authorize the association to do so. The law expressly provides for that the consumers' mandate must not be solicited by public advertising. Moreover, it must be awarded in written form.[10]

B. The Case

The most spectacular case of collective redress so far regards the cartel on the mobile phone market. The three French operators were fined for a market sharing agreement (the so-called "Yalta des parts de marché" or "Yalta PDM").[11] The French consumer association UFC-Que Choisir has asserted claims for about 12,000 clients. In its comment to the White Paper, the organisation complains that the costs of opt-in are exorbitant and that only a minor fraction of the victims could be activated. The number of all consumers affected by the mobile phone cartel is estimated at 20 million, so that the rate of active victims is close to zero.[12]

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[7] See White Paper (supra note 2) at p. 7. See also the Commission's invitation to tender for a study on this subject at http://ec.europa.eu/dgs/competition/proposals2/2008a510_invitation.pdf.

[8] European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2 April 2008, COM(2008) 165 final, 4.

[9] See the *action exercée dans l'intérêt collectif des consommateurs* in Art. L421-1 of the Consumer Code and the *action en représentation conjointe* in Art. L422-1 in the same statute.

[10] Art. L422-1 (2) Consumer Code reads as follows: "Le mandat ne peut être sollicité par voie d'appel public télévisé ou radiophonique, ni par voie d'affichage, de tract ou de lettre personnalisée. Il doit être donné par écrit par chaque consommateur."

[11] The *Cour de cassation* fixed the fine at 442 million Euro. See the judgement n. 1020 of 29 June 2007, case 07-10.303, 07-10.354 and 07-10.397. The *Cour d'appel de Paris* re-established the fine at the amount initially imposed by the French competition authority, that is 534 million Euro, see judgment of 11 March 2009, n. 2007/19110.

[12] UFC-Que Choisir, *Réponse au livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante* (available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments.html), p. 4-5. See generally Idot, L., Private Enforcement of Competition Law – Recommendations flowing from the French Experience, in J. Basedow (ed.), *Private Enforcement of EC Competition Law*, Alphen aan den Rijn 2007, 85.

So far, the action of *UFC-Que choisir* has not been successful. In December 2007, it has been rejected by the Commercial Court of Paris as inadmissible: According to the court, the lawsuit of the consumer association cannot be qualified as a collective, but as a representative action. As the association solicited the consumers' mandate by public communication, the conditions for a representative action are not fulfilled. The consumer association has appealed this judgment. The appeal is pending before the *Cour d'appel de Paris,* the judgment is not to be expected before 2010.

C. Comments

The provisional result is striking. Although French law has standing for consumer associations, this path does not seem sufficiently experienced. Although the Consumer Code provides for collective *and* representative actions and seems to give a choice between these two ways, a court rejects the choice made by the consumer associations and declares the action inadmissible since the conditions for the representative actions are not met.

For the time being, the issue of the appeal proceedings has to be awaited. Nevertheless, the following remarks have to be made. First, in our view, the French approach to provide for an opt-in-system for collective and representative actions, seems to fit best to the entire legal system. It is true, that an opt-out system would indeed be the only means to achieve total compensation of all victims as the French mobile phone case perfectly illustrates. On the other hand, an opt-out system is hardly consistent with the right to be heard before the court. Neither does it correspond to the European tradition to oppose the *res judicata* effect to a person who did not join the action. Therefore, it seems more appropriate to provide for collective mechanisms following an opt-in system. By this means, the criticism by those who evoke the danger of excessive claims can be invalidated. However, if such a cautious solution is adopted, the conditions for the opt-in should be as low as possible. The registration on a website should be sufficient. And it should not be prohibited to associations to point to the possibility of opt-in. Against this backdrop, the French interdiction of public advertising for representative actions does not seem convincing. Moreover, it seems to be completely exaggerated to deduce from the violation of the advertising interdiction the inadmissibility of the lawsuit. It is to be hoped that the appeal court will find a more appropriate solution.

3. "Hybrid" Redress: Assignment in Germany

A. The Institutional Setting

The obstacles for individual redress in Germany were removed by the reform of German competition law in 2005.[13] As regards collective redress, the situation is very restrictive. Consumer associations do not have standing. Trade associations have standing, but only for injunctive relief, not for damages actions.[14] They can require skimming off of benefits gained by competition law violations, but the money goes to the federal budget, not to the association or its members.[15]

[13] Until 2005, the majority of courts only awarded damages when the restriction of competition was directly aimed at the claimant. This rule excluded private claims not only of indirect purchasers but also of direct purchasers in case of industry-wide cartels not directed against a particular enterprise. This situation did not make much sense and was contradictory to the 2001 *Courage*-decision of the ECJ.
[14] See § 33 (2) of the German Act Against Restraints of Competition.
[15] See § 34a of the German Act Against Restraints of Competition.

B. The Case

In the absence of effective collective redress, assignment solutions have found their way into German law. The Belgian company Cartel Damage Claims (CDC) acquires damages claims against cartel participants and brings them to court in a bundled manner. Thanks to the central administration of the several claims by one professional service provider, the costs of civil procedure stay low. In return, CDC is entitled to keep about 15 % of what has successfully been claimed.

In the case of a market sharing and price fixing cartel in the German cement industry, 36 cement purchasers assigned their claims to CDC. The German Federal Court has endorsed this way of proceeding.[16] The first instance will now decide on the substance of the Euro 170 million claim.

C. Comments

Assignment is somewhere between individual and collective redress. On the one hand, individual claims are asserted. On the other hand, by bundling these claims, the advantages of collective redress can be realized. This phenomenon shows that harmed parties, even in the absence of special rules, find an efficient way to get compensated.

However, this way seems more suited for injured enterprises than for consumers. In cases of scattered damages to the detriment of consumers, it will not be attractive for commercial service providers to intervene. Here, only specific collective actions for consumer associations could surmount the judicial abstinence due to costs and risk of taking legal action.

4. Outlook

The examples illustrate that the success of private enforcement not only depends on the institutional setting and the formulation of legal rules, but also – and significantly so – on non-written factors like the willingness of victims to take legal action and of judges to make use of existing flexibilities. The French example shows that even a progressive legal framework providing for collective and representative actions does not necessarily promote private enforcement if the rules are unclear and do not give sufficient guidance to plaintiffs or courts.

It is certainly true that the propensity of victims to sue depends on the incentives to do so. Therefore, legal reforms should be made in the sense of the White Paper. Reference can be made to the contributions in this volume which discuss numerous aspects of possible reforms. Here, it shall be explored a little more how public awareness of private enforcement could be improved and how a basic consensus on the desirability of private competition law enforcement could be established.

III. Visions

Public and private enforcement do not compete with each other but are complements. We do not share the opinion that private enforcement will lag behind as long as public enforcement is easily available. To the contrary, private enforcement takes advantage of the rich experience gathered in administrative proceedings. The rise of a private competition law culture could be accelerated by more closely linking together the two forms of competition law enforcement. For the purpose of follow-on actions, the finding of a competition law

[16] German Federal Court, 7 April 2009, case number KZR 42/08.

violation by a competition authority should be binding for the civil law court. German law adopts this model to the largest extent by binding civil law courts not only to decisions of the German cartel office and of the European Commission but also to decisions of competition authorities in the other EC Member States.[17]

However, this is not sufficient. Private enforcement needs more support by competition authorities. Four fields can be detected where activities of the authorities on the national and the European level could boost private enforcement, which are leniency policy, competition advocacy/encouragement, the *amicus curiae*-function and damages claims by public entities.

1. Leniency Policy

There is a natural tension between leniency and private enforcement. If potential whistleblowers run the risk of being sued for damages, they may be reluctant to report illegal practices to the authorities.[18] In the 2005 Green Paper, the European Commission had put up for discussion the proposal to provide for a rebate on damages claims against the leniency applicant and to liberate him from joint liability.[19] This suggestion was inspired by the US-American Antitrust Criminal Penalty Enhancement and Reform Act of 2004 which has introduced the possibility of "detrebling" and of removing the joint and several liability in favour of whistle blowers.

The reactions to the Commission's proposal were reluctant. Therefore, in the 2008 White Paper, the Commission has become more cautious and "puts forward for further consideration" the idea to limit civil liability of the immunity recipient to claims by his direct and indirect contractual partners. The option in favour of rebates on damages claims against the leniency applicant is not maintained.[20] The argument in favour of this proposal is: Without the whistle blower, injured parties would not have known about the prohibited practice, or would at least have gained knowledge only later. Moreover, due to the revelation, other infringers may be identified who are liable without restriction.

In our view, this path should not be followed. It does not seem consistent with the compensatory goal of tort law to reduce a damage claim because the tortfeasor has cooperated with a public authority.[21] Tensions between administrative and private law should be resolved on the administrative level. The European Commission has adopted such rules in the 2006 Leniency Notice providing for the confidentiality of corporate statements. The leniency applicant may request that his statement is given orally, and is recorded and transcribed by the Commission. Only (other) infringers get access to the statement. The information may only be used for the purposes of the administrative proceeding pending against them.[22] The

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[17] See § 33 (4) of the German Act Against Restraints of Competition.

[18] See Heinemann, A., Interferenzen zwischen öffentlichem Recht und Privatrecht in der Wettbewerbspolitik, in A. Epiney, M. Haag and A. Heinemann (eds.), *Essays in honor of Roland Bieber*, Baden-Baden 2007, 681.

[19] European Commission, *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 19 December 2005, COM(2005) 672 final, p. 10, Option 29 and 30, in conjunction with the Annex to the Green Paper, n. 235 et seq.

[20] European Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2 April 2008, COM(2008) 165 final at p. 10.

[21] In this sense also Wils, W., The Relationship between Public Antitrust Enforcement and Private Actions for Damages, World Competition, 2009, no. 1, p. 4 at 25. Moreover, see the European Commission's Notice on Immunity from fines and reduction of fines in cartel cases ("Leniency Notice"), OJ 2006, C 298/17, n. 39: "The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC."

[22] In accordance with the Commission Notice on the rules for access to the Commission file, OJ 2005 C 325/7.

information is transmitted to the national competition authorities only if these guarantee the same protection.[23]

These rules are adequate. Thus, the confidentiality of corporate statements is guaranteed as far as possible. Remaining tensions have to be accepted. Rather, the existing rules should be changed in the opposite direction: Immunity should only be granted to cartelists who compensate victims as it is the case in US law.[24] Incentives for leniency programmes should not be created at the expense of victims. The opposite is true: Leniency should only be available if compensation is granted. The incentives for whistle blowing should be confined to the reduction of fines.

2. Competition Advocacy/Encouragement

Competition authorities today are not restricted to the mere application of existing competition law. In many countries, they have the vocation to go far beyond and to promote the concept of competition in numerous contexts. The European Commission has begun to publicly draw the attention of cartel victims to the possibility of putting forward claims against offenders. In the press release concerning the lifts and elevators cartel for example, the Commission states that "any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour took place and was illegal."[25]

Even though it is only "moral" support, such public encouragement may have a positive influence on the inclination to take legal action. The following issues demonstrate that the support may also be more material.

3. Amicus curiae

A. Requests by national courts

Art. 15 Regulation 1/2003 governs the cooperation between competition authorities and the national courts. No difference is made between public and private enforcement. The *amicus curiae*-function of competition authorities therefore extends also to private actions. According to Art. 15 (1) Regulation 1/2003, courts of the Member States may – in proceedings implying European competition law – "ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the Community competition rules." The details have been laid down in a Commission Notice.[26] When it is about the transmission of information (e.g. of documents in the Commission's possession or information on the procedural stage of a certain case), the Commission will answer within one month. When the request involves an opinion on the application of EC competition law, the Commission will try to give its opinion within four months.[27] Because of

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[23] European Commission, Leniency Notice (above n. 21), n. 31 et seqq.
[24] US Department of Justice, *Corporate Leniency Policy*, Washington 1993 (www.usdoj.gov/atr/public/guidelines/0091.htm), A5 and B6: "Where possible, the corporation makes restitution to injured parties."
[25] European Commission, IP/07/209 of 21 February 2007. The reference to the courts of the Member States is to be explained by the context of the declaration. It goes without saying, that according to the rules on international jurisdiction also courts outside the European Union may be competent for dealing with such claims.
[26] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of articles 81 and 82 EC, OJ 2004 C 101/54.
[27] Ibid., n. 22, 28.

the independence of the judiciary, the opinion of the Commission does not bind national courts.

As the report on the functioning of Regulation 1/2003[28] has revealed, the practical significance of this mechanism is very low. Since entry into force of the regulation, only in 18 cases the Commission was asked by national courts, 9 of these cases coming from Spain and covering the same problem.[29] Obviously, national judges rather hesitate before asking the European Commission. The report does not explore the reasons for this reluctance. Therefore, only speculations are possible. Judges do not seem very interested in legal opinions of the Commission since they know the law themselves. Therefore, what might be interesting for national courts is information in the hands of the Commission which is not available in the national procedure. However, in this regard the protection of confidential information and of business secrets creates obstacles. In many countries, judges do not seek information that cannot be distributed to the parties.

B. Intervention by the European Commission

However, the Commission does not have to wait until a national court submits a question. According to Art. 15 (3) Regulation 1/2003, the Commission may intervene before national courts on its own initiative "where the coherent application of Article 81 or Article 82 of the Treaty so requires". According to the report on the functioning of Regulation 1/2003, the Commission has decided to do so only on two occasions.[30] This self-restraint is to be explained by the fact, that Art. 15 (3) Regulation 1/2003 primarily confers the *amicus curiae*-function upon the national competition authorities.

Nevertheless, the Commission should make a more ample use of its *amicus curiae*-function. Perhaps it will find a certain encouragement in a recent ECJ judgment which confirmed the right of the Commission to intervene in a national tax law procedure relating to the tax deductibility of fines imposed for infringement of European competition law.[31]

C. Preliminary Rulings

The mechanisms presented above of course do not affect the possibility or the obligation of national courts to ask the ECJ for a preliminary ruling on the interpretation or the validity of Community law pursuant to Art. 234 EC. As regards private enforcement of competition law, it has to be emphasised that both leading ECJ cases, *Courage*[32] and *Manfredi*[33], were preliminary rulings. However, one could have the impression, that national courts – perhaps to a lesser extent than in case of requests for assistance to the European Commission – are reluctant to refer to the ECJ. This is deplorable. On the one hand, courts whose decisions are not subject to a judicial remedy are obliged to refer relevant questions to the ECJ. On the other hand, even if courts are not obliged to do so, a referral to the ECJ has the invaluable

[28] European Commission, *Communication from the Commission to the European Parliament and the Council – Report on the functioning of Regulation 1/2003*, COM(2009) 206 final, 29 April 2009.
[29] See Commission Staff Working Paper accompanying the report, SEC(2009) 574 final, 29 April 2009, n. 277 et seqq.
[30] European Commission (above note 28) n. 35.
[31] ECJ, case C-429/07 *X BV*, 11 June 2009 [not yet reported].
[32] ECJ, case C-453/99 *Courage and Crehan* [2001] ECR I-6297.
[33] ECJ, joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

advantage that the specific question is not only solved within a single legal system but will be perceived throughout the entire Community.[34]

4. Damages claims of public entities

We have already mentioned the lifts and elevators cartel as an example for the competition advocacy function of the European Commission: The Commission encouraged victims to sue for damages before national courts. One side aspect of the case was that also the European Union was a victim of the cartel because the EU had bought lifts and elevators from the cartelists at illegally fixed prices. As a consequence, the European Commission has filed a private damages action before a Belgian court (regarding the damage suffered by the EU). Since fundamental questions of private competition law have to be solved (like e.g. the quantification of damages), this way of proceeding is indeed apt to enrich practical experience with private competition law. Besides, mention should also be made of the wave of bid-rigging in the Dutch construction sector. Public entities which have been injured transferred their claims to a foundation which now asserts 1.100 damages suits.

The examples show that competition authorities could assume the role of a private attorney claiming damages which the state or other public entities have suffered as a result of anticompetitive behaviour. Thus, the case law in the field of private enforcement could considerably be enlarged.

IV. Conclusion

As the other contributions in this volume show, it is important to adopt adequate rules in order to strengthen private enforcement. The most important areas are standing and passing on, the calculation of damages, prescription, access to evidence, litigation costs and the relationship between public and private enforcement. Obstacles should be removed, victims and their associations should sufficiently be incentified to take private action against anticompetitive behaviour. However, experience shows that sometimes, even in the absence of specific rules, damages actions are successful if victims are informed and confident and if courts are willing to make use of existing flexibilities. E.g., in many legal orders, courts have a considerable margin when it comes to establishing and to quantifying damages. This potential should be exploited better in the future.

It sounds paradoxical, but competition authorities could play an important role in promoting private enforcement. The European Commission, whenever imposing fines on cartelists, has started to remind victims that they can go to national courts and seek damages. Competition authorities in the EU have the competence to act as *amicus curiae* and to introduce their perspective into civil procedures. The European Commission itself has started to claim for damages in national courts when the European institutions have become victim, e.g. in the case of the lifts and elevators cartel. Regarding leniency rules, Europe should seriously think about linking antitrust immunity to the restitution of damages as it is the case in the US. By combining the different options, private competition law culture could considerably be strengthened. The examples show that public and private enforcement are not antithetical, but that they complement each other.

[34] Regarding the legal effect of preliminary rulings see Steiner, J., Woods, L. and Twigg-Flesner, C., *EU Law*, 9th Edition, Oxford 2006, p. 217 et seqq. Even if the legal effect is restricted, there is a strong persuasive effect of preliminary rulings.