Deterrence and the relationship between public and private enforcement of competition law.

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I. Introduction

Regulatory laws, of which competition law is only a small component, can be defined as a "control exercised by a non-police public body over the activities of individuals, firms or Member States in order to achieve defined goals; or control by firms of their own activities to achieve such goals".[1] Competition law reflects the willingness of the State to intervene in economic activities by directing and encouraging businesses to conform their practices with the achievement of a wider goal which is the running of a competitive market, that is to say a market where consumers can acquire good quality products for reasonable prices. As we have seen in Europe, behaviour that was deemed institutional at one point in history is now the most condemned.[2] Competition law can be considered as a young sphere of law and many countries such as Austria have introduced competition laws relatively recently.

The deterrent level of a sanction can be defined as the capacity to dissuade a potential offender from committing a certain offence and thus depends on the one hand on the level of a sanction and on the other hand on the probability of being caught. Thus, in the context of economic regulation, the higher the belief of the potential offender that he will be prosecuted and punished in a way that will not leave any room for profit, the greater the deterrent effect.

Increasingly with the years, the aim of deterrence[3] seems to have been recurring in the speeches of competition officials and in the annual reports of not only the Directorate-General for Competition but also of National Competition Authorities. When one looks at the economic or legal literature written by our American colleagues, one sees that the concept is at the centre of the debate but at the same time is a notion that is difficult to capture, because indeed, how do you measure deterrence? One can only look at the amount of workload that the competition authorities have and draw conclusions related to deterrence because the most damaging infractions of competition law are, by definition, concealed. One can say that deterrence is the main goal of the public enforcement that wants to see the economic operators evolve in an undisrupted market. The public authority's job is one of general interest. Thus, the question that follows from the title of the present article is, whether private action helps this deterrent effect, despite the fact that it is motivated by the pursuit of a more personal interest, of which the nature will be compensatory or possibly lucrative in jurisdictions where punitive damages are allowed.

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[1] Chris Hilson, *Regulating Pollution, a Uk and Ec Perspective* (Hart Publishing, 2000).

[2] See for instance, C Harding and J Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2003).

[3] For more details on the theory of punishment as applied to regulatory sanctions, see P H Rosochowicz, "The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law," *European Competition Law Review* 25, no. 12 (2004).

II. Public policy – Different approaches to deterrence

A. The practice in the EU – Administrative sanctions

Regulation 1/2003 came into force on the 1st of May 2004[4] but for the first 42 years, the enforcement of Articles 81 and 82 EC has been framed by Regulation 17/62. Enforcement of competition law has shown that public authorities have had a predominant – if not almost exclusive – role. The figures laid out in the Table below show an increase in the number of sanctions imposed on undertakings but also an increase in the amount of fines of grave violations of EU competition rules. This can be explained by the Commission's will to crack down on the most serious infringements and promote the deterrence aim of its policy as it has repeatedly emphasized in speeches of its officials and in annual publications.

Table 1 Total amount of fine per case and per year imposed by the European Commission for breach of Article 81 and 82 of the Treaty.

Cases	**Total amount of fine in million of Euros**	**Appeals (* pending)**
1998		
TACA - [1999] 4 CMLR 1415	273	Judgement 30/09/03
Preinsulated pipes - OJ [1999] L24/1	92	CFI substantially upheld the decision and reduced some fines, Case T-9../99 Appeal before the ECJ
British sugar - Cases IV/33.708/F3, IV/33.709/F3, IV/33.710/F3, IV/33.711/F3	50	CFI upheld most of the decision, Case T-202../98 Appeal before the ECJ
Volkswagen/Audi – Case COMP/36.693	102	
Stainless Steel - OJ L100, 1.4.1998	27.3	CFI partially upheld and reduced some fines, Case 45.../98 Appeal before the ECJ
Greek Ferries - OJ[1999] L109/24	9.12	Appeal dismissed, Case T-56/99
1999		
Virgin/BA - Case IV/D2/34.780	6.8	
Football World Cup	Symbolic fine	
Seamless steel tubes - Case IV/E1/35.860B	99	CFI reduced fines in a judgement of 8 July 2004, Case T-78/00
FEG-TU – Case IV/F1/33.884	7	Appeal dismissed, Case 5/00, judgment of
2000		
JCB - Case IV/F1/33.884	39.6	
Amino acides (Lysine) - Case IV/F1/33.884	110	CFI reduced some fines by a judgment on 9/07/03, Case T220/00
FETTCSA - Case IV/F1/33.884	7	CFI annuled deciosion to impose fines, judgement of 19

[4] Council Regulation 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1

		March 2003, Case T-213/00
Opel - Case COMP/36.653	43	
Solvay - Case COMP/36.732	33	*
2001		
Vitamins - Case COMP/37.512	855,23	*
Carbonless Paper – Case COMP/36.212	313.69	*
Graphite Electrode – Case COMP/37.614	218.8	Case T-231/01, CFI reduced the fines by a judgement on the 29/04/04
Citric Acid – Case COMP/36.604	135	*
German Bank Charges – Case COMP/37.919	100.8	CFI annulled the decision by a judgement on the 4/10/04, Case T-44/02
Belgian Breweries – Case COMP/37.614	91	*
Luxembourg Breweries - Case COMP/37.800	0.45	*
Sodium Gluconate - Case COMP/36.756	58	*
Zinc Phosphate - Case COMP/37.027	12	*
SAS/Maersk Air - Case COMP/36.756	53	*
Deutsche Post AG I - Case COMP/C1/35.141	24	
Michelin - Case COMP/36.041	19.76	
De Post/La Poste -Case COMP/C1/37.859	2.5	
Deutsche Post AG II - Case COMP/C1/36.915	Symbolic fine	
2002		
Plasterboard - Case COMP/37.152	478	
Methionine - Case COMP/37.519	127	*
Austrian Banks "Lombard"- Case COMP/37.519	124.26	*
Concrete reinforcing bars - Case C OMP/37.956	85	*
Specialty Graphite -Case COMP/37.667	61	*
Industrial & Medical Gases - Case COMP/36.700	26	*
Food Flavour enhancers - Case COMP/37.671	21	
Fine Art Auction Houses - Case COMP/37.784	20	
Methylglucamine - Case COMP/37.978	3	*
2003		
French beef - Case COMP/F-3/38.279	16.68	*
Sorbates - Case COMP/E-1/37.370	138.4	
Electrical and mechanical carbon and graphite products - Case COMP/E-2/38.359	101.44	
Organic Peroxides - Case COMP/E-2/37.857	69.54	
Industrial copper tubes - Case COMP/E-1/38.240	78.73	
Yamaha - Case COMP/F-1/37.975	2.56	
Deutsche Telecom - Case COMP/C-1/37.451, 37.578, 37.579	12.6	
Wanadoo Interactive - Case COMP/C-1/37.451, 37.578, 37.579	10.35	*

There is a will to shift the balance of the cost-benefit analysis that potential offenders of competition law carry out before offending in order to convince them that their action will not pay.

B. Criminal sanctions as part of the American antitrust culture

The main distinction between the European and American system is the nature of the available penalties. The Antitrust rules in the USA give rise to criminal sanctions[5]. It is true that some countries in the EU also provide for criminal sanctions for breaches of competition law but such penalties are rather rarely applied either because the behaviour described in the texts is very narrowly construed or because they have been very recently enacted and it remains to be seen whether they will used.[6]

Section 1 and 2 of the Sherman Act state:

> "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 nation, 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"
>
> "Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade, (...) shall be deemed guilty of a felony (...)"

The Court has discretion in applying these sanctions. Price fixing incurs the highest imprisonment sentences. The felonies committed in violation of those sections were until recently punishable by a fine of up to $10 million for corporation, and a fine of up to $350 000 and/or 3 years imprisonment for individuals.[7] On the 23rd of June 2004, the Assistant Attorney General for Antitrust announced that President Bush signed into law a package which includes the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 which raises the maximum corporate fine to $100 million and the maximum individual fine to $ 1 million and the maximum Sherman Act jail term to 10 years[8]. This new toughening of the antitrust laws, alongside with the detrebling of damages in some cases as part of the new leniency program[9], "will greatly enhance one of the Division's core missions, its anti-cartel enforcement program. The increase in criminal penalties will bring antitrust penalties in line with those for other white collar crimes and will ensure the penalties more accurately reflect the enormous measures provided by the Act will aid in the continues successful detection, prosecution, punishment, and deterrence of hard core cartel activity, further protecting free and open competition" [10]

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[5] For a discussion about the theory of punishment and criminalisation, see P. H. Rosochowicz, " The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law", ECLR, Volume 25 (12) – December 2004.

[6] It is reminded that criminal sanctions have not been very often used in the first fifty years of the Sherman Act.

[7] These figures were originally very low as compared to the benefit that a conspirator could get out of a cartel agreement. At the time of the passing of the Sherman Act, the offence was only a misdemeanour and the maximum fine was $5000 until it was changed in 1973 to become a felony punished by much higher penalties.

[8] Department of Justice release, Wednesday, June 23th, 2004, *Assistant Attorney General for Antitrust, R. Hewitt Pate, issues statement on enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004,* www.usdoj.gov

[9] Ibid

[10] Ibid

C. Conclusion

The European Commission and the National Competition Authorities have been the main enforcers of competition law and have been devising new tools to deter potential offenders such as new leniency programs and new penalties. Some public investigations have been started thanks to the complaint of private parties. However, the role of private parties as the instigator of public enforcement seems to be insufficient and competition law officials have been stressing the importance of the role that private enforcement should play in the European Union.

The level of resources that the public authorities would need in order to achieve a proper level of deterrence would probably be impossible to justify. Thus, private enforcement as a complementary deterrent, in addition to its compensative role, is worth the consideration.

III. Private enforcement - two different approaches and practices

Private enforcement can be seen as being compensatory in nature, that is to say promoting a personal interest of the private actor initiating it, ensuring the protection of an individual right arising from the Treaty. However, isn't it the case that private actions actually, not only compensate the victim of an anticompetitive practice but also help to pursue the public interest goal of deterrence? To what extent can private enforcement shift the weight in the offender's cost-benefit analysis when considering an offence?

A. Brief overview of Treble damages in the USA

Private enforcement plays a central role in the USA. Section 4 of the Clayton Act[11] states that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee".

Treble damages carry both a compensatory and a deterrent aim. Their deterrent aspect works at two different levels. On the one hand, it is an incentive for private enforcement since private plaintiffs are themselves motivated by a private interest and treble damages might convince them to act, in which case, they might heighten the probability of detection of serious anticompetitive behaviour, and thus add to the cost of the offence as the offender would have more chances of being apprehended. On the other hand, the prospect of paying high amounts of damages can itself be a strong deterrent. However, the balance to be reached is very fine. One must give enough incentive to private enforcement but at the same time it must avoid frivolous lawsuits. As far as the USA were concerned there has been a wide debate about the reality or the efficiency of the treble damage sections. They have been described as costly and

[11] 15 USC para 15

leading to overdeterrence in some cases [12] and as an illusion as they could in some cases amount to single damages for the defendant, such could be the situation for instance in long antitrust suits as prejudgment interest is not available.[13] If we assume that treble damages in fact equal to single damages, the punitive side of these damages is illusional and the deterrent effect still existing but weakened as far as the money cost of the violation is concerned but, if the prospect of winning a treble-damage claim encourages claimants to litigate, the detection rate could still be higher, if the claim does not follow a governmental action.

The table below shows the statistics concerning the number of private and public actions[14] and it shows that they play a very important role in the antitrust landscape:

Table 2 Ratio public/private enforcement of Antitrust Laws in the USA

Year	Total number of antitrust actions	Number of private actions	Ratio
1980	1496	1457	97.39
1981	1352	1292	97.56
1982	1066	1037	97.28
1983	1213	1192	98.27
1984	1124	1100	97.86
1985	1082	1052	97.23
1986	877	838	95.55
1987	785	758	96.56
1988	682	653	95.89
1989	658	639	97.11
1990	472	452	95.76
1991	681	650	95.45
1992	503	483	96.02
1993	701	685	97.72
1994	708	672	94.92
1995	775	745	96.13

As the table shows, more than 90% of all antitrust cases are private actions. Very often, private enforcement follows criminal prosecution because a criminal judgement can be considered as evidence for the making of the case. This may have a drawback on the deterrent effect of private actions. Indeed, putting the obvious compensatory role of damages aside, punitive damages are a deterrent in so far that they heighten the probability of detection and cover the gap that may be left by the public authorities. Thus, if most of the private actions follow the prosecution, this aspect of deterrence is

[12] See among others Clifford A. Jones, *Private Enforcement of Antitrust Law in the Eu, Uk, and USA*, ed. Oxford University Press (Oxford University Press, 1999), Robert H. Lande, "Are Antitrust "Treble" Damages Really Single Damages?," *Ohio State Law Journal* 54 (1993), Alfred L Parker, "The Deterrent Effect of Private Treble Damage Suite: Facts or Fantasy," *3 New Mexico Law Review 286* (1973), Malcolm E. Wheeler, "Antitrust Treble-Damage Actions: Do They Work?," *61 California Law Review 1319* (1973).

[13] Lande, "Are Antitrust "Treble" Damages Really Single Damages?."

[14] Source: R. J Roberts, *Analyse compartative internationale des droits d'actions privés*, 1999, http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedIterF/ct01713f.html .

wiped out, leaving only the prospect of paying high amounts of damages in addition of a public fine. On the contrary, private damages could heighten the detection rate of anticompetitive if they do not follow a public prosecution and thus be at the origin of a public prosecution, which could lead, as far as the USA are concerned to a criminal sanction.

Moreover, the recent Antitrust Criminal Penalty Enhancement and Reform Act 2004 enacted the detrebling provision in the case of a company that cooperates with private litigants against other members of a cartel and the Assistant Attorney General stated that:

> "(...) The detrebling provision of the Act removes a major disincentive for submitting amnesty applications, encouraging the exposure of more cartels, and making the Division's Corporate Leniency Program even more effective."

The success of private enforcement in the USA does not depend on the sole trebling provision of the statutes but also on the availability of class actions and contingency fees. Indeed, as is explained later, the interest of victims to bring an action against an anti-competitive behaviour is most of the time very diluted. Therefore, the possibility of bringing actions in groups and the reduction of the costs, by not having to pay lawyer's fees unless the claimant's wins are big incentives to go before the courts.

B. The quasi absence of such enforcement in Europe

The new Regulation 1/2003[15] came into force last year with a clear view of decentralisation of the enforcement of competition rules by conferring more powers to national competition authorities and their courts by establishing a directly applicable exception system which ends the old monopoly of the Commission in this regards. It also tries to enshrine the important rules of national courts to the extent that they deal with private enforcement of competition law. Thus in its recital 7, the regulation states that:

> "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full"

It seems however, based on the report that was recently published by the European Commission on its website[16] that the use of private actions as the basis for claims has been extremely rare.

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[15] *Council Regulation 1/2003 of 16 December 2002, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, [2003] OJ L1/1.

[16] See the DG Competition website:
http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html

1. The use of Articles 81 and 82 EC

The now replaced Regulation 17/62 did not mention the application of the European texts to private litigation. However, the direct applicability of the articles has been demonstrated in extensive case law of the ECJ. Furthermore, Regulation 1/2003 gets rid of the Commission's monopoly to grant exemptions, thus, the courts are enabled to apply articles 81 and 82 EC to case brought before them without previous restraints. The rules to be applied are the national procedural rules.

The competition rules can be used in two different manners, that is to say as swords or as shields[17]. The latter is the one that is the most encountered before the court and is used to protect the defendants from mainly contract-based claims. The former is the one with greater interest to our topic and which seeks damages or an injunction against an anticompetitive behaviour but has been used very rarely[18]. Steindorff, as cited by Jones[19] concludes in a somewhat old article but that is still applicable nowadays:

> 'One can say that the number since then [1971-1978] is increasing slightly, but not considerably. I know that in ninety percent of these cases, European antitrust law was invoked only for purposes of the defence. There are almost no damage cases and not even one case for refusal to sell. If you want an average, I shall say that in two-thirds of the civil cases in France, in Germany and wherever in the Community, the Courts did not find a violation of Article 85. This leaves me with the impression that enforcement of Community antitrust, which does not happen in arbitration, also does not take place in civil litigation before the state courts.'

Using article 81 and 82 EC as a sword would have a deterrent effect on not only the undertaking punished but also on other undertakings. Moreover, damages would not be the only sanction that would be sought. As a matter of fact, an injunction or an interim measure could in some cases be of more value to the plaintiffs and could shift also significantly the balance of the benefits of a violation. Indeed, it is likely that if an interim injunction is not granted as asked before the courts, the case is dropped by the plaintiff[20]. Moreover, from the part of the violator of the competition law, time could be a very precious and lucrative element. If the violation is cut short, either by an interim measure or by an injunction that could be given possibly faster than by the competition authority in charge, the balance might be shifted towards the non-commission of the violation. This could thus be considered as a further deterrent.

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[17] F G Jacobs and T Deisenhofer, "Procedural Aspects of the Effective Private Enforcem ent of E.C. Competition Rules: A Community Perspective," *European Competition Law Annual 2001* (Hart Publishing 2003), B Rodger and A MacCullogh, "Wielding the Blunt Sword: Interim Relief for Breaches of Ec Competition Law before the Uk Courts', Eclr, 17(7), 393-402," *European Competition Law Review* 1996, 17(7), 393-402 (1996), W P J Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?," *World Competition* 26 (3), 473-488 (2003).

[18] E Steindorff, "Common Market Antitrust Law in Civil Proceedings before National Courts and Arbitrators," *12 Fordham Corp. L. Inst 409* (1986).

[19] Jones, *Private Enforcement of Antitrust Law in the Eu, Uk, and USA*.

[20] Rodger and MacCullogh, "Wielding the Blunt Sword: Interim Relief for Breaches of Ec Competition Law before the Uk Courts', Eclr, 17(7), 393-402."

By enacting Regulation 1/2003[21], which came into force less than a year ago, the European Commission is, among other goals, hoping to increase the use of private enforcement of competition law. The most notable change is the introduction of a directly applicable exemption system replacing the Regulation 17/62 Commission notification and exemption monopoly and it is now up to defendant invoking it to prove that the conditions for exemptions as they are laid out in 81(3) are fulfilled. However, it remains to be seen whether private litigation will flourish as many obstacles could be identified within the procedural rules of individual Member states.[22]

The availability of damages have been at the centre of debates for a long time and relatively recently, in *Courage Ltd v. Crehan*, the ECJ held clearly that " the full effectiveness of Article 81 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 81(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"[23]. The judgement does not come as a surprise since the case law and doctrinal interventions were already leaning towards this solution for some time.[24]

2. The case of France[25]

A claim for damages can be brought before the courts by an individual that considers that he has suffered a damage as a result of the breach of a national or European competition law regulation. As there is no law that specifically treats this matter, the general law of civil liability, that is to say article 1382 of the French Civil code will be applied. This text states that 'Any act of man, which causes damages to another, obliges the person at fault to repair it'.

As was said in the preceding section, France is no exception to the rule and private enforcement activity is very close to inexistent when compared to the United States. In order to claim damages, three elements must be established, namely, a wrongful act, a damage and a causal link.

The existence of the wrongful act

As article 1382 of the Code Civil is very succinct, it was up to the Cour de Cassation (French Supreme Court) to set its scope in a very abundant line of precedents according to which a wrongful act is characterized when a civil or criminal text has been violated. It would therefore be sufficient to prove that a line of business is violating European Competition law. The reference for the appreciation of the judge

[21] *Council Regulation 1/2003 of 16 December 2002, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty.*

[22] Jacobs and Deisenhofer, "Procedural Aspects of the Effective Private Enforcement of E.C. Competition Rules: A Community Perspective."

[23] Case C-455/99 *Courage Ltd v Crehan* [2001] ECR I-6297, See A. Andreangeli, "Courage Ltd v Crehan and the Enforcement of Article 81 EC before National Courts", ECLR Volume 25, Issue 12 – December 2004.

[24] See Jones, *Private Enforcement of Antitrust Law in the Eu, Uk, and USA.*

[25] For matters of length and time, this paper will be limited to private enforcement as is applied in France (for a complete overview of all the Member States' enforcement mechanisms, see the Commission report cited in footnote 16).

of a wrongful act is what a person exercising average care and diligence would have done in the same situation (*bon père de famille)*. Moreover, law of civil liability does not require intent. When professionals are involved, the degree of care applied in the assessment is usually greater than for a non-professional.

Thus, the condition of establishing the existence of a wrongful act will be fulfilled if a violation to Article 81 and 82 EC is proven. The discovery by the European Commission or the Competition Council (*Conseil de la Concurrence)* of an anticompetitive practice establishes the existence a wrongful act. Thus, the favourite route of plaintiffs would be first to lodge a complaint to the European and national competition authorities before claiming damages before the national courts[26]. One must note that there are defences that exist under the general law of civil liabilities[27] (ie: the acts of god) but fall outside of the scope of the present study[28].

Four cases can be cited:

- *Cour de Cassation, Chambre commerciale, 1st of March 1982, Bull. Civ. IV, n°76, p. 69, Syndicat des expéditeurs et exportateurs en légumes et pommes de terres primeurs de la région malouine/l'Hourre.*

The Cour de Cassation awarded damages following anticompetitive behaviour violating article 50 of the Ordonnance of 30th of June 1945. The plaintiff had also put forward the then article 85 of the Treaty of Rome. Even though the basis of the solution here is under French national law, the court clearly stated that damages would be available for damages caused by a behaviour in violation of Article 81EC.

- *Cour d'Appel Paris 19 May 1993, Sté Labinal c/Sté Mors and Sté Westland Aerospace*[29]

In this case, the French company Mors decided to do a joint venture with Westland to answer a bid for a system of measurement of tire pressure in Airbus A330/340 (TPIS) in order to effectively be competitive against the company Labinal which specialises in those systems. The British company was to represent the joint venture when dealing with British Aerospace. The joint-venture contract had an arbitration clause.
They won the bid as being the first source for the installation of the systems, Labinal coming only as a secondary source. Nevertheless, the climate between the parties deteriorated and the company Mors alleged that Westland was getting closer to Labinal in order to exclude Mors from the market. Mors filed a damage claim before the Tribunal de Commerce of Paris for unlawful and abusive behaviour under the current articles 81 and 82 EC.
The Commercial Court (*Tribunal de Commerce*) rendered a judgment on the 3rd of June 1992[30] ruling mainly in favour of the claimant. They stated that the confidentiality agreement was void because it was contrary to article 85 § 2 (now Article 81) of the EC Treaty; that Westland had engaged in unlawful competition by postponing the signature of the contract; and the two defendants should pay in

[26] See the comments made on the impact on the deterrent effect in this section A.
[27] For more details see 'les conditions de la responsabilité civile' in J. Flour, JL Aubert and E Savaux, « les obligations », volume 2, 10th edition, Armand Colin 2003.
[28] Ibid
[29] Europe, July 1993, n°299; JDI 1993/4, p. 357, commentary Laurence Idot and Cour de Cassation, chambre commerciale 14 February 1995 in which the commercial chamber rejected the appeal.
[30] T. Comm. Paris, 3 June 1992, not reported as cited by Chantal Momège and Laurence Idot in "Application of Article 81 & 82 EC by the French Ordinary Courts: A Procedural Perspective"

damages a provisional amount awaiting the evaluation of the damage. However, they decided that the company Labinal did not abuse a dominant position.

Labinal appealed but the Court of Appeal[31] ruled in favour of the company Mors and found that Labinal was enjoying a dominant position, which it had abused. This judgment is the first one where the French judges solely apply EC competition rules. National tribunals theoretically are competent for all civil aspects of breaches of competition law. Thus they can decide that an agreement is void and they can award damages to repair the loss that has occurred. The case was then brought before the *Cour de cassation*[32] which rejected the pourvoi. It is only in 1998 that the Court of Appeal decided that the damages that Mors sustained amounted to 34.2 million French Francs. [33]

- *Tribunal de Commerce de Paris, 22 October 1996, Peugeot c/ Eco system*[34]

Eco system was an agent for individuals willing to buy cars of every brand from dealers established all over the European Union. Eco system had some troubles of supply due to Peugeot's behaviour. Eco system filed a complaint before the Commission, which led to a ruling against Peugeot which awarded an interim injunction.[35] Peugeot's appeal was rejected[36]. Then, Eco system summoned Peugeot to the Tribunal de Commerce of Paris, which stated that:

> "Attendu qu'il est constant que la société qui se livre à des pratiques contraires aux articles 85.1 and 86.1 du traité instituant les Communautés européennes engage sa responsabilité sur le fondement de l'article 1382 du code civil. Attendu que c'est bien pour infraction à l'article 85.1 du traité de la Commmunauté européenne que Peugeot a été condamné par décision de la Commission des Communautés européennes le 4 décembre 1991. Le tribunal dira que l'infraction commise par Peugeot et reconnue comme telle par les décisions des juridictions européennes, est constitutive d'une faute au sens de l'article 1382 du code civil »[37]

- *Tribunal de Commerce, 11th of December 1995, JCB/Central parts*[38]

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[31] CA Paris, 13 May 1993, Europe, July 1993, Comm. N°300, *Journal du droit international*, 1993.957, note by L. Idot.
[32] Cass. Comm. 14 February 1995, Bull IV, n°48, *Europe*, April 1995, comm. N°146
[33] CA Paris, 30 September 1998, *Europe*, December 1998, comm. N°410.
[34] Ord. Tribunal 21 May 1990, case T-23/90 R, *Rec* 1990.II.196; Judgement 12 July 1991, case T-23/90, *Rec* 1991. II. 655; Judgement 16 June 1994, case C-322/93P, *Rec*. I.2727)
[35] For more details, see *Peugeot c/ Eco system*, case IV/33.&57; dec/ Comm. N°92/154 of December 1991, OJEC L. 66 of the 11 March 1992.
[36] Peugeot SA Automobiles c/ Commission, 22 April 1993, case T-9/92, *Rec.* II.495.
[37] Not published, found in "La reparation des dommages causes par les pratiques anticoncurrentielles" by Daniel Fasquelle, *RTD com.*51 (4), oct-déc. Translation: 'It is settled law that the company which engages in behaviour contrary to articles 85.1 and 86.1 of the Treaty founding the European Communities is responsible on the grounds of article 1382 of the civil code. Peugeot has been condemned by a decision of the Commission of the European Communities on the 4th of December 1991 for the violation of article 85.1 of the EC Treaty. The Tribunal rules that the infringement by Peugeot and recognised as such by the decisions of the European court, can be qualified as a wrongful act under article 1382 of the civil code.'
[38] Reference found in *Central Parts SA v. JCB Group* [2002] 4 C.M.L.R. 37 in footnote n 1.

JCB has brought proceedings against Central Parts on ground of unfair competition. The court describes JCB's behaviour in France as clear attempts to create barriers to the free movement of products in the EEC and awarded damages to Central Parts. The Cour d'Appel de Paris however reversed the judgment on the 8th of April 1998. It did not deal with the issue of free movement but found Central parts guilty of unfair competition by deliberately misleading customers and reversed the judgment awarding damages to Central Parts and awarded damages to JCB.

A damage/ A loss

In antitrust matters, the loss claimed will be a material one, that is to say one that can be directly be translated into monetary terms.

The damage must be certain, existing and direct[39]. It can be a something that has been lost as a result of the anticompetitive behaviour (*damnum emergens*) or it can be a loss of future earnings (*lucrum cessans*)[40]. However, in the latter case, the loss of earning has to be real and on which the victim could reasonably foresee. [41]

However, quantifying such damage is very difficult. As a matter of fact, the expert will have to divide the loss that could be due to the economic trends and thus due to normal competition from the loss that was incurred directly because of anticompetitive behaviour. This is a task that is very difficult because of the difficulty of determining what the turnover of a company should be or should have been had the anticompetitive agreement not occurred.

A causal link

Last but not least, the causal link between the wrongful act and the damage sustained has to be proven. The claimant has to prove that the wrongful act is the cause of the loss sustained.

There are two main theories prevailing in French law concerning this matter: on the one hand, the judge can apply the theory of the determining factor (*causalité adéquate*) according to which will be verified the causal link between the determining factor and the damage, setting aside all the other factors; on the other hand, the theory of the equivalence of conditions (*équivalence des conditions*) whereby a causal link can exist between the damage and any of all the circumstances surrounding it and thus it is enough to prove that the damage can reasonably be linked to the wrongful act. [42]

The Court seems to favour the former theory[43] and requires therefore the proof of a direct link between the damage and its determining factor that has to be a wrongful act. Nevertheless, in several areas, there is a presumption of causality as long as damage has been proven, in which case it is the defendant that will have to prove that the damage did not occur by its behaviour. However, it does not seem that such a

[39] Cour de Cassation, civil chamber, 14 November 1942, *Gazette du Palais* 1943.1.50
[40] J Flour, JL Aubert and E Savaux, « les obligations », volume 2, loc op cit
[41] Ibid
[42] The formula *sublata causa, tollitur effectus* would be applied to determine the causal link.
[43] For more details see, L. Vogel, A. Blanchot, D. Fasquelle, J. Gallot, *Le juge commercial et le droit de la concurrence,* Atelier de la concurrence, 1999.

presumption is applied to competition law cases.[44] It is clear that in competition law the application of the determining factor can be difficult to apply.

In the Eco system/ Peugeot case, the Commercial court of Paris awarded damages to Eco system because the wrongful act of Peugeot had a "direct incidence" on the development of Eco system's activities.

In the Mors/Labinal case, Mors claimed for the compensation of its injuries on adjacent markets but the court refused the claim on the grounds that the link between the anticompetitive practices and the fact that Mors had been prevented from entering adjacent markets was not established. The court held that there were many other reasons why the company could not enter adjacent markets.

As only the injury suffered by the plaintiff may be compensated, if a claimant passed on some charges that could be attributed to the anticompetitive behaviour, those charges are not constituent of a damage for that plaintiff. However, those overcharges, even if not causing any direct damages to the plaintiff, can still be the cause of the loss of subsequent purchaser because of the increase of price following the anticompetitive behaviour. This could constitute a damage that is direct and certain but the indirect purchaser would have to prove that the overcharge followed the anticompetitive behaviour and the loss of customers. The court would thus be likely to consider that this is sufficient to presume that those customers were lost due to the passing on of the costs and therefore shift the burden of proof on the defendant. The question of standing is discussed in the next part.

IV. The question of standing and deterrence

The most obvious victims of anticompetitive behaviour are, as was seen, direct and indirect purchasers of the entity in breach of competition laws. Moreover one must note that there could be also some 'side-effect' victims such as the non-cartel members and their purchasers and indirect purchaser. The question of standing is an important one and will probably have the biggest influence on the development of private actions in the EU.

The first model that comes to mind is one where direct and indirect purchasers could bring an action against the offenders to the extent of their harm. That is to say, in this case, the passing on defence would be allowed. Each party would be able to recover only as far the loss it suffered. However, even putting aside the fact that measuring every one's damage would be a gigantic task, the main problem with this model is that the chain of victims can be very long and the further down, the more diluted the damage is and the less likely the indirect purchaser is to bring an action. The deterrent effect would be undermined.

A second model would authorise direct purchasers and indirect purchasers to bring a suit against the violator but would not authorise the passing on defence. This lead to direct purchasers being possibly overcompensated if they passed on the harm that they

[44] See D. Fasquelle, 'la réparation des dommages causés par les pratiques anticoncurentielles', *Revue trimestrielle de droit commercial* 51(4).

suffer as a result of the anticompetitive behaviour. The result is thus the equivalent of multiple recovery.

A third example would allow direct purchasers to recover from the offender and indirect purchaser to claim from the direct purchasers. However, the delicate question would be to determine the amount that has been passed on. Moreover, it would possibly induce a lot of claims between the victims of the offence and the direct purchasers might not want to claim in the first place if they have passed on most of the costs.

From a deterrence perspective, it would seem that the second model would be the most appropriate as it would involve multiple recovery that would be assimilated to punitive/exemplary damages, which are in excess of what would be enough to wholly compensate the victims. However, the different systems enshrined in the different Member States might be reluctant as far as punitive damages are concerned.

For instance, in France, the principle of equivalence between the damages and the loss caused has to be applied in claims brought on the basis of article 1382 CC. Damages serve a compensatory role and in no circumstance a punitive one.

In England, there is a general ban on exemplary damages since the primary aim of damages, as in France, is to compensate the claimant for the loss he has suffered. However, there are exceptions in which exemplary damages have been allowed and the Court has justified them as pursuing deterrence and more general public interest goals[45]. The main controversy of these damages is that they can be seen as bringing a criminal element into the civil law without having the same safeguards as criminal law.

Their award is very strictly controlled and the issue was raised in *Rookes v Barnard*[46]. Exemplary damages were available in three categories, but at the jury's or judges' discretion and it has been confirmed by *Broome v. Cassell and Co*[47]*:*

- Conducts calculated to make a profit which may well exceed the compensation payable to the plaintiff (which would probably be the most appropriate for hard-core violation of competition law since they are profit driven by definition)
- Oppressive, arbitrary or unconstitutional conduct by government servants
- Express authorisation by statute

The current state of law does not allow exemplary damages for breaches of competition law but this might change in the future in the light of arguments put

[45] See *Broome v Cassell and Co* [1972] AC 1027
[46] [1964] AC 1129
[47] [1972] AC 1027

forward by different voices such as the Law Commission[48] or by the House of Lords in *Kuddus v. Chief Constable of Leicestershire Constabulary*.[49]

V. Conclusion

In spite of efforts made by the European Commission and the National Competition authorities of the Member States to encourage them, private litigation is still very scarce in the European Union.

By its essence, regulatory law would be ideally best enforced and monitored by public enforcement in their role of preserving or restoring competition. However, in the current state of affairs, such enforcement is very costly and the competition authorities do not have at their disposal all the public financial and human resources that they would need in order to reach an optimal level of enforcement, such an amount of resources could possibly not be justified when balanced with other Community aims.

Private enforcement is not only necessary from a compensation point of view but also in a deterrence perspective to fill in the gaps left by the public enforcers. A system should be devised to encourage them in cases where there is no prior decision by the European Commission or by a National Competition Authority, in order to heighten the detection rate and to emphasize the fact that anticompetitive behaviour does not pay.

The Modernisation Regulation having come into force less than a year ago removes a big burden off the back of the Commission but it remains to be seen whether it will be keeping its promises and enhancing deterrence in order to have a workable and competitive market on the territory of the now 25 Member States. All the specialists will keep an eye on the changes and especially with regards to private enforcement which, is compensatory by nature from the point of view of the victim but can be seen as a further deterrent to the potential offender, who would have to add another weight in its cost/benefit analysis. Private and Public enforcement have to work together. Absent one or the other, the system of enforcement of competition law seems will be less efficient.

[48] See Report 247 *Aggravated, Exemplary and Restitutionary Damages* (1997), http://www.lawcom.gov.uk/files/lc247.pdf

[49] [2001] 2 WLR 1879 where the 'cause of action test' which previously limited the use of exemplary damages to claims based on a cause of action for which such damages were already an established remedy.