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The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture

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Any significant growth in private damages claims for breaches of competition law will push to the fore the question: how far such actions are in the public interest? Both courts and competition regulators will have to develop new ideas and policies to ensure there is an optimal balance between private and public enforcement. For courts, there needs to be a recognition that damages litigation must not be allowed to be conducted in a manner which is at the expense of the public interest. This may mean courts adopt new rules that treat some cases as a form of public interest litigation. This would entail, for example, rules on costs being relaxed to protect weaker parties. It may require that any settlement is given closer scrutiny by courts to ensure no anti-competitive collusion has occurred. In addition, courts should allow limited intervention by competition regulators during proceedings to provide advice to the court on the public interest and to protect the regulator's wider policy goals. For competition regulators, the primary question is how much assistance to give to complaints who seek help to pursue damages claims, given limited agency resources and the potential damage to public enforcement that some forms of help may entail? Competition authorities need to establish clear and defensible guidelines on investigation of complaints, disclosure of documents, and settlement short of prosecution. Such guidelines should protect the essential functions of the agency so that it can pursue its public enforcement role. Failure to do so will lead to inconsistent decisions and maladministration. Private litigants should expect clear and predictable interactions with public enforcers so that a damages Bar can develop autonomously within Europe. Agencies also need to map out their broader policy goals and justify levels of assistance or non-assistance to private litigants by reference to them. The European Competition Network would be a good forum for developing common policies on these questions.

INTRODUCTION

The European slow march towards a culture of private enforcement in competition law may have begun but the end is a long way off.[1] Such a move is generally seen as in the wider public interest because of it will bring the private sector in to augment under-resourced public enforcers.[2] The public interest will be promoted as a side-effect of creating incentives to private action. The purpose of this paper is to ask what role courts and competition authorities should take in this. If private competition

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[1] European Commission, Green Paper - Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final.

[2] Jacobs, 'Civil Enforcement of EEC Anti-trust Law' (1984) 82 Mich LR 1364 and Wils, 'Should Private Anti-trust Enforcement Be Encouraged in Europe?' (2003) 26(3) World Competition 473 provides a spirited rejection of the orthodoxy. This author expresses concerns about private enforcement from a different perspective to that of Wils and believes that the problems can be avoided by careful action by public bodies.

enforcement is generally *deemed* to be in the public interest, do public bodies thereby have a duty encourage and facilitate it? It is clear that courts and regulators have choices about what degree of assistance to give private competition litigants. The courts may have to develop new models of litigation which reflect this wider public interest in bringing private damages claims. Public interest litigation is recognized in the field of public law and some of the principles established there may be transferable to private competition claims.[3]

For competition authorities, as opposed to courts, the issue is more one of how to strike the right balance between pursuing their own policy goals for the whole community and aiding particular private litigants. The growth of private enforcement can be facilitated by assistance from public enforcers. Obvious examples of such assistance are disclosure of documents and issuing infringement decisions to allow follow-on actions. However, sometimes rendering such assistance will conflict with the achievement of the competition authorities' own policy goals. If a plaintiff damages bar does emerge as an interest group, there needs to be a mutually fruitful interaction between private and public enforcers. Plaintiffs (and their lawyers) are understandably likely to demand considerable help from public enforcers. This is particularly so if European systems of civil litigation remains less friendly to plaintiffs, even after any modifications arising from the Green Paper, by comparison with litigation in the United States. Securing the right balance between 'nuture' of private enforcement and protection of the constitutional and policy independence of public enforcers may prove difficult. Public enforcers could become too 'plaintiff-led' in their activities to the detriment of the wider public interest. Competition authorities will therefore need strong and clear guidelines on when and how they will render assistance to plaintiffs. In the absence of these, public enforcers will find it difficult to make consistent and defensible decisions from the perspective of the administrative law that regulates their behaviour. They may also fail to devote their scare resources to areas of the economy that they believe require particular attention. This author therefore supports the adoption of rather more detailed rules to structure the exercise of discretion by public enforcers than presently prevail in European competition authorities and the European Commission. The Federal Trade Commission provides a usefully clear and comprehensive approach to this problem through its detailed staff manual which structures decision-making in relation to complaints. This should also be complemented by broader policy plans which set out the key direction of competition agency enforcement priorities in terms of sectors and types of conduct that will attract resources. These could be pursued jointly, where appropriate, using the European Competition Network forum. This will further help to legitimize and render more transparent decisions about which private actions to support.

[3] The leading English case is *R v Inland Revenue Commissioners ex p. National Federation of Self-employed and Small Businesses* [1982] AC 617. See the discussion at 691-94 in Wade and Forsyth, *Administrative Law,* Oxford, OUP, 2004.

THE ROLE OF THE COURTS: GUARDIANS OF THE PUBLIC INTEREST?

Looking first at courts, one view would be that the best way of promoting private claims is leave them to be conducted purely by reference to the parties' interests. This laissez-faire perspective emphasizes allowing parties to enforce their rights. The courts are neutral referees in adversarial proceedings and should confine themselves to ensuring that the respective parties' cases are fairly heard. This is certainly the traditional English civil law approach to case-management although this is not shared by other European civil procedure systems.[4] Certainly European legal cultures reflect profoundly different views about the role of litigation in liberal societies.[5] Any reform of private competition law procedure must be able to be accepted and applied given the prevailing legal culture within each Member State.[6] The better view is that given that competition law is about preventing wrongs to the public through damage to the competitive process, procedural rules should be facilitative of such litigation. It is for this reason that the Commission Green Paper advocates various reforms to procedure law; for example, that courts remove restrictive rules on discovery.[7] This inherently 'public' aspect of competition law should be reflected in other aspects of courts' approach to private actions. Important public interest issues will arise within private litigation and courts must be ready to embrace these in ways which may conflict with the interests of one or even both the parties. However, they will have to exercise caution so as not to discourage litigation by introducing too much uncertainty through this wider enquiry aimed at promote the wider interests of consumers and other non-parties. Claimants will not litigate if their 'rights' are too subject to 'public interest' considerations. This section looks at two aspects of the role of courts. First, the interaction between courts and regulators in a world of increasing private enforcement. Second, the idea that courts are conducting a form of public interest litigation in competition damages claims.

Courts v Competition Authorities – Who Should Have Primacy over Competition Policy?

In the European context, any idea that there is a parallel system of enforcement along public and private tracks is fanciful at present given the small volume of private enforcement occurring. If however a parallel system does indeed become a reality through more extensive private litigation, there are likely to be important questions regarding the relationship between national competition authorities ('NCAs') and courts. This interaction may need some careful management because up to now, national competition authorities have been able to shape policy without too much

4 Foster, *German Legal System and Laws*, 3rd ed, Oxford, OUP, 2003 which shows how the 19th century laissez-faire approach of the Zivilprocessordnung has been modified to give greater judicial control over the conduct of litigation. Even English procedural rules have been profoundly reshaped along more court-led lines as a result of the civil justice reforms initiated by Lord Woolf in 1999.

5 Caenegem, 'The Unification of European Law: a Pipedream?' (2006) 14(1) European Review 33.

6 Delicostopoulos, 'Towards European Procedural Primacy in National Legal Systems' (2003) 9(5) European Law Journal 599 for a more optimistic view about the submissiveness of national courts to EU reform of civil law.

7 Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final at 5-6.

interference from courts. This was also true at EU level for a long time, but in recent years we have seen a more prickly relationship between the ECJ/CFI and the Commission over issues of the correct direction and interpretation of competition policy. Obvious examples are the decisions in *Oscar Bronner,*[8] *Delimitis*[9] and *Airtours.*[10] These cases show the courts not simply reversing decisions on narrow points of administrative due process but rather challenging the Commission's appreciation of fundamental aspects of competition theory and policy. This may be unobjectionable from a social welfare perspective if it produces better competition laws but it does present challenges to some traditional notions of the separation of powers between courts and administrators.

The move to a damages culture may lead to similar tensions at national level both because courts will hear more cases and NCAs will not be represented as parties to defend their policies. With more freedom, courts will be likely to develop their own theories of competition. This may not a bad thing because competition between agencies may produce better antitrust law. Certainly this idea chimes well with public choice theories which view regulators as often flawed and self-serving.[11] The possibility that companies might seek to shop around between public bodies is thus nothing to be feared. Conflict may however lead to a decline in the authority and consistency of competition law.[12] More importantly, at the constitutional level, NCAs are usually given the prime role of directing competition policy within each Member State. Across Europe, the traditional role of courts is to ensure that administrative bodies act within the law but not to take control of a complex area of public policy like competition.[13] This deference was traditionally grounded in the fact that regulators were given wide discretion by legislation.[14] Courts' role was confined to limited judicial review of the exercise of that discretion.[15] The very nature of competition policy seemed to call for deployment of a discretion that courts were ill-suited to employ.[16] However the growth of specialist courts and the use of more rigorous methodology in competition economics has allowed judges to bring antitrust law within the forensic method. Hitherto this new confidence has been utilized to strike down decisions by the

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8 Case C-7/97 *Oscar Bronner v Mediaprint Zeitungs und Zeitschriftenverlag* [1999] 4 CMLR 112.

9 Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR I-935.

10 Case T-342/99 *Airtours v Commission* 5 CMLR 7.

11 Olson, *The Logic of Collective Action*, Cambridge, Harvard University Press, 1965, and also Stigler, 'The Theory of Economic Regulation' (1971) 6 Bell Journal of Economics and Management Science 3-21 who argues that the public interest is very unlikely to be promoted by regulators because their 'clients' will tend to be large economic concerns.

12 This consideration points us towards narrowing the scope of competition law towards price-fixing where there is less scope for conflict between courts and/or regulators as to the policy merits involved.

13 See Schwarze, *European Administrative Law*, London, Sweet and Maxwell, 1999.

14 Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, Oxford, OUP, 1986.

15 Davis, *Discretionary Justice in Europe and America*, University of Illinois, 1976.

16 Black, Muchlinski and Walker (eds), *Commercial Regulation and Judicial Review*, Oxford, Hart Publishing, 1998 contains a range of material charting the growth in judicialisation of economic law.

regulator.[17] Damages claims will cause a further shift of power towards the courts. The process of courts moving more aggressively into the field of competition policy will be interesting from this constitutional perspective. In the UK, for example, the CAT has a limited judicial review power over mergers but effectively a regulatory power over Article 81 and Article 82 decisions.[18] Private damages claims will further enhance this regulatory jurisdiction if there are a significant volume of cases. In all these cases courts, rather than NCAs, assume the role of, not just primary fact-finder and decision-taker, but also policy-maker. Competition courts may well develop 'policies' in terms of theories of how competition law should function. This is clearly the case in the United States where a great many key principles of anti-trust law have been laid down by the courts rather than (and sometimes in spite of) regulators.[19] It is of course important to note that the expertise of judges and regulators varies enormously across the EU. In some cases, judges will be highly deferent to their NCA because of this and in other cases, both judicial and executive bodies may be weak. There are a number of obvious pressure points where these conflicts will be played out which are explored below.

Interventions by Public Enforcers: An Open Door?

The first and most basic question is the role and involvement of competition authorities in private law proceedings. Should there be a right of intervention conferred on competition bodies in private cases? If there should be, should it be automatic or limited to certain types of cases? The right of intervention would be controversial and parties might well seek to resist such interference which could prejudice their cases. There is a strong argument for a limited right of intervention because of the wider perspective and greater resources and expertise a public enforcer may bring. In the United States, there are many recent examples of intervention by public enforcers in private cases. These generally take the form of amici briefs. The Supreme Court has recently made reference to such evidence in number of cases: *Verizon Communications v Trinko*[20] on essential facilities where the amici brief on behalf of ten States authorities was not accepted; *Hoffman La Roche v Empagram*[21] on jurisdiction where the court was influenced by the argument that leniency programmes would be undermined; *Intel*[22] where the EU Commission itself filed a brief to explain its powers and procedures to the Court. Most recently in a case on tying *Illinois Tool Works Inc. v Independent Ink, Inc.*[23]

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[17] We see examples of this at EU level in cases like Case T-5/02 *Tetra Laval v Commission (I)* [2002] 5 CMLR 28 and Case T-310/01 *Schneider Electric v Commission* [2003] 4 CMLR 17 and also in the UK in CAT decisions like *Racecourse Association v Office of Fair Trading* [2005] CAT 29.

[18] The judicial review jurisdiction of the CAT is limited to review of decisions by OFT not to refer mergers and market investigations to the CC. See Enterprise Act 2002 s 120 for mergers and s 179 for market investigations. Otherwise the statutory framework says that the CAT jurisdiction is appellate, see s 46 Competition Act 1998.

[19] *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP* 540 U.S. (2004) provides a recent example but there are many others.

[20] *Verizon Communications Inc. v Law Offices of Curtis V Trinko, LLP.* 540 U.S. (2004) 398.

[21] *F. Hoffman la Roche v Empagram S.A.* 542 U.S. (2004) 155.

[22] *Intel Corporation v Advanced Micro Devices, Inc.* 542 U.S. (2004) 241.

[23] *Illinois Tool Works Inc v Independent Ink, Inc* 547 U.S. (2006).

the Court said, 'Our review is informed by extensively scholarly comment and a change of position by the administrative agencies charged with enforcement of the anti-trust laws.'[24] The position in United States seems to be that amici briefs (but not full intervention) from regulators are fairly commonly accepted by the courts and they form one of the factors that influences the ultimate decision. They are not however decisive and the courts appear ready to reject opinions that they do not accept to be sound in competition law terms.[25]

Particularly in Member States where courts are just beginning to decide competition cases and which lack expertise, the intervention of the national regulator may be able to offer considerable assistance to judges. However there are clear dangers in terms of judicial independence if regulators exceed a narrow remit during any intervention. The ultimate decision must be one for the court and national competition authorities should not be able to dictate the outcome of cases. Thus issues like fact-finding, evaluation of evidence and appraisal of competitive harm must be left to the court. Article 15 of Regulation 1/2003 contains some useful declaratory provisions for national courts relating to interventions but these do not take matters much further. Paragraph (3) gives a *right* for NCAs to make written observations 'on issues relating to the application of Article 81 or Article 82' to their national courts. However, full intervention through oral submission is allowed only with the permission of the court. No guidance is given on when this should be done but Article 15(4) does say that the Regulation applies without prejudice to any wider powers of intervention bestowed upon NCAs under national law.

There should be clear guidelines from courts when such intervention will be permitted and what the evidential status of such material will be. A tentative view is that intervention should be confined to three kinds of case: (1) those raising important novel issues of principle where the intervention may be essential to ensure that courts do not overlook essential arguments; (2) those in which a party seeks to mount a collateral challenge to the policies or guidelines of the competition authorities and (3) those concerning significant competitive harm across the wider economy. This last one is the most difficult to define but should include cases where the litigation concerns part of a wider set of practices that do have significant competitive harm, even if the particular proceedings themselves do not alone meet this threshold. This would also include cases involving a challenge to a dominant firm controlling an essential facility or network.

Competition Authority Policy and Decisions: Binding on Courts?

Even if interventions are permitted, this leaves open the extent to which courts should follow the opinions and conclusions of public authorities. The public enforcers may wish to direct courts in what the public interest requires by reference to their greater knowledge of the state of the market in question. They may give views on economic science, market definition, abuse or other issues. The competition authority might have

[24] Per Stevens J at 3.

[25] *CE Continental v GTE Sylvania* 97 S. Ct. 2549 (1977). The federal bench in the United States has no formal requirement that economic or anti-trust training be undertaken but judges can opt to do so.

reached a view of general importance on, for example, the essential facilities concept in Article 82.[26] Should a court seek to apply or reject such a view in a private damages claim before a national court? Or should courts respect the decisions and policies of the competition agency with their panoramic view of the competition landscape? Courts may reject such evidence but this will depend on their jurisdiction, expertise and culture. In Europe, public enforcement is the tradition and courts will without doubt be ready to defer to public enforcers more readily over some matters, particularly relating to the wider public interest, when intervention occurs. Courts in some Member States may feel that they lack the expertise to question the regulator's views. This issue will be an acid test for the relative power of courts as against regulators. The confidence and ability of judges to challenge regulators will obviously depend upon the training, resources and jurisdiction of courts. The EU is clearly attempting to ensure that the European Competition Network is a functioning reality and judicial training is a key part of that. This will have benefits but there are constitutional and practical dangers too and these interactions will have to be carefully managed. The rise of the expert judge will undermine one of the bases for competition authorities claimed primacy, namely technical skill in complex economic evaluations. However NCAs can still lay claim to more extensive knowledge of the wider public interest.

As regards adjudication, there is also an issue of consistency of decision-making between courts and the competition agencies. Where a previous relevant decision has been taken by a competition authority, how far does a court have to follow? At EU level, the well-known *Masterfoods* decision[27] applies. This states that national courts cannot make judgments that are contrary to decisions already taken by the Commission in respect of the same agreements or practices. This doctrine, now set out in Article 16 of Regulation 1/2003, is a narrow one as was recently confirmed by the United Kingdom House of Lords in the *Crehan* litigation. National courts are only bound by formal Commission decisions directed at a party to subsequent national litigation in relation to the same agreement or practices already ruled on by the Commission.[28] Informal findings contained in a comfort letter addressed to a party or formal decisions about another agreement do not fall within *Masterfoods*. At the level of principle, the House suggested that it would be an abdication of the judicial role and a breach of the right to a fair trial for a court not to make its own findings on the evidence.[29] The *Crehan* decision suggests that there is neither an obligation nor any justification for courts to simply accept regulators informal or general views on facts which are disputed in proceedings. The House of Lords did not appear to think that a trial court should give any particular weight to such views, especially where the court has heard more extensive evidence than was before the regulator.

The narrow *Masterfoods* approach could be followed by national courts in relation to their own competition authorities. However this hierarchy of regulator over courts

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[26] See the debate between the EU Commission and the ECJ in the *Oscar Bronner* case.

[27] C-344/98 *Masterfoods Lrd v HB Ice Cream Ltd* [2000] ECR I-1369.

[28] *Inntrepreneur Pub Company and others v Crehan* [2006] UKHL 38

[29] Per Lord Bingham at para 11-12.

results only from the supremacy principle within EU law.[30] It does not mean that it should be applied in the context of the relationship between NCAs and courts. However there are indications that it will be followed in Member States. In the UK, infringement decisions and findings of fact made by the NCA are binding on the Competition Appeal Tribunal when a follow-on damages action is brought by one of the injured parties.[31] This mirrors the US Clayton Act practice of giving plaintiffs the benefit of shifting the burden of proof to the defendant in follow-on actions. In Germany this has been taken further such that a decision by any NCA among the Member States is binding on the German courts. This latter is a powerful display of comity and faith in the workings of the competition system across the EU by the most long-standing and respected competition authority in Europe.[32]

Competition Damages Claims as Public Interest Litigation

Private damages cases will inevitably straddle both the private dispute between the parties and the wider public interest in promoting sound competition laws. As noted above courts need to go about the task of adjudicating impartially vis a vis the parties without losing sight of this wider perspective. They may need to involve public authorities to assess this question. In fact we may go further and note that, if the rhetoric is to be believed, this is really a form of public interest litigation. If so, this is wholly novel and should be treated in a much more sympathetic manner than traditional private litigation. What should this public interest litigation look like in terms of procedural rules? There are a few precedents in the UK for courts modifying their approach in recognition of the wider public benefit that a litigant may confer by litigation.[33] However these cases have all involved challenges to public bodies and were aimed at upholding the rule of law. The courts will have to move a considerable distance to view cases brought against private defendants as meriting such favourable treatment. Where the plaintiff is a consumer organization acting in some sense *pro bono publico*, then there is a stronger case to characterize the proceedings as public interest litigation. However where large corporate rivals are employing competition litigation to further commercial interests, it hard is difficult to see why they should benefit from more permissive rules than any other commercial litigant just because they have invoked competition law in their pleading. Cases brought by small companies or their trade federations, of limited means, against dominant firms would fall somewhere in between this spectrum. The courts may have to evaluate the litigants' motives and also the wider public interest of the case in order to decide on how to conduct the litigation. That could lead to uncertainty but it is not beyond the courts' capacity.

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[30] See the classic C-14/68 *Walt Wilhelm v Bundeskartellamt* [1969] CMLR 100. See the contribution by Assimakis Komninos for further detail on this argument.

[31] Section 58 and section 58A of the Competition Act 1998.

[32] It is important to note that the UK and Germany rules on follow-on actions only apply after the time-limit for appeal against the NCA decision has expired or the decision has been up-held on appeal.

[33] For example, in *R v Prime Minister exp Campaign for Nuclear Disarmament* [2002] EWHC 2777(Admin) and *R v ECGD exp Cornerhouse* [2005] EWCA Civ 192 protective costs orders were made.

Overseeing Litigation and Settlement

The conduct and settlement of proceedings by the parties is one area where the courts may need to exercise a heterodox vigilance to uphold the public interest. Traditionally courts in UK, for example, have been very non-interventionist in relation to settlement. Only in cases of litigants under a disability have courts been required to decide on the adequacy of settlement.[34] If competition law is about promotion of public interests, then perhaps more rigour is required and a more inquisitorial style of litigation management. Thus for example where parties reach a compromise, it is important that the court is rigorous in reviewing the grounds for this and vigilant in rejecting suspicious deals. The potential for settlements that actually facilitate anti-competitive conduct is real. A graphic example of the kind of behaviour that will become normal was illustrated in the recent *Claymore Dairies v OFT*[35] case. The matter concerned a complaint against the OFT for refusal to take action against Wiseman for abuse of dominance and concertation in the milk industry in Scotland. In an attempt to settle the case, lawyers for Wiseman threatened that they would expose Claymore as a cartel-member during the final hearing and suggested that Claymore withdraw from the litigation by telling the CAT that the complainant had now accepted the correctness of the OFT decision.

The CAT ultimately found that the OFT decision should be quashed but also considered the behaviour of the lawyers. The CAT was concerned that this form of bargaining might be a contempt of court and gave guidance on the issue. It emphasized that the purpose of competition law is to protect the public interest and parties must not use threats which interfere with that end. Thus cartel allegations must be put to the authorities not used to induce settlement. As this was a first case on the matter, the CAT in the end concluded that it was improper conduct but took no further action against the solicitors concerned. This emphasizes the fact that courts should not be misled regarding settlement and reciprocal allegations must be made openly to the relevant authorities. Private litigants will find their bargaining tactics restricted in such cases. Settlements that attempt to allocate markets or lead to other forms of concertation will come under review by the court. There are serious questions about the scope of this limitation however because the courts cannot know all the factors that go into a particular settlement and assess their worth in money terms very easily. Parties may find it difficult to negotiate freely and in confidence if they believe that they will have to justify themselves to the courts. But that is the very clear aim of a decision like *Claymore Dairies*.

Limiting Costs Risks

The approach to costs is also something that the public interest may bear upon.[36] Thus the traditional rule that the loser pay the winner's costs in might be seen to be too discouraging of private enforcement. The Green Paper discusses this and proposes a

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[34] O'Hare and Hill, *Civil Litigation*, Sweet and Maxwell (2000) Ch.35.

[35] *Claymore Dairies v OFT* [2006] CAT 6

[36] See John Peysner's contribution in this volume for a detailed analysis of the costs jurisdiction in the UK.

rule that only manifestly unreasonable plaintiffs should pay costs and that limits on costs recovery should be made at the outset of cases.[37] In the United Kingdom, public interest litigation has recently been given significant encouragement by a relaxation of the traditional costs rule. For example in *Campaign for Nuclear Disarmament*[38] the Divisional Court granted the applicant, a pressure group, a 'protective costs order'. This effectively limited the amount of costs that it would have to pay if it lost the case to a fixed sum known in advance. The defendant in that case was a government minister and the case was brought to test the legality of war in Iraq. The public interest was clear and pressing. The law was developed further in the Court of Appeal decision in *Cornerhouse*[39] where guidelines were laid down for when such orders would be made. These included that the action was genuinely being brought in the public interest and not for private gain and that it would be discontinued without protection against costs.

Translating this to the competition context, we can see an example of this in *Federation of Wholesale Distributors v OFT*[40] where the CAT adopted a more lenient approach to costs. This case concerned a refusal by OFT to refer a merger to the Competition Commission. There was a challenge brought by a third-party but this was fairly swiftly withdrawn. The OFT sought its costs of defending the matter. The CAT emphasized that, whilst there must be some costs consequences for unsuccessful parties, courts should not apply rules 'in a way that might deter applicants or would have a chilling effect on the development of this jurisdiction.'[41] In *GISC* the CAT said that costs rules should not be, 'seriously counter-productive, from the point of view of achieving the objectives of the Act, particularly as regards smaller companies, representative bodies and consumers.'[42] These cases are important and may give a clue to the approach the CAT would take in a private damages claim however it is important to note that the defendant here was a public body accused of wrongly exercising its statutory discretion. Moving to the context of litigation brought to challenge anti-competitive behaviour by private companies, perhaps a more traditional approach will be applied. A private defendant may have acted against the public interest but courts have generally drawn a sharp distinction in their treatment of challenges to conduct by private and public bodies.[43] Principles of public interest litigation have only applied in cases of judicial review of public bodies. The idea that private damages actions in competition cases should also merit the application of such principles is novel. If adopted, the courts will have to assess each case carefully to determine the public interest being served by the litigation and thus decide on whether a more generous approach to costs is merited.

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37 At 2.6.

38 *R v Prime Minister exp Campaign for Nuclear Disarmament* [2002] EWHC 2777 (Admin).

39 *R v ECGD exp Cornerhouse* [2005] EWCA Civ 192 protective costs orders were made.

40 *Federation of Wholesale Distributors v Office of Fair Trading* [2004] CAT 11.

41 At para 38.

42 At para 54.

43 Although longstanding in continental legal systems, the public/private division was made clear in the United Kingdom in cases starting with *O'Reilly v Mackman* [1983] 2 AC 237 and including *R v City Panel on Takeovers and Mergers ex parte Datafin* [1987] QB 815 and *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 AC 624. The decision in *Mercury Communications v Director-General of Telecommunications* [1996] 1 WLR 48 does not change the conclusion that private bodies are immune from judicial review.

This would involve a consideration of the scale of harm to consumers caused by the practice, an assessment of the strength of the merits, the likelihood that public enforcement may be forthcoming in any event and the respective means of the plaintiff and defendant. Courts should give consideration to cases where a plaintiff can show that a prima facie well-founded action to challenge seriously damaging anti-competitive conduct cannot be brought without a protective costs order. The order might well only apply to a particular stage of the case. Thus a split trial could be ordered with a protection against costs order only applying to the liability stage of the case or up to the exchange of expert evidence. The court could then review matters at that stage to reassess the merits and thus the appropriateness of extending the protective costs order.

THE COMPETITION AUTHORITIES: THE IMPORTANCE OF MAINTAINING CONSTITUTIONAL INDEPENDENCE AND ADMINISTRATIVE PROPRIETY

As regards the competition authorities, there are challenges as well as benefits presented by a rise in damages claims. The benefits are clear in terms of greater enforcement efforts and better deterrence, the challenges are less obvious. As noted above courts may come to threaten the authority of NCAs to direct competition policy. More importantly, if greater incentives to sue for damages lead to large numbers of damages claims, the public authorities may become swiftly embroiled in such cases. In a Community of 27 or more competition authorities, if one authority can be persuaded to assist a private action, then an infringement decision could be used to collect damages across the EU, assuming the *Masterfoods* decision is extended that far. If private parties begin to demand high levels of assistance from national enforcers then their constitutional independence may be undermined.[44] This may lead to various problems. First, diversion of scare resources and priorities away from public enforcement actions that may produce more public benefit. Second, maladministration in the form of inconsistent or incoherent decisions about which private actions to support. Third, public enforcers may find themselves isolated by defendant firms or whistle-blowers that fear any engagement will come to be exploited by plaintiff lawyers. Co-operation and sources of information may dry up. Finally, in extreme cases, dishonest or corrupt practices by public officials in charge of investigations may emerge.[45] This is particularly likely in countries that already have relatively high-levels of corruption in

[44] With 27 Member States and NCAs in each, the risk of interest group capture is not fanciful. NCAs may not all be robust enough to withstand the financial pressure that may come to bear upon them or their agents. The importance of interest groups in European politics is emphasized in many writings: Scharpf, 'Community and Autonomy: Multilevel Policy-making in the European Union' (1994) 1 Journal of European Public Policy 219. For the theoretical model see Stigler, 'The Theory of Economic Regulation' (1971) 6 Bell Journal of Economics and Management Science 3-21.

[45] The economic model is well-known and posits that regulators are utility maximizers who may seek to sell their services to competing 'clients'. Public officials face a range of incentives and disincentives to either comply with their public duties or to act corruptly. If pan-European private damages actions become lucrative then there is a possibility that public officials may seek or be offered a share of the proceeds in return for their help. The incentives to act corruptly will increase. See Becker G and Stigler G, 'Law Enforcement, Malfeasance and Compensation of Enforcers' (1974) Journal of Legal Studies 3:1-19.

public service.[46] There are a number of these in the European Union particularly the new Member States of Romania and Bulgaria, who have had to make commitments to tackle governance. The standard models of corruption in public officials emphasize that the expectation of such behaviour increases where the rewards go up without any increased risk of detection.[47]

The broad conclusion of the following section is that the constitutional and policy independence of executive bodies must be maintained alongside any new damages culture. This has implications for a number of aspects of competition authority policy: the types of cases that are investigated; the access given to private parties in their pursuit of claims as regards documentary evidence; and, finally, the exercise of discretion over whether to issue an enforcement decision. These all illustrate aspects of discretion held by public bodies which must be exercised in accordance with their constitutional position. They must remain independent of private parties. This requires that there be clarity and consistency about when assistance will be rendered to private parties. Failure to do this will lead to competition authorities becoming drawn too deeply into private interests leading to them being compromised in their independence. At the very least, in the absence of such policies, they will be unable to demonstrate consistent and rational administration and be open to judicial review on this ground. To avoid this there must be clear guidelines on executive action and great vigilance by courts, auditors and ethical standards agencies. These are set out in greater detail below.

The US Experience under the Clayton Act: A Legislative Order to Render Assistance?

The comparison with US law is instructive in considering the relationship between public and private enforcers. US private enforcement was given some powerful encouragement by the Supreme Court in several important post-war cases. The Clayton Act gave the right to sue for treble damages but also procedural benefits from prior public enforcement. This related to the suspension of the limitation period where public enforcement was on foot and the use of judgments secured by public enforcers as prima facie proof in private damages claims. The Supreme Court interpreted these provisions widely in a purposive fashion in *Emich Motors v General Motors*[48] saying the provisions:

> 'reflect a purpose to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions.'[49]

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[46] See Transparency International's Corrupt Perceptions Index 2005 which sees Poland at 70th position in terms of the most corrupt nations in the world according to this particular methodology. This is the same position as Burkina Faso. Czech Republic and Slovakia are at 47th position jointly. Italy is 40th and Romania is presently 85th. There are 161 countries surveyed.

[47] Rose-Ackerman S, *Corruption and Government*, Cambridge, CUP, 1999.

[48] 340 U.S. 558 (1951)

[49] At p 566.

This legislative purpose was used by the Court to justify a wide reach regarding the extent to which jury verdicts made in public prosecutions are binding during later follow-on private damages claims.

Later in *Minnesota Mining v NJ Wood Co,* a case on limitation periods, the Court made even more explicit links between private and public enforcement:

> 'it is plain that in 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions … The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances … Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed so useful is this service that government proceedings are recognized as a major source of evidence for private parties.'[50]

When the damages litigation culture began to grow in the 1960s in the United States, these views were utilized by plaintiff lawyers critical of the low level of assistance from public enforcers they were receiving in damages claims.[51] The Clayton Act was taken as a leitmotif justifying greater and greater assistance for plaintiffs. Although the courts never fully endorsed this, there was considerable pressure brought to bear on public authorities to change their policies in a number of respects to accommodate private damages claimants. Discovery was a particular area of dispute with the plaintiffs seeking to obtain a wide array of documents held by public enforcers following their investigations.[52] The problems that European competition law may face in respect of these pressures are set out below.

European Competition Enforcement: A Dependency Culture?

The primacy of public enforcement in Europe was fostered by the Commission through its readiness to take action upon receipt of complaints. We can see many examples of the Commission taking up complaints that probably defied any criteria for the rational use of scare enforcement resources.[53] The practical difficulties of private

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[50] 381 U.S. 311 (1965)

[51] See 'Workshop III: Government Enforcement and Private Actions.' (1972) 42 Anti-trust LJ 208. The participants in this debate generally described the government as unhelpful and lacking enforcement zeal. See for example Mayor Joseph Alioto: 'if there is a lawyer, for example, who has a client who comes in who thinks that he has been the victim of a price fixing conspiracy as a consumer, you have a choice. You can go to the government and say, 'Look, I think we have a price fixing case here.' You can then expect to be shunted around unless you actually come in with the documents in your hand like the case I just mentioned. … Go to an identifiable plaintiff's lawyer who you know will get at it aggressively and who is staffed to handle it aggressively.'(218-9)

[52] Edward W Mullinix, a defendant lawyer, said during the above debate 'These attempts were rather audacious – offensive to traditional notions of grand jury secrecy, offensive to attorney-client privilege, offensive to the work-product doctrine and highly offensive to the dignity of our profession.' (Ibid at 221)

[53] See for example Case C-22/78 *Hugin v Commission* [1979] ECR 1869 and *BBI/Boosey and Hawkes: Interim Measures,* [1987] OJ 1987, L286/36, [1988] 4 CMLR 67.

enforcement also encouraged complainants to have recourse to public enforcers.[54] The Commission no doubt rightly felt it necessary to build a body of practice and a culture of competition law through pursuing complaints in this manner. This has bred a climate of dependency upon competition authorities in Europe which could grow more serious through the reform of civil litigation. For example, if common rules on assessment of damages were established throughout the EU but little change occurred in relation to discovery, parties would have great incentives sue but little means of doing so themselves. They will then turn to public enforcers to demand even more assistance than they do now. At a basic level they could demand that an investigation take place. They might then seek to secure discovery of material culled by the competition authority using freedom of information laws. They would be relying upon the privileged discovery powers of public bodies so as to by-pass procedural restrictions on private litigants.[55] Finally, they might demand that an enforcement decision be taken against their target in order to facilitate them bringing a follow-on damages claim.

These observation take on increased significance if there were to be mutual recognition that NCA decisions have binding effect in the same way as *Masterfoods* held applies to those of the European Commission. A private party who can persuade any NCA among the 27 Member States to ensure an enforcement decision may in theory be able to secure damages across the EU subject to rules on jurisdiction. None of this is directly a cause for concern and indeed the efficient use of litigation resources in this manner will help in increasing the deterrent effect of competition law. Nevertheless, these increased incentives will lead to forum shopping to find the most congenial regulator. This will be unacceptable if it results in some regulators engaging in practices which could undermine the wider European competition system.

Regulation 1/2003 in Article 11 provides mechanisms for co-operation amongst authorities and, along with the creation of the European Competition Network, these could be used to combat some of these problems.[56] We have seen recent efforts to encourage consistent practices which may benefit the whole competition enforcement system. Regarding exchange and use of information held by NCAs for example, Article 12 Regulation 1/2003 allows transmission of information between authorities where it is to be used for the purpose of applying Article 81 and 82. Thus such information could also be used to help private litigants sue by providing them with discovery. The Regulation does not attempt to deal with the problem of protecting informants against such a risk. However, this is now acknowledged in the recently agreed ECN Model Leniency Programme which seeks to harmonize leniency policies. As part of this it notes that discovery in civil proceedings of statements made by leniency applicants risks 'dissuading co-operation in the CAs' leniency programmes [and] could undermine the

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[54] See the report prepared by Ashurst solicitors for the European Commission on private actions.

[55] Under Arts 18 and 20 Regulation 1/2003 the Commission is only required to show that the demands for information or inspections relate are 'necessary' in the sense that they are legitimately considered to be related to the presumed infringement. Case T-39/90 *SEP v Commission* [1991] ECR II-1497. The test in UK law for the OFT under s 25 Competition Act 1998 to justify an inspection is 'reasonable grounds for suspecting' a violation of Articles 81 or 82 which is perhaps higher but still not too burdensome.

[56] See Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/03.

effectiveness of the CAs' fight against cartels.'[57] The Programme therefore provides that oral statements by leniency applicants be allowed where appropriate. However it does not require protection of records of oral statements from discovery save up to the issuing of a statement of objections by the competition authority. This was said to be impossible to achieve because of diverse national laws on disclosure of public records. There needs to be further work of this nature to ensure that national competition authorities are being mutually reinforcing in their enforcement policies. There should be development of consistent policies on disclosure of documents to third parties generally to ensure the right balance between openness and confidentiality. For example, there could be protection afforded to defendants who make informal enquiries with competition authorities about the legality of business practices. This should be confined to cases where the practices do not have as their object the restriction of competition. There could also be co-operation on the selection of those markets across several Member States that are worthy of investigation and the development of joint public enforcement policy priorities. This will mean that European competition enforcement is more coherent and less *ad hoc*.

Breaking the Umbilical Cord: the Need for Strict Guidelines on Public Assistance for Private Litigants

The competition authorities must be alive to these issues and anticipate them by providing clear guidelines on which kinds of complaints will be pursued and which will not. The private sector and national courts must be encouraged to develop their own autonomous methods and resources for enforcing competition law. At EU level, we have the *Automec v Commission*[58] decision which gives the Commission wide discretion about which cases to investigate. The Court of First Instance said, 'in the case of an authority entrusted with a public service task, the power to take all organisational measures necessary for the performance of that task, including setting priorities within the limits prescribed by law … is an inherent feature of administrative activity.'[59] As a consequence, the Court said, 'the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.'[60] Finally, the Court in *Automec* approved the use of the 'Community interest' as a priority criterion for deciding on whether to investigate a matter in depth. It may be assumed that NCAs will find themselves allowed similar discretion when applying EC competition law by national courts.

For NCAs and the Commission there is however a need to formalize policies on this issue in order to maintain good standards of administration embodying consistency, rationality and transparency. In the absence of these, NCAs may find themselves pursuing some complaints and refusing others without sufficient grounds to distinguish between cases. The process could become quite arbitrary. If large damages claims hinge upon prior public enforcement action, judicial review of refusals of assistance will

[57] Para 47.

[58] Case T-24/90, [1992] ECR II-2223.

[59] Para 77.

[60] Para 77.

become more common. In addition, if the philosophy of the Commission Green Paper is followed and private damages claims are in the public interest, it may become more difficult to justify refusing to assist a willing complainant. There is the potential for extensive satellite litigation between the public authorities and parties unless the executive adopts and applies defensible policies on these matters. Indeed, the problem of complaint driven enforcement is already beginning to be questioned. Based upon his concern that public resources were being misdirected by aggressive private complainants, the Chief Executive of the OFT has recently said that his NCA will concentrate resources on cases where private enforcement is not feasible rather than continue to provide public support to investigate disputes between large rival firms.[61]

The basic rule should be that private litigants should stand on their own feet and bring damages claims themselves in national courts. They should bear the risks and costs of litigation and not attempt to divert public authorities from their own priorities.[62] There should, of course, always be flexibility in policies. Authorities must not absolutely fetter their discretion.[63] Where for example a complainant is clearly too impecunious to bring private proceedings but the case is one with wider benefits which are consistent with the goals of the competition authority, public enforcement might be appropriate. Similarly, where private damages actions would fail due to restrictive national limits on discovery, the public enforcer's wider powers might be appropriately deployed.

The United States example is again useful here; the FTC and Department of Justice have clear staff guidelines on which kinds of cases will be investigated and at which stage approval is required to conduct further enquiries.[64] The FTC guidelines look at factors like how likely private enforcement is in the absence of public action, complexity of the matter, consumer benefit and novelty. The decision to investigate must ultimately be one for the authority exercising its very wide discretion in such matters. However, the rationality of that exercise of discretion will be greatly enhanced by clear guidance. This author would strongly endorse such guidelines which combine clarity with sufficient flexibility. At the EU level, the Commission did produce guidance on its prosecution policy in the Commission Notice on handling complaints.[65] This was ostensibly published in order to provide clearer guidance on procedural rights of complainants. However it does not provide much in the way of illumination as to which cases the Commission will investigate and up what level. Rather it seeks to maintain maximum discretion for the Commission by providing an open-ended list of

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[61] Keynote speech by Phillip Collins, Chairman, OFT, IBC UK Competition Law Conference, London, 1/12/05.

[62] The 'free-rider' problem is real in this area with many large firms seeking to use public authorities to do the hard work of enforcement for them. This distorts the 'market' for competition enforcement because it reduces the costs that firms have to pay for enforcement without adequate justification. The risk/reward calculus that every litigant has to engage in is alterted. Only where the overall social welfare benefit of a particular piece of public enforcement exceeds the opportunity cost should it be pursued.

[63] In English administrative law the concept of fettering discretion is a not a rigid one but depends upon the nature of the discretion given. The leading case is *British Oxygen v Ministry of Technology* [1971] AC 610.

[64] See FTC Operating Manual Ch.1-3, especially 3.3 on authorizing full investigations beyond initial phase. This appears to limit initial phase investigations to 100 staff hours.

[65] OJ 2004, C101/65.

reasons to reject a complaint. The one concrete reason for rejection of a complaint arises where a complainant 'can bring an action to assert its rights before a national court.'[66] This follows from the emphasis in the Notice upon the complementary nature of public enforcement by the Commission and private enforcement before national courts.[67] Here the Notice notes the duties and powers of national courts to provide effective remedies, including damages, and that this is an important factor in deciding when the Commission need not take action itself.

However, the ECJ decision in *UFEX*[68] does impose limits upon the extent to which the Commission can reject a complaint on that basis alone. In this case, the Commission had made a decision rejecting a complaint, inter alia, on the grounds that an infringement decision was being sought to aid a damages claim in the national court. The ECJ annulled the decision, saying that, even if such a claim was being brought that did not allow the Commission to reject it without establishing the facts necessary to decide whether anti-competitive conduct was continuing and, if so, whether the Community interest required enforcement action be taken. The effect of this decision is to require the European Commission to make a balanced decision that takes account of a range of factors, when deciding to reject a complaint. Good administration by a competition authority requires that the menu of such factors be published and known in advance by complainants and potential defendants. The factors used by the Federal Trade Commission are indicative and should be given careful consideration by European competition agencies.

Disclosure of material held by the competition authorities to plaintiffs is also an area where great care must be taken. At EU level, the basic rules on access to documents are contained in Regulation 1049/2001[69] which covers all the EU institutions. This right of access to documents for EU citizens and legal persons residing a Member State is subject to Article 4(2) which states that institutions:

> 'shall refuse [underlining added] access to a document where disclosure would undermine the protection of … (1) - commercial interests … including intellectual property; (2) - court proceedings and legal advice; (3) - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.'

There is also an exception in Article 4(3) for documents drawn up or received by the institution disclosure of which would, 'seriously undermine the institution's decision-making process'. This again is subject to an overriding public interest in disclosure being present. Where a document originates with a third-party they must be consulted first unless the status of a document is clear.[70] The mandatory injunction to refuse disclosure of these types of documents unless an overriding public interest prevails,

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66 Para 44.

67 Paras 12-18.

68 Case C-119/97 *Union Francaise de L'express (Ufex) v Commission* [1999] ECR I-1341.

69 Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents.

70 Article 4(4).

presents a challenge because it does not give the Commission a wide discretion to disclose.

Documents held by DG Competition as a result of investigations might well fall into some of the non-disclosable categories. Leniency applications and other documents relating to negotiations between the Commission and private parties are other obvious examples that might be excluded from disclosure.[71] Documents that were obtained by compulsory powers of inspection would seem to be disclosable (subject to legal privilege and business secrets exceptions) but only once the investigation had concluded. Could the Commission or an NCA argue that promotion of private damages claims was 'an overriding public interest' which justified disclosure of an otherwise protected document? This seems doubtful despite the strong support given to damages claims in the Green Paper. The benefits of disclosure would be too intangible when set against the harms which non-disclosure is designed to prevent. Authorities may find that co-operation from defendants is much reduced if they adopt too liberal a disclosure policy toward private plaintiffs.[72]

For national competition authorities, disclosure rules will fall under national freedom of information statutes at first instance. Space precludes a full survey of these but it is reasonable to suppose they contain similar exceptions as the EU regime.[73] NCAs will need to adopt clear policies on how these broad freedom of information rules intersect with the public interest in effective competition policy. Ideally this should occur through the European Competition Network. To the extent that national authorities have legal power to do so, disclosure to third parties should be restricted where it would substantially harm public enforcement. One example is the case of information held by an authority as a result of a company coming forward voluntarily with it. To disclose such information might lead to companies declining to approach authorities in the future which could lead to concealment of anti-competitive practices.

Similar observations can be made about the decision to close a file after an investigation. The FTC has very clear rules on what kinds of file closing procedures to adopt.[74] Where a settlement is reached without a formal cease and desist order, there is the publication through the Notice and Comment procedure. Affected parties may make observations but the discretion to settle rather than proceed to final decision is one for the prosecutor. However here again there must be guidance on what kinds of cases are appropriate for settlement and which are not. The debates in the 1960s and 1970s in the United States between plaintiffs and prosecutors reveal concern amongst the former that government targets to settle cases were leading to inappropriate closure of files.[75] The 'slap on the hand' approach was properly criticised by plaintiff lawyers

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[71] See Green Paper on Damages Actions at 2.7 which notes that leniency applications should not be discoverable.

[72] This is also a reason to protect whistle-blowers from joint and several damages claims as the Commission argues in the Green Paper.

[73] Birkinshaw, *Freedom of Information*, London, Butterworths, 2000.

[74] See FTC Operating Manual.

[75] 'Symposium: Relationships Between Government Enforcement Actions and Private Damage Actions' (1967) 37 Anti-trust LJ 823. See for example the comments of Lee A. Freeman 'We submit that the way to a

eager to secure res judicata or estoppel decisions to bring follow-on actions. The plaintiffs argued that Congress intended private actions to be key weapon in the fight against anti-competitive behaviour and that public authorities had a positive duty to assist by not settling. This goes too far but it is clear that any policy on settlement must be defensible else it too could be challenged as an unlawful fetter on discretion to prosecute.

In the EU context, this issue now arises under Regulation 1/2003 because of the power to make a commitment decision pursuant to Article 9. These only arise where a Statement of Objections has been issued but the Commission no longer wishes to proceed. Similar procedures exist in some Member States and decisions to accept undertakings are clearly useful alternatives to the expense of prosecution. This author suggests that undertakings should not be taken in cases of serious violations of competition law whose object was to create widespread consumer harm. Similarly where proceeding to a formal decision would not be expensive in terms of resources then this should be done in order to provide public vindication of the competition laws. Finally, where a meritorious private plaintiff would not be able to afford to pursue a stand-alone damages action, serious consideration should be given to making a formal decision where the agency cost is not excessive. Facilitation of follow-on actions in such circumstances is a justifiable use of public resources because of the deterrent effect it produces.

CONCLUSIONS

It is concluded that private and public enforcement are perfectly compatible but there needs to be explicit recognition of the courts' role as promoting competition in the public interest even in private cases. This requires some modifications of the tradition Anglo-American adversarial civil procedure. This should allow for controlled intervention by public authorities, less strict costs rules and more inquisitorial methods, especially regarding settlement. In their substantive adjudication courts must have careful regard to the decisions and practice of competition authorities in order to preserve the constitutional balance of the enforcement system. For competition authorities, there is a great need to produce clear and defensible guidelines on when they will render assistance to private enforcers. Thus issues such as investigation, prosecution and settlement priorities must be made more transparent. Competition authorities may wish to concentrate resources on the most serious abuses such as cartels or in particular sectors of the economy. They should devise rules which allow them to do so. Similarly rules on disclosure of material must be clear. Failure to do this may lead to inconsistency and maladministration. The policies on such matters are essential to maintain constitutional independence and integrity of enforcement agencies. The best encouragement to private litigation is to provide clearly defined but limited assistance to private plaintiffs to the extent that this is consistent with the published competition policy goals of the public enforcement agencies.

businessman's heart and mind is through his profit and loss statement. The need to repay damages inflicted - threefold – is the only effective deterrent. But consent decrees without admission of guilt tend to circumvent the policy favouring damage claimants.'(829)