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Private Enforcement of Competition Law

from a Corporate Social Responsibility

Perspective:

Too Much of a Good Thing?

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Summary

At the beginning of this century, the EU set itself the ambitious goal of becoming the most competitive, sustainable and dynamic knowledge-based economy in the world. In this context, the concept of corporate social responsibility is gradually presenting itself as the hidden key to success. This means that companies should not just aim at financial gain, but should also take up societal and environmental responsibilities that go beyond their business as usual. Since this is perceived to provide the best guarantee for long-term business success and a sustainable market, the European Commission is determined to use it as a tool to elevate the internal competitiveness of the EU, thereby in turn enhancing its external competitiveness.

Within this context, competition law plays an essential role in regulating the European economy. The latest intent to stimulate observance of competition law is by promoting private enforcement thereof. The purpose of this thesis is therefore to analyse the current debate around private enforcement of competition law from a corporate social responsibility perspective. Private enforcement is desirable in terms of compensation for those who have suffered from wrongdoings of others. Additionally, it could increase awareness of, and compliance with competition rules. In terms of corporate social responsibility, however, the effects are not per definition as positive. The essential question to be answered is therefore whether private enforcement of competition law can be shaped in a way that fosters rather than frustrates broader policy goals of corporate social responsibility.

This thesis establishes different relationships between corporate social responsibility and competition. Most importantly, social responsibility and competition act in a mutually reinforcing way. Healthy competition in a market will create incentives for companies to outperform competitors by means of socially sound innovation and initiatives. Social responsibility, in turn, boosts competitiveness, especially in terms of image. By enhancing compliance with competition law, private enforcement could provide an

extra push to these mutually reinforcing powers. This thesis establishes, however, that the opposite result is as likely to happen, especially when private enforcement is made too attractive.

Private enforcement policy as proposed so far, could lead to over-enforcement at high social costs. Various side effects will have chilling consequences on competitive and innovative behaviour. For example, competitors might bring suites based on malicious incentives and fear of liability for huge damages compensation will make companies passive. No company will feel called upon to make a viable business case for investing in the changes needed to serve societal or environmental interest if the benefits do not outweigh the risks. Thus, numerous economically and socially desired projects, which in the end might well have been pro-competitive, will not be undertaken.

This thesis emphasises these risks, it does not claim that private enforcement should not be possible at all. The conclusion to be drawn is that private enforcement of competition law could foster corporate social responsibility, under the condition that it is shaped very cautiously. When establishing the final policy framework for private enforcement of competition law, close account should be taken of possible detrimental effects on society. That private enforcement should be encouraged does mean that there cannot be too much of a good thing.

Preface

During the first semester of the Master of European Affairs Programme, I became aware of the current debate concerning private enforcement of competition law. An interesting discussion I wanted to know more about, so my initial intention was to focus my research on this topic alone. However, gradually I came to realise that it would not be easy to add something new that had not been part of the debate already. Therefore, I decided to give my research a creative turn and bring in another hot topic that has my special interest for some time now: corporate social responsibility. Quite a challenge I must admit, since a connection between these topics was not crystal-clear on first sight. Nevertheless, I hope and actually believe that this alternative viewpoint could make an interesting and useful contribution to the ongoing debate around private enforcement of competition law.

I would like to thank everybody involved in the Master of European Affairs Programme for giving me the opportunity to participate therein. Special thanks goes to teachers, friends, fellow master candidates and all others who have made this year an inspiring, fun and memorable experience which will be of immeasurable value for my future.

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Marije Borghart
Lund,
May 2007

Abbreviations

AFEP	Association Française des Entreprises Privées
CFI	Court of First Instance
CSR	Corporate Social Responsibility
DTI	Department of Trade and Industry
EC	Treaty Establishing the European Community
ECJ	European Court of Justice
EU	European Union
ICC	International Chamber of Commerce
NCA	National Competition Authority
OECD	Organisation for Economic Cooperation and Development
SAS	Scandinavian Airline Systems
UK	United Kingdom
UN	United Nations
US	United States of America

1. Introduction

“Europe needs not just business but socially responsible business that takes its share of responsibility for the state of European affairs.”

The European Commission¹

1.1 Background

Companies are more and more expected not just to act as business entities aimed at increasing financial gain, but also to behave as socially responsible citizens. In fact, the perception is growing that sustainable business success and shareholder value cannot be achieved solely through maximizing short-term profits. Instead, optimal conditions can only be established through market-oriented, competitive yet responsible behaviour. Corporate social responsibility is of increasing importance both within the EU and globally and is part of debates about globalisation, competitiveness and sustainability, often referred to as the hidden key to success. Consequently, better regulation and promotion of a responsible business culture are now high on the EU agenda. The ambition is to make Europe a ‘pole of excellence on corporate social responsibility in support of a competitive and sustainable enterprise and market economy.’² In other words, the European Commission is committed to elevate the competitiveness of the European economy by stimulating social initiatives of companies. This in turn is believed to be able to contribute to achieving the strategic goal expressed in the Lisbon Strategy³ of becoming by 2010:

¹ COM(2006) 136 final, 22 March 2006, p. 3.

² Ibid, p. 11.

³ Ten-year program aimed at revitalising growth and sustainable development across the EU, agreed upon in Lisbon, 2000. The fields of focus are economic, social and environmental renewal and sustainability. At the core lies the economic concept of innovation as the motor for economic change and social and environmental renewal. See http://ec.europa.eu/growthandjobs/index_en.htm

“the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”⁴

The fundamental goal is thus to nurture the internal competitiveness, which is in turn essential for external competitiveness. Within this context, competition law plays an essential role in regulating the European economy. Dynamic competition provides the best guarantee that European companies will increase their productivity and innovative potential. Competition law enforcement, like corporate social responsibility, is therefore also a key element of the Lisbon Strategy⁵ and a main concern of the Commission. The latest measure to stimulate observance of competition law is by promoting private enforcement thereof. This means that private parties can bring a lawsuit in front of national courts, mostly for damage claims, when they are harmed by anti-competitive behaviour of others. In 2005, the Commission published a Green Paper,⁶ which sets out possible options to facilitate private damages actions. The purpose of the paper was to stimulate debate on the issue. Debate definitely arose; there are as many advocates as there are opponents, as many advantages as there are disadvantages. Ideally, it enhances observance of competition rules, thereby stimulating a competitive and innovative EU market and thus providing a useful contribution to achieve the responsible business climate that grants Europe a strong position on the global market. There is, however, serious risk for exactly the opposite result.

1.2 Purpose

The purpose of this thesis is essentially to analyse the current debate in the field of private actions for damages from a corporate social responsibility perspective. It will examine whether private enforcement can indeed

⁴ See COM(2002) 347 final, 2 June 2002, p. 3.

⁵ COM(2005) 672 final, *Green Paper on Damages actions for breach of EC antitrust rules*, 19 December 2005. Hereafter ‘The Green Paper’.

⁶ *Ibid.*

produce the suggested positive effects or whether it can become counterproductive by stifling creativity and innovation and by causing conflicting priorities for companies. The question I will try to answer is therefore: can private enforcement of competition law be shaped in a way that fosters rather than frustrates broader policy goals of corporate social responsibility?

1.3 Method and Material

Although a lot has been written on private antitrust enforcement, this literature is, in my view, characterised by substantial lack of variation. Most writing concentrates solely on the specific options brought forward in the Green Paper and all review this from the same legal angle. The Commission's approach, too, is quite one sided. It does not provide sufficient reflection on the impact on the defendants, whether legal, economic or financial, of the items it submits for discussion. To my opinion, more should be taken into account before the most optimal policy form can be determined. It is surprising that the Commission pays so little attention to the high costs for Europe's business environment and society that might appear. Therefore, I decided to add an interesting new dimension to the current discussion by confronting myself with the challenge to analyse private antitrust enforcement in the light of corporate social responsibility, rather than applying a pure legal analysis.

However, whether there is a relevant connection between the two concepts or even a connection at all, was not clear from the beginning. By trying to make a creative contribution to the discussion I also run the risk to come to no other conclusion than that it is of little relevance to examine private enforcement from a corporate responsibility perspective. Nevertheless, I believe that closing down roads also contributes to, or is even essential for, the eventual creation of an optimal system.

This thesis will involve not only legal issues, but will also touch upon the law and politics as well as law and economics perspectives, which in my opinion fits well into the interdisciplinary character of the Master of European Affairs. Hence, the sources I have used are on the one hand the usual legal sources, primary and secondary EC law, case law of the European Courts and of course literature on EU but also US law. On the other hand, I have analysed policy documents of the Commission, like the Green Papers on private enforcement and corporate social responsibility, as well as studied economic literature and researches that are performed on the interface of law and economics.

1.4 Delimitations

Because I analyse a broader dimension of private antitrust enforcement, this study will not be purely legal and predominantly of a horizontal character rather than taking a vertical approach by only assessing one small aspect. This thesis is thus not an attempt to be exhaustive in describing all aspects of private enforcement or corporate social responsibility, but rather endeavours to establish the overarching links between these concepts and their value for the discussion on private enforcement policy.

1.5 Disposition

This thesis is divided into five chapters, throughout which the issues relevant for achievement of its purpose are discussed from a relatively broad towards a narrow and interrelated perspective. The first chapter introduces the subject and outlines the purpose and structure.

The second chapter focuses on the role of competition law within the EU and private enforcement thereof. The emergence of this concept will be discussed with the help of ECJ case law, and it will be assessed why and how the Commission is promoting private enforcement of competition law.

The third chapter analyses the concept of corporate social responsibility and its growing importance. Thereafter, it will be assessed where these concepts stand in relation to competition; whether these goals are mutually exclusive or rather connected and mutually reinforcing.

The fourth chapter links the two previous chapters and discusses private damages actions for infringements of competition law from a corporate social responsibility perspective. Several options from the Green Paper will be discussed to show that an imprudent approach towards private enforcement can seriously endanger the competitive and innovative climate the Commission is striving for.

The fifth chapter draws a conclusion as to the interface between private enforcement of competition law and corporate social responsibility. Additionally, suggestions are made to ascertain a signal towards companies that responsibility pays, instead of makes them pay. Cautious remarks are expressed in order to assure a win-win situation in which private enforcement of competition law fosters rather than frustrates broader corporate responsibility objectives.

2. Private Enforcement of Competition Law

“Businesses and individuals who suffer losses because of illegal activities (...) have a right to compensation. Currently, this right is all too often theoretical because of obstacles to exercising this right in practice.”

Neelie Kroes⁷

2.1 Competition within the European Union

Competition within a market is generally believed to be the best tool to achieve the optimum set of products and services in terms of price, quantity and quality and consumer choice.⁸ By encouraging competitive behaviour, competition law thus seeks to benefit consumers and the economy as a whole, while such a competitive environment also rewards enterprises that respond efficiently to consumer demand.⁹

In the European Union, competition law is regulated by Articles 81 and 82 of the EC Treaty.¹⁰ Article 81 is the principle instrument for the control of anti-competitive agreements, which can be either horizontal, between firms at the same level of the production cycle, or vertical, between firms at different levels of the same cycle. Article 81(1) catches agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. In accordance with Article 81(2) EC, such

⁷ EU Press Release IP/05/1634, 20 December 2005.

⁸ Federal Trade Commission report: *To promote innovation: the proper balance of competition and patent law and policy*, October 2003, p. 3.

⁹ OECD Guidelines for Multinational Enterprises 2000, p. 53

¹⁰ Treaty Establishing the European Community 1957 as amended in accordance with the Treaty of Nice, consolidated version 2002 OJ C 325/1.

agreements or decisions are automatically void, unless they fall within the exemption of Article 81(3) EC.¹¹

Article 82 EC is essentially aimed at controlling market power. It prohibits abuse by one or more undertakings of a dominant position within the common market if this affects trade between Member States. Thus, this Article does not prohibit market power per se. Companies are encouraged to compete whereby the most efficient players will become most successful. It would be odd to penalize the winner for being more efficient than the other players are. Hence, instead of targeting market power in itself, Article 82 rather aims to control the behaviour of a company in such a position.¹²

Competition law has always been a fundamental element of EU policy. Competition law plays a crucial role in the establishment of one single, open and dynamic market with optimal exploitation of economic activity and benefits for end-consumers. Competition law is thus one of the cornerstones of the European economy and its provisions are essential for the fulfilment of tasks assigned to the European Community as well as for the achievement of growth and sustainable employment.¹³ Finally, competition law is of central importance in facing the challenges of globalisation.¹⁴

2.2 Private enforcement of competition law

Based on its fundamental importance, the Commission is constantly seeking to enhance competitive behaviour and compliance with competition rules within the EU. One of the latest measures to achieve this is by stimulating private enforcement of competition law, which can nowadays be found at the top of the Commission's priority list. Private enforcement means that private parties can file a lawsuit in a national court in case of harm caused by anti-competitive behaviour of others, for example by claiming damages.

¹¹ Such an escape is only possible if (i) the agreement improves the production or distribution of goods or promotes technical or economic progress; (ii) consumers receive a fair share of the resulting benefit. (iii) it contains solely restrictions which are indispensable to the attainment of the agreement's objectives; and (iv) it cannot lead to the elimination of competition in respect of a substantial part of the products in question.

¹² P. Craig & G. De Búrca, *EU Law*, third edition, Oxford 2003, p. 992.

¹³ See www.europa.eu/scadplus/glossary/lisbon_strategy_en.htm

¹⁴ European Parliament *Draft Report on the Green Paper*, 24 October 2006, p. 8.

To get a clear understanding of this concept it is essential to first analyse the background scene against which the promotion efforts of the Commission take place.

2.2.1 Modernization of EU competition law

In 1999, the Commission issued a white paper on reform of the competition policy from a procedural perspective,¹⁵ which led to Council Regulation 1/2003/EC.¹⁶ The white paper proposed a comprehensive modification of the enforcement regime, aimed at shifting the supervision of day-to-day activities from the Commission to national authorities. At the basis for this modernisation lays the ever-increasing workload of the Commission, causing lack of resources to deal with notified agreements or to adjudicate individual exemptions within a reasonable time.¹⁷

The traditional system was characterized by a centralized approach. The basic rule of procedure was that agreements had to be notified to the Commission, which also held a monopoly to grant exemptions under Article 81(3) EC. The altered system is more decentralised and removed both notification and the Commission's monopoly with regard to Article 81(3). National competition authorities (NCAs) and national courts will be able to apply Article 81 in its entirety.¹⁸

According to the Commission, the centralized system was needed at the foundation of the EC, but many of the central rules of EC competition law are now well established and capable of being applied at national level. The time was there to implement legislation designed to meet the challenges of

¹⁵ *White Paper on Modernization of the Rules Implementing Article 85 and 86 of the EC Treaty*, Commission Programme 99/27, 28 April 1999. *Commission Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ 2000 C 365E/284.

¹⁶ *Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ 2003 L 1/1. The regulation entered into force in 2004.

¹⁷ Craig & De Búrca 2003, *supra* note 12, p. 1063.

¹⁸ Subject to the possibility of making a preliminary reference under Article 234 EC. Craig & De Búrca 2003, *supra* note 12, p. 1062-1063.

an integrated market and a future enlargement of the Community.¹⁹ Nearly half a century had gone by of policy development and administrative enforcement by the Commission itself and judicial rulings by the ECJ and CFI. European competition law was now sufficiently clear for undertakings and individuals to enforce their rights, in the same way as in other areas of law, before the national courts or specialist tribunals. This decentralized system would allow the Commission to focus on novel problems or particular severe breaches of competition law.²⁰

One objective related to this reform was to increase the private enforcement of EC competition law as, and this is important to keep in mind, a complement to public enforcement. Major breaches will generally be subject to investigation by the NCAs or the Commission. However, not all infringements are investigated by public authorities, let alone sanctioned and private enforcement could fill the gap. The idea is that by encouraging private enforcement, infringements will decrease; private enforcement is not an aim in itself. The Competition Commissioner has stressed that the Commission is interested in fostering a competition culture, not a litigation culture:

“Every effort should therefore be made to design a system which protects the genuine interests of the final consumer without imposing a disproportional burden of the defendant.”²¹

This wording mirrors the view of predecessor Mario Monti who expressed the concern to avoid the “excesses of certain other jurisdictions.”²²

¹⁹ H.H. Lidgard, *Competition Classics; Material & Cases on European Law and Practices*, Course Material University of Lund 2006/2007, p. 436.

²⁰ J. Pheasant, “Damages Actions for Breach of the EC Antitrust Rules: The European Commission’s Green Paper”, in: 27 *European Competition Law Review* vol. 7 2006, p. 365.

²¹ Competition Commissioner N. Kroes, *Enhancing Actions for Damages for Breach of Competition Rules in Europe*, dinner speech at the Harvard Club, New York, September 22, 2005. *Damages Actions for Breaches of EU Competition Rules: Realities and Potentials*, speech at the conference “La réparation du prejudice cause par une pratique anti-concurrentielle en France et à l’étranger: bilan et perspectives”, Cour de Cassation, Paris, October 17, 2005.

²² M. Monti, *Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation*, IBA—

Yet, in the light of the modernisation, private enforcement will ease the Commission's workload since private parties will also bring actions at national level, based on the direct effect of the Articles 81 and 82.²³ They are in turn not dependent on approval of the Commission and can combine community law claims with those of domestic nature. Hence, national courts are proclaimed essential forums for the enforcement of EC competition law in the sense that they are able to order interim measures and, unlike the Commission, grant damages.²⁴

2.2.2 What does it really imply?

Private parties are increasingly meant to play a double role in the enforcement of competition law. With regard to public enforcement, they are essential to bring complaints about anti-competitive behaviour. The Commission and NCAs may start investigations based on any such complaint. Under this procedure, the complaining party has not to bear the enforcement costs but neither can it claim compensation for loss suffered by the infringement.²⁵ Enforcement of antitrust law before national courts by individuals and companies could thus be a good alternative.

The Commission clearly favours such a possibility. The primary benefit from private actions for damages is of course that it ensures that those harmed by anti-competitive activity are compensated for their losses. Furthermore, it hopes that civil actions create a culture of competition with more awareness and support for the competition rules and their enforcement.²⁶ Together, these effects would strengthen the deterrent effect on potential offenders and stimulate compliance. The prospect of being

eighth Annual Competition Conference, Fiesole, September 17, 2004. Clearly a diplomatic reference to the prevailing view that a combination of features of US private antitrust litigation leads to excesses; discussed in more detail in chapter 4.

²³ See paragraph 2.2.2.

²⁴ G. Berrisch, E. Jordan and R.S. Roldan, "E.U. Competition and Private Actions for Damages", 24 *Northwestern Journal of International Law & Business*, no. 3 Spring 2004, p. 586.

²⁵ C. Diemer, "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules", 27 *European Competition Law Review* 6, 2006 p. 310.

²⁶ N. Kroes, *Damages Actions for Breaches of EU Competition Rules: Realities and Potentials*, supra note 21, at 3.

taken to court for damages, adds to the deterrent effect of public actions, thereby strengthening the enforcement of antitrust law, the Commission believes. Additionally, the possibility of successful damages actions can uncover otherwise undetected infringements of competition law. Parties that possess industry specific knowledge and interact with suppliers or rivals that behave anti-competitive often are the first to notice an infringement.²⁷ Nevertheless, many doubt whether facilitated access to national courts alone is sufficient to reach the goals of the Commission, because a higher number of undesirable claims could follow, which could result in counteracting effects, as we will see in Chapter 4.²⁸

Regardless of being favoured or not, fact is that so far very few damages claims have appeared before national courts for breach of competition law. In other words, right now theory is much better than practice. Private enforcement in Europe is still in its infancy, or at least it is clearly not practised on the scale familiar from the United States, where some 90% of antitrust proceedings are initiated by private parties.

A study was initiated on the conditions for damages claims in case of infringement of EC antitrust rules in the Member States. The comparative study presented a picture of ‘total underdevelopment’ and analysed for every single Member State the obstacles to private actions for damages. This so-called Ashurst Report linked the low number of private actions directly to the “astonishing diversity” of approaches displayed by the Member States.²⁹ Before we come to the discussion of the possible solutions the Commission puts forward, it is interesting to have a look at the development of case law concerning damages actions by individuals in case of infringements of EU law.

²⁷ J. Rüggeberg & M.P. Schinkel, “Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement”, 29 *World Competition* 3, 2006, p. 395-396.

²⁸ Diemer 2006, supra note 25, p. 311. See also Chapter 4.

²⁹ Waelbroek, Slater and Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules—Comparative Report*, Ashurst, Brussels 31 August 2004. Available at <http://europa.eu.int/comm/competition/antitrust/others/actionsfordamages/comparativereportcleanen.pdf>

2.3 General development of ECJ case law

2.3.1 Fundamental provisions of EC law

Due to the essential role competition law plays in the achievement of the EC objectives, Article 81 and 82 EC were declared fundamental provisions within EC law.³⁰ These articles were almost instantly given direct effect, which means that they are directly applicable in relations between individuals and create rights in respect of individuals, which national courts must safeguard.³¹ Moreover, the EC competition rules have primacy over national rules. EC law and national law can exist in parallel, but in case of a conflict, Article 81 and 82 EC prevail and the conflicting national rule has to be set aside.³² In sum, national courts have to safeguard protection of the rights of individuals from harmful effects caused by infringements of the competition provisions.

2.3.2 Development towards a right to damages

There is no provision in the EC Treaty that provides for actions before an EU Court by a private party against another private party for a violation of EU law; nor is there any provision that sets out under which conditions private parties can sue each other before national courts for the violation of EU law. Thus, such actions must be brought before the national courts under national procedural rules.

Despite this lack of reference in the EC Treaty, the ECJ has developed a general principle of entitlement to damages for private parties and created minimum standards for the enforcement of EU law. Particularly, the ECJ set two limits on the application of national procedural rules, known as the principle of equivalence and effectiveness. The remedies available to enforce EU law must not be less favourable than those available to enforce

³⁰ Article 3(1)(g) EC. See also Articles 2(1) and 4(1) EC and C-126/97, *Eco/Swiss China Time Ltd v Benetton International NV*, 1 June 1999 ECR I-3055.

³¹ C-127/73 *BRT v. SABAM I*, 30 January 1974 ECR 51.

³² C-14/68 *Walt Wilhelm v. Bundeskartellamt*, 13 February 1969 ECR 1.

comparable national law provisions and it may not be made impossible or excessively difficult for parties to exercise rights derived from EU law.³³

The most famous ruling in which the ECJ went further and indicated that EC law requires national courts to provide a specific form of remedy is *Francovich*.³⁴ The Court stated that the full effectiveness of Community rules would be impaired and the protection of the rights they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law. The principle of state liability for harm caused to individuals by breaches of Community law for which a state can be held responsible is inherent in the Treaty system.³⁵

As appears from *Francovich*, the effectiveness of Community law would be weakened if individuals were unable to obtain redress when their rights were infringed by a breach of Community law. The right to reparation can be said to be a necessary consequence of the direct effect of the provision whose breach caused the damage³⁶ and necessary for the full and complete implementation of the Treaty. The specific extension of the right to compensation for damages to horizontal situations, damages resulting from a breach of EC law by private rather than state parties, emerged in 2001 in the field of competition law.

2.3.3 *Courage v. Crehan*³⁷

In 1991, Mr Crehan concluded two 20-year leasing contracts regarding public houses with IEL, a merger between brewery Courage and Grand Metropolitan plc. IEL ran a policy that all its tenants had to buy their beer exclusively from Courage. Consequently, Mr Crehan had to purchase a fixed minimum quantity of specified beers, while IEL agreed to deliver the

³³ C-33/76 *Rewe v. Landwirtschaftskammer*, 1976 E.C.R. 1989, par. 5.

³⁴ This case concerned the principle of state liability to provide compensation for breach of EC law. Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

³⁵ Par. 33-35. Further foundation for the obligation on the part of the Member State to pay compensation for such harm is to be found in Article 5 EC, under which Member States are required to nullify the unlawful consequences of a breach of Community law, par. 37.

³⁶ Cases C-46/93 & C-48/93 *Brasserie du Pêcheur SA v. Germany*, and *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-1029, par. 20-22.

³⁷ Case C-453/99 *Courage Ltd v. Bernard Crehan* 20 September 2001, ECR I-6297.

supply of specified beer to the tenant by Courage at the prices shown in the latter's price list. In 1993, Courage brought an action for the recovery from Crehan of the sum of more than GBP 15 000 for unpaid deliveries of beer. Mr Crehan, however, brought up in defence that the exclusive purchase obligation was contrary to Article 81(1) EC and he counter-claimed for damages. The basis for Crehan's claim was the fact that Courage sold its beer to clients not bound by the beer tie at substantially lower prices than those given in the price list imposed on its tied tenants. He contended that this price difference resulted in a reduction in profitability for tied tenants, thereby driving them out of business.

English law, however, did not allow a party to an illegal agreement to claim damages from the other party. Moreover, in an earlier judgment the Court of Appeal had held that Article 81(1) EC was designed to protect third-party competitors and not parties to the prohibited agreement. It was held that they are the cause, not the victims of the restriction of competition. This background let the Court of Appeal to refer questions to the ECJ for a preliminary ruling concerning the compatibility of the national law in question with Community law. More specifically, two questions were at stake in this case. First, can a co-contractor rely on a breach of Article 81 EC before a national court to obtain relief from the other party and obtain compensation for loss resulting from being subject to an unlawful agreement? If so, the second question concerns the factors that should be taken into account when assessing the merits of such a claim for damages.

The ECJ concluded that any individual could rely on a breach of Article 81(1) EC before a national court, even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.³⁸ The Court recalls that national courts are required to ensure that Community law provisions take full effect and to protect the rights they confer on individuals.³⁹ The Court then proclaims, in line with *Francovich*, that the full effectiveness of Article 81 EC would be at risk if it were not open to any individual to claim damages for loss caused to him by a contract

³⁸ Par. 24.

³⁹ Par. 25, see *supra* note 7.

or by conduct liable to restrict or distort competition. The existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices that are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition within the Community.⁴⁰

Article 81 EC thus precludes a national rule under which a party to an anticompetitive contract is barred from claiming damages for loss caused by performance of that contract.⁴¹ However, the Court also asserted that Community law does not preclude a national rule barring a party to an unlawful contract from obtaining damages where it is established that that party bears significant responsibility for the distortion of competition.⁴² The ECJ referred the case back to the English High Court to decide whether Crehan was entitled to damages.⁴³

This judgment is of essential importance in the light of the current discussion on private enforcement of competition law. The follow-up came in 2006 with the ECJ ruling in the case of *Manfredi*.

2.3.4 Manfredi⁴⁴

In 2000, the Italian competition authority declared that several insurance companies had implemented an unlawful agreement in view of exchanging information between them. The agreement facilitated the increase in premiums for compulsory civil liability insurance relating to accidents caused by motor vehicles, vessels and mopeds that was not justified by prevailing market conditions.

⁴⁰ Par. 26 and 27.

⁴¹ Par. 28.

⁴² Par. 31.

⁴³ *Bernard Crehan v. Inntrepreneur Pub Company and Brewman Group Limited* 2003 E.W.H.C. 1510 (U.K.). The plaintiff was not ultimately compensated because the national court found that the underlying agreement was not unlawful.

⁴⁴ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, and Nicolò Tricarico, Pasqualina Murgolo v. Assitalia SpA*, 13 July 2006.

Vincenzo Manfredi and others brought actions before a national court to obtain restitution of the increase in the premiums paid as a result of the unlawful agreement. The local court asked the ECJ to provide guidance in the interpretation of certain principles of EU competition law. One of the questions was whether third parties who have a relevant legal interest may rely on the invalidity of a prohibited agreement and claim damages where there is a causal relationship between the agreements and the harm suffered. The Court recalled that the principle of invalidity can be relied on by anyone, and that the courts are bound by it once the conditions for the application of Article 81(1) EC are met and so long as the agreement concerned does not satisfy the grant of an exemption under Article 81(3) EC.⁴⁵ The Court then proceeded with a similar line of reasoning as in *Courage* and concluded that any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC.⁴⁶

Another question concerned the possibility of national courts to award punitive damages of their own motion. The Court determined that it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law.

Further, it follows from the principle of effectiveness that injured persons must be able to seek compensation not only for actual loss, but also for loss of profit plus interest. Total exclusion of loss of profit as a head of damage for which compensation can be awarded cannot be accepted in the case of a breach of Community law since, such a total exclusion of loss of profit would make reparation of damage practically impossible.⁴⁷

⁴⁵ Par. 57.

⁴⁶ Par. 61.

⁴⁷ Par. 95-96.

2.4 The Green Paper on Damages Actions

It is now clear that infringement of the EU competition rules generates rights to damages, which undertakings and individuals may enforce in national courts. However, instead of providing clear guidelines, case law is filled with unclear and inconsistent references to “effectiveness” “effective protection” and “effective judicial protection”.⁴⁸ It is thus questionable whether the use of EC law to establish breach and a right to compensation and the parallel use of national law to establish the amount of compensation, is a certain or satisfactory solution.

In fact, there are numerous reasons why private enforcement of EU competition law remained underdeveloped in Europe, yet the main reason is perhaps this regulation by national law instead of EU law. Inconsistency in the different judicial systems across Europe in, for example, standard of proof, fault requirement and establishing causality creates legal uncertainty. Moreover, there are concerns about the capacity of the national courts to deal with questions related to Article 81 and 82 EC. Another remark could be that individual incentives to bring damages case before national courts are too weak in the absence of punitive or multiple damages, class action suits and contingency fees. Furthermore, it will often be very hard for the plaintiff to prove both a breach of competition law as well as damages because of that breach. Finally, it could also be argued that European citizens generally do not seem to be that concerned about the absence of private enforcement, also given that losses from antitrust violations are often widely dispersed and thus do not pose a serious threat for the individual.⁴⁹ Overall, the European tradition is in general far less plaintiff-friendly than in the United States for example.

It has to be concluded that although the ECJ has established the possibility of damages actions and certainly improved the position of private parties, a notable increase in actions before national courts has failed to appear. Thus,

⁴⁸ S. Drake, “Scope of Courage and the principle of ‘individual liability’ for damages: further development of the principle of effective judicial protection by the court of justice”, 31 *European law Review* 6, 2006, p. 846.

⁴⁹ W. Wils, *The Optimal Enforcement of EC Antitrust Law; Essays in Law and Economics*, The Hague 2002, p. 18-19.

given the inadequacies of using case law to fill the gap, the Commission in 2005 published its Green Paper on how to facilitate damages actions for breach of the EC antitrust rules.⁵⁰ This document leaves no more doubts about the Commission's intention to give private litigants greater weight within the current enforcement scheme.

The Green Paper states that actions for damages serve a two-fold purpose: compensation and deterrence. Besides reimbursing loss suffered, private damages claims should contribute to the maintenance of effective competition in the Community while also bringing individual companies and consumers closer to competition rules, who thereby become more actively involved in enforcement of these rules.⁵¹ What the Green Paper essentially does, is exploring the mechanism of private damages actions and identifying the main obstacles to a more efficient system for bringing damages claims. For each of these obstacles, several options are put forward for debate. The Commission has until recently given all interested parties the opportunity to make comments relating to the various obstacles identified, before it will decide on its definite strategy.⁵²

Soon we will leave the topic of private damages actions behind to assess the broader context in which the discussion appears. However, in order to have a clear picture of the overall dilemma, it will be helpful to appraise shortly which issues the Commission identifies as potentially causing the main problems. First, there are the access to evidence, fault requirement and how to define and calculate damages. Then there is the question concerning the standing of different categories of potential claimants and the linked issue of the passing on defence. Further, questions exist about the need to ensure the rights of consumers and purchasers with small claims and about whether there should be special rules to reduce the cost-risk for the claimant. A particular dilemma appears within the coordination of public and private enforcement, more specifically with regard to leniency programs. Finally, matters concerning jurisdiction and applicable law have to be specified, as well as a number of other issues such as limitation periods and the possible

⁵⁰ The Green Paper 2005, *supra* note 5.

⁵¹ *Ibid.*, p. 4.

⁵² Several of these reactions are discussed in Chapter 4.

clarification of the requirement of causation to facilitate damages actions. Several of these issues will be analysed in further detail in Chapter 4 within the context of corporate social responsibility.

This chapter has analysed the legal perspective on private enforcement of competition law. However, a good understanding of the broader perspective, including economic aspects, is also essential for developing the right legal and institutional settings for optimal private antitrust enforcement. To understand better which dilemma's private enforcement can cause, in particular some of the options set out in the Green Paper, requires a framework includes business concerns and interests. Due to the limited size of this thesis, only a very small aspect can be discussed. Therefore, the next chapter will explain the growing responsibilities of companies within the context of corporate social responsibility. More importantly, a link will be provided between these concepts and competition.

3. Competition and Corporate Social Responsibility

“There is one and only one social responsibility of business: to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”

Milton

Friedman⁵³

“Contrary to theorists who for centuries declared the corporation to be an amoral creature, society today has endowed the corporation with a moral personality.”

Lynn Sharp Paine⁵⁴

3.1 Growing societal expectations

Simply speaking, over time the primary stance on the responsibilities of business entities has shifted from the view expressed by Milton Friedman to the allegation of the second quote. It is increasingly believed that companies should not only behave as commercial entities focussing on purely economic priorities and imperatives, but also act as good citizens, taking into account broader issues and stakeholders' interests.⁵⁵ The conventional view as expressed by Friedman that the only social responsibility of a company is to maximize profits for the shareholders seems impossible to uphold in today's world of increasing globalisation. For an investor the main purpose of business might be to maximize profits, but not for other

⁵³ M. Friedman, “The Social Responsibility of Business is to Increase Profits”, *The New York Times Magazine*, 13 September 1970.

⁵⁴ Professor Lynn Sharp Paine of Harvard's Business School. See K. Katen, Vice Chairman Pfizer, *The Moral Basis of Competitiveness* Speech delivered to the Southern Institute of Ethics & Commerce Club, Atlanta, Georgia 30 November 2005.

⁵⁵ Stakeholders include employees, suppliers, customers, banks and other lenders, regulators, the environment and the community at large.

stakeholders such as customers, employees and the local community.⁵⁶ As Karen Katen sharply remarked:

“if you think the business of business is simply business than maybe you shouldn’t be in business at all.”⁵⁷

Increased sensitivity and awareness concerning environmental and ethical dilemmas has promoted today’s heightened interest in the role of businesses in society. The media are highlighting negative issues and investors have begun to take account of a company’s social policy in making investment decisions. Corporate governance scandals at internationally operating companies such as Enron⁵⁸ had a worldwide effect on capital markets and placed issues like ethics, accountability and transparency firmly on the business and policy agendas. Although not traditionally responsible for finding solutions to issues like sustainable development, environmental quality and human rights, it is more and more believed that companies have a duty in this regard. Moreover, it will most likely be in the private sector’s best interest to be part of the solution rather than part of the problem.⁵⁹

In general, most commentators believe in a positive relationship between social concerns on the one hand and productivity growth and competitiveness on the other hand, and public policy goals are slowly becoming a normal part of doing profitable business. The interrelated concepts of corporate governance, social responsibility and sustainable development are intensely promoted to stimulate this process. The early twenty-first century is already characterised as the age of governance.⁶⁰

⁵⁶ J. Mackey in a debate titled *Rethinking the Social Responsibility of Business*, available at: www.origonews.com/filemgmt_data/files/rethinking-social-responsibility-of-biz.pdf.

⁵⁷ Katen 2005, supra note 54.

⁵⁸ Enron became notorious in 2001, when it was disclosed that its reported financial state was sustained mostly by institutionalized, systematic, and creatively planned accounting fraud. Enron has since become a symbol of corporate irresponsibility. “[t]his was the most important corporate scandal of our lifetimes.” It caused “the most consequential reorientation of corporate behavior in living memory.” <http://en.wikipedia.org/wiki/Enron>

⁵⁹ World Bank webpage on corporate social responsibility, available at <http://web.worldbank.org/>

⁶⁰ <http://corp.gov.net/library/definitions.html>

3.2 Corporate social responsibility

3.2.1 Corporate Governance

Corporate governance is the core of corporate social responsibility (CSR) and a key element in enhancing economic growth and stakeholder confidence. The term has a twofold meaning: the processes by which companies are directed and controlled as well as a field in economics, which studies the many issues arising from the separation of ownership and control.⁶¹ Hence, corporate governance is the set of processes, customs and policies affecting the way a corporation is directed, administered or controlled. It also regards the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance.⁶² Corporate governance is thus not an abstract goal in itself, but serves corporate purposes by providing a structure within which directors and management can pursue the objectives of the company most effectively.⁶³ There is no single model of corporate governance,⁶⁴ but the principles of the OECD, although non-binding and not aiming at detailed prescriptions for national legislation, provide useful guidelines as they seek to identify objectives and suggest diverse means for achieving them.

In essence, corporate governance concerns the relationships among the many players involved: a company's board and management, its shareholders but also other stakeholders. The shareholders might be the primary parties to whom directors owe a duty of loyalty and in whose interest the company should be managed. Nonetheless, it is in the long-term interest of shareholders for a company to treat employees well, to serve customers well, to keep good relationships with suppliers and to have a

⁶¹ http://en.wikipedia.org/wiki/corporate_governance.

⁶² *OECD Principles of Corporate Governance* 2004, p. 11.

⁶³ The Business Roundtable *Statement on Corporate Governance*, September 1997, p. 2. Available at: <http://64.203.97.43/pdf/11.pdf>.

⁶⁴ “[T]he substance of good corporate governance is more important than its form; adoption of a set of rules or principles or of any particular practice or policy is not a substitute for, and does not itself assure, good corporate governance” and “Good corporate governance is not a one size fits all proposition.” The Business Roundtable 1997, *supra* note 63.

reputation for social responsibility. An excellent example of this will be provided at the end of this Chapter, concerning airline operator SAS.

It thus becomes clear that corporate governance is a multi-faceted subject, with issues like accountability, transparency, trust and ethics as its key principles. Indeed, besides commitment to the company, good corporate governance calls for special attention to factors such as business ethics and awareness of the environmental and societal interests. These issues are highly relevant to a company's decision-making processes as they can have a substantial impact on its reputation and long-term success. In sum, the presence of an effective corporate governance system, within an individual company and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of the market.⁶⁵

3.2.2 responsibility towards employee, consumer, society and environment

Around this core of responsible management, CSR relates to environmental and societal concerns. In essence, corporate social responsibility is the concept whereby companies integrate social and environmental concerns in their business activities and in interaction with their stakeholders on a voluntary basis.⁶⁶ It is the continuing commitment by business to behave ethically and contribute to economic growth while improving the quality of the environment and the lives of employees, the local community and society at large.⁶⁷

Not in the last place, the CSR trend builds on the view that corporations, because of their strength and size, play a profound role in shaping global economies. These corporations have expansive networks that may have the potential to be more effective at distributing values and norms than would

⁶⁵ OECD Principles of Corporate Governance 2004, p. 11.

⁶⁶ COM(2001) 366, 18 July 2001, p. 6.

⁶⁷ World Business Council for Sustainable Development Report, *CSR Meeting Changing Expectations*, 1 March 1999, p.6.

states and international organisations, especially where corporate social responsibility is related to or aimed at the developing world.⁶⁸

Naturally, the main function of a company is to create value through producing goods and services that customers demand, thereby generating profit for its owner and shareholders as well as welfare for society. However, new social and market pressures are increasingly leading to an enlargement of the business activity horizon. CSR slowly requires a business approach that puts stakeholders' expectations and the principle of continuous improvement and innovation at the very heart of business strategies,⁶⁹ an obligation that extends beyond their statutory obligation to comply with legislation.

CSR is closely linked to the principle of sustainable development, which requires that enterprises should make decisions based not only on financial factors, but also on the immediate and long-term social and environmental consequences of their activities. In sum, CSR is thus part of many debates, including those about globalisation and sustainability⁷⁰ but also about competitiveness, as we shall see in the next paragraph, and therefore becoming of fundamental importance for the business climate in Europe.

Among companies themselves, the perception is also growing that sustainable business success and shareholder value cannot be achieved solely through the traditional way of looking for short-term goals of maximizing profit. CSR might often start with a state of denial by a company as to its accountability,⁷¹ but companies change their attitudes when they perceive it in their interests to engage with the issue. Typically, businesses move through a period of compliance, and then see the need and

⁶⁸ K. Sahlin-Andersson, "Corporate social responsibility: a trend and a movement, but of what and for what?", 6 *Corporate Governance* 5, 2006, p. 600.

⁶⁹ COM(2002) 347 final, 2 July 2002, p. 5.

⁷⁰ COM(2006) 136 final, 22 March 2006, p. 2.

⁷¹ Consider the following statement by A.J.C. Brak from Shell International: "As a commercial enterprise we cannot get involved in judgements and actions about human rights which we strongly believe is clearly the domain of governments and intergovernmental organisations and not of business." This statement dates from 1995, while nowadays Shell can be considered one of the frontrunners in the field of CSR. Sir G. Chandler, 'The responsibilities of Oil Companies'. In: A. Eide, O. Bergesen and P. Goyer, *Human Rights and the Oil Industry*, Antwerp 2000, p. 9.

gain from integrating issues into core management processes. Companies realise that it is possible, and even vital, to manage their operations in a way that enhances economic growth and competitiveness, while at the same time contributing to the improvement of societal interests.⁷²

The foregoing holds true especially in today's society, where considerations of image and reputation play an ever more important role in the competitive environment, thereby rewarding social responsibility. Partly because of this, shareholders ask for the disclosure of information going beyond traditional financial reporting to allow them to better identify the success and risk factors inherent in a company and its responsiveness to public opinion.⁷³

For all reasons above, strong business commitment to CSR is becoming increasingly important during the past decades both on local, national, European and global scale. In order to be a successful economic model nowadays, the market economy not only needs an effective legislative and regulatory framework, but also self-limitation and self control as much as a proactive climate of innovation and entrepreneurship, fairness and trust. All these are necessary elements to combine high levels of economic success, environmental protection, social cohesion and welfare.⁷⁴

Due to this growing popularity, better regulation and the promotion of a responsible business culture are now high on the EU agenda. The Commission is committed to boost the competitiveness of the European economy by emphasising the social responsibility of companies and encouraging them to maximize their commitment to CSR goals. The aim is to create a business environment that supports the Lisbon objective of becoming the world's most dynamic knowledge-driven economy in the world. More than ever, the Commission believes, Europe needs a climate in which businesses are appreciated not just for making a good profit but also for making a fair contribution to addressing certain societal challenges.⁷⁵

⁷² COM(2002) 347 final, 2 July 2002, p. 5.

⁷³ Ibid., p. 6. During a seminar on CSR at Lund University, consumer trust and shareholder demands were mentioned by the majority of business representatives as the main reason why their company adopted CSR policies.

⁷⁴ COM(2006) 136 final, 22 March 2006, p. 10.

⁷⁵ Ibid., p. 2.

In conclusion, responsible business practice needs to become truly embedded into business values and culture, a natural part of everyday business practice and competitiveness.

3.3 responsible competitiveness

Business as usual can thus deliver social and environmental benefits next to economic gain, but the fact remains that the market's 'invisible hand' often creates its own motion; the negative impacts of global competition are not always easy to prevent. Individual businesses, even powerful market players, find it difficult to go against the 'grain of the market'. Consumers care, but not always enough to create success out of responsible behaviour. More and more investors are concerned with social and environmental risks, but many remain focused on short-term returns.⁷⁶ Thus, a competition-driven race to the bottom remains a realistic danger.⁷⁷

What is essentially needed is the emergence of 'responsible markets' in the sense that markets reward companies that incorporate responsible practices in their daily operations. This is increasingly believed to be the only way in which competitive markets will create a 'race to the top' in productivity, human development and environmental responsibility.⁷⁸ The challenge is thus not just to find a balance between the needs of competition and other societal interests, but rather to truly embed social and environmental goals and outcomes in the very heart of competitiveness. Debates on responsible competitiveness have only just begun, but research reveals that CSR and competition are linked in different ways, which will be discussed here.

First, it is worth noticing that compliance with competition rules is a component of CSR. The OECD Guidelines for Multinational Enterprises

⁷⁶ S. Zadek, "Corporate responsibility and competitiveness at the macro level; Responsible competitiveness: reshaping global markets through responsible business practices", 6 *Corporate Governance* vol. 4, 2006, p. 335.

⁷⁷ Particularly where competition is intense and where the society's attention is lacking, competition can for instance drive down labour expenses or further the destruction of the environment through extraction or dumping, or a combination of the two.

⁷⁸ Zadek 2006, *supra* note 76, p. 334-335.

pay specific attention to competition.⁷⁹ It is considered part of corporate responsibility that companies should conduct their activities in a manner consistent with all applicable competition laws, cooperate with the competition authorities and promote employee awareness of the importance of compliance with competition law and policies. As a result, many companies mention competition in their codes of conduct.⁸⁰ The OECD guidelines further emphasise that the growth of cross-border trade makes it more likely that anti-competitive behaviour will have harmful effects in other jurisdictions as well. Hence, enterprises are called upon to take into account both the laws of their mother country as well as the laws of the countries in which the effects of their conduct are likely to be felt.⁸¹

The OECD principles of corporate governance even provide that where law protects stakeholder interests, these stakeholders should have the opportunity to obtain effective redress for violation of their rights.⁸² Although most likely aimed at employee rights, the term stakeholders includes consumers, which might imply that even private enforcement of competition law fits within the corporate governance scope.

As much as competition is part of corporate responsibility, good governance is part of competitiveness as well. Real competition policy enforcement requires a high degree of openness, accountability and monitoring; which depends on good governance.⁸³ Particularly companies operating on the global market should place great importance not just on the legal requirements, but also on good practice guidelines. This leads to the question whether competition can foster CSR, rather than frustrate broader sustainable development goals for example. In fact, the answer is a clear

⁷⁹ *OECD Guidelines for Multinational Enterprises* 2000, Principle IX, p. 26-27.

⁸⁰ See for example *Shell Sustainability Report 2005*, p. 17, www.shell.com/integrity; *Alfa Laval Business Principles*, www.alfalaval.com/businessprinciples; *Summary of Pfizer Policies on Business Conduct*, p. 11, www.pfizer.com/pfizer/download/investors/corporate/business_conduct_policies_summary_2003.pdf.

⁸¹ *OECD Guidelines for Multinational Enterprises* 2000, p. 54.

⁸² *OECD Principles of Corporate Governance* 2004, Principle IV, p. 21.

⁸³ M.W. Gehring, *Sustainable Competition Law, for the 2003 Fifth Session of the Ministerial Conference of the World Trade Organization*, Cancun, September 2003.

yes. As the World Bank Competitiveness Advisory Group stated in general terms:

“Competitiveness implies elements of productivity, efficiency and profitability; but it is not an end in itself or a target. It is a powerful means to achieve rising living standards and increasing social welfare – a tool for achieving targets.”⁸⁴

Dynamic competition in an open market is generally believed to provide the best guarantee that companies will increase their productivity and innovative potential. By improving economic governance, stimulating innovation and constant product improvement, competition law also clearly supports CSR and sustainable development.⁸⁵ Increased competitive conditions may lead companies to develop safer, healthier, more environmentally sound or socially just products. Environmental protection provides a good example in this. Throughout the EU, the polluter-pays principle is making ground. In a proper functioning market, unrestricted competition will avoid increased prices resulting from this principle simply being passed on to consumers and impose pressure on enterprises to use and develop less polluting techniques. Once environmental considerations are internalized, competition can then provide the following step on the way to sustainability.⁸⁶

While companies protected by cartels or secure in a monopoly position have little incentives to change their practices, companies faced with competition may seek to develop new product lines, or improve old ones, to meet the environmental and social expectations of consumers.⁸⁷ Where particular global players hold a very strong position in an industry, many small or medium sized enterprises are needed to encourage experimentation and make more sustainable technologies viable; competition law could thus

⁸⁴ World Bank Competitiveness Advisory Group to the President of the European Commission, June 1995. Available at <http://web.worldbank.org/wbi>.

⁸⁵ Gehring 2003, supra note 83.

⁸⁶ A. Boute, “Environmental Protection and EC Anti-Trust Law: the Commission’s Approach for Packaging Waste Management Systems,” 15 *RECIEL* 2, 2006, p. 147.

⁸⁷ Gehring 2003, supra note 83.

achieve benefits. One could think of the energy sector for example, where huge energy conglomerates offer cheap, reliable fossil fuels but thereby crowd out smaller players who could develop new renewable energy sources such as solar, wind or small-scale hydro energy. Competition law and policy that partitions those markets would permit the small companies to make a profit, thereby encouraging the development of these small-scale alternatives.⁸⁸

Finally, it becomes clear that this discussion moves along a circular line. Exactly why competition can foster socially responsible behaviour, CSR can also foster competition. In fact, corporate social responsibility is often seen as the hidden key to increasing competitiveness and productivity of businesses.⁸⁹ As Kathryn Gordon, OECD's chief economist, notices:

“It is almost true by definition that appropriate business behaviour is good for competitiveness.”⁹⁰

Well-managed companies with strong corporate governance records and sensitive social and environmental performance will be able to outperform their competitors. Increasing incorporation of CSR into business practices could result in a method of shaping corporate image as well as of successful innovation.

In a time characterized by anti-globalisation movements and criticism towards specific companies or industries, while the market strength of companies is derived largely from brand image, companies cannot avoid to demonstrate an awareness of social, human and environmental issues.⁹¹ Voluntary initiative beyond legal and contractual obligations whereby certain standards are translated into business operations is essential to build

⁸⁸ M.W. Gehring, “Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law”, 15 *RECIEL* 2, 2006, p. 183 See also ECJ judgment C-379/98 *PreussenElektra* [2001], discussed in Chapter 4.

⁸⁹ EU Press Release 255/2006, *Corporate Social Responsibility is the hidden key to EU's success and innovation*, 22 November 2006.

⁹⁰ *Responsible Competitiveness: Reshaping global markets through responsible business practices* 2005, Executive Summary p. 4.

⁹¹ Sahlin-Andersson 2006, *supra* note 68, p. 596.

trust and preserve confidence of business, thereby enhancing competitiveness over time. Credible, responsible business practices strengthen the legitimacy of the business community and it might enhance trust of other key players such as labour organisations and public bodies. Furthermore, responsible business practices might reduce labour related conflicts and burdensome statutory regulations and increase the flexibility of businesses to respond to changing market circumstances. In effect, as is generally accepted, where business is more trusted, it is given more liberty to do what it takes to remain competitive.⁹² Evidently, the aim of socially responsible behaviour is to send a positive signal to the various stakeholders with whom they interact. In doing so, companies are investing in their future and expect that their voluntary commitment will help to increase their profitability and market position.⁹³

Rather than viewing business benefits in static terms such as reputation and brand gains, the innovation argument suggests that corporate responsibility enables businesses to become better, for example, at developing new products, processes and distribution channels.⁹⁴ It is believed that when CSR is genuinely incorporated into business practices, it could create a sound foundation for innovation that can help to confront social challenges. One can think of innovation into new technologies, into products and processes that are more sustainable or address other previously unmet social needs. Through harvesting the commercial rewards for these innovations, the company's market position will strengthen and its competitiveness increase.

Around 2002, Ohio-based rubber manufacturer Lauren Manufacturing CO, for example, faced killing competition from around the world. Instead of waiting to be exterminated by competition, Lauren chose to take up the challenge by taking a fresh look at things. In 2002, the company decided to change business strategies, but understood the importance of employee sympathy. To ensure full employee support, the company sent every one of

⁹² Zadek 2006, supra note 78, p. 338.

⁹³ COM(2001) 366, Executive Summary.

⁹⁴ Zadek 2006, supra note 78, p. 338.

them a letter announcing the concept of change.⁹⁵ In particular, the company determined that eliminating waste was the way to stay ahead of competition. Furthermore, a statement was made on the necessity to break down the mental walls between divisions, departments and even individual job assignments. The facility was reorganised, jobs reclassified, and the whole transformation towards environmental and employee friendly, sustainable business practices eventually led to a turnover increase of \$ 12 million.⁹⁶

3.4 SAS v. Commission

A clear example concerning corporate governance, containing many of the factors discussed above, concerns the Scandinavian companies SAS and Maersk. Simultaneously, this example provides a link back to the previous Chapter. As we saw at the beginning of this chapter, corporate responsibility starts at the top. It is the board's responsibility to develop responsible management policy, apply high ethical standards and act in good faith, with due diligence and care. In order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information.⁹⁷ The OECD explicitly mentions that an important board responsibility is to oversee systems designed to ensure that the corporation obeys applicable competition laws.⁹⁸ Again, the board is not only accountable to the company and its shareholders, but is also expected to take due regard of other stakeholder interests. Since the board is the primary body to set the ethical tone of a company, it should also bare the consequences of defiant behaviour.

In 2005, the Court of First Instance rejected an appeal by Scandinavian Airlines Systems (SAS) AB against EU fines over a market sharing

⁹⁵ T. Purdum, *Survival of the Fitter – Ohio-based Lauren Manufacturing embraces a lean environment in order to compete*, 1 August 2006, available at: <http://industryweek.com/ReadArticle.aspx?ArticleID=12309>.

⁹⁶ Ibid.

⁹⁷ OECD Principles on Corporate Governance 2004, p. 24-25.

⁹⁸ Ibid., p. 58.

agreement with Maersk Air.⁹⁹ In 2001, the Commission had imposed these fines on SAS and Maersk of respectively € 39.375.000 and € 13.125.000 after it found that these companies have been involved in a secret agreement to share routes between them.¹⁰⁰ Maersk Air had withdrawn from the Copenhagen-Stockholm route, where it was until then a competitor of SAS. At the same time, SAS had stopped flying on certain routes to and from Denmark, leaving Maersk Air as the only carrier. These suspicious practices formed part of a wider market-sharing agreement that included an overall non-compete clause covering the parties' future operations on international routes to and from Denmark and on Danish domestic routes. This was discovered during on-site inspections carried out in June 2000 by the Commission. SAS and Maersk Air were eventually fined and competition between the airline companies consequently restored to the benefit of consumers.¹⁰¹

This was, however, not yet the end of the victory for competition and consumer. After the findings of the Commission in 2001, an independent panel made up of three high-profile lawyers was called into existence to review the actions and responsibilities of the SAS board. The panel strongly criticised the conduct and concluded that even though the nine-member board was not aware of the agreement, it showed a 'lack of activity' after the said office raid by EU antitrust investigators.¹⁰² As a result, the entire board was forced to resign due to irresponsible, unethical behaviour.

Hence, the fact that the board had no knowledge of the agreement made no difference. It was the sum of the criticism that had emerged, as well as the situation SAS found itself in, which made the election of a new board of directors inevitable. According to many, this was the only appropriate course of action:

⁹⁹ T-241/01 *Scandinavian Airlines Systems AB v. Commission of the European Communities*, 18 July 2005.

¹⁰⁰ COMP/D2/37.444, SAS/Maersk Air and COMP/D2/37.386, Sun-Air versus SAS and Maersk Air, OJ L 265, 5 October 2001.

¹⁰¹ <https://www.oecd.org/dataoecd/33/30/2489064.pdf>

¹⁰² *New York Times*, "World Business Briefing – Europe – Sweden: SAS Board Quits", 18 September 2001.

“A board that does not prevent a company from entering into illegal agreements which cost it SEK 360 million in fines has not been doing its job properly. In this light, the crucial question is not what the board knew, but what it should have known. The board’s passivity is reason enough for its resignation. The management of so large a company is dependent on the trust and confidence of the political authorities, its passengers and employees. That confidence was no longer there – and that is why the board had to go. We hope that a new board can rebuild the trust SAS is totally dependent on in a market which is becoming increasingly competitive.”¹⁰³

The Swedish economy minister at that time, Bjorn Rosengren, was of the opinion that SAS should also compensate its customers for the high prices that were the result of the anti-competitive behaviour. SAS has apologised for the cartel but said that it was not going to pay any compensation.¹⁰⁴ Danish and Swedish airline passengers as well as Sweden's consumer ombudsman and the Danish consumers association have threatened to go to court, thereby forcing SAS to refund customers. So far, SAS has ruled out any payment to customers, arguing that the Maersk deal did not cause overcharging.¹⁰⁵ It will be very interesting to see how this will continue. SAS was also punished by investors. Several shareholders sold or considered selling their shares in SAS shortly after the Commission decision, saying that the company's business methods were illegal. At the same time, the press recorded that SAS, which had so far been the prime player on the Scandinavian flights market, was expected to face a fierce attack by competitors aiming to target its displeased customers.¹⁰⁶

¹⁰³http://www.regjeringen.no/nb/dokumentarkiv/Regjeringen-Stoltenberg-I/Utenriksdepartementet/232973/233199/norway_daily_no-178-01.html?id=233547

¹⁰⁴ *SAS apologises for cartel but will not pay compensation*, 8 August 2001, available at: http://findarticles.com/p/articles/mi_m0CWU/is_2001_August_8/ai_77055083

¹⁰⁵ *Customers demand SAS refund*, 13 August 2001, available at: <http://news.bbc.co.uk/1/hi/business/1488394.stm>

¹⁰⁶ *Ibid.* The Danish airline Sun-Air apparently said it was considering a challenge to SAS on flights between Oslo and Copenhagen. A Danish newspaper quoted British Airways' boss in Denmark Sam Heine saying the airline was considering introducing flights between the Scandinavian capitals, a claim later denied by a BA spokesperson who said the airline has no such plans at the moment.

Here we saw how much impact unethical behaviour towards stakeholders can have for a company, how it is punished by its environment and which impact it has on its competitive position. To sum up, under the right conditions, CSR and competition relate to each other in a mutually reinforcing way.¹⁰⁷ This cooperation is thus of utmost relevance for the objective of making the EU the most dynamic, competitive and sustainable economy in the world. CSR is believed to determine in the long run the health of the European economy and consequently the stability and future of the EU. It is thus of primary concern that the European markets functions in a way that systematically and comprehensively rewards businesses for more responsible practices, and penalises them for the opposite.¹⁰⁸ The next chapter will analyse which role private enforcement of competition law can have in this regard. To get a thorough insight, however, it is useful first to make clear how many socially responsible projects come about in practice and the possible dilemma this might raise in terms of competition law. This is all the more useful since that dilemma is often one of the underlying factors in the main problems private enforcement of competition law can cause for CSR goals, as discussed in Chapter 4. Environmental protection will be used as an example.

3.5 CSR Agreements

The optimal system of mutually reinforcing powers as established in this chapter might not always be firmly established in reality. Consequently, companies willing to adopt more socially beneficial practices risk jeopardizing their competitive position, disregarding the image effects for a moment. Consequently, instruments are needed to encourage firms into such practices on a voluntary basis. Environmental agreements are examples of such instruments. In fact, many CSR measures, think of product

¹⁰⁷ For a more detailed discussion see for example M. Molteni, "The social-competitive innovation pyramid", 6 *Corporate Governance* no. 4 2006, pp. 516-526; Chi-Kun Ho "Corporate Governance and Corporate Competitiveness: An International Analysis", *Corporate Governance: An international Review* Vol. 13, No. 2, pp. 211-253, March 2005. Available at SSRN: <http://ssrn.com/abstract=684311>.

¹⁰⁸ Responsible Competitiveness Report 2005, *supra* note 90, p. 4.

improvement, transport restructuring or other measures in the fight against climate change, come about through agreements between companies. If CSR projects require expensive and extensive processes in terms of research, logistics, technology or any other reason, this may only be viable and sensible if several companies team their efforts.

In the field of waste management, for example, manufacturers, packers and distributors of sales packaging are often taking part in a collective system of collection and recycling of their packaging. There is no general legal obligation to participate. The collective concludes waste disposal contracts with recycling companies who, in turn, conclude contracts with undertakings to perform the actual collection, sorting, transport and recycling. Such agreements, especially between competitors, can cause dilemmas from a competition law perspective.¹⁰⁹

Although the Commission finds that environmental agreements do not always constitute restrictions of competition, the attention that its assessment of such agreements actually pays to environmental protection as such is small. Rather, the commission follows a more rational economic application of competition law. Environmental protection is thus no legitimate reason in itself to exempt from competition rules. Some environmental agreements do and some do not fall within the prohibition of Article 81 and some might be exempted under Article 81(3) EC. This is determined by a complicated economic assessment on a case-by-case basis.¹¹⁰

An agreement among the members of the European Association of Manufacturers of Automobiles to reduce CO₂ emissions from new passenger cars, for example, did not violate Article 81(1) EC according to the Commission. It loosely established a sector-wide reduction target and individual members were not bound by specific targets and remained free to determine the means to diminish the emissions of their cars.¹¹¹ Agreements

¹⁰⁹ See Boute 2006, supra note 86, p. 153.

¹¹⁰ See Commission's 2001 *Guidelines on the application of Article 81 of the EC Treaty to horizontal cooperation agreements*, (2001/C 3/02) and 2004 Notice, *Guidelines on the application of Article 81(3) of the Treaty* (2004/C 101/08), OJ C 101/97.

¹¹¹ See European Commission, *XXVIII Report on Competition Policy 1998* (Brussels, 1999), p. 57, par. 131.

can fall under article 81(1), however, if they are presumed to have a high potential for negative effects on competition, for example if they are in fact disguised cartels. An agreement to prevent deterioration in water quality by establishing a conformity label for washing machines and dishwashers was asserted by the Commission as serving in reality to prevent the entry of competitors into the market.¹¹² A collective financing system created by a Danish association of oil companies to cover the costs of the clean up of polluted petrol stations was considered anti-competitive since it would in fact be used to regulate the market.¹¹³

As we saw in the first chapter, agreements that lead to appreciable restrictions of competition can be exempted under article 81(3) EC, providing that four conditions be met.¹¹⁴ These agreements compensate their anti-competitive effects by bringing advantages for the realisation of the internal market. The general approach of the Commission, however, seems to be that these advantages cannot be of a non-competitive, non-economic nature.¹¹⁵ The Commission does integrate environmental considerations in its assessment of potentially anti-competitive agreements, but these considerations are supplementary to traditional economic efficiency arguments. Environmental improvement as such is thus not sufficient for exemption under Article 81(3) EC and can only be taken into account if it would, for example, upgrade production. Genuine environmental agreements generating solely benefits for the environment as a whole could thus be hindered by this a strict economic interpretation.

In essence, the Commission's verdicts whether such CSR related agreements are anti-competitive or not, rely on complex economic assessments on a case-by-case basis. Further, a balance between economic costs and benefits of an agreement is made.¹¹⁶ The outcome of these evaluations will often not be easy to predict by the parties in question. If

¹¹² Commission Decision 82/371, *Anseau-Navewa* [1982] OJ L 169/39.

¹¹³ *Oliebrancher Faellerad* case, see European Commission *XXIV Report on Competition Policy: 1994*, Luxembourg 1995, at 368.

¹¹⁴ *Supra* note 11.

¹¹⁵ Notice on the application of Article 81(3) 2004, *supra* note 112, par. 33.

¹¹⁶ *Ibid.* See also Horizontal Guidelines 2001, *supra* note 112.

numerous courts across the EU have to perform such complex economic assessment, in the context of actions for damages for example, the chances of divergent decision-making will severely increase, with negative implications for the integrity of the internal market.¹¹⁷

Finally, it is interesting to mention that fairly recently, the ECJ was confronted with a similar issue, but in the field of state aid. Germany introduced a law that guaranteed a certain percentage of the German energy market for alternative, renewable energy sources.¹¹⁸ The ECJ upheld the law, ruling that while it violated competition law, it was doing so for the important social goal of protecting the environment.¹¹⁹ Apparently, the ECJ *did* consider environmental protection a legitimate reason to exempt the law from the competition provisions on state aid.¹²⁰ In essence, the uncertainty as to which side the coin will land on, will inevitably create legal uncertainty for the parties involved. The implications this can have in the light of the current discussion will be illustrated in the next chapter.

¹¹⁷ Boute 2006, supra note 88, p. 159.

¹¹⁸ *Stromeinspeisungsgesetz* of 7 December 1990, BGBl. I p. 2633, now replaced by *Erneuerbare-Energien-Gesetz* of 21 July 2004, BGBl. I nr. 40 of 31 July 2004 at 1918.

¹¹⁹ “The use of renewable energy sources for producing electricity, which a statute such as the amended *Stromeinspeisungsgesetz* is intended to promote, is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.” C-379/98 *Preussenelektra AG v. Schleswig AG*, 13 March 2001, ECR I-2099, par. 73.

¹²⁰ See P. Cameron, *Competition in Energy Markets*, Oxford 2002, p. 338-339.

4 damage actions in relation to the competition – CSR interface

“Tech Times Are Good, So Why Not File A Lawsuit?!”

Wall Street Journal¹²¹

“Today you have to start from moral questions in doing business. Competitiveness has to be based on moral concern and honourable action.”

Karen Katen¹²²

4.1 A glance back

As became apparent, competition and social responsibility are both key elements in improving economic growth and efficiency. In an optimal system, these two fields relate to each other in a mutually reinforcing way. Since observance of competition rules is a component of, as well as driving force for corporate responsibility, private damages actions to enforce competition law could be an effective additional. It could enhance awareness of competition law and boost the mutually reinforcing powers even further. However, we cannot ignore the ironic fact that while the EU is desperately seeking to expand private rights of damages actions, at exactly the same time the United States is seeking to restrict those rights. In fact, private enforcement of antitrust law is under attack more than ever since the rise of modern antitrust in the late 1930s,¹²³ and probably not without good reason.

Private antitrust enforcement is an important part of the U.S. legal system, as private individuals initiate over ninety percent of antitrust proceedings.

¹²¹ *The Wall Street Journal*, 20 July 2005, headline of a column by Holman W. Jenkins Jr. on the opinion pages. The column discussed a suit by Advanced Micro Devices Inc against rival Intel Corp and argued that the CEO of AMD is “shrewd enough to realise that a lawsuit can be a branding exercise, a way to garner free media for an ‘AMD Inside’ message to answer Intel’s own long-running and expensive sloganeering over its chips.”

¹²² Katen 2005, supra note 54.

¹²³ S.W. Waller, “Towards a Constructive Public-Private Partnership to Enforce Competition Law”, 29 *World Competition* 3, 2006, p. 371.

Most of these proceedings are actions seeking damages.¹²⁴ The reason for this popularity of private actions for damages is the nature of the legal system: a plaintiff-friendly system in which they often obtain high financial rewards.¹²⁵ The legal factors responsible for this success in the United States include the availability of treble damages, the rejection of the so-called pass-on defence, the availability of class action and the fact that lawyers earn contingency fees on each case won. This system lends itself to abuse, illustrated by questionable lawsuits aimed at extracting settlement payments in the millions.¹²⁶ Moreover, instances are known in which companies refrained from development and innovation due to high risk of harmful damages claims. According to Waller, everyone agrees that if starting afresh in the US, no one would create the system as it is at present.¹²⁷

The US experience should be a clear warning signal for policy makers within the EU. All these factors should be closely examined in order to find the best possible system of private enforcement. In that regard, some serious concerns should be raised about the exact impact of private enforcement as so desperately desired by the Commission, especially in the light of the heavy weight on European companies to enhance Europe's socially responsible and sustainable climate. In March 2005, the European Council proclaimed that:

“In order to encourage investment and provide an attractive setting for business and work, the European Union must complete its internal market and make its regulatory environment more business-friendly, while business must in turn develop its sense of social responsibility.”¹²⁸

124 See Federal Judicial Caseload Statistics, Table C-2: US District Courts – Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-Month Period Ending March 31 2006, available at

http://www.uscourts.gov/caseload2006/tables/c02_Mar_o6.pdf. (Last visited 17 May 2007).
125 For example in 2003, 1.05 billion dollar was awarded in treble damages against U.S. Tobacco Company for violations of the Sherman Act. *Conwood Company L.P. v. U.S. Tobacco Co.*, 290 F.3d 769 (6th Cir. 2002).

126 Berrisch 2004, *supra* note 24, p. 599.

127 Waller 2006, *supra* note 123, p. 375.

128 COM(2006) 136 final, 22 March 2006, p. 4

This attractive and business-friendly climate will be seriously jeopardised if some proposals in the Green Paper are applied too frivolously. Consequently, the social responsibility of companies in terms of projects, products and processes will thereby be hampered instead of stimulated. The most controversial options of the Green Paper will be discussed to strengthen this concern. In this, the intention is not to be exhaustive but rather to point out aspects of law and economics that will be most troublesome for European business.

4.2 The Green Paper assessed

In general, one can start out by noticing that there is a fundamental tension inherent in many of the choices that lie at the basis of the Green Paper, and a careful balance is crucial.¹²⁹ There are options that may be desirable in the light of fostering deterrence, for example by making access to evidence easier or imposing multiple damages. However, exactly these choices may inflict an unintended or undesirable burden on business; think of the high cost of providing access to evidence or the chilling effect of such far-reaching damages on pro-competitive activities.

Essential is further that a distinction should be made between hardcore cartels and more complex, grey-area cases that require careful considerations of the pro-competitive and efficiency enhancing effects of the challenged product or process. One can think of new product introduction, innovative product distribution or other conduct having socially desirable effects as portrayed in the last paragraph of Chapter 3. The Green Paper does not draw a sufficient distinction in this regard.

¹²⁹ *Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities on Damage Actions for Breaches of EU Antitrust Rules*, April 2006.

4.2.1 Fault Requirement

- Option 11: proof of the infringement should be sufficient.
- Option 12: proof of the infringement should only be sufficient in relation to the most serious antitrust infringements.
- Option 13: there should be possibility for the defendant to show that he excusably erred in law.

One of the crucial questions raised by the Commission was whether fault should be a requirement for antitrust related damages actions, as is the case under most national laws of the Member States. The majority of the respondents to the Green Paper answered in the affirmative. This is also the dominant view in Law and Economics literature.¹³⁰ It can be argued that in hard-core cartels there will always be fault but, as illustrated, in competition law there is a large grey area in which it is not easy to assess whether behaviour is legitimate or not. It will become hard for companies to predict the consequences of their own conduct and combined with risk of costly claims, this will undoubtedly have a chilling-effect on innovation and initiative in business practices that goes beyond the normal duties.

As illustrated earlier, agreements within a sector or industry are often necessary in the light of CSR to improve products or production processes, reduce pollution or contribute to the fight against climate change, for example. Research and development agreements and technology transfer agreements are often compatible with competition law and so may other cooperation agreements, but this will normally depend on detailed analysis of circumstances and economic benefits of these agreements. If this uncertainty comes hand in hand with considerable risk of tremendous financial punishment through private damages actions, it is not hard to imagine how this can be disastrous for innovation and CSR.

Hence, abolition of the fault requirement introduces the danger of useful entrepreneurial decisions not being made only because of the risk of

¹³⁰ Erasmus University The Netherlands, *The EC Green Paper on Damages Actions in Antitrust Cases; An Academic Comment*, April 2006.

damages claims.¹³¹ In trying to limit their risk, companies will get passive, for example in the areas of research and development or environmental projects, in order to avoid as much as possible their exposure to damage claims.¹³² In the light of this, Option 13 is most often mentioned as the preferred option. Such a rule would be particularly relevant in areas where undertakings rely on self-assessment under Article 81(3) EC and those where novel or ambiguous issues are raised.¹³³ Only activities that are entered into deliberately or negligently to injure the competitive process should be the basis for an award of damages.

In sum, liability regardless of fault would unjustly place uncertainty and risk on the side of the defendant, especially in non-hardcore cartel cases. It would cause concerns regarding unintended creation of liability and threat of an obligation to pay compensation for damages. This will have detrimental effects on competition, innovation and sustainability. Numerous economically and socially sensible projects that in the end would not infringe competition law will not be undertaken due to significant economic risks. The freedom of action of companies would thereby be unreasonably restricted, to the burden of us all.

4.2.2 Damages

Option 14: definition of damages with reference to the loss suffered by the claimant as a result of the infringement.

Option 15: definition of damages to be awarded with reference to the illegal gain made by the infringer.

Option 16: double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.

The most intense discussion concerning private antitrust enforcement in Europe turns around the nature of damages. The question is whether damages should be purely compensatory; whether they should be based on

¹³¹ *The Cefic Comments of the Chemical Industry on the Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules*, 12 April 2006.

¹³² *AFEP Comments on Green Paper* 21 April 2006.

¹³³ *Vodafone Comments on Commission Green Paper* 2006.

the unlawful profit gained by the infringer, or should even be multiplied in order to establish a real punitive character. As set out before, in the EU actions for damages are in principle governed by the national Member State rules on damages. The ECJ has stressed that damage actions are important to enforce the rights derived from Community law, but did not specifically require the introduction of remedies that allow a plaintiff to recover damages in excess of the losses actually suffered.¹³⁴

No Member State currently permits treble damages. In fact, the vast majority of Member States allows only for the recovery of damages actually suffered and do not even permit the recovery of exemplary or punitive damages.¹³⁵ For example, English, French and German law all see damages exclusively as a way of compensation. The concept of punitive damages was even expressly excluded when it was raised during the debate on the introduction of class actions in France.¹³⁶ In England, exemplary damages have been awarded in exceptional circumstances, but not in the antitrust field. It is possible but far from certain that exemplary damages may be available for a breach of antitrust law in hard-core cartel cases.¹³⁷

Thus, the predominant view is that ensuring the effectiveness of Article 81(1) EC does not necessitate the award of compensation greater than the harm suffered.¹³⁸ Deterrence is seen as an area that should be for competition authorities. They are public authorities, obliged to act in accordance with principles of fair and just administration and not driven by

¹³⁴In *Manfredi*, the Court only determined that it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions based on Community competition rules, if such damages may be awarded for similar actions based on domestic law. *Supra* note 44, par. 65.

¹³⁵ These damages are only permitted under certain extreme circumstances in States such as England and Wales, Ireland and the Netherlands.

¹³⁶ See *Comments of the American Bar Association* 2006, *supra* note 129.

¹³⁷ In England and Wales, public policy might well accommodate a calculation of damages based on illegal gain if it were shown that the profits from infringing behaviour would outweigh any subsequent fines and damages (payable on the traditional, compensatory basis). The Government's current policy is that there should be no further extension of the availability of punitive damages in civil proceedings. This reflects the view that the primary purpose of civil law on damages is to provide compensation, not to punish. See *UK Department of Trade and Industry, Commends on Green Paper*, 21 April 2006, par. 70.

¹³⁸ Advocate General Geelhoed in C-295/04-C298-04, *Manfredi*, 26 January 2006, par. 68.

the prospect of financial gain. Public authorities act in the public interest; private litigants act for private gain.¹³⁹

Not surprisingly, the most controversial option in the Green Paper is Option 16, which considers double damages for horizontal cartels. This option clearly echoes the US punitive treble damages system, but as said, European attitudes are different from the US perspective on damages in private antitrust litigation. Treble damages exist for a long time already under US law whereas even double damages are regarded with considerable cynicism by many in Europe. Furthermore, US society is more comfortable with the role of private enforcement as a deterrent mechanism, and not just a compensatory one.¹⁴⁰ Nevertheless, even in the US the automatic trebling of damages has always been the source of intense debate.

There is some reasonable sense in the Commission's statement that pure compensation of the loss does not always constitute a sufficient incentive for potential plaintiffs to bring an action for damages. Additionally, advocates of this view would argue that without multiple damages, private actions would not serve as a deterrent because infringers need not worry about adverse consequences resulting from their infringements. Even if they have to repay damages, defendants may still have profited from their cartel.¹⁴¹ However, the predominant belief remains that punitive damages do not fit into European legal tradition.

The general argument against multiplied damages is that they create too great an incentive for private litigation because it gives rise to a motivation to file lawsuits even when there is a small chance of establishing a claim, aimed at settlements or false convictions. Rüggeberg and Schinkel warn against the risk of unjust enrichment in this regard;¹⁴² Diemer compares it with the attempt to catch a fish from a common pool.¹⁴³ Because of this risk

¹³⁹ *ICC Comments on the Commission's Green Paper on damages actions for breach of the EC antitrust rules* 2006.

¹⁴⁰ *Comments of the American Bar Association* 2006, *supra* note 126.

¹⁴¹ *Ibid.*

¹⁴² Rüggeberg J. and Schinkel M.P., Amsterdam Center for Law and Economics, Reply to selected questions and options in the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules, 23 April 2006.

¹⁴³ Diemer 2006, *supra* note 25, p. 315.

of gigantic damages reimbursement, bad publicity and litigation costs, in the US serious private antitrust cases are not often resolved on their merits following a full trial.¹⁴⁴

The most important argument against the possibility of elevated damage liability is that it can deter companies from engaging in conduct that may be pro-competitive, innovative, welfare enhancing and in the interest of society. Similar to the risk of no-fault liability, the risk for excessive damages claims will decrease the incentive for innovation, especially since it is not always easy to draw a clear line between legal and illegal conduct. A company may not even know it has violated competition rules until well after the fact. In such circumstances, given the fear of potential future multiplied damage exposure, companies may be reluctant to engage in conduct that would be pro-competitive and beneficial to societal goals.¹⁴⁵ Thus, consumers will not per definition be better off in a system like this, nor will the internal market.

The American and European Pharmaceutical Associations underpin this argument with their own experience. The Associations indicate that they are devoted to promote public policies that encourage innovation in medicines and therefore support initiatives aimed to elevate undistorted competition. However, they are sceptical towards private damages claims for antitrust infringements, as their members have been exposed in the past to numerous private antitrust damages actions in the United States. Such actions proved excessively frustrating because they have often appeared driven by considerations unrelated to the promotion of competition and biased by judicial rules unsuitable to address complex antitrust issues.¹⁴⁶ Indeed, excessive lawsuits against manufacturers of drugs and medical devices have caused initially interested companies from the chemical industry abstaining from research and development and consequent entering into these

¹⁴⁴ Especially in combination with the possibility of class actions, as will be discussed later on in this chapter.

¹⁴⁵ R. Hewitt Pate, Suggested Topics for Antitrust Modernization Commission Study, 5 January 2005, available at: www.usdoj.gov/atr/public/comments/207122.htm

¹⁴⁶ The Pharmaceutical Research and Manufacturers of America (PHRMA) and The European Federation of Pharmaceutical Industries and Associations (EFPIA) (“the Associations”), *commends on Green Paper* 2006, p. 3.

pharmaceutical markets.¹⁴⁷ Vodafone acknowledges this and warns that the introduction of punitive damages could lead companies in high technology industries to avoid legitimate practices that are crucial to interoperability and innovation, in order to protect themselves against speculative claims.¹⁴⁸ The U.S. experience thus teaches us that allowing plaintiffs to recover damages in excess of what they lost would twist their incentives, which can put undue pressure on defendants to settle cases or can dampen their inducement to social responsibility. While the welfare benefits of deterring cartels are clear, deterrence of pro-competitive behaviour and socially desirable initiatives is too high a risk when introducing the possibility of elevated damages. In the end, the effect will certainly be counter-productive. Hence, the Commission will have to take into close consideration the widely divergent policy goals that drive the rationale for one form of damages over another. At any rate, it should be avoided that competition law becomes an instrument to protect competitors from competition, resulting in paralysing effects for the EU's sustainable business climate.

4.2.3 Class Actions

Option 25: a cause of action for consumer associations without depriving individual consumers of bringing an action.

Option 26: a special provision for collective action by groups of purchasers other than final consumers.

A single consumer or purchaser with a small claim rarely has a sufficient interest in bringing a damages case because the individual damage may be comparatively low, think of all individual SAS passengers that might have bought one or more flight tickets during the relevant period. The expected costs of legal proceedings will simply exceed the expected benefits. Through a class action, an individual may sue as a representative of a group of injured persons. This provides protection of consumer interests as well as

¹⁴⁷ *The Cefic Comments of the Chemical Industry on the Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules*, 12 April 2006.

¹⁴⁸ *Vodafone Comments on the Commission Green Paper 2006*.

consolidates a large number of smaller claims into one action, thereby saving time and money.¹⁴⁹ Proponents of class actions have referred to the concept as ‘one of the most socially useful remedies in history’ while opponents called it ‘legalised blackmail’.¹⁵⁰ US Courts generally respond favourably to class actions in antitrust cases but is it doubtful whether the same reaction would appear in Europe.¹⁵¹

Class actions do not exist in most continental European legal systems.¹⁵² However, most national laws do permit several parties, who have suffered damages because of the same course of action, from jointly bringing an action to seek redress. Moreover, in some Member States, consumer associations are specifically entitled to bring actions in the interest of consumers.¹⁵³ Noteworthy in this light is that, at present, the EU is considering proposals to introduce new rules protecting consumer rights in a move that could lead to class action-style suits being coordinated across Europe.¹⁵⁴ This would entail that individuals and consumers bodies in different EU Member States are provided the opportunity to band together in pursuit of collective redress.¹⁵⁵ This development might imply that the EU is becoming more open towards class actions.

Opponents, however, point at the risk of “legal blackmail”. Major class actions against a company, especially in combination with high damages claims, places a great burden on companies, as was recently emphasized before the U.S. Congress:

“We have a system in the United States where the plaintiffs’ lawyers frequently file class actions, and if the class is certified, and if the

¹⁴⁹ The Green Paper 2005, supra note 5, p. 8.

¹⁵⁰ See Waller 2006, supra note 123, p. 373.

¹⁵¹ Berrisch, Jordan & Roldan 2004, supra note 24, p. 595.

¹⁵² With the exception of Portugal and Sweden.

¹⁵³ E.g. England, France, Italy, the Netherlands and Spain.

¹⁵⁴ http://ec.europa.eu/consumers/overview/cons_policy/EN%2099.pdf

¹⁵⁵ “if consumers are to have sufficient confidence in shopping outside their own Member State and take advantage of the internal market, they need assurance that if things go wrong they have effective mechanisms to seek redress.”

alleged potential damages are high enough, then it's only a very imprudent businessman who won't settle."¹⁵⁶

Major class actions can lead to negative media coverage that damages the company's business and reputation. This means that in many cases, companies are under pressure to settle the claim not because of the merit of the claim but to avoid the consequences of bad press. Getting class action lawsuits dismissed at an early stage of the litigation before any expensive and time consuming discovery begins can be difficult. Even if the defendants ultimately win the case – and even if the case is won without having to go to trial – the defendants will suffer significant costs.¹⁵⁷

This, again, creates serious risk for chilling effects on pro-competitive and pro-innovative practices. It will make business passive and paralyses the mutually stimulating relationship between competition and socially responsible practices and innovation. Developing and sustaining an optimal competitive business environment in the EU is vital since competition provides the best incentive for practices beyond profit making to the benefit of society, environment and sustainability. Antitrust policy is crucial in this regard and its enforcement can be fundamental for creating and sustaining a healthy business climate as much as it can be detrimental and responsible for destroying such a climate if not shaped cautiously. Hence, also concerning the option of class actions the argument can be put forward that it creates the risk that fear of unintentional scenarios of liability could entail a genuine disincentive for undertakings to pursue initiative and innovation. This development would therefore undermine the very aims of the Lisbon Strategy the Green Paper is intended to generate.

¹⁵⁶ Testimony of former FTC Chairman Timothy J. Muris before the U.S. House of Representatives, Subcommittee on Commerce, Trade and Consumer Protection, 15 February 2006.

¹⁵⁷ *ICC Comments on the Commission's Green Paper on damages actions for breach of the EC antitrust rules*. See also paragraph 2.3.5.

4.2.4 Leniency

- Option 28: exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of leniency applications.
- Option 29: conditional rebate on any damages claim against the leniency applicant.
- Option 30: removal of joint liability from the leniency applicant, thus limiting the applicant's exposure to damages.

A more general concern regarding the possibility of private damages claims is the impact on leniency programs. Many respondents to the Green Paper express their concern about, for instance, the impact of punitive damages, no-fault requirement and class actions on the willingness to comply with leniency programs.¹⁵⁸ The penalties for companies that breach the competition rules can be very severe. However, companies that have participated in illegal cartels have a limited opportunity to avoid or reduce a fine. The Commission operates a leniency policy whereby companies that provide information about a cartel in which they participated might receive full immunity from fines or a reduction of fines.¹⁵⁹ This system depends much on good citizenship and responsible management of companies, on openness, transparency and accountability. If the result of this cooperative behaviour is that companies run the risk of helping potential private applicants to build damages claims against them, no reasonably thinking businessperson will consider blowing the whistle.

This dilemma is recognised by the Commission and mentioned in the Green Paper as part of the discussion on the coordination of public and private enforcement, as becomes apparent from the three options above. The Green Paper mentions that close consideration should be given to the impact of damages claims on the operation of leniency programs to preserve their effectiveness. For the reasons set out above, most reactions on the Green Paper support its proposals to entitle successful leniency applicants to a

¹⁵⁸ *AFEP Commends on Green Paper* 21 April 2006.

¹⁵⁹ <http://ec.europa.eu/comm/competition/cartels/leniency/leniency.html>

rebate on potential private damages and to remove the risk of joint and several liabilities.¹⁶⁰ The recently adopted US Antitrust Criminal Penalty Enhancement and Reform Act of 2004 limits the civil liability of corporations that participate in the Justice Department's corporate leniency program to single damages attributable to their own share of commerce affected by the violation. These changes to the US leniency program have been generally well received.¹⁶¹

The incentives of an undertaking to apply for leniency may be significantly reduced unless the act of 'blowing the whistle' is recognised under the private enforcement regime by a reduction in damages payable by the whistle-blower.¹⁶² Otherwise, the effectiveness of the leniency program will be undermined as well as competition in general. Companies will essentially run the risk of being punished for responsible behaviour. Nonetheless, a claimant in such a case would still be able to obtain compensation from the other cartel members, whose infringement may only have become known because of the defendant's openness.

Essentially, a plaintiff claiming damages should be prevented to seek disclosure of the leniency application documents submitted to the competition authority, in order to strengthen his case. The importance of this protection is recently laid down in the revised Leniency Notice, which came into force on 8 December 2006. This instrument introduces a procedure to protect corporate statements made by companies under the Leniency Notice from being made available to claimants in civil damage proceedings. This ensures that applicants cooperating with the Commission investigation are not impaired in their position in civil proceedings, as compared to companies who do not cooperate.¹⁶³

In conclusion, in making it easier for plaintiffs to bring private actions, undertakings must not be discouraged from applying for leniency.¹⁶⁴ These

¹⁶⁰ Many commentators propose that a successful leniency applicant should risk only single damages. Pheasant 2006, *supra* note 20, p. 369.

¹⁶¹ The Pharmaceutical Associations comments on Green Paper 2006, *supra* note 137.

¹⁶² *Vodafone Commends on Commission Green Paper 2006*.

¹⁶³ *Commission Notice on immunity from fines and reduction of fines in cartel cases*, 8 December 2006, OJ C 298.

¹⁶⁴ *UK DTI Commends on Green Paper*, *supra* note 139, par. 119.

programmes are important instruments of competition law enforcement and too generous private enforcement options would impair the effectiveness of these programmes and send a contradictory signal into the market. This will only frustrate competitiveness within the EU, with the self-evident harmful consequences for the dynamics of the economy.

4.3 Final Analysis

Some, essentially business commentators, express their view that it almost appears as if the Green Paper is tainted in its very structure by a somewhat negative view of the behaviour of companies. Regardless of whether such a suspicious attitude lies at the basis or not, the Green Paper seems indeed based on an assumption that private enforcement of competition law is beneficial per se; that private actions lead to greater enforcement of Competition law by an increased number of enforcers. Indisputably, the possibility to seek fair and reasonable compensation for those who have suffered from wrongdoings of others is a fundamental principle in any civilised society. It is therefore not the purpose of this thesis to claim that such a system should not exist at all. On the contrary, the possibility of private damages actions could very well raise awareness of the competition rules, thereby increasing competitiveness and innovation in Europe. However, as it stands now, many share the view that the Commission's endeavours as expressed in the Green Paper run the risk of creating a system of over-enforcement. The Pharmaceutical Associations, for example, are concerned that the premise on which the Green Paper is based, is in reality that more litigation would bring more competition. The Commissioner for Competition has repeatedly emphasized her wish to 'foster a competition culture, not a litigation culture'. Yet, based upon the Associations' experiences in the US, the reach of the options envisaged by the Green Paper carries a great risk of establishing this litigation culture anyway, thereby seriously inhibiting instead of increasing competition and thus

consequently imposing great costs on the dynamics and sustainability of the EU economy.¹⁶⁵

The inventiveness of parties to find ways of making money out of litigation should simply not be underestimated and nor should the chilling consequences on competitive and innovative behaviour. There is a serious risk that a private party's motive may either fall short or exceed socially adequate motives.¹⁶⁶ In such a culture, defendants may well have little choice but to settle cases that have no legal merit, in order to avoid costly and resource-heavy litigation. The stated aims of deterrence and of raising the profile of competition law enforcement would not be served, since settlement agreements would not be made public.

The risk for such perverse incentives and the high costs these suits bring along, not in the last place in terms of image damage, could paralyse companies. In that case, the good citizenship initiatives beyond primary business practices will be the first ones to get the worst of it. Companies would stick to tried and tested pattern of conduct and avoid risky innovations, which in the end would have been pro-competitive and boost CSR in the EU. An aggravating factor in this is the fact that unintentional illegality is often not easy to predict for companies either. Often positions are not clear-cut and the law is not always sufficiently clear for companies to be able to rely on self-assessment of their agreements and practices. Existing block exemptions provide some guidance, but not in any case a safe harbour. Under such circumstances, there might be no company that feels called upon to make a viable business case for investing in the changes needed to serve societal interest better or to reduce pollution, for example, because the benefits do not outweigh the huge risks.

Improving research and innovation offers the only hope of finding solutions to the strongest problems such as climate change and demographic change. Creating a more innovation friendly Europe is thus vital. This largely depends on achieving the right framework conditions including competitive markets with low entry barriers. The social price to be paid for the wrong

¹⁶⁵ The Pharmaceutical Associations, *commends on Green Paper 2006*.

¹⁶⁶ Diemer 2006, *supra* note 25, p. 311.

signal excessive private enforcement measures can send to the market actors might thus in the long-run even be higher than the costs to the economy.¹⁶⁷

A general concern that becomes apparent from the analysis of the proposed policy options is that the Green Paper and the surrounding discussion on private actions for damages seem to overlook marketing consequences and the following detriment to business practice. The Commission does not provide sufficient reflection on the economic or financial impact of the items it submits for discussion. The consequences in terms of image should also be taken into account, especially within a context of strong global competition.¹⁶⁸ These consequences can be considerable, as we have seen in the example of SAS. Individuals and companies confronted with a lawsuit not only have to take into account the cost of the suit, the likelihood of damages and the amount of those damages, but there are also considerable costs and benefits involved from a marketing perspective. Thus, from the side of the plaintiff, a decision to file a lawsuit may be viciously influenced by the possibility that a suit against a competitor could be portrayed favourably in the press and lead to an increase in revenue for the plaintiff.¹⁶⁹ Conversely, for exactly these reasons the defendant company might feel forced to settle, or worse, be discouraged from initiative, pro-competitive and innovative practices already by the possibility alone.

In the light of the foregoing, the prevailing view is that public enforcement should remain the dominant element in a plan for optimal enforcement of competition law. Next to that, private enforcement should be shaped in such a way that it becomes an instrument of antitrust law, not a goal in itself. Only when public and private enforcement work together to detect, punish and compensate victims of unlawful anticompetitive conduct is a consumer

¹⁶⁷ *The Cefic Comments of the Chemical Industry on the Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules*, 12 April 2006.

¹⁶⁸ *AFEP Comments on Green Paper* 21 April 2006, p. 5. They express concern that the costs of this mechanism were, moreover, passed on to the consumer in the prices of goods and services, for instance by steady increases in insurance premiums, sometimes with considerable effect. It is as a result of such developments, for instance, that the cost of health care in the United States has reached a level that is unparalleled anywhere else.

¹⁶⁹ B.D. Gelb and D. Bush, "The Marketing Consequences of Competitor Lawsuits", *MIT Sloan Management Review*, Winter 2006, p. 21.

friendly sustainable economy possible.¹⁷⁰ The intention to use private litigation as a second pillar of European antitrust enforcement requires a sensitive approach that takes into account the socially detrimental effect of damages actions.¹⁷¹ Consequently, it will make a useful contribution to the EU economy in which competition and CSR are able to expand with the stimulus of one another.

Nevertheless, so far the Commission has already achieved one of its main purposes, which was to raise awareness of the possibility for victims of antitrust infringements to obtain compensation for the harm suffered. A White Paper on this issue is on its way. It will be interesting to see if this document takes account of these social and economic concerns. This is at least what the Commission has promised.¹⁷²

The Commission can almost not afford to neglect these issues. The EU is facing intense challenges from both its traditional competitors, the USA and Japan, and emerging economic powers such as China and India. The EU is therefore anxiously looking for creative possibilities to offset these competitors.¹⁷³ One way in which the EU proclaimed to accomplish this, as was made clear in the introduction, is by becoming the front-runner in the field of corporate social responsibility. If the EU is really determined to get there, then it should make absolutely sure that private enforcement of competition law is not shaped in a way that could discourage businesses from taking up their social responsibilities. Precisely how this should be achieved is an open question that goes beyond the scope of this thesis.

An essential factor that became apparent, however, is that although private lawsuits are an appropriate tool to compensate for damages suffered, they should not go beyond compensation by explicitly aiming at preventing future misbehaviour or be punishing in character. Further, they should only be based on activities that are entered into deliberately negligently to injure

¹⁷⁰ Waller 2006, supra note 123, p. 368.

¹⁷¹ Diemer 2006, supra note 25, p. 313.

¹⁷² N. Kroes, *Developments in competition policy since October 2006 – and a look forward into 2007*, Speech/06/163, European Parliament, Economic and Monetary Affairs Committee Brussels 20 march 2007.

¹⁷³ *Responsible Competitiveness in Europe: Enhancing European Competitiveness through Corporate Responsibility* 2006, Executive Summary, p. 3.

the competitive process. The claimant's position would otherwise be alleviated at the cost of the defendant, business and the internal market. Some of the option in the Green Paper, as formulated up until now, would turn the balance too much in favour of the claimant.

5. Conclusion

“Corporate social responsibility can play a key role in contributing to sustainable development while enhancing Europe’s innovative potential and competitiveness.”¹⁷⁴

“Easing damages claims carries a great risk of sending a wrong signal to the market players and may very well result in detrimental effect on economic growth, productivity and innovation in contrast with the objectives of the Lisbon Strategy.”¹⁷⁵

At the beginning of this century, the EU set itself the ambitious goal of becoming the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more jobs and greater social cohesion. This does not only call for business with competitive attitude and high innovative potential, but also for socially responsible business that takes its share of responsibility for the state of European affairs. Corporate social responsibility is gradually presenting itself as the hidden key to long-term business success. In the search for innovative solutions to satisfy the expectations of stakeholders better, these solutions become factors in developing the competitiveness of a company and the sustainability of the market. Not surprising, therefore, that Europe aspires to become a pole of excellence on CSR in order to elevate its competitive and sustainable market economy. Nurturing internal competitiveness will after all be essential for its external competitiveness.

The precise implication of this ambition seems to have slipped the Commission’s memory at some points when designing the Green Paper on private actions for damages. The question posed in the introduction was

¹⁷⁴ COM(2005) 24, 2 February 2005.

¹⁷⁵ The Pharmaceutical Associations’ *Commends on Green Paper* 2006.

whether private enforcement of competition law can be shaped in a way that fosters rather than frustrates broader policy goals of corporate social responsibility. This thesis established several relevant links between CSR and competition. In essence, they need each other to achieve optimal results. Hence, the success of this mutually reinforcing system can rise or fall with the way competition law is enforced. High compliance with competition rules will clearly stimulate the process whereby competition drives companies towards social and environmental initiatives beyond normal business practices to boost their image and harvest the subsequent gains. To enhance this compliance by promoting private actions for damages in addition to public enforcement mechanisms could provide improvement.

The possibility to seek fair and reasonable compensation for those who have suffered from wrongdoings of others is fundamental in any civilized society. Private lawsuits can be an appropriate tool to establish this. Furthermore, private antitrust damage actions are potentially an important channel for the detection of competition law infringements. It is therefore understandable that such suits are being encouraged by the European Commission. It should, however, closely consider in how far it wants to take example of the US system, which is currently making a U-turn.

From the viewpoint of CSR, it became clear that although ideally private enforcement enhances observance of competition rules, thereby indeed stimulating a competitive and innovative EU, the odds for exactly the opposite result are at least as high. The Green Paper seems based on an assumption that increased private enforcement of competition law would be beneficial per se. However, more litigation will not per definition bring more competition. The contrary is as likely to become true and the Green Paper largely ignores the economic and social damage possibly caused by private enforcement.

The threat of private enforcement in addition to well-established mechanisms of public enforcement can lead to over-enforcement at much higher social costs than any possible under-enforcement of the current regime. The social price to be paid for such a wrong signal to the market actors might in the long-run even be higher than the costs to the economy.

Attempts by plaintiffs to gain money from a beneficial litigation climate, fear of high marketing costs resulting from bad press and risk of a high punishment on top of considerable public fines are all possible scenarios with destructive consequences for the internal market. Since it is also often not easy to assess whether behaviour can lead to unintended illegality and exposure to liability, easing private damages actions make companies avoid risky innovations and less willing to invest in social projects that go beyond standard business duties. In other words, it would frustrate the mutually reinforcing system that stimulates innovation into more socially and environmentally sound products and processes. Numerous economically and socially sensible projects that in the end would not infringe competition law will not be undertaken due to significant economic risks. The objective should thus not be an increase in damages actions as such, but an effective protection of the rights of consumers and businesses. Any reform resulting in an unbalanced litigation system would serve neither public interest nor customers or businesses. Public enforcement should therefore remain the dominant element in a plan for optimal enforcement of competition law.

In conclusion, the EU's plan to face its ever-stronger competitors on the global market by making its economy a front-runner in the field of CSR has great potential. Nevertheless, if the EU is really determined to get there, then it should make absolutely sure that it sends a signal to European businesses that social responsibility pays, instead of makes them pay. For behaviour that relies so much on voluntary initiatives and goodwill, a too strict antitrust enforcement system can be detrimental. What is required are market conditions and regulation that initiate a race to the top of increasing productivity, innovation and social responsibility. Too high a risk for liability to damages compensation will cramp this race already before the contestants take off. Both CSR and competition are fundamental ingredients to business success and enforcement of one to the detriment of the other should be avoided at all times.

To conclude this analysis, the question whether private enforcement of competition law can be shaped in a way that fosters rather than frustrates broader policy goals of corporate social responsibility can be answered in

the affirmative. Under the condition, nevertheless, that it is shaped cautiously, takes account of broader economic and social implications and sticks to the clear purpose of compensation. That private enforcement should be encouraged does not have to mean that all manner of such enforcement should be encouraged, or that there cannot be too much of a good thing.

Bibliography

BOOKS

- Cameron P., *Competition in Energy Markets: Law and Regulation in the European Union*, Oxford 2002.
- Craig P. & De Búrca G., *EU Law*, Oxford 2003.
- Eide A., Bergesen O., and Goyer P, *Human Rights and the Oil Industry*, Antwerp 2000.
- Lidgard H.H., *Competition Classics; Material & Cases on European Law and Practices*, Course Material Faculty of Law, University of Lund 2006/2007.
- Wils W., *The Optimal Enforcement of EC Antitrust Law; Essays in Law and Economics*, The Hague 2002.

ARTICLES

- Berrisch G., Jordan E. and Roldan R.S., “E.U. Competition and Private Actions for Damages”, 24 *Northwestern Journal of International Law & Business* 3, 2004, pp. 585-600.
- Boute A., “Environmental Protection and EC Anti-Trust Law: the Commission’s Approach for Packaging Waste Management Systems,” 15 *RECIEL* 2, 2006, pp. 146-159.
- Chi-Kun Ho “Corporate Governance and Corporate Competitiveness: An International Analysis”, 13 *Corporate Governance: An international Review* 2, 2005, pp. 211-253. Available at: <http://ssrn.com/abstract=684311>
- Diemer C., “The Green Paper on Damages Actions for Breach of the EC Antitrust Rules”, 27 *European Competition Law Review* 6, 2006, pp. 309-316.
- Drake S., “Scope of Courage and the principle of ‘individual liability’ for damages: further development of the principle of effective judicial protection by the court of justice”, 31 *European law Review* 6, 2006, pp. 841-864.

- Friedman M., “The Social Responsibility of Business is to Increase Profits”, *The New York Times Magazine*, 13 September 1970.
- Gehring M.W., *Sustainable Competition Law*, for the 2003 Fifth Session of the Ministerial Conference of the World Trade Organization, Cancun, September 2003.
- Gehring M.W., “Competition for Sustainability: Sustainable Development Concerns in National and EC Competition Law”, 15 *RECIEL* 2, 2006, pp. 172-184.
- Gelb B.D. and Bush D., “The Marketing Consequences of Competitor Lawsuits”, *MIT Sloan Management Review*, Winter 2006.
- Hewitt Pate R., *Suggested Topics for Antitrust Modernization Commission Study*, 5 January 2005, available at: www.usdoj.gov/atr/public/comments/207122.htm
- Molteni M., “The social-competitive innovation pyramid”, 6 *Corporate Governance* no. 4 2006, pp. 516-526.
- Pheasant J., “Damages Actions for Breach of the EC Antitrust Rules: The European Commission’s Green Paper”, in: 27 *European Competition Law Review* 7, 2006, pp. 365 – 381.
- Purdum T., *Survival of the fitter – Ohio-based Lauren Manufacturing embraces a lean environment in order to compete*, 1 August 2006, available at: <http://industryweek.com/ReadArticle.aspx?ArticleID=12309>
- Rüggeberg J. & Schinkel M.P., “Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement”, 29 *World Competition* 3, 2006, pp. 395-420.
- Sahlin-Andersson K., “Corporate social responsibility: a trend and a movement, but of what and for what?” 6 *Corporate Governance* 5, 2006, pp. 595-608.
- Waller S.W., “Towards a Constructive Public-Private Partnership to Enforce Competition Law”, 29 *World Competition* 3, 2006, pp. 367-381.
- Zadek S., “Corporate responsibility and competitiveness at the macro level; Responsible competitiveness: reshaping global markets through responsible business practices”, 6 *Corporate Governance* vol. 4, 2006, pp. 334-346.

LEGAL SOURCES

Treaty Establishing the European Community 1957 as amended in accordance with the Treaty of Nice, consolidated version 2002 OJ C 325/1.

Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

Stromeinspeisungsgesetz of 7 December 1990, BGBl. I p. 2633, now replaced by *Erneuerbare-Energien-Gesetz* of 21 July 2004, BGBl. I nr. 40 of 31 July 2004 at 1918.

EUROPEAN COMMISSION DOCUMENTS AND DECISIONS

COM(2001) 366, *Green Paper, Promoting a European Framework for Corporate Social Responsibility*, 18 July 2001.

COM(2002) 347 final, *Corporate Social Responsibility: A business contribution to Sustainable Development*, 2 July 2002.

COM(2005) 24, *Communication to the Spring European Council, Working together for growth and jobs; A new start for the Lisbon Strategy*, 2 February 2005.

COM(2005) 672 final, *Green Paper on Damages actions for breach of EC antitrust rules*, 19 December 2005.

COM(2006) 136 final, *Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility*, 22 March 2006.

XXIV Report on Competition Policy 1994, Luxemburg 1995.

XXVIII Report on Competition Policy 1998, Brussels 1999.

White Paper on Modernization of the Rules Implementing Article 85 and 86 of the EC Treaty, Commission Programme 99/27, 28 April 1999.

Commission Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations 1017/68/EEC, 2988/74/EEC, 4056/86/EEC and 3975/87/EEC, OJ 2000 C 365E/284.

Guidelines on the application of Article 81 of the EC Treaty to horizontal cooperation agreements 2001 (2001/C 3/02).

Notice, *Guidelines on the application of Article 81(3) of the Treaty* 2004 (2004/C 101/08), OJ C 101/97.

Notice on immunity from fines and reduction of fines in cartel cases, 8 December 2006, OJ C 298.

Commission Decision 82/371, *Anseau-Navewa* [1982] OJ L 169/39.

COMP/D2/37.444, *SAS/Maersk Air* and COMP/D2/37.386, *Sun-Air versus SAS and Maersk Air*, OJ L 265, 5 October 2001, pp. 15-41.

SPEECHES

Katen K., *The Moral Basis of Competitiveness* Speech delivered to the Southern Institute of Ethics & Commerce Club, Atlanta, Georgia 30 November 2005.

Kroes N., *Enhancing Actions for Damages for Breach of Competition Rules in Europe*, dinner speech at the Harvard Club, New York, September 22, 2005.

Kroes N., *Damages Actions for Breaches of EU Competition Rules: Realities and Potentials*, opening speech at the conference “La reparation du prejudice cause par une pratique anti-concurrentielle en France et à l'étranger: bilan et perspectives”, Cour de Cassation, Paris, October 17, 2005.

Kroes N., *Developments in competition policy since October 2006 – and a look forward into 2007*, Speech/06/163, European Parliament, Economic and Monetary Affairs Committee Brussels 20 march 2007.

Monti M., *Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation*, IBA—eighth Annual Competition Conference, Fiesole, September 17, 2004.

REACTIONS TO THE GREEN PAPER

(All available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html - Last visited 16 May 2007)

AFEP *Commends on Green Paper*, 21 April 2006.

Cefic, *Comments of the Chemical Industry on the Commission Green Paper on Damages Actions for Breach of EC Antitrust Rules*, 12 April 2006.

Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities on Damage Actions for Breaches of EU Antitrust Rules, April 2006.

Erasmus University The Netherlands, *The EC Green Paper on Damages Actions in Antitrust Cases; An Academic Comment*, April 2006.

European Parliament *Draft Report on the Green Paper*, 24 October 2006.

ICC, *Comments on the Commission's Green Paper on damages actions for breach of the EC antitrust rules 2006*.

Rüggeberg J. and Schinkel M.P., Amsterdam Center for Law and Economics, *Reply to selected questions and options in the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, 23 April 2006.

The Pharmaceutical Research and Manufacturers of America (PHRMA) and The European Federation of Pharmaceutical Industries and Associations (EFPIA) ("the Associations"), *Commends on Green Paper*, 2006.

UK Department of Trade and Industry, *Commends on Green Paper*, 21 April 2006.

Vodafone, *Commends on Commission Green Paper*, 2006.

OTHER SOURCES

Business Roundtable *Statement on Corporate Governance*, September 1997.

Available at: <http://64.203.97.43/pdf/11.pdf>

EU Press Release IP/05/1634, 20 December 2005, *Competition: Commission launches consultations on facilitating damages claims for breaches of EU competition law*.

EU Press Release 255/2006, *Corporate Social Responsibility is the hidden key to EU's success and innovation*, 22 November 2006.

Federal Judicial Caseload Statistics, Table C-2: US District Courts – Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During 12-Month Period Ending March 31 2006, available at: http://www.uscourts.gov/caseload2006/tables/c02_Mar_o6.pdf

Federal Trade Commission report: *To promote innovation: the proper balance of competition and patent law and policy*, October 2003.

Muris T.J. testimony before the U.S. House of Representatives, Subcommittee on Commerce, Trade and Consumer Protection, 15 February 2006.

New York Times, “World Business Briefing – Europe – Sweden: SAS Board Quits”, 18 September 2001, available at: <http://query.nytimes.com/gst/fullpage.html?res=9805E4DE153BF93BA2575AC0A9679C8B63>

OECD *Guidelines for Multinational Enterprises* 2000.

OECD *Principles on Corporate Governance* 2004.

Responsible Competitiveness in Europe: Enhancing European Competitiveness through Corporate Responsibility, Report by AccountAbility, the European Policy Centre, INSEAD and ESADE, 22 November 2006, Executive Summary.

Responsible Competitiveness: Reshaping global markets through responsible business practices, Report by AccountAbility 2005, Executive Summary.

Waelbroek, Slater and Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules—Comparative Report*, “Ashurst Report”, Brussels 31 August 2004. Available at: http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/comparative_report_clean_en.pdf

Wall Street Journal, 20 July 2005.

World Business Council for Sustainable Development, *CSR Meeting Changing Expectations* 1 March 1999.

World Bank Competitiveness Advisory Group to the President of the European Commission, June 1995. Available at: <http://web.worldbank.org/wbi>

WEBSITES

(all Websites last visited on 16 May 2007)

http://ec.europa.eu/growthandjobs/index_en.htm

www.europa.eu/scadplus/glossary/lisbon_strategy_en.htm

www.origonews.com/filemgmt_data/files/rethinkingsocialresponsibilityofbiz.pdf

<http://en.wikipedia.org/wiki/Enron>

<http://web.worldbank.org/WBSITE/EXTERNAL/WBI/WBIPROGRAMS/CGCSRLP/0,,contentMDK:20760254~pagePK:64156158~piPK:64152884~theSitePK:460861,00.html>

<http://corp.gov.net/library/definitions.html>

http://en.wikipedia.org/wiki/corporate_governance

www.shell.com/integrity

www.sas.com/corporate/corpgovernance/sascodeofethics_2006.pdf

www.alfalaval.com/businessprinciples

www.pfizer.com/pfizer/download/investors/corporate/business_conduct_policies_summary_2003.pdf

www.oecd.org/dataoecd/33/30/2489064.pdf

www.regjeringen.no/se/Dokumentavuorka/Regjeringen-Stoltenberg-

Utenriksdepartementet/232973/233199/norway_daily_no-178-01.html?id=233547

http://findarticles.com/p/articles/mi_m0CWU/is_2001_August_8/ai_77055083

<http://news.bbc.co.uk/1/hi/business/1488394.stm>

http://ec.europa.eu/consumers/overview/cons_policy/EN%2099.pdf

<http://ec.europa.eu/comm/competition/cartels/leniency/leniency.html>

Table of Cases

EUROPEAN COURT OF JUSTICE (ECJ)

- C-14/68 *Walt Wilhelm v. Bundeskartellamt*, 13 February 1969 ECR I.
- C-127/73 *BRT v. SABAM I*, 30 January 1974 ECR 51.
- C-33/76 *Rewe v. Landwirtschaftskammer*, 16 December 1976 ECR 1989.
- C-6/90 and C-9/90 *Francovich and Others*, 19 November 1991 ECR I-5357.
- C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany*, and *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, 5 March 1996 ECR I-1029.
- C-126/97 *Eco/Swiss China Time Ltd v Benetton International NV*, 1 June 1999 ECR I-3055.
- C-379/98 *Preussenelektra AG v. Schleswag AG*, 13 March 2001, ECR I-2099.
- C-453/99 *Courage Ltd v. Bernard Crehan* 20 September 2001, ECR I-6297
- C-295/04 to C-298/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v. Fondiaria Sai SpA, and Nicolò Tricarico, Pasqualina Murgolo v. Assitalia SpA*, 13 July 2006.
- Opinion of Advocate General Geelhoed, 26 January 2006.

COURT OF FIRST INSTANCE (CFI)

- T-241/01 *Scandinavian Airlines Systems AB v. Commission of the European Communities*, 18 July 2005.

NATIONAL COURTS

- Bernard Crehan v. Innpreneur Pub Company and Brewman Group Limited* 2003 E.W.H.C. 1510 (U.K.).
- Conwood Company L.P. v. U.S. Tobacco Co.*, 290 F.3d 769 (6th Cir. 2002).