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Session II - Integrating Public and Private Enforcement in Europe - Legal and Jurisdictional Issues

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Integrating Public and Private Enforcement in Europe - Legal and Jurisdictional Issues

1. - Introduction and global overview

1.1. - In order to discuss the idea of a possible integration of public and private enforcement of competition law in the Europe (particularly enforcement of EU competition law) it is useful, on the one hand, to perceive how the idea of private enforcement of EU competition law has developed over recent years and, on the other hand, to purport to provide a systematic and analytic understanding of the so called ‘private enforcement’ ‘vis a vis’ public enforcement of competition law, that has clearly represented the cornerstone of the EU system of competition law.¹

That brief introductory overview, in turn, will lead us to perceive and critically debate three contrasting views that may currently be sustained in the context of the gradual, albeit so far very limited, emergence of forms of private enforcement of competition law in the EU. These, in short, correspond to the following:

(i) A view sustaining a fully integrated framework of enforcement of competition law, integrating public and private enforcement techniques in a distinctively European way (basically different from the American way) and drastically reviewing the theories

¹ Given the very preliminary nature of this Draft Paper - basically intended for purposes of discussion in Session 2 of 16th Annual Competition Law & Policy Workshop (Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies), we have drastically reduced doctrinal references or quotations of relevant case law (these will be developed at a later stage of preparation of the final Paper after the discussions that will take place in the context of the Workshop).
and/or foundations underlying enforcement of competition rules;\(^2\)

**(ii)** A view sustaining a *fully autonomous or independent system of private enforcement of competition law*, largely based on *adequate mechanisms that allow for collective redress* for claimants with small and dispersed losses to recover damages for losses they have suffered on account of anticompetitive conduct; whilst admitting that such private enforcement based on collective redress may, in some limited forms, *complement* public enforcement of competition law (particularly as regards the so-called *follow-on cases* to which we shall refer *infra*), according to this view, private enforcement anchored in collective redress is basically *independent of enforcement by public bodies and requires no coordination with that sphere of public enforcement*;\(^3\)

**(iii)** According to a third possible view, *public enforcement of competition law is to remain a prevailing feature of the EU system of enforcement of competition rules and private enforcement may perform a strictly complementary and subsidiary role, which will require some forms of coordination between the two areas* (but always keeping in mind the

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\(^2\) This view is sustained, *inter alia*, by Christopher Hodges. See from Hodges, *e.g.*, “European Competition Enforcement Policy: Integrating Restitution and Behaviour Control. An Integrated Enforcement Policy, involving Public and Private Enforcement with ADR”, in World Competition 2011, forthcoming.

\(^3\) This view was, *e.g.*, and curiously (coming from a public enforce), expressed in very peremptory terms, by the Irish Competition Authority in the context of its submission to the European Commission Public Consultation: “Towards a Coherent European Approach to Collective Redress” (Brussels, 4 February, 2011 SEC(2011)173 final.)
dominant role of the public sphere and without requiring a fundamental shift of the theories and/or foundations underlying enforcement of competition rules).

For the sake of clarity, we may refer from the start that we basically follow this third, alternative, view, for reasons that we shall try to put forward in this very brief Paper.

1.2. - As it is widely known, the European Treaty (currently the Treaty on the Functioning of the European Union - ‘TFEU’) does not provide, as such, remedies for breach of the rights created by the Treaties. As regards competition law, the possible right to damages arising from competition law infractions that citizens may derive from EU law have been established or recognized by the Court of Justice of the European Union (ECJ) in a number of landmark rulings (notably “Courage v. Crehan”\(^4\) and “Manfredi v Lloyd Adriatico Assicurazioni SpA”\(^5\)). In these rulings - particularly in the latter one - the ECJ clearly stated the principle that any individual can claim compensation for the harm suffered where there is causal relationship between that harm and an agreement or practice prohibited under Article 81 EC (currently, Article 101 TFEU). Furthermore, it established a principle of effectiveness in this domain, according to which in the absence of EU rules governing the matter it pertained to the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law, provided, inter alia, that they do not render practically

\(^5\) See “Manfredi v Lloyd Adriatico Assicurazioni SpA” ruling, Joined Cases C 295 - 298/04.
impossible or excessively difficult the exercise of rights conferred by EU law.\textsuperscript{6}

Building on this case law, the Commission successively presented a 2005 \textit{Green Book on Damages Actions for Breach of EC Antitrust Rules}\textsuperscript{7} and a 2008 \textit{White Paper for Damages Action for Breach of the EU Competition Rules}.\textsuperscript{8} This latter element, considering the adoption of guidelines by the Commission and \textit{formal harmonization measures of national legislations} (in order to foster private enforcement of EU competition rules), even led to an informal draft text of a Directive that was circulated in the context of some interested stakeholders in 2009, but was never published. In parallel, the Commission also put forward ideas and proposals in order to foster some forms of collective redress of consumers, in the context of the internal market, for the purposes of duly safeguarding rights derived from EU legislation on consumer protection.

This ultimately led to the adoption of a 2008 \textit{Green Paper on Consumer Collective Redress}.\textsuperscript{9} That 2008 \textit{Green Paper} did not address collective redress for victims of antitrust law infringements, on account of an alleged specific nature of antitrust law and of the wider scope of victims (including SMEs), but several stakeholders argued (and rightly so, in my view) that there were important connections between those two areas and that, accordingly, the Commission should postpone any specific measures or proposals arising from the 2008 \textit{White Paper for Damages Actions} until a

\textsuperscript{6} We basically followed here the wording of the “\textit{Manfredi}” ruling merely updating it to the terminology of the Treaty of Lisbon.
more thorough and global evaluation of the introduction of forms of collective redress in the field of consumer protection was completed. The underlying rationale for that - to which we subscribe without implying that the same options should be applied in the fields of antitrust and consumer protection, given the differences between the two - was essentially the following: If, in the end, political or legal reasons would prevent further introduction or fostering of collective redress measures/instruments on the basis of EU initiatives, those reasons would likewise apply in the fields of consumer protection and competition law. Conversely, if the Commission would take the introduction of collective redress further, it should do it in conjunction in those two areas (whilst, we may add, safeguarding the undeniable particularities of those two areas). Ultimately, and possibly in conjunction with the institutional transition in the Commission, this led to a parenthesis in these initiatives towards private enforcement and collective redress between 2009 and 2010, which was closed with the recent new initiative put forward in February 2011 of the Public Consultation “Towards a Coherent Approach to Collective Redress”, which actually combines the areas of enforcement of competition law and consumer protection law.10

1.3. - Very briefly, since we do not purport to comment ‘ex professo’ these successive policy documents, we may note that the approach followed by the Commission has become more limited and, at the same time, more realistic from the 2005 Green Paper to the 2008 White Paper and to the current 2011 Consultation document, in terms that are particularly relevant to the fundamental problem of the possible interplay between the spheres of public and private enforcement of competition law.

10 Document already quoted, supra, note 3.
In fact, whilst in the 2005 *Green Paper* it was admitted (a) that private enforcement (basically understood as private actions for damages arising from competition law infringements) served the same *deterrence objective* as public antitrust enforcement,\(^{11}\) the 2008 White Paper (b) clearly rejected that approach, replacing it with the idea of *fundamentally separate tasks for public enforcement of competition rules and for its private enforcement through private actions for damages* (with *deterrence* being the main task assigned to public enforcement and *compensation of the victims* being the overriding goal underlying private enforcement).

Somehow, the 2005 Green Paper implicitly assimilated the perspective underlying US antitrust law of private actions for damages as a *key instrument of deterrence*, which in the US is essentially due to the origin and history of US federal antitrust enforcement with limited means allocated to public enforcement and limited fines (leading to what authors like Wouter Wils have suggestively designated as a ‘*deterrence gap*’ that was “*to be filled by follow-on treble damages actions*”).\(^{12}\) Such ‘assimilation’, in turn, made room for (at least hypothetically) considering the idea of adopting in Europe (even if somehow adapting it or limiting its scope) American-modelled legal instruments or options of, *e.g.*, provision of treble damages or the exclusion of passing-on defence in actions brought by direct purchasers (just to mention some of the most noteworthy among the array of options contemplated in the US legal system). Having clearly - and more realistically - separated the tasks of *deterrence* and of

\(^{11}\) See the very straightforward statements produced in the 2005 *Green Paper*, *e.g.*, “*public and private antitrust enforcement (…) serve the same aims: to deter anti-competitive practices*” (*Green Paper*, page 3, emphasis added).

compensation of victims, with the first one fundamentally pertaining to public enforcement and the second to private enforcement, the 2008 White Paper understandably rejects those more radical options of the US legal system in order to foster private enforcement.\footnote{Preferring more limited instruments; see, \textit{inter alia}, for a short summary of those more limited instruments ultimately contemplated in the 2008 White Paper, A. Komminos, “The EU White Paper for Damages Actions: A First Appraisal”, in Concurrences N.” 2 - 2008, pp. 84 \textit{et seq} (esp. p. 85).}

In that process, however - and coming now to the current February 2011 Public Consultation - there is a fundamental problem of legal competence to act on the part of the EU that has been continuously overlooked (since any action in this field, translated in the adoption of new binding legal instruments, will require a proper demonstration that there is a basis in the EU treaties for the European Institutions to take action in this area).

Theoretically, new EU actions in this field may be based on Article 114 TFEU -admitting that the lack of harmonised measures in the field of collective redress oriented towards private enforcement of antitrust law (that we take here autonomously in consideration) implies obstacles to trade and to the proper conditions of functioning of the internal market - or on Article 81 TFEU - which relates to developing judicial cooperation in cross-border matters. The point here made is that it is not justifiable to try to delineate an ambitious and overreaching legal architecture in the EU with the purpose of inducing a qualitative transition in the patterns and intensity of private enforcement of competition rules without ascertaining, from the start, a proper normative basis and legal foundation for possible EU initiatives of harmonization (which are to a large extent debatable). This is also an argument in favour of a more \textit{gradualist and incremental approach} that we would tend to favour in this domain, building on the
consolidation of the decentralised public enforcement of EU competition rules and on multiple soft law steps in order to promote a soft approximation of legal instruments that may sustain private enforcement actions and that already exist in several Member States (in a context in which the lack of private enforcement actions does not derive entirely from a complete absence of adequate legal instruments, but from other factors that have to be tackled in a more incremental manner, as we shall observe infra, 6.).

1.4.1. - At this point and to put into perspective the fundamental issues of possible integration of public and private enforcement of EU competition rules, in the context of the multiple evolutions and initiatives oriented towards the fostering of that second sphere of enforcement, it is important to perceive exactly what may be designated as private enforcement of competition law (since this a rather loose and not particularly accurate notion).

As a former Director-General for Competition of the Commission and former coordinator of this Annual Competition Law Workshop, C.D. Ehlermann has put it, “the conviction that competition law enforcement based almost exclusively or even mainly on administrative action is not enough. Like other rules, competition law will only be efficiently applied if there is also private action (…)”.\(^{14}\) (emphasis added) What private action specifically means in this legal context has frequently been very loosely understood as the characterization of ‘private enforcement’ tends to be used to encompass very diverse or even heterogeneous legal actions.

Trying to make the notion more accurate, we may purport to identify two main pillars for private enforcement of competition rules (in a context in which the whole idea of private enforcement has sometimes come to be almost entirely identified with the first pillar and even with some subcategories comprised in that first pillar):

(i) the first pillar comprehends actions brought in national courts by private parties that were somehow injured or suffered harm caused by infringements of EU competition rules, in order to seek indemnity or compensation for that harm;

On this starting point (within this first pillar), we may further identify several subcategories of legal actions, comprehending namely:

(i-1) - Actions brought by private parties for damages caused by infringements of competition rules; these, in turn, comprehend actions for damages brought after a finding of infringement by public authorities and agencies (follow-on actions) or actions brought independently from such finding of infringement in the context of public enforcement (stand-alone actions);

(i-2) - Actions developed in national courts by private parties harmed or that may be harmed or somehow affected by competition law infringements for injunctive relief.
(ii) the second pillar comprehends various situations in which private parties invoke defensively competition rules prohibitions in private contractual or intellectual property litigation, either in judicial courts either in arbitral courts (a domain in which this line of action by private parties in litigation concerning big business transactions has considerably expanded over recent years - something that may frequently be overlooked, since a significant part of Arbitral awards are not made public).15

Given this variety of situations, we may argue that the interplay or connection between public enforcement and private enforcement of competition rules - the way they integrate or not, to come to the ‘leitmotif’ of our Panel - will have qualitative features that are distinctively different depending upon the pillar or subcategory of private enforcement actions that may be at stake.

Going one step further, we may even argue that we could autonomously identify a more limited ‘stricto sensu’ private enforcement of competition rules area. This area would comprehend only actions developed by private parties that put forward - for several reasons and envisaging different legal purposes, from compensation of harm arising from competition infringements to the determination or conditioning of the way in which some business transactions may be construed or executed - possible

15 There is no room within the limited purview of this very preliminary draft paper to further elaborate on these systematic subdivisions of private enforcement of competition rules and on a possible legal categorization of these different realities. See, in general, on this, A. P. Komninos, EC Private Antitrust Enforcement - Decentralised Application of EC Competition Law by National Courts, Hart Publishing, 2008; Clifford Jones, Private Enforcement of Antitrust Law - in the EU, UK and USA, Oxford University Press, 1999.
infringements of competition rules that have not been, as such, the object of actions by public enforcers. In that sense, that ‘stricto sensu’ private enforcement of competition rules should comprise the so-called stand-alone actions [referred infra (i-1), in fine] and the array of legal actions corresponding to what we have referred infra as second pillar of private enforcement [infra, (ii)].

1.4.2. - Again, in this field we would emphasize the potential importance - too frequently overlooked - of arbitration. Turning again to C.D. Ehlermann - as a former coordinator of our Workshop - he rightly anticipated in the context of the post 2003 modernisation of EU competition law enforcement, comprehending beside decentralisation a potential field for private enforcement, that “in future the [European] Commission will have to take a more positive stand towards arbitration, as this is a pre-condition for the success of the modernisation exercise”16 (emphasis added). We refer here, in particular, to a growing coverage of competition law issues - on several accounts and not necessarily induced by public enforcement actions - in the course of arbitral procedures that are too frequently ignored or underestimated given the non public nature of those proceedings.

It is true that, in certain cases, arbitration may be linked to public enforcement of competition rules (e.g, in the context of arbitral clauses as a way to monitor commitments in the context of commitment decisions

adopted under Article 9.º of Regulation (CE) n.º 1/2003). However, in a growing number of cases the self-assessment by undertakings of cooperation agreements and practices in the post-2003 normative framework has been inducing such undertakings to use arbitration procedures, concerning those business cooperative practices, to evaluate competition law issues that may be raised in connection with these practices. Also, moving beyond cooperation practices, and considering that potentially abusive behaviours are more publicly and openly developed by undertakings with market power (in contrast with cartel or other related practices that are bound to maintain some level of secrecy), the growing awareness of the legal issues at stake and the relative scarcity of abuse of dominant position cases initiated by public authorities (either the Commission either national competition authorities) tend to work as a positive incentive for the parties to raise those issues in the context of arbitral procedures.

Jurisprudential developments in this field - namely the widely commented “Eco Swiss v. Benetton” and “Van Schijndel” rulings - also contribute to that competition law awareness of private parties and to a corresponding use of competition law arguments and tools in the course of arbitral procedures (either to discuss alternative ways in which certain business practices may our may not be implemented, or even to claim compensations for harm produced in the context of those business

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18 We refer to the “Eco Swiss v. Benetton” ruling (case C-126/97) and to the “Van Schijndel” ruling (cases C-430/93 and 431/93).
practices, particularly when those practices put into contact undertakings with considerable market power vis a vis undertakings with lesser power).

In short, we are considering here potential developments as regards arbitration chiefly connected with what we have *infra* tentatively designated as the segment of ‘*stricto sensu’* private enforcement of competition rules (meaning private actions oriented towards the application of competition rules that are not dependent on public enforcement actions nor directly related with them).

Furthermore, we believe that some incremental measures or steps may reinforce this important status (albeit largely unperceived as such) of arbitration procedures in order to foster this segment of private enforcement of competition rules (such as, *e.g.*, (a) the encouragement, through soft harmonization impulses, of legislative changes of national laws on Arbitration that give further weight to public policy considerations, including namely the safeguard of competition law and principles, as an element of possible annulment or non enforceability of arbitral awards, as it will predictably happen in the legislative reform of voluntary arbitration that is taking place in Portugal, and that we shall briefly mention *infra, 5*.; or (b) the possible extension/adaptation of article 15, par 1 and of article 16, par 2 of Regulation (CE) nº 1/2003, in order to cover information and opinions to be addressed to arbitral courts and a systematic effort to identify and collect arbitral awards in which competition law issues have been discussed and considered as a basis for the final decision).

2. - The basic foundations of the interplay between public and private enforcement of competition rules
2.1. - After this attempt of providing a systematic and analytic understanding of ‘private enforcement’ ‘vis a vis’ public enforcement of competition law and considering the current status of the debate - following the February 2011 *Public Consultation* and the ongoing discussion on possible EU initiatives in this field - we should try, at a high level basis, to ascertain what possible role may be played by the so-called private enforcement of competition rules and what kind of intersections we may reasonably consider between the spheres of public and private enforcement of competition law.\(^{20}\)

It may be a sobering way to start that analytical exercise to recall a powerful statement of R. Posner on the paradigm of private enforcement in the US legal system:

As Posner stated, “*students of antitrust laws have been appalled by the wild and woolly antitrust suits that the private bar has brought - and won. (…) in short the influence of private action in the development of antitrust doctrine has been on the whole a pernicious one*”.\(^ {21}\)

Whilst we may not entirely subscribe to the vehemence of that statement, it represents, nevertheless, a powerful illustration - even as regards the US legal context whose history and evolution as we have already emphasized is very different from the EU competition law system - of the inherent limitation of private enforcement to pursue common tasks together with the sphere of public enforcement.

\(^{20}\) We shall not go into the details of the possible specific measures contemplated in the 2008 *White Book* nor of the particular questions raised in the February 2011 *Public Consultation*.

Clearly, some different overriding goals of antitrust law and policy cannot be pursued simultaneously or with the same intensity level through the public and private enforcement spheres (contrary to what was implicitly supposed in the 2005 Green Book). High levels of deterrence and prevention of hardcore infringements of competition law (e.g., in particular cartels), through public enforcement policies based on very high fines (with an alleged strong deterrent effect)\(^{22}\) combined with a strong recourse to leniency instruments, tend not to be compatible with a strong encouragement of private actions oriented towards the maximization of compensation for antitrust damages. Policy priorities have to be defined and a more ‘nuanced’ approach has to be delineated in order to conciliate or combine different policy objectives in the spheres of public and private enforcement.

The initial approaches apparently followed by the European Commission in 2005 - and by the multiple analysis that followed the 2005 Green Paper, advocating a robust approach for the fostering of private enforcement of competition law in the EU - were not entirely realistic and sometimes involved an unbalanced pursuit of contradictory objectives. Following the 2003 transition to a decentralised system of enforcement, EU competition law system is still, by and large, going through a transitional stage.

In this stage, priorities have to be reasserted as regards the development of EU competition policy and, in that context, the fist priorities should address the public enforcement sphere, which has to be actually consolidated in the aftermath of the decentralisation policy initiated in 2003 and incentives to

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\(^{22}\) Policies of high levels of fines as the ones that have been pursued by the Commission over recent years, as discussed by several authors. See, *inter alia*, on this Van Bael & Belis, *Competition Law of the European Community*, Wolters Kluwer, 2010, esp. pp 341 et seq.
private enforcement should only come after that. Also, coming clearly in second place as regards priorities to be defined in the overall context of EU competition policy, any moderate and well balanced initiatives designed to foster private enforcement should be based on a clear recognition of separate functions or tasks to be pursued through the public and the private enforcement spheres. EU competition policy has been anchored in two prevailing goals or functions of (a) delineating adequate parameters of prohibition of anticompetitive behaviours (those parameters assuming sometimes an evolutionary nature, coming from the initial overriding goal of fostering economic integration to the current emphasis on efficiency maximization\(^{23}\)) and of (b) deterrence and due punishment of those anticompetitive behaviours.

2.2. - Conversely, private enforcement should predominantly be oriented towards a growing relevance of an autonomous goal of compensation of consumers injured by competition law infringements. That does not mean that private enforcement should be regarded - in the context of the pursuit of that relatively new goal of compensation to entities harmed by competition infringement - as basically independent of enforcement by public bodies and requiring no fundamental coordination or interactivity with that sphere of public enforcement [as sustained by one of the three alternative contrasting views on the relationship between public and private enforcement that we have systematically identified at the beginning of this daft paper, supra, 1.1. (ii)].

\(^{23}\) Although the notion of efficiency to be predominantly taken into consideration is still subject to considerable debate. See, on that, Massimo Motta, *Competition Policy - Theory and Practice*, Cambridge University Press, 2004 (esp. chapter 1).
We believe that, while the aforementioned goals or functions of (a) delineating adequate parameters of prohibition of anticompetitive behaviours and of (b) deterrence and due punishment of those anticompetitive behaviours, should remain the prevailing feature of the EU system of enforcement of competition rules, in the context of a clearly leading role of public enforcement of those rules, private enforcement may perform a complementary and subsidiary role. We refer to a subsidiary role which, on the one hand, will require some type of coordination between the two areas, but, on the other hand, without requiring, at the same time, a fundamental shift of the theories and/or foundations underlying enforcement of competition rules.

In fact, we do not consider that the public enforcement policy should be globally reconsidered - in order to reduce an alleged excessive emphasis on deterrence as the almost exclusive enforcement theory or an alleged unjust focus on leniency policy and with the purpose of adopting, instead, public powers that would not ‘privatize’ damages but would incorporate restitution of the injured parties.24

On the contrary, we admit that the aforementioned functions of delineating parameters of prohibition of anticompetitive behaviours and of deterrence and due punishment of those behaviours (with leniency as an important instrument for that task) should be consistently kept within the public sphere of public enforcement. The relatively new function of compensation or restitution of injured entities should - on a separate basis - be essentially entrusted to the sphere of private enforcement, but, conversely, that does

24 That corresponds by and large to one of the three main contrasting views on the relationship between the spheres of public and private enforcement, sustained, inter alia, by C Hodges (and to which we have referred supra, 1.1.
not mean that the sphere of public enforcement should be completely absent from that domain, thus providing some form of coordination with the sphere of private enforcement (e.g., as we shall consider infra, though taking into consideration, to a certain, limited, extent, forms of voluntary compensation by infringing entities when assessing the levels of fines). However, on the whole, that represents a gradual evolution of public enforcement policy and not a radical departure or shift as the one proposed, ‘inter alia’, by C. Hodges.\textsuperscript{25}

Furthermore, without fundamentally calling into question what should remain as separate tasks or functions of public and private enforcement (without pursuing a fallacy of a shared role of deterrence entrusted both to the public and the private spheres of enforcement) we admit that some positive interplay between public and private enforcement may also develop, not as regards the deterrence function ‘proprio sensu’ (that should essentially remain with the sphere of public enforcement), but as regards relevant factors for a balanced competition policy, such as wider awareness and effective assimilation of competition parameters as elements actually conditioning market behaviour. In that respect, a particular contribution should be expected from the second pillar of private enforcement that we have identified supra, \textbf{1.4.1.}, (ii).

In this context of essentially separate functions of public and private enforcement, but allowing some room for reciprocal positive interplay between the two spheres and requiring - to a certain extent - some types of coordination between those two spheres, we should acknowledge that, at

least in the short term, it is more easy to discern positive effects generated by public enforcement on private enforcement (namely in follow-on actions through the so-called “Masterfoods rule” of article 16 of Regulation (CE) n.º 1/2003), then the opposite (positive effects overflowing from private enforcement to the sphere of public enforcement).

Given this overall picture, particular caution should be observed in order to prevent situations in which ill-designed attempts to foster private enforcement may adversely impact on the effectiveness and/or efficiency of public enforcement (as the prevailing domain of enforcement of EU competition law).

2.3. - Considering these types of potentially positive interplay between the spheres of public and private enforcement of competition rules and, conversely, the potential risks that, in some cases, this latter sphere may carry to the effectiveness of public enforcement, we may, for analytical purposes, select three main areas in which those two enforcement spheres reciprocally intersect and that deserve, as such, further comment (albeit a very succinct one given the limited purview of this very preliminary draft paper). We refer here to:

(a) issues of access to information in the context of public enforcement and how that may interact with actions envisaged in the context of private enforcement;

(b) issues related with leniency policy and instruments (and the impact on it of private enforcement actions);
and to

(c) issues concerning particular incentives or focus in order to selectively encourage, in the field of private enforcement, forms or domains of antitrust scrutiny that tend to be somehow elusive to public enforcement; in other words, that has to do with encouraging, on a rather selective basis, private enforcement in domains that would be very difficult to cover, in the coming years and in the foreseeable horizon, through public enforcement actions, instead of developing an unrealistic agenda of simultaneously pursuing contradictory, irreconcilable goals, or, at least, goals that are difficult to combine, through public and private enforcement.

3. - Access to information in the context of public enforcement and interaction with private enforcement

3.1. - It may not be ignored that privileged access to information in the context of public enforcement actions may facilitate - or even stimulate - follow-on actions for damages. That facilitating effect may arise from two separate factors, comprehending, namely, access to the Commission’s public enforcement file and access to the contents of Commission decisions on competition law infringements (while safeguarding confidentiality issues in the disclosure of those decisions).

There is a clear case of tension between conflicting elements and interests in these types of access to information related with public enforcement actions by potential claimants in private enforcement follow-on actions.
On the one hand, and considering the dynamic interplay between public and private enforcement and the potential adversary effects of the latter over the former, allowing potential injured parties and claimants access to the Commission file during the investigation phase of the public procedure may seriously affect the exercise of powers of investigation (even if we consider that potential claimants may also act as complainants in the public procedure, who may require, in that capacity, a certain degree of intervention in the public procedure to whose development they may have been instrumental). On the other hand, even outside the boundaries of leniency procedures - to which we shall refer infra, 4. - the willingness of undertakings to cooperate, to a certain extent, with the public investigations may be seriously undermined if those undertakings perceive a risk of public discovery powers being used as tool for follow-on claims (through potentially abusive or distorted use of information rights conferred by through Regulation 1049/200126).

3.2. - Generally speaking, we would admit that this type of tensions must be solved in the interest of the effectiveness of public enforcement of competition rules. Accordingly, there is ground to refuse potential claimants access to the Commission’s file while the investigation is taking place. The issue is, however, controversial and will be hopefully settled or definitely clarified by several rulings of the General Court (following the ruling of this Court in the “MyTravel Group v Commission” case27). Whilst it seems to be widely recognized that the Regulation which addresses in general freedom of information matters (Regulation 1049/2001) is not a particularly adequate instrument to provide information to potential

27 See “MyTravel Group v Commission” ruling of the General Court - Case T-403/05.
claimants, the idea of creating a specific access regime for these claimants in follow-on actions for damages under Regulation (CE) N.º 1/2003 has already been put forward (given their specific legitimate interest in the Commission file). Nevertheless, we would resist the idea of providing them with that type of access while the investigations are pending. However, another scenario has to be considered. That corresponds to the initiation of private follow-on actions for damages in national courts in the course of which these courts request access to the Commission file under the general duties of the Commission to cooperate with courts (article 15 of Regulation (EC) n.º 1/2003). In that case, it may be a matter of debate how the confidentiality of certain business secrets and aspects of the file is to be preserved (either through a confidentiality assessment by the Commission, when delivering the file, or through a confidentiality verification by the requesting court). Again, given the controversial and sensitive nature of these kinds of issues, a further jurisprudential clarification produced in this area by the General Court would be a very positive development.

As regards access to the content of Commission decisions verifying the existence of competition law infringements, and considering that the Commission is under an obligation to publish a non confidential version of such decisions (‘ex vi’ article 30 of Regulation (EC) n.º 1/2003 (purged from business secrets), it may be also debated the extent to which a national court, in the course of a follow-on action on damages, can require comprehensive access to these decisions (if certain elements of the decisions are at the core of a certain claim). This is also an area requiring jurisprudential clarification.
4. - Leniency policy and instruments its reciprocal impact on private enforcement actions

4.1. - In the context of the leniency regime, which has come to represent a fundamental part in the Commission’s arsenal for antitrust scrutiny of anticompetitive practices (and a highly effective one), undertakings that are part or have taken part in cartels may obtain fine reductions or even immunity from fines through their active cooperation with the competition authorities in finding a cartel and in compiling relevant evidence of that cartel. However, the granting of fine reductions or immunity from fines does not protect a leniency applicant undertaking from the civil law consequences of its past participation in a cartel.

On the one hand, while theoretically a reduction or mitigation in follow-on liability for damages could represent a further incentive to apply for leniency, that has not been proved necessary, in terms of public interest, for the purposes of deterrence that - as previously referred (infra, 2.) absolutely prevail in the context of public enforcement of competition rules. The high level of fines which is practiced ensures ‘a se’ sufficient incentives to apply for leniency. On the other hand, that would correspond to an unbalanced collision between the deterrence function (predominantly ensured through public enforcement) and the compensation function (predominantly ensured through private enforcement, whilst public enforcement may gradually come to contribute also for pursuing that goal). In other words, that would represent, on the part of the public enforcement

28 The same observations may be produced ‘mutatis mutandis’ about the correspondent or comparable leniency programs developed by the national competition authorities that are part of the European Network.
sphere, an undue intrusion and conditioning of the possibilities conferred by private enforcement actions focused on damages.

4.2. - Conversely, the disclosure of information provided in the context of a leniency application to potential claimants for damages in follow-on actions may be perceived as a risk by these undertakings and, accordingly, undermine their willingness to recur to leniency (with serious adverse affects for the public interest inherent to the effectiveness of the leniency program). To a certain extent, the incentives for undertakings to seek immunity under the leniency regime seem preserved in the proposals put forward by the 2008 White Paper. In fact, in that document the Commission sustained that potential claimants should not have the right to access at any stage ‘corporate statements’ (statements through which an undertaking puts forward its knowledge of a cartel and its role in the cartel as part of an application for leniency). However, beside those so-called ‘corporate statements’ it may be further debated the extent of complementary protection of other materials concerning the leniency applicant participation in a cartel, that are ultimately conveyed to the Commission file (and, as such, accessible to claimants in follow-on actions, including through the intervention of their national courts). National legal systems may rule on that kind of protection, but it would perhaps be advisable to introduce clarifications in EU law concerning the extent and/or limits for such protection conferred to the leniency applicant (as there are conflicting interests at play here).

4.3. - Another relevant issue that may be raised in the context of the leniency program, and relevant for the interplay between public and private  

enforcement, has to do with the possible reduction of fines if the infringing undertaking agrees to some form of voluntary compensation to the entities who have suffered damages as a result of the competition law infraction at stake. It should be here reminded that, while under US leniency policy one of the conditions to obtain immunity is that where possible the undertaking makes restitution to injured parties, no such condition exists under the Commission leniency policy (or under comparable leniency policies adopted by the Member States). However, the European Competition Authorities “Principles for convergence on pecuniary sanctions imposed on undertakings for infringements of antitrust law” (adopted in May 2008) admit as a possible mitigating circumstance - allowing a reduction of the fine - the fact that the offender takes active steps to provide voluntary compensation to those who have suffered damages arising from the competition law infringement.

As far as we are concerned, this may represent a promising way in order to gradually incorporate elements of compensation in the public enforcement of competition rules (while acknowledging that such contribution will not affect the fact that the prevailing role for pursuing that compensation function will be kept by the private enforcement sphere). Nevertheless, the introduction of this new feature has taken place in a way that tries to strike a balance between the deterrence and punishment functions - that are to be entirely safeguarded in the context of public enforcement (and should not be jeopardised for compensation purposes) - and the compensation function. Within that frame of mind, point 18 of the 2008 European Competition Authorities “Principles for convergence on pecuniary sanctions imposed on undertakings for infringements of antitrust law”, which provides for the possible reduction of fines in exchange of voluntary
compensation, is accompanied by the proviso that “where compensation is taken into account as a mitigating circumstance, this reduction should not in any case be such as to undermine the deterrent effect of the fine” (emphasis added).

It is, however, by no means clear the qualitative level upon which a certain mitigation of the fine seriously undermines the deterrent effect of the same fine. The issue should be further clarified in the interest of promoting a gradual - albeit limited - integration of compensation considerations in the field of public enforcement of competition rules (without affecting the other prevailing functions of that public enforcement).

5. - Particular incentives that may selectively encourage domains of antitrust scrutiny more elusive to public enforcement

As aforementioned, and considering the crosscurrents and intersection points we have been exploring between private enforcement and public enforcement - the latter undoubtedly corresponding to the prevailing dimension of the EU competition law system - it would make sense, whenever possible, to encourage, on a selective basis, private enforcement in domains that tend to be more difficult to cover through public enforcement actions.

In a very broad manner, we would ‘prima facie’ consider as candidate domains for that increased recourse to private enforcement and for, accordingly, stimulating it therein, e.g. (a) the monitoring of potentially abusive practices under Article 102 TFEU (seldom covered by the
Commission and even by national competition authorities, at least in relative terms, bearing in mind the potential abuse of dominant position cases that may exist, in different moments, in the market); (b) the antitrust scrutiny of joint ventures and of possible anticompetitive effects that may be inherent to minority shareholdings of a significant dimension but short of conferring control (chiefly, crossed minority shareholdings in two or more undertakings) in certain undertakings and even the (c) antitrust scrutiny of multiple relationship that have to do with exercising and/or managing IP rights.

As regards abuse of dominant position cases, these are almost inevitably complex and its scrutiny is bound to be time-consuming and frequently involving remedies that are difficult to ascertain and to calibrate and, therefore, competition authorities have to carefully select a limited number of cases or situations they will monitor. It may be easier for undertakings and/or consumers with lesser economic power to react timely to these situations through multiple private actions (including here injunctive relief and not even necessarily large collective redress mechanisms). And, as we shall try to emphasize infra - in the next section, 6. - there are multiple incremental steps that may be inserted in a soft law/soft harmonization approach at the EU level in order to increment the awareness, efficiency and corresponding use of those private action mechanisms.

30 As a particularly significant example that, somehow, confirms or illustrates of the potential relevance of abuse of dominance cases in private enforcement actions - maxime, in stand-alone cases - see, e.g., the very recent ruling of the English High Court (ruling adopted on the 15th of April of 2011), in which the High Court found that Heathrow Airport has abused its dominant position (“Purple Parking Limited and Meteor Parking Limited v. Heathrow Airport Limited” Case). Significantly, what was essentially at stake from the part of the claimants was the granting of access to the forecourts of Heathrow Airport Terminals 1 and 3 to enable them to carry out their valet parking activities. In Portugal we may refer to an arbitral award, adopted in May 2011 (the content of which will not be fully disclosed), and concerning a case of abuse of dominant position in the pharmaceutical sector (also a stand-alone case).
Also, in the fields of joint ventures, minority shareholdings of a significant dimension (chiefly, crossed minority shareholdings) in certain undertakings, and of relationship related with the exercise or management of IP rights, relevant market situations may be kept secret or relatively undisclosed and the type of cross-interests involved may render less probable potential complaints by some of the parties at the core of those situations. It may well happen that the very business dynamic of those situations will lead the parties - either directly involved or parties somehow affected by those situations - to multiple forms of private litigation in which they may introduce issues of compliance or lack of compliance with competition rules. We admit that, typically, that may happen in the course of arbitration procedures normally employed in the biggest business transactions and in the context of the functioning or managing of big corporate structures and of joint ventures.

This leads us, again, to underline the particular importance that arbitration may have for the development of private enforcement of competition rules (especially in the aforementioned domains). And, considering that potential importance of arbitration - in light of the “Eco Swiss v. Benetton” and “Van Schijndel” jurisprudence - it would make sense to encourage (through orientations and/or recommendations) legislative reforms in the Member States adopting, e.g., the solution that has been established (albeit with a lot of criticism from several stakeholders heavily involved in arbitration) in the legislative proposal that has been discussed in this first semester of 2011 by the Portuguese Parliament, reforming the Portuguese Voluntary Arbitration Act. That concerns the possibility of annulment of arbitral awards due to any infringement of public order principles (a normative solution phrased
with enough latitude to comprehend within these *public order principles* the principles of competition law).\(^{31}\)

6. - Possible gradual and incremental approach to foster private enforcement without adversely affecting public enforcement

In light of our precedent comments and analysis, we admit that - following the *Public Consultation* of February 2011 - a soft harmonization, phased, approach (through a Communication of the Commission or a set of recommendations addressed to the Member States) would be a good option to foster private enforcement of competition rules without unduly or adversely affecting public enforcement, that is to remain the cornerstone of the system.

In fact, apparently small and incremental steps may have a large impact in order to promote a smooth transition to a more intense recourse to multiple forms of private enforcement (particularly in areas as the ones referred *infra, 5.*, that remain more elusive in terms of public authorities scrutiny; conversely, in the domain of follow-on actions, and given the high level of fines practiced, private enforcement in not a priority for purposes of deterrence, whilst even for purposes of compensation these may be gradually integrated, as we have seen (*infra, 4.3.*), in the public measures adopted).

\(^{31}\) We refer to the new article 44, nº 4, b) of the legislative Proposal 48/XI that has been approved by the Portuguese government and submitted to Parliament in the first semester of 2011 (available at the website of the Portuguese Parliament).
We refer here - and we do not purport, anyway, to be exhaustive - to incremental steps that would mainly arise from changes of the national competition Acts of the Member States, which could be recommended at EU level, through a soft-harmonization approach, as in fact it has happened, on the whole, with the gradual approximation of national competition rules in accordance with the EU competition law paradigm (with the proviso that some of the solutions that we are putting forward are, albeit in variable forms, already contemplated in the national legislation of certain Member States). These steps/changes could include, *inter alia*:

- Establishing the possibility of intervention of the national competition authority as *‘amicus curiae’* in any court proceedings, at the request of national courts, or through the competition authority own initiative or upon request by the parties, whenever articles 101, 102 TFEU, or equivalent rules of national law are to be applied or are relevant for the case;

- Mandatory communication by national courts to their respective national competition authority of all the rulings and appeals that involve application of the aforementioned rules;

- Possibility of staying court cases in which the application of the aforementioned rules may be at stake, whenever the court is aware - or is made aware - of proceedings initiated by the Commission or by the national competition authority, and considering that it may be somehow convenient to wait for the adoption of a decision by those authorities;
• Recognition (formal recognition) as legitimate parties in judicial proceedings concerning compensation or indemnity for infringement of competition rules of competing undertakings or of any other market players directly or indirectly affected by those possible competition law infringements (extended to associations that may be deemed relevant, under national law, for that purpose, e.g. trade or professional or consumer associations);

• Mandatory information to be collected and conveyed by the national competition authority - an obligation to be discharged in the website of the national competition authorities - on the full text of all judicial rulings covering competition law issues, including, namely, private actions concerning in any manner the application of competition rules.

• Adoption of measures concerning arbitration (referred in the course of this Paper).

Lisbon, FIRST DRAFT/VERY PRELIMINARY - 14 of June - 2011
(subject to extensive review and to be complemented through further analysis).