

Public and Private Enforcement of EU Competition Law



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Introduction

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- EU competition rules have many fascinating features
- One of their most intriguing features is that they are subject to specific enforcement mechanisms
- Unlike other rules of law, the EU competition rules are enforced not only through the courts system (« private enforcement », upon requests of private parties), but also by independent administrative agencies (« public enforcement »)
- Unlike in the US, where private enforcement > public enforcement, in the EU public enforcement > private enforcement

Outline and Goals

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- I. A Quick Reminder
- II. Public Enforcement
- III. Private Enforcement
- IV. Conclusions

- Two underlying stories
 - Rise of a system of “*shadow*” public enforcement
 - Development of “*schizophrenic*” legal situations, due to emerging private enforcement

I. *A Quick Reminder*

Background – The Theory

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- Competition rules are predicated on the view that market competition promotes economic efficiency in the form of low prices, increased choice and technological innovation (+ in the EU contribution to market integration)
- Modern competition rules generally outlaw:
 - Anticompetitive agreements between independent firms (Article 101 TFEU) => price-fixing amongst competitors, exclusivity agreements that foreclose rivals, etc.
 - Abuse of dominance (Article 102 TFEU) => excessive prices, predatory pricing, refusal to supply indispensable inputs, etc.
 - Anticompetitive concentrations => mergers to monopoly/oligopoly
- Articles 101 and 102 TFEU only apply to practices with appreciable effect on cross-border trade

Background – The Practice

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Article 101 TFEU

- *Lifts and escalators cartel, 2007*
- *International removal services cartel, 2008*
- *Washing Powders and Consumer Detergents, 2011*

Article 102 TFEU

- *Microsoft I, 2004*
- *Intel, 2009*
- *Microsoft II, 2010*
- *IBM, 2011*
- *S&P, 2011*
- Pending investigations into *Google, Motorola, etc.*

Background – The Practice

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- **A conventional competition case**
 - Is decided by an administrative agency (Commission at EU level + NCAs across EU 27 = ECN)
 - Gives rise to finding of infringement, a cease and desist order and a possible fine in case of fault or negligence
 - Last on average several years
 - Ordinary courts of law can also apply EU competition law. Main use is to award damages, to firms victims of competition infringements

II. Public Enforcement



Today's Submission (1)

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Detection (i)

Investigation (ii)

Evaluation (iii)

Decision (iv)

The textbook procedure

- Market monitoring
- Complaints

- Dawn raids
- Request for information

- Decision to open formal proceedings
- SO
- Access to file
- Written reply
- Oral hearing

- Finding of infringement
- Cease and desist order; behavioral and structural remedies
- Fines

Standard Threshold for Commission intervention

- Leniency
- Sector inquiries
- Settlements and commitments
- *Microsoft III* and *Alrosa* remedies

The shadow procedure

1. Detection, the theory ...

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- The first and foremost activity of competition authorities is to unearth information indicative of potential infringement
- To this end, competition authorities rely on 4 types of detection mechanisms
 1. Market monitoring (*Parisian palaces* case)
 2. Information gathered through other activities (EUMR, SSR, etc.)
 3. Consumers (in the past, [online form](#) on DG COMP website)
 4. Complaints (mostly abuse of dominance cases)
 1. Third parties entitled to procedural rights but burdensome
 2. Ability for the Commission to dismiss on discretionary grounds (non priority case, overly demanding investigation, etc.)

and the practice...

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- Leniency (1.1.)
- Sector inquiries (1.2.)

1.1. Leniency

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- End 1990s => priority on anti-cartel enforcement
 - Very harmful (“*cancer of market economies*”, MONTI)
 - Hidden conduct (cartel participants meet secretly “*in the smoked-filled rooms of luxury swiss hotels*”, “*falsify travel records*”, “*use sobriquets*”, etc., JOSHUA)
 - Reported that participants to *Freight Forwarders* cartel organised their contacts in a so-called “*Gardening Club*” and code names based on names of vegetables – such as “*asparagus*” and “*baby courgettes*” – were used when talking about fixing prices...
- Resilience of cartels, despite increasing fines: Levenstein and Suslow => cartels up to 30 years (Organic Peroxydes, 29 years)

Economic Rationale

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- G. Becker => to ▲ compliance, ▲ fear of getting caught
- Eckart and Bryant, 1991 => max 17% detection rate
- To this end, ▲ *ex officio* detection, together with ▲ whistle blowing by fellow cartellists

Standard Prisoner's dilemma

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- How to induce WB?
- If WB, fines reductions, and possibly immunity (« *guilty plea* »)
- Payoff matrix that rewards full cooperation, and sanctions lack of cooperation
- Whatever B's choice, A's best move is to blow the whistle
- Whatever A's choice, B's best move is to blow the whistle

(courtesy of P. Berghe)

		Cartellist B	
		Fine with WB	Fine without WB
Cartellist A	Fine with WB	(5 ; 5)	(0 ; 10)
	Fine without WB	(10 ; 0)	(10 ; 10)

Legal Framework

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- The EU system
 - First introduction in 1996
 - Now enshrined in 2006 Commission Notice on immunity from fines and reduction from fines in cartel cases
 - ✦ Main principles
 - Full immunity for 1st applicant which submits information that enables Commission to (i) carry out a targeted inspection in relation to a cartel; (ii) find an infringement of Article 101 TFEU
 - Partial immunity (reduction of a fine) for N°2, 3, 4, etc., if they provide evidence which represents significant « *added value* » with respect to evidence already in Commission's possession (sliding scale: 30-50% for 2nd; 20-30% for 3rd; 20% for followers)

Conditions for Full Immunity

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1. The undertaking cooperates genuinely, fully, on a continuous basis and expeditiously from the time it submits its application (§12a)
2. The undertaking ended its involvement in the alleged cartel immediately following its application (§12b)
3. When contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application (§12c)
4. An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines (§13)
5. Before a SO has been released



The Marker System

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- At §§14 and 15, the 2006 Leniency Notice introduced a so-called “*marker*” system for immunity applicants. A marker protects an immunity applicant's place in the queue for a specified period in order to allow for the gathering of the necessary information and evidence required to meet the threshold for immunity from fines.

Assessment

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Pros

- Most cartel cases now originate from leniency applications
- Almost all NCAs now have a leniency programme

Cons

- Time-bomb?
- Adverse selection?
- National discrepancies?
- Fraud (French *LGP* case)?
- Undesirable expansion of types of conduct thrown to leniency (GC, *Dole v Commission*, T-588/08, 14 March 2013)

2.2. Sector Inquiries

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“Overall it is indeed a conclusion that there is something rotten in the state of the pharmaceutical industry”



N. Kroes, July 2009 following release of final report in Pharma inquiry

The Legal Framework

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- Article 17 of Regulation 1/2003: *“Where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market, the Commission may conduct its inquiry into a particular sector of the economy or into a particular type of agreements across various sectors”*
 - Strategic sectors (Lisbon agenda) => Energy, Telcos, etc.
 - Sectors with exposure => Retail banking and pharma

A Nice Instrument

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Lax conditions

- Unlike in standard investigations, the decision to open a sector inquiry does not require a shred of suspicion of an infringement
- Unlike in standard investigations, the Commission must not delineate the “*subject matter*” of its investigation in its decision
- Recent reminder, GC, T-135/03, *Nexans v. Commission* (overly large subject matter, i.e. “electrical cable”)

Max powers

- Same powers as in standard investigations
 - Articles 18 (RFI), 19 (interviews), 20 (inspections), 23 (fine) and 24 (periodic penalty payments)
- Sole exception, no ability to search other premises (article 21)

Controversy

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Risks of “*fishing expeditions*”?

- Violates presumption of innocence
- Most inquiries gave rise to reports
- Not yet a pharma case since the sector inquiry

v.

Checks and Balances

- Decision taken by College of Commissioners
- Consultation of LS
- MS Advisory Committee on Restrictive Practices and Dominant Positions
- Also, in the context of Regulation 1/2003, it is legitimate to grant the Commission increased *ex officio* powers

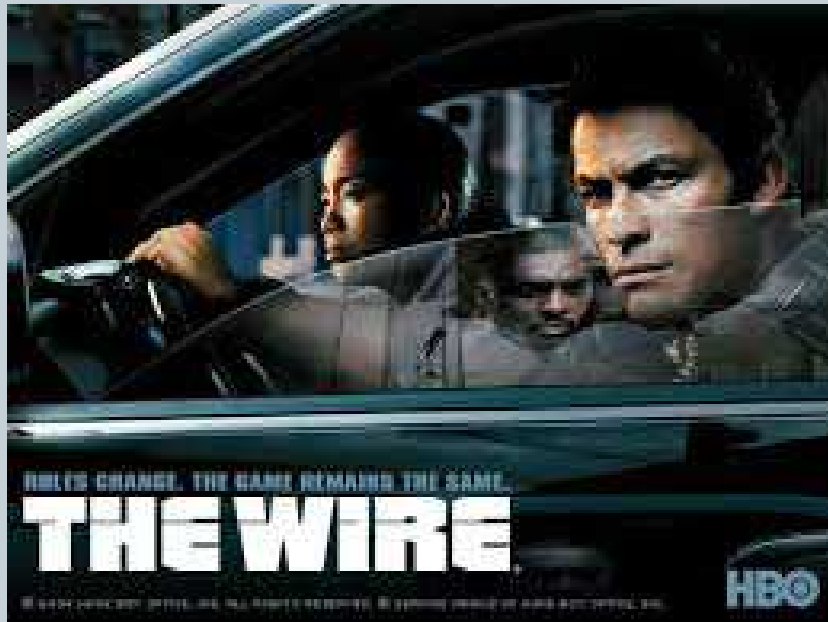
Tableau 1 – Aperçu des enquêtes sectorielles ouvertes par la Commission

Secteur concerné	Date d'ouverture	Commissaire responsable	Base juridique
Margarine	1971	Sassen	Article 12, Règlement 17/62
Distribution de bière	1971	Sassen	Article 12, Règlement 17/62
Secteur pétrolier en Hollande	21-déc-73	Borschette	Enquête informelle
Edition musicale ^[1]	janv-01	Monti	Enquête informelle
DVD Coding System	2001	Monti	Enquête informelle (Commission Press Release IP/01/1212, 20 August 2001)
Itinérance	27-juil-99	Monti	Article 12, Règlement 17/62
Lignes louées	27-juil-99	Monti	Article 12, Règlement 17/62
Boucle locale	27-juil-99	Monti	Article 12, Règlement 17/62
3G	30-janv-04	Monti	Article 12, Règlement 17/62
Energie (gaz et électricité)	13-juin-05	Kroes	Article 17, Règlement 1/2003
Assurance des entreprises	13-juin-05	Kroes	Article 17, Règlement 1/2003
Banque de détail	13-juin-05	Kroes	Article 17, Règlement 1/2003
Secteur pharmaceutique	15-janv-08	Kroes	Article 17, Règlement 1/2003

versions internationales en vigueur et le Code de la propriété intellectuelle du 1er juillet 1992. Toute

And more Detection Gadgets

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- Bounties/rewards for individuals ([OFT: 100,000£](#); Kovacic, at [http://www.eui.eu/RSCAS/Research/Competition/2006\(pdf\)/200610-COMPed-Kovacic.pdf](http://www.eui.eu/RSCAS/Research/Competition/2006(pdf)/200610-COMPed-Kovacic.pdf))
- Wiretaps
- Internal WB mechanisms within firms

2. Investigation and Evaluation, the theory...

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Investigation

1. Requests for information (frequent) – Article 18, Reg. 1/2003
2. Dawn raids (less frequent, mostly cartel cases) – Article 20, Reg. 1/2003
3. Inspection of other premises (private premises) – Article 21, Reg. 1/2003 (*Marine Hoses* cartel case)
4. Interviews at DG COMP's premises

Evaluation

1. The Commission first issues a “*Statement of Objections*” (SO) (parties are informed of allegations levelled at them)
2. Parties are then granted “*access to file*” (equality of arms)
3. Parties can then use their “*right to reply*” (optional)
 - Written response to SO (at least 4 weeks)
 - Oral response during hearing (only if written response)

and the Practice...

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- Settlements (2.1.)
- Commitments (2.2.)
- Rise of instruments which lift the evidentiary burdens that the Commission must normally discharge

2.1. Settlements

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- “*Inculpatory*” settlements
- “*Guilty plea*” => early in the procedure, the parties to a cartel may be ready to acknowledge their participation in an infringement in exchange for a reduction in the potential fine

Win-win

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Firm

- Financial savings
 - Lower fine
 - Lower fees
 - Lower damages?

Commission

- Simplifies administrative proceedings
- Dries up litigation before the European Courts
- Free resources to open new investigations
- Enhance deterrence by helping the Commission deal more quickly with cartel cases

Legal Framework

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- Commission Regulation (EC) No 622/2008 of 30 June 2008
- Commission Notice on the conduct of settlement procedures

Procedure

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- Commission issues a *‘request for the parties to express their interest in engaging in settlement discussions’*
- If the parties accept, the Commission will disclose: (i) its potential objections to their conduct; (ii) the supporting evidence; (iii) the non-confidential versions of the relevant documents; and (iv) the range of probable fines.
- If the Commission and the parties concur on those elements as a matter of principle, the Commission will request the parties (i) to confirm in writing, and within a given time limit, that they wish to enter into a settlement and (ii) to formulate a settlement proposal (admission of guilt against proposed reduction of the eventual fine).
- If the Commission agrees with the settlement proposal, it sends to the parties a simplified (summary version) Notice of Objections, which the latter must formally accept. The Commission then adopts a final decision under Article 7 or 23 of Regulation 1/2003.

Waivers

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- Parties waive their rights to
 - Oral hearing
 - Access to the file
 - Judicial review?

The Settlement Decision

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- Standard Article 7 “*negative*” decision => parties are guilty
- Exceptional discount on the fine (§32)
 - 10% of the maximum fine that could have been applied (10% of global turnover)
 - Any specific increase for deterrence used in their regard will not exceed a multiplication by two
 - Can be combined with leniency

A Reality Check

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- Since the Settlement Notice was announced in June 2008, five cartel cases have been settled: *DRAMs*, in June 2010; the case *Animal Feed Phosphates* in July 2010, *Detergents* in April 2011, *CRT glass* in October 2011 and *refrigeration compressors* in December 2011
- [CRT Glass Case](#), Settlement decision, 19 October 2011
 - The Commission has settled a cartel investigation with four producers of cathode ray tubes (CRT) glass used in televisions and computer screens
 - The cartel was operated on the basis of bilateral or trilateral meetings, organised at the request of the members. The cartel members supplemented their price coordination activities with the exchange, on an ad hoc basis, of confidential and sensitive market information.
 - Total amount of the fine: € 128,000,000. The fine on all three companies includes a reduction of 10% for acknowledging their participation in the cartel, thereby helping the Commission to conclude the case more rapidly.
 - One of the firms was granted full immunity for being the first to give information about the cartel.

Hybrid Cases

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- **Two scenarios**
 - All parties start settlement talks, one drops out in the process (still procedural efficiencies) => *Animal Feeds* cartel
 - Some parties join, others refuse from the outset (less scope for procedural efficiencies)

2.2. Commitments

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- “*Exculpatory settlements*”
 - Agencies have limited resources/firms are willing to avoid financial and reputational damage caused by protracted infringement proceedings
 - In the course of an investigation, and before the infringement is proven, the parties can be ready to meet the Commission’s “*serious doubts*” by offering “*commitments*” which restore market competition, in exchange for the termination of the proceedings (without a formal finding of infringement)
 - Article 9 of Regulation 1/2003 entitles the Commission to do this: the Commission adopts a summary decision which renders the commitments compulsory on the parties; and declares there’s no longer ground for action
 - Conditions
 - ✦ Proposed at the initiative of the undertakings concerned
 - ✦ Shall entirely remove the “*serious doubts*” of the Commission
 - ✦ Only apposite in cases where the Commission does not intend to impose a fine

Settle 'Em All – Overview of the Past 5 Years (EU)

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Commitments decisions

- *IBM – Maintenance services*
- *Standard and Poor's*
- *ENI*
- *E.On gas foreclosure*
- *Swedish Interconnectors*
- *Long term electricity contracts in France*
- *Microsoft (Tying)*
- *Rambus*
- *GDF foreclosure*
- *Ship Classification*
- *RWE gas foreclosure*
- *German electricity balancing market*
- *German electricity wholesale market*

Infringement decisions

- *Telekomunikacja Polska*
- *Intel*

Some Cases (1)

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- S&P, Commitments decision, 15 November 2011
 - S&P sets allegedly unfair prices for the distribution of International Securities Identification Numbers (ISINs)?
 - ISINs are the international key identifiers for securities based on the international standard ISO 6166
 - Indispensable for a number of operations such as interbank communication, clearing and settlement, custody, reporting to authorities and reference data management
 - S&P has been designated by the American Bankers Association as the competent NNA and as such enjoys a monopoly for the issuance and the first- hand distribution of ISINs
 - The ISO provides for cost-recovery principles, fair pricing of ISIN, and no charge for indirect users
 - S&P charges on indirect users; S&P charges more than costs on direct users; S&P charges for full ISIN database, rather than the relevant ISIN number
 - S&P commits to abolish all charges to indirect users for the use of ISINs within the EE
 - In respect of direct users and ISPs, S&P commits to distribute ISIN records separately from other added value information, consisting solely of the ISIN Record, via an FTP delivery on a daily basis. The initial price of this service will be set at USD 15 000 per year

Some Cases (2)

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- IBM, Commitments Decision, 13 December 2011
 - Refusal to grant adequate access to certain inputs necessary for the maintenance of IBM mainframe hardware and OS software products
 - IBM might have imposed unreasonable supply conditions, with regard to certain inputs required for the maintenance of IBM mainframes, on its competitors in the maintenance market, thus putting them at a competitive disadvantage
 - Restricts competition from third party maintainers (TPM)
 - IBM commits, for a period of five years, to the expeditious availability of critical spare parts and technical information under commercially reasonable and non-discriminatory terms and to allow third parties to enforce the commitments

Some Cases (3)

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- Microsoft, Compliance decision, 6 March 2013
 - 2009 Commitments Decision on the tying of Windows and Internet Explorer: Microsoft offered commitments to boost competition on the web browser market. Those commitments address Commission concerns that Microsoft may have tied its web browser Internet Explorer to the Windows PC operating system in breach of EU rules on abuse of a dominant market position (Article 102 TFEU).
 - Microsoft committed to offer European users of Windows choice among different web browsers and to allow computer manufacturers and users the possibility to turn Internet Explorer off.
 - An Article 9 decision legally binds the companies concerned to comply with the commitments. If a company breaks the commitments it offered, Article 23 (2) of Reg. 1/2003 empowers the Commission to impose fines of up to 10% of its total turnover in the preceding business year.
 - In 2012, the Commission imposed a €561 million fine (about 1 percent of Microsoft's 2012 revenues) on Microsoft for failing to roll out the browser choice screen with its Windows 7 Service Pack 1 from May 2011 until July 2012. 15 million Windows users in the EU therefore did not see the choice screen during this period.
 - First time that the Commission has had to fine a company for non-compliance with a commitments decision.

Some Cases (4)

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- E-books case, Commitments decision, 13 December 2012.
 - In December 2011, the Commission opened proceedings against Apple and five international publishers (Simon & Schuster, Harper Collins, Hachette, Verlagsgruppe Georg von, Penguin), fearing that these companies may have contrived to limit retail price competition for e-books in the European Economic Area (EEA). The Commission suspected collusion, which would harm authors, publishers, distributors, retailers and ultimately European consumers.
 - Prior to January 2010, e-books were sold by publishers to retailers under the wholesale model:
 - ✦ Retailers buy e-books from publishers
 - ✦ Retailers freely determine the retail prices for those e-books when sold to consumers.
 - In January 2010, Apple and the four publishers jointly switched to agency contracts that all contained the same key terms. Retailers became sales agents for publishers:
 - ✦ The publishers determined the retail prices for e-books according to pricing rules in the agency contracts.
 - ✦ Those pricing rules included an unusual retail price “most favoured nation” (MFN) clause, maximum retail price grids and the same 30% commission payable to Apple.
 - Main commitments:
 1. Termination of agency agreements
 2. Termination of agency agreements concluded with retailers other than Apple
 3. Two-year cooling-off period
 4. Five-year ban on retail price MFN clauses

Is the Commission Commitments' Addict (1)?

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- Article 9 commitments decisions have become the conventional procedure in abuse of dominance cases

Is the Commission Commitments' Addict (2)?

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- In *Microsoft II*, the Commission settled a case which 3 years before had been solved with a fine (thereby violating the principle that settlements are not apposite in cases where fines are warranted, see recital 13 of Regulation 1/2003).
- In *S&P*, *IBM* and in a gaggle of energy cases, the Commission settled cases where anticompetitive effects had lasted over a significant period of time, thereby failing to punish past anticompetitive conduct (and in turn, possibly denying justice to the victims of the infringement)
- In the *e-Books* case, the Commission settled what it otherwise deems a “*hardcore restriction*“, namely an industry-wide resale price maintenance scheme (what if no infringement found with non settling company?)
- In the upcoming *Google* settlement, the Commission is poised to close a case which raises novel legal and economic issues. Yet, how can the Commission possibly suspect an infringement short of any significant precedent?

The Pros

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- Limits time and resources devoted to investigation and evaluation
- Commission enjoys large margin of maneuver
 - No need to test proportionality (order that go possibly beyond the remedies it can enjoin under Article 7), as long as parties agree => CJEU, *Commission v Alrosa*, Case C 441/07 P
 - Possibility for Commission to change remedial approach in similar cases (>< *Microsoft I and II*)

The Cons

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- Risks of:
 - short term **over-enforcement** => innocent parties settle because they are set to fail in standard procedure (old-fashioned substantive standard + limited judicial review) => « *Lesser of two evils* » calculus => type I errors
 - short term **under-enforcement** => an agency's ability to obtain a settlement hinges on the credible alternative threat of infringement proceedings. If the agency no longer has a track record of infringement cases, then firms will unlikely settle => type II errors
 - Long term « *guidance desert* » => almost no guidance for external observers => very terse decisions => type I and II errors

Need for Restraining Principles

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- Rule n°1 => **Exclude from Article 9 decisions, cases where anticompetitive conduct has lasted over time** (settlements only change the future, and do not correct, punish and compensate past harm)
- Rule n°2 => **Exclude from Article 9 decisions cases raising novel legal and economic issues from settlements** (such cases should simply not be settled, because the agency cannot reasonably suspect an infringement short of any precedent. Moreover, agencies should give guidance to the market when new legal and economic problems arise)

3. Decision, the theory ...

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Types of Decisions

- Decisions finding an infringement of Article 101 and 102 TFEU
- Decisions may also prescribe “*cease and desist*” orders, if the infringer has not given up the unlawful conduct
- Decisions may give more details as to how to eliminate risks of future infringement, with behavioral and structural remedies (article 7 of Regulation 1/2003)

Formal and substantive requirements

- Proportionality
- Duly to fully state reasons
- Behavioral remedies first, structural remedies only if no equally efficient behavioral remedy (or if there is, but more burdensome)

and the Practice ...

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- Remedies after *Microsoft III* (3.1.)
- Remedies after *Alrosa* (3.2.)

3.1. Remedies after *Microsoft III*

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- GC, *Microsoft Corp. v Commission*, T-167/08, 27 June 2012
- Takes several years to MSFT to grope for the FRAND price level for interoperability information
- Running periodic penalty payment, up to €899,000,000
- Challenge before GC => The Commission should only be entitled to slap fines to induce compliance, if it defines clearly the obligation with which it seeks to promote compliance

3.1. The Court's Nonsense-Ruling

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- GC, §91: *“the use of imprecise legal concepts within a provision does not prevent liability being established as against a person who contravenes it. As the Commission points out, if it were otherwise, an infringement of Article 101 or 102 TFEU – which are themselves drawn up using imprecise legal concepts, such as distortion of competition or ‘abuse’ of a dominant position – could not give rise to a fine without the prior adoption of a decision establishing the infringement”... no comment*
- *Nulla poena sine lege certa* => Way below the threshold set under the ECHR, Charter of Fundamental Rights of the EU and of General Principles of Law
- Practical consequence => Commission can leave the content of remedies open-ended in Article 7 Decisions

3.2. Remedies after *Alrosa*

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- Idea: Commission can get more (remedial power), with less (proof)
- No longer any incentives to take Article 7 decisions
- Case about commitments: CJ, C-441/07 P, *Commission v Alrosa Company Ltd*, 29 June 2010

Facts

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- Russian firm Alrosa and Luxemburg company De Beers active on the worldwide market for the production and supply of rough diamonds, on which they occupy the number two and number one positions respectively
- Commission opens proceedings for abuse due to exclusive supply agreement from Alrosa to De Beers (Alrosa reserves production to De Beers)
- On 25 January 2006 De Beers individually offered new commitments to the Commission providing for the definitive cessation of all purchases of rough diamonds from Alrosa with effect from 2009
- On 22 February 2006 the Commission adopted a decision making binding the individual commitments proposed by De Beers
- Alrosa had however offered less intrusive commitments (cap on sales)
- In 2007, the GC finds that the Commission has not observed the principle of proportionality. The complete prohibition of all commercial relations between the two parties with effect from 2009 was manifestly disproportionate

CJ's Judgment

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- **In 2010, the ECJ reverses the GC's ruling**
 - The Commission's obligation to ensure that the principle of proportionality is observed has a different extent and content, in relation to the imposition of remedies (Article 7) and commitments (Article 9)...
 - Those two procedures pursue distinct objectives, one of them aiming to put an end to the infringement that has been found ... the other aiming to address the Commission's concerns following its preliminary assessment, the Commission not being required to make a finding of an infringement ...
 - Otherwise the Commission would be required to identify from the outset, and of its own motion, all sorts of alternative. This would undermine the very nature of the procedure ...
 - Plus, undertakings which offer commitments consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted by it...

Critical Appraisal

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- Commitments decisions may be more intrusive than infringement decisions, even if infringement has not been proven...
- Structural remedies can be adopted even if there are less intrusive/equally efficient behavioral ones
- Reasoning => somewhat weird

4. Bottoms Lines

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- Rise of a “*shadow*” infringement procedure, with Commission achieving decisional outcome = to formal infringement procedures, without ever having to prove its case with cogent, hard evidence?
- Commission bargaining power further ▲ by:
 - Deficient judicial review in complex economic cases
 - Inexistent positive enforcement at EU level (no article 10 decisions or Guidance letters) and “*tough-look*” policy (refusal to grant discounts for compliance programmes)

III. Private Enforcement

1. Background

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- Article 101 and 102 TFEU are directly applicable
- Natural and legal persons can thus invoke them before ordinary courts of law
- In addition, competition rules are rules of “*public policy*”. National courts have the duty to raise violations of EU competition law of their own motion (subject to equivalence rule)
- This is conventionally referred to as “*private enforcement*” (although the expression is slightly confusing)



2. Actual Scope of Private Enforcement

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- On paper, private enforcement before courts has a number of interesting features
 - Duty of courts to deliver judgment
 - One stop shop => ordinary courts can deal with several facets of a case
- In practice, very limited involvement of national courts
 - Typical setting => “*Euro-defense*”
 - A plaintiff seeks to obtain execution of a contract (payment)
 - The defendant argues that the contract is null and void under Article 101 TFEU (or that its implementation is tantamount to an abuse of dominance under Article 102 TFEU)
 - Illustration => “*Beer contracts*” with exclusive purchasing clauses and allegedly unfair pricing (C-453/99, *Courage v. Crehan*, etc.)
 - That said, very few cases
 - And when cases, issues with little impact on economic welfare/society at large

Today's Submission (2)

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3. The Future of Private Enforcement

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- In recent years, growing sentiment that national courts should play a larger role in the EU competition enforcement system, through the allocation of damages to victims of antitrust infringements
- After all, administrative fines do not make good for the harm caused to customers (who pay higher prices), competitors (who lose market share), suppliers (who pay lower prices)
- In addition, the allocation of damages to victims will increase the costs of competition infringements and in turn improve deterrence
- Increasing policy support to follow-on actions

3. The Future of Private Enforcement

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- Articles 15 of Regulation 1/2003
- Notice on cooperation with the courts of the EU Member States
- Funding programme for training of national judges in EU competition law and judicial cooperation between national judges
- In 2004, DG COMP launches an empirical review process, which is followed by a Green Paper in 2005
- Picture is clear => right to damages is ineffective
 - EU institutions have no jurisdiction to award damages for competition infringements
 - Only possible at national level. But existing domestic rules and legal traditions are ill-suited for such actions
 - ✦ Access to evidence
 - ✦ Unfavorable cost/benefit analysis for damage seekers, in particular end-consumers
 - ✦ Passing-on defense
 - ✦ Limitation periods
 - ✦ Fault requirements
 - ✦ Etc.

3. The Future of Private Enforcement

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- On 2 April 2008, the Commission adopts a White Paper on Damages Actions for Breach of the EC antitrust rules
- It presents a set of recommendations to ensure that victims of competition law infringements have access to genuinely effective mechanisms for obtaining full compensation for the harm they have suffered
- In 2009, the Commission adopts a “*Proposal for a Directive on rules governing damages actions for infringements of Article 81 and 82 of the Treaty*”
- Important => primarily focused on follow-on actions

3. The Future of Private Enforcement

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- **Full compensation**
 - No multiple compensation (as in the US) => deterrence is NOT the purpose of the directive
 - Damnum emergens (actual loss) and lucrum cessans (lost opportunities) + payment of interests for the time between infringement and compensation
- **Computation of damages**
 - Jurisdictional issue => national matter, and well-settled rules in MS
 - But Commission may provide guidance (price overcharge + output effect), possibly through soft law instrument
- **Passing-on defense**
 - Infringers can invoke passing-on defense
 - But direct purchasers can rebutt the presumption
 - Directive unclear on compensation of output effect => direct purchaser may have passed-on the price overcharge, but meanwhile may have reduced purchasing orders and thus lost business
- **Limitation periods**
 - Commission recommends a new limitation period of at least *two years* starting once the infringement decision on which a follow-on claimant relies has become final

3. The Future of Private Enforcement

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- **Using final decisions as evidence**
 - To save time and costs, the Commission recommends, as is already the case for Commission decisions, that final infringement decisions of Member States' competition authorities should be considered as irrefutable proof of an infringement in subsequent civil actions for damages
- **Fault requirement**
 - Draft directive seeks to eliminate requirement of fault for the award of damages
- **Collective redress**
 - Action is brought on behalf of individual victims of an infringement => economies of scale
 - Two types of collective redress mechanisms:
 - ✦ Opt-in collective actions : combines in one single action the claims from those who have expressed their intention to be included in the action
 - ✦ Opt-out collective actions: representative actions brought by empowered entities (or other), with claimants being entitled to opt-out
 - ✦ Commission draft directive eventually chooses « opt-out »

4. Current State of Commission's Policy

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- Faced with intense lobbying against the proposal, Commissioner Kroes fails to muster support to its proposed directive
 - Fear of a US-style litigation culture
 - Resistance to change in the MS
 - Industry concerns re. increased financial stakes (deterrence through the backdoor)

4. Current State of Commission's Policy

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- Change of approach: Commissioner Almunia committed to improve actions for damages in competition cases. It focused its work on two main areas it considers important within the context of actions for damages :
 - Collective redress
 - ✦ Public consultation on collective redress, to gather the views and concerns of stakeholders and civil society
 - ✦ Transversal approach: involves other EU policies (internal market, environment, consumer policy, etc.). Joint Information Note of 5 October 2010 that underlines the need for a coherent European approach to Collective Redress
 - ✦ Following the Information Note, the Commission held a public consultation and a public hearing on collective redress in early 2011, in order to identify common legal principles on collective redress in the EU.
 - ✦ Building upon the public consultation, the 2012 Commission Work Programme foresees a legislative proposal on actions for damages for breaches of antitrust law, as well as a follow-up initiative to the Commission's previous work on collective redress.
 - ✦ European Parliament's most recent resolution on this topic, adopted on 2 February, recognises the importance of collective redress for ensuring effective compensation for victims of EU law infringements

4. Current State of Commission's Policy

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○ Quantification of harm

- ✦ The success of antitrust damages actions and obtaining full compensation for victims will depend on the availability of techniques to quantify the harm suffered by those victims.
- ✦ In 2011 DG COMP held a public consultation on a Draft Guidance Paper on quantifying harm, aiming to offer assistance to both the national courts, and to the parties involved in actions for damages, by making the information relevant for quantifying the harm caused by antitrust infringements more widely available.
- ✦ Speech by [A. Italianer, February 2012](#)

4. Current Status of Commission's Policy

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- Commission draft texts should be out before the summer
- Then legislative debate (at Parliament notably)
- Transversal questions: collective redress and limitation periods
- Competition specific issues: passing on and access to NCA documents
- Several texts, in the form of directives and guidelines?

Private v. Public Enforcement?

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- CJEU, C-360/09, *Pfleiderer*, 14 June 2011
 - No EU rules on disclosures of leniency documents held by NCAs (§20)
 - MS thus free to craft such rules, in accordance with principle of effectiveness and equivalence of EU law, and in particular of Article 101 and 102 TFEU (§24);
 - Surely, disclosure may deter leniency applications (§§26-27);
 - But right to damages is of utmost importance (§28)
 - And this right “*strenghtens the working of the competition rules*” (§29)
 - Hence, EU law does not preclude access to leniency application documents by damage seekers. It is for the national organs to “*weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency*” (§30)

Concerns

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- **Undermining effect on public enforcement**
 - Leniency applications
 - International agency cooperation

Follow-up of *Pleiderer*

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- Does this apply to documents held by Commission?
 - Possible disclosure under Regulation 1049/2001. But ability to refuse disclosure if undermine protection of
 - ✦ “commercial interests of a natural or legal person, including intellectual property; court proceedings and legal advice; the purpose of inspections, investigations and audits ... unless there is an overriding public interest in disclosure...”
 - ✦ GC, T-437/08 *CDC Hydrogene Peroxide v Commission*, judgment of 15 December 2011
 - Possible disclosure under Article 15(1) of Regulation 1/2003 or via the defendants?
 - ✦ *UK National Grid v. ABB* case

Follow-up of *Pleiderer*

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- The balancing exercise envisaged by the ECJ was carried out by the English High Court in the *National Grid v ABB* case (*National Grid Electricity Transmission Plc v ABB* [2012] EWHC 869 (Ch)), a damages action following the Commission decision in the gas insulated switchgear cartel. In April 2012, the High Court ordered disclosure of selected leniency materials and in particular of limited parts of the confidential version of the Commission's infringement decision, as well as parts of the defendants' responses to the Commission's information requests.
- Take away points:
 - § *per se* approach
 - *Pleiderer* concerns an Article 101 TFEU issue
 - Commission can always send observations
 - Orders the defendant

Options

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- ECN => in a blunt joint statement, EC + NCAs affirm that “*leniency materials should be protected against disclosure*”
- Agencies to define types of information that can be subject to disclosure (Commission’s preferred option)
- Limit to disclosure: leniency applicant is asymmetrically harmed vis-a-vis other conspirators
- Transfer of damages borne by leniency applicants to other conspirators

Additional Problems

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- CJ, *Europese Gemeenschap v. Otis NV and others*, C-199/11
 - Lifts and elevators cartels, 2007
 - Commission acts for damages before Brussels commercial court => “test case”
 - Preliminary reference => does the Commission have capacity to act? Is this not a violation of the principle of equality of arms and impartiality? Easy questions
 - Problems lied elsewhere => two pending procedures: follow-on damages action // initial decision challenged before review courts. What shall the national court do?
 - Options: (i) Stay proceedings? but limitation to private enforcement; (ii) Award damages? But issue if review court subsequently quashes decision
 - CJ, §65: “*the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court*”
 - ✦ Applies re NCAs’ decisions too?
 - ✦ Applies in all cases (talks of “*agreements or practice*”: also abuses, etc.?)?
 - ✦ Overstretching of *Masterfoods*? => did not imply to accept existence of prohibited practice
 - ✦ Intrusion in national civil law (fault)?

Careful What you Wish For

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- *LIBOR* saga
- Morgan Stanley Study (one basis point + focus on US)

Exhibit 10
Estimate Potential Cost Per Bank Based on Size of Rate Derivative Book, 35 bp of LIBOR Suppression Over 4 Years and 1% Probability of Payout

	Rate Derivative Notional (USD trillions)	% Dealer-to-Client or Corporate	% Adversely Impacted from suppression of LIBOR	Notional amount adversely impacted (USD trillions)	Amount LIBOR understated (bp annualized cost)	probability of successful claim	loss estimate per 1 bp LIBOR understated (\$ millions)
BAC	56.5	24%	50%	6.9	35 bp	1%	994
C	39.9	24%	50%	4.9	35 bp	1%	702
JPM	55.4	24%	50%	6.6	35 bp	1%	975
CB	42.2	24%	50%	5.2	35 bp	1%	742
UBS	33.3	24%	50%	4.1	35 bp	1%	565
DBK	59.1	24%	50%	7.2	35 bp	1%	1,041
BIG	18.7	24%	50%	2.3	35 bp	1%	329
RBC	60.0	24%	50%	7.3	35 bp	1%	1,057
HSBC	19.8	24%	50%	2.4	35 bp	1%	348
LLOY	3.3	24%	50%	0.4	35 bp	1%	59
BARC	55.1	24%	50%	5.7	35 bp	1%	970
Total	443.2			64.2			7,802

Source: Company Data, Morgan Stanley Research estimate

Regulatory Competition (UK)

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- Sections 58 and 58A of the Competition Act 1998 : findings of fact and of infringement are binding on the court. This means that claimants do not need to establish liability in a follow-on action, although they will need to prove causation and loss.
- April 2007: Discussion Paper of the OFT, *Private actions in competition law: effective redress for consumers and business*
- April 2012: the BIS issued a consultation paper “*Private actions in competition law: a consultation on options for reform*”.
- Four key reforms:
 - **establishing the CAT as a major venue for competition actions in the UK** (including stand-alone claims)
 - ✦ to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them;
 - **Introducing an opt-out collective actions regime**
 - ✦ Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem
 - **Promoting alternative dispute resolution**
 - ✦ to ensure that the courts are the option of last resort;
 - **Ensuring that private actions complement the public enforcement regime.**
 - ✦ To make sure that whistleblowers are not discouraged from informing on cartels
- On 5 July 2012, the CAT handed down its judgment in the *Cardiff Bus* case, awarding damages in a follow-on claim for the first time

IV. Conclusions

Food for Thought

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- On public enforcement, the interplay between procedural rules and substantive standards => further compounds the “*shadow enforcement*” problem (in particular, resilience of forms-based standards)
- On private enforcement, are new rules really needed?
 - Third party funding? => Corporate law departments under pressure to reduce legal expenses (risk sharing), and create shareholder value (no longer mere costs centers) => investment-firms as new intermediaries
 - Creative use of Article 9 commitments, see J. Bourgeois and S. Striévi, *World Competition*, Vol 33, 2010

Thank you!