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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- France --

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THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ENFORCEMENT IN COMPETITION LAW¹

-- France --

1. The rules governing competition were laid down from the outset in the European project as a correlative, for corporate entities, for the ‘great freedoms’ of circulation. The Treaty of Lisbon, while changing the formulation of the objectives of the European Union (‘the EU’), confirmed in this respect that competition regulation was to be introduced into the creation of the internal market – the reaffirmed relationship between the rules of competition and the internal market that is now contributing more extensively to the construction of ‘a social market economy’.
2. In this context, the predominance of public enforcement can be seen in Europe, in particular due to (i) the setting up of competition authorities concomitant with the development – albeit delayed – of competition law and (ii) restraints on the development of private enforcement.
3. Unlike the United States in which private enforcement is the main vector for the application of competition law – more than 90% of law suits involving antitrust law that come before the jurisdictions are ‘private’² suits – private enforcement has adopted a role within the European Union that is both compensatory and punitive, so the situation is the reverse, namely, that competition law is enforced mainly by the competition authorities, while ‘private’ enforcement is concerned exclusively with compensation³.

¹ Drafted under the sole responsibility of the French Autorité de la concurrence.

² A study conducted by two university researchers, R.H. Lande and J.P. Davis, based on a set of 40 decisions adopted between 1990 and 2007 showed that damages recovered in the United States through private enforcement ranged between 18 and 19.6 billion dollars. This figure represents three times the damages originating from funds imposed by the Department of Justice for the same period (see R.H. Lande and J.P. Davis ‘Benefits From Private Enforcement: An Analysis of Forty Cases’ quoted in *Le contentieux privé des pratiques anticoncurrentielles* [Private Disputes in Antitrust Practices], Rafael Amaro, Editions Bruylant, p. 51).

³ The theoretical possibility of granting punitive damages in Europe is restricted to common law systems, the United Kingdom, Ireland and [Cyprus](#).

“Footnote by Turkey:

The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

Footnote by all the European Union Member States of the OECD and the European Union:

The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus. ”

4. Numerous reports published since the early 2000s have revealed the lower use of private enforcement in comparison with the one pursued by the authorities⁴.

5. Nevertheless, the effectiveness of competition rules is not based solely on public enforcement, but also depends on the option for the victims of such practices to obtain compensation for harm they have suffered. The Court of Justice of the European Union ('the CJEU') recognised, during the previous decade, the complementary nature of private suits for damages and public enforcement '*in contributing substantially to maintaining effective competition within the Community*'⁵.

6. In France, while law suits involving antitrust practices remain few, a recent increase has been noticed. Thus, of the 163 decisions adopted by judicial courts between 1986⁶ and June 2013, more than 80% were adopted in the last ten years⁷. It can be seen, however, that the vast majority (about 85%) of cases brought before the courts were pursued independently of any proceedings before the French Autorité de la concurrence (such court proceedings being known as '*stand alone*')⁸.

7. The years 2014 and 2015 led to substantial progress in practice, in facilitating the implementation of the right, enshrined by the judges of the European court, to seek compensation (**point I**).

8. With respect to the current legal context, two issues arise that are particularly relevant, in that their resolution affects both private enforcement and the maintenance of robust public enforcement in France:

- The issue of interaction between competition authorities and the courts, which need to benefit from specific arrangements (**point II**);
- Assessment of the damages, which is the focal point for compensation litigation (**point III**).

1. The development of actions for damages in support of the spread of a competition culture

9. The issues are threefold for creating conditions for extending actions for damages as regards competition in France.

10. Firstly there is the issue of competitiveness. Indeed, it would appear that making France an attractive venue for litigation would lead to improved competitiveness, by preventing the legal marginalisation of the country insofar as French companies are being sued in foreign jurisdictions. There is then the issue of rendering justice. When infringements to competition rules are sanctioned by the Autorité de la concurrence, large corporations that are victims often obtain compensation from the infringers through an out-of-court settlement while small and medium-sized enterprises ('SMEs') and consumers do not have equivalent negotiating powers. Finally, there is the issue of trust, it being recalled that the acceptability of the principles of competition must be subject to a law that is effective for all litigants,

⁴ See, in particular, the report published on 31 August 2004 by Ashurst law firm (<http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>).

⁵ See CJEU, 20 September 2001, *Courage v. Crehan*, C-453/99 and CJEU, 13 July 2006, *Manfredi*, linked cases C- 295 to 298/04.

⁶ Date of entry into force of the first measures covering antitrust practices in France

⁷ Rafael Amaro, *op.cit.*, Appendix 1.

⁸ *Le contentieux privé des pratiques anticoncurrentielles [Private Law Suits Involving Anti-competitive Practices]*, Rafael Amaro, Éditions Bruylant, Appendix 2.

consumers as well as companies, who are entitled to obtain compensation for harm suffered due to anti-competitive practices. This is one of the essential conditions for the spread of a competition culture, which is in the interest of all companies.

11. Recent years have been pivotal for private enforcement, with the culmination of two significant structural initiatives. One of these occurred in France with the introduction of the class action mechanism (**point 1.1**) and the other occurred at EU level, being designed to harmonise certain vital aspects of enforcement litigation (**point 1.2**).

1.1 Introduction of the class action mechanism in France: a balanced solution

12. Law no. 2014-344 of 17 March 2014 governing consuming (the so-called ‘Hamon Law’) proposed the introduction of a class action mechanism consisting, in the case of competition law, of enforcement following a decision by the Autorité de la concurrence (known as ‘*follow on*’), when introduced by a consumers’ association.

13. The procedure adopted is thus one of private enforcement based on public enforcement, thus increasing the visibility of competition law and its implementation by consumers. It enables effective damages to be paid, including in mass disputes, while preventing frivolous law suits. Finally, the initiative of the French class action in many respects echoes the ‘European model’ class action recommended by the European Commission in its recommendation of June 2013⁹.

14. Two types of observations can be made concerning the substance of the arrangement provided for under the Hamon Law:

15. Firstly, the mechanism introduced is balanced and appropriate for avoiding judicialisation of the economy by ensuring that those involved act responsibly due to a number of safeguards. This balance emerges, in particular, through the choices operated in favour of the *opt-in* principle, rejecting the ‘discovery’ mechanism or the exclusion of punitive damages. The new text also encourages settlement of a law suit by advocating for collective mediation.

16. By ensuring that a class action is supported by a prior finding from a competition authority that an infringement has been committed, the French government and Parliament have attempted to preserve the balance on which competition rules are based, both in France and in the rest of Europe, by recognising the decisive role played by the competition authorities in the initial detection of unlawful conduct. This being the case, the Hamon law makes it easier for consumers’ associations to find the burden of proof needed for the existence of an infringement, which a competition authority may have already established.

17. Finally, the system limits the risk of unfair damage to the reputation of companies by making the implementation of publicity measures conditional on a court decision concerning the substance of the case.

18. Secondly, there are two ways in which this arrangement, unprecedented in France, could develop.

19. Firstly, the law does not provide for a manner in which SMEs could benefit from the mechanism. Opening up the option of class action to SMEs, as decided in several member states of the EU (Denmark,

⁹ The Commission recommends the introduction of collective appeal mechanisms based on an *opt-in* system, opening the way for purely compensatory damages with interest, ‘maintained at the status quo’ through public action, where applicable, the financing of which should not create an incentive for instituting frivolous prosecutions (strict regulation of *pacta de quota litis*, the losing party to be made liable for the court costs).

Italy, Netherlands, Portugal, United Kingdom and Sweden), could thus be envisaged in the future, especially as they are often the first victims of the practices applied to intermediate goods and services and their powers of negotiation are too weak, thus closing the door for them to seek compensation by means of a negotiated out-of-court settlement.

20. Furthermore, the connection between collective and public action could be further strengthened. In this respect the evidentiary effect of decisions issued by competition authorities who establish that competition rules have been infringed (considered to have been established irrefutably for the purposes of a class action) is confined only to those decisions that have become final. This could delay enforcement to a period in which the evidence, which is sparse and unsuited to archiving since it involves routine daily purchases, will have deteriorated or disappeared over time. The ‘shuttle’ system applicable in France, involving frequent round trips between the *Cour de cassation* (French judicial Supreme Court) and the Paris Court of Appeals in each case, before the decision of the Autorité became final, renders the risk all the more acute. The legislator has already partially taken this difficulty into account by providing for a mechanism for the early introduction of class actions enabling the consensual resolution of the dispute through mediation (in the interest of consumers as well as the companies accused) without waiting for the avenues of appeal to be exhausted. Furthermore, the probative effect attached to the decisions of the competition authorities would begin to apply as soon as appeals had been exhausted in the case of ‘*the component concerning the establishment of offences*’, thus making it possible, in particular, for decisions adopted following a settlement procedure to become the subject of a class action more swiftly, notwithstanding the existence of pending appeals against the penalty or the quantum involved.

21. In any event, this unusual arrangement offers consumers who are the victims of anticompetitive practices a new, balanced route by which to solicit compensation for the harm they have suffered. If such an innovation is to be effective and if the risk of ‘*forum shopping*’ is to be avoided, it must be accompanied by an intervention at EU level so as to harmonise certain aspects of national procedural and substantive laws; this has been done with the adoption of Directive no. 2014/014/EU by the European Parliament and the Council of Ministers on 26 November 2014 with respect to certain rules governing actions for damages with interest in national law for competition law infringements.

1.2 The European Directive concerning actions for damages: extending the aim of adapting of civil suits to the specifics of antitrust law suits

22. The essential contribution of the Directive concerning actions for damages lies in its ‘horizontal’ scope, beyond the mere field of class action. Indeed, the Directive contributes a series of responses that are indispensable for adapting the rules of civil procedure or civil law to the specifics of antitrust litigation, thus devising a common rule that is necessary if the single market is to be achieved.

23. First, it should be stressed that the Directive cannot be compared to a foreign body whose influence could upset the balances, however carefully crafted, of civil law as practised in France:

- The probative effect attached to the decision by the Autorité de la concurrence, which has become final, complies in every respect to the procedure adopted by the Hamon Law (see above point 1.1), including the manner in which it was drafted. The Hamon Law goes even further than the Directive with respect to the status granted to ‘foreign’ decisions since it makes no distinction between French decisions and those adopted in other Member States¹⁰.

¹⁰ French law does not differentiate between French and foreign judgements with respect to the burden of proof although the Directive only grants foreign judgements the status of a ‘commencement of proof’

- A guarantee is offered that the plaintiff will still be entitled to act after the decision of the competition authority has been adopted and the avenues of appeal exhausted, as an extension of the amendment to article L.463-7 of the Code of Commerce introduced by the Hamon Law that provided for an interruption to the limitation period until the decision taken by the competition authority has become final. Here again, the drafting is remarkably similar to the provisions applicable in French law, especially the starting point from which the limitation period begins to run¹¹. Certain adjustments may probably be necessary, however, to take account of the fact that the limitation period only starts when the infringement is no longer being committed, as well as the period starting from the time the alleged victim became aware of or was assumed to have become aware of the elements of the infringement¹².

24. Secondly, the Directive provides the necessary responses to the points that remained pending, especially by making it easier to establish the existence of the possible repercussions of increased cost, a major obstacle in an action for compensation by indirect victims – especially consumers who are the last link in the chain and who are less likely to have access to accounting and financial documentation that would enable them to identify themselves the additional cost involved and the repercussions thereof. The Directive has further established a common standard for obtaining and using documents taken from the files of the competition authority (see point 2.2 below).

25. These last two points should be transposed into French law, which currently does not contain a provision identical to those provided for by the Directive. In particular, the principle should be introduced whereby the burden of proof is incumbent upon the defendant in demonstrating the repercussions of the increased cost in an action for damages, where it is able to resort to such a defence, rather than upon the plaintiff.¹³

26. While these advances are significant, the fact remains that the effectiveness of competition rules, in their implementation in both the private and the public sphere, also depends on the ability of the authorities and the courts to interact in the context of proceedings for compensation (**point II**) as well as the possibility, in practice, for victims to be able to demonstrate the existence and extent of the harm suffered – and for the judge to assess it (**point III**).

¹¹ *The Directive provides that the limitation period begins: '[before] the Claimant becomes aware or could reasonably considered to have become aware [of the facts]' while article 2224 of the Civil Code determines it 'to begin from the date on which the holder of a right becomes aware or ought to have become aware of the facts'.*

¹² Article 10, paragraph 2 of the Directive reads: '*Limitation periods shall not begin to run before the infringement of competition law has ceased and that the claimant knows or can reasonably be expected to know:*

a) of the behaviour and the fact that it constitutes an infringement of competition law;

b) of the fact that the infringement of competition law caused harm to it; and

c) of the identity of the infringer'.

¹³ The *Cour de cassation* currently accepts that proof of damage implies a demonstration by the victim, '*that it could not have passed on the effects of the price increases*' (Cass. Com., 15 May 2012, 11-18.495, not published).

2. The appropriate articulation between private and public enforcement requires fluent dialogue between the competition authorities and the courts

27. Actions for damages, especially if instituted simultaneously with or at the outcome of administrative proceedings, involve two challenges. On the one hand, there is the need to maintain consistency in the application of the competition rules; on the other hand, there is the need to take into account the constraints that a private litigation could place on the ability of an authority to detect and penalise anticompetitive practices effectively.

28. Over and above these two issues, the aim naturally consists in maintaining the effective application of competition rules in their private as well as their public dimension.

29. The combination of these issues and this objective determines the nature of the dialogue between competition authorities and courts awarding compensation.

30. If this articulation between private and public enforcement can apply to the standard procedures for dialogue between the authorities and the judges (**point 2.1**), the specific issue of access to the files of a competition authority by the parties to a private law suit is an invitation to rethink and specify the limits of such a dialogue (**point 2.2**).

2.1 *Tools have long existed that make it possible to structure discussions between the competition authority and courts awarding compensation*

31. Dialogue between the judge and the competition authority has been based from the outset on flexible mechanisms. The role of the competition authority is not to issue a final ruling on a legal issue or question of interpretation, applicable for the future, which, depending on the case, would be the role for the offices of the Court of Justice of the European Union or national supreme courts, but rather to enlighten and to inform the judge so that he/she is in a position to better assess the substance of the case by setting out the law and articulating it, as appropriate, with the facts of the case, though without going as far as substituting itself for the judge.

32. First, the option of *amicus curiae* is most significant in such a dialogue. This principle is enshrined in article 15 of Regulation no. 1/2003, and provides the option for any national competition authority and for the European Commission, at the request of a national judge or at their own initiative, to share their observations in the context of cases in which issues of the application of competition law are at stake. This channel of dialogue makes it possible to go outside the specific context of the dispute between two parties and can be used in cases of an appeal against a decision by a competition authority, where the authority has the status of being one of the parties in a case¹⁴, in order to enable a discussion of a different nature in which the competition authority fulfils the role of a ‘voluntary informant’¹⁵.

33. Thus between 2004 and 1 May 2015, the European Commission intervened with national jurisdictions at their request on 30 occasions and at its own initiative on 17 occasions. Incidentally, it is interesting to note that a French judge only once asked the European Commission for assistance pursuant to article 15, paragraph 1 of Regulation no. 1/2003¹⁶, yet nearly one third (5) of the observations submitted

¹⁴ See the judgement in VEBIC VZW, C-439/08, op. cit.

¹⁵ Under the editorship of G. Cornu, *Vocabulaire juridique* [Legal terminology].

¹⁶ The Paris Court of Appeal solicited the advice of the European Commission for the first time on the basis of Article 15, paragraph 1 of Regulation 1/2003 in a order issued on 19 June 2014 in the so-called ‘on

at its own initiative by the European Commission, on the basis of article 15, paragraph 3 of Regulation no. 1/2003, were submitted in the context of a case that was currently before French courts.

34. The Autorité de la concurrence intervened, however, with the Commercial Court of Paris as an *amicus curiae* to offer guidance on the concept of commitments, in the context of the legal disputes arising from Decision 10-D-29 concerning the practices employed by the companies Eco-Emballages and Valorplast in the sector of recovery and re-use of plastic household packaging waste. It also intervened in 2014 in a case that is ongoing.

35. Secondly, judges may question the Autorité by asking for an opinion, as provided for under Article L.462-3 of the Code of Commerce, the existence of which may partially explain the absence, until now, of apptence by French judges to consult the European Commission.

36. One example is Opinion 12-A-15 of 9 July 2012 rendered in the case in which Carrefour was challenged by its franchisees on the legality of certain of the reaffiliation clauses. Far from restricting itself to this particular dispute in the context of which the request for an opinion was made, the position of the Autorité concerning these clauses was usefully adopted subsequently by the judge in a series of commercial cases opposing brand owners and franchisees¹⁷.

37. A further example is the consultation by the Paris Court of Appeals with the Autorité de la concurrence in the law suit between Bottin Cartographe and Google. In this case, Bottin Cartographe obtained a judgement against Google in the lower court which required it to repair the damage caused by the abuse of its dominant position in the online cartography sector. In a decision dated 20 November 2013, the Paris Court of Appeals, hearing an appeal against this judgement, sought the opinion of the Autorité so that it might issue an opinion on certain points in the case, especially the definition of the relevant markets and Google's position in the markets in question.

38. Lastly, law no. 2012-1270 dated 20 November 2012 (known as the 'Lurel Law') recently supplemented the range of tools that can be used in a dialogue between courts and the Autorité de la concurrence, by securing the transmission of documents between the Autorité de la concurrence and the judge, whether in the context of proceedings when its opinion might be sought, as an *amicus curiae* or in a dialogue with a judge that did not involve a law suit.

39. The Autorité de la concurrence can thus transmit certain documents that would be useful in resolving the dispute without contravening the requirement for professional confidentiality¹⁸. In doing so, the Lurel Law also strengthens a fruitful dialogue with a judge outside the more restrictive context of the procedure for requesting an opinion. These provisions, which enable the Autorité to act at its own initiative, have now become part of the Autorité's terms of reference which involve acting to preserve 'economic public order' in the interest of the manifestation of the truth of the facts – and not merely for the purpose of defending a specific interest.

net/off net' case concerning wrongful differences in pricing implemented by SFR and Orange in urban areas (Decision no. 12-D-24).

¹⁷ Paris Court of Appeal, Pôle 5 - Chamber 4, 3 April 2013, 10/24013.

¹⁸ Article L.463-6 of the Code of Commerce.

2.2 Access to the files of competition authorities: finding the balance

40. It has progressively become essential to establish suitable gauges for the EU as a whole which, while preserving access to justice, would regulate *ex ante* for all parties concerned the question of the scope and intensity of protection that a competition authority's file should enjoy against the risk of disclosure.

41. The Court of Justice has, on several occasions¹⁹, had the opportunity to seek a balance when judging the question of access to the competition authorities' leniency files²⁰. It has thus enshrined the principle under which protection of leniency programmes will aid effective application of Articles 101 and 102 TFUE. However, there is nevertheless the need to establish a protection framework that takes into account any sensitive documents in the file (basically the self-incriminatory documents provided voluntarily by the parties) for which the case-by-case approach enshrined by the Court of Justice would not offer the required legal security.

42. This common regulation reflects a European consensus on the need to protect certain file documents failing which the work that the competition authorities carry out in terms of detecting and sanctioning violations would be affected.

43. First, it can be noted that the directive guarantees the effectiveness of public enforcement (i) by protecting self-incriminatory declarations made by companies cooperating with the competition authorities and (ii) by ensuring there is no interference with the on-going investigations until they are completed.

44. In terms of leniency, the directive ensures that companies that are participating in such a programme by reporting a cartel cannot become designated targets for legal action for damages. In fact, the conditions for the granting of leniency by the Autorité de la concurrence include a general cooperation obligation that must be fulfilled by the company in question. This involves disclosing all information and evidence that may come into its possession or which it might hold in relation to the presumed agreement²¹. There could be a risk stemming from this cooperation obligation in terms of administrative proceedings in the civil courts if the documents provided in this context were then divulged to third parties in the context of a follow-on dispute.

45. Thus, the protection of the declaration made by the applicant for leniency, as well as other documents of a similar nature provided in the course of negotiated procedures (cf. in France, the minutes in a settlement procedure), avoids placing companies that have voluntarily cooperated with the competition authority in an unfavourable situation as a result of their cooperation. These guarantees allow the incentives for companies to enter into negotiated procedures to remain in place.

46. Furthermore, documents drawn up by the competition authority and the parties specifically for the requirements of the procedure are protected under the directive as long as the procedure before the competition authority is in progress. This makes it possible to ensure there is no interference with the

¹⁹ See Court of Justice rulings; Pfleiderer of 14 June 2011 (C-360/09) and Donau Chemie of 6 June 2013 (C-536/11).

²⁰ The Court of Justice held that in the absence of EU regulations on access to information provided in the context of a leniency programme, it is the job of the national courts to establish, on the basis of their internal law and on a case-by-case basis (thus avoiding a systematic refusal to disclose) the conditions under which such access should be authorised or refused, by balancing the interests justifying the disclosure of the information and the protection of the latter which was provided voluntarily by the applicant for leniency.

²¹ See point 21 of the procedural notice of 2 March 2009 on the French leniency programme.

proper conduct of the investigation, while ensuring the legitimate requirements of access by the plaintiff to material that will be useful to its claim can be met. In practice, it is a matter of (i) avoiding any interference with the conduct of public enforcement by way of regular and untimely requests which would create a significant administrative burden and influence investigation strategy, (ii) limiting disclosure of preliminary analysis evidence without placing it in the context of an on-going investigation and (iii) preventing the circumvention of rules governing access to the file held by the authority by recourse to injunctions to produce or obtain documents from the courts where the preliminary proceedings are taking place.

47. Finally, the directive establishes a general framework for assessing the needs and proportionality of an order to disclose information, with specific reference to requests for the disclosure of documents held in the file of a competition authority. In particular the factors to be taken into account by the courts include, "*the need to safeguard the effectiveness of public enforcement of competition law*" (article 6, paragraph 4(c)) and Recital 24).

48. It should be noted that these advances need to be transposed into French law. Indeed, while, as noted previously (cf. point 2.1 above), an innovative and well balanced framework had been found with the "Lurel law" amendments made to Article L. 462-3 of the Code of Commerce, the directive provides definitive consolidation of the protection of self-incriminatory statements made by companies cooperating with the competition authorities and more broadly, documents in the file of which disclosure would harm the investigation.

49. Secondly, above and beyond this specific regime of access to evidence in the file of a competition authority, the directive also lays down the means by which a fruitful dialogue, with no interference, may be held between the competition authority and the court.

50. In first place it allows the competition authority, acting at its own initiative, to submit observations to the court on the sensitive nature of some documents which could not be disclosed without putting public enforcement at risk (article 6, paragraph 11). This is an extension of the power offered to the European national competition authorities ("NCA") to intervene on the substance of a case on the basis of Article 15, paragraph 3 of Regulation 1/2003, by protecting the submission of comments by the NCAs which are not directly related to the application of Articles 101 and 102 TFEU, but to matters that might indirectly affect the effective implementation of these provisions²². With a view to ensuring the possibility,

²²

On this matter, order X BV of the Court of Justice (C-429/07) of 11 June 2009 distinguished between interventions made by the NCAs and the European Commission respectively, on the basis of Article 5, paragraph 3, indicating the scope of intervention of the latter was broader than that of the former: "*The first and second sentences of the first subparagraph of Article 15(3) permit the competition authorities of the Member States to submit written observations on their own initiative, and, with the permission of the court concerned, oral observations to the national courts of their Member State on issues relating to the application of Articles 81 EC or 82 EC. The third and fourth sentences of that provision also permit the Commission to submit written observations on its own initiative, and, with the permission of the court in question, oral observations to courts of the Member States where the coherent application of Articles 81 EC or 82 EC so requires. Thus, the first subparagraph of Article 15(3) of Regulation No 1/2003 refers to two different types of intervention with separate fields of application: intervention by the national competition authorities before the national courts of their Member State on issues relating to the application of Articles 81 EC or 82 EC, and intervention by the Commission before courts of the Member States where the coherent application of Articles 81 EC or 82 EC so requires.*"

in practice, of NCAs submitting their observations in due time, the Directive also makes reference, in its considerations, to an NCA information system regarding requests for the disclosure of documents²³.

51. The directive then envisages that the parties (both plaintiff and defendant) with a direct interest in the dispute, should be those whom the courts prioritise in the request for the submission of documents, since the office of a competition authority and its limited resources is incompatible with measures aimed at systematically bringing it before the court in the context of private proceedings. Thus, a court's request for disclosure of documents from the file of a competition authority may only take place when one party or a third party is not already in a position to or cannot reasonably supply the requested documents. Such a "subsidiarity" principle had already been used by the French courts in a case where the parties in a procedure before the Autorité - who on this basis had the file available to them - had requested a court to order the latter to disclose its file²⁴.

3. **Damage: what is the competition authorities' role in the evaluation of the harm suffered by the victim?**

52. The establishment of mechanisms to support action for damages and the organisation of interaction between the court and the competition authorities is one of the essential stages in progress towards offering effective access to compensation for victims of anticompetitive practices.

53. However, the problem of demonstrating harm - both its existence and its quantum - still remains: the right to compensation is still purely theoretical, even in the presence of an efficient procedure, without the possibility *in fine* of presenting evidence of real damage to the courts.

54. In a legal context where follow-on activities are encouraged, the competition authority has a pedagogical role to play (**point 3.1**). This is not to say that systematic intervention on its part should be envisaged; action for compensation and the question of individual assessment of damages are still outside the remit of competition regulators (**point 3.2**).

3.1 ***The pedagogical role of competition authorities in anticipation of actions for compensation***

55. As has been noted above, both European and French legislation tend to encourage follow-on actions for compensation. In fact, by releasing plaintiffs from the burden of proving the misconduct that a competition authority has already established, these legislative developments are a strong incentive to adopt a final decision on the practices before action for compensation is launched. This is all the more true when changes made to the limitation period will guarantee that plaintiffs will still be in a position to take

²³ Recital 30: "*Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in that competition authority's investigation into the alleged infringement, without prejudice to national law providing for ex parte proceedings.*"

²⁴ In the *Ma liste de courses* case, the Appeal Court of Paris, in a judgement of 20 November 2013, held that "*the documents for which disclosure has been ordered are covered by the confidentiality of the investigation which only ceases to exist when the disclosure of the documents is necessary for the exercise of a party's rights, it is incumbent upon the company MDLC to justify the need to disclose such documents for the exercise of its rights in the dispute with the companies (...); breach of confidentiality is only admitted when this is necessary for the exercise of rights to defence, the Autorité and its agents should not have to bear the risk of a breach of confidentiality in lieu of the party which is the only one to be able to determine exactly, since it has them itself already, which documents are necessary for the exercise of its rights; the Authority may therefore duly avail itself of a lawful impediment.*" This solution is likewise confirmed in a subsequent judgement of the Appeal Court of Paris of 24 September 2014, in a case *Eco-Emballages and Valorplast v/ DKT*.

action once the authority's decision has been adopted and all avenues of appeal exhausted (cf. point 1.2 above).

56. Victims will, however, still be subject to the obligation to demonstrate both the existence of a causal link and of harm. It is in this latter area that competition authorities may now be called upon to play a part.

57. First, it is useful to highlight the possibilities open to the plaintiff before the competition authority in terms of using the file documents at its disposal to form the grounds of its claims within the framework of follow-on action. The solution already delivered in the Semavem decision by the *Cour de cassation* of 19 January 2010 and, in the future, the provisions of the Directive on actions for damages, will allow the party that already has the file documents to use them, without conditions. However, this use will be subject to the respect of any absolute or temporary protection applied to the declarations by the applicant for leniency, the settlement and the procedural acts - in the case of the latter, for as long as the investigation is in progress.

58. Moreover, the very content of the decisions published is likely to facilitate proceedings before the court awarding compensation. In France, the Autorité de la concurrence has already taken this factor into account. Its decisions published in their entirety in this regard are rich in useful findings for the plaintiff, in terms of the effects on or harm to the economy.

59. Certain developments of the Autorité de la concurrence's decisions can in fact provide a bridge between public and private enforcement, in particular (i) identity of the victims or categories of victims, (ii) detailed description of the practice's mechanisms (purpose of a cartel for example), (iii) scope of practice (markets concerned) and also (iv) the value of sales in the market concerned and (v) duration of the practices.

60. The Commercial Court of Paris recently passed judgement on an action for damages filed by Outremer Télécom against Orange. This action had been brought following the Autorité de la concurrence's decision no. 09-D-36, finding Orange Caraïbe and Orange guilty of anticompetitive practice perpetrated on the mobile and fixed telecommunications services markets in the French Antilles-Guyana region. In its judgement of 16 March 2015, the Commercial Court of Paris used the findings of the Autorité de la concurrence in this case (and the Appeal Court in the context of the appeal against the decision) in awarding compensation amounting to 8 million Euros to the plaintiff.

61. Above and beyond the qualitative assessments made in the context of the examination of the criteria of loss to the economy, the Autorité de la concurrence may be in a position to give indications as to the possible extent of the loss in the form of estimates of overpricing. The Autorité will not be bound to do so, however, and only when the litigation before it provides useful information for this purpose.²⁵ The structural consequences of the practices highlighted by the Autorité, in particular where there have been market sharing agreements or predatory behaviour, can also be used by the courts in the exercise of their judicial review²⁶.

²⁵ See by way of illustration judgement no. 11-D-02 of 28 January 2011 "Historic monuments" where the Autorité estimated the overpricing as a result of anticompetitive practices at 24% or judgement no. 10-D-39 of 22 December 2010 "Road signs" where it identified overpricing caused by the practices of around 5 to 10%, with some witness statements indicating an overpricing of more than 20%.

²⁶ See by way of illustration judgements no. 13-D-11 of 14 May 2013 "Plavix" and no. 13-D-21 of 18 December 2013 "Subutex" on practices involving abuse of dominant position in the pharmaceutical sector where the Autorité made comparisons between the observed substitution rates and the average substitution rates for drugs in the same therapeutic class.

3.2 *Public and private enforcement: a different approach to the notion of damage*

62. First, while the decisions published by the Autorité de la concurrence have a role in a certain number of cases in terms of providing support for the victims of anticompetitive practice, in terms of demonstrating the harm caused, the role that the Autorité can play is still limited by the fact that the purposes of its analysis of the effect of the practices or loss to the economy are fundamentally different to those of the analysis of the courts in terms of assessing how much individual harm a victim has suffered.

63. For a start, the objectives of an administrative fine and civil redress are different; the first is punitive and aimed at general and individual dissuasion recognised by case law with a view to the legal imperative to provide protection for economic public policy measures,²⁷ while the second redresses a damage, thus responding to the principle by which any action, which causes harm to another, obliges the party that has caused the harm to provide redress.

64. In addition, these differences in purpose entail differences in method and content: loss to the economy generally speaking takes into account all aspects of the disruption that the practice has caused to the competitive operation of activities, sectors or markets directly or indirectly concerned, as well as the economy as a whole. Therefore, taking loss to the economy into account falls within the perspective of preserving economic public policy, and is not a practice of repair or redress. The harm caused to the economy is thus distinguished from individual or group damages sustained by the direct or indirect victims of anticompetitive practices and is not limited solely to the illegal earnings that the perpetrator(s) might reasonably have made from these practices, at the time when they were engaged in them. By way of example, the Autorité highlighted in its decision 09-D-05 of 2 February 2009 "temporary employment" that for the companies in question, the practice consisted of reaching agreement to confiscate for their own profit, part of the welfare cost reduction retrocessions (the so called "Fillon reductions") by diverting them from the companies for which they were intended. In view of the extent of the harm caused to the economy, the Autorité, when calculating the fines, took into account the major disruption to the incentive effects of public employment policies and their budgetary impact. It also took into account the fact that the latter was supported by the taxpayer, in the context of tackling unemployment and the priority given to economic growth.

65. Loss to the economy is not therefore comparable to individual harm sustained by a victim.

66. Secondly, for the future, certain provisions of the Directive on actions for damages invite interaction between public and private enforcement in relation to damages, by the following two means:

67. The first is the introduction of a provision aimed at allowing consultation with the competition authorities with regard to the determination of the quantum of the damage (Article 17(3) of the Directive). The competition authority is free to determine whether or not it will agree to a request for consultation. Effectively, it may give such assistance when it "*considers such assistance to be appropriate*". To this end, the involvement of a competition authority in this new terrain should be guided by two principles. First, resources allocated to detecting infringements to competition law should not be diverted into private enforcement proceedings; therefore it would seem sensible to favour a support based on the file which the competition authority already holds rather than envisaging any additional investigation in the context of this consultation. In addition, it is important not to go into precise figures but rather to stick to a detailed methodological report, if relevant based on information that is already available in the file. Failing this, the competition authority runs the risk of acting as a substitute for the court and generating more and more consultation requests from litigants and/or the courts.

²⁷ The dissuasive nature of the fine was acknowledged in 2011 by the *Cour de cassation* in its decision not to transfer a QPC to the perfumes case.

68. The Directive then specifies that a competition authority "may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor" (Article 18, paragraph 3). The aim of European legislation is to encourage the consensual settlement of disputes between perpetrators and victims of anticompetitive practices. This new provision does not restrict the margin of appreciation of the competition authority in fixing the amount of the fine, in accordance with the criteria and principles set out in national law - expressions of procedural autonomy left to the national courts under European law. However, it does nevertheless move in the opposite direction to the one set out throughout this contribution, in the sense that here, for the first time, the outcome of a private dispute is likely to have an impact on the assessment made by the competition authority in terms of the implementation of "public" enforcement. In addition, several safeguards are necessary, including the limiting of this recognition to cases of consensual settlement²⁸ and not making it a new obligation on the part of the competition authorities.

²⁸ This is understood to exclude the case of settlement by arbitral judgement. Cf. the definitions of "consensual dispute resolution" and "consensual settlement" in Article 2, paragraphs 21 and 22 of the Directive.