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CONSUMERS' ACCESS TO EU COMPETITION LAW PROCEDURES: OUTER AND INNER LIMITS

KATALIN J. CSERES AND JOANA MENDES *

Abstract

Enforcement of competition law affects consumers' economic interests, as part of the public interests EU competition law protects. Therefore, consumers ought to be involved in the respective enforcement procedures. Against this normative background, we analyse consumers' access to the public enforcement by the Commission; we assess whether and how the formal role they are assigned during this procedure and the way access is defined enable consumers to protect their economic interests. We identify outer and inner limits to consumers' access to competition enforcement procedures, arising from the Commission's discretion in handling complaints and in defining access to information. We critically evaluate those limits against the contention that the enforcement of competition law rules, and the way it is pursued by administrative actors, ought to be guided by the public interests inherent in EU competition law.

1. Consumers and the enforcement of EU competition law

Competition laws are set and enforced in order to maintain and protect the competitive process and to provide society with high quality goods and services at low prices. The ultimate public interest underlying competition law enforcement is the protection of the competitive process. This is also the case in EU competition law.¹ But EU competition law also guarantees that

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1. Already the drafters of the Rome Treaty had as one of the objectives the improvement of European living standards. As competition policy had a core role in the integration process from the beginning, consumers' welfare formed part of the aim to increase people's living standards, though this did not mean that the drafters saw the aim of competition rules in the improvement of "consumer welfare" as an economic concept as understood today. Akman, "Searching for the long-lost soul of Article 82 EC", 29 *Oxford Journal of Legal Studies* (2009), 300.

consumers get a fair share of the economic benefits resulting from the effective working of markets.² The enforcement of competition law affects consumers' economic interests, and therefore, consumers ought to be involved in competition law procedures. In EU law, consumers can bring complaints before the Commission and national competition authorities, and participate in the respective administrative procedure. In this role, they contribute to the public enforcement pursued by competition authorities, deterring undertakings from law infringements and making them comply with the law. Consumers may also bring damages claims before national courts,³ in which case they enforce competition rules in private litigation, seeking compensation for the harm suffered. In general, consumers' knowledge of the day-to-day functioning of markets, in particular those in mass-market consumer goods, make consumers and consumer organizations important information providers for competition authorities by way of bringing complaints and/or initiating damages actions before national courts.

The reform of EU competition law rules in the last 10 years,⁴ among other aspects, has bolstered the participation of private actors in the enforcement of EU competition law, by strengthening private enforcement and introducing leniency programmes.⁵ This reform also entailed a more pronounced role for consumers: they were called upon actively to take part in the public *and* private

2. This is explicitly addressed in Art. 101(3), which says that consumers must receive a fair share of the efficiency gains generated by an otherwise restrictive agreement; cf. Case C-26/76, *Metro/Saba I.*, [1977] ECR 1875, para 47; Case C-45/85, *Verband der Sachversicherer e.V. v. Commission*, [1987] ECR 0405, para 15; Joined Cases T-528, 542, 543 & 546/93, *Métropole Télévision and Others v. Commission*, [1996] ECR II-649, para 118; Case C-309/99, *J.C.J. Wouters et al. v. Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577; Case C-519/04 P, *Meca-Medina*, [2006] ECR I-6991; See Cseres, "Towards a European model of economic justice: The role of competition law", in Micklitz (Ed.), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar, 2011), pp. 405–450. Townley, "Is anything more important than consumer welfare (in Article 81 EC)?: Reflections of a community lawyer", 10 *CYELS* (2007–2008), 345–343. As to Art. 102 TFEU, see Case C-53/03, *Syfait and Others v. GlaxoSmithKline*, [2005] ECR I-4609, Opinion of A.G. Jacobs of 28 Oct. 2004; Akman, "Consumer welfare and Article 82 EC: Practice and rhetoric", 32 *World Comp.* (2009), 71–90.

3. Case C-453/99, *Courage*, [2001] ECR I-6297, para 26. Joined Cases C-295-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619; Case C-199/11, *Otis NV*, judgment of 6 Nov. 2012, nyr.

4. Increasing the deterrent effect of competition rules was one of the purposes of the reform, which began with the introduction of the more economic approach by endorsing the economic concept of consumer welfare. The introduction of a consumer welfare-based approach meant the application of economic analysis measuring economic effects in the identification of competitive harm. Cseres, "The controversies of the consumer welfare standard", 3 *Competition Law Review* (2007), 121–173.

5. White Paper on modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No. 99/027, O.J. 1999, C 132/1.

enforcement of the competition rules. The new decentralized enforcement system established by Regulation 1/2003 was intended to reduce the number of complaints addressed to the Commission in cases where national competition authorities (NCAs) could effectively deal with them.⁶ At the same time, on the assumption that they cannot investigate all complaints, public enforcers were to set priorities in their treatment of cases and choose which complaints to reject accordingly.⁷ Many Member States provide now for the possibility to reject a complaint on the basis of different priorities or lack of resources. One criterion of priority setting that the Commission pursues is the possibility for complainants to seek and obtain effective relief before national courts.⁸ Whenever possible, private enforcement before national courts was considered preferable to public enforcement by the Commission. Some Member States followed the Commission. The United Kingdom,⁹ the Netherlands,¹⁰ Hungary,¹¹ Sweden¹² and the Czech Republic¹³ uphold this same criterion, rejecting complaints when complainants can file damages claims at national courts. National practices differ in this respect,¹⁴ but there is

6. Delegation of enforcement powers to national authorities was intended to tackle the slow progress of decentralized enforcement by national competition authorities (NCAs) as well as the complainants' reluctance to resort to national courts. White Paper, *ibid.* Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, O.J. 2004, C 101, points 21, 24–25 The Commission may even reject a complaint in accordance with Art. 13 of Regulation 1/2003, on the grounds that an NCA is dealing or has dealt with the case.

7. Commission Notice, *ibid.*, point 8.

8. Commission Notice, *ibid.*, points 16–18.

9. The Office of Fair Trading's (OFT) Prioritization principles state that the alternatives to OFT action could include private enforcement. OFT, *Prioritisation principles*, Oct. 2008 p. 9.

10. *Prioritering van handhavingsonderzoeken door de Nederlandse Mededingingsautoriteit* Staatscourant 2012, nr. 2151, 14 Feb. 2012, p. 2.

11. The Hungarian Competition Authority (GVH) Fundamental principles of competition policy as applied by the Hungarian Competition Authority (GVH), 8 May 2007, available at: <www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_alapelvek_antitrosztpolicy_2007_05_a_pdf.pdf> (last visited 29 Dec. 2013), point 1.37.

12. The Swedish Competition Authority is careful to note that merely because it refrains from pursuing a matter or adopts a position that an issue or practice is not subject to further investigation, affected parties may still pursue the matter in other fora (such as courts). Konkursverket, The Swedish Competition Authority's policy for prioritizing competition and procurement issues, 5 Oct. 2010, available at: <www.kkv.se/upload/Filer/ENG/About/Prioriteringspolicy_eng.pdf> (last visited 29 Dec. 2013).

13. "The authority will also refer all 'harmed subjects' (i.e. competitors or consumers) to a court. The authority notes that such parties must prove the anti-competitive behaviour themselves". Nedelka and Linhartová, *Prioritisation in competition cases: A step forward?*, available at: <roadmap2013.schoenherr.eu/prioritisation-in-competition-cases/> (last visited 29 Dec. 2013).

14. At present, the ability of NCAs to set priorities, as well as the criteria upon which complaints are rejected differ greatly among the Member States. ECN Recommendation on the

a tendency to voluntary harmonization converging around the Commission's priority-setting criteria.¹⁵

As a result of this reform, an intense discussion began on the role of consumers in the private enforcement of competition law through damages actions, and the associated benefits. However, a similar discussion about the role and interests of consumers in the public enforcement of competition law and its relation to the possibility of complainants to file an action before a national court has until now been absent. This is the subject of the present article. We analyse consumers' access to the public enforcement procedure carried out by the Commission, and assess whether and how the formal role they are assigned during this procedure and the way access is defined enables consumers to protect their economic interests. Three caveats are in order to clarify the scope and purpose of the article. First, access to public enforcement procedures by the Commission is only one aspect of the access of consumers to the public enforcement of EU competition law, given the possibility to resort equally to NCAs. These authorities also filter consumer access and some of them also select complaints invoking the possibility to resort to private enforcement. In this sense, our analysis is a first contribution to clarifying an issue that is broader in scope. Second, our focus is on final consumers, i.e. the customers at the end of the distribution line. Competition rules do not differentiate between final consumers and firms that are the immediate buyers of the products or services of the parties being investigated.¹⁶ However, the factual situation of these two groups is distinct.

power to set priorities, Dec. 2013, available at: <www.epant.gr/img/x2/news/news608_1_1386943842.pdf> (last visited 29 Dec. 2013), p. 2. See also Working group on cooperation issues and due process, decision-making powers report, 31 Oct. 2012, p. 71, available at: <ec.europa.eu/competition/ecn/decision_making_powers_report_en.pdf> (last visited 29 Dec. 2013). There is generally a high degree of discretion and flexibility for the NCAs to decide whether to act upon a complaint: Jenny, "Priority setting and discretionary powers of competition authorities, roundtable on 'Priority setting and resource allocation as a tool for agency effectiveness'", UNCTAD, Geneva, 9 July 2013, available at: <unctad.org/meetings/en/Presentation/IGE2013_PRESPrior_Jenny_en.pdf> (last visited 29 Dec. 2013).

15. In 2012, the ECN's Report on decision-making powers reflected a high level of convergence among the NCAs and was intended to serve as a basis for further harmonization on the NCAs' procedures for competition law enforcement. Working group on Cooperation issues and Due process, Decision-making powers Report, 31 Oct. 2012, p. 5. In 2013 this convergence of national competition law procedures was summarized in ECN Recommendations on key investigative and decision-making powers. See in particular ECN Recommendation on the power to set priorities, previous note, p. 3.

16. Guidance on the Commission's enforcement priorities in applying Article 82 (EC) to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/19, See also Guidelines on the application of Article 81(3), O.J. 2004, C 101/97, point 84. See e.g. Report by the economic advisory group for competition policy on "An economic approach to Article 82", July 2005, available at: <ec.europa.eu/dgs/competition/economist/note_eagcp_july_05.pdf> (last visited 21 July 2013), p. 8.

As a rule, the economic resources of final consumers – sparse when compared with the economic resources of companies – limit their possibilities to participate in both private and public enforcement.¹⁷ As EU competition law now stands, final consumers can have direct access to the administrative procedure conducted by the Commission.¹⁸ But having access does not mean that the conditions upon which access is granted enable them to protect their economic interests – which is a question this article addresses. Third, at first sight, this question may come across as being essentially a policy issue: to what extent *should* consumers participate in the Commission’s competition public enforcement procedures. Yet, this becomes a distinctly legal problem from the moment the protection of consumers’ interests is also one of the public interests the Commission is bound to uphold under EU law. The Commission’s decisions concretize the goals set by law.¹⁹ As we will argue, the protection of consumers’ economic interests is a public interest inherent in the goals of EU competition law enforcement. Procedures matter for the pursuance of public interests: they affect the range of decisions available and, thereby, influence substantive outcomes.²⁰ Therefore, the design of procedures, and, in particular, the determination of who has access and under which conditions, is a crucial condition in making the administrative decision-maker comply with the public interests and the legally protected interests of affected persons it is legally bound to respect.

The first part of the article explains the relation between the protection of consumers’ economic interests and the goals of EU competition law. It identifies the public interests that, in accordance with the legislative framework and the Court’s interpretation thereof, ought to be pursued in the enforcement of competition law and, thereby, situates the relevance of consumer interests in the respective legal regime (section 2). As mentioned above, the Commission’s assessment of complaints – and in particular the justification for the role of consumers in its public enforcement – is premised

17. The specific situation of final consumers in competition law enforcement underline the judgment of the GC in Joined Cases T-213 & 214/01, *Österreichische Postsparkasse*, [2006] ECR II-1601, paras. 110–119. See section 4 *infra*.

18. Art. 27(1) and (3) of Regulation 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. 2002, L 1/1 and Arts. 6 and 13 of Regulation 773/2004 of 7 Apr. 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004, L 123/1.

19. See on administrative decisions in general, Schmidt-Assmann, *La teoría general del derecho administrativo como sistema* (Marcial Pons, 2003), p. 358.

20. McCubbins, Noll and Weingast, “Administrative procedures as instruments of political control”, 3 *Journal of Law, Economics & Organization* (1987), 254–255.

on the assumption that consumers could also turn to national courts with a view to protecting their interests. Accordingly, before entering the analysis of the design of public enforcement procedures, we analyse the interplay between public and private enforcement. In fact, if this interplay functions as the legislature and the Commission have conceived it, there may be no reason to reconsider the way public enforcement procedures are currently structured. We argue that this is not the case (section 3). *Outer limits* to consumer participation – i.e. those that condition *a priori* consumers' access to the public enforcement procedure²¹ – result from the Commission's discretion in setting priorities and deciding whether to pursue certain complaints. This discretion is strongly grounded on the argument that private enforcement serves as an alternative mechanism of consumer redress. We critically assess this contention. Finally, we analyse administrative procedures in the enforcement of EU competition law and the relevance of consumers' participation rights, with a view to assessing the *inner limits* to consumer participation (section 4). These inner limits result from the way administrative enforcement procedures are structured, once consumers are admitted to the procedure. We analyse the present EU procedural model of tripartite distinction between undertakings, holders of a "legitimate interest" and holders of a "sufficient interest". In particular, we assess the conditions under which consumers may have access to information contained in an administrative file, and whether the current rules protect their interests sufficiently. We conclude with an overall assessment of the outer and inner limits, and, on this basis, we question two firmly rooted characteristics of the public enforcement regime and put forward two proposals: the Commission should differentiate its priority setting decisions on the basis of the types of infringements to which complaints refer; and it should classify the information contained in the competition file as a means of balancing the competing interests of the undertakings investigated and of the consumers who have been victims of their putative infringements (section 5).

21. Practical imitations such as lack of financial resources, limited knowledge and hence limited ability to engage with issues involved in competition law enforcement are as relevant as these and may, in fact, condition access even more than legal rules. They are, however, outside the scope of our analysis. Weber, "Towards an optimal mix of public and private enforcement in consumer law – A comparative law and economics analysis of European consumer law enforcement (package travel vs. misleading advertising)", PhD thesis, Rotterdam University (2012), on file with the authors; Hodges, Vogenauer, and Tulibacka (Eds.), *The Costs and Funding of Civil Litigation – A Comparative Perspective* (Hart Publishing, 2010); Tuil and Visscher, (Eds.), *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis* (Edward Elgar, 2010).

2. The goal of competition law enforcement and consumers' economic interests

Administrative procedures on possible infringements of competition law need to be guided by the public interests that EU competition law pursues. That the European Commission's decisions ought to uphold the public interests protected by EU law is a general requirement of the rule of law, which underpins the EU legal system (Art. 2 TEU). However, which public interest guides the enforcement of EU competition law is subject to debate. The Court of Justice has clearly stated that this public interest is "competition as such", stressing that EU competition rules aim to protect "*not only* the interests of competitors or of consumers, but also the structure of the market" (our emphasis).²² This contradicts an earlier judgment of the General Court, where that Court, stressing the relevance of consumer welfare as part of the objectives of competition law, considered the well-being of consumers as the "ultimate purpose" of competition law.²³ The positions of the two Courts indicate different ways of interpreting how the overall material welfare of society, which competition law generally aims to increase by maintaining rivalry among firms, relates to the protection of consumer interests. In general, the final objective of competition policies can either be considered to be the protection of the competitive process as such, to which the interests of consumers are subordinated, or the immediate (and short-term) interests of consumers.²⁴

Nevertheless, even if one endorses the former position (as the ECJ did in *T-Mobile*), the economic interests of consumers remain a key part of the

22. Case C-8/08, *T-Mobile Netherlands and others*, [2009] ECR I-4529, paras. 38–39; Joined Cases C-501, 513, 515 & 519/06 P, *GlaxoSmithKline Services Unlimited v. Commission*, [2009] ECR I-9291, paras. 62–63.

23. *Österreichische Postsparkasse*, cited *supra* note 17, para 115 (as well as Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission*, [2006] ECR II-2969, para 118).

24. Brodley, "The economic goals of antitrust: Efficiency, consumer welfare, and technological progress", 62 *New York University Law Review* (1987), 1035. For a detailed discussion on the protection of consumer interests through substantive competition rules see Cseres, *Consumer protection and competition law* (Kluwer International, 2005); Cseres, *op. cit. supra* note 2 and note 4. Andriychuk differentiates between an utilitarian perception of competition (competition as an instrument to achieve certain external goals) as opposed to competition in a deontological sense (competition as more than just a tool to increase economic efficiency). Andriychuk, "Can we protect competition without protecting consumers?", 6 *Competition Law Review* (2010), 77–88; Andriychuk, "Does competition matter? An attempt of analytical 'unbundling' of competition from consumer welfare", 2 *Yearbook of Antitrust and Regulatory Studies* (2009), 11–26.

equation when assessing possible competition law infringements.²⁵ Protecting competition implies ensuring economic efficiency, which results from the effective working of markets and from economic and technical progress. It is generally acknowledged that increased prices, reduced output and decreased quality are the prime *indicia* of negative effects on competition. Importantly, these indicators are also the hallmarks of consumer injury, which is generally regarded as the inherent part of adverse effects on competition.²⁶ This means that protecting the process of competition essentially also includes safeguarding consumers' economic interests. Business conduct which makes consumers worse off in terms of price, output and quality makes the competitive process worse off. This is reflected in the Commission's rhetoric in the past years.²⁷

The horizontal clause set out in the Treaty on the Functioning of the European Union – according to which “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities” (Art. 12 TFEU)²⁸ – is a legal argument that supports this view. It was invoked by the General Court in *Test-Achats*, to stress that consumer protection is an interest that, by force of the Treaty, necessarily ought to be taken into account in the implementation of any EU policy and activity, including, therefore competition law.²⁹ Indeed, Article 12 TFEU – like Article 153(2) EC before it – forms a constitutional basis to weigh the interests of consumers in the assessment of possible infringements to competition law, even if the protection of consumers' economic interests is not taken as the public interest that competition law ought to serve.³⁰

25. On the goals of competition law, see Cseres, op. cit. *supra* note 4; Lovdahl Gormsen, “The conflict between economic freedom and consumer welfare in the modernisation of Article 82 EC”, 3 *European Competition Journal* (2009), 329. Akman, op. cit. *supra* note 1.

26. Stucke, “Is competition always good?”, (2013) *Journal of Antitrust Enforcement*, 1–36. Marsden and Whelan, “Consumer Detriment and its Application in EC and UK Competition Law”, (2006) ECLR 569, 169. See *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); Case C-78/70, *Deutsche Grammophon v. Metro*, [1971] ECR 487 (excessive prices). Joined Cases C-241 & 242/91 P, *RTE (Magill)*, [1995] ECR I- 743 (new product).

27. E.g. Commission Article 81(3) Guidelines, cited *supra* note 16, para 13; Commission Notice, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, O.J. 2004, C 101/2, para 5 (“the aim of Article 81 [101 TFEU] as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources”).

28. See also Art. 38 of the Charter of Fundamental Rights of the European Union, which determines that EU policies ought to ensure a high level of consumer protection, equally invoked by the Court.

29. Case T-224/10, *Association belge des consommateurs test-achats ASBL v. Commission*, judgment of 12 Oct. 2011, nyr, para 43.

30. *Ibid.*

It follows that consumers' economic well-being is one of the core public interests pursued in the enforcement of competition law, irrespective of whether competition is considered as a means to achieve an end or as an end in itself. Arguably, this ought to be reflected not only in the rules that govern access to the administrative procedure, but also in the very structure of the procedure. Procedures may otherwise hinder an implementation of competition law that is coherent with the public interests postulated by law. If in practice decision-making is detached from the public interests the administrative enforcer is deemed to pursue, this hinders the legitimacy of administrative enforcement. It is within this normative framework that we will examine the access consumers currently have to enforcement procedures. The Commission's selection of the complaints it will pursue and of those it will reject is a crucial first filter thereof.

3. The outer limits of access: Priority setting and the interplay between private and public enforcement

Filing a complaint before the Commission is one important means of consumer participation in the enforcement of competition rules. The Commission's priority setting as to which complaints should be acted upon and which should be rejected importantly conditions consumer participation in enforcement procedures. Priority setting is a basic tool of public administrative authorities to rationalize resource allocation and to deal optimally with financial and human resource constraints. Choosing and pursuing articulated priorities with a reasonable and well-explained rationale can enhance the effectiveness as well as the credibility of administrative action.³¹ Administrative entities generally use prioritizing criteria as filters to help them determine which actions are likely to lead to certain desired results. Deciding whether a matter is a priority often depends on the interplay of a number of different factors. The Commission's present priority policy has developed on the basis of the EU Courts' case law. Its main principles have later been laid down in soft-law instruments. It is premised, among other aspects, on the idea that complainants, instead of turning to the Commission,

31. Kovacic, Hollman and Grant, "How does your competition agency measure up?", 7 *European Competition Journal* (2011), 25–45. Prioritization is the process of translating strategic objectives into operational priorities. Through prioritization, agencies direct resources, time, and energy to those projects that are deemed most relevant to achieving the objectives laid out in the agency's strategic plan. International Competition Network, *Agency effectiveness Handbook* (2010), ch. 1: Strategic planning and prioritization, p. 29. Available at: <www.internationalcompetitionnetwork.org/uploads/library/doc744.pdf> (last visited 21 July 2013).

might file an action before a national court. We will, first, examine this aspect of the Commission's priority setting policy and then critically analyse the way the interplay between private and public enforcement is conceived.

3.1. *Priority setting: Automec II principles*

The main principles governing the Commission's obligations and margin of discretion when it receives complaints were laid down in *Automec II*.³² The *Automec II* principles are the most important pillars of complainants' participation in competition law procedures. These principles are currently enshrined in the 2004 Notice on the handling of complaints; they still guide the Commission's priority setting when enforcing Articles 101 and 102 TFEU.³³ Three main points, relevant for our analysis, follow from *Automec II* and the subsequent case law. First, the Commission, as the institution responsible for the implementation and orientation of Union competition policy and the application of Articles 101 and 102 TFEU, has a wide margin of discretion in deciding whether or not to pursue a complaint.³⁴ The right to file a complaint does not include the right to obtain a decision from the Commission,³⁵ but the Commission is under an obligation to examine carefully the factual and legal particulars brought to its notice by the complainant.³⁶ Secondly, in deciding whether to pursue or reject specific complaints the Commission is entitled to classify them according to different degrees of priority on the basis of the Union interest.³⁷ In doing so, the Commission is acting as an administrative authority that must act in the public interest. Unlike civil courts, its task is not to safeguard the individual rights of private persons in their relations *inter se*. Under the duty to state reasons (now contained in Art. 296 TFEU), the Commission must set out the legal and factual considerations that led it to conclude that there was insufficient Union interest to justify investigating the case.³⁸ Thirdly, reasons pertaining to procedural economy and the sound administration of justice militate in favour

32. Case T-24/90, *Automec Srl*, [1992] ECR II-2223.

33. Commission Notice on the handling of complaints, cited *supra* note 6, point 44.

34. Art. 105 TFEU has conferred wide powers on the Commission to fulfil its law enforcement tasks. *Automec II*, cited *supra* note 32, para 73.

35. *Automec II*, *ibid.*, paras. 74–76. The Commission is neither bound to commence proceedings seeking to establish the existence of an infringement of Union law, nor can it be required to give a decision in that connection, nor is it under an obligation to rule on the existence of an infringement or otherwise be compelled to carry out an investigation. This is known in some countries as the principle of opportunity.

36. *Automec Srl*, *ibid.*, para 79.

37. *Ibid.*, paras. 83–84.

38. *Ibid.*, para 85.

of the case being considered by the national courts,³⁹ rather than by the Commission, when the same matter has been or can be referred to them.⁴⁰

This third aspect was confirmed and further developed, in particular, in *BEMIM*⁴¹ and *Tremblay*.⁴² In these cases, the Court stated that rejecting complaints depends on the fact that the rights of the complainant or of its members can be *adequately* safeguarded, in particular by national courts.⁴³ According to the Court, possible difficulties of national courts in interpreting Article 101 or 102 TFEU is not a factor the Commission is required to take into account in appraising the Union interest in further investigating a case, given the possibility of resorting to a preliminary reference under Article 267 TFEU. At the same time, the rights of a complainant cannot be regarded as sufficiently protected before the national court if that court is not reasonably able, in view of the complexity of the case, to gather the factual information necessary to determine whether the practices criticized in the complaint constituted an infringement of the said Treaty provisions.⁴⁴ In more recent cases, the Courts follow the same approach described above.⁴⁵

It follows that the question whether national courts can adequately safeguard the rights of the complainant is one of the key factors to determine consumers' access to public enforcement by the Commission and to ground the Commission's criteria for priority setting. This argument presupposes that potential complainants – among whom, consumers – turn to national courts. This is an essential point, because if there are legal and practical obstacles that

39. This refers to private enforcement of competition law, i.e. individually initiated litigation, either as stand-alone or follow-on action, before a court to remedy a violation of competition law. Such an action may lead to civil law sanctions such as damages, restitution, injunction, nullity or interim relief. Notice on handling complaints, cited *supra* note 6, points 12–18, European Commission, Report on competition policy (2005), available at: <ec.europa.eu/competition/publications/annual_report/2005/en.pdf> (last visited 21 July 2013), p. 26.

40. *Automec II*, cited *supra* note 32, para 87. Notice on handling complaints, cited *supra* note 6, point 44, Report on competition policy (2005), cited *supra* note 29, p. 26.

41. Case T-114/92, *BEMIM*, [1995] ECR II-147.

42. Case T-5/93, *Tremblay*, [1995] ECR II-185, paras. 60–62.

43. *BEMIM*, cited *supra* note 41, para 86. The Court considered that where the effects of the alleged infringements are essentially confined to the territory of one Member State, and where proceedings have been brought before the courts and competent administrative authorities of that Member State by the complainant, the Commission is entitled to reject the complaint by referring to a lack of sufficient Union interest in further investigation of the case.

44. *BEMIM*, *ibid.*, para 88; *Tremblay*, cited *supra* note 42, paras. 60–62, para 68. Case T-575/93, *Koelman*, [1996] ECR II-1, para 79. where the CFI argued that in this case the applicant has not shown that it would actually be impossible for him to bring an action before the national court in order to challenge the alleged abuse of a dominant position.

45. Case T-427/08, *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, [2010] ECR II-5865, Case T-458/04, *Au lys de France v. Commission*, [2007] ECR II-00071, para 83; see, to that effect, *Automec II*, cited *supra* note 32, paras. 89–96.

prevent consumers from turning to national courts then consumers' access to public enforcement should not be barred.

3.2. *Private enforcement: An alternative for final consumers?*

The Commission transformed the principles set in *Automec II* into guidelines for the filing of complaints.⁴⁶ Backed up by the European Courts, the Commission tried to encourage (potential) complainants to secure adequate protection of their rights before the national courts instead of filing a complaint with the Commission. In the 2004 Notice on the handling of complaints, the Commission clearly conveyed that private law actions before national courts are an alternative or, even, a more efficient avenue for potential complainants to secure law enforcement. The Commission stressed the considerable advantages for individuals and companies of the enforcement of EU competition law by the national courts *vis-à-vis* public enforcement by the Commission.⁴⁷ At the same time, the possibility to resort to national courts became a relevant ground to justify Commission' discretion to reject complaints. Indeed, the 2004 Notice on the handling of complaints emphasized that there is normally not a sufficient Union interest in examining a case when the plaintiff is able to secure adequate protection of his rights before the national courts.⁴⁸ In verifying the existence of Union interest in pursuing a complaint, the Commission examines whether the case is or has already been the subject of private enforcement or whether it is of a type that can appropriately be dealt with judicially. However, the Commission does not assess the likelihood of private enforcement – i.e. whether potential claimants

46. Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, O.J. 1993, C 39/6. This Notice established the terms of the cooperation between the Commission and the national courts. It set out the practical measures for increasing the involvement of national courts in the application of Arts. 101 and 102. The 2004 Notice on handling of complaints and the Commission's 2005 report on Competition Policy summarized and transformed the Courts' case law into guidelines for filing complaints with the Commission Notice on the handling of complaints, cited *supra* note 6, points 65–77. Commission, Report on competition policy (2005), cited *supra* note 39, p. 26.

47. Among them, it mentioned that national courts can award compensation for loss suffered as a result of an infringement of Art. 101 or Art. 102; adopt interim measures and order the ending of infringements more quickly than the Commission is able to do; combine a claim under Union law with a claim under national law; and, in some Member States, award legal costs to the successful applicant. Damages claims may only be brought before the national courts. Companies are more likely to avoid infringements of EU competition rules if they risk having to pay damages or interest in such an event. Notice on cooperation, cited previous note, point 16. Notice on the handling of complaints, *ibid.*, point 16.

48. Notice on cooperation, *ibid.*, point 15. Notice on the handling of complaints, *ibid.*, point 44.

face legal and practical obstacles that would prevent them from enforcing the competition rules before national courts.⁴⁹

Can consumers effectively enforce their rights before the national courts? The critical assessment of this conditional link between consumers' access and consumers' private enforcement of competition law is central to evaluating the Commission's current policy on handling complaints.

The Commission's policy of encouraging complainants to turn to national courts stands in contrast with the empirical evidence on the low number of cases brought by consumers before their national courts.⁵⁰ While the Commission has published a Green Paper in 2005, a White Paper in 2008 and finally in June 2013 a proposal for Directive in order to create incentives for private damages actions,⁵¹ final consumers still face various difficulties to enforce competition rules. Whether final consumers are able to bring their claims to the courts crucially depends on their legal and economic means to initiate private actions before national courts, and on the types of infringements at stake.⁵²

Both private and public enforcement have strengths and weaknesses. Final consumers act as "private attorney generals"⁵³ when they bring private law suits to their national courts with a view to enforcing competition law. It has been argued that private enforcers have greater incentives, better information and sufficient resources to enforce competition rules. Private enforcement can provide compensation for harm suffered as a result of anti-competitive

49. Likelihood is used in the U.S. Federal Trade Commission operational manual ch. 16 s. 8.5, available at: <www.ftc.gov/foia/ch16correspondence.pdf> (last visited 8 Aug. 2013), p. 26.

50. Van den Bergh, "Private enforcement of European competition law and the persisting collective action problem", 20 MJ (2013), p. 23.

51. Green paper on damages actions for breach of the EC antitrust rules, 19 Dec. 2005, COM(2005)672 final; White paper on damages actions for breach of the EC antitrust rules, COM(2008)165; Commission proposal of 11 June 2013 for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)404 final.

52. Cseres, "Collective consumer actions: A competition law perspective", in Van Boom and Loos (Eds.), *Collective Consumer Interests and How They are Served Best in Europe; Legal aspects and policy issues on the border between private law and public policy* (Europa Law Publishing, 2007), pp. 125–177. Cseres, op. cit. *supra* note 2; Van den Bergh and Visscher, "The preventive function of collective actions for damages in consumer law", 1 *Erasmus Law Review* (2008), 5–30.

53. The term "private attorney general" refers to the use of private litigation in the U.S. as a means of bringing potential antitrust law infringements into courts. In the U.S. public enforcement has long been assumed to be inadequate to achieve effective enforcement, and therefore private litigation has been used for public enforcement. Private litigants play a public role by assisting public authorities in their enforcement role. Gerber, "Private enforcement of competition law: A comparative perspective", in Möllers and Heinemann (Eds.), *The Enforcement of Competition Law in Europe* (Cambridge University Press, 2007), pp. 416–417.

conduct and thus achieve corrective justice goals. In addition, it has a deterrent effect, similar to public law enforcement mechanisms, insofar as it functions as an added burden that potential infringers might need to carry and, as such, might deter them from future violations.⁵⁴

At the same time, private enforcement entails additional costs. It may lead to strategic litigation and to an abuse of the private action mechanism.⁵⁵ Moreover, there may be incentive problems due to rational apathy. Private enforcers will balance the costs of searching for information with the benefits of a possible legal action. If the latter do not outweigh the former, they will not act. It would be irrational for them to bear the high costs of legal proceedings if no offsetting benefits can be expected. This is often a reason of consumers' inaction, as will be argued below.⁵⁶ Free-riding is an additional problem: potential private enforcers may tend to leave the enforcement to other victims, hoping to free-ride on the latter's efforts.⁵⁷

On the contrary, public enforcement has the advantage that enforcers can choose the form and level of sanctions as well as the resources they devote to detection in a way that better ensures the public interest. Public enforcers may set the extent to which public enforcement is considered desirable.⁵⁸ Moreover, they can increase the rate of detection and decrease the costs of enforcement by applying leniency programmes.⁵⁹

Considering the fact that both enforcement mechanisms have potential positive and negative effects, the debate has concentrated on finding an optimal balance between these two enforcement mechanisms.⁶⁰ Recent literature has proposed a differentiated approach in order to find an optimal

54. Becker and Stigler, "Law enforcement, malfeasance, and compensation of enforcers", 3 *Journal of Legal Studies* (1974), 1–18. Private law actions impose additional sanctions on undertakings which infringe competition rules, thus make them comply with the law. The aim of private law sanctions, often in the form of damages, is to prevent offender and other potential infringers from breaking the law.

55. Wils, "Should private enforcement be encouraged in Europe?", 26 *World Comp.* (2003), 472–488. Shughart, "Private antitrust enforcement – Compensation, deterrence, or extortion", 12 *Regulation Magazine* (1988), McAfee, H. Mialon and S. Mialon, "Private v. public antitrust enforcement: A strategic analysis", 92 *Journal of Public Economics* (2008), 1863–1875.

56. Van den Bergh, *op. cit. supra* note 50, p. 17.

57. *Ibid.*, p. 20, 24.

58. Polinsky, "Private versus public enforcement of fines", 9 *Journal of Legal Studies* (1980), 105–127; Schwartz, "An overview of the economics of antitrust enforcement", 68 *Georgetown Law Journal* (1980), 1075–1102.

59. Leniency programmes grant total or partial immunity to parties owning up to participation in an illegal cartel.

60. Wils, "The relationship between public antitrust enforcement and private actions for damages", 32 *World Comp.* (2009), 3–26. Renda et al., "Making antitrust damages actions more effective in the EU: Welfare impact and potential scenarios", Final report (2007), available at: <ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> (last visited 21 July 2013).

mix of public and private enforcement that would combine the advantages of both.⁶¹ The criteria to make an optimal mix include possession of information and the different incentives of private and public actors to start proceedings.⁶² In the light of these criteria, what could be an effective enforcement mix between the Commission's public enforcement (or that of NCAs) and the private enforcement by consumers? How does this reflect on the justification of the *Automec II* principles? The combination between private and public enforcement depends on the type of infringement at stake: horizontal agreements (hard-core cartels), vertical agreements, abuse of a dominant position.

Possessing information and gathering evidence to determine what may be considered anti-competitive according to EU law competition rules is crucial for both private and public enforcers. The type of infringement, the type of the victim, and the moment when information becomes available are factors that condition the possibilities of access to relevant information about an infringement.⁶³ Due to the secret character of hard-core cartels (horizontal agreements) it is reasonable to say that neither public nor private actors possess initial information to start proceedings. However, public agencies often have information-gathering advantages through instruments such as leniency programmes. Final consumers are often indirect purchasers of the law-breaking firms. Being further away from these firms, they are often unaware of law infringements before actual harm has occurred. In cases of hard-core cartels most consumers do not even realize that they have been harmed. Still, the availability of information concerning competition law infringements and the identity and location of the wrongdoer are crucial for consumers in order to initiate private law actions before the courts.

On the other hand, outside the area of hard-core cartels the information advantage may lie with private actors – including consumers – rather than public authorities. When it comes to vertical agreements and abuse of dominance, suppliers or buyers are often aware of restrictions in contractual agreements. Competition authorities may have neither the resources nor incentives to identify cases of vertical restraints or abuses of dominant position. In these cases, consumers may have the necessary information

61. Hüschelrath and Peyer, "Public and private enforcement of competition law a differentiated approach", 13 *CCP Working Paper* (2013); Van den Bergh, op. cit. *supra* note 50, p. 23.

62. The likelihood to initiate proceedings by private or public agents depends on and is determined by a set of incentives created by the expected financial award, the deterrent effect and the retributive motive the expected sanctions provide Shavell, "The optimal structure of law enforcement", 36 *Journal of Law and Economics* (1993), 255–287.

63. Van den Bergh, op. cit. *supra* note 50, p. 17. Hüschelrath and Peyer, op. cit. *supra* note 61, pp. 17–19.

through their contractual relationship with the wrongdoers. This may justify a more important role for private enforcement. Accordingly, these types of cases could be indeed referred to, and more suitably considered by, national courts, through private law actions, rather than to an enforcement authority such as the Commission. In the US, the Federal Trade Commission Guidelines state that “describing major issues and questions relevant to specific types of cases, the protocols offer assistance to staff in selecting cases for investigation and evaluating the public interest.”⁶⁴ A similar case selection on the basis of the types of infringements would enhance the clarity and legitimacy of the Commission’s policy regarding priority setting and it would structure its exercise of discretion. Even in cases where theoretically consumers could turn to national courts, i.e. cases where *prima facie* private enforcement has advantages over public enforcement, the likelihood that consumers initiate proceedings depends on their incentives i.e. the expected costs and benefits of the enforcement. Arguably, private consumers are much more influenced by costs and benefits than public enforcers. The costs of accessing information in order to discover the infringement, litigation costs including the lawyer’s fees and perhaps expert witnesses are often the main reasons why consumers refrain from litigation.⁶⁵ These are costs that public entities only face if they ultimately also need to litigate. However, unlike consumers, public entities enforce competition law rules as part of the functions they are expected to perform. Beyond this financial hurdle there are two additional reasons why final consumers may not enforce competition law: rational apathy and free-riding, already mentioned above. Rational apathy prevails when consumers’ private incentives are insufficient to detect and litigate cases, i.e. their expected private gains are lower than the costs of enforcement. The losses suffered by individual consumers are smaller than the losses of society. Consumers’ financial reward is small compared to the costs of enforcement and they may benefit only marginally from the deterrent effect of enforcing competition rules against wrongdoers. In cases where damage is widespread and individual losses are low, rational apathy prevails among the injured individuals who will not sue.⁶⁶ Furthermore, consumers who are victims of a competition law infringement have an interest to leave the enforcement efforts to other actors, so that profits can be obtained without having to spend own resources. This “free-riding” problem reduces the number of private actions below the level of enforcement that would be socially optimal.⁶⁷

64. FTC operating manual, op. cit. *supra* note 48, ch. 1.6.5., *Policy protocols*.

65. Van den Bergh and Visscher, op. cit. *supra* note 52.

66. Van den Bergh, op. cit. *supra* note 50, pp. 24–25.

67. Van den Bergh and Visscher, op. cit. *supra* note 52, p. 14.

In order to remedy these incentive problems, collective and representative actions have often been considered to be the way forward.⁶⁸ While in most EU Member States consumer organizations already had standing to bring actions for injunctive relief, they had no powers to sue for damages.⁶⁹ Many EU Member States have revised their legislation in recent years and have given legal standing to consumers to sue for damages *via* means of collective action, such as collective opt-in actions and representative actions brought by consumer associations.⁷⁰

Still, empirical evidence shows that these new legal rules have not yet resulted in a considerable increase in consumer litigation.⁷¹ Consumers, who are often not in a direct contractual relationship with the wrongdoer, so-called indirect purchasers do not turn to national courts to obtain redress. Although consumers and SMEs have been identified as potential claimants affected by anticompetitive behaviour, the available data shows a very low proportion of consumer claims.⁷² It has been suggested that national collective redress

68. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a European horizontal framework for collective redress, COM(2013)401 final. Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013)3539 final.

69. E.g. the recent decision of the German Federal Court of Justice on indirect purchaser standing, passing on defence and new type of claim aggregation. Federal Court of Justice BGH of 28 June 2011, KZR 75/10 ORWI, BGH of 7 Apr. 2009, KZR 42/08 CDC.

70. Collective actions are more common in the EU Member States than giving a major role to individual consumers. This is considered a “European approach” that is “rooted in European legal culture and traditions”. Commission White paper, cited *supra* note 51, p. 3. In the debate on the private enforcement of EU competition law the most important issue was whether group actions should be based on an opt-out or an opt-in principle. The Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms now follows the opt-in approach. Recommendation, cited *supra* note 68, para 21. For an overview of national legislation on types of standing for consumers see Buccirossi et al., *Collective redress in antitrust*, June 2012, available at: <www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=74351>, p. 22, table 1 (last visited 21 July 2013).

71. E.g. in Sweden, France and the UK, consumer associations have standing to bring representative actions for damages; still the number of cases is low and participation rates greatly vary: Van den Bergh, *op. cit. supra* note 50, p. 23.

72. A recent empirical study of collective consumer actions in 27 Member States found that the most common cases are business contractual disputes and only very few consumer cases (<4%) exist. Rodger, “Competition litigation and collective redress: a comparative EU analysis with focus on Portugal and recent developments in the UK”, 3 June 2013, University of Lisbon law school, available at: <www.ideff.pt/xms/files/Iniciativas/varios_2013/Rodger_2013_Private_enforcement_Lisbon_presentation.pdf> (last visited 21 July 2013). See also Rodger, “Private enforcement and collective redress: The benefits of empirical research and comparative approaches”, 8 *Competition Law Review* (2012), 1–6.; Peyer, “Private antitrust litigation in Germany from 2005 to 2007: Empirical evidence”, 8 *Journal of Competition Law and Economics* (2012), 331–359.

schemes have been introduced only recently and their effectiveness has not yet resulted in better consumer access to collective redress instruments. For example, even in those Member States where consumer organizations can sue for damages they have remained passive as enforcers.⁷³

The above analysis questions the conditional link between private and public enforcement that underlies the Commission's policy in priority setting. First, in case of horizontal cartels it is clear that the Commission's public enforcement is more effective than consumers' private enforcement because of the information it gathers through its leniency programme. In these cases, consumers need to have access to the public enforcement procedure and to documents if they wish to file damages actions and activate private enforcement, since they are otherwise unlikely to have the information they need for this purpose. Thus the ability of consumers to resort to private enforcement crucially depends on the Commission's enforcement actions. Second, the available data shows that in practice consumers fail to enforce the competition rules before national courts, even though they may in principle have optimal access to information on vertical restraints and unilateral conduct, which would facilitate private litigation. In this type of cases, the Commission should be required to estimate the concrete possibilities private actors have to enforce the competition rules before reaching a decision on whether or not to handle a complaint.

It follows from the above that the conditional link set by the Commission between consumers' access to public enforcement and consumers' private enforcement of competition law can be justified in some types of cases (vertical restraints and abuse of dominance), but not in others (horizontal agreements). Moreover, while many Member States implement legislation on some form of collective action in order to facilitate consumer actions, empirical evidence indicates that the expected increase in consumer litigation has not occurred. Both in the EU and in the Member States, new laws have been adopted in order to facilitate private enforcement in general, and consumers' access to national courts through collective actions in particular.⁷⁴

73. The most recent study argued that "the number of actions related to antitrust infringements is still very limited. This may be in part due to the fact that most of the national collective redress systems in Europe have been introduced only recently, but it might also suggest that existing legislation is scarcely effective in promoting consumer and SME access to collective redress instruments". Buccirosi et al., *op. cit. supra* note 70, p. 13, 42–43.

74. See Commission Proposal of 11 June 2013, cited *supra* note 51. Germany changed its law on damage claims in 2005, broadening the entitlement to damage claims and introducing a provision that binds the courts in so-called "follow-on actions" to previous decisions of courts and competition agencies within the EU regarding the anti-competitive nature of the specific conduct. Section 33(4) of the German Act Against Restraints of Competition (ARC); these changes were meant to encourage damages claims but have not led to an increase in the number of claims at the courts. In the *ORWI* judgment of 2011, the German Federal Supreme Court

Similarly, the Commission could more clearly align its policy on complaint handling to the feasibility of consumers' private litigation. A first step in strengthening the argument according to which complaints may be rejected if consumers can effectively enforce their rights before the national courts would be to introduce a differentiation on the basis of the types of infringements to which complaints refer and to investigate the range of factors that enable final consumers to go to court in the absence of public enforcement.

Such a differentiated priority setting should also include a higher threshold for the Commission to justify the rejection of complaints on the basis of the type of cases at stake and of the possibilities of the potential complainants to initiate proceedings before national courts. As long as the Commission's priority setting policy relies on the alternative of private enforcement before national courts, it should adduce concrete arguments that establish the conditional link between private and public enforcement in the case at hand, if it rejects a complaint on this basis.

We now move on to assess the inner limits to consumers' access to enforcement procedures. Once the Commission initiates a public enforcement procedure, what role do consumers have?

4. The inner limits of access: Consumers' participation rights in the in the Commission's public enforcement procedures

4.1. Participation rights in a bilateral and adversarial procedure

When the Commission initiates proceedings, either pursuing a complaint or acting on its own initiative, under which conditions can consumers access the procedure and what are their procedural rights?⁷⁵ Does their formal role foster the protection of consumers' economic interests, which constitute a core public interest pursued by competition law?

answered the specific question of how to deal with damage claims of indirect purchasers and the passing-on defence. Drexl, "The interaction between private and public enforcement in European competition law", in Micklitz and Wechsler (Eds.) *The Transformation of Enforcement, European Economic Law in Global Perspective* (forthcoming), p. 13 of the chapter.

75. The participation rights of consumers will be analysed on the basis of the administrative procedures pursuant to Arts. 101 and 102 TFEU. The Commission's enforcement procedure is similar but not identical in case of merger procedures (see Art. 11(c), second indent, of Regulation 802/2004, Art. 18(4) of Regulation 139/2004, Art. 16(1) of Regulation 802/2004), and State aid procedures (Art. 20 of Regulation 659/1999). On the similarity between State aid and merger control procedures (regarding the conditions of *locus standi* of holders of procedural rights) see *Test-Achats*, cited *supra* note 29, para 31.

Infringement procedures for the enforcement of EU competition law have been conceived along a strictly bilateral scheme. The procedure gravitates around the relationship opposing the Commission and the undertakings targeted by its investigations. All other natural or legal persons concerned by the procedure are considered third parties, and intervene in different procedural qualities.⁷⁶ This bilateral structure has been enshrined in the EU regulations that have ruled this matter since the outset of European integration.⁷⁷ It mirrors the adversarial nature of the procedure. This way of conceiving the procedure seems to be fully justified by its object and by its possible outcome: the procedure assesses the conduct of undertakings investigated for a putative infringement to competition law rules and may lead to a decision that impacts negatively on their legal sphere. The Commission may find that the undertaking or a group of undertakings has infringed competition rules, may issue a decision requiring that infringement is brought to an end, may order interim measures on the basis of a *prima facie* finding, may impose a fine or establish the definitive amount of a periodic penalty payment.⁷⁸ These are prototypical situations of adversarial procedures where guarantees of due process are required. Indeed, the undertakings or associations of undertakings under investigation have, by statute and as a matter of legal principle, a right to be heard before the decision concerning them is adopted. This right is today enshrined in Regulation 1/2003 and Regulation 773/2004, and is protected by the *audi alteram partem* principle, which is a general principle of EU law, consolidated by the case law of the European Court of Justice since the 1960s.⁷⁹ The right to be heard is, moreover, reinforced by the fundamental right to a fair trial laid down in Article 6 of the European Convention of Human Rights.⁸⁰

76. The term “persons” refers here both to natural and legal persons. It is acknowledged that in the specific context of competition law procedures, only legal persons (i.e. the undertakings concerned) are addressed by infringement decisions.

77. Regulation 17/62 (First Regulation implementing Arts. 85 and 86 of the Treaty, O.J. 1962, L 13/203), Regulation 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Art. 19(1) and (2) of Council Regulation No 17 (O.J. 1963, L 127/2268), later replaced by Regulation 2842/98 (O.J. 1998, L 354/18).

78. Arts. 7, 8, 23 and 24(2) of Regulation 1/2003.

79. Art. 19 of Regulation 17/62 and Arts. 2–4 and 7 of Regulation 99/63/EEC, cited *supra* note 77; Art. 27 of Regulation 1/2003, Arts. 10–12 of Commission Regulation 773/2004, cited *supra* note 18. See, among many others, Case C-17/74, *Transocean Marine Paint Association v. Commission*, [1974] ECR 1063, para 15; Case C-85/76, *Hoffmann-La Roche & Co. AG v. Commission*, [1979] ECR 461, para 9; Joined Cases T-125 & 253/03, *Akzo Nobel Chemicals Ltd and others v. Commission*, [2007] ECR II-3523, para 120; and Case C-511/06 P, *Archer Daniels Midland Co v. Commission*, [2009] ECR I-5843, paras. 84–86.

80. See e.g. Wils, “EU antitrust enforcement powers and procedural rights and guarantees: The interplay between EU law, national law, the Charter of fundamental rights of the EU and the European Convention on Human Rights”, 34 *World Comp.* (2011), 203–206; Flattery,

Very different is the legal status of persons who, being potentially affected by the same decision, can participate in the procedure. Access to the procedure of persons other than the targeted undertakings is filtered by a discretionary assessment of their interest to participate.⁸¹ Holders of a “sufficient interest” apply to be heard and their participation depends on the assessment of the Hearing Officer.⁸² The participation of complainants in infringement procedures depends both on the Commission’s assessment of their “legitimate interest”,⁸³ and on the Commission’s finding that there is a Union interest in pursuing the complaint.⁸⁴ Hence, the establishment of “legitimate interest” results from a decision of the Commission, following the procedure to deal with complaints. Besides holders of “sufficient interest” and of a “legitimate interest”, other persons may be invited by the Commission to participate in the procedure.⁸⁵ Their participation depends, by its very nature, on an assessment by the Commission. But when may a person qualify as holder of a legitimate interest or holder of a sufficient interest?

A person concerned by a putative infringement to competition law qualifies as holder of a legitimate interest if directly and adversely affected by the conduct suspected of infringement to competition law rules. The indications the Commission gives in its Notice on the handling of complaints suggest that a direct and adverse effect exists when there is a sufficient material connection

“Balancing efficiency and justice in EU competition law: Elements of procedural fairness and their impact on the right to a fair hearing”, 7 *Competition Law Review* (2010), 53–81. Zingales, “The hearing officer in EU competition law proceedings: Ensuring full respect for the rights to be heard?”, 7 *Competition Law Review* (2010), 129–156.

81. Art. 19(2) of Regulation 17/62, cited *supra* note 77, and Art. 27(3) of Regulation 1/2003.

82. Art. 13(1) and (2) of Regulation 773/2004 (previously, Art. 7(1) of Reg. 99/63 and Art. 9(1) and (2) of Reg. 2842/98). Art. 5(2) and (3) of Decision of the President of the European Commission of 13 Oct. 2011, on the function and terms of reference of the hearing officer in certain competition procedures (O.J. 2011, L 275/29 – henceforth, “the hearing officer terms of reference”). See also point 105 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, O.J. 2011, C 308/06. On who may qualify as holder of a sufficient interest, see *infra*.

83. Art. 3(2) of Regulation 17/62, cited *supra* note 77, and Art. 7(2) of Regulation 1/2003. In assessing a complaint, the Commission will verify whether the complainant has a legitimate interest (cf. Commission Notice on handling complaints, cited *supra* note 6, points 33–40). The following analysis will not deal with the procedure for the rejection of complaints. The focus is on procedures initiated in order to determine the existence of an infringement.

84. Arts. 5–9 of Regulation 773/2004, cited *supra* note 18; Commission Notice on handling complaints (section D), cited *supra* note 6.

85. Art. 7(2) of Regulation 99/63, cited *supra* note 77; Art. 9(3) of Regulation 2842/98, cited *supra* note 77; Art. 13(3) of Regulation 773/2004, cited *supra* note 18.

of the person concerned to the factual situation being assessed.⁸⁶ According to the Commission, persons who wish to come forward on general interest considerations but are incapable of demonstrating that they or their members are liable to be directly and adversely affected by the infringement do not qualify as holders of legitimate interests.⁸⁷

The category of holders of sufficient interest is less defined than that of holders of legitimate interest, at least in the context of Regulation 1/2003 procedures.⁸⁸ According to the Hearing Officer's terms of reference, in assessing whether a third person has sufficient interest, he will "take into account whether and to what extent the applicant is sufficiently affected" by the conduct.⁸⁹ To the authors' knowledge, the reports of the hearing officers do not give concrete indications on the test used to assess a sufficient interest. Yet, general indications on the definition of this category may be deduced *a contrario* from the observations above regarding holders of legitimate interest. Holders of sufficient interest may be, for example, persons who provide information to the Commission on suspected infringements but who do not comply with the formal requirements for complaints pursuant Article 7(2) of Regulation 1/2003, or, substantively, cannot be considered to be directly and adversely affected but rather as intervening in the public interest (*uti cives*). Even if they may be harmed by the suspected conduct, the intensity of the harm caused to their interests – to use the formulation of the General Court in *Österreichische Postsparkasse*⁹⁰ – is not considered sufficient to justify a procedural position similar to that of complainants.

4.2. *Where do consumers stand?*

In the procedural scheme established by the EU legislature, consumers can be considered to hold both a legitimate interest and a sufficient interest.⁹¹ In the light of the above, the main questions to address when assessing the possibilities for consumers to participate in the procedure are, first, whether the test of direct adverse effect is too strict to ensure an adequate procedural protection of the interests of consumers who could act as complainants, and,

86. Commission Notice on handling complaints, cited *supra* note 6, points 35–39. The rules of judicial origin regarding who may qualify as complainant – and hence as holder of a legitimate interest – are, to a certain extent, summarized in the Commission's Notice on handling complaints.

87. Commission Notice on handling complaints, *ibid.*, point 38.

88. A search in the Eur-Lex database has not provided any relevant results in this respect.

89. Art. 5(2) of the hearing officer terms of reference (cited *supra* note 82).

90. *Österreichische Postsparkasse*, cited *supra* note 17, para 101.

91. Art. 27 of Regulation 1/2003, and Arts. 6 and 10–14 of Regulation 773/2004, cited *supra* note 18, which mirror the corresponding rules in Regulation 17 and the respective procedural regulation that preceded the current rules.

second, what criteria are followed to assess whether a third person has a sufficient interest.

As to the first aspect, the judgment of the General Court in *Österreichische Postsparkasse* indicates that the requirement of direct and adverse effect does not constitute an insurmountable condition that effectively prevents consumers' access. According to the General Court, individual consumers may qualify as holders of legitimate interest, if they show that their "economic interests have been harmed or are likely to be harmed as a result of [a restriction of competition]".⁹² The General Court recalled its previous case law in *BEMIM*, where it ruled that an association of undertakings could claim a legitimate interest in making an application within the meaning of Article 3 of Regulation 17 even if it was not directly concerned by the conduct complained of, provided, however, *inter alia* that the latter is liable adversely to affect the interests of its members.⁹³ The test of adverse and direct effect allowed to consider as holders of legitimate interest a person affected in their "objective and abstract status" as consumer, but whose position is not sufficiently differentiated from that of other consumers (to lead to individual concern).⁹⁴ Therefore, final consumers can rely on *Österreichische Postsparkasse* to claim a legitimate interest to file a complaint, as long as they demonstrate that their "economic interests have been harmed or likely to be harmed".⁹⁵ In a previous case, the Court had established that consumers' associations can also be recognized as having a legitimate interest for the purposes of filing a complaint.⁹⁶

As mentioned above, there are fewer indications as to the criteria for assessing whether a third person has a sufficient interest. However, Recital 11 of Regulation 773/2004 indicates that "consumer associations that apply to be heard *should generally* be regarded as having sufficient interest where the

92. *Österreichische Postsparkasse*, cited *supra* note 17, para 114. In this case, individual consumers were final customers of Austrian banks who had suffered substantial financial damage as a result of anti-competitive practices.

93. *Österreichische Postsparkasse*, *ibid.*, para 112; *BEMIM*, cited *supra* note 41, para 28.

94. The quoted expression is from *Test-achats*, cited *supra* note 29, para 33. It results *a contrario sensu* from the *Plaumann* test, which continues to determine private standing of persons other than the addressees of a decision in actions for annulment (Case 25/62, *Plaumann v. Commission*, [1963] ECR 123). The threshold that the GC applied in *Österreichische Postsparkasse* (paras. 114 and 116.) was not influenced by the Courts' case law on direct and individual concern in actions of annulment, which would set a too high threshold of admissibility. This contrasts with the concept of persons concerned for the purposes of Art. 108(2) TFEU, in State aid procedures, which has been influenced by the Courts' interpretation of the requirement of "direct and individual concern". See further, Mendes, *Participation in EU rule-making. A rights-based approach* (OUP, 2011), pp. 390–391.

95. *Österreichische Postsparkasse*, cited *supra* note 17, para 114.

96. Case T-37/92, *Bureau Européen des Unions des Consommateurs and National Consumer Council v. Commission*, [1994] ECR II-265, para 36.

proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services".⁹⁷ The legal value of the preamble is doubtful; yet, arguably, this reference gives at least interpretative guidance as to when the participation of consumer representatives should be granted.⁹⁸

In this respect, the way the procedure is structured does not seem to be problematic in the light of the public interests that the Commission needs to pursue in enforcing competition law. As argued above, consumers' economic interests are a core consideration in the protection of the process of competition and the case law has shown that consumers – both individual consumers and consumer associations – can be granted access to the public enforcement procedure. Nevertheless, whether they are accepted to the procedure depends on a discretionary assessment of the Commission or of the Hearing Officers on how the alleged illegal conduct affects their legally protected interests. To the authors' knowledge, there is no empirical data on how often consumers are indeed granted access when they manifest their interest via the available legal means. Whether the Commission and the Hearing Officers have a consistent practice in this regard – and how effectively they assess legitimate and sufficient interest – is unknown. In this manner, the protection of consumers' economic interests and the place it effectively has in the assessment of the Commission is fully dependent on the Commission's view and interpretation of the circumstances of the cases it needs to decide upon. In sum, though the way the procedure is designed does not ignore the position of consumers and, potentially, gives them a role in the public enforcement of competition, the procedure is not constructed to give them voice with a view to protecting their economic interests.

The analysis of whether the formal role of consumers adequately enables them to protect their economic interests requires us to make a further inquiry. Admitting that individual consumers or consumer associations are entitled to access the procedure, the crucial question is then what procedural status they have once admitted to the procedure. Do their procedural rights allow them to adequately defend the interests of consumers who are victims of an infringement of competition law?

97. Emphasis added. Reproduced in Recital 12 of the hearing officer terms of reference (cited *supra* note 82).

98. In merger control procedures, sufficient interest of consumer associations in such circumstances is explicitly recognized in Art. 11(c) of Regulation 802/2004. See further *Test-achats*, cited *supra* note 29, paras. 40 and 43.

4.3. *Right to be heard, right to participate*

The procedural position of the undertakings targeted by the procedure and that of third parties is radically different. This has been clearly expressed in *BAT and Reynolds*, regarding the relative position of complainants and targeted undertakings. The Court settled that the procedural rights of the former are not “as far reaching as the right to a fair hearing of the companies which are the object of the Commission’s investigation” and their limits “are reached where they begin to interfere with those companies’ right to a fair hearing”.⁹⁹ The complainants in this case were competitors of the undertakings investigated for a possible breach of current Articles 101 and 102 TFEU (ex 85 and 86 EEC). They had been closely associated to the procedure the Commission had initiated following their complaints,¹⁰⁰ but claimed nevertheless that they ought to have had a stronger procedural involvement. Effectively, they were seeking the recognition of a right to be heard on similar terms to that of the undertakings investigated.

At first sight, one may doubt the relevance of this judgment to our argument. The facts of this case are quite distant from the problem analysed in this article: the position of consumers. In addition, in one reading of *BAT and Reynolds*, one could argue that the Court simply countered an attempt by the complainants to place themselves in the same procedural position of the targeted undertakings. Yet, the Court’s reasoning in this case is revealing of the its conception of competition law infringement procedures, which has, arguably, a broader significance beyond the concrete facts of this case. According to the Court, the investigation the Commission carries out in the context of enforcement of competition law rules “does not constitute adversary proceedings” between the companies that are the object of the investigation and those that have filed a complaint.¹⁰¹ Rather – it is implied – this procedure opposes the Commission and the companies that are the object of the Commission investigation. The different relative position of persons concerned is defined by reference to a bilateral procedure. This approach naturally has consequences regarding the content of the procedural rights granted to these persons, in particular regarding their rights of access to the non-confidential version of the statement of objections, as will be seen below. Ultimately, it is the structure of the procedure that determines the procedural rights of the different categories of persons concerned. This adversarial

99. Joined Cases 142 & 156/84, *BAT and Reynolds v. Commission*, [1987] ECR 4487, para 20.

100. It appears from the facts of the case that the complainants had had several possibilities of putting forth their views in the procedure (*BAT and Reynolds*, cited previous note, paras. 16–18).

101. *BAT and Reynolds*, *ibid.*, para 19.

conception of administrative procedures is arguably influenced by the analogy with judicial procedures, which is both fed and reinforced by the interpretation of the right to a fair hearing in competition law enforcement procedures in the light of Article 6 ECHR.¹⁰² In accordance with the bilateral structure of the procedure, the Courts have characterized the procedural rights of third parties – complainants included – as a right to be associated to the procedure. This can be generally designed as a right to participate in the administrative procedure, qualitatively different from the right to be heard as a right of the defence of the targeted undertakings.¹⁰³

Underlying this construction is a different conception of the role that each category of persons concerned – undertakings, complainants and third parties *stricto sensu* – plays in the procedure. The procedural intervention of the undertakings whose possible anti-competitive conduct is being assessed is grounded on a “moral imperative” of enabling them a defence before the adoption of a decision that expressly names them and may imperil their rights as legal persons and interests. Their right to be heard ensures that they are not “treated purely as an object” of the administrative decisions.¹⁰⁴

Third parties intervene in a different quality. They do not need to defend their personal legal sphere, since the procedure has not been initiated against them.¹⁰⁵ In other words, they do not intervene in the quality of defendants. Still, they have an interest in its outcome: the ensuing decisions might affect their economic interests, even if not always in a direct way. They are “merely liable to suffer the incidental effects of the decision”.¹⁰⁶ The “different degree of intensity of the harm caused to their interests” – the criterion that, according

102. See e.g. Joined Cases T-122-124/07, *Siemens AG Österreich and others v. Commission*, [2011] ECR II-793, paras. 232 to 234 (appeal pending). Albeit referring to national administrative procedures, see judgment of the ECtHR of 27 Sept. 2011, in Case *Menarini Diagnostics S.R.L. v. Italy*, Appl. No. 43509/08.

103. Case T-17/93, *Matra Hachette*, [1994] ECR II-595, para 34; Case T-65/96, *Kish Glass*, [2000] ECR II-1885, para 34; Case T-5/97, *Industrie des poudres sphériques SA v. Commission*, [2000] ECR II-3755, para 229. The French version of these judgments designates the right of third parties as a “*droit d’être associés à la procédure administrative*”. This has been translated into English as a right to participate.

104. Hilf, Ciesla and Pache, “Rights vis-à-vis the administration at the Community level”, in Cassese, Clapham and Weiler (Eds.), *Human rights and the European Community: methods of protection* (Nomos, 1991), p. 459. See also Section above: “Access to administrative procedures: the relevance of consumers’ participation rights”.

105. On the relevance of a procedure being “initiated against” the holder of the right to be heard, see Rabinovici, “The right to be heard in the Charter of fundamental rights of the European Union”, 18 EPL (2012), 149–173.

106. Case T-290/94, *Kaysberg SA v. Commission*, [1997] ECR II-2137, para 107; see, however, *Test-achats*, cited *supra* note 29, para 43. These cases regard the interpretation of Regulation 4064/89 on merger control procedures, but this procedure is constructed on the same premises as the one analysed in this paper.

to the Court, allows differentiating the categories of persons concerned¹⁰⁷ – places them in a different procedural position. The participation of third persons is mostly grounded on the instrumental function of their intervention. They provide information that might be relevant to achieve an accurate representation of the factual situation that will enable the decision-maker to issue a materially correct decision in correspondence with the truth of the facts.

The predominantly instrumental rationale of the intervention of third parties in the procedures is well established in relation to complainants.¹⁰⁸ There are, however, contradictory indications on whether this applies also to other interested third parties. On the one hand, according to the Hearing Officer's terms of reference, "in assessing whether a third party shows a sufficient interest, the hearing officer shall take into account whether and to what extent the applicant is *sufficiently affected* by the conduct which is the subject of the competition procedures".¹⁰⁹ On the other hand, access to an oral hearing may be conditioned by "the contribution they can make to the clarification of the relevant facts of the case".¹¹⁰ Arguably, the assumption that these persons do not intervene as defendants – under the bilateral construction of the procedures – may confuse the assessment of their procedural interest to intervene as holders of affected interests with the assessment of their possible contribution to the procedure.

This different rationale underlying the participation of undertakings targeted by the procedure, on the one hand, and complainants and holders of sufficient interests, on the other, justifies, in the current structure of the procedure, the different procedural rights granted to each category. The differences concern mostly the right to access information on the procedure.¹¹¹ The different rights of access to information will be analysed

107. *Österreichische Postsparkasse*, cited *supra* note 17, para 106.

108. See e.g. recital 5 of Regulation 773/2004, cited *supra* note 18. Commission Notice on the handling of complaints, cited *supra* note 6, para 3.

109. Art. 5(2) of the Hearing Officer terms of reference (cited *supra* note 82), emphasis added.

110. Recital 13 of the Hearing Officer terms of reference, *ibid*. This was also the criterion that, under the previous guidelines of the Hearing Officer, was applied when deciding both requests to participate and requests for access to the oral hearing ("Guidance on procedures of the Hearing Officer in proceedings relating to Articles 101 and 102 TFEU (ex- articles 81 and 82 EC)", points 33 and 42).

111. They also concern the right to be admitted to the oral hearing. Only the undertakings investigated to which the Commission has addressed a statement of objections have the right to request an oral hearing, which is conducted by the Hearing Officer (Arts. 12 and 14 of Regulation 773/2004; Art. 6(1) Hearing Officer terms of reference, cited *supra* note 82). Complainants and third parties may participate at this hearing, if they have submitted written comments, subject to a specific request and to the Hearing Officer's decision to admit them thereto. (Arts. 6(2) and 13(2) of Regulation 773/2004; Art. 6(2) Hearing Officer terms of

next. In fact, consumers' access to information regarding the potential infringement determines not only the role of consumers in public enforcement procedures, but also, as argued above, their possibility to introduce damages claims, and thereby trigger one of the main mechanisms of private enforcement.

4.4. *Procedural rights of consumers*

4.4.1. *Access to information regarding the procedure*

Consumers – as complainants or as holders of sufficient interests in competition enforcement procedures – have limited access to the file compiled by the Commission on the investigation of the infringement. While the *targeted undertakings* have the right of access to the file from the moment in which they are notified of the statement of objections, *complainants* have a right to access the non-confidential version of the statement of objections, or, in the case in which the Commission intends to reject the complaint, the documents on which the Commission bases its provisional assessment.¹¹² In turn, *holders of sufficient interest* only have a right to be informed in writing of the nature and subject matter of the procedure to the extent that they apply to be heard.¹¹³ However, if the Commission refuses to disclose documents that are necessary for the exercise of the right to be heard or to participate in the procedure, third parties can make use of the possibility to make a reasoned request for access to the Hearing Officer, in the terms defined in Article 7 of its terms of reference.¹¹⁴

The limited access to information for third parties under the rules on access to the file in competition law procedures has led them to seek access *via* the general EU rules of Regulation 1049/2001, under which any citizen or

reference). Hence, they are not entitled to participate in the oral hearing; their access thereto depends on a discretionary assessment of the Hearing Officer. They have no guarantees of access. See further Recital 13 of the Hearing Officer terms of reference. Yet, once admitted to the oral hearing, the procedural rights of third parties are the same as those of the undertakings investigated (Arts. 10(4), 11 and 12 Hearing Officer's terms of reference).

112. Arts. 15(1), 6(1) and 8(1) of Regulation 773/2004. Access is limited by the need to protect “business secrets, confidential information and internal documents of the Commission and of the competition authorities of the Member States”, as well as the correspondence exchanged between the latter and between them and the Commission (Art. 15(2) of Regulation 773/2004; see also Art. 8 hearing officer terms of reference, cited *supra* note 82). See further the Commission Notice on the rules for access to the Commission file, O.J. 2005, C 325/7.

113. Art. 13 of Regulation 773/2004, cited *supra* 18.

114. Cited *supra* note 82. See in more detail, Wils, “The role of the hearing officer in competition proceedings before the European Commission”, 35 *World Comp.* (2012), 3, point V.A.4. The intervention of the Hearing Officer on disputes over access to procedural information may avoid lengthy judicial conflicts over access to documents in the file.

registered person can request access to documents held by the EU without needing to give reasons for their request. Yet, the rationales of access under this Regulation and that of the competition rules on access to the file are different. Regulation 1049/2001 seeks closer participation of the citizen in the decision-making process and greater legitimacy of the administration,¹¹⁵ but the competition rules on access to the file were designed as procedural safeguards intended to protect the rights of the defence and to apply the principle of equality of arms.¹¹⁶ The relationship between access to file, as provided in sector specific EU law, on the one hand, and Regulation 1049/2011, on the other, has been widely debated following the judgment of the General Court in *Verein für Konsumenteninformation (VKI)*.¹¹⁷ VKI, an Austrian consumer organization, applied to the Commission for access to the administrative file relating to the *Lombard Club* Decision. Under the rules on access to the file in competition procedures it had no entitlement to access the documents. In *VKI*, the Court relied on the general rules on access to documents to allow it access to the file, thereby strengthening considerably the rights of access to information for third parties in competition law procedures. Critics have highlighted the risks of this judgment, stressing precisely the different logic of the two regimes on access to documents.¹¹⁸ The Commission's statistics on the application of Regulation 1049/2001 in the past years may confirm the practical relevance of *VKI*. At least since 2010 onwards, they show an increasing number of requests for access to documents in the area of competition law.¹¹⁹ Requests on access to documents in this area

115. Recital 2, Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (O.J. 2001, L 145/43).

116. Bartelt, case note on Case T-2/03, *Verein für Konsumenteninformation*, 43 CML Rev. (2006), 197–198.

117. See, among others, Leino, “Just a little sunshine in the rain: The 2010 case law of the Court of Justice on access to documents”, 48 CML Rev. (2011), 1241–1246. See also decisions by the European Ombudsman on refusal of access to the Commission's administrative file in a State aid investigation Case: 1735/2010/MHZ opened on 20 Sept. 2010, decision on 3 May 2011, and refusal to grant public access to documents in competition law procedure Case: 2953/2008/FOR opened on 9 Dec 2008, decision on 27 July 2010.

118. Bartelt, op. cit. *supra* note 116.

119. Report from the Commission on the application in 2010 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, Brussels, 12 Aug. 2011, COM(2011)492, final Point 4.1 and 4.3; “2010 has seen a significant increase of the number of initial applications made under Regulation 1049/2001... Competition policy comes first on the list of domains of interest with 9.07% of initial applications, followed closely by other major EU policy areas...” See also the point 10, which shows an increase of applications in the field of competition policy from 7.18% in 2008 to 9.07 % in 2010 of the total applications made.

decreased in 2011 and in 2012, but of Commission DGs, DG Competition still has the third highest number of requests.¹²⁰

The case law subsequent to *VKI* has given disparate indications on how to address the relationship between the general rules on access to documents and sector rules on access to the file. In *Technische Glaswerke Ilmenau (TGI)*, the Court of Justice, deciding on appeal, clearly stated that the specific rules on access to the file – in this case, those applicable in the context of State aid procedures – should be taken into account when interpreting the exceptions on access to documents established in Regulation 1049/2001.¹²¹ More strongly, the ECJ considered that the applicant did not have access to the file in the administrative procedure on the basis of a general presumption that disclosure would in principle undermine the protection of the objectives of investigation activities.¹²² Therefore, the ECJ countered the possibility of third parties resorting to Regulation 1049/2001 to avoid the restrictions on access to the file. This specification applies *mutatis mutandis* to the relationships between the specific rules on access to the file in competition law procedures and the general rules on access to documents of the EU institutions.¹²³ However, the Court of Justice and the General Court keep giving contrary signs on the possibility to resort to general presumptions in the interpretation of the exceptions of Article 4(2) and (3) of Regulation 1049/2001.¹²⁴ It is uncertain, at present, whether the specific sector rules can be an effective obstacle to

120. Report from the Commission on the application in 2012 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, Brussels, 10 July 2013, COM(2013)515, final points 3.3 and 10. Report from the Commission on the application in 2011 of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, Brussels, 2 Aug. 2012, COM(2012)429, final points 4.3 and 10.

121. Case C-139/07 P, *Commission v. Technische Glaswerke Ilmenau*, [2010] ECR I-5885, para 58. For a critical analysis of this case, see Leino, op. cit. *supra* note 117, 1226–1227.

122. *Technische Glaswerke Ilmenau*, cited previous note, paras. 55–58.

123. Case C-404/10 P, *Commission v. Éditions Odile Jacob*, judgment of 28 June 2012, nyr, para 59, and Case C-477/10 P, *Commission v. Agrofert*, judgment 28 June 2012, nyr, para 59, holding that they apply to merger control procedures. See also Case T-344/08, *EnBW Energie Baden-Württemberg AG v. Commission*, judgment of 22 May 2012, nyr, para 61, although defending a different view on the possibility to establish general presumptions (currently under appeal: Case C-365/12 P; appeal lodged 31 July 2012 by the Commission, O.J. 2012, C 87/29).

124. On the discrepancies of the Courts in their ruling on access to documents, see Adamski, “Approximating a workable compromise on access to official documents. The 2011 developments in the European courts”, 49 CML Rev. (2012), 521–522. On the issue discussed in the text, see in opposite senses Case C-506/08 P, *Sweden v. Commission and My Travel Group plc*, [2011] ECR I-6237, paras. 87–89 and Case T-29/08, *LPN v. Commission*, [2011] ECR II-6021, paras. 123–127. On both, see Adamski, *ibid.*, 529–530; 542–543. See further *EnBW Energie Baden-Württemberg*, cited *supra* note 123. As mentioned, the case is under appeal. The judgment of the ECJ will be another opportunity to settle the different approaches of the two Courts.

broader access to procedural information sought by persons concerned who are not the addressees of administrative decisions.¹²⁵ Admittedly, as the Court of Justice highlighted in *TGI*, and more recently in *Agrofert* and in *Éditions Odile Jacob*, allowing third parties to resort to the general rules on access to documents to gain access over documents they would otherwise not be entitled to have, would call into question the sector rules.¹²⁶ The latter constitute *lex specialis* resulting from a delicate balance of the interests at stake in each policy field. As such, they ought to prevail over the general rules on access to documents.¹²⁷ Yet, although a solution is needed to ensure the *effet utile* of sector regimes on access to the file, this does not prevent the need for these regimes to be revised so as to reflect a more balanced equation between access and the interests that a lawful refusal protects.¹²⁸

Arguably, the current rules on access to the file overlook the specific situation of consumers in competition enforcement procedures. This brings us back to the arguments made above when analysing the capacity of consumers to trigger private enforcement of competition law rules.¹²⁹ Consumers and consumer organizations do not have the means to gather market data and/or specific commercial information about competition law infringements. Access to the Commission's file is particularly important as a means to access information that allows them to build possible judicial claims in private enforcement actions. As argued above, this is especially the case with regard to horizontal agreements.¹³⁰ Access to the information compiled by public enforcement authorities is also important to ensure the effectiveness of consumers' participation in public enforcement procedures. If crucial information is withheld, their rights to participate in the procedure will be hindered since they will not be able to voice their interests adequately. In this respect, consumers, as any other third party to the procedure, do have means to

125. See, more recently, Case C-477/10 P, *Commission v. Agrofert*, judgment 28 June 2012, nyr, paras. 57–64, and Case C-404/10 P, *Commission v. Éditions Odile Jacob*, judgment of 28 June 2012, nyr, paras. 106–198, and 121–122, where the ECJ forcefully upheld its judgment in *TGI* (cited *supra* note 121).

126. *Agrofert*, cited *supra* note 123, para 63; *Éditions Odile Jacob*, cited *supra* note 123, paras. 121–122.

127. In *Éditions Odile Jacob*, cited *supra* note 123, para 110, the ECJ has a different interpretation: there is no provision in either of the regulations at issue that establishes primacy of one over the other; therefore, they need to be interpreted in a way that ensures their coherent application. In practice, in the Court's view, this amounts to recognizing general presumptions of non-access, the compatibility of which with the regulation on access to documents is highly questionable (see, in particular, para 118).

128. In this sense, see Leino, *op. cit. supra* note 117, 1246.

129. See *supra* section 3.2.

130. See *supra* section 3.2.

react against undue lack of disclosure: as mentioned, they can make a reasoned request for access to the Hearing Officers. Yet, this request is logically instrumental to the exercise of the right to be heard, which, in the case of complainants and third parties is dependent on a discretionary assessment of the Hearing Officers.¹³¹ Thus: the procedural position of consumers affected by the possible infringement to competition law rules depends on a discretionary assessment – made in this case by the Hearing Officers. This does not mean that their position will not be duly taken into account. It indicates, however, that the procedure is not designed to accommodate their position as victims of a potential infringement.

4.4.2. *Access to information and private enforcement*

The tension between the interests protected by disclosing the information in an administrative file on a competition law infringement and the interests of protecting that information is at the core of the current rules on access to a competition file. This tension has come to the fore in recent judgments: *Pfleiderer* and *Donau Chemie*.¹³² Both cases concerned the conflict between private claimants that seek access to documents received in the course of leniency applications and the interest of leniency applicants in keeping that information confidential.¹³³ Despite this specificity, these cases illustrate very well the problems in reconciling, on the one hand, the right to claim damages – which depends on access to information by third parties – with, on the other hand, the effectiveness of public enforcement, which may need to rely on the confidentiality of the information undertakings provide to public authorities. If documents relating to a leniency procedure are disclosed to affected persons who intend to bring an action for damages (these will include consumers), this may deter leniency applicants and hinder what has become a very important tool to detect wrongdoings and enforce competition rules.¹³⁴ An analogous tension may arise between, on the one hand, disclosing to third parties documents beyond those that are included in the non-confidential version of the statement of objections to which complainants can have access, or those that, in accordance with the rules explained above, can be disclosed to holders

131. Art. 7(1) of the Hearing Officer terms of reference. On access to a hearing, see Arts. 5 and 6(2) of the Hearing Officer terms of reference, op. cit. *supra* note 82.

132. Case C-360/09, *Pfleiderer v. Bundeskartellamt*, [2011] ECR I-5161; Case C-536/11, *Bundeswettbewerbshoerde v. Donau Chemie*, judgment of 6 June 2013, nyr.

133. Leniency is one specific, albeit highly relevant, tool of public enforcement, through which the infringer voluntarily provides sensitive information to the public enforcer (NCAs or the Commission) with a view to benefiting from immunity or reduction of the final sanction applied.

134. *Pfleiderer*, cited *supra* note 132, para 25. The voluntary provision of confidential information may be the only way of public enforcers detecting cartels.

of sufficient interest; and, on the other hand, protecting the objectives of the Commission's investigation activities. Despite the fact that *Pfleiderer* referred to enforcement by national authorities (the documents at issue had been given to a national competition authority by a leniency applicant) and *Donau Chemie* to access to documents held by a national court on cartel cases, these two cases reveal the same tension and weighing of interests that would apply to enforcement procedures conducted by the Commission and, hence, to documents held by it.¹³⁵ They also give indications on a possible way to reconcile these competing interests.

In these judgments, the Court stressed the fundamental importance of both leniency programmes and actions for damages before national courts for the effective application of Articles 101 and 102 TFEU.¹³⁶ In *Pfleiderer* the Court held that EU rules on cartels should not preclude a person's right to bring an action for damages by denying them access to documents relating to a leniency procedure.¹³⁷ Safeguarding this right ultimately depends on a balancing that needs to be struck between the interests protected by disclosure and the interests protected by non-disclosure of the relevant information, which is a task of national courts.¹³⁸ The Court did not give any further indication on this balancing exercise. In line with *Pfleiderer*, the Court in *Donau Chemie* considered that a national law that made disclosure of information fully dependent on the consent of the cartel participants (i.e. the parties to the enforcement procedure) was excessively onerous for the exercise of a right to damages.¹³⁹ Such a solution gave cartel participants the possibility to "object to the access to the file without having to give any reasons".¹⁴⁰ The Court also noted that this legislative solution did not take into account that "access may be the only opportunity those persons have to obtain the evidence needed on which to base their claim to compensation".¹⁴¹ A solution that

135. Considering that *Pfleiderer* also applies to Commission leniency programmes, see the judgment of the English High Court of Justice in *National Grid Electricity Transmission v. ABB and Others*, [2012] EWHC 869 (Ch), para 26, where the Court also highlights that the Commission in its observations did not oppose this view (available at: <www.bailii.org/ew/cases/EWHC/Ch/2012/869.html>).

136. *Pfleiderer*, cited *supra* note 132, paras. 25–27, 29. *Donau Chemie*, cited *supra* note 132, paras. 42, 23.

137. *Ibid.*, para 32.

138. In this case, the German Local Court (*Amtsgericht Bonn*) ended up refusing disclosure, by a judgment of 18 Jan. 2012 (available at <www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf>). A different conclusion was reached by the English High Court of Justice in a case regarding enforcement by NCAs where partial disclosure was granted (*National Grid*, cited *supra* note 135).

139. *Donau Chemie*, cited *supra* note 132, para 32.

140. *Ibid.*, para 38.

141. *Ibid.*, para 39.

would give full protection to the interests of leniency applicants has therefore been clearly discarded.¹⁴² The extrapolation of this conclusion to documents held by the Commission has been made by Advocate General Jääskinen in his Opinion in *Donau Chemie* – because of the EU rules on access to information, “an outright ban on access to Commission documents that have been collected in the context of a cartel investigation is inconceivable”.¹⁴³

Following the Courts’ case law, it is clear that there needs to be a case-by-case balancing of the competing interests at issue. The tension between the interests of confidentiality of leniency applicants and the interests of disclosure of damages applicants is, however, far from solved. As the English High Court of Justice acknowledged in a recent judgment where it followed the Court’s reasoning in *Pfleiderer*, the interests that need to be balanced are of “a very different character”, which does not make the balancing exercise required by the Court of Justice an easy task.¹⁴⁴ The right to claim damages needs to be protected, but the protection of this right cannot jeopardize the possibility of public enforcement *via* leniency programmes.

In *Donau Chemie*, the Court gave further indications on how to deal with the tension between disclosure and protection. In doing so, it opened the way to what can be, in our view, a possible solution: the selection of the information that is relevant for potential actions for damages and that could potentially be disclosed. In fact, the Court explicitly held that a rule of generalized access with a view to ensuring the rights of potential claimants would not be required to ensure the effective protection of the right to claim damages. According to the Court, not only would such generalized access hinder the public interest of enforcement, because it would deter potential leniency applications, but also it is “highly unlikely that the action for damages must be based on all of the evidence in the file relating to those proceedings”.¹⁴⁵ Extrapolating from this judgment, one could argue that, when compiling the information in the file, the Commission ought to examine the documents it collected or that were made available by parties to the procedure, and consider, first, how relevant certain documents may be for potential damages claims, and secondly, whether potential claimants could have access to the necessary information *via* other means that would still ensure their possibility to resort to civil action. In leniency cases, at least, pre-existing documents submitted by a leniency applicant – i.e. documents that exist independently of a leniency procedure – that could support a

142. Art. 6(1) of the Commission Proposal of 11 June 2013, cited *supra* note 51, contains a provision that, in the light of *Donau Chemie* might equally be considered too onerous. On this see, Drexler, *op. cit. supra* note 74.

143. Opinion of A. G. Jääskinen in *Donau Chemie*, para 59.

144. *National Grid* case (cited *supra* note 135).

145. *Donau Chemie*, cited *supra* note 132, para 33.

damages claim should not be withheld from possible damages claimants.¹⁴⁶ On the basis of this assessment, the Commission could create different sub-files, with information that would be disclosed and information that would remain confidential. This “classification” of information as a means of balancing the competing interests of confidentiality and disclosure follows the criteria used by the European Ombudsman in a case regarding the Commission’s refusal to grant, under Regulation 1049/2001, access to documents which had been requested with the purpose of filing an action of damages resulting from an infringement of EU competition law.¹⁴⁷ In accordance with the Ombudsman’s decision, this classification would be subject to a duty to give reasons to those interested in accessing confidential documents, even if “the level of detail required of the Commission when providing such explanations can never be such as to require the Commission to reveal the confidential information”.¹⁴⁸

Conflicts regarding access to information contained in administrative files are a permanent feature of competition law enforcement. What the recent judgments on leniency documents show is that the protection of the interests of the victims of anti-competitive practices – be they consumers or not – is an essential part of a procedural regime on enforcement. They need to be protected and balanced with competing interests. This conclusion sheds light also on the insufficiencies of the rules on access to the file mentioned above. It stresses that general presumptions of the type defended by the ECJ in *TGI*, *Agrofert* and *Éditions Odile Jacob* are too onerous on the persons who have the burden of proving that a given document is not covered by the presumption without having had access to the said document.¹⁴⁹ It stresses also that the sector specific rules on access to file in competition procedures are too restrictive, if their application does not take into account the interests of potential victims – including consumers – in having access to information other than that contained in the non-confidential version of the statement of objections. The classification suggested above, subject to justification, is, perhaps, one way of dealing with the complex issue of balancing the conflicting interests at stake, even if it does not constitute a panacea for the

146. In this sense, Opinion A.G. Mazak in *Pfleiderer*, para 47.

147. Decision of the European Ombudsman closing his inquiry into complaint 3699/2006/ELB against the Commission, 6 Apr. 2010, para 110. The Ombudsman’s decisions also reproduce the criteria used by the English High Court on the *National Grid* case in defining a proportionality test applicable to decide on disclosure of leniency documents. See *National Grid*, cited *supra* note 135, para 39.

148. *Ibid.*, paras. 105 and 109.

149. On the possibilities of overturning the presumption, see *TGI*, cited *supra* note 121, paras. 62, 68 and 70, *Agrofert*, cited *supra* note 123, para 68, and *Éditions Odile Jacob*, cited *supra* note 123, para 68. The remark on the difficulties of overturning such a presumption is made by Leino, *op. cit. supra* note 117, p. 1251.

problems this balancing poses. Arguably, this perspective requires overcoming the strictly bilateral construction of the procedure and, in particular, the fact that, due to this construction, the procedural rights of third parties are, in the current legislative scheme, *a priori* limited by the rights of the defence.

5. Two proposals to overcome current limits

In this article we identified outer and inner limits to final consumers' access to enforcement procedures in EU competition law. Outer limits stem from the way public enforcement has been premised on the assumption that consumers should primarily seek judicial protection of their rights before national courts, instead of attempting to initiate an administrative procedure of enforcement before the Commission or NCAs. Inner limits stem from the fact that the administrative procedure of enforcement is essentially structured as an adversarial procedure in which the procedural rights of consumers – as third parties – are limited by the protection of the rights of the defence of the undertakings investigated. These condition *a priori* the information that can be made available to third parties.

We have assessed those limits against the contention that the enforcement of competition law rules, and the way it is pursued by administrative actors, ought to be guided by the public interests inherent in EU competition law. Irrespective of whether the main goal of EU competition law is the process of “competition as such” (*T-Mobile*) or whether the well-being of consumers is the “ultimate purpose” of competition law (*Österreichische*), we argue that the economic interests of consumers remain a key part of the equation when assessing possible competition law infringements. Protecting the process of competition implies ensuring the effective working of markets, economic and technical progress through low prices, increased output and quality. In this sense, protecting competition also implies safeguarding consumers' economic interests as an essential aspect. It follows that consumers' economic well-being is one of the core public interests being pursued in the enforcement of competition law. Arguably, the administrative structures that serve this enforcement ought also to provide suitable means of protecting the consumers' economic interests.

Within this normative framework, we have contended that two characteristics of public enforcement of EU competition law, as currently conceived, in fact constitute limits to consumers' access to this enforcement. The first limitation is the Commission's discretion on setting priorities regarding which complaints it will pursue. We analysed the validity of the Commission's argument that the possibility for potential complainants to

bring a case to national courts may be a justification to reject a complaint. Neither the Commission nor the Courts have addressed the specific factors and types of cases that condition potential claimants enforcing the competition rules before national courts, or to what extent the Commission must prove the feasibility of effective private enforcement in order to reject a complaint. We contended that the abstract possibility of private enforcement is not a valid argument to support a rejection, if it is not followed by a specific requirement to investigate the range of factors that condition the possibility of final consumers to resort to courts in the absence of public enforcement. In fact, the ability of final consumers to bring their claims to court crucially depends on the type of infringement at stake and on their legal and economic capacity to initiate private actions before national courts. The available empirical research on the low number of cases brought by consumers before national courts questions the Commission's policy of encouraging complainants to turn to national courts. In our assessment of this conditional link between consumers' access and consumers' private enforcement of competition law, we concluded that the Commission's discretionary power in rejecting complaints is not sufficiently structured. This conditional link can be justified in some types of cases (vertical restraints and abuse of dominance), but not in others (horizontal agreements), where the Commission's public enforcement is more effective than consumers' private enforcement, because of the information it gathers through its leniency programme. In these cases, consumers should have access to the public enforcement procedure and, subject to a balancing of competing interests, to information that enables them to file damages actions and activate private enforcement. We suggested that the Commission could more clearly align its policy on complaint handling to the feasibility of consumers' private litigation by differentiating its priority setting decisions on the basis of the types of infringements to which complaints refer. Such a differentiated priority setting should set a higher threshold for the Commission to justify the rejection of complaints on the basis of the type of cases at stake and of the possibilities of the potential complainants to initiate proceedings before national courts. Moreover, the Commission should adduce concrete arguments that establish the conditional link between private and public enforcement in the case at hand, if it rejects a complaint on this basis.

The second characteristic of public enforcement of EU competition law is the very structure of the respective administrative procedures. The present EU procedural model – grounded on a tripartite distinction between undertakings, holders of a “legitimate interest” and holders of a “sufficient interest” – has deep roots in EU competition law. It results from the fact that the administrative procedure serving the enforcement of EU competition law is

very much conceived along the lines of a judicial trial type procedure. It is an adversarial *inter partes* procedure structured around the bilateral relationships that opposes the Commission to the undertakings investigated. This conception is deemed to ensure the protection of the public interests that the substantive and procedural rules of EU competition law are intended to pursue. The structure is in accordance with the object of the procedure, which is the investigation of the undertakings' behaviour. It is the assessment of their behaviour that bases the decisions about potential infringements. Yet, at the same time, it makes the procedural rights of third parties conditional on the protection of the rights of the defence of the undertakings investigated. Consumers can have access to the procedure. Both the legal rules and the way the Courts have interpreted them acknowledge that consumers can be recognized as having a legitimate interest or a sufficient interest. Nevertheless, whether they effectively qualify as holders of such interests depends fully on a discretionary assessment by the Commission and the Hearing Officer. To the authors' knowledge, it is unknown whether they have a consistent practice in this respect. The way the procedure is designed does not ignore the position of consumers or the fact that they are affected by the putative infringement and by public enforcement decisions. However, it is not constructed to ensure that their views as victims of potential competition law infringement will be voiced, i.e. it is not constructed to give them voice with a view to protecting their economic interests.

This characteristic becomes a limit to consumer access to competition law enforcement from the moment in which they can be denied access to information that may not only be important to enable them to express their views during the public enforcement of competition law, but also, and fundamentally, may deny them the very possibility of exercising their right to file an action for damages before national courts. The limited access third parties have to access to competition files has led them to resort to the general EU rules on access to documents (Regulation 1049/2001). We have seen that this way of accessing information may not be the most suitable, and, in practice, remains uncertain, given the conflicting views of the two Luxembourg Courts on this matter. We argue that the competition rules on access to the file ought to be revised, or applied differently, in a way that would protect the interests of affected consumers in having access to information that is crucial to enforce their rights. Extrapolating from recent judicial developments regarding access to leniency documents – illustrating the conflict between, on the one hand, preserving confidential information to protect the interests of the undertakings concerned and the possibility of public enforcement, and, on the other, providing access to documents that ensure the procedural rights of other affected persons – we proposed that

the Commission should classify the information contained in the file as a means of balancing the competing interests of the undertakings investigated and of the consumers who have been victims of their putative infringements. This classification should be guided by two criteria, which have been suggested by the European Ombudsman: the relevance of documents for a potential damages claims and the effective existence of other means of accessing the information compiled in the administrative file. The procedural protection of the economic interests of consumers would require that this classification be subject to a duty to give reasons, which, in itself, needs to balance the competing interests at stake – i.e. it cannot jeopardize the interest of confidentiality, nor can it void the procedural rights of consumers.

Our two proposals – on differentiated priority setting and on classification of documents – point in the same direction: the Commission's discretionary power in dealing with complaints and in determining the procedural rights of consumers should be structured in a way that better ensures the procedural protection of one of the core public interests underlying competition law: the economic interests of consumers, also inherent to the protection of the competitive process.