THE EU/US COOPERATION IN THE FIELD OF ANTITRUST LAW ENFORCEMENT – SOME CHALLENGES TO FUTURE COOPERATION

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Abstract: Today, undertakings frequently operate in an international environment where cross-border arrangements are common. As a result, it is easier for them to circumvent national competition laws by taking advantage of differences between countries. Consequently, this has increased the risk of cross-border anti-competitive conduct. In order to cooperate better and lessen differences in the application of their competition laws, the European Union and the United States have concluded different agreements and understandings between them.

This paper aims to examine how these agreements and understandings have worked in practice and to define the main problems in the application of the EU and US antitrust rules in situations, which might also have an impact on the territory of the other contracting party. In addition, it intends to outline the main challenges for a functioning cooperation, particularly in light of the intention of the European Commission to foster private enforcement of the antitrust rules.

Keywords: Antitrust enforcement, public enforcement, private enforcement, European Union, United States, Competition Cooperation Agreement, positive comity, negative comity.

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1. Introduction[1]

During the last decades transactions carried out have to an increasing degree become international and undertakings frequently operate at a global level or at least their activities have effects also outside the country where they are registered. As a result of globalisation and cross-border arrangements, it is also easier for undertakings to circumvent national competition laws and to take advantage of differences between competition laws of different countries. This in turn has increased the risk of cross-border anti-competitive conduct.[2] In order to remedy this situation, countries have tried to resort to extraterritorial application of their competition laws, *i.e.* they have applied their competition laws to anti-competitive conduct occurring in other countries. Due to difficulties with cross-border investigation and enforcement, the regulation may still be insufficient. This is a consequence of countries' tendencies to enforce their competition laws only with regard to their own domestic interests and their frequent disregard of effects on foreign markets.[3] Furthermore, enforcement that is aimed at increasing national welfare might not always at the same time be optimal for the collective global welfare.[4] The different interests of countries may thus cause frictions when the competition authorities of the countries in question apply their competition laws to the same conduct in a manner that results in divergent outcomes.[5]

The EU and the USA also apply their competition laws extraterritorially.[6] In particular, mergers tend to have impacts in different countries and are therefore subject to review in several countries. However, the outcomes have not always been the same in the EU and the US jurisdictions, an example being the *GE/Honeywell* transaction which was approved in the US but prohibited by the European Commission.[7] In the field of antitrust, the outcomes of the scrutiny of the *Microsoft* case by the EU and the US competition authorities have also been divergent.[8]

The risk of divergent outcomes and jurisdictional conflicts, the extraterritorial scope of the EU and US competition laws,[9] the adoption of the EC Merger Regulation[10] and the increasing

[1] A previous version of this article has been submitted as a research paper at the Complutense University of Madrid.
[2] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 36.
[3] *Ibid.*, at p. 37-38.
[4] *Ibid.*, at p. 44.
[5] *Ibid.*, at p. 49.
[6] Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, *OJ* L 95, 27.4.1995, p. 47-52.
[7] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 51.
[8] *Cf.* Apon, J.: "Cases Against Microsoft: Similar Cases, Different Remedies", *E.C.L.R.*, vol. 28, issue 6, June 2007, p. 327-336, at p. 327. *Cf.* Case COMP/C-3/37.792 *Microsoft*, Commission Decision of 24.3.2004 and *United States v Microsoft* 231 F.Supp 2d 144 (D.D.C. 2002), confirmed by *United States v Microsoft* 373 F.3d 1199 (D.C. Cir. 2004).
[9] The ECJ confirmed the extraterritorial scope of the EC antitrust rules in the so-called "*Wood Pulp*" case, *cf.* Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v. Commission* ("*Wood Pulp*"), [1988] ECR p. 5193.

EC competition law enforcement prompted in 1991 the negotiation and conclusion of a formal cooperation agreement between the EU and the US in the field of competition enforcement[11] in an attempt to strengthen the cooperation between them in this field and to lessen differences in the application of their respective competition laws.[12] This cooperation agreement has later been complemented by other agreements and understandings, for instance, the EU/US Positive Comity Agreement concluded in 1998.[13]

The objective of this paper is to examine how the different agreements and understandings between the EU and the USA in the field of competition law have worked in practice. The paper aims to define the main problems in the application of the EU antitrust rules and the US antitrust laws in situations, which might also have an impact on the territory of the other contracting party, and to outline the main challenges for a functioning cooperation. The focus will be on the enforcement of antitrust rules, not on mergers. The cooperation in mergers is easier than in antitrust enforcement since the parties to the proposed operation usually waive their right to protection of the confidentiality of the information that they provide in the review process, whereas the cooperation in antitrust cases is rendered difficult by the fact that the competition authorities are bound by their national laws concerning confidentiality[14] and the undertakings subject of the investigations are usually not willing to agree to the transfer of information to another jurisdiction. Due to the implementation of the modernisation of the EU competition rules, which entered into force on May 1st, 2004 and the attempts of the European Commission to increase private enforcement in the EU, the antitrust field is of a particular interest.

The next chapter will briefly present the existing agreements and understandings between the EU and the USA that are currently in force. Chapter three will make a general evaluation of how well the cooperation has worked until now and will define the main problems up to date. The main chapter of this paper is Chapter four, which focuses on the most important challenges for and obstacles to the cooperation in the field of antitrust enforcement. Finally, Chapter five will draw some conclusions on the functioning of the cooperation and will suggest some improvements to the future cooperation.

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[10] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, *OJ* L 395, 30.12.1989, p. 19-38.

[11] *Cf.* Fullerton, L. and Mazard, C.C.: "International Antitrust Co-operation Agreements", *World Competition*, 24(3), 2001, p. 405-423, at p. 416.

[12] Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, *OJ* L 95, 27.4.1995, p. 47-52.

[13] Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, *OJ* L 173, 18.6.1998, p. 28-31.

[14] Article VIII of the Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, *OJ* L 95, 27.4.1995, p. 47-52.

2. Existing agreements and understandings between the EU and the USA

The first agreement between the EU and the USA in the antitrust field was concluded in September 1991 when the Government of the USA and the European Commission (hereinafter "the Commission") signed an agreement regarding the application of their competition laws[15] (hereinafter "the EU/US Competition Cooperation Agreement"). Following an action for annulment brought by France, claiming that the Commission had lacked the competence needed to conclude the agreement and that the agreement should instead have been concluded by the Council in accordance with the procedural rules, the European Court of Justice (hereinafter "the ECJ") held in August 1994 that the act whereby the European Commission sought to conclude the EU/US Competition Cooperation Agreement was void. In order to ensure the continuation of the application of the agreement in question, the Council decided hence to conclude the agreement.[16] The agreement concluded by the Council on behalf of the European Communities and by the Commission on behalf of the European Coal and Steel Community was to be applied retroactively as from 23 September 1991.[17]

In order to strengthen the effectiveness of the cooperation between the EU and the USA in the antitrust field, the EU/US Competition Cooperation Agreement was followed by the EU/US Positive Comity Agreement in 1998[18] and the Administrative Arrangement on Attendance[19] in 1999. Furthermore, in 2002, the EU and the USA agreed on best practices on EU/US cooperation in merger cases.[20]

2.1 EU/US Competition Cooperation Agreement

The EU/US Competition Cooperation Agreement is not a treaty but an executive/administrative agreement.[21] The objective of the agreement is to promote cooperation and to lessen the possibility or impact of differences between the EU and the USA when they apply their competition laws. The agreement contains provisions with respect to notification of enforcement activities, exchange of information, cooperation and

[15] Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, *OJ* L 95, 27.4.1995, p. 47-52.
[16] Corrigendum to Decision 95/145/EC, ECSC of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, *OJ* L 131, 15.6.1995, p. 38-39.
[17] Decision 95/145/EC, ECSC of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, *OJ* L 95, 27.4.1995, p. 45-46.
[18] Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, *OJ* L 173, 18.6.1998, p. 28-31.
[19] *Cf.* http://ec.europa.eu/comm/competition/international/bilateral/usa.html.
[20] For more details, *cf.* Best practices on cooperation in merger investigations, available at: http://ec.europa.eu/competition/international/bilateral/eu_us.pdf.
[21] *Cf.* Ham, A. D.: "International cooperation in the anti-trust field and in particular the agreement between the United States of America and the Commission of the European Communities", *C.M.L.R.*, 1993, 30, p. 571-591, at p. 571.

coordination of the parties' enforcement activities, negative and positive comity, a consultation mechanism and confidentiality of information.

Under the agreement, the parties have an obligation to notify the other party whenever their competition authorities become aware of that their enforcement activities may affect important interest of the other party.[22] The exchange of information is aimed at facilitating the application of the laws of the respective competition authorities or at promoting better understanding of economic conditions and theories relevant to the competition authorities' enforcement activities and interventions or participations in a regulatory or judicial proceeding independent of the enforcement activities.[23] Moreover, the competition authorities will provide each other with any significant information that come to their attention about anti-competitive activities, which they believe is relevant to the enforcement activity by the other competition authority.[24]

The Commission and the US government have agreed to assist each other's competition authorities in their enforcement activities in so far as that is compatible with their laws and important interests using their reasonably available resources.[25] If both parties have an interest in undertaking enforcement activities with respect to related situations, they may coordinate their enforcement activities.[26] To the extent possible they shall conduct their enforcement activities consistently with the enforcement objectives of the other party.[27]

Under the agreement, the parties have a so-called negative as well as a positive comity obligation. Negative comity means that the enforcing country must consider the interests of an affected country when it is enforcing its competition laws. It must also refrain from taking enforcement action that adversely affects the interest of the other country.[28] Pursuant to Article VI of the EU/US Competition Cooperation Agreement, the parties will hence seek to take into account the important interests of the other party to the extent that this is compatible with their own laws and interests.

Positive comity, in turn, places an obligation on an enforcing country to consider express requests for enforcement action made by an affected country to the extent that the conduct in question in the territory of the enforcing country is adversely affecting the other country.[29] Under the Competition Cooperation Agreement, the party that has been notified by the other party about possible anti-competitive activities that are being carried out in its territory is to inform the notifying party about its decision with regard to the request to initiate enforcement

[22] Agreement between the Government of the United States and the Commission of the European Communities regarding the application of their competition laws, *OJ* L 95, 27.4.1995, p. 47-52, Article II (1).
[23] Article III (1) of the EU/US Competition Cooperation Agreement.
[24] Article III (2) of the EU/US Competition Cooperation Agreement.
[25] Article IV (1) of the EU/US Competition Cooperation Agreement.
[26] Article IV (2) of the EU/US Competition Cooperation Agreement.
[27] Article IV (3) of the EU/US Competition Cooperation Agreement.
[28] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 110.
[29] *Ibid.*, at p. 112.

activities and, if it decides to initiate enforcement activities, the outcome of those activities.[30] The positive comity obligation has been invoked by the US Department of Justice in 1997 when it requested the Commission to investigate the Computer Reservation System Amadeus due to Amadeus's allegedly exclusionary behaviour.[31]

As to the confidentiality of information, the EU and the US competition authorities are not required to provide information to each other if such disclosure is prohibited by the laws of the party possessing the information or it would be contrary to important interests of that party.[32] They are thus bound by their domestic laws in this respect.[33] Furthermore, the parties have an obligation to maintain, to the fullest extent possible, the confidentiality of any information that the other party has provided to it under the agreement.[34]

2.2. EU/US Positive Comity Agreement

In 1998, the EU and the USA decided to conclude an agreement on positive comity (hereinafter "the EU/US Positive Comity Agreement") as they believed that this would enhance the effectiveness of the EU/US Competition Cooperation Agreement in relation to anti-competitive activities occurring in the territory of one party that would adversely affect the interests of the other party.[35] The objective of that agreement is to ensure free trade and investment between the parties and to protect competition and consumer welfare against anti-competitive activities contrary to the parties' competition laws. Furthermore, the Positive Comity Agreement aims to achieve the most effective and efficient enforcement of competition law through the establishment of cooperative procedures. This implies that the competition authorities of each party will normally not deal with anti-competitive activities that occur principally in and are directed principally towards the other party's territory if the relevant authorities of the other party are able and willing to examine and take effective sanctions to deal with those activities.[36]

According to Article 1 of the EU/US Positive Comity Agreement, there are two conditions for the application of the agreement. First, the anti-competitive activities have to occur in whole or in substantial part in the territory of one of the parties and they must adversely affect the interests of the other party. Second, the activities concerned must be prohibited under the competition laws of the party in the territory of which the activities are occurring.

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[30] Article V (3) of the EU/US Competition Cooperation Agreement.
[31] *Cf.* Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000) 618 final, Brussels, 4.10.2000, at p. 6.
[32] Article VIII (1) of the EU/US Competition Cooperation Agreement.
[33] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 112.
[34] Article VIII (2) of the EU/US Competition Cooperation Agreement.
[35] Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, *OJ* L 173, 18.6.1998, p. 28-31. This was prompted by the jurisdictional conflict between EU and US with regard to the *Boeing – McDonnell Douglas* merger in 1996, *cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 115.
[36] Article I (2) of the EU/US Positive Comity Agreement.

Positive comity means that a party may request the competition authorities of the other party to investigate and take actions against anti-competitive activities in accordance with the competition laws of the requested party. This is possible even if the activities in question do not violate the requesting party's competition laws.[37] Usually the requesting party will suspend or defer its own enforcing activities as long as the requested party is taking enforcement actions, if certain conditions are meet. These include a situation where the anti-competitive activities do not have a direct, substantial and reasonably foreseeable impact on consumers in the requesting party's territory or, in case there is such impact, the activities occur mainly in and are directed principally towards the other party's territory, and the adverse effects on the interests of the requesting party can and are likely to be investigated and eliminated by the actions of the requested party.[38] Moreover, the competition authorities of the requested party must agree to fulfil certain requirements contained in Article IV(2)(c), such as devote adequate resources to the investigation and pursue all reasonably available information, notify the requesting party of any change with regard to investigation or enforcement and inform the other party of the results of their investigation. When all conditions are met, a party that does not defer or suspend its enforcement activities shall inform the other party of its reasons. However, a party that suspends or defers its enforcement activities may later initiate such activities by informing the competition authorities of the other party of the intentions and reasons for doing so.

In addition, the Positive Comity Agreement contains a provision with regard to confidentiality and use of information. When one party has provided information to the other party's competition authorities for the purpose of implementing the Positive Comity Agreement, the latter may only use it for that purpose. Only if the first party's competition authority consents to it and has acquired the consent of the source of the confidential information, may the information be used for another purpose.[39]

There are several advantages of positive comity agreements. Positive comity enhances more efficient cross-border enforcement since the authority, which undertakes the enforcement action, is best placed to gather evidence. The need to share information is also reduced, as the authority with the best access to information will normally be responsible for the enforcement. If the positive comity agreement is to work efficiently, it requires that the conduct, which is subject of the enforcement action, be classified as unlawful in both countries.[40] As far as the cooperation between the EU and the US is concerned, this should not be a problem thanks to their similar competition laws.[41] In addition, a further requirement for successful positive comity is that the requesting country has sufficient confidence in its

[37] Article III the EU/US Positive Comity Agreement.
[38] Article IV of the EU/US Positive Comity Agreement.
[39] Article V of the EU/US Positive Comity Agreement.
[40] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 117.
[41] *Cf.* Ginsburg, D. G.: "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics* 1(3), 2005, p. 427-439, at p. 428.

counterparty's abilities to enforce the conduct at issue effectively. Finally, the outcome will depend on the requested party's will, as there is no obligation to respond to any request.[42]

2.3. Administrative Arrangement on Attendance

The Administrative Arrangement on Attendance was concluded in 1999 in the framework of the agreements between the EU and the US on cooperation in the field of enforcement of competition rules. It is not an agreement but an understanding about administrative arrangements to apply to the EU/US Competition Cooperation Agreement. These administrative arrangements concern reciprocal attendance between the EU and the US competition authorities at certain stages of the procedures in individual cases in which competition rules are applied.[43] The attendance requires the express consent of the persons concerned by the enforcement activities in either jurisdiction.[44]

These administrative arrangements were invoked for the first time in 1999 in the *BOC/Air Liquide* merger, where the US Federal Trade Commission attended the Commission's oral hearing.[45] The following year a Commission official, in turn, attended a "pitch meeting" between the US Department of Justice and the parties to the proposed *MCI Worldcom/Sprint* merger.[46]

3. Evaluation of the cooperation to date based on the existing agreements

3.1. General evaluation

On the whole, the cooperation between the Commission and the US competition authorities has worked fairly well. Already the Report from 1999 on the application of the EU/US Competition Cooperation Agreement[47] underlined the close daily contacts established between the case teams of the competition authorities and their importance for mutual confidence building, increased knowledge of the substantive and procedural rules in the other jurisdiction, convergence in competition analysis etc.[48] In general, the Commission has made

[42] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 117-118.
[43] *Cf.* http://ec.europa.eu/comm/competition/international/bilateral/usa.html.
[44] *Cf.* XXXth Report in competition policy 2000 – SEC(2001) 694 final, p. 121.
[45] *Cf.* Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000) 618 final, Brussels, 4.10.2000, at p. 6.
[46] *Cf.* XXXth Report in competition policy 2000 – SEC(2001) 694 final, at p. 121.
[47] *Cf.* Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000) 618 final, Brussels, 4.10.2000.
[48] *Cf.* Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000) 618 final, Brussels, 4.10.2000, at p. 3.

more notifications under the agreements to the US competition authorities than vice versa.[49] The cooperation has mainly concerned mergers,[50] although there appears to have been an increase in cooperation also in cartel cases, at least in cases were leniency applications have been submitted simultaneously to both competition authorities.[51]

As to cartel cases, the Commission Report from 1999 stresses the improved cooperation and staff visits. However, it notes that the effective cooperation is impeded by the authorities' inability to exchange confidential information. Furthermore, investigations are often not conducted in parallel but one after another.[52] In the last years, there appears, nevertheless, already to have been more case-related contacts between the competition authorities in cartel investigations thanks to simultaneous applications for immunity in the EU and the USA. The EU and the US authorities have also conducted coordinated enforcement actions, for instance, in the *Heat stabilizers and impact modifiers* case in 2002.[53] In relation to the EU-US summit of June 2004, the parties agreed to further enhance the cooperation in competition matters and to explore the possibilities of exchanging certain confidential information also in international cartels.[54]

3.2. Particular problems

Despite the fact that the cooperation has in general worked well, it has not been possible to completely avoid divergent outcomes. Extraterritorial application of competition laws tends to cause friction between competition authorities and will therefore be briefly described. The paper will then analyse the problems to date related to the enforcement of antitrust rules.[55]

3.2.1. Extraterritorial application of competition laws

Antitrust matters having an international dimension have increased significantly during the last two decades. At the end of 1990's, the percentage of "international cases" of all cases

[49] *Cf. e.g.* the Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000) 618 final, Brussels, 4.10.2000, at p. 3.
[50] *Cf.* Fullerton, L. and Mazard, C.C.: "International Antitrust Co-operation Agreements", *World Competition*, 24(3), 2001, p. 405-423, at p. 416.
[51] *Cf. e.g.* XXXIII[rd] Report on competition policy 2003 – SEC(2004) 658 final, at p. 161 and the Report on Competition Policy 2005, at p. 190, available at http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf
[52] *Cf.* Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000) 618 final, Brussels, 4.10.2000, at p. 5.
[53] *Cf.* XXXIII[rd] Report on competition policy 2003 – SEC(2004) 658 final, at p. 161.
[54] *Cf.* Report on Competition Policy 2005, at p. 190, available at http://ec.europa.eu/comm/competition/annual_reports/2005/en.pdf
[55] There have also been a number of divergent merger decisions of the EU and US competition authorities but the analysis of those decisions falls outside the scope of this paper, which focuses on the cooperation in antitrust cases.

reviewed by the US Department of Justice had risen to almost 40 % and half of the merger cases investigated are estimated to affect consumers in more than one country. The position of the USA has long been that anti-competitive conduct abroad, which has adverse effects on consumers in the USA, falls within the subject-matter scope of US antitrust laws. As long as the requirements for obtaining personal jurisdiction over the defendants are met, the US laws apply extraterritorially to anti-competitive conduct abroad.[56]

The US extraterritorial application is known as "the effects doctrine"[57] and was frequently applied still in the 1980's. It resulted in frequent jurisdictional conflicts,[58] which prompted other countries to adopt legislation that would block the US extraterritorial jurisdiction. This legislation was either aimed at blocking the enforcement of the foreign judgments or restricted foreign litigants from obtaining evidence or compelling production of commercial documents that could be used in foreign proceedings.[59]

Other countries as well as the EU have also resorted to extraterritorial application of their competition laws.[60] In its *Wood Pulp* ruling, the ECJ held that the decisive factor for the application of the EC competition rules is the place where the agreement is implemented.[61] According to the Court, it was hence without significance whether the undertakings that participated in the infringement had subsidiaries, agencies or the like in the Community.[62] Consequently, the ECJ has not expressly recognized the "effects theory" but has still extended the application of the EC competition rules to situations where the anti-competitive activities are implemented within in the Community.[63]

The USA even resorts to the application of its antitrust laws when US exporters are adversely affected by anti-competitive conduct abroad. However, lately the US competition authorities have not often applied US antitrust laws extraterritorially to this kind of cases. The EU has, to the best of this author's knowledge, not applied the EU competition rules to anti-competitive conduct occurring outside the EU which only has adverse effects on European exports.[64]

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[56] *Cf.* Fullerton, L. and Mazard, C.C.: "International Antitrust Co-operation Agreements", *World Competition*, 24(3), 2001, p. 405-423, at p. 406-407.
[57] Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 62.
[58] *Ibid.*, at p. 55.
[59] *Ibid.*, at p. 58.
[60] *Ibid.*, at p. 64.
[61] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v. Commission*, [1988] ECR p. 5193, at § 16.
[62] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlström Osakeyhtiö and others v. Commission*, [1988] ECR p. 5193, at § 17.
[63] *Cf.* Tizzano, A.: "Quelques observations sur la coopération internationale en matière de concurrence", *Revue du Droit de l'Union Européenne*, 1/2000, p. 75-100, at p. 90. With regard to mergers, the Court of First Instance stated in *Gencor/Lonrho* that the application of the EC Merger Regulation (*i.e.* Regulation 4064/89 which was in force at that time) "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community". *Cf.* Case T-102/96, *Gencor v. Commission*, [1999] ECR p. II-753, at § 90.
[64] *Cf.* Fullerton, L. and Mazard, C.C.: "International Antitrust Co-operation Agreements", *World Competition*, 24(3), 2001, p. 405-423, at p. 408-409.

Following the increase in extraterritorial application of competition laws, foreign governments have requested to be notified of investigations affecting their nationals for anti-competitive conduct occurring within their borders in order to have an opportunity to express their views on the extraterritorial enforcement.[65] This is also one of the obligations that the EU and the US antitrust authorities have undertaken in their cooperation in the field of competition law enforcement. The positive and negative comity obligations serve the purpose of coordinating enforcement activities and avoiding extraterritorial application of competition laws that have an adverse affect of the interests on another country.

3.2.2. Enforcement of antitrust rules

Traditionally there has been less cooperation between the EU and the US competition authorities in antitrust cases than in merger cases. This appears to a large extent be due to the obligation of the authorities to protect the confidentiality of information received by them during the investigations and the unwillingness of the undertakings subject of these investigations to waive that confidentiality. The adoption of leniency programs seems, nevertheless, also to have facilitated the cooperation between the competition authorities in cartel cases.

3.2.2.1. Cartel investigations and antitrust damages actions

Thanks to simultaneously made immunity applications to several jurisdictions, the EU and the US competition authorities have increasingly been able to coordinate their enforcement activities. Until the last few years, it was, nonetheless, more common that the competition authorities conducted their investigations one after another, as was the case *e.g.* in the *Vitamins* cartel.[66]

Despite the successful cooperation in cases such as the *Heat stabilizers and impact modifiers* and *Bulk liquids shipping*[67] obstacles to an efficient cooperation remain. Problems related to the confidentiality of information provided during the antitrust investigations still exist in many cases. What is more, the risk for undertakings of facing sanctions and possible civil damages claims in other jurisdictions might make them refrain from applying for immunity and, consequently, render it more difficult for the competition authorities to prove a violation of the antitrust rules. In addition, it has to be taken into account that individuals found guilty of antitrust violations may be subject to criminal sanctions in the USA and in some EU Member States. Therefore, they will not easily be willing to consent to that information provided by them be transferred to another jurisdiction.[68] These challenges for cooperation in antitrust enforcement will be examined more in detail in Chapter 4.

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[65] *Ibid.*, at p. 410.
[66] *Cf.* Case COMP/E-1/37.512 – *Vitamins*, Commission Decision of 21.11.2001, at p. 15.
[67] *Cf.* XXXIII[rd] Report on competition policy 2003 – SEC(2004) 658 final, at p. 161.
[68] For instance, the US Department of Justice has estimated that approximately one-third of the individual defendants convicted have been foreign nationals and roughly half of the corporate defendants in criminal cases have been foreign-based undertakings. *Cf.* Hammond, S.D.: "A Summary Overview of the Antitrust Division's

3.2.2.2. The *Microsoft* case

Recently, the EU and the US competition authorities have also reached different outcomes in a case concerning an abuse of a dominant position, namely the *Microsoft* case. The Commission imposed a (then) record high fine of € 497 millions on Microsoft for abuse of a dominant position. According to the Commission Decision, Microsoft had infringed Article 82 EC [now Article 102 of the Treaty of the Functioning of the European Union] by refusing to provide interoperability information to competitors for work group servers and by bundling the Windows Media Player with the Windows operating system.[69]

In the USA, Microsoft had allegedly unlawfully tied its browser Internet Explorer to its operating system Windows. The case is hence not identical to the one decided by the Commission, but similar since the latter concerned, *inter alia*, bundling the Windows Media Player with the Windows operating system.[70] Initially, Judge Jackson ruled that Microsoft ought to divest and separate the operating systems business from the applications business.[71] However, the D.C. District Circuit Court of Appeals reversed his decision,[72] although it did uphold many of the findings that Microsoft had violated the US antitrust law. The Court remanded the case to Judge Kathleen Kollar-Kotelly, but Microsoft and the Justice Department reached a settlement agreement in November 2001 before the court proceedings ended. In March 2002, they later revised that agreement, which was accepted almost as such by Judge Kollar-Kotelly.[73]

Following the Commission's decision to impose a fine on Microsoft, ten members of the International Relations Committee of the US House of Representatives wrote an open letter to the Commission invoking that the Commission Decision might have violated the antitrust agreements between the EU and the USA. M. Müller has examined whether the Commission Decision could have violated the EU/US Competition Cooperation Agreement or the EU/US Positive Comity Agreement. He first analyses whether the decision is in breach of Article IV of the EU/US Positive Comity Agreement according to which a party that has requested the other party to undertake enforcement activities will suspend its own enforcement activities if the anti-competitive activities do not have a direct and substantial impact on consumers in its territory or they occur principally in and are directed principally towards the requested party's territory, the adverse effects are likely to be investigated and remedied by the other party and the requested party will devote adequate resources to the investigation in question. Müller concludes that since the conduct has a direct and substantial impact on consumers in the EU using the same multimedia software and server software as the Americans, the first condition is not met. As Microsoft applied the same strategy on the US and the European markets and

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Criminal Enforcement Program", presented at the New York State Bar Association Annual Meeting in New York, 23.1.2003.

[69] Case COMP/C-3/37.792 *Microsoft*, Commission Decision of 24.3.2004.

[70] *Cf.* Apon, J.: "Cases Against Microsoft: Similar Cases, Different Remedies", *E.C.L.R.*, vol. 28, issue 6, June 2007, p. 327-336, at p. 327-328.

[71] *United States v. Microsoft Corp.*, 97 F.Supp.2d 59 (D.D.C. 2000)

[72] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[73] *Cf.* Jennings, J.P.: "Comparing the US and EU Microsoft Antitrust Prosecutions: How Level Is the Level Playing Field?", *Erasmus Law and Economics Review* 2, no. 1, March 2006, p. 71-85, at p. 74.

the European market contributes a significant share to Microsoft's revenue, the conduct is not either occurring principally in or is not directed principally at the US territory.[74] As it is therefore clear that not all conditions will be met, it is not necessary to examine whether the rest of the conditions are met in order to establish that the Commission Decision did not breach Article IV of the EU/US Positive Comity Agreement.

Müller then goes on to examine whether the Commission Decision has violated the negative comity obligation in Article VI of the EU/US Competition Cooperation Agreement, *i.e.* the obligation to take into account important interests of the other party. The points raised by Müller include, for instance, the fact that the adverse effects on European consumers are more important than the fact that the competitors of Microsoft are US undertakings, thus justifying enforcement by the Commission. As the EU started its investigation before the case was settled in the USA, the USA could not either rely upon the EU to refrain from action. Moreover, the Commission Decision would not undermine US enforcement action, since the US regulation on the US market is not affected by the decision.[75] In short, it appears that the claim by the US senators was not justified.

In September 2007, the Court of First Instance [now the General Court] upheld most of the findings of the Commission Decision in the *Microsoft* case.[76] However, a high official of the US Justice Department, Thomas Barnett, criticized the Court's decision by stating concern over that the standard applied to unilateral conduct by the CFI might harm consumers by chilling innovation and discouraging competition instead of helping consumers. The Competition Commissioner at the time, Neelie Kroes, responded to the criticism by calling it "unacceptable that a representative of the US administration criticises an independent court of law outside its jurisdiction"[77] and added that the European Commission did not criticize rulings by US courts either and expected the same degree of respect from US authorities for rulings by EU courts.[78]

This press row between Kroes and Barrett can arguably be seen as a sign of more strained relations between the two jurisdictions, probably caused by differing underlying priorities in the field of antitrust enforcement. In fact, the reasons for the Commission imposing a large fine on Microsoft, whereas the US antitrust enforcers agreed to settle a partially similar case, has been explained by the different focus of antitrust policy (the US is seen as promoting competition whereas the EU is claimed to be protecting competitors) and the different issues involved in the two cases as well as political considerations. The Bush administration governing at the time when the US antitrust authorities settled the case with Microsoft had a more pro-business stance, while Mario Monti, who was Competition Commissioner in the EU

[74] *Cf.* Müller, M.: "The European Commission's Decision Against Microsoft: A Violation of the Antitrust Agreements Between the United States and the European Union?", *E.C.L.R.*, vol. 26, issue 6, June 2005, p. 309-315, at p. 309-311.
[75] *Ibid.*, at p. 313-314.
[76] Case T-201/04, *Microsoft Corp. v. Commission of the European Communities*, [2007] ECR p. II-3601.
[77] Spongenberg, H.: "US remarks on Microsoft ruling 'unacceptable', says Kroes", *EUobserver*, 20 September 2007, available at http://euobserver.com/9/24803.
[78] *Ibid.*

during most of the case, was famous for being a tough antitrust enforcer.[79] Taking into consideration the different political priorities between the EU and the USA in this issue, it is unlikely that a stronger cooperation between the antitrust agencies would have made it possible to avoid the divergent outcomes.

Nevertheless, the *Microsoft* saga did not end here. For instance, in 2009, the Commission opened another investigation of Microsoft's business practices by sending a statement of objections to Microsoft, this time focusing on the company's tying of its browser Internet Explorer to its operating system Window,[80] *i.e.* the same type of conduct that the US antitrust authorities had investigated, but settled, earlier. However, this time the Commission accepted commitments made by Microsoft to address the Commission's concerns regarding the tying and closed the investigation in December 2009.[81]

3.3. Conclusions

The cooperation between the EU and the US appears, in general, to have been fruitful up to date. The possibility to consult each other on an informal basis in the daily context of case investigation, together with the possibility to attend oral hearings and pitch meetings in the other jurisdiction, have resulted in more convergence of the decisions and have contributed to lessen the adverse effects on the markets of the other jurisdiction.

However, in cases concerning abuse of a dominant position, it has not been possible to avoid diverging decisions. In general, it is in the IT sector that the Commission and the US antitrust authorities have in recent years reached diverging conclusions. Apart from *Microsoft*, mergers in the IT sector have been subject to tougher scrutiny in the EU than in the USA.[82] The

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[79] *Cf.* Jennings, J.P.: "Comparing the US and EU Microsoft Antitrust Prosecutions: How Level Is the Level Playing Field?", *Erasmus Law and Economics Review* 2, no. 1, March 2006, p. 71-85, at p. 81-83.

[80] MEMO/09/15, "*Antitrust: Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows*", Brussels, 17th January 2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/15&format=HTML&aged=0&language=EN&guiLanguage=en. Other recent antitrust investigations by the Commission against Microsoft include one opened in the field of interoperability in relation to a complaint by the European Committee for Interoperable Systems (ECIS) and another one in the field of tying of separate software products, *cf.* MEMO/08/19, "*Antitrust: Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position*", Brussels, 14th January 2008, available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19&format=HTML&aged=0&language=EN&guiLanguage=en.

[81] IP/09/1941, "*Antitrust: Commission accepts Microsoft commitments to give users browser choice*", Brussels, 16th December 2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941&format=HTML&aged=0&language=EN.

[82] *Cf.*, for instance, the *Orcale/Sun* merger which was approved in the US, while the Commission initiated an in-depth investigation and at one point seemed willing to give its approval only if the company made commitments, although the deal was finally approved. *Cf.* IP/09/1271, "*Mergers: Commission opens in-depth investigation into proposed takeover of Sun Microsystems by Oracle*", Brussels, 3 September 2009, available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1271&format=HTML&aged=0&language=EN&guiLanguage=en, Waters, R. and Tait, N.: "Move to block Oracle-Sun deal", *Financial Times*, November 4 2009, available at http://www.ft.com/cms/s/0/78468da4-c8e3-11de-8f9d-00144feabdc0.html?nclick_check=1.

reasons for the different approaches are partly political in that the USA traditionally has been more business oriented. It should also be borne in mind that Microsoft is an American company, which could explain why the EU and US jurisdictions have reached different outcomes. What is more, the substantive rules applicable to abuse of a dominant position partly differ between the two jurisdictions, although the EU seems to be moving closer towards the US position.[83] Finally, it should be noted that the market conditions are not the same in the EU and the USA. Therefore, divergent outcomes could even be perfectly justified in certain cases.

As regards cartel cases, the cooperation appears to have increased and the coordination of investigations has been possible in several cases. This is significant especially because the obligation to protect the confidentiality of information provided by undertakings under investigation has traditionally impeded the cooperation, in particular, in cartel cases. The international cooperation in cartels remains, nevertheless, the area where there is still a need to enhance the cooperation. Consequently, the problems related to public and private enforcement of the antitrust rules will be analysed in the next chapter.

4. Some challenges to future cooperation

As concluded above, the cooperation between the EU and the US competition authorities has, on the whole, functioned well. Nevertheless, the cooperation in some areas could be further improved. Laws preventing the sharing of confidential information impede increased enforcement cooperation. The parties to the competition cooperation agreement might also be unwilling to undertake enforcement actions on behalf of the other party if those actions could harm their national interests.[84] Furthermore, the EU/US Competition Cooperation Agreement does not contain any provisions on private enforcement of antitrust rules[85] and how to conciliate the public enforcement interests of one country with the private enforcement interests of the other party. More importantly, a control mechanism is lacking for the application of the cooperation agreements and understandings, *i.e.* there are no legal sanctions available if the parties do not fulfil their obligations pursuant to those agreements.

The focus of this chapter will be on different kinds of problems related to both private and public antitrust enforcement and the consequences both for antitrust enforcement and for undertakings subject of enforcement actions by several competition authorities. Furthermore, a distinction will be made between the implications of enforcement actions for undertakings

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Lohr, S. and Kanter, J.: "Cultural Bent Hangs Over Oracle's Battle for Sun", *The New York Times*, November 11, 2009, available at http://www.nytimes.com/2009/11/11/technology/companies/11oracle.html?_r=1 and Case No COMP/M.5529 – *Oracle/ Sun Microsystems*, Commission Decision of 21.1.2010.

[83] *Cf.* DG COMP, Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf.

[84] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 121.

[85] *Cf.* Ham, A. D.: "International cooperation in the anti-trust field and in particular the agreement between the United States of America and the Commission of the European Communities", *C.M.L.R.*, 1993, 30, p. 571-591, at p. 571.

allegedly guilty of anti-competitive behaviour and the implications for the victims of such conduct.

4.1. Private antitrust damages actions

Contrary to the USA, where private enforcement of the antitrust rules amounts to over 90% of competition law enforcement,[86] the number of damages actions is still comparatively low in the EU.[87] Although it appears that these actions have increased somewhat during the last years, especially in comparison to the findings in the Ashurst Report[88] published in 2004, these actions still represent only a very small percentage of competition law enforcement. Public enforcement thus still remains the main source of competition law enforcement in the EU. However, the Commission is attempting to foster private enforcement in the EU. It published a Green Paper on Damages Actions for Breach of the EC Antitrust Rules[89] in December 2005 and a White Paper on Damages Actions for Breach of the EC Antitrust Rules in April 2008.[90] The Green Paper examines the conditions for bringing damages actions for breach of the EU antitrust rules and identifies obstacles to the current framework. It also presents different options for solving the problems related to the current system with a view to facilitating private enforcement of the EU antitrust rules. The White Paper, in turn, presents concrete measures to be taken in the field of private enforcement. These measures include the introduction of two types of collective redress mechanisms and a minimum level of disclosure *inter partes* and establishment of a binding effect of decisions by national competition authorities finding an infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union. Moreover, the White Paper suggests, *inter alia*, how to treat the passing-on of over-charges to the next level in the distribution chain and how to reduce the costs of damages actions, and proposes measures that aim to ensure that private enforcement will not have negative effects on public enforcement of the EU antitrust rules.

4.1.1. Problems related to civil responsibility of undertakings

The extraterritorial application of antitrust rules has some consequences also for the civil responsibility of undertakings. When a competition authority has taken a decision establishing that an undertaking has breached the antitrust rules, victims of the anti-competitive agreement or concerted practice or abusive conduct might decide to bring a damages action before the

[86] *Cf.* Waller, S.W.: "Towards a Constructive Public-Private Partnership to Enforce Competition Law", *World Competition*, 29(3), 2006, p. 367-381, at p. 369.
[87] *Cf.* "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", Report for the European Commission, Contract DG COMP/2006/A3/012, Final Report prepared by the Centre for European Policy Studies, Erasmus University Rotterdam and LUISS Guido Carli, Brussels, Rome and Rotterdam, December 21st, 2007, hereinafter "External Impact Study", at p. 28.
[88] Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules. Comparative report prepared by Denis Waelbroeck, Donland Slater and Gil Even-Shoshan, 31 August 2004.
[89] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2005) 672 final, Brussels, 19.12.2005.
[90] *Cf.* Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

court in order to seek compensation for the loss that they have suffered as a result of the anti-competitive activities. Undertakings that have complied with the laws of their country might not have been aware of the fact that, at the same time, they have breached the competition laws of another country. In the situation under scrutiny, *i.e.* when the undertakings concerned are subject of investigations by the EU and/or the US competition authorities, that will, however, rarely be a problem since paragraphs 1 and 2 of the Sherman Act correspond to a large extent to Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter "TFEU").[91] At least when it comes to cartels, such a risk is non-existent. As to abuse of dominance, there are still some differences, but even in this area the EU is likely to move closer to the US approach, as the Discussion Paper on Article 82 EC [now Article 102 TFEU] is proposing, *inter alia*, that an efficiency defence should also be accepted in cases involving an alleged abuse of a dominant position, if the conduct is indispensable to produce efficiencies that benefit the consumers and it does not eliminate competition in a substantial part of the products concerned.[92]

In the European Union, the ECJ has held that any individual may claim damages for loss caused to him by an agreement or conduct liable to restrict or distort competition[93] as long as "there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC [now Article 101 TFEU]".[94] Consequently, where the person claiming damages can establish the causal relationship between the harm and the restrictive practice or conduct, he would be entitled to bring an antitrust damages action. It does not matter whether the claimant is a party to an anti-competitive agreement, a direct or an indirect purchaser, a competitor or a consumer.[95]

Under the Clayton Act, the right to bring a damages claim in the USA is also extensive: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee […]".[96] However, the possibility of indirect purchasers bringing a claim is limited at federal level. In *Illinois Brick Co. v. Illinois*, the US Supreme Court held that an indirect purchaser (in the case at issue the State of Illinois) was not entitled to invoke that it had suffered injury to its business or property on the ground that the general contractors which it had hired had passed the over-charge to the subcontractor that it had hired in turn and which had passed on the over-charge to the indirect purchasers. Nevertheless, many States and the District of Columbia allow in their statutes also indirect

[91] *Cf.* Ginsburg, D. G.: "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics* 1(3), 2005, p. 427-439, at p. 428.
[92] *Cf.* DG COMP, Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, at p. 26.
[93] Case C-453/99, *Courage v. Crehan*, [2001] ECR p. I-6297, at § 26.
[94] Joined Cases C-295/04-C-298/04, M*anfredi*, [2006] ECR p. I-6619, at § 61.
[95] In *Courage v. Crehan*, the ECJ expressly stated that even a party to a contract that is restricting or distorting competition could bring an antitrust damages action. *Cf.* Case C-453/99, *Courage v. Crehan*, [2001] ECR p. I-6297, at § 23-24.
[96] 15 U.S.C. § 15.

purchasers to bring damages claims[97] and the Antitrust Modernization Commission has recommended that *Illinois Brick* and *Hanover Shoe* should be overruled to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages.[98]

The consequence of limiting the right of indirect purchasers to bring an antitrust damages action is that in certain cases, where there is no incentive for direct purchasers to bring an action, there is a risk of under-enforcement of competition law. This would be the case where direct purchasers have passed the over-charge that they have paid to the next level in the chain of distribution. The direct purchasers would not have any incentive to bring an action for damages because they would not have suffered any actual harm. The indirect purchasers might also prefer to stay on good terms with their suppliers and thus prefer to refrain from damages claims in order to ensure that their suppliers will also deliver them the products in question in the future.[99] On the contrary, consumers that have been harmed by the anti-competitive agreement or conduct would be barred from seeking compensation even though it would be in their interest to do so. The only possibility for consumers to seek compensation would be limited to cases where they have bought the products subject of an over-charge directly from an undertaking, which has infringed the antitrust rules.

The limits resulting from the national laws on confidentiality also affect the possibility to establish the civil responsibility of undertakings that have participated in the anti-competitive agreement or conduct. Under the EU/US Competition Cooperation Agreement, the competition authorities do not have an obligation to provide information to each other if the laws of the party possessing the information prohibit such disclosure or it is contrary to important interests of that party.[100] The competition authorities must also maintain, to the fullest extent possible, the confidentiality of any information that the other party has provided to them under the agreement.[101] The information provided could therefore, in principle, not be transmitted to third parties in order to be used to bring antitrust damages actions, what in turn renders private enforcement more difficult.

However, the risk of violating undertakings' right to confidentiality might be increased by the existence of rules on discovery. Under US law, the parties to court proceedings have a right to extensive discovery. This includes an obligation to make certain initial disclosures to the other party before a formal discovery request or court order, [102] written interrogatories,[103] requests for documents[104] and oral testimony through depositions.[105] Courts usually tend to require

[97] *Cf.* Ginsburg, D. G.: "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics* 1(3), 2005, p. 427-439, at p. 431.
[98] Antitrust Modernization Commission: "Report and Recommendations", at p. 18, available at http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf.
[99] *Cf.* Waller, S.W.: "Towards a Constructive Public-Private Partnership to Enforce Competition Law", *World Competition*, 29(3), 2006, p. 367-381, at p. 380.
[100] Article VIII (1) of the EU/US Competition Cooperation Agreement.
[101] Article VIII (2) of the EU/US Competition Cooperation Agreement.
[102] Federal Rules of Civil Procedure 26(a)(1)
[103] Federal Rules of Civil Procedure 33.
[104] Federal Rules of Civil Procedure 34.
[105] Federal Rules of Civil Procedure 30.

disclosure of potentially relevant information unless the party that resists discovery demonstrates that it would face an undue burden if it were to comply with the discovery request.[106] The parties could also obtain access to all the documents provided by the undertakings that have infringed the antitrust rules to competition authorities. If another authority had provided information to the competition authority in question, there would be a risk that private parties could also obtain access to this information, which could be of confidential nature. Consequently, the undertakings' right to protection of confidential information and business secrets should be guaranteed.

In the EU, rules concerning access to evidence are governed by national law and vary from Member State to Member State. In general, most Member States lack discovery mechanisms similar to those in the USA, whereas the UK and Ireland provide for such mechanisms.[107] Following the modernisation of the EU competition rules, the courts of the Member States can when they are hearing an action for damages for antitrust violations ask the Commission to transmit to them information in its possession.[108] If the Commission sends documents to national courts, it is of crucial importance that they can guarantee the confidentiality of the information provided. This is especially important with regard to leniency applications. This is why the Commission will only transmit to national courts information voluntarily submitted by a leniency applicant with the consent of that applicant.[109]

Nevertheless, if the proposal in the White Paper on introducing an obligation of disclosure *inter partes* were implemented one day, national courts might be able to obligate parties or even third parties to disclose key evidence in their possession to victims of antitrust violations if such disclosure would be the only manner for the latter to prove their damages claim.[110] Therefore, the White Paper also emphasises the need to protect corporate statements submitted by leniency applicants against disclosure in antitrust damages actions in order not to endanger public enforcement of the antitrust rules.[111]

A further problem is potential abusive claims. Judge Ginsburg has pointed out that there are certain features in the US system that makes it appealing to plaintiffs to sue for antitrust damages even though they have not actually been harmed by an anti-competitive agreement or conduct. These features include liberal discovery rules, contingency fees, the award of costs and lawyers' fees to successful plaintiffs, class actions and treble damages. He has, in

[106] *Cf.* Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damages Actions for Breaches of EU Antitrust Rules, April 2006, at p. 11.
[107] *Cf.* International Bar Association Antitrust Committee Working Group on Private Antitrust Litigation in Europe, Submission Regarding the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules, at p. 2.
[108] Article 15(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* L 1, 4.1.2003, p. 1-25.
[109] *Cf.* Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101/54, 27.4.2004, p. 54–64, at p. 58.
[110] Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 31.
[111] *Cf.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 84.

particular, stressed the relationship between classifying a conduct as "*per se*" unlawful and the increase in numbers of damages actions. As the plaintiff will not in those cases have to prove an anti-competitive effect of the conduct, the threshold for bringing also unfounded actions decreases. Because of the existence of treble damages, many undertakings that are facing an antitrust suit might tend to settle the case regardless of whether or not the conduct was in fact anti-competitive in an attempt to avoid high costs.[112] Consequently, these aspects need also to be taken into account when the EU will adopt rules concerning private enforcement of the antitrust rules, although recent reforms in the USA have limited the risk of abuses.[113]

The consequence for the EU/US Competition Cooperation Agreement of the potential problems outlined above is that the competition authorities must ensure that the confidentiality of the information that the other party has provided to them remains protected to the extent possible and is not disclosed to third parties. The extensive rules on discovery existing in the USA may be a reason for the Commission to abstain from transferring information to the US authorities in order to ensure that the information that it has obtained from the undertakings under investigation will remain confidential. With regard to leniency applications, the Commission may accept oral corporate statements unless the applicant has already disclosed the content of the corporate statement to third parties.[114] This possibility has expressly been foreseen in order to avoid the obligation to transmit corporate statements to US authorities or US courts.

The Commission, in turn, will under Regulation 1/2003[115] be requested to transmit information in its possession to national courts deciding on cases involving the application of Article 101 or 102 TFEU. If the US competition authorities believe that this entails a risk of disclosure of confidential information transferred by it to the Commission during their cooperation, it might also be dissuaded from close cooperation with the Commission.

The EU/US Competition Cooperation Agreement does not contain any specific rules on private enforcement. Indirectly, the provisions concerning confidentiality of information and the obligation to abstain from enforcement activities that could harm the other party's interests could also be applicable in these cases. The competition authorities should thus ensure that private enforcement is not made impossible due to their enforcement activities but, at the same time, they are obliged to guarantee the confidentiality of the information provided to them during the cooperation. These objectives might not always be possible to conciliate and some kind of best practices should be elaborated and included in the cooperation agreement.

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[112] *Cf.* Ginsburg, D. G.: "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics* 1(3), 2005, p. 427-439, at p. 435-437.

[113] For instance, the Class Action Fairness Act of 2005, has made it considerably more difficult to bring class actions in State courts in which abuses have traditionally occurred, *cf.* Schnell, G., "Class Action Madness in Europe – a Call for a More Balanced Debate", *E.C.L.R.*, vol. 28, issue 11, 2007, p. 617-619, at p. 618.

[114] *Cf.* Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17–22,at § 32.

[115] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25, (hereinafter "Regulation 1/2003").

4.1.2. Problems related to access to evidence for potential litigants

The main problem for victims of anti-competitive agreements or conduct would appear to be access to evidence and proving the violation of the antitrust rules and the harm that they have suffered as a result of the violation. This is the case for all potential litigants that are not parties to the anti-competitive agreement as the undertakings that have participated in the violation are usually the ones in the possession of evidence which is necessary in order to prove the violation in question. The burden of proof in antitrust damages actions is fairly high as the claimants must prove the causal relationship between the anti-competitive agreement or conduct and the harm caused by that agreement or conduct to them.[116] Especially in cases where the claimant is a consumer or an indirect purchaser, this is challenging since he would be required to prove what part of the over-charge that has been paid has been passed on to the respective levels in the chain of distribution and what is finally the extent of the over-charge that he himself has to bear.

This is also the reason why indirect purchasers have been barred from bringing antitrust damages actions at federal level in the USA because they are not perceived as efficient antitrust enforcers.[117] However, as consumers are often harmed the most by an anti-competitive agreement or conduct because they are not being able to pass on to anybody the over-charge that they have paid, their possibility of seeking compensation for the harm that they have suffered should be enhanced. As the situation is now, they are in general forced to resort to follow-on actions instead of bringing a stand-alone action on their own initiative. A follow-on action is an action brought by a claimant after a competition authority has taken a decision where it has found a violation of the antitrust rules. As there is already a decision establishing the violation, the claimant only has to prove that he has been harmed by that violation and his task to prove his case is thus somewhat facilitated. Nevertheless, the plaintiff must still prove the extent of his damages and the temporal scope of the violation.[118]

In the USA, potential plaintiffs can use discovery requests in order to obtain from the defendant undertakings access to documents that the latter have provided to the competition authorities.[119] Discovery rules provide access to relevant information, which in turn makes it possible for the parties *e.g.* to uncover crucial facts and test and verify assertions made by the other party. This makes it easier for them to prove the existence of the antitrust violation and may facilitate the task of establishing at least the temporal scope of the violation. The majority of antitrust damages actions are settled before trial thanks to the discovery process,

[116] *Cf. e.g.* Joined Cases C-295/04-C-298/04, M*anfredi,* [2006] ECR p. I-6619, at § 60-61.
[117] *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).
[118] *Cf.* Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damages Actions for Breaches of EU Antitrust Rules, April 2006, at p. 17.
[119] *Cf.* Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damages Actions for Breaches of EU Antitrust Rules, April 2006, at p. 15.

which enables the parties to assess their possibility of succeeding in their claim based on all the evidence available to each side.[120]

Nevertheless, plea negotiations, where the defendant admits its involvement in an antitrust violation, are usually conducted orally. Also interviews of undertakings' staff are in general conducted without recording the interview. This kind of evidence is, consequently, not available to private plaintiffs. Similarly, internal documents of the competition authorities are not either available to them.[121]

In the EU, the private plaintiffs' task to prove the infringement is, in general, even more difficult, as most jurisdictions do not have rules on discovery. Under the new Regulation 1/2003, the Commission may send documents and other information in its possession to national courts that are applying Articles 101 and 102 TFEU.[122] The competition authorities of the Member States may also submit their written observations to the national courts on issues relating to the application of Articles 101 and 102 TFEU. They may even submit oral observations in the court proceedings provided that the court in question agrees to this. The Commission may also act as *amicus curiae* in the national court proceedings when the coherent application of Articles 101 and 102 TFEU so requires.[123] These measures will contribute to easing the potential litigants' burden of proof in antitrust damages actions, but as they are not directly available to plaintiffs but only to the national courts (if the courts wish to make use of this possibility), it depends in the end on the court whether or not the claimants' situation is improved.

However, if the Commission's proposal on a minimum level of *inter partes* disclosure in antitrust damages cases were approved, private plaintiffs' burden of proof would also be eased in the EU. But even in these cases the claimant must first assert sufficient facts to establish a plausible claim that he has suffered some harm as a result of an antitrust violation. He must demonstrate that he cannot assert the specific facts or produce the means of evidence for which he is requesting disclosure and must specify sufficiently precise categories of information or means of evidence, which should be disclosed. Finally, the disclosure measure must be relevant to the case, necessary and proportional in scope.[124]

To sum up, currently, potential private plaintiffs may easier obtain access to evidence under the extensive discovery rules in the USA. In the context of antitrust claims made in the USA, private plaintiffs could by making discovery requests also obtain access to documents and other information transferred by the Commission to the US competition authorities. This could also encourage European plaintiffs to seek damages in US courts when they have been harmed by a global anti-competitive agreement or conduct while purchasing products. But in

[120] *Cf.* Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damages Actions for Breaches of EU Antitrust Rules, April 2006, at p. 11-12.
[121] *Ibid.*, at p. 16-17.
[122] Article 15(1) of Regulation 1/2003.
[123] Article 15(3) of Regulation 1/2003.
[124] Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 31.

this context it should be noted that the Commission's approach to accept oral corporate statements by leniency applicants limits the information available to potential plaintiffs.

4.1.3. Implications of the Commission's White Paper and the new US approach to private enforcement

The Commission's White Paper on Damages actions for breach of the EC antitrust rules outlines various options for facilitating private enforcement of the EU antitrust rules. It covers, in particular, issues such as access to evidence, fault requirement, damages, the passing-on defence and standing for indirect purchasers, collective and representative actions, costs of actions and coordination of public and private enforcement. An introduction of collective actions (*i.e.* representative actions, which would be brought by qualified entities on behalf of some or all of their members, and opt-in actions, in which victims would expressly decide to combine their individual claims into one single action)[125] would make it easier for victims to bring antitrust damages claims since they could join their forces and take advantages of economies of scale, thus making it less costly to bring a claim. Similarly, follow-on actions would be facilitated by also giving binding effect to decisions by national competition authorities since courts would only have to decide on whether the established antitrust violation has indeed also caused harm to the claimant and the extent of that harm.

The introduction of a minimum level of disclosure *inter partes* would give national courts the competence in certain circumstances to order parties to proceedings or third parties to disclose precise categories of relevant evidence. However, the access to this kind of evidence would be subject to strict judicial control in order to avoid excessive and burdensome disclosure obligations. Since it would become easier to obtain access to evidence in the EU, plaintiffs might start to bring less damages claims in the US. Today, potential private plaintiffs sometimes try to bring a claim in the US when the procedural obstacles to bringing the claim in an EU Member State makes it very difficult or practically impossible to bring the claim in the EU. However, following the *Empagran* ruling, in order to bring a claim in a US court, a foreign plaintiff would have to demonstrate that the harm that he has suffered would not be independent of any adverse domestic effect.[126] If the plaintiff has purchased the goods outside the United States, he could only sue the cartel members in the US if the harm caused to him is dependent on the harm caused by the price-fixing agreement in the US.[127]

The White Paper aims also to ensure that private enforcement will not have negative effects on public enforcement of the EU antitrust rules. To this aim, corporate statements submitted by leniency applicants shall be protected against disclosure in antitrust damages actions so that companies that have participated in cartels will keep informing the Commission of the existence of those cartels. It is doubtful that this alone will be sufficient to ensure that private

[125] Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-21.
[126] *Empagran v. F. Hoffman-La Roche*, 417 F.3d 1267 (D.C. Cir. 2005).
[127] Ryngaert, C.: "Foreign-to-Foreign Claims: the US Supreme Court's Decision (2004) v the English High Court's Decision (2003) in the Vitamins Case", *E.C.L.R.*, vol. 25, issue 10, 2004, p. 611-616, at p. 613.

damages claims will not influence in a negative way on the number of leniency applications made since leniency applicants will still be liable for civil damages, even though they will obtain immunity from or a reduction of the fine. The Commission is therefore suggesting that limited responsibility of immunity recipients should be contemplated by only allowing their direct or indirect contractual partners to claim damages from them, whereas the direct or indirect contractual partners of the other cartel members could only claim damages from the other cartel members but not from the immunity recipient.[128] The problem with this proposal is that there might be a risk that victims could not obtain full compensation of the harm that they have suffered if they cannot claim damages from any cartel member of their choice.

However, at this point it is not possible to foresee what the effects of enhanced private enforcement would be. In any case, it may be expected that the measures adopted in due time will result in increased private enforcement in the EU, although it is for the time-being not possible to predict how significant that increase will be.

Interestingly, the tendency in the USA appears to be the opposite and there is, in fact, an attempt to restrict private enforcement.[129] For instance, the courts have limited who can bring an antitrust damages action by aggressively applying concepts of standing and antitrust injury and the competition authorities have participated in private enforcement litigation trying to restrict the scope of antitrust laws and/or the availability of private litigation. The Federal Rules of Civil Procedure were also amended in January 2004 increasing the courts control over certification of class actions. As a result, the courts must approve all settlements, dismissals or compromises as fair, reasonable and adequate.[130] It should, however, be noted that, in its review of the US antitrust laws, the Antitrust Modernization Commission did not, for instance, find any reason to change the possibility of obtaining treble damages and prejudgment interests or to further limit private antitrust enforcement.[131]

Even though private enforcement might decrease to a certain degree in the USA, it is still expected to account for the majority of the enforcement activities even in the future. With the expected growth in private enforcement in the EU, private enforcement will continue to play a significant role in competition enforcement and the implications of it for the EU/US Competition Cooperation Agreement should be taken into consideration.

4.2. Public antitrust enforcement

This section will deal with the public enforcement of antitrust rules focusing on the potential problems caused by parallel enforcement first within the EU and then parallel actions in the EU and the USA. As to parallel enforcement in the EU, the effects of the modernisation of the

[128] Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 88-89.
[129] *Cf.* Waller, S.W.: "Towards a Constructive Public-Private Partnership to Enforce Competition Law", *World Competition*, 29(3), 2006, p. 367-381, at p. 368.
[130] *Ibid.*, at p. 372-373.
[131] Antitrust Modernization Commission: "Report and Recommendations", available at http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf.

EU competition rules will be analysed in particular. Moreover, the relationship between public and private enforcement and possible problems related to the parallel public and private enforcement of the antitrust rules will be considered.

4.2.1. Problems related to parallel enforcement by several antitrust authorities within the EU

Following the modernisation of the EU competition rules and the creation of the European Competition Network (hereinafter "ECN") there are specific rules within in the EU to regulate parallel public enforcement in the EU and to enhance efficient cooperation between the competition authorities in the ECN when they apply Articles 101 and 102 TFEU.[132] The ECN provides for a system for the division of work between the competition authorities aiming at allocating the cases to the best placed competition authority or authorities. It is hence possible that several competition authorities investigate a case in parallel if that is believed to be the most efficient form to bring the infringement to an end. A competition authority is considered to be well placed to deal with a case when the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented in or originates from its territory, the authority is able to effectively bring an end to the entire infringement and it can gather the evidence required to prove the infringement.[133]

Under Article 11 of Regulation 1/2003, national competition authorities shall inform the Commission before they start the first formal investigating measure in a case involving the application of Article 101 or 102 TFEU.[134] After this notification, a so-called re-allocation period starts during which the case in question may be re-allocated to another competition authority (or several authorities) if it is considered to be the best placed authority to deal with the case.[135] The competition authorities must also inform the Commission at least 30 days before they adopt a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation.[136] This enables the Commission to ensure that Articles 101 and 102 TFEU are applied in a consistent and uniform manner throughout the whole EU. Moreover, if the Commission initiates proceedings to adopt a decision finding an infringement, to adopt interim measures or to accept commitments, national competition authorities are barred from applying Articles 101 and 102 TFEU to the case.[137] A competition authority may also terminate or suspend its proceedings if another ECN competition authority is already dealing with the case.[138] As a result, parallel investigations by several national competition authorities and/or the Commission are

[132] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53.
[133] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53, at § 8.
[134] Article 11(3) of Regulation 1/2003.
[135] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53, at § 18.
[136] Article 11(4) of Regulation 1/2003.
[137] Article 11(6) of Regulation 1/2003.
[138] Article 13 of Regulation 1/2003.

governed by specific rules in order to avoid conflicts and to ensure an efficient and uniform application of Articles 101 and 102 TFEU.

The system also provides for a possibility for the ECN competition authorities to request another authority to conduct an inspection on their behalf. The requested competition authority may decide whether it will conduct the investigation, but if it consents, it is obligated to exchange the information, which it collects during the investigation.[139] The legality of the manner in which the information is gathered is governed by national law,[140] but even if a national law has been violated, the exchange of relevant information within in the ECN is not excluded. An undertaking can thus only prevent the authority that has gathered the information from using it, but may not prevent that authority from transferring the information within the ECN. The system provided for in the framework of the ECN would not work otherwise if the ECN members could evaluate the legal system of another member. Instead, the ECN is built on mutual recognition of the standards of the legal system of each ECN member.[141]

Under Article 12 of Regulation 1/2003, the ECN members may exchange information for the purpose of applying Articles 101 and 102 TFEU. This includes also confidential information.[142] There are, however, limits to this exchange of information. The information exchanged may only be used in evidence for the purpose of applying Article 101 or 102 TFEU in respect of the subject-matter for which it was collected by the transmitting authority. The only exception to this is the situation where national competition law is applied in parallel to EU competition law and does not lead to a different outcome.[143] A further restriction to the use of the exchanged information is that it may only be used in evidence to impose sanctions on natural persons if the sanctions foreseen by the law of the transmitting authority are of similar kind as those provided for infringements of Articles 101 and 102 TFEU or the information has been collected in a way that respects the same level of protection of the rights of defence of natural persons as provided for under the law of the authority receiving the information. In the latter case, the information cannot be used to impose custodial sanctions.[144]

The limits to the exchange of information formally only concern natural persons. Nevertheless, also undertakings may invoke the protection of rights of defence as general principles of EU law.[145] As some Member States (such as the UK, Ireland and Estonia), to the difference from the majority of the Member States, provide for criminal sanctions, the

[139] *Cf.* Reichelt, D.: "To what extent does the co-operation within the European Competition Network protect the rights of the undertakings*?"*, *C.M.L.R.*, volume 42, number 3, June 2005, p. 745-782, at p. 765-766.
[140] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53, at § 27.
[141] *Cf.* Reichelt, D.: "To what extent does the co-operation within the European Competition Network protect the rights of the undertakings*?"*, *C.M.L.R.*, volume 42, number 3, June 2005, p. 745-782, at p. 751-752.
[142] Article 12(1) of Regulation 1/2003.
[143] Article 12(2) of Regulation 1/2003.
[144] Article 12(3) of Regulation 1/2003.
[145] *Cf.* Perrin, B.: "Challenges facing the EU Network of Competition Authorities: insights from a comparative criminal law perspective", *E.L.Rev, v*ol. 31, 2006, p. 540-564, at p. 547.

exchange of information for the use in criminal proceedings is limited to exchanges only between those countries concerned.

In addition, the exchange of information under Article 12 is limited in cases where the competition authority has received the information under a leniency program. Leniency programs, where the undertaking that has participated in a cartel reveals the existence of the cartel to the competition authorities and cooperates closely with them in order to establish the violation and, in return, will not be subject to sanctions, are today effective tools for bringing antitrust violations to an end. Since there is no harmonized EU-wide leniency program, the leniency applicant must make separate applications to each competition authority in the territories affected by the antitrust violations that is well placed to take actions to enforce Article 101 or 102 TFEU.[146] However, information that a leniency applicant has submitted to a competition authority will only be transmitted to another ECN member with the consent of the applicant.[147] That kind of information may only be submitted without the consent of the applicant, if the receiving authority has also received a leniency application from the same applicant or the receiving authority has provided a written commitment that it will not use the information to impose sanctions on the leniency applicant, any other natural or legal person covered by the leniency program or any employee or former employee of any of those persons mentioned before.[148] As the competition authority will obtain evidence under a leniency program, which it would otherwise not have access to, it must in turn ensure the undertaking applying for leniency that the evidence will not be used against the latter by other competition authorities; otherwise the undertaking would not be interested in applying for leniency.

The ECN has implications also for the EU/US Competition Cooperation Agreement. The possibility to exchange information within the ECN might enable ECN members to also exchange information provided by the US competition authorities to the Commission, for instance, if the Commission requests a national competition authority to conduct inspections on its behalf and for that purpose the Commission needs also to transmit to the authority in question some confidential information transmitted to it by the US authorities. Because of this, the US antitrust enforcers might hesitate to transmit confidential information to the Commission, if the disclosure of the information to another competition authority in the ECN could have negative consequences for the public enforcement of antitrust rules in the USA.

4.2.2. Parallel actions in the EU and the USA

The EU and US cooperation in the public enforcement of antitrust rules has long been fairly restricted as a result of problems related to confidentiality of information provided to the authorities by the undertakings under investigation. As long as the parties to the cooperation

[146] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53, at § 38.
[147] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53, at § 40.
[148] Commission Notice on cooperation within the Network of Competition Authorities, *OJ* C 101, 27.4.2004, p. 43-53, at § 41.

agreement believe that the disclosure of information to the other party would be contrary to its important interests, it is not required to provide information to the other authority[149] and has no incentive to cooperate. Furthermore, the EU/US Positive Comity Agreement limits the use of information to the purpose for which the information has been provided. This means that if the information has been provided for the establishment of an antitrust violation that is subject of administrative proceedings, it may not be used in criminal proceedings. Only if the competition authority, to which the confidential information has been provided consents to it and has acquired the consent of the source of the confidential information, may the information be used for another purpose.[150] In the USA, the inability to share information renders criminal prosecutions for violations of antitrust law more difficult, since the burden of proof is stricter in criminal proceedings than in administrative proceedings.[151] From the undertakings' point of view, the risk of criminal charges is a further deterrent for them to consent to the transfer of information to another jurisdiction.

As the sanctions available in the EU and the USA still differ with regard to criminal sanctions, which are only available in a few EU Member States, it has not always been possible for the competition authorities to cooperate. Their obligation to keep information that the other party has provided to them confidential, to the extent that it is possible, has in practice also limited their cooperation possibilities. The extensive rules on discovery available in the USA might in certain situations also give private plaintiffs access to information, which the provider of the information expected to be kept confidential. Therefore, the competition authorities might prefer not to take the risk that the confidential information that they have transmitted to the party to the cooperation agreement for the purpose of public enforcement is later being used in civil proceedings in order to obtain damages for the antitrust violation. Due to these problems related to confidentiality, the enforcement of anti-competitive activities has traditionally not been parallel, but one investigation has followed the other.

Simultaneous applications for immunity made to the EU and the US competition authorities have lately made it possible for these authorities to cooperate more closely and to even carry out coordinated inspections.[152] When undertakings apply for immunity or leniency in both jurisdictions at the same time, they have no interest in impeding one of the competition authorities to share the information with the other authority in order to use it for the enforcement of the antitrust rules, thus making the cooperation between the authorities possible. What is more, the leniency programs of the EU and the USA are very similar, which makes it easy for the undertakings to make simultaneous applications for immunity. Consequently, the EU and US competition authorities should encourage the leniency applicant also to apply for leniency in the other jurisdiction when it might also be liable to sanctions there.

[149] Article VIII (1) of the EU/US Competition Cooperation Agreement.
[150] Article V of the EU/US Positive Comity Agreement.
[151] *Cf.* Taylor, M.D.: "*International Competition Law, A New Dimension for the WTO?*", New York, 2006, at p. 113.
[152] *Cf.* Section 3.2.2 on enforcement of antitrust rules.

Often, it might also be in the interest of the party to the cooperation agreement not to investigate certain anti-competitive agreement or conduct but instead, under the EU/US Positive Comity Agreement, request the other party to investigate the anti-competitive activity, if that anti-competitive agreement or conduct is mainly affecting the interests of the other party, although it may also have effects on the territory of the first party. If the other party is willing to undertake enforcement activities, the problems related to access to evidence and transfer of confidential information could be avoided as the first party is better placed to gather information and could sanction the violation itself, thus not having to transmit any information to the other competition authority. As long as the investigating competition authority would be willing and able to address the competition concerns of the requesting party, this would make it possible to terminate the anti-competitive activities and also to avoid possible divergent outcomes of parallel investigations. The parties to the Competition Cooperation Agreement should therefore examine whether their enforcement activities are really necessary or whether it would be better to rely on the other party to undertake enforcement actions.

4.2.3. Interlinks between public and private enforcement

Private plaintiffs often rely on a decision by the competition authorities when they seek damages for an antitrust violation, since it might otherwise be virtually impossible for them to prove the violation. Public enforcement thus has direct implications for private enforcement of the antitrust rules. On the other hand, private enforcement also influences on public enforcement because the risk for undertakings of also being liable for civil damages may deter them from cooperating under a leniency program with the public enforcers in establishing the antitrust violation.

The existence of leniency programs has become crucial to the efficient enforcement of antitrust rules. This explains why the US government is not in favour of treble damages awarded to private plaintiffs who are victims of a cartel[153] as they are a big incentive for the plaintiffs to also sue the undertaking that has cooperated in the cartel investigation and hence rendering it less likely that undertakings will apply for immunity and reveal the existence of cartels. As the participation of leniency applicants in the antitrust violation is described in more detail in the decision of the competition authority than the participation of the non-cooperating cartel members, the former are in a worse position in civil damages claims than other cartel members, although they have contributed to the public enforcement of the violation in question.[154] It may thus deter undertakings from seeking leniency in the first place and, therefore, render public enforcement of the antitrust rules more difficult.

Currently, following an amendment of the law, undertakings that have cooperated with the US antitrust authorities are only subject to single instead of treble damages in any subsequent

[153] *Cf.* Waller, S.W.: "Towards a Constructive Public-Private Partnership to Enforce Competition Law", *World Competition*, 29(3), 2006, p. 367-381, at p. 376-377.
[154] *Cf.* Sandhu, J.S.: "The European Commission's Leniency Policy: A Success?", *E.C.L.R.*, vol. 28, issue 3, March 2007, p. 148-157, at p. 155.

civil liability proceedings.[155] They would hence still have an incentive to cooperate as the damages that they would be liable for in the event that their involvement in the violation could be established even without their cooperation would be three times bigger than if they agreed to cooperate.

Also the Commission faces the problem of conciliating efficient public enforcement, using effective leniency programs, with private enforcement. In particular, the American rules on discovery, which make it possible for the civil litigants to obtain access to corporate statements made by a leniency applicant to the Commission, has prompted the Commission to also consider these aspects in its reviewed leniency policy. Accordingly, corporate statements, where the leniency applicant voluntarily presents to the Commission its knowledge of the cartel and its role therein, may be made orally.[156] Access to these statements will only be granted to the addressees of a statement of objections, provided that they commit not to make any copy of any information in the statement and ensure that the information will only be used for the purposes of judicial or administrative proceedings for the application of the EU antitrust rules at issue in the administrative proceedings.[157] In this manner, US private litigants cannot seek discovery of corporate statements, which leniency applicants have provided to the Commission.[158]

A further challenge in the EU is that the majority of the national courts cannot impose punitive damages as the law stands. As a consequence, it is not easily possible to reduce the civil damages that undertakings which have cooperated in the enforcement of cartels will be liable for, since victims have a right to the full compensation of the damage that they have suffered.[159] Therefore, it is difficult to give an incentive to undertakings to apply for leniency if, by doing so, they would face the risk of civil damages even if they obtained immunity from the fines.

One could also argue that when an anti-competitive conduct has been the subject of public enforcement, the victims of that violation should also be able to seek compensation for the harm that they have suffered without public enforcement rendering this more difficult. In addition, private enforcement complements public enforcement in cases where the public enforcer is unwilling to act.[160] There should hence be sufficient incentives available to private plaintiffs that are significantly harmed by an anti-competitive practice, although that practice

[155] *Cf.* Waller, S.W.: "Towards a Constructive Public-Private Partnership to Enforce Competition Law", *World Competition*, 29(3), 2006, p. 367-381, at p. 376-377.
[156] Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ* C 298, 8.12.2006, p. 17-22, at § 31-32.
[157] Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ* C 298, 8.12.2006, p. 17-22, at § 33-34.
[158] *Cf.* Sandhu, J.S.: "The European Commission's Leniency Policy: A Success?", *E.C.L.R.*, vol. 28, issue 3, March 2007, p. 148-157, at p. 155.
[159] On the right to full compensation, c*f.* Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 56.
[160] *Cf.* Waller, S.W.: "Towards a Constructive Public-Private Partnership to Enforce Competition Law", *World Competition*, 29(3), 2006, p. 367-381, at p. 370 and Joined Cases C-295/04-C-298/04 *Manfredi v. Lloyd Adriático Assicurazion SpA ("Manfredi")*, [2006] ECR I-6619, at § 95.

might not be that significant from the perspective of the society as a whole. Balancing public and private interests are thus the main challenge for competition enforcers. In the context of the EU/US Competition Cooperation Agreement it might also be necessary to work out some kind of best practices for situations where the public interests of one party might conflict with the private enforcement interests of the other party.

5. Concluding remarks

The EU/US Competition Cooperation Agreement does not bind the US courts. As the courts play an important role in both public and private enforcement in the US, there might be a risk that the agreement is not sufficiently effective.[161] On the whole, the agreements and understandings can be said to be only morally and politically binding. Therefore, the fulfillment of the different obligations under the agreement depends on the will of the parties.

However, the main principles provided for in the agreements, such as the negative comity obligation, appear in general to work well and have contributed to the low number of divergent outcomes both in mergers and antitrust cases. But the cooperation has it limits in situations, where the substantive rules are not completely the same, which is the case today with regard to cases involving abuse of dominance. In addition, to the extent that it is possible, cooperation in cartel cases should be enhanced by improving the possibilities of exchanging confidential information between the authorities. One way to achieve this would be to encourage leniency applicants to apply for immunity in both jurisdictions whenever both jurisdictions have an interest in undertaking enforcement activities.

In its resolution on EU-US transatlantic economic relations, the European Parliament has supported the objective of concluding a further competition agreement with the US which would allow the exchange of confidential information in investigations under EU an US laws.[162] It has also called for the creation of a joint transatlantic framework on competition policy, which would increase the coordination of enforcement activities and facilitate the exchange of confidential information.[163] These measures could be expected to have a positive effect on the cooperation between the EU and US competition authorities. Nevertheless, it should at the same time be ensured that the exchange of confidential information does not harm the efficiency of existing leniency programs or violate the rights of undertakings to protection of confidential information. Appropriate safeguards should thus be put in place. The Commission's revised leniency policy with regard to corporate statements demonstrates a practical solution, which aims at balancing public and private interests.

On the whole, some kind of best practices regulating the relationship between public and private enforcement in the cooperation agreements would be welcome, in particular, since the

[161] *Cf.* Ham, A. D.: "International cooperation in the anti-trust field and in particular the agreement between the United States of America and the Commission of the European Communities", *C.M.L.R.*, 1993, 30, p. 571-591, at p. 597.
[162] European Parliament resolution on EU-US transatlantic economic relations (2005/2082(INI)), at § 58.
[163] European Parliament resolution on EU-US transatlantic economic relations (2005/2082(INI)), at § 57.

EU is contemplating various alternatives to increase private enforcement. Public enforcement should not undermine private enforcement and vice versa. This is certainly an objective, which is common to both parties and calls for practical solutions.

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