

# EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag

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*Compensation for victims of competition law infringements is not satisfactory in today's European Union: too few victims seek damages. This is even truer in consumer cases. This article explains how a fairly simple alternative use of two current public competition law tools could contribute to improving this situation. Compensation could be accepted as an undertaking in the framework of a commitment procedure. Alternatively, compensation could be treated as a mitigating circumstance in the fine setting process. Previous Commission decisions and the case law show that the proposed solution is feasible. Compensation at the public enforcement stage clearly benefits consumers as victims, but also companies as (alleged) wrongdoers. Consumers receive an early and, in most cases, unexpected or unanticipated compensation. Companies obtain either the termination of the investigation that has been initiated or the reduction of their fine. The benefit of this alternative remedy is extended to competition law enforcement in both its private and public forms.*

## 1. INTRODUCTION

Good competition rules are without use if their enforcement tools are not effective and if these tools do not evolve and improve in order to achieve their purposes. These purposes include deterring and punishing infringers, compensating victims, and clarifying the rules themselves.<sup>1</sup> There is room for improving these tools with respect to consumer cases in today's EU.

Two types of enforcement need to be distinguished: public enforcement by competition authorities and private enforcement through damages actions and other actions by private parties. Competition authorities and private parties pursue different enforcement objectives. Competition authorities aim to protect the public interest by enhancing competition and – through effective competition – consumer welfare. Public enforcement is therefore mainly focused on punishment and, most importantly, deterrence. The latter occurs both at an individual level when infringers are punished (punishment) and at a general level when potential offenders, after considering the applicable sanctions and the probability of being caught,<sup>2</sup> refrain from engaging in an anti-competitive practice

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<sup>1</sup> Wouter P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', *World Competition* 32 (2009): 3.

<sup>2</sup> Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice', *World Competition* 29 (2006): 183.

(deterrence).<sup>3</sup> Public enforcement may also serve the purpose of clarification.<sup>4</sup> Unlike private enforcement, however, public enforcement is not directly concerned with compensation.

Private parties are almost exclusively interested in reparation of the harm suffered. The other purposes of enforcement do not directly concern them. This is particularly true when the victims are consumers rather than companies. Consumers have no apparent strategic interest in preventing or putting an end to anti-competitive behaviour while companies, which are aware of the benefits of their competitors' and commercial partners' compliance with competition rules, may also consider deterrence and punishment as (secondary) objectives of their actions. The enforcement as it functions fairly generally today in the EU means that consumers can only obtain compensation and therefore benefit directly from enforcement, if they can successfully bring private actions. In the EU, the harm suffered as a result of anti-competitive behaviour is estimated at several billion Euros a year.<sup>5</sup> For several reasons, however, private damages actions are rather rare.<sup>6</sup>

As a consequence, enforcement of competition rules in the EU is currently carried out almost exclusively by competition authorities, which show little concern for private parties and their expectations. Thus the goal of compensation remains unachieved. It therefore seems desirable, both from a political and from a competition economics' point of view, that competition authorities demonstrate an interest in consumers going beyond the abstract policy goal of efficient and workable competition. Even if the main purpose of public enforcement is the public interest, this does not exclude that competition authorities simultaneously satisfy more specific private interests. In the same way as an efficient system of private enforcement can contribute to the public policy objective of deterring infringements,<sup>7</sup> a well-designed system of public enforcement can – and should – contribute to compensating victims.<sup>8</sup>

This article aims at demonstrating how the current public enforcement system in the EU could contribute to some extent to the objective of providing compensation for

<sup>3</sup> Recital 4 of the European Commission Guidelines on the methods for setting fines (The Guidelines) distinguishes between general deterrence and individual deterrence. The latter is equated with punishment. Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation 1/2003, [2006] OJ C210/2.

<sup>4</sup> 'Accidental' infringements resulting from a misunderstanding of the rules are avoided when rules are clarified. This in turn reinforces legal certainty.

<sup>5</sup> European Commission, Impact Assessment Report accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2 Apr. 2008, SEC (2008) 405, s. 2.2.

<sup>6</sup> On these reasons, see European Commission, White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2 Apr. 2008, COM (2008) 165 final; European Commission, Green Paper on Damages Actions for Breach of the EC Antitrust Rules, 19 Dec. 2005, COM (2005) 672 final; European Commission, Impact Assessment Report accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2 Apr. 2008, SEC (2008) 405; European Commission Staff working paper, 19 Dec. 2005, SEC (2005) 1732; Ashurst, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, 31 Aug. 2004, <[http://ec.europa.eu/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf)>.

<sup>7</sup> Francis G. Jacobs, 'Civil Enforcement of EEC Antitrust Law', *Michigan Law Review* 82 (1984): 1364, 1367; Wouter P.J. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics* (Kluwer, 2002), 19; European Commission Green Paper, n. 6 above; Dan Wilsher, 'The Public Aspects of Private Enforcement in EC Law', *Competition Law Review* 3 (2006): 27, 34. In the US, private actions contribute to a larger extent to deterrence and punishment.

<sup>8</sup> One example for this is the US leniency procedure, which requires that 'where possible, the corporation makes restitution to injured parties.', US Department of Justice, Corporate Leniency Policy, Antitrust Division, 10 Aug. 1993, <<http://www.usdoj.gov/atr/public/guidelines/0091.htm>>.

consumers,<sup>9</sup> otherwise than by the up-to-now largely theoretical possibility of obtaining damages through private enforcement.

This goal could be achieved by accepting compensation as an alternative form of undertaking in the commitment procedure or by taking compensation into account as a mitigating circumstance in the setting of fines. As we will see later, the link between compensation and fines has already been recognized by the Commission and the EU Courts.<sup>10</sup> After a description of the practical modalities of the proposed remedy (section B), we demonstrate that the law does not need to be amended to achieve this result (section C). Lastly, we analyse the advantages created for consumers and competition law enforcement in general (section D).

This attempt is timely. On the one hand, the European Commission White Paper on damages actions for breach of the EC competition rules has sparked so much controversy from a purely legal perspective, as well as from a policy perspective, that it is unsure that it will lead, in the short or medium term, to significant changes in enforcement. On the other hand, while policy makers' emphasis on consumer welfare as the ultimate goal of competition policy is to be welcomed, in the current economic circumstances the benefits of competition policy are put into question by short-term considerations of political expediency.<sup>11</sup> In the light of these considerations, it may be advisable to examine how the benefits of competition policy for consumers can be made more tangible.

## 2. THE PROPOSED REMEDY

### 2.1. THE BASIC IDEA: CONSUMERS COMPENSATED EARLIER

The main idea behind the proposed remedy is to provide an incentive for infringers to compensate consumers at the stage of public enforcement. During the investigating phase regarding a possible termination of the investigation, competition authorities could accept undertakings to compensate consumers as a special kind of commitment and put an end to the investigation. Or, once the infringement has been established, they could reward such compensation with a fine reduction.

One can even conceive that in cases where the company has not purposefully infringed competition rules, the case could be closed, or the fine could be reduced to zero, purely because of such compensation. This might, for example, be appropriate in cases

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<sup>9</sup> In the US the Federal Trade Commission (FTC) can, under s. 13(b) of the FTC Act, seek restitution remedies for consumer victims of anticompetitive behaviour. Its action is limited to exceptional cases where consumers' private damages actions are unlikely. See notably FTC, *Policy Statement on Monetary Equitable Remedies in Competition Cases*, <<http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>>.

<sup>10</sup> See Part 3.2.

<sup>11</sup> Recently the OECD felt the need to re-affirm the economic merits of competition policy: See OECD Secretary General Angel Gurría's opening address at the OECD Global Forum on Competition in Paris, 19 Feb. 2009: Mr Gurría underlined the vital role of competition in increasing productivity and economic performance and in preventing further market distortions: 'Competition law and policy should continue to ensure a level playing field that is underpinned by clear rules and strong enforcement by competition authorities.', <[http://www.oecd.org/document/27/0,3343,en\\_2649\\_34685\\_42211291\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/27/0,3343,en_2649_34685_42211291_1_1_1_1,00.html)>.

where the competition authority applies the law in a novel way thus finding a new form of infringement.

## 2.2. COMPENSATION

Regarding compensation itself, three practical issues need further consideration: to whom should compensation be paid; how much should be paid; and how should it be paid?

Should only the victims of an infringement that can prove their loss benefit from this remedy? It is submitted, for two reasons, that compensation should be granted to victims in a wider sense, that is, to past and even future<sup>12</sup> consumers. First, this measure is not a substitute for private damages actions but part of public enforcement of competition rules. As such it is intended to have a wider scope than individual interests. Second, a requirement of individual proof of harm would render the procedure too burdensome, ultimately putting at risk the effectiveness of the entire public action.

The question about the amount of compensation has two aspects. First, it concerns the amount paid to each individual consumer. Individual harm may be very difficult to establish. For example, how many consumers will have kept the relevant receipts showing how much they paid for a particular product? As a consequence and for the same two reasons as above concerning the determination of the recipient of the compensation, the amount of individual compensation should not depend on the criteria and proof requirements that are applied in private damages actions. Furthermore, disputes about the amount paid to each individual consumer would damage public enforcement by making it lengthy and complicated. Above all, the amount of compensation should not be determined by the competition authority but rather proposed by the infringer. The role of the competition authority should be limited to the decision whether or not to reward the company by ending the investigation or by a reduction of the fine. Second, concerning the aggregate amount the company will have to pay (i.e., the global compensation), the company again should play an active role. Its proposals may or may not be accepted by the competition authority. It is therefore up to the alleged infringer to determine how much he is willing to pay. He would have to consider the alternative if the competition authority does not accept his proposal and fines him for infringement of competition rules. In any case, the amount of compensation accepted by the competition authority should be capped at the level of the potential fine.

Finally, the practicalities of compensation, such as its form, its exact content as well as its timeframe, should be left open and adapted to the characteristics of each individual case. One can imagine for instance that the infringer might offer to grant discounts to consumers adding up to a total predefined amount, or to reduce its prices, or even to offer goods or

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<sup>12</sup> In the case of consumer goods, one can imagine a payment to consumers identified after the (alleged) infringement has ceased. Future purchase can be seen as an indication that the consumer had or would have purchased the good in the past.

services for free up to a certain amount.<sup>13</sup> It is also advisable to determine how to react if, despite good faith and real efforts, the company could not completely fulfil its obligation to grant compensation, because not enough customers requested it. For instance, the time limit within which the obligation should be carried out could be extended or the company could be simply exempted from fulfilling the unachieved part of its commitment.

It is also necessary to inform consumers. First, they need to be informed about the existence of the compensatory scheme and its practicalities (who is eligible, when and how will the compensation occur, etc.). This is key to the success of the compensatory process. The proposed measure aims at early compensation. If consumers do not get compensated because they are not aware of this possibility, this alternative remedy does not make sense.

Secondly, consumers should be informed of the role played by the competition authority and the company offering compensation. This remedy would not have been possible at this stage of the procedure if both of them had not actively pursued this result. This information contributes to a better understanding of the role of competition authorities and competition rules. Competition authorities should also state clearly that their involvement has no consequences on the right to bring private actions. This would avoid any confusion between public and private enforcement.

It is equally important to highlight the voluntary character of such compensation. This can make companies more inclined to offer this kind of compensation, as it gives them the possibility to win back some of the goodwill that they lost as a result of their infringement (and the higher prices that come with it). Companies value their reputation because it influences their business. The voluntary payment of a compensation could be the price that they are willing to pay to maintain or re-establish their good reputation.

### 3. LEGAL BASIS

The present article does not aim at covering national competition law systems, but we consider that the proposed measure could be perfectly well implemented by the European Commission (hereinafter: the Commission). To the extent that national and EC enforcement procedures and policies have the same characteristics, the proposed remedy could therefore equally be made available under competition rules of the Member States.<sup>14</sup>

We propose an alternative application of existing enforcement tools, namely commitments and fines. We affirm that our solution would enable an early compensation of victims

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<sup>13</sup> A class action against some department stores accused of price fixing has been settled in the US after the department stores agreed to give away free cosmetics amounting up to USD 175 million. Only one free product per person was available. See Eric Wilson, 'A Thing of Beauty, and It's Free', *The New York Times*, 22 Jan. 2009, 4. See also, <<http://www.nytimes.com/2009/01/22/fashion/22ROW.html>>.

<sup>14</sup> Regarding the application of EC rules by the competition authorities of the Member States, Art. 5 of Regulation 1/2003 (Council Regulation 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2003] OJ L1/1) states that 'The competition authorities of the Member States shall have the power to apply Arts 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions: – requiring that an infringement be brought to an end, – ordering interim measures, – accepting commitments, – imposing fines, periodic penalty payments or any other penalty provided for in their national law'.

of anti-competitive behaviour without any amendment of the current rules. The only real issue is whether the Commission (and national competition authorities) would be willing to look out of the box and make a creative and new use of the tools that they already have at their disposal.

Our proposal relating to the setting of fines would also be applicable to settlement procedures, because they also involve the imposition of a fine. However, in our view, settlements could not replace commitments. Settlements are very limited in scope. They apply to cartels only. Moreover they require the acknowledgement of an infringement. Our goal is different. We want to widen the possibilities for consumers to be compensated.

### 3.1. COMMITMENTS

Article 9 of Regulation 1/2003<sup>15</sup> (hereinafter ‘Article 9’) provides the possibility for alleged infringers to propose commitments that remove the Commission’s concerns. If the Commission agrees with the proposed commitments, it terminates its investigation and the case is closed.

The only restriction concerns the type of cases that are suitable for this kind of commitment. Regulation 1/2003 states at Recital 13 that ‘*cases where the Commission intends to impose a fine are not appropriate*’. A few months after the entry into force of this Regulation,<sup>16</sup> the Commission interpreted this restriction as meaning that commitment decisions would not be available in hardcore cartel cases.<sup>17</sup> This reading appears debatable, in particular if every cartel is understood to be a hardcore cartel. Every kind of anti-competitive behaviour, not only (hardcore) cartels, can attract a fine. Some do; some do not. The answer depends mainly on whether it is necessary to deter. There would furthermore not appear to be any reason to exclude hardcore cartels from a possible commitment decision. Circumstances may exist, even in cartel cases, where a fine may not be appropriate. *Bank-Charge Euro-zone* is a good example of this.<sup>18</sup> The decisive element is whether the Commission intends to impose a fine.<sup>19</sup> Three commitment decisions were adopted under Regulation 1/2003 in cases concerning horizontal agreements.<sup>20</sup> It seems hence that, in the view of the Commission, a fine was not appropriate in these cases. The Commission now appears to distinguish between cartels for which a fine is

<sup>15</sup> This article provides a legal basis for a long standing practice of informal settlements/termination of proceedings carried out by the Commission under Regulation 17/62 (Regulation 17/62 implementing Arts 85 and 86 of the Treaty, [1962] OJ 13/204). Regulation 17/62 did not provide for but could not be interpreted as prohibiting termination of proceedings following commitments.

<sup>16</sup> Regulation 1/2003 is also known under the name Modernization Regulation.

<sup>17</sup> Commission Press Release MEMO/04/217, 17 Sep. 2004.

<sup>18</sup> See para. 23 below.

<sup>19</sup> In some commentators’ opinion the Commission has already closed cases where a fine could have been imposed. This shows the degree of discretion enjoyed by the Commission when deciding to stop its investigations. (See Denis Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges ?*, GCLC Working paper 01/08, 2, 22, 26).

<sup>20</sup> Commission Staff working paper, Report on the functioning of Regulation 1/2003, COM(2009)206 final, para. 97.

not appropriate (cartels open for commitments) and cartels for which a fine is appropriate (cartels not open for commitments: hardcore cartels).

As for the type of commitments, Regulation 1/2003 is silent and neither imposes nor precludes any form of commitment. In this respect, the Commission enjoys discretion, although the General Court may, of course, review the commitment's proportionality.<sup>21</sup> For the Commission, the commitment decision is a matter of efficiency.<sup>22</sup> The Commission strikes a balance between putting an immediate end to presumably anti-competitive behaviour and the deterrent effect of an infringement decision. The decision in favour of terminating the proceedings immediately results in healthier competition and saves time and resources that can be dedicated to infringements whose gravity is considered to require punishment. The solution proposed in this article does not depart from these principles underlying the application of Article 9. In addition, accepting immediate compensation of consumers as a form of commitment makes benefits more concrete for consumers.

The compensation of victims via commitment decisions is not entirely new. The Commission came close to applying it in the *Deutsche Telekom* and in the *Bank Charges Euro-zone* commitment decisions.<sup>23</sup> In *Deutsche Telekom*, the Commission found that Deutsche Telekom had charged excessive prices for access to its network, but it decided to terminate its proceedings when Deutsche Telekom committed to apply lower tariffs.<sup>24</sup> In the second case, several banks were accused of collectively fixing charges for exchanging Euro-zone banknotes.<sup>25</sup> Although this was a cartel case, the Commission terminated proceedings against certain banks when they committed to reduce their charges. Two reasons were decisive: a particular circumstance existed (the introduction of euro notes and coins) and the reduction produced immediate beneficial effects for consumers. The Commission simultaneously continued its investigations against the banks that contested the Commission's charges and fined them.<sup>26</sup> Thanks to the commitment some consumers paid less for the service and ultimately benefited from a kind of compensation whereas clients of the banks that were not part of the commitment decision continued to pay higher charges. In Belgium, in the *Banksys* case,<sup>27</sup> the competition authority agreed to

<sup>21</sup> Case T-170/06, *Arosa Company v. Commission*, [2007] ECR II-2601, paras 86–111.

<sup>22</sup> Commission Staff working paper, Report on the functioning of Regulation 1/2003, COM(2009)206 final, para. 99; Commission Press Release MEMO/04/217, 17 Sep. 2004; Wouter P.J. Wils, 'The Modernisation of the Enforcement of Articles 81 and 82 EC', *Fordham International Law Journal* 24 (2000–2001): 1655, 1715; Wouter P.J. Wils, 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation 1/2003', *World Competition* 29 (2006): 345, 350.

<sup>23</sup> Note that these cases occurred under Regulation 17/62 and were thus informally settled/terminated.

<sup>24</sup> XXVIIth Report on Competition Policy 1997, para. 77.

<sup>25</sup> Commission Press Release IP/01/1159, 31 Jul. 2001; Commission Press Release IP/01/554, 11 Apr. 2001; Commission Press Release IP/01/634, 3 May 2001; Commission Press Release IP/01/635, 3 May 2001; Commission Press Release IP/01/650, 7 May 2001; Commission Press Release IP/01/690, 14 May 2001; XXXI<sup>st</sup> Report on Competition Policy 2001 (published in conjunction with the General Report on the Activities of the European Union – 2001), 34; Commission decision in Case COMP/E-1/37.919, [2003] OJ L15/1, fn. 9. This case was informally settled/terminated as it occurred under Regulation 17/62.

<sup>26</sup> Commission Press Release IP/01/1796, 11 Dec. 2001.

<sup>27</sup> Case CONC-1/O-00/0049: *Banksys SA and others*, [http://economic.fgov.be/organization\\_market/competition/jurisprudence/jurisprudence\\_1220061012.pdf](http://economic.fgov.be/organization_market/competition/jurisprudence/jurisprudence_1220061012.pdf).

commitments offered by Banksys, which put an end to discriminatory prices and which led to lower prices for small businesses. These commitments followed a private settlement between Banksys and the complainants, which was said to correspond to possible remedies suggested by the competition authority.<sup>28</sup> In addition these commitments met the competition authority's concerns.

There is no reason to limit the commitment to the reduction of charges for the future. In the above-mentioned cases, the commitments could easily<sup>29</sup> have gone further and could have involved the reimbursement of the surcharge paid by consumers/customers in the past.

The Commission took such a step two years after *Bank Charges Euro-zone* when it terminated its investigation in the *Philips/Sony CD Licensing Program* case.<sup>30</sup> Amongst the commitments was the retroactive application of a reduced royalty rate. In this case twenty complainants (manufacturers of CD pre-recorded discs) representing about 25% of all EEA licensees were at the origin of the Commission's investigation into the Philips and Sony CD disc licensing program. The preliminary assessment concluded that possible anti-competitive behaviour existed. However, the Commission settled/terminated the case informally when '*after discussing the preliminary analysis with the parties, in view of the alleged abusive behaviour and the cooperative attitude of all the parties involved, a two-step solution was envisaged, the result of which turned out to be equivalent to the one that could have been obtained through more formal proceedings*'.<sup>31</sup> The first step consisted of allowing time for complainants and alleged infringers to reach a settlement. This led to almost all complainants withdrawing their complaints. The second step consisted of Philips and Sony notifying new agreements, that is, improved versions of the agreements that were under scrutiny. The retroactive application of the reduced royalty rate was one of these improvements. In addition, Philips and Sony undertook to grant a one-time credit of USD 10,000 (approximately EUR 8840) on royalties to each EEA licensee, which amounted to about USD 800,000 (approximately EUR 707,200).<sup>32</sup>

To sum up, voluntary compensation in the framework of a commitment procedure would be an efficient and speedy way of contributing both to remedying possible anti-competitive behaviour and indemnification of victims.

### 3.2. FINES

Under Article 23(2)(a) of Regulation 1/2003, the power to impose fines on companies that have infringed Article 81 or 82 EC has been entrusted to the Commission.

<sup>28</sup> Case CONC-I/O-00/0049: Banksys SA, see weblink above, fn. 14 of the decision.

<sup>29</sup> The victims were easy to identify.

<sup>30</sup> XXXIIIrd Report on Competition Policy 2003, 197–200; Commission Press Release IP/03/1152, 7 Aug. 2003; Miguel A. Peña Castellot CPN 3 (2003): 56; this case occurred under Regulation 17/62 and was thus informally settled/terminated (see n. 15 above).

<sup>31</sup> XXXIIIrd Report on Competition Policy 2003, 199.

<sup>32</sup> Twenty complainants represent almost 25% of the EEA licensees; there must have been about 80 EEA licensees in total.



The Guidelines<sup>33</sup> on the method of setting fines (hereinafter: the Guidelines) provide further details about this public enforcement tool. They recall the case law of the European Court of Justice granting the Commission a wide margin of discretion when setting fines.<sup>34</sup> They recognize that fines should have a sufficiently deterrent effect.<sup>35</sup> The Guidelines state also that the fine may be reduced to reflect mitigating circumstances and list five such examples.<sup>36</sup> One can see three explanations why the listed circumstances call for a lessening of the sanction: (i) the harm to competition was involuntary (committed through negligence or support was given by public authorities); (ii) the harm was limited (the infringer deviated from the agreement and behaved competitively or the infringer terminated its behaviour immediately when the Commission started its investigation); or (iii) the company cooperated proactively, beyond what was legally required.

The compensation of victims would be entirely in line with these reasons underlying a milder sanction. By compensating victims voluntarily, a company would take an active part in the enforcement of competition law, beyond what is legally required, and would help render corrective justice. Moreover, while it cannot retroactively act competitively and limit the harm, the offender would at least be adopting a critical view on its past behaviour and act accordingly by repairing the harm.

This self-critical and proactive behaviour deserves to be rewarded by a fine reduction or in some exceptional cases by the absence of a fine, where, for instance, the infringement is involuntary. The Netherlands Competition Authority considers compensation as a mitigating circumstance.<sup>37</sup> The EEA competition authorities meeting at the ECA<sup>38</sup> forum share the view that a fine 'may be reduced if the offender takes active steps to mitigate the adverse consequences of the infringement, in particular in providing voluntarily, timely and adequate compensation'.<sup>39</sup> The Spanish Competition Act already accepts to take into account '*the performance of actions intended to repair the damage caused*'.<sup>40</sup>

In fact, the Commission or EU Member State competition authorities have already granted or at least considered such a reward. In *General Motors Continental*,<sup>41</sup> the Commission fined General Motors for having charged an abusive price for issuing certificates necessary to import vehicles thereby impeding parallel imports. This fine was reduced

<sup>33</sup> Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation 1/2003, [2006] OJ C210/2.

<sup>34</sup> Guidelines, para. 2.

<sup>35</sup> Guidelines, para. 4.

<sup>36</sup> Guidelines, para. 29.

<sup>37</sup> The NMa Fining Code already states at para. 49(c) that 'the circumstance that the offender of his own accord provided compensation to the injured party/injured parties' is a mitigating circumstance; NMa Fining Code 2007, Guidelines on the method of setting fines <[http://www.nmanet.nl/Images/NMa%20Fining%20Code%202007%20AMEW\\_tcm16-107358.pdf](http://www.nmanet.nl/Images/NMa%20Fining%20Code%202007%20AMEW_tcm16-107358.pdf)>.

<sup>38</sup> European Competition Authorities.

<sup>39</sup> ECA Working Group on Sanctions, Pecuniary sanctions imposed on undertakings for the infringements of antitrust law, Principles for convergence, para. 18, <[http://www.autoritedelaconurrence.fr/doc/eca\\_principles\\_uk.pdf](http://www.autoritedelaconurrence.fr/doc/eca_principles_uk.pdf)>.

<sup>40</sup> Article 64(3)(c), Spanish Competition Act 15/2007, Official Gazette No. 159, (English (non-official) version, <<http://www.cncompetencia.es/Inicio/Legislacion/NormativaEstatal/tabid/81/Default.aspx>>).

<sup>41</sup> Commission decision in Case IV/28.851, [1975] OJ L29/14.

*inter alia* because General Motors reimbursed consumers. In the *Nintendo case*,<sup>42</sup> a reduction of EUR 300,000 was granted on the ground that substantial financial compensation was offered to third parties identified in the statement of objections as having suffered financial harm. In the *Pre-Insulated Pipes cartel*,<sup>43</sup> the Commission reduced the fine on the ground that substantial compensation had been paid to the complainant. In the UK *Fee-paying schools case*,<sup>44</sup> the Office of Fair Trading departed from its penalty guidance in part because of an *ex gratia* payment made by the infringers (schools) to fund a GBP 3 million educational trust fund for the benefit of the pupils concerned by the anti-competitive behaviour. The Netherlands Competition Authority reduced the fines imposed on eight shareholding banks in Interpay for having infringed the prohibition on cartels by setting-up Interpay (Interpay provides for network services for debit-card transactions in the Netherlands).<sup>45</sup> One of the mitigating circumstances was the infringers' creation of a EUR 10 million fund for an efficient payment system.

It could be discussed whether the amount deducted should be equivalent to the amount of the compensation paid.<sup>46</sup> Full deduction should not be *a priori* excluded. In practice, there may be situations in which full deduction would be appropriate.<sup>47</sup> We believe that this should be decided on a case by case basis. Some companies may consider the payment of compensation only if it is fully taken into account, some may not require (expect) full deduction, for instance, because they are in any case better off. The reduction of a fine is not a bargaining process. However, if a company insists on a full deduction, it should obtain a precise and unconditional assurance from the Commission to that effect.<sup>48</sup>

To sum up, compensation paid to consumers could be taken into account as a mitigating factor when setting fines. This could be used more systematically as a way for public enforcement to achieve compensation for consumers who have suffered harm as a result of anti-competitive behaviour. This may not always be successful but should be encouraged in every case.

As already said above, the offer by an infringer of compensating victims could be taken into consideration too and could conceivably lead to more expedited settlement procedure.

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<sup>42</sup> Commission decision in Cases COMP/35.587, COMP/35.706, COMP/36.321, [2003] OJ L255/33, paras 440–441.

<sup>43</sup> Commission decision in Case IV/35.691, [1999] OJ L24/1, para. 172.

<sup>44</sup> Office of Fair Trading Decision No. CA98/05/2006 in Case CE/2890-03, para. 1427, <[http://www.of.gov.uk/shared\\_of/ca98\\_public\\_register/decisions/schools.pdf](http://www.of.gov.uk/shared_of/ca98_public_register/decisions/schools.pdf)>. This decision is the outcome of a cartel settlement procedure.

<sup>45</sup> NMa Annual Report 2005, <[http://www.nmanet.nl/Images/NMAU05SVD\\_UK%2Bomslag\\_tcm16-88247.pdf](http://www.nmanet.nl/Images/NMAU05SVD_UK%2Bomslag_tcm16-88247.pdf)>; NMa Press Release 05-46, 22 Dec. 2005, <[http://www.nmanet.nl/engels/home/News\\_and\\_Publications/News\\_and\\_press\\_releases/2005/NMa\\_Reviews\\_Fines\\_Imposed\\_on\\_Banks\\_and\\_Interpay.asp](http://www.nmanet.nl/engels/home/News_and_Publications/News_and_press_releases/2005/NMa_Reviews_Fines_Imposed_on_Banks_and_Interpay.asp)>.

<sup>46</sup> For a support for a partial deduction, please refer to Wils, 2009, sec n. 1 above, 21.

<sup>47</sup> The key element is to maintain deterrent and punishment effects. The amount of the fine, after deduction of the compensation, may still have these effects.

<sup>48</sup> Case T-13/03, *Nintendo*, para. 206 (NYP).

#### 4. ADVANTAGES OF THE PROPOSED REMEDY

The present article does not present a miracle solution for every single case. We believe, however, that the proposed remedy could enable early reparation of damages, in particular, in simple consumer cases.

When applicable, the proposed measure offers several advantages, not only for consumers who were victims of anti-competitive practices but also for competition law enforcement in general.

##### 4.1. FROM A CONSUMER'S POINT OF VIEW

With this alternative form of remedy in public enforcement cases, indemnification occurs earlier and more consumers can benefit. They are better off than before because they can receive compensation in cases where a private action seems to be difficult or where such an action is not likely for other reasons. The proposed remedy would thus provide compensation to a greater number of victims.

Moreover, this kind of remedy may help to solve some of the problems linked to competition fines, in particular, the problem that fines may be passed on to consumers in the form of higher prices.

##### 4.1.1. *Compensation of a Greater Number of Victims*

One can identify at least two categories of victims of anti-competitive behaviour: the first group comprises those who have not purchased because the price was above the price they would have accepted to pay. Although they are actually the first victims to suffer from the infringement, they currently are almost never compensated because of the quasi-impossibility of demonstrating the existence of the harm and of quantifying damages.

The proposed remedy would enable these victims to benefit from compensation that they may not even have thought about.

The second category includes those who have purchased at too high a price. This category is usually the focus of discussions on damages and compensation. For them it may be easier to be compensated, in particular, in follow-on actions where the infringement has already been established by a decision of a competition authority. However, determining the exact amount of damages remains difficult. This is in particular true for consumers. They are often indirect purchasers that have suffered harm because the direct purchasers have 'passed-on' the higher price to their customers. In addition, consumers often refrain from filing damages action because the amount of loss and consequently the expected compensation is small in relation to litigation costs and time.

The proposed measure would enable these victims to receive compensation without having to prove their individual damage or to balance the pros and cons of a private action.

The proposed remedy would hence be an efficient way of providing corrective justice for consumers, in particular, but not only, where no private action is conceivable. It should,

however, not exclude the right of consumers to seek further compensation in a private action if they wish to do so. Thus, where actions for damages are available, consumers can in principle receive full compensation. Therefore, compensation made possible by public enforcement should not be understood as a private settlement between infringer and consumers, excluding the separate right for consumers to seek damages. As a result, if the harm is not entirely repaired, victims should be perfectly entitled to initiate a private claim until they have received full compensation for the loss suffered (i.e., payment of the difference). Additional compensation is of course not possible for victims that have been compensated in a private settlement. In this case the victims have renounced and are precluded from asking further damages.

#### 4.1.2. *Lessening the Drawback of Higher Prices for Consumers*

Imposing fines on infringers serves the purpose of deterrence well, but it may have a major drawback for consumers. Companies may try to pass-on the fine to their customers by way of higher prices. Ultimately, the effect of fines could be higher prices for consumers, in particular, in markets with ineffective competition. Ironically, those that suffer most from anti-competitive behaviour, the consumers may also be the ones that suffer from the competition authorities' remedy.

Of course, the measure proposed would not necessarily reduce the overall sum to be paid by the infringer, and the infringer could try to pass on the costs to its customers. But the risk of an increase in price is significantly reduced where compensation is paid over a certain period of time (e.g., discount vouchers). In this case the financial impact on the company is not as strong as it would be in case of a one-time payment of the total amount of compensation.

If a price increase cannot be avoided,<sup>49</sup> at least consumers would benefit first and would get something out of public enforcement. Part of the consumer surplus that was captured by the infringing companies would be re-distributed to consumers. Consumers would in any event be better off than before and also better off than under the current enforcement regime.

#### 4.2. FROM AN ENFORCEMENT POINT OF VIEW

The proposed remedy would enhance the efficiency of enforcement as a whole because it would lead to more private and public enforcement and would help achieve punishment and deterrence, which benefits public enforcement.

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<sup>49</sup> One can imagine however that, in some cases, a mechanism (e.g., a commitment) could be found in order to prevent companies from raising prices.

#### 4.2.1. *Private Enforcement*

As already explained above, victims would greatly benefit from the proposed remedy. This could start a virtuous circle for private enforcement. By helping consumers, the remedy would convey a positive image and a better understanding of competition law for the general public. A greater public interest in and awareness of the actions and decisions of competition authorities could in turn prompt consumers to seek damages in court.

Contrary to a sceptical view that could result from the Commission's allegation in the *Nintendo* case, private enforcement would not be deprived of its deterrent effect when fines are mitigated on account of voluntary compensation, whatever the level of reduction granted. At the hearing, the Commission contended that 'if reductions equivalent to or greater than the public law sanction were granted [...] the obligation to pay compensation under private law would be deprived of any deterrent effect'.<sup>50</sup> One should not pay too much attention to this argument, which does not answer the criticism of breach of legitimate expectation and to which the Court did not respond. Moreover, in *Nintendo*, some of the victims accepted compensation, which indicates that private settlement occurred.<sup>51</sup> The Commission's assertion is, in fact, very case specific, whereas our proposal regarding the reduction of fine has a wider scope. Its application is not limited to cases where private settlement occurs and, therefore, never forecloses access to civil courts.

At this point it must be considered whether the incentives for companies to pay compensation earlier would not be reduced if the likelihood of private actions increases. This cannot be excluded. But first, such a risk is unlikely to exist at present. Second, our proposal is an attempt to react to the currently quasi-absence of private actions and compensation. If our proposal becomes obsolete in the light of increased private enforcement, the objective sought by this article would be achieved.

#### 4.2.2. *Public Enforcement: Saving of Time and Money for Competition Authorities*

Competition authorities would save time and money because, first, they would be able to achieve a satisfactory result earlier thanks to commitment decisions and second, they would have to defend fewer decisions on appeal.

As mentioned earlier, the proposed remedy would increase incentives for infringers to offer commitments and would permit the termination of cases. Infringers would have a chance to improve their image in the eyes of consumers, which is not to be underestimated in today's media-driven world. In addition, infringers would not need to plead guilty and would avoid lengthy, uncertain and expensive procedures.

Sometimes the adoption of commitment decisions can take a while, because it occurs only after a statement of objections or because the market test required by Article 27(4) of

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<sup>50</sup> Report for the hearing, Case T-13/03, see n. 47 above, para. 144.

<sup>51</sup> Commission decision in cases COMP/35.587, COMP/35.706, COMP/36.321, see n. 42 above, para. 440.

Regulation 1/2003 is not immediately positive. However, in any event, it will take less time than the adoption of an infringement decision.

Some cases might not be suitable for commitments, for instance, because they are too complicated or because the market test does not provide a satisfactory outcome. However, what really counts is the creation of new opportunities. The more cases where alleged infringers are willing to terminate, the more cases would be of the kind that the competition authorities can terminate under the commitment procedure.

Litigation costs would be saved since appeals of commitment decisions are less likely. The same may be true, albeit to a lesser extent, for appeals of infringement decisions when the fine has been reduced on account of compensation. A company offering a commitment is certainly less prone to appeal the decision.<sup>52</sup> Moreover, it is highly doubtful whether such an appeal would succeed.<sup>53</sup> In addition, third parties may also be less inclined to challenge the decision granting compensation for consumers. The victims have received some compensation. Competitors may be less inclined to appeal a decision that benefits consumers because this would be bad publicity for them.

#### 4.2.3. *Public Enforcement: Enhancement of Deterrent Effect*

The deterrent effect of public enforcement would be enhanced. Deterrence is achieved through a combination of two factors: the probability of being caught and the expected punishment.<sup>54</sup> The former increases when competition authorities have more time and more money to spend on their investigations. As for the latter, it must be set at a level where gains derived from the infringement are not sufficient to tip the balance towards infringement.

With the proposed remedy, the total amount to be paid when the Commission finds an infringement would not be reduced. The infringer pays his fine (or no fine in appropriate cases) and the compensation instead of paying a 'full' fine. This and the fact that there will be more than one recipient, is not important, since the infringer's only concern is the total amount he has to pay.<sup>55</sup>

As for the probability of being caught, it could be increased. First, consumers would have a strong incentive to file a complaint with a competition authority. Second, competition authorities may be inclined to investigate lesser infringements if they know that these cases can be closed relatively easily via compensation and a commitment decision. This would contrast with the current situation where infringers may get away with the infringement, because the likelihood that competition authorities are actually looking at their behaviour is low. Finally, the relatively easy termination of lesser infringement cases would,

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<sup>52</sup> Richard Whish, *Commitment Decisions under Article 9 of the EC Modernisation Regulation: Some Unanswered Questions*, in *LiberAmicorum in Honour of Sven Norberg*, eds M. Johansson, N. Wahl & U. Bernitz (Bruylant, 2006), 570.

<sup>53</sup> Denis Waelbroeck, *Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?*, GCLC Working paper 01/08, 2, 20, 23.

<sup>54</sup> Wils, 2006, see n. 2 above.

<sup>55</sup> Wils, 2002, see n. 7 above, 21.

as already said, free up time and financial resources for the prosecution of hardcore cases, thus also increasing the probability of uncovering such infringements. To sum up, it is likely that the proposed remedy would overall lead to a higher probability of detection, which in turn would strengthen the deterrent effect of public enforcement.

The additional deterrent effect linked to private actions would not be weakened by the proposed remedy because private actions are not excluded and might even be encouraged as explained above. The overall effect of the proposed remedy on deterrence is thus clearly positive.

## 5. CONCLUSION

Overall, with the proposed remedy one can expect the efficiency of enforcement to increase. Moreover, more consumers would be compensated than before. They would be better off, and this could be achieved without any substantial modification of the current enforcement system.