Book Review: Jürgen Basedow (editor), *"Private Enforcement of EC Competition Law"*, Kluwer Law International, 2007, ISBN 978-90-411-2613-9.

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Until recently, infringements of the competition rules of the EC Treaty (Articles 81-89 EC) have been almost exclusively dealt with under the public enforcement channel of EC competition law, i.e. by the European Commission and the national competition authorities of the Member States. The other channel of enforcement of EC competition law, i.e. private enforcement, was brought to the foreground by Regulation 1/2003 (Modernisation Regulation)[2], which abandoned the former centralised system of prior notification and authorisation and introduced a new decentralised system of legal exemption and *ex post* assessment where national competition authorities and national courts play a vigorous role in the application and enforcement of Articles 81 and 82 EC. The central aim of that development was the improvement of the effectiveness of EC competition rules through the decentralisation of their enforcement and the working of public and private enforcement channels in tandem. A divisive debate on the right of the victims of anti-competitive conducts (contractual or not) to bring legal actions before national courts for breach of EC competition law was triggered by the recognition on the part of the European Court of Justice (ECJ) in its *Courage and Crehan judgment*[3] of the importance of the right to damages and was followed by a heated and indeed broad deliberation depicted in the Green[4] and White[5] Papers on damages actions of the European Commission. Currently, the private enforcement of EC competition rules constitutes one of the hottest policy choices and one of the thorniest legal issues for the European Commission. The corresponding Directive proposal is thus eagerly awaited. In the wake of the Green Paper, the Max Planck Institute for Comparative and International Private Law (directed by Professor Jürgen Basedow) convened an international conference in Hamburg on 6 and 7 April 2006 in order to contribute to the debate which was launched by the Commission. The present book, published in 2007 by Kluwer Law International, presents the papers and proceedings of these two days. It should be stressed from the outset that the expertise and experience of the contributors uphold the validity and the significance of the comments and views made thereof, thereby rendering the book a useful tool for both scholars and practitioners.

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[2]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, Official Journal L 1, 04.01.2003, p.1-25.

[3]Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, where the ECJ recognised a right to compensation to anyone who has suffered losses from a violation of Articles 81 and 82 EC in order to guarantee the effectiveness of the EC competition rules. The conclusions of this judgment were subsequently confirmed in joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

[4]Green Paper on damages actions for breach of the EC antitrust rules, COM(2005) 672 final.

[5]White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165, 02.04.2008.

The book is made up of eleven ground-breaking presentations that were delivered by practitioners, academics, economists and European policy makers. These presentations address the most significant questions raised in the Green Paper from both a Community and a comparative perspective and each one is followed by a summary of the subsequent debate. As mentioned above, although the conference took place before the adoption of the White Paper, all the questions raised and the issues discussed thereof remain on the current agenda in view of the awaited next legislative step on the part of the European Commission. The thorough way in which the hottest issues in this area of EC competition law are discussed and the valuable insight provided for by the authors led me to write a review about this comprehensive book regardless of its 'age'.

The book starts with a thorough presentation of Emil Paulis (former head of the Policy and Strategic Support Directorate in DG Competition) on the main policy issues with regard to the private enforcement of EC competition law. After stressing that private enforcement is a complement to -as opposed to a substitute for- public enforcement, he addresses the most crucial issues in this area of law and policy, such as the need for more vigorous rules concerning access to evidence, the passing-on defence theory that he identifies as "one of the most difficult legal issues", the need to favour consumer claims and the question of collective redress, and eventually the issue of coordination of public and private enforcement, especially when it comes to leniency.

In the second presentation, Professor and former Advocate General of the ECJ Walter van Gerven explains in great detail the relevance of the *Courage* case and how guidance could be found by national courts in Article 288 EC and the *Francovich*[6] liability case law. He however stresses that this could not replace a codified system and hence emphasizes the need for a comprehensive legislative intervention at the Community level.

The book continues with a comparative analysis involving the experience from the national laws of the United States (Hannah Buxbaum), of Germany (Wulf-Henning Roth), of France (Laurence Idot) and of Italy (Carlo Castronovo). In each case, the contributors draw upon their national experiences in private enforcement to set out useful and detailed practical recommendations and conclusions as to how the respective issues could be addressed in the broader and more peculiar Community regime.

[6]Joined Cases C-6/90 & C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357.

Following the comparative analysis, some key issues on the substance of the debate are thoroughly addressed. From an economist perspective, Professor Martin Hellwig (Bonn) deals with the important issue of the calculation of damages and discusses in particular the problem of the passing-on defence of losses sustained in an upstream market to customers in a downstream market in the context of horizontal price-fixing cases.

Professor Ralf Stürner (Freiburg) deals with another hot issue, namely the question of the claimant's burden of proof in providing evidence in civil proceedings and the related question of access to evidence, which plays a key role in rendering damages actions effective. He proposes to encourage, through a provision in a Directive, national courts to grant a reduction in the requirements of specification of facts and evidence in appropriate cases where the relevant facts are in the sphere of the opponent or third persons, according to the ALI/Unidroit Principles of Transnational Civil Procedure.

Professor Astrid Stadler (Constance) focuses her presentation on the question of collective actions which is another fundamental issue in ensuring the effectiveness of private enforcement. The *rationale* of collective actions is that small claimants are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. Mechanisms allowing the aggregation of claims, would allow victims to receive compensation. After examining the various options for the design of collective actions (joint actions, test cases, actions brought by associations and class actions), she explains why, according to her view, only class actions (whereby one affected individual or association brings an action on behalf of identified or identifiable victims) are an efficient means of private enforcement where important damages have occurred, both in terms of compensation and deterrence.

Dr. Ulf Böge, President of the German Cartel Office, focuses his presentation on the important question of the conflicts that may arise from the interrelation between the private and the public enforcement channels of EC competition law, concentrating in particular on the interaction between leniency programmes and damages actions. After explaining that companies could be deterred from applying for leniency by weighing the reduction of fines against potential damages actions, he outlines possible policy options to enhance the attractiveness of leniency programmes and in particular argues for favouring leniency applicants over non-cooperating firms in civil proceedings.

In the final presentation, Professor Jürgen Basedow (managing director of the Max Planck Institute for Comparative and International Private Law and former chairman of the German Monopolies Commission) examines the crucial questions pertaining to jurisdiction, applicable law and forum-shopping. Given that most damages actions based on infringements of the EC competition rules have an international (or at least transnational) dimension and involve cross-border elements, all the issues highlighted in this final part of the book are bound to be at the centre of attention in a multi-jurisdictional environment. Indeed, the said issues increasingly constitute important battlegrounds, especially in claims involving EU-wide cartels or other cross-border anti-competitive conducts.

To sum up, this book underlines the significance of private enforcement as a compensatory as well as a deterrence tool against anti-competitive conducts. As Jürgen Basedow highlights in his introduction: « *fines may reach high amounts of money, but they do not compensate the losses caused. And if they do not match the prospective profit to be earned by the cartel members, they cannot provide for an effective deterrence against cartelization* ». Not only does the book provide a detailed examination of the most important legal issues of private enforcement of EC competition law, but it also contains a comprehensive analysis of the different options set out in the Green and the White Papers, which helps the reader to elucidate the major challenges that remain to be faced before the adoption of a legislative proposal by the European Commission. The structure of the book is solid and its quality is indeed high. The contributions are thorough and clear, focusing less on theoretical considerations and more on concrete policy proposals as to how the most puzzling issues of this challenging area of EC competition law can be dealt with. Post modernisation and at a time when the European Commission, having considered and assessed the input provided to it as a response to the Green and White Papers, is expected to adopt a legislative proposal, this book constitutes a precious tool for students, academics, practitioners, judges and all those engaged in or faced with issues of enforcement of EC competition law, be it within its public or private channel.