Public-Private Partnerships for Effective Enforcement:
some ‘hybrid’ insights?

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A hybrid vehicle uses an on-board rechargeable energy storage system and a fuel based power source for vehicle propulsion. These vehicles use much less fuel than their counterparts and produce less emissions. Hybrid vehicles recharge their batteries by capturing kinetic energy through regenerative braking. Some hybrids use the combustion engine to generate electricity by spinning a generator to either recharge the battery or directly feed power to an electric motor that drives the vehicle.²

It may be a bit cheeky to base an Antitrust Marathon paper on a motoring metaphor. But bear with me. I've been injured for a while and need all the help I can get. The idea of some assisted driving came to me because private enforcement of competition law has been sputtering along, particularly in Europe. Sometimes it seems like an extreme form of the 'Galloway method' of marathon training: run for a mile, walk for a bit, run for a mile, walk for a bit.³ Except in Europe the run/walk ratio is skewed towards ‘two steps forward, three steps back’, if that.

There are still political concerns about opening up too many areas to private litigation, not just with respect to competition harms. Opponents of improved mechanisms for redress conjure up images of hoards of class action attorneys racing at us brandishing unmeritorious suits that will clog our courts and delay both justice and effective redress. They note that such litigants would rely on European competition law standards that are relatively vague but stern; and argue that this would chill genuinely pro-competitive business activity and further delay a return to ‘growth’.

Most of these concerns are overblown. No serious recommendation for improving the availability of collective redress for competition harms advocates a model that would drag with it the worst excesses of other systems. Nevertheless, European mechanisms for private actions need some form of kick-start – not only to ensure that wrongs are, as much as possible, righted, but also to create a much-needed synergy

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² http://saveenergy.about.com/od/fuelingyourautomobile/g/Hybrid.htm
³ http://www.jeffgalloway.com/training/walk_breaks.html
between public enforcement and private redress. With dwindling enforcement, frankly both sides need all the help they can get.

Some of the difficulties of bringing private actions are well-known, and are not unique to the competition law area: burden of proof, proving harm and causality, costs of litigation relative to diffuse harm, access to evidence, deep-pocketed defendants, delay, and risks of adverse costs orders, etc.

These difficulties conspire to inhibit private actions in the first place. That is why private actions that follow-on from successful public enforcement such a likely form of claim. This is not enough to guarantee effective redress though. In public cases, defendants fight to ensure that only the bare minimum is left for private claimants to use. They insist on heavy redactions from authorities’ decisions, and delay decisions being issued to further reduce the likelihood of a private claim.

There is a more general problem though with relying solely on the follow-on actions. Public budgets are shrinking and competition authorities are having to prioritise casework. Some, perhaps many, meritorious complaints are not followed up by authorities. As a result, there may never be a decision to follow-on from in the first place. Similarly even when an investigation has been started, settlements are more common, and defendants will have been careful to ensure that they do not provide admissions of liability or evidence on which to base a private claim.

This discussion paper does not focus on improving the ability to bring stand-alone or follow-on actions though. What I wish to explore are clever ways to link and gear private actions and public enforcement together.

First of all, let’s examine whether such a linking would be appropriate. After all, we would likely agree that private actions and public enforcement have different aims. Private actions focus on the private interest in compensation. Public enforcement focuses on public interests such as deterrence, and protecting and restoring a competitive process. But they both have linked interests too. To some extent they both are concerned about ‘righting a wrong’, returning players to a level playing field, and working for consumers. They also complement one another in effect, their actions each add to deterrence for example. Similarly they assist one another, with public enforcement often providing the evidential basis for private actions (and vice versa at times). Similarly they can provide ‘relief’ for one another, for example, by filling gaps where the other has not acted. They also each contribute to a growing competition culture, and recognition within society that anti-competitive conduct should not be tolerated. This may lead to an even greater recognition within governments and sectoral ministries of the importance of competitive markets.

One can thus think of a ‘hybrid’ enforcement model of public enforcement and private action. My tortured metaphor sees a ‘drive train’ of two power sources which link up
and feed each other and better propel a consumer-focussed competition law and policy. This paper tries to identify some of those links.

In this, I am inspired by my colleague and Antitrust Marathon series co-chair, Professor Waller, who has noted:

...some private rights of actions are a necessary complement to the public enforcement of competition law, ...Neither public nor private enforcement should ‘monopolize’ competition law, but must work together to deter, detect, punish, and compensate victims of unlawful anticompetitive conduct. Only then is a consumer friendly competitive economy possible.4

Terhecht has added that

[e]specially in the European Union the creation of a ‘competition culture’ is still an important task for the enforcement process and could be achieved with a balanced approach that is based on private enforcement as well as public enforcement’ emphasising that the ideal situation is one of mutual encouragement.5

This discussion paper provides some examples of how the public/private drive-train can be set up so that the two different engines can work together in mutual encouragement.

I divide the examples into three groups:

- **The first group** – ‘engine-ignite’ - contains examples where one engine is ignited by the other, for instance where a private complaint will simply just not go away, and in addition to the court action the plaintiff keeps submitting more and more material and pressure and eventually causes the government to launch enforcement action. (This is not ‘assistance’, and is more akin to separate pressure from one side to the other.)

- **The second group** – ‘engine-assist’ - contains examples where the private or public engines are actually more closely linked or aligned and do indeed help the other. The most obvious of these involves the government filing supportive or clarifying amicus briefs in private actions but there are many other examples that are considered.

- **My third group of examples** – ‘engine-unite’ - are closer to full integration. Here the drive train is truly unified, the extreme (and rather
delightful) example being where a public authority is a private claimant in a competition damages action.

I. ‘Engine ignite’

My first example is typified by the NASDAQ case in which the private litigation was filed long before any investigations had been undertaken by the DOJ or the SEC. Indeed, the public complaints were only issued after private plaintiffs had done extensive investigation. In fact, the private efforts and pressure kept the government investigations alive through periods of scepticism. The private counsel and economists provided the DOJ with direct and economic evidence and benefited in return from the results of public discovery actions and the filing of the DOJ and SEC complaints and consent decrees. As one of the plaintiff’s co-lead counsel noted, such a tight cooperation was ‘of course, not how the government and private bar always conduct themselves’.

It is perhaps a bit more common in the European administrative system however. Private complainants are much more involved in such a regime, bombarding the agencies with documents and demands, objecting to and even appealing any public inaction. As Roach has noted,

Private enforcement can supplement public resources with private initiative and information. This is particularly compelling if the public resources devoted to enforcement are modest or diminishing and there is a need for jurisprudence to flesh out the general standards contained in the public law. ...Private enforcement can also be an effective and efficient means of holding public enforcers accountable for decisions not to prosecute.

European complainants do have such voice and influence within the public enforcement system. Oddly though they still only seem to have the right to be compensated, bereft of an effective private actions mechanism to back it up.

More can be done to facilitate the ‘engine-ignite’ process and private actor involvement in public cases. One devise can help to address the resource and coordination constraints on private parties, generally, which make it difficult for them to sustain effective pressure on competition authorities. This is the provision by some governments of super-complaints processes.

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8 See Kaplan at 113, 116.
In the UK, for example, the Secretary of State for Business, Innovation and Skills can designate certain bodies which represent consumers to make super-complaints to the OFT. Super-complaints can be made by such a body when it thinks that a feature, or combination of features, of a market is, or appears to be, significantly harming the interests of consumers.

Within 90 days of receiving the super-complaint, the OFT must consider the evidence submitted, undertake whatever work is necessary to establish the extent, if any, of the alleged problems, and then must publish a response stating what action, if any, it proposes to take. In some cases, it may be possible to resolve the concerns and propose remedies within the 90-day period but, in more complex cases, further work may be called for. This can be undertaken as part of a market study by the OFT, by referring the market to the Competition Commission for further investigation, or by any other action available to the OFT.

In the UK, super-complaints have been made with about a range of products including the supply of cash ISAs, care homes, beer in pubs, credit card interest rates and surcharges, doorstep selling, home credit, payment protection insurance and private dentistry. More often than not these resulted in some form of enforcement action or further referral of the sector to a full competition inquiry with remedies. The EU has adopted a similar procedure enabling consumer associations to request injunctive relief in consumer protection cases in Member State courts.  

Marathon question: how do ‘engine ignite’ mechanisms function in your jurisdiction? What more can be done to make use of them?

II. ‘Engine assist’

My second set of examples involves situations where the private or public ‘engines’ do more than pressure or provoke the other side to act, but actually help each other. The assistance can have varying degrees of directness. The most indirect form of help, but one which should not be forgotten, is the issuance of clear decisions and guidance on the law and of what constitutes an infringement. More direct assistance comes from authorities ensuring that their infringement decisions, on which a litigant bases its own claim, are of course clearly drafted, and evidentially-rich and analytically robust. Direct assistance involves governments filing amicus briefs in support of arguments made in private actions.

In many ways the amicus brief process is an important part of ensuring complementarity and clarity of the law itself. Many courts in the EU are required to

notify their respective competition authority of any private action that cites competition law provisions, and to provide rights of audience to authorities who wish to intervene.

There are also provisions requiring national courts and tribunals to have regard to decisions and guidance of their national competition authority; indeed this are increasing. For example, in the UK, the government has been keen to help ensure that consistency is maintained between the forthcoming Competition and Markets Authority and the Competition Appeals Tribunal by:

- Amending the CAT Rules to require it to notify the CMA when private actions cases are initiated;
- Amending the CAT Rules to empower the CMA to act as an intervener, where appropriate, in private actions cases;
- Ensuring that the CAT has the power to stay cases being investigated by a competition authority.

Many national authorities have some experience in submitting amicus briefs, though records and access to the briefs varies. Helpfully, the European Commission has made public accounts of its experiences in five cases so far. Two that are notable for having a direct impact on the private action are outlined below:

**BIDS and 101(3)**

The Commission submitted *amicus* observations to the Irish High Court in a case between the Irish Competition Authority and the Beef Industry Development Society Ltd (BIDS) regarding the latter’s rationalising of the beef sector through capacity-reducing restructuring agreements which ensured the withdrawal of firms from the market in return for compensation paid by BIDS and funded by the remaining rivals.

The purpose of the Commission’s observations was to clarify the application of Article 101(3) TFEU to crisis cartels in general. The Commission took the opportunity though to submit that agreements such as those at issue in BIDS amount in principle to a restriction of competition by object, for which it will be difficult to succeed with a defence under Article 101(3). Nevertheless, the Commission provided information about how three (of the four possible) 101 (3) conditions for exemption might apply to capacity-reducing restructuring agreements.

(i) The Commission noted that efficiencies resulting from such restructuring are either due to removal of inefficient capacity from the market or economic benefits through an increased capacity utilisation rate by the remaining players.
(ii) The Commission indicated that benefits for consumers must at least compensate for any negative impact caused by the restriction of competition.

(iii) The Commission held that the condition requiring that the agreements be indispensable to provide benefits is only fulfilled where market forces cannot remedy over-capacity problems.

In January 2011, BIDS withdrew its claim for exemption under Article 101(3).

**Tax deductibility of fines**

The Commission submitted amicus observations to the Belgian Constitutional Court in a case concerning whether or not fines imposed by the Commission can be wholly or partially deductible from taxes.

The Commission argued that any such tax deductibility endangers the objectives of the European Union and would be contrary to the principle of loyal cooperation as between authorities and courts as laid down in Article 4(3) TEU. Tax deductibility provides for a considerable advantage for an infringer, in that a part of the fine is “repaid” by the State. Tax deductibility would undermine the deterrent character of such a fine. In December 2012, the Belgian Court held that allowing tax deductibility for fines would affect the effectiveness and consistent application of the competition rules.

**More direct assistance**

Competition authorities can also act even more directly on behalf of private interests. Although rare, this can even amount to mandating private redress in its own public enforcement action. For example, a competition authority may extract commitments from a wrongdoer to compensate its victims. In November 2006 the OFT announced that it found that an agreement between 50 of the UK’s fee-paying independent schools to exchange detailed fee information infringed competition law. The decision also imposed penalties totalling just under £500,000 on the schools. The relatively low fine for each school reflected the exceptional circumstances of the case, including the schools’ charitable status and the fact that they all agreed to make payments totalling £3 million into a charitable trust to benefit the pupils who attended the schools during the relevant academic years. The OFT noted that this case
'demonstrates our willingness to consider innovative solutions in appropriate cases.'

A different engine-interaction is for governments to claim damages on behalf of victims. There are express procedures in France for this and in the United States. The drive train can operate in the other direction too, with some regimes allowing private litigants to claim damages on behalf of governments that have been harmed.

In the US, for example, Affirmative Civil Enforcement ("ACE") permits civil actions by private parties to recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, or environmental laws.

Many of these cases result from qui tam or whistleblower lawsuits under the False Claims Act. In qui tam actions, individuals or entities with inside information about fraudulent conduct file suit on behalf of the US. The ACE program then undertakes an investigation of the allegations. Whistleblowers can then receive a percentage of the government’s recovery. Nationally, ACE programs have recovered billions of dollars for the United States.

Of course, neither cycling nor performance-enhancing drugs are permitted on the Rome Antitrust Marathon course. Nevertheless it is noteworthy that a large private lawsuit in the US brought by a former teammate of Lance Armstrong against the cyclist has been joined by the US Department of Justice, seeking return of sponsorship money provided by the US Postal Service and treble damages.

Marathon question: are the more direct ‘engine-assist’ procedures identified above conceivable for competition violations? If so, which are the most appropriate? How would they work? What problems might they encounter? How could these be addressed?

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12 http://www.of.t.gov.uk/news-and-updates/press/2006/166-06#.UTYlj9a8Ag4
III. ‘Engine-unite’

My third example is closer to full integration, by which I mean a public authority acting not for a private claimant, but as one itself. Here we see not ignition, or assistance, but a truly unified hybrid drive train.

The most obvious example is the European Commission’s own action for recovery of damages from the ‘lifts’ cartel that it had already investigated and fined; the EU bureaucracy being a major purchaser of such services. This, in many ways, delightful case, has not been without its problems of course. Our third Antitrust Marathon in Boston focussed on rule of law issues, and as would be expected many such issues arose in this case. Most notably the Commission’s right to claim damages for an infringement it had itself identified was claimed to violate the European Charter of Fundamental Rights.

In April 2011, the Brussels Commercial Court in which the private claim was being heard - decided to refer two questions to the ECJ for a preliminary ruling, focussing on whether the defendants’ rights under the Charter to a ‘fair trial’ through access to a tribunal and ‘equality of arms’ between the parties were being infringed due to the Commission having investigated and decided the underlying public case. One particularly thorny issue was based on the fact that, under the Treaty, national courts can not call into question the validity of Commission decisions.

The ECJ ruled last November. It began by noting that it is settled case law that any person, including the EU, can claim compensation for the harm suffered where there is a causal link between that harm and a prohibited agreement or practice. However, the fundamental rights of the parties, as safeguarded by the Charter of Fundamental Rights, must be observed.

The principle of effective judicial protection in Article 47 of the Charter of comprises the right of access to a tribunal and the principle of equality of arms.

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15 As background: On 21 February 2007, the European Commission announced that it had imposed fines totalling over EUR990 million on four groups of companies (Otis, Kone, Schindler and Thyssenkrupp) for infringing Article 101(1) of the TFEU by operating cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands between 1995 and 2004. In June and July 2007, the cartel members brought actions for annulment before the General Court which appeals were largely dismissed in 2011. That November, the companies within those four groups all appealed to the European Court of Justice (ECJ) seeking to have the judgments of the General Court set aside. These appeals are all pending.

Separately, in June 2008, the European Commission (representing the European Union) brought proceedings before the Brussels Commercial Court against Otis, Kone, Schindler and Thyssenkrupp seeking just over EUR7 million in damages. The Commission argued that the EU had sustained financial loss in Belgium and Luxembourg as a result of the cartel in which the undertakings concerned had taken part. In particular, the EU had entered into a number of contracts for the installation, maintenance and renewal of elevators and escalators in various buildings of the European institutions with offices in both Belgium and Luxembourg, the price of which was allegedly higher than the market price as a consequence of the lifts and escalators cartel declared unlawful by the Commission.

16 Although this was being considered by the European courts due to the defendants’ appeal in the main public case.

17 ECJ press release 138/12 and Case C-199/11 - European Union (represented by the European Commission) v Otis NV and others, judgment of 6 November 2012
As regards the right of access to a tribunal, the ECJ confirmed that where national courts rule on agreements under Article 101 of the TFEU which are already the subject of a Commission decision, they indeed cannot take decisions running counter to the decision adopted by the Commission. The ECJ held that this rule also applies when national courts are hearing an action for damages for loss sustained as a result of a competition violation as prohibited by decision of the Commission.

However, the ECJ found that this does not mean that the parties do not have access to a tribunal. EU law provides for a system of judicial review of Commission competition decisions which affords all the safeguards required by the Charter – those appeals by the same defendants were indeed pending before the European courts already. The ECJ added that, although it is true that national courts are bound by the Commission's findings of anti-competitive conduct, the national courts alone are competent to assess whether there is loss and a direct causal link between that conduct and the loss sustained. For these reasons, the ECJ concluded that, in the context of this case, the Commission cannot be considered judge and party in its own cause.

As regards the principle of equality of arms, the ECJ noted that each party must be afforded a reasonable opportunity to present its case, which both sides do still have; and that there would only be inequality if the court had information which favoured one party to the detriment of the other.

In this case, the Brussels Court was not provided with any information other than that which was available in the Commission's public decision relating to the cartel and therefore the Commission is not in an advantageous situation.

As a result, the ECJ confirmed that the Charter does not prevent the Commission from claiming compensation for cartel damages before national courts.

Marathon question: what are your reactions to the engine-unite model? How sustainable is it? How does it contribute to the public and private engines and the general 'competition environment', including the usual stakeholders of competition policy?

This discussion paper has argued for greater exploration of three ever-closer unions of private actions and public enforcement. Of course we need to be live to situations where the drive-trains might clash with one another. One such example is the vexed question noted above about access by private parties to leniency documents.

18 Article 16(1) of Regulation 1/2003
Another relates to the fuel-mix. If one engine is powered by the equivalent of jet fuel, then it will largely overpower the other, with perhaps odd effects. We see this in the relative differences between the US and EU, the former driven by private actions, fuelled by generous costs orders, treble damages and joint and several liability, compared to the EU which lacks all those and more, but has a relatively well-funded administrative investigation model. Problems can arise though if the competition law standards are affected, either by becoming stricter, in response to over-ease of use by private litigants, or never get tested enough, through lack of challenge and thus remain relatively uninterpreted and vague.

In my view though when looking at private actions and public enforcement the areas of complementarity vastly outweigh those of conflict. These links are still under-explored and under-emphasised. The more we can link together the engines, the better. Thus I hope our discussion at the Rome Antitrust Marathon and future research will help provide a more efficient and more effective ‘enforcement and redress’ engine, which also contributes positively to the competition environment.