Welcome to this edition of the CCP newsletter, where we are celebrating our fifth birthday and renewed ESRC funding for 2009-2014. Our celebration included a visit from US Federal Trade Commissioner William Kovacic, who spent the day at the centre to deliver a lecture and hear about our current research projects.

This newsletter illustrates the range of recent CCP research. From a political science perspective, Heather Savigny presents some of the preliminary results of her empirical analysis of the media’s coverage of cartel prosecutions. Andreas Stephan continues the theme of cartels, discussing firm compliance programmes and their interaction with leniency policies in the US and EU. As Morten Hviid observes, the recession means consumers are increasingly seeking out good offers from firms and, in order to persuade consumers to purchase, firms are offering best price guarantees. Although this may seem to be good from a consumer perspective, the practice may reduce incentives on firms to compete vigorously. Also from a consumer perspective, John Ashton analyses the Competition Commission’s recent ban on the bundling of loans and payment protection insurance by banks. From his research, it appears many consumers do not fully appreciate the costs of the bundled insurance product and this would appear to lend weight to the Commission’s decision. Finally one of the centre’s PhD students, Sebastian Peyer, highlights some of his findings from his empirical study of competition litigation in Germany - the most complete and comprehensive dataset of its kind.

CCP celebrates two new faculty members, Dr Stephen Greasley, a Lecturer in the School of Political, Social and International Studies and Dr Subhasish Chowdhury, Lecturer in Economics. Oles Andriychuk also joined the Centre in September as a post doctoral fellow, following completion of his thesis at the European University Institute on the theory of dialectical antitrust and its application to sports broadcasting; and Leanne Denmark began her role as Communications Coordinator, bringing experience of media, research and human resources. I am grateful to Leanne for her work as editorial executive, and to Michael Harker who has taken over editorship of this newsletter. We also welcome several PhD students, including ESRC or University studentships: Tim Burnett (Economics), Henry Allen (Political Science), and Sven Gallasch and Ali Massadeh (Law); and we are delighted to be supporting two masters’ students following the LLM in International Competition Law and Policy. We will be advertising at least two PhD studentships next year, and welcome enquiries. This all lays the basis for continuing the unique interdisciplinary research in competition and regulation policy at CCP for the next five years and beyond. Please visit our website at www.uea.ac.uk/ccp to follow our progress and events in the months ahead, and get in touch with any comments or questions.
Washington University and one of the most powerful actors in US antitrust policy as Chairman of the FTC in 2008-9, spoke to a lively audience. He also attended research presentations on six of the Centre’s current projects and met with leading researchers during his visit on 12th October.

Professor Kovacic said: “In only five years, CCP has established itself as one of the world’s foremost institutions for research and teaching in competition policy. Among its many strengths the Centre’s faculty embodies a genuine integration of the disciplines of economics, law and political science and it is no accident that the Centre has attracted superb graduate students from around the world”.

Centre director Catherine Waddams added: “It was a great honour to welcome back Bill as one of the leading authorities in competition policy; he has provided tremendous support for our work. CCP is now well known on the international stage and this is the crucial building block for the development of critical young researchers with high aspirations to inform and implement tomorrow’s policies”.

CCP was awarded its renewed funding from the Economic and Social Research Council at the beginning of September, to continue its work for at least another five years. The Centre will be exploring five broad themes; consumers’ role in making market’s work, how institutions that support competition policy develop, the regulation of market power, the appropriate approach to mergers, and agreements between firms and tacit collusion.

“The Centre’s contribution to research and instruction have significance well beyond the boundaries of the UK and European Union”, Professor Kovacic added. “It’s work is helping jurisdictions worldwide build the human capital and base of knowledge that support the development of a competition system and those of us who work in this field are much the better for it”.

Scandal: Cartels, crime and the politics of getting away with it in the media

Heather Savigny, Senior Lecturer in Political Science.

The Conservative MP Peter Viggers claimed £1600 for a duck-house and former MP Ian Gibson claimed £80,000 in mortgage payments for his daughter’s flat. These acts are among several which have generated pages of newspaper coverage and moral outrage, bringing our entire political system into question. Yet the amounts involved in these scandals pale into insignificance against the extra £270 million recently paid in higher prices by shoppers due to the fixing of higher prices for dairy products. While the MPs’ expenses scandal has attracted prolonged media attention on newspaper front pages and has generated moral outrage in the media, the same cannot be said in respect of the coverage of the investigation into price fixing by Tesco and Morrisons. The behaviour of MPs in wrongly claiming expenses has been presented as illegal, shocking and against the public interest. Firms colluding either as cartels or in cases of price fixing are also engaging in illegal behaviour which is against public interest. Yet far from being publicly discussed as illegal and accompanied by moral outrage, these ‘white collar’ crimes are presented much less vehemently than the behaviour of our elected representatives, or those who commit ‘heinous blue collar’ crimes, like benefit fraud.

As we see MPs deselected as a consequence of the expenses scandal, it becomes clear that the media play a powerful role not only in shaping public life, but also in defining the parameters of what is politically legitimate.

So why is it that this kind of moral outrage is much less likely to follow in cases of cartels and collusion? My research aims to address this question and explore the ways in which the media frames responses to cartel and price fixing prosecutions. This is underpinned by a series of questions. In whose interests is this coverage constructed? Does this benefit businesses at the expense of the effective implementation of legislation? Does this subsequently impact upon the ways in which markets may operate? For example, if businesses perceive they will get a reasonably ‘easy ride’ in the media and this in turn is unlikely to prevent customers purchasing from them, might this incentivise firms to collude or fix prices given that the benefits of so doing may exceed the costs?

The empirical part of my research is a content and discourse analysis of cartel and price fixing prosecutions, which aims to establish the nature of press coverage since the criminalisation of this activity. Content analysis is used to establish what the nature of the coverage is. From here, discourse analysis is employed to reflect upon whose interests are represented, and the implications this may have for consumers. If the purpose of competition policy is to promote and enhance competition and make markets work for consumers, how well is consumer welfare being served in the public arena? Preliminary findings suggest that despite the potential for consumer interest being jeopardised, and despite the neoliberal emphasis upon consumer empowerment as a consequence of markets, the default position within the media is to privilege the role of business, which in turn implies that consumers are empowered only to the extent that business (and the media - notably also a business) wants them to be.
Catch me if you can: why compliance programmes are unlikely to protect firms from hefty cartel fines

Andreas Stephan, Lecturer in Law

Cartel practices including price fixing, market sharing, bid rigging and output restriction need involve little more than an exchange of emails or the odd telephone call, motivated by the promise of higher profits through less competition. Cartels are considered the most serious breaches of competition law and are increasingly attracting fines in Europe close to the maximum of 10 per cent of an undertaking’s worldwide turnover in all its operations. It is thought that the threat of large corporate fines is a strong incentive for firms to ‘keep their ship in order’ by maintaining effective internal compliance programmes. The danger to firms is intensified by the use of leniency programmes by competition authorities, which provide immunity to the first firm to self-report an infringement, leaving the other companies involved exposed to steep pecuniary penalties. For example in the Passenger Fuel Surcharges case (2007), Virgin received immunity from fines in the UK and the US (this extended to immunity from criminal prosecution for its employees). By contrast, British Airways were fined £121 million by the Office of Fair Trading (OFT), $300 million by the US Department of Justice, and four of its employees are currently pending trial under the UK’s criminal cartel offence.

We know little about the proliferation of competition law compliance programmes in Europe. However, a publication on compliance by the American Bar Association (ABA) provides a snapshot of antitrust compliance programmes in the US. Competition law compliance programmes ostensibly protect firms by reducing the scope for future infringements through training, and uncovering potential current infringements through periodic auditing of company activities. It is thought that the support of senior management is fundamental to a successful compliance programme. Compliance programmes may be ineffective at protecting firms from hefty cartel fines. There is little doubt that the employees responsible for hardcore cartels generally know what they are doing is illegal, but choose to do it anyway in pursuit of collusive profits. This is epitomised by the lysine cartel meetings filmed by the FBI in the 1990s in which executives mocked competition officials and their customers: “our customers are our enemies”.

First, cartelists go to great lengths to disguise their collusive activities and avoid detection by competition authorities and compliance audits. These include: staggered price announcements or bids to give the impression of genuine competition; communicating through private email accounts and unregistered mobile phones using encrypted messages; avoiding any contact through secretaries or other administrative staff; and avoiding the use of documents at meetings or destroying them immediately afterwards. These efforts have been so effective, that in a number of cases the European Commission could not be entirely sure that the infringement had ceased when delivering its decision.

Secondly, most cartels are coordinated by individuals holding senior managerial positions, making it difficult for firms to deal with such breaches of competition laws internally. Table 1 provides an approximate breakdown of the positions held by the individuals involved in 40 international cartels. This includes both the individuals directly involved in the cartels’ operation and those executives who allowed collusive practices to occur.

<table>
<thead>
<tr>
<th>Table 1: The executives responsible for collusion</th>
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<tbody>
<tr>
<td>Marketing/Sales</td>
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<td>0 5 10 15 20</td>
</tr>
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</table>

Thirdly, compliance efforts provide no mitigation of fines in the US and the EU, even where an effective compliance programme is in place. Since 2004, the United States Sentencing Guidelines have excluded mitigation for compliance efforts, where ‘high-level personnel’ (those with price setting authority) participated in the infringement. This has been strongly criticised by the ABA for discouraging firms from strengthening compliance programmes. In Europe, the Commission has the discretion to award mitigation, but so far has chosen not to. In the UK, the OFT did provide a 10 per cent discount for compliance efforts in two early cases under Competition Act 1998. However, more recent guidance on compliance appears to indicate a shift in line with fining practice in the US and on the Community level.

In jurisdictions where fines are the only sanction imposed on cartels, compliance programmes may simply highlight how the corporation as a whole bears the risk of breaches of competition law by individual employees. In EU Competition Law, for example, it is not unusual for fines to be imposed ten years or more after the cartel was instigated. If compliance programmes are to
communicate a credible threat to individual cartelists, a combination of imprisonment, and immunity to the first whistle-blower, will be essential.

The increasing number of jurisdictions adopting criminal penalties should strengthen the effectiveness of compliance programmes, provided those penalties are regularly invoked in cartel cases. Moreover, none of the factors outlined in this article should render competition law compliance programmes redundant. They serve an important educational role, helping avert less serious breaches of competition law by employees, and those committed out of ignorance. They also harden attitudes towards cartel practices in the long run by creating and strengthening a culture of compliance within the business community. The decision by British Airways to promote one of the four employees pending trial for price fixing in the UK, for example, may suggest that cartel offences are not currently taken as seriously as other forms of white collar crime.\footnote{1 Arbatskaya, M., M. Hviid and G. Shaffer, 2004, On the Incidence and Variety of Low-Price Promises, Promises: A Case Study. Journal of Law and Economics XLVII, 307-332.}

Even with these restrictions, price promises may appear wholly beneficial to consumers and this is true, if the main concern is relative prices over price level. However, extensive literature has shown how price promises can deliver higher prices by reducing incentives which firms have to compete.

Price promises that relate to rivals’ prices (best price guarantees, price matching or beating guarantees) provide an automatic and immediate response to price cutting by any rival. This response negates any business stealing effect of the rival’s behaviour. A price promise therefore reduces the incentive of others to lower their price. Price promises that relate to a firm’s own future prices punishes any future price reductions. A single firm adopting a guarantee covering both own and rivals’ prices could then remove any incentive on anyone in the industry to lower prices today or tomorrow! This is so even if the current prices are as high as the monopoly level. Worryingly, even if such guarantees could support exploitative prices, such single firm adoption is unlikely to be caught by current competition law.\footnote{2 Arbatskaya, M., M. Hviid and G. Shaffer, 2004, On the Incidence and Variety of Low-Price Promises, Promises: A Case Study. Journal of Law and Economics XLVII, 307-332.}

Promises, Promises!

Morten Hviid, Professor of Competition Law

The recession means more people are worrying about missing good offers. Maybe there is a better price elsewhere or maybe the firm you are considering using today will drop its price tomorrow? Searching takes time and for those of us who are not natural bargain hunters, this is not an enjoyable way to spend it. Having spent all that time searching, it would be pretty annoying if you missed a better deal.

The price guarantee can solve these anxieties. What if a firm, concerned that customers are searching rather than buying, could offer peace of mind by guaranteeing that there is no better deal available? And if one did emerge, the promise would offer some sort of compensation, maybe a straight refund of the difference or even an extra 50% of that price difference?

Such a promise could be more or less generous depending on who (e.g. local firms, all firms or on-line deals) and what (all products, selected products, not special offers) it covered. It could be vague (“never knowingly undersold”) or specific (e.g. related to a product or rival). Firms face a trade-off here. Too many restrictions and the costs of making use of the guarantee may mean that it is not worthwhile or not believed by the consumer. Too few and rivals might (deliberately or not) choose strategies which may make the guarantee back-fire. For example, a rival could slash its price below their avoidable costs, hoping the customers would go to the firm with the generous price promise and demand an even lower (and to that firm likely loss making) price. No firm would then offer a price promise without choosing appropriate restrictions, such as limiting the promise to particular firms [e.g. local, within a specific radius, non-web based], certain products [e.g. similar, available], or a particular period [e.g. today, within a week, a month]. Work undertaken with Maria Arbatskaya and Greg Shaffer\footnote{Morten Hviid and Greg Shaffer, 2009, “Matching Own Prices, Rivals’ Prices, or Both?”, Forthcoming in Journal of Industrial Economics (see also CCP Working Paper 08-26).} demonstrates how the restrictions are chosen carefully to reduce the potential downsides.

CCP Annual conference: Vertical Restraints

CCP 6th annual conference
17-18th June 2010

Vertical Restraints remain an active area both in terms of academic research and policy relevance, with recent advances in theoretical and empirical understanding, where there is close interaction between economists and lawyers. The conference looks broadly at recent advances in theoretical and empirical understanding, where there is close interaction between economists and lawyers. More information regarding this event will be on our website, www.uea.ac.uk/ccp early next year. Alternatively contact Stu White, Centre Manager, on + 44 (0) 1603 591624 or s.white2@uea.ac.uk
New Research Casts light on Payments Protection Insurance Judgement

John K Ashton, Senior Lecturer in Regulation, Norwich Business School and Robert Hudson, Newcastle University Business School

On 7 September 2009, Barclays bank appealed one of the remedies forwarded by the Competition Commission from the Payments Protection Insurance investigation published in January. Specifically, Barclays is challenging the restriction on the point of sale ban, prohibiting the sale of payment protection insurance with loan or credit products at the time of sale and up to seven days afterwards.1

The magnitude of this Competition Commission remedy was substantial and far reaching. First, payments protection insurance which is used to cover repayments on personal credit which may arise from unemployment and/or sickness is very large. The Competition Commission reported that gross written premiums for £3.8bn were paid for payment protection insurance in 2007. Indeed, banks internationally are increasingly reliant on the fee income provided by products such as these, as profits from traditional banking functions have declined in the last decade.

Secondly, the wider movement towards both producing and selling banking and insurance products jointly was a major aim of financial de-regulation movement of the 1980s and 1990s. This allowed 'bancassurance' and universal banking models of financial services production and distribution to arise in the European Union and latterly in the United States. By banning the joint distribution of loan and insurance products, the Competition Commission’s decision provides a rare retreat from the movement towards the joint distribution of financial services. This may also reflect the more critical assessments of financial deregulation which have arisen in recent years.

Acknowledging the major implications of this Competition Commission investigation of payment protection insurance and the subsequent appeal, it is important to question whether the point of sale ban justified. Recent research from CCP casts light on this issue by examining two related research questions.

• Is payment protection insurance used to cross-subsidise lending?

• Have all banks acted to the detriment of customers or have the actions of a few banks lead to a prohibition across this entire sector?

These questions were investigated using both theoretical and empirical approaches. Initially a theoretical model of the joint provision of credit insurance and unsecured lending was developed. The principles underlying the model included:

• Cross subsides may flow between the pricing of a primary good, here an unsecured personal loan, and an add-on good, the payment protection insurance.
• Customers with weaker decision making abilities may be exploited by the joint pricing of loans and payment protection insurance. This process can occur if they consider only the price of the loan when purchasing a loan and insurance product. More informed customers will make purchase decisions based on all cost information.

The model provided three predictions. First, the joint pricing of unsecured loans and payments protection insurance by profit maximising banks will occur and leads to a cross subsidy from less to more informed consumers. Second, it is the joint sale of credit with insurance, rather than variation in the customers’ decision making abilities that drives this result. Therefore an emphasis on improving financial education whilst always welcome will not amend this situation. Lastly, in the case of banks which do not profit maximise, such as mutually owned building societies, cross subsidies between these payment protection insurance and credit do not necessarily arise.

The empirical examination tested these predictions using monthly UK data on the personal unsecured lending market. The data included the costs of 211 different loan products with and without payment protection insurance offered by 85 different suppliers. The unsecured personal loans were of £5000 to be repaid over three years.

Employing parametric and non-parametric tests, it is reported that the cross-subsidy of unsecured personal loans from payments protection insurance by profit maximising banks will occur and leads to a cross subsidy from less to more informed consumers. Second, it is the joint sale of credit with insurance, rather than variation in the customers' decision making abilities that drives this result. Therefore an emphasis on improving financial education whilst always welcome will not amend this situation. Lastly, in the case of banks which do not profit maximise, such as mutually owned building societies, cross subsidies between these payment protection insurance and credit do not necessarily arise.

A further and striking finding from this empirical research was the degree of variation in the relative costs of loans and payment protection insurance. For
personal unsecured £5000 loans, the average difference between the highest and lowest cost was £190 or around 3 per cent of the relevant three year cost. The average difference between the highest and lowest associated payment protection insurance costs was £142 or 21 per cent of the total three year cost. This indicates a far higher level of dispersion for payment protection insurance costs relative to the variation in the unsecured personal loan costs. This is consistent with a far more competitive loan market relative to the payment protection insurance market.

Table 1: Average Total costs of Unsecured Personal Loans and Payment Protection Insurance for £5000 borrowed and to be repaid over three years.

<table>
<thead>
<tr>
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<th>Average Total loan cost (£)</th>
<th>Average Total insurance cost (£)</th>
<th>Insurance cost of total cost (%)</th>
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</thead>
<tbody>
<tr>
<td>Coventry BS</td>
<td>5697</td>
<td>511</td>
<td>8.2</td>
</tr>
<tr>
<td>Saffron Walden BS</td>
<td>5502</td>
<td>551</td>
<td>9.1</td>
</tr>
<tr>
<td>Skipton Building Society</td>
<td>5502</td>
<td>551</td>
<td>9.1</td>
</tr>
<tr>
<td>Bank of Ireland</td>
<td>5756</td>
<td>592</td>
<td>9.3</td>
</tr>
<tr>
<td>American Express</td>
<td>5673</td>
<td>590</td>
<td>9.4</td>
</tr>
<tr>
<td>Newcastle BS</td>
<td>5671</td>
<td>586</td>
<td>9.4</td>
</tr>
<tr>
<td>Nationwide BS</td>
<td>5710</td>
<td>597</td>
<td>9.5</td>
</tr>
<tr>
<td>CVC Capital Partners</td>
<td>5737</td>
<td>1022</td>
<td>15.1</td>
</tr>
<tr>
<td>HBOS</td>
<td>5887</td>
<td>1067</td>
<td>15.3</td>
</tr>
<tr>
<td>Discover</td>
<td>5671</td>
<td>1043</td>
<td>15.5</td>
</tr>
<tr>
<td>General Electric</td>
<td>5554</td>
<td>1033</td>
<td>15.7</td>
</tr>
<tr>
<td>British Gas</td>
<td>5548</td>
<td>1044</td>
<td>15.8</td>
</tr>
<tr>
<td>Bank of Scotland</td>
<td>5893</td>
<td>1126</td>
<td>16.0</td>
</tr>
<tr>
<td>The Funding Corporation</td>
<td>5685</td>
<td>1090</td>
<td>16.1</td>
</tr>
<tr>
<td>Britannia</td>
<td>5980</td>
<td>1154</td>
<td>16.2</td>
</tr>
<tr>
<td>Capital One Bank</td>
<td>6361</td>
<td>1291</td>
<td>16.9</td>
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In summary, this research lends support to the Competition Commission’s ban on the joint selling of loans with payment protection insurance. In particular, it shows that profit maximising banks cross-subsidise unsecured loans using overpriced payment protection insurance. This can have a negative impact on consumers who obtain loans with payment protection insurance product bundles, yet consider only the loan cost when making this decision. It is also clear that not all firms have priced loans and payment protection insurance in a similar manner.

As with all academic work, reservations do exist. Initially within all assessments of payment protection insurance premiums, it is important to remember the premium will also reflect expected payout on the policy. A firm with a more risky clientele, more likely to default on their repayments, is justified in charging higher premiums. Similarly all unemployment insurance is influenced by economic cycles and will have lower levels of payout in periods of economic growth. Lastly, it is important to remember that despite widespread public, regulatory and media criticism, payment protection insurance can still be a useful insurance product. Protecting people from the adverse financial consequences of unexpected events is, and will remain important, for both individuals and society. To ensure this may be achieved, through other means if necessary, should remain an important policy consideration.

Similar level of dispersion are also present when considering individual firms providing joint unsecured personal loans and payment protection insurance. Within Table 1, a truncated sample of firms providing these joint products is reported. The table considers the average costs for £5000 unsecured personal loans repaid over three years and associated payment protection insurance. Further the costs of payment protection insurance as a percentage of total loan and insurance costs are also reported. It is clear that substantial variation exists between firms in the pricing of these loans and deposits and clearly not all firms behave uniformly in this market.

Private enforcement does exist - new empirical evidence from Germany

Sebastian Peyer, PhD student

Discussing ways to improve private enforcement of the antitrust laws in Europe is en vogue. In contrast to the US, where the very early laws against monopolies already permitted victims to pursue their rights privately, the focus in Europe has long been on public agencies enforcing the antitrust prohibitions. Over the last decade, policy interest in Europe has turned towards private enforcement of the competition laws.
Within just a few years civil claims have mostly been accepted as an additional enforcement mode on EC level and in the Member States. If properly devised, private antitrust actions have several advantages. Private enforcement utilises the superior knowledge of market participants to detect and convict culprits. It can add to the scarce resources of the public enforcer if violators are condemned in court. Minor cases that are not taken up by the competition agency can be pursued privately. Thus, private antitrust enhances the deterrence effect of competition law enforcement and, in the case of damages actions, helps the victim to recover losses. An additional, although hardly measurable, effect is the increasing awareness of competition law.

The late awakening of policy makers in Europe has been followed by a good deal of activity to call up private enforcement from its presumed state of hibernation. Those efforts culminated in the publication of the European Commission’s Green Paper of 2005 and White Paper of 2008 analysing probable obstacles to private antitrust damages actions for the breach of EC competition law and viable policy options to overcome those impediments. The Papers were underpinned by two studies which, although not primarily aimed at empirical research, attempted to shed some light on the state of private antitrust enforcement in the Member States. Despite these time-consuming and costly efforts little is known about private antitrust litigation in Europe. Nevertheless, it is commonly characterised as being underdeveloped. Due to a lack of data in Europe the suggestions in the Green and White Paper often refer to the US experience - an approach that has its pitfalls because of the unique procedural setup in the US. In general, the debate and the well-intended policy proposals suffer from a lack of real-world data on private enforcement of both EC and national antitrust rules. Information from civil law jurisdictions is especially in short supply. The two major studies on European private enforcement that also undertook, inter alia, empirical research did not find much evidence for EC damages litigation let alone successful cases. Furthermore, these reports did not attempt to gather data about private enforcement of national competition laws. A new empirical study into private antitrust enforcement in Germany offers some insights into the magnitude and nature of private competition law actions from 2005 to 2007. Initially based on decisions German civil court notified to the German Federal Cartel Office, I subsequently revised and extended the database to collect all German private antitrust cases. Among other things, the study contains information about the court, parties, industry in which the litigation took place, remedies and their outcome, and alleged illegal behaviour. The data collection focused on core competition law claims; that are actions for the violation of Art 81 and 82 and the German equivalents.

In setting up the database several obstacles had to be overcome, mostly due to missing or incomplete information. I have uncovered most litigated German cases in the observation period, however, the real number is presumably higher due to unreported cases, non-existing information about settlements, and potential reporting backlogs. A considerable number of cases were excluded since I could not clearly establish the nature of the competition law claim. Despite those precautions the study revealed a surprisingly high level of private litigation for the infringement of competition law: between 2005 and 2007, 439 private antitrust cases were concluded before German courts. Compared with public enforcement activity those 439 antitrust cases represent a significant share in the overall enforcement scheme. Counting completed investigations of the Federal Cartel Office and civil actions, private claims account for more than 40 per cent of all competition law cases. However, in contrast to the litigated cases, which almost exclusively ended with a court decision, most investigations of the Federal Cartel Office were dropped or settled. The Office concluded only 22 inquiries with a fine or prohibition during the observation period.

Figure 1: Private and public antitrust cases in Germany from 2005 to 2007

Figure 1 shows the ratio and development of completed public investigations and private claims distributed over the three years of the study. We observe a drop of both public and private cases. The reasons for this decline are obscure. It is somewhat counterintuitive because the German legislator introduced measures to strengthen antitrust (damages)
actions in 2005. Maybe those measures, intended to facilitate private claims, prompted defendants to settle earlier or the development of private cases is, to some extent, dependent on the decreasing number of public investigations.

Private antitrust enforcement is often viewed merely as actions for damages. The White Paper proposals, for instance, focus exclusively on compensatory actions. In contrast, the data from Germany shows that private antitrust cases are far more spread out as illustrated in Figure 2. Plaintiffs pursue competition law violations using the full range of court imposed civil law remedies such as restitution claims, injunctions, interim relief, and void requests. Damages are pursued in 11.4 per cent of all primarily sought remedies. Claimants asked more often for injunctions in which the defendant was requested to stop a refusal to deal and continue or conclude a contract. Interim remedies, which normally require the defendant to do something or refrain from certain behaviour without granting a decision on the merits of the case, were also somewhat more popular than compensatory claims. In a lot of cases parties requested the judge to declare a contract void. Most of those claims were brought forward by the initial defendant; that means that the alleged violation of antitrust was used as a defence (counterclaim) against, for instance, payment claims. The variety of applied remedies poses the question whether policy makers are right to focus on damages actions. We could interpret the results either way. Yes, it is right to focus on damages actions because there are not that many. No, it is wrong because plaintiffs prefer other, maybe less costly, remedies. In any case, before implementing measure to solely strengthen private damages actions those issues need to be addressed.

Figure 2: Primarily sought remedies in antitrust litigation in Germany from 2005 to 2007

The current discussion about private enforcement of antitrust laws focuses on the application of EC antitrust rules. In Germany, the vast majority of claims are based on the infringement of national competition law. About three quarters of the cases primarily cited prohibitions of the Act Against Restraints of Competition. Most German antitrust rules resemble EC competition law. The Act Against Restraints of Competition provides prohibitions of vertical and horizontal constraints as well as abuse of dominance similar to Art 81 and 82 of the Treaty. However, in addition to that, German law also prohibits the abuse of an economically strong position waiving the dominance pre-requisite in certain circumstances. In that respect national provisions are broader than EC law. Whether or not this specific German characteristic prompts potential victims to sue for the breach of German rather than EC law cannot be said on the basis of the available data. It raises the question, though, whether we need more European law to be applied or, assuming that the German equivalents are sufficiently similar, competition law is enforced in equal measures through national provisions. Some preliminary conclusions may be drawn from the data. First, we know little about antitrust litigation in the Member States. Before devising and amending national laws, we should scrutinise the nature of private enforcement of the competition laws. Second, the assumption that private enforcement is underdeveloped does not hold true for Germany. Admittedly, we observe fewer applications of the EC antitrust rules and not that many damage claims as, for instance, in the US. However, the question is whether we need more enforcement of EC rules to effectively preserve competition and welfare if the same can be achieved with private enforcement of similar national competition law rules. Third, it is also important to ask why claimants do not ask for damages more often. More empirical work is definitely needed to understand the true nature of private antitrust enforcement in general, and in civil law jurisdictions in particular.

4 The European courts do not have jurisdiction over private legal actions for the breach of Art 81 and 82 or national competition law. Those proceedings takes place before the courts of the Member States.
5 It may also balance for potential double-counting issues.
6 Without decisions of the European Commission and the competition authorities of the Federal States.