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# SOME ELEMENTS TO ENHANCE DAMAGES ACTIONS FOR BREACH OF THE COMPETITION RULES IN ARTICLES 81 AND 82 EC

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> "26. The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.
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> 27. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community". ECJ in *Courage*[2].

## 1. Introduction

It took almost 50 years from the creation of the first Community, the European Coal and Steel Community, and 43 years from the creation of the European Economic Community (EEC),

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[2] C-453/99 Courage v. Crehan 2001 ECR I – 6297 CJ

until the European Court of Justice on 20 September 2001 finally confirmed what many scholars, practitioners and not least the European Commission had, for many years believed, i.e. that Community law provides a legal basis for actions for damages brought under Articles 81 and 82 EC. As to the reasons why this issue had not earlier been raised before the ECJ, one explanation is certainly, in relation to the US, the considerably less litigious tradition in Europe. Others may be a strong tradition in several Member States to favour the secret and often more expedient proceedings of arbitration or the inclination in other States to prefer "settlement on the threshold of the court room" rather than risk the creation of new case law. It should, however, be recalled that in 1994 Advocate-General Van Gerven in his very forsighted opinion in *Banks*[3] concerning the corresponding Articles 65 and 66 ECSC had clearly presented the arguments in favour of such a legal basis for damage action in Community law. The *Courage* judgment is one amongst the four landmark judgments regarding the interpretation of Articles 81 and 82 EC that the ECJ delivered during the years when the Modernisation Reform regarding the Enforcement of Articles 81 and 82 was in progress.[4] All four judgments were delivered by the full Court as preliminary rulings where National courts had referred questions to the ECJ under Article 234 EC.

Regulation 1/2003[5], through which the Modernisation Reform was brought about, contains a recital (7) which reads: "National courts have an essential role to play in applying the Community competition rules. When deciding disputes between private individuals, they

[3] C-128/99 Banks v. British Coal, 1994 ECR I 1209 CJ

[4] The other three are C-126/97 Eco Swiss China Times v. Benetton 1999 ECR I – 3055 CJ, C-344/98 Masterfoods v. HB Ice Cream 2000 ECR I 11369 CJ, and C-198/01 Consortio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato 2003 ECR I 8055, CJ.

[5] Council Regulation (EC) 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJL1, 4 Jan 2003.

protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full".

As recalled in this recital, private actions before National courts constitute a necessary complement to the public enforcement by the Commission and National Competition Authorities (NCAs) of EC Competition law. Neither can replace the other, but must continue to support the other. In this way the overall objective of achieving an effective and uniform application of Articles 81 and 82 EC in order "to establish[ing] a system which ensures that competition in the common market is not distorted"[6] can be met.

In its Work Programme for 2005, the Commission announced its intention, by the end of the year, to adopt a Green Paper[7] on Damages Actions for Breach of the Community Competition Rules as laid down in Articles 81 and 82 EC[8]. In preparation for such a Green Paper the Commission in December 2003 commissioned a study regarding the conditions of claims for damages in case of infringement of EC competition rules in national courts. The study, generally referred to as the "Ashurst study", after the law firm that drafted it, was published in September 2004 on the website of DG Comp[9].

[6] Cf. Recital (1) of Reg. 1/2003 and Article 3(g) EC..

[7] In Commission terminology a Green Paper is a discussion paper which the Commission, normally at an early step in a legislative procedure, produces in order to get reactions and comments on the analysis of a particular issue with options for action that might be suggested later on.

[8] COM(2005)15 of 26 January 2005.

[9] http://europa.eu.int/domm/competition/antitrust/others/private-enforcement/index-en.html.

The purpose of this paper is neither to give any preview of what an eventual Green Paper will contain, nor to discuss the findings of the Ashurst study. The intention is rather independently thereof to try to highlight and discuss a few of the most essential elements for obtaining both a more efficient remedy in terms of damage actions in EU and a more level playing field. At the same time it should already here be stated that the purpose by no means should be in Europe to create anything similar to what some times is referred to as the "excessive litigation" found in US.

Underlying the analysis in the following is also the fact that antitrust injuries present some characteristics, which distinguish them from traditional types of injuries to persons or goods, which are dealt with under the general principles of the laws of torts. First of all, while there are many Articles of the EC Treaty, which produce direct effect, Articles 81 and 82 do not only give rights to individuals vis-à-vis public authorities but they also provide rights that are enforceable between private parties[10]. Article 81(2) further expressly provides that an agreement that violates Article 81 is null and void. Secondly, in the field of antitrust the tort feasor commits the infringement having a clear financial gain in mind. His objective is more to make money and maximise his profit and not necessarily the injury itself. Furthermore, the most serious damage from an antitrust infringement is not necessarily the one suffered by the injured party or parties, not even in the case of financial mass losses, but the general damage to competition, i.e. the loss to consumer welfare.

Finally, as the ECJ also held in *Courage*[11], it is clear that actions for damages will have a deterrent effect. Taking into account the many complexities in this field, not least the need to have an analysis of the market context, successfully to bring such a case, it is, however,

[10] Case 127/73 BRT and SABAM 1974 ECR 51, paragraph 16, CJ.
[11] C-453/99 Courage v. Creham, see above.

necessary further to facilitate and encourage such actions. This requires, that an efficient order is provided which through effective procedures also can see that such a deterrent effect becomes a reality.

## 2. The issues addressed in this paper

### 2.1. General

While certainly it is true that in Europe private enforcement through actions for damages for breach of Articles 81 and 82, may seem very modest in comparison to the US, it may be recalled that also in the US it took more than 60 years from the adoption of the Sherman Act in 1890 until the number of private actions started to take off. Thus during the first 50 years there were only 175 private actions, of which only 13 were recorded as successful. However, during 1996 to 2000 the number of actions averaged 674 per year with 858 filed in 2000 alone[12]. It seems further that treble damages suits did not get started until after the Supreme Court in the *Bigelow* case[13] had formulated the rules for the proof of the damages.

Seen in this perspective, it is no doubt important to examine closer the situation in Europe. As already mentioned, the importance of the ECJ judgment in *Courage*[14] cannot be sufficiently underlined. Thereby, final clarification was provided regarding the legal basis in Community law for damages for breach of Articles 81 and 82. Nevertheless, a number of other matters also need urgent clarification in order to further facilitate such actions.

[12] See Clifford A. Jones: Private Competition Law Enforcement in Europe: A growth market, in Carl Baudenbacher (ed.) 11th St. Gallen Internationales Kartellrechtforum 2004, Basel 2005, p. 115

[13] Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946)

It is clear, not least from the abovementioned Ashurst study, that what the authors of the study refer to as an "underdeveloped European situation" with regard to the possibilities for a claimant who has suffered injury due to an illegal agreement or practice under Articles 81 and 82 is due to a great number of obstacles of various sorts and that a fully efficient system for successfully bringing such claims would require many kinds of actions. As already mentioned the purpose of this paper is only to look a bit closer at some of the key issues with a view to seek operational solutions from an enforcement point of view. With regard to certain of these issues Community law as developed in the ECJ case law would seem to clarify the situation, while with regard to others there exist already in one or more Member States solutions that also would seem to respond to that requirement. One important set of issues not dealt with here relates to access to evidence, where in general the institute of discovery is mostly lacking in Europe.

Both in selecting the issues to be addressed and in looking for operational solutions the particular character and role, as frequently underlined by the ECJ[15], of Articles 81 and 82, which constitute fundamental provisions that are essential for the accomplishment of the tasks entrusted to the Community and, in particular for the functioning of the internal market has to be kept in mind. The issues addressed in this paper are the questions of (a) whether for a right to damages fault should be required or not, (b) the passing on defence, (c) the indirect purchaser and (d) collective actions for consumers.

[14] see above

[15] E.g. see the cases *ECO Swiss*, *Masterfoods*, *Courage*, referred to above.

2.2. Fault requirement

One of the issues highlighted in the Ashurst study and frequently confusing the discussion on the question of right to damages under EC law for injury caused by violation of the EC antitrust rules is the relationship between competition law and general rules of liability under national law. While today about half of the 25 Member States have specific rules on damages for antitrust infringements[16], in the rest the right to damages will have to be assessed under the general rules of liability. Even the specific rules that exist tend to fall back on what is traditionally required under the national law on torts[17]. This may lead to situations where the requirements under national law are stricter than what would follow from an application of the case law of the ECJ. One example of this concerns the conditions for liability and more particularly whether fault, intentional or negligent, should be required.

An infringement of Treaty provisions, such as Articles 81 and 82, which through their prohibitions impose a duty on individuals or undertakings, constitutes unlawful conduct and thus gives rise to liability. As the ECJ further specifies in *Courage*, with a reference to *BRT and SABAM*[18], (para 16) these provisions do not only confer rights on individuals but on "any individual". Advocate General Van Gerven concluded in *Banks*[19] that

> "there is no question of applying any criterion that is more favourable to those who engage in such conduct, such as that applied by the Court in Article 215 cases with a

[16] There has been a rapid development, since the first such provisions were introduced in the Swedish 1993 Competition Act.

[17] One example is 33§ of the Swedish Competition Act, where intent or negligence is required for liability.

[18] Case 127/73 BRT and SABAM 1974 ECR 51 CJ.

[19] Case C-128/92, Banks v. British Coal Corporation 1994 ECJ I 1209, (paragraph 53 and footnote 152) CJ.

> view to appraising the exercise by the authorities of a broad discretionary power, namely that a 'sufficiently serious breach of a superior rule of law for the protection of the individual has occurred' -- the relevant rules of competition impose on undertakings precise, directly effective obligations which are reflected in rights conferred on individuals. --- Once a breach of such a provision, viewed in objective terms, is established, an action for damages can be brought on the basis of Community law without there being any possibility of the defendant relying upon the grounds of exemption contemplated by national law. --- the prohibitions laid down in Community competition law cannot be made conditional on proof of fault or on the absence of any ground of exemption. Those prohibitions are aimed at safeguarding undistorted competition and freedom of competition for undertakings operating in the common market, the crucial factor being the effect of the prohibited practices and not the intention of those who engage in them".

This view has recently been discussed by Temple Lang[20], who concludes that, all one can say is that the strong wording of the judgment in *Courage* does not suggest that there is liability only for "serious" breaches of Articles 81-82, and is consistent with the view that every loss clearly and specifically caused by an identifiable breach of either Article gives rise to liability.

As recently underlined by Van Gerven[21], the case law of ECJ requiring that a breach is "sufficiently serious" cannot be applicable here, as that case law would only apply to public

[20] John Temple Lang: Practical Experiences of National Common Law Courts in Competition cases in Carl Baudenbacher (ed.) 11th St. Gallen Internationales Kartellrechtsforum 2004, Basel 2005,pp. 166-168

[21] Walter Van Gerven, Provisional Background Paper for Joint EU Commission/ IBA Conference, Brussels 10-11 March 2005, p. 8.

authorities having a large margin of discretion when they act[22]. As this would seem to be a correct conclusion, it would mean that any infringement within the scope of Articles 81 and 82 will give rise to liability.

The issue of whether a fault requirement separate from the proof of the infringement should be needed is also discussed in the Ashurst report. Although this seems to be required under most national legislations in the EU Member States, this is not the situation under Community law. This would follow from what the ECJ concluded in *Brasserie du Pêcheur* (paras 79 and 80)[23] in combination with *Courage*[24] (para 26).[25] The relevant paragraphs of these judgments read, respectively:

> "79. "The obligation to make reparation for loss or damage caused to individuals cannot however, depend upon a condition based on any concept of fault going, beyond that of a sufficiently serious breach of Community law. Imposition of such a

[22] Cf. Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and others 1996 ECR I 4845, para 25, CJ.

[23] Joined cases C-46/93 and C-48/93Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen V. Secretary of State for Transport, ex parte : Factortame Ltd, 1996 ECR I 1029, CJ.

[24] Case C-453/99 Courage v. Crehan, above.

[25] Cf. Walter Van Gerven, in the above mentioned paper and also AG Van Gerven's opinion in case C-128/92 Banks v. British Coal 1994 ECR I – 1209 at p. 1258 CJ. See also Nils Wahl: Konkurrensskada-Skadeståndsansvar vid överträdelse av EG:s konkurrensregler och den svenska konkurrenslagen, Stockholm 2000; and by the same author; Damages for infringement of competition law in the Finnish Yearbook of Competition, Helsinki 2003, p. 186. Wahl also refers to the case C-180/95 Nils Draempaehl v. UraniaImmobilien-Service OHG 1997 ECR I 2195, para 22, CJ, which concerns Council Directive 76/207/EEC on the principle of equal treatment for men and women as regards access to employment etc.

supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

80. Accordingly, the reply to the question from the national court must be that, pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law."

"26. The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."

Thus contrary to what the authors of the Ashurst report conclude, the matter seems to be settled by the ECJ as far as Community law is concerned. This is also particularly logical and satisfactory with regard to breaches against Articles 81 and 82, where there is no requirement of fault to show that there has been a violation. Already with regard to Article 81 this follows from the text itself, which already outlaws agreements having as "object" or "effect" the restriction of competition. This is also confirmed by the consistent case law of the European Courts, which makes it clear that abuse is an objective concept[26]. Since such a fault requirement in national law in many cases render it "practically impossible or excessively

[26] See for instance case C-85/76 Hoffmann - La Roche v. Commission, 1979 ECR 461 CJ.

difficult" (principle of effectiveness) to exercise the rights conferred by Community law, it would not seem possible to uphold it in actions under Community law[27].

.3. The passing –on defence and the indirect purchaser

One central issue in relation to damages for antitrust injury is of course the question of who out of several parties in a supply chain should be entitled to claim and to be compensated for a loss made. The question that in particular arises is whether a direct purchaser, e.g. a wholesaler, who buys at an excessive price from a manufacturer who is a member of a price-fixing cartel but who may be able to pass on all or part of his loss to the next purchaser in the chain, should be compensated for the whole loss or only for an amount reduced by what he has been able to pass on. This is in other words the question of whether the so-called passing on defence should be allowed or not in damage actions for breach of Articles 81 and 82 EC. This matter will be addressed first. Thereafter will be treated the question of the standing of the so-called indirect purchasers, i.e. those who purchased the goods not from the infringer of the competition rules but later on in the chain.

2.3.1. The passing-on defence

The passing on defence in antitrust injury actions was first addressed in US Courts and in particular in the judgment of the US Supreme Court in *Hanover Shoe* in 1968[28], where the Court, after considering that the acceptance of such a defence in the end would mean that the loss would stay with the final consumers, stated: "In consequence, those who violate the

[27] See as a case in question 33§ of the Swedish Competition Act, see further below.

[28] Hanover Shoe Inc. V. United Shoe Machinery Corp., 392 U.S. 481, 88 s.ct. 2224

antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them".

Although it could seem that the Supreme Court based its conclusion on a reasoning of what could be fair justice from the point of view that the American rules are subject to penal sanctions, this does not seem to have been the case. On the contrary the outcome was rather directed by the difficulties in calculating the amount of what had actually been passed on as well as on the circumstance that even if part of the loss had been passed on, the injured party could be presumed to have suffered a reduction in turnover. The Court also held: "We are not impressed with the argument that the sound laws of economics require recognizing this defence. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different… he would have chosen a different price. Treble damage actions would require long and complicated proceedings involving massive evidence and complicated theories"[29].

While in the EU under most national tort legislations it would seem that a passing on defence is allowed, there is very limited case law thereon regarding competition cases. The ECJ first discussed the passing on defence in an Article 288 action (non-contractual liability of the Community) in case *Ireks-Arkady*[30]. In that case producers of quellmehl claimed compensation from the EC for loss they alleged had occurred to them due to the legal abolition by the Council of protection refunds for such products, whereas for the competing product, starch, the refunds were maintained. The defendants (the Council and the

[29] Ibid. At 492-3

[30] Case 238/78 Ireks-Arkady v. Council and Commission, 1979 ECR 2955, para 14, CJ.

Commission), inter alia objected that the applicants in fact had eliminated, or could have done so, by passing on the loss resulting from the abolition of the refunds in their selling prices. The Court accepted this argument in principle, although such was not the situation in the case in question (para 14). Several legal commentators have strongly criticized this judgment.

Thus Todt[31] convincingly concludes that it "flies in the face of all accepted principles of the law on liability" to accept that "damage caused… in clear infringement of Community law should be borne by the customers of the injured party… other than by those responsible for it". This view is approvingly supported by Craig & De Búrca[32] who hold "that such an idea is wrong in principle, since it would mean that losses would be borne by consumers rather than by the institutions, which have committed the wrongful act". Wahl[33] questions how, on the one hand, it could be unacceptable to allow the injured party an unjust gain but, on the other, acceptable to allow the same gain to be kept by the tortfeasor.

After *Ireks-Arkady* there have been a number of actions for the recovery of illegally levied duties brought by undertakings against Member States, e.g. cases *Just*[34], *San Giorgio*[35], *Bianco*[36], *Comateb*[37], *Mikhailidis*[38]. In these cases, which concern the straightforward

[31] A.G. Todt. The concepts of damage and causality as elements of non-contractual liability in The Action for damages in Community Law (Henkels, F.- McDonnell, A. (eds) pp. 189-198, Kluwer 1997.

[32] Craig & De Búrca, EU Law, 3rd ed. 2003 p. 571. See also Van Gerven in Provisional Background paper for Joint EU Commission IBA Conference, p. 12

[33] Wahl, Konkurrensskada, p. 303

[34] Case 68/79 Hans Just v. Denmark, 1980 ECR 501, para 26, CJ.

[35] Case 199/82 Amministrazione delle Finanze dello Stato v. (SpA) San Giorgio1983 ECR 3595, para 18?, CJ.

[36] Joined cases 331/85, 376/85 SA Les Fils de Jules Bianco and J. Girard Fils SA v. Directeur Général des Douanes et droits indirects, 1988 ECR 1099, para…, CJ.

[37] Joined cases C-192/95 to C-218/95 Société Comateb, 1997 ECR I 165, CJ.

repayment of taxes or levies charged by State authorities in breach of EC law, the ECJ has accepted the defence of passing on. Thus Mr. Just in Denmark had unlawfully been charged excessive import taxes on spirits, which he had passed on to his customers by adding the additional tax charge to his usual profit margin. The increased prices resulted in lower sales and imports and redundancy among his staff. When he claimed compensation, the Danish Government argued that repayment of the excessive taxes would result in unjust enrichment, since Mr. Just had passed on the tax increase. The ECJ ruled that it was not incompatible with Community law for Denmark to apply its national principle of unjust enrichment where the unlawful charges had been passed on. Although the Court in *Just* accepted that pass on was compatible with Community law, it also held that damages for lost profits due to reduced sales also were compatible with Community law (paragraph 26). The Court, however, 17 years later in *Comateb*[39] with reference to *Just*, pointed out that "the trader may have suffered damage as a result of the very fact that he has passed on the charge levied by the administration in breach of Community law, because the increase in price of the product brought about by passing on a charge has led to a decrease of sales… In such circumstances the trader may justly claim that… the inclusion of that charge in the cost price has … caused him damage which excludes, in whole or in part, any unjust enrichment which would otherwise be caused by reimbursement".

In *Comateb* the Court thus made it clear that there is a distinction between, on the one hand, the extent to which there may be pass on and, on the other, the damage suffered as a result of reduced sales. The Court has in other words treated pass on and actual enrichment as cumulative conditions, which both have to be fulfilled in order for there to be any reduction in

[38] Joined cases C-441/98 and 442/98 Mikhailidis v. Asphaliseon (IKA), 2000 ECR I 7145, para 31, CJ.

[39] See judgment at footnote 358, para 31

repayment to a trader of an unduly claimed charge. This was further developed in *Weber's Wine World*[40], where the Court held:

> "102. It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse …… repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charges would entail for the trader be established".
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> "107. It follows from the foregoing that the principle of effectiveness referred to at paragraph 103 of this judgment precludes national legislation or a national administrative practice which makes the exercise of the rights conferred by the Community legal order impossible in practice or excessively difficult by establishing a presumption of unjust enrichment on the sole ground that the duty was passed on to third parties".

The development of the Court's case law would now seem to have gone so far that the possibility, in practice, to argue and prove pass on as a defence in antitrust has become difficult to such an extent, that it is very doubtful whether it should at all be maintained. Furthermore, as initially underlined, the whole case law on pass on, with the exception of the very questionable *Ireks-Arkady,* concern claims for restitution from the state of illegal duties or levies. In addition, all the cases have been between a private party and a public one, while disputes regarding damages for antitrust injuries are between two private parties.

[40] Case C-147/01 Weber's Wine World Handels-GmbH and others v. Abgabenberufungskommission Wien 2003 ECR I 11365, paras 102 and 117, CJ.

Against this background, what would then be the situation under Community law as to pass on in antitrust injury claims? The ECJ has so far not been expressly asked to pronounce itself thereon, but it has in *Courage*[41], in paragraph 29 recalled that,

> "in the absence of Community rules governing the matter, [it] is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly form Community law provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see case C-261/95 Palmisani [1997] ECR I – 4025, para 27)"[42].

This is then followed, in the next paragraph, by this general statement:

> "In that regard, the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see in particular…) *Ireks-Arkady*[43] (para 14), *Just*[44] (para 26) and *Mikhailidis*[45](para 31).

[41] See above

[42] Courage para 29

[43] See above

[44] See above

[45] See above

The fact that the Court made this statement, has by some commentators[46] been interpreted as if the Court thereby also would have taken a standing in favour of a passing on defence in antitrust injury claims.

There are, however, reasons speaking against drawing such a far-reaching conclusion from this passage of the judgment. First of all, neither the referring court nor the parties or the Commission would seem to have expressly addressed this issue[47]. Furthermore, it is in any case obvious that a claim for damages due to an infringement of the fundamental antitrust rules in Articles 81 and 82, which, as the Court itself has expressed it, are "essential for the accomplishment of the tasks entrusted to the Community and, in particular for the functioning of the internal market" (*Courage*, para 20 with reference to *Eco Swiss*, para 36), is very far from the situations of claims for recovery of illegally charged duties or levies, where the Court has developed its case law on unjust enrichment. With regard to infringement of the antitrust rules there is also the fact, as the Court further underlined in *Courage* (para 27), that the existence of the right for an individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition "strengthens the working of Community competition rules and discourages agreements or practices, which are frequently

[46] e.g. Wahl in Damages for infringement of competition law, see above, page 190, and Erling Hjelmeng: Privat handhevelse av EØS-avtalens konkurranseregler, (Private enforcement of the competition rules of the EEA Agreement), Bergen 2003

[47] From AG Mischo's opinion of 22 March 2001, it would seem that the UK Government, that was in favour of Mr Crehan's action, made it clear that it did not advocate that the party to the unlawful agreement should obtain more than he had lost. Thus it held that to avoid unjust enrichment and the imposition of penal damages on the defendant, such benefits, which was a matter for national courts, should in principle be taken into account in the assessment of damages (para 59 of the opinion). This might explain why the Court's judgment in line with

covert". Here the Court clearly underlines the importance of the deterrent effect of private actions for damages under these fundamental Articles before national courts, which also as the Court puts it "can make a significant contribution to the maintenance of effective competition in the Community" (para 27 in fine).

As mentioned in the introduction in section 1, antitrust injuries distinguish themselves from most traditional types of injuries dealt with under the general principles of the laws of torts in the sense that the injury suffered corresponds to a gain for the injurer. Such a gain does not always have to be equal to the loss for the injured party, but can be either smaller or larger. In the case of horizontal cartels the total gain for the infringers will by far exceed the individual losses for those who are exposed to the competition restriction[48]. It can also be questioned why there would be a question of unjust enrichment only in the case of the injured party and never with regard to the tortfeasor. With this in mind, and taking into account the interests underlined by the ECJ in *Courage*[49] of seeing to it that actions for damages in such cases really can make a significant contribution to the maintenance of effective competition in the Community, it would seem correct to conclude that under Community law a passing on defence in actions for damages for injury caused by a violation of Articles 81 or 82 should not be accepted. This conclusion would also be in line with the US situation. It is in this context interesting to note the situation under German law after the recently entered into force 7th amendment of the German Act against Restraints of Competition. Thus under § 33(3)2,

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previous cases, none of which was between private parties nor was in the field of antitrust, contains this reference to the earlier case law.

[48] Wahl, Konkurrensskada p. 304

[49] See above

following some recent cases[50] where courts had ruled that as far as the plaintiff was able to pass on the overcharge to his customers he had not suffered damage in the first place, it is now stated, that if a good or service is provided at an overcharge, the damage is not excluded because it may have been traded further. The question of pass on defence in German law is thus made more ambiguous.

2.3.2. Indirect purchasers

The US Supreme Court in *Illinois Brick*[51] laid down the case law as to whether there could also be accepted an "offensive" use of pass on, i.e. if an indirect purchaser at the receiving end of the passed on overcharge could bring an action against the infringer. Having in its earlier judgment in *Hanover Shoe*[52] excluded the passing on as a defence the Court now decided that the logics thereof, in order inter alia to avoid to "create a serious risk of multiple liability to defendants" would be not to accept the offensive use of pass on by an indirect purchaser. The Court also considered that the evidentiary complexities and uncertainties involved in the defensive use of pass on against a direct purchaser are multiplied in the offensive use of pass on by a plaintiff several steps removed from the defendant in the chain of distribution…". The general principle of *Illinois Brick*, which applies to cases of overcharges is, however, subject to some limitations, e.g. regarding vertical price-fixing (resale price maintenance) or pre-existing fixed mark-up and fixed quantity contracts. The ruling has been very controversial and several attempts have been made to introduce legislation in Congress to repeal it. Close to half of the states have, however, passed Illinois

[50] ELG Mannheim, judgment of 11.7.2003 – 7/0/326/02 and OLG Karlsruhe, judgment of 28.1.2004 – 6U 183/93.

[51] Illinois Brick Co. v. Illinois 431 US 720 (1977)

Brick Repealer statutes[53]. The many problems arising from this situation are well described in the American Bar Association, Section of Antitrust Law, Report of 2001[54].

The question of the standing of indirect purchasers in antitrust cases has not been raised before the ECJ. The Court's ruling in *Courage*[55] would, however, at first sight seem to go against any limitations with regard to any particular category of individuals, taking into account the Court's wording of paragraphs 23 and 24. There the Court first recalls its earlier case law in *BRT and SABAM* as well as *Guérin*[56] regarding Articles 81 (1) and 82 producing direct effects in relation between individuals and creating rights for the individuals concerned which the national courts must safeguard. The Court then (paragraph 24) concludes: "It follows from the foregoing considerations that any individual can rely on a breach of Article [81](1) of the Treaty before a national court" (emphasis added).

It is also clear that Articles 81 and 82 EC do not only protect the overarching interest expressed in Article 3(1)(g) EC of "ensuring that competition in the internal market is not distorted" but also the individual interests of economic operators whose freedom of action could be restricted by anticompetitive behaviour[57]. This category includes indirect purchasers

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[52] See above

[53] Donald I. Baker: "Federalism and Fertility: Hitting the Potholes on the Illinois Brick Road", Antitrust 17 (Fall 2002), 14,16.

[54] American Bar Association, Section of Antitrust Law, The State of Federal Antitrust Enforcement.

[55] See above

[56] Case 127/73 BRT and SABAM, 1974 ECR 51, para 16, CJ; and case C-282/95 P, Guérin Automobiles v. Commission, 1997 ECR I 1053, para 39, CJ.

[57] E.g. cases C-70/93 BMW Motorenwerke AG v ALD Auto-Leasing 1995 ECR I 3439, para 19 and C-266/93 Bundeskartellamt v. Volkswagen AG and VAG Leasing GmbH 1995 ECR I – 3477 para 23-24

and users as well as consumers, the protection of which Articles 81(3) and 82 expressly mention[58].

It follows furthermore, from what the Court states in *Courage*[59] (para 26), that the full effectiveness of Article 81 and, in particular, the practical effect of the prohibition laid down in Articles 81 (1) and 82 "would be put at risk if it were not open to any individual to claim damages for loss caused to him" (emphasis added). In other words, individuals have to be protected in an appropriate way from anticompetitive actions violating those provisions. As the Court further concludes, (para 27), "actions for damages can make a significant contribution to the maintenance of effective competition in the Community".

When the Court handed down its ruling in Courage, the Commission's proposal for the Modernisation reform was still being discussed in the Council and the Parliament. One essential element of that proposal, which also was approved and adopted in Regulation 1/2003[60], is the empowerment but also the obligation for national courts and competition authorities to apply Article 81 as a whole, i.e. also Article 81(3). Thereby the possibilities for an effective private enforcement of damages actions are in principle provided.

From the above analysis of Courage and the case law referred to in that judgment thus follows that under Community law both direct and indirect purchasers would have the right to bring action for damages for loss caused to them by infringements of Articles 81 and 82. It is, however, clear that in many cases the chain of transactions from the original infringer to the

[58] Van Gerven in the above mentioned Background paper for joint EU Commission/IBA conference, Brussels, March 2005, p. 14.

[59] See above

end consumer can be quite long. From this follows that if all indirect purchasers in such a case would bring actions for damages, there could arise quite a number of complications in calculating and apportioning the losses resulting from the original infringement. Even though it certainly can be the case that such an unrestricted right for an indirect purchaser to bring an action could imply procedural complications, it would, on the other hand, contribute to increased enforcement of Community law as well as more deterrence. In a system like the European one, which does neither know of anything like the concept of treble damages nor recognize US-type systems for class actions or contingency fees but where rather the general line is more to limit compensation to actual loss occurred, the risks involved should not be exaggerated. However, there are certainly reasons from a procedural economy point of view that speak against intensive litigation by indirect purchasers. At the same time it cannot be denied that the issue of how to facilitate claims by end consumers, e.g. through some sort of collective actions, is also of essential importance.

### 2.4. Recent amendments to the Swedish Competition Act

It may here be of interest to note that the 1993 Swedish Competition Act, which in its 33§ contained the first example of an EU Member State having a special provision on tort liability for violation of the national antitrust rules, was recently amended with a view to widen the scope of persons entitled to claim damages. In its original version those entitled to claim damages were limited to undertakings or contracting parties. Through a recent amendment of this provision called for by the Modernisation Reform as well as by *Courage*[61] this limitation is now eliminated. The reworded 33§ of the Competition Act thus now simply states that the

[60] See above

[61] Case C-453/99 Courage v. Crehan, above

damage that occurs due to the infringement of 6§ or 19§ of the same Act or of Articles 81 or 82 EC is to be compensated[62].

In its Bill to Parliament, where the amendment was discussed, the Swedish Government[63] first underlines that the objective of the Competition Act is to safeguard, from a social economic and consumer policy point of view, the interests of effective competition. There are thus no obstacles in principle against including other consumers, than those who may be considered as contracting parties, among those entitled to damages. The Government further recalls that the right to damages according to the Competition Act both has a remedial and preventive function. "Through a widening of the category of those entitled to damage it may be expected that there will be more scope for the remedial effect of the competition rules, especially since the Act (2002:599) on Class Actions can be used in those cases, where there is a series of compensation claims for which it is not practical to run separate court proceedings. An enlarged right to damages for new categories of consumers and others who are not undertakings would also make it possible to increase the preventive effect of the Competition Act".

In further discussing the legislative solution how in the Act to define those, who may be entitled to damages, various possibilities are discussed in the bill. The final solution was in

[62] Governmental Bill. Prop. 2004/05: 117 Parliament 2004/05: NU 17. This and other amendments of the Act entered into force on 1 August 2005.

[63] Prop. 2004/05 117, section 6.2. "Those entitled to damages". This discussion and the ensuing amendment had as its origin criticism against the original wording of the provision, which not least in the light of the Courage-judgment was considered too narrowly defining those entitled to damage as being "an undertaking or another contractual party". In addition it was necessary to clarify that the provision also covers infringements of Articles 81 and 82 EC.

the end to follow the example of the Swedish Act (1972: 207) on Torts which only states that the one who causes it is obliged to compensate the damage that arises through his action without defining any categories of persons entitled to damage. This led to the following final wording of 33§ first paragraph of the Swedish Competition Act:

> "If an undertaking intentionally or out of neglect infringes the prohibitions in 6 or 19§ or in Articles 81 or 82 of the EC Treaty, the undertaking shall compensate the damage thereby occurring"[64].

In assessing the consequences of such a general and undefined formulation of the provision, the Government in the Bill refers to the interests to be protected under the Act as well as to general principles of adequate causality in the law of torts. It is further stated in the Bill that in the end it will fall upon the Courts to assess inter alia in what cases the link between the claimant and the infringement causing the damage would be such that liability should exist. A natural limitation would also arise through the requirement that a right to compensation requires that there is an identifiable damage. It is further stated that case law might show that there are situations where the burden of proof as to causation should be lowered as has been the case in other fields[65]. It is also pointed out that while it can frequently be difficult to prove the size of damage, in particular for consumers, the Courts in such cases may assess the damage to a reasonable amount. Nevertheless, it may be that in practice, in particular where

[64] Unofficial translation into English by the author of this paper. 6§ and 19§ of the Competition Act correspond to Art. 81 and 82 EC. At the same time the prescription period for raising a compensation action has been extended from five to ten years from when the damage occurred. It is also always possible to raise any such claim before the Stockholm City Court (c.f. 33§ second and third paragraphs).

[65] This reference would seem to refer, in particular, to product liability and environment.

the person suffering damage is several contractual stages away from the infringing undertaking, the right to damages will be limited.

2.4. Protection of Consumer interests

It is evident that in many cases, where the interests of consumers come to suffer due to an infringement of Articles 81 or 82 EC, the individual consumer will find it too difficult and costly to bring a court action against the infringer. This will almost always be the case with small claims e.g. that could result from a market sharing and price-fixing cartel in a classical consumer goods market. The Commission has for instance investigated and brought infringement decisions with fines against a number of European brewers, for a series of cartel arrangements in several Member States[66]. Characteristic for many beer markets in Europe is not only that they, as well as most other consumer goods markets are national, but also that they are oligopolistic or even duopolistic or close to monopolistic. In the Belgian Beer Cartel the two parties together held around 75% of the market.

Assume that in a cartel investigation it were to be proven that two companies had regularly and over a period of three years agreed and implemented price increases of 5% a year on top of any other price adjustments arising from increases in the cost structure. An ordinary consumer, who would like to get compensation for his loss (i.e. what he had paid in excess) in comparison to the situation where no cartel arrangement had existed, would find it extremely difficult, cumbersome, costly and risky to bring on his own an action against the two or anyone of the infringers. On the other hand, he would certainly not be the only one to have

[66] One example is Commission Decision of 5 December 2001 regarding the Belgian beer cartel, case IV/37.614/F3 PO/Interbrew and Alken-Maes, OJ 7.8.2003, L200 p. 1

suffered such a loss. Therefore, some sort of collective action could be desirable for this and similar situations.

There are many advantages from an enforcement point of view in being able to bring a collective action for small claims. If raised individually, the potential claimant would hardly find it worthwhile to bring his claim to Court. Both time and costs would be saved and at the same time the negotiating position of small and disparate claimants would be strengthened in relation to large, well-organized and economically strong defendants. In particular, such collective actions would be of great importance to safeguard the interests of final consumers, where otherwise companies that violate the competition rules in Articles 81 and 82 even if detected and sanctioned by fines, could keep a great part of their illegal profits. Collective actions would thus also serve the interest of increased deterrence.

The situation of collective action in the EU is well summed up by Advocate-General Jacobs in his opinion in *Österreichischer Gewerkschaftsbund*[67]:

> "Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially

[67] Opinion of AG Jacobs of 27 January 2000 in case C-195/98 Österreichischer Gewerkschaftsbund v. Austria, 2000 ECR I 10497, para 47, CJ, which was not a competition case.

stronger opponents. The danger of abuse of such collective rights of action is again normally tackled by national procedural rules. Consequently the Court has never objected to national rules providing for such collective rights of action and in practice often deals with questions referred in proceedings brought by interested associations". (emphasis added)

Many of the provisions in national law referred to in this opinion have as their origin Community law, since they are adopted in implementation of EC Directives regarding consumer injunctions and unfair contract terms[68]. Two other fields where Community law plays a role is the field of environment[69] and intellectual property[70].

As to specific provisions in Member States' national legislation, some cases of particular relevance for the field of competition are of interest. Thus in the UK it is under section 47B of the 1998 Competition Act[71] possible for consumer associations specified by the Secretary of State to bring actions for damages on behalf of two or more individual consumers before the Competition Appeals Tribunal. Such claims have to be brought on the back of an infringement decision by a public authority (OFT or the European Commission).

[68] Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests (OJ L166, 11.6.98,pp. 51-55) and Council Directive 93/13/EEC on unfair terms in consumer contracts (OJL 95, 21.4.93, pp. 29-34).

[69] Commission proposal for a Directive of the European Parliament and of the Council on the access to justice in environmental matters, COM(2003)624 of 24 October 2003, Article 5.

[70] Directive 2004/48/EC of the European Parliament and the Council on the enforcement of intellectual property rights (OJ L157, 30.4.2004, p. 45)

[71] Also inserted by section 19 of the 2002 Enterprise Act.

Class actions as a means to bring an action on behalf of a class of claimants is a particularly well-known mechanism in US law. The most distinguishing feature of the US class action is probably that an individual can bring an action on behalf of an unidentified class of persons. The class operates on the basis of opt-out by claimants (i.e. an individual is in the class unless he chooses not to be).

In the EU, while in several Member States (e.g. France) work is ongoing, so far only Sweden has introduced a system for class-actions. The Swedish model differs, however, fundamentally from the US one in that it is an opt-in system, where an individual is in the class only, if he has specifically made a declaration to that effect.

The Swedish 2002 Act on Class Actions[72] came into force on 1 January 2003. Under the Act there are three kinds of class actions, i.e. individuals, organisations or public authorities can bring a court action without any power of attorney on behalf of members of a specific group. In order to bring an individual class action the applicant has to be a member of a group he wishes to represent. As to an organisational action this can be brought by non-profit making associations in the fields of consumer law or environmental law. With regard to public class actions the Government lays down special rules for public authorities to bring such actions.

Furthermore, the Act requires that in order to be accepted by the Court, a class action has to be the best procedural alternative, i.e. the action is based on circumstances which are common or similar for the members of the group, the action must not seem inappropriate due to substantial differences in the underlying circumstances of some claims, and the majority of the claims can only be brought on a group basis and not on an individual basis. The group of

[72] Lag (2002: 599) om grupprättegång.

claimants bringing the action should also be of such a size and be so clearly defined as to enable the Court to determine what procedural steps are necessary to ensure judicial administration of the case. Finally, the applicant must be suitable to represent the group taking into account his interests, his economic means etc.

Members who have given written notice to the Court to "opt-in" participate in the proceedings as passive members and are then bound by a final decision of the Court. As a rule they do not have to pay any legal costs to a successful defendant, the normal rules of Swedish law being that the losing party has to pay the winning party's costs.

All settlements reached under a class action require judicial authorization and the Court will not authorize any settlement that discriminates against certain group members or is otherwise clearly unreasonable.

It would seem so far that at least five class actions with claims for damages under the Swedish Act have been introduced before the Swedish Courts[73]. One of these were introduced in December 2004 by the Consumer Ombudsman, where damages of between 100 and 1000€ were claimed for each of around 7000 electricity consumers[74]. It does not seem, as yet, that any such case concerned claims for antitrust injuries.

[73] P-H Lindblom: Lagen om grupprättegång – bakgrund och framtid, in Svensk Juristtidning 2005, p. 152 et seq.

[74] The case Konsumentombudsmannen v. Kraftkommission i Sverige AB is before the District Court in Umeå, which in June 2005 decided that the Ombudsman's action complied with the requirements laid down for a class action. This decision has since been the subject of an appeal by the defendant to the Court of Appeal in Umeå.

In its recent bill regarding damages under the Competition Act[75] the Swedish Government also discussed the possibility to designate the Swedish Competition Authority, Konkurrensverket, to bring public class actions in question of damages under the Competition Act. In its considerations the Government, however, concluded that individual class actions seem well suited for actions for damages under 33§ of the Competition Act. It would also seem that such an action could be brought as an organisational action, when the claim concerns goods or services that an undertaking has offered consumers. As to the idea to designate Konkurrensverket as a public authority to bring group actions, reference is made to the preparatory works to the Act on Class Action, where this possibility was declared to be particularly intended to be suitable for the creation of case law[76], while it would be less suitable if the main purpose of an action would be to ensure that the members of the group get their claims satisfied. The Government's conclusion was more, that at present there are not sufficiently strong reasons to designate Konkurrensverket to bring this sort of public class action.

## 3. Some conclusions

From what so far has been found regarding the four issues selected for this paper the conclusions, as far as the situation under Community law is concerned, would be as follows: First of all there cannot for a right to damages be required that fault (intent or negligence) is proven. Secondly, there would seem to be very strong reasons to support the view that a passing on defence should not be allowed in actions for antitrust damages. Thirdly, there are

[75] See above

[76] So far the Swedish Government only designated two public authorities to bring public actions, the Environmental Agency (Naturvårdsverket), and the Consumer Ombudsman (Konsumentombudsmannen).

at present no formal restrictions for indirect purchasers to claim damages from the antitrust infringer. Fourthly, there are no good reasons against introducing more generally in Europe class action systems similar to the Swedish model.

Furthermore, as to what actions might be called for at the Community level, it might be appropriate to recall the findings of the Ashurst study, that there are many other obstacles in Europe that would also have to be tackled before we arrive at a situation where there are reasonable incentives to bring appropriate damage actions for breach of the European antitrust rules. Nevertheless, with regard to the four issues treated in this paper, it would seem to be most urgent to clarify the situation as to the passing on defence. This could be done, as suggested by Van Gerven, either by the Commission issuing a Notice thereon, or rather by adopting a regulatory instrument, preferably a Regulation, where this, together with other relevant issues, is clarified.

Finally, it is important, in the search for solutions to enhance efficient actions for damages for breach of Articles 81 and 82, not “to make the best the enemy of the good”. It may thus be that a balance has to be struck between, on the one hand, granting everyone in a supply chain that might have suffered a loss a right to sue and, on the other, the interest of seeking efficient and deterrent procedures. If thus, through a non-acceptance of the passing on defence and limitations in the rights for indirect purchasers, there would sometimes arise a risk for some overcompensation, this ought to be accepted, since it would both strengthen the deterrent effect and at least seem less unfair than allowing the tortfeasor to keep a major part of his gains.