PRINCIPLES OF PROPER CONDUCT FOR SUPRANATIONAL, STATE AND PRIVATE ACTORS IN THE EUROPEAN UNION

- TOWARD A *IUS COMMUNE* -

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LIABILITY OF SUPRANATIONAL, STATE AND PRIVATE ACTORS

- comment from the point of view of EU competition law –

by

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Introduction

Art. 81 EC Treaty prohibits agreements between companies which restrict competition within the meaning of Art. 81-1 and cannot be exempted by the Commission pursuant to Art. 81-3. According to the terms of Art. 81-2, "any agreements or decisions prohibited pursuant to this Article shall be automatically void". It is for national courts – and for national courts only – to declare unexemptible agreements prohibited by this provision null and void. In principle, however, the nullity only applies to those parts of the agreement which infringe Art. 81. It only affects the "agreement as a whole if it appears that those parts are not severable from the agreement itself".[1] In case the null and void contractual provisions can be severed from the other parts of the agreement, the consequences of their nullity for these other parts are not a matter of Community law".[2]

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[1] Judgement of 30.06.1966 in *Société Technique Minière v. Machinenbau ULM*, case 56/65, ECR p. 337; see also judgement of 14.12.1983, *Société de vente de ciments et betons v. Kerpen & Kerpen*, case 319/82, ECR p. 4173 (paragr.11).

[2] Ibidem.

Today it is not entirely clear what *remedies* the nullity of an agreement or some of its clauses entails as a matter of Community law (as opposed to national law) and who can avail himself of such remedies.

There is no coincidence in our having chosen this issue for today's address.

First of all, "His Master's Voice" has not remained silent on the matter. In *Banks*, Van Gerven - then Advocate General - argues that a national court has in principle the duty (not just the power) under Community law to award damages in case of an infringement of ECSC (or indeed EC) Treaty competition provisions with direct effect.[3] And more recently, Van Gerven – as *ius commune* advocate – provides inspiring thoughts in a contribution on "rights, remedies and procedures" under Community law, even though his contribution focuses on the remedies of compensation, interim relief and restitution linked to *state* liabilities vis-à-vis private parties, not to liabilities incurred by private parties vis-à-vis other private parties in the antitrust context.[4]

Secondly, since *Banks*, the Court of Justice is now being offered a second opportunity to declare whether or not a private party has a right to claim damages for an infringement of Community competition provisions. In *Courage Ltd. v. Bernard Crehan* (hereafter *Crehan*),

[3] Opinion of 27.10.1993 in case C-128/92, *Banks Ltd. v. British Coal Corp*, ECR I-1209. Banks was a small opencast mining company operating under two types of licences granted by British Coal. Its grievances against British Coal were twofold: as a holder of a "royalty licence", it paid excessively high royalties to British Coal for extracting coal and as a holder of a "delivery licence", it received excessively low purchase prices from that company for selling coal to it. In its view, British Coal infringed Art. 65 as well as Art. 66-7 ECSC Treaty. The former provision prohibits any form of anticompetitive agreement whereas the latter prohibits any abuse of a dominant position. It sued British Coal for damages in the U.K. High Court. The national court referred the case to Luxembourg. The Court did not reach the damage issue because it did not think that the competition provisions relied upon by Banks had direct effect.

[4] Van Gerven, *Of rights, remedies and procedures*, (37) C.M.L.Rev. 2000 p. 501. See also some of his earlier contributions: *Bridging the gap between Community law and national laws: towards a principle of homogeneity*

the U.K. Court of Appeal puts four questions to the Court.[5] With the first two questions, it queries whether a pub tenant who is a party to an exclusive dealing (i.e. tying) agreement prohibited by Art. 81-1 EC Treaty can seek (any sort of) "relief" from the brewer who is the other party to that agreement and, if so, whether he is "entitled to recover damages" as a result of his adherence to a clause in the agreement which governs the price at which he purchases his beer requirements. With its two other questions, the UK Court of Appeal places this relief/damage issue in the national law context. It queries whether (and, if so, to what extent) a rule of national law preventing national courts from allowing a party to "rely upon his own illegal actions as a necessary step to recover damages" is consistent with Community law.

Section 1: Crehan v. Courage

a) facts

It is useful briefly to recall the facts in *Crehan*. In 1991, Mr. Crehan enters into a 20 year lease with Inntrepreneur, a company jointly owned by Courage (a brewing company) and Grand Met (a company with various catering and hotel interests which had withdrawn from the brewing sector). Mr. Crehan undertakes to buy essentially all his beer requirements from Courage. His lease is a standard contract entered into by thousands of pub tenants. Mr. Crehan complies with his contractual obligations for some years but then refuses to pay for the supplies of beer by Courage. Other pub tenants do the same or stop paying the rent due to Inntrepreneur. They all contend that they pay much more for their beer than the free, independently owned public houses who operate without a tie or the pub companies who own

in the field of legal remedies, (32) C.M.L. Rev. 1995, p. 679 and *In het verleden ligt de toekomst van een Europees ius commune*, (59) Rechtskundig Weekblad 1995-1996, p. 1430.

[5] Case C-453/99, *sub judice*

numerous estates of pubs and are typically not tied to a brewer either. In their view, the price differential reduces their profitability and might even drive some of them out of business altogether. Mr. Crehan (like other pub tenants) and Courage end up in the national courts.

Mr. Crehan claims damages. Essentially, he seeks to obtain reimbursement of the price excess. This means that he is in fact seeking a form of *restitution* of the amount by which he has overpaid for his beer requirements. His reasoning is that it is the exclusive dealing arrangement (i.e. the tie) that causes the price differential and thus the injury. In other words, in his view, the price clause cannot be severed from the tying clause. He brings his damages action on the ground that Courage bears tort liability for breach of a statutory duty (i.e. Art. 81).

The UK Court of Appeal specifies that its request for a preliminary ruling takes place in the context of a "hearing by way of preliminary issue of law only" and, as a consequence, that "that hearing has proceeded on the assumption […] that the beer tie in Mr. Crehan's lease of a public house is contrary to article 81 EC". For the purpose of this comment, we can therefore leave entirely aside whether or not the standard leases are actually contrary to Art. 81-1 EC.

One comment though in order to avoid confusion. The Inntrepreneur cases have a long history. The Commission has never come to a final say concerning the "old" standard brewery contract which Courage has used as a model for Mr. Crehan and so many other pub tenants in the early nineties. The Commission has cleared "new" standard contracts notified by the

Grand Pub Company (successor to Inntrepreneur and Spring) but these clearances are without any relevance to the present case.[6]

b) <u>Why a request for a preliminary ruling?</u>

The UK Court of Appeal clarifies why it wishes to know whether there is a right of compensation for damages as a matter of Community law. In a recent judgement, it has ruled that "English law does not allow a party to an illegal agreement to claim damages from the other party for loss caused to him by being a party to the illegal agreement" and that "this is so whether the claim is for restitution or damages".[7]

The UK Court of Appeal explains the rationale for this ruling. In its view, Art. 81-1 is designed to protect *third party* competitors and not parties to the prohibited agreement because the latter are the cause, not the victims, of the restriction of competition. In the present case, from a competition law viewpoint the vice of the exclusive dealing (tying) agreement is that it forecloses market access. Third party competitors cannot have their beer resold through the "tied" outlets run by pub tenants like Crehan. By entering into their brewery contracts, these tenants, along with Courage, would therefore appear to have caused

[6] Inntrepreneur had notified the "old" standard contracts back in July 1992 but it eventually withdrew that notification in October 1997. Soon thereafter, the Commission referred all complaining pub tenants to the national courts on the ground that the case no longer presented a sufficient Community interest. As far as the "new" standard contracts were concerned, the circumstance that the Grand Pub Company (GPC) came onto the scene in 1998 meant that *two* contractual relationships needed to be assessed: on the one hand, the relationship between GPC and brewers and, on the other hand, that between GPC and its owned estates of pubs. In March 1998, the Commission issued a negative clearance comfort letter for the "upstream" beer supply contracts between GPC and a number of brewers since there were no longer any beer ties (In 1998, GPC had decided to cut the exclusive dealing links between it and Scottish & Newcastle, the brewer who took over Courage's beer business in 1995). And in June 2000, the Commission adopted a formal negative clearance decision with respect to the "downstream" contracts between GPC and its pubs observing that the ties at that level did not lead to an appreciable restriction of competition within the meaning of Art. 81-1 in light of the non-exclusive dealing arrangements "upstream" with the brewers.

[7] UK Court of Appeals in *Gibbs Mew*, (1998) EuLR p. 588, at p. 606.

the restriction of competition. The prime victims are the third party brewers. This is the UK Court's reasoning.

The English law rule referred to is said to be based on the *in pari delicto* or *ex dolo malo non oritur action* principles: courts will not lend their aid to private parties who found their cause of action upon an immoral or illegal act. Other legal proverbs, such as *in pari causa turpitudinis cessat repetitio,* may refer to a similar principle.

c) scope of Crehan's damage claim

In his recent article (which does not specifically deal with liability issues in the field of competition), Van Gerven distinguishes between the remedies of *restitution* and *compensation for damages*. In its request for a preliminary ruling, the Court of Appeal also seems to refer to these two remedies. It indeed declares the *in pari delicto* principle applicable "whether the claim is for restitution or damages".

There is a some risk of confusion here. It is true that Crehan sues Courage for *damages* and that his action is based on *tortuous* liability for breach of a *statutory* duty (Art. 81). The compensation sought, however, appears to be limited. Crehan merely requests that he – as injured party – be put in the position he would have been in, if he had not concluded the contract. In other words, he wants the *status quo ante* to be restored. It would therefore appear that he merely seeks to avail himself of some remedy of *restitution*. He does not seek compensation for consequential losses, e.g. reduced competitivity caused by the fact that he has paid too much for his beer.

Section 2. Preliminary observation: remedies as a matter of Community law

In its Notice on cooperation with national courts in applying Art. 81 and Art. 82 EC Treaty, the Commission merely observes that "national courts are able to ensure, at the request of the litigants or of their own initiative, that the competition rules will be respected for the benefit of private individuals" and that "in addition, Art. 81-2 enables them to determine, in accordance with the *national procedural law* applicable, the civil law effects of the prohibition set out in Art. 81" (italics provided). [8] Basing itself on well established case law (see below), the Commission notes further that "individuals and companies have access to all procedural remedies provided for by *national* law on the same conditions as would apply if a comparable breach of national law were involved".[9] Quite understandably, it does not endeavour to create Community law rights or remedies. It has no authority to do so of its own.

Besides, the Commission has over the years published a number of studies concerning the conditions under which national courts can apply Art. 81 in their *national* legal orders.[10] Again, these studies – which anyhow do not contain a Commission position - only give an overview of the remedies for breaches of Art. 81 which are available under national law. They do not – at least not directly – address the question of which remedies are available under Community law. They do provide a comparative basis for finding out to what extent national legal orders have principles *in common* concerning remedies under Art. 81. And this is, of course, from a *ius commune* viewpoint not without interest.

[8] OJ C 39/6 of 13.02.1993., paragr. 6.

[9] Ibidem, paragr. 11.

[10] See 1966 study (published in the series "Concurrence") entitled "réparation des conséquences dommageables d'une violation des Art. 85 et 86 du Traité instituant la CEE", updated in 1985 and the 1997 study on "The application of Art. 85 and 86 of the EC Treaty by national courts in the Member States" with national reports compiled and coordinated by A. Braakman (Office for Official Publications of the European Communities 1997,

Is there anything in the case law of the Court of Justice concerning remedies under Community law for breach of Art. 81? Not much. The Court has, of course, qualified Art. 81-1 as a provision having direct effect[11] and it regularly refers to the direct effect of this provision to remind parties that they can address themselves to a national court.[12] But these reminders do not mean that the Court recognizes that a breach of Art. 81 gives rise to tortious liability as a matter of Community law.

As pointed out above, the Court has observed that the consequences of the nullity of some contractual provisions for other *severable* provisions in the agreement "are not a matter of Community law" (but rather of national laws on severance).[13] This suggests that the *consequences* of the nullity of the former provisions *are* a matter of Community law. But the Court has not worked out the details of what this means in concrete terms.

This leaves us with essentially two questions. First, can a contracting party rely at all on Art. 81-2 and invoke the nullity of the agreement he has entered into (see section 3 below)? Second, if the contracting party can, can he claim compensation of damages (in the form of restitution or otherwise)? The latter question falls apart into two further issues. Is there a basis for a damage action under Community law in the absence of a statutory provision (see section 4 below)? If there is, can a contracting party (as opposed to a third party) avail himself of this remedy (see section 5 below)?

[11] Judgement of 30.01.1974 in *BRT and SABAM*, case 127/73, ECR p. 51 (paragr. 16).

[12] See e.g. judgement of 18.03.1997 in *Guérin Automobiles v. Commission*, case C-282/95 P , ECR I-1503 (paragr. 39).

[13] See judgements cit. note 1.

Section 3. Does a contracting party have the right to invoke the nullity of the agreement pursuant to Art. 81-2 as a matter of Community law?

In the past, there have been many brewery (and other) cases in which one contracting party invoked Art. 81-2 against the other contracting party before a national court. In some of these cases, the courts referred issues of Community law to the Court of Justice.[14] But in none of these cases was the Court asked to clarify whether the contracting party could rely on art. 81-2 as a matter of Community law. This was no doubt because national law offered the contracting party the right to invoke Art. 81-2. In *Crehan*, things present themselves differently. National law does raise a problem for the pub tenant.

Although there is no Court ruling addressing the issue "head on", it would nevertheless seem to follow from the Court's judgements in *van Schijndel* and *Eco Swiss* that not only third parties, but also contracting parties can invoke Art. 81-2 as a matter of Community law.[15]

a) van Schijndel and Eco Swiss revisited

In *van Schijndel*, the Court of Justice qualifies Art. 81 as a "binding rule".[16] The label "binding" is as such not terribly revealing. But it is clear from the judgement that the Court considers that Art. 81 has a mandatory character *erga omnes* as a public policy provision.

[14] See e.g. judgement of 12.12.1967 in *Brasserie de Haecht v. Wilkin-Janssen ("Haecht I")*, case 23/67, judgement of 18.03.1970 in *Bilger v. Jehle*, case 43/69, judgement of 06.03.1973 in *Brasserie de Haecht v. Wilkin-Janssen ("Haecht II")*, case 48/72, judgement of28.02.1991 in *Delimitis v. Henninger Bräu*, case C-234/89.

[15] Judgement of 14.12.1995 in *van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, joined cases C-430/93 en C-431/93, ECR I-4705 and judgement of 01.06.1999 in *Eco Swiss China Time Ltd v. Benetton International NV*, case C-126/97, not yet reported.

[16] Paragr. 13. Applicants had invoked Art. 81 and other EC Treaty competition provisions for the first time before the Hoge Raad and argued that the lower court should have applied the relevant provisions *ex officio*.

Referring to its ***Rewe*** and ***Comet*** case law, it observes that national courts must declare an agreement null and void of their own motion if national procedural law obliges the courts to apply binding domestic rules of their own motion.[17] It will be recalled that in ***Rewe*** the Court observed for the first time that "in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to […] determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizen have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature".[18]

The Court goes beyond ***Rewe*** and ***Comet*** by adding that Art. 5 EC Treaty requires national courts to do so even when national procedural law merely confers discretion upon the courts to apply binding rules of their own motion.[19] The Court makes a reservation though: national courts must not "abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases its claims".[20] The Court stresses that the principle according to which it is for the parties to take the initiative and for the court to act of its own motion only in exceptional cases where the public interest requires its intervention "reflects conceptions prevailing in most Member States".[21] It follows that this reservation too goes beyond ***Rewe*** and ***Comet***.

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[17] Paragr. 13. Judgements of 16.12.1976 in *Rewe Zentralfinanz and Rewe Zentral v. LandwirtschaftskammerSaarland*, case 33/76, ECR 1989 and in *Comet v. Produktschap Siergewassen*, case 45/76, ECR 2043.

[18] Paragr. 5 in *Rewe* and paragr. 13 in *Comet*.

[19] Paragr. 14.

[20] Paragr. 22.

[21] Paragr. 21.

In *Eco Swiss*, the Court describes Art. 81 as constituting "a fundamental provision which is essential for the accomplishment for the functioning of the internal market" and "a matter of public policy within the meaning of the New York convention" concerning the recognition and enforcement of foreign arbitral awards.[22]

It concludes that Community law requires national courts to overrule arbitral awards failing to apply Art. 81 if national procedural law obliges the courts to quash arbitral awards which fail to observe national rules of public policy.[23] This conclusion would seem to be no more than an implicit translation of the principles set forth in *Rewe* and *Comet* (whereas in *van Schijndel* the Court brings in Art. 5 EC Treaty to go one step beyond). Besides, as in *van Schijndel*, the Court makes a reservation. This time, it is an explicit reference to *Rewe* and *Comet*: any court action based on Art. 81-2 will be barred by national procedural law according to which the arbitral award acquires the force of *res iudicata* when no application for annulment has been brought within the prescribed time limit, at least if that time limit does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.[24]

One can bring both cases together to conclude that Community law in principle requires a national court (*van Schijndel*) and an arbitrator (*Eco Swiss*) to apply Art. 81-2 of their own motion because Art. 81 is a public policy rule. The Court's reasoning in *van Schijndel* appears to be the more far reaching one in this respect. To begin with, the national court is said to have a duty to apply Art. 81-2 of its own motion even if national procedural law merely gives it *discretion* to apply mandatory provisions of national law. Furthermore, the reservation

[22] See paragr. 36 and 39. Benetton had invoked Art. 81-2 for the first time before a national court in order to obtain annulment of an arbitral award condemning it to pay Eco Swiss compensation for breach of contract. Eco Swiss took the case to the Hoge Raad

[23] Paragr. 37.

concerning the passive role assigned to judges is presented as referring to a principle *common* to most Member States.

b) From the ex officio application of Art. 81-2 to an application of this provision at the request of a contracting party

The facts in *Eco Swiss* suggest that - in purely practical terms - a contractual party can invoke Art. 81-2 before a national court to obtain nullity of an agreement. Although the central issue in this case was whether an arbitrator must apply Art. 81-2 of its own motion, this issue reached the Court because one of the contractual parties had *requested* a national court to apply Art. 81-2. For that court, the issue was not one of applying Art. 81-2 of its own motion but of overruling an arbitral award – at a contracting party's request - for ignoring the impact of Art. 81.

In any event, if *van Schijndel*, respectively *Eco Swiss* mean that national courts and arbitrators must apply Art. 81 *even if* the contracting party who has an interest in such application has not invoked the provision, it would seem to follow that those best placed to flag up the infringement to the national courts, namely the contracting parties themselves, must have a right – as a matter of Community law - to invoke the nullity of their agreement pursuant to Art. 81-2. True, the Court's implicit or explicit references to *Rewe* and *Comet* qualify this conclusion. But in *van Schijndel*, the Court goes beyond these references by reminding Member States of their duties pursuant to Art. 5 EC Treaty and by presenting its reservation (about a national court's passive role) as the reflection of a principle common to most

[24] Paragr. 44-47.

Member States. It would therefore seem that a contracting party's "Community law" right to invoke Art. 81-2 is not conditioned in its *core* existence by national procedural law.

c) Consequences of using van Schijndel and Eco Swiss as a conceptual basis for concluding that a contracting party can invoke Art. 81-2

If the *van Schijndel* and *Eco Swiss* judgements – with their reliance on the public policy nature of Art. 81 – constitute the conceptual basis of a Community law right for contracting parties to invoke Art. 81-2 before national courts, this has an important consequence for the conditions under which these parties can invoke this provision. The contracting parties must then indeed be seen as law enforcers acting in the public interest rather than as holders of subjective rights. This would mean that a national court which applies Art. 81-2 at their request, does so because it considers their action to serve a broader policy objective: that of enhancing the functioning of the internal market through the preservation of a competitive market place. The achievement of this objective is clearly in the interest of all market players and consumers at large. From this perspective, the national court would not be applying Art. 81-2 as a provision designed to create subjective rights for certain individuals (*Schutznorm*) but as a provision which is binding *erga omnes* and needs to be enforced effectively.

To be true, this may give an *objective* dimension to the direct effect of Art. 81. This dimension is, however, not novel. It is worth noting that Van Gerven introduces a similar distinction between "subjective" and "objective" direct effect in his recent article "Of rights, remedies and procedures". Consider the following passage:

"Disapplying national measures which are found to be incompatible with Community law in themselves, or because of the invalidity of the Community law rules on which they are based, is the most general remedy which individuals whose rights have been infringed may institute before a national court of law. The remedy has become larger in scope because of the ever

broader effect which the Court, for the sake of full effectiveness of Community law, has attached to the concept of direct effect; even to the point that, in some instances, *it has lost its inseparable link with the protection of individual rights*, with the result that it has been suggested that it is possible to distinguish between "objective" and "subjective" direct effect"(italics provided).[25]

The above can be applied to the present case. Crehan would in fact hold the right to invoke Art. 81-2 in the interest of the third party brewers who see their access to the market foreclosed because of the network of tying contracts in the relevant market. It is indeed this foreclosure problem that is much more relevant from a competition view than any distortion of competition that may result from differential pricing towards pubs re-selling beer they have purchased from Courage.[26]

In other words, if it is the "objective" direct effect of Art. 81-1 which confers upon Crehan the right to invoke the nullity of an agreement, his court action finds its basis in the notion of effective law enforcement and not in that of effective protection of subjective rights. Or, at least, any protection of such rights coincides entirely with that of the effective enforcement of Art. 81 as a public policy provision.

This leads to a further – in my view fundamental - point. A contracting party inevitably contributes - to an extent that may vary from case to case – to the infringement of Art. 81 by the mere fact of entering into the agreement and complying with its contractual commitments. If he invokes Art. 81-2 as a law enforcer rather than as a bearer of subjective rights, his co-responsibility for the infringement would seem to be irrelevant. He should be given the right

[25] Cit. p. 506. Van Gerven attributes the suggestion concerning the distinction between objective and subjective direct effect to *inter alia* Judge Edward who wrote on the issue in the *liber amicorum* in honour of the late Judge Mancini.

[26] Of course, this approach requires the national court to look beyond the contract before it and undertake a genuine market analysis under Art. 81-1. But this is precisely what the Commission's new approach concerning vertical restraints advocates.

to bring the infringement to an end by obtaining from the national court a declaration of nullity (and, if need be, a cease and desist order). This must be so even if it cannot be excluded that he has lodged his court action on opportunistic grounds aiming at escaping his contractual obligations by any means.

Section 4. In the absence of any statutory provision, does the nullity of an agreement give rise to a remedy of compensation for damages as a matter of Community law?

Whereas there is a *statutory* provision of Community law providing for the right to invoke the nullity of a prohibited agreement, neither primary nor secondary Community law provides for a right of compensation for damages (of any sort). However, the Court's judgements in *Brasserie du Pêcheur* and *Factortame III* aswell as in *Francovich* indicate that this should not be the end of the story.[27]

a) Brasserie du Pêcheur, Factortame III and Francovich revisited

Two points need to be highlighted.

To start with, the Court firmly establishes that Member States are liable for breach of a provision of Community law even in the absence of a statutory rule providing for such liability. This results from the following excerpts of the above judgements.

[27] Judgement of 05.03.1996 in *Brasserie du Pêcheur v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte Factortame and others*, joined cases C-46/93 and C-48/93, ECR I-1029 and judgement of 19.11.1991 in *Francovich, Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90, ECR I-5357.

In *Brasserie du Pêcheur* and *Factortame III* [28], the Court of Justice recognizes – to start with - that the EC treaty "contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States" but considers that in such a situation "it is for the Court […] to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal sytems of the Member States".[29]

It then refers to Art. 215 EC Treaty concerning the non-contractual liability of the Community and observes that this provision "is simply an expression of the general principle familiar to legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused" and that it "also reflects the obligation on public authorities to make good damage caused in the performance of their duties".[30]

It finally quotes a passage from *Francovich* according to which "the principle of state liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty".[31] In *Francovich*, the Court had observed in addition that "the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for

[28] In these cases, applicants sought compensation for damages caused by the Member States concerned as a result of their failure to comply with respectively Art. 30 and Art. 52 EC Treaty.

[29] Paragr. 27.

[30] Paragr. 28-29.

[31] Paragr. 35. Applicants claimed that Italy's failure to implement the directive concerning the protection of employees in the event of the insolvency of their employer had caused damage to them.

which a Member State can be held responsible" and it had found a "further basis for the obligation of Member States to make good [the] loss and damage […] in Art. 5 EC Treaty".[32]

The second point to be recalled is that in ***Brasserie du Pêcheur and Factortame III***, the Court holds Member States liable for the infringement of a *directly applicable* provision of Community law (whereas in ***Francovich***, applicants were unable to invoke a Community directive without prior implementation by the Member State). The Court takes the view that "the right of individuals to rely on the directly effective provisions of the Treaty before the national courts is only a minimum guarantee and is not sufficient in itself to ensure the full implementation of the Treaty" and that "the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained".[33] This is almost literally what Van Gerven opined in ***Banks***.[34]

b) From state liability to private party liability under Art. 81

It is clear from the above judgements that individuals or companies have a right to claim compensation for damages from a Member State for breach of (even directly applicable

[32] Paragr. 33 and 36.

[33] Paragr. 20 and 22. It would therefore seem that the Court's statement in a much earlier case according to which "[the Treaty] was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law" no longer holds true (see judgement in *Rewe handelsgesellschaft v. Hauptzollamt Kiel*, case 158/80, ECR 1805, paragr.44). Besides, as Van Gerven observes in his article "Of rights, remedies and procedures" (cit. note 2, p. 517), the new remedy sought in that case was a drastic one anyway.

[34] Cf. paragr. 44 of the opinion: "recognition of such a right to obtain reparation constitutes the logical conclusion of the horizontal direct effect of the rules concerned…"

applicable provisions of) Community law even in the absence of a statutory provision establishing such a right.

The Court's rationale seems to have at least two different limbs.

On the one hand, the Court refers to common principles in the national laws and to Art. 215 EC Treaty which itself refers to such common principles. This is – what we would call – the *ius commune* rationale.

On the other hand, it relies on the "full effectiveness of Community law" or more generally even to "the system of the Treaty" and to the right of reparation as "the necessary corollary of the direct effect of the Community provision whose breach caused the damage".

The latter approach is no doubt more audacious. It reflects a clear conviction about the need to strengthen the Community legal order as an independent body of law, even in the absence of any common principles in the national laws.

If the dominant rationale is the preservation of the full effectiveness of Community rules, it would seem that it can constitute the basis not only for state liability but also for the liability of a *private party* for breach of such central Treaty provisions as those related to competition. In his opinion in ***Banks***, Van Gerven observes that "such a rule on reparation plays a significant role in making the Community rules of competition more operational, particularly since the Commission, as guardian of those rules, itself acknowledges that it is dependent on the cooperation of the national courts in enforcing them" and that "individual actions as for

damages have for some time proved useful for the enforcement of federal antitrust rules in the United States as well".[35]

c) One final query

We have one final query which is related to the scope of Crehan's damage action. Crehan in fact only seeks to obtain that he be put in the position he would have occupied in the absence of the contract (which he claims is null and void). In this sense, his *damage* action has much in common with an action merely seeking *restitution*. It could be argued that this limited remedy is inextricably linked to a court finding that the agreement is null and void (since the nullity operates *ab initio* and should lead to the *status quo ante*).[36] Hence, if there is a statutory basis for nullity (which there is: Art. 81-2), there might actually be one for this remedy of restitution as well. Under this logic, one would not even have to rely on *Brasserie du Pêcheur and Factortame* and *Francovich*.

Section 5. If there is a remedy of compensation for damages as a matter of Community law, can contracting parties avail themselves of it?

In Section 3, we have submitted that a contracting party must always have the right to invoke Art. 81-2 (and obtain a declaration of nullity and, if need be, a cease and desist order) because he acts as law enforcer in the public interest rather than as a holder of subjective rights. We have advanced a rationale which is closely related to the concept of full effectiveness of Community law. In Section 4, we have argued that the same concept, as prominently featuring

[35] Cit., paragr. 44 *in fine*.

[36] The same would seem to be true for the cease and desist order. If the agreement is null and void, it will not only disappear as if it has never existed but its implementation for the future should also be stopped.

in *Francovich* and *Brasserie du Pêcheur and Factortame III* , pleads in favour of relief in the form of damages (and we have suggested that a damage action seeking to obtain no more than *restitution* might actually have a statutory basis in Art. 81-2). The remaining question is whether this remedy of *damage* (whether limited to *restitution* or going beyond) is *at all times* available for a contracting party who has contributed to the infringement by entering into the null and void contract in the first place.

In line with the query made in the previous section, we submit that it might be necessary to distinguish between damage actions which merely aim at seeking restitution and other actions which go beyond restitution in that they aim at obtaining reparation for consequential damages.

a) compensation of damages in the form of restitution

If a contracting party merely seeks to obtain that he be put back in the position he was in before he had concluded the contract, much is to be said in favour of an unqualified right to claim damages. This would seem be defendable not so much because the scope of his *petitum* is limited but because it in fact coincides with (or belongs to) the natural legal consequences of the nullity of the agreement. Nullity is bound to lead to the re-creation of the *status quo ante*. This would mean that Crehan is entitled – as a matter of Community law - to a reimbursement of the difference between his purchase price for beer and the price paid by the untied pub tenants.

Arguably, this would mean that the first question of the UK Court of Appeal (about relief) and its second question (about damages) should receive identical answers.

b) compensation of damages going beyond mere restitution

When a contracting party claims compensation of consequential losses and thus seeks to obtain financial compensations going beyond those that merely restore his position prior to the conclusion of the contract, such a claim does not automatically result from the nullity of the agreement. There is a "subjective" element in his claim that goes beyond the "objective" nullity of the agreement. This is reflected in the burden of proof that lies with the contracting party. That party not only has to demonstrate that the agreement is illegal. He must also show that he has suffered damages and that there is causation between the illegality and the damages.

We submit that it must be verified under what circumstances a contracting party invoking this "subjective" right in a situation in which he has inevitably contributed to the infringement of Art. 81 (by entering into the contract whose validity he now challenges) nevertheless "objectively" contributes to the effective enforcement of Art. 81 (by obtaining, in any event, a declaration that the agreement is null and void). Things are different for a third party because – by definition – he never contributes to the infringement.

In our view, contracting parties should have a right to claim compensation for damages *as a matter of Community law* whenever the mere possibility of such an action clearly serves as a deterrent to companies contemplating the commission of an infringement of Art. 81. Where the damage action manifestly serves no deterrent purpose or where it is unclear whether the action serves such a purpose, no right to claim compensation for damages should exist (still as a matter of Community law). In the latter case, it would be for national law to specify

whether, and, if so, to what extent, the contracting party could nevertheless bring a damages action.

The Commission itself has recognized the link between damages claims and deterrence. In its 1993 Notice concerning its cooperation with national courts, it observes that "companies are more likely to avoid infringements of the Community competition rules if they risk having to pay damages or interest" in the event that a damages claim is brought before the national court.[37]

In a leading US antitrust case dealing with treble damages, Justice Black also observes for the Supreme Court that "[past decisions] were premised on a recognition that the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter any one contemplating business behaviour in violation of the antitrust laws" and that "the plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favour of competition".[38]

In some instances, a contracting party's damages action is clearly – even though paradoxically – capable of contributing to the effective enforcement of Art. 81. In other situations, it definitely is not. And in yet other cases, it may be difficult to tell.

Let us start with the cases in which the private damages claim serves no public enforcement purpose. Consider a company initially participating in a straightforward, *per se* illegal, price cartel but subsequently lodging a damages claim against the other cartel members for breach of Art. 81 because its commercial interests now make it worthwhile to step out of the cartel.

[37] Cit. note 8, paragr. 16. Of course, as already mentioned, the Commission only has in mind a damages claim based on national law. Besides, it does not make a distinction between third parties and contracting parties.

[38] See *Perma Life Mufflers Inc. v. International Parts Corp* (392 US 134, at 138).

As a matter of fact, in such "real world" cartel cases, it would be unlikely (though not entirely excluded) to find a genuine contract capable of being declared null and void.

As Justice White observes in the above mentioned US antitrust case, "to permit [a competitor combining to fix higher prices] a recovery may be counter-deterrent" since "by assuring him illegal profits if the agreement in restraint of trade succeeds and treble damages if it fails, it may encourage what the Clayton Act was designed to prevent".[39]

When the competitor is equally at fault, it is not the degree of fault *as such* that pleads against awarding this competitor the claim. It is his purely opportunistic behaviour. To reward such behaviour produces no deterrent effect and may actually, as observed, be counter-deterrent.

In contrast, the full effectiveness of Community competition law in general, and Art. 81 EC Treaty in particular, is certainly served in all cases where a contracting party bringing the damages claim - while perhaps formally co-responsible for the infringement with the other party - has in fact merely adhered to a non-negotiable standard contract. It could be left to the national courts to decide – in light of national contract law – when a contracting party finds himself in such a situation. In any event, it could be said that the liability of the weaker party is not *par* and that, as a consequence, the *in pari delicto* principle should simply not be applied to it.[40]

Once more, Justice Black's opinion in *Perma Life Mufflers* is particularly eloquent. He observes that the plaintiff's participation in the illegal scheme (as franchisees) "was not voluntary in any meaningful sense", that many of the contract clauses were actually quite detrimental" but that "acquiescence was necessary to obtain an otherwise attractive business opportunity". He acknowledged that "the possible beneficial by-products of a restriction from the plaintiff's point of view can of course be taken into consideration in computing damages"

[39] Ibidem.

[40] In his dissenting opinion in *Perma Life Mufflers*, Justice Harlan does not seem to be all that far away from the majority when he talks in such cases about a "coercion" exception to the *in pari delicto* doctrine.

but he went on to say that "once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him". And Justice White similarly makes the direct link with deterrence. He observes that "when those with market power and leverage persuade, coerce or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of [Section 4 of the Clayton Act], since it will deter those most likely to be responsible for organizing forbidden schemes".

For the category of cases in between these two extremes (*contrats d'adhésion* and *per se* illegal cartels), it is more problematic to describe in the abstract what the outcome should be under Community law if the admissibility of a damage action is to be assessed in light of the deterrence objective. The only thing that one could say is that the *in pari delicto* principle, when interpreted literally, does not seem to be incompatible with the "full effectiveness" and "deterrence" principles. Indeed, when a contracting party bears sufficient co-responsibility to an infringement of Art. 81 to call his responsibility "*par"*, then his damage action is unlikely to serve any deterrence objective and the right to such an action can be denied to him.

In the case at hand, it is not clear why the national court considers that the *in pari delicto* principle is at all applicable to Mr. Crehan's court action as a matter of *national* law. As pub tenant, he has merely entered into a standard lease imposed upon him by Inntrepreneur and his position seems to be similar to that of a party to a *contrat d'adhésion*. Another matter is whether he could somehow have limited the extent of his loss. The UK Court of Appeal quite radically observes that "he should have mitigated his damages by never entering into the agreement in the first place". The Court of Justice has recognized that there is indeed a principle common to the legal systems of the Member States according to which an injured party must show reasonable diligence and do everything it can to mitigate the damages.[41] However, by arguing that this due diligence should have led Crehan not to enter into the

contract at all, the UK Court of Appeal seems to ignore the real nature of the contract and to expand the *in pari delicto* principle beyond its logical scope.

Conclusion

The judgement of the Court of Justice in *Crehan* will have important consequences for the effectiveness of EC antitrust law *if* it addresses the questions raised by the UK Court of Appeal. It is therefore to be hoped that the Court will not find ways to get round the questions. In order to avoid this, it should first of all assume that the brewery contract between Crehan and Courage is indeed illegal under Art. 81. It should also assume that somehow the *in pari delicto* principle is relevant to the case under domestic law in spite of the fact that Crehan's responsibility for the infringement does not seem to be "*par*".

The Commission's recent proposals for a modernisation (read: radical overhaul) of the enforcement of Art. 81 give the pending case a supplementary policy dimension. As you know, the Commission's proposals rest upon the premise that Art. 81 as a whole (not just Art. 81-1) has direct effect. The Commission therefore advocates a decentralization of the enforcement of Art. 81 which goes much further than the decentralization so far propagated. Its otherwise radical proposals fall short of stipulating that private parties have a right to claim compensation for damages in national courts as a matter of Community law. This may be seen as a missed opportunity because Art. 83 (ex-Art.87) would seem to constitute a sufficient legal basis for the Council to write such a right into a piece of secondary Community legislation. But for the Commission this opportunity might have been a feasibility matter. For

[41] See judgement of 19.05.1992, *Mulder and Heinemann v. Council and Commission*, joined cases C-104/89 and C-37/90, ECR I-3061.

the Court of Justice it is a matter of law. It is therefore hoped that it will to take up that opportunity.