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**The effects of nullity of Article 81(2)
EC**

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Summary

The creation of an internal market is one of the objectives of the EC Treaty, and EC Competition provisions are instrumental for the achievement of this goal. Articles 81(1) and 82 EC establish, in general terms, a prohibition of practices which may distort trade between the Member States. The consequence of falling into such a prohibition is given by the EC Treaty itself in Article 81(2): nullity. However, it was for Regulation 17 and the ECJ to develop the effects of such nullity. The effects provided by Regulation 17 are administrative measures imposed by the Commission: 1) termination of the infringement and 2) fines. The ECJ also recognized the power of the Commission to grant interim measures. Nevertheless, for a private party, these effects happen to be not sufficient to repair the damage sustained. It is here that the ECJ, together with national courts, comes into play.

Since the judgment in *Francovich (1991)*, in which the Court recognized the right to damages against Member States for breach of EC rules, many had wondered if the same principle could be applied between private parties (horizontally). It was not until 10 years later that the Court expressed its view. Certainly, since the ruling on *Courage* in 2001, there is a Community right to damages for breach of EC Competition rules. The exceptionality of this case was that a co-contracting party to a prohibited agreement brought the action for damages. Under national law, it was prohibited that a party to an illegal agreement could bring such actions (this is known as the *in pari delicto* principle). However, the ECJ held that even a party to an anticompetitive agreement can bring such claims, subject to two limitations (unfair enrichment and significant responsibility). To understand the reasoning of the Court it is necessary to study three principles: direct effect, supremacy and State liability. Without the development or recognition of one of them, the ECJ would have found difficult to acknowledge private liability as it did in *Courage*. Indeed, the two grounds on which the case relies on are: direct effect and full effectiveness. Although the Court made

itself clear that there is a right to claim damages for breach of Article 81 EC, it left many issues unresolved. It is expected that future cases will provide the answers.

From another perspective, the ruling on *Courage* is consistent with the decentralization scheme provided by the future Regulation 1/2003 to be implemented next year. National courts are to have an important role in the enforcement of Articles 81 and 82 EC *in toto*.

Preface

The suggestion of writing about the effects of nullity of Article 81(2) EC was given to me by Advokat Magnus Ramberg, from Lindahl law firm in Helsingborg . The idea captivated me since the beginning for its practical use. However, during my research on the subject I have not found any article specifically related to it. On the other hand, the judgment of *Courage v. Crehan* provided me with a new start for my research. Although no literature refers to *Courage* as a decision regarding an effect of nullity of Article 81(2), the connexion is indisputable. It is on this ground that I regard the recognition of damages for breach of EC Competition law as one of the most important effects of the nullity concerned.

I would like to dedicate my first thank to God for holding me up during the difficult times in the last year. There are also many people I would like to be grateful for their support: Prof. Henrik Norinder for his continuous encouragement in the development of this paper; André, my husband, for all his love and patience; all my in-laws (whom I like to refer to as “my in-loves”); and special thanks to my parents for their prayers.

Abbreviations

AG	Advocate General
CMLR	Common Market Law Review
E.Bus.L.R.	European Business Law Review
EC	European Community
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
ECSC	European Coal and Steel Community
E.L.Rev.	European Law Review
LIEI	Legal Issues of Economic Integration
OJ	Official Journal

1 Introduction

The EC Treaty considers Competition rules as fundamental instruments for the achievement of the internal market¹, which is one of the objectives of the Community. Among the provisions established in the EC Treaty, Articles 81 and 82 are the central clauses which provide the basis for EC Competition law. The aim of these provisions is to safeguard that competition in the Community remains undistorted.

Despite the importance acknowledged to EC Competition rules, the EC Treaty makes reference in Article 81(2) to only one effect for anticompetitive agreements: nullity.

It is evident that persons or undertakings affected by unlawful practices suffer loss or harm which cannot be remedied by a mere declaration that those acts are null and void. Anticompetitive practices produce effects both between the contracting parties themselves and on third parties. When those effects are harmful, there should be a way to correct the damage caused. What can an undertaking do when it suffers the negative consequences of anticompetitive practices? Is there any action for damages available under Community law? Does it matter if the undertaking itself is involved in the anticompetitive agreement? Are there any requirements? The expressed provisions of the EC Treaty are obviously not sufficient.

Current Regulation 17² deals with some of the effects of such nullity. Although very important, they fall strictly within the administrative area. It is the role of the European Court of Justice (hereinafter “ECJ” or “the Court”) that has proven to be very significant in terms of interpreting EC law in these matters. Ever since the judgment in *Francovich*, which recognized the principle of State liability for breach of EC law, many have wondered if the same principle could be applied between private parties; that is if there is a principle of private liability for breach of EC law. In a recent judgment, *Courage v. Crehan*, the ECJ supplied the answer.

¹ Article 3(1)(g) EC Treaty

² Regulation 17/62, OJ P 013 , 21/02/1962

This work consists of four sections which are arranged in the following manner.

The first part presents a brief background on EC Competition law in order to offer a better understanding of this work to those who are not acquainted with the subject. Nevertheless it is necessary to mention that this work was written with the presumption that the reader has some basic knowledge on EC law in general and EC Competition law in particular.

The second part focuses on the three main aspects which provide the basis for the recognition of private liability for infringement of EC law, namely direct effect, supremacy and liability for breach of EC law. Without having these concepts clear, it is difficult to understand the reasoning of the ECJ in the *Courage* case, which is developed in the following section. The cases selected for each of the principles were chosen according to their impact on Competition law and their relevance in the judgment of *Courage*, especially *Francovich*, *Brasserie du Pêcheur* and *Banks*. The years of the cases are given next to them to illustrate the reader the extension in time between each of them and to point out that *Courage* is the result of a development which was initiated since the origins of the Community, with the inclusion of Competition provisions in the EC Treaty.

The third part analyses in detail the judgment in *Courage v. Crehan* as the leading case on the recognition of private liability for breach of EC Competition law. This case is undoubtedly the answer that many have been waiting for regarding the civil effects of the nullity of Article 81(2) EC. Subsequently the grounds of its judgment are compared in context with the previous case-law with their similarities and differences. As *Courage* is the first case in this matter, there is an ongoing debate about the interpretation of the judgment. Some of the points of discussion are presented at the end of this chapter.

While the previous sections covered substantive matters, this last section covers the practical matters which round up the possibilities for a private party to bring actions before the Commission or the national courts according to Regulation 17 and illustrates the differences in the effects available in one and in the other. Lastly, the new scheme in the enforcement of EC Competition law provided by Regulation 1/2003 is briefly presented.

The paper ends with a personal conclusion.

The purpose of this paper is to study the effects of the nullity stated in Article 81(2) EC from a business perspective. The main focus is the civil effect of the nullity, namely the private liability for infringement of EC Competition law.

The method employed is the traditional legal method on the analysis of case-law of the European Court of Justice.

The sources for this work are legislative material, case-law from the ECJ, articles from journals and literature available at the University of Lund.

This paper does not cover a) US antitrust law, b) the effects of Article 81(2) neither in Mergers and Acquisitions nor in bilateral or multilateral agreements with third countries, and c) national case-law regarding the application of EC Competition law.

2. EC Competition Law

The importance of Competition rules in an economy market cannot be understated. Although competition is an economic concept³, competition rules are necessary to guarantee the functioning of the market without distortion. Undertakings interact with each other as well as with consumers. In conditions of effective competition, undertakings have equal opportunities to compete for business on the basis and quality of their goods or services.⁴ However, it is a reality that there are a number of undertakings which, in order to maximize their own benefits, fall into practices which are deemed to jeopardize the system of effective competition. Such practices can involve, in general terms, agreements between undertakings or abuse of a dominant position in order to restrict the access or the development of other competitors in the market. It is in these circumstances that Competition rules come into play. These rules seek to prevent the unfair acquisition of market power by individual undertakings.⁵

The EC Treaty establishes the importance of Competition rules in the achievement of the internal market. Articles 81 and 82 EC constitute an essential part of the Community's competition policy⁶ since they both serve as instruments in the realization of the mentioned objective by ensuring that competition is not distorted.

Article 81(1) EC establishes that “agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the

³ FAULL, J. & NIKPAY, A., “The EC Law of Competition”, 1999, N.Y., ISBN 0-9-876538, p. 199

⁴ GOYDER, D.G., “EC Competition Law”, 3rd edition, 1998, N.Y., ISBN 0-19-826296-5, p. 15

⁵ *Ibid*

⁶ KERSE, C.S., “E.C. Antitrust Procedure”, 4th edition, 1998, London, ISBN 0 421 610 506, p. 1

common market” are prohibited. As it can be noticed, three elements must be fulfilled to fall into the prohibition: 1) existence of agreement, 2) affect trade between Member States, and 3) distortion of competition.

The only case in which such types of agreements do not fall into the prohibition is by obtaining an exemption on the grounds of Article 81(3). The power to grant an exemption is, at the present time, exclusive of the Commission.⁷ There are two types of exemption: an individual exemption, which is granted by decision of the Commission, and a block exemption, which applies automatically with no requirement to be notified to the Commission.⁸ The article itself provides the four conditions for the grant of an exemption. They are :

- 1) improvement of the production or distribution of goods or promotion of technical or economical progress;
- 2) benefit to consumers;
- 3) restrictions should be indispensable for the attainment of the agreement’s objective; and
- 4) it should not lead to the elimination of competition

In case that an agreement falls into the described prohibition and is not exempted, Article 81(2) EC determines that the effect is its automatic nullity. This is the only expressed mention of the Treaty about the effect of Article 81(1).

The ECJ held that the nullity applies only to those parts of the agreement which fall under the prohibition.⁹ If the elements which fall into the prohibition cannot be severed, then the whole agreement falls under the nullity of Article 81(2).¹⁰ If they can be severed, then the rest of the agreement remains valid. The severed parts fall under the nullity of Article 81(2), and the other parts of the agreement are a matter of national law.

⁷ Article 9 Regulation 17, see *supra* note 2

⁸ KAPTEIN, P.J.G. & VERLOREN VAN THEMAT, “Introduction to the Law of the European Communities”, 3rd edition (Student edition), 1998, London, ISBN 90-411-9666-8, p. 867

⁹ Case C-56/65, *La Technique Minière v. Maschinenbau Ulm*, [1966] E.C.R. 235

¹⁰ KERSE, see *supra* note 6, p. 17

Article 82 EC also establishes a prohibition, “Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.” The two required elements are: 1) abuse of a dominant position, and 2) affect trade between Member States.

It is to be noticed that Article 82 EC lacks of a provision equivalent to Article 81(2) EC. However, taking into consideration that both Articles 81 and 82 EC pursue the same objective, there is nothing that restricts the application on Article 82 EC of the same effect provided in Article 81(2) EC.

Regulation 17 is the principal regulation dealing with the practical application and enforcement of Articles 81 and 82 EC.¹¹

While the EC Treaty remains silent concerning the effects of the nullity provided in Article 81(2), current Regulation 17 provides two effects: termination of infringement¹² and fines of up to 10% of the total turnover of the preceding year for each of the undertakings involved¹³. The ECJ also recognized the Commission’s power to grant interim measures. But more importantly, the ECJ has recently provided for another effect or remedy: the right to damages for breach of EC Competition law.

¹¹ KERSE, *ibid*, p. 35

¹² Article 3(1) Regulation 17, see *supra* note 2

¹³ Article 15(2), *ibid*

3. Three fundamental pillars

In order to have a comprehensive view of the reasoning of the ECJ in *Courage*, it is necessary to make a reference to three principles/doctrines developed by the Court through its case-law. These are: direct effect, supremacy and liability for breach of EC law. As it will be developed in the next chapter, these pillars are crucial to the recognition of private liability for breach of EC law.

The cases mentioned in the following sub-sections were taken with an illustrative purpose either for being the first ones in recognizing the principle or for their impact in the development of the doctrine. The reference to these few cases by no means excludes the abundance of others which apply the same principles.

3.1 Direct effect

The doctrine of direct effect, in general terms, allows individuals to rely on provisions of EC law to be applied on national courts.¹⁴ Articles 81 and 82 EC belong to the provisions having direct effect.

3.1.1 Origin of direct effect. *Van Gend en Loos*¹⁵ (1963)

The general concept of direct effect has its origins in 1963 when the European Court of Justice (hereinafter “the Court”) released its judgment in *Van Gend en Loos*.

In 1960, Van Gend en Loos (a dutch company) was forced to pay an import duty to Customs and Excise for importing a chemical substance from Germany. Van Gend en Loos claimed that the imposition of that duty was contrary to Article 25 EC. The main question referred to the ECJ was

¹⁴CRAIG, P. & DE BÚRCA, G., “EU Law text cases and materials”, 3rd edition, 2003, NY, ISBN 0-19-924943-1, p. 180

¹⁵ Case C-26/62, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 13

whether Article 25 had direct effect in national law in the sense that individuals may claim rights which the national court must protect.

The Court stated that “the Community constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their *nationals*. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to *confer upon them rights* which become part of their legal heritage [emphasis provided]”. It is in this expression that the ECJ recognized for the first time the doctrine of direct effect. Moreover, it also established the conditions for a Treaty provision to produce direct effect: clear and unconditional.

It was necessary for the Court to develop this concept in view of the achievement of the objectives of the Treaty and to ensure that Member States did in practice comply with the provisions to which they had agreed upon.¹⁶

3.1.2 Direct effect of EC Competition law

The first reference to the direct effect of EC competition provisions is to be found in *Brasserie de Haecht II*¹⁷ in which the Court established that “apart from the possible intervention by the Commission by virtue of the regulations and directives referred to in [Article 83], the judiciary, by virtue of the direct effect of [Article 81(2)], is competent to rule against prohibited agreements and decisions by declaring them automatically void.”¹⁸

However it was in *BRT v. SABAM* that the Court expressly accepted the direct effect of Articles 81(1) and 82 EC.

¹⁶ CRAIG & DE BÚRCA, see *supra* note 11, p. 184

¹⁷ Case C-48/72, *Brasserie de Haecht SA v. Wilkin*, [1973] ECR 77

¹⁸ Para. 4, *ibid*

3.1.2.1 *BRT v. SABAM*¹⁹(1974)

In this case, the court of first instance in Brussels was asked to rule about the compatibility of the statutes and standard form contracts of SABAM (a copyright collecting society) with the prohibition of Article 82 EC (abuse of a dominant position). SABAM brought an appeal under Article 9(3) of Regulation 17, which provides that authorities of the Member States are competent to apply Articles 81(1) and 82. One of the questions referred to the ECJ was whether a national court was a national authority within the meaning of Article 9(3) of Regulation 17.

The ECJ held that “as the prohibitions of [Articles 81(1) and 82] tend by their very nature to produce *direct effects* in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard [emphasis added].”²⁰ The ECJ came to the conclusion that “the fact that the expression ‘authorities of the Member States’ [...] covers [national competition courts] cannot exempt a court before which the *direct effect* of [Article 82] is pleaded from giving judgment”.²¹

3.1.2.2 *Eco Swiss*²²(1999)

In a more recent case, the Court dealt in *Eco Swiss* with an arbitral award which was claimed to be null due to the nullity of the licensing agreement between Eco Swiss and Benetton upon which the award had relied on. The agreement fell under the prohibition of Article 81 EC since it contained a market-sharing clause. One of the main questions referred to the ECJ was whether arbitrators were under an obligation to apply EC Competition law on its own motion and if failure to do so was against public policy. The Court held that Article 81 EC constitutes “a fundamental provision which is essential for the accomplishment for the functioning of the internal market”²³ and is to be considered “a matter of public policy”.²⁴ In effect, the

¹⁹ Case C-127-73, *BRT v. SABAM*, [1974] ECR 51

²⁰ Para. 16, *ibid*

²¹ Para. 20, *ibid*

²² Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, [1999] E.C.R. I-3055

²³ Para. 36, *ibid*

ECJ recognized the importance of Article 81 EC in the accomplishment of the internal market. Such importance is evidenced by the automatic nullity provided in Article 81(2) EC.²⁵ And in acknowledgment of the direct effect of such provisions, the Court held that where a national court is required to grant an application for annulment of an arbitration award which is found to infringe national rules on public policy, it must also award such an application for breach of Article 81(1) EC.²⁶

It is clear from the cases presented above that the absence in the Treaty of an express private right of action for infringement of Articles 81 and 82 EC is in part compensated for the application of the principle of direct effect.²⁷

3.1.3 “Objective” and “subjective” direct effect

There is not a unanimous concept of direct effect.²⁸ It is suggested that there is a distinction between “objective” and “subjective” direct effect.

On the one hand, objective direct effect indicates that the Treaty provision does not grant a subjective right to individuals but only imposes a specific obligation to be obeyed *per se*. In other words, it is not necessary that the provision creates right for individuals to be invoked before the courts; the only requirement to be fulfilled is that the provision is clear and unconditional. Consequently, the affected party would invoke the provisions of the Treaty as a law enforcer, and the existence of individual rights is a consequence of the direct effect.

On the other hand, subjective direct effect is expressed as the capacity of a provision of EC law to confer rights on individuals which they may enforce before national courts.²⁹ Therefore, the party would invoke the provisions of

²⁴ Para. 39, *ibid*

²⁵ Para. 36, *ibids*

²⁶ Para. 37, *ibid*

²⁷ JONES, Clifford A., “Private Enforcement of Antitrust Law in the EU, UK and USA”, 1999, N.Y., ISBN 0 19 826868 8, p. 59

²⁸ CRAIG & DE BURCA, see *supra* note 14, p. 179

²⁹ VAN GERVEN, W., “Of Rights, Remedies and Procedures”, [2000] 37 CMLR, p. 501

the Treaty as a bearer of subjective rights. According to this concept, the right of individuals is a condition for the existence of direct effect.

The consequences for the adoption of either one or the other concept of direct effect can be significant. This distinction will be further developed in the analysis of *Courage v. Crehan* (Section 4.4.3).

3.2 Supremacy

The recognition that Articles 81 and 82 EC have direct effect is necessary but not sufficient to provide a basis for private actions for breach of EC Competition rules.³⁰ The recognition of the principle of supremacy is necessary in order to maintain the effectiveness of EC law.

3.2.1 Origin of supremacy

This principle arose also in *Van Gend en Loos* and was developed by the Court a year later in the judgment of *Costa v. ENEL*³¹ (1964) in which the ECJ held that “the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”. But it was in *Simmenthal II* where it attained more definition.

3.2.1.1 *Simmenthal II*³² (1978)

In *Simmenthal I*, the ECJ ruled that the fees which had been charged to Simmenthal for a veterinary inspection of the beef which it imported from France were incompatible with the EC law. On these grounds, the Pretore ordered the Italian fiscal authorities to repay the amounts. However, the Italian fiscal authorities claimed that national authorities could not detach from national law conflicting with EC law without first bringing the matter

³⁰ JONES, C.A., see *supra* note 27, p. 59

³¹ Case C-6/64, *Costa Flaminio v. ENEL*, [1964] ECR 585

³² Case C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, [1978] ECR 629. This case is commonly known as simply *Simmenthal*.

before the Italian Constitutional Court. It is in these circumstances that a preliminary ruling was referred to the ECJ. The question was whether a national law which conflicts with EC law must be set aside without waiting for the constitutional authority to rule on this matter.

The ECJ ruled that Community law takes precedence over national law³³ and that, based on the *principle of effectiveness*³⁴, “every national court [...] must apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule”.³⁵

The judgment of the Court established that national courts, including those of first instance, are required to apply directly and immediately Community rules based on the principle of supremacy.

3.2.2 Supremacy of EC Competition law

3.2.2.1 *Walt Wilhelm*³⁶ (1969)

The case involved matters concerning parallel proceedings, one before the Commission under Article 81 EC, and the other before the national authorities under national law. The main question referred to the ECJ was whether it was compatible with the Treaty to have parallel proceedings, especially regarding the risk of a different legal assessment of the same facts.

The ECJ held that parallel proceedings were allowed in so far as three conditions were met: 1) that the application of the national law does not prejudice the uniform application of EC competition rules and of the full effect of the measures adopted to implement that law³⁷, 2) that national law does not allow what is prohibited by EC law, and 3) that *in case of conflict between EC provisions and national provisions, Community law takes precedence*.³⁸

³³ Para. 17 *ibid*

³⁴ Para. 20 *ibid*

³⁵ Para. 21 *ibid*

³⁶ Case C-14/68, *Walt Wilhelm and others v Bundeskartellamt*, [1969] E.C.R. 1

³⁷ Para. 4, *ibid*

³⁸ Para. 6, *ibid*

The recognition to the precedence of EC law derives from the application of the principle of effectiveness. In words of the ECJ “it would be contrary to the nature of such a system to allow Member States to introduce or retain measures capable of prejudicing the practical effectiveness of the Treaty”.³⁹

This was the first case in which the ECJ recognized the supremacy of EC Competition law as regards national competition laws.

3.3. Liability for breach of EC law

The third pillar was also a principle derived from the case-law of the ECJ. Neither the EC Treaty, nor secondary Community legislation provides for a right to compensation for damages.⁴⁰ Therefore, it was the task of the ECJ to decide on this matter. Since *Rewe*⁴¹, there have been a number of cases which aided in the development and recognition of the principle of liability for infringement of EC law. The recognition of liability began from actions brought against Member States, which by action or omission contravened directly applicable EC provisions.

The following sections refer to the most significant cases in the development of liability for breach of Community law prior to *Courage*.

3.3.1 State liability

3.3.1.1 *Francovich*⁴² (1991)

The origin of the principle of state liability in damages for breach of EC law lies in the judgment of the Court in *Francovich*.

In this case, Mr. Francovich, due to the insolvency of his employer and relying on a Council Directive, claimed from the Italian State the guarantees

³⁹ Para. 6, *ibid*

⁴⁰ GYSELEN, Luc, “Liability of Supranational, State and Private Actors”, article found in Principles of Proper Conduct for Supranational, State and Private actors in the European Union – Towards a *Ius Commune*, Colloquium organized by the K.U. Leuven held on 15-16 September, available on internet at

http://europa.eu.int/comm/competition/speeches/index_2000.html 2003-01-05, p. 15

⁴¹ Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, [1976] ECR 1989

⁴² Joined cases C-6 & 9/90, *Francovich and Others v. Italian Republic*, [1991] ECR I-5357

of payment of unpaid wages or, in the alternative, compensation. It is to be observed that the Italian State failed to implement the Directive within the prescribed period, which was prior to the time of the proceedings. As a consequence, the question of whether the State was liable to pay the sums owed was raised.

The Court analyzed if the conditions for the existence of direct effect were fulfilled and came to the conclusion that the Directive was not directly effective for not being sufficiently clear and precise, since it did not identify the national institution to be held responsible for the guarantee.

Nevertheless, this did not prevent the Court to sustain that “it is a principle of Community law that the Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible”⁴³. To come to this assertion, the Court relied on Article 10 EC and on the *full effectiveness* of Community rules. Article 10 EC refers to the principle of co-operation between Member States and the Community: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.” This means that if a Member State does not provide a fully effective judicial remedy for the protection of Community rights, the Member State itself may have breached its obligation under Article 10 EC⁴⁴. The principle of full effectiveness provides 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 which a Member State can be held responsible.”⁴⁵

The Court stated that the principle of State liability “is *inherent in the system of the Treaty* [emphasis added]”⁴⁶, therefore it sustained that the

⁴³ Para. 37, *ibid*

⁴⁴ JONES, C.A., see *supra* note 27, p. 73

⁴⁵ Para. 33, *Francovich*

⁴⁶ Para. 35, *ibid*

existence of rights is inevitably connected with the existence of remedies (*ubi jus, ibi remedium*).⁴⁷ Thus, it clearly stated that individuals have a right to obtain compensation which is directly based on Community law (this is known as the *Francovich* reservation), not national law.⁴⁸ The language used by the Court does not restrict liability to failure of implementing a directive, but it is so broad as to comprise any other breach of Community law.

Despite the importance of this judgment the ECJ limited itself to provide minimum guidance⁴⁹, and left it to the legal systems of Member States to deal with the substantive and procedural conditions for reparation of loss and damage⁵⁰, provided that these conditions must “not be less favorable than those relating to similar domestic claims, and may not be so framed as to make it virtually impossible or excessively difficult to obtain reparation”⁵¹ (principle of equivalence and principle of effectiveness, respectively).

It is in this case that the Court laid down the foundation for the conditions for State liability. However they took definitive shape in a posterior case, namely *Brasserie du Pêcheur*, which is described in the following subsection.

From a private enforcement of EC competition law perspective, the importance of *Francovich* is that national courts would be required to give effect to the right to compensation in private enforcement actions regardless of the position of national law, based on the recognition that this right is founded in Community law and confirmed by Article 10 EC.⁵²

⁴⁷ TRIDIMAS, Takis, “Liability for breach of Community law: growing up and mellowing down?”, [2001] 38 CMLR, p.301

⁴⁸ JONES, C.A., see *supra* note 27, p. 71

⁴⁹ CRAIG & DE BURCA, *supra* note 14, p. 257

⁵⁰ VAN GERVEN, Walter, “The ECJ’s recent case-law in the field of tort liability; towards a European *ius commune*?” from *European Ambitions of the National Judiciary* by Jansen, R., Koster, D. and Van Zutphen, R., 1997, The Hague, ISBN 90 411 0381 3

⁵¹ Para. 43, *Francovich*

⁵² JONES, C.A., see *supra* note 27, p. 73

3.3.1.2 *Brasserie du Pêcheur*⁵³ (1996)

After *Francovich*, the most significant case regarding the protection of individual rights against Member States for breach of EC law was *Brasserie du Pêcheur*. In this case, *Brasserie du Pêcheur*⁵⁴ (a French beer company) brought an action against the German State for the loss it had suffered as a result of an import restriction based on the purity requirement in the Law on Beer Duty, which was previously resolved by the ECJ as being incompatible with the EC Treaty. The main question was whether State liability also applied in the case of damage suffered by individuals for breaches of Community law when those breaches were the result of an act or an omission on the part of the national legislature.

The answer of the Court was that the principle of State liability “holds good for *any* case in which a Member State breaches Community law, *whatever* be the organ of the State whose act or omission was responsible for the breach [emphasis added]”.⁵⁵ To come to this conclusion the Court relied on four grounds: 1) the principle of effectiveness, 2) the direct effect of a Treaty provision, namely Article 28 EC, 3) the second paragraph of Article 288 EC, and 4) the recognition that the principle of State liability is inherent in the system of the Treaty, sustained in *Francovich*.

Two of these grounds are worth to be described. Regarding the first point, the Court relied on the principle of effectiveness to sustain that “the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a *minimum guarantee* and is not sufficient in itself to ensure the full and complete implementation of the Treaty [emphasis added]”⁵⁶. And as regards the third point, the EC Treaty establishes in the

⁵³ Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, [1996] ECR I-1029

⁵⁴ The facts in *Factortame* are omitted in this paper due to the parallel reasoning done by the ECJ with regards *Brasserie du Pêcheur*.

⁵⁵ Para. 32, *Brasserie du Pêcheur*

⁵⁶ Para. 20, *ibid*

second paragraph of Article 288 that “in case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties”. The Court asserted that this principle of non-contractual liability of the Community was common to the legal systems of the Member States.

The ECJ subjected the liability of a Member State to the same conditions as those laid down in the ECJ’s case law with respect to breaches of Community law committed by Community institutions. It expressly held that “the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage”⁵⁷. This is an interesting development because it guarantees equal treatment of injured parties irrespective of who is responsible for the violation of Community law.⁵⁸

After having expressed that point, the Court pointed out the three conditions for the existence of State liability under Community law when there is a wide legislative discretion involved:

- 1) the rule of law infringed must be intended to confer rights on individuals;
- 2) the breach must be sufficiently serious; and
- 3) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties⁵⁹

⁵⁷ Para. 42, *ibid*

⁵⁸ VAN GERVEN, see *supra* note 50, p. 99

⁵⁹ Para. 51 *Brasserie du Pêcheur*

Here the Court introduced the notion of serious breach as a crucial condition for State liability.⁶⁰ It held that a breach is sufficiently serious when “the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.”⁶¹ As regards precise and directly effective competition rules, it is evident that the requirement of a “manifest and grave disregard “cannot be applied⁶² since there is no margin for discretion.

The Court took into consideration that it is a principle common to the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage⁶³ and laid out some factors which national courts may consider in order to determine the extent of the reparation:

- 1) reasonable diligence by the injured person in order to avoid or limit the extent of the damage or loss
- 2) whether he made use of all the legal remedies available to him in time⁶⁴

Moreover, it concluded that reparation of loss or damage caused as a result of breaches of Community law must be commensurate with the loss or damage sustained⁶⁵ (principle of proportionality).

3.3.2 *Private liability?*

The recognition of State liability opened up the question whether the same reasoning can be applied to private liability. The Court of Justice missed its opportunity in *Banks*. However it is important to examine this case due to the valuable reasoning from Advocate General van Gerven.

⁶⁰ TRIDIMAS, see *supra* note 47, p. 301

⁶¹ Para. 55 *Brasserie du Pêcheur*

⁶² ANDERSON, David, “Damages for Breach of Competition Rules” in *European Community Law in the English Courts* by Andenas, Mads and Jacobs, Francis, 1998, N.Y., ISBN 0 19 826592 1, Chapter 13 P. 189

⁶³ Para. 85 *Brasserie du Pêcheur*

⁶⁴ Para. 84 *ibid*

⁶⁵ Para. 90 *ibid*

3.3.2.1 *Banks*⁶⁶ (1994)

The case concerned an action for damages brought by Banks (a private company) against British Coal (a supplier of coal) on the grounds that the latter abused its dominant position which prevented Banks from making a reasonable profit. According to Banks, British Coal infringed Articles 4(d), 69, 65 and 66(7) of the ECSC Treaty and, in the alternative, Articles 81, 82 and 305(1) of the EC Treaty.

The main two questions referred to the ECJ were the following:

- 1) Are the mentioned articles of the ECSC Treaty directly effective and such as to give rise to rights enforceable by private parties which must be protected by national courts?
- 2) Does the national court have the power and/or the obligation under Community law to award damages in respect of breach of the said articles of the ECSC and EEC Treaties for loss sustained as a result of such breach?

The Court sustained that, in this case, the applicable provisions were those of the ECSC but concluded that the aforementioned articles were not directly effective and therefore, they did not confer rights which were directly enforceable by private parties in proceedings before the national courts.

The commendable work of the AG reached to a different conclusion. He sustained that the applicable provisions were those of the articles from the ECSC; however, contrary to the ECJ, he sustained that they were directly effective. Even though the AG elaborated his opinion on the basis of the abovementioned articles of the ECSC, the results of his examination are applicable to Articles 81 and 82 EC. It is worthy to mention that when this case was dealt by the ECJ, *Brasserie du Pêcheur* was pending before the Court. Therefore, it is not surprising to see some similarities between the judgment of *Brasserie* and the Opinion of the AG in *Banks*.

⁶⁶ Case C-128/92, *Banks v. British Coal Corporation*, [1994] ECR I-1209

AG van Gerven openly declared that the ruling in *Francovich* served as a precedent for this case.⁶⁷ The question was whether the judgment in *Francovich* could be extended to action by an undertaking against another undertaking for damages caused by the latter in breach of a Treaty provision which has direct effect in relations between private parties. In other words, could the “*Francovich* reservation” be applied on private parties?

The answer of the AG was in the affirmative: the basis established in *Francovich* also applies where an individual breaches EC provisions to which he is subject and causes loss or damage to another individual.⁶⁸ First of all, the AG asserted that, according to settled case-law, direct effect “is only a *minimum guarantee* and is not sufficient in itself to ensure the full and complete implementation of the Treaty [emphasis added]”⁶⁹. Then, he relied primarily on the *principle of effectiveness* to declare that “direct effect constitutes a point of departure, but is certainly not the end of the matter”⁷⁰ and to paraphrase *Francovich* in the following terms, “the full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law – all the more so, evidently, if a directly effective provision of Community law is infringed”.⁷¹

The AG provided two arguments supporting the possibility of obtaining reparation for loss or damage based on Community law:

- 1) Based on the principle of effectiveness: “the only effective method whereby the national court can [...] fully safeguard the directly effective provisions of Community law which have been infringed is by restoring the rights of the injured party by the award of damage”
- 2) Based on an instrumental perspective: “such a rule on reparation plays a significant role in making the Community rules of

⁶⁷ Para. 42 Opinion of Advocate General Van Gerven, *ibid*

⁶⁸ Para. 43, *ibid*

⁶⁹ Para. 38, *ibid*

⁷⁰ *ibid*

⁷¹ Para. 43, *ibid*

competition more operational, particularly since the Commission [...] itself acknowledges that it is dependent on the cooperation of the national courts in enforcing them.”⁷²

AG van Gerven was of the opinion that it was a duty of the ECJ to provide detailed rules – substantive and formal – for bringing an action for damages of this kind. His justification relied upon the risks to the uniform and effective application of Community law if too many details were left to national law.⁷³ The AG sustained that there should be

- minimum rules of Community law for the grant of remedies by the national court,
- uniform conditions of liability for breaches of Community law.

As regards the minimum rules, the AG brought out the principles or recognitions developed by the ECJ in its case law, such as:

- the right to obtain an effective legal remedy against measures which are contrary to the rules of Community law
- the principles of equivalence and of effectiveness
- the recognition to national courts from ensuring that the protection of Community rights does not result in an unjust enrichment of those entitled⁷⁴

Regarding the uniform conditions of liability, AG van Gerven drew inspiration from the second paragraph of Article 288 EC and held that the conditions for liability of the Community should also apply to actions for breach of directly effective provisions of Community competition law. Such conditions are: the existence of damage, a causal link between the damage claimed and the conduct alleged, and the illegality of such conduct.⁷⁵ In acknowledging the existence of the first condition, the damage should be real or imminent and foreseeable with sufficient certainty. To quantify the

⁷² Para. 44, *ibid*

⁷³ Para. 47, *ibid*

⁷⁴ Para. 48, *ibid*

⁷⁵ Para. 50, *ibid*

extent of the damage account should be taken to the loss of earnings and to the reasonable diligence of the injured party in limiting the extent of his loss or damage.⁷⁶ As regards the second condition, the causal connection should be direct. And finally, regarding the illegality of the conduct, it is sufficient that an undertaking infringes a directly effective provision of Community competition law to fulfill the requirement.

One last interesting remark from this Opinion is that AG van Gerven supports the inclusion of interests in the award of damages.

⁷⁶ Para. 51, *ibid*

4. Private liability!

Courage v. Crehan (2001)

The judgment of the ECJ on September 20, 2001 in *Courage v. Crehan*⁷⁷ is to be considered a breakthrough in the area of private enforcement of EC law. It is the first time in the history of the Community that the ECJ enunciated a Community law-based right in damages between private parties. Although many of the legal writings after *Francovich* have been concerned with the effects of infringement of EC law between private parties, it was not until the *Courage* case that the ECJ clarified this matter.

4.1 Facts

In 1991, Mr. Crehan entered two 20-year leases with Intrepeneur Estate Ltd (IEL), a company equally owned by Courage (a beer company) and Grand Metropolitan plc. (a company with various catering and hotel interests). By virtue of these leases, Mr. Crehan accepted to buy a fixed minimum quantity of beer from Courage at prices specified by the latter; this essentially meant that Mr. Crehan was required to buy all his beers from Courage. While the cost of the rent could be negotiable, the exclusive purchase obligation (beer tie) and the rest of the clauses of the contract were not open to discussion.

In 1993, Courage brought an action against Mr. Crehan for the recovery of the amount due for the unpaid deliveries of beer. Mr. Crehan contended that the beer tie was in breach of Article 81 EC and counterclaimed for damages, based on the allegation that Courage sold its beer to independent tenants of pubs at substantially lower prices than those shown in the list imposed on IEL tenants. In fact, what Mr. Crehan is seeking is the *restitution* of the amount he had overpaid for his beer requirements.⁷⁸ According to Mr.

⁷⁷ Case C-453/99, *Courage Ltd. v. Crehan*, [2001] ECR I-6297

⁷⁸ GYSELEN, Luc, *supra* note 40, p. 4

Crehan, the difference in price reduced the profitability of the tied tenants, driving them out of business.

4.2 Grounds for preliminary questions

The English Court of Appeal requested a preliminary ruling from the ECJ in view of the conflict that posed the English law in the application of EC law. The English law provides that a party to an illegal agreement is not allowed to claim damages from the other party (this rule is based on the *in pari delicto* principle). Following this rule, Mr. Crehan could not claim damages even if the agreement infringed Article 81. In a previous judgment, namely the *Gibbs Mew* case⁷⁹, the Court of Appeal determined that Article 81(1) was designed to protect third parties, and not the parties to the prohibited agreement themselves. The latter were considered not the victims but the cause of the restriction of competition. However, unlike this previous judgment, the Court of Appeal regarded that a preliminary ruling was necessary considering 1) that the U.S. Supreme Court held in *Perma Life Mufflers Inc. v. International Parts Corp.* that a party to an anticompetitive agreement may sue the other contracting party if the former is in an economically weaker position; and 2) that there might be a conflict between the principle of procedural autonomy and the principle of uniform application of Community law if EC law provides protection to a contracting party of a prohibited agreement in the same way as the U.S law offers it.

The questions were the following:

- 1) Can a party to a contract liable to restrict or distort competition within the meaning of Article 81 EC rely on the breach of that provision before a national court to obtain relief from the other contracting party?

⁷⁹ JONES, Alison and BEARD, Daniel, “Co-contractors, Damages and Article 81: The ECJ finally speaks”, [2002] ECLR, p. 248

- 2) Can a party obtain compensation for loss which he alleges to result from his being subject to a contractual clause contrary to Article 81 EC?
- 3) Does Community law preclude a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages?
- 4) If Community law precludes a national rule of that sort, what factors must be taken into consideration in assessing the merits of such a claim for damages?

4.3 Judgment

The Court examined all questions together but only seemingly so. Indeed, following the structure of the judgment, it responded to all four preliminary questions referred by the Court of Appeal.⁸⁰

As regards the first question, the Court held that “*any individual can rely on a breach of Article 85(1) [now Article 81(1)] of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision [emphasis added]*”.⁸¹ To come to this conclusion, the Court took a three-step analysis:

- 1) First, it recalled *Van Gend en Loos*: “the Treaty has created *its own legal order*”.
- 2) Second, it emphasized the importance of Article 81 EC as a “*fundamental provision*” for the attainment of the internal market, making a reference to the *Eco-Swiss* case. It also held that the “principle of automatic nullity [of Article 81(2)] can be relied on by anyone, and the courts are bound by it”.
- 3) Third, it referred to the *direct effect of Articles 81(1) and 82 EC* on individuals, as it was established in *BRT v. SABAM*.

⁸⁰ KOMNINOS, A.P., “New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan and the Community Right to Damages*”, [2002] 39 CMLR, p. 466

⁸¹ Para. 24, *Courage v. Crehan*

Once it had established that a remedy should be available for a party to a contract which infringes Article 81(1) EC, the Court continued its analysis by considering the availability of compensation in the form of damages.⁸² Accordingly, for the second question, which is the most important one⁸³, the ECJ answered that “there should not [...] be any absolute bar to such an action [to seek compensation or damages] being brought by a party to a contract which would be held to violate the competition rules”.⁸⁴ With this statement, it is clear that the Court recognized the possibility to bring an action for damages for infringement of EC competition provisions. The reasoning of the Court was based on the principle of effectiveness developed since *Simmenthal II*. Such principle establishes that “national courts [...] must ensure that [Community] rules take full effect and must protect the right which they confer on individuals”. On the one hand, if individuals had not the right to claim damages for anticompetitive practices, then the effectiveness of Article 81 EC would be put at stake.⁸⁵ And on the other hand, the existence of such a right discourages the formation of prohibited agreements, and therefore reinforces the maintenance of effective competition in the Community.⁸⁶

On the third question, the ECJ basically held that Community law precludes national law except when a contracting party is seeking an “unjust enrichment”⁸⁷ or when a party “is found to bear significant responsibility for the distortion of competition”⁸⁸. Here the Court reiterates the consistently held recognition of national procedural autonomy which should respect the principles of equivalence (the rules applied should not be less favorable than those governing similar domestic actions) and effectiveness (those rules should not render practically impossible or excessively difficult the exercise of rights conferred by Community law). Nonetheless, it is perplexing to

⁸² CUMMING, G.A., “Courage Ltd v. Crehan”, [2002] ECLR, p. 200

⁸³ KOMNINOS, see *supra* note 80, p. 468

⁸⁴ Para. 28 *Courage v. Crehan*

⁸⁵ Para. 26, *ibid*

⁸⁶ Para. 27, *ibid*

⁸⁷ Para. 30, *ibid*

⁸⁸ Para. 31, *ibid*

notice that the ECJ made a reference to *Palmisani* instead of *Francovich* or *Brasserie du Pêcheur*⁸⁹ to reach to the conclusion that damages should in principle be available.⁹⁰ There is the opinion that the choice was not fortuitous since *Palmisani* is a case where the Court delegated the executive conditions of State liability to national law, subject to the Community requirements of equivalence and effectiveness.⁹¹ However, the same can be sustained from *Francovich* and *Brasserie du Pêcheur*.

Lastly, the ECJ answers the fourth question by enumerating a non-exhaustive series of factors that national courts should take into account in deciding whether or not to make the remedy of damages available to a contracting party into a prohibited practice.⁹² The parameters to assess the degree of responsibility of each co-contractor mentioned by the Court are:

- a) the economic and legal context of each case,⁹³
- b) the respective bargaining power and conduct of each of the co-contractors (whether a party is in such a substantially weak position that it cannot negotiate the contractual terms freely),⁹⁴
and
- c) the cumulative effects on competition of any other similar contracts when they are parts of a network.⁹⁵

The decision of the ECJ comprised the recognition that a co-contractor has rights which must be protected and that an effective remedy must be provided.⁹⁶

⁸⁹ Para. 83, *Brasserie du Pêcheur*

⁹⁰ JONES & BEARD, see *supra* note 79, p. 251

⁹¹ KOMNINOS, see *supra* note 80, p. 470

⁹² CUMMING, see *supra* note 82, p. 201

⁹³ Para. 32, *Courage*

⁹⁴ Para. 33, *ibid*

⁹⁵ Para. 34, *ibid*

⁹⁶ ODUDU, O. and Edelman, J., "Compensatory damages for breach of Article 81", [2002] 27(3) E.L. Rev. p. 330

4.4 Comparison with previous cases

It is interesting and inevitable to analyze *Courage* in the light of the former cases dealt by the Court, and which were presented in the previous chapter. This may provide some assistance in understanding the motivation of the Court to sustain some assertions claimed in previous cases, while remaining silent in others. Firstly, the focus will be on the similarities, which are given expressly in the judgment. And secondly, on the differences, which is the actual interesting part of this analysis. This will hopefully provide assistance in understanding the future development of private liability, which is one of the effects of nullity of Article 81(2) EC.

4.4.1 Similarities

The Court initiated its judgment in *Courage* with a reference to the *new legal order* of the Treaty.⁹⁷ Such an indication was used in *Van Gend en Loos* to establish the doctrine of direct effect, and in *Francovich* to sustain that there is a right to damages based on Community law. It can be affirmed without doubt that when the ECJ intends to “create” new doctrines or principles, it relies on this expression to have a support which is not provided in the written text of the Treaty. *Courage* was no exception. In fact, the Court created a new principle, namely the private liability for breach of EC law, in this case for breach of Article 81.

The *principle of full effectiveness*, initiated with *Simmenthal II*, has proven to be a very important instrument for the recognition of Community rights which are not expressly stated in the Treaty. Basically, the entirety of the case-law regarding liability relies on this principle. The reasoning of the Court in *Francovich*, *Brasserie du Pêcheur* and *Courage* and the Opinion of AG van Gerven in *Banks*, to just mention the cases dealt with in this paper, applied this principle to arrive to the same conclusion: the existence of liability of breach of EC law.

⁹⁷ KOMNINOS, see *supra* note 80, p. 467

The two arguments presented by the ECJ in *Courage* for the recognition of compensation for loss due to breach of EC competition law are the same two arguments that the AG van Gerven presented in *Banks*. These were

- 1) the right to compensation is the only effective method to safeguard the direct effect of Article 81(1), and
- 2) the existence of such right strengthens the working of the EC competition rules.

Another parallel point between *Courage* and the Opinion of the AG in *Banks* is the limit, in accordance with national law, of applying EC law when the protection of the rights guaranteed by the Community entails the *unjust enrichment* of those who enjoy them.

In *Courage*, as well as in *Francovich*, the Court imposed a remedy disregarding provisions of national law. They are both leading cases in their own arena, namely State liability and private liability.

4.4.2 Differences

The first difference that calls the attention is that in *Francovich*, as well as in *Brasserie du Pêcheur*, the ECJ held that the principle of State liability is “inherent in the system of the Treaty”. However, in *Courage*, while recognizing the principle of private liability, the ECJ remained silent concerning this expression.⁹⁸

It is also noticeable that besides relying on the principle of full effectiveness, *Francovich* relied on Article 10 EC and *Brasserie du Pêcheur* on Article 288 EC to provide a *further basis*⁹⁹ for State liability. There was no such a parallel in *Courage*. Private liability relied purely on the principles of full effectiveness and direct effect. There was no mention of any article from the EC Treaty.

⁹⁸ KOMNINOS, see *supra* note 80, p. 470

⁹⁹ Para. 42, Opinion of AG van Gerven in *Banks*, see *supra* note 66

Another point is that while it provided the conditions for State liability in *Francovich* and *Brasserie du Pêcheur*, the ECJ said nothing about the conditions for private liability in *Courage*. Despite the fact that AG van Gerven developed in detail the conditions for private liability, which were identical to those applied for liability of the Community, they were not taken into account by the ECJ. The Court only imposed two limitations in *Courage*: that the party claiming damages did not bear significant responsibility, and that the protection of EC rights did not lead to the unjust enrichment of those entitled.

While the existence of rights derived from directly effective provisions was not a pre-condition for the recognition of State liability (in *Francovich* the Directive was not directly effective and in *Brasserie du Pêcheur* direct effect was only a minimum guarantee), in *Courage* direct effect is a fundamental pre-condition for the existence of private liability.

AG van Gerven expressed his opinion in support of a commensurate reparation of the loss and damage sustained by the individual. That is, that it should observe the principle of proportionality. The ECJ supported this view in *Brasserie du Pêcheur*. However, in *Courage* it made no mention to this principle even though it acknowledged the right to damages between private parties.

4.4.3 Ongoing discussion

Due to the fact that the ECJ, on the one hand, recognized such an important principle but, on the other, did not give detailed rules on the issue, legal scholars have been eager to analyze the possible interpretations of the grounds of the judgment in *Courage*. Komninos, in absolute support of the judgment of the ECJ, sustains that it would have been inappropriate for the Court to rule on so many problems at his stage.¹⁰⁰ Some of the opinions can be complemented, and others reach to completely opposite conclusions. At this early stage on the development of private liability for breach of EC

¹⁰⁰ KOMNINOS, see *supra* note 80, p. 478

Competition law, it is difficult to ascertain which interpretation will prevail. Nonetheless, it is enlightening to present some of them in this section.

In the opinion of A. Jones and Beard¹⁰¹, it is not quite clear who is entitled to bring claims. The ECJ set two limitations for private liability: unjust enrichment and significant responsibility. However they turn out to be insufficient for its purpose. For instance, in a situation regarding excessive pricing of a cartel (or a monopolist), it is the direct purchaser of the cartel who suffers the consequence of paying such price. Nonetheless, the direct purchaser is able to pass-on some of the loss to its buyers (indirect purchasers). Are direct and indirect purchasers entitled to claim for damages on the same grounds? In the case of the direct purchaser, the fact that he passed on some of the loss may restrain him to claim for damages on the grounds of “unjust enrichment”. And in the event that the right to damages was recognized to him, how would the loss be quantified?

Odudu is also of the opinion that “the ‘significant responsibility’ test fails to state who or what is protected and how a remedy is supposed to achieve this protection”.¹⁰² He notices that while the ECJ recognized the right of a co-contracting party of an anticompetitive agreement to obtain a relief from the other party, it did not mention which remedy was to be applied. Since the Court said nothing about the parameters of the relief, treble damages would be able to fall within the category of remedies, if it is recognized by national law. It is obvious to mention that an award of treble damages would strengthen the working of the EC Competition rules and discourage unlawful practices.¹⁰³

Regarding the silence of the ECJ on the conditions for the existence of private liability, Alvizou¹⁰⁴ sustains that private liability is subject to the same conditions as State liability, namely the existence of a serious breach,

¹⁰¹ ALISON & BEARD, see *supra* note 79, p. 253

¹⁰² ODUDU & EDELMAN, see *supra* note 96, p. 332

¹⁰³ *ibid*, p. 336

¹⁰⁴ ALVIZOU, Anastasia, “Individual Tort Liability for Infringements of Community Law”, [2002] 29(2) LIEI, p. 191

the conferral of rights to individuals and the existence of a causal link between the breach and the damage suffered. On the contrary, Anderson¹⁰⁵ sustains that the requirement of “sufficiently serious breach” cannot be applied on directly effective EC Competition rules. Since, for this condition to be applied, there should be a margin of discretion which is not present on directly effective EC provisions.

Lastly, as it has been shown, direct effect is a fundamental pre-condition for the existence of private liability for breaches of EC law. Luc Gyselen¹⁰⁶, in a work which was released when *Courage* was still pending before the ECJ¹⁰⁷, presented a remarkable analysis of the application of Article 81(1)-(2) EC on the grounds of the difference in the concept of direct effect. It is sustained that the judgment in *Eco Swiss* supported the objective direct effect since it relied on the public policy nature of Article 81 EC. This generates an “important consequence for the conditions under which the contracting parties can invoke this provision”.¹⁰⁸

On the one hand, if it is the subjective direct effect that applies when a co-contractor invokes Article 81 EC, then he would be seen as a *holder of subjective rights*. His co-responsibility would be taken into account to decide his right to claim damages. On the other hand, if it is the objective direct effect that applies to Article 81(1)-(2) EC, then the co-contractor who invokes this article would be seen as a *law enforcer*. His action would be seen as to serve the public policy of Article 81 EC, and his co-responsibility in the prohibited practice would not affect his claim on damages.¹⁰⁹

While recognizing the importance of Article 81 EC in the attainment of a Community objective and making special reference to *Eco Swiss*¹¹⁰, the ECJ in *Courage* did not adhere exclusively to the objective direct effect. In fact, it adopted both concepts simultaneously. It is to be remembered that the ECJ

¹⁰⁵ ANDERSON, see *supra* note 62, p. 189

¹⁰⁶ Head of Unit at the Competition Directorate-General

¹⁰⁷ GYSELEN, see *supra* note 40

¹⁰⁸ *ibid*, p. 13

¹⁰⁹ *ibid*, p. 13-15

¹¹⁰ Para. 20 *Courage v. Crehan*

relied on two arguments to award damages: the right of any individual to claim damages on the grounds of the full effectiveness of Article 81 EC, and the importance of such claims for the strengthening of EC competition rules, which are fundamental for the internal market..¹¹¹

¹¹¹ Paras. 26 and 27 *Courage v. Crehan*

5. Effect of complaints

Up to now, the work has dealt with substantive matters. In this chapter, the focus is on practical matters. As it was previously explained, anticompetitive practices produce harmful effects to the Community internal market in general and to private undertakings in particular. When one suffers loss due to the existence of practices prohibited by Articles 81 and/or 82 EC, there are currently two ways which one can opt for: 1) go before the Commission or 2) complain before the national court. However, since 1 May, 2004, with the new Regulation 1/2003¹¹², all cases will be handled in principle by national courts, and exceptionally by the Commission.

5.1 Current situation

At the present time, Regulation 17 is the applicable implementing regulation for Articles 81 and 82 EC. It maintains a centralized scheme whereby all agreements and practices falling under Articles 81(1) and 82 have to be notified to the Commission¹¹³. Regulation 17 establishes that both the Commission and national courts have concurrent powers to apply Articles 81(1) and 82 EC. However, it is only the Commission that has the power to declare Article 81(3) EC applicable¹¹⁴; thereby preventing national courts and national competition authorities to apply the rules on EC Competition.¹¹⁵

5.1.1 Action before the Commission

The Commission acts as an administrative body in the interest of the Community. According to Regulation 17, a natural or legal person who claims a legitimate interest can make an application to the Commission to terminate an anticompetitive practice.¹¹⁶ The category of persons who have a legitimate interest is not limited to third parties but includes persons who

¹¹² Regulation 1/2003, O. J. L 001 , 04/01/2003, p. 1-25

¹¹³ Article 4, Regulation 17/62, O.J. P 013 , 21/02/1962, p. 204

¹¹⁴ Article 9, *ibid*

¹¹⁵ Point 5, Preamble of Regulation 1/2003, see *supra* note 104

¹¹⁶ Article 3, *ibid*

are involved in the agreement or practice in question. When a party requests the Commission to keep confidential its identity, the Commission is bound to respect that request (as it is not unnatural for the complainant to fear retaliatory action from the undertaking complained of).¹¹⁷ Upon finding the existence of the prohibited practice which was not priorly notified, the Commission can impose, in addition to the *termination of the infringement*¹¹⁸, a *fine*¹¹⁹ and, depending on the case, a *periodic penalty payment* to the undertakings or associations of undertakings to compel them to obey its decisions¹²⁰. The ECJ has held that the Commission has also the powers to take *interim measures* in suitable cases.¹²¹

The Commission has a margin of discretion. This means that it is not obliged to act against every infringement of Articles 81(1) and 82 EC. It is entitled to set priorities in the light of the resources available to it and of the significance of the anticompetitive conduct concerned for the internal market, which is the Community interest.¹²² This is clearly a negative aspect for an undertaking which relies on the Commission in order to protect its private interests.

Another negative aspect is that a private party cannot bring action for damages before the Commission. Therefore, if the aim of the complainant is merely to bring the anticompetitive practice to an end and to keep its identity protected, then an action before the Commission is appropriate. However, if the affected undertaking has in mind to recover some of the loss it had suffered for the prohibited practice, then it is advisable to bring actions before a national court.

¹¹⁷ KERSE, see *supra* note 6, p. 86

¹¹⁸ Article 3(1) Regulation 17

¹¹⁹ Article 15(2) *ibid*

¹²⁰ Article 16, *ibid*

¹²¹ KERSE, *supra* note 6, p. 52

¹²² KAPTEIN & VERLOREN VAN THEMAAT, *supra* note 8, p. 914

5.1.2 Action before a national court

In practice, the Commission frequently rejects complaints for lack of sufficient Community interest.¹²³ In fact, it has been actively pursuing a policy of decentralization regarding the enforcement of EC competition law. The 1993 Notice on co-operation with national courts¹²⁴ revealed the Commission's intention to concentrate on matters having particular, economic or legal significance for the Community.¹²⁵ Having this in mind, it promoted some of the advantages of bringing actions before the national courts¹²⁶:

- The Commission cannot award compensation for loss suffered as a result of a prohibited practice. Only national courts are entitled to do so. Companies are more likely to avoid infringements of EC competition rules if they risk having to pay damages or interest in such an event.
- National courts can usually adopt interim measures and order the termination of infringements more quickly than the Commission is able to do.
- Before national courts, it is possible to combine claims under Community law and under national law. This is not possible for the Commission.
- In some Member States, the courts have the power to award legal costs to the successful applicant. This is not possible for the Commission.

Regarding the first point, the consequences in national law of breach of Article 81(1) EC may include non-contractual liability, damages and restitution of sums paid but not due.¹²⁷ Now, after the judgment of the ECJ in *Courage*, national courts are bound to recognize the right to damages for

¹²³ KERSE, *supra* note 6, p. 91

¹²⁴ Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, O.J. 1993, C39/6

¹²⁵ Para. 14, *ibid*

¹²⁶ Para. 16, *ibid*

¹²⁷ KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 8, p. 858 fn. 480

infringement of EC Competition law as a Community-based right, and they are compelled to provide a remedy to such infringement.

5.2 Future situation with Regulation 1/2003

On May 1, 2004, when the new Regulation 1/2003 replaces the old Regulation 17, private parties will not have the previous options. The rule will be to complain before the national court or national competition authority, and the exception to bring the action before the Commission.¹²⁸

The Commission promoted the decentralization in the enforcement of Articles 81 and 82 EC in order to have a more efficient and more democratic approach.¹²⁹ The Commission would be able to concentrate on the most serious infringements, and national courts and competition authorities would be able to apply EC Competition law more effectively.¹³⁰ Article 81(3) EC will become a directly effective provision; therefore national courts as well as national competition authorities will be able to enforce the entirety of Article 81 and 82 EC.¹³¹

In terms of effects of the nullity of Article 81(2) EC, there are no substantive changes with Regulation 1/2003. On the one hand, when an action is brought before a national competition authority, the possible effects for infringement of Articles 81 and 82 EC, according to this new regulation, are: 1) *termination of the infringement*, 2) *interim measures*, 3) *commitments*, and 4) *fines*, periodic penalty payments or other penalty provided by its national law.¹³² It is clear that actions before national competition authorities under the new regulation have, basically, the same effects as those provided by the Commission under Regulation 17. The new elements are the expressed recognition for interim measures and the acceptance of commitments offered by the infringing undertaking.

¹²⁸ BOVIS, Christopher, "Transforming the Application of EC Competition Laws", [2001] May/June E.Bus.L.Rev., p. 98

¹²⁹ TODINO, Mario, "Modernisation from the perspective of national competition authorities: impact of the reform on decentralised application of E.C. competition law", [2002] 21(8) ECLR, p.348

¹³⁰ Point 3, Preamble of Regulation 1/2003

¹³¹ Articles 5 and 6, Regulation 1/2003

¹³² Article 5, *ibid*

On the other hand, when the action is brought before a national court, the situation is the same as the one presented at the end of the previous section (section 5.1.1). It is possible to obtain *damages* based on EC Competition law. It is indisputable that the judgment of the ECJ in *Courage* is consistent with the decentralization scheme brought by the Commission.

8. Conclusion

Articles 81 and 82 EC are fundamental provisions of Community competition law. They are recognized as so important that an infringement of these articles would entail the automatic nullity, established in Article 81(2) EC, of the anticompetitive agreement or practice. Such nullity is the only expressed reference that the EC Treaty makes regarding the effect for the infringement of Article 81(1) EC. There is no further provision establishing the consequences of such nullity. It is in these circumstances that Regulation 17 and the ECJ come into play. They provide a spectrum of effects for the nullity established in Article 81(2) which can assist injured parties in protecting their rights. As far as it goes for the Commission, it can require the termination of the infringement, impose fines, and grant interim measures. In the case of national courts, the role of the ECJ has proven to be essential in the recognition of another effect: a Community right to damages, which is available to any person for breach of EC Competition law.

The acknowledgment of private liability is not fortuitous. It is the result of the continuous work of the ECJ since *Van Gend en Loos* (1963). The development of the principles of direct effect, supremacy and State liability, together with the underlying principle of full effectiveness, provided the basis for such recognition. It was since *Francovich* (1991) that the question of whether a private party could claim damages for breach of EC law against another private party arose. And it was not until 10 years later that the ECJ in *Courage* recognized this right.

The ruling in *Courage* is, with no doubts, of great importance. The ECJ took a radical step in recognizing a Community right to damages even to a contracting party of a prohibited agreement; nevertheless it stayed very cautious on many issues, such as conditions for the existence of such liability and quantification of the damage. It is expected that the next generation of case-law will be able to provide more definite answers, in the

same way as *Brasserie du Pêcheur* and the subsequent cases did for *Francovich*.

I personally support the view that the conditions for private liability should differ from those of State liability. They should be similar but not identical. Where the points of departure are different, it is not justifiable to apply identical conditions. Direct effect is absolutely necessary for the recognition of private liability. If there is no direct effect, there is no private liability. On the contrary, in State liability, direct effect is not an essential requirement; it is a minimum guarantee. Therefore identical conditions would be incompatible with private liability.

Despite the fact that *Courage* was the first judgment of its kind, the absolute silence of the Court regarding the assessment of compensation or restitution for damages is to be criticized. Unless the ECJ had in mind to accept exemplary or treble damages, a reference to the principle of proportionality would have been welcomed.

The Commission's aspiration to have a decentralized system of enforcement of EC Competition provisions is greatly supported by the ruling in *Courage*. With this case, the ECJ prepares national courts as enforcers of EC Competition law before the application of Regulation 1/2003. In the new system, national courts are to have "an essential part to play in applying Community competition rules".¹³³ However, the question remains on whether national courts will be able to rule on EC Competition cases as it is expected by the Commission. There is still no harmonization (substantive or procedural) on these matters, and it is for the EC legislator or the ECJ to fulfill this task. In any event, at this moment of "no-harmonization" the impact of the new regulation does not seem to bring any change in the spectrum of the effects of nullity of Article 81(2).

¹³³ Point 7, Preamble of Regulation 1/2003

As a last remark, the results of this case go beyond the limits of EC Competition law since the reasoning employed to recognize the existence of private liability for breach of Community competition rules can perfectly be applied between private parties to any other breach of a directly effective provision of the Treaty. Perhaps, the ECJ had also these consequences in mind to remain silent in so many issues.

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