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Private Damage Claims due to Breaches of EC Competition Law

- and the implications of standing for indirect purchasers and the linked usage of the passing-on defence

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Contents

Summary

This thesis is inspired by the recent development within the Community concerning the standing of private parties to claims damages for harm caused by a breach of the EC antitrust rules. The European Court of Justice (ECJ) declared, in the cases of *Courage* and *Manfredi,* that this is a right deriving from the Treaty. In the wake of this change, the Commission has issued a Green Paper followed by a White Paper on the issue. This has initiated a wild debate regarding the possible ways to proceed from the prevailing legal status. Is it time for the legislature to intervene or should it be left out to the national authorities, with the guidance of the ECJ case law, to solve the problems and questions surrounding it?

Nonetheless, this transition includes numerous major subjects that need to be resolved. This thesis will focus on one of the most prominent issues, namely the right to obtain reparation for all of the indirect purchasers that are harmed by an anti-competitive conduct and the closely linked possibility for the defendants in such a situation to use the passing-on defence. The purchasers that have a direct connection with the infringer often pass on the illegal overcharge along the distribution chain down to private undertakers and individuals. A question therefore arises if, and how, these indirect purchasers will recover their losses. The ECJ has ruled, in the cases mentioned, that "any individual" should be able to claim damages before the national courts for the harm suffered, as long as they can show a causal link between the harm and the violation. When safeguarding this right in the absence of Community law, the detailed provisions was left to the Member States to regulate as long as it did not lead to any unjust enrichment and as long as the principles of equivalence and proportionality are respected. The debate on this has almost solely considered that the wording of the ECJ grants indirect purchasers this right. However there are still uncertainties regarding the detailed regulation on the matter and to which extent the Member States discretion reaches. The passing-on defence has been even more scrutinized. This defence is supposed to grant a tool to the defendant against claimants who has already passed on, the whole or parts of, the overcharge that he seeks to obtain. Permitting or prohibiting the passing-on defence necessarily goes hand-in-hand with the availability of indirect purchasers' possibility or hindrance to claim damages. Otherwise there are great risks of overcompensation or unjust enrichment.

The White Paper puts forth different Policy Options and specific measures on how to ensure that victims of anti-competitive behaviour are able to exercise their right to achieve full compensation for the harm caused, through an efficient procedure. The Commission examines the specific matters of the standing of indirect purchasers and the passing-on defence, and presents detailed suggestions on how these issues should be resolved by legislative measures. Invited commentators have been mainly negative towards a legislative intervention and believe that the issues will be resolved by national authorities and the ECJ case-law. In sum, there are still great uncertainties surrounding this area and its future developments but the attention that has been drawn to the problems demands some adjustments.

Sammanfattning

Detta arbete är inspirerat av den utveckling inom EU som berör privata aktörers rätt till skadestånd vid en konkurrensskada. Den Europeiska Gemenskapens domstol (EG-domstolen) har bekräftat denna rätt, i fallen *Courage* och *Manfredi*, och Kommissionen har utfärdad en Grönbok och en efterföljande Vitbok inom området. Detta har i sin tur inlett en vild debatt som behandlar det nuvarande rättsläget och vilka möjliga åtgärder man ska ta för att lösa problem som uppstår när man gör skadeståndsrätten mer tillgänglig vid en konkurrensöverträdelse. Är det hög tid för lagstiftaren att ingripa eller ska regleringen kring privata aktörers rätt till skadestånd vid överträdelse av de EG-rättsliga konkurrensreglerna överlämnas till de nationella myndigheterna för säkerställande, med vägledning av EG-domstolens nuvarande och framtida avgöranden?

Denna förändring omfattar en mängd betydande problemställningar som är i behov av utredning. Detta arbete kommer att fokusera på några av de mest framträdande problemen, nämligen de indirekta köparnas rätt att erhålla skadestånd för den skada de har lidit till följd av en överträdelse av konkurrensreglerna och den relaterade möjligheten för svaranden att använda sig av en så kallad övervältringsinvändning gentemot detta skadeståndsanspråk. Det är vanligt att kunderna som har ett direkt förhållande till förbrytaren övervältrar, hela eller delar av, det olagliga överpris som kan uppstå exempelvis vid en kartell. Detta övervältras då på aktörer längre ner i distributionskedjan – de indirekta köparna. En fråga som då uppstår är om och i så fall hur dessa indirekta köpare kan erhålla en kompensation för den skada de har lidit till följd av denna övervältring. EG-domstolen har beslutat att alla individer bör kunna initiera ett skadeståndsanspråk inför den nationella domstolen, så länge de kan påvisa ett kausalsammanband mellan deras skada och överträdelsen. I avsaknaden av regleringar inom EG-rätten är det upp till medlemsstaterna att konstruera åtgärder som tillförsäkrar denna rätt så länge detta inte leder till en obehörig vinst och så länge som proportionalitetsprincipen och ekvivalensprincipen är respekterade. I debatten som har följt har det nästan uteslutande ansetts att dessa EG-rättsliga rättsfall ger indirekta skadelidande en rätt till skadestånd. Dock råder det fortfarande osäkerhet kring specifika frågeställningar och hur långt medlemsstaternas diskretion sträcker sig. Överträdelseinvändningen har blivit än mer granskad. Detta försvar ska verka som ett instrument för svararen mot de käranden som redan har övervältrad, hela eller delar av, det olagliga överpriset men som ändå söker full ersättning från förbrytaren. En tillåtelse eller ett förbud mot överträdelseinvändningen går ofta hand i hand med de indirekta köparnas möjlighet eller hinder till att utkräva skadestånd.

Kommissionens Vitbok stipulerar olika policy-val och specifika åtgärder som ska garantera en rätt till skadestånd för de som lidit skada till följd av en konkurrensöverträdelse, genom en effektiv process. Kommissionen undersöker de specifika frågeställningarna som rör indirekta köpare och övervältringsinvändningen och presenterar detaljerade förslag på hur dessa effektivt kan regleras genom lagstiftande ingripanden. De olika intressenter som blev inbjudna att komma med åsikter angående dessa förslag var till största del negativt inställda till en lagstiftning på området och föreslog att medlemsstaternas myndigheter, med hjälp av vägledande EG-rättsliga fall, skulle få ansvaret att reglera detta område.

Abbreviations

EEC	European Economic Community
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EC Treaty	European Community Treaty
EU	European Union
FTC	Federal Trade Commission
IAR	Impact Assessment Report
SWP	Staff Working Paper
UK	United Kingdom
US	United States
USA	United States of America

1 Introduction

1.1 Subject background

Since the EEC Treaty was signed in 1957, due to an increased level of legal cartels, state controls and protection policies, the competition area has consistently been a cornerstone of the Community legislation. The establishment and maintenance of a common market and an economic and monetary union is a paramount task of the community, enshrined in Article 2 of the EC Treaty. According to Article 4 of the EC Treaty this economic policy shall be "conducted in accordance with the principle of an open market economy with free competition."[1] As is well known, the state is supposed to intervene as little as possible in a market economy so that the consumers' demand will dictate and shape the market and drive the production. However, the market is incapable of creating perfect conditions that are exhausted of inefficiencies. Therefore, there is room for certain interventions to create "a system ensuring that competition in the internal market is not distorted" as stated in Art 3 (1)(g) EC Treaty.

Despite this, the more precise role of competition law is highly debateable and it has always been an area that is complex and hard to encapsulate. The reasons for having competition law are manifold and consequently there are a number of differing objectives that might be pursued by the competition policy.

In Europe, competition law is in most cases publicly enforced by competition agencies, subject to review by the courts. There are no stipulations of the possibilities for private parties to initiate action damages in the present Community legislation. The uncertainties and complexities surrounding the private victims' rights to obtain compensation from a harm caused by an anti-competitive behaviour have resulted in an absence of private litigations in Europe. Since the private enforcement route has turned out to be insufficient, the public authorities have always filled this void within the Community.

However, there has been a recent shift in the stance on the importance of private enforcement as a supplement to the predominant public enforcement of the competition rules within the Community. There are several sources to this enhancement. Regulation 1/2003[2] have been enacted, decentralizing the monitoring of the competition rules and gives the national courts the competence to punish violators of Articles 81 and 82 EC Treaty. The exclusion of the former necessity to await a Commission decision regarding a possible exception in Article 81(3) of the EC Treaty before delivering a judgement has made the process before national courts more efficient and less complex. Furthermore the ECJ declared, in the case of *Courage*, that everyone who has suffered losses from a violation of Articles 81 or 82 of the EC Treaty is entitled compensation as long as a causal link is shown between the violation and the harm. This case was followed and reinforced by the *Manfredi* case a few years later. As a reaction to this development, the Commission adopted a Green

[1] Articel 4 EC Treaty.
[2] Council Reg 1/2003 of 16 Dec 2002 of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L1/1

Paper on damages actions followed by a recent White Paper on the same subject.

Nonetheless, the instrument of private damages actions and a potential enhancement of it within the Community are still followed by many uncertainties. Two of the main issues regarding this are the questions surrounding the regulation of indirect purchasers' right to claim damages and the closely linked possibility for the defendants to use the passing-on defence.

It is not only the purchasers that have a direct connection to the violators that are affected and harmed by an anti-competitive conduct. There are often indirect victims below this level that are subjected to higher prices and less options of competing products and services. I will try to demonstrate this with a basic example. For instance, a group of manufacturers of cement together holds a dominant position at the relevant market and decides to engage in a price-fixing cartel. Within this cartel they agree on increasing the prices of cement considerably. The retailer, which here is the direct purchaser of the cement, is an undertaker constructing houses and offers them for sale to private undertakings and individuals. When the retailer faces the illegal overcharge on the price set by the cartel he has an option to absorb the whole of the overcharge, pass on parts of the overcharge or pass on the whole overcharge to the individual or undertaker purchasing the house. If he passes on any of the illegal overcharge, the purchasers will have to pay a higher price on their houses. They are indirectly influenced by the initial anti-competitive conduct, which makes them indirect victims. A closely linked question to this is the possibilities for the defendant in these cases to use the so-called passing-on defence. The passing on defence is used to show if and if so which parts of the illegal overcharge that has been passed on by the claimant. If the defendant can prove that the whole or parts of the overcharge has been passed on then the claimant has not suffered any actual loss and is not entitled to compensation for that amount.

Even though there has been an extensive development towards a more certain right to claim damages, the awarding of damages are still rare and especially the indirect victims are missing out on enormous compensation figures due to the present, inefficient system. The White Paper is based on this problem and suggests a variety of options on how to solve this problem.

1.2 Purpose

The purpose of this thesis is to examine the private enforcement of the competition rules within the Community. There is an ongoing enhancement in this area and numerous issues have to be solved to create an efficient supplement to the public enforcement. Two of the main issues that need to be analyzed and sufficiently discussed within this change are the possibilities for indirect purchasers to initiate such damage claims before national courts and the closely linked question of the defendants usage of the passing-on defence.

A comparative study of the American private antitrust approach to the passing on defence and possibilities for indirect purchasers to obtain reparation from the antitrust infringer will be employed to study the practical problems. Since they have had a decades-old standpoint, and an associated debate, in the United States regarding these matters it is inevitable to be influenced in any which way by concepts and insights

developed there.

This thesis purpose will therefore be to investigate the prevailing legal status regarding these topics and it will also consider the most efficient way for the Community to, if at all, intervene.

To answer the purpose, three main questions present themselves:

- Is there today, under Community law, a possibility for indirect purchasers to be compensated for the harm caused by an infringement of EC competition law, before national courts?
- Is there today, under Community law, a possibility for defendants, in an action for damages due to an infringement of EC competition law, to use the passing-on defence against a claimant?
- How should the Community handle these issues? Would a legislative intervention be efficient or should it be left to the discretion of the Member States?

1.3 Method and material

This thesis written using a traditional dogmatic method with a description and an analysis of the prevailing legal status within the Community. The method involves a review of the relevant Community law and the jurisprudence from the European Court of Justice. Reliable doctrine and articles will also be used for further guidance and information. This thesis will further try to apply this legal analysis in a historical and a forthcoming context. The purposive aspects of this thesis merit a closer analysis in the future concerns. There is a need to analyze the interconnection between the public and the private enforcement strategies and their contributions towards a more efficient antitrust regulation since the approach to the standing of the indirect purchasers and the availability of the passing-on defence will affect the importance of the private enforcement.

1.4 Delimitations

This thesis deals with the matters of standing of indirect purchasers and the possibility to use the passing-on defence, which arises in the midst of an enhancement of the private enforcement within the Community. Other major obstacles, such as the rules on access to evidence, the interaction with the public leniency programs, the fault requirement, the definition and calculation of damages, the question of collective redress mechanism and the issues of limitation period and applicable law have no room to be further examined with any depth in this thesis. These issues are also dealt with by the Commission in its White Paper so to maintain a focus on the standing on indirect purchasers and the availability of the passing-on defence, I will explain the Commissions stance on these issues only and hence not the their proposed solutions in their entirety.

1.5 Outline

After this introductory chapter, the second chapter will present a brief overview of the interconnection between the public and the private enforcement of competition rules in general. Chapter 3 will give a general and historical background on the application of the Community rules and their relationship with the national legal systems and authorities. Chapter 4 will put forth the prevailing legal status in Europe on the question of damages actions for breach of the competition rules. The consecutive 5th chapter will analyse and discuss the issues of standing of indirect purchasers and the possible usage of the passing-on defence. The prevailing European approach will be compared to its American counterpart and the chapter will be concluded with a discussion and a summarization of different writers' views on the matters. Chapter 6 will illustrate the aim of the Commission, given in the White Paper, and various stakeholders who comments on the suggestions specified by the Commission. The final chapter contains the conclusions and an attempt to analyse the problems and propose guidance on the way ahead.

2 Creating an efficient competition enforcement

To understand the effects of a more accessible approach to private damage claims due to a breach of the competition rules will have on the Community it is important to briefly explain the general tasks of the competition enforcement and how to make it as efficient as possible. Should it rely on private actors initiating damage claims towards the violators when they are harmed or should it be left to the public authorities to find and initiate litigations against them?

2.1 Private and public enforcement

All anti-competitive conducts are harmful for the economy as a whole. Even though the market is intended to be "free", it needs to be sufficiently regulated to make sure all participants play a "fair game". Anti-competitive behaviour have negative influences on the market and might result in businesses missing out of opportunities, consumers paying excessive prices and undertakers being driven out of the market. The prohibition of anti-competitive behaviour needs to be sufficiently regulated and potential victims must have instruments to rely on, when enforcing these competition rules, that compensates them for the harm caused. The other main aim with the enforcement of the competition rules is the deterrent effect it is supposed to have toward future infringements. Creating an efficient structure to enforce these rules is therefore crucial within the field of competition. As in almost every jurisdiction there is thus a need to find a balance between the private enforcement and the public enforcement. In literature, both private[3] and public[4] enforcement structures have been criticized and held to be incapable of independently enforcing the competition rules efficiently. The majority of the competition scholars have promoted a combination of both public and private elements to create an ideal model where these two approaches complement each other.[5] The crucial task is to adjust it so that it fits the legal cultures and traditions of the given area. Within this area, the competition enforcement must satisfy numerous different groups and their, sometimes contradicting, interests. For example, many stakeholders want a system that recognizes competition law as an instrument to encourage consumer welfare. Therefore they mean that consumers and other private victims should be given great incentives to initiate damage claims against anti-trust violations and that there should be low hurdles in the process leading to compensation of the damages caused. In this view, the American treble damages, that provide great incentives for private damage actions, is a desirable approach. Other groups focus on the deterrence that the private enforcement brings to the competition rules which generally promotes a more profitable and efficient economy.[6]

[3] E.g. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?* 2003, 26(3) World Competition, p. 473., Jones, *Private Enforcement of Antitrust Law*, 1999, p. 88 ff.
[4] E.g. Komninos, *EC Private Antitrust Enforcement*, 2008, p. 7 ff.; Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, 2006, 29 (3) World Competition, p. 379 ff.
[5] E.g Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, 2006, 29 (3) World Competition, Komninos, *EC Private Antitrust Enforcement*, 2008, p. 9.
[6] Backer & McKenzie p. 3.

Nevertheless, both public and private enforcement brings necessary features to the table and a modern antitrust enforcement scheme needs to combine both approaches to be efficient in all aspects. The difficulty lies within the question of balancing the space given to them in the pursuit of an efficient enforcement.

2.2 The advantages of a combined public and private enforcement

In the last few years, the public enforcement of the competition rules within the Community has increased in the wake of a transformed, decentralized, approach to Articles 81 and 82 EC Treaty where Member States has gained more competence as enforcers and the Commission has imposed higher fines than ever before. However in practice, the private enforcement and the advantages it brings to the effectiveness throughout the Community are almost nonexistent, despite these positive developments. The area of competition law within the EU has been heavily depending on public enforcement, with the Commission and national authorities to ensure the effectiveness of the competition rules. The Commission has historically had almost exclusive control of the competition regulation, which created a centralized administrative system where the lack of private enforcement legislation has undermined the development of private damage claims. In addition, the national legal systems' private enforcement structures have been uncertain and complex, which consequently has led to public enforcement filling this gap throughout the Community.[7]

Even though public enforcement authorities may be experts and appropriate in most cases to terminate an ongoing anti-competitive behaviour and even though the public enforcement is a more independent and manoeuvrable system than one relying on private parties own will and capacity to take actions, it has flaws and it cannot solve all aspects independently. The most pressing problem is the fact that it cannot provide adequate procedures to compensate the victims of a breach since its main purpose is to serve as deterrence and not compensation. Moreover, it is impossible for the present competition law fines to cover all the harm caused by anti-competitive behaviour and the public enforcement might not be enough to discourage an ongoing infringement since the "successful" cartelization has sometimes huge potential profits. There is also an issue of the impracticality of prosecuting all violations, for an independently operating public enforcement, on the market with only a few authorities whose operations are time-consuming and its resources limited.[8] Private enforcement of the competition law with private damage claims might therefore serve as an important complement to the public anti-competitive activities in the Community. Public and private enforcement are focusing on different goals within the same area creating a combined structure that are necessary to create effective competition enforcement.

[7] Komninos, *supra* note 13, at p. 9.
[8] Van Gerven, *Private Enforcement of EC Competition rules in the ECJ – Courage v. Crehan and the way ahead*, a contribution to *Private enforcement of EC Competition law*, edited by Basedow, 2007, p. 2.

Seen from a competition law angle, the enforcement has successfully been argued to have three interconnected objectives, which needs to be pursued in an ideal combination of public and private enforcement:[9]

I. ***Injunctive objective:*** The enforcement is supposed to bring the illegal conduct to an end as soon as possible. This can be made with both positive and negative measures. Negative in the sense of demanding the violator to abstain from the wrong-doing and positive in the sense of creating an incentive to ensure that the conduct ceases in the future.

II. ***Compensatory objective:*** The victims must have a possibility to be compensated for the damage caused to them by the infringer. This possibility must be realistic and gainful to the persons harmed.

III. ***Punitive objective:*** The anti-competitive conduct must be punished in some way. This punishment shall also serve to deter the infringer or any other potential infringer from conducting any illegal acts in the future. [10]

Relying on private enforcement may, directly or indirectly, in theory serve as a solution to all three objectives. From a community point of view, negative and positive injunction might be less problematic and costly to receive from a national judge than from the Commission. Moreover, the public enforcement instruments in Europe have been insufficient when attempting to pursue the compensatory objective, which is obviously the main focus and very efficiently obtained when using private enforcement. Lastly, in legal systems with access to punitive remedies, there is a possibility to have a punitive addition to the private damage compensation, although admittedly not as dominant as within the public enforcement.[11] Competition enforcement might therefore benefit from enhancing the private enforcement position.

However, it must be born in mind that the private and the public enforcement are institutionally independent of each other and that neither of them are in practice superior to the other. The independence of the enforcement systems and their complementary role might create practical problems. They often intend to fulfil different aims and therefore they sometimes come into conflict. Practices such as settlements, leniency and the amount of fines and damages will sometimes be complicated to structure efficiently with the combination of the systems.

An adjustment of the powers and the role given to the different enforcement schemes is very complex to handle. The long history and the strong position public enforcement enjoys in the Community will be the hardest obstacle to overcome if there should be a shift towards a more private oriented enforcement with a more accessible approach to private damage claims on an EU-level. The Community authorities are the main enforcers of EC competition law and private enforcement enjoys an almost nonexistent, supplementary, role providing a hard-won possibility for compensation. This positioning has been developed due to the different powers

[9] C Harding and J Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency*, 2003, p. 229 ff.
[10] Kominos, *supra* note 13, at p. 7.
[11] Ibid. p. 8.

conferred to public authorities and the interaction between the Member States that will conflict with the strengthening of private enforcement.[12]

The Ashurst study[13] recognizes the inadequacy existing in the Member States legal systems concerning tort laws, both procedural and legal, as the primary hurdle for private victims to be compensated for a damage suffered due to a breach of the EC competition rules. It was found that there, in many of the Member States, existed legal uncertainties regarding the right to claim damages that are created due to absence of an EC based claim in their competition rules and because of the "astonishing diversities" in the approaches taken by the Member States. Furthermore, the study also showed that it is common that the national systems have separate legal bases for the bringing of on the one hand national claims and on the other Community law based claims which result in cases that are based on both systems simultaneously. This increases the complexity of damage claims.[14]

2.3 Useful experiences from the U.S. approach

When analyzing the impact and how to proceed with an enhancement of private damage claims on an EU-level, the U.S. experience are most useful. The challenges it has had over time, all the debates surrounding it and the fact that it has not been any substantial modification since the original provisions enabling private actions, all contributes to an appealing history for the Community legislators to study. However, a direct adoption of the U.S. system will most likely not happened since there are great diversities in the legal cultures and tradition in the different areas.

There has been a combined public and private competition enforcement model in the USA since the adoption of the Sherman Act[15] in 1890, which was the first federal antitrust legislation in the Country. The Antitrust Division of the United States Department of Justice has an exclusive power to initiate criminal antitrust cases when there is a violation of Section 1 of the Sherman Act[16], with imprisonment and high fines as potential remedies. There are other public authorities such as the Federal Trade Commission (FTC) that have powers to prevent methods that they find to be unlawful under Section 5 of the Federal Trade Commission Act.[17]

In USA, the importance of use of private litigation and/or injunctive relief has been eminent for the competition enforcement. Transferred from the Sherman Act in 1914, the main provision today concerning the right for private actors to claim damages due to an antitrust violation is stipulated in 4 § of the Clayton Act[18]. The paragraph holds that: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore […] and shall recover

[12] An example of this is the conflict that will arise between the crucial leniency programs and a more efficient approach for individuals to claims damages.
[13] Ashurst, *Study on the Conditions of Claims for damages in case of Infringement of EC Competition Rules*, Comparative Report, prepared by Waelbroeck, Slater, Evan-Shoshan, 2004,
[14] Ibid. p. 102.
[15] 15 U.S.C. §§ 1-7.
[16] This section relates to hard core cartel conducting illegal behaviours such as bid rigging, market division and price fixing.
[17] 15 U.S.C. § 45. .
[18] 15 U.S.C. §§ 12-27

threefold the damage by him sustained". This is the so-called "treble damages" and it is used to pursue the encouragement of injured parties to obtain reparation while at the same time assisting the government safeguarding the effectiveness of the antitrust legislation. Both the compensation and the deterrence elements have been stressed consistently by the Supreme Court of Justice to achieve this goal. The plaintiff then arrays the role of a governmental resource preserving the effective maintenance of the antitrust rules. The private enforcement has always been dealing with different aims such as deterring future violations, compensating the victims of antitrust infringements and punishing the violators. While the Community consistently has stressed that the private enforcement's aim is mainly compensatory, the American legislature has historically emphasized deterrence as a result of equal importance.[19]

However, deterrence has today emerged as the primary aim when promoting the private enforcement in the U.S. system. It has been influenced by the theories within law and economics were the remedies' only goal is to achieve optimal deterrence and the compensation part is only a positive by-product of this. This approach is not entirely embraced by courts and policymakers but the compensation aspect has been superseded in the pursuit of a more efficient deterrent framework. This is demonstrated by the *Illinois Brick*[20] case (analyzed under 5.2.1) and the *Hanover Shoe*[21] case (analyzed under 5.1.2).

The private antitrust enforcement actions in the USA represent more than 90 % of the total litigations against antitrust violators.[22] Consequently, the private litigant in the United States has been considered to be an additional major antitrust enforcement "agency".[23] The deterrence of committing an antirust violation by having a treble damage provision has also been the main focus in the doctrine. It has sometimes been accused for creating economic inefficiencies and sometimes celebrated for its multiple functions. According to some of the critics, the potential awarding of treble damages has encouraged far too much litigation, which has been time-consuming for the courts and rendered in high administrative costs. These treble damages have also been criticized for being over-deterrent in the sense that undertakers sometimes refrain from economic conducts, that would probably be permissible, since they are afraid of being close to an illegal conduct that triggers the devastating lawsuit. This is to the detriment of the market economy as a whole. Another party that might be frightened by the large treble lawsuits is potential "whistleblowers" that provides important information to the federal authorities of an ongoing infringement in exchange of amnesty programs.[24] The government has thus responded to this by constructing legislation that limits, under certain conditions, the potential actions against such a whistleblower.[25] A final harmful consequence that has been pointed out is the broader affect it has on the field of antitrust as a whole. The private litigations brought before courts reflects only the issues and interests of private parties, which creates a rather

[19] Jones, *supra* note 12, at p. 80.
[20] *Illinois Brick Co v. Illinois*, 431 US 720 (1977)
[21] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S 481 (1968)
[22] Wils, *supra* note 12, at p. 477.
[23] Jones, s*upra* note 12, at p. 16.
[24] Wils, *supra* note 12, at p. 477.
[25] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, combined with the Standards Development Organization Advancement Act, Pub. L. No 108+237 (2004)

inconsistent and inefficient antitrust case law that is lacking a strong, coherent enforcement strategy.[26]

The supporters however replies that the preventive functions of the strong, "litigation friendly", private enforcement are crucial to the U.S. approach and that the costs of having a different solution with more governmental interference would probably be even higher.[27] The strong reliance on the private damage claims in the private enforcement creates both a compensatory and deterrent effect, even though there has lately been a focus on the deterrent effect.[28] Furthermore, the private enforcements complementary effect is manifested in the numerous cases where the public enforcement finds a case to be uneconomical to enforce. Damage claims by private litigators have in these cases proven to be successful "gap-fillers" and demonstrate that even small or hard reached violations are often caught by the U.S. antitrust enforcement.[29] Many defenders have claimed that a mixed system with strong private enforcement creates a balanced way of approaching the enforcement, which might result in a less intervention-oriented scheme that is the case when the authorities are the exclusive enforcers.[30]

2.4 Is there a "right" choice?

The U.S. approach to enforce the provisions has always been heavily dependent on litigations initiated by different private and public actors to secure compliance, deterrence, compensation and punishment. Apart from some possibilities of imposing criminal sanctions on a number of different antitrust violations, its view towards pluralistic enforcement and reliance on private litigations is the main dissimilarity towards the European approach. The current European system on the other hand, relies on their public agencies who create a rather coherent enforcement strategy and who are not controlled and determined by private parties' choices to bring their issues before courts. Although there are a number of federal enforcement agencies in the USA they do not have the same authorities and powers regarding the enforcement policy as the Commission have within the Community. There is, as an example, no such thing as a notification system with governmental interference on behalf of the undertakings and the governmental actions are severely superseded by the private actions.[31]

Noticeably, there are advantages and disadvantages with both public and private enforcement and it is almost impossible to balance them in a way that creates a perfect enforcement since opposite interests held by different stakeholders, both public and private, will be impossible to satisfy. Since a perfect enforcement system is unattainable in theory it is even more complicated when they are applied in practice on a certain area. The balancing of the space given to the different enforcement approaches will most likely deviate from the approach taken in the USA since they

[26] Van Gerven, *supra* note 9, at p. p. 48.
[27] Ibid. p. 81 f.
[28] 15 U.S.C. §§ 4, 16 The treble damage system provides the litigants with a possibility to sue for three times their actual damages, plus attorneys fees and costs. A losing plaintiff has no obligation to pay for the defendants' fees and costs.
[29] Waller, *supra* note 13, at p. 370.
[30] Komninos, *supra* note 13, at p. 10.
[31] Jones, *supra* note 12, at p. 15 ff.

have different overriding aims to fulfil and they have different legal cultures and traditions. However, one cannot say that there exists a given “right” enforcement that should be applied. There are different structures that fit the relevant are better that others.

3 General application of EC law in national courts

Before putting the possibilities for private damage claims due to a breach of the competition Articles in a historic and legal context I intend to make a brief general presentation of the present situation regarding the adaption of Community law and how it connects to the national courts in general and, more specified, to Articles 81 and 82 of the EC Treaty. The possibility for private damage claims derives from these directly applicable Treaty Articles. Private parties must be able to practice the right to claim damages before the national courts. The national courts shall safeguard this right but still has some discretion in their judgements. Therefore, I find it crucial to elaborate on the principle of direct effect and the procedural autonomy of the national courts which determines the powers and limits of the Member States. The chapter will also briefly present Articles 81 and 82 of the EC Treaty and Regulation 1/2003, which more specifically determines the position of the national courts when assessing damage claims within the field of competition law.

3.1 Direct effect

It should be borne in mind that the Treaty today has created a new legal order, which is an integrated part of the national legal system and which the national courts are bound to follow. This legal order is not only subjected by its Member States but also their nationals. The possibility to enforce the competition law before a national court is possible due to the principle of direct effect. The European Court of Justice established early on, in *Van Gend en Loos*[32] that those Treaty obligations, which were clear, unconditional and not subject to intervening action by Member States could be relied upon by nationals and in national courts directly since they had direct effect. In the case *BRT v. SABAM*[33] the ECJ had to elaborate on the question if Articles 81 and 82 of the EC Treaty satisfied the conditions laid out in *Francovich*[34] and accordingly had direct effect. The Court answered in the affirmative, that both Articles 81 and Article 82 of the EC Treaty conferred unconditional rights and obligations on individuals that could be relied on before national courts. In this case the Court also emphasised that the national courts have an obligation to safeguard the rights granted by these Articles.

The principle of direct effect permits and encourages the enforcement of the Community law at a national level. The solidarity obligation enshrined in Article 10 EC imposes an obligation of solidarity among the national authorities as it states that the Member States have to take all appropriate measure to ensure the fulfilment of the Treaty. Therefore, national courts are obliged to apply directly effective provisions of

[32] Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.
[33] Case 127/73 *Belgische Radio en Televisie et siciété belge des auteurs, compositeurs et éditeurs v. SV SABAM et NV Fonior* [1974] E.C.R 51.
[34] Case C-6 & 9/90 *Franchovic v. Italy*, 19 November 1990, [1991] ECR I-5357.

Community law which have supremacy over any conflicting principles of national law and to safeguard the rights which originate from Community law.[35]

3.2 The procedural autonomy of the Member States

When claiming damages for breach of the Community competition law Articles there is a question of the applicable procedural and tort rules. There are today no stipulations at Community level regarding this. However, the mentioned doctrine of direct effect requires that individuals are able to claim different substantive rights before their national courts. The rights that derive from Community law must be safeguarded by the national courts with detailed measures in national law.

The starting point for any consideration of Community law's effect on national rules of remedies and procedures began in 1989. In *Rewe-Handelsgesellschaft*[36], the ECJ specified the principle of national procedural autonomy, which persists as long as there are no Community measures harmonising the circumstances. This principle explains that, when the national courts protect the rights deriving from Community law, it is national law that sets out the rules governing the procedures in the Member State courts. It is in fact a duty for the Member States to safeguard these rights. The Court held that "in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of rights which citizens have from the direct effect of Community law …"[37]. Furthermore, and to ensure that the effectiveness of the protection of Community will not vary too much between the different national legal systems, the court stipulated two limitations on the procedurals anatomy that is required to be satisfied by the national rules. The first limitation was the principle of equivalence stating that the national conditions safeguarding the Community right must not be less favourable than those relating to similar actions of domestic nature. The other limitation was set by the principle of effectiveness, which demands that the national rules must not make it virtually impossible or excessively difficult to use the right that they are protecting. Concerning the rules of evidence, the ECJ held in the recent *Vonk Dairy Products*[38] that it is for the national courts to verify (in this case whether there was a "repeated irregularity" present) whether the illegal act or acts is at hand. When satisfying this responsibility, the courts must do this in accordance with the rules of evidence of national law and make sure that the effectiveness of Community law is not undermined.[39]

In order to fulfil the protection of the effectiveness of the Community, the national courts are free to apply the most appropriate measure or impose the most suitable remedy to fulfil the aim pursued. These sanctions imposed must be adequate and have

[35] Case C-198/01, *CIF v. Autoria Garante della Concorrenza e del Mercato* [2003] ECR I-8055, para. 48.
[36] Case 158/80, *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel* [1981] ECR 1805
[37] Ibid. para. 5.
[38] Case C-279/05 *Vonk Dairy Products BV v. Productschap Zuivel* [2007] ECR I-00239,
[39] Ibdi. para. 43.

to guarantee real and effective judicial protection of the protected Community rights.[40]

3.3 The decentralized enforcement system

In the wake of this discretion given to the Member States and the direct effect granted to Articles 81 and 82 of the EC Treaty, the Commission called for a modernisation of the current enforcement rules of the competition law. It was suggested that there should be a more decentralized approach were the national courts could operate freely. The new enforcement system of the competition Articles were contested at Council level by some Member States when the Commission adopted a formal proposal in 2000. However, as the general outlines of the proposed system were presented, an acceptance had grown since a wide consensus had grown believing that the old system was no longer justifiable. Therefore Regulation 1/2003[41] finally was adopted. The regulation was part of the "Modernisation Package" that also included six Commission Notices that would provide further guidance to the Member States.[42]

The Member States possibilities to use Articles 81 and 82 of the EC Treaty in their national courts were until Regulation 1/2003 only supported by case law. The competition area then had a centralized structure but the granting of the direct effect to the Articles created decentralized features. The national courts could, according to the old Regulation 17/62[43], apply art 81(1), but the Commission had an exclusive power to assess the individual exemptions in art 81(3). The national courts could not apply the Articles on a certain illegal behaviour if the Commission already had initiated a process and they where always bound and delayed by its judgement regarding the exemption question. This created inefficiencies and from a private enforcement perspective, the prospect of obtaining reparation for damages caused by a violation of the competition rules was clouded with great uncertainties. However, the Commission did not have the resources needed to deal with the increased number of notifications and they had only time to examine a small number of individual exemptions. The workload continued to increase and after a White Paper on Modernization[44] and massive post-White Paper discussions in literature, the necessary Regulation began to apply from 1 May 2004.[45]

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[40] Case 34/67 *Lück v. Hauptzollant Köln* [1968] E.C.R 245, para. 3.
[41] Reg 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[42] Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C101/43; Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the Application of Arts 81 and 82 EC [2004] OJ C101/54; Commission Notice on the Handling of Complaints by the Commission under Arts 81 and 82 EC of the EC Treaty [2004] OJ C101/65; Commission Notice on Informal Guidance Relating to Novel Questions Concerning Arts 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters) [2004] OJ C101/78; Commission Notice – Guidelines on the Effect of Trade Concept Contained in Arts 81 and 82 of the Treaty [2004] OJ 101/81; Communication from the Commission – Notice – Guidelines on the Application oft Art 81 (3) of the Treaty [2004] OJ C101/97
[43] Reg 17/62 of 6 February 1962 – First Regulation Implementing Articles 85 and 86 of the [1962] OJ L13/204
[44] Commission White Paper of 28 April 1999 on Modernization of the Rules Implementing Articles 85 and 86 of the Treaty, COM(1999) 101 final, [1999] OJ C132/1.
[45] Ibid Art 45.

This marked the beginning of a new enforcement regime within the Community. It decreases the Commissions workload by abolishing the system of prior notice and its exclusive power to apply art 81(3) of the EC Treaty by stipulating in Article 1(2) of the Regulation that "agreements, decisions and concerted practices caught by Article 81(1) of the EC Treaty which satisfy the conditions of Article 81(3) of the EC Treaty shall not be prohibited, no prior decision to that effect being required". Article 3(1) of the Regulation stipulates that the national courts have a power to use Articles 81 and 82 of the EC Treaty, without it being necessary to apply national competition law as well. However, when a national court applies national competition law to agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States within the meaning of Article 81(1) of the EC Treaty or to any anti-competitive conduct prohibited by Article 82 of the EC Treaty, they also have to apply EC competition rules to those agreements, decisions, or practices.

Articles 5 and 6 of the Regulation declares that the national competition authorities and courts will have the power to apply the EC competition Articles in its entirety. The only exemption to this is the block exemption, according to Article 29 of the Regulation, where the Commission enjoys exclusive powers. The new Regulation also provides for extensive duties of cooperation between the Commission and the courts of the Member States that has been further specified in a Commission Notice (se below chapter 3.3.1). Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations to the Commission before the national courts of their Member State. This Regulation provides more discretion to the national courts and competition authorities is supposed to strengthen the private enforcement of the EC competition law

3.3.1 Commission Notice regarding the co-operation between the Commission and the courts of the Member States

As mentioned above, the Regulation was accompanied by six Commission Notices due to of the difficulties for the Regulation to cover all aspects of the new modernised and decentralised system. Since there is not enough room to cover all of these Notices in this essay I intend to make a brief presentation of the most relevant notice; The Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the Application of Arts 81 and 82 of the EC Treaty.[46] This Notice is supposed to provide further guidance on the co-operation between the Commission and the national courts when the latter apply the Community competition rules. Regulation 1/2003 made the national courts enforcers of the EC competition law and this Notice is intended to give assistance to that task.

Part II of the Notice regulates the competence conferred to the national courts to apply Articles 81 and 82 of the EC Treaty. It stipulates that national courts have got a significant role in the enforcement of Articles 81 and 82 of the EC Treaty when they fulfill private actors' requests to safeguard their individual rights.

[46] Commission Notice on Cooperation between the Commission and the Courts of the EU Member States in the Application of Arts 81 and 82 EC, *supra* note 39.

Part III stresses the importance of the co-operation between the commission and national courts. Even though Article 234 EC is the only explicit stipulation that requires the co-operation between national courts and the ECJ, the Commission means that the Community courts interpretation of Article 10 EC, which obliges the Member States to assist the achievement of the Community aims, demands that the European Institutions and the national authorities co-operates with a view to attaining the objectives of the EC Treaty, including the competition field. Therefore, Article 10 creates an obligation in the Commission to assist national court in competition cases and vice versa. Article 15(3) of the regulation provides for the possibility for national competition authorities to submit observations before the national courts of their Member State.

4 The legal basis for damage claims development within Community law

There is today an absence of Community harmonization regarding claims for competition damages before civil courts. Therefore the national rules on civil liability and civil procedure apply. The Member States must also comply with the conditions for applying Community competition rules. The only stipulated consequence in the Community competition rules is the above-mentioned nullity of the clauses in the agreement or the agreement as a whole. Thus, this issue has always been regarded to be a matter for the Member States and their national laws to regulate. However, this has not prevented the ECJ jurisprudence from developing a right for private parties to receive damages for injuries caused by Member States infringement of Community law.

4.1 Articles 81 and 82 of the EC Treaty

Article 81 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effects the prevention, the restriction or the distortion of competition when this illegal act affects trade between two different Member States. The consequences of committing such a violation are that the act becomes automatically void, according to Article 81(2) of the EC Treaty. There are no stipulations of any right for damage claims due to a breach of the Articles. In *STM v. Maschinenbau Ulm GmbH*[47] the Court interpreted Article 81(2) of the EC Treaty and claimed that those parts of the agreement that is affected by the prohibition is void but if the same clauses cannot be severed from the remainder of the agreement, then the whole of it will be considered void. This is for the national courts to determine and they are bound to apply this principle of automatic nullity unless there the agreement is, or may be, exempted pursuant to the block exemption in Article 81(3) of the EC Treaty.[48] This Article allows the otherwise prohibited agreements if they contribute to the improvement of production or distribution of goods or the promotion of technical or economical progress. The other principal provision concerning competition policy is Article 82 of the EC Treaty. This Article regulates the restrictions subjected to undertakers that enjoy a dominant position at the relevant market in question. If an undertaker abuses that position and it affects trade between two Member States, then it shall be prohibited.

[47] Case C-56/65, *Société La Technique Miniére v. Maschinenbau Ulm* [1966] E.C.R. 235.
[48] Ibid, p. 250.

4.2 The European Court of Justice's road to *Courage* and *Manfredi*: case law on damages actions

Outside the area of competition law, in its early case law, the ECJ initially chose a rather restrictive path and imposed severe limits on national institutional and procedural autonomy. In its judgement in *Rewe Handelsgesellschaft,* the Court reminded the parties of the lack of Community law regarding rules or guidelines that the buyer in question could rely on to compel his third party to comply with the EC rules. The ECJ held that there was no obligation on the Member Sates to create new remedies for the requirement of effectiveness Community law other than those already established.[49]

This path with a core of national and procedural freedom was however later deviated from to a more pro-active Community approach. In subsequent case law the ECJ emphasised the new priority given to ensure the effectiveness of Community law over National law. Despite numerous cases were the national legal systems still enjoy a primary responsibility and the autonomy is emphasised in the absence of Community remedies, a development towards more constraints to this discretion began in the late 80's. A line of case law that focused on a particular substantive EC law right, often specified in Community legislation, demanded the Member States to make a specific national remedy available to grant this right.[50] Cases such as; *San Giorgio*[51] on the repayment of charges, *Factorame*[52] on interim reliefs, *Heylens*[53] on judicial review and *Marshall*[54], all demonstrated that the national courts are sometimes bound to guarantee specific remedies in certain circumstances. However the detailed conditions stipulated to grant these remedies are still for the national court to determine.

The thought that Community law might require a right to damages started when the ECJ established the principle of state liability for breaches of EC law in the famous *Francovich* case[55]. In this case, The ECJ stated that there must exist a right for an action for compensation in certain cases where a Member State has infringed EC law. The Court explained that otherwise "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."[56] The Court also stressed the principle of loyalty, which the Member States are bound to follow according to Article 10 EC. This judgment and its implications initiated a discussion by commentators concerning the possibility for an extension of the principle to also

[49] Case 158/80, para. 6.
[50] Craig and De Burca, *EU Law – text, cases and materials, fourth edition,* p. 328.
[51] Case 199/83 *Amministrazione delle Finanze dello Stato v. San Giorgio* [1983] ECR 3595.
[52] Case C-213/89 *The Queen v. Secretary of State for Transport, ex p. Factorame Ltd.* [1990] ECR I-2433.
[53] Case 222/86 *UNECTEF v. Heylens* [1987] ECR 4097.
[54] Case C-271/91 *Marshall v. Southampton and South West Hampshire Area Health Authority* [1993] ECR I-4367.
[55] Case C-6 & 9/90 *Franchovic v. Italy,*
[56] Ibid, para. 33.

confer a right in damages for private parties in cases of EC competition law and that this derived from the Community law and was therefore not a matter of national law. This since the foundation for the liability derived from the principle of full effectiveness, which theoretically should not differentiate between state and individuals.[57] The principle of state liability departs from the earlier standard that the national law provides the remedies while the Community law provides the substantive rule. This ruling created a remedy for damages that the national courts are bound to follow and enforce and therefore it is no longer important whether national law acknowledges a possibility for damages remedy or not.[58]

The jurisprudence of the ECJ and the literature became progressively more detailed regarding state liability, especially after the long and complex joined cases of *Brasserie du Pecheur/Factorame III.*[59] This is a very interesting ruling that seemed to shift towards a more remedies oriented case law and the use of effective judicial protection, which gave more support to those who defended a Community right of damages for antitrust victims. The German government, defending its own role as an EC Treaty interpreter, held that a general right for reparation of an infringement of Community rules demanded legislation otherwise it would be incompatible with the allocation of powers between the Member States and the Community institutions. The ECJ did not agree with this statement and held that "it is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained."[60] Consequently, the Court concluded, as in *Francovich*, that there is a possibility for individuals to claim damages before their national courts when the state is liable for a breach of Community law as long as three conditions, set forth by the Court, are met. The Court held that the rule of law that has been breach must confer rights on individuals, the infringement must be sufficiently serious and there must be a causal link between the breach of the obligation and the damage prolonged by the parties claiming damage.[61] The case strengthened the view that there was a right under Community law that allows claims for damages from undertakings which has violated the EC Competition rules, as long as the conditions are met.

4.3 Private action for damages due to a breach of competition law

Until 2001 the Court of Justice hand never had an opportunity to rule in the question of the existence of civil liabilities arising from infringements of Articles 81 and 82 of the EC Treaty. However, the debate regarding the existence of a Community based right for private actors to claim damages due to a breach of the competition rules

[57] Smith, *The Franchovic case: State Liability and the Individual's Right in Damages*, 1992, 13 E.C.L.R. p. 132, Komninos, *EC Private Antitrust Enforcement*, 2008, p. 166.
[58] Jones, *supra* note 12, at p. 72.
[59] Case C-46/93 & 48/93 *Brasserie du Pêcheur SA v. Germany and The Queen v. Secretary of State for Transport, ex parte Factorame Ltd and others* [1996] ECR I-1029.
[60] Ibid. para. 22.
[61] Ibid para. 51.

began in 1992 in a case concerning the interpretation of the old European Coal ad Steel Convention.

4.3.1 Case C-128/92 HJ Banks & Co Ltd v. British Coal Corporation

The first time the ECJ was faced with the question whether an individual may, as a matter of EC law, have a right to claim damages for harm caused by an infringement of the Community competition rules was in *Banks v. British Coal.*[62] Advocate General *Van Gerven* argued extensively in this case for such a possibility.

The litigation concerned a feud between the state owned British Coal Corporation and Banks, which was a private company engaged in the production of coal. At the time, the British Coal Corporation owned almost all coal in the whole of the UK and they had been authorized by law to grant licensing rights to other undertakers providing them with a right to extract their coal. The coal could either be sold to the British Coal Corporation at a fixed price or it could be sold to third parties with a stipulation that a certain sum had to be paid to the Corporation in return. Banks argued that they paid excessive fees to the Corporation and received much lower prices than an open market would create. Unfortunately, this issue concerned ECSC Treaty, which only provided for a partial integration since it was limited to the coal and steel sectors and was denied any direct effect recognition.[63] Therefore, in its judgment, the ECJ did not have to address the question concerning compensation.

Nonetheless, *Van Gerven* thoroughly discussed in his opinion, the possibilities of extending the *Franchovic* ruling to cover general damage claims. He argued for the various factors that militate in favor of undertakings having a chance, under Community law, to bring an action for compensation before a national court. He meant that civil claims against other private parties are a necessary feature to uphold the effectiveness of the competition rules and the broader principles of the Community,[64] although he agreed with the Court regarding the direct effect as an *a fortio* argument for the application of the Community right to damages.[65] Regarding the question whether the *Franchovic* ruling would be extended to concern horizontal actions for damages between two private parties, he answered in the affirmative. *Van Gerven* took the view that the effectiveness of Community law would be impaired if individuals were unable to claim damages from a party breaching one of its provision that confer the former a direct right and imposes an obligation on the latter.[66]

4.3.2 Case C-453/99 *Courage v. Crehan Ltd.*

Since Articles 81 and 82 of the EC Treaty create direct effect and since the Court has held that the right to reparation is the necessary corollary of this direct effect in previous cases, the right to obtain reparation for the damages caused should not be dependable of the identity of the infringer according to the debate. The judgement in

[62] Case C-128/92 *HJ Banks & Co Ltd v. British Coal Corporation* [1994] ECR I-1209
[63]. para. 23.
[64] Advocate General Van Gervens opinion in Case C-128/92. paras. 37-41.
[65] Ibid. para. 40.
[66] Case C-128/92 para. 43.

Courage v. Crehan Ltd[67] was therefore much welcomed. Finally, the ECJ had to rule on the question whether private claims for damages due to a breach of the competition rules was a right granted by the Community.

The ECJ judgment, dated 20 September 2001, concerned a rather common situation in Britain, a so-called "beer tie". Courage was a brewery holding 19% share of the United Kingdom market in sales of beer. It concluded an agreement with Mr Crehan in 1991, which gave Mr Crehan a right to lease a pub from Courage under beneficial conditions. However, this agreement also placed him under a contractual obligation to exclusively purchase a certain minimum quantity of beer, at a specified price, from Courage. In litigations before the national court, Courage sued Mr Crehan in 1993 for unpaid deliveries of beer. However, Mr Crehan contested the action, holding that the agreement in question was incompatible with Article 81 of the EC Treaty (former Article 85 of the EC Treaty) since it required him to purchase the beer at a fixed price that was substantially higher than the prices offered to those undertakers independent of the "beer-tying"-contracts in question. On the same grounds he also made a claim for damages connected to the alleged infringement. The possibility to challenge the "beer ties" compatibility with Community law before the national court follows from Article 81 of the EC Treaty and its directly effective rights granted to individuals.

The Court of appeal referred in total four questions to the ECJ for a preliminary ruling. The first concerned English law, and its compatibility with EC competition law. According to English law, and the *in pario delicto* principle, a party of an illegal contract, which the Court concluded it to be, is denied to claim damages from the other party of the agreement. The Court of Appeals sought guidance as to whether the same outcome was found when applying Article 81 of the EC Treaty (former Article 85 of the EC Treaty). The ECJ reaffirmed the principles outlined preciously in *Eco Swiss*[68] when they recalled the primacy of Article 81 of the EC Treaty in the Community legislation by stating "Art 85 (now Article 81) of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market"[69]. The Court also acknowledged the principle of automatic nullity that is expressly stated in art 81of the EC Treaty and that the competition Articles produces direct effect, which provides individuals with rights that the national courts must safeguard.[70] Taking all this into consideration the Court declared "that *any individual* can rely on a breach of art 85(1) of the Treaty before a national court even where he is a party to a contract that is liable to distort competition within the meaning of that provision"[71]. This included a party that relied on a contract that had been declared illegal by the National court. The Court stated that it is of importance that individuals have a possibility to use art 81 of the EC Treaty and its prohibition to claim damages for a behaviour that distorts competition. The ECJ explained that the full effectiveness of the Article would be put at risk if they were denied such a claim.[72] To enhance the possibility of private enforcement further through the national courts and the national competition authorities, the ECJ explicitly recognized the existence of a right to

[67] Case C-453/99 *Courage v. Crehan Ltd.* [2001] ECR I-6297.
[68] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, para 36.
[69] Case C-126/97, para. 36.
[70] Case C-453/99, paras. 20-23.
[71] Ibid. para. 24. (emphasis added)
[72] Ibid. para. 26.

initiate compensation procedures and held that such "action for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."[73]

Even though the Court holds that there should not be any kind of absolute bar to this right to claim damages, it is for the national courts to set up the procedural rules that uphold the right that derives from Community law. When setting up these rules, the national courts have to respect the principle of effectiveness and the principle of equivalence to construct their legal systems in a way that is compatible with Community law. As long as these principles are considered, the Community law does not prevent courts of the Member States to adopt a system that, while safeguarding these rights, does no entail the unjust enrichment of those who enjoys it.[74]

4.3.3 Joined Cases C- 295/04 to C-298/04 *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*

In the rather recent ruling of *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*[75] the Court of Justice confirmed the ability to claim compensation for harm caused by an infringement of the competition rules and stipulated more detailed rules regarding the procedure which provided more encouragement to the private enforcement of EC competition rules.

The case concerned a preliminary reference from Italy where a number of Italian consumers sued insurance companies for infringement of the competition rules. The Italian authorities had previously condemned the automotive insurers since they had unlawfully exchanged information, which resulted in a cartelized behaviour that increased the premiums of the compulsory auto incurrence's with an average of 20 percent. Therefore, Manfredi and the other applicants brought an action before the Italian national court to obtain damages against each insurance company concerned for the illegal price increase. The insurance companies pleaded, inter alia, that the concerned Italian court did not have jurisdiction under national law and that the limitation period to obtain the damages had elapsed. The Italian court referred a number of questions to the ECJ including, in essence, whether Article 81 of the EC Treaty is to be interpreted as:

1. Providing individuals a right to sue infringers of this Article and claim damages for the harm suffered when there is a causal link between the illegal agreement or practice prohibited and the harm;

2. If the limitation period for seeking compensation for the harm caused by the illegal behaviour begins on the day which the agreement or concerted practice was implemented or the day when it came to an end;

[73] Ibid. para. 27.
[74] Ibid. paras. 28-31.
[75] Joined Cases C- 295/04 to C-298/04 *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619.

3. Requiring the national courts to, of its own motion and to discourage the illegal practice or agreement, award punitive damages to the injured third party when the profit gained by the violator is higher than the damages available under national law

The ECJ answered the questions by reaffirming and building on the *Courage*-case by stating that Article 81 of the EC Treaty needs to be applicable for *any individual* to make sure that the full effectiveness of and the prohibition in the Article is not jeopardized.[76] They declared that, "it follows that any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC."[77] It is for the claimant who initiated the damage claim to prove that there exist an antitrust infringement, the harm suffered and the causal relationship between them. The Court rules that injured parties must be able to seek compensation not only for actual loss, but also for loss of profit.[78]

However, the Court held that it is for the national authorities to safeguard this right in the absence of Community law governing the possibilities to claim. According to the Court, they have to assure that there are sufficient detailed rules that safeguard this right, which the individuals receive directly from Community law. This includes the prerequisite of the "causal relationship" between the illegal conduct and the harm suffered. The Court furthermore emphasised the importance of, when safeguarding these individual rights, respecting the principle of equivalence (national rules cannot be less favourable than Community rules) and the principle of effectiveness (the national rules cannot de facto make it practically impossible or excessively difficult to exercise the right).[79] The requirement to safeguard this right in the absence of Community law by the national courts answered the second and the third questions as well. The domestic legal system of each Member State may prescribe whichever rules they find suitable provided that the principles of effectiveness and equivalence are observed. Also, any limitation periods cannot be such as they might disturb the right to seek compensation [80]

4.4 The discussion in literature

Manfredi and *Courage* provide a strong basis for private parties' possibilities of bringing claims for reparation in national courts due to a competition violation. This could be seen as a first important step towards a Community wide notion of damages for competition law and a stronger private enforcement. Indirect purchasers have extensively been argued to be included in this right as the Court holds that *any individual* may obtain compensation for the harm suffered, as long as a causal link between the harm and the infringement of the competition rules can be proven.[81] The ECJ seems to focus mainly on the importance of the substantive Community right at issue, here the competition rules, and not on the procedural anatomy of the national

[76] Joined Cases C-295/04 to C-298/04, para. 60.
[77] Ibid. para. 61.
[78] Ibid. para. 100.
[79] Ibid. paras. 62-64.
[80] Case C-298/04, paras. 81-82 regarding the first question and, paras. 98-100 regarding the third question.
[81] Case C-298/04, para. 61 and Case C-453/99, para. 24.

laws. Therefore, these cases joins in the line of case law demanding that the national legislation have to have a specific remedy available due to the right that is inherited by the directly applicable competition laws. *Craig* and *de Burca* assume that this approach is used by the European Court of Justice to override or disapply national rules that are too restrictive. Applying that statement to the ECJ rulings would mean that the Court might have a desire to make the competition damage claims less complicated for individuals.[82]

Komninos holds that the Court seems to make a distinction between the exercise and the existence of the right to claim damages. Just like in *Courage* the Court repeated the importance of the existence of such a right and how it strengthens the Community competition rules. The stipulated criteria by the Court in these cases are basically the same as the ones neglected from the early *Banks*, where Advocate General *van Gerven* encouraged a similar approach to the right for individuals to claim damages in these cases. The ECJ has, with the *Courage* and the *Manfredi* rulings, established what seems to be a rather broad rule of standing. To sum up the judgements of the cases, compensation for any loss may be granted:[83]

i) To *any individual* as long as there is,
ii) an *infringement* of the competition rules,
iii) the infringement in question *reflects harm* on the individual,
iv) the existence of a *causal link* between the harm done and the agreement or practice held to infringe the competition rules.

It is the claimant that bears the burden of producing evidence of the antitrust breach of the harm he suffered and of the causal link between them. I think this is a necessity in order to restrict the claims to injuries that is foreseeable and naturally caused by the competition breach. When safeguarding those rights, the ECJ pointed out some limitations on the national procedural autonomy. The national courts have to execute the exercise of this right in a way that guarantees the non-existence of unjust enrichment of the claimant and that it also have to respect the principle of equivalence and the principle of effectiveness. This provides a clear basis for claimants to challenge any of the national procedural rules that might hinder the individual claims.

It should also be noted that even though none of the cases concerned a breach of Article 82 EC, the wording of the ECJ clearly applies also to breaches of Article 82 EC.[84]

Komninos argues that the most important part of *Courage* and *Manfredi* is that it finally sets out the principle, which has both symbolic and practical consequences. It terminates the great uncertainties that have characterized the question whether damages can be awarded for violation of Articles 81 and 82 of the EC Treaty. He means that the signal it creates to the national courts and the Community is an anticipated beginning towards a more uniform, consistent and effective application of the competition rules at national level.[85] Former Advocate General *Van Gerven* is not

[82] Craig and De Burca, *supra* note 53, at p. 320.
[83] Komninos, *supra* note 13, at p. 173 ff.
[84] Commission Staff Working Paper of 2 April 2008 accompanying the White Paper on Damages actions for breach of the EC competition rules, SEC(2008) 404, p. 15.
[85] Komninos, *supra* note 13, at p. 170.

as optimistic as *Komninos*. He holds that even though the importance of the *Courage* decision increased in the wake of Regulation 1/2003, which gave the national courts a competence to apply Articles 81 and 82of the EC Treaty in their entirety, there will still be no greater change in practice to the number of claims for damages action by private parties.[86] There are still only a small number of initiated litigations brought before national courts by competitors, direct or indirect purchasers, end users or consumers.[87] This legal case-law basis in Community law for damage claims supported by the power granted to the national courts by Regulation 1/2003 will certainly raise the awareness of the possibilities for damage claims but there are still, according to *Van Gerven*, to many uncertain conditions. Furthermore, he explains that the private enforcement alternative is still too time-consuming and costly as opposed to the public enforcements. It is too complex for private plaintiffs to initiate the uncertain judicial procedure guided exclusively by case-law, themselves. Therefore, they will continue to prefer to submit complaints to the Commission that will handle the infringements and the private claims for damages will mainly, outside the realm of contract cases such as *Courage*, be used when there is a successful public enforcement action that lays out the foundation, a so-called follow-on action.[88]

I find the above argumentation from *Van Gerven* convincing. The conditions concerning a successful damage claim needs to be further harmonized in order to increase the private enforcement. There is a need for some legislative intervention that would create a harmonized foundation regarding the mode of procedure throughout the Community. This is a pressing issue today since the internal market is more integrated and it is increasingly common nowadays that private undertakers, and even individuals, carry out cross-boarder transactions. The granting of certain discretion to the Member States to prescribe the detailed rules governing the possibility to claim damages by the ECJ in *Courage* and *Manfredi* will, due to their different legal approaches, further the uncertainties and the complexity of conducting a successful damage claim. This will prevent the economic integration throughout the Community. For instance, in *Manfredi*, the ECJ abstained from developing the concept of causality. It held that it was for the Member States, in the absence of Community rules, to stipulate the more detailed rules regarding this right. The discretion explicitly included the application of the concept of causal relationship that requires a confirmation in order to successfully be awarded damages.[89] The basic definition of the causal relationship will differ among the legal systems of the Member States because of their different legal cultures. Therefore, interpretations will be made and they will have different approach and degrees or restrictiveness which will provide additional complications to the assertion of antitrust damage claims and decrease harmonization that would make the competition enforcement more efficient. Even though the principles of equivalence and effectiveness limit the discretion to a certain degree, I find it necessary for an EC legislation to intervene and eliminate the Member State approaches that are too restrictive. It will probably be difficult for some of the private actors to gather enough evidence, that they believe is needed under the prevailing case law status, to prove the anti-competitive behaviour, the harm caused

[86] Van Gerven, *supra* note 9, at p. 23f.
[87] According to the Ashurst Study, p. 1, there were only about 60 cases, in the whole of the Community, where an judgement had been made for damages actions until the year 2004. Among these cases there were as few as 28 successful awards in t.
[88] Van Gerven, *supra* note 9, at p. 23f.
[89] Joined Cases of C-295/04 to C-298/05, para. 64.

and the causal link between them. Gathering this evidence is often a high cost that private actors cannot afford. For that reason, I believe that a legislative intervention is needed to somewhat ease the burden of proof for the victim and create legal certainty. Otherwise the victims will only continue to prefer the involvement of competition authorities.

Despite these hurdles *Van Gerven* is optimistic towards a more pro-active private enforcement approach within the Community but believes that it is crucial for the ECJ to have an opportunity to further clarify and for the legislature to intervene.[90] Other hurdles that might contribute to the "underdevelopment"[91] of the European private enforcement is, according to *Bulst*, that the victims often have created an important, dependent, economic relationship with the infringers that are to costly to break. Moreover, *Bulst* mentions another potential cause to the insignificant present role of the private enforcement of competition rules in Europe, and that is that the harmed purchasers are simply not aware of the damages inflicted on them, especially in a case of an infringement of Article 81 of the EC Treaty. As long as cartel behaviour is not exposed it is sometimes practically impossible for the private purchasers to find out that it is in fact an illegal cartel price that they are paying. In these situations they have to wait for the public authorities to discover and prosecute the infringement and these actions are often limited to the substantial infringements. With this in mind in addition to the general approach to private enforcement working only as a supplement to the supreme public enforcement within the Community, *Bulst* means, just like *Van Gerven* that the follow-on actions, where public authorities take the initiatives, will be the only common damage claims.[92]

Another problem that arises in the wake of a more accessible right to claim damages is the effects it will have on the public enforcement. An example that illustrates this is the negative effect it will have on the important leniency program. The leniency program requires applicants to expose themselves and their illegal conduct in the application to gain the immunity that the leniency programme offers. To officially recognize the anti-competitive conduct might result in civil liabilities for the undertaker. Before the judgement of the cases that have been discussed above in this chapter, follow-on actions made by private parties have never been a real threat to the whistle blowers. However, with an increasing access and efficiency for private actors to claim damages, and potential interventions by the Community institutions within this area, will probably create a strong disincentive to seek leniency.[93] An Additional factor that aggravates this problem is the Commission's statement in its 2006 leniency notice that the granting of immunity of fines or reduction of fines within the leniency programme cannot protect the same undertaker from consequent civil law consequences due to his illegal conduct infringing Article 81 of the EC Treaty.[94]

[90] Van Gerven, *supra* note 9, at p. 30
[91] Ashurst Study, p. 37. However, *Bulst* are questioning this label since, apart from the U.S, Canada and maybe Austrailia there is no private enforcement system in the world were claims for damages are "developed" and plays a significant role.
[92] Bulst, *Private Antitrust Enforcement at a Roundabout*, 2006, E.B.O.L.R. 7, p 728 f.
[93] Ibid. p. 730,
[94] Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases [2006]

4.5 Conclusions

The possibilities within Community law for private persons to claim damages from both public authorities and private individuals and entities have historically been regarded as insufficient. Even though the state liability principle was settled early in *Francovich* the private damage has been lacking Community guidelines, which has generated in a weak private enforcement on Community level. Public enforcement has therefore, in the absence of private enforcement, filled the enforcement need of the competition rules and has been granted great powers to do so. However, the strong public enforcement structure and the lack of harmonization on the private enforcement area have been to the detriment of private victims of anti-competitive behaviour. In the cases of *Courage* and *Manfredi* the ECJ for the first time had an opportunity to elaborate on the issue. This jurisprudence gave individuals a right to claim damages, as long as they could prove the infringement, the harm and the causal link between them.

Despite these welcoming judgments the platform for individuals to claim damages before their national courts is still insufficient. Initiating such a claim is complex and costly for a private actor and there are still too many uncertainties' surrounding this right since it is only guided by the ECJ's judgments. These judgements have created a debate among different stakeholders regarding the important matters that were left unsolved by the ECJ and the most efficient way to address the accessibility to it on a Community level. The questions concerning the right for indirect purchasers to claim damages and the defendants' ability to use the passing-on defence are two of the main issues that needs to be solved if the private damage claims should be regulated in some way at a Community level.

The next chapter will therefore discuss these matters. It will present the impacts a potential approval for indirect damage claims and the usage of the passing-on defence would have on the competition enforcement. This presentation will lead to Chapter 6 that covers the recent White Paper by the Commission which proposes detailed suggestions on how to improve the legal conditions for victims to exercise their right under the EC Treaty to claim damages due to a breach of the EC antitrust rules. The suggestions concerning indirect purchasers and the passing-on defence will be thoroughly examined and will lead to a final analysis covering the thesis purpose.

5 Indirect purchasers standing and the passing-on defence

There is a strong rationale for an examination of the passing-on defence when discussing the damage claims of indirect purchasers due to a breach of the competition rules since they are closely linked to each other. The passing-on defence may be used defensively by the defendants in cases were the claimant has passed on, some or the whole, illegal overcharge that he seeks to be compensated for. The indirect purchasers possibility to claim damages can only be realized if they can use the passing-on defence offensively, claiming that an undertaker above them in the distribution chain have passed-on parts or the whole of their illegal overcharge to them. Indeed, standing of indirect purchasers has been referred to as "offensive passing-on"[95]. The U.S. method will be examined in each of these matters to ascertain the factors in their approach that would be positive or negative for the Community to adopt. There are still numerous questions regarding the Community approach on these issues since the ECJ has not had a proper opportunity to elaborate directly on the issues, at least not on the defensive passing-on instrument. Therefore, after an analysis of the prevailing legal status in the U.S. and in the EU, this chapter will be concluded with a discussion and analysis on the subjects.

5.1 The passing-on defence

The problem addressed in this chapter is the possibilities for defendants, in an antitrust damages case against them, to use the passing-on defence in order to limit his liability. In the U.S. antitrust case law, the possibility to use the passing-on defence has been observed in several cases within the field of antitrust. Within the Community the question has never been brought to court.

Assessing the degree of the passed on overcharge is very difficult and complex. To answer this question the court might use a statistic method. By observing earlier increases in the marginal cost and the effect that has had on the price of the final consumer conclusions can be drawn regarding the degree of the passed on overcharges in the present case. However, reliable information concerning the price setting and costs is sometimes difficult to attain and thus a precise calculation is impossible.[96]

5.1.1 The U.S. approach

The legal system in the USA has a long history of dealing with the possibilities of using the passing-on defence. They confronted the problem and gave it a solution early on.

The first time the term "passing-on" gained judicial and academic acceptance in the

[95] Jones, *supra* note 12, at p. 177 f.
[96] Clark, Hughes and Wirth, *Analysis of economic models for the calculation of damages*, European study on the conditions of claims in case of infringement of EC competition rules, 2004, p. 33.

USA was in the case *Hanover Shoe Inc v United Shoe Machinery Corp*[97], and is today still the leading case. This judgment was finalized in 1968 and that was the first time the Supreme Court of Justice specifically faced the issue of the passing-on defence. Hanover Shoe sued United Shoe since they tried to monopolize the market for shoe-making equipment, which infringed Article 2 of the Sherman Act and reflected harm on the plaintiff. United Shoe was a manufacturer of these equipments and they made them available to the market on a lease-only basis and consequently refused to sell to Hanover Shoe. The defendant United Shoe responded to this argument by arguing that the plaintiff was not entitled to claim any damages since he had not suffered any actual injury. The defendant meant that the plaintiff already had passed the alleged overcharge to his costumers and hence had no right to claim the price paid in excess.

The Court began by establishing that the alleged conduct did constitute a violation of art 2 of the Sherman Act.[98] Hereafter it refused to allow the passing-on defence that United Shoe presented and the economic arguments in favor of it. It justified its refusal on grounds of maintaining efficiency and effectiveness throughout the litigation. First of all, the Court explained that its efficiency-level would be lowered and the litigation would be excessively complicated if it where to trace the overcharge and deal with the extensive proof required every time the defence would be used.[99] The Court explained that the pricing decisions by the companies are highly individualized and subjected to a range of factors that are hard to analyze *ex post*, and even if the overcharge is recognized there is a possibility that the plaintiff incurred other injuries, such as a reduction in the number of units sold, which will be even harder to prove.[100] The judges held that it would always be complex "in the real economic world, rather than an economist's hypothetical model … [to what extent] a change in a company's price will have on its total sales."[101]

Secondly, the Court clarified another problem that would follow an allowance of this kind of defence. It would, according to the Court, reduce the effectiveness of the important treble damages, as the direct purchasers possibilities would be weekend. The passing-on defence might create situations where the final consumers, in this case the purchasers of single pair of shoes, would ultimately be the only group entitled to seek compensation since they would be the only party suffering any actual loss. The loss will most likely then be shattered on several different consumers who will have a small stake and little interest in initiating a costly civil antitrust. Consequently no one would be able to bring suit against the offenders that in the end "would retain the fruits of their illegality".[102]

[97] 392 U.S 481, *supra* note 21.
[98] Ibid. at 484.
[99] Ibid. at 492-494.
[100] Ibid. 493.
[101] Ibid.
[102] 392 US at 494.

5.1.2 The European approach

As a result of the almost exclusive focus on the public enforcement of the competition rules there is no prior case law on Community level that has dealt with the issue of the passing-on defence in an action for damages due to a violation of the competition Articles. *The Ashurst report* furthermore establishes that there is a very inconsistent approach to this defence at a national level. Germany, Italy and Denmark were the only Member States that had any national case law to share regarding this issue. In Germany there had been a proposal, supported by a majority of the country's legal experts, to explicitly exclude the passing-on defence, but ultimately the legislators left the question open for the courts to find an appropriate solution based on the facts of the case before them. In Denmark and Italy the defence was considered possible. The rest of the Member States had not dealt with it although a majority thought that the defence in theory could be used.[103]

Nevertheless, the passing on defence has been dealt with by the ECJ in other cases e.g. regarding the passing on of taxes or administrative charges. In *Hans Just*[104] the Danish government had charged excessive taxes on spirits that was found unlawful. Mr. Just had, due to the excessive taxes, increased his prices on the concerned drinks and consequently this resulted in lower sales and imports. He sought compensation for the damage caused by the illegal conduct but Denmark argued that such compensation would amount to an unjust enrichment on Mr. Just's behalf. Denmark claimed that he already had passed on the tax increase to his customers. The ECJ did not expressly confirmed the usage of the passing-on defence defensively but the ruling in this case confirms that the principle of unjust enrichment could be used to show that the unlawful charges had been passed on, have been considered in part to be analogous to the defensive passing-on of illegal overcharges within the competition field.[105] The Court has implicitly recognized the passing-on defence in other cases. *Ireks-Arkady* concerned extra-contractual liability under Article 288 EC. ECJ examined, before determining the damage award, to what extent the claimant had passed on the loss from an elimination of refunds. The Court admitted that if the loss had been included in the selling price then they could not include this amount in its measurement since the price increase had filled the harm that the eliminated refunds had caused. [106] In the similar case of *Dumortier Fréres,* the Council intervened and found that the damage calculation could not exclude the damage simply because the producers had passed on the loss in their selling prices. The Court held that in the context of action for damages, "such an objection may not be dismissed as unfounded. In fact, it must be admitted that if the loss of the abolition of the refunds has actually been passed on in the prices the damages may not be measured by reference to the refunds not paid. In that case the price increase would take the place of the refunds, thus compensating the producer."[107]

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[103] The Ashurst Study, *supra* note 14, at p. 79.
[104] Case 68/79, *Hans Just I/S v. Danish Ministry for Fiscal Affairs,* [1980] ECR 501.
[105] See, Jones, *supra* note 12, at p. 193.
[106] Case C-238/78 *Ireks-Arkady GmbH v. Council and Commission of the Eurpopean Communities,* ECR [1979] 2955.
[107] Joined Cases 64, 113/76; 239/78; 27, 28, 45/79, *Dumortier Frerés SA and Others v. Council of the European Communities* ECR [1979] 3039, para. 15.

Société Comateb[108] and *Kapniki Michailidis AE*, are two cases concerning Member State liability for breach of Community Law were there was a question regarding the usage of the passing-on defence. ECJ specified rather strict rules when using the defence. It was for the defendant to prove that no passing-on had occurred and detailed verification was according to the Court needed for the passing-on defence to be approved. Although the Court implicitly recognized that the defence existed, the terms of usage was vague and complex and ultimately it was left to the national courts to decide on whether the passing-on actually had occurred. None of these cases concerned any individual claims against undertakings which are the common case in a claim for an EC antitrust claim for damages. There is a question of the extent of the implicitly accepted stance made by the ECJ and how they will respond to the issue when it is a private EC competition litigation.[109]

Although the *Courage* case dealt with somewhat different issues than the above mentioned tax cases it is significant since the Court acknowledged the prevention of unjust enrichment as a legitimate goal while refereeing to certain cases where the Court had, at least implicitly, confirmed the passing-on defence.[110] This really affirms the relevance of these cases within this field. *Van Gerven* was early on positive of the passing-on defence to avoid unjust enrichment. The Advocate General claimed, in his opinion in the *Banks* case, that "In quantifying the damage it is necessary, in any event, in accordance with the aforesaid prohibition on unjust enrichment, to take account of the extent to which the damage has been passed on in the selling prices of the complainant undertaking."

5.2 Indirect purchasers standing

Before discussing indirect purchasers right to claim damages there is a need for a basic definition for the harm caused. There are differences between indirect and direct purchasers. The direct purchasers are the ones buying directly from the infringer of the competition law. Indirect purchasers are everybody below the direct purchasers in the distribution chain. Almost all average consumer good goes through several levels of distribution and everybody in the chain down to the final consumers, except for the one purchasing directly from the infringer, are indirect purchasers. They lack a direct relationship with the infringer, contractual or non-contractual. There has also been a more detailed distinction between the primary and the secondary victims within the terminology of indirect purchaser – the primary and secondary indirect victims. The primary victims within this definition are so impaired by the situation that they cannot allocate resources to purchase the product or service in question at the anti-competitive price and thus forcing them not to be a part of the transaction at all. It is so difficult to indentify these victims that there has never been a case where damages were awarded to them and consequently they are not the objective of this thesis. However, secondary victims are persons and undertakers that bought the product or

[108] Joined Cases C-192/95 to C-218/95, *Société Combateb and Others v. Directeur general des dounanes et droites indirects* [1997] ECR I-165.
[109] Jones, *supra* note 12, at p. 195.
[110] See, Case C-453/99, para. 30 Where the ECJ refers to the above mentioned cases C-238/78, para. 14 and Case 68/79, para. 26. They also refers to the more recent Joined Cases of C-441/98 and C442/98, *Kapniki Michaïlidis AE v. Idryma Koinonikon Asfaliseon* [2000] ECR I-7145, para. 31.

service in question, albeit to an anti-competitive price, and are the indirect purchasers referred to below.[111]

5.2.1 The U.S. approach

As explained above under chapter 5.1.2, the jurisprudence of the Supreme Court of Justice in *Hanover Shoe* strictly prohibits the defensive use of the passing-on defence by the defendants. In *Illinois Brick Co. v. Illinois*[112], which is the mirror of *Hanover Shoe*, the question arose whether the passing-on defence could be used offensively, giving the indirect purchaser that suffered from the passed on illegal overcharges a possibility to sue for damages caused by the original violator. The Supreme Court denied indirect purchasers the right to claim damages and thus deviated from the stipulated foundations of the private enforcement in the USA, where Section 4 of the Clayton Act states that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" to obtain treble damages.[113]

In *Illinois Brick Co. v. Illinois* the State of Illinois and 700 local governmental entities, which bought brick through masonry contracts, alleged Illinois Brick Co. to be a part of a price-fixing cartel vertically conspired between the producers and distributors on the relevant market of concrete block. The cartel sold the concrete blocks at excessive prices to masonry contractors, which in turn sold to general contractors from which some of the governmental entities had purchased. Illinois Brick moved for partial summary judgement against all plaintiffs that were indirect purchasers of block from them, contending that only direct purchasers could sue for the alleged overcharge.

The Court began by reminding the parties of the *Hanover Shoe* ruling stipulating that only the direct purchasers may claim an injury within the meaning of the 3 § of the Clayton Act and that they were not convinced to overrule that construction.[114] It is, according to the Court, important to maintain symmetry with the *Hanover Shoe*-ruling, that denied the defensive use of the passing-on defence by not allowing the offensive use of the passing-on defence so that indirect purchasers may claim damages, for two different reasons. First of all, due to the potential serious risk of multiple liabilities for defendants. The overcharge that the indirect purchaser proves by using the passing-on defence offensively might be the same or parts of the same amount that the direct purchaser had already recovered in a different damage claim. Allowing the indirect purchasers a right to claim damages while, at the same time, prohibiting the violator of using the passing-on defence defensively against the direct purchasers would thus create overlapping recoveries for the defendants.[115] This duplicative liability might result in antitrust violators that would be held liable more than once for three times the amount of the overcharge in question because of the possibility of treble damages. Secondly, as a consequence of the first reason, the Court held that "the reasoning of *Hanover Shoe* cannot justify unequal treatment of

[111] Komninos, *supra* note 13, at p. 202, fn 372.
[112] 431 US 720, *supra* note 20.
[113] U.S.C 15 § 5(a) (emphasis added)
[114] Ibid. at 729.
[115] Ibid. at 730.

plaintiffs and defendants with respect to the permissibility of pass-on arguments"[116]. If that harm may not be taken into consideration defensively between the seller and the purchasers, it would be unfair if it would be permissible for an indirect purchaser to use the passing-on principle offensively in damage proceeding.

To summarize the ruling, and apart from some state antitrust laws that may allow indirect purchaser suits in certain circumstances,[117] the indirect purchasers cannot cover any damages under the present, federal, U.S. antitrust laws even though the excessive pricing has been passed on to them. The Indirect purchasers have therefore been left to pursue remedies only under state antitrust laws. This ruling has for ages been heavily criticised and debated. Primarily, it has been pointed out to deter the effectiveness of private antitrust enforcement since it deprives injured parties of their right to obtain reparation.[118]

5.2.2 The European approach

The Court has, with the above-analyzed cases of *Courage* and the *Manfredi*, established what seems to be a rule of standing for individual damage claims. In *Courage* the ECJ held, as above mentioned, that "the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it was not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"[119]. The Court later reaffirmed this position in the *Manfredi* case where stating that "It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC".[120]

The wording of the European Court of Justice when it explains that *any individual* may claim damages is probably of such a nature that it encompasses indirect purchasers as well. It is also consistent with the directly effective Treaty rights and the principle of full compensation that all those that are harmed by an EC antitrust infringement at least have a possibility to repair those damages. The Court only deals with Article 81 of the EC Treaty but by the reasoning of the ECJ it has been held to clearly also concerns Article 82 of the EC Treaty. [121]

It should also be noted that the stipulation of the causal link requirement creates discretion for the national courts to create their own legislation in this matter. This might lead to the result of national legal systems that prohibits indirect purchasers in some cases, for instance when a national court finds the harm to be too remote from the conduct.[122]

[116] 431 US 730.
[117] Komninos, *supra* note 13, at p. 202, fn 374.
[118] Jones, *supra* note 12, at p. 179.
[119] Case C-126/97, para. 26. (emphasis added)
[120] Case C-298/04, para. 61.
[121] Commission Staff Working Paper, *supra* note 86, at p. 15
[122] Ibid.

5.3 Discussions in literature

The European approach towards these examined issues deviates from its U.S. counterpart. With the jurisprudence of the above-mentioned ECJ-judgements in *Courage* and *Manfredi* it seems, from the wording of the Court, like indirect purchasers are able to claim damages. In the U.S. there is a prohibition carried out by the Supreme Court of Justice of both the indirect purchasers right to claim damages and the right to use the passing-on defence defensively. The prohibition of the passing-on defence was *inter alia* made to create symmetry with the banning of the indirect purchasers ability to claim damages that was early laid down to avoid overcompensation to the victims and to avoid efficiency decreases of the important treble damages.

5.3.1 Indirect purchasers standing

Harris and *Sullivan* analyzes the U.S. prohibition and critique the approach since it bans all down-chain purchasers possibilities to sue and that it results in a discouragement much more than an encouragement of the enforcement of the antitrust rules. They explain that there are numerous situations where the total exclusion of indirect purchasers forecloses any private suit when the direct purchasers are not inclined to sue. This is especially true when the ongoing violation has been operative for so long (or short termed and the indirect purchasers are already heavily invested) that the parties have made long-term adjustments which have created a valuable relationship that would be jeopardised in the realization of a damage claim for the direct purchasers. It would then be uneconomical for the direct purchaser to litigate against the violator and it would probably ruin their profitable relationship. The absence of indirect purchasers damage claims in these situations will create a situation were no one enforces the antitrust laws against the violator.[123] *Waller* also elaborates on this and thinks that a denial of the right of indirect victims to claims damages is devastating, especially with a consumer aspect. The final consumers are almost exclusively indirect victims in these situations and are sometimes those suffering the most from the initial infringement. Leaving this weak part without a right to claim damages is therefore unfair.[124]

However, economic analyses of the problem has often rendered in the approval of the rule.[125] *Landes* and *Posner* argue that, contrary to *Harris* and *Sullivan* and in terms of economic efficiencies, an allowance of standing for indirect purchaser due to a breach of the antitrust rules would impede more than advance the enforcement. The prohibition of indirect purchasers encourages, according to them, those most likely to litigate to actually do so. Therefore it also decreases the processing costs of litigation since the indirect victims' burden of proof enhances the complexities and costs of the case.[126] They see the deterrence objective, and not the compensatory objective, as the chief achievement of the antitrust laws. *Landed* and *Posner's* analyses demonstrates

[123] Harris and Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, (1979) 128 U Pa.L rev. 269 p. 352 f.
[124] Waller, *supra* note 13, at p. 379 f.
[125] Landes and Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the rule of Illinois Brick*, (1979) 46 U Chi. L Rev. p. 602; Landers and Posner, *The Economics of Passing-on: A Reply to Harris and Sullivan*, 128 U Pa.L Rev. 1274 (1980)
[126] Landes and Posner, (1979) *Supra* note 120, at p. 604.

that the *Illinois Brick*-ruling puts the risk of the expensive antitrust litigation on the direct purchaser while indirect purchasers obtains a certain benefit based on the expected value of the claim. An overruling of the judgement, which *Harris* and *Sullivan* opted for, would result in the direct- and indirect purchasers sharing that risk and the price of the products would therefore increase to compensate that extra cost inherited by the producer.[127]

Jones explains the current position in the USA by pointing out that the prohibition of indirect purchaser claims in this regard is definitely a policy choice made by the Supreme Court of Justice. They chose the position that promotes the antitrust enforcement most efficiently and did this by making it independent of the U.S. statutory system. This structure and approach makes it, from *Jones* view, less suitable to copy in a potential European approach since it has deterrence aspect as the primary aim and not the compensatory aspect.[128]

Jones and *Beard* acknowledges the obvious argument in support of denying indirect purchasers (*Illinois Brick* rule) a right to claim damages, namely that it precludes duplicate recoveries from a defendant and promotes consistent verdicts. The direct purchaser has a right to recover the whole illegal overcharge from the violator while the indirect victim is denied to retain a portion of this against the same defendant in a separate action. The direct purchasers are the victims most likely to initiate a damage action and this gives them a great incentive to do so. When this approach is complemented with the *Hanover Shoe* rule, disallowing the defensive passing-on, it will effectively ensure that the wrongdoers are "stripped of the fruits of their wrongdoings"[129] and as a consequence also deter anti-competitive behaviour. However, *Jones* and *Beard* points out the differences in the legal structures between the U.S. and the Community and why the American approach is not suited to be adopted by the Community. They mean that the American approach would be inconsistent with the directly effective Community competition Articles. A consequence of this rule is that some cases will result in the direct purchaser obtaining some reparation whilst others, further down the chain that also suffered loss, are left uncompensated. They mean that this would undermine the principle that victims suffering a loss due to a breach of the directly effective competition rules are entitled compensation.[130] *Jones* also discusses the impossibility of adopting the *Illinois Brick* rule because of the different developments and structures in the Community of antitrust standing. He emphasizes the substantial and material differences between the Sherman Act and the EC Treaty antitrust rules. That the EC Treaty has been held to have a "constitutional character" and that the competition Articles confer directly effective rights on individuals. The Sherman Act however is not a constitution and nor does it confer such rights directly on individuals. *Jones* argues that "It would seem that under the doctrine of direct effect in the Community law, a plaintiff who can show injury caused by an infringement has a private right of action which is coextensive with the substantive reach of the directly effective competition rules of the EC Treaty".[131] This argumentation is supported by the wording of the ECJ in *Courage* and *Manfredi*, where they claimed that "the full effectiveness of Article 81

[127] Ibid. 605 f.
[128] Jones, *supra* note 12, at p. 180.
[129] Jones & Beard, *supra* note 123, at p. 255.
[130] Ibid.
[131] Jones, *supra* note 12, at p. 187.

of the EC Treaty and, in particular, the practical effect of the prohibition laid down in Article 81(1) of the EC Treaty would be put at risk if it was not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"[132]

Accordingly, a prohibition of using the passing-on defence offensively and therefore denying indirect purchaser a right to claim damages, would create an intolerable difference between the scope of the remedy and the substance of the directly effective rights.[133]

5.3.2 The passing-on defence

Regarding the practice of the passing-on defence defensively *Jones* and *Beard* brings up the primarily factors that promotes such a usage. The compensatory principle would be satisfied, in theory, with an aim at compensating the actual loss of the claimant, ignoring the part of the overcharge that he passed on to another purchaser down the chain. This argument is even more convincing when seen in the light of the strict prohibition of unjust enrichment throughout the Community. It seems like it would be problematic for a claimant to be unjustly enriched if he could only recover those damages that he has already passed on.[134] *Eilmansberger* argues in the same line and does not consider the effects of the passing-on defence to prevent private damage claims. Instead, it would in theory define the victims that are entitled to repair their damages due to the damage finally caused. However, regarding the above mentioned cases where the Court implicitly have confirmed the defence in the framework of unjust enrichment, *Eilmansberger* finds the application of the defensive use of the passing-on defence unsuitable in the context of the unjust enrichment principle since it does not really change the unjustness of the enrichment by illegal levied charges. He means that the defence is much more appropriate in the context of the definition of damages because it obviously affects and establishes the amount of the damage claimed. Since it today exist a possibility for to be compensated for the actual damage suffered, due to a breach of the competition law, he implies that it from this follows that the passing-on defence could be used under Community law and that it will hardly will be changed through the Court's jurisprudence. Such a limitation or exclusion could only, according to him, be achieved by Community legislation.[135]

However, *Eilmansberger* raises doubt as to the practical implications of such a defence and expresses a fear that it would work as an efficient shield against damage actions. Using the passing-on defence against a direct purchaser will often leave the infringer absent of civil liability since the overcharge he has passed on is usually to a shattered group of indirect purchasers that are typically too small to give an incentive to sue.[136] *Jones* also mentions this problem and fears that the consequence will be

[132] See Joined Cases of C-295/04 to C-298/05, para. 60. And Case C-453/99, para. 26
[133] Jones, *supra* note 12, at p. 195.
[134] Jones & Beard,, *supra* note 123, at p. 254.
[135] Eilmansberger, *The Green Paper on Damages Actions for breach of the EC antitrust rules and beyond: reflections of the utility and feasibility of stimulating private enforcement through legislative action*, 2007, C.M.L.R. 44, p. 473 ff.
[136] This problem might somehow be solved by so called class actions which would permit a shattered group of victims to organize themselves in one claim. However, this thesis does not have the space to investigate this any further.

that the loss will be born by the consumers and not the wrongdoers.[137]

Jones recognizes that the Community will have a difficult policy decision when choosing its approaches to the offensive (and consequently giving indirect purchasers a right to claim damages) and defensive use of the passing-on defence. Both the *Illinois Brick* and the *Hanover Shoe* rules have been argued to have both positive and negative implications on the competition area. For instance, prohibiting the defensive passing-on while permitting the offensive passing-on might lead to double recoveries, but it has also been held to maximize the ability of both direct and indirect purchasers to bring actions against infringers. However, if both defensive and offensive passing-on is allowed, and only a part of the indirect victims sue, then the infringer will retain some of his "illegal fruits" but will at the same time deny some of the victims the right of compensation. *Jones* implies that both major alternatives have aspects that are unsatisfactory and that it will be a question of which alternative serves as a fair and effective one to the Community antitrust.[138]

5.4 Analysis

Since there is no European equivalence to the treble damages, I find the wording of the ECJ in *Manfredi* and *Courage,* stating that any individual have the right to claim damages, welcoming. It creates a compensatory tool that is much needed within the Community. It also supplement on the deterrence aspect that the public authorities currently almost exclusively maintains. If the Community damages cover not only the directly injured parties but also the indirect victims and their damages, and the award of the damage encompasses both actual loss and loss of profit, it will have a great deterrent effect. If only direct purchasers were to have the possibility to claim damages it would work poorly as a discouragement for undertakers from conducting profitable infringement, since the Community does not have anything equivalent to the U.S. treble damages. Today only the public authorities have been known to initiate litigations against infringers. These litigations are however very few in relation to the many infringements. A right for indirect purchasers would generate in more private litigations will fill a very important gap in the European enforcement, according to me.

I must however raise a question regarding the standing of indirect purchasers under EC law. It should be borne in mind that neither the *Courage* case, nor the *Manfredi* case involved indirect purchasers, which creates some uncertainties concerning this right of standing. It does seem like indirect purchasers, like any other individual, has a right to claim damages according to the wording of ECJ in these cases but the Court has never awarded such a purchaser compensation in a specific case. The American Clayton § 4 states, just like the wording of the ECJ, that "any person" have the right to obtain reparation for the harm caused (in this case treble damages). The Supreme Court however ruled that this does not cover indirect purchasers. Therefore, and until the ECJ specifically has ruled in the matter, I find it hard to be certain that indirect purchasers have a standing under Community law.

[137] Jones, *supra* note 12, at p. 195.
[138] Jones, *supra* note 12, at p. 197.

Regarding the passing-on defence I support the views of *Jones* and *Eilmansberger* above when they argue that granting this defence might create practical implications on behalf of the victims. I think that in the majority of cases when the infringer uses the passing-on defence, and successfully proves that the direct purchaser has passed on all or most of the illegal overcharge to undertakers or individuals downstream, it will sometimes result in absent damage claims by remaining indirect victims that are unable or unwilling to sue for some reason. This can be illustrated with the above-analyzed *Courage* case. Here, Mr. Crehan claimed that he was subjected to a contractual clause that was contrary to Article 81 of the EC Treaty. He had a direct connection to the suspect infringer as he held that the contract made him pay excessively higher prices than the tenants without such a contract, that Courage also sold their beer to. The potential illegal overcharge that Mr. Crehan would pass on in this case would be in the form of excessive prices on the beers served to their final customers at the pub. It does not seem probable that these indirect victims would find the harm caused to them sufficient to initiate a damage claim against the brewery. The original violator whose anti-competitive contract caused the damage will as a result to this benefit from his wrongdoing and will be encouraged, as opposed to deterrent, to conduct this behaviour in the future. Nonetheless, if a defendant in these cases successfully imposes the passing-on defence the direct purchaser have already passed on the harm that the overcharge brought and it would, according to me, be inappropriate to grant him a right to claim damages.

To summarize, I find it crucial, in the event of a legislation or case law granting the passing-on defence, that this area have to be sufficiently regulated in a way that promotes the private actions more efficiently than the present framework. A solution must be presented where indirect victims are encouraged to initiate a damage claim. This might be done by a less burdensome requirement concerning the evidence needed. Otherwise, the defence will, in numerous cases, only lower the efficiency of the private enforcement and allows wrongdoers to retain some of the fruits of its illegal behaviour. The Community will have a difficult and important task to identify proposals that will encourage claims by everybody harmed by the breach of the directly effective competition Articles. One of the most obvious approaches to this promotion would be the facilitation of efficient group actions that would allow the shattered group of indirect victims to join in a class action against the violator. However, it is the purpose to further investigate this instrument in this thesis.

6 Why a Commission White Paper and the way ahead

The important rulings of the *Courage* and *Manfredi*-cases established a clear right for individuals to claim damages due to the harm caused by a breach of the competition rules. This created the required incentive for the Commission to adopt a more pro-active stance on the question of private enforcement of the competition rules. For a long time, private damage claims has been the source to an intense debate throughout Europe.

6.1 The road to the White Paper

The Commission published, on 19 December 2005, a Green Paper and a Commission Staff Working Paper on damages actions for breaches of the Competition rules.[139] In this Paper the Commission addressed a number of obstacles to the right and the specific rules that should be stipulated to remedy the victims of an infringement. The purpose of this Green Paper, which was constructed with different questions and options on how to overcome the potential obstacles to a more effective system of damages claims, was to initiate an intensive debate and receive comments from the concerned practitioners. A majority of the submissions received agreed that such a possibility was much needed for the individuals to exercise this right more efficiently. They had, even though they highlighted the difficulties involved, great expectations regarding an effective private enforcement. However, numerous respondents regarded the authorization of a more important role of the private enforcement too costly and therefore advised the Commission to refrain from setting up a system leading to, as their concerns claimed, excessive and unmeritorious litigations.[140] In the wake of the rewarding Green Paper and its comments and the encouraging cases of *Courage* and *Manfredi*, the Commission decided to adopt a White Paper on damages actions for breach of the EC antitrust rules. It was published in April, 2008.[141]

6.2 The White Paper on damages actions

The Commission acknowledged that there is a pressing problem throughout the Community regarding private individuals and undertakers' possibilities of obtaining reparation for harm before the civil court caused to them due to a competition infringement. Although the case law has revealed the possibility, the numbers of litigations initiated are still unchanged due to the various difficulties claimants face in a potential exercise of the right. According to the Commission, this lack of a functioning legal framework for antitrust damages also precludes the deterrent effect that follows from successful damage claims against anti-competitive behavior. The Commission reminds the reader of this White Paper of the public policy status that the

[139] Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final.
[140] Commission Staff Working Paper, *supra* note 86, at p. 7.
[141] Commission White Paper of 2 April 2008 on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final.

competition Articles enjoys and that this lies at the heart of the functioning of the internal market. Inadequacy in effective enforcement of Articles 81 and 82 of the EC Treaty impedes the achievement of the aims of the competition framework, such as, greater economic efficiency, better allocation of resources lower prices and increased innovation. The countless victims that under the prevailing status are left uncompensated force the Commission to admit that there is a lack of corrective justice surrounding the area.[142]

In the wake of the recent increase in the awareness on the part of the victims, due to the ECJ case law and the Green Paper on damages actions, there have been various legislative developments in some of the Member States. Although this is welcoming, The Commission explains that such isolated efforts will not be capable of solving the problem. Therefore, the Commission emphasizes the need of some form of action coordinated at a Community level.[143] Therefore, and despite the recent changes in this field, the Commission believes that victims of competition breaches still faces to many difficulties when looking for effective redress and considers it appropriate to suggest measures that goes beyond a mere clarification of the current legal status.[144]

This White Paper is not a proposal for one single legislative instrument. It is a wide scope of different approaches to the issues presented in the Paper and that relates to the damages actions, e.g.; soft law instruments for the calculation of damages, directives on representative actions, recommendations for Member State actions on costs and regulation on the conditions of the fault requirement. However, this thesis is primarily interested in the Commissions prospects regarding the indirect purchaser claims and the usage of the passing-on defence defensively. The White Paper is accompanied by two different Commission documents, which are:

I. A Commission staff working paper (the SWP), on EC antitrust damages actions, which clarifies the considerations underlying the White Paper more detailed and also presents a brief overview of the already existing prevailing legal status and;
II. An Impact Assessment Report (the IAR), which investigates the possible benefits and costs of various Policy Options presented to deal with the problem.

When pursuing this goal the Commission realizes and discusses the obstacles and complexities, as discussed in the chapters above, that accompanies this change which have to be lessened to create the efficiency needed. To summarize this extensive documentation package, the Commission puts forth three general and important measures that need to be followed:

1. **Full compensation:** This compensatory object is according to the Commission the most important principle that they intend to pursue. Primarily, this principle is stipulated to safeguard the individual's usage of their Treaty right and receive compensation for all the harm caused. Inherently, this also leads to greater deterrence since the costs (both the administrative and the reparation cost) of the

[142] Commission Staff Working Document of 2 April 2008 accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, SEC(2008) 405 p. 11 ff.
[143] Ibid. p. 20 f.
[144] Commission Staff Working Paper, *supra* note 86, at p. 92.

infringements, in case of a successful litigation, will be born by the infringers and there will be a greater numbers of illegal behaviors that will be detected.[145] The Commission means that preference is given to allow a higher number of claims rather than restricting claims to merely those that will potentially have an outcome that would deter feature anticompetitive conduct the most.

2. **The legal framework should be based on a genuinely European approach:** The measures taken in order to deal with the obstacles of an enhanced level of private enforcement are meant to balance the different legal cultures and traditions of the Member States. This will create an effective system and will discourage the initiation of unmeritorious litigations.[146] This is most likely a statement made by the Commission to relieve the massive fears from undertakers and practitioners that there will be too many influences from the American approach. Treble damages, class actions, contingency fees and other instruments would most likely be inefficient in many of the civil law countries within the EU. In my opinion, the powers and instruments that the Community authorities have are incommensurable to the American counterpart and therefore it would be precarious to be influenced by detailed measures within their approach.

3. **The need to preserve a strong public enforcement:** Since there has always been such a strong emphasis on public enforcement within the Community the European competition enforcement scheme is heavily rooted and structured by it. Consequently, the Commission finds it important to preserve this central role. The objectives of the private damage claims, that primarily serve to compensate the victims, differs from the objectives of the public enforcement, that mainly serves as deterrence and overall compliance of Articles 81 and 82 of the EC Treaty. The successful public instruments, such as the investigation powers given to the public to detect anti-competitive practices, have to and will still be, according to the Commission, indispensible for an effective and efficient enforcement. Even though the private enforcement will be enhanced it will still serve as a complement, and not a replacement, to the public enforcement.[147] This relates to the issue more thoroughly discussed above in chapter 4.4 and concerns primarily the successful leniency programs controlled by the Commission. Too much power vested into the private enforcement or not enough regulations to safeguard its effectiveness would undermine its purpose. When an undertaker applies for leniency he exposes his illegal behavior and thus risks potential private damages claims against him. This will result in undertakers refraining from applying, which is a result that must, and probably can, be avoided and probably can be with sufficient measure**.**

[145] Commission Staff Working Paper, *supra* note 86, at p. 10.
[146] Commission Staff Working Paper, *supra* note 86, at p. 11.
[147] Ibid.

6.2.1 The passing-on defence and standing for indirect purchasers

The Commission straightforwardly acknowledges, while referring to the above discussed *Manfredi* and *Courage* cases, the prevailing legal status regarding the standing for indirect purchasers by stating that the wording of the ECJ when declaring that "any individual" can claim damages also refers to indirect purchasers"[148]. Even though some commentators to the Green Paper thought that, holding the U.S. considerations as guidance, admitting indirect purchasers a right to claim damages would be inefficient due to its complexity in calculating and proving the damage, the Commission claimed that this right is important for the Community and the principle of full compensation. In fact, indirect purchasers have historically been the victims that primarily have absorbed the harm caused by many of these breaches. Thus, the principle of full compensation cannot be upheld unless an indirect purchaser possesses a right to obtain reparation. The Commission also declares that the reasoning in the cases clearly applies to Article 82 of the EC Treaty as well, although it only refers to Article 81 of the EC Treaty. [149]

Finally, the Commission proclaims that it has no intention to limit or change this present legal status and gives the national courts, in line with the European Court of Justices permission, the discretion to ban indirect purchasers' claims if they are unable show the stipulated causal link. It seems like the Commission has no intention to create a more harmonized approach to the concept of causality in this situation.[150]

The scope of the right granted by the EC Treaty to indirect purchasers is determined by the question of the offensive usage of the passing-on defence. The Commission thoroughly examines the potential usage of the defence both offensively and defensively in this White Paper. In its Green Paper, the Commission presented the possible approaches of admitting or prohibiting the usage of the passing-on defence combined with the question of standing for indirect purchasers. The comments received were widely diverse, however almost all was unified concerning the need to avoid unjust enrichment both of the claimant and the defendant.[151]

6.2.1.1 Using the passing-on defence as a "shield"

When discussing the defensive use of the passing-on defence the Commission yet again emphasises the importance of respecting the full compensation of the harm that the claimant has suffered. The permission of the defence could lead to the defendant not compensating anyone for the harm his illegal conduct has caused. This would be the result in cases were he used the passing-on defence as a shield and no one downstream of the claimant initiates any action. However, in this case the claimant has passed on the whole overcharge to the indirect victims that will have a right to claim damages.

Seen from the violators perspective, the defensive use of the passing-on defence will be applied to assure that the claimant only recovers the actual compensation, and not

[148] Ibid. p. 15.
[149] Commission Staff Working Paper, *supra* note, at p. 14 f.
[150] Ibid.
[151] Commission Staff Working Paper, *supra* note, at p. 13 f.

whole of the overcharge, since he might have passed on some of the illegal overcharge downstream. If the defendant in such a case would be prohibited to use this defence it would, according to the Commission, generate in an unjust enrichment for the claimant and the possibility of the defendant compensating the overcharge more than once. If a direct purchaser has purchased a product at an anti-competitive price and passes on the whole illegal overcharge to an undertaker downstream it would be unfortunate if the violator is unable to invoke the passing-on defence as a shield when the indirect purchaser also has a right to sue for his excessive price. This would most likely be the outcome in cases were both the direct and the indirect purchaser wants to obtain reparation. The burden of proving that the overcharge has been passed on is born by the defendant that uses it, both the evidence of the factual circumstances and to what extent. The standard of proof for the passing-on cannot be lower than the standard to which the claimant has to prove his damage since it would otherwise have the consequence of a reversal in the burden of proof, which is not in accordance with the objective of achieving effective and full compensation of the harm caused by a breach of Article 81 and 82 of the EC Treaty. [152] The full compensation principle is the most important principle, according to the Commission, and is intended to guarantee the reparation of all harm that the breach of the competition rules has caused the victims. Since it is common that the illegal overcharges are spread among a large group of downstream purchasers, and not born completely by the direct purchaser, and since the damage claims are intended to become more easily accessible with a new reform, the litigations where both direct and indirect purchasers are claiming damages will increase. Accordingly, The Commission holds that the prohibition of the passing-on defence will increase the unwanted result of unjust enrichments and multiple overcharge compensations and therefore supports such a defence.[153]

6.2.1.2 Using the passing-on defence as a ”sword”

The Commission also investigates the question whether the passing-on defence should be used offensively within the Community, as a “sword”. As mentioned above, the claimant bears the burden of proof and if he is unable to convince the judges of the harm and the causal link between his harm and the original infringement, he will not be compensated. This particularly concerns the indirect purchasers, who normally lacks any relationship with the original infringer and faces difficulties in proving that their harm is linked to the antitrust infringement. Hence, the Commission finds it appropriate, for the assurance of an efficient and full compensation, to mirror the defensive use of the passing-on defence with the allowance of the offensive use of the defence.

Bringing sufficient evidence not only to prove the infringement and to what extent the excessive price has been passed on down the distribution chain is, according to the Commission, equally difficult in theory for both the defender and the claimant. If the defendant has used the passing-on defence successfully as a shield towards a purchaser above the current claimants level and the claimant is unable to bring sufficient evidence to prove the passing-on down to his level, then the defendant will not compensate anyone for the harm he has caused. This will, according to the Commission, be contrary both to the principle of full compensation and to the

[152] Commission Staff Working Paper, *supra* note 86, at p. 63 f.
[153] Commission Staff Working Paper, *supra* note, at p. 64 f.

prohibition of unjust enrichment. On the contrary, if the defendant would bear the burden of proof regarding the extent of the passed on illegal overcharges, it would be equally unfair to him. This would result in multiple liabilities for the defendant when both direct and indirect purchasers could be compensated for the same harm suffered even though one of them already passed on the overcharge. Consequently, regardless on who will bear the burden it proof, it will amount to an unjust enrichment on either side.[154]

The Commission hence proposes to ease the claimants' burden of proof, since it is more probable that the defendant is unjustly enriched than him facing multiple liabilities. The Commission sets up three conditions that have to be met before the defendant will face multiple liabilities, which it considers much more difficult to fulfil than a claimant not being able to prove the passing-on, the extent and the causal link:

i) The defendant is sued by both direct and indirect purchasers for the same, or parts of the same, overcharge while in fact only one of these has been harmed by that give overcharge.

ii) He is unable to use the passing-on defence as a shield successfully.

iii) The Court does not balance the defendant for a joint, parallel or subsequent damage action where he has already compensated the same overcharge.

In the end, the infringer is the one that has to bear the described risk of burden. If the claimant shows the breach and the overcharge that he has paid, it is more reasonable that the infringer bears the risk of proving that the overcharge has been passed on than the victim, according to the Commission. Therefore, the Commission proposes a way to reduce the burden on the claimant to show the overcharge and its extent. This will be done by stipulating a rebuttable presumption that the whole illegal overcharge imposed on the direct purchaser is passed on downstream in its entirety to the indirect purchasers. To break this presumption the infringer can simply use the passing-on defence defensively and provide, by the required standard of proof, evidence that the defendant has passed-on the whole overcharge or parts of it. An easy way to do this, if he already has compensated an upstream victim, is to show a prior judgement clarifying that the overcharge (or some of the overcharge) claimed in the present case. The Commission here reminds the reader about the claimant still has an obligation to prove the infringement, the existence of the initial overcharge and the size of the damage.[155]

[154] Ibid. p. 65 f.

[155] Commission Staff Working Paper, *supra* note 86, at p. 66 f. The claimant will still have to prove the infringement, the existence of the initial overcharge and the size of the damage.

6.2.2 The Preferred Option

When dealing with this change in private damage claims the Commission suggests detailed measures to solve the issues presented. They go trough various options and finally extracts the best parts and creates a "Preferred Option" with it. The Preferred Option strikes a careful balance between effective protection of victims' rights to compensation, the legitimate interests of potential defendants and third parties and important interests of Member States. The Commission, in the IAR, examines specific measures to deal with the obstacles presented. They calculate on the potential benefits and cost to the Community and sets forth five different Policy Options, in relation to different issues,[156] that is thoroughly scrutinized. According to the Commission, and the analysis made in relation to the White Paper, "Policy Option 2 has the greatest potential for achieving the objectives identified, while avoiding excessive costs."[157] The Preferred Option deviates only slightly from Policy Option 2 and is modified to more efficiently achieve the objectives pursued and to lessen the implementation costs. According to the Commission the Preferred Option will guarantee the objective of ensuring that victims of anti-competitive conduct within the Community have access to truly effective mechanisms to obtain full compensation for the harm they suffered.[158] This Option's scheme guarantees a balance between effective protection, the right to compensation, the legitimate interests of potential defendants and third parties and important interests of Member States.[159]

The Preferred Option stipulates the following measures concerning the areas that are of relevance for the purpose of this thesis:

- **Damages:** Although Policy Option 2 discussed a double damage action introduction towards the hardcore cartel infringements the Preferred Option only provides a full single compensation. The full singe compensation would consist of all types of damages, including actual loss, loss of profit and interest and is a codification of the *Manfredi* judgement. The rationale for this is the view in most of the Member States towards damages as a strictly compensatory instrument and should not be construed as an additional penalty. The Commission points out that the full single compensation is in line with the prevailing principle throughout the national legislations in the Community and will enhance the harmonisation and efficiency.[160]

- **Indirect purchasers and the passing-on defence:** The Commission's Preferred Option permits both the offensive and the defensive use of the

[156] The issues examined are: standing: indirect purchasers and collective redress, access to evidence through *inter partes* disclosure, binding nature of competition authorities' decisions, fault, definition of damages, availability of the passing-on defence, limitation periods, costs of damages actions and interaction between action for damages and leniency programmes. See Commission Staff Working Paper, *supra* note 86, at p. 8.
[157] Commission Staff Working Document, Impact Assessment, *supra* note 140, at p. 55.
[158] Commission Staff Working Document, Impact Assessment, *supra* note 140, at p. 58.
[159] Ibid. p. 62.
[160] Ibid. p. 55 f.

defence by claimants and defenders. The defendant has to prove the passing-on of overcharges when using it as a shield and the standard of proof for this cannot be lower than the standard to which the claimant has to prove the damage. In case of indirect victims using the defence as a sword, they will be able to rely on the rebuttable presumption that the whole illegal overcharge has been passed on to him. To break this presumption, the defendant has to contest it and prove that the overcharge has not been passed on at all or to that specific level.[161]

6.2.3 The need of a European legal framework

The Commission believes that there is a need for a Community intervention to safeguard the basic legislative framework regarding the effective exercise of the antitrust damage claims. The Commission explains that this would, first of all, create the important awareness of the basic rights under Community law. Secondly, the Commission emphasizes the importance of the stipulation of the minimum protection rights, which will guide the Member State and refrain them from adopting legislation or rulings that run counter to this. A basic European framework, with national legislations specified in the line with this legislation, would thirdly enhance the deterrent effect of anti-competitive behaviour. Finally, this would contribute to the internal market since the claimants and the defenders who conduct business within the Community can expect a uniformed treatment in all of the Member States.[162]

Despite the recent changes in this field, the Commission believes that victims of competition breaches still face to many difficulties when looking for effective redress. Therefore the Commission finds it appropriate to codify the right to compensation that is available to all individuals who suffered harm due to a breach of the EC competition rules. The Commission declares that this right cannot be contested or conditioned by national legislation of any kind. Even though the Member States will analyze and judge the damage claims they do not enjoy total discretion when safeguarding the right derived from the Treaty, for private action damages. Outside of this codification, the Commission also suggests, as mentioned above, that an indirect purchaser would be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level.[163]

In a consecutive part of the White Paper, the Commission suggests measures that go beyond a mere clarification of the current legal status. The Commission mentions explicitly the passing-on defence as a suitable matter to modify with through legislation even though the ECJ has not dealt with the issue. Other aspects, not included in this stipulated list of issues demanding legislative intervention, are, according to the Commission, can adequately be dealt with through soft law.[164]

[161] Ibid. p. 30 f.
[162] Commission Staff Working Document, Impact Assessment, *supra* note 140, at p. 20 f.
[163] Ibid. p. 90.
[164] Ibid. p. 92 ff.

6.3 Comments on the White Paper

The Commission welcomed a public consultation, for a limited time period, to the suggested Preferred Option and the various approaches taken in the White Paper from different, both private and public, stakeholders. This subchapter will analyze portions of the debate regarding the issues that is this thesis purpose to encompass.

The German Federal Ministries of Justice, Economics and Technology, Food, Agriculture and Consumer protection supports the White Paper's main objective to enhance the competition efficiency and that this can be done by increasing the importance of the private enforcement, which is a perfect supplement to the predominant public enforcement. According to the ministries, an effective and adequate national legal framework is of fundamental importance for the compensation of the victims of anti-competitive behaviour, which will further the position of the private enforcement. Private damage action is already legislated in Germany and has considerably improved the legal conditions for private actions. However the German ministries are of the opinion that the Commission has not convincingly demonstrated that the welcomed objective is impossible to achieve through Member State actions. Therefore, and with the strong impact that the Green Paper and the White Paper has had and will continue to have on the Member States, there is no need for further legislative measures on at a Community level.[165] *Baker & McKenzie*, also welcomes, in principle, the broad policy objective taken by the Commission to enhance the effectiveness of the private enforcement as a complement to the public enforcement. They also emphasizes that the there has been significant developments in the last years due to the policy papers from the Community institutions, Regulation 1/2003 and the cases of *Courage* and *Manfredi*. Accordingly, the law firm thinks that, in some of the more problematic areas that the White Paper has covered, there is a strong argument that Member States should be left to develop the appropriate tools themselves. With that said, *Baker & McKenzie* agrees that there are other areas that requires and are suited for some form of minimum harmonization.[166]

The Law Society of England and Wales argues somewhat in the same line, although they have a more negative attitude towards legislative measures, as they suggests that only small and easily achieved improvements, such as guidelines, should be made to enhance the private enforcement. They feel that it is the task of the public enforcement, and not the private enforcement, to create instruments that deter infringers. The lack of damages obtained by victims of anti-competitive behaviour, which is the premise that the White Paper is based on, might in some parts be misleading. *The Law Society of England and Wales* explains that, within their territory, there are a great number of cases that are resolved outside the doors of the courts and often of sizeable amounts of financial reparation. In fact, the damage claims should be a last resort and an alternative resolution should be encouraged. *The Law Society of England and Wales* do not support the mentioned measures to

[165] German Ministries' comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf, p. 1
[166] Baker & McKenzie LLP's comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bakmck_en.pdf, p. 1

harmonize the Member State's national civil procedural rules with a legislative intervention as they believe that each Member State should have the discretion to establish their own ways of ensuring the effectiveness of the Community law, bearing in mind the fundamental principles of EC law. Although they find the White Paper useful to provoke further discussion, there is not sufficient legal basis for a legislative intervention.[167] *The American Bar Association* is also sceptic as to the large extent of the suggested modifications of the prevailing legal status. Even though there is a stronger focus on compensation rather than deterrence, the numerous litigation tools[168], that are proposed in order to support an increase in damage claims, might steer the area closer to an American approach and undermine the "European legal cultures and traditions", which the Commission attempts to uphold. Since the American legal society has found it difficult to scale back their "litigation friendly" approach once it had been adopted, they advise the Commissions to undertake cautiousness to such intervention.[169]

The Government of the Netherlands has a slightly different view as they argue outside the realm of the competition area. Even though they agrees with the general objective of the White Paper and is pleased that the Commission emphasizes a balanced system with a strong preserved public enforcement, they regret the Commission's fragmented approach. There are often combined claims where the competition aspects are just one of many. There will then be a question of which rules that take precedence – the specific competition rules, which only cover a part of the combined claim, or general rules of the other areas included. *The Netherlands* therefore calls out for a more general horizontal approach that would in principle apply to all relevant areas of private law since the fragmented approach detracts from the internal cohesion of the national systems of law of civil procedure.[170]

Concerning the question of the compensatory principles and the extent of the damages that are claimed, the *UK Competition Law Association* submitted that they support the Commission's suggestion of full compensation. This full compensation principle includes the loss of profits and the interest, as ruled by the ECJ in *Manfredi*. The association furthermore calls out for carefulness when determining the scope of the damages, if a codification of the *Manfredi* ruling is to be undertaken, so that certain damage claims are not excluded. As an example on such damages they bring up restitutionary measures and/or an account for profits in situation where it may be complex to establish the quantum and causation of losses under ordinary principles.[171] *The International Chamber of Commerce* likewise finds the suggestions regarding the damages reasonable.[172]

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[167] The law Society of England and Wales' comments on the White Paper, foud at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/lawsoc_en.pdf, p. 2 f.
[168] i.e permitting discovery, making NCA decisions binding on national courts, the rebuttable presumption that ay overcharges has been passed on to indirect purchasers, providing guidelines for the calculation of damages.
[169] The American Bar Association's comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf, p. 3.
[170] The Government of the Netherlands' comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/nether_en.pdf, p. 2.
[171] The United Kingdom Competition Law Association's comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/ukcla_en.pdf, p. 6 f.
[172] The International Chamber of Commerce's comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/intcc_en.pdf, p. 3.

Linklaters, means that *Manfredi* and *Courage* did not specifically rule in the question of standing for indirect purchasers and that it can not be concluded that there exist such a right under EC law. They also argues that direct purchasers are much more effective in bringing damage claims, as opposed to indirect purchasers that hardly has any relevance, and points out that the prevailing German rule, granting only direct purchasers the right to claim damages, has been very successful. This is also the view of *The German Federal Ministries of Justice, Economics and Technology, Food, Agriculture and Consumer protection.* They argue that the *Courage* and *Manfredi* rulings do not grant a non-discriminatory right at an EU-level that all individuals that can prove a causal link must tot be allowed claim damages. The ministries interpret the ECJ ruling as a broad discretion given to the Member States to lay down the detailed rules on whom that actually is entitled to claim damages. Insofar there is no need for a Community rule under secondary law.[173] The *Netherlands*, on the other hand, supports the Commissions interpretation of the ECJ confirming the legal standing for indirect purchasers by stating that "any individual" must be allowed to clam damages. An exclusion of the indirect purchasers would obviously limit this right.[174]

The experiences of the *American Bar Association* show that permitting the passing-on defence and the availability of indirect purchaser action necessarily goes hand-in-hand, and needs to be fairly regulated. Allowing indirect purchasers to obtain reparation while prohibiting the passing-on defence could lead to duplicative recovery by both direct and indirect purchasers and authorizing the passing-on defence without granting indirect purchasers actions would provide defendants with a possibility to escape liability for overcharges that were passed on. The Association fears that the option suggested by the Commission in the White Paper, which approves such a defence for the violators and inserts a rebuttable presumption in favor of indirect purchasers that overcharges are passed on in their entirety, might increase the probability of dual recovery by direct and indirect purchasers, and defendants being exposed to dual liability, which is not what the Commission has intended. This might be the result since it will be difficult for defendants to break this presumption in litigations with indirect purchasers, while they at the same time might not be able to prove, when using the passing-on defence defensively, that the direct purchasers have passed on the illegal overcharge that are claimed. Therefore, they find this approach unfair to the defendants. This argument is moreover supported by *Baker & McKenzie.*[175] *The Law Society of England and Wales* also puts forth arguments against this, as they do not see the logic in the rebuttable presumption rule. It is the indirect purchasers that presumably would hold the evidence that could show the passing-on of the illegal overcharge and not the defendant. There are not strong enough justifications for putting the defendant in this unfavourable position. Although they consider that a harmonisation and the usage of the passing-on defence and the standing of indirect purchasers at a Community level would be effective, they find it too complicated to devise such a rule.[176] The Swedish *Näringsutskottet* is as well opposed to the rebuttable presumption rule that will relieve some of the burden the indirect victims have in proving their harm. They question the suitability of such a

[173] German Ministries, *supra* note 149, at p. 5.
[174] The Government of the Netherlands, *supra* note 154, at p. 3 f.
[175] Baker & McKenzie LLP, *supra* note 150, at p. 4.
[176] The Law Society of England and Wales, *supra* note 151, at p. 9.

rule and writes that it might lead to an even more complex system and consequently runt counter to the White Paper's objectives.[177] Furthermore, *the German Federal Ministries* finds any legislative measures of the passing-on defence inappropriate. The national courts must have some discretion to assess whether, in the specific case, the conditions satisfy the purpose of compensation, so that the violator is not unduly exonerated (from the German principle *Vorteilsausgleichung*). Accordingly, the passing-on defence should only be used in exceptional circumstances.[178]

The Netherlands supports the usage of the defence which is already incorporated in the Dutch legal system. They are on the other hand not convinced of the need to stipulate a rebuttable presumption. A reversal of the burden of proof should be left to the national authorities to determine in each specific case. The *UK Competition Law Association* supports the passing-on defence and the rebuttable presumption since it is a sensible step to promote the private enforcement.[179]

6.3.1 Summarization of the comments

To summarize the comments from the various stakeholders presented above, some general conclusions can be drawn:

1. The private enforcement should work as a complement to the predominant public enforcement within the Community. The Commission's objective of enhancing the importance of the private enforcement by increasing the awareness of the possibilities for individual damage claims are welcomed as long as it continues to bear a supplementary role to the public enforcement.

2. The ways to pursuit this objective differs. The most common view is that a legislative intervention in the specific areas, as suggested, are overly comprehensive and premature. However, some areas might be suitable to regulate with soft law. Numerous stakeholders believe that the legal status is already improving and that it should be left to the national authorities and the case-law of the ECJ, to regulate it.

3. Although nearly everybody agrees that the passing-on defence is appropriate in the European field of competition, the rebuttable presumption will most likely create a more complex system and might create unjust enrichments on behalf of the claimants. Most stakeholders therefore consider it unfair towards the defender.

4. Indirect purchasers should, with the exception of German stakeholders' views, have a right to claim damages.

[177] The Swedish Näringslivsutskottet's comments on the White Paper, found at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/naring_se.pdf, p. 8.
[178] German Ministries, *supra* note 149, at p. 9.
[179] The United Kingdom Competition Law Association, *supra* note 155, at p. 7.

7 Analysis and Conclusions

Even though I consider the interventions proposed in the White Paper a bit excessive, I do think that parts of this field need to be regulated on a Community level. The private enforcement has undergone a massive development the last decades. The ECJ jurisprudence in the cases *Courage* and *Manfredi*, backed by Regulation 1/2003 and the Commission's Green and White Paper on damages actions, has provided the tools to create a more efficient legal framework and enforcement of the EC competition rules. It has been shown that, in the present situation, victims of EC competition infringements only rarely obtain reparation for the harm suffered due to various legal hurdles that exists both on a national and on a Community level. These hurdles consist of legal uncertainties and complex factual and economical analyses required by private actors, which creates an unfavorable risk/reward balance for them. The White Papers objective concerning the enhancing the accessibility of all victims to effective redress mechanisms is thus very welcomed. To harmonize parts of the Member States procedural and tort law, which have historically always been areas left to their discretion in the specific area of competition law is however a major step and needs to be detailed and sufficiently regulated. This raises fundamental problems and I think, in parts, the Commission has failed to fulfil all of them.

I understand the arguments especially made by the UK commentators in their reply to the Commissions suggestions in the White Paper that there are a substantial amount of unidentified cases of private settlements in this area. They claim that this diminishes the problem presented by the Commission as a foundation to the White Paper, which is the absence of compensation. Consequently, they do not think that there is a need for intervention, even though the fact still remains that the Community has an underdeveloped private enforcement. In addition to the argument concerning the problem not being as serious as the Commission presented it, numerous stakeholders furthermore meant that there are ongoing developments in various Member State's legal systems that will solve this problem without any Community intervention.

I find both of these arguments unpersuasive. To begin with, and even though I agree with the belief that litigation should always be a course of last resort, every legal area should always guarantee effective redress mechanisms for victims harmed by violations of that legislation when it confers direct rights on individuals. The mentioned settlements might in fact be a direct, and unhealthy, consequence of national legal systems that fails to provide developed possibilities for private actors to use their right to claim damages due to competition infringements. The complex and costly option of bringing the infringement to court might force them to agree to less favourable settlements with the violators. These violators will therefore enjoy a more beneficial position when settling with the victims, as opposed to a situation where the private party has an efficient litigation-option to threaten with. Secondly, although some judicial systems have, there is still a majority of the national authorities that have yet failed to construct effective redress instruments. In addition, the Member States that actually have presented an effective system differ in their approaches, which make the diversities throughout the EU even greater. As mentioned in the discussion in chapter 4.4, the internal market is becoming increasingly more

integrated and cross-boarder transactions more common. The efficiency of the internal market demands harmonized rules, especially within the field of competition law. A practical example of this is the current diverging approaches to the passing-on defence. This is something that a majority of the Member States has not regulated in any way. If some of the national legal systems grant the use of the defence while other prohibits the defence, it will, when conducting cross-boarder transactions, occasionally lead to either multiple liabilities for the same overcharge on behalf of the defendant, or to no compensation at all for the claimant. A harmonization through legislative intervention would diminish these concerns. Since the offensive use of the passing-on defence seems to be accepted, granting indirect purchasers a right to claim damages, the defensive use of the passing-on defence must be adopted to create symmetry and to avoid unjust enrichment. If a claimant has already passed on the overcharge and still claims damage for that parts from the defender it would be highly inappropriate not to grant the defendant the right to use the passing on defence as a shield. This would avoid unjust enrichment both of the claimant and the defendant

Different interventions by the Community Institutions would create a more efficient and homogenous application of the competition rules within the internal market. An internal market that constantly demands more unified aims. If left out to the Community and national courts to develop solutions, there is also a concern of waiting for the occasion of suitable cases to be brought up. This discussion was held early on in the, above-mentioned, *Banks*-ruling when Advocate General *Van Gerven* argued in favour of a more uniformed possibility of private actors to obtain reparation; unfortunately the ECJ did not have to rule in the question in that case. When the subsequent competition damage claim case of *Courage* was brought to the ECJ and they finally had a chance to address some of the issue, seven years had elapsed. Three years later the *Manfredi* case was brought to the ECJ but only a modest further guiding was given. Insofar, there are still numerous major issues that need to be addressed. Consequently, opportunities for the ECJ to create further clarifications in all these areas might take forever while the victims of competition infringements will continue to forego billions of euros each year in missed out compensations.

The objective of the predominant public enforcement has always been to primarily pursue deterrence and an overall compliance with the competition rules within the Community while the private enforcement's primary objective has always been of compensatory nature. In the American system there has been a shift in the aim of the private enforcement to primarily serve as an efficient deterrence. This is something that the Commission seeks to refrain from since the Community has different legal cultures and traditions. *The American Bar Association* advised the Commission to take cautious steps towards a more "litigation friendly" system. This since it might undermine the European legal cultures and traditions and since it will be difficult to scale back the approach once taken.

I am positive towards a more litigation friendly system. The competition rules are one of the cornerstones in the Community legal system and its enforcement must not rely on private actors. Conclusive evidence in these matters will often be very difficult to obtain with the present legal status, which makes the private actors more inclined to trust a competition authority with that task. With that being said, a strengthening of the private enforcement by creating a more harmonized approach to the damages actions within the Community is still of great importance and will both fulfill the

principle of compensation and provide further deterrence as an added bonus, which would according to me be appropriate. I am of the opinion that a more "litigation friendly" legislation shall be enacted because it will, if constructed right, significantly increase the compensatory possibilities for harmed private actors and strengthen the overall enforcement of the European competition rules. Regarding the comparison with the U.S. system, it can be concluded that there are major divergences between its aim with the private enforcement and the Community's fundamental doctrine of direct effect. We have to bear in mind that civil claims in the USA make up the vast majority of antitrust enforcement while damage claims in Europe are extremely rare Additional other cultural and legal divergences complicate the possibilities of receiving constructive lesson. Therefore, I do not think that there is a possibility that a litigation system in Europe will ever be as "friendly" as in the USA.

The more accessible private damage claims should be pursued with a sufficiently detailed regulation that will adequately militate against implications on the European legal cultures and traditions. Without going into detail, I assume that such rules should, to the extent possible, be based on general principles that the national systems are familiar with. The main obstacle today is the difficulties for private actors surrounding such litigation, especially to prove the harm and the fault. Legislative intervention should be stipulated to ease these risks involved in the current unpredictable litigations. Some prerequisites, such as the causal link, that the claimants have to fulfil would give them assistance and benefit from a unified and thoroughly regulated EC intervention.

Two components that must not be constructed restrictive towards the claimants are the standing of indirect purchasers and the passing-on defence. If constructed restrictively, they would have the same effect as the prevailing legal status. They would discourage the damage claims instead of encouraging them because of the uncertainties and ambiguities surrounding them.

An exclusion of the indirect victims' abilities of initiating damage claims would be incompatible with Community law. Article 81 and 82 of the EC Treaty confers direct Treaty rights on these victims, which means that compensation for anti-competitive behaviour cannot be ignored. The ECJ has already stated, in the *Courage* case that the standing should be granted to "*any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"[180]. This was reinforced in *Manfredi* where the Court declared that this right, conferred on all individuals, derived directly from the EC Treaty. I agree with the proposals made by the Commission that this case law should be codified by legislative measures. Indirect purchasers are often the ones most hurt by a competition infringement and they should have access to an effective redress mechanism. Therefore a harmonization on the right throughout the Community would erase all uncertainties that have caused an absence of private damage litigations in the Community and massive losses carried by private actors. With that being said, I find the proposed rebuttable presumption questionable. To legally presume that the entire overcharge was passed on to the last level in the distribution chain is, in my opinion, unfair. The evidence that needs to be presented by the defendant to break this presumption is more likely to be in the hands of the indirect purchaser or at intermediate level. I believe that this presumption eases

[180] Case C-453/99. Para. 26, (emphasis added)

the burden on the claimants too much and will create an increase of private damage actions for the wrong reasons. If granted, the presumption will create numerous situations were the infringer will be faced with double burdens. The indirect victims can rely on this presumption when they invoke the passing on of overcharges as a sword to substantiate their claims and at the same time, in a potential parallel case, the defendant also has the burden of proof when using the passing-on defence as a sword against a direct purchaser. On the other hand, the rebuttable presumption fosters the much-needed effectiveness of indirect claims and it eases the complicated burden of proving the causality. I therefore think that this presumption, if legislated, should be restricted to proven hard-core infringements. It would also need further guidance, perhaps through soft law, on the conditions regarding the breaking of the presumption.

Nevertheless, I find that the most serious challenge for the Community when strengthening the private parties' ability to claim damages in these cases, and thus increasing the position of private enforcement, will be the impact it will have on the enforcement in Europe with the deeply rooted public enforcement. As mentioned above under the chapter two, it has been widely accepted that the private enforcement merely plays a small supplementary role, which has preserved the absence of a harmonization with the procedural and tort laws of the Member States. There will probably be a long initiation period where the interconnection between the two enforcement positions will create efficiency decreases towards each other. One of the biggest problems being the interference with the Commission's leniency programmes that has become a crucial tool in the fight against cartels throughout the Community.

If the private enforcement in Europe wants to be taken serious there is as suggested by the Commission, a need and a possibility to take legislative actions. However, such measures must be proportionate. They must be stipulated in a way that corresponds with the domestic legal principles and they cannot be unfairly constructed towards the defendant. When all these legal questions and hurdles have been overcome, the mentality of a non-litigation culture is forced to recognize the benefits the EC competition enforcement will gain by a stronger private enforcement. It is hard to predict the future of the EC competition enforcement. Several other major issues demands further explorations and discussions before a more accepted and processed way is found. The various stakeholders who commentated on the White Paper were mostly pessimistic towards a comprehensive legislative intervention. Even though I believe it is going to take a while before anything concrete and promising can be presented, the existing debate and demands for a change in the present insufficient area of private damage claims will not come to an end before some result is presented that creates an improved Community platform for private purchasers to claim damages.

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