



FACULTY OF LAW
University of Lund

Filippa Honeth

Calculation of Damages in
Antitrust Cases in Community
Competition Law

Master thesis
20 points

Henrik Norinder

Competition law

Autumn 2006

Contents

SUMMARY	1
1 INTRODUCTION	3
1.1 Method	3
1.2 Disposition	4
1.3 Material	4
2 BACKGROUND	6
2.1 Francovich	6
2.2 Post Francovich	7
2.2.1 <i>Banks</i>	7
2.2.2 <i>Factortame III</i>	7
2.3 <i>Courage v. Crehan</i>	8
2.3.1 <i>The ECJ Judgment</i>	8
2.3.1.1 Facts of the Case	8
2.3.1.2 The Judgment	10
2.3.1.3 The Advocate General	11
2.3.1.4 Analysis	12
2.3.2 <i>The High Court Judgment</i>	13
2.3.3 <i>The Court of Appeal Judgment</i>	14
2.3.3.1 Analysis	15
2.4 Summary	15
3 GREEN PAPER	17
3.1 Introduction	17
3.2 Damages	19
3.2.1 <i>Definition of Damages</i>	19
3.2.2 <i>Quantification of Damages</i>	20
3.2.3 <i>Split Proceedings</i>	21
3.2.4 <i>Calculation of Damages</i>	21
4 CALCULATION OF DAMAGES	22
4.1 Introduction	22
4.1.1 <i>Types of Claim</i>	22
4.1.2 <i>Damage Parties</i>	22
4.1.3 <i>Burden of Proof</i>	23
4.2 Calculation methods	23

4.2.1	<i>Before-and-After method</i>	24
4.2.2	<i>Yardstick method</i>	25
4.2.3	<i>Cost-Based method</i>	25
4.2.4	<i>Market Share method</i>	26
4.2.5	<i>Econometric modelling</i>	27
4.2.6	<i>Theoretic modelling</i>	28
4.2.7	<i>Calculation Based on Accounting</i>	28
4.2.7.1	Earning-based Valuation	29
4.2.7.2	Market-based Valuation	30
4.2.7.3	Asset-based Valuation	30
4.2.8	<i>Calculation in cases of Exclusion</i>	30
4.2.8.1	Losing Prices	31
4.2.8.2	Tying	31
4.2.8.3	Price Discrimination	31
4.3	Calculation Problems	32
4.3.1	<i>Time-Period Aspect</i>	32
4.3.2	<i>Ex Ante or Ex Post Calculation</i>	32
4.3.3	<i>Problems related to Data</i>	33
4.4	National Damage Cases	34
4.4.1	<i>France</i>	34
4.4.2	<i>Italy</i>	35
4.4.3	<i>United Kingdom</i>	36
4.4.4	<i>Germany</i>	36
5	CONCLUSIONS	38
	BIBLIOGRAPHY	40
	The Commission	40
	Literature	40
	Articles	40
	TABLE OF CASES	41
	European Court of Justice	41
	English Court of Appeal	41
	English High Court	41

Summary

The right to damage in antitrust cases within the European Community arises from the case Francovich decided by the ECJ. The case established that the individual's right to compensation could be based on Community law. The case also established that the national courts are required to apply the right to compensation regardless of the position of the national law. The first case to follow the principle established in Francovich was Banks. The Advocate General argued that the principle founded in Francovich should be applied also in this case. However, the ECJ was of another opinion and did not apply the rules of the Treaty in the case. In the case Factortame III, the principle was further elaborated.

The first case where remedies for breach of antitrust rules were raised was *Courage v. Crehan*. The ECJ held that Article 81(1) and 82 EC creates a direct effect between the individuals as well as rights the national courts must protect. The individual can rely on the breach of Article 81(1) EC in national courts even if he is part of a contract liable to restrictions or distortion of competition. In the English Court of Appeal, the judges followed the line of the ECJ and based its decision on previous decisions made by the ECJ together with general Community principles.

The Commission has published a Green Paper on damages actions for breach of the EC antitrust rules. The aim of the Paper is to find ways to improve the facilitation of damage actions in national courts. In a study commissioned by the Commission obstacles to successful damage actions are identified. The conclusion of the study is that the actions of damages in the Member States are undeveloped and that there is diversity in the approach taken to damage actions in antitrust cases. In the Green Paper three different questions regarding damages are mentioned; firstly the definition of damages, secondly the quantification of damages and thirdly split proceedings.

One of the largest problem when calculating damages is to establish the counterfactual scenario; how would the situation been but for the violation of competition. Factors affecting this "but for" scenario, such as demand, range and competition, must be taken into consideration.

A number of different calculation methods have been identified to calculate damages. The methods should not be seen separately but complements each other. The more simple methods can be used as cross checks to the more complex methods. The methods identified are the before-and-after method, the yardstick method, the cost-based method, the market share method, econometric modelling and theoretic modelling.

When calculating lost profit, accounting, finance and economic methodologies are used to estimate the difference between the profit made

and the “but for” profit. Three different methods can be used for this calculation; the earning-based method, the market-based method and the asset-based method. In cases of exclusion, it is natural to calculate the damage by calculating the profit the undertaking would have made without the violation.

If the violated part is a rival to the violator, it can be more relevant to calculate the lost profit due to the anti-competitive conduct. This calculation is normally based on the accounting of the undertaking.

Some general problems can be related to calculation of damage. The time-period aspect and the information availability are issues that must be recognised.

When reviewing national damage cases, some general points can be made. Only a few Member States have rewarded damages in antitrust cases, no Member State is prescribed to use a certain calculation method and all calculation methods used have been simple and with no relation to econometric modelling.

None of the methods is superior to the others. The choice of method must be made from the information and data available in the specific case.

1 Introduction

Competition on an open market is one of the best guarantees for companies to increase productivity. Therefore, competition law enforcement is one of the key elements for economic growth in the European Union. The rules on antitrust law are found in Articles 81 and 82 of the EC Treaty and have the aim to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them¹.

1.1 Method

The rules on damages actions in antitrust cases are unclear. In the Green Paper on damages actions for breach of the EC antitrust rules², the Commission is focusing on damages actions alone³. By facilitating damage claims for breach of antitrust law, it will be easier for consumers and companies who have suffered losses due to infringement of antitrust law to recover damages from the infringement but also to strengthen the enforcement of antitrust law.⁴ The purpose of damage actions in antitrust law is to compensate those who have suffered a loss and to ensure full effectiveness of the antitrust rules in the Treaty by discouraging anti-competitive behaviour.⁵ In the absence of Community rules on the matter, the legal systems of the Member States have to provide detailed rules for damage actions.⁶ The first case to establish the obligation for national Courts to provide remedy for damages in antitrust cases was *Courage v. Crehan*⁷. The Green Paper outlines some of the obstacles that relates to damage actions. One of these obstacles is the calculation of damages.

Little information exists on calculation of damages in antitrust cases. Quantification of damages in antitrust cases can be complex given the economic structure of the illegality and the difficulty of reconstructing how the situation would have been without the infringement. Therefore, it is necessary to look at calculation methods used in the US where more information can be found and damage assessments cases outside the field of antitrust.

¹ Green Paper COM(2005)672 p. 3

² COM(2005)672

³ Ibid., p. 4

⁴ Ibid., p. 3

⁵ C-453/99 *Courage v. Crehan*, paragraphs 26-27

⁶ Ibid., paragraph 29

⁷ Case C-453/99

1.2 Disposition

In his thesis, I will first look at damages in antitrust cases from a general point of view and then look deeper at calculation of damages and different methods of calculation. In the second chapter, I am introducing the background on damages in antitrust cases from the view of the Francovich⁸ case. It has been argued in literature that the right to damages arises from the principle founded in the Francovich case. I will then continue by looking at how the outcome of Francovich has been used in other cases ruled by the ECJ (European Court of Justice) in competition law cases.

In the third chapter, I look more deeply into the first case, the Courage case, that raises the question of damages in cases of breach of antitrust rules. The English Court of Appeal asked for a preliminary ruling from ECJ in four questions regarding compensation in antitrust cases. The case has recently been decided in the English Court of Appeal.

In the fourth chapter, I focus on the Commission's Green Paper on damage actions for breach of the EC antitrust rules⁹. I will first present the general idea of the paper and then go deeper into how the paper handles the question of damages and the definition of damages.

In the fifth chapter, I start with an introduction to calculation of damages by introducing different types of claims, the different damage parties and the burden of proof. I then present the different calculation methods and calculation of damages in cases of lost profit. I will also look at some problems related to the calculation methods. I end the chapter with a look at cases of damages decided in national courts.

1.3 Material

As for material, I have, as a base, used the book *Private enforcement of antitrust law in the EU, UK and USA* by Clifford Jones from 1999. Little new literature can be found on the subject, I have therefore used two articles; *Awarding damages for breach of competition law in English Courts – Crehan in the Court of Appeal* by Renato Nazzini and Mads Andenas and *New prospects for private enforcement of EC competition law: Courage v. Crehan and the community rights to damages* by Assimakis Komininos for a deeper perspective on the subject. I have also used *The Green paper on damages actions for breach of the EC antitrust rules* published by the Commission and the *Study on the conditions of claims for damages in case of infringement of EC competition rules, both the Comparative and the Analysis report*, by Ashurst to a great extent. Lastly a report published by the Swedish Competition Authority, *Metoder för att beräkna privat*

⁸ Joined Cases C-6/90 and C-9/90 and C-9/90, *Andrea Francovich and Others v. Italian Republic*

⁹ Above note 1

konkurrensskada och krav på precision i domstol, has provided information on the methods of calculation,

2 Background

Few cases on liability arising from infringement of EC competition law have been ruled by the ECJ. In literature, it has therefore been argued that right to damages arises from the case Francovich^{10, 11}. The theory of Francovich has been further evolved by the ECJ in a number of cases, the most important cases being Banks and Factortame III. The development of the Francovich principle has led to the first judgment on damage recovery in antitrust cases, the Courage¹² case.

2.1 Francovich

In Francovich, the Italian State had failed to implement a Community directive. The failure to implement the directive had been established in a prior judgment by the ECJ. It is clear from the case that an individual's right to compensation can be directly based on Community law and not only on national law.

The outcome of Francovich is applicable to private individuals as well as to undertakings and governments. The purpose of the Community right to damages is to assure effective protection of Community rights and must therefore logically be applied to any category of entity or undertaking which can be held responsible for breach of Community law.¹³

Two important points were made in Francovich. First, it confirms a principle of right to damages for breach of Community law. After Francovich it may no longer be of importance whether national law recognizes damage remedies because Francovich has forged a Community law damage remedy of wide scope that the Member States are forced to recognize and enforce. The right to compensation is founded directly on Community law.¹⁴

Secondly, if a Member State does not provide for a fully effective judicial remedy for enforcement of Article 81 and 82 EC, the Member State may have been in breach of Article 10 EC where the Community law is given full protection. In other words, a Member State that does not judicially or legislatively provide for antitrust damage remedies for individuals and undertakings may itself be required to pay damages.¹⁵ The breakthrough in Francovich is therefore that the national courts are required to give effect to

¹⁰ Above not 8

¹¹ Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, p. 454

¹² Above not 7

¹³ Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, p. 71

¹⁴ *Ibid.*, p. 72

¹⁵ *Ibid.*, p. 73

the right to compensation in private enforcement actions regardless of the position in national law.

There is no compelling reason to differ between State and individual liability for damage caused by infringement of Community law because the effectiveness and liability of Community law is not affected by the identity of the perpetrator.¹⁶

2.2 Post Francovich

2.2.1 Banks

The first case to apply the judgment of Francovich in a competition law case is *Banks*¹⁷. In *Banks*, a private company claimed that British Coal had abused its dominant position as a supplier of coal for electricity production. The ECJ decided not to apply the rules of the Treaty. The national courts could not entertain actions for damages if there was an absence of a Commission decision on compatibility with those rules.

However, Advocate General Von Gerven did argue for the principles in Francovich to be applied in this case. The Advocate General argued for recognition of Community rights to obtain reparation in respect of loss of damages as a result of infringement of the Community rules which had direct effect.¹⁸ In the opinion of the Advocate General, the basis established in Francovich was also applicable in cases of “breach of a right which an individual derives from an obligation imposed by Community law on another individual”. “The full effect of Community law would be impaired if the former individual or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law – all the more so, evidently, if a directly effective provision of Community law is infringed.”¹⁹ The Advocate General was of the opinion that a Community right to damages in competition law would make the Treaty’s rules on antitrust law more operational.²⁰

2.2.2 Factortame III

In the joined cases *Brasserie du Pêcheur and Factortame III*²¹ the ECJ further elaborated the principles of Francovich. The court rejected the opinion that the principles only could be applied to situations where the provisions of Community law breach were not directly effected. The right to

¹⁶ Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, p. 454

¹⁷ Case C-128/92

¹⁸ *Ibid.*, Advocate General’s Opinion, paragraph 37

¹⁹ *Ibid.*, paragraph 43

²⁰ *Ibid.*, paragraph 44

²¹ Cases C-46/93 and C-48/93

rely only on directly effective provisions was only a minimum guarantee and is not in itself sufficient to ensure full implementation of the Treaty.²² The court was of the opinion that if individuals cannot obtain remedy when their rights are infringed the Community law would be weakened and that the “right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damages sustained”.²³

The court repeated its statement from Francovich saying that the Member State must make reparation for the consequences of the loss and damages caused in accordance with the national rules on liability and that these rules flows directly from Community law.²⁴

The court also discussed the extent of reparation required and concluded that it was for the national legal system to set the criteria. However, according to the court, certain items are permissible or required, including; mitigation of damages obligations, loss of profits in economic or commercial litigation and exemplary damages.²⁵

2.3 Courage v. Crehan

2.3.1 The ECJ Judgment

The first cases where the ECJ dealt with substantive aspect of private enforcement were in *Courage*²⁶ where the question of remedies in cases of breach of antitrust rules was first raised.²⁷

2.3.1.1 Facts of the Case

In 1990 *Courage Ltd*, a brewery, and *Grand Metropolitan plc*, a catering and hotel company, agreed to merge their leased public houses (“pubs”) and found *Inntrepreneur Estate Ltd* (“IEL”) equally owned by *Courage* and *Grand Met*. In an agreement concluded between IEL and *Courage* it was stated that all IEL tenants had to buy their beer exclusively from *Courage*. The prices for beer were specified in a price list applicable to the pubs leased by IEL.²⁸

In 1991, Mr *Crehan* signed two 20-year leases with IEL with the condition only to purchase beer from *Courage*. The tenant had to purchase a minimum quantity of specified beers and the IEL agreed to produce the supply of beer by *Courage* at the price showed in the price list. The rent was under regular

²² *Ibid.*, paragraph 20

²³ Cases C-46/93 and C-48/93, paragraph 22

²⁴ *Ibid.*, paragraph 67

²⁵ *Ibid.*, paragraphs 84-90

²⁶ Case C-453/99

²⁷ Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, p. 449

²⁸ C-453/00 *Courage v. Crehan*, paragraph 3

review and was to be the highest of the rent for the immediately preceding period or the best open market rent obtainable for the residue of the term on the other terms of the lease.²⁹

In 1993, Courage brought an action against Mr Crehan for recovery of unpaid deliveries of beer. Mr Crehan contested the action saying it was contrary to Article 85 (now Article 81) EC. He also counter-claimed for damages on the ground that Courage sold beer to independent tenants at a lower price than the price in the price list imposed on IEL tenants. The higher prices reduced the profitability of the tied tenants forcing them out of business.³⁰

The standard lease agreement used by the Courage, Grand Met and their subsidiaries was notified to the Commission in 1992. In 1993 the Commission published a notice stating its intention to grant an exemption under Article 85(3) (now Article 81(3)) EC. The notification was withdrawn in 1997 followed by a new standard lease from IEL, also notified to the Commission. The new lease is not at issue in the main proceedings since the action concerns the beer tie under the old lease.³¹

The Court of Appeal referred the question to the ECJ on the ground that English law does not allow the party of an illegal agreement to claim damages from the other party. Because of this, Mr Crehan's claim for damages would fail since the Court of Appeal considered the agreement illegal.³²

The Court of Appeal had in a prior judgment held that Article 85(1) (now Article 81(1)) EC had the intention to protect third parties and not parties of prohibited agreements since they were the cause, not the victim, of the agreement.³³

The following questions were therefore referred to the ECJ:³⁴

1. Is Article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?
2. If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?
3. Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a

²⁹ Ibid., paragraph 5

³⁰ Ibid., paragraphs 6 and 7

³¹ C-453/99, paragraphs 8-9

³² Ibid., paragraphs 10 and 11

³³ Ibid., paragraph 12

³⁴ Ibid., paragraph 16

necessary step to recovery of damages be allowed as consistent with Community law?

4. If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?

2.3.1.2 The Judgment

The ECJ begins with stating that the Treaty is not only the subject for Member States but also for their nationals. It gives both burdens on and rights to individuals that become their legal assets. The rights are not only those that are clearly stated in the Treaty, but also those that are imposed in a clearly defined manner by the Treaty on both individuals and the Member States and the Community institutions.³⁵

The court continues by addressing the importance of Article 85 (now Article 81) EC saying that it “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”³⁶.

Articles 85(1) and 86 (now Articles 81(1) and 82) EC creates a direct effect in relations between the individuals and creates rights which the national courts must protect.³⁷

From that reasoning, the court states that it is clear that an individual can rely on a breach of Article 85(1) (now Article 81(1)) EC in a national court even though he is part of contract liable to restrictions or distortion of competition.³⁸

The possibility to seek compensation for loss caused by such a contract must be guarded by the national courts. The task of the national courts is to apply the Community law in areas within their jurisdiction and ensure that the rules take full effect to protect the rights of the individual.³⁹ That effectiveness would be put at danger if an individual cannot seek compensation caused by a contract or by conduct liable to restrict or distort competition.⁴⁰ “There should not therefore be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules”⁴¹.

The court continues by saying that in the absence of Community rules, the national legal systems of the Member States have the jurisdiction to lay

³⁵ Ibid., paragraph 19

³⁶ C-453/99., paragraph 20

³⁷ Ibid., paragraph 23

³⁸ Ibid., paragraph 24

³⁹ Ibid., paragraph 25

⁴⁰ Ibid., paragraph 26

⁴¹ Ibid., paragraph 28

down the details regarding procedural rules governing actions of the rights of individuals that derives directly from Community law. These rules must not be less favourable than national rules governing similar domestic actions. The rules cannot render the exercise of rights conferred by Community law, the principles of equivalence and effectiveness becoming practically impossible or excessively difficult.⁴²

National courts can, if the above circumstances are fulfilled, deny a party who is significantly responsible for distortion of competition the right to obtain damages from other contracting parties. The national court should, when assessing a party's responsibility, take into account the economic and legal context, the respective bargaining power and conduct of the parties, whether the party who claims to have suffered loss is in a weaker position than the other party and therefore cannot negotiate the contract freely and if part of a network the effects on competition of similar contracts.⁴³

2.3.1.3 The Advocate General

Advocate General Mischo in his opinion argues that it is clear from the facts from the Court of Appeal that Mr Crehan can succeed in the case only if he can rely on rights deriving from the EC Treaty rights the national court must consider.⁴⁴

The Advocate General continues by saying that an individual must be able to go before the national court to seek enforcement of all the consequences of automatic nullity of contractual matters incompatible with Article 81 EC. Article 81 EC must therefore be "interpreted as meaning that a party to a prohibited lease of a public house containing an exclusive purchase clause may rely on the nullity of that lease before the courts"⁴⁵.⁴⁶

The second question⁴⁷ laid before the ECJ must be interpreted to mean whether Community law precludes that rule of English law.⁴⁸ Article 81 EC precludes direct effect in the relation between directly created rights and individuals which the national courts must safeguard. This must be seen as including the right to protect individuals from the effect of an agreement, which is automatically void. It is primarily third parties who can benefit from such protection. A party to the agreement can normally not benefit since he is the cause of the agreement, based on that a party may not benefit from his wrongdoing. However, the responsibility of a party's wrongdoing should be measured in regard to the party's responsibility of the distortion of competition. If he genuinely bears such responsibility, he cannot profit from his wrongdoing by enjoying protection against the agreement in the

⁴² Ibid., paragraph 29

⁴³ Ibid., paragraphs 31-34

⁴⁴ C-453/99 Opinion of Advocate General, paragraph 16

⁴⁵ Ibid., paragraph 27

⁴⁶ Ibid., paragraphs 25 and 27

⁴⁷ Above chapter 3.1.1

⁴⁸ C-453/99 Opinion of Advocate General, paragraph 32

way a third party can. If the responsibility is less significant, there is not a reason why the party should not be protected by Article 81 EC. The party has in that case had the agreement imposed upon him rather than freely entering it. The party has more in common with a third part rather than with the author of the agreement.⁴⁹

2.3.1.4 Analysis

The ECJ had to choose between two routes when judging the case, either the traditional way or the integrationist way. It could consider the whole question of damage as a question for national law where the Community law is the minimum requirements of equivalence and practical non-impossibility or adequacy, or it could proceed in the recognition of a Community right in damages as Advocate General Van Gerven proposed in *Banks* and many commentators had urged. The court followed the latter way.⁵⁰

If the court had followed the Advocate General Mischo's opinion, it would have been unfortunate for the whole cause involved in the case. It is not very common for national courts to refer similar questions on civil liability arising out of the Treaty competition rules.⁵¹

The *Courage* case stresses the importance of the principle of equivalence and effectiveness with delegating further questions to national laws and courts. The concern of the case is the effectiveness of the Community law and effective judicial protection. The case is of importance for general Community law and must therefore be seen in the context of earlier case law on State liability.⁵²

The principle of effectiveness-effective protection have been used by the Court in different cases in order to strike down or check national rules that may impair with Community law-based rights. The result of this protection can be attained not only by positive common prescription by the court, as *Factortame III*, but it can also be served in other areas with other measures in a more indirect-negative way. The positive way is defined by the pertinent constitutive conditions and the negative way by checking if the executive conditions governed by national law offend the principle of equivalence and effectiveness-adequacy. The court has stressed, both in *Francovich* and in *Factortame III*, the need for flexibility by saying that the liability arising "depends on the nature of the breach of Community law giving rise to the loss and damage"^{53, 54}.

⁴⁹ *Ibid.*, paragraphs 37-39 and 42-44

⁵⁰ Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, p. 466

⁵¹ *Ibid.*, not. 84

⁵² Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, p. 473-474

⁵³ Case C-6/90 and C-9/90 and C-9/90 *Francovich*, paragraph 38 and case C-46/93 and C-48/93 *Factortame III*, paragraph 38

Many unexplored issues are left unanswered in *Courage*. The case is more of the type of *Francovich* than *Factortame III* since it is the first case in the field, setting the principle.⁵⁵

2.3.2 The High Court Judgment

The case reverted in the English courts and came to trial in the High Court⁵⁶.

In the High Court, the claim by Mr Crehan failed. The judge, Mr Justice Park, held that it failed on the evidence since it was not proved that the balance of probabilities, that in the relevant period the UK market for the supply of beer to on-licensed premises, was foreclosed. He argued that Inntrepreneur's argument that its standard lease did not infringe Article 81(1) EC was not an abuse of process and that the court was not bound by the decisions made by the Commission in previous cases⁵⁷.

Mr Crehan argued that the standard lease of Inntrepreneur had been notified to the Commission and that the Commission took the view that it infringed Article 81(1) EC. The reason the Commission did not make a formal decision was because Inntrepreneur withdrew its notification. The High Court judge firstly held that the Commission never adopted a formal decision which Inntrepreneur could bring an action on for annulment under Article 230 EC. Secondly, the Commission never engaged in a full debate on the application of Article 81(1) EC. Thirdly, Inntrepreneur was suggested by the Commission to withdraw its notification and that it was up to the national courts to decide whether Article 81(1) EC was infringed. Fourthly, Inntrepreneur never conceded that the standard lease infringed Article 81(1) EC.

Mr Crehan held that previous decisions⁵⁸ should be adopted in this case. The judge disagreed saying that, firstly, Inntrepreneur was not a party of those proceedings. Secondly, it was not possible to justify passages of the Commission's decisions on the basis of evidence before the court. Thirdly, a considerably body of evidence was before the court enabling it to decide the point. Fourthly, the Commission had in a letter stated that the national courts was to decide whether Article 81(1) EC was infringed.

⁵⁴ Komninos, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, p. 474 and 477-478

⁵⁵ *Ibid.*, p. 478

⁵⁶ *Bernard Crehan v Inntrepreneur Pub Co (CPC)* [2003] UKCLR 834. Judgment of the High Court of England and Wales

⁵⁷ *Scottish & Newcastle* [1999] OJ L186/28, *Bass Holdings Ltd, Bass Lease* [1999] OJ L186/1, *Whitbread* [1999] OJ L88/26. The cases regard agreement between different parties but addressing the issue of foreclosure of the market at the relevant times.

⁵⁸ *Ibid.*

The judge concluded by saying that Mr Crehan had failed to establish that the UK market for the supply of beer to the on-licensed premises was foreclosed by addressing the evidence. Mr Crehan was not awarded damages.⁵⁹

2.3.3 The Court of Appeal Judgment

The judges in the Court of Appeal⁶⁰, Lord Justice Peter Gibson, Lord Justice Tuckey and Sir Martin Nourse, reversed the judgement of the High Court and awarded Mr Crehan damages. The main reason for doing so was that the court gave more weight to the Commission's decisions in *Scottish & Newcastle, Bass Holdings Ltd, Bass Lease and Whitbread*⁶¹. The court started by confirming two points from the High Court. Firstly, administrative decisions from the Commission are not legally binding for anyone but parties directly addressed. Secondly, it was not an abuse of process from *Inntrepreneur* to argue that the standard lease did not infringe Article 81(1) EC. However, unlike the High Court, the Court of Appeal rely on a number of Community principles: the principle of cooperation under Article 10 EC, the principle of full effectiveness of Community law and the principle that national courts should avoid giving judgment that are in conflict with decisions adopted by the Commission. Therefore, the Court of Appeal adopted the decisions of the cases *Scottish & Newcastle, Bass Holdings Ltd, Bass Lease and Whitbread*, despite the fact that these cases were related to agreement between different parties.

The weight to be given to decisions made by the Commission in cases relating to the same kind of facts but between different parties depends on different Community principles. First, In order to achieve the objectives of the Treaty, Article 10 EC requires Member States to cooperate with Community institutions. One of those objectives is the establishment of a system to ensure that competition on the common market is not distorted. Secondly, the different tasks of the Commission and national courts in the application of EC competition law presuppose the primacy of the Commission's role. Thirdly, the principle of legal certainty will not be guaranteed if the national courts give judgment in conflict with decisions made by the Commission. Therefore, decisions by the Commission must be taken into account if they are relevant for the case even though they are not legally binding.⁶²

⁵⁹ Nazzini and Andenas, *Awarding Damages for Breach of Competition Law in English Courts – Crehan in the Court of Appeal*, p. 1193

⁶⁰ *Bernard Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637, Judgment of the Court of Appeal of England and Wales

⁶¹ Above not 54

⁶² *Bernard Crehan v Inntrepreneur Pub Co (CPC)* [2004] EWCA Civ 637, paragraphs 97-98

The court concluded by saying that decisions by the Commission that are not legally binding must still be adopted by national courts if they are relevant for the factual issue.⁶³

2.3.3.1 Analysis

It must be seen as clear that the judgment made by the Court of Appeal is more in line with the ruling of the European Court of Justice than the judgment made by the High Court. The safeguard of the effectiveness of the Community law is not protected by the possibility of damage awarding. The protection must be measured in remedies actually awarded in concrete cases. If damages were rarely awarded because of the claimant's difficulties in discharging the burden of proof, the effectiveness of the Community law would be set aside. Therefore, the judgment of the Court of Appeal is important for the development of remedies for breach of Community law that is directly effective.⁶⁴

The fact that the Court of Appeal is basing its factual findings on the evidence of previous decisions made by the Commission dealing with the same issue but between other parties regarding a different agreement is a significant change. The earlier established principle of "a strict rule of privity applies to limit the binding effect of findings of fact or law by judicial or administrative authorities to the parties, their privies, or successors in title"⁶⁵ is abandoned.⁶⁶

The primary point in the judgment of the Court of Appeal is the binding capacity of Community law. The question is how to weigh the factual findings made in a decision by the Commission in national law between different parties and relating a different agreement.⁶⁷ The judgement of the Court of Appeal can be of great importance if other national courts follow the same approach. It extends the effect of the Commission's decisions to third parties in proceedings of similar issue of the decision.⁶⁸

2.4 Summary

The Francovich case has founded the base for all damage rewarding. The principle of the individuals right to damages based on Community law has been further developed in *Banks* and *Factortame III*. This principle was applied in the first case regarding damage rewarding in an antitrust case, *Courage*.

⁶³ Nazzini and Andenas, *Awarding Damages for Breach of Competition Law in English Courts – Crehan in the Court of Appeal*, p. 1197-1198

⁶⁴ Nazzini and Andenas, *Awarding Damages for Breach of Competition Law in English Courts – Crehan in the Court of Appeal*, p. 1193

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 1208-1210

Still, many questions regarding damage for breach of antitrust rules are left unanswered. The Commission published a Green Paper⁶⁹ on damage actions for breach of the EC antitrust rules in 2005. The aim of the Paper is to improve the facilitation of damage actions in national courts.⁷⁰ The main points of the Paper are presented in chapter three of the thesis.

⁶⁹ COM(2005)672

⁷⁰ COM(2005)672, p. 6

3 Green Paper

3.1 Introduction

The aim of the Green Paper⁷¹ and the Commissions Staff Working Paper⁷² is to find ways to improve the facilitation of damage actions in national courts. The compensation of victims and the enforcement activities of public enforcement authorities will hereby be better. This is part of enforcement of Community competition law. The paper deals with the question of private enforcement and not public enforcement. The difference is that private enforcement is legal actions brought by the victim of anti-competitive behaviour before the national court, whereas in public enforcement the public authority investigate suspect violation of competition law being able to impose measures such as fines on infringing undertakings.⁷³

In private damage actions, is it fundamental that the victim of a violation who suffers loss is entitled to compensation. Damages be claimed in actions both between co-contractors and third parties. Improved private enforcement will help make the market open and competitive. By making the opportunity to enforce rights better the competition rules and the involvement will be brought closer to both the citizens and the business.⁷⁴

The advantages for private parties to have availability of private actions are many. For example the claim can be combined with other claims and the court can apply civil sanctions to contractual relationship at the same time as hearing the damage claim. In the wider context, the competition can encourage innovation and efficiency and lead to improved growth and productivity. The reason for competitiveness is to achieve an open and competitive market and ultimately a higher standard of living. This is acknowledged in the Commission's Action Plans for the renewed Lisbon Strategy forming a Partnership with the Member States.⁷⁵

Despite the importance of the advantages of the private enforcement, it is also important to consider the costs associated with private competition law litigation in the case of unmeritorious or not well founded claims. The aim of the Commission is to find better ways to compensate for breach of antitrust rules, but at the same time to avoid situations where defendants settle because the litigations costs are too high.⁷⁶

⁷¹ COM(2005)672 Green Paper Damages actions for breach of the EC antitrust rules

⁷² COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules

⁷³ Ibid., p.6

⁷⁴ Ibid., p.6-7

⁷⁵ Ibid., p.7

⁷⁶ Ibid., p8

The private actions should be seen as a complement to the public enforcement and not as a replacement. The public enforcement is still necessary for detecting anti-competitive practices such as cartels. The authority will still play a strong role in cases where a full economic analysis is necessary.⁷⁷

The Commission commissioned a study⁷⁸ to identify and analyse the obstacles to successful damages actions in the Member States of the European Union. The conclusion of the Study is that the actions of damages are totally undeveloped and that there is an astonishing diversity in the approach taken towards breach of EC antitrust rules by the Member States. Only a limited number of successful damages awards for breach of EC antitrust rules since 1962 were found. The Study outlines a number of obstacles related to private enforcement of EC antitrust rules found in the different Member States. The obstacles identified are the following:

1. Collective actions
2. Fault
3. Burden and standard of proof
4. Collection and presentation of evidence
5. Evidential value of national competition authorities and national court decisions
6. Qualification of damages
7. Passing on defence and indirect purchase claims
8. Amount of damages
9. Time limitations
10. Costs
11. Applicable law

While the European system of antitrust litigation is underdeveloped, the system in the US offers strong incentives to bring actions before the court. The most notable features of the US system is the availability of treble damages, adapted rules on costs and the possibility to amalgamate small claims into one effective claim under class action procedural rules. The US system is often described as encouraging unmeritorious or vexatious litigations.⁷⁹

A clarification of the rules on damage in breach of antitrust rules will lead to more legal actions. If the rules are more clear, potential claimants will know which rules they will face in the court before they commence an action and this will encourage litigation.⁸⁰

⁷⁷ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 8

⁷⁸ Study on the conditions of claims for damages in case of infringement of EC competition rules, published on the DG Competition's website on 2 September 2004. The study is carried out by the law firm Ashurst. The study can be found at:

http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html

⁷⁹ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 15

⁸⁰ Ibid. p.15-16

When creating a levelled play field of the EC rights enforcement across the Member States, a litigant will have the same protection in the whole Community. If a litigant of one Member State faces a better chance in his national court than another litigant in another Member State, the substantive body of the Community competition law will not be uniformly enforced all over the Community. It is essential that the same rules of the rights of the European citizens are applied all over the Community and that all citizens have the same protection.⁸¹

3.2 Damages

In the Green Paper, the Commission focuses on three different questions regarding damages. Firstly, it deals with different approaches taken from Member States to calculate the basis of damages in order to make it more attractive to file a damages claim. Secondly, the Commission is focusing on different methods of quantification both by showing ways to calculate the damage and showing a more equity based approach. Thirdly, the Commission is considering procedural alternatives by splitting the finding.

3.2.1 Definition of Damages

Compensation is defined as granting a person kind or money for the loss he suffered. It must be distinguished from restitution where a person is put in the situation he was before the infringement. Some Member States will only give compensation if restitution is impossible or extremely difficult.⁸²

Damages can also be structured as an action for recovery of illegal gain caused by the infringement. The recovery is not for the loss suffered but for the gain made by the defendant from the infringement. This can be of more advantage to the claimant if the gain of the defendant is exceeding the loss of the claimant.⁸³

Another structure of the damage can be in the form of exemplary or punitive damage. It is a sort of punishment of the defendant for breaching the law and to deter him from repetition of the wrongful conduct. It can also be seen as compensating for aspects that are too difficult to estimate. Mostly, punitive damage goes deliberately beyond compensation to achieve a higher degree of deterrence or to reach policy goals. In the case *Factortame III*⁸⁴, it can be read that if domestic law allows punitive damages in cases similar to damage actions in breach of antitrust law, it would also be possible to allow

⁸¹ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 16

⁸² *Ibid.*, p. 34

⁸³ *Ibid.*

⁸⁴ Above not 19

punitive damages in antitrust cases.⁸⁵ It is important to remember that not all Member States exclude punitive damages as being contrary to their public policy. It must therefore be considered whether it would be appropriate to allow national courts to award more than single damages in more serious antitrust infringements. It would create a clear incentive for claimants to file a damage claim.⁸⁶

As for the award of interest, both the interest rate and the point in time are of importance. They must both be at a level where the real values are compensated. A number of possible times from when the interest can be awarded exist. It can be from the time of the infringement, the time of the injury, the time of a demand for payment, the time of the notice to stop the breach, the time of the filing of a claim or the time of the judgment. If the award of interest is set at a higher level than the real value, the interest can be seen as a technique to increase deterrence^{87, 88}.

3.2.2 Quantification of Damages

Quantification of damages is complex due to the economic nature in competition cases and the difficulty to reconstruct the situation of the claimant that would have existed if the illegality would not have happened. The loss is often measured by the “but for” principle; the difference between the claimant’s actual situation and the situation he would have been in “but for” the illegal conduct. The claimant is compensated for the actual losses and profits that would have been gained as well as hypothetical situations the claimant would be in if the infringement would not have occurred. To establish this “but for” scenario (the prices, profits, costs, market situations etc.), a number of methods exist.⁸⁹

The most common claims in antitrust cases are overcharges (increased prices in cases of cartels or excessive prices in cases of dominant position) and lost net profits (predatory pricing or refusal to supply). The overcharge can consist of two parts, damages due to the infringement (higher prices) and lost profits if the purchaser bought fewer goods and made less profit due to that he could only produce fewer products.⁹⁰

Methods used for calculation of damages should not be seen separately, they are complementary since many of them can be considered in the same case

⁸⁵ C-46/93 and C-48/93, Factortame III, paragraph 90

⁸⁶ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 35-36

⁸⁷ The technique was used in Directive 2000/35 on combating late payment in commercial transactions, OJ 2000 L 200/35

⁸⁸ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 37

⁸⁹ Ibid., p. 37-38

⁹⁰ Ibid., p. 38

and many of them are overlapping. The more simple methods can be used as a cross-check for the more complex methods.⁹¹

3.2.3 Split Proceedings

It is possible to get a partial judgment regarding the finding of the infringement and the finding of the damages in some Member States. Such a judgment does not affect the quantification of the damage but continues until the quantification can be made. It is not unusual for the parties to agree on a settlement before such a judgment. These split proceedings exist in two different forms. In the first group, the Member States split the main proceeding into two. The liability is established in the first phase and the damages are assessed in the second. In the second group, the Member States have two separate full proceedings. In the first, the liability is established, in the second, the amount of damage is settled.⁹²

3.2.4 Calculation of Damages

In the Green Paper, the calculation methods are presented in a separate study⁹³. The different methods for the calculation are dealt with in chapter five of this thesis.

⁹¹ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 38

⁹² Ibid., p. 42

⁹³ Analysis of Economic Models for the Calculation of Damages

4 Calculation of Damages

4.1 Introduction

When calculating damages in antitrust cases, a number of problems must be faced. One of the more central problems is how the counterfactual scenario would have been but for the violation. The “but for” situation is the base for the calculation. In a cartel situation, the price on the market but for the violation is estimated and in a case of exclusion, the market share of the undertaking but for the violation must be calculated. Different factors, such as demand, range and competition, are affecting the market and must be considered when deciding the counterfactual situation.

Another problem is the case of exclusion. If the violated part existed on the market before the violation, a natural point of comparison exist. If the violation result in the undertaking disappearing from the market, it is harder to estimate the amount of the damage.

It is even more complicated to estimate the damage in a situation where the undertaking is prevented to enter into the market. The profit of the undertaking if it would have entered the market must be estimated.⁹⁴

4.1.1 Types of Claim

As described in chapter 4.2.2, there are two types of claims in antitrust cases. The first is overcharging and the second is exclusion. Within these types of claims, there can appear horizontal and vertical cooperations within the field of prices and purchase and abuse of dominant position with losing prices, price discrimination and selective pricing.⁹⁵

4.1.2 Damage Parties

A number of different persons can be affected by the antitrust violation. Firstly, the most obvious are the *direct purchasers* who have paid an inflated price because of the violation. Secondly, the *indirect purchasers* are affected if the overcharged is passed on to them from the direct purchaser. There is a debate among economists and lawyers whether this passing on should be given legal standing. In the US, the Supreme Court has ruled that the indirect purchaser cannot recover damages for violations of antitrust law.⁹⁶ Thirdly, there might be an “*umbrella effect*” where firms outside of the cartel raise their prices in line with the firms within the cartel harming

⁹⁴ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 20-21

⁹⁵ Ibid., p. 14-15

⁹⁶ Illinois Brick Co v. Illinois (1977)

direct buyers from non-cartel producers. Fourthly, consumers who are willing to pay competitive prices but not cartel prices may be forced to buy less desirable substitute goods or reduce their total purchases. These are called “*dead-weight loss*” and have normally not been awarded legal standard. Fifthly, the *suppliers* of goods and services to the cartel may lose sales and income due to the restrictions of the cartel. Sixthly, *competitors outside the cartel* may be affected by the actions made by the cartel. If the cartel refuses to supply to consumers that previously switched to non-cartel suppliers, this can affect the future sale of those non-cartel members. Seventhly, suppliers of *complementary goods and service* may be affected if the demands are lowered on the complementary market because of higher prices charged by the cartel.⁹⁷

4.1.3 Burden of Proof

In most Member States, the burden of proof rest on the claimant. The claimant has to prove the infringement, the causal connection between the infringement and damage and the quantum of damages. The standard of proof is regulated by national laws where the civil law jurisdictions mostly use a test where the claimant need to win the conviction of the judge and the common law jurisdiction mostly use a test of balance of probabilities to establish the conditions of violation under Articles 81 and 82 EC.⁹⁸

Since there are few judgments in the area in Europe, it can be of relevance to look at cases decided in the US. In the US there is a difference in burden of proof between proving the actual harm and proving the amount of the damage. The burden of proof is higher when the actual harm is being established but lower when the amount of the damage is established. The different burdens of proof are natural since the higher burden is necessary to stop undertakings not harmed from seeking damages. The reason why the burden of proof is lower when it comes to establishing the amount of the damage is the uncertainty of the amount of damage because of the violation. It is the violating undertaking that, because of the violation, is responsible for the uncertainty. It would not be fair if the violating part could have advantages because of this uncertainty.⁹⁹

4.2 Calculation methods

A number of different calculation methods have been identified for establishing damages in antitrust cases. These methods should not be seen separated, but are complementary to each other. Several of them can be considered depending on the facts to see if they are giving similar estimates

⁹⁷ Analysis of Economic Models for the Calculation of Damages, p. 11-16

⁹⁸ COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 25

⁹⁹ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 21-22

of the quantum of damages. The following calculation methods can be used in cases of overcharging.¹⁰⁰

4.2.1 Before-and-After method

This is probably the most used calculation method.¹⁰¹ In this method, the prices during the period of the alleged cartel and the prices in the period before and/or after are compared. The prices in the period before and after must be a reasonable approximation of the price level in the absence of the cartel. Even though this method is one of the simpler, it has some problem issues related to it.

Firstly, the period for establishing the normal prices should capture equilibrium prices over a long period of time. The conditions under which the prices have been set must therefore be carefully attended. If the prices do not capture the prices of the period, the “but for” prices will be misleading.

Secondly, the method assumes that the prices are constant during the period of the cartel. This leads to the assumption that the key determinants of pricing conduct have remained unchanged. This assumption will be difficult to justify if the period of time is significant and the prices are likely to have changed.

Thirdly, the prices under a cartel tend to be higher than average. Different consumers will have different experiences and the damage calculation must therefore be calculated differently depending on the different consumer groups. By just considering the average prices the result could be inaccurate.¹⁰²

One of the conditions for this method is that the claimant must have been established on the market before or after the period of the cartel. In addition, the period of the cartel must be able to be easily defined. In most cases, the violation is introduced gradually and will still be effecting the undertaking when it has stopped. If too many important variables are affecting the market of the period before, under or after the violation, the before-and-after method can be too uncertain and therefore other methods can be to prefer.¹⁰³

The method is best used when there has been little change in market conditions “but for” the cartel. This is often the case if the cartel was short-lived or where mature industry is involved without significant changes in demand and supply factors. If these conditions are at hand, this method is

¹⁰⁰ Analysis of Economic Models for the Calculation of Damages, p. 17

¹⁰¹ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 25

¹⁰² Analysis of Economic Models for the Calculation of Damages, p. 17-18

¹⁰³ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 25-26

simple and can easily be understood by the court. Otherwise, the method is best used as a crosscheck to other more complex methods.¹⁰⁴

4.2.2 Yardstick method

In cases where the period of the cartel is difficult to establish or where there is not any natural before and after period to compare between, it is possible to look at a market similar to the market where the violation has been made, the yardstick method.¹⁰⁵

In this method, prices in the market where the violation has been made is compared to a market not affected by the cartel. It could either be a comparison of identical product markets in different geographic areas, different product markets in the same geographic area or different product markets in different geographic areas. It is preferable if the different markets compared have similar competitive characteristics and lies outside the influence of the cartel activity. If the markets are too different, it will be difficult to isolate the effect of the cartel and hard to convince the court of the validity of the comparison. Ideally, this method is used when two markets of the same products but in different geographic areas are compared. The prices can more easily be compared in that case.

Similar to the before-and-after method, the yardstick method is helpful in markets, which are similar when it comes to demand and supply, and where differences in prices between the markets therefore easily can be shown. It can also be useful in conjunction with the before-and-after method to enrich the information available from that method. The yardstick method is, in the same way as the before-and-after method, prone to errors if other factors than those related to the cartel influence the prices between the areas.¹⁰⁶

If there is a suitable market available for comparison, the yardstick method has some advantages to the before-and-after method. The yardstick method does not have to consider the period of the cartel since the same period of time of the two markets can be compared. In addition, the same external variables are likely to affect similar markets and are therefore “automatically” observed in the yardstick method.¹⁰⁷

4.2.3 Cost-Based method

A cost-based method is based on the calculation of the undertaking of the cartel's average unit cost of production, adding a margin considered

¹⁰⁴ Analysis of Economic Models for the Calculation of Damages, p. 17-18

¹⁰⁵ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 26

¹⁰⁶ Analysis of Economic Models for the Calculation of Damages, p. 19

¹⁰⁷ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 27

appropriate under the competitive conditions. The average cost is used as a valuation for the price under competition.¹⁰⁸

The average cost will be calculated from accounting data or from internal management reports for the main production costs. The average unit costs will be calculated by dividing total costs of production by total units of output.

Problems with this method are, likewise as with the two before mentioned, its over-simplification of factors affecting the prices if the cartel would not have happened. The method assumes that the competitive costs and the price-margin are constant. It also assumes that the relation between cost and prices is constant but for the infringement, while in reality, the relation could have changed due to other demands and costs in absence of the infringement. Another problem with the method is that it assumes to reflect a competitive market, but the competition can be limited even without the violation of the cartel. This assumption can lead to an overestimated harm infringed by the cartel.

The margin used should reflect the cost of capital as an investment compared to other investments that could have been made. This can be compared to the actual profit of the cartel undertaking by establishing a “normal” profit in the market in question to estimate “but for” prices in the conspiracy period. However, other reasons can be given why profits exceed the cost of capital in a competitive market. The profit can be higher due to superior efficiency, business cycle or growing market, innovations or as a reflection of a successful gamble.

The problems with the cost-based method are extensive and limit its use. However, it can be used as a reference to show that the cartel has had an effect on the undertaking profit even though it can be difficult to estimate the amount of the effect.¹⁰⁹

4.2.4 Market Share method

The market share method is a more sophisticated version of the before-and-after and the yardstick method. The market share of the violated undertaking, if violation would not have happened, is subtracted with the market share the undertaking has because of the violation. The difference is multiplied with the total sales on the market and the lost sale of the undertaking is estimated. The damage is a result of this estimated sale lost multiplied with the average profit of the undertaking.¹¹⁰

¹⁰⁸ Ibid., p. 28

¹⁰⁹ Analysis of Economic Models for the Calculation of Damages, p. 20-21

¹¹⁰ It has been questioned whether the Cost prediction method is a method of its own since it is influenced by the before-and-after method and the yardstick method.

The advantage of this method is that it can be used when exogenous influences affecting the whole market but not affecting the distribution of market shares appear. If the market during the period of the violation is affected by higher prices on products used by all producers on the market, the total sale will probably be lower but the market shares will be constant. The price prediction method can be used since the actual sales volumes are the base for the method, not the volumes from the time before or after.

Problems with the method are that it predicts that the market shares and the profits are constant during the violation. The average profit must not be representative for the period of the violation. The profit must not be proportionate to the market share.¹¹¹

4.2.5 Econometric modelling

Econometric modelling is an analysis based on economic theories. A theoretic model is used to explain the connection between features of the analysis; for example the price or profit, and factors explaining this feature, for example costs or demand. With help of data from the market, the strength of the connection is tested with regression analysis.

The advantage of the model is that the analysis can control several factors affecting the price and thereby isolated the effect of the illegal conduct. The model can determine which factors that are important to the analysis and can also give the significance of each of the factors with some degree of certainty.

When calculating the damage, two models can be used; the structured model or the reduced model. In the structured model, different regressions for demand and range on the market are estimated. Data of quantity, prices and other factors determining the range and demand must be available when using the structured model. A condition is that the data is from the period before or after the violation.

In the reduced model, the price is expressed as a function of different demand and range factors affecting the price. Separate functions are not used. The model is reduced because it is a result from the interaction between demand and range. It needs less data than the structured model since it does not need access to quantities on the market.

When calculating using the reduced model, no information on the appearance of the demand or range is given in the outcome of the calculation. Therefore, no measure of the accuracy of the model can be read from the result. Even though its limitations, the reduced model is the more widely used of the two models. The advantages is that the model is simple to use and can give an answer to important questions in estimating the

¹¹¹ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p.27-28

damage, such as how much higher the price was due to the cartel or the importance of other factors on the price.

A limitation of the structured model is that it presumes the existence of perfect competition on the market as it gets the average price by putting the demand equal to the range. As said before, a presumption of perfect competition is seldom realistic.¹¹²

4.2.6 Theoretic modelling

If not enough data is available to use a regression analysis, the theoretic model, also called simulation model, can be used. The model is considering the non-perfect competition on the market. A theoretic model describing the competition on a market not affected by a cartel is used. Two different models can be used, the Cournot model or the Bertrand model. The Cournot model is used when the quantity is the undertakings strategic variable and the Bertrand model is used when the price is the strategic variable. The models are calibrated to the reality by using information on individual prices, quantity, costs and demand on the market. Information about elasticity of demand can be given by using an econometric model however, unfortunately, usually mostly secondary information is available which limits the usefulness.

The different models are static and are not considering whether competition is developing over the time. Also, good knowledge in economic analysis is necessary to use the models. Little practice exists on the calculation of the models, therefore, little information can be found about the usability of the model.¹¹³

4.2.7 Calculation Based on Accounting

In cases where the violated part is a rival of the violator, it is more relevant to calculate the lost profit due to the anti-competitive conduct. Often, this calculation is made from the accounting of the violated part. The starting point is the profit the undertaking is losing because of the violation. The definition of profit is simple; income subtracted with cost.¹¹⁴

The estimation of lost profit is used in many cases of damage calculation, not only in antitrust cases.

Lost profit can be described as “the qualification of the reduction in earnings, the calculation of interest on past losses, and the application of financial discounting to future losses. The losses are measured as the

¹¹² Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 29-31

¹¹³ Ibid., p. 37

¹¹⁴ Ibid., p. 38

difference between the earnings the plaintiff would have received if the harmful event had not occurred and the earnings the plaintiff has or will receive, given the harmful event.”¹¹⁵

A number of different issues must be considered when calculating lost profit. Firstly, the timing of the injury must be decided. Some problems can be related to this. Firstly, the damage may not occur at the same time as the infringement starts and it can continue for some time after the infringement is terminated. Secondly, the discounting of future loss must be calculated. The discount rate is an estimation of the cost of capital which captures the return required by investors for investing and it takes into account the risk of the investment. Thirdly, the plaintiff’s duty to mitigate losses must be taken into account. Fourthly, the effect of taxes must be considered. If taxes would have been payable, the pre-tax profits must be rewarded in order for the undertaking to pay the taxes with enough remaining to cover the post tax profit. Fifthly, prejudgment interest must be calculated. The interest of past losses must be decided.¹¹⁶

When calculating lost profit, accounting, financing and economic methodologies are used to estimate the difference between the profit made by the plaintiff and the profit but for the infringement. Three different accounting methods for valuating are used to calculate the loss, earning-based (discounted cash flow) valuations, market-based valuations and asset-based valuations.¹¹⁷

4.2.7.1 Earning-based Valuation

The earning-based method takes the accounting profit in the income statement and adjusts it to reflect the actual cash flow generated. The damage is estimated by the difference between the actual cash flow and the “but for” cash flow. The “but for” scenario is estimated of what the sales and costs are calculated to have been but for the antitrust infringement. This involves taking into account historical trading result, internal information such as budgets and forecasts, marketing reports and strategies, financial and production reports and correspondence with customers. The historical information cannot be used if there is reason to believe that the future would have been different from the past in absence of the infringement. Identifying the costs can be difficult since some costs are fixed and some are variable. Costs that are fixed in the short run, can in the longer run become variable.¹¹⁸ It is the cash flow from the variable activity of the business that is interesting in the judgment of the economic harm of the business, other

¹¹⁵ Robert E. Hall and Victoria A. Lazear (1994), Reference Guide on Estimation of Economic Losses in Damage Awards, Reference Manual on Scientific Evidence, Washington D.C., Federal Judicial Center, p. 280

¹¹⁶ Analysis of Economic Models for the Calculation of Damages, p. 35-36

¹¹⁷ Ibid., p.37

¹¹⁸ Ibid., p. 37-38

cash flows are interesting if they are directly affected by the harm or tied to the variable activity.¹¹⁹

The earning-based method of calculation is complex and requires accounting and economist skills for the calculation. However, the method is widely used in different cases of damage calculation and extensive expertise exists on the area.¹²⁰

4.2.7.2 Market-based Valuation

The market-based method uses financial multiples to value the injured business. The financial multiples can be market values or profits from comparable businesses whose shares are listed. The method involves taking the multiple of sales of similar businesses applying the multiple to the sales of the injured business. The same can be done with profits instead of sales. The multiples can be applied both before and after the injury; the difference will be the measure of damages.

The method is dependant on the identification of other businesses listed. It is critical that the two business compared are truly comparable in key factors such as capital structure, product mix, size, market share, accounting policies and future earnings potential in order for the method to be used.¹²¹ In reality it is almost impossible to find two business identical to each other. Instead, the task is to be able to handle the error of the comparison on the side of the market-based analysis.¹²²

4.2.7.3 Asset-based Valuation

The asset-based method uses information from the balance sheet to value the business. The value of the company after it has been damaged is subtracted from the value of the company before it was damaged. The method is simple, but has limitations. Firstly, since the balance sheet provides historical data, it is unlikely to provide a reliable estimation of how the value of the company has been impaired. Secondly, the method can only be used if the illegal conduct has a direct and measurable effect on the asset and liabilities of the plaintiff. Thirdly, the method is difficult to use if only a small part of the company has been injured.¹²³

4.2.8 Calculation in cases of Exclusion

When an anti-competitive action leads to extensive loss of market shares of an undertaking, resulting in total exclusion from the market or in prevention to enter the market, it is natural to calculate the damage by calculating the

¹¹⁹ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 40

¹²⁰ Analysis of Economic Models for the Calculation of Damages, p. 38

¹²¹ Ibid., p. 38-39

¹²² Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 43

¹²³ Analysis of Economic Models for the Calculation of Damages, p. 39-40

profit the undertaking would have done without the violation. Little information on issues related to this can be found in literature, but three examples can be found; losing prices, tying and price discrimination.¹²⁴

4.2.8.1 Losing Prices

The losing prices violation have the aim to push out or hinder competitors to enter the market. The dominant undertaking is selling products at a lower price than the costs during a limited period. One of the problems in such a case is the calculation of the profit the competitors would have had if the undertaking were able to enter the market. The problem is to calculate for how long the violated action will affect the profit and to separate the competitive action from a non-competitive action. It is important to localise the prices on the market without the violating action and the profit this would have given the damaged part.¹²⁵

4.2.8.2 Tying

Tying exists if products are sold together in fixed proportions or sold with the condition to buy product A if product B also is purchased, even though both products can be purchased separately. Not all tying is an infringement of competition.

In the USA, many tying cases deal with health and medical care. Private-practising doctors working in hospitals with the same right as hospital-employed doctors has been prevented from seeing clients. This has been possible due to valuation systems to ensure the quality of the private-practising doctors. The hospital-employed doctors have been said to make use of the system to hinder private-practising doctors' access to clients since they are competitors. The damage calculation has in these cases been based on an estimation of the income the private practising doctor is losing.

Tying can exist in the form of higher prices, limited access to better substitutes or worsened conditions. The calculation of the damages in these cases is difficult. It is not enough to prove that the price of product B is higher; it is the total price that is of interest. Therefore, the price of product A in absence of the tying must be estimated.¹²⁶

4.2.8.3 Price Discrimination

Price discrimination can hinder competition and can appear, for example, as loyalty discount. It mostly appears in cases of abuse of dominant position. Competitors can be affected by losing prices towards the competitors' customers. The damage is the profit the competitors is losing due to the violation. If it is a question of abuse, the price discrimination must be a

¹²⁴ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p.44

¹²⁵ Ibid., p. 44-45

¹²⁶ Ibid., p. 45-46

hinder to competition and the competitor must show that it is the price discrimination that is causing the lost profits.

When damage is proven, two ways exist to calculate the damage, the automatic rule and the special damage rule. In the automatic rule, the price difference in relation to the competitor is multiplied with the quantity sold by the violated part. In the special damage rule, the reduced profit is calculated. This is done by subtracting the profit due to the discrimination with the profit without the discrimination. In the USA, the special damage rule is considered to reflect the damage better and therefore the automatic rule is excluded from use. The automatic rule is, despite this, easier to use since the quantity sold of the product despite the discrimination must not be estimated.¹²⁷

4.3 Calculation Problems

When calculating damages, some general problems common for all calculation methods appear.

4.3.1 Time-Period Aspect

The time-period of the violation must be established. This is necessary to decide the counterfactual situation. It is often difficult to identify the violation period. It is not likely that the date of the discovery of the violation is the starting point of the violation. The violation can have been going on for some time before it is discovered.

In addition, the end of the violation must be established. The violation can stop when it is discovered, but the process of establishing damage can also affect it. There is reason to believe the violation will stop no later than when the parties settle or there is a judgment from a court. However, the harm of the violation must not be limited to the violation period. Often, it takes a long time before the damaged part is completely compensated. The harm can continue long after the violation has stopped. Therefore, even when the period of violation is established, the period of the harm must be considered.¹²⁸

4.3.2 Ex Ante or Ex Post Calculation

When calculating damage, the information available is important. Lack of information will make the calculations uncertain. The legal process in a competition case is often long, therefore, it is possible to have availability of

¹²⁷ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol., p.46-47

¹²⁸ Ibid., p. 49-50

information appearing after the discovery of the violation. The question is whether this information should be used or not. Should the damages be calculated ex post or ex ante? The difference between the two is of special importance in cases of exclusion and when quantifying the value of the undertakings lost opportunities.

In an ex ante calculation, the starting point is the time when the harm starts, when the factual and the counterfactual scenarios goes apart. In the ex post calculation, the time of the court proceedings is the start. All information available is used to construct the counterfactual scenario.

Both of the methods have related problems and none is superior to the other. The ex ante calculation leads to difficulties in being objective in its expectations when the outcome already is known. The ex post calculation depends on the date of the court proceedings which can, in some cases, lead to advantages if the proceeding is delayed. In addition, there are incentives to change the behaviour of the undertaking after the violation is discovered in order to affect the development of the market.

In the USA, the courts are taking into consideration all the information available, the same would be to expect from the courts in Europe.¹²⁹

4.3.3 Problems related to Data

The use of econometric modelling¹³⁰ is increasing when calculating damages. One of the problems related to this model is the different types of data. The data is the critical factor in the regression analysis; this means that, it is of great importance that the data is of god quality. One of the problems is that it is expensive and time consuming to collect the data. Therefore, it is a question of balance between the use of collected the data and the possibility to present reliable data. This kind of adjustment can be difficult to make.

The different data available are usually of varied quality in the meaning that the different data are more or less useful to calculating the damage.

Data on prices and sold quantity over time, both from the undertaking and from competitors, belongs to the most useful data. The problem is the availability of this data, especially from the competitor, if it is not available through the legal process. Often, undertakings do not save this kind of historical data. Therefore, other types of alternative data must be used.¹³¹

These alternative data can be data from the undertakings accounting¹³². Commercial data can also be used. It is important to remember that this kind

¹²⁹ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p.51-53

¹³⁰ Above chapter 5.2.5

¹³¹ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 5-54

¹³² Above chapter 5.3.1

of data does not have to be representative for the market; this can be tested by comparing data from commercial databases with data from the actual market or product. Questionnaires or experiments can be used but these kind of data are hypothetical, therefore data from real choices is to prefer. In addition, data from the stores where sales are registered, so called scanner data, can be used.

Another problem can be outliers. Some observations are significantly different from other observations among the data available. This can be a problem if the data consists of few observations and it can have a great effect on the outcome if not noticed. Related is if the outlier should be included in the data. It is important to know where the outlier comes from. If it is a wrong of measures, it should be corrected or excluded. If it is a circumstance of importance for the competition in the market, it should be included. Statistic tests can be used to measure whether outlier data is at hand.

If data is missing on important factors, data on other factors can be used as imperfect substitutes, so called proxy variables. It is of importance how the substitutes correlate with the origin factors. If no data is available, the calculation will be unreliable.¹³³

4.4 National Damage Cases

When reviewing the national cases within the EU on antitrust damage some points can be found. Firstly, it is only in a few Member States that damage for competition law infringement has been awarded. In several other Member States there are pending cases and a small number of judgments have hinted that the methodology of calculation of damages can be used in future judgments. Secondly, in no Member State it is prescribed by law the use of a certain calculation method. All Member States calculate damages with the aim to return the plaintiff in the position but for the infringement. Thirdly, all calculation methods used have been simplistic with no relation to econometric modelling.¹³⁴

The cases listed below are all cases decided on damages in antitrust cases in the Member States.

4.4.1 France

Two different models can be recognised in the calculation made by the French courts. Firstly, the “before and after” method is used by comparing prices, costs and margins encountered in the relevant market and prices,

¹³³ Metoder för att beräkna privat konkurrensskada och krav på precision i domstol, p. 53-56

¹³⁴ Analysis of Economic Models for the Calculation of Damages, p. 43

encountered at the time of the anticompetitive practices. Secondly, the “cost-based” method and accounting measures are used by assessing the profit that would have been made in the potential market based on a hypothetical “but for” price of estimating a reasonable profit margin added to the unit costs.¹³⁵

In the cases *Mors v. Labinal*¹³⁶ the calculation of damage was made by calculating a margin of the competitors turnover and assessing the production costs of the supplied equipment. The reference was factors such as current orders, projections, penetration rate and expected lifetime of the product. The calculation was made by an expert appointed by the court. The court did not change the judgment from the opinion of the expert.

In the case *Ecosystem v. Peugeot*¹³⁷ the calculation of the harm suffered was calculated to be the difference between the loss suffered and the profit made the previous year.

4.4.2 Italy

In Italy, the courts have used the “before and after” method in all cases where damages in antitrust cases have been awarded.¹³⁸

In the case *Telsystem v. SIP*¹³⁹ the calculation was made from the lost business of the plaintiff and profits foregone as a direct result of the infringement. The actual calculation method is not presented in the judgment, but it is believed to be based on the “before and after” method.

In the case *Albacom v. Telecom*¹⁴⁰ the damage was calculated based on the market share of the plaintiff in the year before the infringement multiplied with the earning in the market of the defendant for the period of the infringement. The court then used a ten percent profit margin to calculate the total damage. It should be noted that no adjustment was made for the fact that the profit margin might have fallen if Telecom had permitted access to the market for the plaintiff. Telecom could in that case have had to cut the prices due to competition on the market.

In the *Bluvacanze* case the court awarded *Bluvacanze* damage based on the accounting documents provided. The company was awarded damages for the profit it could have made but for the exclusion from the market. The company was also awarded damage to compensate for the loss of commercial reputation caused by the defendant.

¹³⁵ Ibid.

¹³⁶ Paris Court of Appeal, judgment of 19 May 1993

¹³⁷ Paris Commercial Tribunal, judgment of 22 October 1996

¹³⁸ Analysis of Economic Models for the Calculation of Damages, p. 45

¹³⁹ Corte d’Appello of Milano, judgment of 18 July 1995

¹⁴⁰ Corte d’Appello of Rome, judgment of 20 January 2003

4.4.3 United Kingdom

It has only been one antitrust case where damage has been awarded in the UK, the previously cited Crehan case¹⁴¹.

The Court of Appeal¹⁴² held that damages should be awarded under two heads.

Firstly, the direct losses suffered as a result of Mr Crehan having to pay too much for beer sold in the pubs. The damages should be calculated as the difference between the amount lost and the amount that would have been made if Mr Crehan had been charged reasonable prices. The losses suffered by Mr Crehan, according to his accountant, was £45,487 over the period of the lease. In addition, the profit during the same period would have been £11,634. The total amount of damage for the first head was £57,121.

Secondly, losses suffered for giving up the loss-making leases should be awarded. This was determined by the sale value of the leases at the time when they were given up. The value was established to 2.5 times the latest estimated annual profit without the tie of the leases (total £25,186) and an additional £4,500 for selling the two pubs together, the marriage value. The total damage for the second head was therefore £74,206 (2.5x(£25,186+£4,500)).

In total, the Court of Appeal awarded Mr Crehan £131,336 plus interest in damage.

4.4.4 Germany

The basic principle in the national courts of Germany is to put the claimant in the position he would have been in but for the infringement. This is made by comparing the actual situation with the hypothetical development of the market conditions without the infringement.

The yardstick method, where different markets are involved is used as a basis for estimating the development of the relevant market but for the infringement. Comparisons can also be made to the relevant market but in other time-periods, the before-and-after method. The less similar the compared market is to the relevant market, the more closely the court will analyse the difference between the markets and the more difficult it is to calculate the accurate damage.¹⁴³

¹⁴¹ Above chapter 3.

¹⁴² *Bernard Crehan v Innpreneur Pub Co (CPC)* [2004] EWCA Civ 637, Judgment of the Court of Appeal of England and Wales

¹⁴³ Analysis of Economic Models for the Calculation of Damages, p. 49

The only antitrust case where damage has been awarded in Germany is the Vitamins case¹⁴⁴. The damage was calculated based on the percentage decline in prices following the cartel. Tables of the prices over the period of the cartel showed that the higher cartel prices prevailed and did not change. Prior to the cartel, prices were going down. Therefore, the Court assumed that, in the absence of the cartel agreement the prices would have fallen.

¹⁴⁴ Landgericht Dortmund, judgment of 1 April 2004

5 Conclusions

It is clear that use of damages in antitrust cases in Europe is undeveloped. Few cases exist and few common lines can be drawn from them. Each Member State has its own methods and no general regulations exist. In order to develop stronger and more sufficient rules, it is necessary to facilitate Community rules on damage claims. The consumer and the foreseeability will be better protected. It will be easier to recover damages for losses caused by anti-competitive violations.

The key element when calculating damages is to establish the “but for” scenario. The situation if the violation would not have happened must be constructed. A number of factors are affecting the scenario; demand, range and competition must be considered when deciding the situation.

A number of different calculation methods have been identified. Many of them can be used in the calculation of damages in general, not only in the violation of antitrust rules. The methods should not be seen separately but are complementing each other and a combination of the different methods can sometimes be used. The more simple methods can be used as a cross-check to the more complex methods.

It is not possible to suggest the usage of one method or model over the others. The different methods all have different strengths and weaknesses. The usability of the different methods depends on what kind of claim is at hand, the market share of the undertaking and the availability of data. The information and data available in each case can make one method more suitable in one case but another method better in another situation. The choice must be made to the specifics of the case.

In cases of lost profit or exclusion, the best way to calculate the loss is to use the accounting of the undertaking. The starting point is the profit the undertaking would have made but for the violation of competition. It is however important to remember that not all cases of exclusion are anticompetitive.

One of the problems related to calculation of damages is the time-period aspect. It is of importance to establish the time-period of the violation in order to get the counterfactual situation right. If the time-period is calculated wrong, it can have a great impact on the finished calculation result.

It can be argued that the more complex methods should be preferred if sufficient data, time and detailed information is available. The result will be more accurate and correct, the better the access is to quality data recording. If relevant data do not exist on the other hand or if they are not satisfactory, the more simple methods should be preferred.

If the conditions are right, there are arguments for the econometric modelling to be preferred. It can lead to establishing the damage to some degree of statistic certainty, while other methods tend to be of a more speculative nature.

In the future, it can be expected that the number and nature of cases of damage actions in antitrust law in the EU will increase similar to the development that has taken place in the US. It is therefore necessary to establish rules that make it possible to increase the predictability in such cases in Europe. Antitrust rules are an important part of the creation of a functioning market in Europe.

If the facilitation of damage actions will improve along the lines suggested in the Green Paper, I believe damage action in cases of antitrust law in national courts in the Member States will increase rapidly. Today, there exist a hesitation to raise the question of damages, due to the uncertainty within the field. After improvements have been introduced, the foreseeability will be greater and it will be easier to predict the outcome of the case.

It is difficult to predict which of the calculation methods that will be most commonly used by the courts. On one hand, the econometric model it to prefer as stated above. On the other hand, I believe the more simple methods will be most commonly used. The more simple methods do not require the same amount of data and can be calculated by non-professionals. However, I would advocate that the best result will be reached by calculating the damage with two different methods using the simpler of the method as a cross-check.

Bibliography

The Commission

COM(2005)672 Green Paper *Damages actions for breach of the EC antitrust rules*

COM(2005)672 Commission Staff Working Paper, Annex to the Green Paper *Damages actions for breach of the EC antitrust rules*

Literature

Jones, Clifford A., *Private Enforcement of antitrust law in the EU, UK and USA*, Oxford University Press, 1999

Articles

Komninos, Assimakis P., *New Prospects for Private Enforcement of EC Competition law: Courage v. Crehan and the Community Right to Damages*, Common Market Law Review 39:447-487, 2002

Nazzini, Renato and Andenas, Mads, *Awarding Damages for Breach of Competition Law in English Courts – Crehan in the Court of Appeal*, European Business Law Review, 17:1191-1210, 2006

Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report*, 31 August 2004

Ashurst, *Study on the conditions of claims for damages in case of infringement of EC competition rules, Analysis of Economic Models for the Calculation of Damages*, 31 August 2004

ECON Analys AB, *Metoder för att beräkna privat konkurrensskada och krav på precision i domstol*, Konkurrensverkets uppdragsforskningsserie 2006:1

Table of Cases

European Court of Justice

Cases C-6/90 and C-9/90 and C-9/90, *Andrea Francovich and Others v. Italian Republic* [1991] ECR I-5357

Case C-128/92, *H.J. Banks & Co. Ltd v. British Coal Corporation* [1994] ECR I-1209

Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany (Factortame III)* [1996] ECR I-1029

Case C-453/99, *Courage Lth v. Bernard Crehan* [2001] ECR I-6297 and [2001] 3 W.L.R. 1646

English Court of Appeal

Bernard Crehan v Inntrepreneur Pub Co (CPC) [2004] EWCA Civ 637, Judgment of the Court of Appeal of England and Wales

English High Court

Bernard Crehan v Inntrepreneur Pub Co (CPC) [2003] UKCLR 834. Judgment of the High Court of England and Wales