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Private Enforcement of EC Competition Law

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Summary

Private enforcement of EC competition law involves private parties enforcing the competition law through civil damage claims in national courts. The legal basis for such actions under EC law has been uncertain, but was clarified in the case *Courage v. Crehan*.

It is now unquestionable that private parties are allowed to bring damage suits under EC law, but whether they will, is another question.

Private enforcement under the current EC law presents certain problems. Firstly, almost no substantial rules of private enforcement exist, so national courts have to fill the gaps with national law. This of course endangers the uniform application of EC law. Secondly, few legal incentives to spur private actions exist under EC law. Thirdly, the EC private enforcement system also lacks certain legal features which enable private parties to bring successful damages suits.

In contrast to the EC system, the U.S. system illustrates how an effective system of private enforcement works. The U.S. system also illustrates how private actions can be encouraged and supported with legal features such as pre-trial discovery, class actions, contingency fees, and treble damages. Whether legal features of U.S. kind also will be adopted by the EC remains uncertain, but one thing is for sure, a great interest in creating a system of effective private enforcement exists within the Community. This is, among other efforts, manifested by the commissioning of the *Ashurst Study on the Conditions of Claims for Damages in Cases of Infringement of EC Competition Rules*.

Abbreviations

CFI	Court of First Instance
DOJ	Department of Justice
EC	European Community
ECJ	European Court of Justice
E.C.R.	European Court Reporter
FTC	Federal Trade Commission
O.J.	Official Journal

1 Introduction

The designated role of private enforcement in the Community has been discussed with some vigor, especially in relation to public enforcement. Some scholars see it as an either-or-scenario, i.e. either public enforcement or private enforcement. Mario Monti (former Commissioner for competition matters) has, however, stressed that, “[p]rivate actions before national courts should, of course, remain complementary to the public enforcement of EC competition law.”¹

Private enforcement of competition law, as a concept, can be given several different definitions. A broad definition could, for instance, proclaim that private enforcement involves enforcement of competition laws through the initiative or intervention of private parties. Such a definition particularly includes all cases where private parties merely act as complainants to competition agencies. While a broad definition, as the one suggested, might serve a certain purpose, it should be noted that cases initiated by private complaints are generally considered as *privately triggered public enforcement*.² Consequently, the concept of private enforcement demands a more narrow definition in order to avoid conceptual misunderstandings.

A more narrow definition of private enforcement could focus on the fact that any private parties involved in the enforcement of the competition laws must do so as litigants in a litigation procedure against a perceived offender. However, such a definition would include cases where private parties intervene in already existing litigation between an administrative authority and a defendant. This could be the case at national or community level when a private party has a direct and legitimate interest in the adjudication. Nonetheless, it seems unwarranted to suddenly deem the enforcement as private just because a private party has intervened in the proceedings.³

To really distinguish the concept of private enforcement a narrow definition seems most appropriate. Such a definition could classify private enforcement as “litigation, in which private parties advance independent civil claims or counter-claims based on the . . . competition provisions.”⁴ This particular definition, which was advanced at the sixth Annual EC

¹ Speech by Mario Monti, *Private Litigation as a Key Complement to Public Enforcement of Competition Rules and the First Conclusions on the Implementation of the New Merger Regulation*, IBA – 8TH ANNUAL COMPETITION CONFERENCE (Fiesole, 17 September 2004), at <http://europa.eu.int/rapid/pressReleaseAction.do?references=SPEECH/04/403&format=HTML&aged=1&language=EN&guiLanguage=en>.

² See ASSIMAKIS P. KOMNINOS, *Introduction*, in EUROPEAN COMPETITION ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW xxiii (Claus-Dieter Ehlermann & Isabela Atanasu eds., 2003).

³ See *id.* at xxiv.

⁴ See *id.*

Competition Law and Policy Workshop⁵ in 2001, includes civil litigation as well as third party civil claims attached to civil/administrative proceeding when courts exercise judicial review over decisions made by national competition authorities.

European private antitrust enforcement is experiencing a new dawn with renewed possibilities due to Regulation 1/2003 and the *Courage v. Crehan* decision. A further discussion of the subject therefore appears of great current interest.

1.1 Purpose and Delimitations

This thesis aims at examining;

- what private enforcement possibilities EC competition law offers;
- to highlight some difficulties related to effective private enforcement in the current EC system and;
- how to promote more private enforcement in the EC and the difficulties related to this.

The thesis will only examine private enforcement in the context of the EC legal system and not with regards to any specific Member State. Implications of Community nature will hence be the main focus of the thesis.

1.2 Method and Material

In this thesis three methods haven been employed in order to examine the stated purpose. First and foremost, the traditional legal dogmatic method, which essentially involves studies of case law, legal literature, and other available sources of law, has been employed. Second, the economic method of the Optimal Deterrence Model has been employed in order to examine how to set optimal penalties and optimal levels of deterrence (See ch. 3 & 9). Third, a comparative method has been employed in order to illuminate the differences in the US and the EC system of private enforcement (See ch. 8 & 9).

The citations in this thesis have been made in accordance with the guidelines of *The Blue Book*, a standard generally followed by American Law Schools.⁶

⁵ For transcript, see EUROPEAN COMPETITION ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003).

⁶ See THE BLUE BOOK: A UNIFORM SYSTEM OF CITATION (Colombia Law Review Ass'n er.al. eds., 17th ed. 2000).

Most of the material has been located through the database West Law International and from general books of EC Law. Articles from various journals constitute the primary sources, since very few specific books on the subject of private enforcement exist.

1.3 Disposition

Chapter 2 deals with the objectives of competition laws and more specifically the purpose of antitrust enforcement.

Chapter 3 discusses economic theory of enforcement and presents the Optimal Deterrence Model as method of ensuring optimal enforcement.

Chapter 4 defines the concept of private enforcement.

Chapter 5 examines how Regulation 1/2003 has modernized EC competition enforcement.

Chapter 6 canvasses means of public enforcement and what powers the Commission and national enforcement authorities possess.

Chapter 7 elucidates substantial remedies available to private enforcers and their basis in EC law.

Chapter 8 highlights some substantial issues of private enforcement that national courts have to deal with.

Chapter 9 provides some insight into damages calculations in theory and practice.

Chapter 10 explores the U.S. enforcement system with special focus on private enforcement.

Chapter 11 makes way for my concluding remarks.

2 The Objective of Competition Law

In the creation of the European Union competition law has played a significant role. Nonetheless, the main object of European competition law has remained a much-contested issue. European policymakers have generally promoted three different objects, namely, *consumer welfare*, *the creation of a single European market* and *the protection of consumers and smaller firms from large aggregations of economic power*.⁷

2.1 The Purpose of Antitrust Enforcement

In order to evaluate how the system of antitrust enforcement works and should work, the goals of antitrust enforcement has to be identified.

The apparent goal of antitrust enforcement involves *stopping violations* of the antitrust laws and *preventing anticompetitive effects* from occurring. This is mainly achieved through sanctions such as criminal penalties, civil or administrative penalties, and private damages. However, sanctions do not only exist to penalize, but also to deter subjects from violating the law. In other words, when considering sanctions *ex ante*, they should be seen as threats.⁸

The logic of deterrence rests on the assumption that a potential violator will do a cost/benefit analysis before breaking the law. Therefore, if the costs exceed the benefits, the potential violator will refrain from breaking the law. In this context costs relate to the probability of either facing a criminal or a pecuniary sanction, while benefits normally equal monetary profit. The theory of deterrence seems to be very appropriate in the area of antitrust since most antitrust violations derive from business decisions. However, deterrence is not the only way to promote compliance with the law.⁹

Business managers do not only follow the numbers, even though cost/benefit calculations play a significant role in every business decision. When it comes to the law, they might feel a moral obligation to follow it. This implies that compliance with the law can be enhanced by reinforcing people's moral conviction to follow the law; for instance, through education.¹⁰

⁷ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 936-937 (3d ed. 2003).

⁸ Wouter P.J. Wils, *Should Private Antitrust Enforcement Be Encouraged in Europe?*, 26(3) *W.COMP.* 473, 478 (2003).

⁹ *Id.*

¹⁰ *Id.* at 479.

Another aspect that determines compliance with the antitrust laws involves the clarity of the law. If the law is very vague violations and anticompetitive effects might occur by mistake. In this respect the legislature has a great responsibility. However, the judiciary can also help to avoid the problem by clarifying and elaborating the law through interpretations and precedents.¹¹

A second goal of antitrust enforcement rests on the notion of *corrective justice*. This notion stipulates that, if one party commits a violation which adversely affects another party, the former should compensate the latter. By following the logic of corrective justice a fair balance between the parties is once again reestablished through compensation.¹²

As established above, the main goals of antitrust enforcement includes deterrence and the idea of corrective justice. However, the main question still remains, at what cost should deterrence and corrective justice be pursued?

¹¹ *Id.*

¹² *Id.*

3 Economic Theory of Enforcement

Getting people to obey the law takes both public and private resources. While some people obey the law out of a moral conviction, many do not. So, in order to prevent offenses and apprehend offenders, society has to promote obedience to the law. However, the main question is, what determines the amount and type of recourses, and punishment required to enforce a piece of legislation? In order to further elaborate on this question, this section will examine the issue of optimal deterrence.

3.1 The Optimal Deterrence Model

The logic behind the Optimal Deterrence Model can be traced back to Nobel Prize winner Gary S. Becker's research on optimal penalties and probabilities of apprehension and conviction for criminal offences.¹³ Becker assumes that criminals act in their best interest from what knowledge they have about the likelihood of apprehension, conviction, and the severity of punishment. Since criminals act *rationally*, legal sanctions should consequently aim at creating deterrence. However, deterrence requires both public and private resources, which together manifest the cost of deterrence. So, in order to institute optimal sanctions that enhance economic efficiency, Becker suggested that a sanction should only condemn a conduct when it costs less than allowing the conduct to continue. In other words, only economically inefficient violations, where the social cost exceeds the gain to the offender, should be deterred. This is the optimal fine level because it internalizes to the offender all of the external costs of the offence, given the assumption of costless and certain punishment.¹⁴ Social cost in this context includes three elements, (1) the cost created by the conduct itself; (2) the costs of detecting and apprehending suspects and establishing their guilt; and (3) the costs of imposing sanctions.¹⁵ Thus in the end, optimal polices against illegal behavior comes down to optimal allocation of resources.¹⁶

With reference to Becker's work, William M. Landes created the Optimal Deterrence Model in 1983. The purpose of the Model involves determining the adequate amount of antitrust damages by comparing the allocative inefficiency (dead-weight loss) of a conduct with its productive efficiency (cost savings). A simple graph easily illustrates the concepts (See FIGURE 1).

¹³ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 170 (1968).

¹⁴ *Id.* 180-185.

¹⁵ *Id.* at 181.

¹⁶ *Id.* at 209.

Assume that the industry marginal cost, MC_0 , equals the supply curve under competition and that the competitive output and price equals Q_0 and P_0 .

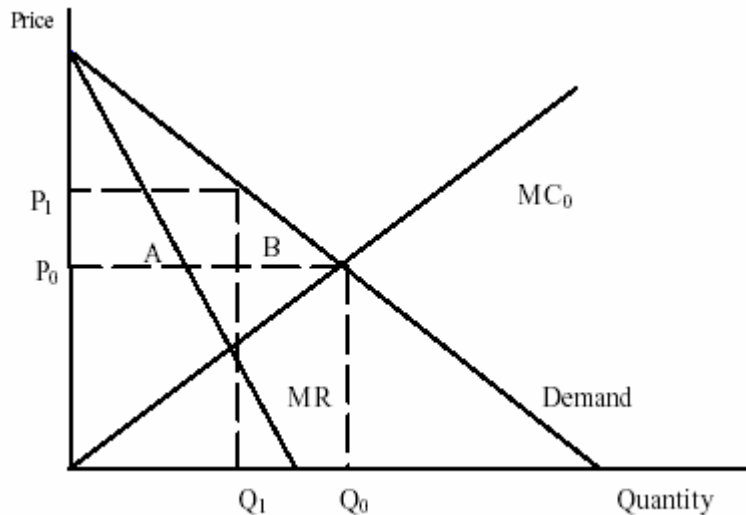


FIGURE 1 – Market Power, Allocative Inefficiency and Wealth Transfer

Furthermore, assume that a cartel would reduce output to Q_1 and raise price to P_1 . Also assume that the conduct would lead to a total dead-weight loss of 50 € (area B) and an aggregate overcharge of 100 € (area A). The dead-weight loss B is borne by consumers and represents resources that are withheld from consumers, but without showing up as a gain to the cartel either. In addition to the dead-weight loss B, consumers also have to bear the cost of the overcharge. The overcharge A represents a transfer of wealth from the consumers to the cartel. Consequently, the total net harm to consumers equals 150 € (area A + B).¹⁷

The basic economical rationale for outlawing cartels is not that they overcharge or redistribute wealth from consumers to cartels member, but rather that they restrict output which causes dead-weight loss - a loss to consumers without any gain to producers. So, in order to prevent this loss, cartel members should be penalized by a sanction sufficient enough to deter cartels from forming in the first place.¹⁸ Still, what is the optimal penalty?

In our example a damage award of 50 € (corresponding to the social loss) would, if all other things are equal, obviously be too low to deter since the cartel would still make a net profit of 100 €. Instead, a damage award should, according to the logic of the Optimal Deterrence Model, equal the net harm to persons other than the violator. In this case, the net harm to everyone, except the violator, is 150 €¹⁹

¹⁷ See William M. Landes, *Optimal Sanctions For Antitrust Violations*, 50 U. CHI. L. REV. 652, 653 (1983).

¹⁸ *Id.*

¹⁹ *Id.* at 655.

On the other hand, a fine that exceeds the social cost would certainly deter as well, but according to the Optimal Deterrence Model such a penalty would not be beneficial to society. The logic of the Model, following Beckers' arguments, suggests that the purpose of penalties is to *deter inefficient penalties, not efficient ones*. In other words, the Optimal Deterrence Model takes into account potential cost savings deriving from the cartel's conduct. Consequently, the optimal level of offences generally exceeds zero.²⁰ To illustrate (see FIGURE 2), assume that by forming a cartel the members reduce their production costs from MC_0 to MC_1 .

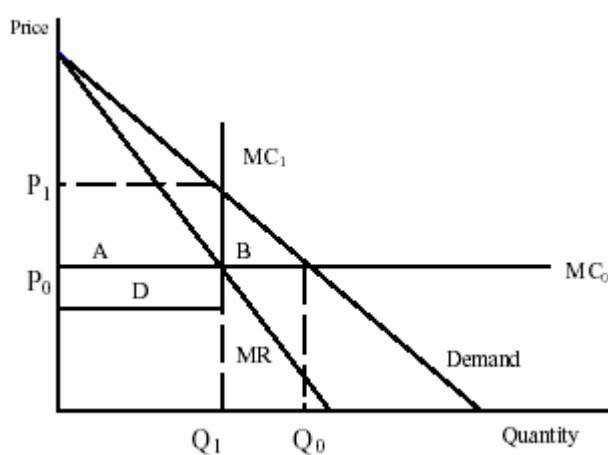


FIGURE 2 – Market Power, Allocative Inefficiency and Productive Efficiency

The aggregated cost saving from the cartel equals the area D. Suppose that D is greater than B, for example, say that D equals 26 € and B equals 25 €. In this case, the cartel's offence is efficient, according to the Optimal Deterrence Model, since the cost savings are greater than the dead-weight loss (society gains 1 €). Consequently, the total gain to the cartel would be 126 € (100 € overcharge plus 26 € cost savings). A fine that exceeds 126 € would deter the formation of the cartel, but the outcome would be inefficient since the cartel is socially beneficial. In other words, a fine greater than 126 € would *over-deter* and hence deter socially beneficial cartels.²¹

3.2 Scrutinizing the Optimal Deterrence Model

The Optimal Deterrence Models rests on the notion that the exclusive goal of antitrust policy should be economic efficiency. More precisely, antitrust policy should seek to maximize allocative efficiency while doing as little harm as possible to productive efficiency. In the case of monopoly-creating

²⁰ *Id.*

²¹ *Id.* at 655-656.

conduct, the Optimal Deterrence Model only deems such conduct unprofitable if allocative efficiency losses exceed productive efficiency gains.²²

Allocative inefficiency primarily depends on the concept of the *social cost of monopoly*. Consequently, the definition of the social cost of monopoly is of utter importance to the creation of optimal antitrust penalties. A too narrow or too wide definition of the concept will induce inefficient penalties.²³

3.2.1 The Concept of Social Cost

In the discussion concerning the concept of social cost, Herbert Hovenkamp suggests three elements of social costs. Besides the traditional *dead-weight loss* under the demand curve, the “*wealth transfer*” from consumers to producers (overcharge) might also be deemed as a social cost.²⁴ However, according to Hovenkamp overcharges should not be considered as a wealth transfer, but rather as wasted resources.²⁵ The logic behind this notion rests on the idea of *rent seeking*. Rent seeking is the amount of resources a monopolist will be willing to spend in order to maintain or enlarge the monopoly. Likewise, rent seeking also constitutes resources that a potential monopolist is willing to spend in order to acquire a monopoly. So, in FIGURE 1 and FIGURE 2 area A should be considered as a welfare loss, since it approximates the costs of rent seeking.²⁶

While most rent seeking is inefficient, some will result in social benefits. A good example of benign rent seeking can be found within the patent system, since the system considers research and development socially beneficial. So, in the competition for patents (i.e. rent seeking) resources spent will produce social benefits.²⁷

Turning to the Optimal Deterrence Model, the inclusion of rent seeking into the concept of social cost would nonetheless have any effect on the Model, since the Model does not consider how monopolists spend their profits. As prescribed by the Model, the optimal damage award equals the net harm to everyone, *except the violator*. It does, hence, not matter how the violator spends the transferred wealth when it comes to determining the optimal penalty. In the context of the Model it does not either matter whether the overcharge is considered as wealth transfer or a social cost since the Optimal Deterrence Model will still not consider it when determining the optimal penalty.²⁸

²² Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 12-13 (1989).

²³ *Id.* at 17.

²⁴ *See id.* at 14.

²⁵ *Id.* at 16.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Landes *supra* note 17, at 655.

Rent seeking, as such, surely represents an interesting contribution to the discussion about the Optimal Deterrence Model, but is nevertheless, not the greatest deficiency of the Model. As pinpointed by Hovenkamp, the greatest problem with the Model involves the disregard of inefficiency costs produced by unfair exclusionary practices (rent seeking). Contrary to overcharges, competitors' lost profits and investments do not transfer to the monopolist. Hovenkamp illustrates this with an extreme example:

[S]uppose that the world market contains two aircraft manufacturers, each of which owns a single plant. The chief executive officer of one of the firms creates a monopoly by visiting the other firm's plant one night with a can of gasoline and a match, and burning it down. In this case . . . [the traditional dead-weight loss] is indeterminate; . . . [the social cost of rent seeking] is the cost of the match, the gasoline, the opportunity cost of the CEO's time, and the risk and expected consequences of getting caught. At the very least, . . . [additional social cost of the exclusionary practice] is the cost of the destroyed plant, inventory, and perhaps goodwill, of retraining employees whose jobs have been lost, and of reliance interests lost by broken contracts.²⁹

In conclusion Hovenkamp argues that the Optimal Deterrence Model only focuses on allocative efficiency and productive efficiency and therefore fails to deter offences aimed at forcing competitors off the market. For instance, assume that a monopoly results in a traditional dead-weight loss of 100 €, a wealth transfer of 200 €, and cost savings of 125 €. The Optimal Deterrence Model would then set the damage award to 300 € (200 + 100), but nevertheless, the violation will still continue since it generates a profit of 25 € (200 + 125 – 300). However, suppose that the conduct also forces the competitor to exit the market and thereby to waste his business investments of 35 €. In that case, the activity is ineffective. But since the Optimal Deterrence Model neglects to take additional social costs of exclusionary practices into account, it would permit the activity.³⁰

3.3 Defending the Optimal Deterrence Model

In order to refute Hovenkamp's criticism and defend the Optimal Deterrence Model William H. Page published two articles; *The Scope of Liability for Antitrust Violations*³¹ and *Optimal Antitrust Penalties and Competitors'*

²⁹ Hovenkamp *supra* note 22, at 18.

³⁰ *See id.* at 20.

³¹ William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445 (1985).

*Injury*³². With his articles Page brought attention to the necessity of establishing causal relationships between competitive harms and monopolistic conduct. Such a causal link can, for instance, be established between the traditional dead-weight loss under the demand curve and monopolistic output restriction. However, according to Page no causal link exists between anticompetitive conduct which forces a firm off a market, and Hovenkamp's notion of lost investments.³³ Page illustrates his point by considering the model of pricing by a dominant firm which has to share the market with fringe firms with higher marginal costs. In such a market, the fringe firms are price takers and accordingly increase their output to meet the higher (umbrella) price set by the dominant firm. In other words, the output restriction by the dominant firm causes increased production from the less efficient firms and therefore also increased production costs. Since the production inefficiency has a causal link to output restriction set by the dominant firm it should be deemed as a social cost. However, the increased costs of the competitors (the production inefficiency) can not be considered as compensable losses since they do not incur any actual harm. The costs are in reality fully recovered by the overcharges paid by consumers due to the umbrella price.³⁴

When turning to the question of exclusion, Page acknowledges that if a dominant firm successfully forces the fringe firm off the market the dead-weight loss of the pure monopoly will be greater than the sum of the dead-weight loss and the productive inefficiency associated with the dominant firm pricing.³⁵ Furthermore, the exclusion also results in lost revenues to the excluded firm. But such lost revenues are *not* additional social costs of the exclusions. As explained by Page:

The fringe firm loses the stream of rents it would have garnered from pricing under the dominant firm's umbrella. But fixed costs have already been incurred; they are bygones, not an additional cost of the monopolistic practice. Moreover, if the firm's output drops to zero, its variable costs are actually saved by the exclusionary practice.³⁶

The true social loss of the exclusion is, therefore, the lost value associated with the units of output that the fringe firm would have produced, minus the savings in production costs.³⁷

In the case of an ongoing predatory pricing campaign, losses imposed on the fringe firm are the result of reduced revenues and not increased production costs, according to Page. These losses constitute wealth transfers to

³² William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151 (1990).

³³ *Id.* at 2154.

³⁴ *Id.* at 2156.

³⁵ *Id.*

³⁶ *Id.* at 2157.

³⁷ *Id.*

consumers, who benefit from the lower prices. The only social cost of an ongoing predatory pricing campaign is the increase in production beyond the level at which consumers are willing to pay the marginal cost of producing the good. However, since the predator himself produces the marginal units, the costs are entirely his own.³⁸

Even when the predatory scheme aims at raising competitors' prices, the losses to competitors should not be regarded as social costs. What makes predatory pricing monopolistic is that the practice reduces the supply elasticity of the fringe firms and thereby increasing the monopoly power of the predator.³⁹

If a dominant firm is able to increase its competitors' marginal costs by, for instance, denying them access to an economy of scale, the competitor's output will decline and hence also the overall market output. Consequently, the social loss includes the lost value from units that would have been produced in a competitive market, i.e. in a market without predatory pricing. However, when competitors reduce their output cost savings occur. These cost savings roughly counterbalances the increased marginal costs and therefore sometimes even diminish the productive inefficiency.⁴⁰

In conclusion, Page argues that, "[t]he effect of predatory practices on the victim's costs is damaging not because of its effect on the firm's costs but because of the effect of the reduction in the firm's supply elasticity on the predator's monopoly power."⁴¹

3.3.1 Substitutes for Social Costs

Although Page stipulates that competitor's losses are not social losses, he still acknowledges that such costs, in some cases, should be compensated as antitrust damages. The reason for this is that competitors' losses can be deemed as substitutes to the demonstrable costs of monopoly – at least in some cases.

When determining whether competitors' losses should be compensated, Page suggests the usage of the *concept of proportional variety*. The concept of proportional variety establishes whether the alleged harm varies in proportion to the inefficiency associated with the practice of the monopolist.⁴² In other words, the Concept explores whether a causal relationship exists between the practice and the harm. However, the concept of proportional variety is not limited to determining compensable harms of competitors; rather it can be employed to determine any compensable harm in the production chain. For instance, since the harm that a monopolistic

³⁸ *Id.* at 2158.

³⁹ *Id.* at 2158-2160.

⁴⁰ *Id.* at 2159-2160.

⁴¹ *Id.* at 2160.

⁴² Page *supra* note 31, at 1463.

overcharge imposed on consumers is proportional to the allocative efficiency of the offence (both are the result of the same output restriction), the harm is compensable under the Optimal Deterrence Model, even though it constitutes a wealth transfer and not a social cost.⁴³

In a market where a cartel controls less than the entire market, fringe firms will increase their output until their marginal cost equals the cartel price. As a result of this their consumers will also pay an overcharge - due to the umbrella price set by the cartel. The output restriction that allows the cartel to set the higher price also allows the fringe firms to set their price at the same level.⁴⁴ Consequently, the overcharges paid by the fringe firms' consumers are causally connected to the allocative inefficiency associated with the cartel. This connection justifies the fringe firm consumers to claim damages under the Optimal Deterrence Model.⁴⁵

Turning to competitors, the concept of proportional variety allows competitors to be compensated for exclusionary practices under the Optimal Deterrence Model.⁴⁶ If a fringe firm is excluded from a market, the restriction of output in that market will correspond directly to the elimination of the fringe firm's output. According to the Optimal Deterrence Model, the expected returns to the fringe firm from the lost production should therefore be compensated.⁴⁷ Not because the harms to the competitors are social costs, but because they are causally linked to the monopolistic output restriction, and therefore, serve as a reasonable substitute for the welfare loss associated with the output restriction. The same reasoning also applies to predatory pricing that aims at rising competitors' costs.⁴⁸

3.4 Conclusions Regarding the Optimal Deterrence Model

The Optimal Deterrence Model offers an interesting perspective on enforcement and optimal penalties. As stated by Judge Richard A. Posner, [i]t is not enough to have good [legal] doctrine; it is also necessary to have enforcement mechanisms that ensure, at reasonable cost, a reasonable degree of compliance with the law."⁴⁹ All enforcement obviously involves balancing results and costs, but by adhering to economic models the balancing becomes more scientific. However, different models promote different goals. While the Optimal Deterrence Model promotes overall social welfare another model might focus more on protecting individual

⁴³ *Id.* at 1465-1467.

⁴⁴ *Id.*

⁴⁵ Page *supra* note 32, at 2162-2163.

⁴⁶ Page *supra* note 31, at 1473-1476.

⁴⁷ Page *supra* note 32, at 2162-2163.

⁴⁸ Page *supra* note 31, at 1475-1478.

⁴⁹ RICHARD A. POSNER, ANTITRUST LAW 266 (2nd ed. 2001).

rights. In other words, the goals of the model have to concur with the goals of the legal system in order for the model to serve its purpose. For instance, if the overall purpose of a country's antitrust law is to promote consumer welfare, then its enforcement model also has to serve this goal in order to be effective.

4 Public Enforcement

All enforcement efforts by the Commission and national competition authorities fall within the category of public enforcement. This section will examine how the public enforcement system within the Community works.

4.1 Discovering the Violation

Article 85 of the Treaty allocates the duty of enforcing and investigating potential infringements of the competition law to the Commission. However, in order to actually enforce the competition law, the Commission has to become aware of potential violations. There are basically two ways in which this may happen, namely, through (1) *investigations/inspections*, and (2) *complaints*.⁵⁰

4.1.1 Investigations and Inspections

Under Article 18 of Regulation 1/2003 the Commission has the right to *request information* from undertakings, association of undertakings, governments, and competition authorities of Member States. When extending a request, the Commission has to state the legal basis and purpose of the request; specify which information is required and the time-limit in which the request should be fulfilled; and the penalties for providing incorrect or misleading information.⁵¹ Requests by the Commission can either be *simple requests* or *requests based on a decision*. If the request lacks the form of a decision, no duty to comply seems to exist. The wording of Article 18(2) suggests this by only stating that “incorrect or misleading” information can be penalized.⁵² Furthermore, the Article only provides a right for review by the Court of Justice when requests are based on decisions. So, if a company voluntarily complies with a simple request, it should be aware of that it may be penalized for providing incorrect or misleading information.

It should be noted that the Commission’s power to obtain information only encompasses *necessary* information. However, the Commission has a lot of discretion when it comes to deciding the necessity of a piece of information. Naturally it is very hard to objectively decide the necessity of a certain piece of information, but as stated by Advocate General Jacobs and confirmed by the ECJ:

⁵⁰ See CRAIG & DE BÚRCA *supra* note 7, at 1064-1071. It should also be noted that before Regulation 1/2003 potential violations could also be caught through the notification system for an individual exemption.

⁵¹ See Article 18(2) of Regulation 1/2003.

⁵² Also see VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 206, 222 (8th ed. 2004).

A mere relationship between a document and the alleged infringement is not sufficient to justify a request for disclosure of the document; the relationship must be such that the Commission could reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place.⁵³

A company under investigation has to effectively cooperate with the Commission and provide information known to it, even if the information helps to establish an infringement. The obligation does, however, not preclude a company's right of defense and thus its right against self-incrimination. Consequently, a company cannot be forced to answer a question which constitutes an admission of an infringement. But the line between justified and unjustified questions is naturally very hazy.⁵⁴

When a company fails to comply with a request based on a decision, the Commission may impose a fine under Article 23(1.b) or daily penalties under Article 24(d). In order to take such actions, a separate decision has to be taken, apart from the decision to provide information.⁵⁵ Fines under Article 23(1) can amount to as much as 1 % of the total turnover of the preceding business year, while daily penalties under Article 24 may be set as high as 5 % of the daily average turnover of the undertaking.

During an investigation the Commission also has the power to conduct *inspections*. According to Articles 20 of Regulation 1/2003, the Commission may enter the premises of an undertaking to examine the books and other related records to the business, and ask any employee for explanations relating to facts or documents of significance to the investigation. Furthermore, if the inspection requires more than one day, the premises may be sealed for the time necessary to complete the inspections.⁵⁶ Just as requests for information, inspection can either be *voluntary* or *mandatory*.⁵⁷

The investigative powers of the Commission are very extensive and do not stop at the business' premises. As stated in Article 21(1), inspections may even be conducted at the homes of directors, managers, and other staff member. In addition to this, legal and natural persons may be interviewed, but only if they consent to it.⁵⁸ If a person agrees to a voluntary interview the Commission cannot punish that person for misleading or false answerers. This safeguards the right against self-incrimination.⁵⁹

⁵³ Case C36/92 P., SEP v. Commission, [1994] E.C.R. I-1911, para. 21, referring to paras 21-42 of the opinion of Advocate General Jacobs.

⁵⁴ VALENTINE KORAH *supra* note 52, at 222.

⁵⁵ VALENTINE KORAH *supra* note 52, at 222.

⁵⁶ See Article 20(2d) of Regulation 1/2003.

⁵⁷ See Article 20(3) and 20(4) of Regulation 1/2003.

⁵⁸ See Article 19 of Regulation 1/2003.

⁵⁹ VALENTINE KORAH *supra* note 52, at 224.

In order to conduct inspections in different Member States the Commission needs the help of the national competition authorities, since no direct power exists under Community law to enter premises. Article 22 therefore enables the Commission to request a national competition authority to conduct an inspection, or to send an official to assist the Commission officials. If the inspectors show up without a formal decision under Article 20(4), the company does not have to grant them access. So, in most cases inspections will be backed by formal decisions, especially in the case of surprise inspections. If a firm still ignores the inspections officers the Commission may impose fines under 23(1c) or daily penalties under 24(1e); just as in the case of non-compliance with an information requests.⁶⁰

4.1.2 Complaints

The most common way for the Commission to become aware of a possible infringement of the competition law is through complaints from the public or from injured competitors. As stated in Article 7(2), natural or legal persons are entitled to file a complaint with the Commission, provided that they can show a legitimate interest. Member States are also entitled to file complaints, without having to show a legitimate interest.

Once a complaint has been filed with the Commission it has a duty to examine the facts put forward by the complainant.⁶¹ Failure to do so can lead to action under Article 232 for failure to act. Where the Commission has studied the facts of a complaint, but decided not pursue it, it has to inform the complainant of the reasons behind its decision. The reasons have to be substantial enough to survive a potential review by the Court of Justice.⁶²

If the Commission deems it necessary it may also hear *other* natural or legal persons in relation to a complaint.⁶³

4.2 Public Enforcement by the Commission

Once the Commission has discovered a possible antitrust violation it can take further action to establish whether an actual infringement has occurred.

⁶⁰ *Id.* at 225.

⁶¹ See Case 210/81 Demo-Studio Schmidt v. Commission, [1983] E.C.R. 3045, para. 19.

⁶² CRAIG & DE BÚRCA *supra* note 7, at 1068.

⁶³ See Article 27(3) of Regulation 1/2003.

4.2.1 Interim Orders

Competition violations can cause a lot of harm to the victims, and the longer the violation continues the more harm it will cause. This, in conjunction with the fact that a final decision by the Commission on an infringement matter may take some time, justifies the need for *interim orders*.

Article 8 of Regulation 1/2003 enables the Commission to grant interim relief when there is a risk of “serious and irreparable damage to competition”. An interim order can only be granted for a specified period of time, but renewed if necessary and appropriate.⁶⁴

4.2.2 Infringement Decisions

The most significant power of the Commission involves the right to make *formal decisions on questions of infringement*. Article 7 prescribes that if the Commission establishes an infringement it may order the undertaking to bring the infringement to an end. To that purpose, the Commission may impose any behavioral and structural remedies that are proportionate and necessary to end the infringement. Furthermore, if the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

Before the Commission reaches a decision under Article 7, 8, 23 or Article 24(2), it shall give the undertakings that are the subjects of the proceedings the opportunity of being heard on the matter in question.⁶⁵ The Commission can only base its decision on objection which the parties have been able to contest in a hearing. Otherwise the Court of Justice may invalidate the decision.⁶⁶

An important issue with regards to the proceedings involves *the right of defense*. As regulated in Article 27(2) the parties are entitled to access the Commission’s file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right to access the file does not include confidential information and internal documents of the Commission and the national competition authorities. The exception especially excludes access to correspondence between the Commission and national competition authorities.

Once a hearing on certain objection has been conducted the Commission may conclude, according to Article 7(1), that an infringement, which should be terminated, has occurred. The nature of the order will depend on the circumstances of the case, and so will the remedies. The remedies can either

⁶⁴ See Article 8(2) of Regulation 1/2003.

⁶⁵ See Article 27(1) of Regulation 1/2003, also see Commission Regulation on the Hearing of Parties in Certain Proceedings under Articles 85 and 86 of the EC Treaty, O.J. L 354 (1998).

⁶⁶ CRAIG & DE BÚRCA *supra* note 7, at 1073.

be positive or negative; i.e. either demand a specific form of action, or to stop doing something. Furthermore, the remedy will depend on which article of the Treaty the infringement falls under. For instance, an obligation to supply can be imposed for a breach of Article 82, while an agreement in breach of Article 81 cannot lead to an order to supply.⁶⁷

An undertaking may offer commitments in response to an intended infringement decision by the Commission. Such commitments may avert a formal infringement decision if they are sufficient enough. The commitments are voluntary, but the Commission can make them binding by decision.⁶⁸

4.2.3 Decisions of Inapplicability

When new agreements and practices evolve within the Community expedient decisions on the legality of those agreements and practices is sometimes necessary; especially with regards to the Community public interest of consistent application of the law. In such cases the Commission may declare that an agreement or practice corresponds with Article 81(1) or that it fills the conditions of Article 81(3).⁶⁹

4.2.4 Exemptions

Under Regulation 17 the Commission was the only institution permitted to grant *individual exemption* according to Article 81(3). This changed with the passing of Regulation 1/2003 which allocated the same right to grant exemption to the national courts of the Member States. So in essence, both the Commission and national courts may grant exemption according to Article 81(3) under the new regulation.⁷⁰

The prerogative of *block exemptions* stills remains with the Commission, as provided in Article 29. Through block exemptions the Commission may declare Article 81(1) inapplicable to certain categories of agreements, decisions by associations of undertakings, or concerted practice. The benefit of any block exemption can be withdrawn if a certain agreement has effects contrary to the provisions in Article 81(3).⁷¹

4.2.5 Judicial Review

Parties who wish to contest Commission decision may bring proceedings under Article 230 or 232 and get their complaint reviewed by the ECJ or the

⁶⁷ *Id.* at 1074.

⁶⁸ See Article 9 of Regulation 1/2003.

⁶⁹ See Article 10 of Regulation 1/2003.

⁷⁰ See Article 1-6 of Regulation 1/2003.

⁷¹ See Article 29 of Regulation 1/2003.

CFI. In order to appeal under Article 230 a party needs to fulfill the requirements for standing. Naturally a party, against whom a competition decision has been made, will be accorded standing. Likewise a complainant will have standing to appeal a decision by the Commission.⁷²

In cases where the Commission fails to act complaints can be brought under Article 232. Complainants will, for instance, resort to this provision when they feel dissatisfied with the Commission's response to their complaints. However, as stated above, the Commission is not obliged to proceed with every complaint.⁷³

4.3 Public Enforcement by National Competition Authorities

Public enforcement of the competition laws does not only involve the Commission but also the national competition authorities. As prescribed in Article 5 of Regulation 1/2003 the national competition authorities are empowered to apply Article 81(1) when the conditions of Article 81(3) are not fulfilled. National competition authorities are also empowered to apply Article 82.

The powers of the national competition authorities correspond to those of the Commission. National competition authorities may, just as the Commission, start investigations on their own initiative or on the basis of complaints. They may also order the termination of an infringement, impose an interim measure, accept commitments, and impose fines or periodic penalties, or any other penalties under national law.⁷⁴

⁷² CRAIG & DE BÚRCA, *supra* note 7, at 1077.

⁷³ *Id.*

⁷⁴ See Article 5 of Regulation 1/2003.

5 Private Enforcement

Private enforcement of the competition laws is still very rare in Europe. As stated in the Ashurst Study only around 60 cases for damage awards have been adjudicated in Europe (12 on the basis of EC law, around 32 on the basis of national law, and 6 on both). Of these judgments, 28 resulted in an award of damages (8 on the basis of EC law, 16 on national law, and 4 on both).⁷⁵ These figures clearly show that the European Commission and National Competition Authorities dominate the enforcement of the competition laws in Europe. In the United States the ratio between private and public enforcement is quite the opposite, with around 90 percent private actions and 10 percent public actions.⁷⁶

Although the Commission emphasizes the importance of a vivid system of private enforcement, no legislative measures have been introduced to promote more private actions. Regulation 1/2003 surely helps to enable a system of private enforcement, but serious doubt exists whether the decentralization scheme and direct applicability of Article 81(3) alone will be sufficient to create a workable system of private enforcement.⁷⁷

5.1 The Modernization of EC Competition Law

The notion to modernize the procedural aspects of EC competition law was first articulated in a White Paper published by the Commission in 1999.⁷⁸ This sparked a process, which eventually led to the adoption of Council Regulation 1/2003.⁷⁹ Regulation 1/2003 went into force on May 1st 2004 and thereby fundamentally changed the enforcement of EC competition law. As expressed by Mario Monti (former Commissioner for competition

⁷⁵ Ashurst, *Comparative Report*, in STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES, 1 (2004), at http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf.

⁷⁶ CLIFFORD A. JONES, PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE EU, UK AND USA 80 (1999).

⁷⁷ See for instance excerpt from panel discussion on substantive remedies, in EUROPEAN COMPETITION ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 11-49 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003).

⁷⁸ See Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty – Commission Programme No. 99/027. COM (99) 101, 28 April (OJ C 132 of 12.5 1999).

⁷⁹ See Council Regulation (EC) 1/2003 of 16 December 2002 on the Implementation of the Rules Laid Down in Articles 81 and 82 of the Treaty (OJ L 1, 04.012003, p.1).

matters), the regulation constitutes “the most important legislative initiative in the competition field since the 1990 Merger Regulation.”⁸⁰

5.1.1 Regulation 1/2003

By adopting Regulation 1/2003⁸¹ the EC forwarded the idea of a decentralized system of competition law. Because in contrast to the old Regulation 17/62⁸², the new Regulation postulates that Article 81(3) is *directly applicable* in all Member States.⁸³ As a result of this, the Commission’s exemption monopoly has been eliminated and thus enabled national competition authorities and national courts to fully apply Article 81. The notification system has likewise been eliminated. However, the new Regulation does not only decentralize the enforcement system, it also allows the Commission to focus its limited resources on the most serious competition restrictions and abuses.⁸⁴

When it comes to private enforcement of Article 81 and 82, Regulation 1/2003 lacks any explicit provisions on the matter. However, various formulations in the Regulation implicitly support private actions in national courts. For instance, recital 7 of the Regulation suggests that national courts should protect subjective rights under Community law by “for example . . . awarding damages to the victims of infringements.” Further implicit support for private enforcement can be found in Article 2, which fixes the burden of proof of meeting the conditions of Article 81(3) on the party claiming its benefit; and in Article 15(3), which allows the Commission to make written submissions in cases pending in national courts. It is also rumored that the Commission plans to introduce comprehensive private remedies legislation.⁸⁵ This rumor seems to be supported by the commissioning of the *Ashurst Study on the Conditions of Claims for Damages in Cases of Infringement of EC Competition Rules* (Ashurst Study).⁸⁶

⁸⁰ Press Release from the Commission, Competition: Commission Proposes Regulation that Extensively Amends System for Implementing Articles 81 and 82 of the Treaty (Sept. 27, 2000), IP/00/1064.

⁸¹ Council Regulation (EC) 1/2003 of 16 December 2002 on the Implementation of the Rules Laid Down in Articles 81 and 82 of the Treaty (OJ L 1, 04.012003, p.1).

⁸² Council Regulation 17/62 of 6 February 1962 implementing Articles 81 and 82 of the Treaty, as amended by Regulation No 59, by Regulation No 118/63/EEC and by Regulation (EEC) No 2822/71 (OJ 13, 21.2.1962,p.204/62).

⁸³ VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 206 (8th ed. 2004).

⁸⁴ See Press Release from the Commission, Competition: Commission Proposes Regulation that Extensively Amends System for Implementing Articles 81 and 82 of the Treaty *supra* note 80.

⁸⁵ Clifford A. Jones, *Private Enforcement in Europe: A Policy Analysis and Reality Check*, 27(1) W. COMP. 13, 14 (2004).

⁸⁶ See Ashurst, *Comparative Report*, in STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES (2004), at

http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf.

5.2 Substantive Remedies for Private Enforcement

In order to compel private parties to enforce the competition laws substantive remedies are of utter importance. Therefore, this section will examine which remedies community law allows private parties to invoke.

5.2.1 Nullity

As stated in Article 81 (2) of the EC Treaty, “[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void.” This proclaims that an anticompetitive agreement is void from the moment of formalization. However, in order to be nullified the agreement must be brought to the court’s attention by either a competition authority or a private party, since courts cannot initiate cases on their own. When the competition authority invokes Article 81(2) it acts with regards to the public interest, but when private parties invoke the article, they generally do so to get out of a contract.

Nullification according to Article 81(2) only catches the anticompetitive provisions in an agreement. The agreement as such will prevail, but without any illegal competitive restraints.⁸⁷ Even though Article 81(2) aims at preventing anticompetitive provisions in contracts, parties often invoke the Article in order to get out of an obligation when it gets too burdensome or unbeneficial. This might be the situation for a defendant in a contract liability case where the plaintiff claims specific performance of the contract or alleges its breach and claims damages. Such a defense is generally characterized as a *shield defense*.⁸⁸

When Article 81(2) works as a shield defense it does little to promote competition since the competitive harm often already has occurred. The shield defense rather promotes the pecuniary interest of a party that wants to get out of an – once beneficiary – anticompetitive agreement.⁸⁹

5.2.2 Compensation

Article 81 and 82 lacks any reference to compensation as a remedy for contracting parties, or third parties, who incur losses as a result of an anticompetitive agreement or conduct. Such an absence of regulation implies that relief through compensation has to be sought in national courts

⁸⁷ See Case 56/65, *Société La Technique Minière v. Maschinenbau Ulm*, [1966] E.C.R. 235, at 250.

⁸⁸ ASSIMAKIS P. KOMNINOS, *Introduction*, in EUROPEAN COMPETITION ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW xxvii (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003).

⁸⁹ *Id.*

with the support of domestic law. However, the jurisprudence of the ECJ suggests that a community-based remedy nonetheless exists.

5.2.2.1 National Legal Basis for Competition Damages

Obviously the possibilities of receiving compensation for antitrust damages vary from country to country; depending on the domestic law. The Ashurst Study offers some comparative insight to the possibility of compensation in different Member States.

In twelve Member States a specific statutory basis for national law based claims exists, while, thirteen Member States lack any such statutory provisions. However, in the thirteen states, which lack any statutory basis for private antitrust damage claims, a general legal basis is normally employed. The specific provisions are often very plain and thus normally tied to more general rules of substantive and procedural law.⁹⁰

In many countries the specific damages provisions apply both to claims based on national law and EC law. Specific legal basis for competition damages might also restrict the possibilities of bringing such claims. For instance, in Finland the specific provisions disallow consumers from bringing damage actions under the Finnish Competition Act. However, such action can instead – at least in theory – be brought under the general laws on damages.⁹¹

5.2.2.2 EC Legal Basis for Competition Damages

Since EC law lacks any explicit provision that allows claims for competition damages, an investigation into EC case-law has to be launched. Such an investigation into precedents naturally leads to the *Francovich*⁹² judgment, which deals with the issue of *state liability* in damages for breach of EC law.

5.2.2.2.1 The Francovich Case

In the *Francovich* case two Italian workers held the Italian government liable for wages which their employers could not pay due to insolvency. The basis of their legal claims was related to the Italian government's negligence to implement Directive 80/987, on the protection of employees in the event of their employer's insolvency. By neglecting to implement the Directive the State had become liable to pay the sums owed.

⁹⁰ Ashurst Study, *Comparative Report supra* note 75, at 29.

⁹¹ *Id.* at 29-30.

⁹² Joined Cases C-6/90 and 9/90, *Francovich and Bonifaci v. Italy*, [1991] E.C.R. I-5357.

The ECJ declared that the issue of the case revolved around the question of state liability for harm resulting from breach of obligation under EC law. Further elaborating, the Court proclaimed that, national courts “must ensure that . . . [community] rules have full effect and protect the rights which they confer on individuals”.⁹³ In the case at hand, Community rules would be impaired and the rights of individuals weakened, unless individuals were able to claim compensation.⁹⁴ The Court found it inherent in the system of the Treaty that, “Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible.”⁹⁵ Furthermore, Member States are required to take all appropriate measures to ensure fulfillment of their obligations under Community law, according to Article 10.

5.2.2.2 The Brasserie Du Pêcheur Case

While the Francovich case established the principle of state liability, it still left many questions regarding the scope of the liability unanswered. This led the Court to revisit the issue of state liability in the *Brasserie Du Pêcheur* case.⁹⁶

The Brasserie case arose from two separate breaches of EC law, one in the UK and one in Germany. The UK breach involved the conditions for registration as a British vessel, while the German breach involved Germany’s beer purity laws. In both cases the injured parties sued the government for damages.

The German government argued that compensation should not be available for breach of directly effective EC law, since national remedies would be available for such.

The Court rejected the German argument and declared “the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty”.⁹⁷ In the view of the Court, Community law includes a general right to reparation when a right under EC law is infringed. The Court especially stressed its own competence to interpret the Treaty and to distinguish the broad principle of Community law; such as the principle of state liability.⁹⁸

⁹³ *Id.* at para. 32.

⁹⁴ The Court is adhering to the principle of effectiveness in its line of arguments to justify a right to reparation.

⁹⁵ Joined Cases C-6/90 and 9/90, *Francovich and Bonifaci v. Italy*, [1991] E.C.R. I-5357, para. 37.

⁹⁶ Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Germany, and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others*, [1996] E.C.R. I-1029.

⁹⁷ *Id.* at para. 20.

⁹⁸ *See id.* at para. 27.

In concurrence with the Francovich case, the Court referred to the principle of effectiveness and Article 10 as the foundation for the right to reparation. But to further underpin the idea of reparation the Court also drew support from Article 288 on the Community's liability and concluded that, "[t]he protection of the rights which individuals derive from Community law cannot vary depending whether a national authority or a Community authority is responsible for the damage."⁹⁹

5.2.2.2.3 The Banks Case

Whereas the Francovich and Brasserie case established the principle of state liability for breaches of EC law, the question of horizontal liability between private parties remained unanswered. The Court was, however, posed with that question in a reference for a preliminary ruling in the *Banks v. British Coal* case¹⁰⁰.

The controversy in the Banks case involved conditions under which British Coal granted licenses for the extraction of coal. Since British Coal operated under a state monopoly, Banks contended that the royalty licenses were set excessively high and, that coal extracted under delivery licenses were bought at a too low price. As a result of this, Banks brought an action for damages before the British High Court of Justice.¹⁰¹ The High Court of Justice extended a request for a preliminary ruling and asked, among other questions, whether "the national court [had] . . . the power and/or the obligation under Community law to award damages in respect of breach of the ECSC and EEC Treaties for loss sustained as a result of such breach?"¹⁰²

The ECJ unfortunately left the question without further elaboration, since the relevant provisions in the ECSC Treaty fell under the jurisdiction of the Commission and hence could not be directly enforced by private parties. In other words, the provisions lacked direct effect.¹⁰³ However, the Advocate General Van Gerven delivered some interesting thoughts on the subject in his opinion.¹⁰⁴

According to Advocate General Gerven the general basis established by the Francovich judgment also extends to actions by private parties against other private parties. So, if one private party violates a provision of Community law and thereby causing loss and damage to another private party, the latter may claim compensation.¹⁰⁵ As stated by the Advocate General, "the full effect of Community law would be impaired if the [injured] . . . individual

⁹⁹ *Id.* at para 42.

¹⁰⁰ Case C-128/92, H.J. Banks & Co. Ltd v. British Coal Corporation, [1994] E.C.R I-1209.

¹⁰¹ *Id.* at para. 3-6.

¹⁰² *Id.* at para 7.

¹⁰³ *Id.* at para. 15-21.

¹⁰⁴ See Opinion of Mr Advocate General Van Gerven delivered on 27 October 1993, Case C-128/92, H.J. Banks & Co. Ltd v. British Coal Corporation, [1994]E.C.R I-1209.

¹⁰⁵ *Id.* at para 40-41.

or undertaking did not have the possibility of obtaining reparation from the party who can be held responsible for the breach of Community law”.¹⁰⁶

5.2.2.2.4 The Courage Case

The matter of horizontal liability for breaches of EC law once again came before the ECJ with the case *Courage v. Crehan*¹⁰⁷.

The dispute of the case arose from a beer tie agreement which the Inntrepreneur Estates Ltd (IEL) Company imposed on their tenants. Every tenant had to buy a fixed minimum quantity of beer at a certain price for Courage - a beer brewery which owned fifty percent of IEL. Mr. Crehan, a tenant of IEL, brought proceedings against Courage and argued that the beer tie was contrary to Article 81. Mr. Crehan also sued for damages, since Courage had sold beer at a substantially lower price to customers who were not bound by the beer tie. It should, however, be noted that Mr. Crehan instigated his suit as counter-claim after Courage had claimed recovery for unpaid deliveries of beer.¹⁰⁸ The case came before the Court of Appeal of England and Wales, which found it necessary to ask for a preliminary ruling by the ECJ.

Four questions were referred to the ECJ for a preliminary ruling;

1. Is Article 81 EC 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 of the other contracting party?
2. If the answerer 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 necessary step to recovery of damages, be allowed as consistent with Community law?
4. If the answerer to Question 3 is that in some circumstances such a rule may be inconsistent with

¹⁰⁶ *Id.* at para 43.

¹⁰⁷ Case C-453/99, *Courage v. Crehan Ltd.*, [2001]E.C.R I-6314.

¹⁰⁸ Opinion of Mr Advocate General Misho delivered on 22 March 2001, Case C-453/99, *Courage v. Crehan Ltd.*, [2001]E.C.R I-6314, para. 2-9.

Community law, what circumstances should the national court take into consideration?¹⁰⁹

When considering the questions the Court found it appropriate to answer the first, second, and third question together. The gist of those questions revolves around the issue of whether a party can obtain compensation for a loss which results from a contract clause contrary to Article 81; and if Community law, therefore, precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages.¹¹⁰

The Court started by declaring that the Treaty created its own legal order, which not only applies to Member States, but also to individuals. Just as the legal order imposes burdens upon individuals, it also confers rights to them.¹¹¹

Turning to the question of nullity and Article 81, the Court elucidated that Article 81 and 82 produce direct effects in relation between individuals and create rights for individuals which the courts must safeguard.¹¹² It therefore follows that “any individual can rely on a breach of Article 85(1) [now Article 81(1)] of the Treaty before national courts even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.”¹¹³ The full effectiveness of Article 81 would be put at risk if individuals were unable to claim damages for loss caused by a contract or a conduct liable to restrict or distort competition. Actions for damages before national courts contribute to the maintenance of effective competition within the Community, and should therefore be allowed.¹¹⁴

However, since Community law lacks detailed procedural rules regarding damages actions, national laws have to supplement Community law. National courts are therefore allowed to ensure that the rights guaranteed by Community law do not entail the unjust enrichment of those who enjoy them.¹¹⁵

In conclusion the Court provided the following answers to the questions in the reference:

1. A party to a contract liable to restrict or distort competition within the meaning of Article 85 of the EC Treaty (now Article 81 EC) can rely on the breach of that article to obtain relief from the other contracting party.

¹⁰⁹ Opinion of Mr Advocate General Mischo delivered on 22 March 2001, Case C-453/99, *Courage v. Crehan Ltd.*, [2001] E.C.R I-6314, sec. II.

¹¹⁰ Case C-453/99, *Courage v. Crehan Ltd.*, [2001] E.C.R I-6314, para. 17.

¹¹¹ *Id.* at para. 19.

¹¹² *Id.* at para. 23.

¹¹³ *Id.* at para. 24.

¹¹⁴ *Id.* at para. 26-28.

¹¹⁵ *Id.* at para. 29-30.

2. Article 85 [now Article 81] of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages from loss caused by performance of that contract on the sole ground that the claimant is a party to that contract.
3. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.¹¹⁶

5.2.2.2.5 Conclusions from Case Law

Damage awards for breaches of EC law was not a self-evident remedy before the ECJ started examining the institution. The Treaty lacks any provision which regulates liability for breaches of EC law, but the Court, nonetheless, distinguished such a principle as an integrate part of Community law.

With the Francovich case the Court established the principle of state liability as inherent in the system of the Treaty.¹¹⁷ By declaring the remedy as an inherent part of the Treaty, the Court implied that it merely discovered something that already existed within EC law. However, it could instead be argued that the Court created a completely new remedy, since no actual support for damages exists in the Treaty text. Such an action would directly contrast the early *Rewe-Handelsgesellschaft* statement which declared that the Treaty did not intend to create new remedies to ensure the observance of Community law.¹¹⁸

In the second state liability case, *Brasserie Du Pêcheur*, the Court went even further to legitimate the principle of state liability. Besides the references made in Francovich to effectiveness and Article 10, the Court now also referred to the context of Article 288 on the Community's liability. Through this reference a connection was made with general principles common to the Member States. This further established the notion that the principle of state liability rather derived from well-established principles of the national legal orders, than from the ECJ's own agenda.¹¹⁹

¹¹⁶ *Id.* at section Ruling.

¹¹⁷ See Joined Cases C-6/90 and 9/90, *Francovich and Bonifaci v. Italy*, [1991] E.C.R. I-5357, para. 35.

¹¹⁸ See Case 158/80, *Rewe-Handelsgesellschaft Nord mbH v. Hauptzollamt Kiel*, [1981] E.C.R. 1805, para. 44.

¹¹⁹ See *CRAIG & DE BÚRCA*, *supra* note 7, at 262.

On the issue of horizontal liability, both *Francovich* and *Brasserie* implied that the principle of liability for breaches of EC law might extend beyond states and also apply to private parties. The Court stressed in *Francovich* that private subjects needed to be able to claim damages in order to protect their rights under EC law.¹²⁰ With the *Courage* ruling the issue was finally settled. The Court confirmed that private parties could seek damages from other private parties for breaches of EC law competition law which they were responsible for.

5.2.3 Restitution

The Remedy of restitution generally involves the return of unduly transferred corporeal property and the repayment of unduly paid money. In some case it also involves compensation where the defendant of unduly paid money has been enriched other than by the transfer of property or payment of money.¹²¹ EC case-law has referred to restitution as “the recovery of sums” and recognized it as a Community remedy.¹²² All EC cases involving restitution has either concerned recoveries from public authorities of monies unduly paid by private subjects, or recoveries by public authorities of monies unduly granted to private subjects.¹²³

5.2.4 Interim Relief

The necessity of interim relief in order to preserve Community rights of private parties was recognized by the ECJ in *Factortame I*.¹²⁴ The Court declared that the full effectiveness of Community law demanded the existence of interim relief as a remedy under Community law.

In order to receive interim relief certain conditions have to be fulfilled. These conditions were articulated in *Zuckerfabrik Süderdithmarschen*¹²⁵ with regard to the application of a Community regulation. First, serious doubt must exist as to the validity of the Community measure and the suspension of application must retain the character of an interim measure. Second, the grant of relief must be a matter of urgency intended to avoid

¹²⁰ See Joined Cases C-6/90 and 9/90, *Francovich and Bonifaci v. Italy*, [1991] E.C.R. I-5357, para. 33.

¹²¹ WALTER van GERVEN, *Substantive Remedies For the Private Enforcement of EC Antitrust Rules Befor National Courts*, in EUROPEAN COMPETITION ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 63 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003).

¹²² See for instance Case C-188/95, *Fantask A/S v. Industriministeriet* E.C.R. [1997] I-6783.

¹²³ van GREVEN *supra* note 121, at 63.

¹²⁴ See Case C-213/89, *The Queen v. Secretary of State for Transportation, ex parte: Factortame Ltd. and Others*, [1990] E.C.R. I-2433.

¹²⁵ Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, [1990] E.C.R. I-415.

serious and irreparable damage to the party seeking the relief, and must take into account the interests the Community.¹²⁶

¹²⁶ *Id.* at Summary para1.

6 Substantial Issues of Private Enforcement

The conclusion by the Court in the *Courage* case was a breakthrough *in principle*, which allowed private parties to seek compensation for damages incurred as a result of unlawful anti-competitive behavior by other private parties. However, the *substantial questions* of private liability were left for national courts to deal with.

This section will therefore highlight some substantial matters of the principle.

6.1 Jurisdiction

Jurisdictional issues should generally not produce any problems within the European Community due to the *Brussels Regulation*¹²⁷. This regulation indicates which Member State's court commands jurisdiction to rule on competition-based damages claims.

The general rule of the Brussels Regulation prescribes that a person domiciled in a Member State must be sued in the courts of that Member State.¹²⁸ However, the Regulation also offers some alternatives to this rule by way of *special jurisdiction*. For instance, in tort matters, a person may be sued in the place where the harmful event occurred.¹²⁹

In some cases, a court of a Member State commands *exclusive jurisdiction*. For instance, exclusive jurisdiction exists for companies domiciled within a Member State's territory.¹³⁰

A national court may also command jurisdiction over claims brought by foreign subject, if those claims are sufficiently connected to claims falling under the jurisdiction of the national court by virtue of the defendant's domicile.¹³¹

¹²⁷ Council Regulation (EC) 44/2001 of 22 December 2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L 012 , 16/01/2001 p.1).

¹²⁸ *See id.* Article 2(1).

¹²⁹ *See id.* Article 5(3).

¹³⁰ *See id.* Article 22(2).

¹³¹ *See id.* Article 6(1).

6.2 Standing

The issue of *standing* presents a more difficult problem within the European Community since no legal harmonization has been effectuated. However, most jurisdictions qualify issues of standing according to some requirements such as, for instance, affectation of the rights or interests of the plaintiff, or according to a genuine grievance standard.¹³²

Different standards of qualifying standing result in unequal opportunity under EC law. For instance, if one Member State's court only grants standing to direct purchasers, while another Member State's court grants standing to both direct and indirect purchasers; the latter obviously allows greater opportunity to sue for damages.¹³³

6.3 Burden of Proof

One of the few procedural issues regulated by EC law is the burden of proof with regards to proving an infringement of Article 81 or 82. As stated in Article 2 of Regulation 1/2003:

In any national or Community proceedings for the application of Article 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) of Article 82 shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) shall bear the burden of proving that the conditions of that paragraph are fulfilled.

On this matter uniformity clearly exists within the Community.

6.4 Means of Proof

The burden of proof rests on the plaintiff in infringement cases, as established above (8.3). However, crucial evidence will often be in the hands of the other side or third parties. Such evidence will therefore be hard to obtain, especially since private parties lack the investigative and injunctive powers that national enforcement authorities generally enjoy. This reality makes the plaintiff very dependant of official help in the quest for evidence.¹³⁴

¹³² Ashurst, *Comparative Report supra* note 75, at 38.

¹³³ See Donncadh Woods, *Private Enforcement of Antitrust Rules – Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431, 448-450 (2004).

¹³⁴ FRANCIS G. JACOBS & THOMAS DEISENHOFER, *Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective*, in EUROPEAN COMPETITION ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 193 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003).

However, only three Member States, the U.K., Cyprus and Ireland, offer some form of pre-trial discovery; i.e. the compulsory disclosure of all documents relevant to the case. In other Member States, requests for documents and other evidence generally have to go through the judge and be somewhat specified.¹³⁵

6.5 Standard of Proof

Most Member States lack an established abstract definition of the standard of proof such as, for instance, the generally known “beyond reasonable doubt”. Countries that do have an abstract definition use terms as “probability”, “balance of probabilities”, “high degree of probability”, “no reasonable or serious doubt” and “certainty” to describe the standard of proof.¹³⁶

A standard of proof of course conveys very little in abstract. In order to fully appreciate a specific standard it has to be examined in light of a specific case and in light of the facts of that case.

6.6 Conclusions

When canvassing different substantial issues related to private enforcement actions, it becomes very clear that private damages cannot be obtained under equal conditions within the EC. National law differs on so many different accounts, that similar damages actions in different Member States may render different outcomes. This is highly undesirable, since Community law should offer equal opportunity despite Member State. It also illustrates the impact of procedural rules. For instance, if one Member State denies a certain group standing, it completely circumvents any prospects of damages for this group. Procedural rules should hence offer equal opportunity in order to guarantee the uniform application of EC law.

¹³⁵ See Ashurst, *Comparative Report supra* note 75, at 61-65.

¹³⁶ *Id.* at 55.

7 Calculating Damages

The issue of calculating damages has been investigated by the law firm Ashurst, pursuant to a tender by the Commission. As a result of the investigation a report was published, which analyzed the economic models available for calculating of damages.¹³⁷

This section will examine the different economic models available to national courts when calculating damages. Damages calculation will be discussed in the context of cartels, in order to simplify the discussion. It will also be assumed that all damage claims are brought by *direct* purchasers.

7.1 Calculating Damages in Theory

When assessing damages in collusion cases it generally comes down to the difference between:

- (a) the plaintiff's actual position – i.e. the economic situation of the plaintiff given that an antitrust violation has occurred (for example, the profit/losses made during the period when customers faced inflated prices for a product due to a cartel); and
- (b) the plaintiff's position in the hypothetical scenario where the illegal act has not occurred but conditions are otherwise similar – i.e. its “but for” conditions (for example, the profits/losses that would have been made in the absence of the cartel).¹³⁸

An economic methodology has to be employed in order to calculate this difference. Several methods exist, namely:

- (a) the “before-and-after” method;
- (b) the “yardstick” approach;
- (c) the cost based approach;

¹³⁷ See Ashurst, *Analysis of Economic Models For the Calculation of Damages*, in STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES (2004), at http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/economic_report_clean_en.pdf.

¹³⁸ *Id.* at 10.

- (d) price prediction which uses econometric modeling to seek to predict prices on the basis of historical determinants of prices or yardstick comparisons with other markets; and
- (e) theoretic modeling (simulation) of oligopoly, with econometric modeling and other data being used to estimate key model parameters.¹³⁹

All these methods should be seen as complementary in the sense that more than one of them may be considered in case to see if they produce the same estimates.¹⁴⁰

7.1.1 The “Before-and-After” Method

This method involves comparing prices during the period of the alleged cartel with the prices in the period before and/or after the alleged cartel. Such a comparison provides a reasonable approximation of price levels in the absence of the cartel.¹⁴¹

The advantages of this method include simplicity in application and visual transparency. For instance, a graph can easily demonstrate the difference in price before, during, and after the cartel. However, the pitfalls of the methods should not be overlooked. First, the benchmark period, which demonstrates “normal” pricing, should be chosen with great consideration. Ideally, the period should capture long-run equilibrium prices, averaged over a fairly long period. Secondly, the method assumes that benchmark prices would have been constant during the period of the cartel. This might be hard to justify if the cartel exists over a period of some time, since supply and demand fluctuations naturally affect price. Thirdly, different customers may well be affected differently by the cartel prices, depending on factors such as, for instance, bargaining power. This should also be considered when calculating damages by, for example, dividing customers into specific groups based on how the cartel price affected them.¹⁴²

7.1.2 The “Yardstick” Approach

This approach involves comparing prices in the market where a cartel operates with a similar market where prices are unaffected by the cartel. Such a comparison can be done by looking at identical product markets in other geographic areas; or different product markets in the same geographic areas; or both different product markets in different geographic areas.¹⁴³

The main problem with the yardstick approach involves finding a market with similar conditions as the alleged cartel market. If the yardstick market

¹³⁹ *Id.* at 17.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 17-18.

¹⁴³ *Id.* at 19.

differs too much from the alleged cartel market, it might be hard to isolate the effects of the cartel.¹⁴⁴

7.1.3 Cost Based Approach

A different approach of calculating damages involves obtaining information on the average unit cost of production from the cartel members and estimating a competitive price by adding a profit margin. The difference between the cartel price and the competitive price indicates the damage done to the customer.¹⁴⁵

All economics models simplify in order to create manageable methods of calculation. In the case of the cost based approach, oversimplification appears as its greatest drawback. Generally the method oversimplifies the factors affecting prices in the absence of a cartel. It assumes that the competitive costs and the price-cost margin would be constant for the period of the cartel. Furthermore, assessing the competitive price is not an easy task since profit margins depend on several different factors. A competitive price might not at all be the appropriate benchmark, as for example, in an oligopolistic market.¹⁴⁶

7.1.4 Price Prediction

A more sophisticated approach towards the calculation of damages involves econometric modeling and other data to predict what prices would have been if not for the cartel. The calculation takes into account past determinants of the market price in order to make the reconstruction more accurate.¹⁴⁷

The price prediction model enables, at least theoretically, control over other factors which affect price over a period of time. This makes it easier to isolate the actual effect of the illegal collusion. A statistical model is developed for that purpose, and hence examines the relationship between price, and supply and demand factors which affect price. The statistical model ultimately produces an estimate of the average price based on the various factors employed in the model.¹⁴⁸

One of the great drawbacks with the price prediction model involves its complexity. Generally, the model requires a high level of expertise in economics. The model also requires a lot of statistical data, and time to process and evaluate the data.¹⁴⁹

¹⁴⁴ *Id.* at 19.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 20-21.

¹⁴⁷ *Id.* at 22.

¹⁴⁸ *Id.* 22.

¹⁴⁹ *See id.* at 21-24.

7.1.5 Theoretic Modelling

Theoretic modeling involves using simulations in order to predict certain effects in the market. Simulations have especially been used to analyze the effect of mergers on price and output in relevant markets. This is achieved by inputting estimates of elasticities of demand and other variables such as marginal costs, price and quantity into a model of how firms compete and how they respond to rivals' competitive decisions. An adequate model not only illuminates the significance of individual competitors, but also the whole competitive process in the industry.¹⁵⁰

Theoretic modeling is associated with great difficulties and requires a great degree of knowledge in econometrics. This of course limits the use of the models. Theoretic models can also be criticized for making certain assumptions about behavior and hence creating *static* economic environments. Such static economic environments are less suited to explain how firms determine *dynamic* competitive responses to their rivals' competitive initiatives.

7.2 Calculating Damages in Practice

Theories are often products of the academic world and thus not always useful in real-life application. A certain theory might produce excellent results but still be useless. This might, for instance, be the case if the theory is too complex for judges and juries to understand.

The *Crehan v. Inntrepreneur* case gives some insight into how damages can be calculated in a private enforcement situation and therefore serves as an excellent example.

7.2.1 The Damage Calculation in *Crehan v. Inntrepreneur*

The British Court of Appeal concluded in *Crehan v. Inntrepreneur*¹⁵¹ that Mr. Crehan should be awarded damages under two accounts. First, for direct losses incurred as a result of paying too much for the beer sold in the two pubs leased from Inntrepreneur. Second, for losses suffered from giving up the two loss-making leases.¹⁵²

Under the first account, the Court of Appeal assumed that in the absence of the beer tie Mr. Crehan would have charged lower prices and consequently sold more beer. So, in addition to the losses which Mr. Crehan suffered

¹⁵⁰ *Id.* at 24.

¹⁵¹ *Crehan v. Inntrepreneur Pub Company* CPC [2004] E.C.C. 28.

¹⁵² *Crehan v. Inntrepreneur Pub Company* CPC [2004] E.C.C. 28, at para. 172.

from paying a higher beer price, he also forewent profits which he would have earned by selling at a lower price. The Court of Appeal therefore awarded Mr. Crehan £57,121 in damages for actual losses and foregone profits.¹⁵³

Under the second account the Court addressed the value of the leases, if they would have been sold without the beer tie, instead of given up. According to experts' estimates, the two pubs could have been sold for 2.5 times the latest estimated annual profit as calculated without the restrictive tie. In addition to this, a premium value should be added for selling the two pubs together. In total, the court awarded £74,206 in damages under this account.¹⁵⁴

7.3 Conclusions

As shown above (8.1) several different theories of calculating damages exist. Some are rather easy to apply, others more complex. Even though experts generally provide the calculation, the courts have to validate them. Generally the court confines itself to appraising whether the conclusions of the expert are reasonable and not contradicted by any statements or documents provided by the parties. However, the fact that judges and juries have to rely on economists, involves a patent risk of expert rule.

In the Crehan case the British court assessed the damages by looking at what the situation would have been *if not* for the tie. The Court concluded that Mr. Crehan would have paid less for the beer and thus also sold it for less. In addition to this, the Court went one step further and concluded that by selling the beer at cheaper price, Mr. Crehan would consequently have sold more beer. So, the beer tie also resulted in the loss of potential profits.

When assessing the actual damages, the Court applied the “yardstick” method by looking at what other untied customers had to pay for the same beer. This comparison illustrated what the price would have been if not for the tie, and thus also the loss that Mr. Crehan made on every beer purchase. The other part of the assessment involved the loss of profits. In this matter experts provided calculation of how many more barrels of beer Mr. Crehan would have sold under the lower untied price. Together these two counts provided the basis of the damage award under the first account.

The Crehan ruling confirms that the role of the court, when assessing damages, comes down to deciding the reasonableness of different assumptions offered by expert witnesses.¹⁵⁵ For instance, was it reasonable that Mr. Crehan would have made profits at a certain suggested level if not for the tie? In other words, different courts might very well come to different conclusions regarding the damages. The Crehan case also

¹⁵³ *Id.* at para 172 and 183.

¹⁵⁴ *Id.* at para. 182.

¹⁵⁵ *See Crehan v. Inntrepreneur Pub Company CPC [2004] E.C.C. 8, at para 271 et seq.*

illustrates this, since the Court of Appeal awarded £131,336 plus interest in damages, while the High Court only wanted to award £1,311,500 in damages.¹⁵⁶

¹⁵⁶ The huge difference in damages was mainly the result of different opinions about the timeframe under which damages should be calculated; *see* Ashurst, *Analysis of Economic Models For the Calculation of Damages* *supra* note 137, at 48.

8 Antitrust Enforcement in the U.S.

The American experience of private antitrust enforcement offers a great deal of insight into the institute of private antitrust actions. However, a comparative examination between the European and U.S. system would be futile since the European system is still very underdeveloped. Instead the U.S. system should be examined in order to gain a better understanding of how a system of private enforcement actually works. Such an examination will illuminate the benefits and the disadvantages of the system and hence be of great help in the process of developing the European system.

8.1 The U.S. Antitrust Laws

After the Civil War (1865) the industrialization process in the U.S. excelled rapidly. By the 1880s many industries experienced problem related to overproduction. This overproduction led industries to consolidated or cartelized in order to control output, price, and ultimately competition. However, cartels turned out to be weak and vulnerable since members would often cheated on the cartel to profit even more. If one member of a cartel cheats the whole purpose of the cartel falls. To overcome the weak structure of the cartels and to diminish the incentives to cheat, companies started to co-operate trough trusts.¹⁵⁷

A trust was a tighter form of cooperation than a cartel. It involved the participating companies turning over their stock to a board of trustees in exchange for trust certificates to an equivalent amount. Through this arrangement, the trustees gained full control over the participating companies and could thus prevent them from cheating. The first and best known trust was the Standard Oil Trust (1882), but many others trusts soon followed.¹⁵⁸

The term “trust” ultimately became synonymous with any type of monopoly. Therefore, when Congress finally passed legislation against anticompetitive behavior the act was naturally named the Sherman Anti-Trust Act, and more generally denoted as the antitrust law.¹⁵⁹

¹⁵⁷ CLIFFORD A. JONES *supra* note 76, at 7.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

8.1.1 The Sherman Act

The Sherman Act was passed in 1890 and included seven sections. The most important of these were section one and two. Section 1, as amended, deals with illegal collusions and provides that:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.¹⁶⁰

Section 2, as amended, addresses the issue of monopoly and provides that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.¹⁶¹

On the issue of enforcement section 7 in the original Sherman Act specifically provided for a right of private enforcement.¹⁶² This section has now been replaced by section 4 of the Clayton Act. As amended this section provides in part that:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.¹⁶³

8.1.2 The Clayton Act

The Clayton Act was passed in 1914 as a response to the worries that the judiciary had deprived the Sherman Act of much of its efficiency by

¹⁶⁰ Sherman Act, 15 USC § 1 (2004).

¹⁶¹ *Id.* at § 2.

¹⁶² See Sherman Act, ch. 647, § 15, 26 Stat. 210, (1890).

¹⁶³ Clayton Act 15 USC § 15 (2004).

introducing the *rule of reason*. This judicial standard went against the words of the Sherman Act, section 1 -which deemed every restraint as illegal - and only disbarred *unreasonable* restraints.¹⁶⁴

By passing the Clayton Act, the legislature implicitly hoped to circumvent the *rule of reason* and prevent judges from allowing too many *reasonable* combinations. The Act itself identifies certain practices of particular antitrust concern and subjects them to a less demanding standard of liability than that of the Sherman Act; which talks about “restraint of trade” or “monopolization”.¹⁶⁵ This standard of liability prohibits practices that “substantially lessen competition or tend to create a monopoly in any line of commerce.”¹⁶⁶ Special practices dealt with by the Act involve price discrimination, tying or exclusive dealing contracts, mergers and acquisitions, and interlocking corporate directorates.

8.2 Enforcement of the U.S. Antitrust Laws

The U.S. antitrust enforcement is allocated to a number of different parties, both public and private. Three governmental bodies enjoy the prerogative of enforcing the federal antitrust laws; namely, the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the Attorneys General of the various states. The different enforcement agencies operate under somewhat overlapping jurisdictions. For instance, the Antitrust Division of the DOJ shares the enforcement responsibility of the Clayton Act with the FTC; and in some cases with State Attorneys General.¹⁶⁷ Various opinions about the overlapping enforcement system exist. Some argue that the system promotes competition between the various agencies and therefore also efficiency. While others argue that the system instead promotes inconsistency and an unnecessary workload.¹⁶⁸

Private parties may also enforce the antitrust laws, as regulated in Clayton Act section 4.¹⁶⁹ The Act creates a large incentive for private actions by allowing private parties to sue for treble damages and lawyer fees. Statistical information illustrates that private actions represent at least 90 percent of all antitrust actions in the U.S.¹⁷⁰

¹⁶⁴ KEITH N. HYLTON, ANTITRUST LAW ECONOMIC THEORY & COMMON LAW EVOLUTION 39 (2003).

¹⁶⁵ CLIFFORD A. JONES *supra* note 76, at 10.

¹⁶⁶ *See for instance* Clayton Act 15 USC § 14 (1982).

¹⁶⁷ KEITH N. HYLTON, *supra* note 164, at 47-49.

¹⁶⁸ Barry E. Hawk & James D. Veltrop, *Dual Antitrust Enforcement in the United States: positive or negative lessons for the European Community*, in PROCEDURE AND ENFORCEMENT IN THE E.C. AND U.S. COMPETITION LAW 21 *et seq.* (Alison MacDonell & Piet Jan Slot eds., 1993).

¹⁶⁹ *See* Clayton Act 15 USC § 15 (2004).

¹⁷⁰ *See* Clifford A. Jones, *Exporting Antitrust Courtrooms to the World: Private Enforcement in a Global Market*, 16 LOY. CONSUMER L. REV. 409, 411 (2004).

8.2.1 Special features of Private Enforcement in the U.S.

The U.S. antitrust system not only *allows* private parties to bring damages suits, it also *enables* them to do so. Different special legal features create incentives that encourage private parties to actually bring private antitrust suits. These special legal features include class actions, contingency fees, treble damages, pretrial discovery, and the cost of losing a lawsuit.¹⁷¹

8.2.1.1 Class Actions

In some cases private parties may refrain from filing suits for damages even though they might have a legitimate claim. This often occurs when the prospective damage award falls short of the cost and effort to litigate. However, the cost/benefits analysis significantly changes if the individual joins other individuals in the same situation to bring a *class action* suit. This allows cost sharing and a minimal amount of effort.¹⁷²

Class action suits in antitrust cases appear to serve a dual purpose. First, they provide compensation for a large number of antitrust victims who have such a small individual claim that they would go uncompensated otherwise. Second, they may provide a powerful deterrent effect, which in the long run benefits all consumers.¹⁷³

Despite the benefits of class actions, the institution remains controversial. Especially in light of cases where lawyers receive high fees, while the class action members receive very little. For instance, in *In re Domestic Air Transportation Antitrust Litigation* the lawyers received 14.3 million dollars plus expenses after settling the case, while the class action members received flight coupons.¹⁷⁴

The stakes are often high in class action suits and lawyers stand to profit a lot from them. This might tempt some lawyers to launch frivolous lawsuits, if for no other reason to force a settlement. However, what enriches the lawyer not always enriches the clients. Basically it all comes down to a classical agent/principle problem.¹⁷⁵

¹⁷¹ WOODS *supra* note 133, at 436.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See *In re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297 (N.D. Ga. 1993).

¹⁷⁵ WOODS *supra* note 133, at 436.

8.2.1.2 Contingency Fees

Class actions are commonly mentioned together with *contingency fees*. By accepting a case on a contingency basis a lawyers agrees to get paid depending on the success of the case. If the case fails, he gets nothing, but if it succeeds he gets a percentage of the damages award. The contingency fee transferees the risk of spending money on a trial, and receiving noting, from the plaintiff to the law firm. Law firms will generally accept such a risk with the prospect of receiving a piece of a large damages award.¹⁷⁶

However, attorney fees are often disputed on the basis of Section 4 of the Clayton Act which provides for an award of “reasonable” attorney fees.¹⁷⁷ For instance, in the *In re Domestic Air Transportation Antitrust Litigation* the attorneys requested fees of 24 million dollars but were only granted 14.3 million dollars plus expenses by the court.¹⁷⁸

8.2.1.3 Treble Damages

As provided for in Section 4 of the Clayton Act, antitrust injuries shall be compensates by “threefold the damages” sustained.¹⁷⁹ The reason for treble damages is, in part, to punish for past antitrust violation and, in part, to deter future antitrust violations.¹⁸⁰ Whether treble damages actually accomplices this, is a much contested issue. Some scholars argue that treble damages, in the absence of prejudgment interest¹⁸¹, do not amount to more than single damages.¹⁸²

8.2.1.4 Pre-trial Discovery

Evidence to prove a violation of the antitrust laws can be hard to obtain for an individual. U.S. law therefore enables private parties in civil procedures to engage in *pre-trial discover*.

Pre-trial discovery works more or less independently from the judge and allows the parties to investigate the relevant facts of the case. This may, for instance, be done by holding witness examinations under oat or by requesting documents from the other party. If a party refuses to produce a requested document, or destroys documents, a jail sentence of maximum five years may be imposed for contempt of court.

¹⁷⁶ *Id.*

¹⁷⁷ Clayton Act 15 USC § 15 (2004).

¹⁷⁸ *See See In re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297, 348-351 (N.D. Ga. 1993).

¹⁷⁹ Clayton Act 15 USC § 15 (2004).

¹⁸⁰ WOODS *supra* note 133, at 437.

¹⁸¹ Prejudgment interest is the interest on damages from the time of injury to the date of judgment.

¹⁸² *See for instance Robert H. Lande, Are Antitrust “Treble” Damages Really Single Damages*, 54 OHIO STATE L.J. 115 (1993).

Pre-trial discovery has been criticized as it can be misused by private parties to go on so called “fishing expeditions” in order to see if a private action could be successful at all.¹⁸³ Discoveries can also be very time consuming and costly. For instance, the pre-trial discovery in *Zenith Radio Corp. v. Matsushita Electric Industrial Co*¹⁸⁴ generated millions of documents.¹⁸⁵

8.2.1.5 The Cost of Losing a Lawsuit

The price of losing a law lawsuit in the U.S. is minimal in the sense that the costs of the defendant do not have to be reimbursed by the plaintiff even if the plaintiff loses the case.¹⁸⁶

8.3 Conclusions

U.S. antitrust enforcement depends on private parties to bring private antitrust suits for damages. The whole system was designed with private enforcement in mind and therefore includes incentives such as treble damages. With a tradition of private enforcement since the enactment of the Sherman Act, the system naturally functions very well and benefits from past experiences.

The European Community can obviously learn a lot from the American experience, both when it comes to good solutions and bad ones. What the European system generally lacks are some of the special features which have enabled private enforcement actions to thrive in the U.S. However, a great interest in private enforcement exists within the Community, so such features might not be fare away.

¹⁸³ See Charles W. Sorenson Jr., *Disclosure Under Federal Rule of Civil Procedure 26(A) – ‘Much Ado About Nothing?’*, 46 HASTINGS L.J. 679, 697 (1995).

¹⁸⁴ *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F.Supp 866 (1981).

¹⁸⁵ See Thomas C. Bradley, *Some Limits on the Judicial Power to Restrict Dissemination of Discovery*, 44 MAINE L. REV. 417, 441 (1992).

¹⁸⁶ Wouter P.J. Wils *supra* note 8, at 476.

9 Final Concluding Remarks

Antitrust enforcement in Europe has generally been regarded as a fiscal matter and as such been controlled by the Commission and National Competition Authorities. However, the recent interest in private enforcement conveys the emergence of a new enforcement paradigm. This paradigm involves the notion of private parties as enforcers of competition law. Private enforcement promotes individual freedom and market competition and thus also corresponds with the broader liberal goals of the Community.

The designated role of private enforcement is to complement public enforcement within the EC and not to replace it. This appears as a sound policy since public and private enforcement actions are brought for different reasons.

While public actions aim at enforcing the competition laws with the public good in mind, private actions instead aim at promoting purely individual interests. Obviously, private parties lack a vested interest in enforcing the competition laws. So, private enforcement actually *only occurs* as a side-effect of private damages suits in competition cases. This suggests that only some cases will trigger private enforcement actions, namely, the ones that offer prospects of individual monetary gains. Will this present a problem in the EC enforcement system?

The answerer to this question is no, for two reasons. First, private enforcement still remains complementary to public enforcement and probably will, if not always, for a very long time. This enables public enforcement agencies to bring antitrust suits which private parties lack the incentive to bring. Such public suits will guarantee continued education, deterrence, and clarification of the law when socially necessary. Second, no indications of downsizing the public enforcement scheme exist. So, if anything private enforcement should instead result in more antitrust enforcement. This of course prods the question whether more antitrust enforcement actually is desirable and beneficial?

Intuitively more antitrust enforcement seems like a good idea. If someone breaks the law he should be punished, and more enforcement allows us to punish more antitrust offenders. However, issues of enforcement and punishment should not be settled intuitively, especially not in the area of antitrust law. To settle such issues economic models seem most appropriate since it comes down to *deterrence* and *optimal penalties*.

Too much antitrust enforcement or/and too high damages awards create *over-deterrence*. As a consequence, some lawful and economically beneficial conduct will be deterred. For instance, an arguably socially beneficial cooperation between two companies might never occur due to

over-deterrence, i.e. due to the enhanced risk of getting sued and penalized under the antitrust laws. The obvious rebuttal to this is, if you are not breaking the law why should worry about getting sued or prosecuted? In theory this works just fine, but in practice the line between lawful and unlawful antitrust conduct is often unclear. Ultimately it comes down to evaluating the conduct and determining whether it promotes competition or restrains competition. If enforcement increases the probability of being sued also increases and hence to possibility of being penalized.

As a result of adhering to the Optimal Deterrence Model, the social cost of a certain (anti-competitive) conduct in relation to its benefits becomes clear. The Model stringently promotes overall social welfare and hence totally ignores issues of corrective justice.

By instead focusing on corrective justice societal costs in relation to benefits becomes less important than re-establishing the balance between the violator and the injured party. In light of the idea of corrective justice the issue of over-deterrence therefore becomes insignificant.

More antitrust enforcement of private nature supposedly includes the risk of more *frivolous antitrust suits*. With the prospect of receiving large damages awards, litigants will take greater chances with unmeritorious law suits. However, the lack of certain legal features seems to dismantle the notion that enhanced private enforcement in the EC will propel more frivolous law suits. Firstly, damages awards are not that high in Europe, partly due to the absence of treble damages awards. This makes the monetary prospect of a damages suit smaller and hence the incentive to sue in the first place smaller. Secondly, the limited possibilities of class actions suits together with contingency fees also disincentives any excessive filing of frivolous antitrust suits. Thirdly, the losing party has to pay the winning party's legal costs. By imposing the winning party's legal cost on the on the losing party, the cost of losing becomes greater and hence also the disincentives against frivolous law suits.

In the absence of certain legal incentives, the risk of excessive frivolous antitrust litigation seems very little. On the other hand, it should be noted that the same legal incentives which enable frivolous law suits also generally spurs benign private enforcement. So, legal incentives such as treble damages should not be discharged as totally unwarranted.

The U.S. system of private enforcement offers some interesting insight in to the use of special legal incentives as a way of further promoting private enforcement. In essence, the U.S. system not only *allows* private parties to bring damage suit in antitrust cases it also *enables* them to do so. This is done by certain specific legal features such as pre-trial discovery, treble damage, class action, contingency fees, and the loser does not have to pay rule. These features create incentives and provide legal means to bring successful private enforcement actions.

Similar legal features do not exist within EC law or under national law in most Members States. This fact prods the question of whether the EC should adopt similar legal features?

The poor record of private enforcement actions in Europe obviously indicates that something has to be done in order to stimulate private enforcement. At the same time, it is hard to predict if something that works in the U.S. would work in the EC since most legal feature have a historical justification. Specific legal features are also interconnected with other legal features and therefore might work less effectively in a different legal system. For instance, plaintiffs are less prone to instigate class actions without being able to hire lawyers on contingency basis, while lawyers are less motivated to take on cases on contingency basis without the prospect of high (treble) damages. So, adopting one or two legal features might not be enough in order to promote an effective system of private enforcement.

The adverse effect of adopting a private enforcement system based on the U.S. system obviously involves an increased risk of frivolous law suits. Enhance private enforcement seems to come at the cost of some frivolous law suits, but the system should, nevertheless, be regarded as justified as long as the benefits exceed the costs.

One of the great benefits with private enforcement relates to the fact that private parties may bring cases *independently* of the Commission. This allows private parties to bring cases which the Commission for some reasons has declined to forward. Because, even though the Commission, finds a certain case unmeritorious, a court might just as well reach a different conclusion. However, it should be noted that the Commission has greater possibilities of bringing a *successful* suit than a private party. This is due to the fact that the Commission enjoys greater investigative powers and resources.

Obtaining evidence in order to prove an infringement is of utter importance to the success of a damages suit. Private parties have to facilitate this on their own. The lack of procedures such as pre-trial discovery makes this very difficult. This of course limits the number of private enforcement actions, because, even if you have a legitimate claim you still have to substantiate it with evidence. Pre-trial discovery would obviously help private parties to gather evidence, but also enable them to misuse the procedure. The general concern involves parties using the procedure as a “fishing expedition”, i.e. in order investigate if there is *anything* they can base a suit on. This may, however, be addressed by creating rules that strictly govern the discovery procedure and hence prevent such “fishing expeditions”.

When turning to the issue of private enforcement and the Treaty, it has been elucidated above (7.1.2) that the Treaty lacks any explicit provision which regulate the right to damages for breaches of EC law. Such a right was established by the ECJ.

While the ECJ argued that it merely distinguished the right from existing EC law, it rather seems as if the Court invented the right. Judicial activism is nothing new when it comes to ECJ, but nevertheless just as undesirable. In a democratic society the legislatures passes the law and the judges apply the law. Obviously, judges have to interpret the law and clarify it in single cases, but they should never go as far as creating new features of the law.

According to the Court, private parties have to be able to seek damages in order for EC competition law to work *effectively*. The rights conferred to individuals through Article 81 and 82 would be meaningless if private parties were unable to protect them by claiming damages when infringed. However, by adhering to the argument of *effectiveness* almost any measure could be seen as a necessity. For instance, in couple of years criminal sanctions might be seen as a necessity in order for EC competition law to work effectively.

The implicit support for private actions in Regulation 1/2003 (see 5.1) manifests the only support of legislative nature for private enforcement. Yet, Regulation 1/2003 lacks *any explicit* support for private enforcement. This appears somewhat puzzling since promoting private enforcement seems to be on top of the priority list within the Community – at least in the field of competition.

A right now doubtlessly exists to claim damages under EC competition law and therefore, as such, has to be respected and applied by national courts. However, it also rests on the national courts to give substance to the principle established in *Courage v. Crehan*. This turns out to be problematic from a Community point of view, since national law differs in different Member States. As a consequence the application of Community law is also bound to differ depending on national jurisdiction. This calls for further efforts to harmonize substantial and procedural rules between Member States; at least with regards to private damages actions in competition cases.

The Ashurst Study indicates that the Commission strives at creating an effective system of private enforcement to complement the public enforcement system. What specific measures this will result in, still remains uncertain. However, in my opinion EC law has to be clarified in order to guarantee effective uniform application of the rights conferred to private subjects by Article 81 and 82. This includes harmonizing different national standards as well as introducing new legal features.

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