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The relationship between leniency
programmes and action for damages
- A Comparative study in the competition
laws of the European communities, Sweden
and the U.S.

Master thesis
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Summary

Public enforcement of community competition law is well developed, however the same does not apply to private enforcement. The Commission has adopted a Green Paper that describes several problems that has to be solved; to accomplish that private enforcement in the future should serve as a natural compliment to public enforcement.

Action for damages are brought before national court in a Member State, this mean that it is the procedural rules in that particular Member State which applies to that particular case. Up to this date case-law before the ECJ as well as before Member States' courts have been rare, but since the so-called *Courage* case there is no doubt that entitlement to compensation upon infringement of community competition law exists. One particular issue that has to be solved is the relationship between the leniency programme(s) and action for damages. The fact that a cartel member "*blows the whistle*" and obtain immunity does not hinder a decision on violation of community competition rules from the Commission or national competition authority, although the undertaking will not be fined. The Commission has clearly stated that obtaining leniency under a leniency programme does not hinder liability from civil law consequences. Consequently, a decision adopted can serve as evidence in a future litigation process, where the undertaking can be obligated to pay damages, possibly in several cases. The balancing between keeping the incentive to file for leniency and the incentive to seek compensation for loss suffered upon a competition violation is not easy. Solutions can be found, but many factors have to be taken into account for the framework to facilitate effective enforcement and also to achieve harmonization on the issue.

The Green Paper is to be followed by a White Paper, which the Commission will issue in the year 2007. The latter will hopefully result in a reasonable framework that can be handled by the Member States and lead up to harmonization. However, the White Paper has not yet been adopted and though this is the case, it is not out of date to illustrate the relationship between leniency programme(s) and action for damages. Since the community competition rules are to be implemented in Member States' national law it is important to illustrate examples on how a Member States has done this. In addition, since the framework is not yet set out, the EU could look at other legal systems, as the US who has a well-developed antitrust system, for guidance. The development of the leniency programme(s) and action for damages will help the Commission to find infringers of competition law and to find an own balance between public and private enforcement that serves the best purpose of community competition law.

Sammanfattning

Offentlighetsrättsliga sanktioner av EU:s konkurrensrätt är ett välutvecklat område. Detsamma gäller dock inte för civilrättsliga sanktioner. Kommissionen har antagit en Grönbok, som beskriver flera problem som behöver lösas för att uppnå att privata sanktioner i framtiden fungerar som ett naturligt komplement till de offentlighetsrättsliga.

Skadeståndsanspråk framförs i nationell domstol i en medlemsstat, vilket innebär att det är processrätten i den specifika medlemsstaten som gäller i just det fallet. Fram tills idag har praxis i ECJ och även inför medlemsstaternas domstolar varit sällsynt, men efter det så kallade *Courage* fallet finns det ingen tvekan till att rätt till skadestånd följer på en överträdelse av EU:s konkurrensrätt. Ett problem som måste lösas är förhållandet mellan "leniency" programmet/programmen och framförande av skadeståndsanspråk. Detta beror på faktumet att om en kartellmedlem "blows the whistle" och därmed får immunitet så hindrar inte detta att ett beslut eller en dom från Kommissionen eller en nationell konkurrensmyndighet tas om att konkurrensrätten har blivit överträd. Företaget blir dock inte bötfällt. Kommissionen har tydligt uttalat att det faktum att ett företag får immunitet inte hindrar civilrättsliga konsekvenser. Följaktligen, kan ett antaget beslut fungera som bevis i en framtida civilrättslig process, där ett företag kan bli skadeståndsskyldigt, kanske till och med i flera fall. Balansen mellan att behålla incitamenten till att ansöka om immunitet och incitamenten att söka skadestånd till följd av en konkurrensbegränsande handling är inte en lätt balansgång. Lösningar finns, men många aspekter måste tas med i avvägningen för att ramverket ska underlätta ett effektivt genomdrivande av konkurrensreglerna och även leda till harmonisering.

Grönboken uppföljs av en så kallad Vitbok, som kommissionen kommer att ge ut under år 2007. Den senare kommer förhoppningsvis att resultera i ett rimligt ramverk som blir lätthanterligt för medlemsstaterna och även leda till harmonisering. Emellertid har Vitboken ännu inte utgivits och trots att så är fallet, är det ändå inte inaktuellt att beskriva "leniency" programmet och skadeståndsanspråkets förhållande till varandra som det är utformat idag. Eftersom EU:s konkurrensrätt ska implementeras i medlemsstaternas nationella rätt är det också viktigt att ge exempel på hur så har skett. Dessutom, eftersom regelverket för skadestånd inom konkurrensrätten ännu inte är färdigställd, kan EU snegla på andra rättssystem, såsom USA som har en välutvecklad konkurrensrätt, för vägledning. Utvecklingen av "leniency" program/programmen och skadeståndsrätten kommer att underlätta för Kommissionen att påträffa överträdelser av konkurrensrätten och att hitta en egen balans mellan offentlighetsrättsliga och civilrättsliga sanktioner som bäst uppnår syftet med EU:s konkurrensrätt.

Preface

Four and a half years have now ended. My experiences, which are unforgettable, in Lund have prepared me to face new challenges. First, I want to thank my family, especially my mother who always has been only a phone call away when I needed her support. I'm so happy that I ended up in Lund and met all my wonderful friends, which I have shared so many happy times with. Also, I want to thank the Faculty of Law for giving me a pleasant working environment, where I got the chance to meet the best colleagues possible! It was when I was working with Suffolk summer law programme last year that my thoughts about specialization, my thesis and the future fell into place and therefore I want to send my thanks to Suffolk Faculty members, which I in the future will share new educational experiences with.

Henrik Norinder has been my supervisor during my writing and his support has been invaluable. Everytime I have been stuck and needed answers he has provided them, but in the educational way of asking the right questions so, I have found my way back on the track by myself. Thank you for sharing your experiences and your humour!

Abbreviations

CA
ECNP

FTC Act
NCA
SA
SCA

Clayton Act
European Competition Network
model leniency programme
Federal trade commission Act
National Competition Authority
Sherman Act
Swedish Competition Act

1 Introduction

A field that is under development within the EU is competition law. The enforcement of this area of law tends to move slowly from public enforcement towards private enforcement. Competition law is about striking a balance between economy efficiency, protection for inferior parties and most importantly, if you see to the aims of the EU, the facilitation of a single European market.¹ Focus has lied on public enforcement of community competition law until previous years. To facilitate detection of cartels the Commission has adopted the so-called leniency programme. The Commission is working to increase private litigation and in a Green Paper², it is discussing problems in today's competition system when using private litigation as enforcement of antitrust violations in the different Member States.

There is a need for a balance between public and private enforcement. Incentives for undertakings to reveal cartels, "blow the whistle", need to be encouraged and for this to be the case clarification is needed on the relationship between the leniency programme and civil litigation, since the risk of being sued for damages in a Member State's court is increasing when cartels are detected. At the same time, the means of private litigation should not be hindered if it is going to be a successful complement to public enforcement. In the US private litigation represents 90% of the Antitrust cases in courts. In addition, the corresponding leniency programme in the US is a bit differently designed. The US antitrust system is a model to glance at in the development of community competition law, but you have to keep in mind that the latter system is very different in its structure and it must finds its own balance between public and private enforcement of competition law. Further, the community competition rules are connected to the different Member States and their legal systems, which makes it even more complicated.

¹ Craig and De Búrca, *EU Law Text, cases and materials*, p. 937.

² Green Paper, Damages actions for breach of the EC antitrust rules.

1.1 Purpose

Focus in this paper will be private enforcement within community competition law and its relationship with the leniency programme within the same legal system. It is important to keep in mind that community competition rules are superior to national law. Although, each Member State also has its own competition- and procedural law, which has to be used in private litigation irrespective if it is a community or only a Member State aspect of an infringement of competition rules. To grasp the concept of private enforcement within the EU competition system there is a need to describe the competition rules in general and to illustrate public enforcement. The relationship between the latter and private enforcement is complicated, because to enforce community or national competition rules one have to consider, in addition to the actual statutes governing the actual violation, several rules adopted considering the Commission, NCA:s and Member States' courts relation to each other. Therefore, this paper will go through such rules, but only to give a general scope on what issues need to be dealt with in private and to some extent public enforcement.

Since several legal systems can be involved in a competition case Sweden has been chosen to illustrate a way for a Member State to create its national competition law in the light of community competition rules. Though, competition law is not only a field within the EU system, United States has a long history of competition law, or antitrust which is the correct term to use in that country. The latter system will be described in very general terms to show an alternative way to solve competition issues, than the path the EU has taken.

Commissioner Neelie Kroes favours and are working to create a private enforcement system, which will serve as a compliment and to give weight to public enforcement. However, this will not be possible without that some friction will arise in certain areas of competition law. Such a friction is the relationship between the incentive for an undertaking to file for immunity and its civil liability for damages. This paper intend to illustrate this issue and describe how the system is created currently, what changes can be done and if there are any knowledge to implement from the United States antitrust system.

1.2 Method and material

A traditional legal approach has been employed for this thesis. Cases and bibliography have been examined when looking at the European, Swedish and American legal antitrust laws. In addition, I have looked at preparative work to the Swedish competition law and material from the Commission and the Swedish competition authority has also been analyzed.

I have used well established works on competition law in my general description of the framework on how community competition law is created. In addition, centre of attention has been the material that covers how community competition rules are to be interpreted and handled, issued by the legislative authority, the Commission. Only a few sources have been used regarding Swedish competition law and American antitrust, due to that those chapters are only to give a general description how the system competition system is built up and implemented. Case-law on action for damages is rare within the community competition law, but relevant cases that exists are however mentioned.

1.3 Delimitation

As to this date, the Commission is preparing a White Paper that are to follow the Green paper³ on action for damages. The field of action for damages that follows upon a violation of the community competition rules and the Member states' corresponding competition rules are a topic of most current interest. The Green Paper and upcoming White Paper are of huge importance for the future private enforcement of community competition rules. Although all issues brought up in the Green Paper are vital, the scope of this paper has been narrowed down to give information on the most central provisions that are of significance to the discussion of the relationship between public and private enforcement within community competition law. The chapters are to bring up the provision which are of significance to be able to analyze the relationship, specifically, between the incentive to obtain immunity according to the community competition leniency programme and to obtain damages according the community competition rules. It is important that the two different enforcement types are not pulled out of the overall context of community competition law; otherwise, the problems relating to enforcement cannot be fully understood. As seen in the Green Paper a lot of different factors interplay when it comes to the relationship of the two mentioned instruments (immunity and damages). However, this paper does not have the aim of going through each and everyone of those factors in detail, but some are mentioned for the purpose to serve as an awareness of other factors of importance.

³ Green Paper, Damages actions for breach of the EC antitrust rules.

The reason for only describing Swedish competition law, is that the scope of this paper would be too great otherwise. Swedish competition law is put into the paper to serve as an example as to how a Member State has chosen to create its own and at the same time implement community competition provisions, especially when it comes to the leniency programme and the means to obtain compensation for a violation of competition rules.

The mentioning of the American antitrust system in brief terms is to show an alternative path to the one that has been implemented into community competition rules up to this date. It is vital to point out some differences of the systems, but for a penetrating analysis of the American antitrust rules to serve any relevant purpose in this paper, the paper as a whole would have to be broader and that is not the purpose.

1.4 Outline

Section two in this paper gives a description of the central provisions of community competition law and the framework set out to implement the Articles. Both application for immunity according to the leniency programme and action for damages requires a violation of the competition Articles. Section three discuss what comes upon a breach of the competition provision(s), what role has the Commission and what rules are set out regarding the conditions between the different authorities that can have competence or jurisdiction? Thereafter section four and section five gives a description of public- respectively private enforcement. Those sections first give a general description, but then also go into more detail of immunity and action for damages.

The previous mentioned sections, are all about community competition law. The next two chapters will describe a Member State's (Sweden) and another legal system's (USA), rules regarding competition. The latter system are not in any way linked to the community competition system, except for that overlapping jurisdiction can occur if an undertaking commit a violation of competition rules in both states.

In the last section I will discuss different aspects and problems of the framework, as it is created today and possible future changes due to the propositions in the Green Paper, set out on immunity and action for damages. The discussions will be adopted to illustrate the difficulties with the relationship between the two enforcement types and therefore not all aspects, which can follow upon a problem due to the discussion, will be analyzed.

2 EU Competition Law

EU Competition law is part of the legal framework of EU law and it takes precedence over the Member States' own national law. Community competition law was adopted in 1957.⁴

Integration is the keyword for the EU and competition law is not an exception. The focus lies on to hinder violations of competition rules that constitute an obstacle for the integration. Therefore, it is important that there is sufficient competition on the market, so that the aims of the Treaty of EC can be fulfilled. Within the Treaty of EC lies both political and social considerations and not just economic ones.⁵

Article 85 EC gives the Commission the comprehensive power to guarantee the enforcement of Articles 81 and 82 EC and complemented provisions. The Commission shall itself take initiative or on request by a Member State examine presumed violations of the competition provisions. The Commission shall cooperate closely with Member States and their authorities. Suitable actions shall follow when an infringement is discovered and if it does not cease to stop a decision shall be adopted by the Commission, where the authority lays down that an infringement of the EC competition rules exist. Then the Commission shall empower the competition authorities in the Member States (NCAs) to act appropriately to terminate the infringement, due to the Commission's conditions and rules.

Article 2 EC states that one of the major aims with the EC is to provide a high degree of competition on the European common market. Focus will lay on the provision Articles 81, 82, Regulation 1/2003⁶ and other connected provisions and regulations. General EU principles such as the principle on equal treatment and non-discrimination are also applicable in the assessment of community competition rules.

2.1 Article 81 EC

Article 81 EC states a prohibition for companies and gatherings of undertakings within the European market to participate in acts that hinder or limit the competition on that common market. Examples of forbidden behaviours are listed in the Article and they are as follows; i. directly or indirectly fix purchase or selling prices or any other trading conditions; ii. limit or control of production, markets, technical development or investments; iii. to share markets or sources of supply; iv. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage and v. make the conclusion of

⁴ Bernitz, *Svensk och Europeisk marknadsrätt*, s 61.

⁵ Jones, *Private enforcement of antitrust law*, p. 25 f.

⁶ Council Regulation 1/2003 of 16 December 2002.

contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Three conditions have to be fulfilled for Article 81 EC to be imposed; i. some kind of collusion between undertakings; ii. which may affect trade between member states and iii. which has the object or effect of restricting competition within the common market. A group of undertakings are counted as a single undertaking when acting under a common control, the same does not apply for decisions of associations of undertakings.⁷

Further, the Article contains an exemption in paragraph 3 where it is stated that the prohibition in paragraph one can be declared inapplicable in certain cases.⁸ Since the Regulation 1/2003 came into force the Commission now no longer have a monopoly on granting exemptions.⁹ Regulation 1/2003 abolishes the system of notification before the Commission. Instead, Article 81(3) EC has direct effect in the Member States, in both national courts and the NCAs. According to article 1 of Regulation 1/2003 the national courts may consider whether article 81(3) EC should be applied or not. In the White Paper there were discussions whether it is appropriate that national courts makes the assessment of Article 81(3) EC. It was argued that there is a risk that they would not be consistent and coherent when they were applying the rule. There is complex economic analysis involved within the assessment of the Article.¹⁰ However, the Commission has issued a notice on the interpretation on the application of Article 81(3) EC.¹¹ It is important to stress that Regulation 1/2003 only hold provisions of procedural rules and remedies only for proceedings before the Commission. All proceedings in the national courts or NCAs in the Member States are governed by national law.¹²

An exemption under 81(3) EC is a decision that there are no reasons for the European Commission to take any actions under article 81 EC based on facts that the European Commission has in its possession.¹³ Assessment of exemption can take place under the provision directly or in a form of a block exemption regulation. Either assessment is due to that the agreement fulfils the four cumulative conditions laid out in the provision. The conditions are; i. that the agreement contributes to improving the production or distribution of goods; ii. promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; iii. that it does not impose on undertakings concerned restrictions which are not indispensable to the attainment of the objectives and iv. does not afford such undertakings the

⁷ Korah, Valentine, *An introductory guide to EC competition law and practice*, p. 40 f.

⁸ Jones, *Private enforcement of antitrust law*, p. 30.

⁹ Article 6 Council Regulation 1/2003 of 16 December 2002.

¹⁰ Jones, *Private enforcement of antitrust law*, p 1047. Here Jones refers to a summary of observations on the White Paper, DG Competition, Doc. 29 Feb. 2000, para. 5.2.

¹¹ Commission Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 4.

¹² Korah Valentine, *An Introductory guide to EC competition law and practice*, p. 206 ff.

¹³ Article 10 Council Regulation 1/2003 of 16 December 2002.

possibility of eliminating competition in respect of a substantial part of the products in question.

Article 81(2) EC¹⁴ states that “any agreements or decisions prohibited pursuant to this Article shall be automatically void”. Consequently a party to such an agreement cannot enforce the same. Further, which is set clear from the case *Société La Technique Minière v. Maschinenbau Ulm GmbH*¹⁵, only when clauses within the illegal agreement cannot be distinguished from those that constitute the prohibited conduct the agreement as a whole is void.¹⁶

2.2 Article 82 EC

Dominant behaviour by an undertaking, that holds a dominant position within the common market, is prohibited according to Article 82 EC. The meaning of a dominant position within the EC Treaty, was declared in the case *Michelin v. Commission*¹⁷, where the ECJ stated that it is a firm which has:

“a position of economic strength employed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of competitors and ultimately of consumers”.

In the case *United Brands v. Commission*¹⁸ the ECJ expressed that a company that can be presumed to be dominant on the relevant market, when it withholds market shares above 40-50 per cent. Further, the court defined a dominant position such as:

*“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers”.*¹⁹

Article 82 EC has no equivalent to Article 81(3) EC, but there is in fact a comparable assessment when the Commission determines if there has been abusive behaviour within the meaning of Article 82 EC. Conducts of dominant undertakings may actually lead up to positive contribution on the common market. Conducts that do not have only negative effect and are proportionate, for example a legitimate commercial behaviour outside the scope of Article 82 EC, can be objectively justified.²⁰ In addition, there is no corresponding void clause, such as 81(2) EC, in Article 82 EC.

¹⁴ For further discussion about this paragraph of Article 81(2) see chapter 5.1.

¹⁵ Case C56/65 *Société Technique Minière v Maschinenbau Ulm*, para 11.

¹⁶ Jones and Sufirin, *EC Competition law*, p. 179.

¹⁷ Case 322/81, *Michelin v. Commission*, para 30.

¹⁸ Case 27/76, *United Brands v Commission*.

¹⁹ *Ibid*, para. 65.

²⁰ Craig and De Búrca, *EU Law Text, cases and materials*, p. 1030.

To find a conduct illegal according to Article 82 EC the Commission, Member States' courts or competition authorities must establish a definition of the relevant geographic and the product market in that specific case, and the undertaking or associations of undertakings must abuse its/theirs dominant position. There has to be an affect on trade between Member States on the common market. Factors that are relevant when appreciating a dominant position are for example barriers to entry and the undertaking's market share. The ECJ established in the case *AKZO*²¹ that market shares of 50 per cent or more, when it is a stable position, gives a rebuttable presumption of dominance. However, the Commission must also regard other considerations in its assessment.²²

Four different conducts are mentioned in Article 82 EC, but it is important to stress that they are just examples of a conduct that could distort competition on the common market. The conditions set out are as follows; i. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ii. limiting production, markets or technical development to the prejudice of consumers; iii. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage and iv. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2.3 Council Regulation 1/2003 on the application of Articles 81 and 82 EC

Regulation 1/2003²³ withholds rules on how, Article 81 and 82 EC, should be implemented. Conduct falling under Article 81 or 82 EC should be prohibited, although conducts, which fulfils the conditions in the exemption rule, Article 81(3) EC, should be allowed. In all different situations, no prior decision to the effect is required.²⁴ According to Article 2 burden of proof lies on the authority alleging infringement, whereas an undertaking or association claiming the benefit of exemption bears the burden of proving that the conditions in 81(3) EC are satisfied.

Each Member State of the EU has its own competition system with its own rules. Article 3 states that although national competition law is applied, by national courts or competition authorities, on a conduct, also Articles 81 and 82 EC should be applied if trade has an affect between Member States. If the conduct by undertakings or associations in a Member State satisfies the conditions within the exemption in the European rule, the national courts and authorities do not have to prohibit the conduct. The national courts or

²¹ Case (62/86) *AKZO Chemie BV v Commission*, para. 59-61.

²² Korah Valentine, *EC Competition law and practice*, p. 91 f.

²³ All Articles in this section refers to Council Regulation 1/2003 16 December 2002, unless stated otherwise.

²⁴ Article 1.

authorities may however apply stricter rules on behaviour on their territory, which do not affect trade between Member States. The above does not apply when national courts or authorities apply national merger control laws. Further, Article 3 states that national law that primarily have a different objective from Articles 81 and 82 EC should not be precluded by the use of Regulation 1/2003.

Both NCAs as well as the Commission itself can apply Articles 81 and 82 EC. They can act on their own initiative or on a complaint lodged by others when they enforce competition law. They have the power to take decisions on; i. requiring that an infringement be brought to an end; ii. ordering interim measures; iii. accepting commitments and iv. imposing fines, periodic penalty payments or any other penalty provided for in their national law. These different instruments can be used, as well as a decision that states that there are no grounds for action on the authority's part.²⁵

To achieve the goal of an effective enforcement of the community competition rules, both in the Member States as well as in the EU as a whole, there is a need for cooperation between the different regulatory bodies. The NCAs shall inform the Commission whenever they adopt a decision about termination of an infringement, acceptance of commitments or when withdrawing the benefit of a block exemption. Not only shall the information be revealed to the Commission, but also competition authorities in other Member States can get access to the information. Further, not only information regarding decisions is to be shared, the Commission and the NCAs have the power to exchange information that can be used as evidence of the other, but that information should only concern the application of Articles 81 and 82 EC. Of significance is if the sharing of information is due to that the transmitting authority foresees sanctions of a similar kind when looking at a breach of the Articles. In addition the information should have been collected in a proper way, which protects the rights of defence of natural persons under national rules. The receiving authority cannot use the exchanged information to impose custodial sanctions.²⁶

National courts may ask for information, which is in the hand of the Commission, and they may ask for the Commission's opinion on how the community competition rules should be applied. The Commission shall get a copy of judgements made in the Member States, when they are applying Articles 81 and 82 EC. A NCA submit written observations or oral observations (if allowed) to a court in their own Member State. This also applies to the Commission. NCAs and the Commission may request the relevant court of the Member State to transmit, or ensure the transmission to them of, any documents necessary for the assessment of the case. Conversely, the law of a Member State can give wider power than described above.²⁷

²⁵ Articles 4-6

²⁶ Article 11-12

²⁷ Article 15

To be able to create a single market: agreements, decisions and practices given by different authorities in the Member States and by the Commission cannot contradict each other, which follows from Article 16. Therefore the Commission's decision should be seen as guidance. In addition Article 16 states that the obligation to follow the Commission's actions is without prejudice to the rights and obligations under Article 234 of the Treaty.

To get a uniform application of Articles 81 and 82 EC it is important that the Commission, national courts and NCAs knows what respective authority is investigating and what cases it is dealing with. The cooperation between the authorities will be described in more detail in Chapter 3.

3 Breach of Articles 81 and 82 EC

There is a need for incentives to follow the legal framework, for the operators on the common market. This applies to all legal systems. Without sanctions there are no consequences for not obeying the regulations and with that no incentive to play by the rules. When it comes to Article 81 EC there is the important consequence that an agreement or concerted practices which violates the competition rules becomes null and void.²⁸ In the EC it is stated that the Commission should propose appropriate measures to cease the found infringement. It should investigate cases of suspected infringement of Articles 81 and 82 EC with the help of competent authorities in the Member States. The Commission should give a reasoned decision if the infringement is not terminated.²⁹

Both Articles 81 and 82 EC have direct effect, which means that they create both direct applicable rights and obligations for private parties, which leads to that the provisions can be enforced by the latter. A provision must be clear, unconditional, non-discretionary and final to be given direct effect. This was first stated in the case *Van Gend en Loos*³⁰ and from this case it follows that national courts are required to protect victims of infringement by granting adequate remedies.³¹

3.1 Enforcement

The NCAs have the right to apply Articles 81 and 82 EC in its entirety. This application enables authorities to; i. take any decision requiring that an infringement be brought to an end; ii. adopt interim measures; iii. accept commitments and iv. impose fines, periodic penalty payments or any other penalty provided for under national law and v. take no action when the conditions for prohibition are not met.³² It is important to stress that the NCAs only can carry out negative decisions and these are only binding within the territory of that particular Member State, not binding on another Member State or the Commission. As previously stated NCAs are not allowed to take decisions that are in conflict with decisions adopted by the Commission.

²⁸ Article 81(2) EC.

²⁹ Article 85 EC.

³⁰ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*.

³¹ Korah, *An introductory guide to EC competition law and practice*, p. 3.

³² Van Bael and Bellis, *Competition law of the European community*, p 1027

In the case *Walt Wilhelm v. Bundeskartellamt*³³ the ECJ stated that concurrent proceedings to the same infringement can be implemented but this is only feasible when the use of national law does not endanger the full and uniform application of community law. There are a number of conditions set out in Article 3 of Council Regulation 1/2003 that must be fulfilled, for concurrent proceedings to be carried out.³⁴ Another question is which regulatory bodies in a Member States that fulfil the criteria for a national competition authority.³⁵

3.2 Complaints to the Commission

The number of complaints that have been filed in, to the Commission, has varied over the years. Both weak and strong market operators are filing in complaints nowadays. As stated in Article 7(2)³⁶ all those who has a “legitimate interest” are entitled to lodge a complaint. This means anyone who could plausibly claim to have suffered from an infringement, can file a complaint and that refers to people, legal persons or a Member States who can show a legitimate interest. However, you can only complain as long as the infringement proceeds. The Commission always has the option to initiate its own procedures irrespective if a complaint has been made or not. This is however due to Article 89(1) EC, which states that the Commission is obliged to initiate investigations if a complaint is made by a Member State. Complaints can also be handed in to a NCA, but this means that if there is no community dimension it will be handled according to national competition law.

Relevant documents should be presented to the Commission. If the Commission finds that such presentation is not necessary to be able to make a proper examination of the case, it can make an exception. Important to note is that it is the Commission itself that decides if it should initiate a proceeding or not and it is not certain that a complaint will result in a final decision. Cases with community interest are of priority to the Commission. A complaint can be referred to the suitable NCA when there is no community interest at stake under the condition that the NCA gives the possibility to claim an infringement according to national rules.

In the expression community interest lies; i. a balance between assessing applicability of block exemption; ii. restrictive practice or the effects of abuse of a dominant position on the competition situation in the Community; iii. seriousness or/and gravity of the alleged infringement; iv. whether the case raise a new question of law; v. the size of undertakings concerned; vi the impact on trade between the Member States or on the market integration; vii. the existence of similar problems in different Member States; viii. concurrent proceedings; ix. which stage investigation is

³³ Case 14/68, *Walt Wilhelm v Bundeskartellamt*, para 9.

³⁴ See chapter 3.3.1.

³⁵ Van Bael and Bellis, *Competition law of the European community*, p 1032 f.

³⁶ Cited supra note 6.

in and x. what attitude the company has to change its conduct to be compatible with the community rules. Important to stress is that this is not an exhaustive list and decisions should be made on a case by case basis. With this in mind, complainants should consider whether they should complain to the Commission or a NCA, which is a question of efficiency.³⁷

There is a three stage proceeding when a complaint is brought before the Commission; i. the collection of information; ii. a notice made to the undertaking that the information is insufficient as ground for pursuing the matter and iii. the Commission rejects the complainants complaint on the reject of the decision.³⁸

The Commission has a duty of vigilance when it examines a possible infringement. All facts and legal arguments should be investigated carefully. In its decision, the Commission has to set out facts justifying it and the legal considerations that have been made.³⁹

3.3 Powers of the Commission

To have an effective public enforcement of the community competition rules it is not sufficient with others filing complaints that the Commission can investigate. An important task for the Commission to implement the provisions is the power of discovery, this means the right to request information and to carry out investigations at the company of interest. The information can be supplied by persons authorized to represent the company, but also by lawyers if requested by the client.⁴⁰

First of all the Commission can take initiative to an investigation if it sees tendencies in certain sectors of the economy or particular types of agreements across various sectors that suggests that competition may be restricted within the common market. Undertakings and associations are obligated to give out information, when so is requested, otherwise it would be impossible to see which effect agreements, decisions and concerted practices have in the scope of Articles 81 and 82 EC. The results can be published by the Commission and interested parties are given the opportunity to give comments. The Commission has to give a legal basis and a purpose for its request. In addition, information about exactly which information it is interested in and how much time the undertaking or association has to provide it, must be mentioned in the request.

³⁷ Van Bael and Bellis, *Competition law of the European community*, p. 1040 f.

³⁸ Ibid, p. 1046 f.

³⁹ Ibid, p. 1045 f.

⁴⁰ Ibid, p. 1050 f.

The Commission can impose penalties if the company or undertaking gives out misleading information. The Member State whose territory the company of current interest is situated in and whose territory is affected should get a copy of the Commission's simple request. Information can also be obtained through interviews with natural or legal persons, whose consent has been given.⁴¹

Additional, so called, on sight inspections can be carried out by the Commission to collect further information. According to Article 20⁴² this investigation has to begin with a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23, in case of production incorrect or misleading information in any way from the undertaking. The Commission and other officials or accompanying persons, authorised by the Commission, are empowered to enter an undertaking or associations premises, land and means of transport. There they can investigate books and other documents related to the business. Staff can be asked to explain facts related to the books and documents that are investigated. The Member State, in whose territory the inspection is carried out, should be informed and should assist the Commission upon its request. However, the Commission may have to apply for assistance according to national procedural rules.

If a serious violation of Articles 81 and 82 EC can be suspected and if there is reasonable suspicion that material that can prove this violation is to be found at another location that are linked to the undertaking or association, i.e. the home of a director, the Commission are allowed to carry out investigation at those places. However, this is due to a prior authorisation from the national judicial authority of the Member State concerned. In addition, the competition authority of a Member States is authorized to carry out the same conduct as the Commission regarding investigations, but under national law, if it suspects infringement of Articles 81 and 82 EC. Furthermore, a Member State may have to undertake inspections upon request by the Commission.⁴³

⁴¹ Council Regulation 1/2003 16 December of 2002, Article 17-19.

⁴² Ibid.

⁴³ Ibid, Article 21-22.

3.3.1 Cooperation within the network of competition authorities regarding concurrent proceedings

Occasionally more than three Member States are affected by agreement(s) or practice(s) adopted by undertakings and the Commission is seen to be more suitable to handle such cases.⁴⁴ For the best NCA suitable to handle a case and to avoid multiple procedures there is a mechanism that is triggered by Article 11.⁴⁵ This means that the members of the network have to be informed when a proceeding is initiated, so that the case can be allocated quickly if that is in the best interest both for the network and the undertakings concerned. A NCA have to inform the Commission whenever acting under Articles 81 or 82 EC before or immediately after commencing the first formal investigative measure. Conversely, the Commission has an obligation to inform the NCAs when beginning a procedure. The network authorities shall also inform each other about its procedures.⁴⁶

When multiple proceedings lies before different NCAs, Article 13⁴⁷ gives the NCAs authorisation to suspend proceedings or to reject a complaint on the grounds that another authority is dealing with the case or has dealt with the case. This is the case when another authority is investigating or has investigated the case on its behalf, not merely that a complaint has been lodged. Article 13⁴⁸ can be referred to when the agreement(s) or practice(s) involves the same infringement(s) on the same relevant geographic and product market(s). Article 13 does not oblige the NCA to take action, it leaves a scope of appreciation on the NCA itself to determine what action that is to be followed. This flexibility facilitates a consistent application of the rules.⁴⁹

Information can be transferred between two NCAs, when one of them determines to suspend or to close its proceedings. Article 12⁵⁰ states that the information provided by the complainant can be transferred to the NCA that shall continue to deal with the case. Further, these rules apply not only to the procedure as whole but also to parts of it. National procedural law in the Member States is also applicable.⁵¹ Although, Regulation 1/2003 takes precedence over national law.

⁴⁴ Commission Notice on cooperation within the Network of Competition Authorities, para. 14.

⁴⁵ Cited supra note 6.

⁴⁶ Commission notice on the cooperation within the Network of Competition Authorities, para. 16 f.

⁴⁷ Cited supra note 6.

⁴⁸ Ibid.

⁴⁹ Commission notice on the cooperation within the Network of Competition Authorities, paras. 20 – 22.

⁵⁰ Cited supra note 6.

⁵¹ Commission notice on the cooperation within the Network of Competition Authorities, paras. 23 – 25.

Information that can be given or exchanged are also such that are confidential. The information is to be used as evidence. National law is testing whether the information has been gathered lawfully and the transmitting authority may inform if the gathered information can be contested or has been contested. Information is also exchanged between the NCAs in the network. But there are certain safeguard for the undertakings when it comes to exposure of confidential information:

- i. the kind of information covered, according to Article 28 Council Regulation 1/2003, by the obligation of “professional secrecy”. However, this term is including business secrets and other confidential information, which creates a minimum level for what is revealed, but it is important to stress that this protection does not obstruct the necessity of revealing information to prove an infringement of Article(s) 81 and/or 82 of the EC.
- ii. the actual exchanged information can only be used in evidence for the application of Articles 81 and 82 EC and for the subject matter for which it was collected, but it can also be exchanged for parallel application of national law in the same case.
- iii. information exchanged can only be used when the transmitting and receiving authorities provide for sanctions of a similar kind. Procedural safeguards in both Member States are then considered equivalent. Conversely if the systems do not provide the same sanctions, the information are only legitimate to be used if the same level of protection of the rights of the individual has been respected in the case at hand.⁵²

A complaint can be suspended or rejected by a NCA due to the fact that the same possible infringement is investigated by a NCA in another Member State. For the same reasons, the Commission can reject or suspend a complaint. If it rejects a complaint, it should also give the complainant a written decision on its rejection. The Commission should also give a decision if it prohibits the agreement or practice.⁵³

NCAs have to inform the Commission, no longer than 30 days before adopting a decision under Article(s) 81 and/or 82 EC, where an infringement is required to be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation. A summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action should be submitted. This information may also be shared with other members of the network. If the Commission has not decided to initiate proceedings 30 days after submission of information from the NCA, it can adopt its decision, which under certain conditions can be adopted more swiftly.⁵⁴

⁵² Commission notice on the cooperation within the Network of Competition Authorities, para 28.

⁵³ Ibid, paras. 35 - 36.

⁵⁴ Ibid, paras 44, 46 – 47.

If the Commission initiates proceedings to adopt a decision under Chapter III of Regulation 1/2003⁵⁵, this proceeding relieves other NCAs of their competence to apply Articles 81 and 82 EC. This means that they can no longer act under the same legal basis or against the same agreement(s) or practise(s) on the same relevant geographic and product market(s). If the Commission initiates proceedings, without that any previous action in the community has been taken, the only thing that occurs is that the other NCAs cannot start their own procedures. When NCAs are already acting on their own initiative on a given case the Commission can initiate proceedings, according to 11(6) of Regulation 1/2003, during the initial allocation period. After this period the Commission can only open its own proceeding under special circumstances:

- i. network members are adopting conflicting decisions in the same case.
- ii. decision(s) adopted by member(s) are in conflict with community case-law.
- iii. network members are drawing out excessively proceedings in the case.
- iv. the NCA does not object.

If already a NCA is acting on a case the Commission has to inform its initiative proceedings under Article 11.6 to the NCA concerned and to other members of the network. The network members shall be given the opportunity to ask for a meeting with the so-called advisory committee on this matter before the Commission actually initiates its proceedings.⁵⁶

3.3.2 Cooperation within the network of competition authorities regarding leniency applications

An application for leniency⁵⁷ have to be filed into each Member State that has a leniency programme, since there is no Union-wide system of harmonised leniency programmes. The responsibility to take suitable actions to protect itself from possible proceedings by other authorities in other Member States is on the undertaking itself, if it files an application for leniency to a Member State's competition authority.

The NCA must inform the Commission, about the leniency applications that it receives, and make the information available to other NCAs in the community. Conversely, the Commission has to inform the NCAs of the leniency applications that it receives. There is, however, a difference when the Commission gives out information about its leniency applications. Those applications cannot, pursuant to Article 11⁵⁸, be used by other members of the network as a basis for starting an investigation on their own

⁵⁵ Cited supra note 6.

⁵⁶ Commission notice on the cooperation within the Network of Competition Authorities, paras 53 - 57.

⁵⁷ For description of leniency programmes, see chapter 4.2.

⁵⁸ Cited supra note 6.

behalf. It does not matter whether this investigation would be under the competition rules of the EC or under the NCAs national competition law or other laws.

Information given voluntarily by an undertaking, are only authorized to be transmitted to another NCA under Article 12⁵⁹, but with the consent of the applicant. The same applies to all fact-finding measures, which could not have been obtained without the leniency application. Consent is encouraged by the network members. Consent given by an undertaking cannot be withdrawn. This is the case except when:

- i. the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority. This is due to the fact that the applicant cannot withdraw the submitted information to that receiving authority.
- ii. the receiving authority has given written assurance that neither the information transmitted to it nor any other information it may obtain during the period of transmission, will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions; i. on the leniency applicant; ii. on any other legal or natural person covered by the favourable treatment due to the leniency programme or iii. any employee or former employee of any of the persons covered by the two above.
- iii. information collected by a network member on behalf of and for the account of the network member, under Article 22(1) of Regulation 1/2003.

Information according to paragraph 42, given under Article 11(3) Regulation 1/2003 will only be transmitted to those NCAs who have given consent to respect the rules set out in the notice on cooperation within the network. This also applies to information given to the Commission in a leniency application. However, a NCA still has the power to act under Article 12 of Regulation 1/2003, pursuant that paragraphs 40 and 41 are respected.

⁵⁹ Cited supra note 6.

3.3.3 Cooperation between the Commission and Member States' courts

Article 234 EC helps national courts to interpret community law with assistance of the ECJ. The Commission is bound by Article 10 EC to cooperate with national courts and the same obligation is laid upon the national courts themselves if the Commission needs assistance.⁶⁰ The two Articles mentioned above constitute the foundation for Regulation 1/2003 and the Commission's notice on cooperation between the Commission and the courts of the EU.⁶¹

National courts may ask for information, which is in the hand of the Commission, and they may ask for the Commission's opinion on how the community competition rules should be applied. The Commission shall get a copy of judgements made in the Member States, when applying Articles 81 and 82 EC. Also a NCA can submit written observations or oral observations (if allowed) to a court in their own Member State. This also applies to the Commission. NCAs and the Commission may request the relevant court of the Member State to transmit or ensure the transmission to them of any documents necessary for the assessment of the case. Conversely, the law of a Member state can give wider power than described above.⁶²

To be able to create a single market: agreements, decisions and practices given by different authorities in the Member States and by the Commission cannot contradict each other, which follows from Article 16 of Regulation 1/2003. Therefore, the Commission's decision should be seen as direction. In addition, Article 16 states that the obligation to follow the Commission's actions is without prejudice to the rights and obligations under Article 234 EC. This means that the Commission shall give the national court information of its proceedings and their development. If the national court is of a different opinion, it has to await for the outcome of an possible appeal before it rules on the question or it has to ask for a preliminary ruling to the ECJ. If the national court however is certain of the outcome of the Commission's contemplated decision, or if the Commission already has decided upon a similar question in another case, the national court can continue its court proceedings.⁶³

⁶⁰ Jones and Sufrin, *EC competition law*, p. 1195.

⁶¹ Commission notice on the co-operation between the Commission and the court of the EU Member States in the application of Articles 81 and 82 EC.

⁶² Council Regulation 1/2003 16 December of 2002, Article 15.

⁶³ Jones and Sufrin, *EC competition law*, p. 1197.

There is also an option for the national court to ask the Commission for an opinion on economic, factual and legal matters. The Commission will not consider the merits of the case, it will only give the national court factual information or the economic or legal clarification asked for. The answer from the Commission is not legally binding on the national court.⁶⁴

National procedural laws and sanctions are the rules applicable when a national court has a competition case, with community interest, pending before it. This is only the case when no provisions and procedure is available within the European legal framework.⁶⁵ Point 35 in the previously mentioned notice clarify that the national procedural rules have to be compatible with the general principles laid out in the legal framework of the European community. Two of those important principles, to comply with, are the principle of effectiveness and the principle of equivalence.

As stated above there is a duty for both the Commission and the national courts to assist and help each other. National courts have to transmit their judgements to the Commission when they are applying Articles 81 and 82 EC. The Commission shall receive a copy of a judgement, without delay, after it has been notified to the parties.⁶⁶ National courts play a varying role when the Commission is carrying out inspections of business and non-business premises. In certain cases a national court shall give authorisation for a national competition authority to be allowed to assist the Commission in its inspections.⁶⁷

⁶⁴ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, point 27.

⁶⁵ Ibid, point 10.

⁶⁶ Council Regulation 1/2003 16 December of 2002, Article 15(2).

⁶⁷ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, points 30-40.

4 Public sanctions

Public enforcement has been dominant within the community competition framework to this day. The powers of the Commission have been described in chapter 3.3. For effective enforcement those powers have to be followed by sanctions. Fines are the means, in combination with the so-called leniency programme, that the Commission applies for compliance by the undertakings throughout the community.

4.1 Fines

As stated above Article 23⁶⁸ withholds sanctions to impose on the undertakings or associations of undertakings if the Commission, after its investigations, finds an infringement of Article(s) 81 and/or 82 EC. Fines can be imposed if parties; i. supply incorrect or misleading information in response to a request; ii. either intentionally or negligently infringe Articles 81 or 82 EC; iii. contravene a decision ordering interim measures or; iv fail to comply with a commitment made binding by a decision.

There are different thresholds for how much the fine can be set to. It is one percent of total turnover in the preceding business year for wrongful information and ten percent on its total turnover in the preceding business year for infringement of Article(s) 81 and/or Article 82 EC. There is also the alternative of periodic penalty payments where the Commission may impose on undertakings or associations of undertakings payments not exceeding five percent of the average daily turnover in the preceding business year per day calculated from the date appointed by the decision, in order to compel them to different obligations set out in the Regulation 1/2003.⁶⁹

Important factors that the Commission takes into consideration when they are setting fines are clearly set out in the Guidelines that has been issued.⁷⁰ According to section 1, the Commission first imposes a basic amount of fine based on calculation of sales, which will be proportionately related to the degree of gravity of the infringement multiplied by the years of infringement. The degree of gravity is assessed on a case-by-case bases. Further, when assessing the proportion, factors that are taken into account are such as; i. the nature of the infringement, ii. the combined market share of all the undertakings concerned, iii. the geographic scope of the infringement and iv. whether or not the infringement has been implemented. The duration of the infringement is also of importance, but there is always an entrance fee that the Commission applies.

⁶⁸ Council Regulation 1/2003 16 December of 2002.

⁶⁹ Ibid, Articles 23-24.

⁷⁰ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

Section 2 states that the basic amount can be adjusted depending on aggravating and mitigating circumstances. It is important that the fines have a deterrent effect and due to this factor the Commission can increase them if it feels that the turnover that the undertaking or association of undertakings has made is too large. However, there is a maximum ceiling of ten percent of total turnover. In exceptional cases, a reduction can be made due to the undertakings ability to pay.

4.2 Leniency programme

To have a more efficient public enforcement the Commission has adopted the leniency programme, which put further pressure especially on cartels to seize the infringement and to report the violation. The aim of the leniency programme is to create an incentive for undertakings to “blow the whistle” on cartels that they participate in and therefore leniency can only follow upon an infringement of Article 81 EC. The reason for giving a favourable treatment to those who cooperate with the Commission is due to the interest of consumers and citizens.

Assessment of the leniency programme is to be found in the 2006 Notice on immunity from fines.⁷¹ It is important to stress that the leniency programme consists of two alternative types of relief. If the undertaking is first to lodge an application according to the leniency programme the undertaking has a possibility to get immunity, which means that the Commission will not fine the undertaking at all under prerequisite that it fulfils the conditions set out in the notice⁷². Alternatively, if the undertaking is not the first to submit an application for leniency to the Commission, it can get reductions of fines due to the fact that the undertaking actually is cooperating with the Commission. Both alternatives will lead up to that a decision will be adopted by the Commission, where an infringement of community competition law is established, the difference from a “normal” decision of infringement is that the undertaking does not actually get fined or get a reduction of the fines.

4.2.1 Immunity

There are two alternative options for undertakings, to be guaranteed total immunity from fines. These options are set out in point 8(a) and 8(b) in the notice. The criteria set out are that the undertaking is either the first to submit evidence that will eventually result in a decision from the Commission after it has carried out an investigation of an alleged cartel. Criteria in point 8(b) is that the Commission can find an infringement of Article 81 EC in connection with an alleged cartel affecting the community due to and undertakings submission of evidence.

⁷¹ Commission Notice on immunity from fines and reduction of fines in cartel cases.

⁷² Ibid.

For the Commission to be able to carry out a target inspection, according to point 8(a) the undertaking has to meet up additional criteria set out in point 9. This point states that the undertaking has to attach a corporate statement, which contain;

- a detailed description of the alleged cartel arrangement;
- “the name and legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;
- the names, positions, office locations and to all that, to the applicants knowledge, are or have been involved in the cartel, including those individuals which have been involved on the applicant’s behalf;
- information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and
- other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particularly any evidence contemporaneous to the infringement.”

If the Commission already had sufficient evidence to adopt a decision or to carry out an inspection in connection with the alleged cartel or had already carried out such inspections, immunity according to point 8(a) in the notice cannot be granted.⁷³

In addition to point 8(b) three criteria have to be fulfilled which are set out in point 11. Fully cooperation, during the investigation, between the undertaking and the Commission must take place. The same time, as the undertaking provide the Commission with the information, it also has to cease its participation in the cartel. The submission will not have effect if the undertaking had coerced any other undertaking to join the cartel. In addition, the Commission, at the time of submission, should not have had access to sufficient evidence to find an infringement of Article 81(1) EC.

To qualify for any of the immunities set out in point 8, the undertaking has to fulfil further conditions. First, the undertaking has to cooperate genuinely and fully during the whole procedure. This comprises to provide the Commission with relevant information and evidence upon the Commission’s request. It must also be of the Commissions accessibility to answer questions and further it has to make employees and directors available for interviews that the Commission wants to hold. The undertaking is not authorized to destroy, falsify, or to conceal relevant information or evidence relating to the infringement. Any facts or any of the content of the application is not to be disclosed to anyone before the Commission has issued a statement of objection in the case. This criterion pertains to unless otherwise agreed. Immediate termination of participation in the cartel, or after some time if considered reasonably by the Commission, is an important criterion to receive immunity. Lastly, the applicant cannot have falsified, destroyed or concealed evidence, fact or other content in its application, except to other competition authorities.⁷⁴

⁷³ Commission Notice on immunity from fines and reduction of fines in cartel cases, point. 10.

⁷⁴ Ibid, point. 12.

Total immunity from fines does not always come in question. Paragraph 21 gives the Commission power to reduce penalties imposed where an undertaking for example has provided the Commission with information, which has significantly added value to its assessment.

As stated above, an application for leniency to one competition authority does not mean that the application for immunity has been filed to other Member States' authorities or the Commission as well. This could be of discouragement for potential leniency applicants. Therefore, a European Competition Network has adopted a model for leniency programmes throughout the community (hereafter called the ECNP). The programme is applicable to full immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in the exchange for the voluntary disclosure of information regarding the cartel, which satisfies specific criteria prior to or during to the investigative stage of the case. An application according to point 8(a) in the notice⁷⁵ is called type 1(a), while applications according to 8(b) in the notice are called 1(b) in the ECNP. An application for reduction of fines is called type 2.⁷⁶

Initially in an application for immunity, an undertaking can apply for a so-called marker, which protects the applicants place in a possible queue for a given period of time. If several undertakings apply for immunity regarding the same cartel a queue will be formed and the system is that the first one in line will be able to benefit from immunity, while other undertakings in line only can get a reduction of a fine. The marker allows the undertaking to gather necessary information and evidence in order to meet the relevant evidential threshold for immunity. It is up to the NCA to grant a marker or not. When a NCA finds an undertaking's submissions sufficient to meet up to the criteria for immunity, it will grant the undertaking a conditional immunity from fines in writing. At the end of the procedure, the NCA will take a final decision to grant immunity or not.⁷⁷

There is now a possibility for undertakings to file so-called summary applications to NCAs suitable to act under the Network notice⁷⁸, type 1(a) cases, if the Commission is particularly well placed to deal with an application for immunity from fines. A summary application should contain; i. name and address of the applicant; ii. other parties to the alleged cartel; iii. affected territory(-ies); iv. duration, v. nature of the alleged cartel conduct; iv. Member State(s) where the evidence is likely to be located and vi. information on its other past or possible future leniency applications in relation to the alleged cartel cases.

⁷⁵ Cited supra note 71.

⁷⁶ ECN Model Leniency programme, p. 1 f.

⁷⁷ Ibid, p. 5.

⁷⁸ Commission Notice on cooperation within the Network of Competition Authorities, para. 14.

The NCA who receives the summary application will give out a receipt to the applicant and also a confirmation of that it is the first to apply to that particular NCA for immunity, if so is the case, and if the NCA decides to instigate a procedure the undertaking has some time to complete the application. In some cases the NCA finds that the threshold for immunity is not met. Then the applicant has to make a submission of more information and evidence, in such cases, a time limit will be set and if the applicant fulfils the requirement, the information and evidence will be looked at as if it was submitted on the date when the summary application was made. The NCA does not have to seek the applicants consent to be allowed to transfer information to another authority pursuant to Article 12 of the 1/2003 Regulation⁷⁹ during the following circumstances;

- i. if the receiving authority also has, got an application for leniency relating to the same infringement, as the transmitting authority, provided that the applicant during the period have the choice to withdraw its application;
- ii. if the receiving authority has provided a written commitment where it holds that neither information received by it or that is transmitted to it, by the transmitting authority following the date and time of transmission, will not be used when it is transmitted to impose sanctions on the leniency applicant, any other natural or legal person that are treated favourable by the transmitting authority, on any other employee or former employee of any of the two mentioned above;
- iii. if information was collected by a network member according to Article 22(1) of the 1/2003 on the behalf of and for the account of the network member who received the application for leniency, no consent is required for the former to transmit the information to the receiving authority.⁸⁰

However the NCA, that receives a summary application, will not grant or deny conditional immunity. If the NCA yet not has decided if it should take action in the matter, the applicant duty to provide further information only exists towards the Commission, although the undertaking has to comply to requests from the NCA so it will be able to make a decision on its view to allocate the application.⁸¹

Members of the European competition network are in favour of civil proceedings as a complement to official sanctions and proceedings. Although this is the case, it would in their view, not be fair to put cooperating undertakings, who is revealing cartels, in a less favourable position in respect of civil damage claims than cartel members that refuse to cooperate. Therefore, the ECNP allow oral applications (summary, marker or full applications) in cases where it would be appropriate and justified. This is always the case when the Commission is particularly well placed to act. Further, the ECNP impose that no access will be granted to any records of any oral statements before the statement of objections has been issued.

⁷⁹ Cited supra note 6.

⁸⁰ ECN Model Leniency programme, p. 6.

⁸¹ Ibid, p. 14.

Various jurisdictions throughout the community have different rules concerning access to the file and/or public access to documents and therefore the programme states that exchange of records of oral statements between NCAs is limited to cases where the protections afforded to such records by the receiving NCA are equivalent to those afforded by the transmitting NCA.⁸²

4.2.2 Reduction of fines

If an undertaking cannot meet up to the criteria set out for immunity it still has the possibility to qualify from a reduction from fines. Still they have to disclose its participation in the cartel by themselves. The undertaking has to provide the Commission with information, which adds value as evidence to the alleged cartel. In addition, the same criteria applies as for immunity, set out in point 12 in the notice⁸³. “Added value” means evidence that as such gives the Commission possibility to prove the alleged infringement.⁸⁴

There are different levels of reduction, that undertakings can be eligible for. Those undertakings that provides significant added value to the procedure can get a reduction of 30 – 50 %. Second undertaking to provide this kind of value can benefit from a reduction of 20 – 30 %. Other following undertakings can get a reduction between 0 and 20 %. In its assessment of the amount of reduction the Commission considers the time at which the evidence fulfilling the criteria to benefit from reduction was submitted and the extent to which it represents added value. If the undertaking in question is the first to submit convincing evidence, that by its very nature gives the Commission the tools to prove an alleged infringement, the Commission does not look at additional facts when it determines the amount of fines for the applicant.⁸⁵

Procedure is that the undertaking must hand in a formal application for a reduction of a fine, together with sufficient evidence of the alleged infringement. The evidence which the undertaking wish to benefit from must be clearly identified when submitted and it must be stated that the undertaking wish for it to be part of its application, otherwise the Commission will not take it into consideration in its assessment of setting a fine. The undertaking can request a receipt of its submission, where it is stated the date for application and which evidence that are attached to it, from the Director Generale for competition. The Commission will inform the undertaking if it finds that it meets up to the requirements for reduction of a fine. Conversely the Commission will give information if it finds that the undertaking has not met the requirements.⁸⁶

⁸² ECN Model Leniency programme, p. 15 f.

⁸³ Commission Notice on immunity from fines and reduction of fines in cartel cases.

⁸⁴ Ibid, point 23 ff.

⁸⁵ Ibid, point 26.

⁸⁶ Ibid, point 27 ff.

Ultimately the Commission will evaluate the different undertakings applications and it will adopt a final decision where it determines:

- (a) “whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission’s possession at the same time;*
- (b) whether the conditions set out in points (12)(a) to (12)(c) above have been met;*
- (c) the exact level of reduction an undertaking will benefit from within the bands specified in point (26).”⁸⁷*

If the criteria are not met in the notice the Commission the undertaking will not benefit from any favourable treatment under the notice.⁸⁸

⁸⁷ Commission Notice on immunity from fines and reduction of fines in cartel cases, point 30.

⁸⁸ Ibid, point 30.

5 Civil Sanctions

Focus in the European community has lied on public enforcement and sanctions followed upon such. A complement is civil sanctions, which can follow upon infringement of Article(s) 81 and/or 82 EC. Regulation 1/2003 was adopted in the Commission's work to increase civil litigation and decentralize enforcement in general.⁸⁹

5.1 Article 81(2) EC

Article 81 EC contains a null and void clause in paragraph 2. However, Article 81(2) EC is only applicable to clauses in an agreement which may be affected by the Article 81(1) EC prohibition. The effect of this is that some parts of the agreement still can be valid⁹⁰. There is no equivalent provision in Article 82 EC. The effect however - that the part of the agreement which is infringing EC competition rules is unenforceable - is the same.⁹¹ A case where an agreement was caught under Article 82 and was found void is the case *Scandinavian Airlines System v. Swedish Board of Aviation*.⁹² The void clause is not very often enforced in court since the undertakings, that i.e. is part of a cartel, normally would not want to show their participation in such a conduct.⁹³

The case *Eco Swiss China Time v Benetton*⁹⁴ shows in practice that clauses in an agreement becomes void after an infringement of Article 81(1) EC. Further, the ECJ stated in *Société Technique Minière v Maschinenbau Ulm*⁹⁵ that if it is possible to severe provisions, which are not offending Article 81(1), those should remain valid and enforceable. This is according to the doctrine of severance, which states that:

*“the parts of a restrictive covenant which infringe a particular rule of law can, in principle, be severed for the rest of the covenant provided that the court does not have to re-write the covenant in order to achieve this effect”.*⁹⁶

⁸⁹ Jones and Sufrin, *EC Competition law*, p.1193 f.

⁹⁰ Ibid, p. 179.

⁹¹ Smith, *Competition law – Enforcement and procedure*, p. 446.

⁹² Jones and Sufrin, *EC Competition law*, p. 1203. The SAS case is given as an example by the authors, however it is an unreported case.

⁹³ Whish, *Competition law*, p 286.

⁹⁴ Case 126/97, *ECO Swiss China Time v Benetton*.

⁹⁵ Case 56/65, *Société Technique Minière v Maschienbau Ulm*.

⁹⁶ Smith, *Competition law – Enforcement and procedure*, p. 447.

The validity should be determined according to the national law in each Member State and it is therefore not a general assessment under community law. Which country's law that is applicable is of importance since there are different ways on how to sever an unlawful restriction from contracts in the Member States. To know which law that should be applied The Council Regulation on jurisdiction and the recognition and enforcement⁹⁷ is used, when determining applicable law to the agreement in question.⁹⁸ An additional question is if the entire or part of an agreement that infringe Article 81 EC or conduct prohibited by Article 82 EC not only is void but also illegal.

5.2 Injunctions

While bringing an action before a national court there can be of importance for the party, that the asserted infringement of Articles 81 and 82 EC, is stayed during the proceedings. This remedy shall be available in Member States' court if the right to injunctive relief rises under similar national law, since Community law must not be less extensive than national rules.⁹⁹

5.3 Private enforcement before national courts

Earlier, private actions in front of the Commission and national courts have been according to the "Euro-defence model", which means that a party in a civil action uses the prohibitions in community competition law as a defence, so that the agreement shall be declared null and void according to Article 81(2). Conversely, the so-called "Euro-offence" model are used in opposite direction, which is now applied more often by litigants. Here the Articles in the EC are used to initiate a proceeding for injunctive relief, damages or other remedies, because the complainant has been affected by an anticompetitive conduct which is prohibited according to the EC competition rules.¹⁰⁰

5.3.1 Actions for damages

Although Articles 81 and 82 EC have direct effect, it does not follow automatically from the community competition provisions, that private parties have a right to damages from the infringing party. Though, several EU principles indicate that a right to damages follows from the EC Treaty. Within the principle of equivalence falls the requirement that Member States should offer the same remedies when they enforce the EC as to the domestic rules. It follows from the principle of effectiveness that Member States are

⁹⁷ Council Regulation 44/2001, Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁹⁸ Whish, *Competition law*, p 289

⁹⁹ Smith, *Competition law – Enforcement and procedure*, p. 456

¹⁰⁰ Van Bael and Bellis, *Competition law of the European community*, p. 1173

not allowed to make it virtually impossible or excessively difficult to enforce EC law. Effective remedies should be offered and sometimes right to damages can be the only effective sanction available.¹⁰¹ In addition, one can draw the conclusion, from case law from the ECJ, that private parties are entitled to damages.

As previously stated, the Regulation 1/2003¹⁰² gives the national courts in the European community the authority to apply Articles 81 and 82 EC directly. This reform allows companies and individuals that suffer harm from a prohibited anticompetitive conduct not only to seek redress, but also damages from the infringing parties directly at a national court, who are responsible for the protection of the subjective rights that individuals or legal persons have according to EC Competition rules.¹⁰³

Availability of compensation for loss that have arisen from a violation of Articles 81 and 82 EC serve as a complement to public enforcement with that it deters possible infringers from anti-competitive behaviour on the market, since they not only have to pay fines for violating community competition law, but in addition have to pay damages to individuals.¹⁰⁴

In Recital 7 of Regulation 1/2003 it is acknowledged how private enforcement should serve as a complement to private actions for damages before national courts:

“National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States”

5.3.2 Case-law development

The Case *BRT v SABAM*¹⁰⁵ already in 1973 stated that the Articles 85 (now 81 EC) and 86 (now 82 EC) of the Treaty that govern competition enforcement within the European community produce direct effect and therefore they create rights for different parties. This was further developed in *Franovich v. Italy*¹⁰⁶, which stated that the national courts have to safeguard these rights in accordance to the fundamental principle of effectiveness inherent to the EC law and Article 10 EC.

The ECJ concluded that Member States could be liable for damages in the abovementioned case *Franovich*. In that particular case, private parties were entitled of damages because of Italy’s lack of implementation of a Directive. In the case *Banks v. British Coal*¹⁰⁷ the conclusion in *Franovich*

¹⁰¹ Van Bael and Bellis, *Competition law of the European community*, p. 1180 f.

¹⁰² Cited supra note 6.

¹⁰³ Van Bael and Bellis, *Competition law of the European Community*, p. 1168.

¹⁰⁴ Commission Staff working paper on action for damages, p. 6 – 7.

¹⁰⁵ Case 127/73, *BRT v SABAM*.

¹⁰⁶ Case 6/90, *Franovich v. Italy*.

¹⁰⁷ Case 128/92, *Banks v. British coal Corporation*,, para. 37.

was developed by the Advocate General Van Gerven, who stated that also private parties should be entitled to damages because national courts are: “under an obligation to award damages for loss sustained by an undertaking as a result of the breach by another undertaking of a directly effective provision.”

The ECJ did not rule in favour of the arguments from the Advocate Generale. On the other hand, they gave a party right to private damages in the case *Courage v. Crehan*,¹⁰⁸ but this was not until seven years later.

Three substantive conditions were set out in the case *Brasserie du Pêcheur SA v. Germany*¹⁰⁹ that must be fulfilled for a Member State to be obligated to make reparations when acted in breach of community law. The conditions are as follows:

“The Member State has infringed a rule of Community law which is intended to confer rights on an applicant; which is sufficiently serious; and in circumstances in which there is a direct causal link between its breach and the applicant’s loss”.¹¹⁰

The distinction from *Francovich* was if a similar principle should also apply in horizontal cases where it is an undertaking, not a Member State, who is in breach of community competition rules. The answer to this question was set out in the case *GT-Link A/S v. De Danske Statsbaner (DSB)*¹¹¹ where the ECJ concluded that when the conditions in the case *Brasserie*, were fulfilled, an individual could claim reparation of loss by a private undertaking. The case dealt with Article 82 EC, not 81 EC, and a State’s liability. It also stressed the rights conferred upon the individual. The same remedies shall be available irrespective if there is a breach of Article 81 or 82. It can be interpreted that individuals should have the same rights regardless if a State or non-State entity adds charges. Further Article 82 EC raises obligations on both public and private entities and from that follows that the case *GT-Link* applies even to breaches committed against private undertakings.¹¹²

Courage was settled in 2001 and is one of the major cases in private enforcement, in other words legal action brought by the victim of anti-competitive behaviour before a national court. Private enforcement consists of two types of actions. These are either action for nullity or action for damages. Even though the result is that, an illegal anti-competitive agreement is void that does not automatically give a legal basis for liability for damages.

¹⁰⁸ Case 453/99. *Courage v. Crehan*,. The case is described more in detail in section 5.5.

¹⁰⁹ Case 46/93 and 48/93, *Brasserie du Pêcheur SA v. Germany*.

¹¹⁰ Jones and Sufrin, *EC Competition law*, p. 1210

¹¹¹ Case 242/95, *GT-Link A/S v De Danske Statsbaner (DSB)*.

¹¹² Jones and Sufrin, *EC Competition law*, p. 1211

The ruling in *Courage* creates a new legal order for the European community. The rights are actually conferred on individuals through the EC itself and they have to be safeguarded by the national courts. Otherwise, they would not be given full effect in the enforcement of the competition rules. The Community public enforcer supports private actions before national courts.¹¹³

5.3.3 Who are liable for damages?

According to community competition law, only undertakings can be held liable for violation of the competition rules. Therefore, only undertakings can be made liable for action for damages, but then the question of what constitutes an undertaking in the meaning of community competition law has to be solved. The conception is defined as a physical or legal person that operates economical activity. The activity does not have to be carried out with the purpose of making a profit. The assessment can mean that several undertakings can be seen as one whole economical entity. Also Member States can be seen as an undertaking if it acts as one. The main issue whether an entity is seen as an undertaking or not within community competition law, is not its judicial status, but the actual nature of its activity.¹¹⁴ It can be hard for the damaged person or undertaking to prove that adequate causality is existing and that an equitable responsibility for damages exists between several undertakings. If the abovementioned criterion can be established, the undertakings are equitable responsible for the damage as a whole but liability is then tried based on each and everyone of the undertaking's participation.¹¹⁵

The undertaking can be liable for damages either strictly or by negligence. In the assessment of liability, a trial is made of the undertaking's negligence and which measures it has followed to limit the damage. Community competition law does not have a direct requirement for strict liability, but for liable undertakings such a responsibility ought to be the most effective remedy for the affected undertaking or person, since a liability based on negligence would limit the responsibility. In the case *Draehmpaehl*¹¹⁶ the ECJ established that individual liability should be strict. The justification to this point of view is that individual's responsibility of the prohibition of discrimination in the Directive 76/207 should not depend of a criteria of negligence.¹¹⁷

¹¹³ Case 453/99. *Courage v. Crehan*, para 26 f.

¹¹⁴ Wetter m.fl., *Konkurrensrätt – en handbok*, p. 55 f.

¹¹⁵ Wahl, *Konkurrensskada*, p. 194 ff.

¹¹⁶ Case 180/95, *Nils Draehmpaehl v Urania Immobilienservice OHG*.

¹¹⁷ Wahl, *Konkurrensskada*, p. 211.

In community competition law there is not necessary for a violation to depend on the criteria negligence.¹¹⁸ In the case *Banks v British Coal*¹¹⁹ case the Advocate Generale had the opinion that there should not be a requirement on negligence for a violation of community competition rules to have occurred, because the infringement itself is negligent.¹²⁰ In conclusion, this means that strict liability applies on community competition rules.

5.3.4 Who are entitled to damages?

Regulation 1/2003¹²¹ gives the national courts in the European community the authority to apply Articles 81 and 82 EC directly. This is a reform which allows companies and individuals that suffer harm from a prohibited anticompetitive conduct not only to seek redress, but also damages from the infringing parties at a national court, who are responsible for the protection of the subjective rights that individuals or legal persons have due to community competition rules.¹²²

From the ruling in *Courage v. Crehan*¹²³ it follows that both competitors, consumers and also parties to a void anti-competitive agreement can rely on an infringement of Article 81(1) EC before national courts. Private parties should be able, according to the ECJ, to seek damages when an infringement of EC competition law has occurred. Therefore, Member States must have actions for damages as a remedy.¹²⁴

All parties, to whom a decision is addressed and others to whom it is of direct and individual concern, have the right to lodge an appeal according to Article 230 EC. The ECJ could consequently examine whether the Commission has violated the EC in substance or procedurally.¹²⁵ As was stated in *Courage v Crehan*¹²⁶ the EC required that individuals, who have suffered a loss arising from a violation of Articles 81 or 82 EC, have the right to claim damages. Actions can be brought between co-contractors, as well as third parties.¹²⁷

¹¹⁸ Wahl, *Konkurrensskada*, p. 209.

¹¹⁹ Cited supra note 107.

¹²⁰ Wahl, *Konkurrensskada*, p. 211.

¹²¹ Cited supra note 6.

¹²² Van Bael and Bellis, *Competition law of the European Community*, p. 1168

¹²³ Cited supra note 108.

¹²⁴ Van Bael and Bellis, *Competition law of the European community*, p. 1182.

¹²⁵ Korah, *An introductory guide to EC competition law and practice*, p.26

¹²⁶ Cited supra note 108.

¹²⁷ Commission staff working paper, p 6.

Article 232 EC gives the CFI right to sue the Commission if it has not taken the appropriate measures to enforce the EC Treaty. There is a difference between if the ECJ take up a case after an appeal to the Commissions decision or if a national court requests for a preliminary ruling according to article 234 of the EC Treaty. When applying article 234 the ECJ has to give an abstract ruling instead of applying it to the facts.¹²⁸

The Circle of those who are entitled to damages are limited to those who shall be protected by the norm and they also have to suffer a substantial injury. Since the aim of protection in community competition rules are individuals they should be comprised by an entitlement to damage. However, a problem that needs to be considered is where the line is to be drawn.¹²⁹

“*Locus standi*” according to community competition rules is granted to natural or legal persons who plead that the defendant(s) have infringed Articles 81 and 82 EC and the infringement is likely adversely to affect the legitimate interests of the plaintiff or adversely has affected the legitimate interests of the plaintiff.

5.4 Procedural aspects

When a party seeks damages for breach of Articles of 81 and 82 EC they have to turn to a national court in a Member State. To enforce community competition law the national court has to use national procedural law, although this is the case there are some things that national courts has to take into consideration.¹³⁰

It is more preferable for private parties to seek compensation before a national court than to lodge a complaint before the Commission, because national courts have exclusive jurisdiction to resolve contractual disputes and are best suited to grant interim measures, since it only can be granted on the Commission’s own initiative, not on claim by a complainant. To turn to the Commission can only result in a decision on infringement when a party lodge a complaint. Objection to this can be raised due to that it is free of charge to have a case pending in the Commission, while a national court would charge for procedural costs. Although this is not fully accurate since there can be legal fees in the procedure before the Commission. The Commission has more resources to make a correct economic assessment. A disadvantage can be that the Commission has more incentives to change case law and therefore depart from previous decision.¹³¹

¹²⁸ Korah, *An introductory guide to EC competition law and practice*, p. 27

¹²⁹ Wahl, *Konkurrenskada*, p. 240 f.

¹³⁰ Van Bael and Bellis, *Competition law of the European community*, p 1185

¹³¹ *Ibid.* p 1172

It is important to stress that national courts, in disparity from NCAs and the Commission, have no obligation to apply Articles 81 and 82 EC to safeguard competition policy orientation or the public interest of enforcing the two Articles. Instead, the direction is to apply the Articles in the context of civil litigation between private parties. This means that public authorities do not have to have taken any measures before the case and if the Commission decides to initiate procedures, the national court does not lose jurisdiction.¹³²

The Commission has adopted a Green paper¹³³ and a Commission staff working paper¹³⁴, which describes the issues around private enforcement in the Member States. Problems and different possible solutions to the different obstacles are discussed and this will then result in a so-called White Paper that will be adopted by the Commission in the year 2007. The White Paper will set out in concrete terms some ideas for the follow-up to the Green Paper.

5.4.1 Evidence

The first problem dealt with is access to evidence, because evidence is not easily available for a possible claimant. Therefore, it should be considered whether there should be an obligation to give out documents, which can be used as evidence in a case regarding action for damages due to violation of community competition rules. This would especially be of interest in the so-called stand-alone actions, which does not build upon that a NCA has already found and taken a decision on infringement. In such cases an action for damages is called a follow-on action because the civil action is brought after a NCA has found an infringement. However, there is another issue in the latter cases. It can be discussed whether documents that are submitted to the NCA should be disclosed. Further rules on burden and standard of proof can be of importance. Significant is what evidentiary value a decision adopted by a NCA is given.¹³⁵

It can be hard for a claimant to prove the actual loss and to be able to give a correct view of the right market context. The individual has to define the relevant market and prove that the conduct complained of has negative effects as to prices, output or innovation on the relevant market. The amount of damages has to be defined which can be difficult because the claimant has to show the difference between i.e. the cartelized price and a fictional competitive price. Evidence then has to show other actual and/or potential players' activities on the market. This means that the claimant has to be informed of the defendant's behaviour on the market and its market position.¹³⁶

¹³² Van Bael and Bellis, *Competition law of the European community*, p. 1172 f.

¹³³ Green Paper, Damages actions for breach of the EC antitrust rules.

¹³⁴ Cited supra note 128.

¹³⁵ Green Paper, Damages actions for breach of the EC antitrust rules, p. 5.

¹³⁶ Commission Staff working paper, p. 16 – 17.

Judges can oblige, to some extent, parties in a case to disclose documents. This can be done either upon request or *ex officio*. Most often the claimants have to rely on voluntarily cooperation from the defendant(s). A different aspect arise when documents from the defendant are actually handed in to the Commission or a NCA. There is a regulation 1049/2001¹³⁷, which builds upon Article 255 EC. This Article allows citizens in the EU and those residing in the EU to have access to the documents of the European Parliament, the Council and the Commission. Even though this right exists, it would be appropriate to introduce a specific rule that states a right for private litigants to obtain information directly from the other parties, which the parties have supplied to the Commission or NCA. This would be of significance since the protection of private interests in claiming damages is not the objective of the Regulation 1049/2001.

In Article 10 EC there is introduced a duty of loyal cooperation, which is addressed in Article 15(1) in Regulation 1/2003 and this is further clarified in the Commission's Notice on cooperation between the Commission and national courts.¹³⁸ This cooperation is however due to certain limitations, such as the obligation of professional secrecy, which protect business secrets and other confidential information. In addition, the Commission can refuse to submit information to a national court if the interest of the community and the function of the authority are threatened. Information submitted by a leniency applicant can only be transmitted after consent of the latter, as previously mentioned.¹³⁹

Standard of proof is regulated by national laws, not by Article 2 in Regulation 1/2003¹⁴⁰. The burden on the claimant can be considered to be too high and asymmetry is present between the two possible parties in action for damages cases, as the rules are constructed today. The claimant's burden of proving the violation of community competition rules can possible be alleviated, that is what both national law and community law indicates in case of information asymmetry. The burden on the claimant would be to present facts which may constitute evidence of an infringement of the community competition rules, and conversely the defendant then would have to bring forward the necessary explanations or justifications to proof that those facts do not comprise of a violation of those rules.

¹³⁷ Council Regulation 1049/2001 regarding public access to European Parliament, Council and Commissions documents.

¹³⁸ Cited supra note 61.

¹³⁹ Staff working paper on damages, p. 24 f.

¹⁴⁰ Cited supra note 6.

The national court can not adopt a judgement that are running counter to a Commission's decision, if the Commission has adopted a decision according to Article 249 EC. Article 10 EC lies behind that theory, and both national courts and NCAs are obligated to attain the aims of the objectives of the EC. This decision can serve as proof for a claimant for the claimed infringement. However, if there is a prior decision of an infringement of community competition rules adopted by a NCA the same does not apply in all Member States and this constitutes a problem.¹⁴¹

The options proposed by the Commission in its Green Paper are cited below. The first question considers special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty.

- “Option 1. Disclosure should be available once a party has presented reasonably available evidence in support of its allegations (fact pleading). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.*
- Option 2. Subject to fact pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, should be possible.*
- Option 3. Subject to fact pleading, there should be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.*
- Option 4. Introduction of sanctions for the destruction of evidence to allow the disclosure described in options 1 to 3.*
- Option 5. Obligation to preserve relevant evidence. Under this rule, before a civil action actually begins, a court could order that evidence which is relevant for that subsequent action be preserved. The party asking for such an order should, however, present reasonably available evidence to support a prima facie infringement case.”¹⁴²*

Issue two, relating to evidence, is whether special rules regarding access to documents held by a competition authority should be adopted and the form for such rules. The suggestions are:

- “Option 6. Obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all documents which have been submitted to the authority, with the exception of leniency applications. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defence would be addressed under the law of the forum (i.e. the law of the court having jurisdiction).*
- Option 7. Access for national courts to documents held by the Commission. In this context, the Commission would welcome feedback on (a) how national courts consider they are able to guarantee the confidentiality of business secrets or other confidential information, and (b) on the situations in which national courts would ask the Commission for information that parties could also provide.”¹⁴³*

Thirdly, there are also suggestions in the Green Paper whether a claimant's burden of proving the antitrust infringement in damages actions shall be alleviated and which forms such a possible alleviation should take.

¹⁴¹ Commission Staff working paper, Annex to the Green Paper Damages actions for breach of the EC antitrust rules, p. 26 f.

¹⁴² Green Paper, Damages actions for breach of the EC antitrust rules, p. 5

¹⁴³ Ibid, p. 6.

- “Option 8. Infringement decision by competition authorities of the EU Member States to be made binding on civil courts or, alternatively, reversal of the burden of proof where such an infringement decision exists.”*
- Option 9. Shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant with the aim of redressing that asymmetry. Such rules could, to a certain extent, make up for the non-existence or weak disclosure rules available to the claimant.*
- Option 10. Unjustified refusal by a party to turn over evidence could have an influence on the burden of proof, varying between a rebuttable presumption or an irrebuttable presumption of proof and the mere possibility for the court to take that refusal into account when assessing whether the relevant fact has been proven.”¹⁴⁴*

5.4.2 Leniency

In the Green Paper the problem with how public and private enforcement should relate to each other is brought up. The issue is not whether how they actually should complement each other, but how the incentives for undertakings to “blow the whistle” at the same time if there are no obstacles for possible private enforcers to rely on the decisions (the result of telling) in action for damages. In its notice on immunity from fines¹⁴⁵ the Commission clearly states that leniency does not in any way hinder civil action for damages:

“The fact that immunity or reduction of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.”¹⁴⁶

Leniency is only an advantage, which the undertaking can benefit from in relation to public enforcement conducted by the Commission. The problem relates first of all to the follow-on actions, but can also be transferred to stand-alone actions, since it is possible that the decision can serve as evidence. The information submitted to the leniency application can be used as motivation in a decision adopted by an authority, this means that information, that otherwise maybe not would be disclosed, would come to a possible claimants knowledge. If the decision is not successfully appealed the decision is made binding, due to Article 16 Regulation 1/2003¹⁴⁷. Submitted documents may also be used as evidence in civil trials.¹⁴⁸ Whether such documents have to be handed over depends on if it is oral or written statement, and whether the undertaking in question has the material in its own possession and also it depends on the applicable national law.¹⁴⁹

It is likely that leniency programmes, both from the Commission as well as in the Member States, will increase action for damages and that this will constitute a hinder, when it comes to the incentive for undertakings to apply for leniency, since it is possible that it will end up paying anyway. Another aspect is that the undertaking might not avoid civil claims although it has

¹⁴⁴ Green Paper Damages actions for breach of the EC antitrust rules, p. 6

¹⁴⁵ Commission notice on immunity from fines and reduction of fines in cartel cases, para. 31.

¹⁴⁶ Ibid.

¹⁴⁷ Cited supra note 6.

¹⁴⁸ See discussion of possible solutions for the evidence question in chapter 5.4.1.

¹⁴⁹ Commission Staff working paper, p.64 f.

not filed in for leniency. This is due to the fact that another party of the cartel, might “blow the whistle” and expose the other undertaking for public procedure. This could lead to that the undertaking does not get immunity or a reduction of fines at all, and in addition will be held liable in a civil case and pay damages to a company or person.¹⁵⁰

The options for how an optimum coordination of private and public enforcement can be achieved are discussed in the Green Paper¹⁵¹ and they are as follows:

“Option 28. Exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of the leniency applications.

Option 29. Condition rebate on any damages claim against the leniency applicant, the claims against other infringers – who are jointly and severally liable for the entire damage – remain unchanged.

Option 30. Removal of joint liability from the leniency applicant, thus limiting the applicant’s exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of damages corresponding the applicant’s share in the cartelised market.”¹⁵²

5.4.3 Other issues

A problem with action for damages is whether only those directly affected by the violation should be entitled to damages or also indirect purchaser should be permitted to sue. This issue connects with the so-called “passing on defence”. The “passing on defence” means that the defendant uphold that the plaintiff not has suffered any real damage because it has passed on the increasing costs, that has come up due to the defendant’s possible violation of Community Competition law, to its own customers.¹⁵³

Standard of the requirement of proof are also a question of concern, since some Member States has the requirement that fault have to exist upon an illegal action under community competition law. Other Member States do not have this presumption. There is a need for harmonisation.¹⁵⁴

Once an infringement of community competition law has been established Green Paper Damages actions for breach of the EC antitrust rules damages can be given to the affected company or person. But how should damages be defined and measured? Quantification of damages demand economical considerations and is a key issue in civil proceedings.¹⁵⁵ The costs for the action also has to be assessed, since it is of significance in the appraisal for a possible claimant on how much money can be lost in the proceeding.¹⁵⁶

¹⁵⁰ Commission Staff working paper, p.65.

¹⁵¹ Cited supra note 2.

¹⁵² Ibid, p. 9 f.

¹⁵³ Ibid.

¹⁵⁴ Ibid, p. 6.

¹⁵⁵ Green Paper Damages actions for breach of the EC antitrust rules, p. 7.

¹⁵⁶ Ibid, p. 9.

One of the aims of private enforcement within community competition law is to protect the consumers. It can be hard for a consumer to bring an action before national court all alone and therefore it should be considered whether there should be a possibility for affected consumers to bring a collective action instead.¹⁵⁷

Since it is national law that governs cases that consider actions for damages in community competition law, it is of importance to decide which Member States' law that should be applicable and which Member State that has jurisdiction. Other issues brought up in the Green Paper¹⁵⁸ are such as whether expert witnesses should be appointed and permitted by the court and if there should be any limitation period for an action for damage, followed upon an infringement of community competition law, and finally legal clarification regarding causation.¹⁵⁹

5.5 EU and Member States' Case Law regarding private action for damages

Case-law concerning private action for damages has been more of a rarity than representing the majority of legal actions regarding competition, as in the U.S. On the European level, case-law has slowly developed towards a private right to seek compensation for loss due to violation of the competition rules, but it was not until the *Courage*¹⁶⁰ judgement this was stated clearly. Action for damages shall be brought before Member states' courts and there have only been a few cases. Amongst them are cases from France, Germany and Spain. Due to that these cases only are available on their original language they will not be described in this paper, instead this paper will bring up three cases available in English. Two are from the ECJ and one is a case from the UK House of Lords.

¹⁵⁷ Green Paper Damages actions for breach of the EC antitrust rules, p. 8. f.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, p. 10 f.

¹⁶⁰ Cited supra note 108.

5.5.1 Courage v. Crehan

According to Article 234 EC the Court of Appeal (England and Wales) (Civil division) asked for a preliminary ruling by the ECJ in the cases *Courage Ltd v Bernard Crehan* and *Bernard Crehan v Courage Ltd and Others*.

The background of the case was that Courage and Grand Metropolitan plc merged their leased public houses (pubs) into the undertaking Innterpreneur Estates Ltd (IEL), which meant that all IEL tenants had to buy their beer from Courage. Such a contract was concluded between Mr Crehan and IEL, (two 20-year leases) which imposed the obligation of buying his beer from Courage. There was a fixed minimum quantity of specified beer that had to be purchased at a special price put up at a special pricelist, set up by IEL.

Courage brought an action before national court for unpaid deliveries of beer. Mr Crehan responded and used competition law as a shield, he held the contract to violate Article 85 of the Treaty (now Article 81 EC) and in addition he counter-claimed for damages. Mr Crehan asserted that Courage sold beer at lower prices to other tenants that was not part of the IEL beer ties. This conduct reduced the profitability of tied tenants and in the end led them out of business.

The Court of Appeal sought a preliminary ruling on the merits that English law precludes someone that are part of an illegal contract to claim damages from the other party, therefore it would not matter whether the contract could be held unlawful according to Article 85 of the Treaty (now Article 81 EC). Further, the Court of Appeal held that community competition law was to protect third parties, not parties to the unlawful agreement. Then the court referred to an American case where the Supreme Court of the United States had ruled that a party to agreement, who are in an economic weaker position, could sue the other contracting party for damages.¹⁶¹

The Court of Appeal stayed its proceedings to find out whether English procedural law was in conflict with community competition law. The essence of the case is whether a party can rely on Article 85 of the Treaty (now Article 81 EC) and attain compensation for loss from the contracting party if the compensation for loss is a result from a contract or contractual clause that violates Article 85 of the Treaty (now Article 81 EC)? The follow up question is if community law precludes national law to provide a rule, which denies a person the right to rely on his own illegal actions to obtain damages. If a party to an illegal contract is allowed to seek damages - is that due to his adherence to the clause in the agreement? If a rule, such as the one described in English law, in some circumstances is incompatible

¹⁶¹ Case 453/99. *Courage v. Crehan*, .para. 11-13.

with community law, the Court of Appeal asks what factors national court should take into consideration.¹⁶²

The ECJ began to state that community law is integrated in Member States' law, which the courts in the Member States are bound to apply. Community law both imposes obligations as well as it creates rights on individuals. Article 85 of the Treaty (now Article 81 EC) is part in the accomplishment of the tasks entrusted to the Community, according to now Article 3(g) EC.

The principle of automatic nullity according to Article 81(2) EC can be imposed by anyone, as long as the conditions set out in Article 81(1) EC are met and as long as the agreement does not fulfil the criteria in Article 81(3) EC, which justify a grant for an exemption. Both Articles 81 and 82 EC have direct effect and therefore an individual can rely on Article 81(1) EC before a national court, although he is party to a contract, which restricts competition according to Article 81(1) EC. This right must be protected by the national court system in a Member State. Actions before national courts contribute to the full effectiveness of competition within the EU. It is the national rules that are governing the procedure when enforcing the community competition rules, in the absence of community rules. Rules regarding community law are not to be less favourable than those covering domestic rules and the national rules are to meet the requirements set out in the principles of equivalence and effectiveness, the ECJ stated.

In that sense, national courts are not precluded from making sure that unjust enrichment does not arise to protect the rights guaranteed by community competition law. Consequently, it is permissible for Member States to have national rules to deny a party, which bear a significant responsibility for the distortion of competition, the right to attain damages from the other contracting party. A litigant should not make profit on its own illegal conduct. Factors to be taken into account by national courts are the economic and legal context in which the parties find themselves. Important is the bargaining power the different parties possess and whether the party to seek damages has a weaker position.

¹⁶² Case 453/99. *Courage v. Crehan*, para. 16.

5.5.2 Inntrepreneur Pub Company (CPC) and others v. Crehan

The dispute between the parties Inntrepreneur Pub Company (CPC) and others against Crehan was the same as that lying behind the ruling in the *Courage* case. However, what was to be settled in the House of Lords was whether judge Park J had taken a judgement that run counter to the view of the Commission.

The Commission got involved in the dispute because CPC had applied for exemption under Article 81(3) EC, according to the old system. That application, however, got withdrawn and the Commission saw no longer an interest in the dispute and stated that it was up to the national court to take a decision on whether the beer tie agreements infringed Article 81(1) EC. To understand this statement there is a need for some background on the involvement of the Commission in the dispute.

Courage and Grand Metropolitan plc (GM) entered into an agreement where GM transferred its brewing interests into Courage and in addition they set up the company Inntrepreneur. The ownership to all tied public houses was transferred into the jointly owned Inntrepreneur company. This merger agreement was to be cleared by the UK competition authority, which required the parties to reduce the number of tied houses for consent to be given. The agenda of opening up the market of beer supply lay behind this requirement. Tenants to Inntrepreneur complained and maintained that the tie agreements infringed Article 81(1) EC. Due to this Inntrepreneur turned to the Commission for acceptance of the arrangements either through article 4(1) of 17/62¹⁶³ (the predecessor to Regulation 1/2003), negative clearance according to article 2, a decision that the agreement fell within a block exemption or that it could be excepted according to Article 81(3) EC.

The Commission decided to give a retroactive exemption according to Article 81(3) EC and published a notice on this view. Different tenants then, amongst them Mr Crehan, turned to the Commission for it to state that the beer ties infringed Article 81(1) EC and to take a decision on this according to Article 3 of 17/62. This originated in a different view taken by the Commission regarding an exemption pursuant to Article 81(3) EC. Inntrepreneur then turned to the Commission and notified looser beer tie agreements under the name Retail Link. After some processing the Commission held that the agreements infringed Article 81(1) EC, but further stated that the requirements to be given exemption according to Article 81(3) EC appeared to be satisfied. However, this did not solve the question what to be done with the old beer tie agreements under Inntrepreneur. Inntrepreneur withdrew its applications and, as stated above, the Commission no longer saw an interest in those beer tie agreements and left

¹⁶³ Council Regulation No 17 (EEC): First Regulation implementing Articles 85 and 86 of the Treaty.

the question about infringement of Article 81(1) to be solved by the national court in the UK.

In the case *Delimitis*¹⁶⁴ the ECJ had set out a test with two conditions, that have to be fulfilled for an infringement of Article 81(1) EC, on the German beer market, to be held. Also, the two undertakings *Bass* and *Whitbread* owned tied houses, whose agreements were notified to the Commission. In the formal decisions to these cases the Commission referred to the *Delimitis* conditions which were fulfilled. Further, it held that Article 81(1) EC was inapplicable due to an exemption given according to Article 81(3) EC. This can indirectly be seen as that the Commission stated that the beer tie agreements did infringe Article 81(1) EC.

In the *Crehan* proceedings, *Crehan* asserted that due to the decision in *Whitbread* the court should “automatically” find that the *Inntrepreneur* agreements infringed Article 81(1) EC, otherwise the judge would question the Commission. The judge Park J did not follow the decision in *Whitbread* and he held that just because the market was looked upon as foreclosed in that case it did not automatically mean that it was in the *Crehan* case. Further judge Park J did not find condition one fulfilled in the *Delimitis* test and consequently Article 81(1) EC was not infringed. Consequently Mr *Crehan* was not entitled to any damages.

The Court of Appeal held that Park J made an error in judgement, because he did not follow the Commission and therefore did not comply with the duty of cooperation according to Article 10 EC.

The pinpoint in this case was whether Park J erred in law making this judgement. To answer this question there is a need to know what actually counts as a conflicting decision. Lord Hoffman, in the House of Lords, refers to the case *Delimitis*¹⁶⁵ and holds that the ECJ clearly states:

“that if the Commission decided that an agreement infringed article 81(1), a national court would be obliged to follow that decision and, if such a decision was pending, should stay its proceedings until the Commission had made its decision.”¹⁶⁶

Now there is a notice on cooperation between the Commission and national courts¹⁶⁷ and in paragraph 20 of this notice it is said that a national court, before it finds an infringement of Article 81(1) EC:

“should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgement, even if they are not formally bound by them”

Further Lord Hoffman referred to the case *Masterfoods*¹⁶⁸ where the Advocate General identified a risk of conflicting decisions:

¹⁶⁴ Case C-234/89, *Delimitis v Henninger Bräu AG*.

¹⁶⁵ Cited supra note 166.

¹⁶⁶ *Inntrepreneur company and others v Crehan*, para 45

¹⁶⁷ Cited supra note 61.

¹⁶⁸ Case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, para. 16.

“only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds, and operative part of the Commission’s decision. Consequently the limits of the binding authority of the decision of the national court and the content of the decision of the national court and the content of the Commission’s decision must be examined every time”

A conflict would be at stake if the court in Ireland would continue an injunction to enforce agreements which the Commission had held to be unlawful. As long as the Commission’s decision would remain in effect this would be the case. Such a risk did not exist in the present case: that the decision taken by the Commission in the *Whitbread* case that those agreements infringed Article 81(1) EC and that a decision from a national court that the Inntrepreneur agreements do not infringe the same Article, according to Lord Hoffman.¹⁶⁹

Community law bring up the framework for conflicting decision in Article 16 Regulation 1/2003¹⁷⁰ and the risk of conflict in law arises if a national court adopt a decision that is running counter to agreements, decisions or practices that are to be the subject under a Commission decision. Consequently, the risk of conflict does not apply to agreements, decisions or practices in the same market, it has to be *the same* agreement, decision or practice. Therefore Lord Hoffman held that there lay no fault in that a national court adopt a ruling that is running counter to what the Commission said in *Whitbread*, but the court could take the decision into account. The ruling by the Court of Appeal suggested that judge Park J was informally bound by the decision taken by the Commission, and that the defendant Inntrepreneur should not have been allowed to adduce evidence suggesting that the Commission was wrong in its decision. The Court of Appeal held that instead Inntrepreneur could have raised the question by pursuing its application for a negative clearance. In Lord Hoffman’s view that would be a denial of a fair trial. In addition the Commission saw no interest in whether the old agreements infringed Article 81(1) EC or not, as they stated so in a letter to Mr. Crehan. Instead it was left open to the national court to decide, as stated above. The decision adopted by the Commission in *Whitbread* was simply of evidential character. Lord Hoffman arrived to the conclusion that judge Park J did not err in law and the other judges in the House of Lords arrived at the same conclusion.

¹⁶⁹ Case Inntrepreneur company and others v Crehan, para. 56.

¹⁷⁰ Cited supra note 6.

5.5.3 Manfredi v. Lloyd Adriatico Assicurazioni

The Italian competition authority (AGCM) initiated proceedings against various auto insurance companies, who were accused of participating in an arrangement with the purpose of exchange of information and tied selling of separate products, where the former arrangement is of interest for this particular case. The AGCM found the arrangement to infringe Article 2 of Law No 287/90, which are corresponding to Article 81(1) EC. Article 33(2) of the former law gives individual the right to so seek action for damages before the Corte d'appello. The decision was appealed but was upheld by the Italian courts.

The applicants in the proceedings claimed damages for the overcharge of premiums. The defendants held that the national court, Giudice de pace di Bitonto, did not possess jurisdiction according to Article 33 of Law No 287/90 and in addition, according to the same Article, that the right to claim damages was out of time. The national court held that since insurance companies from other Member States also participated in the prohibited practice also Article 81 EC was applicable. Therefore any third part that could show causation for the harm suffered and the prohibited agreement should be entitled to seek compensation. This could mean that Article 33 contains conditions running counter to community competition law due to the timeframes set out and the costs to bring actions before the Corte d'appello exceeds those before Giudice de pace. In addition, the national court considered whether the time frame and the amount of damages that an applicant could be entitled of also compromised the effectiveness of Article 81 EC.

The ECJ held that it possesses jurisdiction due to the fact that the questions were regarding interpretation of community law and that the exception; if the court finds the submission by national court for it to give interpretation not to have any bearing, because that the question bear no relation to the facts or main purpose of the case, not to be applicable.

Article 81 EC was of relevance to the facts in the case according to the ECJ who rejected Assitalia's argument that the Article was of no relevance to the case. The ECJ thought it was of relevance for the first question and also held that the national courts should automatically apply Articles 81 and 82 EC, since they are a matter of public policy.

The first question that was submitted was whether the agreement or concerted practice in the present case, where insurance companies exchange information that makes it possible to increase auto insurance premiums, which infringe national competition rules, may also constitute a violation of Article 81 EC due to the fact that undertakings from several Member States took part in the agreement or concerted practice.

To this, the ECJ answered that community competition law and national competition law are to be applied in parallel. Articles 81 and 82 EC produces direct effect and provide individuals with rights that the national court has to safeguard. However, trade between Member States has to be affected for community competition law to apply. Taken alone, participation in an agreement between undertakings from several different Member States are not in itself decisive of if trade is affected. Conversely it is not clear that an agreement, decision or concerted practice that only involve a single market is not sufficient to leave out the possibility that trade between Member States can be affected. The AGCM had observed that there were barriers to entry into the relevant market, but auto insurance companies also participated in the unlawful agreement and therefore the market was susceptible for undertakings from other Member States, although there were difficulties to enter. It follows for the national court to determine whether the existence of the agreement had a deterrent effect on insurance companies from other Member States that did not have activities in Italy.

The answer to question one was that such an agreement as described above may not only constitute an infringement of the Italian national competition law, but also of Article 81 EC if:

“there is a sufficient degree of probability that the agreement of concerted practice at issue may have an influence, direct or indirect, actual or potential, on the sale of those insurance policies in the relevant Member State by operators established in other Member States and that that influence is not insignificant”¹⁷¹

Next question answered by the ECJ was:

“whether Article 81 EC is to be interpreted as entitling any individual to rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between that agreement or practice and the harm suffered, to claim damages for that harm.”¹⁷²

Since Article 81 EC produces direct effects in relation between individuals and also create rights that an individuals can rely on and that national courts must safeguard. Therefore, an individual can rely on an invalidity that has arisen through the application of Article 81(2) EC. Any individual shall be able to seek compensation for harm suffered through a violation of community competition law if there exist a causal link between the harm suffered and the violation. It is for the domestic system in a Member State to assign the procedural rules that shall govern the process. These rules are not allowed to make the process excessively difficult to implement the rights that follow upon community law. In conclusion, individuals can rely on Article 81 EC to claim damages due to a violation of community competition rules. The concept of “causal relationship” between the harm suffered and the violation are governed by national rules but they must fulfil the principles of equivalence and effectiveness.

Thirdly the ECJ gave an answer to whether a rules such as Article 33(2) of Law No 287/90 should be precluded because it asserts that action for damages in a competition case are to be brought before a different court

¹⁷¹ Case 295/04, *Manfredi v. Lloyd Adriatico and others*, para. 52.

¹⁷² Case 295/04, *Manfredi v. Lloyd Adriatico and others*, para. 53.

than other claims for damages according to Italian law. This means that the courts have different jurisdiction. Here it is important to mention that the insurance companies in the case held that this provision only applies when an infringement of national competition rules can be established and not when claiming damages based on an infringement of Article(s) 81 and/or 82 EC. The Commission argued that:

“a national provision laying down rules on competence for civil actions based on infringement of Community competition rules different from those applicable to similar domestic actions is compatible with Community law where the former are not less favourable than the latter and do not render practically impossible or excessively difficult the exercise of rights conferred on individuals by Community law”¹⁷³

The ECJ stated that it is not to interpret national law on whether a national competition rule applies only to actions for damages due to national competition law or also on community competition law. However, national court must safeguard that individuals are not deprived from rights based on community law. As stated above national rules are not to violate the principles of equivalence and effectiveness. As long as this is not the case, the rule is permissible.

The ECJ went further on stating and answering the question whether a rule which provides that the limitation period to seek action for damages, when harm caused by an agreement or practice prohibited under Article 81 EC, begins to run from the day on which that prohibited agreement or practice was adopted.

This is also a rule that is governed by national procedural rules provided that it observe the principles of equivalence and effectiveness. Such a rule, as described above, would make it excessively impossible for an individual to obtain damages for harm suffered by a violation of competition rules. Such a situation would be the case if a short limitation period, which is not possible to suspend, is followed upon the national rule. In these main proceedings, it was up to the national court to determine if this is the case.

The last question to be submitted to the ECJ was whether Article 81 EC requires:

“national courts must award punitive damages, greater than the advantage obtained by the offending operator, thereby deterring the adoption of agreements or concerted practices prohibited under that article.”¹⁷⁴

Here the insurance companies asserted that it is up to each Member State to adopt rules about punitive damage since there are no community provisions adopted regarding this. The Commission have the same view here as in the previously mentioned question.

The ECJ again held that it is up to the Member State to set up domestic procedural rules that does not conflict with the principles of equivalence and effectiveness. Rules on punitive damage are such rules. According to the former mentioned principle, national law must give a possibility to award particular damages such as punitive damages to actions founded on

¹⁷³ Case 295/04, *Manfredi v. Lloyd Adriatico and others*, para. 53.

¹⁷⁴ Case 295/04, *Manfredi v. Lloyd Adriatico and others*, 3.para. 83.

community law if such opportunity is possible to actions founded on national competition law. It is permissible with national rules that precludes the possibility to gain unjust enrichment of those who enjoy them. Further, the ECJ stated that it follows from the principle of effectiveness that an individual shall not only be able to seek damages for actual loss, but also for loss of profit plus interest. Therefore, it is not permissible to have rules that excludes the right to seek damages for loss of profit, otherwise it would be practically impossible to seek reparation for damage, when community law is breached.

6 Swedish Competition Law

Sweden's current competition law was adopted in 1993 and it has been amended during the years. It is the Swedish Competition Act (SCA) regulates competition on the Swedish market. However, since Sweden is a member of the European Union, community competition law together with the SCA forms the framework when the so-called criterion for affect on the community trade is fulfilled. Article 3(1) in Regulation 1/2003¹⁷⁵ states that the Member States are obligated to apply community competition rules, when they apply national competition law if the agreement or conduct has a noticeable affect on trade between Member States. Though, the Member States are not obligated to apply national competition law when applying Articles 81 and 82 EC. Parallel application is thus possible.

Further, it follows from Article 10 EC that the Member States possess a loyalty obligation to take proper measures to guarantee that obligations that follow upon the EC Treaty will be carried out. Article 3(2) in Regulation 1/2003 states that national competition rules are not allowed to prohibit conduct that are legitimate according to Article 81 EC. Thus, this also applies to exceptions according to Article 81(3) EC and block exemptions. There is however unclear whether a Member State is also forbidden to prohibit a conduct which is allowed due to that community competition law is not applicable because other Articles in the EC takes precedence.¹⁷⁶ When it comes to Article 82 EC Member States are authorized to apply stricter rules when applying national law, than Article 82 upholds.¹⁷⁷

The authority in Sweden that handles Competition cases is called "Konkurrensverket" and as stated above the SCA regulates competition on the Swedish market. The SCA is constructed with the EC provisions in the background, but it has some more specific paragraphs that are construed on the basis of the circumstances on the Swedish market.

6.1 The Swedish Competition Act

The corresponding provisions to Articles 81 and 82 EC are Paragraphs 6 and 19 in the SCA. Paragraph 6 is construed differently from Article 81 EC, because it states what is prohibited and enumerates such examples, but the exceptions (single and groups) are located in other Paragraphs.

¹⁷⁵ Cited supra note 6.

¹⁷⁶ Wetter m.fl., *Konkurrensrätt en handbok*, p. 51.

¹⁷⁷ *Ibid*, p. 52.

6.1.1 Paragraph 6 SCA

Paragraph 6 SCA prohibits agreements that has its purpose to hinder, limit or distort competition on the market to an appreciable extent or if the result of the agreement is as such. This applies especially to agreements;

- i. where purchase- or sales prices or other conditions due to the business are agreed upon;
- ii. production, markets, technical development or investments are controlled or limited;
- iii. markets or purchase sources are divided;
- iv. different conditions are applied for equivalent transactions, and therefore certain business partners gets a disadvantage;
- v. where conditions for the agreement, which means that additional obligations which do not in their nature or according to practice in the business that do not have any connection with the object of the agreement, are upheld.

Paragraph 7 SCA states that agreements or conditions in an agreement, which are prohibited according to paragraph 6 SCA, are invalid and the unlawful agreement should be null and void. Further, paragraph 8 SCA provides undertakings the possibility to get exception if it fulfils certain criteria, the fulfilment of these criteria take place through self-assessment. For an agreement to be able to benefit from the exception it has to;

- i. contribute to improve production, distribution or to facilitate technical or economical progress;
- ii. ensure the consumers a fair share of the profit that come up through the improvements brought up above;
- iii. only enjoin limitations for the undertaking that are necessary.

6.1.2 Paragraph 19 SCA

Paragraph 19 SCA states that abuse from one or several undertakings, which holds a dominant position on the market, is prohibited. In the paragraph it is further stated that such conduct can consist of;

- i. direct or indirect force unreasonable conditions upon the business partner, such as purchase- or sales prices;
- ii. limit production, markets or technical development to the consumers disadvantage;
- iii. to apply different conditions for equivalent transactions, with the consequence that some business partners gets a disadvantage or;
- iv. put up conditions, for completion of agreement, that the other party takes on additional commitments that does not in its nature or according to business in the practice have any connection with the object of the agreement.

6.2 Fines and the Swedish leniency programme

An undertaking can receive a fine, “konkurrensskadeavgift”, if itself or someone takes action on its behalf through intent or through negligence violates paragraphs 6 and/or 19 SCA or Articles 81 and/or 82 EC. The criteria intent or negligence was set out in the preparative work and has been confirmed in Swedish case-law.¹⁷⁸ “Konkurrensverket” has to bring an action in national court, which can only be done in the court “Stockholms tingsrätt”, which has been given exclusive competence in such cases. In addition, such a case can only be appealed to the court “Marknadsdomstolen”. Hence it is not “Konkurrensverket” itself that actually gives the undertaking a fine. According to paragraph 26 SCA, “Stockholms tingsrätt” shall fine the undertaking in question if it finds that the criteria set out in SCA are fulfilled. This fine is not to be equalized with fines which are a penalty for violation of Swedish criminal law, but it should have a deterrent effect just as a sentence.¹⁷⁹ To appoint the fine the court takes into account; i. how serious the violation is; ii. the duration of the infringement, iii. other complicated or extenuating circumstances which are of significance to appraise the infringement. If the violation is seen as insignificant then the court should not enjoin any fine.¹⁸⁰

Swedish competition law offers two forms of leniency to undertakings, which they can benefit from. Either the “konkurrensskadeavgift” can be reduced partly or the undertaking can get concession, which means that the fine is set down in its entirety. This can be compared to the chance to receive immunity from fines from the Commission. This does, however, only apply to conduct that violates paragraph 6 SCA or Article 81 EC, because the aim of the leniency rules are to hinder cooperation between undertakings through cartels.¹⁸¹ The concession or reduction of the fee in the SCA were adopted in the year 2002. As stated above the leniency notice¹⁸² also contains these two relieves for undertakings, but in addition it contains the possibility to apply for immunity.

¹⁷⁸ Proposition, 1992/93:56, p. 92.

¹⁷⁹ Wetter, *Konkurrensrätt – en handbok*, p. 797.

¹⁸⁰ Swedish Competition Act, para. 28.

¹⁸¹ SOU 2006:99, *En ny konkurrenslag*, p 471 ff.

¹⁸² Cited supra note 71.

Concession of the fee can be given by “Konkurrensverket”, when an undertaking has violated the prohibition against competition through detrimental cooperation between undertakings. This applies if the undertaking;

- i. notify the infringement to “Konkurrensverket” before the authority has enough foundation to intervene against the violation and none of the other undertakings participating in the violation has not made a previous notification;
- ii. leave “Konkurrensverket” all the information about the violation that the undertaking has access to;
- iii. cooperate fully with the “Konkurrensverket” during the investigation of the violation and;
- iv. has terminated or right after notification terminate to take part in the violation¹⁸³

Although this does not apply if the undertaking in question has had the leading part in the infringement and considering the circumstances, it is therefore obvious that it would be unreasonable to give concession of the fee. An undertaking is seen to have a leading part if its action can be separated from the others and if it has taken initiative for cooperation and has summoned the meetings.¹⁸⁴ Two undertakings cannot take this action and both get concession. Fully cooperation are demanded by the notifying undertaking during the whole process and more specific information are to be obtained in the general guidance issued by “Konkurrensverket”.¹⁸⁵ Paragraph 28(b) SCA does apply to the first undertaking applying for concession and therefore it is not applicable if several undertakings file a common application for concession. Also, “Konkurrensverket” cannot have enough grounds to interfere against the prohibited cooperation between the undertakings, at the time when the undertaking apply for concession.¹⁸⁶

It is likely that the undertaking wants to ensure itself that if it reveals the cartel to “Konkurrensverket” it will also benefit from concession. First of all the appraisal is made by the undertaking itself. Before it actually applies for concession it has the possibility to contact the authority and describe the conduct in hypothetical terms. “Konkurrensverket” then inform the undertaking if it does not think it can fulfil the requirements for concession. After this, the undertaking can choose if it want to make the information more specific and “Konkurrensverket” then takes a preliminary position, but this position is in no way made binding on the authority.¹⁸⁷ Once the undertaking has filed in an application for leniency “Konkurrensverket” shall, according to paragraph 28(c) SCA, adopt a decision, either on that the conditions for concessions are fulfilled or that they are not. A decision on concession or reduction of fines is binding for the courts Stockholms tingsrätt and Marknadsdomstolen.

¹⁸³ Swedish Competition Act, para. 28(b)

¹⁸⁴ Konkurrensverkets allmänna råd, point. 15.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid, points 5-6.

¹⁸⁷ Ibid, points 17 ff.

As stated above, the undertaking also has the possibility to benefit from reduction of the “konkurrensskadeavgift”. Paragraph 28(a) SCA states that if the undertaking; i. essentially has facilitated the investigation of its own or others participation in the infringement or ii. there are other specific reasons that can be assigned to the undertaking, it can get reduction of the “konkurrensskadeavgift”. Conversely the fine can be set to a higher amount, than stated in Paragraph 28 SCA, if the undertaking has violated the SCA or Articles 81 and 82 EC.

6.3 Action for damages

Community competition law does not have a special provision that regulates action for damages, but Swedish law actually does. In Paragraph 33 in the SCA it is stated:

“If an undertaking intentionally or by negligence infringe the prohibitions set out in Paragraphs 6 or 19 or Article 81 or 82 EC Treaty, the undertaking shall compensate for the damage that arise therefrom.

The right to such compensation declines if actions for damages are not brought before court within 10 years from that the damage arose.

Stockholms Tingsrätt is always competent to try action for damages according to this paragraph.”

Forum in action for damages is common courts in Sweden, but one can always turn to “Stockholms Tingsrätt”. Appeal can be made to “Marknadsdomstolen”.¹⁸⁸ The latter also applies to appeal of a decision adopted by “Konkurrensverket”.¹⁸⁹

6.3.1 Who are liable for damages?

Only undertakings can be held liable for infringement of Swedish competition law. The conception is defined as physical or legal persons that operate economic activity, although the activity does not have to be run with the purpose of making profit. The assessment can be made that several undertakings can be seen as one economic entity if they are under common control.¹⁹⁰ Also, non-profit organizations and associations of undertakings can according to paragraph 3(2) SCA be included in the conception of undertakings that can be held liable for civil claims. Further, physical persons, that operate industrial activity, can be seen as an undertaking in the meaning of the SCA. This also applies to official companies in Sweden i.e. Swedish Railroads (SJ).¹⁹¹

¹⁸⁸ Swedish Competition Act, para. 63.

¹⁸⁹ Ibid, para. 60.

¹⁹⁰ Wahl, *Konkurrensskada*, p. 194 ff.

¹⁹¹ Wetter m.fl. *Konkurrensrätt – en handbok*, p. 59 ff.

6.3.2 Who are entitled to damages?

Paragraph 33 SCA does not state exactly who are entitled to damages. The circuit that is entitled to damages depends on Swedish law about damages. Entitled to damages are those who have suffered loss and comprise by the SCA purpose for protection.¹⁹² The purpose of the SCA is according to its first Paragraph to remove and counteract impediment of competition when it comes to production and commerce with goods, services and other utilities. In a report, the aims with the competition legislation were put as efficiency, growth, distribution and consumer welfare.¹⁹³ However, in this preparative work for competition legislation, it was the protection of other undertakings, not the consumers, which was the circuit of protection of interest.¹⁹⁴ Another important aspect, to determine who are entitled to damage, is the purpose of the actual sanction in the law. In Swedish competition law this is that the competition rules should not only depend on an intervention from “Konkurrensverket”. The right to damages should give the undertakings an incentive to own intervention when the competition is harmed on the market, which is a preventive purpose.¹⁹⁵

Previously it was stated in Paragraph 33 SCA that only undertakings and parties to an agreement were entitled to damages. This changed the year 2005. In the preparation document to the now read paragraph it is stated that the aim of competition law is to protect the national economic and consumer interest of an efficient competition situation on the market. Therefore, there should be no obstruction against that also consumers and undertakings that are not party to an agreement can claim damages if they have suffered loss. The regulation thus apply both to relationships within and outside the agreement.¹⁹⁶

6.4 Swedish courts' Case Law

The phenomenon of actions for damages when Articles 81 and 82 EC have been violated have been rare in general within the whole EU. Sweden is not an exception to this rare phenomenon. Actually, there has been no case in Swedish court where the court has given the plaintiff compensation for a violation of Swedish competition law or community competition law. However, there have been plaintiffs alleging damages in Swedish court, but all such cases have resulted in settlements outside the Swedish court.¹⁹⁷

¹⁹² Kenny Carlsson in Karnov, 2006/2007, p. 1667.

¹⁹³ SOU 1991:59 *Konkurrens för ökad välfärd*, del 2, p 45.

¹⁹⁴ Wahl, *Konkurrensskada*, p. 246.

¹⁹⁵ Wahl, *Konkurrensskada*, p. 247.

¹⁹⁶ Prop. 2005/05:117, p. 26 f.

¹⁹⁷ Westlaw database, *Konkurrensrätt – en handbok*, Avsnitt XI, kap 6.

7 American Antitrust

The origin to community competition law is American antitrust laws, although the European framework has developed in a different direction. Even if EU competition stands on its own it is important to glance to the west to compare the systems and see what positive experiences in the U.S. that the European community can learn from and vice versa. This section serves the purpose to give, only, a general summary on American antitrust with focus on leniency and private actions for damages. This is the case because the idea is to see if anything in the American framework, when it comes to leniency and private actions for damages, could fit into the European system and make it more effective.

7.1 The American Antitrust provisions

The Sherman Antitrust Act (SA) was adopted in 1890 and additional antitrust legislation, such as the Clayton Act (CA) and Federal Trade Commission Act (FTA), were adopted in the year 1914. This legislation is the counter stones of American antitrust regulation.

The SA came up due to the big trusts created i.e. the railroad section in the end of the nineteenth century. The vital sections are number one and two, which states:

“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.”¹⁹⁸

“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.”¹⁹⁹

Just as Article 81(1) EC, section one in the SA takes aim at collaboration between undertakings consisting through an agreement or similar. Section two in the SA are corresponding to Article 82 EC. Section two does not prohibit “monopoly” *per se*, instead the rule focus on how the “monopoly” has been gained and sustained, the attempts and conspiracies to monopolize.²⁰⁰ A difference with the SA is that it contains a “rule of reason” approach in the assessment, which only condemns unreasonable conduct.

¹⁹⁸ §1 Sherman Act, 15 U.S.C. §1.

¹⁹⁹ §2 Sherman Act, 15 U.S.C. §2.

²⁰⁰ Gellhorn, *Antitrust law and economics*, p. 26.

The CA was adopted to complement the SA with rules that describes, in general condemnation of undesirable conduct, which shall be prohibited. In addition, it provides sanctions to the illegal conduct, to certify conformity.²⁰¹ The Robinson-Patman Act amended section two of the CA in 1936, which means that the provision banned price-discrimination, but not if the price-discrimination which lay behind the conduct was cost savings or was proven necessary to meet a competitor's price offer. The section can be enforced against both buyers as well as sellers that seek or offer unjustified price-discounts.²⁰² Section two provides rules about;

- i. Discrimination in price, services, or facilities
 - o Price; selection of customers
 - o Burden of rebutting prima-facie case of discrimination
 - o Payment or acceptance of commission, brokerage, or other compensation
 - o Payment for services or facilities for processing or sale
 - o Furnishing services or facilities for processing, handling, etc.
 - o Knowingly inducing or receiving discriminatory price
- ii. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties, 15 U.S.C. § 13a
- iii. Cooperative association; return of net earnings or surplus, 15 U.S.C. § 13b
- iv. Exemption of non-profit institutions from price discrimination provisions, 15 U.S.C. § 13c²⁰³

Section five of the FTC Act contains that:

*“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful; prevention by Commission”*²⁰⁴

This act is enforced only by the Federal Trade Commission. The act does not contain any penalties. Together with the Justice Department the Federal Trade Commission enforce the CA. In addition Section five, described above, can be used when a conduct constitute a violation of the SA, which is due to that American courts have ruled that the section includes such offences stated in that Act.²⁰⁵

US antitrust laws do not contain corresponding rules to community competition block-exemptions, adopted by the commission. However, the US system has statutory exemptions in certain areas, i.e. full or partial exemptions that favours agricultural producer co-operatives and business of insurance. Further, there are also areas where the Congress has eliminated liability for treble damages, but these types of enterprises have to register in advance. Still there is a liability for single damages. In addition, there are judicially-created exemptions. One of them is called “*Parker immunity*”:

²⁰¹ Gellhorn, *Antitrust law and economics*, p. 34.

²⁰² *Ibid.*, p. 507.

²⁰³ § 2 Clayton Act, 15 U.S.C. §§ 13.

²⁰⁴ The FTC Act, 15 U.S.C.A. § 45, section 5.

²⁰⁵ Gellhorn, *Antitrust law and economics*, p. 36 f.

*“This doctrine provides an exemption for state and local regulation of business, provided that the challenged activity is authorized by the state policy is ‘actively supervised’ by an appropriate governmental agency.”*²⁰⁶

The other judicially-created exemption is the so-called “*Noerr-pennington* immunity”. The exemption protects private persons or interests groups if they collectively plead the government for legislation or other action favourable to them. It is permissible that this action injures competitors or consumers if it attaches only in so far as the activity is directed toward obtaining government action. There is however an exception to this exemption if the activity apparently is directed at government action just to cover up interference directly with business relationships of a competitor.²⁰⁷

7.2 Public enforcement

The American Antitrust regulations are enforced by either the Antitrust division of the Department of Justice or the Federal Trade Commission. The Department of Justice has both civil and criminal jurisdiction which it can use, while the Federal Trade Commission only have civil jurisdiction.²⁰⁸ In addition, the antitrust statutes gives standing to state governments, private firms and individuals.²⁰⁹ Federal judges have also an authority since they shape litigation outcomes through interpretation of open-ended statutory terms. The Department of Justice enforce the SA and CA in Federal courts. If it brings a civil suit, it can obtain equitable relief or collect treble damages if it sues on the behalf of the United States as a purchaser of goods and services. The Federal Trade Commission has the authority to enforce the FTC Act alone and the CA. Mainly the Federal Trade Commission enforce the statues through investigations and administrative adjudication. However, the authority can also file civil suits to Federal district court for injunctive relief and in rare cases disgorgement. This follows from Section 13(b) of the FTC Act.²¹⁰

Enforcement by the Antitrust division is carried out from 12 special regional offices throughout the United States. Two of its tasks is to consider or issue so-called “*Business Review letters*”. These letters contains an evaluation of a proposed conduct, by private parties, who have requested it to do so. If the Division takes a position in the matter, it shall state so in the latter. However, such an expressed position does not bind the Department of Justice.²¹¹

²⁰⁶ Jones, *Private enforcement of antitrust law in the EU, UK and USA*, p. 18.

²⁰⁷ Ibid.

²⁰⁸ Gellhorn, *Antitrust law and economics*, p. 38 f.

²⁰⁹ See chapter 7.3.1.

²¹⁰ Gellhorn, *Antitrust law and economics*, p. 526 ff.

²¹¹ Jones, *Private enforcement of antitrust law in the EU, UK and USA*, p. 15.

The Antitrust division also launches investigations and pursues criminal or civil litigation. The investigations follow upon request from private complaints or inquiries conducted at the instigation of the Division itself. Further, it can follow upon a private reporting, this is the case if an undertaking files a pre-merger notification.²¹²

Further, antitrust enforcement also exists on the state government level. Either it is enforced through state antitrust laws as a compliment to federal antitrust jurisprudence. Some regulations are analogous to those at federal level. The state statutes can allow civil or criminal law suits, filed in by the state attorney general. Also private suits for damages and injunctions exists. Some states have adopted so called “below-cost” sales, which can mean less demanding liability tests than such as those developed by the Federal courts under Federal legislation. The alternative way of enforcement is to file federal antitrust suits, according to Section 4 and 16 of the CA. These two sections provide way of means to obtain damages and injunctive relief, where the state and its political subdivisions are treated as “persons” for these purposes.

A difference in the American antitrust system is that the competition authorities can impose criminal sanctions on undertakings as well as on individuals. This is very important to keep in mind when comparing the two systems.

7.2.1 The leniency programme

The terminology and scope of the American leniency programme differs a bit from the European. The scope of leniency in community competition law, as stated above, means that the undertaking does not have to pay any fines or will get a reduction of fines depending in what order it files in its leniency application. Under American antitrust law; immunity, amnesty or leniency (all three expressions manifest the same thing) mean that the undertaking will not be criminally charged and will not have to pay any fines. However, only one corporation can benefit from leniency under American antitrust law. Undertakings that come forward after the leniency applicant and cooperate with the authority, cannot obtain leniency. Instead, those undertakings have to enter into plea agreements, which can mean a reduction of fines. However the plea agreements are not part of the actual leniency programme.²¹³

7.2.2 Amnesty

The American leniency programme consists of two different paths. The concept of leniency in this system is that the corporation will not be charged criminally for the activity that is being reported. Two other expressions that are used are “corporate amnesty” and “corporate immunity policy”.

²¹² Hovenkamp, *Federal antitrust policy the law of competition and its practice*, p. 593.

²¹³ Hammond and others, *Cornerstones of an effective leniency program*, section 8.

The first alternative is to seek leniency before an investigation has begun. Six conditions have to be met for the undertaking to obtain leniency:

1. *“At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;*
2. *The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;*
3. *The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;*
4. *The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;*
5. *Where possible, the corporation makes restitution to injured parties; and*
6. *The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.”²¹⁴*

The other alternative is to apply for leniency, before or after the Division has instigated an investigation, when the conditions set out in the first alternative are not met. If so the following conditions has to be complied with:

1. *“The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;*
2. *The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;*
3. *The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;*
4. *The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;*
5. *The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;*
6. *Where possible, the corporation makes restitution to injured parties; and*
7. *The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.”²¹⁵*

Condition number 7 contains the same considerations as in EU law. Consideration is taken to when the corporation comes forward, at an early stage or at a late stage. Other aspects are whether the corporation was the ringleader and persuaded another party to participate in the illegal conduct. The burden of proving this is low if the corporation comes forward before any investigation of the Division has been instigated and increases at later stages, when the Division comes closer or are having evidence that is likely to result in a sustainable conviction.

²¹⁴ Department of Justice, *Corporate leniency policy*, point A.1-6.

²¹⁵ *Ibid*, point B.1-7.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

If a corporation receive leniency under the first alternative, the corporation's directors, officers and employees will qualify for leniency as well, if they admit their involvement in the illegal antitrust conduct as part of the corporate confession. This means that they will not be charged criminally if they are honest about the wrongdoing and continue to assist the Division throughout its investigation. The other type of leniency will consider if the directors, officers, and employees, who comes forward with the corporation, will benefit from immunity from criminal prosecution on the same basis as if they had approached the Division individually.²¹⁶

American antitrust law contains a specific leniency policy for individuals. This policy applies to individuals in a corporation who come forward to the Division on their own behalf, not as a corporate proffer or confession. Individuals then have to seek leniency for conduct that the Division not yet is aware of. With leniency, in this policy, means the individual not being criminally charged for the conduct it is reporting.²¹⁷

Three conditions have to be fulfilled for an individual to benefit from leniency:

1. *“At the time the individual comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;*
2. *The individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation and*
3. *The individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of the activity.”*²¹⁸

If the three conditions are not satisfied, there are a possibility for an individual to gain statutory or informal immunity, decided on a case-by-case basis by the Division, from criminal prosecution. If the authority thinks that, the leniency criteria are satisfied it should forward its view, that the individual should obtain leniency, to Deputy Assistant Attorney General for Litigation, who takes a final decision in the question. Conversely, if the Division is not in favour of leniency, the individual can turn to the Deputy

²¹⁶ Department of Justice, *Corporate leniency policy*, point C-D.

²¹⁷ Department of Justice, *Leniency policy for individuals*, para. 1.

²¹⁸ *Ibid*, point A. 1-3.

Assistant Attorney General to give its view, however the latter is not a right but it is an opportunity that generally are permissible.²¹⁹

If an undertakings obtains amnesty there is a rule in the 2004 Criminal Penalty Enhancement and Reform Act, which limits the undertaking's civil liability. Civil liability for damages are limited to actual damages "attributable to the commerce done by the applicant in the goods or services affected by the violation". In addition, there are attorney's fees, costs and interest. This mean that undertakings are only liable for single damages, not treble damages and also they are not jointly and severally liable for damages suffered by their co-conspirators' customer.²²⁰

7.3 Private enforcement

Private plaintiffs in US District courts can also enforce antitrust violations. This type of enforcement represents 90 % of the Federal antitrust cases.²²¹ Actually the US antitrust litigation model is created to rely on public and private enforcement in combination. The goals of the antitrust rules, when it comes to private enforcement, are both to give compensation as well as to have a deterrent effect.²²²

7.3.1 Action for damages

Action for damages can be filed according to section 4 in the CA. This section provides:

"any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

- 1. whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;*
- 2. whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and*
- 3. whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof."*

²¹⁹ Ibid, points B-C.

²²⁰ Spagnolo, G., *Leniency and Whistleblowers in Antitrust*, (2006), p.12.

²²¹ Jones, *Private enforcement of antitrust law in the EU, UK and USA*, p. 16.

²²² Ibid, p. 80.

Exceptions are provided for in Section 4(b) where it is stated that the right to sue for damages does not apply fully for foreign states.²²³ Also, there are other limitations to the right to sue for treble damages for a person injured by i.e. a price-fixing cartel or monopolistic behaviour.

As stated above a person has to claim damages in a District court. A person according to the CA consists of natural persons, partnerships, corporations, unincorporated associations and other business entities recognized by federal, state, or foreign law. As previously stated also the United States government can be seen as a person as well. The term business means a commercial interest enterprise or occupation. Property involves things that are protected by the law as an ownership interest.

7.3.2 Who are liable and who are entitled to damages?

Liable for damages are those who can cause an antitrust violation according to American antitrust rules. Due to that, this paper focus on those that are entitled to damages, the different statues and its criteria will not be described further here.

To be able to sue for damages a potential plaintiff needs to possess so-called “locus standi” (standing). A person holds standing in an antitrust case, according to the constitution, when first it is shown that he has a particularized injury or otherwise has a sufficient stake in the outcome of the dispute before the court to make it a genuine case. Secondly there must be a relationship between the injury, which the plaintiff suffered and the alleged antitrust injury. There are several tests that has developed through case-law which give guidance on who has standing in an antitrust case, although the tests set out the position on who has standing is not entirely clear.

7.3.2.1 The direct injury test

This test focus on whether there is a direct link between the victim and the antitrust violator. If there are one or several entities in between then the damage is not seen as a direct injury. According to case-law this mean that i.e. shareholders, suppliers and licensors are denied standing, since they only have suffered indirect injury. This test is not always applied by the courts, due to criticism for its lack of flexibility.²²⁴

7.3.2.2 The target area test

This test focus on the area that antitrust laws are set out to protect. Therefore those that are injured accidentally do not possess standing. The plaintiff must show that he/she is:

“within the are of the economy which is endangered by a breakdown of competitive conditions in a particular industry.”²²⁵

²²³ § 4 Clayton Act, 15 U.S.C. § 15

²²⁴ Jones, *Private enforcement of antitrust law in the EU, UK and USA*, p. 160 ff.

²²⁵ *Ibid*, p. 162.

The test reaches only to the defendant's intended victims, which limits the range of plaintiffs to only a small number. On the other hand, the scope of the test would be too broad if all persons whose injury is foreseeable would possess standing.²²⁶

7.3.2.3 The multi-factor test

In the so-called *McCready* case the Supreme court adopted a more useful alternative to the two test set out in the two previous sections. In this particular case the court gave a woman standing which alleged that her insurance provider conspired with psychiatrists to exclude psychologists from her health policy's coverage. Although it was actually the physiologists that got foreclosed from policy coverage, this automatically also foreclosed the buyers of such services as well. The intended victims was accordingly the psychologists, and even though Ms. McCready was not the target of the antitrust conspiracy her injury was clearly foreseeable. In addition she was a victim of an antitrust injury²²⁷, which was a natural result of diminished competition in the market of medical services. A restriction to this test is that the injury must be:

*"inextricably intertwined with the injury the conspirators sought to inflict on psychologists."*²²⁸

This test was confirmed in another case²²⁹ where the plaintiffs were not given standing due to several factors, amongst that it could not be identified who was injured and how they were injured.²³⁰

7.3.2.4 Antitrust injury

To get standing in an antitrust case the plaintiff must have suffered a so-called antitrust injury. This term was first applied in a case²³¹ regarding mergers, but the doctrine was later also applied to a private action alleging illegal price discrimination under the Robinson-Patman Act. In the first case concerning antitrust injury, the Supreme court gave notice to that antitrust violations not only caused losses which are of concern to antitrust laws. For a plaintiff to be able to recover damages for a violation of the antitrust laws, he must in addition to the actual violation and that he has been injured, show that the injury is the type which the antitrust laws were intended to prevent. Also, he must show that it flows from the fact which makes the defendant's acts unlawful. Further such an act should replicate the anticompetitive effect of the violation.²³²

²²⁶ Hovenkamp, *Federal antitrust policy the law of competition and its practice*, p. 615.

²²⁷ See section 7.3.2.4.

²²⁸ Hovenkamp, *Federal antitrust policy the law of competition and its practice*, p. 616. For details of the case see footnote 12 on page 616 in the book of Hovenkamp.

²²⁹ *Ibid*, see footnote 17 on p. 616.

²³⁰ *Ibid*, p. 616.

²³¹ *Ibid*, see footnote 2 on p. 604 for information on the case.

²³² *Ibid*, p. 604 f.

A plaintiff seeking damages must show actual and present injury. When it comes to *per se* violations, such a violation does not automatically indicate antitrust injury. A problem arises when a *per se* violation does not lead up to an anticompetitive injury at all. In addition to prove; i. that it suffered an injury; ii. that its injury was caused by an antitrust violation and; iii. that the injury qualifies as antitrust injury, there must also be proof of an injury in fact. It also follows from the antitrust injury doctrine that when damages are claimed by a plaintiff it can not claim damages for profits it would have earned as a result of an antitrust violation.²³³

7.3.2.5 The indirect purchaser rule

In American antitrust law only the direct purchaser can claim compensation. This follows from the two famous cases²³⁴ *Hannover shoe* and *Illinois Brick Co.* In the first case the Supreme court stated that a purchaser who has bought things to a monopolistic overcharge, can claim the whole overcharge as damages. This is the case although the purchaser might have passed this overcharge on to its own customers. In the second case the Supreme court went further and held that since the direct purchaser had the right to sue for the entire overcharge an indirect purchaser should not have the right to sue at all. Consequently, it does not matter that part of the overcharge had been passed on to the indirect purchaser and that it therefore had been injured. Though there are certain exceptions to the indirect purchaser rule.²³⁵

7.3.2.6 Recoverable damages

If generalising there are three types of damages that can be claimed in the American antitrust system, although the types of damages can vary greatly on a case-by-case basis due to the precise conduct in the case, the nature of the business or industry concerned and the nature of the violation. The first type is when the plaintiff in some way has paid too much (or been paid too little) for a product. This shall be the case because the seller violates the antitrust laws. The first type is often called overcharge damages. Type two damages are when a plaintiff's business was damaged or incurred losses because of an antitrust violation. In such cases, the amount of past lost profits will be recoverable. The third type of damages are due to that the plaintiff's business has been destroyed or otherwise the prohibited conduct has impaired its future earnings capacity.

²³³ Hovenkamp, *Federal antitrust policy the law of competition and its practice*, p. 604 ff.

²³⁴ *Ibid*, see footnotes 1 and 2 on p. 624.

²³⁵ *Ibid*, p. 624 ff.

8 Analysis

On the one hand, and focus lies on it, there is public enforcement of competition law. On the other hand there is the, in the EU, underdeveloped private enforcement. Private enforcement is to serve as a compliment to the former. Although many resources are put on the public enforcement, the compliment is needed for the enforcement to be effective and sufficiently deterrent for i.e. members of a cartel. The Commission can instigate own measures to detect infringements, but the authority needs help. This help has before the *Courage*²³⁶ case been designed so that it has been the actual violators who has come forward and “*blowed the whistle*” if it see enough incentives to do so. Since the judgement in 2001 there still has not been many action for damages, but that can change with the Green Paper and White Paper and the legislation it can lead up to. These two means of help for the Commission can thus obstruct each other.

Immunity and also a reduction of fines are the carrots for an undertaking to tell on a cartel. If the undertaking had nothing to gain, it would stay in the cartel and make profits on its illegal conduct. An undertaking has to file for leniency both to the Commission and to each and every Member State that it wants to obtain it in. Although the ECNP provides the instrument of filing for a summary application, that still does not mean that an undertaking only has to file one application for leniency. The hassle, that still exist, to file for leniency in several Member States, if a violation has an affect in many EU countries, obstruct an effective leniency programme. The undertaking has to apply for leniency to the Commission as well.

A more detailed coordination of leniency applications is clearly needed. A possibility is that, when an undertaking thinks that several Member States are affected, the undertaking hands in an application for leniency to the Commission who then assess whether the thresholds are fulfilled and what the relevant geographic market is. After a decision on this, from the Commission, the undertaking should file for leniency to the different affected Member States. For this to be feasible, the application to the Commission has to be held anonymous in some way. A more effective coordination between the Commission and the NCA could serve as an additional incentive to file for leniency in the first place.

²³⁶ Cited supra note 108.

As seen in section three, leniency is not the only field within competition law that requires cooperation and coordination between the Commission, the NCAs and the national courts. Harmonisation is a cornerstone, since it is the national rules in each and every Member State that governs national the leniency programme as well that it is the procedural rules in the different Member States that regulates action for damages. For undertakings and private parties to use the means provided by the Commission to increase the competition enforcement in general effort needs to be put down in creating foreseeable and harmonised treatment of those “tools” provided.

It is clear both from case-law and the provision in Regulation 1/2003²³⁷ that a judgement from a national court or NCA are not allowed to run counter to a decision adopted by the Commission. As one can see in the case *CPC and others v Crehan*²³⁸ that it is not evident on what a national court will interpret as what to be included in a decision adopted by the Commission. Also, the case-law of community competition law referred to in this paper shows that there can be uncertainty on what procedural rules that fulfils the criteria within the principles of equivalence and effectiveness. Since the procedural rules in each Member States are many, many rulings by the ECJ are required before case-law has harmonized what should be permissible. Of course there is the option to legislate in the matter to clarify i.e. quantification of damages, and hopefully the White Paper will lead up to this, but until then uncertainty remains.

Although an undertaking obtains immunity according to the Commission’s leniency programme, it still will be stated in the decision from the authority that the undertaking and other members of the cartel has violated community competition rules. This decision can be used as evidence in follow-on actions for damages in a civil case. That decision will probably decrease the undertakings incentive to file for leniency in the first place. This is because, although the undertaking will not receive any fines it still is liable to compensate third parties that have suffered loss due to the infringement of community competition law.

In the US an undertaking, that has obtained amnesty, also is liable for damages claimed by those who has suffered for the undertaking’s infringement of the competition rule(s). However, it is no longer liable for treble damages and another limitation, to keep the undertaking’s incentive to file for amnesty, is that the undertaking is not liable to co-conspirator’s customers. As can be seen above, the leniency systems in the US and EU are created a bit differently. Both, however, has the meaning of giving the undertakings incentive to obtain it for the purpose of detecting cartels. It is not likely that the EU system will go as far as giving victims to a competition infringement the right to treble damages. Thus, it is stated in the *Manfredi*²³⁹ case that there should be a possibility to obtain punitive damages. This increase the incentives for private parties to actually seek

²³⁷ Cited supra note 6.

²³⁸ Cited supra note 108.

²³⁹ Cited supra note 173.

damages, but in my view there would not be too excessive to offer double damages. To get a balance between the incentives of the cartel members as well as those who have suffered loss, a similar construction as in the U.S. could work. Another option, if private parties would have the right to double damages, would be to institute a time limit (shorter than the normal limitation period) for those who has suffered loss to instigate procedures against an undertaking that has obtained leniency.

Looking back until this day the cartel members have not had any reason to worry about private actions for damages. A reason for this is that private parties have not had any clear rules to fall back on and to take a Member State as Sweden as an example, the incentives to seek compensation has not been many. Sweden has a rule that regulates action for damages upon an infringement of community-, as well as, Swedish competition law. Different procedural rules in the Member States have made it difficult to actually obtain damages. Although, the member states have procedural rules about damages, the Green Paper clearly shows that harmonisation is needed. It does not suffice that Sweden has implemented the community competition rules if those rules are too hard to enforce.

One of the main problems is to give private litigants the tools and incentives to file a complaint. The Green Paper mentions several obstacles such as i.e. access to evidence, fault-requirement, costs of action and quantification of damages.

On the subject of access to evidence, it can be hard for a private litigant to obtain enough evidence to prove an infringement. If the Commission already has taken a decision in the matter it makes a huge difference for the private litigant, since the Member State court cannot adopt a decision that is running counter to this. The fact that the claimant has to prove that it has suffered loss from the stated infringement remains. The claimant cannot escape the fact that it has to show evidence on causation, the actual loss etc. What makes this harder is that it in the most cases is the infringing undertaking who has the documents, that can serve as evidence, in its possession.

The Green Paper brings up suggestions on disclosure and access to documents. I find it reasonable for the undertaking to disclose evidence if the other party present reasonably other evidence in support for its allegation. This should be determined by the court, which also should give sanctions upon destruction of such evidence. Also, the claimant should be able to turn to the NCA to obtain the same evidence as the authority has in its possession if it has instigated procedure. I support the suggestion, mentioned in the Green Paper, on that the claimant should turn directly to the competition authority, not go through court. Alleviation of the burden of proving an antitrust infringement is also a question about evidence. Such an alleviation would be that a decision adopted by a NCA could be made binding on civil courts. Another alternative, mentioned in the Green Paper, is that a decision adopted by a NCA would reverse the burden of proof. I

favour all these suggestions, to make it easier for a private litigant. An argument against this could be that each party should obtain its evidence by itself, but as the system as it is built up now is unjust and favours the actual infringers, and that is not the purpose of the community competition system.

If the suggestions above would be implemented the question arises whether such facilitation for potential litigants also should apply for evidence obtained by a competition authority in an application for leniency. Such a possibility would have a deterrent effect on potential leniency applicants. It is clearly stated in the notice on immunity from fines²⁴⁰ that given immunity does not protect the undertaking from civil law consequences of its participation in an infringement of Article 81 EC. It is not likely that an undertaking would like to facilitate for a potential litigant to obtain damages, which would be the case if such a litigant could get access to the undertaking's submitted documents to the Commission or NCA. A potential leniency applicant would then face the situation where it would weigh the possibility of not being discovered against what it would be paying in damages to private litigants. If it would contribute to ease the burden on the private litigants, it is likely that it would choose not to file for leniency at all.

The Green Paper first suggests that the documents submitted in a leniency application should not be discoverable. I favour this suggestion due to keep the incentive to file a leniency application. If the undertaking obtain leniency, it will be mentioned in the latter decision adopted by the authority. Possible litigants can use that decision as evidence in its actions for damages. Then one can argue that there is no difference, because the private litigant will get hold of evidence supporting its claim anyway. This is true, but this problem can be avoided through additional rules. In the US those undertakings obtaining amnesty only can be liable for the actual loss, not treble damages. Irrespective if the EU system will provide double damages, punitive damages or damages for only actual loss suffered, a sort of rebate system (suggested in the Green Paper) could be introduced. The suggestion of reducing joint liability is similar to the system of not being liable for damages to the co-conspirators' customers. Although the two leniency systems are differently created the EU could adopt some of the American system's solutions but adapt them so that they serve the purpose to have private litigation as a compliment, not the main enforcement of competition law.

Adoption of legislation that facilitates action for damages before national courts is needed but not enough. Going through a litigation process takes both time and effort. To increase private litigation private parties need, in my view, something to gain on it, only to be compensated for the suffered loss and punitive damage is not enough. One should keep in mind that detection of cartels through private litigation saves community recourses. To make larger amounts of damages available can have additional deterrent

²⁴⁰ Cited supra note 71.

effect on undertakings to join a cartel in the first place. Since litigation cultures differs in the US and EU the latter maybe should not go as far as awarding treble damages, but double could serve the purpose to get a balance between private and public enforcement.

The span of EU and Member States' case-law regarding action for damages has been very limited, this is Sweden a typical example of. The White Paper and following legislation will hopefully lead up to a sustainable solution, which will lead to that private litigation within the competition field increases. It will take time to adopt harmonised legislation both in the community as a whole as well as in all the Member States. Once the system has started to develop after the changes, the fact remains that we are dealing with different Member State's procedural rules and languages. An issue regarding language differences is that both decisions adopted by a NCA and judgements are not translated. If the competition field is to be harmonized this has to change. Private parties need to be able to obtain other Member State's case-law and decision easily to be able to determine whether their rights are affected by such judgments or decisions.

As seen from the case-law described above much is left open to decide by the national court according to its own procedural rules. To avoid language differences and differences in procedural law, a possibility is to institute a central authority or court to deal with actions for damages followed upon infringement of community competition rules. It could be either located in Brussels or located in several Member States. Another alternative is that a division is created, that are connected to the Commission, which translate judgements and decisions and put them up on the DG Competition website.

Conclusively I state that although the Commission has instigated measures to increase civil litigation in the EU to serve as a compliment to public enforcement there is a long way to go before this will actually be the case. The relationship between the incentive of undertakings to file for leniency and private parties incentives to seek action for damages is a clear example to illustrate this. Action for damages is brought before Member States' courts and the framework for procedure is tricky. The same applies if an undertaking is to file for leniency in several Member States. In addition, a sound relationship between the two enforcement types is hindered due to that there are several considerations that have to be taken into account so that private actions does not obstruct applications for leniency and the other way around. The Green Paper²⁴¹ attentive this and suggests solutions. Whatever solution(s) that is/are chosen in the end it/they has/have to be implemented in each Member State and applied so that all systems brings the community competition system together. The White Paper will be a sequel which hopefully will result in that action for damages increase and will benefit those harmed and the community competition system as a whole.

²⁴¹ Cited supra note 2.

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