

2004

## Private Enforcement of Antitrust Rules - Modernization of the EU Rules and the Road Ahead

Donncadh Woods

*Deputy Head of the Policy Development Unit of the Directorate General for Competition, Commission of the European Communities.*

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Antitrust and Trade Regulation Commons](#)

---

### Recommended Citation

Donncadh Woods *Private Enforcement of Antitrust Rules - Modernization of the EU Rules and the Road Ahead*, 16 Loy. Consumer L. Rev. 431 (2004).

Available at: <http://lawcommons.luc.edu/lclr/vol16/iss4/10>

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# **Private Enforcement of Antitrust Rules— Modernization of the EU Rules and the Road Ahead**

By Donncadh Woods\*

## **I. Introduction**

The author would like to express his appreciation to the Institute for Consumer Antitrust Studies, Loyola University Chicago, for inviting him to its February 2004 conference on the Future of Private Rights of Action in Antitrust, a subject that is now attracting increasing attention in Europe.

This article, an expanded version of the author's presentation at the aforementioned Loyola conference, includes: (1) an introduction which sets out the background to the debate on private enforcement in Europe; (2) key features of private enforcement in the United States, which may be relevant from an European Union ("EU") perspective; (3) key features of private enforcement in the EU; (4) the work of the European Commission ("Commission") in the area of private enforcement; and (5) a conclusion. This article is up-to-date to 20 February 2004, and presents an overview of the issues raised. It does not pretend to be an exhaustive compendium of all the law, case law and otherwise, on the subject.

### **A. Antitrust Modernization**

On 16 December 2002, the Council of Ministers adopted a new regulation (the "Regulation"),<sup>1</sup> which laid down the foundation

---

\* Mr. Woods is the Deputy Head of the Policy Development Unit of the Directorate General for Competition, Commission of the European Communities. The views expressed in this speech are entirely those of the author and may not in any circumstances be regarded as stating an official position of the European Commission. The author would like to thank Ailsa Sinclair and David Ashton for their contributions to this paper.

<sup>1</sup> Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, 2003

for a new and more efficient enforcement of Articles 81 and 82 of the European Community ("EC") Treaty,<sup>2</sup> which seek to regulate cartels and abuses of dominant position respectively. Known as antitrust modernization, the central element of the new Regulation is that it eliminates the present notification and exemption system, whereby the Commission has the exclusive right to decide whether agreements notified to it can benefit from individual exemption under Article 81(3), and introduces the direct application of Article 81 as a whole.<sup>3</sup> This new system will be applied from May 1, 2004.<sup>4</sup>

The new system will enhance the effective enforcement of the competition rules of the EC in several ways:

(1) It will reduce bureaucracy for companies who no longer have to notify agreements to the Commission.

(2) It will allow the Commission to focus its enforcement activities on the most serious infringements like cartels and abusive behavior by dominant firms, instead of working down a pile of notifications.

(3) It will allow the national competition authorities to participate fully in the application of EC competition law, not only Article 82 but also now Article 81 in its entirety. The national competition authorities together with the Commission form a network of public authorities applying the EC competition rules. This network is called the European Competition Network ("ECN").

(4) The new system will ensure that EC competition law is the single common standard for the assessment of restrictive agreements by all authorities in the ECN and

---

O.J. (L1) (4 January 2003).

<sup>2</sup> CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) (4 December 2002) [hereinafter "EC TREATY"].

<sup>3</sup> The Commission's monopoly in applying Article 81(3) is provided for in Commission Regulation No 17: First Regulation of 21 February 1962 implementing Articles 85 and 86 of the Treaty, art. 4, 1962 O.J. SPEC. ED. (P 013). The direct applicability of Article 81(3) of the Treaty is now provided for in Article 1(2) of Regulation 1/2003.

<sup>4</sup> Council Regulation 1/2003, art. 45, 2003 O.J. (L1).

thereby establishes a level playing field for companies active in the internal market of the EU.

(5) The new system will allow national courts to fully adjudicate a competition matter. This is important because, up until now, courts were often blocked in their action because of the notification of agreements to the Commission.

When drafting its proposal for the Regulation, the Commission was aware that its monopoly on Article 81(3) represented a major obstacle to more extensive application of the competition rules by national courts.<sup>5</sup> As noted above, an undertaking could bring private actions to a halt simply by lodging a notification with the Commission. Since the Commission considers private enforcement of EC competition rules an important complement to public enforcement of those rules by national competition authorities, a number of measures were introduced in the Commission proposal to stimulate private enforcement.

First, Regulation 1/2003 eliminates the exemption monopoly of the Commission. As a result, national judges will be able to rule on whether Article 81(3) is applicable. That power is confirmed in Article 6 of the Regulation. In the Commission's view, the elimination of the exemption monopoly and the related abolition of the notification system will stimulate complainants to have more frequent recourse to national courts in actions for damages.<sup>6</sup> It is anticipated that private enforcement will thus increase as a result of the Regulation.

Second, and perhaps more important, Article 3 of the Regulation imposes on national judges the obligation to apply Articles 81 and 82 of the EC Treaty when they apply national competition law to agreements, decisions, concerted practices, or abuses within the meaning of Articles 81 or 82 of the EC Treaty. The Regulation requires that the outcome of the analysis under national law and under Article 81 must be the same.<sup>7</sup>

---

<sup>5</sup> White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty—Commission Programme No. 99/027, COM(99) 101, at 100 (28 April 1999), available at <http://aei.pitt.edu/archive/00001175/> (last visited Apr. 29, 2004).

<sup>6</sup> Cf. Council Regulation 1/2003, Recital 7, 2003 O.J. (L1).

<sup>7</sup> Council Regulation 1/2003, art. 3(2), 2003 O.J. (L1). There is no convergence requirement for unilateral conduct under Article 82, where Member

The possibility to apply EC competition rules has now been turned into an obligation to apply EC competition rules. That means that national enforcers will join the Commission in the enforcement of Articles 81 and 82 of the EC Treaty.

### **B. The EC Law Context for Private Enforcement of Community Competition Law**

The issue of private enforcement of Community competition law is one of protecting Community law rights through adequate remedies and proceedings in the courts of the Member States. The division between rights on the one hand, commonly an area of Community legal competence, and remedies and procedural conditions, on the other hand, which are mostly left to national law, is fundamental to the structure of Community law. Given this distinction, the European Court of Justice ("ECJ") has stipulated that remedies and procedures for breach of Community law must be provided by the courts of the Member States. Specifically, the Community court has held that national law must protect Community law rights to a basic level of minimum effectiveness and ensure that national law rights are not protected more favorably than the equivalent Community law rights.<sup>8</sup>

EC law has recently taken a significant step forward in terms of the remedies available to litigating parties in the enforcement of private law rights, and this significant private law development has taken place in the field of competition law. In *Courage v. Crehan*, the ECJ held that national courts must provide a remedy in damages for the enforcement of the rights and obligations created by Article 81 of the EC Treaty.<sup>9</sup> It is worth repeating the relevant passage of the judgment

---

States may adopt stricter national competition laws for unilateral conduct.

<sup>8</sup> See, e.g., Case 33/76, *Rewe-Zentralfinanz and Rewe-Zentral v. Landwirtschaftskammer für das Saarland/Steenhorst-Neerings*, 1993 E.C.R. 1-5475; and Case 66/95, *The Queen v. Secretary of State for Social Security ex parte Eunice Sutton*, 1997 E.C.R. 1-2163.

<sup>9</sup> Case C-453/99, *Courage Ltd. v. Bernard Crehan and Bernard Crehan v. Courage Ltd. and Others*, 2001 E.C.R. 1 (Eng. C.A. 1999), available at 1999 WL 394609. The Opinion of AG Van Gerven in Case C-128/92, *Banks v. British Coal*, 1994 E.C.R. 1-1209, also dealt extensively with the issue of the availability of damages before national courts for breach of Community competition law. See *Crehan*, at ¶¶ 36-54. The court's judgment in the case, however, did not deal with this issue since it held that the case related only to Articles 65 and 66 of the European Coal and Steel Community Treaty ("ECSC Treaty") and that the Commission, and not national courts, was competent to determine an infringement of those articles.

in full:

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

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.<sup>10</sup>

This ruling, taken in conjunction with the fact that antitrust modernization has removed the Commission's monopoly over the application of Article 81(3) of the EC Treaty, paves the way for Community-level review of the rules relating to remedies and procedures for private actions for breach of Community competition law.

## **II. Key Features of Private Enforcement in the United States That may be Relevant from an EU Perspective**

It is clear that, while private enforcement of the competition rules is well developed in the United States, it is still relatively underdeveloped in the EU.<sup>11</sup> In search of an explanation for this

---

<sup>10</sup> See Crehan, at ¶¶ 26 & 27.

<sup>11</sup> It is commonly stated that private actions account for 90% of antitrust enforcement in the United States. Clifford A. Jones, *A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US*, Report to the 2001 EUI Conference on Private Enforcement of EC Antitrust Law, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 95, 99 (Ehlermann and Atanasiu eds., Hart 2003). There is an average ratio of approximately 9 to 1 private to public antitrust proceedings over the period 1996 to 2000. *Id.* Figures for the EU are harder to come by, but an older article provides figures which indicate an average ratio of approximately 1 to 21 private to public enforcement for 11 Member States of the then EEC (only figures for Ireland are missing) over the period 1989 to 1992, which is a percentage of

divergence, we are faced not only with different cultural attitudes vis-à-vis the use of claims for damages to tackle injurious behavior, but a different procedural and legal framework.

Exploring from an EU perspective the legal context in which private enforcement takes place within the United States, one is readily struck by the presence of a number of incentives that are generally unknown in Europe, namely, class actions, contingency fees, treble damages, and certain provisions relating to costs and discovery.

### **A. Class Actions**

As a result of the possibility to bring class actions, private actors who do not want to litigate on their own, for example, because the damage caused is too small compared to the costs of prosecution, will nevertheless be inclined to join a class action and thus, profit from the economies of scale. Class actions brought under antitrust law appear to serve a dual purpose: (1) they provide compensation for a large number of antitrust victims who have such small individual claims that they would go uncompensated otherwise; and (2) they may provide a powerful deterrent effect that can offer widespread, albeit invisible, benefits to all consumers. At the same time, it is understood that the class action is controversial, especially when the plaintiff's lawyers receive high fees, while the class action members are awarded coupons of limited value. In addition, it seems that class actions may be abused to negotiate large settlements in cases of dubious merit. Another problem may be potential conflicts of interest among multiple parties.

### **B. Contingency Fees**

Even the possibility of bringing class actions may not be a sufficient incentive for a private actor to initiate suit because it still requires money, time, and energy to formulate a collective lawsuit. In the system of contingency fees, these litigation costs are transferred to the law firms willing to assume these costs because of the prospect of a share in a potentially large damages award. These fees are often disputed, as Section 4 of the Clayton Act provides for an award of 'reasonable' attorney fees.<sup>12</sup> Contingency fees are not permitted in

---

roughly 95% public enforcement. See Jacques H.J. Bourgeois, *EC Competition Law and Member State Courts*, 17 *FORDHAM INT'L L.J.* 331, 332-33 (1994).

<sup>12</sup> Clayton Act, 15 U.S.C. § 15a (2004).

litigation in the majority of EU countries. It is understood that attorneys acting on behalf of plaintiffs in the United States often try to settle cases in order to minimize their litigation risk.

### C. Treble Damages

The published cases in Europe suggest that damages awarded by national courts are modest in value.<sup>13</sup> This is not the case in the United States, where the plaintiff may recover damages that are treble the value of his actual loss. Treble damages were designed, in part, to punish past violations of the antitrust laws and also to deter future antitrust violations.<sup>14</sup> It is often argued, however, that effective lack of prejudgment interest<sup>15</sup> in the United States means that compensation awarded is, on this view, closer to single damages.<sup>16</sup> It is understood that prejudgment interest is limited to situations in which a litigant has acted in bad faith to delay proceedings.<sup>17</sup>

### D. Costs

Another significant factor behind the high level of private enforcement in the United States is that the costs of the defendant do not have to be reimbursed by the plaintiff even if the plaintiff loses his case. In most EU jurisdictions, the costs of the successful party are paid, at least in part, by the losing party.<sup>18</sup>

---

<sup>13</sup> See *infra* Part III.

<sup>14</sup> *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

<sup>15</sup> Prejudgment interest is commonly understood to be interest awarded by the court on damages for the period from the time of injury to the date of judgment.

<sup>16</sup> Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages*, 54 OHIO STATE L.J. 115, 122 (1993); and S.D. Susman, *Mandatory Treble Damages—Time for a New Look?*, COMM'N ON CORPORATE AND ANTITRUST LAW OF THE SECTION OF CORPORATION, BANKING, AND BUSINESS LAW, American Bar Association Annual Meeting (New Orleans, 1981) reprinted as an attachment in *Antitrust Damage Allocation: Hearings before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st and 2d Sess., 170-177 (1981-82) (statement of J. Sims).

<sup>17</sup> Clayton Act, 15 U.S.C. § 15a (2004).

<sup>18</sup> This is the case, for example, under English and German civil procedural law.



## E. Discovery

Finally, we should not forget that a party seeking damages for violation of competition rules in the United States disposes of a wide range of possibilities to get access to the evidence needed to prove his case. These far-reaching powers of discovery are reinforced by a maximum jail sentence of five years for contempt of court, resulting from the non-production or destruction of documents.<sup>19</sup>

The procedural context in the EU is different from that in the United States. First, the ECJ lacks jurisdiction to deal with private claims for damages because the relevant forum is that of the national courts. That means that, to the extent there are no procedural rules at the European level—and as a matter of EC law procedural rules are limited in scope for the moment—the national courts operate in the context of their national procedural rules.

## III. Key Features of Private Enforcement in the EU

In *Courage v. Crehan*,<sup>20</sup> the court gives some potential guidance as to the remedial and procedural conditions for private actions for breach of Community competition law.<sup>21</sup> However, there are a number of outstanding questions that remain unanswered. This section of the paper addresses some of these issues.

### A. Jurisdiction

The principal issue in *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*,<sup>22</sup> which is currently before U.S. courts, is whether U.S. courts can exercise jurisdiction over antitrust cases when the following four conditions are met: (1) the plaintiff is foreign; (2) the transactions in question take place outside the United States; (3) the anticompetitive behavior in question has a “direct, substantial, and reasonably foreseeable effect”<sup>23</sup> on the U.S. market; and (4) the damage suffered by the plaintiff is not caused by the effects felt on the U.S. market but

---

<sup>19</sup> FED. R. CIV. P. 37.

<sup>20</sup> See *supra* note 9.

<sup>21</sup> See *Crehan*, ¶¶ 20, 23, & 31-34.

<sup>22</sup> *Empagran S.A., et al. v. F. Hoffman-LaRoche Ltd., et al.*, 315 F.3d 338 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 966 (Dec. 15, 2003) (No. 03-724).

<sup>23</sup> The wording from Section 6a(1) of the Foreign Antitrust Improvements Act of 1982, the governing statutory provision. 15 U.S.C. § 6a(1) (2004).

by effects felt on a market outside the U.S. In a nutshell, the issue is whether a nexus between the conduct and where its effects are felt is required to give jurisdiction.

The issues recently argued before, and decided by, the English High Court at the interlocutory stage in *Provimi Ltd. v. Trouw (UK) Ltd.*,<sup>24</sup> are different, though the two cases both derive from anticompetitive behavior in the vitamins market. Again, in *Provimi* some of the claimants and some of the defendants were foreign. Again, some of the transactions under consideration took place outside the territorial jurisdiction of the court. Again, the effects of the cartel were felt throughout Europe, including England as well as France, Germany, and Switzerland (the three other jurisdictions in which the parties were based). Finally, the English court, like the United States Court of Appeals for the District of Columbia Circuit, granted jurisdiction for claims relating to injury suffered outside its territory.

However, there is less scope for debate over the conclusion reached by the court in *Provimi* on jurisdiction because questions of jurisdiction between the states in which the parties were domiciled were determined by the court in accordance with interstate agreements (the Lugano Convention) in the case of Switzerland,<sup>25</sup> and EU law in the case of the other states (the Brussels Convention, now Regulation 44/2001<sup>26</sup>). The court established the jurisdiction of the English courts in relation to the claims involving parties domiciled in England on the basis of Articles 2(1) and 5(3) of Regulation 44/2001 and the corresponding articles of the Lugano Convention. According to Article 2(1), the defendant is to be sued in the court of the state in which he is domiciled (covering the English defendants in the proceedings), and according to Article 5(3) the defendant can, in tort cases, be sued in the courts “of the place where the harmful event occurred.” The court was prepared to assume that the place where the harmful event occurred is England for a claimant

---

<sup>24</sup> *Provimi Ltd. v. Trouw (UK) Ltd. et al.*, 2003 E.W.H.C. 961 (Comm. May 6, 2003).

<sup>25</sup> EC EFTA Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (16 Sept. 1988), available at <http://www.jus.uio.no/lm/ec.efta.jurisdiction.enforcement.judgments.civil.commercial.matters.lugano.convention.1998/portrait> (last visited Apr. 29, 2004).

<sup>26</sup> Council Regulation (EC) 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1.

domiciled in England.<sup>27</sup> Second, the court then held that the claims in the proceedings not involving an English claimant or defendant can be heard in addition by the English courts on the grounds that those claims were sufficiently connected to those claims falling under the jurisdiction of the English courts by virtue of the fact that the defendant is domiciled in England. This is provided for in Article 6(1) of Regulation 44/2001.<sup>28</sup> The upshot therefore is that the English court held that it had jurisdiction to hear claims brought by non-English claimants against non-English defendants, in addition to the claims involving English parties.

It is not the case in *Empagran* that the district court's findings as to jurisdiction were made in accordance with legal instruments agreed between the states of domicile of the parties to proceedings. Although the decision in *Provimi* appears to give the English courts wide jurisdiction, the jurisdictional conditions for hearing private antitrust actions should be the same throughout the courts of the EU Member States if those courts apply Regulation 44/2001 consistently. The question as to which courts plaintiffs will go will be determined by other procedural, as well as possibly substantive, factors, such as standing and causation of damage, or the definition of infringement.

## B. Standing

The court in *Provimi* made interesting interlocutory findings (to the standard of a "reasonably arguable claim" and not on the merits) as to the definition of the entity that committed the infringement, and as to causation of damage. On the first point, the court held that knowledge on the part of the subsidiary of the cartel, as organized by the parent company, was not necessary to impute the infringement in question to an undertaking defined widely enough to include both parent and such subsidiary. As to causation, the court held that selling on the market in one Member State A at a fixed price could be held to have caused loss to a purchaser in another Member State B, even though that purchaser did not purchase from the offending undertaking operating in Member State A. The court reasoned that in conditions of competition, the seller in Member State A could be expected to provide the product at a lower price to the

---

<sup>27</sup> *Provimi*, 2003 E.W.H.C. 961, ¶ 10.

<sup>28</sup> Article 6(1) of Regulation 44/2001 provides that this is the case where "the claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

benefit (either direct or in terms of the downward pressure this would have put on prices charged by other sellers, including those based in Member State B) of the purchaser based in Member State B. Assumptions of interstate commerce and the functioning of the internal market underlie this judgment, just as the reality of the global effect of cartels on global trade underlie the reasoning of the D.C. Circuit in *Empagran*. Putting these two findings together, the conclusion is that, under English law, or at least under Community law as applied by the English courts, a purchaser based in one Member State has standing to bring a damages action against the subsidiary of a cartel member based in another Member State even where, (1) that subsidiary did not have any knowledge of the cartel as operated by the parent but merely implemented it by charging the cartel price, and (2) there was no actual purchase by this purchaser from this subsidiary.

By contrast, a recent judgment of the Berliner Landgericht (German district court), *Max Boegl Bauunternehmung et al v. Hanson Germany*,<sup>29</sup> is restrictive as to standing.<sup>30</sup> The court held that purchasers of cement at cartel prices could not claim damages unless they had been individually targeted by a market-sharing cartel.<sup>31</sup> It is not enough that prices in the market in which the purchasers were buying were affected as a whole by the cartel. Indeed, the court held that the fact that the whole market was affected equally meant that there was no specific disadvantage to the individual claimants, and, hence, the action could not be founded.<sup>32</sup> This is clearly much narrower than the effect of the decision under English law, and introduces a much stricter requirement as to causation of loss. In particular, a requirement of individual targeting may restrict the scope for interstate actions. In the wake of the *Provimi* judgment, it appears to be the case that standing under German law and the law of some of the other major continental European jurisdictions, such as Italy, to bring antitrust actions is, in effect, narrower than in

---

<sup>29</sup> *Max Boegl Bauunternehmung et al. v. Hanson Germany* (Ger. Dst. Ct. 27 June 2003) (unreported).

<sup>30</sup> The court in *Max Boegl* followed the approach of the German Federal Court in the *Familienzeitschrift* case, B.G.H. N.J.W. 2819, 2822 (1984), in its narrow reading of standing, despite the fact that this approach has been widely criticised in the German legal literature.

<sup>31</sup> See *Max Boegl*, *supra* note 29 (last paragraph of (e) and last paragraph of III).

<sup>32</sup> *Id.* (point (f)).

jurisdictions, such as England. Discrepancies of this kind are liable to provoke so-called “forum-shopping” within the EU.

### C. Discovery

It is commonly remarked that extensive powers of discovery exist for parties under U.S. and English, as well as Irish, discovery procedures, and the absence of such procedures under the procedural laws of other EU Member States is often cited as a reason for the apparent lack of private enforcement actions in those other Member States. Fundamentally, the difference between the common law and continental civil law jurisdictions in relation to the provision and submission of evidence to the courts (a more linguistically neutral term might be “fact-finding”) is that the common law lawyer is under an obligation towards the court to disclose all evidence, both supportive and harmful to his case.<sup>33</sup> On the other hand, a civil lawyer is obliged, generally speaking, only to disclose those materials necessary to prove his case, subject to the power, in certain circumstances, for the judge to order disclosure of material from the parties or third parties. In this case, however, it appears that the order in question has to be made in respect of pre-identified documents. In short, the potential claimant in continental jurisdictions needs to have sufficient evidence to satisfy the burden of proof before launching an action,<sup>34</sup> whereas the common law system offers a much greater scope for launching actions on the grounds that evidence favorable to the claim might be turned up during discovery.<sup>35</sup>

In proceedings before the French commercial courts, the courts with principal competence to hear competition actions, the basic rule is that a party is obliged only to disclose those materials

---

<sup>33</sup> Civ. P. R. 31.6 (standard disclosure in English civil proceedings), available at [http://www.dea.gov.uk/civil/procrules\\_fin/contents/parts/part31.htm](http://www.dea.gov.uk/civil/procrules_fin/contents/parts/part31.htm) (last visited Apr. 29, 2004). There are wide discovery obligations under U.S. law that are backed by heavy sanctions for non-compliance.

<sup>34</sup> Article 146(2) of the French *Nouveau Code de Procédure Civile* (New Code of Civil Procedure) states explicitly that “requests for documents from the other party or third parties cannot be made.” (translated). This would appear to run counter to “fishing expeditions” of the type seen in common law proceedings.

<sup>35</sup> An important exception to the narrowness of disclosure in the civil law systems is the power of the court to order an expert report. This could be into an issue such as the calculation of damages in an antitrust case. The English system also allows the court to appoint an expert and encourages (post the 1998 Woolf reforms) the parties to agree on a joint expert.

necessary to prove his case.<sup>36</sup> This is subject to the power of the *juge-rapporteur*, the judge in charge of the case, to order, either on his own initiative,<sup>37</sup> where the power appears to be more limited, or at the request of one of the parties,<sup>38</sup> the disclosure of material from the parties to proceedings or third parties.<sup>39</sup> It appears that the order in question must be made with regard to pre-identified documents.<sup>40</sup>

Under Belgian civil law, a court will order disclosure of relevant documentary evidence on the request of the claimant only where there are serious, specific, and consistent indications that a party has such evidence. In Italy, as in France, fact-finding is restrictive, with the judge able to order a party to the proceedings or a third party, on application by one of the parties or on his own motion to produce documents. It appears, however, that the judge's discretion to order disclosure is exercised rarely and most commonly in the small claims courts. Again, in Italy it appears that the relevant document must be identified in the order. The situation in the Netherlands also resembles the French system: the judge can order both parties to the proceedings and third parties to disclose documents, but in the absence of such an order, the parties do not have the right of discovery of documents held by third parties. Similarly, in Spain the court can order disclosure of relevant documents held by both parties and third parties. In Germany, the power of the judge to order disclosure of documents appears to be more restrictive even than in the French system, with the power of the court in Germany to order the parties to submit relevant documents appearing to be realized primarily through orders made on

---

<sup>36</sup> N.C.P.C. art. 132.

<sup>37</sup> N.C.P.C. art. 10. Article 144 of the New Code of Civil Procedure also provides that the judge may order a "*mesure d'instruction*," which could include a request for production of a document, whenever "*le juge ne dispose pas d'éléments suffisants pour statuer.*" N.C.P.C. art. 144.

<sup>38</sup> N.C.P.C. arts. 11(2), 138 (third parties); art. 142 (parties).

<sup>39</sup> If the disclosure request is addressed to a third party, it must be issued by the court itself and not the *juge-rapporteur*.

<sup>40</sup> Documents ordered from third parties should be "*suffisamment déterminés.*" Civ 2e, 15 Mars 1979: Bull civ. II, n 88; RTD civ. 1979. The order must identify the desired documents. Com 12 Mars 1979: Bull civ. IV, n 97. Documents cannot be ordered from a party "*sans savoir au préalable de quels documents il peut s'agir et s'ils peuvent présenter quelque lien de rattachement avec un élément de prévue de la cause examinée.*" TGI Marseille, 20 Février 1979: Gaz Pal 1974 2 544; Reims, 6 Octobre 1981: Gaz Pal 1982 1 Somm 181.

the court's own motion.<sup>41</sup> Therefore, even within the continental civil law jurisdictions, there appears to be variation in procedures relating to fact-finding, let alone in comparison simply to the common law system.

It is not to be taken for granted, however, that extensive discovery available to the parties automatically acts as a spur to litigation: the slowness of competition proceedings in the English courts, though this phenomenon is clearly not limited merely to England, has been attributed in part to the broad discovery procedures available. Such procedures can slow down litigation by requiring parties to spend large amounts of time and resources on producing and disclosing various documents to the other side. In the Iberian proceedings before the English courts,<sup>42</sup> which at the time of the judgment of Justice Laddie were already seven years old, the High Court remarked on the extensive discovery proceedings as a factor contributing to the length of proceedings:

[t]hose proceedings were initiated nine years ago and relate to trading more than 10 years ago. Even the English proceedings are now seven years old. I confess that against that background, I do not find the prospect of a full English High Court action with discovery, experts' reports and cross examination at all attractive.<sup>43</sup>

It may be that problems relating to the length of proceedings will be eased by the abolition of the notification system at the EC level, which should mean that parties can no longer make tactical delaying references. Nevertheless, the fact remains that an extensive power of discovery brings with it concomitant delay and expense.

#### **D. Class Actions**

Class actions, as recognized in the United States, are not common in the legal systems of the Member States of the EU. The key feature of a U.S. class action is that an individual, including a lawyer, can bring a claim on behalf of an unidentified group of plaintiffs. Instead, the principal EU jurisdictions tend to favor, if

---

<sup>41</sup> See Peter Gottwald, *Fact Finding: a German Perspective*, in *THE OPTION OF LITIGATING IN EUROPE*, at 72ff (D. Carey Miller & P. Beaumont eds., United Kingdom National Committee of Comparative Law (London), 1993).

<sup>42</sup> *Iberian UK Ltd. v. BPB Indus. PLC et al.*, [1996] 2 C.M.L.R. 601 (1996).

<sup>43</sup> *Id.*

anything, representative actions brought, in the field of antitrust actions, by consumer associations. Provision to this effect exists in the antitrust laws of the United Kingdom and Germany. In the United Kingdom, Section 47B of the Competition Act of 1998, as inserted by Section 19 of the Enterprise Act of 2002, provides that consumer associations specified by the Secretary of State can bring actions for damages on behalf of two or more individual consumers before the Competition Appeal Tribunal, the specialized competition court set up by the Enterprise Act. Under the same provision, such claims can only be brought on the back of an infringement decision made by a public authority, either the Office of Fair Trading or the Commission.

English procedural law also offers, beyond the mechanisms of joinder of parties to a single action<sup>44</sup> and representative actions,<sup>45</sup> the more specific feature of the Group Litigation Order (“GLO”) “to provide for the case management of claims which give rise to common or related issues of fact or law.”<sup>46</sup> Such claims are entered as a group on a GLO register, and a judgment given in any claim in the group is binding on all the other GLO claims entered at the time of that judgment, subject to a common right of appeal, and may be binding on claims raising the same issues entered on the GLO register at a later date. Lawyers for the claimants are encouraged by the procedure to nominate one lawyer to take a lead in bringing and managing the action. There would appear to be no reason why this type of procedure could not be applied to an antitrust action brought before the English courts, though the recent English EU Competition Law Practice Direction, which was published in January 2004 to give effect to certain procedural issues arising from the modernization of EC competition law, is silent on this specific point.

Similarly, in Germany, Section 33 of the *Gesetz Gegen Wettbewerbsbeschränkungen* (German Antitrust Code) allows for an action for an injunction to be brought before the courts by “associations for the promotion of trade interests provided the

---

<sup>44</sup> New parties can be added to the action to “resolve all the matters in dispute” or to resolve a particular issue that affects the additional party. *See* CODE CIVIL [C. CIV.] R. 19.2 (1998) (Eng.). Similar provision exists under German antitrust procedural law. *See* GERMAN ANTITRUST CODE, § 88.

<sup>45</sup> An action may be begun or continued by or against representatives of persons with whom those representatives share a common interest. *See* C. CIV. R. 19.6 (Eng.). Any judgment obtained can only be enforced against a person who is not directly party to the proceedings by means of a court order. *Id.*

<sup>46</sup> C. CIV. R. 19.10 (Eng.). Group Litigation Orders are covered by C. CIV. R. 19.10-19.15 (Eng.).



association has legal capacity.”<sup>47</sup> There is, therefore, no public registration mechanism for class actions of this type in the German system. However, damages actions are not included. It is interesting to note that the U.K. antitrust procedural rules set out in Section 47B of the Competition Act of 1998 (as above) covers damages actions and not actions for injunctive relief. Section 33 also applies only to breaches of German competition law: it does not apply, under the provisions of section 96 of the Antitrust Code, to actions for breach of Community competition law. It should be noted, however, that the proposed “7 GWB Novelle,” which is intended to amend German antitrust law in light of the modernization of EC competition law, would establish the possibility for actions for damages to be brought by trade and consumer associations for breach of EC competition law. This amendment is to be welcomed as helping to realize the jurisprudence of the ECJ in *Crehan*.

Italian law does not provide any procedure for a collective action for the enforcement of competition law. In Italy, a recent law, legge 281/99, has made provision for standing for consumers and consumer associations to bring actions for breach of fundamental rights such as the protection of health, security, product safety, and fairness of commercial transactions, but it does not appear, as of yet, that this has enabled either consumers or their representative associations to find actions for breach of competition law.<sup>48</sup>

There is a similar provision in Portuguese law providing for the right of natural persons or associations (companies are expressly excluded) to apply for injunctive relief in relation to infringements of law on *inter alia* public health, pollution, quality of life, and consumer protection (the list is not exhaustive).<sup>49</sup> It has been suggested that the right to bring this type of injunctive action implies also the right to bring damages actions in relation to the same violations.<sup>50</sup> It has also been suggested that, in contrast to the position in Italy, violations of antitrust law would trigger these provisions,

---

<sup>47</sup> English translation of the German Antitrust Code as provided by the German Federal Cartel Office.

<sup>48</sup> See G. Tesauo, *Private Enforcement of EC Antitrust Rules in Italy: the Procedural Issues*, Italian Procedural Law Report to the 2001 EUI Conference on Private Enforcement of EC Antitrust Law, in *EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW* 267, 276 (Ehlermann and Atanasiu eds., Hart 2003).

<sup>49</sup> The *acção popular*, based on PORT. CONST. art. 52 and Law No 83/95 of 31 August 1995.

<sup>50</sup> Private Antitrust Litigation 2004, at 61 (Global Competition Review, 2004).

although competition law is not expressly included on the list of applicable infringements.<sup>51</sup>

While there would appear to be no provision for a class or representative action in the civil law system of France, there is a possibility of an action in the interest of the *ordre public* to be brought by the *Ministère Public*, though this action is only available in relation to certain specified restricted practices.<sup>52</sup> Furthermore, in France certified consumer associations can also bring a claim seeking to protect consumers' collective interests.<sup>53</sup> In Spain, the Consumers and Users Association can bring a claim on behalf of a determinable group.<sup>54</sup> In the Netherlands, any foundation or association whose object is to safeguard the interests at stake may bring a claim for the protection of third-party interests. Monetary damages cannot be claimed, but such association can request a declaratory judgment on the basis of which individual claimants can sue for damages. In Germany, the proposed "7 GWB Novelle" includes a provision that might help to redistribute the effects of anticompetitive behavior, though it would seem primarily through public rather than private means of enforcement. The proposal provides for a novel right of public action whereby the competition authority can order the recovery of the economic advantage that accrued as a result of an antitrust infringement. This 'fund' can be distributed to entities that suffered damage as a result of the infringement. Companies that have made such payments to the competition authority may use this as a defense in private action claims in the same matter.

In Sweden, the recent Act of Class Actions,<sup>55</sup> which entered into force on 1 January 2003, has introduced the possibility of class actions in a variety of cases. The Act provides for different types of class actions, including: (1) association class actions, brought by a non-profit association, that represents consumer or employee interests in disputes between a consumer and a business enterprise; and (2) public class actions, brought by an authority suitable to represent the group and designated by the government. According to the Act, class actions can only be brought where such an action is the best procedural alternative. In other words, the majority of claims can

---

<sup>51</sup> *Id.*

<sup>52</sup> C. COM. art. L.442-6 (Fr.).

<sup>53</sup> C. CONSUMER art. L.421-1 (Fr.).

<sup>54</sup> C. CIV. art. 11 (7 January 2000).

<sup>55</sup> The Act on Class Actions, 599 (2002) (Swe.).

only be brought on a class and not on an individual basis. The group of claimants bringing the action should be of such a size and be clearly defined so as to enable the court to determine what procedural steps are necessary to ensure judicial administration of the case. The size of the group is also an important factor in establishing whether a class action is the best procedural alternative. Under the Swedish system, all class settlements require judicial authorization and the court will not authorize any settlement that discriminates against certain group members or is otherwise clearly unreasonable. This system for class actions as established by the Act is clearly a recent development and it remains to be seen how it will operate in practice.

There already exists a parallel for the representative actions mechanism at the Community level. A recent proposal in the environmental field includes a provision that a representative body recognized by the Member State in which it is situated, and subject to meeting certain criteria laid down by Community law, shall be able to bring actions for breach of Community environmental law before the national courts.<sup>56</sup> Moreover, Directive 98/27 on consumer injunctions establishes the right for "qualified entities," organizations representing the collective interests of consumers or independent public bodies responsible for protecting the collective interests of consumers, in one EU Member State to seek an injunction with respect to infringements of national law provisions implementing certain EC consumer protection directives in another Member State.<sup>57</sup>

### E. Indirect Purchasers

Under Italian procedural law, Article 2043 of the *Codice Civile* (Italian Civil Code) provides that a claimant has standing to bring a damages action only where he can prove direct injury. This rule appears to have been relied upon by the *Corte di Cassazione* (Italian Supreme Court in the field of private law) to dismiss for lack of standing a consumer action seeking annulment of a bank loan for violation of Article 81 of the EC Treaty.<sup>58</sup> Swedish tort law provides

---

<sup>56</sup> Commission proposal of 24 October 2003 for a Directive of the European Parliament and of the Council on access to justice in environmental matters, art. 5, COM(2003)624.

<sup>57</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, 1998 O.J. (L 166) 51.

<sup>58</sup> Cass., sez. un. I, 4 mar. 1999, n.1811. The court in this judgment appeared to see competition policy more in terms of protecting competition and the

that the claimant must demonstrate loss that is “reasonably caused” by the infringement in question, such that it appears to be the case that claims by indirect purchasers are difficult under general Swedish civil procedural law. The same observation can be made, for example, in relation to French law, which appears to impose a strict causation requirement in damages actions for breach of competition law.<sup>59</sup> Thus, the procedural laws of these Member States could be said to resemble the U.S. indirect purchaser rule, with the result that actions by both consumers and their representative associations become significantly more difficult to bring, though the U.S. experience should show that they are not impossible for that reason alone. The effect of the German decision in *Max Boegl* would appear to have a similarly restrictive effect as to standing for consumers.<sup>60</sup> It has been argued, however, that Community law would favor the exclusion of the indirect purchaser rule.<sup>61</sup> In relation to German and Swedish law, there appears to be a tension between case law and principles of tort law that are restrictive as to standing for indirect purchasers, and specific statutory provisions aimed at encouraging representative or class actions by consumers or their associations, as discussed above.

The situation in Italy has been further complicated by a law adopted on 8 February 2003,<sup>62</sup> which provides that the Giudice di Pace (Judge of Peace) is not competent to issue an “equity decision” in respect of an allegedly anticompetitive contract executed by a large

---

constitutional principle of free enterprise, under Article 41 of the Italian Constitution, than in terms of protecting consumers’ interests directly.

<sup>59</sup> The strict causation test under French law of “causalité adéquate,” whereby a causal link is held to exist only between the damage and the determining factor among all the factors which contributed to the damage, appears to be favored by the French courts in competition actions. *See, e.g.,* Eco System v. Peugeot, Paris Tribunal of Commerce, 22 October 1996 (unreported); Société Labinal v. Sociétés Mors and Westland Aerospace, Cour d’ Appel de Paris, 13 May 1993, Europe, July 1993, comm. no. 300, *upheld by the Cour de Cassation on further appeal*; and Sony v. Concurrence, Cour d’ Appel Paris Oct. 22, 1997 (unreported).

<sup>60</sup> *See supra* Part III.A.

<sup>61</sup> *See* FIDE Congress 1998 General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities, at 44 (1998) (referring to the case law of the Community court on the protection of Community law rights by the national courts as noted above), *available at* [http://ceuropa.eu.int/comm/competition/speeches/text/sp1998\\_027\\_en.pdf](http://ceuropa.eu.int/comm/competition/speeches/text/sp1998_027_en.pdf) (last visited Apr. 29, 2004).

<sup>62</sup> Decree for Urgent Dispositions in relation to Equity Judgments, No. 18 (Feb. 8, 2003) (It.).

number of consumers. The law was adopted in response to the car insurance antitrust actions brought in Italy on the back of an infringement decision in relation to the same behavior by the *Autorità garante della Concorrenza e del Mercato* (Italian Competition Authority). This law appears, therefore, to make it more difficult for consumers to bring antitrust actions, given that the Judge of Peace was held by the *Corte di Cassazione* (Court of Last Appeal) in earlier proceedings relating to the same litigation to be the competent court to hear antitrust actions brought by consumers.<sup>63</sup>

## F. Damages

There is no explicit reference in the text of Articles 81 or 82 of the EC Treaty themselves as to the possibility of awarding damages to parties who suffer financial loss as a result of an activity prohibited by those articles. Nevertheless, after the decision of the ECJ in *Crehan*, it is now established that any individual may claim damages for loss caused to him by a contract or conduct liable to restrict or distort competition within the meaning of Article 81.<sup>64</sup> However, case law in the national courts awarding damages for breach of Articles 81 and 82 goes back before the *Crehan* judgment, even if the case law making such awards is relatively rare.

It is important to note that many lawsuits are settled out of court and details are rarely public, as secrecy is normally a condition of settlement. Therefore, the small number of known cases may represent the tip of a much bigger base of actions not brought to final judgment before a court. Given the extent of the issue and the difficulty of getting hold of all relevant information, it would be difficult to make a full inventory of all successful damages actions brought in the courts of the Member States to date, and what follows is necessarily of the character of an overview.

### 1. In Relation to the Difficulty of Proving the Infringement

Within the national systems of the Member States it appears to be the case that establishing an infringement of Article 81 or 82 of the EC Treaty is problematic for claimants, though the problems with bringing successful actions may not be due only to the establishment of the infringement, but may be connected to other related issues, such as the establishment of the causal link between the behavior in

---

<sup>63</sup> Cass., sez. un., 9 dec. 2002, n.17475.

<sup>64</sup> See *supra* Part I.B.

question and the damage suffered.

In the English courts it appears that there has been only one successful action for breach of Community competition law to date. This is the Article 82 action brought by Hendry and Williams against the snooker world governing body,<sup>65</sup> though in that case no damages were awarded. In Italy, there does not appear to have been any successful damages actions for breach of Community competition law, and in Germany the only action that could be characterized as a successful action for breach of Community competition law was in fact a declaratory action, and no damages were awarded. There appear to be more successful damages actions in France than in the other principal European jurisdictions. This fact might be a counterweight to the wide jurisdictional ambit of the English courts pursuant to the *Provimi* judgment, though this, itself, could be overstated if the courts of the other Member States interpret Regulation 44/2001 consistently.

Turning to the English cases in some more detail, besides *Hendry & Williams et al. v. World Prof. Billiards and Snooker Assoc. Ltd.*, other notable actions relating to Articles 81 and 82 include the recent judgments in *Crehan*<sup>66</sup> and *Arkin v. Borchard Lines Ltd.*<sup>67</sup> The *Crehan* judgment of the English High Court followed on from the reference to the ECJ on the principle of the availability of damages.<sup>68</sup> However, the claimant failed to recover any damages as the judge found that there had been no infringement of Article 81 by the brewer companies. Likewise, in *Arkin*, an Article 82 case, the claimant failed to establish a substantive breach of Article 82, though, in this case the claimant's business strategy and erratic response to the defendant's behavior constituted a considerable block to the success of the action (this relates more strictly to causation, as discussed below). A discernable tendency in the recent case law of the English courts is reliance on the evidence of witnesses and a reluctance to engage in complex economic and market analysis.

As to the German courts, a relevant, recent case is *British Telecommunications PLC & Viag Interkom GmbH v. Deutsche*

---

<sup>65</sup> *Hendry & Williams et al. v. World Prof. Billiards and Snooker Assoc. Ltd.* (S.C.J. Oct. 5, 2001) (unreported).

<sup>66</sup> *Crehan v. Intrepreneur Pub Co. and Brewman Group Ltd.*, [2003] E.W.H.C. 1510 (Ch. 26 June 2003).

<sup>67</sup> *Arkin v. Borchard Lines Ltd. et al.*, [2003] All E.R. (D) 173, [2003] E.W.H.C. 687 (Comm. 10 Apr. 2003).

<sup>68</sup> *See supra* Part I.B.

*Telekom*,<sup>69</sup> where the claimants sought a declaratory judgment that the defendant was liable in damages as a result of the premature implementation of a joint venture in the telecommunication sector. The court held that the defendants had acted in breach of Article 81(1) prior to the effective date of the exemption granted to the joint venture by the Commission and that they could be liable in damages pursuant to Section 823(2) of the German Civil Code in conjunction with Article 81(1) and under Section 1 of the German Antitrust Code. However, no damages were actually awarded. The claimants only sought a declaratory judgment that they were entitled to damages and, subsequently, pending appeal of the proceedings to the Federal Supreme Court, the claimants voluntarily withdrew the action in 1999 following a settlement between the parties.

Before the Italian courts, it appears that there have been no successful damages actions for breach of Community competition law to date. Generally, in Italy failure to prove breach again appears to be one of the main reasons for the failure of Article 82-type actions.<sup>70</sup> It appears, however, that there have been successful actions for damages for breach of national antitrust law, which might be instructive by way of comparison. In *Telsystem/SIP-Telecom*,<sup>71</sup> the defendant, an incumbent telecommunications operator in Italy, delayed the execution of an agreement with the claimant, a new entrant and competitor of the defendant, for the installation of a direct numeric circuit the claimant needed to provide its services. The defendant, who previously had a monopoly for these services, was in a dominant position in the affected market. Following an infringement decision by the Italian Competition Authority, the plaintiff claimed substantial damages as a result of having its access to the market delayed as a result of the defendant's abuse of its dominant position. The Court of Appeal of Milan found that SIP-Telecom had indeed abused its dominant position and was liable for the resulting damages. In a subsequent decision, damages were assessed at approximately 1.8 million Euros, including loss of profit. Damages have also been awarded for breach of Italian national

---

<sup>69</sup> British Telecomm. PLC & Viag Interkom GmbH v. Deutsche Telekom, [1998] C.M.L.R. 114 (1998).

<sup>70</sup> See Tesauro, *supra* note 48, at 272.

<sup>71</sup> Judgments of the Court of Appeal in Milan of 18 June 1995, in *Foro it.* 1996, O, p. 276 and of 24 December 1996, in *Danno e Responsabilità*, 1997, 5, p. 602.

competition law in two judgments from 2003.<sup>72</sup>

There appears to be more successful damages actions in France than in the other principal European jurisdictions.<sup>73</sup> In 1996, in *Eco System/Peugeot*, the Paris Commercial Court awarded damages to Eco System for losses caused by the conduct of Peugeot. The text of the decision is not publicly available, but it is understood that the loss was caused by Peugeot's infringement of Article 81 as established by the Commission in a decision adopted in 1991.<sup>74</sup> The Paris Commercial Court awarded Eco System damages of approximately 245,000 Euros to compensate for losses in its operating results caused by the infringement.<sup>75</sup>

The most notable French case to date is perhaps that of *Mors/Labinal*. This case concerned the supply of tire pressure indication systems for aircraft. In 1998, the Paris Court of Appeal awarded damages of approximately 5 million Euros to the claimant for breach of both Articles 81 and 82.<sup>76</sup> The same court had previously decided, in 1993, that there had been an infringement of those articles.<sup>77</sup> The Court of Appeal in its 1993 judgment had decided on liability and ordered the defendants to pay a provisional amount of damages while referring final assessment of quantum to a later hearing.

There are some examples of successful damages actions for breach of Community competition law from other European jurisdictions. In a judgment of the Swedish Supreme Court in 2002,

---

<sup>72</sup> Judgment of the Corte d'Appello of Rome of 20 January 2003 in *Albacom/Telecom Italia* (damages of approx. 1,300,000 Euros awarded to the claimant for losses caused by the defendant's abuse of a dominant position) and the judgment of the Corte d'Appello of Milan of 30 April 2003 in *Bluvacanze Spa/I Viaggi del Ventaglio Spa et al.* (damages of approx. 230,000 Euros awarded for losses caused by a concerted practice).

<sup>73</sup> Besides the cases for breach of Community competition law as discussed below, it is worth noting that, as in Italy, there is a recorded successful action for breach of national competition law before the French courts. *See* Judgments of the Paris Court of Appeals in *UGAP/CAMIF* of 13 January 1998 and 22 October 2001.

<sup>74</sup> Commission Decision No. 92/154/EEC of 4 December 1991, *Eco System/Peugeot*, 1992 O.J. (L 66) 1.

<sup>75</sup> *Eco System v. Peugeot*, Paris Tribunal of Commerce, 22 October 1996 (unreported).

<sup>76</sup> CA Paris, 30 Sept. 1998, Europe, Dec. 1998, comm. No. 410.

<sup>77</sup> CA Paris, 13 May 1993, Europe, July 1993, comm. no 300, *upheld by the Cour de Cassation on further appeal*, Cass. Com., 14 Feb. 1995, Bull IV, no. 48, Europe, Apr. 1995, comm. No. 146.



SAS was awarded a large sum in damages against the Swedish Civil Aviation Administration ("Luftartsverket") for a discriminatory pricing practice relating to Arlanda airport.<sup>78</sup> The court held that the Luftartsverket had abused its dominant position by applying discriminatory prices against SAS. The Luftartsverket was obliged to pay SAS approximately SKr600 million and SAS was relieved from paying approximately SKr400 million to the Luftartsverket.

In the Netherlands, the Amsterdam District Court awarded damages in the case of *Theal BV and Watts/Wilkes*.<sup>79</sup> The claimant filed a complaint with the Commission and also sued for damages before the national courts. Prior to the eventual adoption by the Commission of a decision finding that the defendants' practice of precluding parallel imports was in breach of Article 81,<sup>80</sup> the District Court of Amsterdam independently decided that the defendants were in breach of Article 81 and awarded damages to the claimant. The Court of Appeal upheld the judgment.

By contrast, in the Dutch case, *Oosterhuis/Eurofair*,<sup>81</sup> the claimant had been refused a place in an international household fair and filed again a complaint with the Commission and sued for damages in a parallel action. The Commission advised Eurofair to change its regulation, and once this was done, gave notice that the regulations were no longer in breach of Article 82. The District Court of Amsterdam decided that the grounds on which Eurofair refused Oosterhuis entry to the fair were in compliance with the amended regulations and, therefore, had not been in breach of Article 82. Accordingly, the court dismissed the claim for damages.

## 2. In Relation to the Burden & Standard of Proof

It appears to be the case that meeting the standard of proof in Article 82 cases, in particular, has been a deterrent to private enforcement. Presumably, this is because it can be difficult for claimants to amass sufficient evidence to meet the standard of proof required to prove in particular dominance for the purposes of Article 82. To help address this problem, section 20(5) of the German Antitrust Code actually puts the burden of proof on the defendant to

---

<sup>78</sup> Luftartsverket v. SAS, Case No. T33-00 (Swe. S. Ct. 2002).

<sup>79</sup> Judgment of the Amsterdam Dst. Ct. of 11 January 1979 (unreported).

<sup>80</sup> Commission Decision No. 77/129/EEC of 21 December 1976, *Theal/Watts*, O.J. (L 39) 19.

<sup>81</sup> Judgment of the Amsterdam Dst. Ct. of 29 October 1980 (unreported).

disprove the abuse in cases of abuse of dominance brought by SMEs—the burden of proof shifts to the defendant if there appears to be a violation “on the basis of specific facts and in the light of general experience.” The defendant is required to clarify those aspects of its business activities “which cannot be clarified by the competitor. . .but which can be easily clarified, and may reasonably be expected to be clarified” by the defendant.<sup>82</sup> This provision applies strictly only to national law. The French system provides for a different mechanism aimed at addressing problems of burden or standard of proof: the Minister of Finance can intervene to submit observations with a view to helping the claimant establish a breach. This appears capable of application in antitrust proceedings, but, to date, does not appear to have been used in this way.

Furthermore, there may be differences between national European jurisdictions as to the required standard of proof in Article 81 and 82 cases. For example, there is English authority for a “high degree of probability” test,<sup>83</sup> while there is Irish authority, based on *Masterfoods Ltd. v. HB Ice Cream Ltd.*,<sup>84</sup> for the “balance of probabilities” test, the normal standard of proof in civil proceedings. The usual balance of probabilities test also appears to have been applied by the English High Court on a preliminary issues hearing in *Arkin*.<sup>85</sup> Confusion of this type could impede coherent private enforcement. In relation to burden of proof, Article 2 of Regulation 1/2003 provides that the burden of proving an infringement of Article 81(1) or of Article 82 rests on the party alleging the infringement,<sup>86</sup> while the burden of proving that the conditions of Article 81(3) have been met rests with the party seeking to rely on that provision—the defendant.

---

<sup>82</sup> English translation of the German Antitrust Code as provided by the German Federal Cartel Office.

<sup>83</sup> *Shearson Lehman Hutton, Inc. v. Maclaine Watson Co. Ltd.*, [1989] 3 C.M.L.R. 429 (S.C.J. 1989) (the court appeared to have reached this conclusion on the grounds that there is the possibility of a fine in competition proceedings).

<sup>84</sup> *Masterfoods Ltd. v. HB Ice Cream Ltd.*, [1992] 3 C.M.L.R. 830 (Ire. H. Ct. 1992).

<sup>85</sup> *Arkin v. Borchard Lines Ltd.*, [2001] Eu.L.R. 232 (Q.B.).

<sup>86</sup> This has been confirmed recently in the context of a Commission investigation by the ECJ in its plenary judgments in Cases C-2/01P & C-3/01P, *Bundesverband der Arzneimittel-Importeure and Commission v. Bayer*, para. 62 (6 January 2004) (unreported).

### 3. In Relation to Causation

It appears from the case law and the literature that causation also appears to be problematic in proving loss in private antitrust actions in Europe. It has been commented that it can be difficult to attribute loss specifically to the defendant's behavior rather than to other factors, such as a general economic slowdown or even the claimant's own business strategy.<sup>87</sup> In *Hendry*, it appears to have been difficult for one of the claimants to argue successfully for the existence of damage caused by loss of a business opportunity.<sup>88</sup> Attributing loss to the claimant's behavior breaks the causal link, as the court in *Arkin* found (obiter), though in *Arkin*, it does appear to have been the case that the claimant was to an extent the victim of his own business strategy. In *Provimi*, the English court held that a sufficient causal link exists between the behavior of the defendant and the claimant's loss even in circumstances where the claimant made no actual purchase from the defendant.<sup>89</sup>

### 4. In Relation to the Calculation of Damages

Quantification of damages in competition cases is not, by its nature, a straightforward issue, and the U.S. experience shows how the possibility of complex econometric methods of damage quantification can complicate private actions. In European case law, it does not seem that the courts of any jurisdiction have developed a coherent approach to the subject, let alone a standardized approach across the different jurisdictions. Not surprisingly, national courts appear to address this issue by turning to the methods of calculating damages available in normal civil proceedings. In some jurisdictions these methods appear capable of generating delays that are aggravated by the complex nature of such calculations in competition cases. Moreover, the differences represent a significant barrier to a level playing field in the procedural conditions for bringing actions for breach of Community competition law before the national courts.

The English courts appear to favor a straightforward approach to the quantification of damages rather than favor any sophisticated econometric analysis, such as might be expected to be made by

---

<sup>87</sup> See, e.g., Tesauro, *supra* note 48, at 276. Tesauro makes this comment in relation to Italian law, but goes on to say that problems of this kind apply in most Member States. *Id.* at 278.

<sup>88</sup> *Hendry*, at para. 157.

<sup>89</sup> See *supra* Part III.B.

regulatory authorities. In this way, the English courts can be seen as essentially applying the usual rules of civil procedure to competition cases rather than seeking to develop any significant expertise or differentiated procedure for the purposes of quantification of damages in such cases. In *Arkin*, for example, the English court was provided with detailed expert, econometric evidence as to the position the claimant would have been in but for the anti-competitive conduct of the defendants. However, the judgment of the court places no weight on this material and is skeptical as to its worth. The judge preferred what he called a "common sense approach." A similar approach was taken in *Crehan*, where the judge appeared to have been influenced by the evidence provided by the claimant's accountant witness, whose evidence was not of a specialist economic or econometric nature. There was no sign of any detailed analysis by the court of the figures before it, but instead the court appeared willing to rely on the figures provided by the witnesses. The claimants in *Hendry*, although successful in establishing an infringement, were unable to recover any damages partly because they did not provide any evidence of loss.

It should be remembered that those parts of both *Arkin* and *Crehan* dealing with quantification of damages are strictly obiter since there was not a substantive finding of infringement in either case. The court in both cases dealt with quantum of damages perhaps in order to pre-empt any attack on this issue in the case of an appeal. It seems that a major challenge for any party relying on economic evidence will be to render such evidence intelligible, credible, and relevant to the judge.

The court in the German case of *Max Boegl Bauunternehmung et al. v. Hanson Germany* indicated that evidence provided by the claimants on the measure of damage, which the claimants appear to have calculated by referring to a hypothetical market price, was not sufficient and, thus, imposed a high evidentiary standard for the calculation of damages. However, the proposal of the German Federal Government, "7 GWB Novelle," provides that the party that has suffered damage can opt to claim the illegal profits that arose from the antitrust infringement instead of a detailed calculation of damages.

As to the Italian cases, the case reports for *Telsystem/SIP-Telecom* do not shed any light on how the damages were quantified. The court stated the principle that the loss of opportunity to enter the market amounted to harm that should be compensated but left the calculation of damages to technical experts. The issue of the criteria used to settle the amount of damages is apparently still to be clarified

in Italy, and the area of quantification of damages as a whole appears problematic under Italian law. The French courts take a similar approach, leaving the quantification of damages to be clarified at a later stage, once liability is established. This happened in *Mors/Labinal*, where quantification was referred by the Court of Appeal to a later hearing of that court, although the defendants were ordered to pay a provisional amount of damages in the interim. It would appear that such a system can result in some delay for the parties. In *Mors/Labinal*, the final order for damages followed five years after the original finding of liability, though this delay was perhaps aggravated by the appeal to the *Cour de Cassation* made by the defendant after the finding of liability by the Court of Appeal and before its quantification of damages.<sup>90</sup> In Italy, this system did not appear to produce such long delays in *Telsystem/SIP-Telecom*, with the decision as to quantification of damages following on 24 December 1996 from the decision as to liability made on 18 June 1995.

### G. Passing On

There appears to have been very little consideration of this potentially important issue in the European jurisdictions to date. There does not appear to be any case law directly on point from any jurisdiction in relation to actions for breach of EC competition law. The issue, however, has been considered by the Italian courts in relation to national antitrust law, which may serve as a useful point of comparison. In *Indaba Incentive Company/Juventus*,<sup>91</sup> the Torino Court of Appeal held that the agreements in question were, as a

---

<sup>90</sup> It is worth noting that the same procedure of precise calculation of quantification of damages at a later hearing has also been used in relation to proceedings for breach of national competition law in France. In *UGAP/CAMIF*, referred to above, the Paris Court of Appeal ruled as to liability in January 1998 and, at that hearing, designated an expert to hear the amount of the loss suffered and postponed a ruling on the amount of damages to a later hearing. Damages were finally quantified by the same court on October 22, 2001, by which it awarded damages to CAMIF amounting approximately to 1.5 million Euros, plus interest accrued since the date of the finding as to liability. The court also added capitalization of interest. In *Eco System/Peugeot*, relating to infringement of Community competition law, the Paris Commercial Court's damages award was made in 1996, five years after the decision of the Commission finding breach in relation to the same behaviour. It is not clear why there is this delay and to what extent, if at all, it is attributable to procedural delay in the court system.

<sup>91</sup> Judgment of the Corte d'Appello di Torino, in *Danno e Responsabilità*, p. 46 (6 July 2000).

matter of substance, in violation of national competition law, but appeared to have refused to award damages on the grounds that the claimant, which provided ticket distribution services to the defendant, had passed on the effects of the defendant's anticompetitive behavior to the final consumers. Thus, it would appear to be the case under Italian law that upstream producers are protected against litigation brought by both intermediaries who have passed on the anticompetitive effects, such as in *Juventes*, and by the indirect purchasers to whom those effects may have been passed on. It should be noted that the current German proposal, the "7 GWB Novelle," provides for the exclusion of the passing on defense.

## H. Settlements

Settlements are more rarely reported than court decisions, since parties that agree to pay damages out of court typically will insist, as a condition of the settlement, that the matter be kept confidential. It is difficult to establish exactly how many settlements are reached in relation to competition actions. It might also be worth considering the impact that settlements have on the conduct of private litigation as a whole and, conversely, the ways in which the conditions for bringing private actions impacts the nature and rate of settlements reached. But, such topics are perhaps beyond the scope of this paper and by their nature difficult to quantify.

Two major cases are known to have been closed in Sweden by way of settlement. These involve, as defendants, two former public monopolies, the former Swedish State Railway, and the Swedish Post. Both of these settlements were reported in the Swedish press when the cases were still pending in the Stockholm City Court.<sup>92</sup> Although the settlements are not public documents, it appears that the claimants had sued the former monopolies for damages caused by abuses of their respective dominant positions. The German case of *British Telecommunications PLC v. Viag Interkom GmbH/Deutsche Telekom*, as discussed above, also settled before damages were awarded, though the type of relief sought before the District Court in these proceedings was not monetary.

---

<sup>92</sup> Cases T 8-1093, BK Tag AB/Statens Jarnvagar AB, and T 8-738-96, Cotu,ao: Swedem AB/Posten Sverige AB.

#### IV. The European Commission & Private Enforcement

The Commission is currently looking at the conditions under which private parties can bring actions before the national courts of the Member States for breach of the Community competition rules.<sup>93</sup> As noted above, it is commonly stated that in the United States private action accounts for around 90% of competition enforcement, whereas in Europe there have been very few successful actions in this field.

The objective of the exercise is to facilitate the enforcement of the Community rules on competition by means of private actions before the courts of the Member States. Under Regulation 1/2003, which applies from 1 May 2004, Article 81 of the EC Treaty will be directly effective in its entirety. Work undertaken in relation to private enforcement of Community competition law should, therefore, be seen in the context of making the reforms brought about by Regulation 1/2003 effective in practice, and as an important further step in the promotion and enforcement of the competition rules throughout the Community. Underpinning the initiative is, therefore, the desire of the Commission to encourage competitiveness in the European industry, as declared to be a central objective of Community policy at the Lisbon European Council, and to protect the interests of the European industry and consumers alike.

Practice and procedure in countries like the United States is clearly an example of some interest to the Commission. The Commission will be seeking to establish, *inter alia*, why private competition actions are common in such countries and infrequent by comparison to date in the Community.

A great deal of research is required to establish what the potential obstacles to private enforcement of the competition rules in the Community are and how the U.S. experience might be of use in relation to the enforcement of the competition rules in Europe. At the end of 2003, the Commission commissioned a study to assist it with this work, the final results of which should be available to it by June 2004. Based on the results of the study and its own research, the Commission will, in the second half of 2004, commence work on the drafting of a Green Paper with a view toward identifying potential ways for the facilitation of private enforcement of Community

---

<sup>93</sup> A previous study, known as the Braakman Report, in this area was carried out for the Commission and published in July 1997. See Braakman (ed.), *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States* (European Commission, July 1997).

competition law. The Green Paper will be used to consult stakeholders, a prerequisite to the launching of any proposal in this area.

## **V. Conclusion**

Although the new enforcement system established by Regulation 1/2003 strengthens the possibilities for private parties to seek and obtain relief before the national courts, a number of potential obstacles to private enforcement remain. The time is now right to clearly identify the relevant obstacles and start looking at ways to facilitate private enforcement before national courts. It will be necessary to tread carefully, drawing, where appropriate, upon the experience of other jurisdictions, and in particular, the U.S. experience.



\*\*\*