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“Modernisation and Enforcement Pluralism–

**The Role of Private Enforcement of Competition Law in the EU
and the German Attempts in the 7th Amendment of the GWB”**

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1. Introduction

On the 1st of May 2004 the so-called “Modernization Package” entered into force with which the European Commission substantially reformed the way in which the Community’s competition law is to be applied in the future. After more than 40 years the European Commission regarded it necessary to reform its system of competition law enforcement in order to ensure the efficient protection of competition in an enlarged Community with 25 Member States. The main reform instruments of the “Modernization Package” are Regulation 1/2003¹, which governs the application of Art. 81 and 82² EC and replaces the old regulation 17/62,³ and Regulation 139/2004⁴ which regulates mergers of undertakings in the Community. In order to complement these Regulations the Commission also adopted a couple of notices and guidelines aiming at providing guidance on a range of aspects that are of particular importance in the new enforcement system.

Regulation 1/2003 eliminates the notification system, requiring undertakings to notify their agreements to the Commission, and the monopoly of the Commission to grant an exemption for an agreement pursuant to Art. 81 (3) EC. The reform leads to a decentralisation of the enforcement of Community antitrust rules as Art. 81 and 82 EC can now be applied by national courts throughout Europe in their entirety. One aim of this decentralisation is to reduce the workload of the Commission to enable it to concentrate its resources on the fight against serious competition restraints, for instance the detection of hard-core cartels. Therefore private parties will be required to have more frequent recourse to national courts in actions for damages sustained due to a violation of the European antitrust rules to complement the work of the competition authorities. One objective of the reform is thus to pave the way for a more effective private enforcement of EC competition law rules.⁵

1.1 What is private enforcement of EC competition law?

Private enforcement means that private parties enforce their under EC competition law before the civil courts of the Member States. It has a threefold importance: it strengthens decentralisation of competition law, it provides compensation to parties injured by acts violating these rules, and it works as an incentive for compliance with these rules by the undertakings. This contrasts with public enforcement by the Commission and the National Competition Authorities (NCA), which currently bear the main

¹ 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, OJ L 1 of 4 January 2003

² The actual numbering of the EC Treaty will be used throughout this paper.

³ Council Regulation No. 17 on implementing Articles 85 and 86 of the Treaty of 21 February 1962, [1957-62] OJ Special Edition 87.

⁴ Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

⁵ See Mario Monti, “Effective Private Enforcement of EC Competition Antitrust Law”, in Claus-Dieter Ehlermann and Isabella Atanasiu (eds.), *European Competition Law Annual 2001: Effective private enforcement of EC antitrust law*, Oxford 2003, p. 4.

burden of enforcement of competition law in the EU. Private enforcement in Europe plays no significant role so far. Of all enforcement procedures within Europe approximately only 12 % are commenced by private parties, be they other private companies or even private natural persons. The opposite exists in the United States, where 90 % of all antitrust cases are brought to court by private parties, while the authorities, e.g. the Federal Trade Commission (FTC), become active in only 10 % of the cases. Therefore, the EC Commission has expressed its intention to facilitate private enforcement, which it considers an effective means for injured parties to receive compensation and allow a more efficient use of the competition authorities' resources.

1.2 Structure of the paper

The aim of this paper is to analyse the role private enforcement can play in the protection of the antitrust rules in Europe, in particular in Germany.

The paper starts with an analysis of the current situation in the US, the UK, and in Germany to elaborate the differences of the systems. The situation in the US is analysed to allow a better understanding of the subject matter, as private enforcement has a long tradition there and has been practised for more than one century. This analysis will also describe the excesses, for instance unmeritorious litigation or unfair settlements occurring in the US which need to be avoided when implementing rules to foster private enforcement in Europe. The description of the situation in the UK, where recently attempts were made to improve the situation of private enforcement, aims at elaborating whether the amendments are sufficient. The analysis of the current situation in Germany documents that private enforcement does not play a significant role in the enforcement of the antitrust rules.

The discussion about private enforcement was revitalised by a recent decision of the European Court of Justice (ECJ) in "*Courage v. Crehan*", in which the ECJ stated that any individual shall have the right to claim damages for loss sustained from a contract that restricts competition. It is discussed whether this judgement gave birth to a Community remedy to claim damages akin to the remedy of state liability introduced by the ECJ in *Francovich*. Moreover, the question is discussed whether it makes a difference for the improvement of private enforcement whether a Community remedy exists or not. To give an overview about recent developments regarding private enforcement judgements in the US, the UK and in Germany concerning damage claims following the decisions of the Commission and the US authorities in the case of a worldwide cartel of Vitamins manufacturers are analysed. This analysis reveals diverse approaches of the courts concerned towards private enforcement on this and on the other side of the Atlantic. The decisions in Germany in particular clarify the need of substantial changes in German law in order to facilitate a more active and efficient role of private enforcement.

The thesis focuses thus on the situation in Germany, where at present a proposal for an amendment of the *GWB (Gesetz gegen Wettbewerbsbeschränkungen – Act against Restraints of Competition)*⁶ is under discussion. This proposal, which contains draft provisions which would lead to substantial changes in the way competition law is enforced in Germany, will be dissected in order to elaborate whether it takes the necessary steps to foster the situation of private enforcement.

Finally, it will be discussed whether a European harmonization of private enforcement is needed or whether a partial harmonization will be sufficient. In the conclusion a forecast will be made about the role private enforcement can play in the future in the enforcement of competition law.

2. The impact of the “Modernization Package”

On the 1st of May 2004 not only 10 new Member States joined the European Union, also a fundamental change in European competition law entered into force.⁷ After more than 40 years the European Commission had regarded the system ready for a substantial change in the application of Community’s competition rules in order to ensure the efficient protection of competition in an enlarged Community with 25 Member States.⁸ The replacement of the old Regulation 17/62 on the application of Art. 81 and 82 EC by the new Regulation 1/2003 was the completion of a five years lasting process during which a White Paper⁹ and a draft Regulation¹⁰ were broadly publicly discussed.¹¹

2.1 Decentralised system of application

Under the old notification system the Commission had to work through a large “pile of innocuous notifications”¹², which bound lots of resources for dealing with simple, unproblematic notifications.¹³ Regulation 1/2003 eliminates the exemption monopoly of the Commission and as result national competition authorities and national courts will be able to apply Art. 81 EC in its entirety, thus giving the Commission the opportunity to focus its own limited resources on the detection of serious competition restraints. To facilitate the functioning of such a decentralised system and to ensure the homogeneity

⁶ BGBl. I 1957, p. 1081. The currently valid version of the *GWB* after the 6th amendment, BGBl. I 1998, p. 2546.

⁷ Commissioner Mario Monti called it in an interview a “revolution in the way competition rules are enforced in the European Union”, *Competition Policy Newsletter*, Special Edition, p. 1.

⁸ Press Release IP/04/411 of 30 March 2004; as Mario Monti put it: “...the companies know the Highway code”, *Competition Newsletter*, Special Edition, p. 1.

⁹ White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty of 28 April 1999 – Commission Programme No. 99/027, COM (1999) 101 final.

¹⁰ Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, COM (2000) 582 of 29 September 2000.

¹¹ See for instance the publication of Claus-Dieter Ehlermann and Isabella Atanasiu, cited in footnote 5, which encompasses the contributions to a whole workshop dedicated to private enforcement at the EUI in Florence in 2001; also Claus-Dieter Ehlermann, “Modernization of EC antitrust policy: A legal and cultural revolution”, 37 *CML Rev.* (2000), p. 537 with further references.

¹² Monti in *Competition Policy Newsletter*, Special Edition, p. 1.

¹³ See the speech held by Commissioner Monti at the CBI’s Conference on Competition Law Reform in London on 12 June 2000, p. 3, available at: http://europa.eu.int/comm/competition/speeches/text/sp2000_008_en.html; see also the detailed analysis of Katherine Holmes, “Public enforcement or private enforcement?: Enforcement of Competition Law in the EC and UK”, 25 *ECL Rev.* (2004), pp. 29f.

of its application throughout an enlarged EU, the Commission produced a “Modernization Package” encompassing regulations and guidelines, respectively notices, concerning the application of competition law rules.¹⁴ Ideally the Commission would like to strengthen the effectiveness of EC competition law with a combined enforcement by Commission, National Competition Authorities (NCA) and national courts and a decentralised application, especially of Art. 81 (3) EC, to bring the rules closer to the undertakings and the citizens.¹⁵

Although the Commission strongly opposes the Commission’s future concentration on detecting hard core cartels and the decentralisation of the enforcement of competition law could eventually lead to a decrease of public surveillance.¹⁶ The Commission Notice on the handling of complaints states that “public enforcers cannot investigate all complaints”.¹⁷ This can be understood that the level of surveillance will decrease. One important objective of the reform is hence to pave the way for more effective private enforcement of EC competition law.¹⁸ Due to the exemption monopoly of the Commission national courts were often hampered to apply the competition rules more extensively as private actions against an undertaking could easily be brought to a halt just by lodging a notification with the Commission.¹⁹ Although neither the old Regulation 17/62 nor the new Regulation 1/2003 contain explicit provisions for private enforcement of Art. 81, 82 EC.²⁰ At least the new regulation comprises a number of formulations which may tend to support private actions in national courts. A provision for instance allocating the burden of proof of meeting the conditions of Art. 81 (3) EC on the side of the party claiming its benefit.²¹ It is hence expected and also welcomed by the Commission that undertakings and individuals will make more use of private actions before national courts in order to defend their subjective rights conferred on them by EC competition rules as private actions enable injured parties to receive compensation for the loss sustained.²²

2.2 The designated role of private enforcement

So far private enforcement of competition rules has been underdeveloped in Europe. Exact figures are difficult to get, but a recent study ordered by the Commission revealed only around 60 cases in

¹⁴ The Modernization Package was finalised with the adoption of the new merger control regulation 139/2004 on 20 March 2004, see Press Release IP/04/441 of 30 March 2004. See for a very comprehensive description of all these measures, Sven B. Völcker, “Developments in EC Competition Law in 2003: An Overview”, 41 CML Rev. (2004), pp. 1028ff.

¹⁵ Monti, in Ehlermann/Atanasiu, p. 4.

¹⁶ See for instance the speech of Commissioner Monti at the CBI’s Conference on Competition Law Reform, London, 12 June 2000, p. 3; Assimakis Komninos, “New prospects for private enforcement of EC Competition Law: Courage v. Crehan and the Community right to damages”, 39 CML Rev. (2002), p. 458 recognises an “enforcement gap”.

¹⁷ See paragraph 8 of the Commission Notice of 27 April 2004 on the handling of complaints under Articles 81 and 82 of the EC Treaty, OJ C 101, p. 65.

¹⁸ Monti, in Ehlermann/Atanasiu, p. 3.

¹⁹ Donncadh Woods, “Private enforcement of Antitrust rules, Modernization of the EU Rules and the Road ahead“, 16 Loyola Consumer Law Review (2004), p. 433.

²⁰ Only in recital 7 of regulation 1/2003 an increase of private enforcement is regarded desirable.

²¹ Clifford A. Jones, “Private antitrust enforcement in the Europe: A Policy Analysis and Reality Check”, 27 World Competition (2004), p. 14 referring to Art. 2 of the Regulation 1/2003.

²² Monti, in Ehlermann/Atanasiu, pp. 3f.; Donncadh Woods, Ailsa Sinclair and David Ashton, “Private enforcement of Community competition law: modernisation and the road ahead”, Competition Policy Newsletter No. 2/2004, p. 31.

Europe in the last 40 years.²³ The other much larger part is exercised by the European Commission and the NCAs. The recent study hence revealed an unsurprising “total underdevelopment” with regard to private enforcement and an “astonishing diversity” in the approach taken by the Member States.²⁴

In the United States the situation is totally different; there around 90% of all antitrust enforcement cases are commenced by private parties and only the remaining 10% by the authorities, *i.e.* the Federal Trade Commission (FTC) and the Department of Justice (DoJ).²⁵

Although the White Paper, as well as the recitals of Regulation 1/2003 speak about the importance of a vivid system of private enforcement, no legislative measures have been introduced and so there are some doubts as to whether the change towards a decentralised system and the direct applicability of Art. 81 (3) EC Treaty alone will be enough to create a workable system of private enforcement capable of ensuring the same level of surveillance as under the old system.²⁶ It seems that the Commission itself is not sure whether this system will work efficiently as they are currently preparing a Green Paper, which shall present potential ways to further facilitate private enforcement.²⁷ If the result of that process would be to produce a Regulation or Directive this would obviously need years of negotiations between the Member States. So the question arises how the system would work in the meantime. To get an idea how useful legislation enhancing private enforcement in Europe should look like one has to look at the history of private enforcement, which mainly took place in the US, to understand its roots.

3. Private enforcement in the United States of America

3.1 Roots of private enforcement

Private enforcement of antitrust law is not an innovation of the American legislator. Its roots can be traced back to the UK’s ‘Statute of Monopolies’ of 1623²⁸, which provided that a person, who had been financially injured, could bring a claim for treble damages and double proceeding costs against the perpetrator.²⁹ But also American antitrust legislation has long tradition, dating back to 1890 when the Sherman Act entered into force, the first statute governing actions against constraints of competi-

²³ Woods, pp. 435f.; The study on private enforcement was undertaken by the law firm Ashurst by order of the EC Commission, available on the internet: http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf, see the Executive Summary of the study of the Commission, p. 1.

²⁴ Executive Summary of the study of the Commission, p. 1; Clifford A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford 1999, pp. 85f. came to the same conclusion already five years earlier.

²⁵ Jones, *Private Enforcement*, p. 80; Rolf Hempel, *Privater Rechtsschutz im Kartellrecht*, Baden-Baden 2002, p. 228; Wouter Wils, “Should private antitrust enforcement be encouraged in Europe?“, 26 *World Competition* (2003), p. 477.

²⁶ Rolf Hempel, “Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle“, *WuW* 2004, p. 362; Karsten Schmidt, “Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedure“, in Ehlermann/Atanasiu, p. 253; Wils, *World Competition*, pp. 480ff. is almost hostile towards private enforcement and regards public enforcement much more efficient.

²⁷ Monti in *Competition Policy Newsletter*, Special Edition, p. 1.

²⁸ Donald Baker, “Revisiting history – What have we learned about private antitrust enforcement that we would recommend to others?“, 16 *Loyola Consumer Law Review* (2004), p. 379.

²⁹ Hempel, *Privater Rechtsschutz*, p. 174.

tion.³⁰ It was subject to some discussion whether the legislator intended right from the beginning in enacting the Sherman Act private parties to be the primary enforcer of antitrust law. The fact that no initial budgetary dispositions had been made to publicly enforce the act makes this assumption sound.³¹ Regardless whether this was the intention at the beginning today approximately 90 % of all antitrust cases in the US are enacted by private persons.³²

3.2 Section 7 Sherman Act and section 4 Clayton Act

The main provision for private enforcers was originally section 7 Sherman Act, which provided “that any person injured in its business by reason of anything forbidden by this act may sue therefore and recover three fold the damages and the costs of the suit, including a reasonable attorney’s fee”. Significant, beside the treble damages, is the cost rule, which is extraordinary under US law as usually every party to a suit has to bear its own costs (so-called “American Rule”).³³ As the provisions of the Sherman Act, including section 7, were regarded insufficient for the fight against constraints of competition - mainly due to the introduction of a “rule of reason test” by the Supreme Court in regard to section 1 Sherman Act³⁴ - two complementary statutes were introduced in 1914, the Clayton Act³⁵ and the Federal Trade Commission Act.³⁶ The former contains all relevant provisions for private enforcement, the latter governs the administrative procedure to fight antitrust violations, conducted by the FTC and the DoJ. These sanctions for antitrust violations encompass fines, structural remedies, and even imprisonment.³⁷

Section 4 of the Clayton Act, which superseded - slightly amended - section 7 Sherman Act, is the central norm for private enforcement. Entitled to sue are only natural and legal persons in the sense of section 1 (a) Clayton Act for infringements of section 1 to section 3 Sherman Act³⁸ and sections 3, 7, and 8 Clayton Act.³⁹ Only such losses which directly result from the infringement can be recovered.⁴⁰

³⁰ Act of 2 June 1890, Ch. 647, 26 Stat. 209 (1890), current version at 15 U.S.C. §§1-7 (1996).

³¹ Hempel, *Privater Rechtsschutz*, p. 174; Kent Roach and Michael Trebilcock, “Private Enforcement of Competition Law”, 34 *Osgoode Law Journal* (1996) p. 465; Jones, *Private Enforcement*, p. 85 assumes that the system was right from the beginning based on the idea of a public-private pluralism.

³² See above note 23.

³³ Hempel, *Privater Rechtsschutz*, pp. 201, 221.

³⁴ Hempel, *Privater Rechtsschutz*, p. 174, Clifford A. Jones, “Trilateralism in Private Antitrust Enforcement: Japan, the USA, and the European Union”, in Clifford A. Jones and Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System*, The Hague 2002, pp. 212f.

³⁵ An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes, ch. 323, 38 Stat. 730 (1914), current version at 15 U.S.C. § 12 (1996).

³⁶ Act of 26 September 1914, Ch. 311, 38 Stat. 717 (1914), current version at 15 U.S.C. §§ 41-58 (1996).

³⁷ Roach/Trebilcock, p. 465. See for a detailed analysis of public enforcement in the US, Frank Wamser, *Enforcement of Antitrust Law: a comparison of the legal and factual situation in Germany, the EEC, and the USA*, Frankfurt a.M. 1994, pp. 29ff.

³⁸ Section 1 and 2 Sherman Act regard restraints of competition as well as monopolization as criminal offences.

³⁹ Roach/Trebilcock, p. 465; Hempel, *Privater Rechtsschutz*, pp. 183, 187 pointing at the role of Attorney Generals of the US Federal States for cases of antitrust violations occurring in their jurisdictions.

⁴⁰ Hempel, *Privater Rechtsschutz*, p. 191 with reference to the relevant US Supreme Court decision in “*Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*”, 429 U.S. 477, 488, 97 S.Ct. 690 50 L.Ed. 2d 701 (1977).

Plaintiffs seeking treble damages are regarded as a “Private Attorney General”, whose activity is encouraged to supplement the scarce governmental resources.⁴¹ Complementary to section 4 is section 16 Clayton Act which permits private parties which have suffered injury through an antitrust violation or are just threatened with it, to seek injunctive relief.⁴² Subsection 2 of section 4 (a) Clayton Act is peculiar as it provides the very limited possibility to order pre-judgement interest, *i.e.* interest that accrue from the day of deliverance of the written claim at court or even from the day at which the damage occurred. But the possibility to grant pre-judgement interest has never been used.⁴³ Section 5 (a) and (i) Clayton Act facilitate so called “follow-on” trials of private litigants, which just follow governmental prosecutions. The former provides that a criminal decree is *prima facie* evidence against the defendant in a later private action and the latter governs that the limitation period is suspended during a public investigation.⁴⁴ A public investigation for instance against electricity producers GE and Westinghouse in the 1950s led to private follow-on suits that finally cost the infringers the enormous amount of more than \$350 million.⁴⁵ Some critics’ say that private persons are more free riding on the public litigation in follow-on suits than fulfilling their role as “private attorney general”, that means detecting competition restraints without prior public investigations.⁴⁶ Nevertheless the role of private enforcers in US competition law remains important.

3.3 Pre-trial discovery and class actions

Beside the provisions of the Sherman and the Clayton Act private enforcement is enhanced by some specific features. One important tool is the “pre-trial discovery”, a self regulating regime for the parties to a civil procedure, working more or less independently from the judge, providing instruments to investigate the facts of the case, e.g. by witness examination under oath or by requesting documents from the other party.⁴⁷ The pre-trial discovery has caused severe criticism as it can be misused by the plaintiff, either to get information whether a private action could be successful at all (so called “fishing expeditions”) or to get internal information from the defendant for other purposes.⁴⁸ Beside that the pre-trial discovery can be extremely time consuming and costly, e.g. in one case 35 million docu-

⁴¹ Jones, Private Enforcement, p. 80; Barry J. Rodger and Angus MacCulloch, “Competition Law Enforcement in the Community. Deregulation and Re-regulation: The Commission, National Authorities and Private Enforcement”, 4 Columbia Journal of European Law (1998) p. 604.

⁴² Hempel, Privater Rechtsschutz, pp. 174, 202; Roach/Trebilcock, p.465.

⁴³ Jones, Private Enforcement, p. 229; Hempel, Privater Rechtsschutz, p. 200.

⁴⁴ Rodger/MacCulloch, p. 602.

⁴⁵ Jones, Private Enforcement, p. 83.

⁴⁶ William Slughart II, “Private Antitrust Enforcement Compensation, Deterrence or Extortion”, 13 Regulation - The Cato Review (1990)p. 55 stating that two-thirds of the private antitrust cases between 1946 and 1963 were preceded by successful DoJ prosecutions of the same defendants, so that private plaintiffs are free-riding on public law enforcement efforts., Hempel, Privater Rechtsschutz, p. 229 opposes this view, presenting figures that only 25 % of all actions follow prior public investigations.

⁴⁷ Hempel, Privater Rechtsschutz, pp. 210ff. referring to the relevant rules 26-37 of the Federal Rules of Civil Procedure.

⁴⁸ Hempel, Privater Rechtsschutz, p. 211.

ments were requested by one party.⁴⁹ Nevertheless it should be noted that the most expensive case ever was a public litigation which started in 1969 and ended with a dismissal of the case in 1982.⁵⁰ Another not less controversial tool is the class action.⁵¹ There a representative plaintiff is acting on behalf of an identifiable group of persons, who are all concerned by the same or a similar issue. In the US the so-called “opt-out” systems applies, that means an individual is member of the class and is bound by a decision or a settlement if he not explicitly excludes himself from the class.

In two highly controversial decisions the US Supreme Court elaborated the scope of private enforcement. In the first decision (*Hanover Shoe Inc. v. United Shoe Machinery Corp*) the court held that there was no passing-on defence – *i.e.*, the defendant could not defeat the claim by showing that the plaintiff had passed on the full overcharge to its customers and hence had not suffered any loss. The court explained that allowing such a defence would substantially complicate such claims and increase the plaintiff’s burden to proof while reducing his incentives to go to court.⁵² The court then decided some years later about the offensive passing-on (*Illinois Brick Co. v. Illinois*), that means the standing of indirect purchasers from a cartel, having bought a product through an intermediary.⁵³ To limit the number of actions in general and class actions in particular the Supreme Court decided that indirect purchasers from the cartel, e.g. parties on a subsequent level of the market restrained, have no *locus standi* to sue in court. The intention was firstly to limit standing to direct purchasers, thus avoiding a too complex economic analysis whether the damage had been passed-on to the subsequent market levels and secondly to avoid that an infringer can be forced to pay to direct purchasers as well as to indirect purchasers thus paying twice. This judgement caused severe criticism and led finally to legislative measures in some States of the US allowing actions of indirect purchasers (so-called “*Illinois Brick* repealers”). These rules created a confusing system of Federal and State rules facilitating *inter alia* forum-shopping for all sorts of class actions⁵⁴ as well as unmeritorious claims.⁵⁵

The class action is hence highly criticised as some frivolous litigation is undertaken by blackmailing the defendant or by settlements - negotiated between the class action lawyers and the company - which are disadvantageous for the plaintiffs. This can be particularly gainful for the plaintiffs’ lawyers as well as for the defendant, the former receiving erratic fees and the latter minimising its legal costs which it always has to bear.⁵⁶ The consequence are settlements like that of *Microsoft* in Minnesota ,

⁴⁹ Hempel, Privater Rechtsschutz, p. 211 with reference to the case *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd*, 529 F.Supp. 866, 874, 1981.

⁵⁰ “*US v. IBM*”, Case No. 69 Civ. 200, USDC SDNY, see for further details Jones, Private Enforcement, p. 83.

⁵¹ Hempel, Privater Rechtsschutz, pp. 215ff.

⁵² US Supreme Court decision in “*Hanover Shoe Inc. v. United Shoe Machinery Corp.*”, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed. 2d 1231 (1968); Baker, p. 395.

⁵³ US Supreme Court decision in “*Illinois Brick Co. v. Illinois*”, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed. 2d 707 (1977); Hempel, Privater Rechtsschutz, pp. 188ff.; Baker, p. 391.

⁵⁴ In Madison County, Illinois, for instance the number of class actions increased by 5,200% from 1998 (2 cases) to 2003 (106 cases).

⁵⁵ Hempel, Privater Rechtsschutz, p. 194; Rodger/MacCulloch, p. 603.

⁵⁶ Wamser, p. 103.

where the customers got vouchers worth up to \$29 to buy new products, while the lawyers received \$59.4 million in fees.⁵⁷ But there are also examples of frivolous litigation like a \$4.5 million settlement between Sony and some moviegoers, who alleged that they were “tricked” into movie theatres by critics of a faked non-existent film critic.⁵⁸ Nevertheless class actions are an important instrument and have a strong lobby in the US, thus all attempts to adopt an amending act eliminating such excesses failed.⁵⁹

3.4 Conclusion

The US is still superior as a venue for private damages actions, nevertheless it should be borne in mind that the Sherman and the Clayton Act were hardly used during their first decades of existence and needed nearly half a century to become commonly used. An analysis of the first fifty years of private enforcement revealed that between 1890 and 1940 in total only 175 private damages actions had been brought before courts with plaintiffs prevailing in only 13 reported decisions.⁶⁰ Nothing in this historical data presaged the explosion in private antitrust litigation that began in 1960, which outpaced public enforcement efforts then by a wide margin.⁶¹ Thus it should not be expected that private enforcement, if at all, will play immediately an important role in Europe similar to that in the US.

The USA has a long and important tradition of private enforcement and antitrust economics from which Europeans can learn.⁶² Nevertheless the excesses described above should make the legislators on European as well as on national level aware of the problems of the current system and careful when trying to copy US enforcement rules.

The Canadian government for instance wanted to avoid such excesses, but it seems that the Canadian legislator had been so cautious in the implementation of private enforcement rules that it possibly was too restrictive so that the system cannot work properly.⁶³

Thus an analysis of the proposals on the table made to foster private enforcement must always have a look towards the risk of misuse and frivolous litigation as they occur in the US, while at the same time aiming at installing a useful and workable system. It is interesting to notice that also on the other side

⁵⁷ See, *inter alia*, for the settlement of *Microsoft Corp.* in Minnesota of 1 July 2004, <http://www.computerweekly.com/Article131710.htm>.

⁵⁸ *Rezec v. Sony Pictures Entertainment, Inc.*, see also California Court of Appeal, B 160586 of 4th March 2004, which rejected Sony's motion to block the suit.

⁵⁹ The last vote about the “Class Action Fairness Act“, an amendment meant to reduce the risk of misuse, failed in the Senate in July 2004. That means that the initiative is blocked for this year.

⁶⁰ Jones, *Private Enforcement* p. 79; Roach/Trebilcock, pp. 465f.

⁶¹ Hempel, *Privater Rechtsschutz*, p. 175; Jones, *Private Enforcement*, p. 79 states that the average number of new private actions since 1985 is in the range of 600 to 1,000 per year.

⁶² See for instance in this regard Herbert Hovenkamp, Landes Posner

⁶³ See Martin Low and Karen Kuzmowich, “New developments in private antitrust enforcement in Canada”, report for the 8th Annual Competition Conference of the International Bar Association held in Fiesole, Italy, in September 2004.

of the Atlantic the reform approaches in the EU are observed with curiosity and that they are even partially regarded useful for reform steps in the US.⁶⁴

As has been said above, private enforcement has no tradition in Europe. Nevertheless the situation between the Member States of the EU differs. United Kingdom for instance has substantially amended its competition law already in 1998. The analysis of the situation in the UK will elaborate whether the amendments are useful and appropriate to fulfil the expectations to enhance private enforcement. Furthermore it will be seen whether the UK common law system is more favourable to private enforcement than a civil law system like in Germany which will be scrutinised afterwards.

4. Private enforcement in the United Kingdom

The British are always regarded “Euro sceptics” what for some regard might be true. For competition law the situation is different, in this area of law the UK has undergone radical changes during the last six years and is in regard to the legislative structure now ahead of the continental European Member States. With regard to private enforcement of antitrust rules the UK are at the forefront and all necessary amendments with regard to the implementation of Regulation 1/2003 could enter into force on 1st May 2004.

4.1 The situation until 1998

Before the UK amended its competition law fundamentally in 1998 the policy was traditionally more focused on public than on private enforcement and the relevant laws⁶⁵ provided very little scope for private litigation.⁶⁶ Already in the past Art. 81 EC could have been used by a defendant as a so-called “eurodefence”⁶⁷ so that a court had to declare a contractual obligation null and void due to an infringement of Art. 81, 82 EC. British courts had already almost 20 years ago acknowledged that for an infringement of Art. 81, 82 EC damages could be claimed.⁶⁸ Also a right for injunctive relief exists, either as interim relief or – less often - as a decision in the main proceedings. The court enjoys a wide range of discretion and can award damages instead of injunctive relief, if the former seems more appropriate. The applicant then has to convince the court that a mere award of damages is not sufficient.⁶⁹

The discussion under which category of tort a right for damages has to be put in, i.e. whether it has to be regarded as a breach of statutory duty, a breach of an economic duty or a right based directly on

⁶⁴ Gregory McCurdy, “The Impact of the Modernisation of the EU Competition Law System on the Courts and Private Enforcement of the Competition Laws: A Comparative Perspective”, 25 ECL Rev. (2004), p. 509.

⁶⁵ The relevant laws were the Fair Trading Act 1973, the Restrictive Trade Practices Act 1976 and the Competition Act 1980.

⁶⁶ Martin Smith, *Competition Law, Enforcement and Procedure*, London 2001, p. 473; Barry J. Rodger, “Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages”, 24 ECL Rev. (2003), p. 103.

⁶⁷ Imelda Maher in Peter Behrens [ed.], *EC Competition Rules in National Courts*, Part II: Benelux and Ireland, p. 270 no. 213: “A eurodefence is any defence with an EC law element that is raised in a case”; Hempel, *Privater Rechtsschutz*, p. 95.

⁶⁸ *Garden Cottage Foods v. Milk Marketing Board* [1984] 1 AC 130; [1983] 2 A 11 770, HL.

⁶⁹ Hempel, *Privater Rechtsschutz*, p. 123.

Articles 81, 82 EC,⁷⁰ may now be somewhat academic following the Court of Appeal decision in *Crehan* in May 2004.⁷¹ The conditions, however, which have to be met, remain the same. The plaintiff needs to be protected by the violated provision, which serves to protect an individual or a legal person just against such a violation. Thirdly, this provision must allow civil law enforcement and the duty, imposed on the perpetrator by the infringed provision, has not been fulfilled. Finally, there must be a direct causal link between the breach and the damage.⁷² These conditions put a heavy burden on the plaintiff to prove the causation between the infringement of EC Law and his damage. Furthermore, it is not entirely clear which persons are entitled to seek damages, e.g. only direct purchasers or also indirect purchasers. Moreover, it remains unclear whether consumers in case of a cartel or an abuse of dominance can claim damages or if there is even a duty under EC law to provide such a right to consumers. Additionally, the courts were in the past somewhat reluctant to award damages, as they feared economically ruinous damage claims and following this an increase in damage claim neither desirable nor workable.⁷³ Thus unsurprisingly exemplary damages were so far not awarded by the courts and private actions in general did not play an important role.

4.2 The Competition Act 1998 and the Enterprise Act 2002

The first reform step took place in 1998, when the Competition Act 1998⁷⁴ (CA1998) repealed much of the relevant statutes and combined them in one single act. The intention was to replace the previous control of abuse scheme with a prohibition approach modelled on Articles 81, 82 EC to align it with the structure of the European antitrust rules.⁷⁵ Section 60 CA 1998 envisaged alignment between UK and EC law by requiring British courts and the Office of Fair Trading (OFT) – the British NCA - to have regard to the way the Commission and the European courts apply Art. 81, 82 EC.⁷⁶ The Chapters I (sections 1-16) and II (sections 17 to 24) CA 1998 mirrored Articles 81, 82 EC in detail with an elaborated scheme of excluded or exempted agreements. Also a system of block exemptions was enacted and a rule stipulating that agreements, which were declared compatible with a European block exemption regulation, were held to be compatible with the CA 1998 as well.⁷⁷ The CA 1998 sought to encourage private actions, although no explicit provision had been included in the act.⁷⁸ Nevertheless, it was clearly stated that “third parties affected by anticompetitive behaviour could seek compensa-

⁷⁰ See the very detailed discussion in Jones, Private Enforcement, pp. 113ff. and Jeremy Lever, “Private Antitrust Enforcement in the European Community” in Jones/Matshushita, pp. 231f

⁷¹ *Crehan v Innpreneur Pub Company* [2003] EWHC (Ch) 1510, [2003] All ER (D) 354 (Jun); CA, [2004] EWCA Civ 637, 21 May 2004. The Court of Appeal awarded in its judgement damages of £ 131,336 plus interest to Bernard Crehan, see the UK report of the Study of the Commission, pp. 2f.

⁷² Hempel, Privater Rechtsschutz, p. 121.

⁷³ Hempel, Privater Rechtsschutz, p. 122.

⁷⁴ The Competition Act 1998, chapter 41.

⁷⁵ Jones, Private Enforcement, pp. 39f.

⁷⁶ Holmes, p. 31. This is now also assured by Art. 16 of Regulation 1/2003, which requires that national court do not issue judgements, which would run counter to a Commission decision.

⁷⁷ Helmut Janssen, “Die Reform des britischen Wettbewerbsrecht“, WuW 1998, p. 241.

⁷⁸ Jones, Private Enforcement, p. 42; Holmes, p. 31, a right to damages was explicitly included in a draft proposal (section 31 (1)), but was finally not adopted as the Government thought that it was not necessary to introduce this right explicitly.

tion”.⁷⁹ This approach was even widened by a statement that under the new act “both competitors and consumers will finally have effective rights to damages”.⁸⁰ The CA 1998 could not fulfil these expectations and left some questions, especially with regard to the binding force of decisions and findings of the OFT, unanswered.⁸¹

This was one of the reasons that only a year after the CA 1998 came into force the legislator published a consultation paper entitled “A World Class Competition Regime”⁸² in July 2001, which proposed further changes to strengthen the UK competition law generally and in particular to enhance the situation of private parties.⁸³ The UK Government, regarding private actions as a very important limb of an effective regime, wanted to assure compensation for those who suffered loss and hence the possibility to concentrate the public authorities’ resources on serious threats to competition as complementary private resources came into play.⁸⁴ But despite all enthusiasm the UK Government wanted to achieve a system in which private actions were less restricted as they had been in the past by avoiding at the same time the problem of excessive use of private enforcement as it occurred in the US system.⁸⁵ The new legislation encouraging private actions was then set out in the Enterprise Act 2002 (EP 2002)⁸⁶, came into effect in June 2003 and contained some major changes. Firstly, the tasks of the Competition Appeal Tribunal (CAT), a specialised court competent to deal with all matters of competition law, are widened to hear claims for damages following an infringement decision of the OFT or the European Commission, section 47 A CA 1998, which provides a statutory procedure (not a new cause of action) to claims damages before the CAT.⁸⁷ The rationale was to speed up proceedings, to reduce costs, and to avoid inconsistent decisions as there are still some doubts with regard to the capability of ordinary civil courts to deal with competition cases. The CAT can only award compensatory and no punitive damages.⁸⁸ The right to claim before the CAT is not exclusive, hence the protection of private parties is not reduced, and the plaintiff still can go to civil courts after having exhausted all appeal procedures. Ordinary civil courts as well as the CAT are bound by decisions of the OFT, section 47 A and 58 A CA 1998.⁸⁹ In order to allow a more efficient distribution of cases to the relevant courts, a mechanism was introduced enabling the transfer of cases both ways, facilitating the transfer of actions involving Community law or infringement issues under the CA 1998 to the CAT,

⁷⁹ Department of Trade and Industry (DTI) Press Release P/97/662 of 16 October 1997

⁸⁰ Secretary of State of Trade and Industry Peter Mandelson, DTI press release P/98/867 of 9 November 1998.

⁸¹ Holmes, p. 31.

⁸² A World Class Competition Regime, Cm. 5233, (2001) of 31 July 2001, available at: <http://www.dti.gov.uk/ccp/topics2/pdf2/compwp.pdf>.

⁸³ Holmes, p. 31.

⁸⁴ A World Class Competition Regime, Cm. 5233, (2001), p. 10.

⁸⁵ Holmes, p. 32.

⁸⁶ The Enterprise Act 2002 of 7 November 2002, 2002 Chapter 40.

⁸⁷ Section 47 A CA 1998 was introduced by section 18 EP 2002.

⁸⁸ Holmes, p. 32; Rodger, pp. 103, 106

⁸⁹ Rodger, p. 108, section 20 Enterprise Act 2002 introduced section 58 A into the CA 1998.

but also the transfer of damages claims from the CAT to the courts.⁹⁰ It is criticized that there may be little added value in channelling such cases to a specialised law forum as the CAT will only deal with cases following a prior infringement determination.⁹¹ Indeed, a more active role of the CAT would have strengthened its position, nevertheless it can be expected that the installation of a specialised court will contribute to the development of a more stringent line in decisions in competition law.⁹² Another remarkable novelty is the introduction of the possibility of a damage claim brought before the CAT by a representative body on behalf and with the consent of two or more consumers who have claims in respect of the same infringement.⁹³ The tool is named “Group litigation order” (GLO), maybe to avoid the misleading and associative notion “class action”. The definition of consumer in the section 47 B is fairly broad and likely to facilitate such a sort of class actions. Maybe even indirect purchasers – that would encompass final consumers – are enclosed in this broad definition. That would be peculiar as in the US indirect purchasers (and thus also final consumers) are not entitled – at least on federal level - to seek damages.⁹⁴ A GLO can compensate final consumers, who otherwise would not go to court, and it streamlines the whole procedure as the CAT can deal with that issue in one single case. A damage award has to be distributed to the harmed consumers, who are not detracted from going to court on their own, the GLO thus merely provides an alternative mechanism.⁹⁵ It is expected that this tool will enhance the deterrent effect of the law.⁹⁶ Remarkable, although not relevant for the effectiveness of private enforcement, is the fact, that the EP 2002 also introduced criminal sanctions for hard core infringements with sentences of up to five years imprisonment for the responsible individuals. Together with Ireland only the UK provide in Europe for criminal sanctions for infringements of competition law.

4.3 Alignment of British law with Regulation 1/2003

The reform did not lead to any judgements as the changes to European competition law required again amendments of British law just a year after the amended provisions had entered into force in mid 2003. However, because of the already undertaken modernisation of their competition law, the amendments then necessary to implement the changes were just merely alienation with the changes on the European level. In comparison to the strong efforts undertaken by the British Government to prepare the reforms with two consultation documents and a quite broad public debate, the outcome, merely reflecting the European reform steps, does not seem visionary.⁹⁷

⁹⁰ Holmes, p. 33; Rodger, p. 107.

⁹¹ Rodger, p. 107.

⁹² Current president of the CAT is Sir Christopher Bellamy, former judge of the CFI.

⁹³ Rodger, p. 108, section 19 EA 2002 introduced section 47 B into the CA 1998.

⁹⁴ Rodger, p. 108, see above 2.3.

⁹⁵ Holmes, pp. 32f.

⁹⁶ Rodger, p. 108.

⁹⁷ In April and July 2003 two consultation documents were published by the UK Government with regard to the modernisation of European competition law.

The OFT has now the same investigatory powers in regard to Art. 81, 82 EC as it already had for Chapter I and II CA1998. Furthermore the system of prior notification is abolished and the OFT, the CAT and the British courts apply Articles 81, 82 EC in their entirety.⁹⁸ The CA 1998 has been amended to mirror this approach so that an agreement that falls within the Chapter I prohibition, but which satisfies the conditions set out in section 9(1) of the Act is not prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable from the moment that the conditions in section 9(1) of the Act are satisfied and for so long as that remains the case. The Act provides that the burden of proof that the conditions are satisfied rests on the undertaking claiming the benefit of section 9(1).⁹⁹ In January 2004 the Civil Procedure Rules were amended stipulating now that all EC competition cases have to be dealt with before a Chancery Division of a High Court to respond to the often complex case structure.¹⁰⁰

4.4 Overview of recent case law in the UK

Although a well-founded basis for private actions in UK competition law exists since 1998 only a few cases were brought to court, some of which resulted in settlements.¹⁰¹ In the case *Arkin v. Borchard Lines* the High Court dismissed the application as Mr Arkin could neither prove an infringement of EC competition law nor the causation of the loss.¹⁰² Most of the cases concerned beer tying agreements of breweries, which as the owner of the pubs let these to the tenants under the condition to supply them exclusively.¹⁰³ The beer cases culminated finally in the judgement of the ECJ in *Courage Ltd. v. Crehan* which will be discussed in detail below.¹⁰⁴ Another recent case has been settled outside the court after the High Court defined itself competent to hear a claim of a German direct purchaser of a cartel against the German and the British subsidiary of a Swiss company, although the purchaser had exclusively bought from the German subsidiary.¹⁰⁵

4.5 Conclusion

It is too early a stage for a final judgement about the British system.¹⁰⁶ The first steps give rise to hope that a system is developing that allows an efficient use of private enforcement for damages. The apprehension that under the new system only follow-on claims will increase in number seems too strict, already one of the first claims, the *Crehan* case, is a case without any prior decisions of the competi-

⁹⁸ Section 9 (1) CA 1998 now also contains the power to grant exemptions, thus reflecting Article 81 (3) EC.

⁹⁹ See the draft competition law guideline of the OFT, document 400a, p. 7.

¹⁰⁰ See the UK report of the study of the Commission, p. 5.

¹⁰¹ Holmes, p. 33; Elizabeth Morony, "Bring on the big guns?", *The European Lawyer* 2002, p. 45.

¹⁰² [2003] EWHC 687 (Comm); see the case note of Marjorie Holmes and Paula Lennon, "Causation and the Route to Damages", 25 *ECL Rev.* (2004), p. 475.

¹⁰³ *Crehan v. Innentrepreneur Pub Co and others*, HC 2003 EWCH 1510, CA 2004 EWCA Civ 637 of 21 May 2004.

¹⁰⁴ Case C-453/99 "*Courage v. Crehan*", [2001] ECR I-6297; see below 5.1.

¹⁰⁵ High Court of Justice, Queens Bench Division of 6 May 2003, *Provimi et al. v. Aventis S.A. et al.*, 2003 EWHC 961 (Comm). The case will be further discussed below 5.2.2.

¹⁰⁶ The next case related to the Vitamins cartel will probably be decided by the CAT next spring, *BCL Old and others .v. Aventis SA, Rhodia Limited, F Hoffmann-La Roche AG and Roche Products Limited*, case 1028/5/7/04.

tion authorities. Thus, one should wait for a couple of years to come to a more funded opinion about the UK antitrust law and its impact on private enforcement.

The UK is one of the forerunners in the field of private enforcement. Continental Europe so far has not put much emphasis to create a workable effective system for private actions against restraints of competition. In order to make the differences and the deficiencies more visible the current situation in Germany will be described below. Although the German GWB is almost 50 years old it does not foster private enforcement properly, the role private enforcement plays is negligible so far. The developments in Germany until today will be described briefly as then the value and the possible effectiveness of the proposals currently under discussion in the German parliament will be scrutinised .

5. Private enforcement in Germany

5.1 The *Gesetz gegen Wettbewerbsbeschränkungen* (GWB)

Until now private enforcement was neither influential nor decisive for the enforcement of competition law in Germany unlike in the United States.¹⁰⁷ This is somewhat surprising as the historic German legislator had already in 1955, when the GWB was drafted, the idea in mind to strongly involve private parties in the enforcement of competition law, e.g. through damage claims or applications for injunctions.¹⁰⁸ The expectation to get a second enforcing power – so to speak a “private attorney general”¹⁰⁹ - beside the public enforcement through the *Bundeskartellamt* (BKartA - German Federal Cartel Office) was never fulfilled This was partly due to an inappropriate legal order and a very restrictive and in a way hesitant practice of the judiciary e.g. to give standing or to award damages to private parties.¹¹⁰

5.2 The current legal situation

The GWB is the relevant law for both public and private enforcement against all restraints of competition. The relevant provision for private enforcement of this act is section 33 GWB, which mirrors the general civil damage rule, section 823 (2) of the *Bürgerliches Gesetzbuch* (BGB – German Civil Code¹¹¹). Section 823 (2) BGB provides that a person who has infringed a statute that purports to protect another is liable to compensate the resulting damage if the infringement has been committed intentionally or negligently. Section 33 GWB grants the same right, but with the limitation that it is only applicable in case that a provision of the GWB having a protective purpose (so called “*Schutzgesetz*”

¹⁰⁷ See the comparative description of Hempel, *Privater Rechtsschutz*, p. 230ff.

¹⁰⁸ See the reasoning of the legislator for the draft GWB, BT-Drucksache 2/1158 of 22 January 1955, p. 25; see in detail Hempel, *Privater Rechtsschutz*, pp. 25f.

¹⁰⁹ Jürgen Basedow, “Who will protect competition in Europe?”, *EBOR* vol. 2 (2001), p. 466.

¹¹⁰ See for a very detailed analysis Hempel, *Privater Rechtsschutz*, pp. 80ff.

¹¹¹ *RGBl.* 1896, p. 195 currently valid in the version of 1 July 2004, *BGBl.* I 2004, p. 718.

zeigenschaft einer Norm”) has been infringed.¹¹² Section 33 GWB also grants a right for injunctive relief, mirroring the general provision section 1004 BGB, but again with this limitation to violations of protective provisions of the GWB. The legal basis in form of substantive rules to claim damages is regarded sufficient under German law and rather the economic and procedural circumstances which determine its application and which apparently deter the victims of cartels from bringing suits are seen as the main reason for the low degree of efficiency of private enforcement.¹¹³ But the limitations of section 33 GWB, thus the substantive law, restrict its scope and make it inapplicable for infringements e.g. of Articles 81, 82 EC. The legal basis for claims to damages based on EC law is thus section 823 (2) BGB. The procedural rules, e.g. regarding the burden of proof or the calculation of damages etc. are laid down in the *Zivilprozessordnung* (ZPO – Civil Procedure Code¹¹⁴), to which the GWB refers in this regard. So reasons for the negligible effectiveness of private enforcement can be found in the substantive as well as in the procedural rules.

5.2.1 The protective purpose of a norm (“*Schutzzweck*”)

One decisive aspect is certainly the requirement that the infringed provision must serve to protect another individual or legal person. The legislator left it to the courts and to legal scholars to determine which provisions of the GWB shall be regarded protective.¹¹⁵ A provision is regarded to be protective if it at least also aims – beside the protection of public goods like free competition – at the protection of individual interests. The whole structure of the law therefore must be analysed by the court to detect whether the legislator intended to give that provision protective effect.¹¹⁶ The *Bundesgerichtshof* (BGH - German Federal Supreme Court) has once stated that the protective function of a provision cannot be proclaimed in general but is dependant on the circumstances of every single case.¹¹⁷ This statement allows and requires the courts to analyse each single case to decide whether the legislator in this specific situation had intended to protect the claimant. But these decisions on a case by case basis led to an incredible rich and confusing case-law to various provisions, which made and makes it to a certain degree unpredictable whether a provision is regarded protective or not. This situation shall be further examined for the application of section 1 GWB to show the deficiencies of the system with regard to private enforcement. Section 1 GWB contains a general cartel prohibition mirroring Article 81 (1) EC with the limitation that section 1 GWB is only applicable to horizontal agreements and practices.¹¹⁸

¹¹² Hempel, *Privater Rechtsschutz*, pp. 32, 38. The consequence is an incredibly rich and confusing case-law to various provisions of the GWB.

¹¹³ Basedow, *EBOR* 2001, p. 462.

¹¹⁴ *BGBI.* 1950, p. 450, lastly amended by Art. 1 of the amending law of 24 August 2004, *BGBI. I* 2004, p. 2198.

¹¹⁵ Hempel, *Privater Rechtsschutz*, pp. 32, 38. The same goes for section 823 (2) BGB.

¹¹⁶ Hempel, *Privater Rechtsschutz*, p. 38; BGH of 13 April 1994, *BGHZ* 125, 366, 374.

¹¹⁷ BGH of 4 April 1975, *WuW/E BGH* 1361, 1364.

¹¹⁸ Vertical agreements are regarded not to be so harmful, if at all. But the draft proposal for a new GWB provides a prohibition of all agreements and practices, no matter whether they are horizontal or vertical, see section 1 draft GWB (GWB-

It has been clarified by the judiciary that section 1 GWB can in principle be regarded protective, but until today it remains unclear, who shall be protected and thus be entitled to claim damages in case of an infringement. It is agreed that competitors of infringing parties are protected in order to avoid that they are pushed out of the market due to this violating behaviour.¹¹⁹ But the situation of participants on the other side of the market, e.g. suppliers or direct buyers of the cartel members, is unclear. The BGH once has drawn this circle of protected persons quite narrowly and required for instance a direct purchaser to prove that the cartel was directly aiming at him (“*Merkmal der Zielgerichtetheit*”).¹²⁰ That completely excludes final consumers from suing damages, even if they are the aggrieved parties of a cartel of retailers as such a cartel usually does not aim directly at specific final consumers but to all. This restrictive approach caused heavy criticism as it practically hinders injured individuals almost completely from claiming damages; nevertheless this requirement remained unchanged.¹²¹ The situation for breaches of Art. 81, 82 EC is quite similar. The problems with section 823 (2) BGB are more or less the same as with section 1 and section 33 GWB. The BGH has generally acknowledged the protective character of Art. 81, 82 EC but only under the restricting condition that the competition restraint is directed against actors on the other side of the market, i.e. direct purchasers.¹²² Attempts to broaden the scope of application made by a higher regional court were not taken up by the BGH.¹²³ A very recent decision of a regional court also renounced the requirement of purposefulness of the infringement, but this decision is not legally binding yet.¹²⁴ This narrow approach led and leads inevitably to the conclusion that private enforcers can not effectively fulfil their role as “private attorney general”.

5.2.2 The burden of proof

Pursuant to the principle of party presentation applicable in civil proceedings the burden of proof for all facts supporting a claim rests on the plaintiff.¹²⁵ This means that the plaintiff must prove the existence of the anticompetitive practice and the active involvement of the defendant. Furthermore, he must show that the infringement resulted in a quantifiable loss. It goes without saying that this is particularly difficult for someone who was affected by the cartel but did not participate actively in it, thus

E), *Regierungsentwurf* (proposal of the German Government) of 26 May 2004. References to a provision of the draft GWB will be indicated as GWB -E (E stands for “*Entwurf*” – proposal).

¹¹⁹ Hempel, *Privater Rechtsschutz*, p. 42.

¹²⁰ BGH of 25 January 1983, WuW/E BGH 1985, p. 1988.

¹²¹ Hempel, p. 363; Ulrich Immenga, Ernst-Joachim Mestmäcker-Volker Emmerich, *Kommentar zum GWB*, Munich 2001, § 33 no. 16.

¹²² BGH of 23 October 1979 WuW/E BGH 1980, pp. 1643f.; Jürgen Basedow, “Private Enforcement of Article 81 EC: A German View”, in Ehlermann/Atanasiu, p. 139; Hempel, *Privater Rechtsschutz*, p. 108 who stresses the parallelism in the application of section 1 GWB and section 823 (2) BGB.

¹²³ OLG Stuttgart of 22 May 1998, NJWE-WettbR 1998, p. 260; OLG Düsseldorf of 28 August 1998, NJW-RR 2000, p. 193. A request for a preliminary ruling pursuant to Art. 234 EC of the BGH of 3 July 2001, KZR 31/99, GRUR 2002, p. 554 did not mention the requirement of the purposefulness at all, but this seems to be an exception. The question was then finally not decided by the ECJ, EuZW 2004, pp. 241ff.

¹²⁴ LG Dortmund of 1 April 2004, 13 O 55/02 Kart., p. 11f.; see also the case note of Friedrich Wenzel Bulst,

“Internationale Zuständigkeit, anwendbares Recht und Schadensberechnung im Kartelldeliktsrecht“, EWS 2004, p. 403.

¹²⁵ Basedow, in Ehlermann/Atanasiu, p. 141; Schmidt in Ehlermann/Atanasiu, p. 262.

having no access to documents giving evidence.¹²⁶ The court can order the defendant pursuant to section 142 ZPO to disclose specific documents, but this is limited to documents clearly and identifiable described by the plaintiff, and, in case the defendant does not disclose these requested documents, the court has no legal mechanisms to force the defendant.¹²⁷

The same problem arises for the claimant to provide evidence for his actual loss. In Germany the *Differenzmethode* is used, that means the actual property of the claimant is compared to the situation he would have been in but for the cartel.¹²⁸ If the actual position is worse than the hypothetical one, the difference between the two is the actual damage and the defendant than has to bring the claimant into the situation he would be in but for the violation. Section 287 ZPO allows judges to estimate the damage if the plaintiff provides substantive facts, which enable an approximate estimation of the damage to be made.¹²⁹ Therefore the plaintiff has to provide the court with data about relevant comparable markets, about prices, price developments etc. which enable the judge to “create” a hypothetical market situation without restraints of competition. This can be extremely difficult if not impossible for a private plaintiff, be it a smaller company or even an individual. The plaintiff can introduce his own experts (but such an expert is not regarded as being independent) and the court can appoint experts on its own motion as well, but this does not lower the burden of proof for the plaintiff. The court has a broad discretion whether to take the expert’s opinion into account or not. The burden of proof or at least the uncertainty to which degree a damage must be proven in order to allow a reasonable estimation of the damage by the court have to a certain degree contributed to the hesitance of private parties in Germany. However, the report about Germany of the study ordered by the Commission does not raise this problem.¹³⁰

5.2.3 No binding force of official decisions

An official decision pursuant to section 32 GWB has no binding force to the court in a private follow-up claim.¹³¹ That means the private litigant has to prove again all facts supporting his claim. Hereby the decision of the court just has indicative effect and has to be taken into account by the court pursuant to section 286 ZPO (so-called “weighing of evidence”). Against the background of the underdeveloped private enforcement is remarkable that a decision of an authority refusing to grant an injunction pursuant to section 32 GWB by referring the claimant to section 33 (1) GWB, *i.e.* to private enforcement, was even confirmed by the BGH.¹³²

¹²⁶ Basedow, in Ehlermann/Atanasiu, p. 141.

¹²⁷ Richard Zöller and Max Vollkommer-Reinhard Greger, Kommentar zur ZPO, Cologne 2003, § 142 no. 12.

¹²⁸ See for a detailed explanation how the damages are calculated in Germany, Analysis of economic models for the calculation of damages, in the study of the Commission, also available on the internet, p. 40.

¹²⁹ Zöller/Vollkommer-Greger, § 287 no.4.

¹³⁰ German report of the study of the Commission, p. 18, which does not sufficiently address these problems.

¹³¹ Immenga/Mestmäcker-Emmerich, § 32 no. 13.

¹³² BGH of 25 October 1983, Der Betrieb 1984, p. 1674; Hempel, Privater Rechtsschutz, p. 61.

5.2.4 Collective actions (*Verbandsklagen*)

The GWB provides in section 33 (2) GWB for collective actions for an injunction against anticompetitive conduct. This tool of collective private enforcement was originally developed in section 13 *Gesetz gegen unlauteren Wettbewerb* (UWG - Act against Unfair Competition¹³³). Non-profit associations for the promotion of trade interests can act pursuant to section 33 (2) GWB.¹³⁴ However, consumer groups are not entitled by this rule to apply for an injunction.¹³⁵ The entitled association has standing if the infringing act in principle could harm the members of that association, an actual harm or damage is not required. Section 33 (2) GWB is not applicable for actions against breaches of Art. 81, 82 EC.¹³⁶

Such collective actions resulted in some judgements,¹³⁷ but as this instrument is not open to collective actions of consumer groups, which represent much more interested and concerned parties, and only provides injunctive relief and no damages, the effect of this tool is rather limited. Especially the expectation that collective actions would be an effective instrument for claims in situations in which the single entity itself does not risk - due to fears of reprisals of an economically stronger defendant - to apply for an injunction could not be fulfilled.¹³⁸ The role of collective actions under section 33 (2) GWB can be regarded negligible, what is somewhat surprising as the role of collective actions under the UWG is more efficient, what becomes obvious from the number of decisions taken by courts pursuant to section 13 GWB.¹³⁹

5.3 The modest importance of private enforcement

5.3.1 The lack of legal certainty

Another deterrent factor for private plaintiffs is the lack of legal certainty. The potential plaintiff considers his chances to win a case and only if there is a reasonable probability to succeed will he pursue the claim. But the uncertainty whether the court will regard the provision as protective and whether it will accept the proof provided as basis for an estimation of the damage pursuant to section 287 ZPO require the claimant to be very sure and extraordinary well-prepared to commence a claim. Besides that the plaintiff bears the risk that he has to pay all legal costs of the claim if he loses the case. A po-

¹³³ *Gesetz gegen unlauteren Wettbewerb* of 7 June 1909, RGBl. 1909, p. 499, lastly amended on 3 July 2004 BGBl. I 2004, pp. 1414 ff.

¹³⁴ Schmidt, in Ehlermann/Atanasiu, p. 265.

¹³⁵ The *Bundesrat* once made a proposal in a comment to a law to grant a right to start actions also to consumer groups, but this was rejected, BT-Drucksache 8/2136 of 27.9.1978, p. 35ff., see Hempel, *Privater Rechtsschutz*, p. 56.

¹³⁶ Hempel, *Privater Rechtsschutz*, pp. 56f.

¹³⁷ See for instance BGH of 4 February 1986, NJW-RR 1986, 915; BGH of 4 April 1995, BGHZ 1995, 2293.

¹³⁸ Hempel, *Privater Rechtsschutz*, pp. 56, 85.

¹³⁹ Hempel, *Privater Rechtsschutz*, pp. 56f.; Schmidt, in Ehlermann/Atanasiu, p. 265 comes to a different conclusion and regards collective actions pursuant to section 33 (2) GWB as being a very efficient tool of private enforcement.

tential plaintiff will be quite hesitant to start proceedings with high costs, if the outcome is so uncertain.

5.3.2 The attitude towards cartel law enforcement

One other point often raised in the debate about the modest importance of private enforcement is that it is against the “nature” of German businessmen or undertakings to use means of cartel law against other market participants. The degree of litigiousness is described to be very low in Germany. Some reasons might be specific for Germany, as the traditionally strong position of banks or the grid of relations between market participants and their representatives, thus hindering private actions as being regarded opportune to use. It is beyond doubt that Germany has no “real” tradition of private enforcement, although the GWB has been enforced almost 50 years ago. But in the area of unfair competition law for instance, the business people use the tools of the UWG to combat unfair competition acts, thus being more litigious.¹⁴⁰ It is definitely true that also the other EU Member States have no real culture of private enforcement¹⁴¹, but to a certain degree it is surprising that in Germany, the biggest economy in the EU, the degree of competitiveness and litigiousness is not higher. Consequently, the economic and procedural circumstances described above must be a significant reason for the marginal importance of private enforcement. Therefore it can be assumed that more effective legal provisions in a more supportive procedural surrounding would increase the number of private litigation in competition law.

The reasons given above might be an explanation for the relatively low figures of private enforcement in Germany, but an empirical study has never been undertaken to explore this issue.¹⁴² Maybe that can be regarded as another “proof” of the modest importance of private enforcement in Germany that no one regarded this area interesting enough to do a scientific, empirical study on it.

Although private enforcement, after the analysis of the British and the German situation, must be described underdevelopment, some movement in this issue can be recognized. In the following some seminal recent decisions of four courts shall be described in order to show different attempts to deal with the issue of private enforcement.

6. Seminal recent judgements

6.1 The “Courage” decision – A Community remedy akin to *Francovich*?

The analysis of the current legal situation in England and Germany above has shown that private enforcement plays so far in neither countries a comparable role to that of public enforcement by the

¹⁴⁰ Hempel, *Privater Rechtsschutz*, p. 86.

¹⁴¹ Wouter Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, Kluwer Law International, The Hague 2002, pp. 150f. recognizes a weaker competition culture and less litigiousness throughout Europe in comparison to the US.

¹⁴² Hempel, *Privater Rechtsschutz*, pp. 82ff. is addressing the problem in detail, but he also can give only sound reasons, no factual evidence.

NCAAs. But the judgement of the ECJ in *Courage Ltd. v. Crehan*¹⁴³ in September 2001 has revitalised the discussion about the role of private enforcement in competition law. While some commentators interpret it as creating a Community remedy akin to the line of case law of the ECJ¹⁴⁴ started with *Francovich*,¹⁴⁵ others argue that the basis of the claim is still national law.¹⁴⁶ The analysis of this decision, which will be followed by annotations to recent decisions in the US, in the UK, and in Germany to see whether the ECJ decision had some impact on the national judiciary, cannot give a final answer as it is too early to draw final conclusions.

6.1.1 The facts of the case

The case arose out of an action for the recovery of an unpaid bill for delivered beer brought by a brewery (Courage Ltd.) against Mr Crehan, the tenant of a pub. He had concluded a beer tying agreement with the proprietor, a company of which Courage was one of the owners. Part of the agreement was that Courage supplied Crehan exclusively for a fixed price. When Crehan came into financial problems and did not pay his bill, he was sued by Courage in court. Crehan contested the action on its merits, contending that the beer tie was contrary to Article 81 EC and he even counter-claimed for damages, arguing that the tying arrangement was in breach of Art. 81 EC and that he had to pay higher prices for his beer supplies than independent pubs had to, thus he had suffered a loss.

The referring court explained that under English law he would be deprived from claiming damages in case the agreement was really infringing Article 81 EC as a party to an illegal agreement is not allowed to claim damages from the other party on the basis of its own wrongful act (rule of *in pari delicto*). The court brought this preliminary reference because it had doubts concerning the compatibility of this absolute bar in English law with Community law and thought that there might be tension between the principle of procedural autonomy and that of the uniform application of Community law.

6.1.2 The argumentation of the Court

The ECJ repeated at first the well known part of *Van Gend & Loos*¹⁴⁷ that the EC Treaty has created a legal order of its own, which is an integrated part of the legal systems of the Member States. Furthermore, the Member States and their nationals are subjects of that legal order which not only imposes burdens, but also gives rise to rights of individuals, Member States, and the Community institutions,

¹⁴³ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297.

¹⁴⁴ Gerald Mäsch, “Private Ansprüche bei Verstößen gegen das europäische Kartellrecht – *Courage* und die Folgen”, *Europarecht* 2003, p. 825; Komninos, p. 447; Walter van Gerven, “Harmonization of private law: Do we need it?” *CML Rev.* vol. 41 (2004), pp. 514f.

¹⁴⁵ Cases C-6/90 and C-9/90 “*Andrea Francovich and Danila Bonifaci and others v. Italian Republic*” [1991] ECR I-5357, para. 35.

¹⁴⁶ For the most recent German case note taking this view, see Wolfgang Wurmnest, “Zivilrechtliche Ausgleichsansprüche von Kartellbeteiligten bei Verstößen gegen das EG-Kartellrecht”, *Recht der Internationalen Wirtschaft* 2003, p. 896; Friedrich Bulst, “The *Provimi* Decision of the High Court: Beginnings of Private Antitrust Litigation in Europe”, 4 *EBOR* (2003), pp. 623, 639f.

¹⁴⁷ Case 26/62 “*NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*” [1963] ECR I.

of which some are expressly mentioned in the EC Treaty, while others arise by virtue of Treaty obligations.¹⁴⁸

The ECJ stressed the importance of Art. 81 EC for the functioning of the internal market for which it is inevitable that any individual, thus even a party to a void agreement, can rely on the principle of automatic nullity in Art. 81 (2) EC of acts, which are in violation of Art. 81 (1) EC, as Art. 81 EC is directly applicable. The Court went on to argue that the obligation to ensure the full effect of Community provisions requires the courts to protect the rights conferred upon individuals. This led the court to the central statement of the decision that, due to this obligation, the full effectiveness of Art. 81 (1) EC would be “put at risk” if not any individual could claim damages for loss caused to him by an unlawful restraint of competition. The existence of such a right is regarded to strengthen the working of the Community competition rules and to increase their deterring effect, so that an effective remedy available to everybody could significantly contribute to the maintenance of effective competition in the Community.¹⁴⁹

An absolute bar to such action under national law would undermine the effectiveness of that principle and is thus regarded incompatible with EC Law. This does not hinder the national courts to deny a party the right to damages if it bears a significant responsibility for the distortion of competition as a litigant in general should not profit from his own unlawful conduct. To illustrate what is meant by “significant responsibility” the ECJ finally gave some advice by pointing to the economic and legal context in which the agreement was concluded and the bargaining power of the parties, requiring *inter alia* a markedly weaker position of the claimant.¹⁵⁰

The ECJ finally stated that in the absence of Community rules governing the matter, the domestic legal systems of each Member State have to provide for procedural rules, e.g. designate the courts and lay down the rules governing actions for safeguarding these rights, under the condition that these national rules fulfil the requirement of the principles of equivalence and effectiveness.¹⁵¹

6.1.3 Analysis of the judgement: The birth of a Community remedy?

Whatever the outcome will be, the *Courage* decision has fulfilled one task; it has stimulated the discussion about private enforcement in European competition law and brought it onto the agenda of public legal debate. Some scholars are convinced that the judgement unambiguously clarifies the existence of a Community remedy “inherent in the Treaty”¹⁵² for breaches of EC competition law.¹⁵³ They argue that there are strong parallels between the two judgements that this decision must be regarded as

¹⁴⁸ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, para. 19.

¹⁴⁹ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, paras. 26f.

¹⁵⁰ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, paras. 32f.

¹⁵¹ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, para. 29 with reference to case C -261/95, “*Rosalba Palmisani v. Istituto nazionale della previdenza sociale (INPS)*”, [1997], ECR I-4025, para.27.

¹⁵² Cases C-6/90 and C-9/90 “*Andrea Francovich and Danila Bonifaci and others v. Italian Republic*” [1991] ECR I-5357, para. 35.

¹⁵³ Van Gerven, CMLRev., pp. 514ff.; Komninos, pp. 466ff.; Mäsch, p. 842.

a *Francovich* type of case. The ECJ will await a suitable *Brasserie du Pêcheur*¹⁵⁴ type of case, in which it then establishes in an appropriate way the conditions of the remedy.¹⁵⁵ Other points brought forward refer to the importance of an effective protection against violations of Art. 81, 82 EC and the right to claim damages, which significantly contributes to the maintenance of effective competition in the EU.¹⁵⁶ The institutional character of this liability for the effectiveness of the law is regarded as even stronger than the question of state liability in *Francovich*.¹⁵⁷

The opponents to such a European remedy say that there is very little in *Courage* to suggest that the ECJ envisaged a *Francovich*-type remedy. The ECJ merely held that the Member States must safeguard the rights that individuals derive from Article 81(1) EC and abide by the principles of equivalence and effectiveness when doing so.¹⁵⁸ Additionally it is referred to a recent judgement of the CFI in which it said that the civil law consequences for a breach of Art. 81, 82 EC are to be determined under national law.¹⁵⁹ Despite the parallels with *Francovich* there are also some differences between the judgements, as in *Courage* the ECJ did not consider the principle of liability in cases of breach of Art. 81, 82 EC to be “inherent in the Treaty”¹⁶⁰ and it is much more reserved in stating that there should not be an absolute bar to such an action being brought by a party to the infringing agreement.¹⁶¹ Furthermore it is said that the invention of a remedy would offer nothing at all to most of the legal systems as they provide already appropriate remedies.¹⁶² Finally, the Court did not refer to the suggestions made e.g. by Advocate General Van Gerven in his opinion in *Banks*,¹⁶³ what would have been plausible in particular to reason the “invention” of a Community remedy.¹⁶⁴

Both sides find reasonable arguments for their views. The reference of the ECJ to the “absence of Community rules governing the matter” in paragraph 29 in *Courage* could be interpreted as a reference that a more detailed regulation by the Court will follow. On the other hand, it did not explicitly say that the principle of horizontal liability is inherent in the Treaty, thus an establishment of a Community remedy can hardly be taken for granted at the moment. Especially, as a Community right for breach of competition law rules would have a strong impact on other areas of civil law where relations

¹⁵⁴ Joined cases C-46 & 48/93, “*Brasserie du Pêcheur S.A. v. Germany and Regina v. Secretary of State for Transport, ex parte Factortame Ltd. Et al. (III)*”, [1996] ECR I-1029.

¹⁵⁵ Komninos, p. 478.

¹⁵⁶ Advocate General Van Gerven, Opinion in Case C-129/92 “*Banks/National Coal Board*”, [1994] ECR I-1212 para. 45; Komninos, p. 468, referring to paragraph 26 of the *Courage* decision of the ECJ.

¹⁵⁷ Komninos, p. 468.

¹⁵⁸ Bulst, EBOR 2003, p. 640.

¹⁵⁹ Case T-395/94 *Atlantic Container Line v. Commission* [2002] ECR II-875, para. 414.

¹⁶⁰ Cases C-6/90 and C-9/90 “*Andrea Francovich and Danila Bonifaci and others v. Italian Republic*” [1991] ECR I-5357, para. 35.

¹⁶¹ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, para. 28.; Komninos, pp. 470 fails to argue convincingly against the impact of these aspects.

¹⁶² Basedow, EBOR 2001, p. 461f. with reference to the current German legal system, an argument, which might be correct in regard to the substantial, but not in regard to the procedural German law.

¹⁶³ AG Van Gerven, opinion in *Banks/British coal corporation* of 27 October 1993, ECR-I, 1212 para. 45.

¹⁶⁴ Hempel, *Privater Rechtsschutz*, p. 101.

between private individuals can end in legal procedures.¹⁶⁵ Such a remedy with horizontal direct effect seems to have too much impact as it could be introduced by the judiciary in a decision, in which this “establishment” of such a Community remedy is not even explicitly mentioned. Furthermore, it is contestable whether the ECJ can set up, although it has the right and the duty to further develop the legal system, such a wide-ranging remedy and whether this should not be the task of the legislator.¹⁶⁶

6.1.4 Conclusion

Be that as it may, a final decision whether we have seen the birth of a new European remedy seems at this stage inappropriate and a mere expression of personal conviction not based on factual evidence in the existent case law of the Community Courts. Certainly, the advantages of the establishment of a Community remedy – for instance uniformity in the application and clear and equal standards throughout the EU - are obvious,¹⁶⁷ but as long as the Court is so imprecise the value of the mere existence of a Community remedy is limited and the decisive standard when analysing the proposal for the amendments to the German GWB remains the principles of effectiveness and equivalence. These principles set, of course, only a minimum standard, but the analysis of the current situation of private enforcement has shown that even these minimum standards were not reached in the past. So, if the proposal does not meet the minimum requirement, it would definitely not match with a Community right, however this right would be shaped by either the ECJ or the European legislator. Nevertheless the *Courage* decision will be used for a detailed analysis of specific provisions of the draft amendment of the German GWB, as the judgement already establishes some requirements which have to be fulfilled by national provisions.

Ahead of the analysis of the draft amendment of the German GWB it shall be examined whether the judgement of the ECJ in *Courage* has already yielded some results and has induced a more positive, supportive approach towards private enforcement of competition law in Europe. The case of the worldwide active *Vitamins* cartels, which led to court actions in various states, can be used to show common points and discrepancies between the different legal orders.

The judgement of the US Supreme Court in “*Empagran S.A. v. Hoffmann-LaRoche Ltd.*”¹⁶⁸ was chosen to allow a better comparison between the handling of the three cases, which all stem from the same *Vitamins* case, in different jurisdictions. The decisions in these follow-on actions are all issued in the wake of the *Vitamins* cartel, recently uncovered by the European Commission and the US DoJ.¹⁶⁹ Various firms, including *Hoffmann LaRoche* and *Aventis S.A.* were convicted and heavily fined for having operated a worldwide cartel for the sale of vitamins. In the aftermath private actions

¹⁶⁵ For Komninos, pp. 484f. a Community remedy is so obvious that he is already thinking ahead and analysing that such a Community remedy would also be suitable for other horizontally directly effective EC provisions as Art. 12 or 141 EC.

¹⁶⁶ Into the same direction Hempel, *Privater Rechtsschutz*, p. 100.

¹⁶⁷ See the somewhat enthusiastic argumentation of Komninos, p. 484.

¹⁶⁸ “*Empagran S.A. v. Hoffmann-LaRoche Ltd.*” of 14 June 2004, 124 S.Ct. 2359.

¹⁶⁹ European Commission, Case COMP/E-1/37.512 of 10 January 2001 – *Vitamins* [2001] OJ 2003 L 6/1.

in several jurisdictions, including the US, the UK, and Germany were launched.¹⁷⁰ The outcome is quite significant and it is quite interesting to see that these three cases, all stemming from the same infringement, were adjudicated so differently by the courts.

6.2 Follow-on claims after the *Vitamins* decision of the Commission and the DoJ

6.2.1 The “*Empagran*” decision of the US Supreme Court

In the US the Supreme Court issued in June 2004 the eagerly awaited decision in *Empagran* overturning a judgement of the District of Columbia Court of Appeals¹⁷¹ which had ruled that US law allowed the US courts to hear claims in respect of damages sustained due to a cartel agreement outside the US, as long as similar claims could be brought in the US in relation to the same cartel. This court decision was regarded as an “invitation” for potential purchasers from a cartel from all over the world to commence proceedings in the US for losses sustained somewhere else.¹⁷²

The Supreme Court came to the opposite conclusion and ruled that, although a cartel may have affected consumers both inside and outside the United States, US antitrust legislation did not allow claims to be brought in respect of losses resulting from the adverse foreign effect if such loss was independent of any adverse effect of the cartel in the US. The Supreme Court’s judgement seems sound from a public international law perspective. With territoriality of the law being the basic principle of jurisdiction, a law should only be applied extraterritorially if there is a clear nexus between the foreign conduct and the forum.¹⁷³ As the UK, Ireland and the Netherlands persuasively pointed out in their briefs as *amici curiae*, the nexus between the US and the plaintiffs’ claims is virtually nonexistent. Another aspect of reasonable jurisdiction is comity or respect for the jurisdiction of other nations concerned. In spite of these differences, however, the *Vitamins* litigation has revealed willingness on both sides of the Atlantic - at least between the common law countries - to seek an adequate justification for establishing jurisdiction over ‘foreign-to-foreign’ claims.¹⁷⁴ In this regard the main contribution of the Supreme Court to this issue is its plea for restraint, which it based on international law limits on extraterritorial jurisdiction. This law limits have served the Supreme Court as a welcome tool to dismiss the claim that finally could have threatened US national interests, such as the use of corporate leniency schemes by the US DoJ and the ready availability of US proceedings for domestic plaintiffs.

As has been said, the situation in Europe is different as private enforcement does not play that dominant role as in the US. However, the UK government has undertaken some major legislative changes and has shown a more positive approach towards private enforcement. Hence the decision of

¹⁷⁰ See the detailed analysis of Harry First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law”, 68 Antitrust Law Journal (2001) pp. 711ff.

¹⁷¹ “*Empagran S.A. v. Hoffmann-LaRoche Ltd.*” of 17 January 2003, 315 F3d 338 (D.C. Cir. 2003).

¹⁷² Cedric Ryngaert, “Foreign-to-Foreign Claims: the US Supreme Court’s Decision (2004) v. the English High Court’s Decision (2003) in the Vitamins Case”, 25 ECL Rev. (2004), p. 614.

¹⁷³ In this case the interpretation of the scope of section 6 Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) was at stake, Ryngaert, pp. 4f.

¹⁷⁴ Ryngaert, p. 7.

the High Court of England and Wales in *Provimi et al. v. Aventis S.A.*¹⁷⁵, described in the following, is somewhat peculiar as it can be regarded as a kind of benchmark for a possible future approach of UK courts towards private litigation after the *Courage* decision of the ECJ.¹⁷⁶

6.2.2 The “*Provimi*” decision of the UK High Court

The *Provimi* case of the High Court of England and Wales dealt with a claim of a vitamins purchaser against a British and a German subsidiary of a Swiss manufacturer, which was a member of the *Vitamins* cartel. The purchaser had bought only from the German subsidiary, nevertheless the British subsidiary had implemented the cartel as well, but without having had knowledge of the price-fixing agreement of the “parent company”. The question was whether such a claim could be brought before a British court even if there was no contractual relationship between the purchaser and the British subsidiary. The High Court held that there was an arguable claim and that it had jurisdiction to hear claims against non-English subsidiaries as long as one of the subsidiaries, taking part in the cartel, was domiciled in the United Kingdom. The High Court had to make even more efforts to declare British jurisdiction available to the claimant as it had to overcome a jurisdiction clause in the contract between the claimant and the German subsidiary clearly stating that the place of jurisdiction for all disputes shall be the court at the seat of the German subsidiary.¹⁷⁷ It is surprising that the High Court undertook these efforts to define itself competent to hear the case, particularly if one has the reluctance of British courts in previous cases in mind.

It is contestable whether the court was right to set aside the jurisdiction clause¹⁷⁸ but it is remarkable in any event that the court took the responsibility to enable the claimant to proceed before British courts. Although the High Court had acknowledged its jurisdiction the case was settled before a substantial claim was brought to court, thus there was no final court decision on the substance of the claim. The judgement in *Provimi* is nevertheless considered to be of great relevance for the future of private enforcement and to establish the UK as the first enforcer for private damages actions in competition law because of this relatively modest approach towards the jurisdictional nexus.¹⁷⁹

¹⁷⁵ High Court of Justice, Queens Bench Division, 6 May 2003, *Provimi et al. v. Aventis S.A. et al.*, 2003 EWHC 961 (Comm).

¹⁷⁶ In this regard it is interesting to remark that the UK Government was enthusiastically in favour of private enforcement in its written observations for the *Courage* case, see Komninos, p. 469.

¹⁷⁷ See for a very detailed analysis of the judgement, Bulst, EBOR 2003, p. 623 ff. with reference to para. 104 of the *Provimi* judgement.

¹⁷⁸ See very well-argued Bulst, EBOR 2003, pp. 647ff.

¹⁷⁹ Bulst, EBOR 2003, p. 650; Charles Koob and David Vann, “Developments in Private Enforcement of Competition Law”, Simpson Thacher & Bartlett, p. 3, available on the internet: <http://www.stblaw.com/content/publications/pub434.pdf>.

6.2.3 The “*Vitamins*” decisions in Germany

The vitamins case has led also in Germany to follow-on trials. The facts of the case were the same as in “*Provimi*”. Two regional courts¹⁸⁰ and one higher regional court¹⁸¹ had to deal with claims for damages of direct purchasers of vitamins from cartel members. The two regional courts came, with a quite similar reasoning, to the same conclusion, stating that the purchaser from a cartel has no right to claim damages if the cartel was not specifically directed at the claimant. The regional courts argued that otherwise the number of potential claimants would become too high and dependant on mere chance as the number would be determined by the length of the distribution chain and the number of direct and indirect customers.¹⁸²

This reasoning is incomprehensible and unconvincing. The courts are perverting the requirement of “*Zielgerichtetheit*”. Such an interpretation of this requirement is limiting or even demolishing judicial protection as a cartel always aims at reducing the choice of other unspecified and unidentified market participants or to increase prices.¹⁸³ Customers of a cartel member on the other side of the market cannot be deprived from their right to claim damages just because the cartel is not intentionally directed at them but to all market participants. A purchaser needs neither less judicial protection, nor can it be regarded as his fault to belong to a large group of harmed market participants. This argument is incomprehensible as the courts are granting some kind of a bonus for wide ranging cartels,¹⁸⁴ as in this situation the single customer’s right to claim damages is detracted. This is in principle the case for every wide-ranging cartel and could lead to a full inapplicability of the right to claim damages.¹⁸⁵ The cynical result would be that the judicial protection is the less the “the bigger the cartel”.

The regional court of Mannheim is referring very briefly to *Courage*, stating that the case at stake has nothing to do with the ECJ decision as the question there was whether a participant of a cartel could be entitled to damages, as before the regional court of Mannheim a customer’s claim was at stake. The court is thus not recognising any similarities and totally ignoring the verdict of the ECJ “that the effectiveness of the prohibition of Art. 81 EC would be put at risk if it were not open to any individual to claim damages for loss caused to him”.¹⁸⁶ It is somewhat surprising that the courts¹⁸⁷ react so reluctantly to analyse *Courage* in more depth and to draw the necessary conclusions therefrom. It can be concluded that the rejections of the courts in the light of *Courage* have to be regarded as a violation of the principle of effectiveness of the Community Courts, which requires the national court that they do

¹⁸⁰ LG Mannheim of 11 July 2003, GRUR 2004 p. 182, with annotations of Helmut Köhler, “Kartellverbot und Schadensersatz”, GRUR 2004, p. 99; LG Mainz of 15 January 2004, NJW-RR 2004, p. 478.

¹⁸¹ OLG Karlsruhe of 28 January 2004, NJW 2004, 2243 on appeal to the judgement of the LG Mannheim, see the annotations of Bulst, NJW 2004, p. 2203.

¹⁸² LG Mannheim, p. 183, the decision was in principle, without a detailed reasoning, upheld by the OLG Karlsruhe.

¹⁸³ Köhler, p. 101.

¹⁸⁴ Bulst, NJW 2004, p. 2202 says the courts are granting a “bonus for mass torts” (in German: “Massenschadensbonus”).

¹⁸⁵ Bulst, NJW 2004, p. 2202; Köhler, p. 100.

¹⁸⁶ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, paragraph. 26.

¹⁸⁷ The OLG Karlsruhe did not only accept but praised the reasoning of the LG Mannheim, without explicitly analysing the reference to the “*Courage* decision”, NJW 2004, p. 2244.

not render practically impossible or excessively difficult the exercise of rights conferred upon individuals by Community law.¹⁸⁸

The decision is even more surprising as a judgement of the regional court of Dortmund already exists, which acknowledges that it is sufficient that the claimant was an identifiable individual who was objectively and directly affected by the cartel.¹⁸⁹ This decision, granting more than €1.5 million in damages to a confectionery manufacturer who had bought products from the *Vitamins* cartel could be a turning point, but it is under appeal and thus the outcome is uncertain. It must be seen whether the higher regional court of Düsseldorf, the competent court of appeal, will share the view of its colleagues. It seems doubtful whether the very purchaser friendly calculation of the damage made by the judge of the regional court of Dortmund will remain unchallenged under appeal, in particular because the regional court of Dortmund had criticised that the defendant did not contribute at all to the gathering of evidence. Following this the regional court of Dortmund estimated the damage pursuant to section 287 ZPO on the basis of the figures provided sufficiently by the plaintiff.

The BGH will finally decide on that matter as it has allowed the appeal to the decision of the higher regional court of Karlsruhe in November 2004.¹⁹⁰ A final decision of the BGH might align the different decisions currently existing. The regional court of Mannheim decided in that case that the plaintiff even did not suffer any damage as he could pass on the overcharge. It will be interesting to see whether the judges of the highest German court agree with this reasoning. In case they regard the defensive passing-on in conformity with the rules or if they want to stick to the requirement that a cartel has to be directed at a specific (legal) person the BGH would be under an obligation to refer the case pursuant to Article 234 EC to the ECJ for a preliminary ruling in order to let these aspects be analysed.¹⁹¹

Even if this is an anticipation of the following analysis of the Draft Act for the Amendment of the German GWB, it is remarkable that the draft proposal in the amended section 33 explicitly states that section 1 GWB and Article 81 (1) EC are meant to protect other market participants, no matter if the cartel is directed at them or not.¹⁹² It seems that also the legislator is convinced that this narrow approach originally formulated by the courts can not be upheld.

¹⁸⁸ Case C-261/95 “*Palmisani*”, [1997] ECR I-4025, paragraph 27; Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, paragraph. 29. It is probably not a violation of the principle of equivalence as the hurdles for a claim under national law (section 33 GWB) are as high (“directed at the claimant”) as for a claim pursuant to section 823 (2) BGB in conjunction with Article 81 EC.

¹⁸⁹ See the recent decision of the LG Dortmund, EWS 2004, p. 434, see above in note 123; see also OLG Düsseldorf, NJW-RR 2000, pp. 193, 197.

¹⁹⁰ Decision of the BGH, KZR 11/04 of 23 November 2004 (so-called *Nichtzulassungsbeschwerde*).

¹⁹¹ Bulst, NJW 2004, p. 2202.

¹⁹² Section 33 GWB-E. The Government has also published a written statement supplementing the GWB-E which explains the intention of the Government for each provision (the so-called “Explanatory memorandum”), pp. 58f.

7. Analysis of the Draft Proposal for the 7th Amendment of the GWB

The analysis of the recent judgements has shown why in Germany private enforcement so far has not played an important role as it was originally intended by the legislator.¹⁹³ The judgement of the ECJ in *Courage*¹⁹⁴ has revitalised the discussion about the need of a functioning system of private enforcement, working supplementary to public enforcement. This problem became even more apparent when the structure of the new Regulation 1/2003 (decentralisation of the enforcement system and thus a complementary role for enforcement through private litigation) became visible. It is therefore somewhat surprising that the latest decisions of the regional courts of Mannheim and Mainz do not show a sufficient sensibility with regard to the introduction of a new system. Particularly the German judgements breathe an air which does not seem to be open-minded towards the new approach in competition law. One could have at least expected a stronger argumentation within the judgements in the light of *Courage*, but the decisions, except that of the regional court of Dortmund, do not even consider *Courage* decisive or related to their cases. Even if they had rejected the claims of the plaintiffs after a weighing of arguments due to the valid provisions and the precedent case law, they could have shown their ability and future willingness to adopt and enforce the new system properly. Against this background the Draft for a 7th Amendment of the GWB shall be examined to analyse whether the new provisions provide for a more efficient system of private enforcement and support the use of it, which should compensate the probable decrease of surveillance and enforcement by public authorities.¹⁹⁵ The final draft was eventually agreed by the German government on 26 May 2004¹⁹⁶ and sent to the *Bundesrat* (Federal Assembly), which debated the draft on 9 July 2004. Surprisingly the *Bundesrat* did not pay much attention to the provisions dealing with private enforcement, so that its comments are not useful in this regard.¹⁹⁷ As the *Bundesrat* has only a right to be heard the GWB will be finally adopted by the *Bundestag* (Lower House of German Parliament). Originally it was planned to let the amended GWB enter into force on 1 January 2005,¹⁹⁸ but it will be delayed due to a need for more discussion.

7.1 The draft proposal for the 7th amendment of the GWB

The proposal for an amendment of the GWB has been published only some years after the 6th amendment entered into force in 1999.¹⁹⁹ It was basically a reaction to the reform of European competition law and the new Regulation 1/2003. Similar to the English legislator the German legislator wanted to align its law with the new system of Art. 81 and 82 EC. It had already started with that to some extent

¹⁹³ See above 4.1.

¹⁹⁴ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297.

¹⁹⁵ See in this regard the report of the Monopolies Commission, p. 21.

¹⁹⁶ Press release of the Ministry of Economics and Labour of the 26 May 2004.

¹⁹⁷ *Bundesrat-Drucksache* 441/04 of 9 July 2004, pp. 12-14.

¹⁹⁸ Bulst, EWS 2004, p. 403.

¹⁹⁹ BGBI. 1998 I, p. 2546 of 26 August 1998, the amendments entered into force on 1 January 1999.

in the 6th amendment of the GWB. It continued now by striking out the first two chapters of the GWB, replacing them by only some provisions mirroring the EC cartel rules. This requires an amendment of section 1 GWB which shall then prohibit all kind of agreements as the current version only bans horizontal agreements.²⁰⁰ The relevant provisions for private enforcement are sections 33, 34, 34a and 89a GWB-E, which shall be discussed in numerical order, although this does not mirror their importance for private actions.

7.2 The “new” Section 33 GWB -E

Section 33 GWB-E remains the central provision, ruling e.g. under which circumstances a right for an injunction and for damages can be invoked, or how collective actions can be pursued. The situation for individual claimants as well as for associations pursuing collective actions will change fundamentally under this new provision. First, the situation of an individual claimant shall be analysed to evaluate whether the proposed amendments are sufficient to enhance the situation of private litigants and to make private enforcement more attractive.

The first noteworthy amendment is a change in the wording as the legislator now expressly stipulates that a claimant can rely on section 33 GWB-E to apply for an injunction (subsection 1) or to claim damages (subsection 3) for infringements of the GWB as well as Art. 81, 82 EC. This amendment has only declaratory character and combines the previous two legal basis (section 33 GWB and 823 (2) BGB) in one provision; it does not change the legal requirements which have to be met in order to be entitled for an injunction or for damages.²⁰¹

7.2.1 The position of individual claimants under section 33 GBW-E

Section 33 (1) GWB-E stipulates that someone acting in breach of a provision of the GWB, Art. 81, 82 EC, or a decision of the cartel authorities has to refrain from such conduct if this infringed provision serves to protect another. This right can already be invoked if a violation is just potential and has not yet occurred and it can be applied by every market participant even if the violation does not directly aim at him. Furthermore, the right for injunctive relief is not excluded just because the other market participant has contributed to the violation (Section 33 (1) sentence 4 GWB-E). A right to damages for infringements of subsection 1 is provided for in section 33 (3) GWB-E, regardless of the fact the harm was caused intentionally or by negligence. For the calculation of the exact damage, for which interest accrues from the day of occurrence, the court can take the additional proceeds of the infringer into account.

The provision contains some substantial changes, nevertheless the proposal is somewhat disappointing. An earlier draft contained a more innovative wording, setting the protective purpose requirement

²⁰⁰ Explanatory memorandum, p. 5.

²⁰¹ Explanatory memorandum, p. 57.

aside.²⁰² This fundamental change had been warmly welcomed as it seemed that this renunciation could have led to an increase of private actions, especially of actions based on section 1 GWB-E,²⁰³ as the plaintiff then would not have anymore doubted whether the infringed provision in his specific case is to be regarded protective or not.²⁰⁴ Furthermore the confusing debate amongst judges and legal scholars as to the protective quality of specific provisions in specific situations would have been brought to an end.²⁰⁵

Nevertheless, the current proposal still requires the violation of a provision serving to protect another.²⁰⁶ The Government explains that in principle it wants to stick to the old requirement. It refers to the judgement of the ECJ in *Courage*, which required changes in the application of the provision. Responding to this the legislator has widened the scope of the provision by stipulating expressly that also market participants, at which the cartel is not directed, can be protected by section 33 GWB-E. Furthermore, final consumers can be encompassed as well, particularly if the cartel occurs on the retailer level, the last level of the distribution chain.²⁰⁷

The requirement that a violated provision has to serve to protect another will remain, and maybe it is right to say that the proposal for that provision in the first draft, which abstained from this limiting requirement, also would have needed some clarification regarding the circumstances under which a plaintiff can bring a claim for injunction or for damages.²⁰⁸ A relinquishment of this requirement would have been desirable in order to make clear that a plaintiff can go to court in any case of violation of his rights. It is not unlikely that to a certain degree this requirement has an effect on the litigiousness of potential claimants as they are uncertain about the “quality” of the infringed provision, whether it will be regarded protective or not and whether they are acknowledged as being protected by it. But in regard to Art. 81, 82 EC this requirement causes no problem anymore as it is expressly mentioned in section 33 (1) GWB-E as being protective. Nevertheless, it would have been preferable to fully abolish this requirement to lower the hurdles for plaintiffs.

Having widened the scope of protection to plaintiffs at which a cartel is not directed at, the more serious problem with regard to standing remains. The draft is ambiguous who exactly shall have standing in court; only direct purchasers or also indirect purchasers or even final consumers having bought the good or service after further intermediary transactions took place. The problem of passing-on comes into play here.

²⁰² See section 33 (1) and (3) of the first draft to amend the GWB of 17 December 2003, prepared by civil servants of the German Ministry of Economy and Labour, the so-called “*Referentenentwurf*”.

²⁰³ This provision contains the general prohibition of cartels and concerted practices, up to now covering only horizontal restraints of competition; section 1 GWB-E will then, mirroring Art. 81 EC, also cover vertical restraints.

²⁰⁴ Monopolies Commission, p. 21.

²⁰⁵ See the description of the debate above 5.2.1

²⁰⁶ See section 33 (1) GWB-E.

²⁰⁷ Explanatory memorandum, p. 58, which do not refer to the “*Referentenentwurf*” of 17 December 2003.

²⁰⁸ Hempel, WuW 2004, pp. 368ff. states that even without this requirement a clarification through precedents of the highest courts would have been needed.

7.2.2 The impact of the problem of passing-on

The passing-on rule stems from damage claims in the US pursuant to section 4 (a) Clayton Act and means the passing-on of the damage sustained by anticompetitive actions to following market levels.²⁰⁹ The “passing-on principle” can be invoked in two ways, either by the defendant, stating that the direct purchaser from the cartel did not suffer any loss as he could pass-on his damage to his clients (defensive passing-on), or by market participants of a more distanced level of the distribution chain, e.g. final consumers, that want to claim damages from the cartel members for having bought the goods or services for an increased cartel price (offensive passing-on).

7.2.2.1 Defensive passing-on

Until these two recent judgements mentioned above²¹⁰ were issued, there was a common conviction that under German law a defensive passing-on is not possible.²¹¹ The legislator followed this opinion and introduced an explicit prohibition of the defensive passing-on into section 33 (3) GWB-E of the first draft, explaining that it would undermine the deterrent effect of private enforcement if the infringer could profit from the ability of the direct purchaser to pass-on the damage to its clients.²¹² Unfortunately in the final draft this is left out. The legislator refers to this change in its explanatory memorandum by stating that it is widely acknowledged under German law that passing-on is not appropriate, and that thus an explicit reference in section 33 (3) GWB-E would have been superfluous.²¹³ It is correct that the prohibition of the defensive passing-on is a common conviction among German scholars²¹⁴, but if one reads the recent judgements of the German courts, one could doubt whether this is really acknowledged in the judiciary all over Germany as well. To avoid any doubts in this regard it would have been preferable to introduce a clear prohibition of defensive passing-on as it was included in the “*Referentenentwurf*”. But possibly the legislator refrained from introducing a clear prohibition of defensive passing-on to avoid contradictions with the much more complicated problem of offensive passing-on, which has substantial impact on the whole system of private enforcement.

7.2.2.2 Offensive passing-on

7.2.2.2.1 The wording of section 33 in the *Referentenentwurf* and in the GWB-E

The question of offensive passing-on concerns all participants on subsequent levels of the distribution chain (indirect purchasers), but particularly final consumers, who, being on the last level of the distri-

²⁰⁹ Hempel, p. 192, see above 2.3.

²¹⁰ LG Mannheim, GRUR 2004, p. 184; LG Mainz, NJW 2004, p. 2243, see above at 5.2.3.

²¹¹ Hempel, WuW 2004, p. 364; Immenga/Mestmäcker-Emmerich, § 33 no. 40; Bulst, NJW 2004, p. 2201; Köhler, GRUR 2004, p. 99; see also the judgement of the LG Dortmund, 13 O 55/02 Kart., p. 13 where the court stated that defensive passing-on is contestable, but that at least the defendant is responsible to prove the facts favourable for him in this regard.

²¹² See the explanatory memorandum of the “*Referentenentwurf*” of 17 December 2003, p. 52.

²¹³ Explanatory memorandum, p. 60.

²¹⁴ Köhler, p. 101; Hempel, WuW 2004, p. 364; Friedrich Bulst, Private Rechtsdurchsetzung nach der 7. GWB-Novelle: Unbeabsichtigte Rechtschutzbefreiungen durch die Hintertür?, EWS 2004, p. 63.

bution chain, are in a fairly weak position if the infringement occurred on the producer or wholesaler level.

The German legislator does not explicitly state that final consumers are only entitled to claim damages if the infringement occurs on the retailer level, but it says that this will be usually the case.²¹⁵ It becomes obvious that the legislator wants to limit the circle of claimants to direct purchasers although this is neither explicitly laid down in the provision nor said in the explanatory memorandum. The *Referentenentwurf* was formulated differently, granting a right to sue to everybody “affected” by an infringement, including indirect purchasers downstream in the market.²¹⁶ Although the scope of this provision sounded broader, the explanatory memorandum clarified that persons “directly affected” shall be protected in particular, thus the difference in the effect of the draft provisions would not have been that big. Nevertheless, the text of the first draft seemed more “final consumer-friendly”.²¹⁷ It may be that the legislator softened the wording of that provision in the GWB-E because it wanted to avoid that indirect purchasers “feel motivated” to claim damages.

7.2.2.2.2 The requirements of the ECJ in *Courage*

The *obiter dictum* of the ECJ in *Courage* quite clearly demands that any individual can claim damages for loss suffered.²¹⁸ The question is whether this requires that any individual under every circumstance must be able to get his damages reimbursed.

This question is independent of the fact whether in *Courage* a Community remedy has arisen or not as minimum requirements must be fulfilled anyway. If the ECJ intended to create a European remedy in this decision it will have to further elaborate the requirements for such a remedy in future decisions, e.g. establishment of the loss, the causality and also the standing.²¹⁹ But until such judgements are issued it remains in the competence of the Member States to regulate such issues, acknowledging on the one hand, the principles of effectiveness and of equivalence²²⁰ and on the other hand, bearing the responsibility to ensure the functioning of the judicial system.

7.2.2.2.3 Onerous burden of proof for indirect purchasers

The consumer bears the burden of proof and has to show that a loss which was passed-on to him occurred due to an infringement of competition law. This is extremely difficult to prove as maybe – beside the cartel agreement- also a lot of other factors were decisive for the price of a good or a service. A retailer for instance might increase his prices because he has to recoup higher organisational or handling costs or he just charges more as the inelastic price structure in the market allows him a raise in

²¹⁵ Explanatory memorandum, p. 58.

²¹⁶ See in detail the critical analysis of Bulst, EWS 2004, pp. 62ff. who regards the *Referentenentwurf* not to be in conformity with the requirement mentioned in the *Courage* judgement of the ECJ.

²¹⁷ See the explanatory memorandum of the “*Referentenentwurf*” of 17 December 2003, p. 52.

²¹⁸ Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, para. 26.

²¹⁹ Mäsch, p. 842; Komninos, p. 478.

²²⁰ Exactly that what the ECJ requested in Case C -453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, para. 29.

price. Another feasible situation is that two undertakings in the market are affected by a market cartel and have to increase their prices. An unaffected third company thus faces less competitive pressure and suddenly some price flexibility (“umbrella effect”). If this third undertaking is increasing its prices and the consumer buys from this company it is difficult for him to prove that the increase in price has any relation to the concerned cartel.

So, even if prices are increased that does not automatically mean that this happened only because of a cartel. Hence, proving that the higher costs have been passed on can be extremely onerous as it requires a lot of complex analysis and vast amounts of economic data, mostly stemming from the sphere of the undertakings in the market. Even if a consumer could use all possible alleviations of his burden of proof, it would be hardly possible for him to sufficiently prove the loss suffered. The assumption that the calculation of this overcharge just could be assessed by simple comparisons with similar markets (“yardstick approach”) seems not correct,²²¹ because an increase of the prices of the direct purchaser is not always a sufficient proof that the overcharge has been passed on as other possible reasons for this increase have to be recognised as well. Furthermore, the costs for such indirect purchaser trials would be enormous and resources of the courts would be blocked with very complex and costly cases, which are predominantly dealing in detail with relatively small sums.²²²

Another problem is that if defensive passing-on would be prohibited, but at the same time all indirect purchasers entitled to claim damages, the defendant would be in danger of being sued multiple times and he would be at risk of paying twice, once to the direct purchaser and the second time to indirect purchasers. Such a wide ranging scope is not requested by *Courage* as it would lead to a disproportionate burden on the defendant and to an unmanageable increase in suits.

It is proposed that direct purchasers claim damages and distribute then this part of it, which they originally could pass on to their clients or consumers. This is comparable to the construction in German law known as “*Drittschadensliquidation*”. The problem is that this technique is not suitable for cases with high numbers of indirect purchasers. Furthermore, the question remains unanswered why direct purchasers should claim damages in cases where they originally could pass-on the full overcharge as they then finally would have to distribute all damages awarded.²²³ It is obvious that such direct purchasers could not be forced to go to court. In that situation indirect purchasers, if they do not have standing themselves, would be unprotected.

7.2.2.2.4 No explicit prohibition possible

²²¹ Bulst, EWS 2004, p. 65.

²²² For the discussion of German scholars see: Hempel, WuW 2004, p. 369, Köhler, p. 101, Bulst, EWS 2004, pp. 62ff; Tobias Lettl, “Der Schadensersatzanspruch gemäß § 823 Abs. 2 i.V.m. Art. 81 Abs. 1 EG”, vol. 167 ZHR (2003), p. 481f. The latter is in favour of a right of indirect purchasers arguing that consumers can not be deprived only because they stay on a subsequent level of the market. Unfortunately he does not give a reasonable explanation how such a broad and wide-ranging remedy should be regulated and implemented.

²²³ Köhler, p. 101 responding to Lettl, pp. 481f.

It is obvious that an explicit exclusion of a possibility for an offensive passing-on for indirect purchasers – pursuant to the *Illinois Brick* decision in the US²²⁴ - would be contrary to *Courage*, as the right of any individual would be explicitly restricted. But that does not mean that the legislator has to restructure the entire system of civil law in order to enable every consumer to get his damages reimbursed. One opinion suggests distinguishing between the judicial and the factual opportunities of market participants on subsequent levels. It argues that the judicial possibility of an indirect purchaser cannot be prohibited. Though it cannot be required to fundamentally change the national tort law in order to a single consumer's complicated and complex burden of proof to establish his damage.²²⁵ Furthermore, it cannot be possible under civil law that the burden of proof of a plaintiff is lowered so, that it is in fact reversed to the detriment of the defendant.

The legislator is forced by *Courage* to provide an effective, accessible remedy for any individual, which fulfils the demands of the principles of effectiveness and equivalence.²²⁶ On the other hand, the legislator must limit an unrestricted access to court, endangering the functioning of the whole judicial system. Furthermore, the legislator cannot be forced to develop a new system of claims for indirect purchasers, consisting of procedural rules which nearly reverse the burden of proof and set aside the normal principles of national tort and procedural law.²²⁷

It is difficult to find a solution for this problem that would be suitable for every conceivable constellation. However, it seems that the legislator was a bit too hesitant while formulating the draft. Maybe it was considering leaving the issue to elaborate the standards finally to the courts – as the legislator did in 1955 regarding the provisions serving to protect another.²²⁸ It would have been preferable to be more strenuous to clarify the position of indirect purchasers in one way or another. Proposals made by a US scholar to introduce specific management rules for such cases and to introduce provisions for allocating recoveries between direct and indirect purchasers sound interesting, but would require a couple of legislative amendments of procedural law only for indirect purchaser claims in competition law cases.²²⁹ It would have also been conceivable to introduce a system in which representative organisations on behalf of indirect purchasers claim - together with direct purchasers - damages which are afterwards distributed on a pro-rata basis between the parties. But also this construction would have needed complex amendments of the relevant laws.

It seems that a legally more sophisticated solution would have needed much more time for preparation and discussion, which was unavailable due to the strict time-schedule of the legislator. In this somewhat uncertain situation it is not unlikely that section 33 GWB-E with the present wording will deal with before the courts. As it will take some time until a stringent line in the judiciary has been found,

²²⁴ See above footnote 52.

²²⁵ Köhler, p. 101.

²²⁶ See Case C-453/99 “*Courage v. Crehan*”, [2001] ECR I-6297, para. 29.

²²⁷ Köhler, p. 101.

²²⁸ See above at 5.2.1.

²²⁹ Baker, pp. 393f.

this might lead to a degree of ambiguity which is not supportive to make private enforcement more attractive. It might even happen that it will be the ECJ which finally has to decide the matter.

7.2.3 Procedural Situation

Regardless whether the wording of the GWB-E and the judicial practice resulting from its application will be regarded sufficient from a European law point of view, it also has to be analysed whether the procedural requirements which have to be met in order to be granted an injunction or damages are easier to fulfil as is the case under the current legislation. The current GWB puts a heavy burden on potential plaintiffs, which make it fairly difficult for them to exercise their rights. The whole debate about a right to sue is rather limited in its meaning as long as the practical problems of implementing a functioning remedy remain unsolved.

7.2.3.1 Easing the burden of proof

Article 2 of Regulation 1/2003 stipulates that the burden of proving an infringement of Art. 81, 82 EC shall rest on the party alleging the infringement. But it does not say anything about the burden of proof regarding the proof of the occurrence of damage or the liability of the defendant. This remains under national legislation and is governed by the general civil procedural rules. Under German civil procedural law it is up to the plaintiff to allege and to prove facts which give rise to the claim and which in particular prove the liability of the defendant.²³⁰ However, if the burden of proof rests entirely on the plaintiff the effectiveness of private enforcement is doubtful.²³¹ Thus, an ease of the burden proof is needed in particular for such plaintiffs not having been a member of a cartel and thus not having access to any documents to provide evidence of the existence of a cartel.

The proposal of the Government takes this issue only partially into account, introducing only two explicit references for an ease of the burden of proof. In section 33 (3) sentence 2 GWB-E it is stated that for the calculation of the loss in particular the additional proceeds of the defendant can be taken into account. This can ease the problem of the claimant to prove his losses. Furthermore, section 33 (4) GWB-E stipulates the binding effect of official decisions and judgments of the *Bundeskartellamt*, the Commission, or NCAs in other Member States declaring an agreement to be in breach of Art. 81, 82 EC. This provision is meant to foster so-called “follow-on” suits of private enforcers as they can hence rely on such a decision and do not have to prove the infringement stated in that decision or judgement.²³² With regard to all other points the normal rules of the GWB, the BGB, and the ZPO apply, the latter containing some general rules which ease the burden of proof under specific circumstances.²³³ Thus, the claimant still has to prove the violation of Art. 81, 82 EC - if it is not a follow-on

²³⁰ Basedow, EBOR 2001, p. 462; Schmidt, in Ehlermann/Atanasii, p. 262.

²³¹ Schmidt, in Ehlermann/Atanasii, p. 258; Monopolies Commission, p. 22.

²³² Explanatory memorandum, p. 60.

²³³ Under German law rules concerning the burden of proof are customarily regarded as part of substantive law, rather than procedural law, this is why such rules can be found in all three laws.

suit - and the exact amount of the damage he suffered as a consequence of this violation. It is thus doubtful whether the proposal will foster the private enforcement of competition law. Firstly, it will remain difficult for a plaintiff, who is not taking part in the violating action, to obtain sufficient proof for the existence of an infringement of Art. 81 or 82 EC. Under the German principle of party presentation (“*Beibringung sgrundsatz*”) every party to a civil trial has to provide the court with all necessary documents supporting his claim.²³⁴ The plaintiff can not generally force the defendant to disclose documents’ stemming from his sphere as no pre-trial discovery rule exists which obliges a defendant to disclose all documents. The court can require some documents to be disclosed only under very limited circumstances. Therefore the plaintiff must describe the specific requested documents very precisely, which is often impossible as he does not know which document exactly proves the infringement itself or enables to calculate his damage. The court can ease the burden of proof of the plaintiff under very specific circumstances and regard information - provided by the plaintiff - about business practices as *prima facie* evidence for the existence of a cartel offence or a misuse of dominance, if the facts provided in this case do not differ – according to general experience of life - from ordinary and common cases. This will only be the case in situations of very obvious restraints of competition. The other party can rebut the *prima facie* evidence by proving other facts that point to a different cause or different course of events, maybe by disclosing certain documents in his property that convince the court of the opposite.²³⁵

This alleviation of the burden of proof might support the plaintiff, but it is up to the wide discretion of the court under section 286 ZPO in this regard and thus to a certain degree unpredictable how the court interprets the specific case and what exactly it demands to acknowledge a *prima facie* assumption of an infringement. A clear provision on which the plaintiff can rely on and which would support his position before the court would have been preferable. Such a provision could for instance force the defendant to disclose specific documents stemming from his sphere of influence under the precondition that the plaintiff has provided convincing information that an infringement could exist, whatever kind of information the plaintiff can submit. Such a duty is not unknown under German law. For instance in the area of product liability the *Produkthaftungsgesetz* (ProdHaftG - Product Liability Act) imposes the burden of proof onto the producer for facts stemming from his sphere, which usually the consumer cannot prove, e.g. information about the production process.²³⁶ Such a rule would of course have to ensure that the business secrets of the defendant are protected.²³⁷ The hesitance of the legislator is the more surprising as such an assumption of a *prima facie* evidence already exists under German law. Section 20 (5) GWB provides that if specific facts appear, which make the assumption reasonable that an undertaking is misusing its market power, it is incumbent upon this undertaking to

²³⁴ Hempel, *Privater Rechtsschutz*, p. 45.

²³⁵ Heinz Thomas and Hans Putzo, *Zivilprozessordnung*, Munich 2003, § 286 no. 17f.

²³⁶ Monopolies Commission, p. 32.

²³⁷ Basedow, EBOR 2001, p. 464.

disprove the existence of a misuse and to clarify such circumstances, which cannot be clarified by the competitor or by an representative association referred to in section 33 GWB.²³⁸ It is thus shown that it is possible to create a *prima facie* evidence to ease the burden of proof of a claimant under narrowly defined circumstances. The legislator missed a chance to introduce such a rule, which would have been a kind of signal to potential claimants that it is not insurmountably difficult to prove the existence of an infringement. It is not sufficient that the legislator gives some “soft guidance” in its explanatory memorandum of the act by referring to section 286 ZPO.²³⁹ A precise and clear regulation concerning an ease of the burden of proof, the shifting of the burden of proof under specific circumstances, or even a declaratory reference in the text of the provision to the rule of section 286 ZPO would have shown that the legislator is aware of the need to foster the situation of private enforcement.²⁴⁰

It is not clear, why the Government is so hesitant to introduce an easing rule also in section 33 GWB. Section 20 (5) GWB-E will not be amended and thus only allow industry associations referred to in section 33 (2) no. 1 GWB-E to rely on the *prima facie* evidence. That means, the scope of this provision has not been widened, e.g. to consumer associations. One possible explanation is the general hesitance of the legislator to create *prima facie* evidence, as such provisions are always somewhat poorly defined and bear an inherent risk to be too broad, thus allowing a misuse and shifting the burden of proof unduly to the defendant. Nevertheless, the legislator could have done more to ease the burden of proof of private enforcers and thus to improve their situation.

7.2.3.2 The calculation of the loss sustained

If the existence of an infringement has been successfully proven, the plaintiff must also prove that the infringement resulted in a loss and the amount of the damage suffered. Usually the so-called “*Differenzmethode*” is taken to calculate the loss sustained under German civil law.²⁴¹ Therefore the plaintiff’s actual position and the situation he would have been in “but for” the illegal conduct are compared. The first encompasses actual losses as well as profits which have not been realised, the latter describes the hypothetical situation in which the plaintiff would be in case no competition law infringement has taken place. The difference between these two positions in the example of a simple price cartel is the actual loss. The loss is thus compensated when the plaintiff is put into the financial situation he would have been in “but for” the infringement. A complex analysis, including a lot of economics, is needed to calculate this hypothetical market price, because economic and statistical data have to be taken into account. It will be often quite difficult for the plaintiff to carry out such a calculation sufficiently if he does not have access to relevant data. The calculation of the loss of profits is

²³⁸ See the analysis of Schmidt, in Ehlermann/Atanasiu, p. 262.

²³⁹ Explanatory memorandum, p. 58.

²⁴⁰ See for further suggestions in this regard, Hempel, *Privater Rechtsschutz*, pp. 308f.

²⁴¹ German report of the study of the Commission, p. 21.

particularly complicated as the hypothetical profits gained in the absence of the infringement have to be calculated. In the example of the price cartel that means that the plaintiff has bought less due to the increased price, so that he received less goods or services. Whether the goods or services were bought for own purposes or for resale, in both cases he has earned less and sustained hence a loss of profits, which is part of his total damage.²⁴²

Section 33 (3) 2 GWB-E shall lower the burden of proof of the defendant concerning the calculation of the loss by stipulating that the court can take the part of the additional proceeds of the defendant received as a result of the unlawful conduct as a basis to calculate the exact amount of damage. Pursuant to section 287 ZPO, also mentioned in section 33 (3) 2 GWB-E, the court has to decide about the exact amount of damage sustained, following the points raised before it by the parties. If the plaintiff cannot provide evidence for exact figures, the court can in principle estimate and introduce it as the relevant amount of damage. The court is of course not totally free in this estimation as it has to weigh all documents and evidences brought before it and can even consult an expert witness, e.g. an accountant, if that is needed. This reference to the additional proceeds of the plaintiff thus is intended to facilitate the enforcement of damages claims, especially in cases where the calculation of the exact damage is onerous or impossible for the defendant due to difficulties to assess the hypothetical market price needed for the calculation.²⁴³ To ease the burden of the plaintiff such a complex and maybe costly analysis of the market shall be avoided. Therefore the reference to the additional proceeds could indeed ease the burden of proof of the plaintiff as it is much easier just to calculate the profits of the defendant. A court can order an expert's opinion to help it in its fact finding if it has reasonable doubts as to the quality of the information provided.²⁴⁴

The legislator clearly expresses its will to ease the burden of proof of the plaintiff. Unfortunately it is rather doubtful whether the legislator will achieve its aim as the text of the draft provision refers namely to the additional profits stemming from the infringement as the decisive basis for the calculation. If only these additional proceeds realised illegally through the infringement are taken, the usefulness of the whole provision is endangered as the plaintiff is in the same situation as before, as he has to prove which part of the profits is earned regularly and which irregularly. This segregation requires again a calculation of a hypothetical market situation as otherwise no calculation of the unlawful additional proceeds is possible. There seems to be a reasonable risk that the intention of the legislator to ease the plaintiff's burden of proof cannot be achieved due to this wording. In the "*Referententwurf*" it was stipulated that the plaintiff can request a part of the profits of the defendant. In ad-

²⁴² Monopolies Commission, p. 34; Hømpel WuW 2004, p. 370.

²⁴³ Explanatory memorandum, p. 59; German report of the study of the Commission, p. 21.

²⁴⁴ The profits are calculated by just deducting the production and operating costs from the turnover of the defendant, explanatory memorandum, p. 59. It is very likely that also the defendant will introduce "his figures" into the trial to convince the court that his calculation of the damage, at least if it is beyond doubt that a damage occurred, is closer to reality, therefore the experts might be useful support for the courts.

dition it can ask the defendant for the book keepings of his profits.²⁴⁵ This provision would have improved the situation of the plaintiff as he would not have had to calculate the additional proceeds and would have had a right to request some useful documents from the defendant. It appears that the new proposal stays behind the former, not really improving the situation of the plaintiff.

Another interpretation, e.g. that all profits shall be taken away, is not covered by the wording of the text,²⁴⁶ although it is somewhat confusing that the Government in its explanatory memorandum refers to the calculation of the whole profit (the turnover minus the production and operating costs) and not to the calculation of the additional proceeds gained illegally.²⁴⁷ The legislator is always speaking about additional profits, thus, especially backed by the unambiguous wording of the provision itself, it seems clear that the Government only wants to deprive the defendant of his unlawful additional proceeds and not of his whole profits.

It is to a certain degree comprehensible that the legislator did not go so far as to deprive the infringer of all his profits. This is uncommon under German civil law as usually damages are regarded restitutionary, thus having no penal effect with regard to the defendant. Taking away all the profits would deprive the defendant also from his lawfully earned “normal” profits.²⁴⁸ The legislator obviously was not inclined to introduce such a far ranging provision. Another reason is that under German law the plaintiff shall not get more than just the amount compensating his loss, any kind of “profit” in form of higher pay backs is not foreseen. The reference of the German legislator in its explanatory memorandum to an “increased deterrent effect” is only meant with regard to the compensation of the losses of the plaintiff.²⁴⁹

In economic theory of law enforcement the idea of profit-skimming (or disgorgement) is not that unusual. The optimal penalty for behaviour which is not efficient - and cartels are not efficient - is the disgorgement of all profits, as the infringers weigh their risk of being caught against the possible extra gains. If they just run the risk to return their additional proceeds gained through the illegal conduct, their risk is not high and hence the deterrent effect of that provision is severely lessened.²⁵⁰ The question of remedies exceeding pure restitution of losses will be dealt with below in regard to the possibility of treble damages.²⁵¹

The idea of easing the burden of proof of plaintiffs has to be welcomed in principle. However, the way in which it is proposed in the draft will not change the situation substantially as the problems of a complex economic analysis of the market remain the same for the plaintiff, who is in need of a man-

²⁴⁵ See section 33 (3) of the “*Referentenentwurf*” of 17 December 2003 and its explanatory memorandum, p. 53.

²⁴⁶ Hempel, WuW 2004, p. 370.

²⁴⁷ Explanatory memorandum, p. 59.

²⁴⁸ See the very early proposal of Ernst Steindorff, “Gesetzgeberische Möglichkeiten zur verbesserten Durchsetzung des Gesetzes gegen Wettbewerbsbeschränkungen”, ZHR vol. 138 (1974), p. 518

²⁴⁹ Explanatory memorandum, p. 60.

²⁵⁰ Hempel, *Privater Rechtsschutz*, pp. 257ff., 298.

²⁵¹ See below 6.2.3.4.2.

ageable and predictable process of gathering evidence to be able to assess his chances to succeed in court.

7.2.3.3 Proving the infringement as the cause of damage

7.2.3.3.1 Direct causal link between the infringement and the loss sustained

The claimant has to prove the direct causal link between the violation of the protective provision and the loss he sustained, thus the burden of proof in regard to the causation of the loss as a consequence of the infringement is not lowered. This results in the fact that a finding of the court that there are additional profits on the side of the defendant received through his unlawful conduct does not necessarily mean that the court believes that these profits mirror exactly the claimant's losses. The direct link between the loss and the damage must be also proven and is as essential as the establishment of the amount of the damage itself.

The plaintiff might be able to show a drop in his sales and an increase in the sales of the defendant, but this is not sufficient evidence for the causation as there could be several reasons for both facts. An ease should have been introduced also for the issue of proving the causation. It would have been possible to introduce a kind of *prima facie* evidence, e.g. that a drop in the plaintiff's turnover that is somewhat related to the market affected by the infringing action should be conclusive evidence of the plaintiff's losses and their causation by the restrictive practice if at the same time the defendant's turnover related to that market have been rising.²⁵² In this regard it would have been also conceivable to think about imposing a duty onto the defendant to disclose the relevant information and to provide the relevant documents. If this examination and appreciation of the provided data could not be done properly by the court alone it could order an expert's opinion, interpreting the documents provided. Such an easing of the burden of proof has not been introduced, hence, the plaintiff must prove the link between his damage and the infringement. This is difficult, uncertain, and costly for him, in particular as he needs to pay in advance payment to the court, which otherwise would not start proceedings.²⁵³

The legislator is taking away the advantages it is granting to the plaintiff by the ease of the burden of proof in regard to the binding force of decisions by authorities and courts and the partial ease of the burden of proof with regard to the calculation of the loss. The legislator missed a chance to ease the position of private parties to enhance their situation in damage claims for breaches of competition law. The situation of the plaintiff bearing the burden of proof remains difficult as the evidence, if it can be obtained, has to be interpreted and weighed, maybe by an expert witness, but in any event finally by the court. This interpretation leads to a high degree of uncertainty as the evidence is rarely so precise and clear that only one interpretation is feasible. This uncertainty and the risk stemming from it have

²⁵² Basedow, EBOR 2001, p. 464.

²⁵³ Section 65 (1) ZPO requires the plaintiff to pay the costs of the trial in advance, otherwise the court will not start the suit. If the plaintiff succeeds he will get the money reimbursed from the defendant, section 91 ZPO. See in detail Hempel, *Privater Rechtsschutz*, p. 78.

to be borne alone by the plaintiff. It is thus likely that this will hinder private enforcement as potential claimants refrain from suing in court under such uncertain conditions.

7.2.3.3.2 The possibility of pre-trial discovery

To ease the situation of plaintiffs the introduction of pre-trial discovery elements has been suggested.²⁵⁴ This instrument is unknown in Germany but regularly used as an almost independently working tool of the parties in US civil courts to discover the facts of the case.²⁵⁵ It allows witnesses to be heard, written questions to be submitted or requests for specific documents to be made.²⁵⁶ The idea is to make all relevant facts known before the trial starts. The problem is that it can be extremely costly and time consuming, especially if one party is abusing its right to request information.²⁵⁷ The pre-trial discovery is absolutely uncommon and unknown in Germany, but that does not mean, that it could not be useful. Especially the right to request specific documents from the defendant could help the plaintiff to prove his claim. But the problem is that this tool does not fit with the principle of party presentation in civil law claims (“*Beibringungsgrundsatz*”). An amendment of the procedural rules only for the sake of competition law does not seem appropriate as the procedural law should be as uniform as possible to all kinds of claims. Furthermore, the rules of pre-trial discovery are tailored to the US court structure and organisation which is different from that in Germany.²⁵⁸ An introduction of this tool would request wide ranging changes and amendments which seem impossible right now. It is questionable whether the additional value of this tool is worth such efforts at all as it would probably require wide ranging amendments and years of discussion and legislative proceedings. It seems more useful to adjust the possibilities already existing to the needs of more private enforcement, e.g. by making it easier for the plaintiff to request documents from the defendant, by increasing the number of *prima facie* assumptions, or by demanding the courts to exercise their powers pursuant to section 287 ZPO more actively.

7.2.3.4 Calculation of accruing interest

7.2.3.4.1 Interest accruing from the commencement of the infringement

The provision of section 33 (3) sentence 3 GWB-E is rather simple but can have far reaching consequences. The provision stipulates that the infringing undertaking has to pay interest accruing from the

²⁵⁴ Hempel, *Privater Rechtsschutz*, p. 299.

²⁵⁵ See above 3.3. Also in the UK the pre-trial discovery is known and frequently used, but it is much more limited to certain categories of documents and is subject to stronger scrutiny of the courts, see p. 15 of the UK report of the study of the Commission.

²⁵⁶ Hempel, *Privater Rechtsschutz*, pp. 210f.

²⁵⁷ Hempel, *Privater Rechtsschutz*, p. 211, see above at note 48 the example of the *Zenith* case, in which millions of documents were requested to be disclosed.

²⁵⁸ Basedow, *EBOR* 2001, p. 463.

outset of the occurrence of the damage.²⁵⁹ Usually under German civil law interest accrue from this day forth on which the plaintiff starts the court proceedings (*lis pendens*), if the plaintiff does not prove an earlier date.²⁶⁰ The rationale behind this exception is the fact that the plaintiff often has to await the end of the official procedures before he can commence follow-on claims. Under the normal interest rule the interest is calculated from the beginning of the follow-on claims, maybe years after the damage arose, and thus the claim of the plaintiff would be devalued because of this long period without any interest duty. Furthermore, the defendant's financial advantage is taken away as he otherwise keeps the unlawfully earned money for a longer period without paying any interest.²⁶¹ This provision is quite useful as it responds to the situation of claimants, who have to wait for years until they get their money back, and also to that of the defendant, from which the advantages of their unlawful conduct are taken away. Furthermore, it makes sense that the interest is due from the occurrence of the damage, because this point in time can easily be proven by the claimant and is the day from which on the plaintiff actually loses money. In comparison to other provisions analysed above this stipulation seems reasonable and effective, nevertheless improvements are conceivable, especially with regard to a stronger deterrent function of private enforcement.

7.2.3.4.2 The possibility of treble-damages or a higher interest rate

In the US pursuant to section 4 a Clayton Act the court can award treble damages to the plaintiff.²⁶² This is regarded very efficient to spur private plaintiffs acting as "private attorney general".²⁶³ But it is doubtful whether this would also be the case in Germany. So far, damages are regarded as having a compensatory character for losses sustained, overcompensation is not envisaged. Although the legislator stated that claims for damages shall also have a deterrent effect, it did not change the basis for the calculation of the exact amount of the loss sustained.²⁶⁴ Treble damages would introduce an entirely new instrument into the German civil law system and it is not clear whether that would improve the situation of claimants. The point has been raised that to a certain degree punitive elements already exist under German law,²⁶⁵ e.g. for the violation of licence fee agreements or for the violation of specific personal rights.²⁶⁶ But these are exceptions which stem from case-law, from specific developments in areas of civil law. An introduction of treble damages would hence also be an exception, but one clearly defined and limited in scope. But the risk might be that people hear the notion "treble

²⁵⁹ Jones, Private Enforcement, pp. 231f. and van Gerven "Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts", in Ehlermann/Atanasiu, pp. 64, 91 made the proposal to award interest from the moment the damage occurred.

²⁶⁰ See sections 288, 291 BGB.

²⁶¹ Explanatory memorandum, p. 59f.

²⁶² See above 3.1.

²⁶³ Basedow, EBOR 2001, p. 466.

²⁶⁴ Explanatory memorandum, p. 60.

²⁶⁵ Monopolies Commission, pp. 40ff. although the BGH expressly did not establish a punitive character of damages, BGH of 4 June 1992, BGHZ 118, p. 339.

²⁶⁶ BGH of 5 December 1995, VI ZR 332/94, NJW 1996, 984. The so-called "Caroline" cases concern the Princess of Monaco of whom unauthorized photographs had been published in German tabloids.

damages” and then suddenly think of excessively high damage awards. That would draw a lot of attention to this issue and could create false hopes, or maybe even attract frivolous claimants looking for high damages or for lucrative settlements outside the court like it happens in the US. Furthermore, the question could be raised, why treble damages should only be available for competition law infringements and not for other damage claims. It seems that treble damages are too rigid a change in a system aiming at compensating the claimant. It is doubtful whether private enforcers need that kind of incentive to become active as “private attorney general”, because if they see a reasonable chance to get their damage compensated they will sue in court, no matter whether they get it back threefold or not. It seems to be more a question of certainty to win than a question of financial incentives to sue. If a punitive element is discussed, a higher interest rate seems more appropriate.²⁶⁷ Such a tool already exists in the late payment directive, where it is stipulated that for late payments a higher interest rate than the normal one can be charged to “discourage” such practices.²⁶⁸ The influence of the interest rate onto the total amount should not be underestimated. It has been calculated that pre-trial interest will be in most cases close to or equivalent to an award of treble damages if the period between the occurrence of the damage and the final judgements is very long.²⁶⁹ An increased interest rate can thus be a sufficient instrument to compensate the plaintiff as well as to punish or to deter the defendant. An increase of the interest rate would probably draw less attention than treble damages as the payment of interest is common under German law.²⁷⁰ It might be true that this then weakens the deterrent effect, but it will also avoid attracting fraudulent litigators hunting for high damage payments or very well paid settlements. In principle, as has been said, the proposed section 33 (3) sentence 3 GWB-E seems sufficient. If a stronger incentive for private enforcement is regarded necessary, a higher interest rate for pre-trial interest seems more appropriate, easier to introduce and less attractive for frivolous litigation than treble damages.

7.3 Bearing the costs – section 89a GWB

Section 91 ZPO rules that the party losing a court trial has to bear all the costs of the trial, that means the cost of the court and of the other party and additional cost, e.g. for an expert witness.²⁷¹ The amount to be paid is dependent on the value of the claim and increases on a diminishing scale, that means the costs increase with the value of the claim, but the higher the cost the lower the percentage

²⁶⁷ See the calculations of Jones, Private Enforcement, pp. 231 f.; Hempel, Privater Rechtsschutz, p. 298; Basedow, EBOR 2001, p. 466.

²⁶⁸ Directive 2000/35 on combating late payment in commercial transactions of 29 June 2000, OJ L 200 p. 35; see in particular the recital no. 16. This has been implemented in Germany by the *Gesetz zur Beschleunigung fälliger Zahlungen* (GBZ - Act to speed-up due payments) of 30 March 2000, BGBl. I 2000, pp. 330ff., which amends section 288 BGB and stipulates that an increased interest rate for late payments of 5 respectively 7 percent above the normal interest rate can be charged.

²⁶⁹ Jones, Private Enforcement, p. 231. Taking an interest rate of 8%, then after 10 years an amount arose which is 80% of the damage, but if compound interest are taken then the amount is even 215% of the damage.

²⁷⁰ Hempel, Privater Rechtsschutz, p. 298.

²⁷¹ Zöller/Vollkommer-Kurt Herget, § 91 no. 3.

increase. The cost risk has been revealed as one of the major obstacles to private enforcement, as a lot of people refrain from going to court as they fear being burdened with high procedural cost in case they do not succeed.²⁷² To lower this hurdle the Government has introduced the new section 89a GWB-E, which allows the court to reduce the value of the claim if the plaintiff applies for that and can plausibly expose pursuant to section 294 ZPO that the bearing of the full costs of the suit would exceed his financial means. If the court regards this statement trustworthy it can align the value of the claim (and thus the potential costs) with the financial situation of the plaintiff. This provision wants to foster collective actions of representative associations and aims in particular at consumer groups referred to in section 33 (2) no. 2 GWB-E, which the legislator expects to play an important role in the private enforcement of competition law.²⁷³ If these associations would face an unreasonable cost risk, they would probably refrain from going to court. The legislator expressly wanted to stimulate such actions and integrated therefore this rule, which is not really a novelty under German law as such provisions already exist in other laws, for instance in section 23 b UWG or section 5 *Unterlassungsgengesetz* (UKlaG - Act for claims for injunctions²⁷⁴). Both provisions also refer to collective actions of representative associations.

The risk of misuse of this provision is negligible as for instance the association must ensure that not someone else is paying directly or indirectly its costs and is using it as a representative to enjoy the reduced cost provision. Furthermore, representative groups are already under strict scrutiny of the authorities so that it is assured that the associations referred to in section 33 (2) GWB-E will reasonably use this possibility. In addition, the provision grants the competence to the court to examine every single case and base its decision pursuant to section 294 ZPO exclusively on the facts brought before it. This means it can reject a single application of an association for a limitation of the case value, but it can also demand a revision of the status of the association itself if it has doubts as to its reliability. The introduction of this rule leads to a kind of contingency fee for the lawyer, which usually is strictly prohibited pursuant to section 49a *Bundesrechtsanwaltsordnung* (BRAO – rules and procedures for the bar²⁷⁵).²⁷⁶ If the plaintiff fails with his claim the lawyer gets a fee calculated on the basis of the reduced value of the trial, but if the claimant succeeds the lawyer can claim a fee based on the real value of the trial from the defendant having lost in court. But it has to be seen that this is something different than the contingency fees usually agreed in US trials, where the lawyer of the claimant requests a part of the sum awarded, usually around 20-25%.²⁷⁷ In Germany the attorney's fee is calcu-

²⁷² Explanatory memorandum, p. 88; Monopolies Commission, p. 52.

²⁷³ Explanatory memorandum, p. 63.

²⁷⁴ BGBl. I 2001, p. 3138.

²⁷⁵ *Bundesrechtsanwaltsordnung* of 1 August 1959, BGBl. I 1959, p. 565.

²⁷⁶ Explanatory memorandum, p. 88; Hempel, WuW 2004, p. 373.

²⁷⁷ Hempel, *Privater Rechtsschutz*, pp. 220f.

lated on the basis of a law,²⁷⁸ no matter whether the fee has to be paid for the reduced value or the full value of the claim, it is not freely negotiable between the parties. Hence, section 89 a GWB-E does not introduce an American type of contingency fee. This notion should be avoided as people, when they hear it, immediately think of the excessively high fees paid in the US and thus have wrong perceptions. The consequence of this fee provision under German law has absolutely no relation to the sums paid in the US as the remuneration of the lawyer is nevertheless based on the relevant statute, just the exact amount depends on succeeding in court or not. This provision is indeed uncommon under German law, despite the exceptions mentioned above, but it is not the first step of an introduction of an American system of contingency fee arrangements into the German judicial system. It is just a more flexible approach in order to respond to the needs of claimants, in particular of representative associations.

The provision furthermore does not infringe the principle of equal treatment (Art. 3 (1) GG) as the *Bundesverfassungsgericht* (BVerfG - German Constitutional Court) has stated concerning the parallel provision in section 23 b UWG that the judicial system is allowed to treat persons differently to ensure that everybody - regardless of its financial situation – has access to the judiciary.²⁷⁹

This provision would be a useful improvement of the GWB, which could have some influence at least on the situation for collective actions as it was the intention of the legislator.²⁸⁰ The norm allows private plaintiffs to start actions in court without bearing the risk of being financially ruined in case of losing in court. On the other hand, it provides the courts with a reasonable tool to mitigate the risk of misuse. Hence, it can be said that this rather simple rule will have some supportive impact on private enforcement.

7.4 Collective actions

7.4.1 Application for injunctive relief by representative associations

In section 33 (2) GWB-E it is stipulated that the right to apply for an injunction provided for in subsection 1 also can be claimed by non profit associations fulfilling the conditions of subsection 2. The GWB-E is thus strengthening the position of non profit associations acting on behalf of e.g. traders or consumers. The right of associations for the promotion of trade interests to apply for an injunction in subsection 2 no. 1 already exists in the current version of the GWB.

In section 33 (2) no. 2 GWB-E the call for a stronger position of consumer groups in competition law has been recognized. A representative body is entitled to act on behalf of the consumers if it is recognized as a consumer group pursuant to section 4 UKlaG or Art. 4 of Regulation 98/27.²⁸¹ Section 4

²⁷⁸ The relevant statute is the *Rechtsanwaltsvergütungsgesetz* (RVG –lawyer’s remuneration act), of 5 May 2004, BGBl. I 2004, p. 718.

²⁷⁹ BVerfG of 16 January 1991, 1 BvR 933/90, NJW-RR 1991, p. 1134.

²⁸⁰ Explanatory memorandum, p. 88.

²⁸¹ Directive on injunctions for the protection of consumers’ interest of 19 May 1998 OJ EG L 166 p. 51.

UKlaG contains specific requirements, which an association must fulfil to be recognized as a consumer group. An association must have the aim, which has to be explicitly mentioned in its by-law, to look after the collective interest of consumers and to contribute to their situation e.g. by providing consumer related information or giving individual advice. The service must be pursued on a non-profit basis and on the long term; the association must be in existence for at least a year. The consumer group must have at least 75 individuals as members and must ensure that it fulfils its tasks sufficiently. These rather strict requirements shall ensure that no misuse occurs and that no organisation is just occasionally founded to litigate in a specific situation. Nevertheless, the risk of misuse seems to be rather low as the associations can only claim for injunctive relief, so there are no direct financial interests involved which could attract associations seeking for own profits.

It has to be welcomed that the right to apply for an injunction has been extended to consumer groups. This denial of standing was the more surprising as already in 1978 attempts were made to grant consumer associations *locus standi* to apply for an injunction, but at that time the legislator was too hesitant.²⁸² Granting *locus standi* will foster the work of consumer groups, which are well organized in Germany and have a very good reputation of being independent and trustworthy. As they have a lot of knowledge and expertise, they will play an active role in competition law enforcement. Furthermore, they will go to fill the enforcement gap, as they have the capacities of dealing with such cases and unlike consumers do not face any risks to start legal proceedings against big companies because of their independence. Against this background it is in particular not reasonable that the Government did the first step, but not the second, that means providing them with the right to claim damages.

7.4.2 Collective actions to claim damages

The effectiveness of the work of representative groups would be increased if the legislator would have widened the scope of section 33 (2) GWB-E to damage claims pursued by representative associations. So far, under German law collective actions are only possible to apply for injunctions, but there are several reasons which support the introduction of a possibility also to claim damages. Germany would not be the first country in the EU introducing such a tool. In France, Greece or Sweden such collective actions for damages are explicitly regulated.²⁸³

A right to claim damages for representative associations would increase the deterrent effect of competition law enforcement. An injunction has only effect for the future while a damage claim has a retroactive effect, taking away the advantages from the perpetrator. The number of potential plaintiffs would increase as well as the risk of violators of being sued in court, as it is more likely that for in-

²⁸² The *Bundesrat* had made a proposal to extend the right to claim for an injunction to consumer associations, but this was rejected by the *Bundestag*, BT-Drucksache, 8/2136 of 27 September 1978, Hempel, *Privater Rechtsschutz*, p. 56.

²⁸³ Monopolies Commission, p. 48; see the Swedish report of the study of the Commission, p. 4.

stance a consumer group will start proceedings than a single consumer, as it has the necessary means and expertise at its disposal.²⁸⁴

As has been described above, the risk of misuse is negligible as the requirements of section 33 (2) GWB-E in conjunction with section 4 UKlaG are rather strict and narrowly defined. Furthermore, the associations are under regular observation by the authorities and their status can be withdrawn pursuant to section 4 UKlaG.²⁸⁵

The problems regarding the exact amount of the damage or the purpose of the money received from the defendant are not insurmountable. With regard to the calculation of the damage there is no reason why not the same easing of the burden of proof should apply as for a single claimant. Concerning the use of the money different options are conceivable. The money could remain with the association, it could be distributed to the consumers, or the judge could be empowered to decide about the use. The claiming association could then have a right to make a proposal.²⁸⁶

It seems practical that the association can keep the money to use it for its respective purposes and in that way contribute to the interests of consumers. Eventhough this would mean that the individual claimant would not be compensated.²⁸⁷ One could also consider to leave it to the court to decide and give the association a possibility for a suggestion. This would also ensure a useful employment of the money.

It seems administratively disproportionate to distribute the money to a large number of consumers as this would require unreasonable administrative efforts of the association. In order to distribute a sum of €500.000 to approximately 20.000 consumers who suffered damages as a result of a cartel agreement would need quite a sophisticated distribution system. Furthermore, instruments would be needed to inform all consumers concerned, e.g. through announcements in newspapers and other media. The consumers would have to provide evidence for all conditions in order to be able to claim damages. They would have to show that they suffered damages as a result of the violation. The association would have to register the consumer to transfer the money.²⁸⁸ Finally, consumers must have a remedy to appeal a decision of the organisation for not acknowledging them as being entitled to any reimbursement. Furthermore, the association bears the responsibility for a correct accounting. If that is not done accurately, be it intentionally or by negligence, provisions are needed which stipulate who then would have to obtain redress. It could neither be the state nor the convicted undertaking as they did not suffer any loss. Consumers would have to claim damages then from the association, but this seems very unlikely to happen.

²⁸⁴ Monopolies Commission, pp. 48f.

²⁸⁵ Monopolies Commission, p. 50.

²⁸⁶ Monopolies Commission, pp. 49f.

²⁸⁷ Although this seems contestable, one should recognize that otherwise probably no money would be paid back at all.

²⁸⁸ It is only conceivable that money would be paid back, as the distribution of vouchers for future purchases, as it happens in the USA, is absolutely inappropriate.

Consequently, it becomes clear that a distribution of the money received would require lots of legislative amendments which seem not realistic at the moment, especially with regard to the time pressure of the legislator for the amendments currently discussed. An introduction of such a complicated tool like the class action would delay the implementation even further. Such an operation would need years of preparation to amend the relevant laws. It seems more reasonable to await a European initiative and then to consider how innovative solutions could be implemented on the European level. A proposal for a Regulation on private enforcement meant as a basis for discussion already exists.²⁸⁹ An adequately prepared form of collective action – as discussed above – would be beneficial especially for final consumers as they are in the weakest position under the current legislation and also in the current draft for the amendment of the GWB. After all it seems thus preferable to leave the additional proceeds received from the violator with the association so that it could be used for a purpose supporting public welfare.

In conclusion it can be said that representative actions asking for damages, at least at this stage, should not be introduced. In a couple of years, when hopefully some experience has been gained with a then more mature system of private enforcement, one could think about introducing a class action style of remedy for damage claims.²⁹⁰ That would need then a detailed look at the American system to elaborate the advantages while at the same time avoiding the excesses. It would then seem possible to introduce a functioning system of representative actions also for damages in Germany or maybe even on the European level.

7.4.3 Skimming-off of profits by representative associations

The new section 34 a GWB-E provides a right for representative associations to order an undertaking having infringed competition rules to pay the amount of money equivalent to the additional proceeds (skimming-off of additional proceeds), which have been incurred by that undertakings through their anticompetitive action. This possibility is subsidiary to the power of the BKartA in section 34 GWB to order a skimming-off of additional proceeds to the Treasury. Such a right of representative groups already exists under German law in the recently amended section 10 UWG. The position of representative groups in this regard is further weakened by the fact that they can only receive an order of the court, which forces the undertaking to pay the additional earnings to the Treasury. The representative claimant only gets its legal costs reimbursed. Section 34 a GBW-E is rather insufficient, it seems even quite likely that the provision will have no significance in practice at all.²⁹¹ The *Bundesrat* even proposed to leave this provision out as it would have probably no practical impact.²⁹² Not many groups

²⁸⁹ See Van Gerven, in Ehlermann/Atanasiu, pp. 90 ff.

²⁹⁰ Hempel, *Privater Rechtsschutz*, pp. 31 ff., analyses broadly the possibility of an introduction of class actions into the German system. He comes to the contestable conclusion that an introduction would be possible without complex amendments and changes, but he also refers to opponents, see, *inter alia*, Steindorff, p. 516.

²⁹¹ See the quite harsh criticism of the Monopolies Commission, p. 51.

²⁹² Comment of the Bundesrat of 9 July 2004, BR-Drucksache 441/04, p. 13.

will take the risk of suing a defendant in court knowing that they just get their costs reimbursed and can not keep any benefits. In practice this means that the groups have to bear the risk of litigation and they have to finance the trial proceedings in advance without having a guarantee of winning the case. This provision will most probably have no effect.

The legislator recognizes that the protection of effective competition is always in the interest of consumers,²⁹³ and thus the rules governing the position of representative groups have in principle to be welcomed, but it seems that the legislator has missed a possibility to introduce a regime giving especially consumer groups clear and powerful tools to fight on behalf of the consumers against anticompetitive practices.

7.5 Suspension of the limitation period

An interesting idea is the regulated in section 33 (5) GWB-E, which stipulates that during official proceedings of the national competition authorities, the Commission, or the competition authorities of other Member States the limitation period is suspended. With this rule the legislator intended to ensure that private enforcers even after a long lasting official procedure are still in the position to sue the infringer, without the risk that the claim is statute barred.²⁹⁴ If the limitation period would start running directly from the day of occurrence of the infringing act, it would be likely that the claim is already prescribed after the official proceedings have been terminated. This provision can definitely be regarded positive as it supports follow-on claims and makes them independent of the duration of previous official proceedings. The broad scope of the provision – encompassing all relevant European authorities - is in principle to be regarded positive. As the courts do not recognise the prescription of a claim *ex officio* either the defendant has to prove that a claim is prescribed or the plaintiff has to provide evidence that proceedings of competition authorities have suspended the limitation period of his claim. This can be partially troublesome in case of investigations of foreign NCA's, but this problem seems surmountable for the plaintiff.

7.6 Binding force of national and foreign official decisions

Section 33 (4) GWB-E contains a rule easing the burden of proof of the claimant. It stipulates that decisions of the BKartA, the Commission and NCAs of other Member States, as well as final judgments are binding on a court, but only concerning the establishment of the infringement of Art. 81, 82 EC. The burden of proof regarding the other facts, like the amount of the damage or the issue of causation, rests on the plaintiff.

The granting of binding effect means that the German legislator believes that all decisions of the listed authorities fulfil all necessary requirements to be recognized as binding by German courts in cases for claims of damages for a breach of Art. 81, 82 EC. This provision alleviates the burden of proof of the

²⁹³ Explanatory memorandum, p. 59; Monopolies Commission, p. 45.

²⁹⁴ Explanatory memorandum, p. 61.

claimant and could be sufficient to foster follow-on claims.²⁹⁵ Furthermore, the broad scope of the provision is encouraging as it encompasses every authority's decision or judgement establishing an infringement. It covers thus not only prohibition or cease-and-desist orders, but also other official acts which establish a violation of Art. 81, 82 EC.²⁹⁶ It is sufficient that the binding force of the decisions is limited to the establishment of the infringement. In regard of the other facts too much disparity throughout Europe prevails, which hinders the grant of binding force for instance for the calculation of damages or the issue of causality as this is not uniformly determined throughout Europe. Although it would have been a real boost for follow-on claims if other facts could also have been established with such a judgement, it is correct to limit the binding effect to the establishment of an infringement. It is not entirely clear if the decisions are only binding for the addressees of the decision or also for others involved in the proceedings, e.g. crown witnesses. A limitation to the direct addressees appears to be more appropriate as otherwise the incentive for undertakings, which acted as a whistle blower and benefited from the leniency notice, would possibly be reduced, because the undertaking then runs the risk of being sued afterwards in courts all over Europe because of the binding effect of that decision. This would be a fatal signal for the effect of tools of leniency.

The binding effect is limited to claims for damages. This approach seems too narrow as there are other claims conceivable where a binding effect would be appropriate to enhance the situation of the private enforcer, e.g. for claims because of unlawful enrichment with which the plaintiff wants to deprive the defendant of his additional proceeds.²⁹⁷ Here the legislator should have been more courageous to widen the binding effect so that other related claims, aiming at skimming-off the additional proceeds from the defendant, would be covered as well.

It is a crucial novelty and a radical change to recognise decisions of foreign authorities. Such a broad, wide-ranging provision did not exist hitherto. Concerning only clearly defined issues a recognition or a binding effect was acknowledged, mostly in bi- or multilateral agreements.²⁹⁸ It is surprising and not clear why the Government went as far as not to grant binding effect to decisions of authorities of other Member States.²⁹⁹ Such a broad unilateral recognition of foreign decisions is absolutely uncommon in international administrative law.³⁰⁰ This might send out a signal to other countries to do the same or to support a Community-wide regulation, but there is a risk that this broad scope of the rule could lead to problems with national standards of judicial protection if the foreign decision came into existence without respecting national or European basic rights of the defendant.

²⁹⁵ Explanatory memorandum, pp. 61f.; Monopolies Commission, p. 23.

²⁹⁶ Monopolies Commission, p. 23.

²⁹⁷ Monopolies Commission, p. 25.

²⁹⁸ Monopolies Commission, p. 27.

²⁹⁹ With regard to Commission decisions, Art. 16 of Regulation 1/2003 already stipulates that national court can not take decisions, which run counter to those of the Commission. In this regard the provision has only declaratory character.

³⁰⁰ Monopolies Commission, p. 27.

There already exists a regulation regarding the recognition of foreign acts: Regulation 44/2001.³⁰¹ Art. 33 (3) of this regulation empowers the deciding court to acknowledge a foreign decision. Art. 34, 35 of Regulation 44 /2001 provide some guidance to the court under which conditions a recognition is hindered, e.g. if the decision violates basic rights of the defendant like his right of being heard by the court, or if the foreign decision would contradict a national decision binding between these two parties. The court is not entitled to assess the decision on its merits, but it has to disregard decisions which are not in conformity with these basic principles mentioned above. This has been clarified by two judgements of the ECJ³⁰² and – under different circumstances - the ECHR³⁰³. The ECJ has clearly stated that it is not only the right but the duty of a state acting through its courts to disregard such violating foreign decisions as otherwise the state can be held liable for a breach of basic rights of its citizens in court. It is clear that the court has to decide about the recognition of a foreign act, but it is not apparent how a court can come to a reliable decision if it has no information about the procedures and judicial standards of authorities and courts in other countries. This information gap could lead to decisions in breach of for instance Art. 103 (1) GG (right to be heard by a court) or Art. 6 ECHR (the right of a fair trial). The legislator should have limited the recognition to national and Commission decisions. In regard to foreign authorities it would have been better to undertake at first a comparative study of the different systems of the Member States which gives a clear view about the procedures and standards of the public administrations and the judiciary. If such a study would show that the relevant procedures are in conformity with the rights of the concerned parties, the German legislator could then finally widen the scope of section 33 (4) GWB-E also to foreign authorities' decisions or it could initiate steps for a European provision, for instance in Regulation 1/2003, declaring all decisions of all concerned authorities and courts to be binding regarding the establishment of an infringement. Although the step for recognition of foreign decision must be welcomed as enhancing follow-on claims and fostering the European cooperation among authorities and courts, it comes firstly too early and is secondly only unilaterally valid, thus maybe even creating incentives to forum-shopping. At this stage this step seems to go too far and it would have been better to abstain from such a wide-ranging rule as it could provoke some complicated, troublesome cases, which finally could even lead to state liability.

7.7 Final remarks

The German proposal for the 7th amendment of the GWB contains some positive changes, but it is in total somewhat disappointing as it does not address all relevant issues. It can only be guessed whether

³⁰¹ Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 12 of 16 January 2001 (so-called "Brussels I").

³⁰² Case C-7/98 "*Dieter Krombach v. André Bamberski*", ECR I-1935.

³⁰³ ECHR of 20 Juli 2001, "*Pellegrini v. Italy*", Reports of the Judgements and Decisions 2001, VIII.

the legislator was not willing or not able to be more responsive to the needs for enhanced private enforcement while amending the GWB.

One aspect could have been the lack of time, especially with regard to issues which would have needed complex amendments of some laws as for instance the pre-trial discovery or the class action. Another aspect might be the reluctance or hesitance to be too innovative, creating means and tools which have so far not been used under German law. The rules regarding representative actions for instance are only the first step towards a more vivid system of private enforcement. It would have been possible without far reaching amendments to extend the right of representative associations also to claim for damages. Especially the limitation to apply only for injunctions or to compel the violator to pay the additional proceeds to the treasury effectively diminishing the value of these tools, the latter will probably have no practical effect.

The protective purpose requirement is another example of the hesitance of the legislator. In principle the legislator sticks to the rule, making only those changes in the application which were required by the ECJ in *Courage*. Striking out this requirement would have been encouraging for more private enforcement, a signal that the legislator is willing to strongly support private enforcers. It seems now as if the legislator is still hesitant towards a stronger role of private enforcers, although stating something different in its explanatory memorandum.

Stronger incentives would have been needed but the changes introduced are only half hearted. The rules regarding the suspension of the limitation period, the interest calculation and the possibility to align the trial costs with the financial situation of the plaintiff are definitely deserving, but they are devalued as the burden of proof with regard to the establishment of a violation and the amount of the damage occurred have only been partially lowered. In this regard stronger means should have been introduced, for instance with the introduction of a *prima facie* evidence for specific market situations or a rule requiring the defendant to disclose certain types of documents being in his possession.³⁰⁴ In this regard the legislator should have been more courageous. Unfortunately a possibility was missed to improve in particular the situation of consumers.

In conclusion it can be said that the proposal is not the big step ahead as it could have been. It does not give the strong incentives needed to boost private enforcement of competition law in Germany. Nevertheless, the number of private actions can be expected to increase, but the legislator could have done more to enhance the situation of private plaintiffs. In particular the burden of proof seems to remain a “real” burden for the plaintiff, which will make life difficult for plaintiffs in cases with ambiguous facts. The *Vitamins* cases are not a good precedent for a working system as the facts were relatively clear and only the calculation of the exact amount of the damage was at stake. In other situation it will become much more difficult to decide whether at all an infringement has taken place and strong evi-

³⁰⁴ See in this regard proposals made by Basedow, in Ehlermann/Atanasiu, p. 141; Monopolies Commission, p. 32.

dence will be needed to prove the infringement and complex economic analysis to calculate the exact damage and its causation. In these situations it will become apparent whether the amended GWB will suit the needs of plaintiffs and defendants. All doubts in this regard could not be resolved. Nevertheless, it is very likely that the provisions fulfil the requirements erected by the ECJ in *Courage*. However, the problem of offensive passing-on and the right of indirect purchasers to claim damages might need a final decision of the BGH or even the ECJ to be ultimately clarified.

Private enforcement will never become as important as it is in the US and this does not seem at all desirable. A functioning public enforcement scheme is moreover always to a certain degree the preservation of an independent and rationale policy in competition law. Private enforcement, however, will become more important and maybe even within some years play an effective role in the enforcement of European competition law rules, acting complementary to public enforcement. It will be seen whether the German GWB provides the necessary means to allow private enforcers to act as private attorney generals and to fulfil the complementary role designated for them.

8. Harmonization of private enforcement on the European level

In principle all contributions to the issue are open minded towards a stronger role of private enforcement³⁰⁵ as a stronger role is considered necessary due to an assumed decrease in the public surveillance.³⁰⁶ The question arose whether a European harmonisation of private enforcement would be desirable. In particular those who regard *Courage* to be the birth of a Community remedy for breaches of Art. 81, 82 EC express their favour for an initiative on the European level.³⁰⁷ This sounds, from their point of view, reasonable as a remedy needs at least some harmonisation to guarantee its functioning and to ensure that a minimum standard is reached in all Member States. A draft regulation for private enforcement of competition law in Europe, meant as a discussion basis, already exists.³⁰⁸

A specific harmonisation or at least some sort of voluntary coordination of legislative measures appears to be necessary to avoid competition between the countries to offer conditions favourable for either the plaintiff or the defendant, thus provoking forum-shopping. At the moment the UK could become – after the *Provimi* decision – the first choice for private actions. It should be avoided that the people, guided by very well-paid law experts offering their services for optimal enforcement, shop around for their favourable jurisdiction. Furthermore, a comparable level of legal protection must be available for everybody as this already stems from *Courage*, no matter whether one regards the judgement as the birth of a Community remedy or not.

³⁰⁵ One exception is Wils, *World Competition*, pp. 480ff. who strongly opposes private enforcement and establishes an inherent superiority of public enforcement as being more effective and cheaper than private enforcement, and serving the general interest instead of private profit motifs.

³⁰⁶ See again Komninos, p. 458 and his reference to the “enforcement gap”, see also note 14.

³⁰⁷ Van Gerven, *ECL Rev.*, pp. 520f.; Jones, *World Competition*, p. 16; Mäsch, pp. 845f. prompting the ECJ to establish the requirements needed for an effective application of the alleged EU remedy.

³⁰⁸ Van Gerven, in Ehlermann/Atanasiu, pp. 90ff.

But it must be acknowledged that it will become quite complicated to find consensus for a legislative measure in this area as a lot of relevant issues concern national procedural laws, e.g. the burden of proof, the suspension of the limitation period, or the calculation of damages.³⁰⁹ In these areas the national governments are very hesitant and reluctant to transfer their powers to the European legislator as they regard it as a core issue of the national competence. And even if the understanding would increase that European rules are preferable, it would need years to come up with a directive or a regulation receiving the approval by at least a majority of the Member States. The process now started with the publication of a Green Paper on private enforcement will thus not necessarily lead to legislative activities. The intention is to provoke a public debate and to hear the views of all concerned and interested parties.³¹⁰ The conclusion drawn from this consultation might be to take no measures at all if the Member States regard this issue sufficiently addressed at the national level

Some attempts recently made or currently undertaken show that also in this difficult area of national jurisdictions and procedural law the possibility exists to achieve a specific level of harmonization. Regulation 44/2001³¹¹ and the proposal for a so-called “Rome II” Regulation³¹² govern which court has jurisdiction and which law is applicable for non-contractual obligations and contain also some provisions regarding procedural issues. Thus, some reforms are already in the pipeline and therefore it can not be said that the Member States are completely unwilling to achieve some harmonisation in these areas. As private enforcement attracts a lot of attention at the moment³¹³ it seems as if the time is ripe to clearly identify the obstacles and start looking at ways to facilitate private enforcement before national courts.³¹⁴

The legislative attempts already undertaken in various Member States show the increased awareness of the importance of this issue, although at least the analysis of the German GWB proposal revealed that the legislator could have fostered private enforcement even more. Hence, it is very likely that within the next couple of years the role of private enforcement will become more important in Europe and that it could fulfil a complementary function to public enforcement on the national as well as on the European level. Hopefully it does not also need more than 50 years to gain momentum.

³⁰⁹ See the proposal of van Gerven, in Ehlermann/Atanasiu, pp. 90ff in the Art. 4 and 6 of his draft regulation, which address the issues of liability and exemplary damage, which are genuine issues of national procedural law.

³¹⁰ Woods, p. 460.

³¹¹ See above note 303.

³¹² Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to non-contractual Obligations (“Rome II”) of 22.7.2003, COM(2003) 427 final.

³¹³ The meeting of the International Bar Association in September 2004 in Fiesole, Italy dealt with this issue, a part of the Dutch Competition Day on the 22nd October was devoted to this topic and various seminars were or will be held to discuss private enforcement.

³¹⁴ Woods, p. 461.

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