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The “Courage”-doctrine: Encouraging or discouraging compensation for antitrust injuries?*

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Introduction

1. Private enforcement of the competition rules as an instrument of effectiveness

The adoption of the Council Regulation (EC) No 1/2003 of 16 Dec. 2002 “on the implementation of the rules on competition laid down in Art. 81 and 82 of the Treaty”¹ has a twofold aim: decentralisation and privatisation of the enforcement of the competition rules. While the first objective has been subject to an intense and controversial debate, in particular concerning the direct effect of para 3 of Art. 81 EC,² the second has found less attention, even though it has been explicitly mentioned in recital 7 where the power of Member State courts to protect subjective rights under the competition rules, “for example by awarding damages to the victim of infringements”, has been explicitly mentioned. This may be explained with the consistent Court practice of making Art. 81 (1) and 82 EC directly effective ever since adoption of Reg. 17/62. Therefore parties to an anti-competitive agreement could invoke the nullity of an agreement according to para 2 of Art. 81 and claim compensation under Art. 82 EC according to the long-established SABAM-doctrine.³ The manifold exemption regulations of the Commission in the areas of cooperation, technology transfer and distribution gave and give guidance to the parties in order to avoid collisions with the Community competition rules; they seemed to have an “anticipatory” effect on enforcement by limiting potential conflicts. This paper will however not go deeper into whether this promise has been realised.

Later developments of Community law have shown that the picture is not quite that simple. The threshold for compensation under Art. 82 EC is exceptionally high and can usually be invoked only in cases where some sort of exclusive or special right in connection with public undertakings under Art. 86 (1) EC is at stake. Art. 82 in conjunction with Art. 86 therefore has become a battleground for the more fundamental question of the relationship between Member state authority to provide or regulate “services of general economic interest”, confirmed in Art. 16 EC and now Art. II-96 of the Draft Treaty Establishing a Constitution for Europe, signed in Rome on 29 October 2004, even when disregarding the competition rules on the one hand, and the free play of a more liberal competition regime on the other.⁴ A striking example will be reported concerning litigation against the German social security rules providing for fixed amounts of compensation of medicines (Festbeträge) monitored by the associations of sickness funds (sub III).

On the other hand, it remained unclear whether violations of Art. 81 (1) EC which could not be exempted under para 3 would give rise to compensation under Community law beyond the sanction of nullity under para 2. The remedy of compensation is obviously paramount to the effective

¹ [2003] OJ L 1.

² For an overview, see Stuyck/Gilliams (eds), *Modernisation of European Competition Law*, 2002; for a critique Basedow, *Who will protect competition in Europe*, EBOR 2001, 443

³ Case 127/73 BRT v SV SABAM [1974] ECR 313.

⁴ A spectacular case has been C-41/90 Höfner and Elser v Microton [1991] ECR I-1979; Reich, *Understanding EU Law*, 2003, at p. 137, 150; Kenny, *The Transformation of Public and Private in EC-Competition law*, 2002.

enforcement of the competition rules. Community legislation so far has been silent on that point. Member State tort law was free to sanction violations of Art. 81 (1) EC under its specific rules on “statutory torts”; German law referred to § 823 para 2 BGB whereby the violation of a legislative provision – including directly effective Community law – would give rise to a tort action, provided that the norm was intended to protect individual interests (so-called *Schutznorm-* or *Normzwecktheorie*, *infra* VI, 1).⁵ Other Member states have their own rules.⁶ Obviously, these rules differed and still differ with regard to protected persons, conditions for compensation, amount of compensation, possible defences etc. The present situation is to some extent similar to the one concerning state liability for breaches of (Community) law before the ECJ, beginning with its *Francovich*-case⁷, set on to harmonise remedies by judicial action.

This paper aims to demonstrate that, with the *Courage*-doctrine⁸ to be analysed in the following paragraphs, a similar process is under way in Community law. This requires to establish a clearer picture of the potential types of injuries, defences, and consequences which may arise as result of a violation of the EU-competition rules. Therefore, the later sections of this paper will distinguish between certain factual situations where claims for compensation may be invoked against anticompetitive behaviour of undertakings. It will be suggested that a *Community specific system of remedies against violations of the EU competition rules* is developing or should be developed which to some extent supplements, and to some extent superimposes itself on national law. The basic philosophy behind this development is the more general principle: *ubi ius, ibi remedium*.⁹ This task is put on the “shoulders” of the ECJ under its “effective protection doctrine”,¹⁰ not so much on the EU-legislator.

2. The importance of the “*Courage*”-doctrine

The “*Courage*”-doctrine of the ECJ was concerned with extending compensation in case of violation of antitrust provisions where the Court held:

“It follows from the foregoing considerations that *any individual* (italics NR) can rely on a breach of Art. 85 (1) (now Art, 81 NR) ... before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision ... Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for

⁵ The leading case is BGH (Bundesgerichtshof – German Federal Court), NJW (Neue Juristische Wochenschrift) 1980, 1224 – BMW-Importe and later cases.

⁶ The leading UK case is House of Lords, [1983] 2 All.E.R. 770 – Garden Cottage Food Ltd. V Milk Marketing Board.

⁷ Joined cases C-6 +9/90 *Francovich v Italy* [1991] ECR I-5357.

⁸ Case C-453/99 *Courage v. Crehan Ltd.* [2001] ECR I-6314.

⁹ V. Gerven, *Of Rights, Remedies and Procedures*, 37 [2000] CMLRev 501 at p. 521.

¹⁰ Reich, *Understanding* at 227-230.

damages before the national courts can make a significant contribution to the maintenance of effective competition within the Community (paras 25-27).”

Even though the case only related to compensation for breaches of anti-trust provisions *within* a tying –agreement and with setting aside the defence possible under English law of “*in pari delicto*”, the Court choose a much broader formula to extend compensation to “*any individual*” (*jedermann* in German, *chaque particulier* in French). Obviously the Court did not want to limit compensation to the parties of the agreement, but extend it to third parties, possibly including consumers. This can be seen by its reference to the consequence of “absolute nullity” of an agreement violating Art. 81 (1) EC; this nullity can also be invoked by third parties; the anticompetitive agreement “cannot be set up against third parties” (para 22).

Such a broad reading of *Courage* is corroborated by referring to the opinion of AG Mischo of 22 March 2001:

“The individuals who can benefit from such a protection are, of course, primarily third parties, that is to say consumers and competitors who are adversely affected by a prohibited agreement (para 38).”

The *Courage* case must be understood as a milestone in the autonomous development of remedies for breaches of EC competition law which was initiated by AG van Gerven in his opinion in *Banks*.¹¹

It is worth mentioning that § 4 of the Clayton Act uses similar language with regard to compensation claims:

“.... *any person* (italics mine, NR) who shall be injured in his business or property....”

Therefore, this paper will briefly refer to similar issues of available defences and standing discussed under US- American antitrust laws which may be useful for sharpening EU-specific remedies for breaches of the competition rules.

The case law of the ECJ, unlike US law, is obviously only in its beginning, and its ambit must be shaped by judicial practice. We agree with *Komninos*¹² who, following prior opinions by the former AG v. *Gerven*¹³ and others, including this author⁴, argues in favour of a Community specific remedy even though

¹¹ Opinion of 27 October 1993, Case 128/92 *Banks* [1994] ECR I-1209 paras 36-45.

¹² New prospects for private enforcement of EC competition law, 39 [2002] CMLRev 447 at 473; Heine-Mernik, Die Entwicklung eines autonomen europäischen Kartellrechts, 2002.

¹³ v. *Gerven*, Substantive Remedies for the Private Enforcement of EC Antitrust Rules before National Courts, in: Stuyck/Gilliams (eds.), supra note 2 at 102

“... it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing action for safeguarding rights which individuals derive directly from Community law, provided that such rules are no less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law” (para 29).

One therefore can argue that the right to compensation originates *autonomously* from Community law, similar as state liability for breaches of Community law. Its recognition as such does in principle does not depend on Member State law, even though Art. 81 EC is silent on that point. It is not a question of competence whether such a right exists, but one of effective legal protection which is one of the basic principles of the “law” which the Community courts are supposed to observe under Art. 220 EC. It is settled case-law that Member States are under an obligation to “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”, as expressly provided now by Art. I-29 (1) of the Draft Treaty Establishing a Constitution for Europe.

3. *Open questions after Courage*

The *Courage*-decision of the ECJ is concerned with effective protection of rights and thereby, in the case before it, was opposed to a defence available under English law which would amount to an “absolute bar to such action brought by a party to a contract which would be held to violate the competition rules” (para 28). It was not opposed to a “relative defence” based on a balancing test to mitigate the liability of the party to the contract responsible for the distortion of competition. It also insisted on the national court’s responsibility to enforce these rights.

The English follow-up judgment of the High Court of 26.6.2003¹⁵ flatly denied on factual grounds any claim of injury by Mr. Crehan, the innkeeper tied by a presumably anticompetitive agreement, and did not even mention the ECJ-judgment. Was there really any need for a reference if no claim existed anyhow? In a case concerning a claim for compensation of a purchaser of vitamins from a supplier who was condemned by the Commission as a member of an illegal price cartel, the German regional court (Landgericht = LG) of Mainz in a judgment of 15.1.2004¹⁶ rejected any importance

¹⁴ Reich, *Understanding*, at p. 316; Reich/Micklitz, *Europäisches Verbraucherrecht*, 4th edition 2003 at p. 216, somewhat more cautious at p. 1127 against the critique of Weyer, *Schadenersatzansprüche gegen Private kraft Gemeinschaftsrecht*, [2003] ZEuP, 318 at 338-342 who criticises the Court to act *ultra vires*.

¹⁵ B. Crehan/Interprepreneur Pub Co & Brewman Group Ltd., per Mr. Justice Park, www.courtservice.gov.uk/judgment/files/j1827/crehan_v_cpc.htm.

¹⁶ [2004] NJW-RR (Neue Juristische Wochenschrift– Rechtsprechungsreport) 478: “anspruchsberechtigt [aus Art. 81 EG] sind nur Personen, gegen die ein Preiskartell abzielt und gegenüber denen sich ein Preiskartell unmittelbar auswirkt”.

of the *Courage*-doctrine to the restrictive German reading of *anticompetitive injury*¹⁷, in that it is limited to persons against whom a price cartel is aimed at and who are directly effected by it.

The “*Courage*”-doctrine seems to be rather “discouraging” to plaintiffs who want to claim compensation for anticompetitive injury – a paradox which needs some elaboration! The main reason for this paradox is that the Court did not clarify its concept of “any individual” even though the case at hand only concerned the party to a tying agreement. The LG Mainz therefore suggested to restrict “*Courage*” to the concrete litigation at hand and to limit its impact to removing the “*in pari delicto*”-defence. This line of argument seems to underestimate the importance of the judgment.

On the other hand, Reg. 1/2003 is shifting enforcement of competition rules to Member State institutions, including courts of law, and must therefore be concerned with private remedies against antitrust injuries. This makes necessary a sharpening of the “*Courage*”-doctrine. The new approach to exemption regulations, notably in the car sector by Regulation (EC) No. 1400/2002 of 31 July “on the application of Art. 81 (3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector”¹⁸ which we will examine in the sections IV and V, and which combines an “economic” approach with imposing certain so-called “hardcore restrictions” on the partners to the agreement, should encourage a use of the “*Courage*” doctrine for private claimants.

The main problem which has not been solved by the “*Courage*”-decision is to define available defences of cartel members and possible standing of those private parties who can bring an action for compensation of an antitrust injury. It cannot be denied that in a complex market, thousands or even millions of persons, particularly consumers who cannot pass on their damage, may be injured by anti-competitive behaviour. Shall we read “any individual” as “every individual” in a certain market to be able to claim compensation from the abuser who may also be subject to sometimes heavy fines which the competition authorities have imposed? There must obviously be certain defences available and limits to standing in compensation claims which have not yet been defined by jurisprudence, legislation or practice.

This paper tries to bring some conceptual clarity into this problem in order to make the “*Courage*”-doctrine manageable. Its conceptual framework has been laid down by a seminal paper of the former AG van Gerven who distinguishes between “rights”, “remedies” and “procedures”.¹⁹ “Rights” take their origin from Community law as developed by legislation and Court practice, eg the right to compensation for antitrust injuries. Community law, which must be autonomously interpreted and applied under the principles of “supremacy” and “direct effect” (para 19 of the *Courage* judgement) determines the existence and the limits of such a right, eg the availability of defences. “Procedures”, on the other hand, are established by the Member States under the broad principles of equivalence

¹⁷ The term “antitrust injury” is borrowed from US-American antitrust law as explained by Sullivan/Grimes, *The Law of Antitrust*, 2000, pp. 917 et seq., referring to US-Supreme Court practice.

¹⁸ [2002] OJ L 203.

¹⁹ V. Gerven, *supra* note 9.

and effectiveness. Finally, the concept of “*remedies*” lies in between and may be called a *hybrid one*, as v. Gerven shows with regard to compensation, restitution, setting aside national measures, and interim relief. It is ruled by the “requirement for uniform application”²⁰ which takes up and goes beyond the principles of equivalence and effectiveness. Here case law is only emerging, and competition law should borrow from areas where Community law has developed more rapidly and clearly, eg in the area of compensation for state breaches of Community law. The problem of remedies is concerned with such questions as standing (*Aktivlegitimation* in German) to specify the broad concept of “any individual”, causation, injury, amount of compensation, inclusion of pure economic loss.²¹

It is suggested to distinguish between the following types of antitrust injury which have played a role in recent litigation:

- Horizontal anticompetitive behaviour, especially price cartels overcharging downstream businesses (I).
- Anticompetitive behaviour of cartel members affecting actual or potential competitors in related lines of commerce (II).
- Anticompetitive restrictions in distribution agreements causing consumer injury, eg resale price maintenance, refusal to sell, absolute territorial restrictions etc (IV).
- Anticompetitive restrictions in distribution agreements, this time causing injury of independent competitors who are illegally denied access to the system (V).
- Before points IV and V can be developed, some remarks are necessary about the third-party effect of exemption regulations (III).
- Compensation issues will be discussed very briefly at the end (VI).

It will be shown in the following that points I and II are mostly concerned with the existence and limitations of “rights” under Community law, while points III- VI relate to “remedies”, in particular standing issues.

I. Antitrust injury by price cartels

I. Restrictive German court practice

Litigation before German courts, namely LG Mannheim²² and on appeal before the OLG (Oberlandesgericht = superior court of appeal) Karlsruhe²³ concerned compensation claimed by producers of foodstuff who allegedly had been overcharged for the vitamins needed for food

²⁰ V. Gerven at 504-506; Reich, Understanding, supra note 4 at p. 37.

²¹ With regard to state liability, see the discussion by v. Gerven at p. 511-512 on the conditions of state liability, criticising the omission of injury as a prerequisite of compensation.

²² Judgement of 11.7.2003, [2004] GRUR (Gewerblicher Rechtsschutz und Urheberrecht) 182

²³ Judgment of 28.1.2004, [2004] NJW 2243.

processing. These were purchased by the plaintiff from a company, member of an illegal price cartel. Cartel prices were said to be about 20 % above market price. The plaintiff asked for a judgment confirming its claim of compensation (Feststellungsklage). This was denied both by the LG and by the OLG; an appeal on matter of law (Revision) is pending before the German Federal Court (BGH = Bundesgerichtshof) who may refer the matter to the ECJ.

The main question before German courts seemingly did not concern the standing of the plaintiffs as such, eg the antitrust injury because there was clearly a case of an illegal anticompetitive behaviour which negatively affected the market position of the plaintiff by being forced to pay higher than “ordinary” market prices for the vitamins needed for food processing. The litigation was concerned with the way on how compensation can be calculated in cases where the plaintiff is able to pass on the damage to its buyers and eventually to consumers (so called passing-on defence). Both courts used a rather restrictive doctrine of compensation under general German civil law. In their opinion, the plaintiff had indeed suffered injury by paying above market prices, but was able to pass the injury on to the downstream line of commerce. At the end of the day its balance sheet was not negatively influenced by the antitrust injury. The OLG Karlsruhe, similar to the foregoing judgment of the LG Mannheim, insisted on the corresponding relation between injury and advantage:

“... der Einkaufspreis ist im betriebswirtschaftlichen Ablauf *von vonherin* (italics in the judgment) nur ein Kostenfaktor, der prinzipiell im Verkaufspreis eingeht und an die nächste Wirtschaftsstufe oder den Endverbraucher weitergegeben wird“ („in a business calculation the purchase price is *in any case* only a cost element which is included into the sales price and is passed on to the next line of commerce or to the final consumer“).

The economic theory behind the judgment of the OLG Karlsruhe may be contested. In case of perfectly elastic demand (e.g. the buyer in the next line of commerce will walk away) or inelastic supply (the seller is unable to alter output and price must remain the same), additional costs caused by the cartel pricing may not be passed on.²⁴

The German *Monopolkommission*, in a study done with regard to the amendments to the German *Gesetz gegen Wettbewerbsbeschränkungen* (GWB = Act against anticompetitive practices),²⁵ argues that even if the damage can be passed on, the first line purchaser may suffer loss of profit by a weakening of his competitive position. There is no reason to believe that he will always be able to pass on his damage, as the OLG Karlsruhe seems to suggest. It is a matter of judicial discretion (possible under German procedural law) to estimate the concrete damage which the first line purchaser has suffered. Therefore, the passing-on defence should not be allowed as an absolute one.

²⁴ Page, The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of *Illinois Brick*, 67 [1999] Antitrust L.J. 1 at p. 16.

²⁵ Gutachten zur 7. Kartellnovelle, 2004 pp. 33-36.

Notwithstanding the poor economic reasoning, the OLG rejected the claim of the purchasers of overcharged vitamins as inadmissible (unzulässig) with the rather strange argument that the plaintiff could have asked for a specified sum of compensation (Leistungsklage) instead of a mere statement that its claim is justified as such (Feststellungsklage). This is to some extent contradictory since the OLG Karlsruhe denied compensation anyhow, whatever the type of claim raised before the court.

As a result, the traditional (German) law concepts of compensation as interpreted by the OLG Karlsruhe (so-called “Differenzhypothese” = damage being the difference between the economic situation “before” and “after” the injury, whereby the “after” includes the passing-on of the damage)²⁶ is invoked to deny an anticompetitive injury under EU law, despite a clear violation of EU competition law directly causing harm to the plaintiff. EU law in theory allows “any individual” a claim for compensation, but German law by allowing the passing-on defence denies to this very same individual his claim. A somewhat puzzling result rejecting the right to compensation of the direct purchaser from cartel member, similar to the consequences of the old English doctrine “*in pari delicto*”.

2. Critique of the German passing-on doctrine

The judgments have found support²⁷, but also critique²⁸ in German legal literature. The German government is proposing a 7th amendment to the anti-competition legislation trying to put the *GWB* in line with EU law. It will include a rejection of the passing-on defence as developed by the OLG Karlsruhe, but this has given rise to controversies in legal literature.²⁹ It seems that the very last amendments will reintroduce the passing-on defence,³⁰ despite the clear support for its abolishment by the Monopolkommission.³¹ But even if this will be done by the German legislator, it does not have any influence on compensation under EU law.

It may be helpful to take a look at US-antitrust law and the practice under the above mentioned § 4 of the Clayton Act, even though EU law does not allow treble damages. The concept of antitrust injury as used in US court practice on the one hand narrowed standing for compensation, but on the other hand allowed American courts a rejection of the passing-on doctrine.³² If there is clear proof of

²⁶ The Monopolkommission at p. 42-43 correctly makes the point that under German law the concept of compensation has been broadened beyond the “Differenzhypothese” to include elements of prevention and deterrence. This concept has been taken up by the recent Directive 2004/48/EC of the EP and the Council of 29 April 2004 “on the enforcement of intellectual property rights”, [2004] OJ L 157/45, especially Art. 13 and 14.

²⁷ Benincà, Schadenersatzansprüche von Kunden eines Kartells?, [2004] WuW (Wirtschaft und Wettbewerb) 604.

²⁸ Köhler, Kartellverbot und Schadenersatz, [2004] Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 99.

²⁹ Hempel, Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle, [2004] WuW 363 at p. 369; Bulst, Private Kartellrechtsdurchsetzung nach der 7. GWB-Novelle: Unbeabsichtigte Rechtsschutzbeschränkungen durch die Hintertür? [2004] EWS (Europäisches Wirtschafts- und Sozialrecht) 62; Bechthold, Grundlegende Umgestaltung des Kartellrechts, [2004] DB (Der Betrieb) 235 at p. 239.

³⁰ Bornkamm, Die Rolle des Zivilrichters bei der Durchsetzung des Kartellrechts nach der VO 1/2003 und nach der 7. GWB Novelle, Zentrum für europ. Wirtschaftsrecht Bonn, 2003 at p. 22.

³¹ Supra note 25 at pp. 36-38.

³² Sullivan/Grimes supra note 17 at p. 926.

an overcharge by a price cartel vis-à-vis its direct purchasers, than the members of the cartel cannot profit from further competitive behaviour of the plaintiffs who may be able (or not) to pass on the damage to their clients. It is the business decision of the plaintiff whether and how he is able to pass on the overcharge; the cartel should not profit from it.³³ As a further consequence and in order to shield members of a cartel against frivolous or unsubstantiated claims, to avoid unnecessary complicated litigation, to provide direct purchasers with incentives to sue, and to prevent multiple liability for defendants, indirect purchasers cannot claim compensation, e.g. businesses and consumers on the further downstream line of commerce or distribution.³⁴ In US-antitrust law, there are certain exceptions to the “*indirect purchaser rule*”, e.g. cost plus contracts and purchaser control of seller.³⁵ The latter situation is frequently found in vertical distribution agreements where the supplier or franchisor illegally imposes prices or territorial restrictions on his distributors or franchisees (infra IV).³⁶ Even though that this indirect purchaser rule has been strongly criticised in US doctrine and has been abolished in several states,³⁷ it still makes sense in cases of antitrust injury by horizontal restraints where there is a need to limit the potential claimants to those who have *directly* suffered damage from the illegal practice.

As far as German and EU practice is concerned, the US case law seems to strike a reasonable balance between on the one hand effectively allowing compensation by rejecting the passing-on defence, and at the same time banning excessive claims in the downstream line of commerce by adopting the indirect purchaser rule, subject to certain exceptions. It allows an adaptation of the general law of compensation to the specifics of an antitrust injury: members of the cartel should not profit from the competitive behaviour of their purchasers; therefore, the price overcharged must be regarded as damage, even if the purchaser is successful in passing-on the overcharge. It is not a valid argument as advocated by a traditional reading of German civil law that the rules on compensation should not lead to an unjustified enrichment of the plaintiff (“*Bereicherungsverbot des Schadensrechts*”) because the “enrichment” is due to autonomous business decisions and is in no way linked to the anticompetitive behaviour of the cartel. As will be remembered from the *Courage*-judgement (para 30), the Court is not opposed to a rule of national law preventing “unjust enrichment” of persons enjoying rights under Community law, provided that this is not an absolute defence and can be established as a matter of fact. The main problem however will be to find out the competitive market price against which the cartel price can be compared. The stronger and “more successful” the cartel can impose its pricing on downstream purchasers like in the vitamin cases, the more difficult will be the calculation of a market price because there simply is no market under

³³ *Hannover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 US 481 (1968).

³⁴ *Illinois Brick Co. v. Illinois*, 431 US 720 (1977).

³⁵ See also the remarks of the Monopolkommission, supra note 25 at pp. 37-39

³⁶ Sullivan/Grimes at p. 930.

³⁷ See *California v. ARC America Corp.* 490 U.S. 93 (1989) where the Supreme Court found that Congress had not pre-empted the field of antitrust law because states had traditionally regulated that conduct; critique by Bauer, *Reflections on the Manifold Means of Enforcing Antitrust Laws: Too Much, Too Little, or Just Right?* 16 [2004] *Loy. Consumer L.Rev.* 303.

competitive conditions with which the cartel price can be compared. In this case, the court should be allowed to estimate the market price and thereby establish the amount of compensation due.³⁸

Furthermore, the “indirect purchaser rule” seems to correspond to ECJ pronouncements in state liability cases where always a “*direct* causal link” between the breach of a Community rule and the injury of the plaintiff is required.³⁹ The above mentioned case of overcharging of a direct purchaser by the price cartel would obviously fulfil the requirement of a “direct causal link”, while further downstream injury, including the final consumer, would normally not give raise to compensation. Such a limitation seems to be justified in order to allow a reasonable limitation of damages and to avoid complicated questions of proof. From a consumer point of view, such a limitation may not be satisfactory but the individual consumer – and even a group of consumers – would hardly be able to specify their damages as in the vitamin cases. How could one calculate or only estimate the amount of overcharge to the individual consumer even if in the upstream line of production the price for vitamins exceeded the market price of 20 %, while the vitamins may only constitute a trifle element in the composition and therefore the price of the finished product?

It seems therefore justified to take over the US- American experience with antitrust injury and to reject on the one hand the passing-on defence, but limit on the other hand indirect purchaser claims without excluding it completely⁴⁰. This line of argument would conform to the basic spirit of the “*Courage*”-doctrine itself, namely the principle of “effectiveness” as a central element of compensation under autonomous Community law. It implies that the (illegal) cartel cannot shield itself behind the (legal) competitive behaviour of the purchaser who may (or may not) be able to pass on his damage in the downstream line of commerce. If the passing-on defence were legitimate, it would take away from Community law of antitrust injury its practical effectiveness (*effet utile*). Antitrust remedies also should serve as a deterrent to potential abusers, while at the same time providing redress to harmed parties.⁴¹

In this context, the *San Giorgio*-judgment⁴² could be cited as support to rejecting an absolute passing-on doctrine. The case concerned an Italian rule requiring that those who sought repayment of unduly levied import charges to prove through documentary evidence that the charge had not passed on and in absence of such proof the charge was presumed to have been passed. Although the ECJ upheld its position that Member States may withhold repayment of unlawful charges where it could lead to unjust enrichment, the Court did not accept the evidentiary rule. The Court found that it

³⁸ Köhler, *supra* fn. 28 at p. 103, Monopolkommission *supra* note 25 at p. 35.

³⁹ Reich, *Understanding*, *supra* note 4 at p 308-309, referring to the leading joined cases C- 46 and 48/93, *Brasserie de Pecheur v Germany* and *R v Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029; see also case C-319/96 *Brinkmann Tabakfabriken v Skatteministriert*[1998] ECR I-5255; critique by Tridimas, *Liability for Breach of Community Law*, 38 [2001] CMLRev 301 at p. 305.

⁴⁰ The Monopolkommission at p. 39 insists that a complete ban of indirect purchaser claims would be against the *Courage*-doctrine.

⁴¹ For an economic analysis of the passing-on defence see Dubow, [2003] E.C.L.R. 238.

⁴² Case 199/82, *Amministrazione delle Finanze dello Stato v S.p.A. San Giorgio* [1983] ECR 3595

rendered it “virtually impossible or excessively difficult” to exercise the substantive Community right (para 13). Even though this case concerned questions of restitution, not of compensation, the reasoning is certainly similar: the exercise of a Community law right should not be made excessively difficult by absolute defences allowed in Member State law, eg on unjust enrichment.

Therefore, the judgment of the OLG Karlsruhe, even if it can be justified by German rules on compensation, does not conform to requirements of EU law. It is hoped that the BGH on Revision will either reject the passing-on defence or ask the ECJ for a preliminary ruling on this question which is vital for the further development of an autonomous Community law of antitrust injury.

II. Compensation of competitors against antitrust injury by cartels

1. The German litigation concerning price fixing by associations of sickness funds

The classic case giving rise to antitrust injury occurs when members of a cartel, market dominating enterprises etc. impose boycotts, refusals to supply, discriminatory treatment and similar anticompetitive practices to their competitors or to other businesses in a neighbouring market. Usually these cases are treated more or less satisfactorily by national antitrust laws, including of course the German GWB, and therefore EU law does not need to be invoked.

An exception may occur when EU competition law takes supremacy over conflicting national law and therefore can be invoked to set aside Member State provisions allowing anticompetitive behaviour which may contradict EU law. In these cases it is particularly important to establish the antitrust injury in order to avoid an encroachment of EU law into areas of Member State competence.

Such a conflict situation occurred when the indirect price fixing of medicines as prescribed by German social security law was challenged under EU competition law. This rather complex litigation, which came before the OLG Düsseldorf⁴³ and (on Revision) before the Bundesgerichtshof, was finally resolved by the ECJ.⁴⁴ It has a rather complex background which cannot be developed in detail here. The point of interest with regard to compensation concerned the pronouncement by the OLG Düsseldorf that the German sickness funds which are involved in a mechanism of social security law to keep prices of non-patented (generic) medicines down by setting fixed minimum amounts (*Festbeträge*) for reimbursement. OLG Düsseldorf regarded this as anti-competitive practice to the detriment of the producers of proprietary drugs and thereby condemned the sickness funds to pay compensation.

⁴³ OLG Düsseldorf [1999] EuZW (Europäische Zeitschrift für Wirtschaftsrecht) at. p. 188.

⁴⁴ Joined cases C-264/01 et al, AOK Bundesverband et al. v Ichtjol-Ges. Cordes, Hermani & Co et al. [2004] ECR I- not yet published

2. *The unresolved problem of standing of producers of proprietary drugs*

The ECJ in its judgment of 16.3.2004 finally ruled that the fixing of *Festbeträge* does not amount to an anti-competitive practice because the associations of German sickness-funds cannot be regarded as “associations of undertakings” in the sense of Art. 81 EC. The imposition of fixed minimum amounts for medicines following criteria laid down by the legislature cannot be said to be an “economic activity” giving rise to an antitrust injury.

This sweeping statement clarified a number of further questions, including the one on compensation, but this notwithstanding the litigation is interesting from a point of view of standing of the producers of proprietary drugs. Can they be regarded as “any individual” having suffered from an anticompetitive injury? Under the “direct injury” doctrine as developed by German courts this does not seem to be a matter of doubt. The fixing of *Festbeträge* was indeed intended to lower the prices of medicines by proprietary manufacturers to the price level of generic drugs. Its main objective was to allow savings for sickness funds, but this could only be reached by imposing limits on reimbursement which had the effect that the manufacturers were forced to realign their prices in order to stay in the market.

On the other hand, and this was not really debated by the OLG Düsseldorf, the fixing of *Festbeträge* cannot be regarded as “antitrust injury” but as an action which is the result of a legal obligation put onto associations of sickness funds. If this legal mechanism allowing or even prescribing to impose *Festbeträge* violates Community law, the (German) state should pay compensation under the doctrine of state liability for breaches of Community law, but not the sickness funds themselves.⁴⁵ In relation to the German sickness funds, the producers of proprietary medicines are not “any individual” because they are not caught by the protective ambit of antitrust law.

This cases clearly shows that the *Courage*-doctrine allowing compensation to “any individual” must be narrowed down by analysing the ambit of the antitrust injury in question. If there is no antitrust injury (but perhaps some other form of injury), than the *Courage*-doctrine cannot be applied, and the broad concept of “any individual” is without meaning.

III. Exemption regulations and their effects on the concept of antitrust injury

1. *Direct effect of exemption regulations*

In traditional Community law practice, exemption regulations only had a limited direct effect. They concerned the validity or nullity of an agreement in the sense of Art. 81 (2) EC with a possibility to invoke a mere partial nullity, but did not intend to regulate the relations between the parties as such

⁴⁵ Reich, Rechtfertigung der Festbetragsregelung durch GKV-Spitzenverbände nach Art. 86 EG? [2000] EuZW 653 at 658.

or create rights of third parties.⁴⁶ This doctrine may lead to “absolute nullity” of the agreement which can be invoked by third parties which are not part of the contract.⁴⁷ However such an extension of the nullity doctrine would not allow for compensation, but only for restitution.⁴⁸

Regulation (EC) 1/2003 may have brought about a change of the traditional view of the legal effects of exemption regulations. According to Art. 1 (1) and (2) of Reg. 1/2003, Art. 81 (1) and (3) EC are both directly applicable. Where a regulation defines the conditions for an exemption, like Art. 3 or 4 of Reg. 1400/2002, this implies an automatic violation of Art. 81 (1), giving rise to compensation and injunctive relief under the *Courage* doctrine. The direct effect of exemption regulations has thus been extended in specifying violations of Art. 81 (1). It is suggested that beyond pursuing the sanction of nullity, or the Commission withdrawing the exemption privilege (Art. 6 of Reg. 1400/2002), the theory of *direct effect* via compensation should additionally be used to combat transgressions of exemption regulations. Such a paradigm shift would make sanctions against violations of the competition rules much more effective because it would allow third parties to claim compensation or injunctive relief if the parties to an anti-competitive yet exempted agreement do not stick within the limits of exemption. It would encourage decentralised enforcement of the competition rules via national courts of law, which is one of the objectives of the new Reg. 1/2003.⁴⁹

2. “Hardcore restrictions” in exemption regulations

The new exemption practice of the Commission allows partners of a distribution agreement a broad area of cooperation, but blacklists certain clauses which are now called “hardcore restrictions”. This practice was first initiated by Art. 4 of Regulation (EC) No. 2790/1999 of 22 December 1999 “on the application of Art. 81 (2) of the Treaty to categories of vertical agreements and concerted practices”⁵⁰ and was repeated in Art. 4 of Regulation 1400/2002 whose importance in the consumer (IV) and independent competitor interest (V) will be analysed in the following. Both Regulations take a broad approach to those restrictions. It is sufficient that the vertical agreement in question has as its object “directly or indirectly, in isolation or in combination with other factors under the control of the parties”, to restrict specified aspects of competition. In its explanatory brochure, the Commission describes them as “severely anti-competitive restraints”.⁵¹

These hardcore restrictions are only forbidden when they are part of an *agreement* or concerted practice, not the result of a unilateral action. This conforms to the rather traditional approach to

⁴⁶ Case 10/86 VAG France v. Magne [1986] ECR 4071 para 12; C-234/89 Delimitis v. Henninger Bräu [1991] ECR I-935 at para 40; Bundesgerichtshof NJW 1994, 1651 (concerning franchising agreements).

⁴⁷ L. Cornelis/H. Gilliams, Private Parties’ Entitlement to Damages on Account of Infringement of the Competition Rules, in: Stuyck/Gilliams supra note 2 at p. 163, referring to case 22/71 Béguelin [1971] ECR 949 para 29.

⁴⁸ Cf. Cornelis/Gilliams at p. 169; v. Gerven, supra note 2 at p. 104-106.

⁴⁹ van Gerven supra note 2 at p. 112-125; Lenaerts, Modernisation of the Application and Enforcement of European Competition Law, in: Stuyck/Gilliams supra note 2 at p. 32; Reich/Micklitz, supra note 14 at p. 151.

⁵⁰ [1999] OJ L 336/21

⁵¹ At p. 28.

competition law whereby Art. 81 EC does not cover unilateral anti-competitive behaviour but requires an agreement respectively a concerted action by the parties of the exclusive or selective distribution or franchising system. There must be some sort of *collusive* behaviour between the supplier and the distributor in order to make Art. 81 (1) EC respectively the prohibition on hardcore restrictions applicable. Unilateral anti-competitive behaviour is only forbidden under the much higher threshold of Art. 82 EC, namely abuse of a market dominating position; a mere relative dependency situation (*relative Marktmacht* resp. *Abhängigkeit*) as in German competition law is not enough.

It is sufficient, under the existing case law of the ECJ, that this refusal happens within a distribution system based on vertical agreements to which the other partners as least implicitly agree.⁵² The exact requirements of such an agreement have been before European courts in the *Bayer* case.⁵³ A unilateral action by the supplier, *eg.* a quota system in allocating his products to wholesalers in order to prohibit unwanted exports were not sufficient evidence of an “agreement” according to the judgement of the CFI of 26.10.2000.⁵⁴ The CFI wrote:

“... A distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Art. 81 (1)..., the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. This is the case in particular with practices and restraints in matters of competition., which, though apparently adopted unilaterally by the manufacturers in the context of his contractual relations with its dealers, nevertheless receive the at least the tacit acquiescence of these dealers” (para 70).

On appeal before the ECJ, *AG Tizzano* in his opinion draws a distinction between those cases where the anti-competitive behaviour happens within a selective or exclusive distribution system where usually no additional “agreement” is necessary, or a unilateral action within a simple contractual relationship which would need at least implied consent of the other side in order to be caught by Art. 81 (1).⁵⁵ One could also refer to the *Pioneer* case⁵⁶ where a concerted action between suppliers (of electronic goods) and distributors against outsiders existed.

In its judgement of 6 January 2004⁵⁷, the ECJ basically confirmed the opinion of the CFI:

“The mere fact that the unilateral policy of quotas implemented by Bayer, combined with the national requirements on the wholesalers to offer a full product range, produces the same effect as an export ban does not mean either that the manufacturer imposed such a ban or

⁵² Cf. the *Ford* cases 25 + 26/84, [1985] ECR 2725 para 21

⁵³ Cf. the opinion of AG Tizzano of 22 May 2003 in joined cases C-2+3/01 P

⁵⁴ Case T-41/96 Bayer/Commission [2002] ECR II-3383

⁵⁵ This happened in case C-277/87 Sandoz prodotti farmaceutici/Commission [1990] I-45

⁵⁶ Case 100/80 [1983] ECR 1825.

⁵⁷ Joined cases C-2/01P and C-3/01 P Bundesverband der Arzneimittelimporteure et al. v Bayer AG et al. [2004] ECR I-(6.1.2004).

that there was an agreement prohibited by Art. 81 (1)... (para 88)... For an agreement .. to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers... (para 102)... (T)he mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists” (para 141).

These rather strict requirements of the ECJ with regard to proof of an agreement in the sense of Art. 81 (1) seem to narrow down substantially the concept of an antitrust injury. On the other hand, the anticompetitive practice must be seen within its economic context. In the Bayer case, as AG Tizzano rightly pointed out, there was no vertical distribution system as in the areas covered by the exemption regulations 2790/1999 and 1400/2002. If the latter are applicable, it is suggested that, if a practice amounting to a “hardcore restriction” can be shown to exist, there is a presumption that the anti-competitive behaviour is part of the (distribution) agreement even if initiated by one party, but at least implemented or tolerated by the other. There should be a *prima facie* case for an implied agreement which is sufficient proof for a violation of Art. 81 (1) in conjunction with Art. 4 of Reg. 1400/2002, unless the parties to the distribution agreement show evidence to the contrary. The argument of the Court in its *Anic* judgement⁵⁸ could be used in this context:

(Once the Commission or the private plaintiff has shown that the undertaking charged with anticompetitive behaviour, NR) “participated in a meeting where the price initiative had been decided on, planned and monitored, it is for (this undertaking, NR) to adduce evidence that it had not subscribed to those initiatives.”

The privilege of intense cooperation allowed by the exemption regulation must be balanced by a strict prohibition of hardcore restrictions, the implementation of which is the responsibility of both parties to the agreement. Third parties usually do not know the details of the agreement and the practice of its implementation. They need particular protection against antitrust injuries, a protection which should not be made impossible by overly strict rules on the burden of proof.

IV. Implementing the “hardcore restrictions” in the consumer interest

1. Hardcore restrictions and available remedies in case of violations

Some of the “hardcore restrictions” of Art. 4 of Reg. 14000/2002 either directly or indirectly concern the consumer interest in the distribution of new cars and after sales service. They contain a catalogue of forbidden practices in distribution agreements covered by the Regulation which is

⁵⁸ Case C-49/42P Commission/Anic [1999] ECR I-4125 para 96.

directly applicable. Its protective scope of application can be concretised by referring to the German “*Normzwecktheorie*”⁵⁹ used in tort law. In order to define the parties who may claim for compensation in cases of breach of a statutory duty according to § 823 (2) BGB, it is necessary to specify the rights and interests which a legal norm forbidding a certain behaviour wants to protect. This may vary according to the circumstances.

This line of argument has been taken up by a recent judgement of the ECJ with regard to state liability: If a depositor claims compensation for loss of his bank deposit beyond the minimum guarantee of Dir. 94/19/EC⁶⁰ against a Member State because its banking supervisory authorities have not fulfilled their duties of care with regard to solvency as required by EU and national law, it must be determined whether such duties exist vis-à-vis the individual or against the general public at large. The ECJ has insisted on the second reading which therefore excludes individual claims against the state: these directives do not confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision, a supervision which is directed at safeguarding the stability of financial markets.⁶¹

Antitrust law, on the other hand, has an element of protecting individual market partners. The specifics of antitrust injury which have been mentioned above must therefore be kept in mind. Most of all, the interests of direct competitors and purchasers need protection. The *Courage*-doctrine allows an extension to the tied, usually weaker party to a restrictive agreement. It can be extended to undertakings up- or downstream in a certain market, which will be discussed in the next section (V). It may under certain circumstances also include consumers when the interdiction of Art. 81 (1), as concretised by a specific exemption regulation, intends to protect the interests of consumers.⁶² Thereby it is possible to define at the same time the “any individual”, in the sense of the very broad wording of *Courage*, who may enjoy a right of compensation (*Aktivlegitimation*) in case of violation. Art. 4 is a directly applicable concretisation of Art. 81 (1) EC. It is therefore necessary to determine standing for every type of forbidden behaviour.

2. *Direct and indirect restrictions*

When discussing details of the hardcore restrictions, one must keep in mind that they are only applicable to vertical agreements (including concerted practices) which have as their *object* certain restrictions; a mere effects test is not enough. A very narrow reading of this requirement would insist

⁵⁹ Van Gerven et al., *Cases, Materials and Text on National, Supranational and International Tort Law*, 2nd ed. 2000, at p. 306

⁶⁰ Directive 94/19/EC of the EP and the Council of 30 May 1994 on deposit guarantee schemes, [1994] OJ L 135/5; for a discussion Reich, *Understanding supra note 4* at p.309.

⁶¹ Case C-222/02 Peter Paul at al v Federal Republic [2004] ECR I-(12.10.2004).

⁶² Micklitz in Reich/ Micklitz *supra note 14* at 1128-1131.; Stuyck, *La place des consommateurs dans le nouveau système d'application des Art. 81-82 CE*, dans : Nihoul (ed.), *La décentralisation dans l'application du droit de la concurrence*, 2004, 191-223 with detailed references.

that the restriction on consumer choice which will be discussed below must be contained in the exempted agreement itself.

Such a narrow approach however is not justified. According to Art. 4 (1) of Reg. 1400/2002 it is sufficient that the vertical agreement, “directly or *indirectly*, in isolation or in combination with other factors under the control of the parties, has as its object...” This reference to an “indirect” object has so far not been used extensively in competition law.⁶³ It is well known from the case law of free movement which also forbids indirect discriminations.⁶⁴ In its explanatory brochure⁶⁵ the Commission wrote:

“This broad definition indicated that each of the hardcore restrictions can be brought about through one or more indirect means, and that in practice this may result in an anti-competitive outcome similar to that resulting from the express inclusion of the restriction in question in the written contract. Hardcore restrictions may of course take the form of outright prohibitions, but may also consist of limitations, financial disincentives, pressures or obstacles to certain activities or transactions”.

The supplier or distributor as party to an agreement under Reg. 1400/2002 thus will have violated the “hardcore restrictions” if the underlying agreement or its implementation makes easier, penalises or rewards in some other way the anti-competitive behaviour. An “express” clause violating Art. 4 is not a necessary condition. The anti-competitive “object” can be inferred from the behaviour of the parties to the agreement in question.

3. *Specifying the consumer interest*

Since Reg. 1400/2002 wants to allow consumer choice even in a market where some anti-competitive practices are exempted in the interest of “efficiency”,⁶⁶ certain hard-core restrictions are expressly forbidden in the consumer interest. These *consumer protective* provisions of Art. 4 (1) are

- restrictions of price competition, particularly by restricting the distributor’s or repairer’s ability to determine its sale price, but allowing at the same time the setting of a maximum sale price or to recommend prices, lit. (a)
- territorial restrictions with certain exceptions for exclusive supply agreements, eg concerning active sales, lit. (b) (i);

⁶³ Case 56/65 *Société Technique Minière v. Maschinenbau Ulm* [1966] ECR I-235 whereby it is sufficient that the anti-competitive practice may *indirectly* affect trade between Member States. Art. 6 (1) Nos. 6-7 of Reg. 1475/95 also included *indirect* restrictions of price competition and refusals to supply.

⁶⁴ As an example out of many see case C-405/98 *Gourmet/Konsumentombudsmannen* [2001] ECR I-1795 concerning the question whether the Swedish restrictions on advertising for alcoholic beverages are an indirect discrimination vis-à-vis foreign suppliers to free movement of goods under the Keck-doctrine.

⁶⁵ At p. 29.

⁶⁶ For example quantitative criteria in selective distribution systems where the market share of the supplier is 40 % for the sale of new motor cars which would otherwise be caught by Art. 81 (1), case 26/76 ECR *Metro/Commission* [1977] 1875 para 20.

- restrictions of active and passive sales to end-users by members of a selective distribution system operating at retail level, lit. (d);
- restrictions of the distributor's ability to sell any new motor vehicle which corresponds to a model within its contract range, lit. (f).

The interdiction contained in lit. (f) is particularly important for the consumer interest to purchase a car at any place in the internal market and to some extent a follow up of the earlier "intermediary clause" of Art. 3 (11) of Reg. 1475/95.⁶⁷ Therefore, recital 14 reads:

"The right of any distributor to sell new motor vehicles passively or, where relevant, actively to end users should include the right to sell such vehicles to end users who have given authorisation to an intermediary or purchasing agent to purchase, take delivery of, transport or store a new motor vehicle on their behalf

Unlike the earlier provision, this authorisation must not be given prior to the contract and in writing.⁶⁸ The recitals list some indirect restrictions of this right of the consumers to purchase a car where ever he/she wants, eg by sales targets or bonus schemes which are based on territorial criteria, thus eliminating incentives for the distributor to sell "cross-border". If a distributor has refused to service a consumer "cross border" without valid economic reason, there may even be a presumption that this refusal is based on a restrictive practice, and that the consumer could claim compensation for non-delivery. Freedom of contract is limited here in the interest of consumer choice. No distributor is required to enter into a contract with a potential client, but in exceptional circumstances the refusal to contract is forbidden when it amounts to a violation of the hardcore restrictions of Art. 4 Reg. 1400/2002.

On the other hand, certain restrictions are "so far" away from the consumer interest that they are not covered by an appropriate interpretation of the "Normzwecktheorie". They do not constitute an antitrust injury towards the consumer. This is particularly true with regard to the restrictions of market access to independent repairers within the definition of Art. 1 (1) lit. (m) of Reg. 1400/2002.⁶⁹ The same is true with producers of "original spare parts" in the sense of lit. (t). Such a restriction may in effect make the repair costs of the consumer higher and therefore seemingly give rise to a claim in compensation or restitution. But the consumer suffers only indirect damage. The above mentioned "indirect purchaser rule" would be applicable here, too. The anti-competitive action is really directed against the independent repairer or the spare part producer. They are the ones that suffer direct damage from this anti-competitive action. It is a question of competition law how far their interests in free market access are protected, and whether they can claim compensation or ask for injunctive relief in case of breach. This will be discussed in the following section.

⁶⁷ For a definition cf. cases T-9/92 Peugeot/Commission [1993] ECR II-493, upheld on appeal in case C-322/93P [1994] ECR I-2727 and the discussion by Reich in Reich/Micklitz supra note 14 at p. 187.

⁶⁸ Reich/Micklitz supra note 14 at p. 192.

⁶⁹ Cf. case C-349/95 BMW Nederland v. Ronal Karl Deenink [1999] ECR I-905 concerning trade mark law, insisting on the right of the independent dealer to use the BMW logo to advertise his services.

The indirect purchaser rule is however not applicable if the consumer does not purchase the car directly from a member of the distribution system, but from a dealer further downstream. It is here where the above mentioned exception of the indirect purchaser rule applies (supra at I 2). According to US- American practice,⁷⁰ the consumer damage consists in the overcharge because of price fixing or other types of anti-competitive practices which violate the hardcore restrictions.

V. Independent competitor protection

1. The interface between consumer and independent competitor protection

The best rules on consumer protection, even if having direct effect in the context of the hardcore restrictions, are meaningless when the consumer does not find businesses who can activate his or her freedom of choice. In the car distribution sector, these are the producers of “original spare parts” and non-franchised repairers, which will be called “independent competitors”. Reg. 1400/2002 is very much concerned on improving their position vis-à-vis the distribution system. Their access to the servicing market is guaranteed by a number of provisions in Art. 4 on “hardcore restrictions” which should be implemented in a similar way as those aiming at directly protecting the consumer, namely via injunctions or – if no other remedy is available – finally via compensation. Interim relief via injunctions to be granted by national courts in competition proceedings is a particularly important remedy for independent competitors because it allows them to stay in business and to fulfil the contract with the consumer they have entered into. The consumer, on the other hand, will not be tied in his needs to service his car by the distribution chain where he purchased the car (with the exception of warranty work) but he is free to choose the most attractive service firm.

Frequently car manufacturers invoke the complexity of technology and the quality argument to restrict consumer’s freedom of choice. They seem to imply that independent repairers cannot do the same job as authorised repairers. This general assertion need not be true and is the result of a rather paternalistic way of thinking: since the consumer cannot protect himself against bad quality servicing of his car, his needs must be taken care of by specially selected repairers. Such a view denies the progress in technology which is now available also to independent repairers, or should be made available to them by certain clauses in the distribution agreement. At the same time, the consumer should not even indirectly be denied to contract with whatever repairers he thinks will best fulfil his needs; in case of non-performance he will have available the general remedies under the applicable civil law in the context of the unfair terms directive 93/13/EC.⁷¹

2. Independent competitor protective provisions

⁷⁰ Sullivan/Grimes, supra note 17 at p. 934.

⁷¹ [1993] OJ L 95/29.

The above suggested *Normzwecktheorie* will help to define the antitrust injury by violating “hardcore restrictions” which are intended to protect independent competitors. They are the following:

- Restrictions on the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use these parts for the repair and maintenance of a motor vehicle, Art. 4 (1) lit. (i);
- The restriction agreed between a supplier of original spare parts or spare parts of matching quality, repair tools or diagnostic or other equipments and a manufacturer of motor vehicles which limits the supplier’s ability to sell these goods or services to authorised or independent distributors or to authorised or independent repairers or end users.
- The restriction of a distributor’s or authorised repairer’s ability to obtain original spare parts or spare parts of matching quality from a third undertaking of its choice (with an exception concerning warranty and recall work).
- Refusal by the suppliers of motor vehicles to give access to electronic control and diagnostic systems; items protected by intellectual property rights shall not be withheld “in any abusive manner”, Art. 4 (2).

The recitals list some of these indirect restrictions.

They include (supra III 2)

- No. 16 – sales targets, quotas, bonus systems, remuneration based on territorial criteria,
- No. 17 on not honouring warranties for cars sold in the common market;
- No. 20 – discriminatory or unjustified supply conditions for purchases in the common market.

3. *Freedom of contract v. unjustified refusals to sell*

Art. 4 (2) of Reg. 1400/2002 by appearance prohibits *unilateral* refusals by the supplier to contract with independent competitors. This seems to be corroborated by recital 26 insisting that “motor vehicle manufacturers must allow all interested operators to have full access to all technical information...”.

The explanatory brochure insists that this access must be “non-discriminatory, prompt, and proportionate”.⁷² The supplier may ask for payment, but it should not be above that asked to its dealers.

However, the language of the regulation is not correct since such refusal must be part of the agreement as mentioned above (supra III 2). If the interpretation suggested here is taken up, then such refusals under the directly applicable Art. 4 (2) of Reg. 1400/2002 will usually allow not only a

⁷² Supra note 65 at p. 65 -70.

damage action by independent operators who are excluded from information without justification, but also, under the *effet utile* doctrine, an *injunction* against the manufacturers to furnish such information, under the conditions mentioned in Art. 4 (2) para 3. This again limits freedom to contract, but is the result of an anti-competitive behaviour provoked within an exempted distribution system. Freedom of contract is not an absolute good, but must be exercised within the limits of competition law.

4. *Abuse of intellectual property rights*

The concept of abuse with regard to intellectual property rights which comes under the prohibition of Art. 4 (2) obviously refers to the *Magill* case,⁷³ without requiring market domination, but some sort of at least concerted action in the above mentioned sense. The explanatory brochure makes express reference to the practice under Art. 82 EC.⁷⁴

It is important to establish the special circumstances which exceptionally make the use of an intellectual property right abusive, eg monopolising a neighbouring market, denying a service for which there is consumer demand.

Recital 26 does not give any hint on the concept of abuse. It is the obvious intention of Art. 4 (2) to allow independent repairers access to technical information which they need to enter the repair market. Usually this information will not be protected by intellectual property rights, eg copyright. Even if this is the case, the question of a possible exhaustion of such rights which are already used on the market must be examined.

VI. **Conditions for compensation or injunctions**

1. *Rights, remedies and procedures*

In using the analysis of the former *AG van Gerven*, we have distinguished between “rights, remedies and procedures”.⁷⁵ In the cases of antitrust injury discussed here under the “*Courage*”-doctrine, the origin of rights of potentially injured persons lies in directly applicable Community law provisions, in the case of the competition rules Art. 81 and 82 EC; in certain cases of consumer and independent competitor injury in the car market they are supplemented by Art. 4 of Reg. 1400/2002. At the same time, an EC-specific *Normzwecktheorie* as suggested here would be able to define the antitrust injury and thereby the persons who come into the protective ambit of Community law and who enjoy standing. This has to be determined on a case-by-case basis. The

⁷³ C-241/91P [1995] ECR I-743 with the clarification by *Bronner*, C-7/97, [1998] ECR I-7791 para 40, as recently confirmed by case C-481/01 *IMS Health v NDC Health*, [2004] ECR I-(29.4.2004).

⁷⁴ *Supra* note. 65 at p. 65

⁷⁵ *Supra* note 9.

“any individual” is not “every individual,” but only the person which is specifically protected against the type of antitrust injury:

- In the case of a horizontal price cartel, only direct purchasers are protected, and the cartel member is normally not allowed to raise the passing-on defence (I).
- In the case of alleged anti-competitive behaviour originating from state regulations, it has to be first defined whether the state or a competitor is causing the injury; the compensation must be limited to genuine antitrust injury (II).
- If an exemption regulation intends to protect the consumer (III, IV) or the independent competitor (V) by imposing so called hardcore restrictions, the ambit of the prohibition defines the antitrust injury and at the same time standing.

The procedures by which such protection is granted before national courts are determined by the so-called *procedural autonomy* of Member States.⁷⁶ The Member States determine the competent courts, the types of actions and defences, the standing of persons allowed to take action, the role of the judge whether active or passive⁷⁷ and the like. But this autonomy is not, as we have mentioned, without limits. It must reply to the Community law criteria of *effectiveness* and *equivalence*.⁷⁸ The bridge between the Community law granting of rights and the procedural autonomy of Member States will be the shaping and evolution of Community specific *remedies*. These have been in our context *compensation* and *injunctive relief*, not necessarily restitution. It is an important point in the evolution of Community law, that these remedies combine elements of national and of Community law, with a tendency to find their autonomous position in Community law itself, like the principle of liability of Member States in case of (serious) breaches of Community law and the conditions under which it can be invoked successfully by the injured plaintiff. After *Courage*, the liability of undertakings in case of breaches of the rules on anti-competitive agreements and concerted practices will be taking a similar direction.

2. *Criteria for compensation and injunctive relief*

The conditions for a successful action for compensation under the *Courage*-doctrine become clearer, as has been mentioned on several occasions, by referring to the concept of antitrust injury as developed under US law. Since EU law is rather underdeveloped in this area, it is, according to the opinion of AG van Gerven in *Banks*⁷⁹, useful to take over the principles of state liability for breaches of Community law *per analogiam*. This means:

- The breach of the competition rules must be sufficiently serious; an element of fault is not necessary.

⁷⁶ Kakouris, Do the Member States possess judicial procedural ,autonomy‘, 34 [1997] CMLRev 1389.

⁷⁷ Cases C-430-431/93, Van Schijndel & Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten [1995] ECR I-4705; comment Prechal, Community law in national courts: The lessons from van Schijndel, 35 [1998] CMLRev. 681.

⁷⁸ V. Gerven supra note 9 at p. 504, 529; Tridimas, The General Principles of Community Law, 1999, at p. 276-312.

⁷⁹ C-128/92 [1994] ECR I-1209 para 43 of his opinion.

- The norm which is violated must intend to protect individuals, a criterion to be fulfilled by the above mentioned *Normzwecktheorie*.
- There must be a *direct causal link* between the breach of the competition rules and the injury of the consumer or the third party-competitor.
- The recoverable damage comprises all types of material damage, including pure economic loss, and lost profit.⁸⁰

The proposal for a “Regulation on the Substantive law aspects of Private Remedies before National Courts” as proposed by *van Gerven* in his contribution to the 2001 Leuven Conference⁸¹ might be helpful in this respect because it more or less codifies existing case law.

As far as injunctive relief is concerned, there is yet no experience with private enforcement in EU-antitrust matters. We refer to the suggestion in an *obiter dictum* by *AG Jacobs*⁸² to extend Community specific remedies in case of breaches of the competition rules to include injunctive relief which he described “as a matter of Community law”; the Court did however not feel a need to take up this *dictum* by its AG.

The criteria developed in *Camera Care*⁸³ on interim relief by the Commission may be applied by analogy. Such measures can only be taken in cases of urgency, where there was likely to be irreparable damage, and where the public interest demanded it. The relief had to be temporary. Legitimate interests of the undertaking had to be taken into account. Therefore, also in private law litigation a balancing test between the provisional nature of the measure on the one hand, and the urgency of granting relief to a potentially injured person on the other must be applied by the national court. If the litigation concerns the enforcement of hardcore restrictions under Reg. 1400/2002, the national court must have serious doubts with regard to the legality of the contested measure by the supplier or distributor, like refusal to supply cars cross-border wise, refusal to grant access to information or spare parts to an independent competitor and the like. Such a measure may *de-facto* impose a contract on the supplier or distributor, thus seriously restricting “freedom to contract” as basis of EU law. But this restriction is justified by the anti-competitive behaviour of the supplier or distributor.

3. *Criteria for enforcing remedies under the competition rules*

The burden of proof is regulated by Art. 2 of Reg. 1/2003 by which in “... national ... proceedings for the application of Art. 81... the burden of proving an infringement of Art. 81 (1)... shall rest on the party alleging the infringement”.

⁸⁰ Joined cases C-46 + 48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029 para 87.

⁸¹ *Supra* note 2 at p. 132-136.

⁸² Opinion of 22.5.2003 to joined cases C-264/01 *AOK Bundesverband et al. v. Ichtyol et al.*, para 104

⁸³ Case 792/79 R [1980] ECR 119.

In proceedings before national courts of law, according to Art. 6 of Reg. 1/2003, rules on easing the burden of proof (*Anscheinsbeweis* in German law, *prima facie* evidence in common law jurisdictions etc.) should be applicable and help make the *Courage*-doctrine effective for a decentralised, protective enforcement of the competition rules in the interest of consumers and competitors.

Art. 15 (1) of Reg. 1/2003 empowers Member State courts to “ask the Commission to transmit to them any information in its possession ...” The Commission is, according to Art. 10 EC, under an obligation to transmit this information if it is relevant for the decision.⁸⁴ This is particularly important if the Commission in infringement proceedings, eg. against car manufacturers or importers, has established a restrictive practice regarding price maintenance, preventing exports or parallel imports, making impossible consumer purchases cross-border etc. This should make consumer or competitor proceedings for compensation much easier.

Rules on prescription or time limits of actions follow national law, but must not make compensation impossible.⁸⁵

If compensation is sought after the Commission has started an investigation itself, an eventual prescription of claims under national law should be staid till the final conclusion of these investigations.⁸⁶ Otherwise the injured plaintiffs would be banned from effectively enforcing his remedy for compensation.

4. *Group actions under Community law?*

Community competition law does not contain any rules on group or class actions.⁸⁷ Dir. 98/27/EC of 19.5.98⁸⁸ is not applicable to competition matters. It remains a question of legal policy whether the implementation of the competition rules by associations of consumers or competitors should be improved this way.

Van Gerven suggests the following Art. 9 in his proposal of a Regulation:⁸⁹

“Where a group of many identified persons have suffered individual injury, or are imminently threatened with such injury, as a result of conduct prohibited by Art. 81 or 82 EC, an action.... may be brought on their behalf by an independent public body....”

⁸⁴ Van Gerven, supra note 2 at p 121; Lenaerts supra note 2 at p 34: intervention of the Commission as *amicus curiae*.

⁸⁵ Cf. case C-261/95 Palmisani v. INPS [1997] ECR I-4051.

⁸⁶ For a similar rule under US law, see Sullivan/Grimes supra note 17 at p 943.

⁸⁷ The (recently more restrictive) US-practice is described by Sullivan/Grimes at pp. 946-956.

⁸⁸ [1998] OJ L 166/91. See Micklitz, in Reich/Micklitz supra note 14 at pp. 1169-1171.

⁸⁹ Supra note 2 at p. 136.

At the time of writing, no such legal base exists, and it therefore depends on Member State law whether they want to grant standing to associations of consumers or third-party competitors in defending their rights under the competition rules. Under the principle of equivalence, if national law allows group actions for consumer associations as proposed in Germany,⁹⁰ these actions should also be available in case of violations of EU competition law. We will not go into details.

Conclusion

As a conclusion of the above reported discussion, it is possible to argue that *Courage* has opened the doors to a more effective private enforcement of the competition rules. It is therefore in line with the spirit of Reg. 1/2003. The doors opened are still relatively small and narrow; nobody has to fear a floodgate of litigation as in the US-American system because there is no provision on treble damages, nor any type of class-action in the Member States. The action for compensation, possibly to be supplemented by an injunction against anticompetitive injury, will therefore be narrowed to some clearly defined violations which this paper has tried to identify in a non-exhaustive manner.

On the other hand, if one shares the view of a relatively autonomous Community law on remedies against antitrust injuries, certain open questions must and can be settled under the existing state of law without having recourse to the Community legislator and without having to debate the question of competence. They concern the elimination of an absolute passing-on defence which is required by the principle of effectiveness as developed in *San Giorgio* for restitution and in *Courage* for compensation claims. Standing issues can be solved by referring to the “Normzwecktheorie” which is not far from already existing Member state law and conforms to US-experiences. The basic idea behind is to avoid an accumulation of claims and to compensate injury where it directly occurred, not in the entire line of distribution. Particularly important will be an effective sanctioning of the so-called “hard-core restrictions” under the new EU distribution regulations insofar as they are intended to protect consumers or third-party competitors. Since EU law does not have rules on the amount of compensation of its own, it has to refer to Member State law under the principles of effectiveness and equivalence; therefore, economic loss, including lost profit, will generally be included, as is the case in state liability issues. Similar rules will have to be developed with regard to prescription periods, time-limits etc. Procedural issues will remain with the Member States, as clearly spelled out in *Courage*. An indirect, judge-made, “bottom-up”⁹¹ harmonisation on private enforcement of the competition rules is emerging. *Courage* therefore should *encourage*, not discourage compensation for antitrust injuries!

⁹⁰ Hempel supra note 28 at p. 372; Monopolkommission supra note 34 at pp. 48-50.

⁹¹ Van Gerven, A Common framework of reference and teaching, [2004] European Journal of Legal Education 1 at p. 8.

Annex: Overview over rights, remedies and procedures for antitrust injuries

Rights (EU law)	Remedies (hybrid: EU Reg. 1/2003 + national law)	Procedures (national law under the principles of equivalence and effectiveness)
<i>Antitrust injury</i>	<i>compensation</i>	<i>Competent courts, national procedural law</i>
Art. 81 (<i>Courage</i> , C-453/99 –yes; <i>AOK</i> , C-2/01P: no)	Standing issues + Normzwecktheorie, eg: <ul style="list-style-type: none"> • competitors, • consumers 	available procedures
Hardcore restrictions (Art. 4 Reg. 2790/99 + 1400/2002)	(direct) causation burden of proof, intention or negligence <i>not</i> required	Access to national procedures under non-discriminatory circumstances
Art. 82 (<i>Sabam</i> , case 127/73)	Indirect purchaser rule	Class actions <ul style="list-style-type: none"> • yes, if provided by national law • no, if not foreseen
Art. 86 (1) (<i>Höfner</i> , C-41/90)	(pure) economic loss	Consumer organisations: <ul style="list-style-type: none"> • Dir. 97/27 not applicable
<i>Absolute defences:</i> <ul style="list-style-type: none"> • <i>in pari delicto</i>: no • <i>passing-on</i>: no 	<i>Relative defenses</i> <ul style="list-style-type: none"> • Art. 86 (2) • Mitigating circumstances 	time limits (<i>Palmisani</i> , case C-261/95)
<i>Effective judicial protection</i>	<i>Injunctions</i> <ul style="list-style-type: none"> • Prevent future injury • Stop imminent harm 	Specific requirements for (interlocutory) <i>injunctions</i> like urgency, public interest, security