

# Private enforcement: An overview of EU and national case law

June 2012

## Introduction

2011 marked the ten year anniversary of the seminal *Courage v. Crehan* ruling of the Court of Justice<sup>1</sup>, so it seems appropriate to take stock. In the last ten years there have been a lot of developments, indeed, a true revolution with regard to private antitrust enforcement in Europe. This statement does not imply a positive or negative stance vis-à-vis private actions for damages in the area of competition law but merely describes a reality. The Court of Justice has spoken three times in preliminary rulings. In 2001 and 2006, it set out the general principle and spelled out the constitutive conditions of individual liability for damages<sup>2</sup>, in *Courage* and *Manfredi*<sup>3</sup>, respectively, while in 2011, in *Pfleiderer*<sup>4</sup>, it was called for the first time to make a balancing between the right to damages and the protection of leniency programmes.

In the legislative context, the last ten years have seen important developments. First, at the EU level, the European Commission published a Green<sup>5</sup> and a White Paper<sup>6</sup> in 2005 and 2008, respectively. In early 2011, the Commission also launched a public consultation aimed at achieving a coherent approach towards collective redress in the EU<sup>7</sup>. In 2009, a leaked copy of a Directive proposal was widely circulated in Brussels but the Union has so far not proceeded to legislate in this area. Nevertheless, the recent Commission Work programme confirms that in 2012 there will be a legislative proposal for private enforcement.

Meanwhile, in order to assist the Commission in the formulation of guidance to be provided to national courts on the quantification of damages, a study was commissioned and published on DG Competition's website in January 2010<sup>8</sup>. Then, in June 2011, the Commission held

a public consultation and published a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules<sup>9</sup>.

Second, at the national level, there have been various reforms designed to facilitate private antitrust enforcement, spanning from the UK Enterprise Act 2002, to the 7th amendment of the German Law against Restraints of Competition (GWB)<sup>10</sup> and most recently to new legislation in Bulgaria<sup>11</sup>, the Czech Republic<sup>12</sup>, Denmark<sup>13</sup>, Hungary<sup>14</sup>, and Italy<sup>15</sup>. Then, there is now a growing mass of national cases, including awards for damages, establishing national precedents and dealing not only with the fundamental questions of the existence of a remedy but also with the more specific conditions for the exercise of the right to damages.

E-Competitions has played a critical role in these developments. The private initiative has filled in an important gap, i.e. the building of a corpus of valuable information on EU and mainly national doctrine, legislation and precedent. Following three e-Competitions special bulletins on this topic, in 2005<sup>16</sup>, 2006<sup>17</sup> and 2010<sup>18</sup>, it is a pleasure to revisit the past decade and have a glimpse of what we can define as "second generation" topics, assuming that the "first generation" questions (existence of a remedy and basic conditions for the exercise of the corresponding right) have now been settled. I leave aside purely procedural questions or questions faced only in one Member State, such as the time limits sagas in the UK<sup>19</sup> or elsewhere<sup>20</sup> and concentrate on the questions of standing and passing-on, characterisation of damages, quantification of harm, causation, binding effect of public authorities' decisions, collective claims and access of claimants to the public authority's file.



**Dr Assimakis Komninos**

**White & Case Brussels**

This article was published on March 22, 2012 as the Foreword to the e-Competitions Special Issue published under the title "Private Enforcement: An overview of EU and national case law", N°44442, on [www.concurrences.com](http://www.concurrences.com)".

# Private enforcement: An overview of EU and national case law

---

## Standing and passing-on

Many national laws in Europe contain restrictive rules on standing for competition law-related damages actions. In continental legal systems, the question of damages for competition law infringements has been more or less clear in jurisdictions following the unitary norm system of the French Civil Code (Article 1382), where the sweeping general nature of the national rule on civil liability allows for a liberal approach with regard to standing, but problems have existed in countries following the German doctrine of *Schutznorm*, where plaintiffs claiming damages have to belong to a group of persons whom the legislator intended to protect. In some other countries, notably Italy, the courts had difficulties in granting standing to certain persons, in particular consumers, because of a distinction made between subjective rights (*diritti soggettivi*) and lawful interests (*interessi legittimi*). According to this approach, the competition rules protected only the latter and consumers could not avail themselves of this protective scope<sup>21</sup>.

In Germany itself, until the latest amendment of the Competition Act, standing to sue for damages was conferred only on persons within the "protective scope" of the law. With regard to liability based on German competition law violations, the German courts tended to grant standing only to persons at whom the illegal activities were specifically directed<sup>22</sup>. For these reasons, section 33<sup>(1)</sup> GWB, which now applies both to German and to EU competition law-based liability, relaxed the rules on standing by referring to "affected persons", including competitors and "other market participants".

However, even under the more relaxed test, German courts have struggled with the question of standing because of the existence of a specific rule against the passing-on defence in the Competition Act (section 33<sup>(3)</sup> GWB). This rule led the courts to be rather reluctant to grant standing to indirect purchasers, bar some exceptional circumstances. The reason has invariably been the risk of unjust enrichment for claimants and multiple liability for defendants. The latter risk has actually led some German courts to innovative, if not impracticable, solutions, while attempting to reconcile the EU law requirements for a broad rule of standing with the German sensitivities. Thus, the Berlin Higher Regional Court, in the *Berliner Transportbeton* case<sup>23</sup>, recognised indirect purchaser standing, while eliminating the risk of multiple liability by considering direct and indirect purchasers as joint creditors (*Gesamtgläubiger*). The court, however, stopped short from providing a rule on contribution among the joint creditors.

In *Carbonless paper*, a claim for damages was brought against a member of a price-fixing cartel, following on from a 2001 decision by the Commission<sup>24</sup>. The Karlsruhe Higher Regional Court awarded damages to a savings bank acting on behalf of an indirect purchaser but, controversially, the judgment strengthened the

case of direct purchasers by restricting the passing-on defence. In so doing, it narrowed the chances for indirect claimants, as well as the circumstances under which they can seek redress. According to the court, such indirect purchasers can only pursue damages if they are customers of direct subsidiaries of the cartel members.

However, this ruling was recently reversed by the German Supreme Court<sup>25</sup>, which held that indirect purchasers, who have acquired goods at an inflated price from a company which has itself been the victim of a price-fixing cartel, can bring damages claims against members of the cartel. At the same time, cartel members may invoke the passing-on defence, by pointing out that the claimant has passed on the overcharge to its customers and was therefore not exposed to the full "cost" of the cartel. In other words, the only meaning that can now be given to section 33<sup>(3)</sup> GWB is that, in principle, the passing-on defence is available, but the burden of proving the "passing on" of costs down the chain will have to be borne by the defendant.

In France, on the contrary, where standing has never been an issue, the courts fully recognise the passing-on defence. A 2010 ruling of the French Supreme Court actually reversed an appellate judgment for failure to assess whether the claimant had fully or partly passed on to its clients the overcharge resulting from the lysine cartel. Such passing-on would have amounted, according to the Supreme Court, to unjust enrichment. It is notable that the court's judgment seems to place the burden of proof on the claimant and has been criticised for viewing the passing-on question only as a shield<sup>26</sup>, unlike the 2008 Commission White Paper, which proposes the admissibility of the passing-on defence but stresses that the corresponding burden of proof must be borne by the defendant.

This is not the first time that a French court admitted the passing-on defence. In the *Vitamins* litigation, the Nanterre and Paris Commercial Courts<sup>27</sup> found that direct purchasers of vitamins passed or could have passed the cartel overcharge on to their customers. Of the two judgments, the first one received a lot of criticism because the court adduced that there was a pass-on from statements by the Commission that the cartel harmed consumers.

## Quantification of harm

National courts have not very often reached the stage of quantifying the harm in private antitrust enforcement cases. There have been many cases which were settled<sup>28</sup>. At the same time, there are examples where the national courts established the liability but left the question of quantification of harm to be decided at a later stage, assuming that the parties would then conclude a settlement<sup>29</sup>.

## Private enforcement: An overview of EU and national case law

---

Claimants often find it difficult precisely to quantify the harm they have suffered as a result of an infringement of the EU competition rules due to a number of factors, including evidentiary burdens, lack of access to data, and/or the general difficulty in producing robust estimations of damage. This can be quite a demanding procedure, as both the 2009 Study and the 2011 Draft Guidance Paper show. It is necessary to rely on economic experts, but then again the whole exercise must be very rigorous and avoid being based only on theoretical models. These difficulties are exemplified in the Spanish *Antena 3* case, where the Madrid Court of First Instance partially accepted *Antena 3*'s claims and awarded EUR 25 million in damages<sup>30</sup>, on the basis of an expert's report submitted by *Antena 3*. The judgment was, however, subsequently overturned by the Madrid Court of Appeal<sup>31</sup>, because the *Antena 3* experts' quantification of the damage was flawed. The court considered that *Antena 3*'s loss of profit must be proved with rigour and that it was unacceptable to award damages where proof of such loss is based on a theoretical expert report that runs counter to reality.

Interestingly, there have been quite a few awards of damages in exclusionary conduct cases. This seems to contradict the commonly held view that it is easier to quantify the harm in exploitative (e.g. cartels) than in exclusionary cases. Nevertheless, difficulties remain with regard to compensation of lost profits. Thus, in *Verimedia*, a French case, a competitor sought damages following an exclusionary agreement<sup>32</sup>. The claim followed on from a 1998 decision of the then French Competition Council, which found that the defendants had voluntarily delayed the communication of information to the claimant necessary for it to conduct its activities in the market for media services. In its claim, *Verimedia* sought to recover damages as a result of loss of clientele. The Versailles Court of Appeal considered that, while the claimant was entitled to recover damages as a result of its loss of clientele, the quantum of those damages should be reduced due to the claimant's lack of knowledge of the business area in which it was starting up, and the lack of precision of certain of its orders. The court therefore compensated the claimant only for the lost opportunity to penetrate the market more quickly. Moreover, the court rejected the claim for damage resulting from the difference between the claimant's expected business plan and its actual financial results, considering that since loss of clientele and the non-attainment of expected profits are one and the same loss, they can be compensated only once.

In *INAZ Paghe*, an Italian case, *INAZ* sought to recover damages for the harm suffered as a result of the National Association of Employment Consultants' collective boycott of its software packages<sup>33</sup>. In its judgment, the Milan Court of Appeal awarded damages, after applying a "but for" test. But the court stopped there. While *INAZ* was able to show that, prior to the boycott, its

business was growing at a rate of more than 10% per annum and that this increase had suddenly ceased at the time of the boycott, the court considered that it could not be sure that this growth would have continued at a similar rate. An exclusionary case is also the first instance where a UK court granted damages. This was based on previous infringement decisions by the OFT in an abuse of dominance case concerning margin squeeze and rebates in the pharmaceutical sector. While the case was still pending before the Competition Appeal Tribunal, the court awarded "interim damages" for an amount of £2 million<sup>34</sup>. That represented, in the court's view, roughly 70% of the likely final damages award. The case was then settled and no final judgment was rendered.

In exploitative cases, mainly cartels, a first barrier to cross, in quantifying the harm, is to prove that the cartel actually produced an overcharge. Three recent cases in Germany discuss this question. In the *Vitamins* case, the Dortmund Regional Court applied the *prima facie* rule that<sup>35</sup>, a market price is generally lower than a cartel price. In *Berliner Transportbeton*, the German Supreme Court (BGH)<sup>36</sup>, which was deciding on the appeals from the public enforcement decision of the *Bundeskartellamt*, stated that the longer is the cartel's duration and the greater its geographic area, the higher should be the threshold for showing that a cartel did not accrue any economic benefit from its activity<sup>37</sup>. The court thus concluded that prices in the cartel were likely to be higher than in a competitive market. Then, on the civil side of this case, the Berlin Higher Regional Court<sup>38</sup> held that there is a *prima facie* evidence that any quota cartel has had an anticompetitive and thus a price-enhancing effect. Furthermore, the court held that it can be assumed that the agreement of setting up a cartel is typically put into practice by its members. In other words, in both of these questions the defendant carries the burden to prove the opposite.

The latter principle has drawn some criticism because it is possible that a cartel was ineffective and hence there was no overcharge. There may also be decisions by competition authorities concerning agreements that infringe Article 101 TFEU or equivalent national provisions "by object" but may have never been implemented. In these cases the overcharge may also be negligible or zero<sup>39</sup>. Even on a cartelised market, price increases might also be explained by e.g. an unexpected increase in demand, as the Mannheim Regional Court has pointed out in the *Carbonless paper* case<sup>40</sup>.

# Private enforcement: An overview of EU and national case law

---

## Characterisation of damages

In cartel cases, quantification of harm is closely related to the legal characterisation of damages, i.e. whether these can be restitutive or even punitive, in order to compensate the victim, while avoiding to embark on a demanding calculation and quantification of harm.

When the *Manfredi* ruling of the Court of Justice was referred back to the national court, the Justice of the Peace of a small Southern Italian city followed an approach based on a mixture of equity and deterrence<sup>41</sup>. This damages claim followed on from a 2000 decision by the Italian competition authority, which found that the members of a car insurance cartel had collectively raised their premiums by 20%. In that decision, the authority had used the "yardstick method" in calculating the cartel overcharge by comparing the prices in the cartelised Italian market with the average European prices in other European (non-cartelised) markets. In support of his damages claim, the claimant relied on that finding. The court, adjudicating on the basis of equity, considered that the Italian competition authority's finding as to the 20% overcharge amounted to a "simple presumption" and that the defendant had failed to rebut it. The court went further than full compensation by awarding the claimant double damages in order to increase deterrence and to skim off the illegal profits made by the defendant as a result of the cartel.

On the other hand, in *Devenish*, the English High Court decided, as a preliminary issue, that the *non bis in idem* principle precludes an award of exemplary damages in a case in which the defendants have already been fined or even not fined (as successful immunity applicants). At the same time, the court held that a restitutive award, i.e. gain-based damages, was not available for competition law-based torts. The court also rejected the claim for an account of profits, which is a remedy aimed at stripping a wrongdoer's profits<sup>42</sup>. On appeal, the Court of Appeal upheld the judgment and did not consider that the principle of effectiveness of EU law dictated a different result<sup>43</sup>.

## V. Causation

Causation is another important question. In *Arkin*, a case concerning liner conferences and the alleged violation of Articles 101 and 102 TFEU, the English High Court found that the right test for causation was whether the breach of duty was the dominant or effective cause of the loss. On the basis of that test, the court was required to consider whether the claimant was the author of its own misfortune by seeking to stay in a loss-making market<sup>44</sup>. In the end, the court decided that the plaintiff's own irrational pricing policy was the predominant cause of his business failure. Thus, the conduct of a plaintiff who continues trading, although he knows that his business is evaporating, may take the form of contributory fault, break the chain of causation and thus exclude the defendant's liability.

In another case, a Swedish court struggled with establishing causation and quantifying harm caused by an exclusionary abuse<sup>45</sup>. In proceedings brought before the Stockholm District Court by competitors of *VPC*, the central securities depository in Sweden, the claimants argued that *VPC*'s refusal to supply them with full CD-ROM copies of share registers constituted an abuse of a dominant position and that *VPC* should be ordered to pay damages. The court agreed that *VPC* had abused its dominant position, but awarded damages for half of the amount claimed, since full proof had not been presented by the claimants with respect to the quantum of their damages. For example, in relation to rental and employee costs, the court considered that it could not be excluded that office space and staff could have been used by other parts of the claimants' business that were not affected by the abuse. Similarly, because the economy as a whole was in recession during the period when the abuse took place, the claimants were unable to precisely identify which part of the losses were the result of the defendant's abusive conduct, and which part was caused by the general economic downturn.

## Binding effect

A comparative analysis of national competition laws shows that although a pre-existing decision by an administrative authority may be used by the courts and the litigants to establish and prove certain facts, in particular in case of follow-on civil actions, such a decision does not normally acquire the status of binding authority, though it can certainly be persuasive authority. However, some Member States have introduced a rule that civil courts in follow-on proceedings for damages are bound by final infringement decisions of national competition authorities<sup>46</sup>.

The scope, however, of this binding effect is not always clear, as, indeed, the English case law shows. Thus, in *Crehan v. Inntrepreneur*<sup>47</sup>, a case decided on appeal from the High Court, the English Court of Appeal was confronted with the effect that past European Commission decisions had on a civil case where the facts were similar but not identical. The Commission in its past decisions, which were considered to be relevant to the facts of the civil case at hand, had found that the cumulative networks of the lease agreements between certain beer suppliers and pub tenants contributed to the foreclosure of the UK on-trade beer market, thus falling foul of Article 101<sup>(1)</sup> TFEU. In *Crehan*, the English courts had to identify whether the cumulative effect of several similar networks of beer distribution agreements foreclosed the UK market. The Court of Appeal reversed the High Court findings that a beer tie imposed on a pub tenant had not infringed Article 101 TFEU and held that the High Court judge should have followed the European Commission's findings in the similar cases referred to above. It was the first time that the English Court of Appeal had awarded damages for breach of competition law<sup>48</sup>.

## Private enforcement: An overview of EU and national case law

---

This was not, however, the last episode and the House of Lords overturned the Court of Appeal and found that the High Court judgment should be restored. The House of Lords referred to the ECJ case law on conflicts between decisions of the Commission and national courts and followed a narrower concept of conflict, holding that there was no conflict between the Commission decisions and the High Court's finding that the agreements did not infringe Article 101<sup>(1)</sup> TFEU. According to the House of Lords, whilst the court should respect the Commission's expert analysis, Commission decisions are ultimately only part of the admissible evidence which the court must take into account.

Similar is the recent Enron case<sup>49</sup>, where the UK Office of Rail Regulation had found that EWS was in breach of Article 102 TFEU for abusing its dominant position, by charging Enron discriminatory prices for access to its rail freight services without having any objective justification. In a follow-on action, the Competition Appeal Tribunal, held that there was no liability in damages for lack of causation<sup>50</sup>. On appeal, the English Court of Appeal ruled that tribunals overseeing damage claims are bound by the facts contained in an antitrust decision, but stressed that these have to be clear statements and not "stray phrases"<sup>51</sup>. In that case, the courts accepted that they were bound by the regulator's findings with regard to antitrust liability but that the question of civil liability was open.

There are also other examples of national courts hesitation to accept a binding effect of administrative authority decisions over civil court proceedings<sup>52</sup>.

### Collective claims – Class actions

The introduction of US-style class actions does not find favour in Europe and has been one of the main points of controversy around the European Commission's legislative proposals in this area. At the same time, some Member States recognise the need for the law to make possible a degree of aggregation of claims and have recently introduced legislation providing for opt-in class action possibilities. However, most Member States still lack specific legislative bases for such types of collective claims.

In the UK, parties have tried, at times successfully<sup>53</sup>, to rely on existing civil procedural mechanisms, such as the Group Litigation Orders (GLOs). GLOs are most often used in mass tort personal injury cases and financial loss cases and are an "opt in procedure" publicised through the England and Wales Law Society. Then, recently, the English Court of Appeal rejected the attempt to use Rule 19.6 of the English Civil Procedure Rules to claim damages on behalf of all direct and indirect purchasers of air freight services from BA, without having identified and requested consent from all affected parties. Rule 19.6 allows representative actions where the

party bringing the claim and each party in the represented class, has the "same interest" in the claim, but the court thought that the claimants were abusing the law and attempting to introduce from the back door an opt-out class action model<sup>54</sup>.

The absence of class actions and collective relief at EU or national level has not, however, stood in the way of claimants joining their claims in national proceedings, using various mechanisms that the national laws allow for. Thus, a mechanism which has successfully been used to aggregate claims is the CDC model, where a specific business organisation (CDC) acquires the claims by customers of cartel members and then brings a bundled claim in its own name and on its own account. At the same time, CDC ensures that a part of the damages recovered will be transferred to the cartel victims. This model has attracted criticism, yet national courts, such as the Higher Regional Court of Düsseldorf, have considered it legal and the corresponding bundled claims admissible<sup>55</sup>. Then, in Slovenia, in 2010, a civil society was created to seek damages for some 75,000 Slovenian households from five electricity distributors that were condemned by the national competition authority for a violation of the competition rules, because they had simultaneously announced an increase in retail electricity prices for households<sup>56</sup>. Similarly, claimants have used "special purpose vehicles" to bring collective claims in the Netherlands.

### Access to the administrative file – Protection of Leniency Programmes

A thorny issue that has to do with the broader question of the relationship between private and public enforcement is access by civil litigants (claimants, in most cases) to the administrative file of competition authorities, in particular, discoverability in civil proceedings of corporate statements made or submitted by leniency applicants. The recent ECJ ruling in *Pfleiderer*, has offered the Commission and national competition authorities some support in their approach to resist or limit access to such evidence by civil claimants, when the effectiveness of their leniency programmes is at stake<sup>57</sup>.

In the specific case, the *Bundeskartellamt* imposed fines on the three largest European producers of decor paper and on five individuals personally responsible for price-fixing agreements and agreements on capacity closure. *Pfleiderer*, a purchaser of decor paper, brought an action for damages against the producers of decor paper, from which it stated it had purchased goods. In order to prepare for the civil proceedings, it applied to the *Bundeskartellamt* for comprehensive access to the files relating to the cartel proceedings. After *Pfleiderer* received a version of the three decisions imposing fines, from which identifying information had been removed, and a list indicating the evidence collected in

## Private enforcement: An overview of EU and national case law

---

a search, it expressly requested, by way of a second application, access also to the leniency applications, the documents voluntarily transmitted by the immunity recipients and the evidence collected. The authority informed the claimant that it intended to accede to that request only in part and to limit access to the file to a version from which confidential business information, internal documents, the corporate statements themselves and documents provided by the applicants had been removed.

The Court of Justice, reminded, first of all, that neither the EU Leniency Notice, nor the ECN Notice, nor the ECN Model Leniency Programme bind the authorities and courts of the Member States, due to their soft law nature. Then, the Court, preferred to give a judgment of principle and not to offer a list of discoverable and non-discoverable evidence, as Advocate General Mazák had proposed in his Opinion. Since this was a matter, for which no Union legislation was in existence, it fell under the competence of the Member States. Therefore, the Court probably felt that it was impossible or – at least – inelegant for itself to construct a specific rule of discoverability. Its reliance, however, on the general principle of effectiveness<sup>58</sup> left no doubt that “leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU. The effectiveness of those programmes could, however, be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages”<sup>59</sup>.

Then, after repeating the *Courage* and *Manfredi* well-known text as to the important role of private antitrust enforcement in Europe<sup>60</sup>, the Court ruled that a balancing exercise is here necessary that can be conducted by the national courts only on an ad hoc basis, taking into account the above principles and the overall circumstances of each case.

It should, therefore, be no surprise that *Pfleiderer* resulted in more preliminary references to Luxembourg. A recent preliminary reference from Austria exemplifies this problem: Under Austrian procedural law, access to cartel proceeding files may only be granted if all parties involved give their express consent. In the case at hand, all cartel members refused to give their consent, so that the Austrian Cartel Court would have to deny access to the cartel file. However, in the light of ECJ’s ruling in *Pfleiderer* the Austrian Cartel Court enquires whether the Austrian provision conflicts with EU competition law<sup>61</sup>.

Apart from cartel proceedings, where disclosure is usually targeted at leniency-related documents, recently plaintiffs have also sought to obtain access to documents held by competition authorities in non-cartel cases. For example, *Ma Liste de Courses* (MLDC), an online discount coupon processor had initially submitted a complaint before the French Competition Authority against two rival companies, *HighCo* and *Sogec*, for setting a standard for online coupons without consulting other companies, such as *MLDC*. The Autorité decided to accept commitments offered by the two undertakings, to remove competition concerns, however, *MLDC* subsequently introduced an action for damages for the harm it had suffered during the period the allegedly anti-competitive conduct was at place. In so doing, *MLDC* sought non-confidential versions of all written and oral statements gathered by the NCA during its investigation, including the parties’ and third parties’ written observations, minutes of hearings, replies to questionnaires and several other documents on the administrative file. The French court decided that disclosure was justified, bearing in mind that the plaintiff only sought access to non-confidential versions of such documents<sup>62</sup>. This is an interesting case showing that claimants may be more successful in their requests for discovery in cases not involving a cartel leniency programme. Indeed, it may be argued that the public policy concerns to resist such disclosure recedes in cases of commitments decisions which, in terms of competition enforcement, do not mean as much as the leniency programmes<sup>63</sup>.

### Conclusion

It is clear that private actions in Europe have taken off. National courts no longer deal with the question whether there is a remedy for victims of anti-competitive conduct, but rather they must now rule on a series of important questions. As a result, an interesting body of national case laws is taking shape. Broadly speaking, the national courts are confronted with the same problems, have similar concerns and respond to the latter in similar ways. This “spontaneous” harmonisation is to be welcomed.

# Private enforcement: An overview of EU and national case law

## Notes

- 1 Case C-453/99, *Courage Ltd. v. Bernard Crehan*, 2001 ECR I-6297.
- 2 See Assimakis P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), pp. 162-179.
- 3 Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, 2006 ECR I-6619. See Eddy de Smijter, Denis O'Sullivan, *The European Court of Justice renders a preliminary ruling under article 234 EC considering issues raised in the European Commission's Green Paper on antitrust damages actions (Manfredi)*, 13 July 2006, e-Competitions, No 36562.
- 4 Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, Judgment of 14 June 2011, not yet reported.
- 5 Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final. The Green Paper is accompanied by a Staff Working Paper which set out the various options more discursively: Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2005) 1732.
- 6 Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final. The White Paper itself is a rather short document that in reality summarises the far more developed Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404. See Daniel Fasquelle, Rodolphe Mesa, *Actions en dommage et intérêts pour violation des règles de concurrence : Le livre vert de la Commission européenne*, Concurrences N° 1-200.
- 7 Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011)173 final.
- 8 Oxera, Assimakis P. Komninos et al., *Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission*, December 2009, available at <http://ec.europa.eu/competition/ant....>
- 9 DG-Competition Draft Guidance Paper, Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, Public Consultation, Brussels, June 2011, available at <http://ec.europa.eu/competition/con....>
- 10 See Helmut Bergmann and Frank Rohling, *The new German antitrust Act gives way to damages actions (Gesetz gegen Wettbewerbsbeschränkungen in der Fassung des Beschlusses des Deutschen Bundestages)*, 16 June 2005, e-Competitions, n° 1140; Stefan Thomas, *Damage claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen)*, 1 July 2005, e-Competitions, n° 12706.
- 11 See Dessislava Fessenko, *The new Bulgarian Act on the Protection of Competition*, 28 November 2008, e-Competitions, n° 23076.
- 12 See Robert Pelikan and Jan Poerwratil, *The Czech NCA circulates a draft amendment to the Act on the Protection of Competition aimed at a harmonisation with substantive EC competition law, inclusion of specific procedural rules and launch of private enforcement*, May 2008, e-Competitions, n° 19852.
- 13 See Jacob Borum, *The Danish Parliament approves an amendment enabling antitrust class action*, 22 February 2007, e-Competitions, n° 13745.
- 14 See Bálint Bassola, «Modernization» of the Hungarian Competition Act, 1 November 2005, e-Competitions, n° 406; Gusztav Bacher, *The Hungarian Parliament adopts an amendment limiting the liability of leniency applicants and introducing new calculation of amount of damages*, 23 March 2009, e-Competitions, n° 26235.
- 15 See Cristina Poncibo, *The Italian Law providing for a group action has entered into force permitting collective enforcement of competition Law in Italy ("Azione di classe")*, 9 July 2009, e-Competitions, n° 26730.
- 16 See Denis Waelbroeck, *Antitrust Damages Decisions in Europe: Publication of the first results of the e-Competitions Damages Research Program – I*, 28 January 2005, e-Competitions, n° 7.
- 17 See David Revelin, *An economic assessment of damages actions for breach of antitrust rules: Foreword of the 2006 edition*, 1 June 2006, e-Competitions, n° 137.
- 18 See Alessandro Marra, Cesare Pozzi, Alessandro Sarra, *Private antitrust actions: An overview of national case laws – Foreword of the 2010 edition*, 8 November 2010, e-Competitions, n° 32953.
- 19 See e.g. Alison Jones, *The UK Competition Appeal Tribunal is to rule on two follow-on damages' claims (Emerson Electric/ Morgan Crucible; The Consumers' Association/JJB Sport)*, 5 March 2007, e-Competitions, n° 13381; Sebastian Peyer, *The UK Competition Appeal Tribunal clarifies limitation period for follow-on claims lodged with the Tribunal (Emerson a. o./Morgan Crucible a. o.)*, 17 October 2007, e-Competitions, n° 15523; Sebastian Peyer, *The UK Competition Appeal Tribunal refuses permission to initiate follow-on claims for damages (Emerson Electric/Morgan Crucible)*, 28 April 2008, e-Competitions, n° 17678; Robert Eriksson, *The British Competition Appeal Tribunal denies permission to bring follow-on damages actions while appeals to the European Court of First Instance are pending (Emerson Electric et al. / Morgan Crucible)*, 28 April 2008, e-Competitions, n° 19627; Charles Balmain, David Smale, *The English Court of Appeal overturns Competition Appeal Tribunal in a pro-defendant judgment on follow-on damages actions (Bcl Old Co. Ltd. / BASF)*, 22 May 2009, e-Competitions, n° 26357; Frances Murphy, Stephen Brown, Matt Evans, *The UK Competition Appeal Tribunal clarifies timing rules for follow-on private antitrust actions for damages against cartel participants (BCL, BASF)*, 19 November 2009, e-Competitions, n° 33762.
- 20 See Florian Neumayr, *The Viennese Commercial Court finds a private damage claim following a fine decision in the non-cash payment industry time barred*, 3 September 2009, e-Competitions, n° 30713.
- 21 Eventually, this ruling was reversed by the Sezioni Unite (a special chamber with an increased number of judges) of the Italian Supreme Court. See Tommaso Salonicco, *The Italian Supreme Court recognizes the right of consumers for claim for damages in case of violation of antitrust rules (Mario Ricciarelli/Unipol Assicurazioni)*, 4 February 2005, e-Competitions, n° 27.
- 22 For examples, see Frank Rohling, Thomas Lübbig, *Several German courts of first instance decide on damages claims brought by the customers of the vitamins cartel (Vitaminpreise)*, 1st April 2004, e-Competitions, n° 329.
- 23 See Stefan Thomas, Christoph Stock, *The Berlin Higher Regional Court rules on key issues of standing and standard of proof in cartel damages suits*, 1st October 2009, e-Competitions, n° 30783.
- 24 See Justus Herrlinger, *The Karlsruhe Higher Regional Court awards € 100,000 in damages to a claimant on behalf of a printing firm which purchased paper from a subsidiary of a cartel holding the passing-on defence does not apply (Carbonlesspaper cartel)*, 11 June 2010, e-Competitions, n° 32441; Stefan Thomas, Christoph Stock, *A German Higher Regional Court rules on key issues of private damages actions against hardcore cartels, decides on the indirect customer's right to claim and addresses the challenging task of quantifying antitrust damages (Carbonless Paper Cartel)*, 11 June 2010, e-Competitions, n° 32898.
- 25 BGH, 28.6.2011 – KZR 75/10.
- 26 See Hugues Parmentier, Mathilde Descôte, *The French Commercial Supreme Court validates the passing-on defence in a follow-on action based on the lysine cartel (Doux Aliments/Ajinomoto Eurolyne)*, 15 June 2010, e-Competitions, n° 32066.

## Private enforcement: An overview of EU and national case law

---

- 27 See Michel Debroux, *A French commercial court dismisses a private action claiming compensation for damages caused by antitrust violation, on the basis of a broad interpretation of the passing on defence (Vitamins cartel)*, 11 May 2006, e-Competitions, n° 12129; Elie Kleiman, Alexandra Szekely, *A French Court refuses to grant damages to alleged victim of the vitamin cartels (Juva/Hoffmann La Roche)*, 26 January 2007, e-Competitions, n° 13385, respectively.
- 28 For example, at least 4 cases brought before the UK Competition Appeal Tribunal under sections 47A and 47B of the Competition Act 1998 have been settled: Case 1060/5/7/06, *Healthcare at Home v. Genzyme Ltd.*; Case 1078/7/9/07, *The Consumers Association v. JJB Sports plc*; Case 1088/5/7/07, ME Burgess, JJ Burgess and SJ Burgess (trading as JJ Burgess & Sons) v. W Austin & Sons (Stevenage) Ltd. and Harwood Park Crematorium Ltd.; Case 1108/5/7/08, NJ and D M Wilson v. Lancing College Ltd. See Alexandra Brown, *The UK Competition Appeal Tribunal grants interim damages of £ 2 M in a case of abusive drugs price setting (Healthcare at Home/Genzyme)*, 15 November 2006, e-Competitions, n° 12650; Suzanne Innes-Stubb, *The UK Competition Appeal Tribunal awards for the first time ever interim damages in an abuse of dominant position case on the drugs market (Healthcare at Home/Genzyme)*, 15 November 2006, e-Competitions, n° 12623; Liza Lovdahl Gormsen, *The UK Court of Appeal rules on discussions on vertical basis and restricts the CAT's test (Argos and Littlewood – JJB Sports)*, 19 October 2006, e-Competitions, n° 12451; Bruce Kilpatrick, *The Court of Appeal of England and Wales dismisses appeals from two decisions of the CAT which had dismissed appeals from two decisions of the OFT finding resale price maintenance and price fixing in respect of replica football kit, toy and games (Argos, Littlewoods, JJB Sports)*, 19 October 2006, e-Competitions, n° 32229; Alison Jones, *The UK Competition Appeal Tribunal is to rule on two follow-on damages' claims (Emerson Electric/ Morgan Crucible; The Consumers' Association/JJB Sport)*, 5 March 2007, e-Competitions, n° 13381 and Liza Lovdahl Gormsen, *The UK Competition Appeal Tribunal relies on the refusal to supply doctrine to adopt a very wide interpretation of abuse (Burgess/OFT)*, 30 March 2006, e-Competitions, n° 521.
- 29 See Aitor Montesa Lloreda, Angel Givaja Sanz, *Spanish first case ordering compensation of damages suffered as a result of antitrust violation (Hidroelectrica de l'Empordal)*, 16 April 2002, e-Competitions, n° 20064.
- 30 See Aitor Montesa Lloreda, Angel Givaja Sanz, *Spanish Courts rules on private actions for damages derived from antitrust law infringements in the subscriber directory inquiries market (Conduit /Telefonica - Antena 3 / Spanish Football League)*, 11 November 2005, e-Competitions, n° 469.
- 31 Audiencia Provincial de Madrid, Judgment of 18.12.2006; upheld by Tribunal Supremo, Judgment of 14.4.2009.
- 32 See Anne-Marie Luciani, *The Versailles Court of Appeal makes good the damages resulting from delayed communication of key market information (Verimedia/ Mediametrie)*, 12 June 2004, e-Competitions, n° 567.
- 33 See Paolisa Nebbia, *An Italian Court of Appeal holds a professional association liable for the damage suffered following a boycotting campaign (INAZ Pagine/ ANCI)*, 10 December 2004, e-Competitions, n° 528.
- 34 See Charles Balmain, James Johnson, *The UK Competition Appeals Tribunal receive the first claims for damages based on abuse of dominant position (Healthcare at Home/Genzyme)*, 10 May 2006, e-Competitions, n° 1332; Alexandra Brown, *The UK Competition Appeal Tribunal grants interim damages of £2 M in a case of abusive drugs price setting (Healthcare at Home/Genzyme)*, 15 November 2006, e-Competitions, n° 12650; Suzanne Innes-Stubb, *The UK Competition Appeal Tribunal awards for the first time ever interim damages in an abuse of dominant position case on the drugs market (Healthcare at Home/Genzyme)*, 15 November 2006, e-Competitions, n° 12623; Alison Jones, *An UK Competition Court grants interim relief in 'follow on' damages claim (Healthcare at Home/Genzyme)*, 11 January 2007, e-Competitions, n° 12710.
- 35 LG Dortmund, 14.2004 – 0 55/ 02 Kart.
- 36 See Florian Wagner-von Papp, *The German Court of Justice rules on the standard of proof for the existence of a revenue surplus from a cartel agreement (Transportbeton Berlin)*, 28 June 2005, e-Competitions, n° 467.
- 37 BGH, 28.6.2005 – KRB 2/05.
- 38 See Stefan Thomas, Christoph Stock, *The Berlin Higher Regional Court rules on key issues of standing and standard of proof in cartel damages suits*, 1st October 2009, e-Competitions, n° 30783.
- 39 See Oxera, Assimakis P. Komninos et al., *Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission*, December 2009, available at <http://ec.europa.eu/competition/ant...>, p. 88. This is also recognised by the Court of Justice in Prym, where it was held there can be no "presumption that the implementation of the cartel has created an effect on the market" and that "where the Commission considers it appropriate for the purposes of calculating the fine to take that optional element – the actual impact of the infringement on the market – into account, it cannot just put forward a mere presumption but (...) must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market" (Case C-534/07 P William Prym GmbH & Co. KG v. Commission, <sup>2009</sup> ECR I-7415, paras 80 and 82).
- 40 See Stefan Thomas, *The German Mannheim Regional Court decided on the right to claim against a vertically integrated cartel and the standard of proof for antitrust damages in a follow on-suit (Carbonless paper)*, 29 April 2005, e-Competitions, n° 16044.
- 41 See Paolisa Nebbia, *An Italian Court awards to a consumer damages amounting to twofold the loss suffered as a result of a cartel among insurance companies after obtaining an ECJ preliminary ruling (Manfredi)*, 21 May 2007, e-Competitions, n° 14052.
- 42 See Anthony Dawes, *The English High Court finds that following an infringement decision by the European Commission, the appropriate claim is for compensatory and not exemplary or restitutionary damages (Devenish/Sanofi-Aventis – «Vitamins Cartel»)*, 19 October 2007, e-Competitions, n° 15157; Robert Eriksson, *The UK High Court rules that restitutionary damages are not an available remedy in anti-trust cases, nor will an account of a defendant's profits be appropriate (Devenish/Sanofi-Aventis «Vitamins Cartel»)*, 19 October 2007, e-Competitions, n° 15159; Jon Lawrence, *The UK High Court rules that exemplary damages are not available to claimants bringing actions against cartelists that have already been fined by the EU Commission, even if their fine has been commuted due to an immunity or leniency application (Devenish/Sanofi-Aventis, Vitamins cartel)*, 19 October 2007, e-Competitions, n° 15029; Dimitrios Sinaniotis, *The UK High Court of Justice rejects a claim for exemplary damages following an infringement decision by the European Commission (Devenish/Sanofi-Aventis 'Vitamins cartel')*, 19 October 2007, e-Competitions, n° 15158.
- 43 See David Henry, *A UK Court of Appeal holds that compensatory damages are adequate and that a restitutionary reward is not available following a finding that the competition rules have been breached (Devenish Nutrition Limited vs Anofit-Aventis SA (France) and Ors)*, 14 October 2008, e-Competitions, n° 242; Andrea Lista, *The UK Court of Appeal decides on restitutionary damages in the Devenish case*, 14 October 2008, e-Competitions, n° 26360.
- 44 See Marjorie Holmes, *The Queen's Bench Division of the High Court of England & Wales gives important guidelines as to the standard of proof for claiming damages in competition cases (Arkin)*, 10 April 2003, e-Competitions, n° 34951.
- 45 See Jakob Lundstrom, *The Stockholm District Court awards damages in private antitrust case for abuse of dominant position (Europe Investor Direct a. o./VPC)*, 20 November 2008, e-Competitions, n° 22902.
- 46 See sections 58A and 47A of the UK Competition Act 1998, as subsequently amended; section 33(4) of the German Competition Act (GWB); Article 88/B(6) of the Hungarian Competition Act. In addition, the Polish Supreme Court has held that NCA decisions establishing breaches of competition law are binding on civil courts. See Tomasz Koziol, *The Polish Supreme Court rules that a civil court may establish an abuse of a dominant position independently, unless the NCA has already found such an abuse (Torun Timber Industry Enterprise)*, 27 July 2008, e-Competitions, n° 34951.
- 47 See Orla Lynskey, *The UK Court of Appeal held that beer distribution agreements containing ties were contrary to Art. 81.1 EC and thus upheld an appeal for damages (Crehan)*, 21 May 2004, e-Competitions, n° 345.

## Private enforcement: An overview of EU and national case law

---

48 Jacques Derenne, *The UK Court of appeal applies Art. 81 EC and award damages for breach of EC law (Crehan)*, 21 May 2004, e-Competitions, n° 204.

49 See Jack Connah, *The UK Court of Appeal upholds a decision of the UK Competition Appeals Tribunal denying a claimant follow-on damages (Enron Coal Services/English Welsh & Scottish Railway)*, 19 January 2011, e-Competitions, n° 34065.

50 See David Smales, *The UK Competition Appeal Tribunal denies the claimant damages in first English follow-on damages case to reach trial (Enron Coal Services / English Welsh and Scottish Railway)*, 17 March 2010, e-Competitions, n° 30779.

51 *Enron Coal Services Ltd. v. English Welsh & Scottish Railway Ltd.*, (2011) EWCA Civ 2.

52 E.g. Pablo Ibanez Colomo, *A Spanish Court refuses to qualify a contract as a resale agreement and holds that the qualification given by «administrative bodies» to similar agreements is not binding upon national Courts (Melón/Repsol)*, 7 July 2004, e-Competitions, n° 171.

53 See Marjorie Holmes, *The Commercial Court of the Queen's Bench Division of the High Court of England and Wales makes a group litigation order in a competition case in the automobile sector (Prentice / DaimlerChrysler UK)*, 30 April 2001, e-Competitions, n° 36124.

54 See Simon Barnes, *The English Court of Appeal holds its judgment on representative action in claim against air cargo cartel (Emerald Supplies and Anor/British Airways)*, 18 November 2010, e-Competitions, n° 33293; Morris Schonberg, *The English Court of Appeal rejects attempted 'opt-out' class action (Emerald Supplies and Southern Glass House Produce/British Airways)*, 18 November 2010, e-Competitions, n° 33285; Alison Knight, *The English Court of Appeal confirms strike-out of the representative element in cartel damages claim (Emerald Supplies Limited/British Airways)*, 18 November 2010, e-Competitions, n° 33893; Zoi Sazaklidou, *The Court of Appeal rules that English court procedures do not allow representative actions on behalf of a class of direct and indirect purchasers of the air-freight cartel (Emerald Supplies/British Airways)*, 18 November 2010, e-Competitions, n° 34063; Ilan Sherr, *The English Court of Appeal rejects representative element of private damages action (Emerald Supplies, Southern Class House Produce / British Airways)*, 18 November 2010, e-Competitions, n° 34263; Ruchit Patel, David R. Little, *The UK Court of Appeal upholds Chancellor's order striking out 'representative parts' of the class action claim (Emerald/ British Airways)*, 18 November 2010, e-Competitions, n° 35238. See also Renato Nazzini, *The UK High Court allows a defendant's application to strike out the representative element of the claim in an action seeking relief from damages (Emerald Supplies Limited / British Airways)*, 8 April 2009, e-Competitions, n° 28301.

55 See Justus Herrlinger, *The Higher Regional Court of Düsseldorf declares admissible a claim for damages against cartel member (CDC – Cartel Damage Claims)*, 14 May 2008, e-Competitions, n° 19856. See also Stefan Thomas, *A German Court rules on procedural key issues for cartel damages suits paving the way to de facto class action for cartel damages in Germany (Cartel Damage Claims SA)*, 21 February 2007, e-Competitions, n° 13224.

56 In that case, the electricity distributors were given a notice for voluntary repayment of the overcharge and, eventually, the Slovenian consumers were given credit notes corresponding to the overcharge that each household had paid.

57 See Pedro Callo, *The European Court of Justice acknowledges the need to weigh the different interests at stake when granting access to documents containing leniency applications in the context of civil claims for damages, in line with US courts (Pfleiderer)*, 14 June 2011, e-Competitions, n° 36988.

58 Pfleiderer, supra note 4, para. 24.

59 Ibid, paras 25-27.

60 Ibid, paras 28-29.

61 See Christina Hummer, *The Austrian Cartel Court brings a preliminary ruling before the European Court of Justice on the question of access to cartel files by third parties adversely affected by a cartel (Printing chemical producers)*, 12 October 2011, e-Competitions, n° 40181.

62 See Lionel Lesur, Philipp Werner, *The Paris Commercial Court orders the French Competition Authority to disclose antitrust investigation documents (Ma Liste de Courses/HighCo and Sogec)*, 24 August 2011, e-Competitions, n° 38891.

63 For the converse case where the plaintiff objects to the defendants' use of documents from the administrative file in a civil follow-on proceeding for damages, see Dodo Chochitaichvili, *The Paris Commercial Court allows the production of documents that are necessary for the rights of defence (Outremer Telecom, Orange Caraïbe, France Télécom)*, 8 November 2011, e-Competitions, n° 40566.

Worldwide. For Our Clients.

[whitecase.com](http://whitecase.com)

---

White & Case LLP  
Avocats-Advocaten  
62 rue de la Loi Wetstraat 62  
1040 Brussels  
Belgium  
Tel: + 32 2 219 16 20  
Fax: + 32 2 219 16 26