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Till Schreiber

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Private Antitrust Litigation in the European Union

TILL SCHREIBER*

Abstract

The private enforcement of antitrust damage claims continues to be a top priority of the European Commission and national competition authorities. Considering the large scope of damages resulting from the violation of E.U. competition law, it is likely that the number of antitrust damage actions in the E.U. will continue to increase in the future. Although damage claims find their legal basis in E.U. law, they have to be enforced on the national level. Against this background, this article explains the key factors for the future development of private enforcement in the European Union (E.U.) and analyzes the measures and policy choices proposed by the European Commission in its White Paper, as well as relevant developments at Member State level. Finally, the article sets out practical solutions on how to overcome the still existing obstacles to private enforcement in the E.U.

I. Introduction

When the “Ashurst Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules” was published in August 2004, it concluded that the state of private enforcement of competition law in the E.U. was characterized by “total underdevelopment” and an “astonishing diversity” in the approaches taken by different Member States.¹ As a reaction to this gloomy picture for the prospects of private enforcement in the E.U., the European Commission published a White Paper on Damages ac-

* Dr. Till Schreiber is Legal Counsel and heads the Brussels office of CDC Cartel Damage Claims. He studied law at the universities of Bonn, Cologne, Barcelona, and London (University College) and published a doctoral thesis on international competition law. Before joining CDC, Till Schreiber has worked as attorney for six years in the antitrust and competition group of a leading international law firm in Brussels, Cologne, and Madrid. Since joining CDC in 2007, Dr Schreiber has been active in the preparation and management of several damage cases relating to pan-European antitrust infringements. He has spoken at numerous conferences and has published articles on the innovative business model of CDC as well as general developments in the field of private enforcement in Europe. Till Schreiber speaks German, English, Spanish, French, and Dutch. The views and opinions expressed in this article are strictly personal.

1. Emily Clark et al., *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, Ashurst, (Aug. 31, 2004), available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

tions for breach of EC antitrust rules on April 2, 2008.² Together with its White Paper, the Commission published a detailed Staff Working Paper,³ which provides the legal background, as well as an Impact Assessment Report,⁴ which contains an economic analysis of different potential private enforcement scenarios. In addition, an extensive economic study on the welfare impact of more effective private damage actions⁵ and, on January 19, 2010, an economic study on the quantification of antitrust damages⁶ were published on the Commission's website.

This activity by the Commission clearly indicates that the legal and economic landscape of actions for damages resulting from the violation of E.U. antitrust law is currently changing to the benefit of victims of antitrust infringements. In addition to the activity at European level, national legislators have introduced important legislative changes at national level in order to facilitate the private enforcement of antitrust damage claims. In Germany for example, the legislator amended the German Act against Restraints of Competition (ARC) in 2005 with the aim to strengthen private antitrust enforcement.⁷

This article aims to provide an overview and contribute to the ongoing discussion in Europe from a practitioner's point of view. The first part sets out some key factors for the future development of private enforcement in the E.U. (Part A). The second part analyzes some specific measures and policy choices proposed by the Commission in its White Paper and/or national legislators (Part B). The third part explains the still existing obstacles to private damage claims in the E.U. and the practical approach of the company Cartel Damage Claims ("CDC") to overcome these obstacles (Part C).

II. Key Factors for the Development of Private Enforcement in the E.U.

Over the last years, a number of key factors for the development of private enforcement have emerged from the case law of the Court of Justice of the E.U. ("CJ"), but also from the Commission's White Paper and the accompanying documents. These elements are part of the *acquis communautaire* and are thus already today directly applicable in damage actions before national courts. They will have a positive impact on the development of a

2. *White Paper on Damages Actions for Breach of EC Antitrust Rules*, COMM'N ON THE EUROPEAN COMMUNITIES, (Apr. 2, 2008), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf.

3. *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COMM'N ON THE EUROPEAN COMMUNITIES, (Apr. 2, 2008), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf [hereinafter *Commission Staff Working Paper*].

4. *Commission Staff Working Document-Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules: Impact Assessment*, COMM'N ON THE EUROPEAN COMMUNITIES, (Apr. 2, 2008), http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_report.pdf [hereinafter *Impact Assessment*].

5. Centre for European Policy Studies, et al., *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report*, COM (2006) AS/012 final (Mar. 30, 2008), available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf.

6. *Quantifying Antitrust Damages, Towards Non-Binding Guidance for Courts*, OXERA, (Dec. 2009), http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

7. Gesetz gegen Wettbewerbsbeschränkungen [German Act Against Restraints of Competition], July 15, 2005, BGBl. I at 2114 (F.R.G.).

more effective system of private enforcement in the E.U., independently of whether the proposals set out in the Commission's White Paper will be adopted or not.

A. THE ECONOMIC IMPACT OF THE OVERALL DAMAGE RESULTING FROM ANTITRUST INFRINGEMENTS IN THE E.U.

The question of whether or not to launch a damage action is mainly driven by an economic evaluation of the costs, risks, and potential outcome implied in such action. The success of private enforcement will therefore ultimately depend on whether market participants consider antitrust damage claims as potentially valuable assets. The overall still limited number of antitrust damage actions in the E.U. shows that this is currently not yet the case. The Impact Assessment Report of the Commission, however, clearly indicates that the size of damages caused by infringements of competition law in the E.U., and thus the damage claims that victims currently forego, does not justify such a reserved approach. The Impact Assessment Report estimates that the total amount of compensation (single damages plus pre-judgment interest) that victims of anticompetitive infringements are currently foregoing amounts to approximately €5.7 billion to €23.3 billion each year across the E.U.⁸ According to the recent "Oxera Study on the Quantification of Antitrust Damages," the average price overcharge caused by hardcore cartels in Europe amounts to between ten percent and twenty percent of the competitive price of the given product or service and the median overcharge amounts to eighteen percent.⁹

Given these impressive figures it seems likely that victims of anticompetitive conducts will in the future more often decide to pursue their potential damage claims. This is particularly true for larger, possibly listed companies, which are bound by corporate law and corporate governance obligations to pursue damage claims in order to safeguard the companies' and the shareholders' interests.¹⁰

B. THE LEGAL BASIS FOR DAMAGE CLAIMS IS ROOTED IN E.U. LAW

According to the case law of the CJ, the right of victims to damages is directly conferred by Community law. In the groundbreaking judgment *Courage v. Crehan*, the CJ laid down that "the practical effect of the prohibition laid down in Article 85 (1) EC (now, Art. 101 of the Treaty on the Functioning of the European Union ("TFEU")) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition."¹¹ In *Manfredi*, the CJ further clarified the right of victims of infringements of E.U. competition rules to claim damages: "It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under

8. See *Impact Assessment*, *supra* note 4, at 15.

9. See *Quantifying Antitrust Damages, Towards Non-Binding Guidance for Courts*, *supra* note 6, at 90.

10. See, e.g., Dr. Alexander Franz & David A. Jüntgen, Die Pflicht von Managern zur Geltendmachung von Schadensersatzansprüchen aus Kartellverstößen [The Obligation of Managers to Claim Damages Resulting From Antitrust Infringements], 32 *BETRIEBS-BERATER* 1681, 1681-87 (2007) (regarding the corporate law obligation of managers under German law to pursue damage claims for the infringement of national and EC competition law).

11. Case C-453/99, *Courage v. Crehan*, 2001 E.C.R. I-6297.

Article 81 EC (now, Art. 101 TFEU).¹² Neither the CJ, nor the Commission have, however, yet clarified whether the right to claim damages is directly enshrined in Articles 101 and 102 TFEU or in the general legal principles of Community law. A comparison with the case law of the CJ concerning the liability of the Member States to individuals for a breach of E.U. Law implies that the latter is more likely to be the case.¹³ From a practical point of view this does not, however, make any difference as it is clear from the foregoing that E.U. Law provides for the legal base on which any victim of an infringement of E.U. antitrust rules may directly claim damages before a competent national court if the following three conditions are fulfilled: (i) there is an infringement of Article 101 or 102 TFEU, (ii) the individual has suffered a damage, and (iii) there is a causal relationship between the damage suffered and the infringement.

C. NATIONAL LAW HAS TO BE INTERPRETED IN LINE WITH THE E.U. LAW PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

Although damage claims for the violation of E.U. competition rules law are rooted in E.U. Law, in practice they have to be enforced before national courts in accordance with the procedural and substantive law provisions applicable in the respective Member State. However, due to the direct effect and the supremacy of European Law, the applicable national provisions are subject to two legal principles of significant practical importance: (i) the principle of equivalence and (ii) the principle of effectiveness. In *Manfredi*, the CJ held that:

in the absence of Community rules, it is for the domestic legal system of each Member State to lay down the detailed material and procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not 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 (principle of effectiveness).¹⁴

In particular, the principle of effectiveness may require national judges to adopt a lenient interpretation or set aside national provisions in order to enable victims to effectively enforce their right to damages conferred by E.U. Law, even if this would *a priori* not be in line with the wording of the provision or established domestic case law. For example, this may be the case when overly severe limitation periods in national law do not take account of the specific circumstances of the often clandestine infringements of E.U. antitrust rules.¹⁵

12. Joined Cases C-295/04 & C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, 2006 E.C.R. I-6619.

13. According to the CJ in *Francovich*, "[t]he full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible." See Joined Cases C-6/90 & C-9/90, *Francovich, Bonifaci v. Italy*, 1991 E.C.R. I-05357.

14. *Manfredi*, 2006 E.C.R., para. 62, 72, 81.

15. According to the CJ "it is for the domestic legal system of each Member State to prescribe the limitation period for seeking compensation for harm caused by an agreement or practice prohibited under Article

D. PRINCIPLE OF FULL COMPENSATION OF DAMAGES

Damage claims represent an economic value and are therefore protected by the right of property enshrined in the fundamental principles of E.U. law as set out in Art. 17 (1) of the Charter of Fundamental Rights of the E.U.¹⁶ In accordance with the case law of the CJ, the Commission therefore established the principle of full compensation as the foremost guiding principle in the context of damage claims for antitrust infringements.¹⁷ According to the CJ, the damage to be compensated under E.U. law encompasses three factors: (i) the actual loss, (ii) loss of profit, and (iii) the right to interest.¹⁸ The European approach thus significantly differs from the United States, where private damage actions are fundamentally designed to deter future infringements.¹⁹ In practice, the differences in the approach may, however, be less important than one presumes at the outset that: Given the long average duration of cartels in the E.U. combined with the right to claim interest as of the first day of infringement, damages easily amount to twice the actual damage so that any “gap” with the U.S. approach is in reality much smaller than perceived.²⁰

E. JURISDICTION AND APPLICABLE LAW

Any violation of E.U. antitrust law by definition affects the market in more than one Member State. This raises complex questions in relation to jurisdiction and the applicable procedural and substantive law.

1. *Jurisdiction*

The international jurisdiction of courts in the E.U. is essentially governed by Regulation (EC) No 44/2001 (“Brussels I Regulation”).²¹ The general rule under Article 2(1) Brussels I Regulation is that any person has to be sued before the court at the defendant’s domicile or seat. However, in the context of tortious liability and collective litigation, the Regulation contains specific heads of jurisdiction. Given the tortious character of antitrust infringements, these specific jurisdictional rules are particularly relevant for antitrust damage actions. With regard to tortious liability, Article 5(3) Brussels I Regulation designates as competent the “courts for the place where the harmful event occurred” (*forum delicti*).²² According to the case law of the CJ, this place can, in general, either be the

81 EC, provided that the principles of equivalence and effectiveness are observed.” *Manfredi*, 2006 E.C.R., para. 81.

16. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. This Charter became binding as a result of the Treaty of Lisbon, which amended the Treaty on European Union and the Treaty establishing the European Community. Treaty of Lisbon, 2007 O.J. (C 306) 1.

17. See *Commission Staff Working Paper*, *supra* note 3, at 3.

18. *Manfredi*, 2006 E.C.R., para. 95.

19. One example for the importance of deterrence in U.S. antitrust law is the automatic trebling of damages, which is nonexistent in the E.U.

20. *Manfredi*, 2006 E.C.R., para. 97. In Germany, Section 33 (3) ARC specifically clarifies that interests start to be calculated from the date on which the damage occurred. German Act Against Restraints of Competition—Seventh Amendment, July 1, 2005, BGBL. I at 19 (F.R.G.).

21. Council Regulation 44/2001, 2000 O.J. (L 12) 44 (E.U.).

22. *Id.* art. 5(3).

place of the event giving rise to the damage or the place where the damage occurred.²³ Accordingly, jurisdiction was established at the seat of a victim of the Vitamins cartel in Germany in relation to an antitrust damage action against a cartel member seated in Switzerland.²⁴

Further, the regulation establishes a specific jurisdiction for collective litigation that is also suited for antitrust damage actions against two or more infringers having their seat in different Member States. Pursuant to Article 6(1) Brussels I Regulation, several co-defendants can be sued at the domicile or seat of one co-defendant (so called “anchor defendant”), provided the “claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”²⁵ Such a factual and legal connection is typically established in cases concerning the enforcement of antitrust damage claims: (i) such claims result from the same anticompetitive conduct (*e.g.* price-fixing, allocation of markets) and (ii) the infringers are jointly and severally liable for the overall damage caused by their illicit activities. This provision therefore designates alternative, equally competent courts at the seat of each of the infringers. According to English case law, actions against a multitude of infringers can also be lodged on the basis of Art. 6 (1) Brussels I Regulation before the competent court at the seat of subsidiaries of the infringers (*i.e.* subsidiaries acting as anchor defendants), at least if the subsidiaries implemented the cartel agreements.²⁶

2. *Applicable law*

The court competent to hear and to adjudicate the case will as a general rule apply the procedural rules of the Member State in question (*lex fori*). In addition, it has to determine which substantive law will apply to claims for damages resulting from the violation of E.U. antitrust law. In this respect, Regulation (EC) No 864/2007 on the law applicable on extra-contractual obligations (“Rome II Regulation”) is relevant.²⁷ The Rome II Regulation harmonized the private international law rules of the Member States concerning tortious liability and entered into force on January 11, 2009. Article 6(3) provides for a special rule on the law applicable to non-contractual obligations arising out of antitrust infringements, covering violations of both European and national competition law. According to Article 6(3) *lit. a* Rome II Regulation, the law applicable on claims resulting from the violation of competition law “shall be the law of the country where the market is, or is likely to be, affected.”²⁸ However, pursuant to Article 6(3) *lit. b* Rome II Regulation in cases where “the market is, or is likely to be, affected in more than one country . . . [the claimant] may instead choose to base his or her claim on the law of the court seized, provided that the market in that Member State is amongst those directly and significantly affected by the restriction of competition.”²⁹ It results that following the choice of the

23. Case C-21/76, *Handelsk wekerig G.J. Bier BV v. Mines de Potasse d’Alsace*, 1976 E.C.R. 1735.

24. This decision concerned the corresponding provision of Article 5(3) Lugano Convention. Landgericht Dortmund Case 13 O 55/02, Landgericht [LG] [District Court], Apr. 1, 2004, IPRax 2005 (542) (F.R.G.).

25. Council Regulation 44/2001, art. 6(1), 2000 O.J. (L 12) 44 (E.U.).

26. *Cooper Tire & Rubber Co. Europe Ltd. & Ors v. Dow Deutschland Inc. & Ors* [2010] EWCA (Civ) 864, 2010; *Provimi Ltd./Roche Products Ltd.* [2003] EWHC (Comm) 961.

27. Regulation 864/2007, 2007 O.J. (L 199) 41 (EC).

28. *Id.* at 44.

29. *Id.*

claimant, claims for damages sustained in different Member States will be adjudicated under application of one single law. In relation to antitrust infringements that took place prior to the entry into force of Article 6(3) Rome II Regulation, there are good arguments that in particular cases where the main infringement (*e.g.* the kick-off meeting of a cartel) took place in one Member State, the substantive law of that Member State is applicable to all damage claims, even if the economic effect (also) occurred in other Member States. In particular, the principle of effectiveness established by the CJ and mirrored in Article 6(3) lit. b Rome II Regulation implies the application of one coherent and set of procedural and substantive law to damage claims based on an infringement of E.U. antitrust law.

III. Specific Measures Proposed in the European Commission's White Paper

In its White Paper the Commission has identified nine areas that require legislative action in order to overcome the current ineffectiveness of antitrust damage actions.³⁰ For each of these areas the Commission proposes specific measures and policy choices. Furthermore, the Commission set out the *aquis communautaire* that clarifies for each of the nine areas the rights conferred by E.U. Law on which victims of antitrust infringements can rely before national courts. This provides a significant improvement for potential claimants, in particular as it is still unclear whether the Commission will take the next step in the legislative process and submit a formal draft directive. But, already the proposals in the White Paper are overall not sufficient and are partly even detrimental to attain the objective of providing a framework for an effective enforcement of antitrust damage claims. In this respect the proposals in the White Paper relating to following areas merit a closer comment: (1) indirect purchasers and collective redress, (2) access to evidence and disclosure *inter partes*, and (3) the passing-on defense.

A. INDIRECT PURCHASERS AND COLLECTIVE REDRESS

The Commission rightly acknowledges the general standing of indirect purchasers to bring damage claims. In *Courage and Crehan*, the CJ clearly stated that “the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to *any individual* to claim damages for loss caused to him. . . .”³¹ But, in the event of small damage claims, typically on the end-consumer level, it is unlikely that the victims will actually make use of their right to claim damages on an individual level. For most end-consumers it is simply not worth going through the hassle and bearing the costs of legal proceedings, if the potential damage to be awarded is not substantial.³² The Commission wants to overcome this fundamental dilemma by combining collective redress

30. These areas are: (i) standing: indirect purchasers and collective redress, (ii) access to evidence: inter partes disclosure, (iii) binding effect of decisions adopted by competition authorities, (iv) fault requirements, (v) damages, (vi) the passing-on of overcharges, (vii) limitation periods, (viii) costs of damage actions, and (ix) interaction between leniency programmes and actions for damages. See *Commission Staff Working Paper*, *supra* note 3.

31. *Courage*, 2001 E.C.R., at para. 26.

32. According to a survey, more than fifty percent of European consumers stated they will not go to court to seek redress for claims of less than €200. Katy Dowell, *Proposal for EU-Wide Class Action Finds No Favour With UK Practitioners*, LAW. (Eng.), Dec. 15, 2008, <http://www.thelawyer.com/cgi-bin/item.cgi?id=136067>.

mechanisms with a general presumption that—in case the action is lodged by end-consumers or their representatives—cartel-related price overcharges are entirely passed on to the end-consumer level.³³ However, the strong focus on and the favorable treatment of end-consumers implies a number of practical problems, which would not foster but hinder the development of an effective private enforcement system and full compensation of victims:

- *Low incentive to start damage actions:* As a result of the cost- and time-intenseness of antitrust damage actions and the low average damage amount, the economic incentive to start damage actions at end-consumer level will be limited, despite the availability of collective redress. This is confirmed by experiences in jurisdictions that already provide for representative or opt-in collective redress at end-consumer level, such as the United Kingdom or Germany. In the U.K. for example, the consumer organization *Which?* was granted the right to bring collective actions against infringers of U.K. competition law in 2005.³⁴ It was not until 2007 that *Which?* brought its first collective action against the sports retailer JJB Sports for price fixing of football replica shirts.³⁵ Despite a large media campaign and significant internal and financial efforts, *Which?* was only able to name 500 individuals in its representative action.³⁶ The total damage enforced at the end of the proceedings amounted to around £18,000, resulting in an individual payout of £20.³⁷ The legal head of *Which?* concluded that the low value of the payout, combined with the hassle to provide court, prove evidence makes it very unlikely that the consumer organization would bring another action soon.³⁸ In Germany, where associations and consumer organizations are allowed to recover illegal gains from the infringers of E.U. and domestic competition law, no such proceeding has ever been initiated.³⁹
- *Lack of court proof evidence:* Any action for damages will only be successful if the claimant(s) can substantiate and evidence (i) the damage suffered and (ii) the causal link between the infringement and the damage.⁴⁰ In the E.U., the burden of proof generally lies with the claimant and typically requires evidence on price overcharges relating to the purchase of the product or service subject to the anticompetitive conduct.⁴¹ But, end-consumers do not typically retain such evidence (e.g. purchase invoices), at least not for a long period of time.⁴² In view of the often long-lasting competition law infringements, this situation results in a lack of court-proof evidence at the end-con-

33. For details on the passing-on of overcharges see section B.3 *infra*. *Commission Staff Working Paper*, *supra* note 3.

34. *Our Legal Powers, WHICH? WORKS FOR YOU*, <http://www.which.co.uk/about-which/what-we-do/campaign-with-you/our-legal-powers/> (last visited Jan. 2011).

35. *Id.*

36. Caroline Binham, *JJB to pay out after football shirts claim*, *LAW*. (Eng.), Jan. 9, 2008, <http://www.thelawyer.com/jjb-to-pay-out-after-football-shirts-claim/130660.article>.

37. *Id.*

38. Katy Dowell, *Class Action Is One Big Headache, Says Which?*, *LAW*. (Eng.), Dec. 1, 2008, <http://www.thelawyer.com/class-action-is-one-big-headache-says-which?/135901.article>.

39. German Act Against Restraints of Competition, July 15, 2005, BGBL. I at 2114, § 34a.

40. *Comments on the European Commission's White Paper on Damages Actions for Breach of EC Antitrust Rules, CDC CARTEL DAMAGE CLAIMS*, at 4 (July 2008), http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/cdc_en.pdf.

41. *Id.*

42. *Id.*

sumer level and thus a perpetuation of the unjust enrichment of the infringers, in particular in long-lasting hardcore cartels. This is confirmed by the above-mentioned experience of U.K. consumer organization *Which?* in the football replica shirt case. The potential availability of disclosure *inter partes* does not remedy this situation. Due to the existence of one or more market levels between the infringer and the end-consumer, the infringer is typically not in a position to provide the court-proof documentation and information required to evidence the damage and the causal link with the infringement at end-consumer level.⁴³

As a result of these practical limitations and based on the principle of effectiveness established by the CJ, the Higher Regional Court of Karlsruhe in Germany has recently generally excluded the standing of indirect purchasers in antitrust damage actions.⁴⁴ This German court has therefore reached a conclusion comparable to the “*Illinois Brick*” doctrine in the United States, according to which damage claims by indirect purchasers are generally excluded at federal level.⁴⁵ Whether this far-reaching conclusion will be upheld, however, remains to be seen.

B. ACCESS TO EVIDENCE: DISCLOSURE INTER PARTES

One of the key requirements to ensure the effectiveness of antitrust damage actions is the access of victims to relevant evidence held by the defendants or third parties. In order to overcome the currently asymmetric availability of evidence, the Commission proposes a minimum level of *inter partes* disclosure, based on fact pleading combined with judicial control of relevance and proportionality.⁴⁶

1. *Discovery before national courts*

According to the CJ in *Laboratoires Boiron*, national courts are already today required to use all procedures available under national law, including that of ordering the production of a particular document by one of the parties or a third party, in order to comply with the principles of equivalence and effectiveness.⁴⁷ Jurisdictions that provide for broad discovery rules under national law may therefore be an interesting forum for bringing antitrust damage actions. However, should the passing-on defense be recognized in the jurisdiction of choice, both claimants and defendants can equally rely on disclosure rules. From a claimant’s perspective, discovery may therefore even have a negative effect as the use of discovery by the defendants may not only significantly prolong and complicate an already complex litigation, but can also result in a situation where defendants find proof that the

43. *Id.*

44. Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe June 11, 2010, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] 6 U 118/05 (F.R.G.).

45. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

46. *Impact Assessment*, *supra* note 4, at 5. For a detailed explanation of the Commission proposal of *inter partes* disclosure, see *Commission Staff Working Paper*, *supra* note 3, at 30-31. The details of the right to *inter partes* disclosure is based on the approach developed by the Commission under Directive 2004/48/EC (IP Directive). Council Directive 2004/48/EC 2004 O.J. (L195/16).

47. Case C-526/04, *Laboratoires Boiron SA v. Union*, 2006 E.C.R. I-07529. The Commission echoes this ruling in the *acquis communautaire* relating to disclosure rights. See *Commission Staff Working Paper*, *supra* note 3.

damage was *de facto* totally or partly passed on to subsequent market levels, making the damage action totally or partially unfounded.

On the other hand, the direct effect of E.U. Law requires that domestic rules relating to the access to evidence that make the exercise of the right to compensation excessively difficult must not be applied to cases of damages for the infringement of E.U. competition rules.⁴⁸

2. Detailed fining decisions by the Commission and access to the file

The General Court of the E.U. specifically recognized the necessity “of persons harmed by the infringement [of] being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished.”⁴⁹ Only detailed decisions setting out the precise facts of antitrust infringements will therefore allow victims to effectively assess the harm suffered. Under its current practice, the Commission does, however, exclude all substantial facts provided in the context of a leniency statement from its publicly available decision. This practice seems difficult to reconcile with the requirement of a high degree of transparency established by the European Courts. The requirement of a detailed and substantiated description of the infringement should also be taken into account by the Commission in the context of its new settlement procedure for cartels.⁵⁰ The Commission is right to state that the protection of confidential information may not *de facto* preclude the exercise of the right to compensation.⁵¹ For the avoidance of discrepancies between the various E.U. jurisdictions, it would therefore be advantageous to introduce a uniform and clear definition of the information that can legitimately be regarded as “confidential.”

With regard to evidence contained in the Commission’s case file, the Commission, as any other European institution, is under an obligation of sincere cooperation with the judicial authorities of the Member States. According to the CJ in *Zwartveld*, the Commission is therefore—within certain limits—obliged to produce relevant documents or authorize its officials to be examined as witnesses before national court proceedings concerning the infringement of E.U. competition law.⁵² In addition, Regulation 1049/2001 grants a right of access to European Parliament, Council, and Commission documents to any E.U. citizen and to any natural or legal person residing, or having its registered office, in a Member State.⁵³ The European Parliament is therefore right to require that victims of antitrust infringements be allowed access to relevant documents in the Commission’s files, unless interests pressingly in need of protection are endangered in the process.⁵⁴

48. See *Commission Staff Working Paper*, *supra* note 3, at 26.

49. Case T-198/03, *Bank Austria Creditanstalt v. Comm’n*, 2006 E.C.R. II-01429, para. 78.

50. See *Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation*, 2008 O.J. (C 167) 1.

51. *Commission Staff Working Paper*, *supra* note 3, at 35.

52. Case C-2/88, *Zwartveld*, 1990 E.C.R. I-04405, paras. 25-26.

53. Commission Regulation 1049/2001, Public Access to European Parliament, Council, and Commission Documents, 2001 O.J. (L 145) 43.

54. *European Parliament Resolution on the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, EUR. PARL. DOC. T6-0187/2009 (2009), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0187+0+DOC+PDF+V0//EN>.

C. PASSING-ON DEFENSE

According to economic theory and depending on a number of economic conditions, direct purchasers may “pass on” part or all of the illegal price overcharge to the next (indirect) purchaser in the chain, *e.g.* a retailer or end-consumer. In legal terms, the possibility of defendants in antitrust cases to invoke the alleged passing-on by the claimant in order to limit the liability for compensation is referred to as “passing-on defense.”⁵⁵ From an economic point of view, the passing-on defense is not a viable means to improve the effectiveness of antitrust damage actions, as the incentive for such actions is essentially driven by the aim of direct purchasers to recover significant damage amounts. This economic presumption led to the adoption of the “*Illinois Brick*” doctrine in the United States.⁵⁶ The principle of an effective and full recoupment of damages as postulated by the CJ implies that the application of the passing-on defense should be the exception and not the rule. It should be limited to concrete cases in which passing-on is likely to have occurred: for example market structures characterized by vertically integrated companies or industries which typically price on a “cost plus” basis.⁵⁷ It also seems necessary to avoid situations where by relying on the passing-on defense, infringers could effectively block the enforcement of legitimate damage claims.

At the national level, there are significant differences with respect to recognition of the passing-on defense in antitrust damage cases. In the U.K. for example, the Lords Justices of Appeal in *Devinish Nutrition* stated that damages should only be available for losses actually suffered, suggesting that the passing-on defense is likely to apply in antitrust damage cases.⁵⁸ In Germany on the other hand, the German ARC explicitly clarifies that the resale of a cartelized good or service does not in itself preclude the existence of a damage of direct purchasers, and thus their standing, in a court procedure.⁵⁹ Based on this provision and the general civil law principles on the balance of advantages (“*Vorteilsausgleich*”), German courts held that the passing-on defense is generally excluded in the context of antitrust damage claims.⁶⁰ Besides the principle of effectiveness established by the CJ the courts based their argumentation on the fact that there is no causal link between the infringement and the (alleged) passing-on of the damage and that infringers should not benefit from the successful and economically justified efforts of direct purchasers, selling their products or services to the next market level at the highest price possible.⁶¹

IV. Existing Obstacles to Private Enforcement and the Approach of CDC to Overcome These Obstacles

Despite recent legislative changes, victims of antitrust infringements still face significant obstacles when it comes to the enforcement of damage claims. The obstacles include (1)

55. BLACK’S LAW DICTIONARY 452 (8th ed. 2004).

56. See *Illinois Brick*, 431 U.S. 720.

57. See *European Parliament Resolution on the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, *supra* note 54.

58. *Devinish Nutrition Ltd. v. Sanofi-Aventis, S.A.*, [2007] EWHC 2394; see also *Emerald Supplies*, [2010] A.C. 1284.

59. German Act Against Restraints of Competition, July 15, 2005, BGBL. I at 2114, § 33(3).

60. Kammergericht [KG] Berlin, Oct. 1, 2009, OLGZ 2 U 10/03 (F.R.G.); OLG, *supra* note 44.

61. *Id.*

the calculation and evidence of damages, (2) the economic risks involved, and (3) the unclear legal situation in many E.U. Member States, including the lack of collective redress mechanisms. Against this background the company Cartel Damage Claims (“CDC”) has developed solutions to practically overcome these obstacles.

A. CALCULATION AND EVIDENCE OF DAMAGES

Under the procedural law of virtually all E.U. Member States a claimant has to sufficiently demonstrate and prove the damage suffered as a result of a tortuous act. In order to comply with the burden of proof, a claimant in an antitrust damage action thus has to submit court-proof evidence in respect of the damage suffered and the causality between the infringement and the damage. In the field of antitrust law it is, however, often extremely difficult for a single victim to calculate and to evidence the damage, as market-wide effects have to be assessed. The key challenge is the determination of the “hypothetical competitive price” of the product or service in question. It is at least the difference between such hypothetical competitive price and the price effectively paid by the victim, multiplied by the unit volumes purchased in the cartel period, which results in the total damage sustained. In view of its hypothetical character it is widely accepted that the competitive price, and thus the individual damage, may finally be estimated by the court.⁶² The German ARC contains a specific provision in this respect, which significantly reduces the burden of proof.⁶³ However, the claimant still has to provide full evidence of the complex factual and economic background (*e.g.* purchase and market data) on the basis of which the court can proceed to its estimation. The required data basis must in particular be sufficiently representative in order to serve as a sound basis for the estimation of the hypothetical market price.⁶⁴ The economic models available to analyze cartel-related damages do not lighten the burden of proof of the claimant as any such analysis ideally presupposes the existence of sufficiently detailed data on the actual price development in the markets concerned.⁶⁵

B. ECONOMIC AND FINANCIAL RISKS

Furthermore, the enforcement of antitrust damage claims may involve significant economic and financial risks. The preparation of claims for damages resulting from the violation of E.U. Competition Law is cost and time intensive. In addition to the collection and

62. According to the Commission, the principle of effectiveness excludes a national court that found that the claimant was harmed by the defendant’s infringement of the competition rules, from not awarding any damages simply because the claimant cannot prove sufficiently precisely the amount of the harm suffered. *Commission Staff Working Paper*, *supra* note 3, at 60. The Commission intends to issue non-binding guidance on the calculation of damages in 2011. As part of such guidance, the Commission will consider suggesting simplified rules for estimating the loss suffered as a result of a competition law infringement. *See id.* at 61.

63. German Act Against Restraints of Competition, July 15, 2005, BGBl. I at 2114, § 33(3).

64. In practice, particularly detailed purchase data from a multitude of victims allow the claimant to track and to analyze the real price development over years in the market concerned. Such precise data are quite difficult to obtain by the single victim, independent of the possibilities to additionally enforce claims for access to information against the infringers, or claims of access to file against the Commission or national competition authorities.

65. *See Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts*, OXERA, (Dec. 2009), http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

analysis of relevant evidence and purchase data, the preparation of antitrust damage actions generally requires support from external legal and economic experts. Depending on the jurisdiction where an action for damages is brought, the filing of damage actions may require the payment of considerable up-front court fees. The financial risk of claimants in antitrust damage cases may further increase as a result of the often long duration of legal proceedings. Finally, corporate victims of antitrust infringements may want to refrain from legal actions due to ongoing commercial relationships with their suppliers.

C. LACK OF LEGAL CERTAINTY AND LACK OF COLLECTIVE REDRESS MECHANISMS

Finally, antitrust damage claims in the E.U. are still in their infancy. Most Member States lack a clear legal framework in respect of damage actions for violation of E.U. competition law. This effectively prevents many victims from enforcing their claims. Although the CJ has formulated key principles, it is essentially for the Member States with their “procedural autonomy” to provide for the material and procedural rules governing such actions.⁶⁶ The legal reforms undertaken so far on a national level are, however, still fragmentary across the E.U. Given that legal certainty and predictability are in most cases decisive for bringing a damage action, it is evident that currently many victims of antitrust infringements are still rather deterred from pursuing their claims.

One fundamental aspect in the relative lack of private enforcement activity in the E.U. is the absence of collective redress mechanisms, in particular for direct purchasers. Effective forms of collective redress would in practice allow the victims to overcome the existing obstacles for bringing antitrust damage actions, as they would allow for the sharing of costs and risks inherent in such claims. While some Member States have introduced in recent years procedures of collective redress, (*e.g.* Portugal, Sweden, and Italy⁶⁷), they are typically designed for end-consumer claims, *i.e.* cases with widely dispersed and individually low value claims. But such procedures have in most Member States not yet been applied in the context of competition law infringements. In England, the Court of Appeal in *Emerald Supplies* explicitly held that the claimants in an antitrust damage action did not have standing to represent other direct and indirect purchasers under the representative action provision in the Civil Procedural Rules.⁶⁸

D. THE APPROACH OF CDC TO OVERCOME EXISTING OBSTACLES

With a view to practically address the obstacles to the effective enforcement of antitrust damage claims in the E.U., CDC was founded in 2002.⁶⁹ CDC is specialized in the purchase, the preparation, and the enforcement of such claims to CDC. The collective approach of CDC not only results in significant synergies, but also considerably strengthens the position of the victims in potential out-of-court/settlement discussions.⁷⁰

66. See *Courage*, 2001 E.C.R.; *Manfredi*, 2006 E.C.R.

67. See Member State Fiches on Consumer Redress, E.U., Jan. 2011, http://ec.europa.eu/consumers/redress_cons/adr_en.htm#MS_fiches.

68. *Emerald Supplies*, [2010] A.C. 1284.

69. About CDC, CARTEL DAMAGE CLAIMS, <http://www.carteldamageclaims.com/About%20CDC.shtml> (last visited Jan. 2011).

70. *Commission Staff Working Paper*, *supra* note 3, at 16.

1. *Purchase of antitrust damage claims*

Without being limited to this approach, CDC bundles damage claims on a material law level. In this respect CDC purchases the damage claims from a multitude of companies damaged by a given antitrust infringement.⁷¹ The victims transfer their damage claims by way of assignment.⁷² After the preparation of the factual and economic background, CDC enforces the damage claims in its own name and on its own account in and out-of court.⁷³ The enforcement encompasses the evaluation of settlement opportunities and litigation.⁷⁴ In court, CDC is represented by external lawyers.⁷⁵ In this way CDC aims to create an incentive for victims of antitrust infringements to start the enforcement of damage claims. In the absence of collective redress mechanisms, the bundling of claims is a trigger for antitrust damage actions, in particular as ongoing business relations are not affected by the enforcement process. In addition, the bundling of antitrust damage claims balances out the structural disadvantage of single victims vis-à-vis the infringers. Finally, given the often significant amount of such damages, the CDC approach of bundling antitrust claims across entire purchaser groups increases the possibilities to reach settlements and to attract third-party funding.

2. *Centralized collection and analysis of relevant data on a market-wide level*

In addition to the bundling of claims, CDC centrally collects and analyzes representative purchase data (i.e. data on cartel-affected purchases), as well as relevant market data.⁷⁶ The collection and analysis of large volumes of purchase data from a multitude of cartel victims allows CDC to precisely mirror the price developments prior, during, and after the infringement period. The collection and analysis of such representative data allows for well-founded conclusions on the market-wide effects of an infringement and the competitive “but-for” price. Therefore, CDC is in the position to precisely demonstrate and evidence the damage that each victim individually has sustained as a result of an infringement.

3. *Business model confirmed by Federal Court of Justice*

In 2003, the German competition authority found that numerous cement producers had shared the German cement market, agreed on sales quotas and fixed prices since the early 1990s.⁷⁷ Subsequently, CDC purchased the cartel-related damage claims of thirty-six cement-consuming companies and analyzed the cartel-related damage. CDC brought an

71. About CDC, *supra* note 69.

72. Approach, CARTEL DAMAGE CLAIMS, <http://www.carteldamageclaims.com/Approach.shtml> (last visited Jan. 2011).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. By decision in April 2003, the Bundeskartellamt fined the six largest companies a record fine of €660 million. One company had exposed the cartel and had applied for the German Leniency Program. See Press Release, the Bundeskartellamt, Bundeskartellamt imposes fines totalling 660 million Euro on companies in the cement sector on account of cartel agreements (of Apr. 14, 2003), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_04_14.php.

action for damages against six cartel members in August 2005 before the Regional Court of Düsseldorf.⁷⁸ The Court by interim judgement on February 21, 2007, declared the damage action admissible.⁷⁹ Subsequently, both the Higher Regional Court of Düsseldorf and in April 2009 the German Federal Court of Justice confirmed this judgment.⁸⁰ In the meantime, CDC has lodged a damage action before the Regional Court in Dortmund (Germany) against the members of the pan-European Hydrogen Peroxide Cartel, in which it bundled the damage claims purchased from thirty-two companies of the pulp and paper industry.⁸¹

4. *Leniency PLUS' concept*

In the E.U., most cartel decisions by the European Commission or national competition authorities are the result of the cooperation by cartel members under public leniency programs. While avoiding administrative fines, leniency applicants are nevertheless exposed to private damage actions. This is in particular the case in Europe, as all cartel members (including leniency applicants) are jointly and severally liable for the entire damage caused. Against this background, CDC has developed its Leniency PLUS' concept, which provides effective solutions by creating incentives for cartel members to cooperate in the context of private damage claims.⁸² Under the concept cartel members have the possibility to minimize their risk exposure to private damage claims by providing evidence on the infringement and the damage caused by the infringement.⁸³ Besides making private enforcement in the E.U. more effective, CDC is confident that its Leniency PLUS' concept also contributes to a better reconciliation of public leniency programs and private damage claims.

V. Conclusion

In view of the large scope of damages resulting from the violation of E.U. competition law, it is likely that the number of antitrust damage actions in the E.U. will continue to increase in the future. Although damage claims find their legal basis in E.U. law, they have to be enforced on the national level. In such cases the courts have, in the absence of European rules, to apply the material and procedural rules of national law, provided they do respect the E.U. principles of equivalence and effectiveness. The White Paper of the Commission and its accompanying documents will play an important role for the development of private enforcement of competition law, independently of whether there will be a E.U. Directive on this subject matter or not. In particular, the proposals in the White

78. German Cement, CARTEL DAMAGE CLAIMS, <http://www.carteldamageclaims.com/German%20Cement.shtml> (last visited Jan. 2011).

79. Landgericht [LG] [Regional Court] Düsseldorf, Feb. 21, 2007, Case No. 34 O (Kart) 147/05 (F.R.G).

80. Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf May 14, 2008, Case VI U (Kart) 14/07; Bundesgerichtshof [BGH] [German Federal Court of Justice] Apr. 7, 2009, Case KZR 42/08, Decision of 7 April 2009, Betriebs-Berater 2009, at 905.

81. The members of the European Hydrogen Peroxide Cartel were fined a total of €388 million, *see* Commission Decision Case COMP/F/C.38.620, 2006 O.J. (L353) 54.

82. For more information, *see* CARTEL DAMAGE CLAIMS, <http://www.carteldamageclaims.com/LeniencyPlus+.shtml> (last visited Jan. 10, 2011).

83. *Id.*

Paper may serve as model rules for the adoption of respective measures on national level. However, the White Paper does not effectively address all existing obstacles for victims of anticompetitive practices to bring damage actions. In many cases a collective approach is required to successfully enforce antitrust damage claims.