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DAMAGES ACTIONS FOR BREACH OF ARTICLES 81 AND 82 OF THE EC TREATY: A MORE ECONOMIC APPROACH

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ABSTRACT

The thesis examines several issues which lay at the intersection between the recent changes in EC competition law policy and the efforts of the European Commission to privatise competition law enforcement. In particular, it examines the relationship between the 'more economic approach' and damages actions for breach of Article 81 and 82 of the EC Treaty. The thesis is structured into four parts. The first part examines the foundations of EC competition law policy and some of the basic characteristics of its objectives structure before the introduction of the more economic approach. The second part discusses some of the fundamental characteristics of the more economic approach itself. Part three contrasts the findings of the first two parts against the current state of Community law and some of the solutions proposed by the European Commission. Part four concludes.

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I. INTRODUCTION

EC competition law is currently undergoing the most significant reform in more than half a century of its existence. The reform encompasses fundamental changes to both its substantive and procedural aspects. On the substantive level, changes have been brought about with the introduction of the 'more economic approach.' Article 81 EC has been fully reformed in line with the approach, while Article 82 EC is still currently under reform. On a procedural level, changes have been brought about with Regulation 1/2003 which established the fundamental legal framework necessary for a decentralised system of EC competition law enforcement. The paper aims to explore some of the issues which lay at the intersection between the two aspects. In particular, the paper aims to examine the relationship between the more economic approach and damages actions for breach of Articles 81 and 82 of the EC Treaty.

The paper is structured into four parts. The first part examines the foundations of EC competition law policy and some of the basic characteristics of its objectives structure before the introduction of the more economic approach. In particular it explores the theoretical foundations of EC competition law and several of its main objectives – economic freedom, market integration and economic efficiency. The second part discusses some of the fundamental characteristics of the more economic approach itself. More specifically, it examines the main aspects of the consumer welfare standard. Part three contrasts the findings of the first two parts against the current state of Community law and some of the solutions proposed by the European Commission. Namely, part

three explores the *Courage* and *Manfredi* decisions of the European Court of Justice and the European Commission's proposals contained in the 2005 Green Paper and 2008 White Paper. Part four concludes.

II. EC COMPETITION LAW POLICY

A. Introduction

Competition law policy is not universally defined. Considerable differences of opinion exist in regard objectives which competition law should aim to achieve. These differences do not only have a geographical dimension but also a temporal one - the understanding of objectives of competition law changes over time.[1] This is so because competition policy is shaped by a multitude of diverging influences. Giorgio Monti has categorised these influences into three groups: a political, an economic and an institutional one.[2] When considering the political issue, two extreme viewpoints can be differentiated: the first provides that competition law should only be utilised to reach objectives which are purely economic; the second, however, provides that in addition to economic objectives, some (other) objectives of public policy should also be pursued.[3] A further complexity lays in the fact that there is no agreement as to which those economic and

[1] G. Monti, *EC Competition Law* (CUP, Cambridge 2007), 3; A. Foer, 'The Goals of Antitrust: Thoughts on Consumer Welfare in the US' in (Ed) Philip Marsden, '*Handbook of Research in Trans-Atlantic Antitrust*' (Edward Elgar Publishing, Cheltenham 2006), 566.

[2] G. Monti, *EC Competition Law*, as note 1 above, at 4.

[3] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* (West Publishing, 1994), at 71-72: 'Today the most important debate about the basic principles in antitrust is between those who believe that allocative efficiency should be the exclusive goal of the antitrust laws and those who believe that antitrust policy should consider certain competing values.'

public policy objectives are. This is where the second, economic group of influences connects to: economic objectives which competition law aims pursue are products of economic theory.[4] Economic theories, however, vary and in certain instances lead to contrasting results. Moreover, economic theories must be supported by the relevant institutions having competence over competition law matters. Institutional activity is not just decisive in shaping economic objectives, it is even more so in the shaping of (non-economic) public policy objectives. Therefore, the nature, competence and personal makeup of institutions affecting these issues of competition law is of great importance. The three named groups of influences are closely interlinked, and a change in one will result in changes to the other two. As a consequence, competition law policy differs from one legal system to another, but also within a single legal system as the three groups of influences change over time.[5]

B. The History of EC Competition Law Policy

1. *The 'Freiburg School' as a theoretical basis of EC competition law policy*

It is widely believed that the foundations of European competition policy have been structured upon the theoretical basis of the so-called 'Freiburg School' of political philosophy. The Freiburg

[4] R. A. Posner, *Antitrust Law*, (2nd edition, University of Chicago Press, 2001), at 286: 'Looking over the entire history of U.S. antitrust law, I conclude that the most powerful explanatory variable is simply the state of economic opinion. Antitrust doctrine has changed more or less in tandem with changes in economic theory, though often with a lag.'

[5] There are more than 100 competition law systems in force throughout the world. See: R. Whish, *Competition Law* (6th Edition, OUP, Oxford 2008), at 1.

School emerged in Germany during the 1930's, and subsequently became known as 'ordoliberalism'. In 1933, the same year Nazis came into power, an economist, Walter Eucken, and two lawyers, Franz Böhm and Hans Grossmann-Doerth, met at Freiburg University and it was there were the three discovered that they shared similar views on the political, economic and legal issues of the time. They soon began to develop a coherent set of ideas which would provide an answer to the issues which German society was facing. That framework would later have an overwhelming influence on the development EC competition law.

The core ideas of the Freiburg School were built upon a critique of German society of the time, but also on the critique of the intellectual framework in which the society operated - economic thought was dominated by historicism and legal thought by positivism. The Freiburg intellectuals rejected both of these approaches as flawed and thus unable to solve Germany's problems. Instead, in search for a new kind of thought that could change German society in its whole, they decided to explore concepts of classical liberalism. The exploration led them to believe in a 'society in which individuals were as free as possible'.[6]

It was perceived, however, that freedom was under persistent pressure from both the power of the state and the private economic power of individuals. The abuse of those powers was seen as a

[6] D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, Oxford 1998), at 240.

problem in particular. Thus, in order for both of these sources of power to be kept within bounds, a system which would disperse them as widely as possible was envisaged.[7]

2. *The economic policy of the Freiburg School*

Freiburg School's economic and social policies were closely interrelated. It was a natural outcome of the theoretical framework developed, as it contained a set of political, economic and legal policies designed so as to govern society in its entirety. As such, the policies were not intended to be applied in isolation, but rather as constituents of a greater whole which complement each other. However, the complementary relationship was developed with social and not economic goals in mind. Economic efficiency was not seen as end in itself, but rather as an indirect consequence of a desired social order.[8] The economic policy of the Freiburg School was first and foremost a proxy for its social policy.[9]

When developing the theoretical bases on which these policies rested, much attention was given to methodological and scientific integrity. One of the most important contributions of the Freiburg School and the theoretical basis of its (economic) policy was a method called 'thinking in orders' (*Denken in Ordnung)*. It was a concept developed by Eucken and it at its foundation

[7] As Böhm has put it: 'the one who has power has no right to be free and the one who wants to be free should have no power'. Cited as in: W. Möschel 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy' (2001) 157 *Journal of Institutional and Theoretical Economics*, at 4.

[8] See: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 239-40; W. Möschel, 'Competition as a Basic Element of the Social Market Economy' (2001) 2 *European Business Organization Law Review*, at 713-4.

[9] See: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 239-40.

laid a distinction between various 'orders' (*Ordnung*).[10] According to Eucken, when considering economies, two fundamental economic orders can be differentiated: a 'transaction economy' (*Verkehrswirtschaft*) and a 'centrally planned economy' (*Zentralverwaltungswirtschaft*).[11] In a transaction economy, economic behaviour is induced by private interests, as in direct contrast to a centrally planned economy where behaviour is based on non-economic considerations.[12] This O*rdnung*-based approach set path for several other principles central to the Freiburg School. A more thorough integration of legal and economic knowledge was called for based on the argument that the gap between economic and legal sciences has made it impossible to fully understand economic processes within a society, as they were unwinding within the norms of a given legal system, not outside them. Furthermore, an 'economic constitution' should be defined as a counterpart to a political constitution, based on an equated relationship corresponding to their 'parallel structure'.[13] The common point should be regarded the problem of power.[14] It was suggested that, just as a society defines a political constitution embodying its fundamental political principles, it should also define an economic constitution embodying its fundamental

[10] See: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 243-4.

[11] Although a variation of this distinction became a paradigm after the Second World War, it was not easily perceivable before it. See: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 243-4.

[12] Eucken perceived these orders to be functioning on genuinely different principles, to the extent that the application of principles underlying one order to the other would result in its malfunction. D. J. Gerber, '*Protecting Prometheus'*, as note 6 above, at 244.

[13] The 'economic constitution' is not a reference to a concrete material constitution but a set of principles. See: W. Möschel, 'The Proper Scope of Government', at 5; D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 245-46.

[14] W. Möschel, 'The Proper Scope of Government', as note 7 above, at 8.

economic principles. For the Freiburg School, those principles should be ones of an open and free market economy.[15]

3. *The competition law policy of the Freiburg School*

By drawing on economic notions of classical liberalism, the Freiburg School viewed competition to be a fundamental institution of transaction economies. The notion of competition as understood by Eucken had a peculiar form and meaning called 'perfect competition' - a form of 'competition in which no firm in a market has power to coerce conduct by other firms in that market.'[16] Hence, the goal of competition law is 'the protection of individual economic freedom of action as a value in itself, through the restraint of undue economic power.'[17] In that sense, competition law is an 'extension of civil law by different means.'[18] Economic freedom should be protected from undue restraints of the state and powerful private individuals. In other words, competition policy focuses on the legitimisation of economic freedom in order to prevent this

[15] W. Möschel, 'The Proper Scope of Government', as note 7 above, at 10.

[16] Also referred to as 'complete competition'. For an explanation, see: D. J. Gerber, *Protecting Prometheus*, at 245. It is argued that although Eucken did not link 'perfect competition' to a particular market structure, the concept shares some common ground with the model of perfect competition as understood in 'traditional' economics. As Möschel has stated: 'The scholars of ordoliberalism have also used economic models for the description of their ideas, for instance, the model of perfect competition as it was developed in the traditional theory of competition. Such models, however, served only for the description of general effects of a market system, illustrating them in what might be called a chemically pure form. That did not imply, however, that those partly unreal premises were to be integrated as goals into practical competition policy.' W. Möschel, 'The Proper Scope of Government', as note 7 above, at 4.

[17] W. Möschel, 'The Proper Scope of Government', as note 7 above, at 4.

[18] W. Möschel, 'Competition as a Basic Element of the Social Market Economy', as note 8 above, at 714.

freedom from destroying its own prerequisites.[19] A strong state was called for, as its role was modest but very important – to '[preserve] the prerequisites of competition',[20] by preventing the 'degeneration of the competitive process'.[21]

Eucken perceived the concentration of excessive economic power to be a negative phenomenon in itself and as such to be prevented.[22] Cartels, as a method of concentrating economic power, should be prohibited.[23] The creation of monopolies should be prohibited and existing ones should be divested where possible.[24] However, Eucken recognised that a monopoly position could be attained without anticompetitive conduct, as in cases of natural monopolies, intellectual property rights or where a company has 'won' the competitive race.[25] In such cases, divestitures would be uncalled for as it would be highly impractical and wasteful.[26] Instead, a system of conduct control should be put in place, which would compel monopolies to act *as if* they were subject to

[19] W. Möschel, 'The Proper Scope of Government', as note 7 above, at 7.

[20] W. Möschel, 'The Proper Scope of Government', as note 7 above, at 3.

[21] The concept of 'indirect regulation' - the state's role is not to command economic processes, but to provide a framework in which economic processes could effectively function. See: D. J. Gerber, *Protecting Prometheus*, at 248-50; W. Möschel, 'Competition as a Basic Element of the Social Market Economy', as note 8 above, at 714-5.

[22] See: W. Möschel, 'The Proper Scope of Government', as note 7 above, at 4.

[23] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 251.

[24] This view was not, however, shared among all ordoliberals.

[25] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 252.

[26] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 252.

competitive pressure or *as if* they did not have such market power.[27] Thus, the 'as if standard' provides a benchmark capable of distinguishing between legal and illegal conduct.[28] For Eucken, such a system has a twofold advantage: it compels companies to behave in line with the standard of perfect competition on one side, and keeps state intervention to a minimum on the other, thus simultaneously providing a solution to the problems of undue private and public power abuse.[29]

4. *Inception EC competition law*

Gradually, as the Second World War came to an end, the philosophy of Freiburg School became known as 'ordoliberalism.' Due to the post-war occupation of Germany, the division of its territory and to the increasing presence of socialism in Europe, the US military government sought to establish a political system that would provide a solution for Germany's monopolised and cartelised market, and at the same time disallow the introduction of a centrally planned

[27] The principle was built upon an idea developed in the 1920's by H. C. Nipperdey, who made a 'distinction between 'performance competition' (*Leistungswettbewerb*) and 'impediment competition' (*Behinderungswenbewerb*)', where performance competition was competition based 'on merits', such as quality of a product or its price, while impediment competition was based on the impediment of rivals performance. Performance competition was seen as a natural outcome of the competitive process, while impediment competition was believed to occur in situations where there was no (significant) competition. See: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 252-3.

[28] By relying on these presumptions, Böhm indentified various types of conduct which he considered to be anti-competitive, such as predatory pricing, loyalty rebates and refusal to deal. D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 253.

[29] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 252.

economy.[30] The solution was found in ordoliberalism, not least because it was untainted by Nazism.[31] As a consequence, many ordoliberals assumed high-ranking positions in the German government and continued to do so for a number of years.

The first supranational organisation created was the European Coal and Steel Community (ECSC).[32] It was created in order to regulate the production and trade of coal and steel within its member's territories. The ECSC Treaty contained rules on competition but their effect on the shaping of EC competition policy was limited.[33] Several years after its creation, and after several failed attempts to create a supranational political organisation of a wider scale,[34] the proponents of Europeanization had limited options to create a vehicle that would carry forward political integration. One of those options was to achieve political integration through economic integration by a common market. In order to implement the idea, the Six had set-up an

[30] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 258; H.L. Buxbaum, 'German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement' *Indiana University School of Law – Bloomington Legal Studies Research Paper Series* No. 22, at 103-5.

[31] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 257.

[32] Treaty Constituting the European Coal and Steel Community. Signed on 18 April 1951 in Paris; entered into force on 23 July 1952; expired on 23 July 2002. It was the first supranational organization in the world and had six Member States: Belgium, the Netherlands, Luxembourg, Italy France and Germany. For a general overview ECSC competition provisions see: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 335-42.

[33] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 342.

[34] Attempts to create a European Defence Community (EDC) and a European Political Community (EPC) had not ended in success.

Intergovernmental Committee, colloquially known as the 'Spaak Committee',[35] whose goal was to produce a report on the feasibility of creating a common market.[36] After several meetings, the Committee produced a report on the study named as the 'Spaak Report'.[37] Soon as the report was approved, work on the drafting of the treaty which would establish the European Economic Community had started.

It was clear from the outset that rules regulating competition would have to be implemented. The rational was simple – measures laid down by the Treaty could easily be rendered ineffective by private parties recreating the barriers the Treaty aimed to abolish.[38] There were, however, differences as to what kind of competition rules should be adopted.[39] In the end, a compromise was reached and several rules prohibiting the distortion of competition where adopted, leaving the procedural aspects of those prohibitions to be regulated down the line.[40]

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[35] The Committee was named after Paul-Henri Spaak, the Belgian diplomat chairing the Committee.

[36] The Committee was set-up on the 'Messina' conference of the Foreign Ministers of the ECSC Member States held in Messina, Italy between the 1st and 3rd of June 1955.

[37] Report of the Heads of Delegation to the Ministers of Foreign Affairs (21 April 1956) ('Spaak Report'). (Provisional English Text). Available at: http://aei.pitt.edu/995/01/Spaak_report.pdf

[38] D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 343.

[39] According to Gerber, both Germany and France wanted to implement some of the basic notions of their national economic systems. See: D. J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP, Oxford 1998) at 343.

[40] Enforcement rules were laid down in Council Regulation 17 of 6 February 1962 – First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

C. The Nature of EC Competition Law Policy

1. *Introduction*

The fundamental objectives of the Community are set out in Article 2 of the EC Treaty:[41]

> The Community shall have as its task, by establishing a common market [...] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, [...] a high degree of competitiveness and convergence of economic performance, [...] and economic and social cohesion and solidarity among Member States.

When setting out activities designated for the attainment of said objectives, Article 3(1)(g) specifically sets out that the Community shall establish 'a system ensuring that competition in the internal market is not distorted.'[42]

[41] Treaty establishing the European Community (Treaty of Rome) (as amended), signed on 25 March 1957, came into force on 1 January 1958.

[42] Gerber argues that the notion of distorting competition embodies several objectives which treated in isolation do not necessarily seem coherent, but when viewed from a holistic perspective of competition distortion prove to be in conformity. See: D. J. Gerber, 'The Future of Article 82: Dissecting the Conflict' in C. D. Ehlerman and Mel Marquis (Eds.) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, Oxford 2008). Available at: http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Gerber.pdf, at 7.

In that respect, the Treaty contains rules dealing with distortion of competition by private actors as well as the state,[43] while merger control rules were not included.[44] Although the exact reasons for drafting Articles 81 and 82 EC in the form they have are generally not well known,[45] it is widely held that the wording and structure of those articles seem to be most closely connected to ordoliberalism.[46]

2. *Economic freedom as an objective of EC competition law*

Article 81(1) prohibits agreements 'which have as their object or effect the prevention, restriction or distortion of competition' while Article 81(2) declares such agreements automatically void. However, such an agreement can be exempted from prohibitions if it meets the four requirements of Article 81(3): namely, (1) an agreement has to generate efficiencies, (2) the restriction of

[43] The rules of competition law are laid down in Articles 81 to 89 EC. However, of central interest for this paper are Articles 81 and 82.

[44] The first rules on merger control were laid down in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395. Before the merger rules came into force Article 82 was utilized for *ex post* control of mergers. See: Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, [1973] ECR 215, [1973] CMLR 199.

[45] For an overview of the legislative history see: D. J. Gerber, *Protecting Prometheus*, as note 6 above, at 343; H. Schweitzer, as note 51 above, at 9-18.

[46] R. Whish, as note 5 above, at 21; G. Monti, EC Competition Law, as note 1 above, at 25-39; G. Monti 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review*, at 1057-62; A. Jones and B. Sufrin, *EC Competition Law* (3rd Edition, OUP, Oxford 2008), at 43; R.J. Van den Bergh and P. Camesasca, European Competition Law and Economics: A Comparative Perspective (2nd Edition, Sweet & Maxwell 2006), at 47-49; D. Hildebrand, 'The European School of EC Competition Law' (2002) 25 *World Competition* 4.

competition has to be indispensible for the attainment of the agreements objectives, (3) the resulting efficiencies have to be distributed – passed on to consumers, and lastly, (4) competition cannot be (actually or potentially) eliminated. If viewed from an ordoliberal perspective, several fundamental notions can be identified. Ordoliberal theory understands competition as economic freedom of action, thus, such a reading of Article 81(1) would prohibit the restriction of economic freedom. However, Article 81(3) allows for a trade-off between economic freedom and efficiencies resulting from the restriction. From an ordoliberal perspective, such a trade-off is not possible – economic freedom is an end in itself and its restriction is prohibited *per se* – hence, there is a theoretical discrepancy.[47] Nonetheless, the overarching principle of economic freedom at the foundations of Article 81(1) and (3) coupled with the principle of wealth distribution, understood as a means of preventing excessive economic power, does bare a close resemblance to ordoliberal theory, although it does not mirror it.[48] The European Commission has on numerous occasions pronounced economic freedom to be imbedded its competition law policy[49] and

[47] Monti argues that the efficiency defence is a 'compromise' which allows, under strict conditions, public policy goals to be pursued at the expense of economic freedom. G. Monti, *EC Competition Law*, as note 1 above, at 28.

[48] See: G. Monti 'Article 81 EC and Public Policy', as note 46 above, at 1060-1.

[49] 'Competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all.' *First Report on Competition Policy* (1972), at 11; '[competition] preserves the freedom and right of initiative of the individual economic operator and it fosters the spirit of enterprise.' *Fifteenth Report on Competition Policy* (1985) 25; 'the exclusive nature of a contractual relationship between a producer and a distributor is viewed as restricting competition, since it limits the parties' freedom of action on the territory covered.' T*wenty-third Report on Competition Policy* (1993) 27.

Community courts have accepted the economic freedom interpretation of competition in several decisions.[50]

Article 82 prohibits 'any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it […] in so far as it may affect trade between Member States.' Again, certain convergence between Article 82 and ordoliberal principles can be identified. It should be noted, however, that it is difficult to establish the level such convergence as ordoliberals did not have a unified and completely developed position in regard of monopolies.[51] As described above, Eucken made a distinction between *avoidable* monopolies and *non-avoidable* ones (natural monopolies, monopolies based on intellectual property and monopolies attained by winning the competitive race). The creation of avoidable monopolies should be prohibited where possible, while existing ones should be divested. As to non-avoidable monopolies, conduct-control based on the *as if* standard is to be applied. However, Article 82 EC does not prohibit the attainment of monopoly position, but merely prohibits its abuse. However, it should be recalled that abuse of power as such (be it public or private) is a fundamental concern in ordoliberal theory and lies at its premises - abuse of a dominant position is a restriction of

[50] Opinion of AG Gerven Case C-234/89 *Delimitis v Henninger Bräu* [1991] ECR I-935, paragraphs. 15 and 17; Case T-112/99 *Métropole télévision and Others v Commission* [1996] ECR II-649, paragraphs 76 and 77; Case C-309/99 *Wouters v lgemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1557, paragraph 97.

[51] One of the more prominent positions on monopolies was developed by Eucken, although it should also be noted that he's view was not shared among all ordoliberals. See: H. Schweitzer, 'Parallels and Differences in the Attitudes towards Single Firm Conduct: What are the Reasons? The History, Interpretations and Underlying Principles of Sec. 2 Sherman Act and Art. 82 EC' *EUI Working Papers - Law* 2007/32, at 20-1.

another's economic freedom.[52] Thus, as a general proposition, Article 82 EC does seem to be in line with ordoliberal theory, although it does not mirror it to the fullest extent.

3. *Market integration as an objective of EC competition law*

Ever since the Community was established the objective of market integration has been *inter alia* pursued by competition law. Although the Treaty contains a number of provisions specifically aimed at creating a common market, such as those providing for the free movement of workers, goods, services and capital, competition law has nonetheless been used as an instrument for achieving the same purpose. The reason behind the application of competition law as an instrument of market integration is somewhat rational – as the aim of the Treaty is to eliminate economic barriers to trade between the Member States and economic operators which could recreate those barriers would be acting directly against this fundamental principle. The objective of integrating the common market is a crucial feature of EC competition law as it differentiates it from any other competition law system in the world.[53] However, the priority given to market integration varied over time. In the early years, the pursuit of the objective was straightforward and rigid.[54] A practice which produced efficiencies but partitioned the market could not be exempted from prohibition, as efficiencies were considered to be an 'inferior' objective as

[52] See: W. Möschel, 'Competition as a Basic Element of the Social Market Economy', as note 8 above, at 715.

[53] A. Jones and B. Sufrin, as note 46 above, at 42.

[54] See: *First Report on Competition Policy* (1972), at 15-16; *Second Report on Competition Policy* (1973) at 40-41; *Ninth Report on Competition Policy* (1980), at 10.

compared to market integration.[55] However, as the process of integration progressed the position taken became more flexible and more importance was given to efficiency considerations both in terms of legislation and decision making. However, a more lenient stance towards efficiency consideration does not mean that the aim of market integration has lost its importance or that it is not anymore seen as a priority. On the contrary, the Commission's concern for the integrity of the market is reflected both in its decision making and legislative efforts.[56]

The problem is, however, that the market integration objective does not blend well with economic considerations. From a purely economic perspective, efficiencies and economic welfare should be the sole benchmark when assessing the legality of certain conduct, and if the objective of market integration is introduced into the assessment it diminishes the use of economics. For that reason, economist and some competition lawyers advocate the exclusion of the single market objective from competition policy and propose its attainment through other means.[57] However, the Commission does not seem willing to take such a radical change in its policy, but has rather moved to somewhat reconcile the single market objective with economic

[55] See: Joined Cases 56/64 and 58/64 *Consten Sarl and Grunding-Verkaufs GmbH v Commission* [1966] ECR 299.

[56] The highest fines imposed for territorial protection were in the *Volkswagen* and *Nintendo* cases. In *Volkswagen* the fine was set on appeal at 90 million, while in *Nintendo* the fine was set on appeal at 119 million. See: *Volkswagen* OJ [1998] L 124/60, [1998] 5CMLR 33; Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, [2000] 5 CMLR 853; upheld on appeal Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, [2004] 4 CMLR 351; *Nintendo* OJ [2003] L255/33, [2004] 4 CMLR 421, on appeal Case T-13/03 *Nintendo v Commission*, not yet reported.

[57] See: R.J. Van den Bergh and P. Camesasca, as note 46 above, at 47.

considerations. The current approach aims to do that by proclaiming that competition law and the single market serve the same objective – the efficient allocation of resources for the benefit of consumers.[58] Indeed, the idea of market integration is in great deal founded on the idea of efficiency, as an integrated market results in efficiencies as firms compete for new markets. However, such a reconciling solution is still not in line with economic reasoning.

4. *Efficiency as an objective of EC competition law*

It is widely argued in literature that efficiency represents the primary objective of competition law. In the US, efficiency became the central objective of antitrust laws during the 70s and 80s years of the twentieth century, while Europe's approach was somewhat different. In the EC, efficiency considerations were not seen as a sole objective of competition law but rather as one of several objectives (such as economic freedom, market integration, fairness, etc.). This meant that efficiency considerations had to be somehow reconciled with other objectives pursued, as pursuing efficiency at the same time as some other goal might lead to a conflict and a trade-off between the objectives. In the early years of the Community, objectives such as economic freedom and market integration were much more favoured, and in the trade-off between these

[58] *Guidelines on the application of Article 81(3) of the Treaty* OJ [2004] C 101/97 paragraph 13: 'The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.'

objectives efficiency was regularly sacrificed. Efficiency was rather seen as a result of economic freedom and not as an end in itself.[59]

Although the notion is increasingly used in regulations, guidelines and notices, EC competition law does not provide a definition of efficiency. In economics, the notion of economic efficiency is considered to be composed of three components: allocative, productive and dynamic efficiency. Allocative efficiency corresponds to a situation where goods and services are allocated between consumers according to the price they are willing to pay, and prices never exceed the marginal cost of production.[60] Allocative efficiency is the equilibrium between supply and demand which is achieved under the conditions of perfect competition. From a welfare economics perspective such equilibrium satisfies the Pareto criterion and is 'Pareto efficient' - no one can be made better off without making somebody else worse off. In other words, if products and services are priced so as to equal marginal costs, no producer can be made better off without making a consumer worse off, and *vice versa*.[61] Conversely, 'allocative inefficiency occurs where firms holding market power are able to affect prices by reducing their output, resulting in prices that exceed marginal costs.'[62] Productive efficiency corresponds to a situation where the

[59] See: G. Monti, *EC Competition Law*, as note 1 above, at 45.

[60] D. Geradin, 'Efficiency Claims in EC Competition Law and Sector-specific Regulation' (November 8, 2004) available at SSRN: http://ssrn.com/abstract=617922 at 4.

[61] See: R.J. Van den Bergh and P. Camesasca, as note 46 above, at 29.

[62] D. Geradin, as note 60 above, at 4.

production of goods and services is maximised at the lowest possible cost.[63] Both allocative and productive efficiencies are static, as they are concerned with existing resources. Dynamic efficiency, however, corresponds to a situation where producers constantly innovate, develop and disseminate new products and services, and thus generate new resources. Both productive and dynamic efficiency imply that economic operators which are more (productively or dynamically) efficient should not be prevented from realising their efficiency at the expense of less efficient ones.[64] In that respect, these efficiencies do not satisfy the Pareto criterion. The tension between the Pareto efficient and non-efficient components is resolved by the Kaldor-Hicks criterion. It allows for the gain of one to be traded-off against the loss of another, and if the gain outweighs the loss total welfare is maximised. Such a Kaldor-Hicks improvement is referred to as a potential Pareto improvement as, if trade-off between gain and loss is allowed, the overall result satisfies the Pareto criterion.

From a general standpoint, one can say that efficiencies are generally used by undertakings as a justification for the conclusion of an agreement which falls under Article 81(1).[65] Article 81(3) provides for a possible exemption of a restrictive agreement from prohibition if, *inter alia*, it 'contributes to improving the production or distribution of goods or to promoting technical or economic progress'. Paragraph 3 is widely understood as implicitly referring to allocative,

[63] See: R.J. Van den Bergh and P. Camesasca, as note 46 above, at 29; D. Geradin, as note 60 above, at 4.

[64] R.J. Van den Bergh and P. Camesasca, as note 46 above, at 29.

[65] D. Geradin, as note 60 above, at 7.

productive and dynamic efficiency.[66] Thus, in order for an agreement which restrict competition to be exempted, economic efficiencies gained have to compensate the loss resulting from the restriction.[67]

The balancing of the gains and losses is performed under the framework of Article 81(3) EC. The Commission has also adopted several regulations and guidelines which, among other things, deal with the application of efficiencies when assessing horizontal and vertical agreements.[68]

5. *The shift in the objectives structure*

The relationship of these three core objectives of EC competition law has, however, gradually shifted during half of century of their existence.[69] In the first years of application of EC competition law, economic freedom and market integration where much more emphasised than efficiency considerations. However, economic efficiency now holds a much more prominent

[66] See: G. Monti, *EC Competition Law*, as note 1 above, at 45.

[67] R.J. Van den Bergh and P. Camesasca, as note 46 above, at 7.

[68] Commission Regulation 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements, [2000] O.J. L 304/3; Commission Regulation 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, [2000] O.J. L 304/7; Commission Regulation 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [1999] O.J. L 336 21; Commission notice - Guidelines on Vertical Restraints, [2000] O.J. C 291; Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, [2001] O.J. C 3/2.

[69] R.J. Van den Bergh and P. Camesasca, as note 46 above, at 5.

position. This is so because there have been significant changes in the three sets of influences shaping competition policy. From an institutional perspective, the focus is shifting from the Commission towards the European Competition Network (ECN), National Competition Authorities (NCAs) and courts of Member States. Corresponding to the institutional shift is a political one. The current political stance holds that, on one side, the circle of public policy considerations has to be narrowed down,[70] while on the other side, the legality of certain market conduct has to be decided by assessing its effect on competition. As to the role of economic freedom, this change has brought about the lessening of its importance, although it has not erased its application altogether.[71] A market power screen has been introduced in the application of Article 81 EC, which in essence provides that the restriction of economic freedom will be taken into account only when the parties to the agreement have significant market power, and only then will efficiencies resulting from such an agreement be balanced against the restraint of economic freedom. Here, economic freedom is seen as a prerequisite of economic efficiency. When considering market integration, the change has not been so drastic. The level of integration is comparably higher than in the early years of the Community. However, the size of the single market has since significantly grown as new Member States have joined the EC. Nonetheless, it may be expected that practices which disintegrate that market will be subject to strict prohibition.[72]

[70] R. Whish, as note 5 above, at 155.

[71] P. Marsden and S. Bishop 'Intellectual Leaders Still Need Ground to Stand On' *European Competition Journal* 315.

[72] In this sense: R.J. Van den Bergh and P. Camesasca, as note 46 above, at 6.

III. THE 'MORE ECONOMIC APPROACH' TO EC COMPETITION LAW AND CONSUMER WELFARE

A. The More Economic Approach

For a long time EC competition law has been dominated by formalism. The legality of business practices has been assessed based on the form of the practice, its technical and legal characteristics, rather than its economic impact.[73] Traditionally, Europe has been significantly less exposed to the influence of economics in competition law than some other legal systems, most notably that of the USA. Such a state of things has attracted lot of criticism, especially from economists and from across the Atlantic. Eventually, the Commission responded to criticism in several ways. On the institutional level, the Commission made several significant changes. For the first time ever, an economist – Mario Monti[74] - was appointed as a Commissioner for

[73] Although, already in 1969 the European Court of Justice has stated that the lack of economic analysis may undermine the foundations of competition law. See: Case 14/69 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, at paragraph 14.

[74] On the legacy of Mario Monti see: M. Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy' (2005) 1 *Competition Policy International*, at 55-78; C.D. Ehlermann and J.M. Ratliff, 'Monti's Legacy for Competition Policy in Article 82' (2005) 1 *Competition Policy International*, at 79-98; N. Levy, 'Mario Monti's Legacy in EC Merger Control' (2005) 1 *Competition Policy International*, at 99-132; C. Grave, and D.S. Evans, 'The Changing Role of Economics in Competition Policy Decisions by the European Commission during the

Competition in 1999. Also, the post of Chief Economist was established within the DG in 2004. Finally, the number of economists within the staff of the DG was significantly increased. Furthermore, the most comprehensive reform of the procedural and substantive aspects of EC competition law was initiated, resulting in the largest changes in more than half a century of its existence. The reform was referred to as the 'modernisation' of EC competition law. The procedural limb of the modernisation process encompassed fundamental changes in competition law enforcement – decentralisation and privatisation. For the first time since Regulation 17 came into force in 1962,[75] the courts of Member States and National Competition Authorities had the right to apply both Articles 81 and 82 EC in their full capacity. This enabled the national courts, the ECN and NCAs to deal with cases which were before within the sole competence of the European Commission. However, such fundamental shift also called for a corresponding shift in the objectives structure. The range of objectives pursued by the application of competition law had to be narrowed down for several reasons: (1) the aim to pursue a large number of (sometimes conflicting) objectives meant that decisional practice was in some cases based on trade-offs between those objectives, which made decisional coherence very hard to maintain even in a centralised system; shared competence in enforcement, especially with inexperienced NCAs and courts, would just further excavate the problem; (2) the implementation of an 'economics based approach' implies that the sole, or at the least the 'central', objective which is pursued is the economic one. This implication rests on the assumption that economic insight and empirical

Monti Years' (2005) 1 *Competition Policy International*, at 133-54; W. Kolasky, 'Monti's Legacy: A U.S. Perspective' (2005) 1 *Competition Policy International* at 155-177.

[75] Council Regulation 17 of 6 February 1962 – First Regulation Implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

evidence provide a suitable benchmark for assessing the legality of certain business practices, and that the implementation of that benchmark contributes to a 'level playing field' of competition enforcement. Thus, since the 1990's and especially since the turn of the century, the 'more economic approach' to EC competition law has been introduced. Although the term is somewhat ambiguous and described as 'potentially misleading', till date both the merger rules and rules on restrictive agreements have been modernised, while rules on abuse of dominance are currently undergoing reform.[76] As Gerber has described:

> 'For some, [the term] implies that the new approach involves nothing more than a change of emphasis within an existing "approach". In this interpretation, it merely represents more use of economics in ways that economics has previously been used, but not fundamental changes in the content of the law. For others, however, the term "more economic approach" refers to a *new approach,* one that is defined by new uses of economics.'[77]

The use of economics in competition law provides several advantages. First, economics provide somewhat vague terms used in competition law with substance.[78] Open-textured standards, like

[76] See: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864 final, and the a accompanying press release IP/08/1877; DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses and the accompanying press release IP/05/1626.

[77] D. J. Gerber, 'The Future of Article 82', as note XXX above, at 10.

[78] Terms such as 'competition', 'restriction of competition', 'dominance', 'abuse', etc.

those in Articles 81 and 82 EC, enable developments in economics to be applied without changing the fundamental legal provisions, which in return allows for changes in competition policy to be (somewhat) gradual. Second, the use of economics provides for 'sound economic evidence' to be employed, which, although increases complexities in competition law, allows for the legality of certain conduct to be assessed in conformity with economic reality. Of special importance in this regard is the use of econometrics, which allows the use of quantitative techniques for gathering of empirical evidence. Third, economics could also be deployed for normative purposes, thus allowing legal rules to be shaped upon economic considerations, although it is noted that economic models may not yet be so developed to be used for policy making.[79]

B. Consumer Welfare

1. *Economic aspects of consumer welfare*

Modern competition economics have mostly been dominated by two paradigms, the total welfare standard and the consumer welfare standard.[80] The total welfare standard is concerned with the maximisation of producer and consumer surplus through the pursuit of allocative and productive efficiency.[81] As a monopolist is able to restrict output and raise prices, a certain number of

[79] R.J. Van den Bergh and P. Camesasca, as note 46 above, at 4.

[80] However, this should be understood only conditionally. It does not mean that other economic approaches to competition were not or are not being utilised, but that in recent times the total welfare standard and the consumer welfare standard seem to be the most widely accepted approaches.

[81] See: R.J. Van den Bergh and P. Camesasca, as note 46 above, at 16.

consumers is priced out of the market, thus allocative inefficiency occurs (deadweight loss). The fact that wealth is transferred from consumers to producers, as a part of consumer surplus becomes producer surplus, is not relevant as it is considered to be a mere reallocation of resources within society. Thus, from a total welfare point of view, if a certain practice results in a greater total surplus gain (the sum of consumer and producer surplus) than deadweight loss, the practice is legal, notwithstanding the distribution of wealth from consumers to producers.

In contrast, the consumer welfare standard is concerned with distribution of wealth between various social groups. In economics, consumer welfare is generally defined as the maximisation of consumer surplus.[82] The goal to maximise consumer surplus requires that consumers are made better off without accepting gains that accrue to producers only, even if these gains are sufficiently large to potentially compensate the losses to consumers.[83] In terms of classroom economics, the argument comes down to whether antitrust should be concerned only with the deadweight loss caused by a monopoly or also with the reallocation of income from consumers to monopolists (and their shareholders), made possible when monopoly rents are created.[84] However, it has to be noted that consumer welfare defined as the maximisation of consumer surplus 'has no basis in welfare economics and can be justified on equity grounds only.'[85]

[82] For different interpretations of consumer welfare see: R.J. Van den Bergh and P. Camesasca, as note 46 above, at 35-8.

[83] R.J. Van den Bergh and P. Camesasca, as note 46 above, at 36.

[84] A. Foer, as note 1 above, at 575.

[85] R.J. Van den Bergh and P. Camesasca, as note 46 above, at 37.

Economists traditionally favour a total welfare standard[86] on the basis that it generates the most for society as a whole and strives for the maximisation of efficiency.[87]

As pointed out by Gerber, the discussion about the objectives of competition law in the light of the more economic approach seems to be resulting in certain confusion, as the scope of applying the said approach is not defined.[88] Gerber makes a distinction between two approaches for the use economics in competition law: (1) the first approach provides that economic science is used for 'fact-interpreting', that is, for establishing what happened or what is going to happen in the future; (2) the second approach provides that economic science is used for 'normative' purposes, that is, it establishes the norms of conduct.

In regard the second approach, two further distinctions can be made: consumer welfare can either be used as *the* normative standard or as a *guide* for the normative standard. If it is deployed as a benchmark – the legality of a certain practice is assessed by measuring its effect on consumer welfare - if a practice reduces consumer welfare it is illegal. However, if it is deployed merely as a guide for a normative standard, than the standard becomes weaker, as there is leeway for other

[86] M. Motta, '*Competition Policy: Theory and Practice*' (CUP, Cambridge 2004), at 20; G. Monti, *EC Competition Law, as note 1 above*, at 83.

[87] K. J. Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3 *Competition Law Review* 126.

[88] D. J. Gerber, 'The Future of Article 82: Dissecting the Conflict' in Claus-Dieter Ehlerman and Mel Marquis (Eds.) *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, Oxford 2008). Available at: http://www.eui.eu/RSCAS/Research/Competition/2007(pdf)/200709-COMPed-Gerber.pdf

policy considerations. Werden describes how consumer welfare could be used as a 'guide' for the development of legal rules:

> 'Considerations of 'consumer welfare' could be important in the formulation of liability rules which themselves might not consider effects on 'consumer welfare'. Practices that almost surely lessen 'consumer welfare' could be declared illegal; practices reasonably likely to lessen 'consumer welfare' could be subjected to a presumption of illegality; and practices likely to enhance 'consumer welfare' could be placed in a safe harbour. [89]

As importantly, Werden went on and added:

> 'Considerations of 'consumer welfare' also could affect procedural rules governing standing to sue or entitlement to damages. Defining 'consumer welfare' precisely can be critical in crafting both liability and procedural rules.'[90]

2. *Political aspects of consumer welfare*

Consumer welfare is an economic concept with relevant socio-political and legal implications.[91] The economic rationale behind the consumer welfare standard seems to be often overridden by its political rationale, which is to legitimise the enforcement of competition rules by competition authorities and

[89] G. J. Werden, 'Essay on Consumer Welfare and Competition Policy' (2009). Available at: http://ssrn.com/abstract=1352032, at 7.

[90] G. J. Werden, as note 89 above, at 7.

[91] K. J. Cseres, as note 87 above, at 122.

reflect society's preferences on income distribution.[92] It is argued that 'the implementation of the consumer welfare standard in competition law is a political choice rather than an economic or legal rationale.'[93] The total welfare and the consumer welfare standards differ as they pursue related but not identical goals - the consumer welfare standard concentrates on the welfare of consumers, as opposed to the total welfare standard which concentrates on the welfare of society at large. From a consumer welfare perspective, different interest groups should not be treated equally but rather discriminately. This narrower approach (preferring certain interest groups as opposed to society) means that the consumer welfare standard is stricter than the total welfare one: not only that a certain practice has to produce benefits, it has to do so for the interest of a certain social group. Thus, political legitimacy considerations can have significant influence when opting between the two standards. In addition, the choice between the two standards can be a question of political bargaining between producers and 'consumers'.[94]

3. *Consumer welfare in EC competition law*

The European Commission has stated on numerous occasions that it pursues the consumer welfare standard as its economic paradigm.[95] However, EC competition law does not make it

[92] K. J. Cseres, as note 87 above, at 122.

[93] K. J. Cseres, as note 87 above, at 122.

[94] See: J. B. Baker, 'Competition Policy as a Political Bargain' Working Paper, available at: http://ssrn.com/abstract=649442, at 59-60.

[95] Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ 101/97, paragraph 13: 'The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources;' Guidance on the Commission's enforcement priorities in applying Article 82 of the

clear how consumer welfare is defined. The Commission's understanding of consumer welfare is described in the following manner: consumers look for lower prices, better quality and a wider choice of new or improved goods and services.[96]

Similarly, EC competition law does not provide a clear definition of benefits or harm to consumer welfare. For example, when describing consumer benefits, the Commission following its description of consumer welfare, states that if the four conditions of Article 81(3) EC are fulfilled 'the agreement enhances competition within the relevant market, because it leads the undertakings concerned to offer cheaper or better products to consumers.'[97] A similar description of consumer benefit is given in the Guidance on abusive exclusionary conduct by dominant undertakings: 'consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services.'[98] In the Horizontal Merger Guidelines the

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EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864 final, paragraph 19: 'The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare.'

[96] See: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ 101/97 footnote 84; Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864 paragraph 5; Guidelines on the assessment of horizontal mergers [2004] OJ C31/5 para. 8; Guidelines on the assessment of non-horizontal mergers [2004] OJ C-265/6, paragraph 10.

[97] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ 101/97, paragraph 34.

[98] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at paragraph 5.

Commission states that 'consumers may also benefit from new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation.'[99]

When describing harm, the Commission follows a similar path. In the Guidelines on the Application of Article 81(3) of the Treaty, the Commission states that 'restrictions [of competition] by object [...] lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.'[100] In the Guidance on abusive exclusionary conduct by dominant undertakings, practices which foreclose markets are described as 'having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.'[101]

It should also be noted that Articles 81(1) and 82 of the Treaty themselves name several situations which cause harm to consumers, such as, *inter alia*, higher prices due to price fixing, less choice and lower quality do to diminished development.[102]

[99] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C-31/5, at paragraph 81.

[100] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ 101/97, at paragraph 21.

[101] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at paragraph 19.

[102] See: P. Marsden and P. Whelan, '"Consumer Detriment" and its Application in EC and UK Competition Law' (2006) 27 *European Competition Law Review*, at 595.

One of the problems with such an understanding of consumer benefits and harm is the fact there is no clear mechanism for resolving the conflict among these named benefits, as on one side, not all of them can be achieved simultaneously, and on the other, different consumers prefer different benefits (e.g. some prefer lower prices, some better quality). However, it should be noted that similar concepts of consumer harm can also be found in other jurisdictions, for example in the UK.[103]

A further complexity of the consumer welfare standard lays in the fact that a choice can be made between short-term and long-term benefits to consumers. Some short-term detriments to consumer welfare could very well result in long-term benefits to consumers and *vice versa*. Here, two questions arise: first, whether such a choice has to be considered at all, and second, if the answer is yes, how to define and choose the more appropriate solution.[104] The answer to the first question is widely recognised to be affirmative – dynamic efficiencies by their very nature produce the greatest benefits in long run. In addition, allocative and productive efficiency are relatively easy to measure, while it is very difficult, if not impossible, to measure dynamic efficiency. Thus, if dynamic efficiencies are going to be acknowledged in competition law, they

[103] In the UK, the Enterprise Act defines both 'consumer benefit' and 'consumer harm' similarly to the Commission, albeit in a more clear and structured manner. According to s.1(a) of the Enterprise Act, customer benefit can take the following two forms: (i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom; or (ii) greater innovation in relation to such goods or services. Inversely, s.134(5) provides that consumer harm can have the following forms: (a) higher prices, lower quality or less choice of goods or services in any market in the UK [...]; or (b) less innovation in relation to such goods or services.

[104] See: G. Monti, *EC Competition Law*, as note 1 above, at 85.

generally require a long term time-frame within which they are going to be assessed. However, such a time-frame is highly case specific.[105]

4. *The notion of 'consumers' in EC competition law*

In EC law, most Directives on consumer protection refer to consumers as natural persons acting outside their trade, business of profession.[106] However, in the EC competition law, the term consumer refers to a broader group, as it distinguishes between intermediate and final consumers. Intermediate consumers are actually the 'customers' of a given undertaking as they are located downstream in the supply chain. Customers use the goods and services obtained from the violator and forward it down the supply chain, either by reselling it or using it as input for their own product or service. Depending on the position within the supply chain, customers can be either direct or indirect purchasers. This distinction between intermediate consumers ('customers') and final consumers is a pivotal point in EC competition law, as it sets the relevant social group(s) as a criterion for assessing the effects of certain conduct.

The Guidelines on the application of Article 81(3) of the Treaty defines the notion of consumer in the following way:

> The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input,

[105] K. J. Cseres, as note 87 above, at 135.

[106] See: e.g. Council Directive 93/13/EEC on Unfair Terms of Consumer Contracts [1993] OJ L95/29, Article 2(b); Council Directive 2005/29/EC on Unfair Commercial Practices [2005] OJ L149/22, Article 2(a).

> wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession. In other words, consumers within the meaning of Article 81(3) are the customers of the parties to the agreement and subsequent purchasers.[107]

The Guidance on abusive exclusionary conduct by dominant undertakings provides a definition in similar vein:

> The concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers.[108]

5. *Whose welfare counts*

Competition authorities examine the effects of practices under investigation on intermediate consumers, relying on the presumption that any harm to those consumers results in harm to final consumers.[109] For example, the Guidance on abusive exclusionary conduct by dominant undertakings states that 'the Commission will address [...] anticompetitive foreclosure either at

[107] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ 101/97, at paragraph 84.

[108] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at footnote 15.

[109] K. J. Cseres, as note 87 above, at 132.

the intermediate level or at the level of final consumers, or at both levels.'[110] When further describing how such assessments will be carried out, the Commission states that: 'where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.'[111] Thus, if intermediate consumers are not actual or potential competitors of the dominant undertaking, the assessment will focus on the effects of foreclosure on the competitor, and not intermediate or final consumers.

It is argued that making a differentiation between intermediate consumer harm and final consumers harm does not seem necessary in every case, as it can be, in general, presumed that harm to intermediate consumers results in harm to final consumers.[112] However, there are situations where end consumers will be affected in a different way than intermediate buyers.[113]

In addition, there is a practical need for such a presumption. Production/supply chains can in certain instances be highly complex. Thus, assessing the effect of an upstream practice on final consumers can be highly speculative. In that respect, it might make more sense to assess the effects of such practices on intermediary consumers, with the presumption that potential positive

[110] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at paragraph 19.

[111] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at note 15.

[112] K. J. Cseres, as note 87 above, at 132.

[113] K. J. Cseres, as note 87 above, at 132.

effects will be passed-on. Although both approaches have their strengths and weaknesses, the Commission's approach seems to provide a greater deal of certainty. As it may be, it should be remembered that competition authorities do have the power to assess effect of certain business practices both on intermediate and final consumers. Furthermore, as argued by Werden 'if the law cared about only the consumers at the end of the relevant distribution chain, the exercise of monopsony power could be of no consequence.'[114]

A further problem that would arise if the legality of certain practices would be assessed solely on their effect of final consumers would be the issue of proof. Again, as longer supply chains tend to be highly complex, establishing negative effects on final consumers and the causal link between those effects and the alleged violation would either highly speculative or plainly impossible.[115]

In sum, competition rules and the enforcement agencies consider the welfare of final consumers in a broader pool of intermediate sellers and customers of the firms and only occasionally consider the impact on the economic interests of final consumers.[116]

6. *Balancing consumer harm and benefits*

The balancing of consumer harm and benefit is carried out under Article 81(3) EC on a regular basis. Indeed, consumer benefit resulting from a restrictive agreement has to outweigh consumer

[114] G. J. Werden, as note 89 above, at 6.

[115] See: G. J. Werden, as note 89 above, at 27-8.

[116] K. J. Cseres, as note 87 above, at 133.

harm in order for the agreement to be deemed legal. Such balancing is performed by competition authorities, courts, but also by undertakings themselves. In that regard, it is crucial to define how such balancing is performed. In the Guidelines on the application of Article 81(3) of the Treaty, the Commission states that:

> Negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market. However, where two markets are related, efficiencies achieved on separate markets can be taken into account provided that the group of consumers affected by the restriction and benefiting from the efficiency gains are substantially the same.[117]

7. *Proof of harm to consumer welfare in EC competition law*

'Competition law, while ultimately concerned with the interests of consumers and with consumer welfare in general, does not require proof of direct harm to consumers in order for its prohibitions to [apply].'[118] Rather, competition law is concerned with the protection of the competitive process, with an underlying presumption is that it will result in benefits to consumers.[119] Indeed, the Guidance on abusive exclusionary conduct by dominant undertakings states that:

[117] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ 101/97, at paragraph 43.

[118] P. Marsden and P. Whelan, as note 102 above, at 569.

[119] According to the Court of First Instance decision in *British Airways*, Case T-219/99 *British Airways v Commission* [2004] CMLR 1008, at paragraph 264: 'Article 82 EC does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the

> 'The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, *thus* having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.'[120]

Therefore, it is presumed that harm to competition will result in consumer harm, although the adequacy of such a presumption is debatable.[121] Thus, it can be inferred that harm to competition and harm to consumer welfare are not understood to be one and the same.

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market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected;' Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at paragraph 6: 'The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.'

[120] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings C(2009) 864, at paragraph 19.

[121] See: P. Marsden and P. Whelan, as note 102 above, at 569.

C. Market Power and Pluralism

The other two core values of EC's economic approach besides the consumer welfare standard are market power and pluralism.[122] The market power concept is built on the idea that greater market power can result in greater consumer detriment. Thus, market power serves as a rule of thumb in indentifying conduct which is most likely to cause detriment to consumers, in shifting the burden of proof when considering the alleged illegality of certain conduct, and in providing a stricter approach when scrutinising the conduct of undertakings having a large degree of market power (the sliding-scale approach). Pluralism, however, partly relies on economic freedom, a notion central to ordoliberalism and EC's competition policy. It is considered to be a prerequisite of 'better economic performance', but unlike before, it is not considered to be an end in itself, but rather as a 'means of increasing consumer welfare'.[123] Taken together, the three core values embodied in EC's economic approach show some sign of continuity with the EC's competition policy before the reform, and to a limited extent, even with ordoliberalism.

[122] See: G. Monti, *EC Competition Law*, as note 1 above, 86-7.

[123] See: G. Monti, *EC Competition Law*, as note 1 above, at 87.

IV. DAMAGES ACTIONS FOR BREACH OF ARTICLES 81 AND 82 OF THE EC TREATY

A. A Community Right to Damages

1. *Direct applicability of Articles 81 and 82 EC*

The European Court of Justice in its judgement in *BRT v SABAM* ,[124] held that the competence of national courts to apply Article 81[125] EC and Article 82 EC 'derives from the direct effect of those provisions',[126] which in return 'create direct rights in respect of the individuals concerned which the national courts must safeguard',[127] and that denying 'national courts to afford this safeguard [...] would mean depriving individuals of rights which they hold under the treaty itself.'[128] Thus, *SABAM* made it clear that Articles 81 and 82 of the Treaty confer direct rights and obligations upon individuals, which national courts must safeguard.[129] Having direct effect,

[124] Case 127/73 *Belgische Radio en Televisie v SABAM* [1974] ECR 51.

[125] Although, at the time the decision was rendered, the application of Article 81(3) was in the exclusive competence of the Commission, having a monopoly stemming from Article 9(1) of Regulation 17. This monopoly was later abolished by the adoption of Regulation 1/2003.

[126] *SABAM*, as note 124 above, at paragraph 15.

[127] *SABAM*, as note 124 above, at paragraph 16.

[128] *SABAM*, as note 124 above, at paragraph 17.

[129] Also: Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 39.

no further legislative enactment is needed to make those rights applicable within Member States. Therefore, there is a Community legal basis for claims arising out of breach of Articles 81 and 82 EC.

2. *A Community legal basis for damage claims*

In *Courage*[130] the ECJ stated that: 'any individual can rely on a breach of Article [81(1)] of the Treaty before a national court even where he is a party to a contract that is liable to restrict or distort competition within the meaning of that provision.'[131] The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[132]

B. Objectives and Principles

Damages actions can aim to achieve at least two fundamental objectives: deterrence and compensatory justice.[133]

[130] Case C-453/99 *Courage v Crehan* [2001] ECR I-6297.

[131] *Courage*, as note 130 above, at 24.

[132] *Courage*, as note 130 above, at 26.

[133] W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473-88; C.A. Jones 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 *World Competition* 13-24; W.P.J. Wils '*The Relationship between Public Antitrust Enforcement and Private Actions for Damages*' (2009), available at SSRN: http://ssrn.com/abstract=1296458 at 6; W.P.J. Wils, '*Principles of European Antitrust Enforcement*' (Hart Publishing, Oxford 2005) at 111-26; W.P.J. Wils, '*Efficiency and Justice in*

1. *Deterrence as an objective of damages actions*

Deterrence is one of the fundamental objectives of competition law enforcement. When comparing the effectiveness of public and private enforcement in that regard, and in specific damages actions as a type of private enforcement, it is argued that public enforcement is superior in that respect for at least two reasons: (1) public enforcement entails wider investigative and sanctioning powers than private enforcement does, and (2) there is a divergence between the incentives of public and private enforcers of competition law.[134] By relying on the power of the state, public authorities enforcing competition law have wide powers of investigation, and thus they can gather significantly more information than private parties in judicial proceedings. It is argued that this also holds true in legal systems which provide for broad discovery powers, such as that of the US.[135] In regard of sanctions, several issues have to be noted. First, sanctions aim to deter future violations of competition law. The idea of deterrence is to create a credible threat of penalties which weighs sufficiently in the balance of expected costs and benefits to deter calculating companies from committing antitrust violations.[136] Second, in legal and economic theory, several concepts of 'optimal deterrence' have been developed.

European Antitrust Enforcement' (Hart Publishing, Oxford 2008); A. Komninos, '*EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*' (Hart Publishing, Oxford 2008)

[134] W.P.J. Wils 'The Relationship', as note 133 above, at 9; R. van den Bergh, W. van Boom and M. van der Woude, 'The EC Green Paper on Damages Actions in Antitrust Cases: An Academic Comment' (April 2006), at 4-5.

[135] W.P.J. Wils 'The Relationship', as note 133 above, at, at 10.

[136] W.P.J. Wils, 'Efficiency and Justice in European Antitrust Enforcement', as note 133 above, at 56.

The *internalisation* approach, based on an economic approach to property crime championed by Nobel laureate Gary Becker,[137] was put forward by William Landes in 1983.[138] Becker in essence argued that only economically inefficient violations should be deterred. Following this argument, Landes put forward an optimal deterrence model which determines the amount of the optimal sanction by considering both allocative inefficiency (deadweight loss) and productive efficiency (cost savings) arising from the alleged violation. Under the approach, 'the optimal fine equals the net harm caused to persons other than the offender, [...] multiplied by the inverse of the probability of a fine being effectively imposed'[139]

The *deterrence* approach, however, provides that the optimal sanction should be determined by considering the expected gain of the offender. Under the approach, 'the amount of monetary sanctions should exceed the expected gain from the violation multiplied by the inverse of the probability of a monetary sanction being effectively imposed.'[140]

It is proposed that the internalisation approach conforms to the total welfare standard,[141] as it measures the social welfare in allocative and productive efficiency. In return, it is argued that a consumer welfare standard or a standard which considers consumer interests in a broader sense,

[137] G. S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169.

[138] W.M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *The University of Chicago Law Review* 652.

[139] W.P.J. Wils, 'Efficiency and Justice in European Antitrust Enforcement', as note 133 above, at 57.

[140] W.P.J. Wils 'The Relationship', as note 133 above, at 11.

[141] W.P.J. Wils, 'Efficiency and Justice in European Antitrust Enforcement', as note 133 above, at 57.

such as consumer freedom of choice or consumer sovereignty, conforms to the deterrence approach.[142]

Wils argues that public enforcement is superior to damages actions in terms of deterrence, as public enforcement allows that the optimal monetary sanction (fine) be at least targeted, as opposed to damages actions where the monetary sanction (damages) is almost impossible to target.[143] In addition, public enforcement can provide that other types of sanctions be imposed besides monetary ones, such as director disqualification and prison sanctions.[144]

The divergence between public and private interests is another issue which influences the deterrent effect of damages actions. Damages actions are motivated by private interests, and thus they are presumably shaped by considerations of likely gains and expenses, and not by

[142] See: W.P.J. Wils, 'Efficiency and Justice in European Antitrust Enforcement', as note 133 above, at 57-8.

[143] W.P.J. Wils 'The Relationship', as note 133 above, at 11.

[144] W.P.J. Wils 'The Relationship', as note 133 above, at 11.

considerations of optimal deterrence.[145] Such divergence leads to suboptimal deterrence. If a violation of competition law accrues, but the victim has no incentive to commence proceedings - under-enforcement occurs. This is so because possible social gains from deterrence can be significantly larger than possible damage awards. Inversely, due to a multitude of possible reasons, over-deterrence can occur. This is likely happen when illegal conduct did not take place but the alleged victim has excessive incentives to initiate damages actions. Motives behind such unmeritorious actions can be various. Over-deterrence is also likely to occur in so-called borderline decisions where making a distinction between legal and illegal conduct is very difficult. This is particularly so in regard of exclusionary practices.

2. *Corrective justice as an objective of damages actions*

Corrective justice aims to correct the consequences of competition law violations when they occur. Not all violations can be prevented and deterred due to economic and psychological reasons.[146] Injunctions can be utilised to bring an on-going violation to an end and to mitigate its negative effects. When the violation already unfolded, corrective justice can be pursued by

[145] See: R. van den Bergh, W. van Boom and M. van der Woude, as note 134 above, at 4: 'Private parties will initiate proceedings only if the private benefits of doing so are higher than the private costs. The private costs consist of, inter alia, the information costs that must be borne to discover the infringement, the costs of the court procedure and the costs to prove the size of the damage and the causal link between the infringement and the harm. [...] This private cost-benefit calculus has no systematic relation with the social costs and benefits. The social costs also comprise the harm suffered by victims who do not sue and other losses ('rent seeking') that cannot be attributed to individual victims. Since potential plaintiffs are driven only by the private gains and expenses of their claims, they typically have insufficient incentives to invest in detecting and litigating all meritorious anti-trust cases.'

[146] W.P.J. Wils 'The Relationship', as note 133 above, at 13.

disgorgement or compensation. Disgorgement implies that gains attained through the violation have to be taken from the violator. Inversely, compensation implies that loss suffered by victims of the violation has to be compensated by the perpetrator of the violation.

Disgorgement is usually realised through monetary sanctions imposed by public enforcers. As the proceeds of fines imposed through public enforcement normally go into the public budget, compensation for the victims of antitrust infringements is normally not achieved through public enforcement, and thus requires additional enforcement action.[147]

The compensation principle implies that all who suffered harm due to competition law infringements should be compensated in full. However, such a principle cannot be realised in practice due to numerous obstacles which make it impossible to identify all individuals who suffered harm, and just as importantly, make it impossible to quantify the amount of detriment suffered. Thus, the principle of compensation is limited in practice.

3. *The principle of efficiency*

Enforcement measures in general are normally not without cost. The detection, prosecution and punishment of violations has a significant administrative cost, which includes both the cost borne by the public sector (cost of competition authorities, prosecutors and courts) and the cost borne by the businesses and individuals concerned (cost of lawyers and experts, management time).[148] Depending on the one hand on the cost of achieving different degrees of prevention, and on the

[147] W.P.J. Wils 'The Relationship', as note 133 above, at 15.

[148] W.P.J. Wils 'The Relationship', as note 133 above, at 13.

other hand on how much value society attaches to the avoidance of antitrust violations, the optimum will be to pursue a certain degree of prevention, which in all likelihood will be less than 100 %.[149] Therefore, the principles of efficiency and effectiveness imply that priority choices have to be made and that resources should be used so as to detect, prosecute and punish the most harmful violations.

Damages actions similarly have a cost which is borne by both public and private sectors, albeit in a different proportion - most of the cost is borne by private individuals.[150] For that reason, damages actions have to be designed so as to be efficient for the parties involved, in particular the plaintiff.

4. *Summary*

As a general proposition, it can be argued that public enforcement is superior in terms of deterrence, while damages actions are superior in terms of compensatory justice. Following this argument, it could be inferred that damages actions should aim to achieve the objective of compensatory justice. Deterrence, albeit imperfect, is most likely to occur in case of follow-on

[149] W.P.J. Wils 'The Relationship', as note 133 above, at 14.

[150] See: R. van den Bergh, W. van Boom and M. van der Woude, as note 134 above, at 5: 'The relevant cost categories do not only include information costs and costs of procedures in court but also error costs (in particular the societal cost of court decisions that erroneously consider a specific act to be a illicit act of antitrust). [T]he costs of private parties to enforce antitrust rules are excessively high, because of the very serious information deficiencies about their existence and the difficulties to prove both the size of the damage and the causality between the infringement and the harm.'

damages action, as awarded damages will add up to the monetary fines imposed in the course of public enforcement, but is less likely to occur in stand-alone damages actions as the amount of damages is awarded based on proven individual loss and not on considerations of optimal deterrence. Thus, deterrence should be pursued by means of public enforcement. In that sense, damages actions have a separate but complementary function in relation to public enforcement.

The European Commission seems to have embraced the said approach. In the White Paper, the Commission stated:

> 'The primary objective of this White Paper is to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules. Full compensation is, therefore, the first and foremost guiding principle. [...] Improving compensatory justice would [...] inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.'[151]

The Commission also stressed the separate roles of public enforcement and damages actions:

> 'Another important guiding principle of the Commission's policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and the competition

[151] European Commission White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final, at 3.

authorities of the Member States.'[152] '[T]he aim is not to substitute public enforcement, or parts thereof, with actions for damages. The role of the public authorities will continue to be of crucial importance in detecting anti-competitive practices such as cartels, where the special investigation powers vested in the public authorities are indispensable for effective and efficient enforcement of competition law.'[153] 'The Commission's objective is to create an effective system of private enforcement through damages actions as a complement to, and not a substitute for, public enforcement.'[154]

C. The Legal Notion of Damages

1. *The legal definition of damages*

Competition law violations result in 'pure economic loss.'[155] Depriving victims of anticompetitive conduct from claiming such loss would mean depriving them of adequate compensation. In *Brasserie du Pêcheur/Factortame III* the European Court of Justice held that:

'[...] total exclusion of loss of profit as a head for damage for which reparation may be awarded in the case of breach of Community law cannot be accepted. Especially in the

[152] White Paper, as note 151 above, at 3.

[153] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, at paragraph 18.

[154] Commission Staff Working Paper accompanying the White Paper, as note 153 above, at paragraph 21.

[155] See: R. van den Bergh, W. van Boom and M. van der Woude, as note 134 above, at 7.

> context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.'

These principles were reiterated in *Manfredi*:

> [...] it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. […] Total exclusion of loss of profit as a head of damage for which compensation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible […] As to the payment of interest, […] an award made in accordance with the applicable national rules constitutes an essential component of compensation.

Thus, *Manfredi* defined damages as sum of actual loss and loss of profit plus interest from the time of violation. In the Green Paper[156], the Commission enquired how damages should be defined, and offered four particular approaches: '(1) Definition of damages to be awarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages); (2) Definition of damages to be awarded with reference to the illegal gain made by the infringer (recovery of illegal gain); (3) Double damages for

[156] European Commission Green Paper on damages actions for breach of EC antitrust rules, COM(2005) 672 final 7.

horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court; (4) Prejudgment interest from the date of the infringement or date of the injury.'

Most responses by Member States opted for compensatory damages coupled with interest from the day of infringement. Such a choice can most likely be linked to the fact that most Member States define damages as a sum of compensatory damages and prejudgment interest, while many of those also consider exemplary damages to be contrary to public policy, thus, double damages in horizontal cartel cases and 'profit disgorgement' were not favoured. In line with the dominant view of Member States and the *Manfredi* judgment, the White Paper and the accompanying Staff Working Paper proposed that 'victims of an EC competition law infringement are entitled to full compensation of the harm caused. That means compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.'[157]

2. *Punitive damages*

As mentioned above, punitive damages have been proposed in the Green Paper as a possible approach to damages in a competition law context. The rationale behind such a proposal is the fact that solely compensatory damages may not constitute a sufficient incentive for victims of anticompetitive conduct to bring private action. However, as most Member States consider damages to have a compensatory function rather than a deterrent one, punitive damages are

[157] Commission Staff Working Paper accompanying the White Paper, as note 153 above, at paragraph 187.

absent from most European legal systems.[158] Indeed, in their responses to the Green Paper, most Member States rejected the possibility that punitive damages be introduced. However, it is important to note that Community law does not preclude punitive damages. This was clearly stated by the ECJ in *Manfredi*: 'in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law.'[159]

3. *Fault*

In the case of stand-alone damages actions a claimant has to show that Article 81 and/or 82 EC has been violated before he can claim compensation for damages arising out of the violation. In EC law, there is no requirement of fault to show that there has been a violation of Article 81 or 82 EC.[160] However, this is to be distinguished from a requirement of fault when establishing a claim for damages arising out of the violation.

[158] D. Waelbroeck, D. Slater and G. Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004), available at: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, at 3: 'Member States mainly see damages actions as being restitutionary in nature. Therefore, the key forms of remedy open to plaintiffs are compensation and restitution. Few states provide for punitive or exemplary damages.'

[159] Joined Cases C-295/04 to C-298/04 *Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al* [2006] ECR I-6619, at paragraph 93. Also see: *Brasserie du Pêcheur/Factortame III*, as note 105 above, at para 90. Thus, the Court did not stipulate that exemplary damages are to be awarded by the Member States as a matter of effectiveness.

[160] Commission Staff Working Paper accompanying the White Paper, as note 153 above, at paragraph 104.

Prior to *Courage*, it was asserted that a legal basis for damages actions for breach of EC competition law could be modelled upon the liability of Member States to individuals for breach of Community law.[161] However, as there is no Treaty basis for the liability of Member States, the ECJ modelled it after the liability of the Community under Article 288 EC. Both the liability of the Community and Member States contain an element of fault which is to be established under the standard of 'sufficiently serious breach' of Community law.[162] However, the liability of Member States is to be established in regard their sphere of legislative discretion. Where such discretion exists - liability is limited - hence the criterion of 'sufficiently serious breach'.[163]

[161] See: C. A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP, Oxford 1999), chapter 6.

[162] See in this respect: Opinion of Mr Advocate General Van Gerven delivered on 27 October 1993 Case C-128/92 *H. J. Banks & Co. Ltd v British Coal Corporation* [1994] ECR I-1209. In paragraph 53 the AG stated: 'Illegality of the conduct alleged [...] for this requirement to be satisfied [...] it is sufficient if an undertaking infringes the directly effective provisions of Community competition law. In that regard there is no question of applying any criterion that is more favourable to those who engage in such conduct, such as that applied by the Court in Article [288] cases with a view to appraising the exercise by the authorities of a broad discretionary power, namely that a "sufficiently serious breach of a superior rule of law for the protection of the individual has occurred": the relevant rules of competition impose on undertakings precise, directly effective obligations which are reflected in rights conferred on individuals. Once a breach of such a provision, viewed in objective terms, is established, an action for damages can be brought on the basis of Community law without there being any possibility of the defendant relying upon the grounds of exemption contemplated by national law.'

[163] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029, paragraphs 51 and 55: 'Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal

However, in cases where Member States do not have legislative discretion the criterion of strict liability is applied.[164] Furthermore, the requirement of fault under national law has to be in line with the requirement of fault under Community law and cannot be extended.[165] In *Courage*, the court held that 'any individual can rely on a breach of Article [81(1)] of the Treaty before a national court... [as the] full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'[166] However, *Courage* did not discuss the requirement of fault

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link between the breach of the obligation resting on the State and the damage sustained by the injured parties. […] As regards both Community liability under Article [288] and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.'

[164] Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd.* [1996] ECR I-2553, para 28: '[W]here, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.'

[165] *Brasserie du Pêcheur* , para 79: 'The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.'

[166] *Courage*, as note 130 above, at 24 and 26.

for establishing liability for damages resulting from competition law infringements.[167] It was in *Manfredi* where the ECJ settled the ambiguity by holding that 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC.'[168] Therefore, *Manfredi* made it clear that in Community law nor fault nor the sufficiently serious breach criterion are elements of liability for damages resulting from infringements of Articles 81 and 82 EC. The mere requirement is causality.

Furthermore, 'in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to […] lay down the detailed 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).'[169] Thus, as in the

[167] Although, the ECJ did, in the case specific context, reflect upon the difference between the requirements of fault when establishing a breach of Article 81 and when establishing a claim for damages resulting from the breach. *Courage*, para 35: 'making a distinction as to the extent of the parties' liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article [81] of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function [...] That case-law concerns the conditions for application of Article [81] of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.' See in this respect: A. Komninos, as note 133 above, at 194.

[168] *Manfredi*, as note 159 above, at paragraph 61.

[169] *Manfredi*, as note 159 above, at paragraph 62.

Francovich[170] and *Brasserie du Pêcheur/Factortame III*[171] line of cases, the principles of full effectiveness and practical effect have to be preserved.

In the Staff Working Paper accompanying the Green Paper, which was published before the judgment in *Manfredi*, the Commission recalled that under Community law a requirement of fault for establishing a violation of competition law does not exist.[172] Furthermore, the Commission argued against the transplantation of the significantly serious breach criterion into damages rules, as it asserted that infringements of EC competition law where by their very nature significantly serious due to their negative effect on the internal market.[173] Having in regard the fault requirement in the legal systems of the Member States and that of the Community, the Green Paper suggested three options: (1) Proof of the infringement should be sufficient (analogous to strict liability); (2) Proof of the infringement should be sufficient only in relation to the most serious antitrust law infringements; (3) There should be a possibility for the defendant to show that he excusably erred in law or in fact. In those circumstances, the infringement would not lead to liability for damages (defence of excusable error).[174]

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[170] Cases C-6 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5337, at paragraphs 32-7.

[171] *Brasserie du Pêcheur*, as note 105 above, at paragraphs 19-22.

[172] Commission Staff Working Paper annex to the Green Paper COM(2005) 672 final, at para 104: 'In the case of Article 81 EC, this flows as much from the text of the provision itself (which condemns agreements having the *"object"* or *"effect*" of restricting competition) as from the case law of the Community courts. In the case of Article 82 EC, the case law makes it clear that abuse is an objective concept.'

[173] Commission Staff Working Paper accompanying the White Paper, as note 153 above, at paragraph 106-7.

[174] Green Paper, as note 156 above, at 6.

In the White Paper,[175] which was drafted after the judgment in *Manfredi*, the Commission proposed that 'once the victim has shown a breach of Article 81 or 82, the infringer should be liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error; an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.'[176] Thus, in line with *Manfredi*, nor fault nor a sufficiently serious breach requirement was proposed. However, an exculpation defence was proposed where 'infringement was the result of a genuinely excusable error.' It was argued that in some cases of violation the undertakings concerned could genuinely believe that they operated within the limits of law, such as in cases of abuse under Article 82 EC where assessing the legality of certain conduct can be controversial and where novel situations can frequently arise. Thus, in the Staff Working Paper[177] accompanying the White Paper, it was reasoned that such exculpation should only be used restrictively, where 'the more serious the restriction of competition by an undertaking, the less likely it would be that the undertaking, whilst applying the required high standard of care, could not have been aware of the anti-competitive object or effects.'[178]

4. *Causation*

[175] White Paper, as note 151 above, at .

[176] White Paper, as note 151 above, at 7.

[177] Commission Staff Working Paper accompanying the White Paper, as note 153 above, at paragraph 404.

[178] Commission Staff Working Paper annex to the Green Paper, as note 172 above, at paragraph 178.

As the ECJ made it clear in *Manfredi*, causation is an indispensible element of liability for a successful damage claim:

> Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.[179]

This position is consistent with the causation requirement in cases of breach of Community law by the Member States, after which the principles governing individual liability were modelled after.[180] The causation requirement is an issue of national law, subject to mandatory Community law requirements of equivalence and effectiveness. As stated by the ECJ in *Manfredi*:

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed.[181]

[179] *Manfredi*, as note 159 above, at paragraph 63.

[180] In *Francovich* the court discussed the three conditions which must be met in order for reparation to be awarded. In paragraph 40, the Court stated that 'the third condition is the existence of a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties.'

[181] *Manfredi*, as note 159 above, at paragraph 64.

In practice, proving the causal link will be the most burdensome task of potential plaintiffs. Indeed, as acknowledged by the Commission: 'proving a causal link might require complex economic analysis based on a large number of facts and economic data.'[182]

D. Standing

1. *Introduction*

Standing to sue for damages is a legal right of an individual to claim compensation for harm suffered due to conduct prohibited by competition law. As such, standing is a fundamental issue of (private) competition law enforcement. Although a given infringement causes harm both to the economy and society, not every individual who suffered harm can be compensated. Thus, the concept of standing seeks to sort out plaintiffs who due to their remote relationship to the infringer have only little chances of actually succeeding in court.[183] Ideally, legal rules regulating damages actions could be designed so as to have, both a deterrent and compensatory function, and at the same time to be efficient. However, these three principles conflict and a legal framework which regulates damages actions demands that certain trade-offs be made between them. As a result, a certain hierarchy of these principles has to be established. Thus, different

[182] Commission Staff Working Paper annex to the Green Paper, as note 172 above, at paragraph 77.

[183] Mark-Oliver Mackenrodt, 'Private Incentive, Optimal Deterrence and Damage Claims for Abuses of Dominant Positions: The Interaction between the Economic Review of the Prohibition of Abuses of Dominant Positions and Private Enforcement' in *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanism?* (Springer, Heidelberg 2008), at 169.

jurisdictions may ascribe to differing objectives and thus differing legal mechanisms regulating damages actions. This is particularly so in regard of standing to sue.

2. *General principles of standing in EC law*

In *Courage*, The European Court of Justice set-out the foundations of a rule of standing: 'any individual can rely on a breach of Article [81(1)] of the Treaty,'[184] and 'any individual [can] claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.'[185] In addition, the Court stated that under certain conditions, even parties to an agreement which restricts competition can claim damages. The wording used, however, is very general and notions fundamental to the rule of standing - 'any individual' and 'loss' – have to acquire a more specific meaning. In *Manfredi*, the court followed the wording in *Courage* and restated that 'any individual can claim compensation for the harm suffered.'[186]

It is argue that EC competition law is 'enshrined in text of constitutional nature' and that together with the four freedoms it forms the 'Community's economic constitution.'[187] Therefore, EC competition law itself defines the constitutive conditions of the right in damages.[188] As standing 'is an indispensible element of a legally enforceable right contained in a directly applicable

[184] *Courage*, as note 130 above, at 24.

[185] *Courage*, as note 130 above, at 26.

[186] *Manfredi*, para 61.

[187] A. Komninos, as note 133 above, at 190.

[188] A. Komninos, as note 133 above, at 192.

provision of the EC Treaty,'[189] a restrictive view of standing would thus offend against the constitutional status of competition law.[190]

Based on this argument, Komninos argues that 'if the unequivocal words used in *Courage* as to the very existence of a right in damages in Community law for all harmed individuals had rendered redundant and effort to make a distinction, based on the "protective scope" of Article 81 and 82 EC, between co-contractors, competitors, consumers, purchasers (direct or indirect) and other third parties, following *Manfredi*, we can now indeed say that such distinctions are incompatible with Community law [...] and should be set aside.'[191]

The Commission seems to take a similar position. In the White Paper, the Commission welcomed the *Manfredi* decision and stated that '[the principle of full compensation] also applies to indirect purchasers, i.e. purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them along the distribution chain.'[192]

[189] See: V. Milutinović, 'Private Enforcement – Upcoming Issues' in G. Amato, C.D. Ehlermann, A. Komninos (Eds.), *'EC Competition Law: A Critical Assessment'* (Hart Publishing, Oxford 2007) at 735.

[190] A. Komninos, as note 133 above, at 191.

[191] A. Komninos, as note 133 above, at 193.

[192] White Paper, as note 151 above, at 4.

The issue of standing should also be viewed in light of objectives which damages actions aim to achieve. As mentioned above, damages actions in EC competition law seem to be closer to the objective of compensatory justice rather than deterrence. In addition, the legal systems of most Member States observe damages as a compensatory remedy for a tort or a *delict*. Thus, the principle of full compensation seems to be in line with the laws of most Member States. Such a strong preference for the compensatory nature of damages actions has strong implications for the issue of standing. If *all victims* of illegal conduct should be *fully* compensated as a matter of principle,[193] than exceptions to that principle should be interpreted restrictively.

The issue of standing 'is also closely connected with the broader question of the goals of competition law and policy.'[194] As discussed previously, the European Commission states that consumer welfare is the ultimate objective of its competition policy. In that regard, standing can be examined against the backdrop of the consumer welfare standard. As described, consumer welfare is concerned with both deadweight loss and reallocation of income. Even if one would adhere to the idea that maximisation of consumer surplus in practice is difficult to achieve and that, therefore, an understanding of the standard as 'consumers at least cannot be made worse off' is adequate for practical application, it can be inferred that the consumer welfare standard provides consumers whose welfare is harmed with strong legitimacy to have a right to claim compensation for the loss suffered.

[193] See: White Paper, as note 151 above, at 3: 'the issues addressed in the White Paper concern, in principle, all categories of victim, all types of breach of Articles 81 and 82 and all sectors of the economy.'

[194] A. Komninos, as note 133 above, at 190.

In that sense, it is also important to know who is a consumer whose welfare is to be protected. As discussed above, in EC competition law 'consumers' are not only *final* consumers but also *intermediate* consumers. Therefore, as a matter of principle, if EC competition law is concerned with the welfare of both intermediate and final consumers, than all those consumers whose welfare if harmed should have a legal right to claim compensation for that loss, without regard to their position within the supply chain.

As it can be inferred from the foregoing, the European Court of Justice and the European Commission seem to have taken a decision to allow for a wide circle of victims of EC competition law violations to claim compensation. A choice like that necessarily involves dealing with several complex issues. The extent of complexities involved in making those decisions can be seen if one compares the developing EC rule of standing to its counterpart in the US. The wording of the ECJ in *Courage* and *Manfredi* and the Commission's proposals in the White Paper resemble the wording of Section 4 of the Clayton Act: '*Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [...] shall recover threefold the damages by him sustained.'[195] The difference being, of course, that US antitrust law mandates the trebling of damages in order to strengthen the law's effectiveness. However, the wording of the Clayton Act did not prevent the US Supreme Court from significantly limiting standing to sue for antitrust damages.

[195] 15 U.S.C. 15 (1976)

In order for certain issues of standing to be illuminated, a circle of possible plaintiffs can be presented on a hypothetical case of a horizontal price-fixing cartel. Such a cartel can restrict output and raise prices just a monopolist or dominant undertaking could. I assume that producers at the top of the vertical supply chain have colluded to fix prices, that there are two levels of *intermediate consumers* (direct and indirect purchasers).

3. *Direct purchaser standing and the monopoly overcharge*

Direct purchasers are customers of the cartel who buy the overcharged product directly from members of the cartel. A differentiation has to be made between (1) direct purchasers who use the product as final consumers, as opposed to (2) direct purchasers who, by reselling the product or by using it as an input, pass the product further down the supply chain. This distinction has important implications for the economic definition and calculus of damages.

As a price-fixing cartel can restrict output and raise prices as a monopoly could, direct purchasers are confronted with having to pay higher prices and buying fewer products. These are the distributive and allocative effects of monopoly pricing. The difference between the enhanced price fixed by the cartel and the competitive price which would have prevailed 'but for' the violation is called a 'monopoly overcharge,' or simply the 'overcharge.'[196] In other words, the overcharge equals the difference between the price actually paid for the overcharged product and

[196] For estimates about the size of cartel overcharges see: J.M. Connor, 'Price-fixing Overcharges: Legal and Economic Evidence.' Available at SSRN: http://ssrn.com/abstract=787924; J.M. Connor, R.H. Lande 'Cartel Overcharges: Implications for U.S. and EU Fining Policies, (2006) 51 *Antitrust Bulletin* 983-1022.

the price that would have prevailed 'but for' the violation.[197] Furthermore, the allocative effect of an overcharge leads to a reduction in the direct purchasers demand.

From a consumer welfare perspective, consumer surplus has been reallocated (distributed) from consumers to producers, and thus, consumer welfare has been harmed. This is exactly the harm EC competition law aims to prevent. Indeed, Articles 81(1)(a) and 82(a) EC in particular aim to protect consumers by prohibiting conduct which 'directly or indirectly [imposes] unfair purchase or selling prices.' Thus, it can be inferred that the consumer welfare standard provides direct purchasers with a strong legitimacy to claim consumer surplus which was illegally reallocated from them. Furthermore, as the imposed overcharge equals consumer surplus which has been reallocated, it is argued that 'the incentive of direct purchasers as private enforcers is, therefore, closely aligned with the incentive of a public enforcer.'[198]

As direct purchasers are positioned directly next to the 'place' of infringement within the supply chain and have direct dealings with the violator(s), they are placed in a position which allows

[197] See: M. A. Han, M. P. Schinkel and J. Tuinstra 'The Overcharge as a Measure for Antitrust Damages' (2009) *Amsterdam Centre for Law & Economics Working Paper* No. 2008-08, at 2: 'In order to determine who is affected by an antitrust violation and to what extent, in principle all actual trades need to be compared to what would have been the market allocation without the anticompetitive behaviour – the so-called 'but-for' world. In practice this is often difficult. At a minimum, it requires information about consumer demand and the structure of the market, such as the number of layers in the production chain, the type and level of competition amongst firms in each layer, their production technologies and costs.'

[198] M. O. Mackenrodt, as note 183 above, at 172.

them to have a certain level of insight into the practices of colluding undertakings and the relevant market in general. This, in most cases, allows direct purchasers to be in possession of superior information as opposed to those purchasers who are removed from the place of infringement.

4. *Passing-on of overcharges and the passing-on defence*

In theory, when direct purchasers are overcharged for a certain product, they face three options: (1) they can pass-on, at least, the whole overcharge; (2) they can pass-on only a part of the overcharge and have to absorb the rest; (3) they have to absorb the whole overcharge. If at least a part of the overcharge has been passed-on, such an illegal price increase will percolate through to other layers of the supply chain in a 'ripple of partial pass-ons.'[199] In other words, an overcharge imposed in the chain, in this example at the level of producers, can be passed-on at every level further downstream until it reaches final consumers. As market conditions can differ substantially, direct purchasers will pass-on overcharges at differing rates. The 'passing-on rate' is the measure of the passed-on overcharge, and is defined as the change in the direct purchaser's price divided by the change in the producer's price.

In terms of economics, a 'complete pass-on' implies that the *whole* overcharge (100%) has been passed-on without *any* reductions in sales accruing from the price increase; an identical quantity of products or services is sold at both competitive and overcharged prices. If less than 100% of the overcharge has been passed on, and/or if there were any reductions in sales caused by the price increase, a part of the overcharge has been absorbed and the pass-on is only partial.

[199] M. A. Han, M. P. Schinkel and J. Tuinstra, as note 197 above, at 2.

5. *The defensive and offensive use of passing-on*

In relation to passing-on of overcharges two separate but interconnected situations are distinguished. The phenomenon of overcharge pass-on can be used both defensively and offensively. In case the plaintiff – the alleged victim of a competition law violation - claims damages resulting from the overcharge, a so-called passing-on defence could be invoked by the defendant – the violator – that would allow him to escape or mitigate his liability by proving that the plaintiff passed-on the whole or a part of the overcharge downstream onto his own customers. In return, the passing-on offence could be invoked by indirect purchasers, claiming damages from the violator based on the fact that the illegal overcharge was passed-on to them. Thus, two separate but connected legal issues arise: (1) should the passing-on defence be allowed, and (2) should indirect purchasers have standing to sue. These issues could be answered in four different ways: (1) both the passing-on defence and standing of indirect purchasers should be allowed, (2) the passing-on defence should be allowed while standing of indirect purchasers should not, (3) indirect purchaser standing should be allowed while the passing on defence should not, and (4) neither the passing-on defence or standing of indirect purchasers should allowed.

It is important to note, however, that there seem to be two different views of the scope of the passing-on defence. The first view provides that the passing-on defence allows a *complete (total)* defence against liability, meaning that the defendant's liability towards direct purchasers can be completely excluded. The underlying assumption is that the direct purchaser successfully passed-on the overcharge and therefore did not suffer damage. From an economic perspective, this means that the direct purchaser was able to pass-on the *whole* overcharge without accruing *any* corresponding reduction in sales. This scenario, however, is possible in case demand is perfectly

inelastic, which is rare or even impossible in practice.[200] Therefore, this kind of defence would be possible only in very rare situations. It is more likely that the direct purchaser was able to pass-on only a part of the overcharge and/or that he suffered reduction in sales. However, if the 'complete' passing-on defence could be triggered without proof that the whole overcharge was passed-on and that no reduction in sales followed, than the defendant could completely exclude liability even though the direct purchaser suffered economic loss.

The second view, however, provides that the pass-on allows a *partial* defence, meaning that benefits obtained by the direct purchaser from raising his own prices have to be deducted from the damage claimed from the defendant.[201] In other words, the amount of the overcharge which the direct purchaser managed to pass-on has to be deducted from the amount of damages that he suffered. In that respect, the method by which damages are calculated is of crucial importance. If damages are calculated by only taking into consideration the overcharge, but not lost profits, than this 'partial' passing-on defence can significantly reduce the amount of damages awarded.

6. *Indirect purchaser standing*

[200] For a short overview of some of those rare situations see: V. Milutinović, as note 191 above, at 739-42; for 'cost-plus' contracts in specific see: H. Hovenkamp, 'The Indirect-Purchaser Rule and Cost-plus Sales' (1990) 103 *Harvard Law Review* 1717.

[201] M. Hellwig, 'Private Damage Claims and the Passing-on Defence in Horizontal Price-fixing Cases – An Economist's Perspective' in J. Basedow, '*Private Enforcement of EC competition Law*' (Kluwer Law International, The Netherland 2007), at 123.

Indirect purchasers are customers who did not have direct dealings with the violator(s) but purchased the overcharged product from direct purchasers. As described, the issue of indirect purchaser standing is inextricably connected to the passing-on of overcharges. If the overcharge was passed-on to indirect purchasers, they suffer harm due to the fact that they have to pay higher prices.

The damage suffered by indirect purchasers corresponds to the welfare loss which EC competition law seeks to prevent. In that sense, it is argued that incentives of indirect purchasers and public enforcers are aligned.[202]

However, as indirect purchasers do not have direct dealing with the offender, they usually do not have insight into the market on which he operates or his business practices. In fact, they might not even know that they have been harmed. In certain situations, even if indirect purchasers are aware that they suffered harm due to anticompetitive conduct, it might be difficult or even impossible for them to indentify the offender.

7. *The passing-on defence and indirect purchaser standing in US law*

In the US, the issues of the defensive and offensive passing-on were addressed in two seminal cases: *Hanover Shoe*[203] and *Illinois Brick*.[204] In *Hanover Shoe* a manufacturer of shoes filed a

[202] M. O. Mackenrodt, as note 183 above, at 173-4.

[203] *Hanover Shoe Inc. v. Unites Shoe Machinery Corp.* 392 US 481 (1968).

claim against a producer of shoe-making machinery who had been earlier found guilty of monopolizing the shoe-making machinery market in violation of Section 2 of the Sherman Act.[205] The defendant monopolized the market by, inter alia, refusing to sell the shoe-making machinery, but operated under a 'lease-only' policy which significantly raised costs for the shoe manufacturers. In its defence, the defendant argued that the plaintiff passed-on the higher costs on to his own customers and thus did not suffer injury. The Supreme Court rejected the argument decisively, in essence arguing that the defensive use of passing-on would unduly lengthen and complicate antitrust cases as determining the passing-on rate would overly burdensome. However, the Court did acknowledge that there might be an exception in case of pre-existing cost-plus contracts. Furthermore, the Court argued that the possibility of the defendant to invoke the passing-on defence would dissipate private incentives to claim compensation and thus would undermine deterrence. Therefore, the *Hanover Shoe* judgment excluded the pass-on defence as a matter of federal law.

In *Illinois Brick*, the State of Illinois along with several hundred local governmental entities brought a claim against a cartel of cement block producers for an overcharge which was passed-on to them by contractors and sub-contractors who carried out construction for the State. The Supreme Court essentially repeated the arguments of *Hanover Shoe* and added that if standing would be given to indirect purchasers, the same offender would be found liable multiple times for the same infringement. The Court in specific stated that 'the antitrust laws will be more

[204] *Illinois Brick Corporation v Illinois* 431 US 720 (1977).

[205] Monopolization was established in an earlier case brought by the US government, see: *United Machinery Corp v United States* 347 US 512 (1954).

effectively enforced by concentrating the full recovery for the overcharge [caused by price fixing] in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.'[206] Thus, Illinois Brick 'mirrored' the Hanover Shoe judgment and set a precedent under which, as a matter of federal law, only direct purchasers have standing to sue for antitrust violations.

8. *Academic discussion*

Academic discussion about the passing-on defence started after the two judgments and is very much alive even today. The initial arguments were exchanged between William Landes and Richard Posner who welcomed the Supreme Court decisions and Lawrence Sullivan and Robert Harris who opposed the decisions and argued for them to be overruled by legislative efforts.[207]

Landes and Posner argued that the *Illinois Brick* decision was correct as the Congress when passing the Clayton Act with treble antitrust damages had the intention to stimulate deterrence, and thus it is the main objective of damages actions. Allowing the possibility of a passing on defence to be invoked contrary to *Hanover Shoe* would seriously undermine the incentive of

[206] *Illinois Brick Corporation v Illinois* 431 US 720 (1977), at 734-35.

[207] W. M. Landes and R.A. Posner, 'Should Indirect Purchasers have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick' (1979) 46 *University of Chicago Law Review* 602; L. A. Sullivan and R. G. Harris, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' (1979) 128 *University of Pennsylvania Law Review* 269; W. M. Landes and R. A. Posner, 'The Economics of Passing on: A Reply to Harris and Sullivan' (1980) 128 *University of Pennsylvania Law Review* 1274; L. A. Sullivan and R. G. Harris, 'Passing on the Monopoly Overcharge: A Response to Landes and Posner' (1980) 128 *University of Pennsylvania Law Review* 1280.

direct purchasers to sue the offender, and thus, also would seriously undermine deterrence. Therefore, the *Hanover Shoe* judgment and the principle of deterrence require that indirect purchasers do not have standing to sue for damages. In addition, direct purchasers have an advantage over indirect purchasers, as they are positioned closest to the offender in the chain, and thereby are in a position to gather information at lower costs. Furthermore, Landes and Posner argued that calculating the pass-on rate when both used defensively and offensively would be highly costly and difficult. Indirect purchasers will be compensated for the loss they suffered through lower prices indirectly, as 'the direct purchaser will charge his customers less when his right of action against sellers to him is not subject to a passing-on defence'[208]

Sullivan and Harris, on the other hand, criticised the Supreme Court decisions. By using microeconomic theory, case studies and insight into pricing practices described in marketing studies, the authors proposed that the pass on is likely to occur both in the short and long run, and that the rate of passing on will particularly be high in the later case. In fact, it was argued that the likely rate of passing on will be 100% or even higher.[209] Therefore, the authors argued, the fact that passing on is likely to happen in fact means that direct purchasers suffer little or no harm. In return, that means that direct purchasers do not necessarily have sufficient incentives to sue for damages, and thus the deterrent effect of direct purchaser damages actions was called into question. Moreover, Sullivan and Harris also contested the allegedly superior position of direct purchaser in terms of gathering information. Interestingly, they pointed to the *Illinois Brick*

[208] W.M. Landes and R.A. Posner, as note 207 above, at 1274.

[209] Sullivan and Robert G. Harris, as note 207 above, at 280.

decision in order to show that indirect purchaser may in fact have considerably more information about the overcharge than direct purchasers do. By drawing on marketing studies, the authors argued that if the difference between direct and indirect costs is taken into account, it can be seen that an only overcharges which affect direct costs will be passed-on. Following that argument, it was further proposed that businesses, in general, form prices either by using a mark-up or cost-plus method. Thus, if one would take into account these presumptions when approaching the issue of passing-on, it could be inferred that the calculation of passing-on rates is not an overly burdensome task.[210] However, it was recognised that tracing the overcharge through the supply chain is not always possible.

Overall, Sullivan and Harris stressed the compensation principle of damages actions and suggested that limiting standing to direct purchasers weakens deterrence. Furthermore, they argued that passing on is likely to occur, that it is possible to draw sufficiently accurate presumptions in order to ease the burden of proof, that those presumptions should be rebuttable by the defendant and that it is manageable to trace the overcharge and calculate it at least to a certain extent. Based on such presumptions, they concluded that both the passing-on defence and indirect purchaser standing should be allowed.

Another contribution to the discussion in the US was made by Gregory Werden and Marius Schwartz.[211] These authors supported the deterrent objective of damages actions, but

[210] Sullivan and Robert G. Harris, as note 207 above, at 286.

[211] G.J. Werden and M. Schwartz, 'Illinois Brick and the Deterrence of Antitrust Violations: An Economic Analysis' (1984) 35 *Hastings Law Journal* 629.

acknowledged that denying indirect purchaser standing weakens the principle of compensation.[212] In that sense, the authors approached the issue of indirect purchaser standing through the effectiveness of those possible plaintiffs on deterrence. They argued that such effectiveness depends on: (1) the magnitude of the potential damage award, (2) the likelihood that collusion will be detected and, (3) in if collusion is detected, on the possibility of plaintiffs to prove their case in court.[213] By using economic models, Werden and Schwartz aimed to analyze the possible deterrent effect of indirect purchaser standing based upon the relationship between the costs of collusion detection and the probability that collusion will be detected. Based on the analysis, several conclusions were made. If there was only one direct purchaser and one indirect purchaser involved, neither of these purchasers should be given exclusive standing. It was suggested that the probability of detection does not seem greater neither in the case of direct or indirect purchasers.[214] Moreover, 'the only clear-cut advantage in assigning the recovery right to the direct purchaser is that the costs of achieving any given level of deterrence would be minimized.'[215] However, when assumed that there will be multiple direct and indirect purchasers, as it would be likely in a real-life situation, Werden and Schwartz proposed that limiting standing only to direct purchasers would make more sense, as direct purchasers would have greater incentives to sue for damages due to the fact that they would have greater benefits from detecting

[212] G.J. Werden and M. Schwartz, as note 211 above, at 633.

[213] G.J. Werden and M. Schwartz, as note 211 above, at 634.

[214] G.J. Werden and M. Schwartz, as note 211 above, at 638.

[215] G.J. Werden and M. Schwartz, as note 211 above, at 638.

and proving collusion.[216] In the authors view, although a larger number of plaintiffs results in higher costs and lower benefits for the individual plaintiff, the appropriateness of standing of indirect purchasers is to be measured by having regard to indirect purchasers as a group. In that sense, it was argued that there could be an issue of interdependence between potential plaintiffs, and that such interdependence is more likely within the larger group of indirect purchasers. Following that logic, a scenario where both direct and indirect purchasers have standing was rejected.

In a more recent paper, Martin Hellwig explored the issues of said interdependence among direct purchaser.[217] He argued that if there is competition among direct purchasers, the upstream overcharge necessarily affects the existing pattern of competition, as the overcharge raises input prices for all at the same time and thereby induces them to raise prices. As a result, indirect purchasers might not have sufficient interest to change suppliers. Thus, foregone profits of a given direct purchaser are counteracted by the price increases of his competitors. In this regard Hellwig draws attention to the fact that much of the discussion about the passing-on defence and indirect purchaser standing has been somewhat fallacious, as it did not take into consideration that purchasers of overcharged products do not only suffer actual loss but also loss of profit. Following that argument, Hellwig contends that the loss of profit effect may actually outweigh the per-unit revenue effect on which the passing-on defence relies. In his view, 'once one takes account of the allocative effect, as well as the distributive effect, of price-fixing, one sees that the

[216] See: G.J. Werden and M. Schwartz, as note 211 above, at 643.

[217] M. Hellwig, as note 201 above, at 121-157.

potential gains from passing-on effects are matched by the business loss that occurs because the increase in the downstream price lowers demand.'[218] Based on the said argument, Hellwig argues that the passing-on defence should be excluded.

Another issue to which the Hellwig draws attention to is the issue of causation. He contends that price-fixing consist of several practices: the agreement itself, refusal to sell under the agreed price, and the actual sale at the agreed price. In that respect, the author questions: (1) which of these practices should be considered to be a violation, (2) whether these practices committed against the competitors of the direct purchaser should also be considered as a part of the violation, and (3) should the reactions of competitors be considered as a part of the violation. If the two latter questions are answered in the affirmative, than the main issue becomes the extent to which the movement of downstream prices can be ascribed to the overcharge imposed by the cartel. Following these remarks, Hellwig goes on to examine the relationship between the economic and legal nature of damages. When drawing conclusions, the he states that assessing the effects of cartelization on the outcome of competition among direct purchasers is difficult to handle, both conceptually and practically. Defining the extent to which the overcharge effected the downstream movement in price as opposed to other externalities, and thus establishing the causal link between the overcharge and damage suffered by a direct purchaser, is complex and complicated. It is therefore questionable if, and to what extent, should cartel members be liable

[218] M. Hellwig, as note 201 above, at 156-7.

for movements in downstream prices. Therefore, the author suggests that indirect purchasers 'do not stand much of a chance to establish causality in legal proceedings.'[219]

In another recent paper, Schinkel, Tuinstra and Rüggeberg developed the so-called 'Illinois Walls' argument.[220] The said argument contends that 'under *Illinois Brick*, an upstream cartel can prevent private litigation as long as it assures that its direct purchasers downstream benefit more from the existence of the cartel than they can claim antitrust damages for.'[221] By ruling out lawsuits by indirect purchasers, *Illinois Brick* enables the cartel to focus side-payments on the only affected parties with standing to sue.[222] Such side-payments could be realised through various means, from bribery among individuals to transactions among companies. Thus, as direct purchasers might be benefiting from the cartel themselves, they might have less incentive (or no incentive at all) to sue for damages. By colluding with direct purchasers and benefiting from an Illinois brick type of rule, the cartel is shielded from damages claims of downstream purchasers.

The authors define several conditions needed for Illinois Walls to be operative: (1) the cartel has to forward profits in excess of the direct purchasers gain from bringing a civil action; (2) no direct purchaser should have an incentive to benefit from the side-payments for some time first

[219] M. Hellwig, as note 201 above, at 152.

[220] M. P. Schinkel, J. Tuinstra and J. Rüggeberg, 'Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion' (2005) *Amsterdam Centre for Law & Economics Working Paper* No. 2005-02, available at: http://ssrn.com/paper=730384.

[221] M. P. Schinkel, J. Tuinstra and J. Rüggeberg, as note 220 above, at 3.

[222] M. P. Schinkel, J. Tuinstra and J. Rüggeberg, as note 220 above, at 3.

and then nevertheless bring a claim; (3) cartel profits net of these side-payments must be larger than upstream competitive profits.; (4) none of the upstream firms should benefit from defecting the cartel.[223]

9. *Summary*

This limited insight into literature dealing with the passing-on defence and indirect purchaser standing allows for several fundamental conclusions to be drawn. First, there is no accord as to whether the defensive and/or offensive use of passing-on should be allowed. Second, authors tend to have differing views based on their adherence to either the deterrent or compensatory objective of damages actions. Third, most of the arguments were made in disregard of loss which direct and indirect purchasers suffer from facing reduced demand due to the fact that they have increased their prices in response the higher prices which they themselves are facing. Fourth, the rate of passing-on greatly depends on market conditions, and direct purchaser (or subsequent indirect purchasers) might actually profit from the upstream price increase. Fifth, it has been argued and showed that a ban on both the passing-on defence and indirect purchaser standing potentially leads to a form of non-collusive cooperation between the violator(s) and direct purchasers (Illinois Walls argument). Sixth, market conditions greatly influence the complexity of damage quantification and apportionment. Although there seems to be a consensus that quantification and apportionment of damages is a complex task, it cannot be said with certainty that such a task is 'insurmountable' in every instance as claimed by the US Supreme Court and some commentators. Seventh, the causal link between the upstream price increase and the

[223] M. P. Schinkel, J. Tuinstra and J. Rüggeberg, as note 220 above, at 4.

downstream price movement is highly controversial, and indirect purchaser will in most cases have great troubles proving its existence.

10. *The passing-on defence and indirect purchaser standing in EU law*

In the Community, there is, so far, no rule of Community law that would bar indirect purchaser claims.[224] Similarly, in the Member States, although the situation is not completely clear, there do not seem to be rules that would explicitly ban indirect purchaser claims. However, if damage claims for losses resulting from competition law violations become more frequent, this issue will certainly become one of the most controversial ones. Having that in sight, the European Commission devoted significant attention to the prospect of introducing the passing-on defence and indirect purchaser standing into Community law.

In the Green Paper, the Commission put forward four scenarios of the passing-on defence and indirect purchaser standing. The first scenario allows both the passing-on defence and indirect purchaser standing. In the Commission's words: 'This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain.'[225] In that respect, attention was also drawn to the issue of proof. The second scenario excluded both the passing-on defence and indirect purchaser standing. This scenario mirrors the Hanover Shoe and Illinois Brick decisions. The third scenario excludes the passing-on defence but allows for both

[224] V. Milutinović, as note 191 above, at 742.

[225] Green Paper, as note 156 above, at 8.

direct and indirect purchaser standing. In the Commission's view 'this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.'[226] The fourth and final option suggests: a two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss.[227] In the accompanying Staff Working Paper, the Commission reviewed Community law and concluded that 'it can be said that there is no passing on defence in Community law; rather, there is an unjust enrichment defence.'[228] However, the Commission rightly noticed that 'passing on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the trader has to raise prices.'[229]

In the White Paper, the Commission suggested, in essence, based on the 'unjust enrichment defence' discussed in the Green Paper, that offenders should have a right to invoke the passing-on defence against purchasers who are not final consumers. In line with Community case law on passing-on in the areas of tax and agricultural subsidies, the burden of proving that the overcharge was passed-on would lie with the defendant. In addition, the standard of proof for the passing-on should not be lower than the standard to which the claimant has to prove the

[226] Green Paper, as note 156 above, at paragraph 8.

[227] Green Paper, as note 156 above, at paragraph 8.

[228] Commission Staff Working paper accompanying the Green Paper, as note 172 above, at paragraph 48.

[229] Commission Staff Working paper accompanying the Green Paper, as note 172 above, at paragraph 47.

damage.[230] In return, the White Paper also approved of indirect purchaser standing in line with *Manfredi*. In order to lighten the burden of proof for indirect purchasers, the Commission proposed that 'indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.'[231] What is problematic with these two solutions is the fact that a prospective defendant would have to prove towards direct purchaser plaintiffs that the overcharge was passed-on, while towards prospective indirect purchaser plaintiffs he would have to prove that the overcharge was not passed-on.

11. *Competitors*

As a general proposition, competitors of the cartel will usually benefit from its existence. As a cartel raises its prices, a certain number of consumers will abstain from purchasing the overcharged product and will seek alternative substitutes. In that regard, competitors of the cartel might benefit from increased sales. Also, competitors might be in a position to raise their prices in line with those fixed by the cartel and thus reap higher profit margins - a phenomenon known as umbrella pricing. On the other hand, competitors of the cartel might be harmed by the existence of the cartel, as it might exclude existing competitors from the market or prevent entry by potential ones. This can occur, for instance, when cartel members conclude a large number of distribution agreements.[232]

[230] Commission Staff Working Paper accompanying the White Paper, as note 153 above, at paragraph 65.

[231] White Paper, as note 151 above, at 8.

[232] See: G. Monti, *EC Competition Law*, as note 1 above, at 346-56.

A further issue is the standing of competitors who are themselves members of a cartel. In *Courage*, the European Court of Justice was asked by the Court of Appeal of England and Wales, 'whether a party to a contract liable to restrict or distort competition within the meaning of Article [81] of the Treaty can rely on the breach of that provision before a national court to obtain relief from the other contracting party.'[233] In particular, 'whether that party can obtain compensation for loss which he alleges to result from his being subject to a contractual clause contrary to Article [81] and whether, therefore, Community law precludes a rule of national law which denies a person the right to rely on his own illegal actions to obtain damages.'[234]

In the decision, the ECJ stated: 'a party to a contract liable to restrict or distort competition within the meaning of Article [81] of the Treaty can rely on the breach of that article to obtain relief from the other contracting party.'[235] Thus, the ECJ ruled that, as a matter of principle, parties to an anticompetitive contract have standing to claim compensation for loss resulting out of the said agreement. Of course, parties to such a contract do not necessarily have to be competitors.

Moreover, the Court went on and ruled that 'Article [81] of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of

[233] *Courage*, as note 130 above, at 17.

[234] *Courage*, as note 130 above, at 17.

[235] *Courage*, as note 130 above, at 36.

that contract on the sole ground that the claimant is a party to that contract.[236] However, 'Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.'[237]

Therefore, the general principle is subject to an important limitation: a party to an anticompetitive contract cannot claim compensation if it 'bears significant responsibility for the distortion of competition.' According to the ECJ, courts of Member States may take into account a number of parameters in order to determine the significance of the party's liability: the economic and legal context of the case, the respective bargaining power and conduct of the parties to the contract, whether the party who claims to have suffered loss found himself in a markedly weaker position than the other party and whether it had freedom to negotiate the terms of the contract.[238] In addition, the Court held that in cases where the contract is illegal solely because it is part of a network of similar contracts which have a cumulative effect on competition, 'the party contracting with the person controlling the network cannot bear significant responsibility for the breach of Article [81], particularly where in practice the terms of the contract were imposed on him by the party controlling the network.'[239]

[236] *Courage*, as note 130 above, at 36.

[237] *Courage*, as note 130 above, at 36.

[238] *Courage*, as note 130 above, at 32 and 33.

[239] *Courage*, as note 130 above, at 34.

Thus, although a party to an illegal contract can claim compensation as a matter of principle, the standing of that party is subject to an important exception. In essence, that exception significantly narrows down the circle of possible plaintiffs. The rationale behind the limitation is derived from the principle which precludes a litigant from profiting from his unlawful conduct.[240] Obviously, a party to such hard-core restrictions of competition as price-fixing cartel will find it very hard, if not impossible, to prove that he did not bear significant responsibility for the distortion of competition. Nevertheless, this aspect of *Courage* is of great importance as it reaffirms the general principle under which any individual harmed by a violation of competition law can claim compensation for the harm suffered.

12. *Umbrella consumers*

Umbrella consumers are purchasers who buy the product or its substitute from competitors of the cartel and, thus, not from members of the cartel. If the cartel raises the price of a certain product, the competitors of the cartel can follow such a price raise by raising their own prices and therefore reap higher profit margins. This is due to a non-cooperative response in pricing behaviour in the market.[241]

In case of umbrella pricing, umbrella consumers suffer harm as they have to pay supra-competitive prices. As a part of consumer surplus is reallocated, wealth is transferred from consumers towards producers. This is exactly the harm EC competition law seeks to prevent. However, in case of umbrella pricing, consumer surplus is reallocated towards non-collusive

[240] See: A. Komninos, as note 133 above, at 198.

[241] M. O. Mackenrodt, as note 183 above, at 181.

undertakings and not towards those participating in the cartel. In theory, the non-collusive undertakings raise prices a response to illegally distorted market conditions, and therefore considered by some commentators as attributable to the cartel.[242]

However, there are significant issues with the standing of umbrella consumers. The causal link between the harm of umbrella consumers and the infringement is very remote and highly questionable. The competitors of the cartel raise the prices of their own product not because they resell the product purchased from the cartel or use it as an input, but because they decide in a non-collusive manner to raise their own margins. In other words, the competitors responded to changes in the market legally. Showing, and let alone proving, the causal relationship between the harm suffered by umbrella consumers and the violation of competition law is thus excessively complex and very well may be a truly insurmountable obstacle.

Therefore, although the consumer welfare standard, and the *Courage* and *Manfredi* judgments allow for a *prima facie* standing of umbrella consumers, the requirement of causality makes it very difficult, if not impossible, for a damage claim of umbrella consumers to succeed. In addition, some Member States may exclude standing of these consumers based on the remote causal relationship between the damage they suffered and the competition law violation.

13. *Deadweight loss consumers*

[242] W. H. Page, 'Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury' (1980) 47 *University of Chicago Law Review* 480.

As price-fixing cartels or dominant undertakings can restrict output and raise prices just as a monopoly could, such inefficient practices result in higher prices, reduced output and deadweight loss. Both the total welfare and the consumer welfare standard consider the deadweight-loss as a negative phenomenon. In fact, the primary objection to price-fixing cartels is the fact that they create deadweight-loss to society.[243] Deadweight-loss consumers are consumers which are priced-out of the market and abstain from buying the product or purchase substitute products from less efficient competitors of the cartel.[244] They incur harm because they are deprived of the utility which they would have derived from using the product.[245] Such harm can be substantial. However due to the complexity, standing of deadweight loss consumers is usually denied.[246]

In practice, proving and quantifying the harm suffered by deadweight loss consumers is highly complex if not impossible, at least through private enforcement.[247] A potential plaintiff has to prove that he was priced-out of the market, and thus had to abstain from purchasing to or had to purchase a substitute product from a less efficient competitor.[248] Ascertaining whether a given

[243] See: W. H. Page, as note 243 above, at 479.

[244] M. O. Mackenrodt, as note 183 above, at 182.

[245] M. O. Mackenrodt, as note 183 above, at 182.

[246] M. O. Mackenrodt, as note 183 above, at 182.

[247] See: R. van den Bergh, W. van Boom and M. van der Woude, as note 134 above, at 7.

[248] R. van den Bergh, W. van Boom and M. van der Woude, as note 134 above, at 7: 'It is already difficult to identify the consumers who have paid too much for the product. How could one identify the individual consumers who are harmed not because they paid too much, but because they would have bought the product if it had been available at a lower price? This seems an impossible task.'

individual would have bought a certain quantity of certain products can indeed be a highly speculative activity, although in certain instances deadweight-loss consumers could provide proof of prior dealings with the violator(s) sufficient for proving the type and quantity of products which would have been bought 'but for' the violation.[249]

For example, if a telecommunication service provider illegally raises prices of certain services, consumers who were regularly and systematically purchasing those services for a certain price, but decided after the prise-raise to abstain from using those services or even any other services of violator at all, might be in a position to prove that they decided to abstain from further purchases due to the price-increase. However, even in this scenario, the possibility that a potential plaintiff will prove that he abstained from the purchase due to the price-increase seems farfetched.

Thus, paradoxically, although both the total welfare and the consumer welfare standard consider deadweight loss to be the most negative effect of monopoly pricing, consumers who actually suffer harm from it, almost certainly cannot recover compensation for the harm they suffered.[250]

E. Economic Notion of Damages

1. *Economic definition of damages*

[249] See: W. H. Page, as note 243 above, at 482.

[250] In the US, the issue of deadweight loss consumers has been addressed in the case *Montreal Trading Ltd v. Amax Inc* 661 F2d 864. However, the deadweight loss plaintiffs were denied standing.

Harm to competition is to be differentiated from harm to individuals.[251] Individual harm is defined as economic loss attributable to an individual person.[252] However, 'economic injury that a firm causes consumers by exploiting market power differs intrinsically from the injury it causes competitors by obtaining, maintaining, or expanding that market power.'[253] Subsequently, the rationale for both the assessment and the calculation of damages is dependent on whether the anticompetitive injury is caused by exploitative or exclusionary practises.[254] As a result, compensation will usually be sought for damages resulting from illegal overcharges or for lost net profit to a continuing business or even lost going concern value of a terminated business.[255]

2. *How are damages calculated*

The nature of any damages calculation will depend on the legal framework in as far as this indicates who may bring a claim, the nature of the injury which must be demonstrated, the provisions surrounding causation, and the policy in relation to passing on.[256]

In the US, nominal damages resulting from overcharges are calculated by multiplying the quantity of the overcharged product purchased by the 'estimated difference between the just and

[251] M. O. Mackenrodt, as note 183 above, at 168.

[252] M. O. Mackenrodt, as note 183 above, at 168.

[253] J. G. Sidak, 'Rethinking Antitrust Damages' (1981) 32 *Stanford Law Review* 330.

[254] See: J. G. Sidak, 'Rethinking Antitrust Damages' (1981) 32 *Stanford Law Review* 330-1.

[255] E. Clark, M. Hughes and D. Wirth, 'Analysis of Economic Models for the Calculation of Damages' (2004), available at: http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf, at 8.

[256] E. Clark, M. Hughes and D. Wirth, as note 255 above, at 10.

fair market price of the goods and the price actually paid.'[257] Therefore, this 'overcharge method' of calculating damages 'ignores lost profits on transactions that could have been made at lower prices, which courts have been reluctant to award.'[258] In addition, US federal law does not award prejudgment interest.[259] The overcharge method was established in *American Crystal Sugar*[260] and has since become the standard. As US law precludes the passing-on defence, damages are calculated without regard to the fact that they might have been mitigated or neutralised by the pass-on.

The 'overcharge method' of calculating damages has been criticised for underestimating the true damage caused by a cartel, as it disregards profits that could have been made due to the greater volume of sales at lower prices.[261] This underestimate of actual harm depends 'on such characteristics of the market as the shape of demand, the number of producers, the type of competition, and the location of the cartel in the chain of production.'[262] Furthermore, the loss of profit effect may outweigh the enhanced per-unit revenue derived from the pass-on, and, as

[257] G.J. Werden and M. Schwartz, as note 211 above, at 670.

[258] M. A. Han, M. P. Schinkel and J. Tuinstra, as note 197 above, at 2; G.J. Werden and M. Schwartz, as note 211 above, at 670.

[259] R. H. Lande, 'Five Myths about Antitrust Damages' (2008), available at: hhtp://ssrn.com/abstract=1263478, at 2.

[260] *American Crystal Sugar Co. v. Mandeville Island Farms* 344 US 219.

[261] M. P. Schinkel, J. Tuinstra and J. Rüggeberg, as note 220 above, at 3: 'We find that even in the most basic of settings–with unit pricing and input price taking–the direct purchaser overcharge is a poor measure of the true antitrust harm.

[262] M. P. Schinkel, J. Tuinstra and J. Rüggeberg, as note 220 above, at 3.

argued by some commentators, in fact it always does when the direct purchaser is not facing competition on the market (e.g. when he is a monopolist).[263] It has also been shown 'that lost profit harm [...] may increase without bound with the length of the production chain.[264] The ratio of antitrust harm to the direct purchaser overcharge can be anything between one and infinity.[265] However, under certain conditions, the profits of direct and indirect purchasers may actually increase in response to the upstream price increases.[266]

As described above, Community law defines damages as sum of actual loss and loss of profit, plus interest from the time the damage occurred until the sum awarded is actually paid. In case of damages resulting from illegal overcharges, the actual loss relates to the part of the overcharge incorporated into the price of the direct purchaser's product. The loss of profit on the other hand relates to the direct purchasers reduction of sales.[267]

If the passing on defence is allowed, the analysis of injury must consider whether market conditions in the plaintiff's markets were such that it was able, and acted to, pass on the overcharge.[268]

[263] See: M. Hellwig, as note 201 above, at 125.

[264] M. A. Han, M. P. Schinkel and J. Tuinstra, as note 197 above, at 3.

[265] M. A. Han, M. P. Schinkel and J. Tuinstra, as note 197 above, at 3.

[266] M. A. Han, M. P. Schinkel and J. Tuinstra, as note 197 above, at 6.

[267] See: M. Hellwig, as note 201 above, at 124.

[268] E. Clark, M. Hughes and D. Wirth, as note 255 above, at 5.

Where a plaintiff is injured by exclusionary conduct, damages may be assessed in terms of lost profits arising from the violation.[269] In the extreme, where an undertaking is partially or totally destroyed as a result of the violation, techniques for the valuation of a going concern and investment projects may be used.[270] This will involve using accounting, finance and economic methodologies to estimate the difference between what the plaintiff's profit was, and what it would have been, but for the antitrust infringement.[271]

[269] E. Clark, M. Hughes and D. Wirth, as note 268 above, at 8.

[270] E. Clark, M. Hughes and D. Wirth, as note 255 above, at 8.

[271] E. Clark, M. Hughes and D. Wirth, as note 255 above, at 5.

V. CONCLUSIONS

EC competition law has been founded on the theoretical basis of ordoliberalism. Correspondingly, one of core objectives since its inception was economic freedom. Although the accent on that objective has since faded do to increased application of economics in the assessment of legality of business practices, pluralism in the market nevertheless remains one of the objectives. Furthermore, EC competition law has embraced the 'consumer welfare standard'. The standard implies that assessment of legality is based upon the outcome of the practice on the welfare of consumer. The consumer welfare standard in EC competition law is satisfied if consumers are at least not made worse-off. In that regard, the concept of 'consumers' encompasses not only consumers in the common sense of the word - natural persons acting outside their trade, business of profession – but also all direct or indirect users of the products, including producers that use the products as an input. When assessing the outcome of potential anticompetitive practices, the European Commission usually considers the effects of those practices on intermediate consumers with an underlying assumption that those effects translate onto final consumers. However, proof of harm to consumers is not a condition which must be satisfied in order for a violation of EC competition law to be established.

The *Courage* and *Manfredi* decisions of the European Court of Justice established that any individual can claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Following up on those decisions, the European Commission initiated a discussion on the substantive and procedural aspects of damages claims for breach of Articles 81

and 82 of the EC Treaty. Central to the discussion is the issue of standing. The primary objective of damages actions in EC competition law is full compensation. In that regard, limitations of the right to claim compensation have to be interpreted restrictively. An *a priori* exclusion of standing of certain groups of victims of anticompetitive practices is therefore undesirable. The issue of standing is also connected to the broader issue of EC competition law objectives. In that regard, the consumer welfare standard provides strong legitimacy for consumers whose welfare has been harmed to claim compensation. Again, that legitimacy makes an *a priori* exclusion of standing of certain groups of victims of anticompetitive practices highly undesirable. However, harm to competition is to be distinguished from individual harm. In that respect, although the European Commission considers lower prices, better quality and a wider choice of new or improved goods and services as consumer benefits, consumers can claim compensation only for harm caused to them by anticompetitive price increases. Furthermore, anticompetitive practices may harm not only consumers but competitors. Again, the principle of full compensation requires that exceptions be interpreted restrictively. Indeed, the European Court of Justice has established that the mere fact that a competitor is a party to a restrictive agreement is not a sufficient condition for such a competitor to be denied standing. However, the ECJ did hold that a party to a contract liable to restrict or distort competition is barred from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition.

It is inserted that the approach taken by the ECJ is a correct one. The principle of full compensation and the consumer welfare standard require that standing is to be provided to any individual whose welfare has been harmed by a violation of EC competition law. Thus,

exceptions to that fundamental rule of Community law should be interpreted restrictively, meaning that exceptions which deny certain individuals to claim compensation for the harm suffered have to be precisely defined. Moreover, one of the most serious causes of concern for potential plaintiffs is proof of a causal link between the violation and harm sustained. Except for a limited class of plaintiffs – direct purchasers – proving that link is quite challenging. However, that difficulty should not be a basis for an *a priori* exclusion of certain groups of victims, especially having in mind the 'constitutional' nature of a Community right to damages.

The issue of standing also has significant implications for the calculation of damages. If a potential defendant can rely on a passing-on defence, than, it is desirable that damages provide compensation for both actual loss and loss of profit. Denying victims of anticompetitive conduct the right to claim compensation for loss of profit seriously undermines the principle of full compensation, but also underestimates the basis upon which the passing-on defence is founded upon. In that respect, Community law is in line with economic reality as it allows injured individuals to claim compensation for both actual loss and loss of profit caused by the illegal price increase.

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