

**THE NEXT BATTLEGROUND IN ANTITRUST LITIGATION:
PRIVATE ENFORCEMENT OF ARTICLES 81 AND 82 IN THE COURTS OF
THE EUROPEAN UNION'S MEMBER STATES**

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I. Introduction.

European Union law, directly applicable by the national courts of the Member States, prohibits agreements in restraint of trade and abuses of dominant position. Although private antitrust actions for damages have traditionally played a very limited role in the enforcement of the Community competition rules, in recent years developments at the European Union level have facilitated the bringing of damages claims and, additionally, certain reforms of the Member States' legal systems have made private antitrust suits more attractive. This article provides an overview of the European Union's antitrust rules, reviews recent milestones in the development of private antitrust enforcement in Europe, and discusses certain features of the national legal systems of four key European jurisdictions – the United Kingdom, Germany, France, and Spain – that are likely to have a significant impact on the development of this area.

II. Substantive Antitrust Law Principles in the European Union.

Articles 81 and 82 of the Treaty Establishing the European Community¹ contain the basic competition rules applicable in the European Union. Article 81(1) prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the European Union. Article 82 of the EC Treaty prohibits the abuse

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¹ 1997 O.J. (C340) 3.

by one or more undertakings of a dominant position within the common market. These provisions are similar in substance to their counterparts in the United States, Sections 1 and 2 of the Sherman Act.²

Articles 81 and 82 are enforceable by the national courts of the Member States. As the European Court of Justice has recognized, “any individual can rely on a breach of [Article 81(1)] of the Treaty before a national court.”³ This is subject to the caveat that Articles 81 and 82 apply only to agreements or abusive practices that are “capable of affecting trade” between the Member States.⁴ Where the requirement of effect on intra-Community trade is not satisfied, the courts of the Member States will apply their national competition laws, which are generally patterned after Articles 81 and 82.⁵

III. The Development of Private Antitrust Enforcement in the European Union.

In Europe, the antitrust laws have traditionally been primarily enforced by the Community bodies.⁶ In this regard, in recent years the European Commission has “put greater priority on the fight against cartels,” and is currently “further sharpening [its] tools in this area.”⁷ Indeed, in 2007 alone, the Commission imposed fines in excess of € 3.3 billion for cartel infringements, and this year it has imposed fines totaling €887.3

² 15 U.S.C. §§ 1-2.

³ *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297, ¶ 24. See also *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, 2006 E.C.R. I-6619, ¶ 59.

⁴ *Manfredi*, ¶ 40.

⁵ See English Competition Act 1998, §§ 2 & 18; German Act against Restraints of Competition, §§ 1 & 19; French Commercial Code, Art. L420-1 – L420-2; and Spanish Competition Defense Act, Art. 1-2.

⁶ Council Regulation 1/2003, Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1/1), Recital 34.

⁷ Neelie Kroes, *Reinforcing the Fight against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a More Competitive Europe* (Mar. 8, 2007), <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>

million for cartel violations.⁸ On the other hand, in the Member States private actions for damages for the infringement of Articles 81 and 82 have been extremely limited, and there is “little evidence that consumers and business customers are fully exercising their right to damages for harm.”⁹ In contrast, private enforcement has always played a key role in the antitrust system of the United States.¹⁰

Notwithstanding this history of limited private enforcement, recently there have been a number of significant developments in the European Union aiming at facilitating the bringing of private damages actions for violations of Community competition law. As noted above, the European Court of Justice expressly recognized in *Courage* and *Manfredi* that individuals can claim compensation for harm caused by an agreement or practice prohibited under Article 81 of the EC Treaty.¹¹ Further, the Council of the European Union explicitly stated that the resolution of damages claims by national courts is essential to the application of the antitrust laws.¹²

In addition, the Commission issued a Green Paper, identifying the main obstacles in the Member States to the effective operation of damages actions for violations of the Community competition rules, and setting out different options for solving these problems and facilitating private antitrust actions.¹³ Last year, the European Parliament adopted a non-legislative resolution, agreeing with the Commission that damages actions

⁸ Cartels Statistics, <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf>

⁹ Kroes, *supra*.

¹⁰ See Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics*, Table C-2 (Mar. 31, 2007) (1,150 antitrust cases were commenced by private parties in the federal district courts during the 12-month period ending March 31, 2007).

¹¹ *Courage*, ¶ 26; *Manfredi*, ¶ 61.

¹² Regulation 1/2003, Recital 7.

¹³ *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672 (Dec. 19, 2005). An attached Working Paper analyzed each of those issues in greater detail. See *Commission Staff Working Paper – Annex to the Green Paper*, SEC (2005) 1732.

should be facilitated.¹⁴ Most recently, the Commission published a White Paper, setting out concrete recommendations aimed at creating an effective private enforcement system in Europe.¹⁵

In addition to these developments at the Community level, the national courts and legal systems of the Member States also have an essential role in the private enforcement of Articles 81 and 82 of the EC Treaty. National courts are responsible for administering private antitrust actions. Further, “it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise” of the right to claim damages for infringements of the competition laws.¹⁶ This article will focus on certain features and developments of the English, German, French, and Spanish legal systems that are bound to have a significant impact on the strengthening of private antitrust enforcement in these Member States.

IV. Courts Competent to Hear Competition Cases.

The courts of a Member State have jurisdiction over antitrust cases when any of the following conditions are satisfied: (i) the defendant is domiciled in that country, (ii) the harmful event occurred there, or (iii) any one of a number of defendants is domiciled in the Member State and the claims at issue “are so closely connected that it is expedient to hear and determine them together.”¹⁷ *See Provimi Ltd v. Aventis Animal Nutrition SA* (a German company could bring an action in England against both English and foreign

¹⁴ *European Parliament Resolution of 25 April 2007 on the Green Paper*, T6-0152/2007.

¹⁵ *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 (Apr. 2, 2008). Here again, an attached Working Paper provided a detailed description of the proposed measures. *See Commission Staff Working Paper Accompanying the White Paper*, SEC (2008) 404.

¹⁶ *Manfredi*, ¶¶ 62-64. *See also Courage*, ¶ 29.

¹⁷ Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12/1), Art. 2.1, 5.3 & 6.1.

members of the vitamins cartel, even though the plaintiff had not purchased any vitamins from the English defendants).¹⁸

Importantly, all of the Member States considered here have recently made significant reforms with respect to the competence of courts to hear private antitrust matters, by assigning responsibility over these cases to a limited number of specialized courts.

In England, the Civil Procedure Rules were amended to provide for the transfer of competition law cases to the Chancery Division of the High Court or to the Commercial Court.¹⁹ Moreover, the Enterprise Act 2002 introduced the possibility of bringing claims for damages arising out of infringements of competition law before the Competition Appeal Tribunal, a specialized court, in cases where an infringement decision has been adopted by the Office of Fair Trading or the European Commission.²⁰

In Germany, panels for commercial matters within the district courts are competent to hear civil actions concerning the application of the national and Community antitrust laws.²¹ Most federal states have concentrated the jurisdiction for civil antitrust litigation within a small number of courts, covering several judicial districts, as authorized by the competition act.²² In addition, the appellate courts have established cartel divisions to adjudicate these cases.²³

¹⁸ [2003] EWHC 961, ¶¶ 45-49.

¹⁹ Civil Procedure Rules, Rule 30.8.

²⁰ Competition Act 1998, § 47A.

²¹ Act against Restraints of Competition, § 87.

²² *Id.*, § 89. See Karl Wach et al., *Germany Report*, 3 (2004). The national reports cited in this article are available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html

²³ Act against Restraints of Competition, §§ 91 & 94.

Similarly, the French Commercial Code vested certain civil and commercial courts, to be determined by decree, with exclusive jurisdiction over antitrust cases,²⁴ and a decree then created 16 courts specialized in competition matters.²⁵

Finally, in Spain, the Mercantile Courts, a newly-created category of civil courts, have exclusive jurisdiction over civil proceedings relating to the application of the competition rules.²⁶

V. Access to the Evidence Necessary to Prove an Antitrust Violation.

In most of the European countries discussed here, the absence of discovery procedures constitutes one of the major obstacles to antitrust damages actions. An exception is England, where the Civil Procedure Rules provide for the standard disclosure by the parties of all documents on which they rely, and of those documents which adversely affect their own or another party's case, or which support another party's case.²⁷ The court can also order additional specific disclosure.²⁸

In contrast, German procedural law “does not provide for any pre-trial discovery,”²⁹ and the court may only order the production of documents to which a party has made reference in its pleadings.³⁰ However, courts may request the submission of documents and information from the Federal Cartel Office,³¹ and victims of criminal and

²⁴ Commercial Code, Art. L420-7.

²⁵ Samantha Mobley et al., *Private Antitrust Litigation 2007*, 40 (Global Comp. Rev. 2007).

²⁶ Judiciary Act, Art. 86ter(2); Competition Defense Act, First Additional Provision.

²⁷ Civil Procedure Rules, Rule 31.6.

²⁸ *Id.*, Rule 31.12.

²⁹ Ulf Böge & Konrad Ost, *Up and Running, or Is It? Private Enforcement – the Situation in Germany and Policy Perspectives*, 27 E.C.L.R. 197, 202 (2006).

³⁰ Code of Civil Procedure, § 142.

³¹ *Germany Report*, 15.

administrative offenses – such as an infringement of the competition rules – have a right to inspect the documents held by the Federal Cartel Office.³² In France, a judge may order the production of relevant documents,³³ but the request must specify what kinds of documents are sought.³⁴ Thus, “[t]here is no such instrument as pre-trial discovery under French procedural rules as it is known in the United States.”³⁵ Likewise, in Spain parties may request the production of documents which relate to the subject of the proceedings, but must describe with specificity each document sought,³⁶ and therefore “[t]rue discovery in the common law sense does not exist in Spanish civil litigation procedure.”³⁷

The difficulty for a plaintiff to obtain evidence of an alleged antitrust violation is less pronounced in follow-on actions, where there is a prior decision from the European Commission or a national competition authority finding an infringement. “[T]he application of Articles 81 and 82 EC by the Commission in a specific case binds the national courts when they apply EC competition rules in the same case in parallel with or subsequent to the Commission.”³⁸ As a result, in a subsequent civil proceeding for damages, a claimant can rely on the Commission’s infringement decision as “binding proof” of the violation.³⁹ However, if the outcome of a follow-on action depends on the

³² Code of Criminal Procedure, § 406(e).

³³ Code of Civil Procedure, Art. 11, 138-139 & 142.

³⁴ Chantal Momège & Nicolas Bessot, *France Report*, 14 (2004).

³⁵ *Private Antitrust Litigation*, 41.

³⁶ Civil Procedure Act, Art. 328.

³⁷ *Private Antitrust Litigation*, 94.

³⁸ Commission Notice on the Co-operation between the Commission and the Courts of the EU Member States in the Application of Articles 81 and 82 EC, 2004 O.J. (C 101/54), ¶ 8. *See also* Regulation 1/2003, Art. 16(1).

³⁹ White Paper, ¶ 2.3.

validity of the Commission's decision, the national court should stay its proceedings until any appeals are resolved by the Community courts.⁴⁰

Additionally, in England the courts (and the Competition Appeal Tribunal) are also bound by the findings of infringements by the Office of Fair Trading, provided that the time for appeals has expired or that any appeals have been unsuccessful.⁴¹ Similarly, in Germany courts are bound by findings of infringement in final decisions by the Federal Cartel Office (or the competition authorities of other Member States).⁴² In France, courts are under no obligation to follow an opinion of the Competition Council, but they are likely to consider it as critical evidence of the existence of an infringement.⁴³ The same is true in Spain, where reports by the National Competition Commission are “not legally binding on the court, but of persuasive value only.”⁴⁴

In addition, the national courts “may ask the [European] Commission to transmit to them information in its possession.”⁴⁵ Although the Commission has an obligation to transmit information to the courts, it is unclear whether the Commission must grant a national court access to the information it gathered in the course of an investigation and, significantly, the Commission “will not transmit to national courts information voluntarily submitted by a leniency applicant.”⁴⁶

⁴⁰ Co-operation Notice, ¶ 13.

⁴¹ Competition Act 1998, §§ 58A & 47A.

⁴² Act against Restraints of Competition, § 33(4).

⁴³ *France Report*, 17.

⁴⁴ Jesús Almuera et al., *Spain Report*, 13 (2004).

⁴⁵ Regulation 1/2003, Art. 15(1).

⁴⁶ Co-operation Notice, ¶¶ 21 & 23-26.

VI. Damages Available for Violations of the Competition Rules.

“[I]t is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC.”⁴⁷ The courts of the United Kingdom and Germany have directly considered the issue of calculation of damages in antitrust cases.⁴⁸

In *Arkin v. Borchard Lines Ltd*, an English court noted that the quantification of loss for breach of Articles 81 or 82 of the EC Treaty would involve starting from the relevant market as it existed at the commencement of the alleged infringement, and asking what loss, if any, the defendants’ conduct had as a matter of common sense directly caused to the plaintiff, which would require a reconstruction of the most likely market conditions that would have been expected in the absence of an infringement.⁴⁹ Similarly, in *Crehan v. Innentrepreneur Pub Co CPC*, the Court of Appeal held that plaintiff was entitled to recover the losses actually suffered on the basis of what its businesses would have sold at reduced prices free of the tie at issue.⁵⁰ Further, punitive damages are precluded in antitrust cases in which the defendants have already been fined by the European Commission.⁵¹ Moreover, restitution and an account of profits by the defendants are not available remedies in antitrust cases; claimants are only entitled to compensation for losses suffered as a result of the infringement.⁵²

⁴⁷ *Manfredi*, ¶ 98.

⁴⁸ In France and Spain, antitrust damages are determined according to the general rules for tort actions. *See* French Civil Code, Art. 1382; Spanish Civil Code, Art. 1902. Punitive damages are not available. *Private Antitrust Litigation*, 43 & 96.

⁴⁹ [2003] EWHC 687 (Comm), ¶¶ 591 & 596.

⁵⁰ [2004] EWCA Civ 637, ¶ 172, *rev’d on other grounds* [2006] UKHL 38.

⁵¹ *Devenish Nutrition Ltd v. Sanofi-Aventis SA*, [2007] EWHC 2394 (Ch), ¶¶ 52, 54, 64 & 69.

⁵² *Devenish*, [2008] EWCA Civ 1086, ¶¶ 157, 160.

In Germany, quantification of damages has been addressed in at least two cartel cases. In *Berliner Transportbeton I*, a court of appeal did not consider it sufficient for damages to be calculated only on the basis of the difference between the cartel price and the price after abandonment of the cartel, but the Federal Supreme Court reversed and stated that general experience of commercial life suggests that cartel prices are higher than those achieved in competition.⁵³ And, in *Vitaminpreise Dortmund*, a district court assessed the damage by focusing mainly on the price difference before and after abandonment of the cartel.⁵⁴ Punitive damages are forbidden under German law.⁵⁵

An important issue relating to damages is the availability of the passing-on defense. There is no detailed analysis of this issue in the case law of the Community courts. As for the Member States' laws, the English Court of Appeal recently indicated that the passing-on defense should be available to antitrust defendants where the plaintiff has reduced its loss by passing the overcharge to its own downstream customers.⁵⁶ In Germany, prior to the recent amendment to the competition act, some courts had taken the passing-on defense into account.⁵⁷ However, the statute now provides that, “[i]f a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service.”⁵⁸ This provision expressly places the burden of proof of the defense on the party alleged to have infringed the competition

⁵³ [2005] WuW/ E DE-R 1567.

⁵⁴ [2004] WuW/E DE-R 1352.

⁵⁵ *Germany Report*, 23.

⁵⁶ *Devenish*, [2008] EWCA Civ 1086, ¶ 150.

⁵⁷ *Germany Report*, 20.

⁵⁸ Act against Restraints of Competition, § 33(3).

rules.⁵⁹ In France, the case law “is not sufficiently developed at this stage” to permit reaching a conclusion.⁶⁰ Similarly, there are no cases in Spain addressing this issue.⁶¹

VII. Rules Concerning the Costs of Litigation.

Cost rules “play an important role as incentives or disincentives for bringing an action” for infringement of the Community competition rules.⁶² In particular, the availability of contingency fees facilitates the prosecution of actions for damages. In contrast, the application of the “loser pays” principle “can be a decisive disincentive to bringing an antitrust damages claim.”⁶³

With respect to contingency fees, English law allows conditional fee arrangements, pursuant to which the fee payable if the claim is successful “is a basic fee plus a pre-negotiated percentage ‘success fee’ uplift” of up to 100 per cent of the basic fee.⁶⁴ In contrast, in Germany contingency fees have traditionally not been permissible for litigation.⁶⁵ However, in March 2007 the German Constitutional Court published a decision holding that this strict ban on contingency fees was unconstitutional, and requiring the legislature to amend the statute.⁶⁶ As a result, a bill revising the prohibition on contingent fee agreements has been introduced in the German Parliament. Further, in Germany there are large lawsuit finance companies that may front the costs of litigation – and pay the opponent’s attorneys’ fees in the event of a loss – in exchange for a

⁵⁹ Böge & Ost, 199.

⁶⁰ *Private Antitrust Litigation*, 44.

⁶¹ *Spain Report*, 15.

⁶² Green Paper, ¶ 2.6.

⁶³ White Paper, ¶ 2.8.

⁶⁴ *Private Antitrust Litigation*, 28.

⁶⁵ *Germany Report*, 26.

⁶⁶ BVerfG, 1 BvR 2576/04 (Dec. 12, 2006).

percentage of the award. In France, contingency fees which represent a supplement to an attorney's general fee are permitted, and there is no prohibition against agreeing that the major part of the fee will be contingent.⁶⁷ Similarly, in Spain attorneys must charge a basic fee, but it is possible to also agree to a success fee.⁶⁸

As for the application of the "loser pays" principle, in proceedings before the English courts the losing party is normally ordered to pay the successful party's costs, including attorneys' fees (up to the rates allowable on taxation of costs).⁶⁹ In Germany, the losing party has to bear the costs of litigation and, in cases of partial success, costs are proportionally allocated between the parties. Recoverable costs include the opposing lawyer's statutory fees, which will depend on the amount of the claim and the procedural posture of the case.⁷⁰ For antitrust cases, however, the court may order a reduction upon a showing of economic hardship.⁷¹ In France, courts have the power to order the losing party to pay the total or a partial amount of the other side's attorneys' fees, as well as other costs related to the proceeding, and may even decide not to order any reimbursement.⁷² Lastly, Spanish courts will order a losing party to pay the litigation costs of both sides, including attorneys' fees determined on the basis of the amount claimed, only when the court rejects all of the party's contentions (except where the case raised serious doubts).⁷³

⁶⁷ *France Report*, 28.

⁶⁸ *Private Antitrust Litigation*, 94.

⁶⁹ Mark Clough & Arundel McDougall, *United Kingdom Report*, 32 (2004).

⁷⁰ *Germany Report*, 26-28.

⁷¹ Act against Restraints of Competition, § 89a.

⁷² Code of Civil Procedure, Art. 695-696 & 700.

⁷³ Civil Procedure Act, Art. 394 & 241.1.

VIII. Conclusion.

As the Commission's recent decisions show, anti-competitive practices affect many industries within the European Union. Indeed, some price-fixing cartels operate worldwide. For example, major air cargo carriers have been or are under investigation, and have received heavy fines, for participating in a global price-fixing conspiracy. The legal developments described in this article have facilitated the bringing of private antitrust actions in Europe. It can reasonably be expected that, in the next few years, private enforcement of the Community competition rules will grow substantially in the national courts of the Member States.

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