Damages for Infringement of Competition Law

Nils Wahl

1 Introduction

Competition law is designed to create some sort of efficiency – be it for the benefit of the consumer, integration or pure economic efficiency. No matter what the principal goal of competition law might be, it is clear that the system would function best if there were no infringements. In this respect a competition law system and its sanctions may be viewed as a system of deterrence. The sanctions in a competition law system are designed to uphold respect for the prohibitions in the said system. Without adequate sanctions, respect for the prohibitions will eventually deteriorate.

Sanctions can be administrative or official on the one hand, or private sanctions, i.e. nullity and/or damages on the other. Under Community competition law, principal weight would seem to have been assigned to administrative or official sanctions. Undertakings infringing the competition rules may be fined up to 10% of their turnover, while on the other hand there is no explicit right to damages for antitrust injuries. The effects of nullity are primarily decided by applicable national law, consequently those effects will obviously differ between the different Member States. Furthermore, nullity will be of little significance when it comes to the classical horizontal cartel or abuses of a dominant position.

An effective competition law system cannot in my view rely solely on official sanctions for principally two reasons. First, an administrative authority, be it the Commission or a national authority, will never have sufficient resources to be able to investigate all possible infringements that it becomes aware of. Second, an official authority will by necessity only discover an infringement after that someone has "blown the whistle" or that it otherwise becomes apparent. From this follows an information deficiency for an authority as compared to private parties.

Private parties more closely connected to the particular offence, such as competitors, customers etc., actively trying to enforce their rights, can thus make

a valuable contribution to the supervision and enforcement of the competition rules. However, in order to play such a role the right to damages must be designed to encourage private action without encouraging vexatious litigation.

By these introductory remarks, I would like to draw the attention to the more basic question of why there should be a right to damages under a competition law system, be it Community law or national. Is a right to damages solely to safeguard the rights that directly effective Community law confer upon individuals, or should it also be used as a means of effectively enforce the competition rules? In my view – and I am aware of that this might be provocative – rules on a right to damages under competition law should be used as a deterrent and not primarily as a means of reparation. This will in some instances mean a rather substantial deviation from established principles not only in Swedish law but also, perhaps to a lesser extent, in Community law. If there is a Community law based right to damages under the *Francovich* principles even as concerns infringements of Community law by private parties, established principles found in the case law of the Court of Justice applicable under the *Francovich*-case law, cannot always be expected to work as a real deterrent when applied under competition law. No doubt the Court of Justice will have the possibility to rule upon several related questions in the upcoming preliminary ruling in *Courage*.[1]

2 Possible Community Law Grounds for a Right to Damages

As we all know there are no explicit rules in the Treaty when it comes to a right to damages for private parties or for that matter the liability of the Member States. As for the liability of the Member States, this has not prevented the Court of Justice from – in its case law – developing a right for private parties to receive damages for injuries caused by Member States' infringement of Community law. On the basis of case law such as *Francovich*,[2] *Brasserie du Pêcheur* and *Factortame III*,[3] etc. the right to damages for private parties is firmly established. Salient features of this case law is that the right to damages is dependent on a sufficiently serious breach of Community law for which a Member State may be held responsible, and that the rule so breached give rights to the individual and – naturally – that the breach caused the injury.

When it comes to an individual's right to damages for another individual's infringement of the Treaty Articles, e.g. the competition rules, the Court of Justice has thus far not had the opportunity (some would call it; not yet had the desire) to comment upon this. However, one of the Court's advocate generals has discussed the topic. In the *Banks v British Coal*[4] case from 1994, AG van Gerven discussed in length whether the principles from *Francovich* also meant that individuals had a right to damages when the offender was another

1 C-453/99 *Courage*, pending, see also Opinion of AG Mischo, 22 March 2001.

2 C-6/90 and 9/90 *Francovich* [1991] ECR I-5357.

3 C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029.

4 C-128/92 *Banks v British Coal* [1994] ECR I-1209.

individual. According to the opinion of the advocate general, there was such a right when someone infringed the competition rules of the Coal and Steel Treaty. Although the advocate general found the case to be decided under the Coal and Steel Treaty, he noted that in his view the same reasoning might well also be applicable to the situation under the EC Treaty.[5]

According to van Gerven, a right to damages would follow from the combined effects of *Simmenthal*,[6] *Factortame I*[7] and *Francovich*, which according to the advocate general's opinion establishes a duty for the party who infringes directly effective Community law to make good the loss of another individual.

As far as I am concerned the reasoning of van Gerven in the Banks case makes perfect sense. A community law based right to damages would create a uniform system of damages when it comes to competition law. However, whether or not it would also be an effective system will depend on in which way such a system will be designed. Questions that need to be addressed are what constitutes an "antitrust injury", who should be able to recover, and how is the amount of damages to be calculated? I will deal with these questions later on.

Francovich, however, is not the only basis on which one might find a right to damages in Community law. Another basis for antitrust damages is the more general approach of Community law towards the protection of individual rights conferred by Community law before national courts. On a number of occasions the Court of Justice has stated that in the absence of Community rules on the subject, it is for the domestic legal system to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law. However, such actions cannot be less favourable than those relating to similar actions of a domestic nature.[8] The requirement of equal treatment is supplemented by the requirement that applicable national rules may not make it impossible in practice to exercise the rights conferred by Community law.[9]

From a competition law perspective this would mean that if national law includes a right to damages for infringement of national competition law, the same right should also be available upon an infringement of Community competition law. This would also seem to be the approach of the Commission, as stated in the Notice on co-operation with national courts.[10] Since Sweden – as opposed to the majority of the other Member States – has explicit rules on a right to damages in the Swedish Competition Act, it is in my view interesting to take a closer look on how these rules should be applied. As you noticed I said, "should", and I did this for the simple reason that even if these rules have been

---

5 C-128/92 *Banks v British Coal* [1994] ECR I-1209, at I-1243.

6 Case 106/77 *Simmenthal* [1978] ECR 629.

7 C-213/89 *Factortame I* [1990] ECR I-2344.

8 Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, ground 5, case 158/80 *Rewe v Hauptzollamt Kiel* [1981] ECR 1805, and case 199/82 *San Giorgio* [1983] ECR 3595.

9 Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, ground 5.

10 *Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty*, [1993] O.J. C 39/6, p. 16.

applicable since 1994, there is to my knowledge no court practice as of yet. However, it would seem that several cases have been settled out of court on the basis of the Swedish rule. For obvious reasons it is not possible to give an account for these settlements.

Before discussing the Swedish rules a few remarks should be made concerning the situation in those other Member States where there are no explicit rules concerning a right to damages for infringement of either national or Community competition law.

In a series of cases the Court of Justice has stated that Member States are under an obligation to include in their national system remedies which will guarantee adequate protection, i.e. if the Member State chose to realise the objective of a directive on equal treatment by means of a right to damages, those measures must be such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer.[11] Furthermore, there exists a requirement that compensation received for an infringement of rights under Community law should equal the full loss.[12]

Given the fact that this case law is concerned with remedies based on directives or the liability of a Member State, one could question if this case law really implies that the Member States are under an obligation to provide damages as a remedy for infringements of Community competition law? In my view it does, but in the absence of the case law from the Court of Justice, this is nothing but a personal opinion.

3 Essential Features of a Right to Damages – the Swedish Example

3.1 Introduction

Although there are a multitude of questions to discuss when it comes to a right to damages under Community competition law, as stated previously one being if there is such a right to begin with, I have chosen to concentrate on just three questions that in my view are essential for such a system. These are, *i* who should be given a right to damages, *ii* for what kind of injuries, and *iii* how should the damages be calculated?

My plan is to discuss these questions alongside with a presentation of the specific rule on damages in the Swedish Competition Act.

According to Section 33 (paragraph 1) of the Swedish Competition Act

> "Any party who, intentionally or negligently, infringes any of the prohibitions contained in section 6 [the equivalent of Article 81] and 19 [the equivalent of Article 82] shall compensate the damage that is caused thereby to another undertaking or party to an agreement."

This explicit rule on a right to damages was a novelty when introduced in 1993, with full effect from 1994. Previous to this, the only Swedish rules applicable to

11 C-271/91 *Marshall II* [1993] ECR I-4367.

12 C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, ground 82.

antitrust injuries, that is injuries due to anti-competitive practices, were found in the general rules applicable to pure economic loss. These rules make a distinction between injuries suffered in a contractual relation and injuries without such a connection. Injuries sustained without being under a contractual obligation are primarily to be compensated if the injury is the result of a criminal offence. As I just said, Section 33 does not contain such a distinction. On the contrary all infringements of the Competition Act are assessed in an identical fashion. In my view this is natural since even in a contractual relation, it is not the infringement of the contractual obligations that give rise to the injury, but rather the fulfilment of the contractual obligations.

The explicit right to damages is according to its wording only applicable to infringements of the Swedish Act. For that reason one could question whether it is also applicable to infringements of Community competition law. However, judging from case law from the Court of Justice it is clear that Section 33 of the Act should also be applicable in those cases where only Community rules are infringed. In the absence of Community rules on the subject, it is according to the Court of Justice for the domestic legal system to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such actions cannot be less favourable than those relating to similar actions of a domestic nature. Thus, there could not be any question of not applying Section 33 in those situations where only Community law is infringed.

A somewhat different question concerns the situation in cases where the infringement has taken place on a different market and the only connecting factor is that somehow jurisdiction is established according to the Brussels convention on jurisdiction and enforcement of judgments in civil and commercial matters. Should the Swedish rules be applicable also in these situations?

First of all one could of course say that if Community competition law has been infringed and if there is jurisdiction in Sweden, the Swedish court should apply the same rules as if national law where applicable. However, the problem would seem to be that the Community law requirement is that national law should supply the same remedies as when national law of a similar nature is infringed and in this case no national law is in fact infringed. National law would presumably not even be applicable. Since there is no case law from the Court of Justice on the subject, the situation would seem at least debatable. On the other hand, it clearly shows the need for a uniform solution, i.e. damages based on Community law. This is especially so in the perspective of a more decentralised application of Community competition law.

3.2 Who should be given a Right to Damages?

An almost obvious answer to a question concerning who should be given a right to damages would seem to be the one who has suffered a loss. However, in my view the question is a lot more complicated than that. First of all it can be noticed that the effects of a particular infringement of the competition rules ripples down the chain of supply and will eventually affect large parts of the

society. In order not to have a system of damages that will be over-deterrent, this speaks in favour of some sort of limitation on liability. Secondly, one could refer back to the basic question of what is the object of a system of damages. Is it simply to compensate those that have suffered a loss, or is it to deter those that are contemplating an infringement?

If it were a question of compensating those that have suffered a loss, one would have to conclude that those that have suffered a loss should be granted damages to that amount. From this would also seem to follow that parties to a prohibited agreement should not be able to recover from each other. However, if the idea is to deter, it really does not matter who is given the right as long as this person is suitable to file a complaint.

As stated previously, according to the Swedish rule, undertakings and parties to an agreement who have suffered due to an infringement of the Competition Act shall have a right to damages. This does not, however, include groups of unspecified consumers. Although protection of the consumer interests is one of the primary goals of the Competition Act, consumer groups are outside the sphere of groups entitled to damages according to the legislative preparatory report.[13] On the other hand an individual consumer should not be considered excluded, if he was the direct victim of a particular offence.

Besides the question of consumers, the Competition Act gives an explicit right to damages to *other undertakings or a party to an agreement.* However, the competitor plaintiff is not always uncontroversial. First, competitors will be among the first to know of a particular offence, both when it is directed towards the competitor and when it is directed towards customers. Consequently, it is a good thing to include competitors amongst those that have a right to damages. On the other hand, it is fairly clear that competitors are mostly harmed not by anti-competitive practices but by competitive practices. If there is a cartel among a group of competitors, any competitor outside the cartel will benefit from either the new higher price or being able to sell more by retaining its existing lower price. There are thus reasons to distrust the competitor plaintiff, since he cannot always be relied upon to complain about the really harmful practices. The whole discussion on the competitor plaintiff also indicates the need for a structured approach towards causation and the determination of compensable injuries.

When it comes to the question of liability between the parties to an agreement, it would seem that the Swedish solution is not always accepted. The way I have understood, for example English law, there is no right to damages when the plaintiff has been a party to the prohibited agreement or practice giving rise to the injury.[14] In fact, this particular situation is subject to a request of a preliminary ruling from the Court of Justice.[15] In other European countries there also seems to be doubts as to whether parties to an agreement are able to receive damages from the other party.

In my view there are, however, strong arguments in favour of giving a party to a prohibited agreement a right to damages. If the idea of a right to damages is

13 Prop 1992/93:56 p. 96.

14 *Gibbs Mew* [1988] EuLR 588, at 606.

15 C-453/99 *Courage*, pending, see also Opinion of AG Mischo, 22 March 2001.

that it should act as a deterrent, it would seem obvious that giving the right to parties will also give strong incentives to the parties to uncover prohibited agreements. This is also the underlying idea of the situation in the US.

In the case *Perma Life Mufflers*[16] from 1968, the Midas company was sued by its retailers for damages for injuries, which had been suffered as a result of Midas' resale price maintenance scheme, an obligation of exclusivity, etc. According to Midas it was not obliged to pay damages since the retailers had actively sought the dealerships and thus the retailers were *in pari delicto*, but according to the Supreme Court

> "[t]he plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favour of competition. … [P]ermitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct".

As stated previously, the situation is similar according to Swedish law, and in my view this solution is far better than the alternative as long as we are talking about damages for infringement of competition law. By granting damages to parties to a prohibited agreement, suits are encouraged and thus more prohibited agreements may be uncovered. This is not, however, to say that these plaintiffs should receive full compensation for injuries suffered. It is clearly possible to envisage some sort of limitation on the amount of damages. Under all circumstances there should be no compensation for injuries suffered due to the absence of a particular restriction of competition.

In the near future the Court of Justice will be given the possibility to rule on whether Community law gives a right to damages to parties to a prohibited agreement.[17]

Another question connected to the question of who should be liable is the question whether fault is required or not. According to the explicit wording of Section 33 of the Swedish Competition Act, fault or negligence is required. Negligence should, according to the preparatory works, be attributable to a person in a leading position of the company in question. From the perspective of an effective competition law system – and for that matter – from a Community law perspective, this requirement could be questioned.

First of all it should be noticed that from a more general perspective it would seem at least negligent to infringe a rule of law. Secondly, both according to Community law and Swedish law, the requirement of fault or negligence for imposition of fines[18] has been interpreted as requiring that the company was aware of the fact that its behaviour affected competition.[19] Given this it seems rather over-cautious to require a strict interpretation of negligence when there is

16 *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968).

17 C-453/99 *Courage*, pending, see also Opinion of AG Mischo, 22 March 2001.

18 Reg. 17/62, Article 15 and the Swedish Competition Act § 26.

19 See for example; Case 19/77 *Miller* [1978] ECR 131 and Case 32/78 and 36-82/79 *BMW* [1979] ECR 2435, and for the Swedish view: MD 2000:2 *SJ*.

a question of damages. If the requirement of fault according to the Swedish rules were to interpreted in a strict manner, the deterrent effect will naturally not be so obvious. Furthermore, the compensatory effect of the rules would diminish.

From a Community law perspective, it would seem at least doubtful if a requirement of fault is possible to uphold. In the *Brasserie du Pêcheur and Factortame III* cases the Court of Justice explicitly declared that a right to damages could not be made conditional upon a requirement of fault.[20] At least nothing that went beyond the "sufficiently serious" criterion. In the *Banks v British Coal* case, advocate general van Gerven stated that in his opinion the mere infringement of the rules would be sufficient to establish liability.[21] Admittedly these cases are not necessarily determinative when it comes to liability under the competition rules, but it could still be argued that they point in a particular direction, a direction that does not include a requirement of negligence.

3.3 Which Injuries should be Recoverable?

An almost obvious question when it comes to damages under competition law is – for which injuries should there be a right to damages? Consider for example the different effects of tying, resale price maintenance, and over-charging. Depending on whether we are talking about competitors, customers or parties to the particular practice, the effects will differ substantially. For that reason there would seem to be a need for a more structured approach towards what should be considered a recoverable injury.

In order for damages to play a role of efficiency enhancing sanctions, only inefficient effects of a particular practice should generate an obligation to pay damages. Effects not clearly connected to the restriction of competition should not be compensated. By a few examples I will try and explain what I mean.

Tying

It could very well be argued that tying primarily harms competitors. Only in those cases when the tying also constitutes a vehicle for price discrimination will customers be harmed. In all other cases, there will be no difference in total price for the two products, since generally speaking it is not possible to extract two monopoly overcharges. If it was possible there would be no need for tying in the first place. Thus consumers will not suffer an antitrust injury, while competitors will.

Resale Price Maintenance

On the other hand, when it comes to resale price maintenance (RPM) competitors will never be injured in a – from a competition law perspective – relevant way. Sure enough there might be an injury in fact, but in my view that injury should not be treated as an antitrust injury. The reason for prohibiting RPM is that it limits the possibilities of the retailer to set its own price, which

20 C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame III* [1996] ECR I-1029, ground 79.

21 C-128/92 *Banks v British Coal* [1994] ECR I-1209, at I-1258.

might or might not harm the retailer, all depending on whether there would be any possibilities of selling more goods in the absence of the RPM scheme (for all the retailers). If a particular RPM scheme is successful, that is that it increases the sales of the participating companies, this means that the competitors are injured. However, this injury follows from the increase in competition, not the prevention or restriction of competition. The retailer will suffer an injury in all those cases where he would have sold more goods in the absence of the RPM scheme. Here it should be noted that one has to take into account the situation of all the other retailers, not only the one claiming to have suffered on account of the RPM. More often than not, a RPM scheme is designed to exclude the free riding of certain retailers on those retailers that invest in pre-sales services, promotion, etc. The relevant question would thus seem to be whether retailers would be able to take a free ride without the RPM scheme. If so, they will suffer an antitrust injury.

Over-charging

When it comes to overcharging, be it by a cartel or someone holding a dominant position, a competitor will not be injured. Either it benefits from the increased price, or it will benefit from increased sales by retaining its existing lower price. The only one that will be injured would seem to be the customer.

In the examples given I have taken as a starting point that only the injuries following from the reason a particular practice is prohibited should trigger liability. In my view only the anti-competitive effects of a particular practice should be recoverable. As far as I have understood American law, this would also seem to be the situation in the US.

In a well-known case from 1977, *Brunswick v Pueblo-Bowl-O-Mat*,[22] the Supreme Court gave its view on which injuries are recoverable. The background of the case is that for a number of years there had be a decline in profitability of bowling centres. Brunswick, being one of leading manufacturers of bowling equipment, was forced to repossess sold equipment and in some instances even taking over the running of a particular bowling centre. When taking over a bowling centre Brunwick was sued for damages by a competitor to the bowling centre that had suffered injuries on account of the alleged illegal take-over, i.e the increased competition. Denying recovery the Supreme Court concluded that in order to be recoverable, an antitrust injury must "*reflect the anticompetitive effect … of the violation …*". Brunswick has since been confirmed on several occasions.

The underlying idea of the American concept of antitrust injury is thus to make a distinction between injury in fact and injuries that follow from the reason that a particular practice is prohibited. Nothing similar has been developed under Swedish law or, for obvious reasons, under Community law.[23] However, in order for a right to damages to be a useful tool, it would seem imperative to make this distinction. If not, a right to damages can do more harm than good.

---

22 *Brunswick Corp. V. Pueblo Bowl-O-Mat, Inc*, 429 U.S. 477, 97 S.Ct. 690 (1977).

23 See, however, for a related discussion C-180/95 *Draehmpael* [1997] ECR I-2195.

3.4 Calculation of Damages

Community law, as described in *Brasserie du Pêcheur*, etc. would seem to require that compensation should have a deterrent effect and also that it should include compensation in full. But what amounts to full compensation and is compensation the relevant measure of damages?

In American literature there is a vivid discussion concerning what is called the Optimal Deterrence Model, according to which damages should be calculated so as to deter companies from infringing the antitrust rules.[24] In essence the whole model aims at setting a level of damage whereby only inefficient effects of a prohibited practice are compensated, i.e. the dead weight loss. According to the Optimal Deterrence Model it is immaterial if the party claiming damages actually has suffered a loss, since the object is not to compensate but to deter. The Optimal Deterrence Model has not been adopted by the American courts, and in my view it could not be. First of all, the Clayton Act Section 4, which governs damages, explicitly refers to injury "by him sustained" and secondly there are no practical ways of calculating the optimal level of damages. How do you calculate the dead weight loss of a particular offence? Although, American antitrust damages are not calculated with reference to anything else but the injuries by the one claiming such a right, it should be noticed that the Optimal Deterrence Model, could possibly be used on a more idea-based level.

If a right to damages shall be able to effectively contribute to the enforcement of competition law, the right to compensation must in my view act as a deterrent. Obviously the amount of damages would seem to be of importance for deciding whether the prospect of damages acts as deterrence. For that reason one could say that the American system of treble-damages deters more than a system, like the Swedish or Community law, where only the actual loss will be compensated. Since Swedish law and Community law do not contain any kind of multiplier, it could be argued that such a system will always be under-deterrent unless the risk of having to pay damages is 1/1. In my view this is not necessarily so. Even smaller awards will act as a deterrent without carrying the risk of vexatious litigation.

Be that as it may, it is vital for a right to damages in all circumstances that it is possible to prove damages. If the courts apply too high a standard of proof, no one will be able to prove injury and/or causation. If on the other hand, the courts would apply a more lenient standard of proof, the right to damages would become a way of compensating a lack of commercial skills.

In the US the Supreme Court has stated that it will apply a high standard for sake of proving an actual injury, while on the other hand the extent of the injury may be subject to approximation. In the *Story Parchment*[25] case from 1931 the US Supreme Court stated that

---

24 See for example; Landes, W.M., *Optimal Sanctions for Antitrust Violations*, 50 University of Chicago Law Review 652 (1983), Page, W.H., *The Scope of Liability for Antitrust Violations*, 37 Stanford L. Rev. 1445 (1985), and for an opposite view; Hovenkamp, H., *Antitrust's Protected Classes*, 88 Mich. L. Rev 1 (1989).

25 *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

> "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate".

According to Swedish rules, Code of Judicial Procedure Chapter 35:5, a similar approach is at least theoretically possible. And, as I see it, without such an approach the right to damages will neither deter nor compensate.

Another question of relevance when discussing the amount of damages would seem to be if all antitrust injuries should be recoverable for all plaintiffs, or if one should limit the rights of some plaintiffs. A purchaser who is the subject of, for example, a prohibited over-charge, will suffer a loss at least equal to the over-charge. However, suppose that this direct purchaser resells what he has bought and at that time he is able to pass on all or part of the initial over-charge. In the example the direct purchaser will consequently not be injured to the full extent of the over-charge or possibly not injured at all. If damages are calculated with reference to the injury suffered, which they would seem to have to be according to both Swedish law and Community law, the direct purchaser would not be entitled to damages (at least not to the full over-charge). But does this mean that the indirect purchaser shall have a right to damages, and what happens in those cases where this indirect purchaser has been able to pass on part of his damage?

According to generally applicable rules of the Swedish Act on Damages it would seem at least doubtful if the indirect purchaser in my example would have a right to damages. Further down the line, damages would seem to be out of the question since those purchasers would seem to be to remote to the actual events. If these rules were also applied in a competition law perspective, the end result would be that no one had a right to damages and, consequently, that the perpetrator will be immune to claims for damages. In my view such a solution would seriously affect the deterrent effect of a right to damages.

If on the other hand one chose to give a right to the full over-charge to the direct purchaser and none to the indirect purchaser, the direct purchaser will obviously be over-compensated, while the indirect purchaser would receive no compensation.

In American federal antitrust law the Supreme Court in the *Hanover Shoe*[26] case of 1968 decided that the direct purchaser was entitled to damages equalling the full over-charge, while in the *Illinois Brick*[27] case of 1977 it decided that the indirect purchaser has no right to damages. The reason for these rulings would seem rather obvious. By giving the right to damages only to the direct purchaser that purchaser is given strong incentives to actually file suit, while at the same time avoiding lengthy litigation concerning to what extent a particular injury has been passed on. As compared to the indirect purchaser the direct purchaser is

---

26 *Hanover Shoe Inc. v United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224 (1968).

27 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061 (1977).

also, generally speaking, in a far better position as plaintiff. Not only will he often have suffered the largest injury but more importantly, he will also be closer to the offence. By giving the right only to one of all of the potential plaintiffs one also reduces the risk of over-deterrence. If all purchasers were given a right to compensation, a right to damages could potentially be extremely costly. It should, however, be noted that not all State antitrust rules have adopted the Hanover/Illinois Brick rules.

In my view the position of the direct and indirect purchaser should be resolved in such a way as to grant a right to damages to the direct purchaser, without there being an obligation to deduct what might have been passed on. By such a solution one would eliminate costly proceedings concerning how much that has been passed on etc. By this I do not mean that one should totally abolish the requirement to mitigate losses, but simple that when it comes to damages under competition law such a solution would be more effective.

As for the actual calculation of the injury suffered different models are possible. Two ways of doing this is to apply either a before-and-after method or the so-called yardstick-method. The before-and-after method would seem more or less self-explicable. One should compare the situation for the injured before the infringement and after the infringement. Although this would seem to be the preferred method according to the US Supreme Court, it should be noted that the yardstick-method has also been used. Compared to the before-and-after method, the yardstick-method has the advantage of comparison not with different time-periods, but with a different company. By this it is (theoretically) possible to isolate the effects of the infringement from other (legal) effects. On the other hand, such comparisons are still often very difficult to perform in reality.

4 Conclusion

In my presentation I have dealt with some questions that in my opinion are of vital importance for a right to damages under competition law. These questions are obviously not the only ones that have to be discussed. Hopefully the Court of Justice will deal with some of the questions in the up-coming case of *Courage*.