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**A step forward in the enforcement of
community competition law by
Member State judges: the *Courage*
case.**

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Abstract

In its Ruling of [September 20, 2001, *Courage Ltd versus Bernard Crehan, C-453/99*](#), the Court of Justice of the European Communities (hereinafter referred to as ECJ), gave judgement yet again on the direct applicability of community law and the civil consequences of the infringement of such law: private individuals who have been party to an infringement of community competition law may claim compensation for damages from other contracting parties before a national judge, provided that the claimants of such damages do not bear significant responsibility for the distortion of the competition in question.

• **Facts**

In the aforementioned case, the ECJ responds to the questions referred to it for preliminary ruling on July 16, 1999 by the Civil Division of the Court of Appeal for England and Wales concerning proceedings between *Courage Ltd*, a U.K brewery, and Mr. *Bernard Crehan*, a pub tenant and bound to *Courage Ltd*. by a contract of exclusive purchase.

In 1990, *Courage Ltd.*, a brewery that holds 19% of the beer market share in the United Kingdom, and *Grand Metropolitan* (hereinafter referred to as “Gran Met”), a company involved in the catering business, agreed to merge their drinking establishments (pubs) and transferred them for leasing purposes to *Inntrepreneur Estates Ltd.* (hereinafter referred to as “IEL”), a company in which *Courage* and *Gran Met* held equal shares. An agreement signed between IEL and *Courage* provided that all lessees were obliged to purchase their beer exclusively from *Courage* and at the set rates applicable to premises leased by IEL. In 1991, Mr. Crehan signed two leasing contracts for twenty years with IEL, which included the aforementioned obligation. Two years later, *Courage* sued for non-payment of beer deliveries.

Courage Ltd. demanded that the pub tenant pay the outstanding debt, and the defendant counterclaimed the illegality of the clause of exclusive purchase in accordance with Article 81 of the EC Treaty and claimed compensation for damages, since other lessees who were not bound by exclusivity purchased their beer at a lower price.

British case law previous to this case had already provided that parties to an agreement that goes against competition law cannot legitimately claim compensation for damages arising from the implementation of such agreement, as a result of being the cause, and not the victim, of the distortion, restriction or misrepresentation of the competition emanating from the agreement.

In the *Gibbs Mew*¹ case, where the compatibility of an exclusive purchase agreement was analysed in the light of Article 81 - at the time, 85 - of the EC Treaty, the Court of Appeal considered that there was no question of claims for damages when such damages were claimed by a party to the agreement since “*it is third party competitors who are intended to be protected by provisions such as Article 85 and who can recover damages for loss suffered as a result for an infringement of those provisions*”. Although one of the parties had requested to refer a question to the ECJ for preliminary ruling, both in the first instance and in appeal, the consultation was considered unnecessary.

The Court of Appeal, at doubt as to whether it should follow the course of former national case law or ask the ECJ if the consequences of civil law in the direct applicability of Article 81 of the EC Treaty also apply to parties to an agreement that supposedly goes against the rules of competition, opted for the latter and referred the following questions to the ECJ:

- a) Is article 81 EC (ex Article 85) to be interpreted as meaning that a party to a prohibited tied house agreement may rely upon that article to seek relief from the courts from the other contracting party?
- b) If the answer to Question 1 is yes, is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Article 81?
- c) Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law?
- d) If the answer to Question 3 is that, in some circumstances, such a rule may be inconsistent with Community law, what circumstances should the national courts take into consideration?.

The doubts of the British judge, and the resulting answer from the ECJ, would clarify, therefore, whether the consequences of the direct applicability of community competition rules include, at all events, the right to claim compensation for damages suffered, and should this be so, whether the parties to an agreement that goes against such community rules can benefit from this right.

¹ Ruling of the British Court of Appeal in the *Gibbs Mew Plc. v. Gemmell* case (1999) 01 EG 117. The ruling was based on the *Tinsley v. Milligan* case [1994] 1 AC 340, where it was established that persons bearing responsibility for an infringement were entitled to recover losses with regard to a legal and equitable interest, although only insofar as it was proven that such interest existed independently of the party's participation in the infringement in question.

• Former Community Case Law

An affirmative answer from the ECJ to the first question was to be expected, owing to the very nature of Article 81 of the EC Treaty and the coherence with all the former community case law.

In this way, in the rulings passed in the [Francovich](#)² and [Brasserie de Pêcheur](#)³ cases, the ECJ had already established that the possibility to invoke, before a judge, directly applicable provisions of community law only constitutes a minimum guarantee and falls short of ensuring the absolute application of the Treaty. “[...] *The full effectiveness of the community rules would be questioned and the protection of the rights they recognise would be undermined if private individuals were not entitled to compensation when their rights are violated due to an infringement of community Law*” (paragraphs 20 of [Brasserie de Pêcheur](#) and 33 of [Francovich](#), respectively).

Comparably, case law has provided ([Simmenthal](#)⁴ and [Factortame I](#)⁵ cases), that it rests with national courts to offer citizens legal protection stemming from the direct applicability of community Law provisions, in accordance with the mechanisms and channels of appeal contemplated by the corresponding national Law. However, the degree of protection resulting from the application of national competition law by Member State courts cannot be less favourable for private individuals than the protection they would receive from the application by such courts of community Law. Nor can such protection be constituted in such a way that the exercising of those rights granted proves almost impossible or difficult. It is a question of equivalence and effectiveness principles, established in the [Francovich](#) case and reiterated at a later date in other cases⁶.

Along the same lines in the [Simmenthal](#) case, the ECJ found that

“Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of community law by withholding from the

² Ruling of the ECJ, 19 November 1991, Andrea Francovich, Danila Bonifaci and others versus Italian Republic, C-6/90 and C-9/90, Rec. p. 5357.

³ Ruling of the ECJ, 5 March 1996, Brasserie de Pêcheur versus Bundesrepublik Deutschland and The Queen versus the Secretary of State for Transport (ex parte: Factortame), C-46/93 and C-48/93, Rec. p. 1029.

⁴ Ruling of the ECJ, 9 March 1978, Administration des Finances de l’Etat versus Société Anonyme Simmenthal, 106/77, Rec. p. 629.

⁵ Ruling of the ECJ, 19 June 1990, The Queen versus the Secretary of State for Transport (ex parte: Factortame), C-213/89, Rec. p. 2433.

⁶ [Ruling of the ECJ, 10 July 1997, Rosalba Palmisani versus Istituto nazionale della previdenza sociale, C-261/95, Rec. p. 4025](#), among others.

national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect are incompatible with those requirements which are the very essence of community law”⁷.

Similarly, in the [Marleasing](#)⁸ case, concerning the application of a Directive not transposed by the Spanish State and invoked by one private individual against another, the ECJ resolved that the judge must interpret the national legislation in the light of the terms and object of the Directive, which led to the ruling out of Articles 1261 and 1275 of the Spanish Civil Code in favour of a provision of the Directive not transposed.

From the aforementioned case law, it is clear that community Law recognises the right of damaged parties to claim compensation for the violation of rights originating in the EC Treaty provisions of direct applicability. Such Law also recognises that the right to compensation takes precedence over any national rule that might stand in the way of its full effectiveness, in such a way that Member State judges must apply community Law directly and disregard the national rule.

Nevertheless, until the *Courage case*, community judges’ resolutions that established the right to compensation as an intrinsic element in the direct effectiveness of community Law had only been pronounced in proceedings where private individuals sought compensation from a Member State for violating community Law. No rulings were passed, however, on claims between private individuals.

In effect, the ECJ had only gone so far as admitting that *“the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible”* ([Francovich](#) Case, Paragraph 33).

Does this case law constitute a sufficient base to admit that community Law recognises the principle of compensation in general terms, that is to say, also when faced with

⁷ It is of interest to transcribe, for their clarity, the words of the European Commission concerning the Cooperation between the Commission and Member State Courts in the Enforcement of Articles 85 and 86 of the EC Treaty (OJ C39/5, 13 February 1993): “[...] *the Commission would like to make it clear that the simultaneous application of national competition law is compatible with the application of Community law, provided that it does not impair the effectiveness and uniformity of Community competition rules and the measures taken to enforce them. Any conflicts which may arise when national and Community competition law are applied simultaneously must be resolved in accordance with the principle of the precedence of Community law. The purpose of this principle is to rule out any national measure which could jeopardize the full effectiveness of the provisions of Community law*”.

⁸ Ruling of the ECJ, 13 November 1990, *Marleasing SA versus La Comercial Internacional de Alimentación SA*, C-106/89, Rec. p. 4135.

infringements, by private individuals, of community Law provisions that are directly applicable, as is the case with community competition rules?

In effect, the direct applicability of articles 81 and 82 of the EC Treaty - at the time, Articles 85 and 86 - was recognised early on by the ECJ in the ruling passed in the [RTB and SABAM](#)⁹ case and confirmed, at a later stage, in the famous [Delimitis](#)¹⁰ case. Since then, it was established that such provisions can be directly applicable in relations between private individuals and that they establish rights in favour of individual interests that Member State courts must protect. Accordingly, all private individuals have the right to invoke Articles 81 and 82 of the EC Treaty before national courts, in defence of their rights recognised in such Articles.

Until now, however, no ruling of the ECJ had given an explicit and clear answer to the question of whether or not, in the framework of proceedings between private individuals subject to community competition rules, this applicability included the right of one party to receive compensation for damages suffered, and to an even lesser extent, the question of whether or not a party responsible for infringing competition law could take advantage of such principle.

The British judge, before deciding to refer the question to the ECJ for preliminary ruling in the framework of the *Courage* case, had attempted to find an answer in the conclusions of the Advocate General Van Gerven in the [Banks v. British Coal Corporation](#)¹¹ case:

"(42) In my view it follows from the terms in which the Court in paragraphs 31 and 32 of its judgment elicits, as a matter of principle, the rule of State liability from "the general system of the Treaty and its fundamental principles" (105) that the ruling in Francovich also serves as a precedent for this case:

It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which it integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions [...].

[...]

(45) I conclude from the foregoing that the right to obtain reparation in respect of loss and damage sustained as a result of an undertaking's infringement of Community competition rules which have

⁹ Ruling of the ECJ, 21 March 1974, *BRT v. Sabam*, 127/73, Rec. p. 51.

¹⁰ Ruling of the ECJ, 28 February 1991, *Stergios Delimitis versus Henninger Braeu AG*, 234/89, Rec. p. 935.

¹¹ Ruling of the ECJ, 13 April 1994, C-128/92, *H.J. Banks v. British Coal Corporation*, Rec. p. 1209. Conclusions of the Advocate General Van Gerven, presented on 27 October 1993.

direct effect is based on the Community legal order itself. Consequently, as a result of its obligation to ensure that Community law is fully effective and to protect the rights thereby conferred on individuals, the national court is under an obligation to award damages for loss sustained by an undertaking as a result of the breach by another undertaking of a directly effective provision of Community competition law”.

Regrettably, the Court of Justice did not enter into those points put forward by the Advocate General, as it considered the ECSC Treaty (European Coal and Steel Community Treaty) to be applicable and not the EC Treaty and judged that the provisions in question were not directly applicable.

Faced with the same doubt, and concerned that the traditional solution applied by British courts - that is to say, the simple application of a principle established by national case law - would not be in accordance with community Law, the Court of Appeal referred the case to Luxembourg.

It was no trivial matter. Should the response from the ECJ be affirmative, the Member State courts would find it difficult, if not impossible, to deny or stand in the way of compensations for damages caused by the infringement of community competition rules, by taking advantage of the application of national rules that go against such principle. On the other hand, this fact could discourage potential offenders of community competition law, who would have to add the eventuality of claims for damages to the economic penalty provided by the law.

• **Response from the ECJ in the *Courage* case**

In the ruling commented upon, the ECJ responds to those questions put forward by the British Court of Appeal in the following way:

- a) *All private individuals may invoke Articles 81 and 82 of the EC Treaty before Member State courts and make use of the rights that stem, in their favour, from the direct applicability of such Articles (paragraph 24).*
- b) *The rights mentioned above include parties to an agreement that goes against such provisions (paragraph 24).*

The direct applicability of the provisions in question, as mentioned previously, is a principle that has been confirmed for decades by the community judge and, by virtue of this, all Member State courts must protect the rights emanating from such provisions, including the rights of those who bear responsibility for infringements.

This is obvious if we take into account that the sanction established by Article 81 of the EC Treaty is of absolute nullity, that is to say, any agreement that goes against such provision will not produce effects of any kind, past or future, with regard to third parties or between parties. To deny one party to an agreement the possibility of invoking the annulment of such agreement, would limit the reach of the sanction provided by the Treaty. In the words of Advocate General Mischo¹², “*any obstacle to that sanction, such as, in the present case, a prohibition on reliance on it by a co-contractor, would partially deprive that provision of its effect*”.

In previous cases referred to the ECJ, it had never given much importance to the fact that Article 81 had been invoked by a party to an agreement liable to be considered as against competition rules (paragraph 24 of the aforementioned Conclusions of the Advocate General Mr. Jean Mischo). Consequently, it could be deduced that such circumstance was not meant to affect the reach of the direct applicability of community competition rules.

Hence, the importance of the clear affirmation contained in the ruling, given the significance that national courts would acquire in a near future in the enforcement of community competition rules¹³.

- c) *All private parties have the right to claim compensation for damages arising from a contract or conduct that is open to restricting or distorting the rules of competition (paragraph 26).*
- d) *No party to a contract can be excluded a priori from the aforementioned right, even in those cases where the contract is judged to go against competition rules (paragraph 28). However, compensation for damages may be excluded in the case where such party bears significant responsibility for the infringement of competition rules.*

Firstly, the ECJ makes it perfectly clear that all private parties are entitled to claim for damages arising from violations of competition law, even in those cases where they have participated in such infringement.

Following the same reasoning used in proceedings where private individuals claimed compensation from a Member State for damages suffered, the ECJ recognises that the right to claim compensation for damages resulting from violations of competition law is a consequence of the direct applicability of the provisions in question. To this regard,

¹² Conclusions presented on 22 March 2001.

¹³ On that score, refer to the White Book on the update of the applicable rules of Articles 85 and 86 [now 81 and 82] of the EC Treaty (approved 28 April 1999) and the Council's Rules and Regulations Proposal with respect to the enforcement of competition rules contemplated in Articles 81 and 82 of the EC Treaty (COM(2000) 582, 27 September 2000).

“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” (paragraph 26). The right to compensation therefore emanates directly from the EC Treaty and as a corollary, all national rules that go against or stand in the way of such right, must be excluded by the judge. In effect, national rules that guarantee the protection of such right will have to respect the aforementioned principles of effectiveness and equivalence.

Secondly, the ECJ establishes an important limitation on such right, echoing the case law provided by the Federal Supreme Court of the United States of America in the [*Perma Life Mufflers Inc. v. Int'l Parts Corp.* \[392 US 134 \(1968\)\]](#) case and recognises that such right is not absolute. On the basis of the principle that private parties cannot benefit from their own illegal acts or enrich themselves without just cause, the ECJ provides that community Law does not oppose national Law denying parties the right to obtain compensation for damages suffered if it has been proven that the claimant *“is found to bear significant responsibility for the distortion of competition”* (paragraph 31).

Consequently, the possibility to claim damages cannot be rejected outright in those cases where parties have participated in the infringement of competition rules. The court must analyse the circumstances of the case and, in this framework, decide whether a right to compensation exists or not. It falls to Member State courts to interpret the exact meaning of *“significant responsibility for the distortion of competition”* and this is obviously no easy task. We should bear in mind that, when carrying out the aforementioned interpretation, there must be a causation nexus between the infringement of the Law and the damages caused.

However, the ECJ does provide national courts with certain criteria and, for such purpose, points out that the economic and legal context of the parties should be taken into account, as well as *“the respective bargaining power and conduct of the two parties to the contract”* (paragraph 32). In this sense, courts must verify whether or not the claimant was in a clearly inferior position with respect to the other contracting party, *“such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him”* (paragraph 33).

Weaker parties to a contract who lack sufficient bargaining power and who would otherwise suffer the injustice of having restrictions of competition imposed on them are hence protected. Likewise, those companies who find themselves in a stronger position can be sued by their counterparties for damages arising from the violation of competition law rules.

On the other hand, the practical consequences of the allowances made by the ECJ in its ruling will only be felt in the framework of vertical relations. Clearly, it is difficult to prove that one of the parties was in a weaker contractual position so far as agreements between competitors are concerned.

• Conclusions

The doctrine established by the [Courage ruling](#) confirms principles already instituted by former case law of the Court of Justice of the European Communities. Yet furthermore, such doctrine clearly takes a step forward in favour of all those involved in the enforcement of community competition law.

Firstly, and from a practical point of view, it strengthens the legal position of private individuals, whether they be individuals or legal persons, direct recipients of these rules. Since the *Courage* ruling, there is absolutely no doubt that articles 81 and 82 of the EC Treaty, with respect to community provisions that are directly applicable by national courts, recognise the right of private individuals to receive compensation for damages resulting from an infringement of community competition law, even though these private individuals were involved in such violation. It must, however, be proven that they do not bear significant responsibility for the distortion of competition.

Secondly, the *Courage* case widens the working scope of lawyers who specialise in competition law, insofar as it allows them to make use of the action for remedy to promote the enforcement of competition law with tools of pure private law.

Finally, the *Courage* case enhances the role of Member State judges in the enforcement of community competition rules. This role could be even greater if the current amendment of the rules under development of Articles 81 and 82 of the EC Treaty is concluded.