CIVIL LAW CLAIMS ON THE ENFORCEMENT OF COMPETITION RULES: A COMPARATIVE STUDY OF US, EU AND TURKISH LAWS

A THESIS SUBMITED TO
THE GRADUATED SCHOOL OF CENTRE FOR EUROPEAN STUDIES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
EUROPEAN STUDIES

DECEMBER 2006

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ABSTRACT

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December 2006, 121 pages

Private enforcement, which primarily represents individuals' right to claim damage arisen from violations of competition law, supplements public enforcement and ensures indemnification of individual loss. However, private enforcement of competition law has fallen behind public law enforcement in laws presented in this study, other than those enforced in the USA. Realizing this fact, European Commission, has recently focused on the enhancement and facilitation of private enforcement in the Community competition law. The lagging behind of private enforcement mainly sources from the cultural and traditional differences in the understanding of liability law between Anglo Saxon Law and Continental Law. Anglo Saxon law tradition is inclined to leave the matter to individual action, whereas Continental Law is in more favor of strengthening regulatory mechanisms. More specific obstacles to the improvement of private enforcement are, yet not exhaustively, indefiniteness of legal basis of claims, involvement of complex

economic analysis while stating the case, courts' lack of technical knowledge, indefinite relationship between judiciary and competition authorities, problems in proving damage and causality, absence of facilitating procedural mechanisms such as class actions, treble damage and discovery rights. In the Community law context it is also highly probable to encounter peculiar problems arisen from co-existence of different national laws. Additionally, implementation of the Community competition law by national authorities may also lead to the weakening of the Single Market objective.

Through this study, we will present probable solutions by depicting all these problems.

Keywords**:** Private Enforcement, Private Litigation, Claims for Damage, Treble Damage Recovery, Passing-on Defense, Indirect Purchaser Claims.

ÖZ

REKABET HUKUKUNDA TAZMİNAT TALEPLERİNİN
REKABET HUKUKU UYGULAMASINA ETKİLERİ:
ABD, AB ve TÜRK HUKUKLARI ÜZERİNE MUKAYESELİ ÇALIŞMA

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Aralık 2006, 121 sayfa

Temel olarak bireylerin rekabet ihlâllerinden doğan zararlarını talep hakkı anlamına gelen özel hukuk yaptırımları, idari yaptırımları tamamlar ve bireysel zararların tazminini sağlar. Bununla birlikte özel hukuk yaptırımları, ABD'de uygulananlar dışında, bu çalışmada incelenen hukuklarda idari yaptırımların gerisinde kalmıştır. Bu noktadan hareketle yakın zamanda Avrupa Komisyonu, Topluluk rekabet hukukunda özel hukuk yaptırımlarının geliştirilmesi ve kolaylaştırılması konularına odaklanmıştır. Bu durum temel olarak, Anglo Sakson hukuku ile Kıta Avrupası Hukuklarının sorumluluk hukuku anlayışlarındaki kültürel ve geleneksel farkdan kaynaklanmaktadır. Anglo Sakson hukuk geleneği bireysel aksiyona ağırlık verme eğiliminde iken, Kıta Avrupası Hukuku daha çok düzenleyici mekanizmaları güçlendirme eğilimindedir. Özel hukuk yaptırımlarının gelişmesinin önündeki daha özel engeller ise, sayılanlarla sınırlı olmamakla birlikte, tazminat

talebinin hukuki niteliğinin belirsizliği, davayı serdederken taleplerin ekonomik analizlere dayalı karmaşık konular içermesi, mahkemelerin bu konularda teknik bilgiye sahip olmayışı, mahkemelerle rekabet makamları arasındaki ilişkinin belirsizliği, zarar ve nedenselliğe ilişkin ispat sorunları, davacılar açısından belgelere ulaşma imkânlarının eksikliği, toplu dava imkânının ve zararın üç katını talep hakkının öngörülmeyişi gibi kolaylaştırıcı mekanizmaların olmayışı olarak özetlenebilir. Avrupa Birliği bağlamında ise, bunlara ilaveten, farklı ulusal hukukların birlikte mevcudiyetinin yaratacağı sorunlar gibi Avrupa Birliğine özgü sorunlarla da karşılaşılabilinir. Ayrıca, Topluluk rekabet hukukunun ulusal makamlar tarafından uygulanması, Tek Pazar amacının zayıflamasına da yol açabilecektir.

Bu çalışma ile bu sorunlar ortaya konularak çzöüm önerilerimiz sunulacaktır.

Anahtar Kelimeler**:** Özel Hukuk Yaptırımları, Özel Hukuk Davaları, Tazminat Talepleri, Üç Katı Zarar, Zararın İntikali Savunması, Dolaylı Alıcı Davaları.

ACKNOWLEDGMENTS

I wish to express my deepest gratitude to my supervisor Assist. Prof. Dr. Gamze Aşçıoğlu Öz for her guidance, advice and criticism throughout the research.

I would like to thank Prof. Dr. Bilgin Tiryakioğlu from Ankara University and Assist. Prof. Dr. Gül Efem from Çankaya for their suggestions and comments.

I also would like to thank Prof. Dr. Kemal Dayınlarlı from Atılım University for his guidance, encouragements and insight.

I am, and always will be, deeply grateful to my family, Ayla Bülbül, Sadi Bülbül and Asım for their trust, love, patience and support.

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ABBREVIATIONS

CAT	Competition Appeal Tribunal
CMLR	Common Market Law Reports
DOJ	Department of Justice
ECJ	European Court of Justice
ECN	European Competition Network
EU	European Union
FTAIA	Federal Trade Antitrust Improvements Act
FTC	Federal Trade Commission
GLO	Group Litigation Order
NCA	National Competition Authority
SME	Small Medium Enterprise
TCA	Turkish Competition Act
TCC	Turkish Code of Commerce
OFT	Office of Fair Trading
USA	United States of America

CHAPTER 1

INTRODUCTION

Competition aims at ensuring a market in which the undertakings operate under the equality of opportunity and determine their output and price in accordance with the consumer choices and foreseen business conditions. Only through such a competitive environment, diversity of products at lower prices and better qualities can be provided. As a result, undertakings will try to improve their competitive strength through technology, efficiency and productivity that would eventually lead to efficiency in resource allocation (Akıncı, A., 2001, s.355). On the other hand, monopolistic conglomerations of economic resources are injurious to both the society and individuals since such structures tend to remove normal market place competition.

Competition in a market would be hard to maintain without competition law; since, when undertakings are left to their own devices, they naturally will seek ways to avoid the cost of competition. However, competition law should provide economic productivity and efficiency by way of setting balance between consumer protection and the encouragement of undertakings (*i.e. individual initiative*). The very first and direct concern of competition law is not only to protect consumers, but to maintain a workable competition[1] in the market whereby the consumers will ultimately benefit from (Öz, G., 1996, p.33). This fact has been also emphasized by the American Supreme Court as antitrust[2] protects competition, not competitors (Lopatka, J. Page, W., 2003, p.1). Nonetheless, antitrust law and consumer protection cannot be

[1] It can be said that workable competition is a realistic version of perfect competition aiming at diversity and also allowing leaders in the market as long as they do not abuse such power they held (Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993). In different words, workable competition is concerned to achieve the most efficient resource allocation available, given the constraints of a modern economy where consumer choice cannot be perfectly expressed (Weatherill, S., 2006, p.504).

[2] Term antitrust will be used to refer to competition law violations in this study.

considered independent from each other. Many consumers have never heard of antitrust laws, but when these laws are effectively enforced, those consumers can save their money in illegal overcharges. On the other hand, prices, when set by competitors would be artificially high and such prices would not accurately reflect cost and therefore will distort the allocation of society's resources. As for undertakings, competition law enables these actors in the market to operate under the same rules. Eventually, effective implementation of competition law gradually would lead to the formation of new rules of ethics of business (Öz, G., 1996, p.33). Consequently, the objective of competition law is not only to protect competitive environment for undertakings or consumers one by one; but, through economical efficiency, to ensure welfare of the society which is based on justice (Gürkaynak, G., 2003, p.98). The ultimate objective of competitiveness is, in the long term, to increase prosperity and living standards.

What the objective of a country's antitrust law is and how that objective can best be achieved by maintaining the balance between different interests -including those pursued by administrative entities- are the key questions while determining the necessity and the application extent of antitrust law and policy. As stated by Whish, competition law may not be so much about any particular policy –for example the promotion of consumer welfare or protection of weak- but about who should actually make decisions about the way in which business should be conducted (Whish, R., 1986, p.20). The challenge, for the courts and competition authorities is to find a way to harmonize different goals -like promotion of economic efficiency; promoting production or distribution of goods, or technical or economic progress; protection of consumers; promotion or strengthening of exports; protection of economic freedom; and protection of the public interest –which may be in conflict with the other - as much as possible in situations where they apparently diverge and in a way to reflect business realities (OECD, Judicial Enforcement of Competition Law, Executive Summary, Paris, 1997, p.12.).[3] Nonetheless, it should be taken into account that it is

[3] In a broader context, courts have to balance between the strict allocate goals presented by economics on the one hand, and other national interests that may be relevant in a given country such as enhancement of employment, or enhancement of international competitiveness of national industries or protection of medium and small size businesses on the other. They may

not an absolute fact that the antitrust law is the only and the best way to foster competition all the time[4], similar to the intellectual property protection,[5] and after all, it reflects a political choice.[6]

To accomplish above mentioned objectives, antitrust laws basically employ two instruments as public law (*public enforcement, public policy tools*) and private law (*private enforcement*) instruments.[7]

Public law instruments such as fines or interim measures (structural or behavioural remedies) imposed by administrative authorities vary and are of broad application. However, upset balance in the economic life resulted from anticompetitive conduct cannot be restored sufficiently through public law instruments. Public enforcement may not be deterrent enough for violators and does not provide full detection of all infringements. Particularly in countries where corruption, or at least political influence on administration, is widespread, probability of precise and effective public enforcement lessens. More important than these assumptions, public enforcement does not directly satisfy individual losses.

The second instrument, private law enforcement, more directly focuses on the prevention of unfair gains and protection of the interests of the individuals. This instrument includes sanction of invalidity -*of agreements infringing competition laws*- (*nullity suits*) and right to claim damage (*compensation suits*) which simply indicates individuals' right to bring action when they are affected from competition law infringements and incurred damage as a result.

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have to balance also between the competition law, on the one hand, and other laws, for example laws protecting intellectual property on the other (Same report, Clark, J. p.19).

[4] Carlton asserts that simple antitrust laws combined with enforceable property laws, access to unrestricted capital markets, and lack of entry restrictions (including free trade) may be the other most potent weapons to foster competition (Carlton, D., 2003, p.20).

[5] States may prefer not to regulate area of intellectual property or antitrust with a view to foster production which is to be realized by imitation, pirating or other illegal ways. Especially encouraging mergers may provide capital accumulation for larger scale investments.

[6] Sherman Act's adoption primarily depends on such a political choice. As expressed by the Senator Sherman, economic conglomerations may turn in political conglomerations in time.

[7] However, American antitrust law is not familiar with such a distinction.

Different from the distributive justice and irrespective of the wealth of the parties, the right to claim damage arises from the corrective justice idea where one party engages in a form of wrongdoing which violates the equal autonomy of another party, a legal obligation is recognized to correct for the consequences of that wrongdoing (Roach, K. & Trebilcock M.J., 1996, p.496). A deterrent and punitive function has also been added to the idea of corrective justice in competition law. Private enforcement of competition law provides violators (*infringers, tortfeasors*) being abide by the law since the litigation threat can have a strong deterrent effect on undertakings to observe the law and thus, results in a higher level of compliance with the competition rules. This function becomes more striking in laws where treble damages remedy, the right to claim threefold the damage, is introduced.

Additionally, private enforcement of competition law particularly helps to disseminate competition culture. As George Priest and Benjamin Klein have argued, individual cases can serve a public good by acting as precedents which allow others to conduct their affairs with more certainty about the relevant legal standards (Roach, K. & Trebilcock M.J, 1996, p.481). In a wider scope it contributes to the promotion of innovation and investment of undertakings since the risk of encountering a legal action can be predicted beforehand. In the United States, damage actions are regarded as the primary means of enforcing standards of professional conduct also for doctors, lawyers, accountants and members of other professions (Carrington, P., 2004, p.1415).

At the same time, private enforcement not only provides individuals with right to compensation but, ensures more comprehensive public enforcement. Private enforcement of public law can act as a check mechanism on the monopoly power of enforcement that public authorities would otherwise enjoy. Alike, environmental law, civil rights law or consumer protection law highly necessitates private enforcement as well. An individual who has suffered a violation may be in a better position and often has greater knowledge of violations than the administrative authorities. To the extent that victims of anti-competitive conduct can bring action for damages, the enforcement mechanism is privatized and the burden on public institutions correspondingly diminishes (Whish, R., 1986, p.277). Private

enforcement increases private parties' motivation to be vigilant and monitor other actors' anti-competitive behavior on the market (Hoseinian, F., 2004, p.6). As a result, scarce government resources can be preserved through such a private check system. A balanced private and public enforcement where the each is complementing and supplementing the other is necessary to achieve competition law objectives and an effective combination of private and public enforcement will ultimately serve public good.

In spite of all the benefits gained by means of the duly enforcement of private enforcement of competition law, it is not an improved and well-known area in the laws, save the USA. Primary reasons of this under-improvement are, yet not exhaustively, individuals' lack of awareness of their rights, Continental Law's strict approach to liability law and more technically in legal terms; indefiniteness of legal basis of claims, difficulty of establishing causality, requirement of protective purpose of the norm, involvement of complex economic analysis in calculating damage, proof problems, absence of treble damages remedy, courts' lack of technical knowledge, indefinite legal relation between judiciary and competition authorities. In terms of procedural law, absence of facilitating procedural mechanisms such as class actions, pre-trial discovery rights can be added to this list. In the European Community law context, in addition to those stated above, it is also highly probable to encounter substantive problems peculiar to and arisen from co-existence of different national laws and also procedural problems of multiple trial situations where the damage occurs in countries more than one; yet, within the common market, which may lead to inconsistent application of the same rules.

American courts encounter substantial amount of private antitrust enforcement partly due to their improved culture of litigation as well as the unique character of American competition law as being the most comprehensive legislation where the all above stated incentives have been granted to plaintiffs. However, unlike the laws examined in this study, main problem in the USA is the excessive (*or misused*) application of private enforcement which may lead to anticompetitive use of anticompetitive law. Equipping plaintiffs with too many incentives may also be at the expense of natural business activity and as for consumer actions in which treble

damages are awarded such a danger is highly probable. Put differently, encouraging individuals to lodge false judicial actions may end up encouraging some firms to handicap their rivals[8] setting aside the fact that instigating a lawsuit also imposes costs on the economy. In the American law context, drawing lines of private enforcement's implementation is of great importance although its application is highly regarded indispensable. Even, American business executives may prefer private litigation to bureaucracy and higher tax burden and unwelcome government involvement (Carrington, P., 2004, p.1429).

In contrast to USA, there is a current European debate on whether to promote private enforcement of Community competition rules. In Europe, probability of excessive implementation of private enforcement has not yet seen in the horizon; reversely, private enforcement of competition law has been tried to be developed. It seems that courts in the European Union appear to be expanding the scope of competition laws, opposite to the other side of Atlantic (Koob, C., Vann, D., Oruc, A., 2005).

Importance of the private enforcement of competition law has been first underlined by the ECJ's *Crehan* judgment which emphasized that the efficacy of Community competition law requires that there would be a right to compensation for loss suffered as a result of anti-competitive conduct and this right discourages anti-competitive conduct in the first place (Courage v Crehan, Case C-453/99, [2001] ECR I-6297). Otherwise, infringers may determine prices in a way to cover the rise sourced from fines they have paid or will pay to the competition authorities and they will either reflect this amount to their consumers or seek to hide it in their budget as an item of loss.

Following the *Crehan* judgment, Regulation 1/2003, called as "*The New Modernization Regime",* introduced a new mechanism to the application of Community competition law and this procedural reform granted national agencies and courts of the Member States with the authority to apply Article 81 and 82 of the

[8] This view is vigorously asserted by Chicago scholars like Judge Posner who is known for the restrictive view of competitors' standing. Basically, Chicago school is known by views advocating leaving competition regulation to market conditions and not interrupting this system through judicial or administrative interventions as much as possible. On the contrary, Harvard school espouses more interventionist approach (Kuntalp, E., Özdemir A., Arıkel, S., 1999).

EC Treaty directly and in their entirety, including the application of Article 81(3) which had hitherto been the exclusive preserve of the Commission (European Union. Reg (European Communities) No. 1/2003 - OJ [2003] L1/1). However, how the inconsistent application within the single market -which expands its boundaries through enlargement process- will be eliminated and how vigorously national authorities will pursue the single market objective are the key questions in this regard which have not known yet.

Nonetheless, the importance of private litigation and the necessity of its application's stimulation are in the agenda of the European Commission as underlined in the comprehensive study prepared by Ashurst for the Commission (CLI 23 November 2004, p.3).[9] This study pointed out that while Community law demands an effective system for damage claims for infringements of antitrust rules, this area of the law in the twenty five Member States presents a picture of "*total underdevelopment*" and private enforcement has highly fallen behind the public enforcement of competition law in the Community.

Following this study, the Commission has adopted a "*Green Paper on Damages Actions for Breach of EC Antitrust Laws"* in 2005 indicating key issues related to damage actions and setting out options for improving the current system in parallel to the conclusions of Ashurst Report. The Commission has not yet decided if actions –legislative or otherwise- are needed especially to interfere with and harmonize national substantive laws nor does it yet have a view about whether any possible action is best taken at the Community or the national level. Green Paper is expected to be a discussion forum stimulating debate rather than setting out definite proposals.

As a part of the Continental Law system, Turkish competition law has been to a large extent an adoption of the European competition law and similar to Europe, private enforcement of competition law is very new in the Turkish law practice. Alike, its application lags behind the public enforcement. There have been few cases tried before Turkish civil courts and only a few studies have elaborated private enforcement of the Turkish competition law. Unlike examined European Union

[9] Ashurst is a law firm which produced two comprehensive comparative reports for the Competition Directorate General in advance and preparation of the Green Paper.

members' national laws in this study, one important feature of the Turkish competition law is the treble damage remedy although Turkish law is not familiar with the concept of treble counting of damage.

In conclusion, benefits expected from competition law vary and reflect a political choice at the end; but, whichever is elected or preferred it cannot be accomplished without private enforcement. As the case has long been in the United States, enforcement of competition law across the globe is no longer being delegated only to government agencies. Availability of private litigation is slowly becoming the norm in many jurisdictions. Judging from these trends, it will not be wrong to say that private enforcement of competition law will be likely to continue to play a significant role in ensuring competitive markets and consumer welfare in recent future. However, its application needs to be enhanced for the proper working of competition; yet, in a sound and balanced fashion.

For these purposes, all above mentioned issues are tried to be given place in this study. Next chapter elaborates historical progress and statutory sources of competition law accompanied by a case study from the United States, the European Union, Germany, France and the UK, in addition to Turkey, with a specific focus on private enforcement. Comparative approach is employed in this study, since only through a comparative approach; current situation can be captured on the path to *"ought-to-be"* situation. Chapter III presents civil law consequences of competition law in detail. In that Chapter implementation conditions of private enforcement are examined and more specific problems are introduced such as possibility of consumer litigation and indirect purchaser actions under the Turkish and Community competition laws. This study is concluded with a set of proposals designed to facilitate private enforcement.

Although, at the first sight this study seems to be totally within the field of law, it is not so due to the exceptional character of the competition law which applies law to economics and becomes an amalgamation of law and economics by way of turning economic concepts into legal rules through a political choice. Evaluating case law in the United States, the European Union, United Kingdom, France, Germany and in Turkey, it is hoped to underline detrimental repercussions of competition law

violations on individuals and undertakings and thus, to reveal importance of the subject, as well as the private enforcement's application possibilities in Turkey and afore-mentioned countries of the European Union.

CHAPTER 2

GENERAL ASPECTS OF COMPETITION LAWS

2.1. American Competition Law

The first comprehensive legal regulation on the prevention and prohibition of anti-competitive behavior is the Sherman Act of 1890 in the United States which is followed and amended by the Clayton Act in 1914.[10] Principal character of the Sherman Act has been described as the "*Magna Carta"* of free enterprise since it expresses a national commitment to free market economy (United States v. Topco Associates, Inc., 405 United States 596, 610 (1972)). American experience that has been developed over a century through decisions of the Federal Trade Commission and precedents of the Supreme Court constitutes a major source for any kind of research related to competition law.

American law applies at two layers as federal and state. Most states in the United States have antitrust laws designed in a parallel fashion with the Federal antitrust law. These state laws generally apply to violations that occur wholly in one state. However, it is the Federal law which applies on inter-state commercial activities or activities of federal scale and therefore, Federal law will be reviewed in this study [2].

Federal antitrust law is principally found in three key statutes. These three pillars of American antitrust law are the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.

Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies which unreasonably restrain interstate and foreign trade [2]. The courts have held that certain agreements are *per se* illegal under Section 1, i.e. they will be

[10] In fact antitrust law and its private enforcement have a long history. Statute of Monopolies enacted in 1623 in the United Kingdom provided that an individual, financially injured in his business or property by a restraint of trade, could bring suit and, if successful, collect treble the amount of his damages from the perpetrator of the anti-competitive activity (Roach, K. & Trebilcock M.J., 1996, p.464).

found to violate the law without regard to any possible justifications. In other words, the conduct in question will be deemed automatically illegal, and the defendant will not be allowed to explain away or justify his conduct. *Per se* illegal agreements are price-fixing, bid-rigging, customer and market allocations, group boycotts, and certain tying arrangements [2]. All other agreements are judged under the rule of reason, which requires a balancing to determine whether the agreement's pro-competitive aspects outweigh its anticompetitive aspects.[11] Under the rule of reason, courts will examine all of the facts and circumstances surrounding the arrangement to determine whether the anticompetitive effects of the arrangement substantially outweigh its pro-competitive benefits. The rule of reason is not an exemption and it does not necessarily mean that the conduct in question will be deemed legal under the antitrust laws; it simply provides the defendant with a chance to justify his/her conduct.

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization and conspiracies to monopolize. Section 2 does not, however, outlaw the possession of a monopoly. Instead it outlaws abusive or predatory practices designed to obtain or maintain monopoly power.

Each section sets forth that relative violation constitute a criminal felony, punishable by fine and/or imprisonment.

The Clayton Act, as a civil statute, does not carry any criminal penalties and does comprise provisions relating to tying, price discrimination (as amended by The Robinson-Patman Act), civil enforcement of the antitrust laws, statute of limitations, mergers and acquisitions (together with The Hart-Scott-Rodino Act), pre-merger notification, and interlocking directorates. Section 3 of the Clayton Act prohibits contracts that substantially lessen competition or tend to create a monopoly in any line of commerce. It is the Section 4 of the Clayton Act permits private parties to sue in Federal courts for three times their actual damage arisen from vertical and horizontal restriction, monopolization and mergers (Akıncı, A., 2001, p.360). Section 16 of the Clayton Act also provides injunctive reliefs.

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[11] There is a recent tendency towards expansion of rule of reason's scope and narrowing down *per se*. (For the European Communities competition law perspective in this regard, see Öz, G., 1999, p.95).

In the United States, it has been accepted from the beginning that agreements contrary to law are void and Article 4 of the Clayton Act states that all injured persons has right to demand compensation. Agreements which are deemed unreasonably restricting competition and injurious to public interest are unlawful and invalid since the public interest is the first consideration. Thus, restraints in the agreement are unenforceable and void as against public policy.

The recently enacted Antitrust Criminal Penalty Enhancement and Reform Act of 2004 also contain provisions relevant to private antitrust litigation. In particular, the Act provides that companies or individuals who have been accepted into the amnesty programs of the Antitrust Division of the United States Department of Justice can limit their liability in civil cases by agreeing to cooperate with civil plaintiffs. They will be liable only for single damages (known as also "*de-trebling*") and are not subject to joint and several liability (Martin, S., 2005, p.79).

All these laws' enforcement are ensured through criminal actions brought by the Antitrust Division of the Department of Justice which may also grant immunity from prosecution and lawsuits that will be brought by private parties for damage claims.

Private antitrust litigation in the United States is well-established and prolific due to the procedural facilities such as treble damage remedy, long-arm jurisdiction[12], *prima facie* evidence[13], broad discovery rights[14], injunctive reliefs together with general principle of freedom of information, one-way cost rules[15], contingency fees[16], civil jury trials[17] and cross-examination, aggregation of claims[18]

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[12] It means a facility to bring suit in the plaintiff's home jurisdiction against a distant business that has caused foreseeable harm at that place (Carrington, P., 2004, p.1415).

[13] Final determinations of prior government enforcement proceedings are *prima facie* evidence of similar facts alleged in subsequent antitrust proceedings.

[14] This right enables parties to inspect and to get private documents before trial.

[15] Attorneys' fees, and costs which are awarded to prevailing plaintiffs.

[16] Contingent fee means hiring a lawyer who agrees to receive compensation only if he or she is successful on condition that he or she will take a substantial share of the recovery, thus liberating the plaintiff from any substantial financial risk in bringing suit. Therefore, litigation costs are transferred to the law firms. (Carrington, P., 2004, p.1416, Woods, D, 1997, p.436).

together with class action procedures, admissibility of claims for mental anguish and the most important of all, due to awareness and improved culture of liability law enforced by individuals.

In order to grasp the importance and wide-spread application of private law instrument one can look at the American system in where it is said that ninety percent of all enforcement is private enforcement, the other ten percent being carried out by public authorities (Hoseinian, F., 2004, p.4, Clifford, J., 1999, p.79). More than eight hundred federal antitrust cases were filed in 2004 [4]. In addition, many indirect purchaser cases are filed in state courts each year (Whish, R., 1986, p.277). Common law that enables broad application of liability law and America's high industrialization level are playing outstanding part in these figures.

The most comprehensive empirical study on private enforcement case law in the United States, yet unfortunately not a recent one, is the Georgetown Private Antitrust Litigation Project (*the Georgetown Project*), which collected and analyzed data on all private antitrust cases filed from 1973 to 1983 in five federal districts, found that from the mid-1960s until the late 1970s, the absolute and relative number of private antitrust cases grew, peaking at 1,611 in 1977, while the ratio of private to public cases exceeded 20:1 (White, L., 2002, p.4). In the 1980s, however, both the absolute and relative numbers of private antitrust cases have declined, and the ratio of private to public cases has fallen to the 10:1 range.

In the sample of cases analyzed in the Georgetown Project, it is seen that horizontal price fixing was the most frequent primary allegation, followed by the refusal to deal (White, L., 2002, p.6). The largest group of plaintiffs were downstream business entities-dealers, business customers, franchisees and licensees-suing their suppliers. The next largest group of plaintiffs was competitors suing each other (Roach, K. & Trebilcock M.J., 1996, p.466). The outstanding sector is the manufacturing since it is larger than other sectors. Manufacturing is followed by

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[17] Jury trials are also criticized on the grounds that the matters are so complex that it renders the suit beyond the ability of a jury to decide (Martin, S., 2005, p.80). However, it is believed in America that jury members are impartial and immune to bribery.

[18] If the claim is small, to aggregate it with other like claims in a class action so that it will be financially worthy of pursuit by private lawyers.

retail and wholesale trade sectors. Final customer (*end user*) constitutes 8.7 percent of the total and they are mostly alleging horizontal price fixing which is successively followed by monopolization, tying, exclusive dealing, price discrimination and refusal to deal (White, L., 2002, p.9). Casual observation of the names of the parties indicates that the defendants are generally from "*Fortune 500*" names (White, L., 2002, p.7).

The data concerning private antitrust suits consistently show that a large proportion of these disputes are settled rather than litigated and nearly 10-15% of antitrust cases are tried to judgment (White, L., 2002, p.10, 40). On the plaintiff's side, it is partly the outcome of the fact that settlement is the cheapest way of avoiding expensive court proceedings. On the defendant's side, uncertain legal standards in antitrust cases which might lead them to form relatively high estimates of plaintiffs' chances of success and in case of success, the danger of treble damage remedy together with high litigation expenses are some of the reasons that make settlement more preferable. Moreover, settlement also helps defendants to suppress public knowledge and thus, to avoid class actions.

As a conclusive remark of different academics and lawyers interpreting the Georgetown Project, it can be said that for and against views on private litigation are nearly equal. However, it should be taken into account that there would have been many meritorious cases that would never have been brought by the government had private litigation not existed (White, L., 2002, p.402).

The United States, from the origins of its antitrust law, has provided for an expansive role for private actions. It was never imagined in the United States that the government's efforts alone would be sufficient to enforce the Sherman Act (Clifford, A. J., 1999, p.249). However, this feature of American competition law has recently become controversial and views on curbing private enforcement have strengthened. This trend started in 1970s, accelerated under the conservative political climate of Reagan and Bush[19] and shaped under the theoretical views of the Chicago school. The United States Supreme Court took action in the late 1970s, with a view to

[19] Through 1992, Ronald Reagan and George Bush had appointed two-thirds of the federal judiciary and five members of the Supreme Court (Vance, S., 1997, p.120). This sample reveals that competition policies are regarded one of the most important policy tools in the US politics.

correcting problems created by overzealous use of the private treble damage action that was blocking Federal courts, by restricting the scope of the rule of *per se* illegality in most vertical restraints, heightening standing requirements and eliminating indirect purchasers' standing (Vance, S., 1997, p.115).[20]

Recent decisions of the Supreme Court clearly demonstrate this tendency as well. In the *Trinko* decision (Verizon Communications Inc v. Law Offices of Curtis V Trinko, LLP, 124 S Ct 872 (2004)) AT&T, telecommunication service provider, provided local telephone service to the plaintiff over another network owned by another company which in the end resulted in a decrease in the service quality. The Court substantially restricted application of antitrust laws under the Section 2 of the Sherman Act and stated that failure to meet regulatory obligations does not constitute a violation in terms of antitrust law.

Alike, as regards the extraterritorial reach of antitrust laws, the FTAIA made clear that the jurisdiction of the US courts was restricted to antitrust conduct that has a "*direct, substantial and reasonably foreseeable effect*" on domestic or import commerce, or on export commerce of an US exporter regardless of whether the infringer sells its products directly into the US or indirectly through independent distributors [5].

In parallel, the Supreme Court, in its *Hoffmann-La Roche* judgment (Hoffmann-La Roche Ltd v. Empagran SA et al, 124 S Ct 2359 (2004)), has limited the extraterritorial reach of the United States antitrust laws and non-United States plaintiffs' access to the United States courts on the grounds that American court would not impose American antitrust policies. Pursuant to the Court, contrary thinking would constitute an act of legal imperialism, through a legislative fiat (Id at

[20] A debate on the excessive implementation of these rules has been ongoing in the United States. In June 2, 1999, 240 economists addressed an open letter, which was published in the New York Times and the Washington Post, to President Clinton calling his attention to the fact that antitrust rules were increasingly invoked by operators in order to achieve protectionist-anticompetitive goals [1]. As being related to the Microsoft case of that time, efforts for bringing activism to antitrust enforcement were criticized in this letter. According to the authors, the broad goal of antitrust should be to encourage greater efficiency in the economy by checking inefficiencies that arise as a consequence of the exercise of market power.

2369) since claims were based on foreign effects –injuries- that had no direct causal relation with anti-competitive conduct's effects on the US commerce. [21]

It can be concluded by looking at American experience that private enforcement of antitrust laws is a sensitive issue in industrialized countries that are likely to encounter such claims massively. Considering many private actions can be brought with motives which are unrelated to the legitimate purposes of competition law and adjudicating such claims will be at the cost to commercial activities, the necessity of more cautionary approach to private enforcement appears as underlined by American critics given above. Although there is a reasonable doubt in respect that most private antitrust litigation might be driven by motives other than those sought and protected by competition laws, it is not incorrect to anticipate that broad application of private litigation in the USA will continue in the near future and the risk of exposure to American scrutiny is still standing for global companies.

2.2. Community Competition Law

2.2.1 General Aspects of Community Competition Law

Competition law plays a hugely important part in the overriding goal of achieving single market integration (Whish, R., 1986, p.19) which can only be achieved by leveling the field; that is to say, ensuring that all companies play by the same rules.

In the European Union, the first principle of competition law is to assure and maintain single market integration and the elimination of private practices which interfere with the integration as designated in Article 3 of the EC Treaty by the objective of "*a system ensuring that competition in the internal market is not distorted*" (Landolt, P., 2006, p.24). The function of the Community competition rules was interpreted by the ECJ as follows:

> *The requirement contained in Articles 3 and 85 of the EC Treaty that competition shall not be distorted implies the existence on the market of workable competition, that is to say the degree of competition necessary to ensure the observance of the basic requirements and attainment of the*

[21] The *Hoffmann-La Roche* decision of the American Supreme Court was diametrically opposed to the outcome of *Provimi* decision heard in the United Kingdom (Provimi Ltd v. Roche Products Ltd et al, (2003) QBD (6 May 2003)). See p. 30 and 43.

objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a single market [Metro v. Commission 1977 ECR 1875,(1978) 2 CMLR 1]

Single market objective constitutes the very concern of Community law which distinguishes Community competition law from national laws. When national competition laws and the Community competition law is compared, basic systemic structural difference which must be taken into account is the fact that the national antitrust laws are statutory, whereas the competition rules of the European Community are at the level of a Treaty which forms the constitutional character of a Community based on rule of law (Clifford, J., 1999, p.4). Moreover, the Community law has a supranational character; that is to say, the authority to rule in this field has been delegated to the Community and the Community law shall apply at the national level. Community competition law is an area of shared competence between the EU and the Member States (Landolt, P., 2006, p.35). The ECJ has provided direction on the coexistence of the Community and the Member State competition regimes (16/68, Wilhelm v. Bundeskartellamt, [1969] ECR 1). As a result, the Member States have been left free to implement their own national competition rules; yet, under the rule of uniform application and supremacy of the Community law[22]. The Member States have their own competition laws and enforcement agencies together with their national substantive laws that have generally converged on the Community standards although some areas of divergence remain [21].

Provisions of competition law were given place in Articles between 81 and 86 –former 85 and 90- in the EC Treaty. Primary competence for applying EU competition law rests with European Commission and its Directorate General for Competition, although state aids in some sectors, such as transport, are handled by other Directorates General. All decisions of the European Commission are subject to the legal review of the ECJ. Article 83 empowers the European Council to adopt measures to give effect to the principles contained in Articles 81 and 82.

[22] However, the principle of subsidiarity is to be observed. According to this principle in areas other than of exclusive competence of the Community, actions are to be taken by the authority where the action in question will be better achieved. Complementarily, another well established principle, principle of proportionality provides limitation of the extent of the EC competition law application to provide minimal impairment of individual freedom.

Article 81(1) of EC Treaty prohibits "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention…"* and subsequently stipulates some of the restrictive conducts. The second paragraph of the Article sets forth that "*any, agreement or decisions prohibited pursuant to the Article 81 shall be automatically void*". Third paragraph of the article sets out conditions of exemption.

Article 82 of the EC Treaty, by referring to some particular cases of abuse in following sub-paragraphs, prohibits any abuse by one or more undertakings in a dominant position within the Common Market or in a substantial part thereof. Abuses are deemed incompatible with the Common Market objective in so far as it may affect the trade between the Member States.

Without going into further detail, it should be noted that Community competition law also includes control of proposed mergers, acquisitions and joint ventures involving companies which have a certain, defined amount of turnover in the EU (This area is governed by the Council Regulation 139/2004 EC known as "*the Merger Regulation*").[23] The European Commission enjoys the exclusive power to investigate mergers involving community Lastly, Community competition law comprises the control of direct and indirect aid given by national authorities of the Member States to companies in order to support a specific economic activity as covered under Article 87 EC (ex Article 92).

2.2.2 Invalidity of Agreements

Pursuant to Article 81(2) of the EC Treaty, agreements that infringe Article 81(1) and do not satisfy the terms in Article 81(3) shall be automatically void as expressed by the ECJ in several decisions (Société La Technique Miniére v.

[23] Notices launched by the Commission and Regulations adopted by the Council with a view to shedding light to the application of these clauses are compiled below: Commission Notice on Agreements of Minor Importance Which do not Appreciably Restrict Competition Under Article 81(1) of the Treaty Establishing the European Community (De Minimis) [2001] OJ C368/13, Green Paper on Vertical Restraints in EC Competition Policy and following Council Regulation 2790/1999 of 22 December on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices [1999] OJ L336/21, Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law [1997] OJ C372/5.

Maschinenbau Ulm; Sociétéde Vente de Ciments et Bétons de l'Est v. Kerpen&Kerpen). This is the absolute nullity in legal terms. The ECJ, in the *Passmore* decision, ruled that Article 85(1) is concerned with certain actual economic effects arising out of the operation of agreements and concerted practices. It only prohibits agreements and concerted practices which have a particular offensive economic objective or effect. No agreement or clause in an agreement is *per se* invalid (*Passmore v. Morland* 1998 4 All ER 468, 1998 European Union LR 580, 501, 1999, 1 CMLR). As regards the abuse of dominant position, Article 82 does not contain a specific provision on voidness, but it is clear that a dominant undertaking could not enforce a contractual term that leads to an abuse of its dominant power.

Partial invalidity is also available in the Community competition law where the effect of severing illegal clauses from an agreement does not altering the intention and scope of the whole agreement (EC Report, 1997, p.53, 54).

When the Commission, on the basis of the facts presented to it, decides that there are no grounds under Article 81(1) or 82 of the EC Treaty to take action in respect of an agreement or practice, it issues a negative clearance either as a formal decision or informally by way of a comfort letter. In cases of Article 81, undertakings usually combine their application for negative clearance with a notification for exemption. However, the legal nature of negative clearance and comforting letters is not clear. Were it accepted that the exemption provides a justification base removing illegality; it would not be possible to claim for damages within the scope of such exemption. According to Whish, the difficulty in relation to the agreements requiring individual exemption would be avoided if they were provisionally valid until the time when the Commission reaches a contrary decision. That is to say, agreements that needed exemption under Article 81(3) are valid only if a favorable decision is taken by the Commission in respect of them, although that validity may be conferred retrospectively; if, however, the Commission does not adopt a favorable decision, the agreement will have been void from the beginning ("*ab initio"*) (Whish, R., 1986, p.262). The period lapsed till the exemption is

granted can be called as the "*transient voidness"*. This process is described by Whish as turning on and off of the statutory prohibition in Article 81(2).

Further questions can be raised in this direction. For instance, in cases where the Commission grants immunity from fines as a result of a *leniency applications* or *commitment decisions* (envisaged in Article 9 of the Regulation 1/2003) whereby applicant informs the authority against somebody to obtain a full immunity or a reduction in penalties[24] in exchange for freely volunteered disclosure of information on a cartel and continuous cooperation in the authorities' investigation, what would happen to the rights of individuals to sue for damages are other questions which are open to discussion. These instruments were employed to encourage companies to negotiate with competition authorities in order to put an end to competition law infringements and they may be very effective in detecting violations. It can be said that leniency application shall not remove illegality inherent in the infringement. It only provides an exception from public law consequences of competition law infringement. Therefore, individuals can still base their claims on the infringement. Nonetheless, it is becoming more difficult for civil law courts to decide on the "*against law*" element while determining invalidity within the scope of the Community competition law.

2.2.3 Damage Claims under Community Competition Law

European legislation creates no right to bring action for damages. Moreover, as the enforcement authority of these provisions, the Commission has no power to award damages. Therefore, claims for damage can only be heard by national courts since this subject is not regulated in the EC Treaty (Akıncı, A., 2001, p.359) and consequently, the Member States are obliged to provide appropriate procedural structures allowing private enforcement of competition law.

Right to claim for damage stems from direct effectiveness –direct applicability and ability to produce direct effects- of Articles 81(1) and 82 (Leclerc v. Commission (T-88/92), 12 December 1996). Direct effectiveness of Community law

[24] Whereas in the USA, a company which was the first to file a leniency application may no longer be subject to treble damages, but only to single damages (Sherman Act, Section 213(b), 118 Stat at 667).

is given rise to rights and obligations on the part of individuals which are safeguarded by national courts. This right is granted and established through the jurisprudence of the EJC. In its decisions of *Belgische v. SABAM* (Sabam case, CMLR 238) and *Italia v. Sacchi* (Case Sacchi v. Commission, 1974, 2 CMLR 177) it was ruled by the ECJ that undertakings restricting competition under Article 85 will be liable for the damages of the third parties. Futhermore, the ECJ has ruled that, in the absence of Community rules on the matter, it is for the legal systems of the Member States to provide for detailed rules for bringing damages actions (Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others,* Press Release 13 July 2006 58/06). Therefore, the difference between American and European Community law has been, to some extent, removed (Akıncı, A., 2001, p.357) through these rulings of the ECJ.

Following the long line of the ECJ case law on private enforcement of directly effective community provisions, the Court held that any remedy for breach of Articles 81 and 82 must comply with the principles of effectiveness and equivalence. Put differently, the conditions for obtaining a remedy for breach of Community competition law must not be excessively difficult or practically impossible to achieve, nor must they be less favorable than those relating to similar domestic claims (*effect utile* or *non-discrimination principle*). However, in the absence of Community law rules governing the matter; these principles are to be applied through national law, by the national courts following domestic procedural rules [9].

In spite of case law above given, it was not until the landmark judgment of the ECJ in the *Crehan* case it was settled beyond doubt with direct reference to the provisions of the Community competition law that some form of remedy should be available to victims of breaches of Article 81, and by analogy Article 82. In the *Crehan* judgment through Article 234 reference by the High Court in the United Kingdom, the ECJ stated that the efficacy of the Community competition law requires that there would be a right to compensation for the loss suffered as a result of an anti-competitive conduct and this right discourages anti-competitive conduct in the first place (Courage v Crehan, Case C-453/99, [2001] ECR I-6297). Otherwise, infringers may determine prices in a way to comprise the rise arisen from fines they

paid or will pay to the competition authorities and reflect this amount to their consumers or hide it in their budget as a loss item to be deducted. The court also underlined that private claims are integral to the enforcement of Article 81 (*ex Article 85*):

> *The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(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. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.* (Courage v Crehan, Case C-453/99, [2001] ECR I-6297. Courage v Crehan op cit paras 26 and 2)

Following the *Crehan* judgment, the Regulation 1/2003 [OJ (2001) L 1/1] which is known as the new "*Modernization Regime"* was introduced by the Council. This was a new mechanism to the application of Community competition law and this procedural reform granted national agencies and courts of the Member States with authority to apply Article 81 and 82 of the EC Treaty directly and in their entirety, including the application of Article 81(3) which had hitherto been the exclusive preserve of the Commission (European Union. Reg (European Communities) No. 1/2003 - OJ [2003] L1/1). This is expressed in the Regulation as follows;

> *…National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 of the Treaty in full (*Regulation (European Communities) no 1/2003, Recital 7*).*

The Member States are now able to enforce Community competition law independently along with their national competition laws, and carry out investigations and prosecute infringements under Article 81, either individually or in combination with other national authorities. Accordingly, national courts now can

fully adjudicate Community competition law (called as "*decentralization*"[25]). In other words, individuals can bring action before their national courts on the merits of violations of Article 81 and 82. As a result, national tort law provisions shall apply to the civil liability cases of both Community competition law as well as national competition law.

This regime has brought new questions to the application of the Community competition law. First of all, national authorities are now in a position to decide whether an infringement is falling within the scope of Community law. The courts of the Member State must ensure the effectiveness of Community rights and it is not difficult to predict that as the integration deepens and widens infringements that of nature to affect trade between the Member States would increase. However, national courts' private enforcement of Community competition law provisions leads to a considerable difficulty, as it may be necessary to analyze the market in order to assess the effect of an agreement or the conduct of a dominant firm on competition and frequently, it may not be simple to tell whether a provision infringes Article 81 or may be enforced (Korah, V., 1997, p.22, 23).

Community competition law will apply *prima facie* to agreements or abuses "*that are capable of having a minimum level of cross-border effects within the Community* (Effect on Trade Guidelines, paragraph 12). Through this so-called "*effect on trade test*" competition authorities and the courts of the Member States shall make determination as to their jurisdiction (Landolt, P., 2006, p.188-179) yet, in compliance with the interpretation of the Commission according to Article 85 and of the Community Courts according to Article 220 of the EC Treaty.

The allocation must be realized by taking into consideration the effect of the violation as to its impact on the relevant market in order to assess whether it has an appreciable effect on the trade between the Member States (*Commission Notice on Cooperation between National Competition Authorities and the Commission in*

[25] In the context of competition law decentralization refers to networking of national agencies and courts with the Community and providing national authorities with the power of implementing Community competition law. The objectives behind this process are ensuring better implementation of Community law with speed, better cooperation and also reducing workload of the Commission. Yet it is feared that decentralization may cause multiple and unnecessary litigations (White Paper on reform of Regulation 17-Summary of Observations Competition DG Document 29.02.2000).

Handling Cases Falling within the Scope of Articles 81 and 82 -formerly Articles 85 and 86- of the EC Treaty [Commission Notice (97/C 313/03); Official Journal C 313 of 15.10.1997)] although, it is not an easy task to determine what is appreciable. The ECJ has focused abstractly on market shares and turnover of the undertakings concerned in assessing appreciability (Landolt, P., 2006, p.181; See Effect on Trade Guidelines, para. 44).

Moreover, notification system (the system of notifying agreements and practices to the Commission for exemption or negative clearance) has been abolished by the Modernization Regime. Thanks to this abolishment national courts will no longer have their proceedings blocked due to the notification of agreements to the Commission, since previous system foresees that the Commission has the exclusive power to decide on exemption. Main purpose behind such a change is to prevent prior applications aiming at delaying the process by putting any national court proceedings on hold during the pendency of an exemption application. Yet, former system helped to secure uniformity and this, in turn, risked leaving national courts and competition authorities in a state of uncertainty when asked to apply EC rules to commercial practices (Weathrill, S., 2006, p.579-580).

Such a decentralisation is hoped to ensure rigorous enforcement of competition laws throughout the European Union (Koob, C., Vann, D., Oruc, A., 2005, p.4). However, it can be asserted that the decentralization, particularly when the European Union goes through in an enlargement process and increases the number of member states, may raise the possibility of the confliction between national laws and the Community law and as a result, inconsistent application of Articles 81 and 82.

As stated above, problems peculiar to the Community competition law basically gather around the issue of harmonization. Complete separation of national and European layers from each other might end up with undermining the common market objective by way of allowing different conditions for different territories within the same Community. Particularly as for actions for damage claims arisen from the Community competition law these differences gain particular importance. Although, it can be considered that all national laws grant a legal protection to a certain extent and therefore there is no need for further harmonization among the

members of the EU in this regard, still there exists the risk of inconsistent application from one member state to another as clearly demonstrated in the Study of Ashurst.

In spite of all probable problems, enhancement of private enforcement both at national and European Community level in a way to provide consistency of these laws has become one of the priorities of the Commission. This situation is hoped to be eliminated through training and closer cooperation.

As a matter of fact, decentralization takes its roots from the past. The Commission first issued *Notice on Cooperation between National Courts and the Commission in Applying Articles 81 and 82 of the EC Treaty* in which the Commission explained how the national court should have dealt with a case (OJ 1993 C 36/6 5 CMLR 95). It was underlined by the Commission that *"national courts are able to ensure, at the request of the litigants or of their own initiative, that the competition rules will be respected for the benefit of private individuals"* and that *"in addition, Article 81 (2) enables them to determine, in accordance with the national procedural law applicable, the civil law effects of the prohibition set out in Article 81*" (OJ C 36/9 13.02.1993, para.6). That notice has been a part of a movement towards this decentralisation of the enforcement of competition rules (Whish, R., 1986, p.260).

Accordingly, European Commission has started working on further cooperation with national courts by creation of the European Competition Network ("*ECN*") as required by Article 15 of the Regulation 1/2003 with a view to providing uniform application throughout the Community. For instance, the Member States are obliged to forward to the Commission a copy of any written judgment of national courts deciding on the application of Article 81 or Article 82 of the EC Treaty. The Commission is already taking some action by, for example, ongoing efforts to improve the training of judges on competition law. In 2004 the European Parliament and the European Council jointly established a Community action program for promoting training for national judges ("*Training of National Judges in EC Competition Law and Judicial Cooperation between National Judges*" 21 April 2004, No 791/2004/EC). Furthermore, the Commission recently created a database of competition-based actions brought in the Member States [12]. It is expected with the

new Modernization Regime of one single integrated Community competition law regime applied by both national courts and the Community institutions, however; the result is yet unknown.

Some asserts that ultimate solution would be higher extent harmonization of the civil and commercial remedies in competition law infringements (FIDE "European Union and European Competition Law and Policy: The Reform of Competition Law Enforcement - will it work?" p.2). These views are noteworthy since, though, uniform application of the Community law is the general principle, the diversity currently present between the laws of the Member States (particularly in their tort law) may in itself also constitute an obstacle to a plaintiff while proving his/her case. Setting aside debates over the necessity of international harmonization or at least international coordination in antitrust laws, it appears that harmonization takes priority in the context of national antitrust laws of the European Community since differences in national laws may lead to different applications of the same competition law. The Modernization Regime created 26 competition authorities including the Commission together with 25 national courts implementing same Community competition law rules. This raises possibility of inconsistent dispositions on similar matters or worse, on the same matter.

The division of national courts' jurisdictions as to the application of the Community competition law and national competition law (in other words, their interpreting of the *effect on trade test*) may, in result, cause plaintiffs to prefer the country they will bring action. Some Member States are in cognizant of the rising importance of private enforcement of the Community competition law. Following new Act's coming into force in 2000 in the United Kingdom, attempts towards transforming competition law to one of the most robust law in the industrialized world have peaked with the *Provimi* case where the court held that conduct outside the jurisdiction may be triable in England where the behavior has a real and substantial connection with the jurisdiction (Joshua, J., 2002, p.67, 73). English courts have asserted broad jurisdiction, allowing non-United Kingdom plaintiffs to bring actions that might be strategically difficult to bring in other jurisdictions (Koob, C., Vann, D., Oruc, A., 2005, p.5). Furthermore, England might be found

more attractive by plaintiffs since it has a special tribunal that is bound by Commission and OFT decisions; relatively faster jurisdiction process; wide discovery rules including production of documents adverse to a party's own case; system of cross-examination in courts by the advocate of the opposing party (opposed to inquisitorial system of some civil law systems which involves supervision of the judge over the evidence, little oral presentation by the advocates and absence of cross-examination). *Provimi* case has been chosen to be lodged in the United Kingdom because of such procedural advantages. Moreover, consumer associations' has been granted standing in England as well. In order to attain these outcomes, Germany also replaced its current act with a more progressive one in July 1, 2005. Consequently, until a greater degree of harmonization is achieved, potential plaintiffs will continue to seek the best place in which to bring a competition law action and England and Germany would be the countries which are seemed more appealing for individuals who will be planning to bring action.

On the other hand, under an obligatory framework interfering with national substantial laws of the Member States and make them to adopt new laws similar to those of the UK and Germany is not an easy task. This is one of the considerations set forth by Federation of German Industries' experts, parallel to the subsidiarity principle the Commission should not intervene in the Member States' obligation laws which were developed over time, unless urgently required on the grounds of essential harmonization. The Commission could, however, identify common European fundamental principles (Benedict, P.B Francis., 1995).

Decentralization and the Modernization Regime may also cause the weakening of the single market aim. While it is true that the Commission will continue to play a pivotal role in directing competition policy in the new system, it remains to be seen whether national competition authorities and national courts will be as motivated as the Commission is by the goal of market integration (Weatherill, S., 2006, p.613). The European Commission or a national competition authority as the implementing authority of the competition law provisions takes action against business practices which restrict competition in the internal market pursuant to Article 81 and 82 by using different legal instruments. Both authorities can order companies to end

agreements which lead to an appreciable restriction of competition according to Article 81 and which are not covered by the block exemptions. Yet, this also means that the Commission will not be able to interfere with a decision by a member state authority not to apply EC competition law upon a finding that "*effect on trade*" test is not satisfied (Landolt, P., 2006, p.178).

Table 1: Number of Damages Actions Brought (Ashurst, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Analysis of Economic Models for the Calculation of Damages, prepared by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.100, 101)

	Damages awarded			Damages refused			Pending cases		
Country	European Community			European Community			European Community		
	National		Both	National		Both	National		Both
France	3[26]	3[27]	2[28]	-	1[29]	2[30]	-	2[31]	-
German	-	8[32]	1	-	15	5	3	9	-
United Kingdom	1	-	-	1	-	-	1[33]	-	-

One year later following the introduction of Modernization Regime, the Commission, in order to see the current situation in the Member States as to their

[26] Eco System v. Peugeot

[27] Concurrence v. Sony, SARL Parfumerie Jerbo v. SNC Estée Lauder ; SA BMW France v. SARL Rotative Typo Offset Imprimeries

[28] UGAP v. SA CAMIF, SARL P. Streiff Motorsport v. Société Speedy France SAS

[29] SNCF v. SOGEA

[30] Société Catimini v. Société Cofotex, and SARL P. Streiff Motorsport v. Société Speedy France SAS

[31] SNCF v. Dumez and SNCF v. Bouygues

[32] Including six declaratory decisions

[33] Based on the Commission vitamins decision (Commission decision of 21 November 2001, Vitamins, [2003] OJ L 61

national competition laws and their compatibility with that of the Community with a view to revealing the scope and extent of these difficulties that may arise from the new system, assigned a law firm, Ashurst, to prepare a report on the conditions for damages claims for Community competition law infringements (CLI 23 November 2004, p.3)[34].

The Report first pointed out that while Community law demands an effective system for damage claims for infringements of antitrust rules, this area presents a picture of "*total underdevelopment*".

In contrast with the widespread application of private enforcement in the USA, according to the Report it appears that there have been only about 12 successful damage awards for violations of Community competition law since 1962 [4]. At first sight, primary reason is the proverbial cultural difference as depicted by the fact that America is simply more litigious and antitrust law is a very long-standing tradition in Anglo-Saxon law (known also as "*Common Law*"). Additionally, Community law enforcement can be defined as institution-centered. Public enforcement is perceived inherently superior to private enforcement and individual actions are regarded as not capable of fulfilling such functions provided by institutions regulating the market. General lack of awareness can be shown as another reason for low levels of private enforcement which eventually depends on damaged persons' awareness of their rights as to bring action against violators. Therefore, it is not easy to anticipate an American style massive individual initiative and participation in the Community in the near future.

Following the study, the Commission has recently adopted a "*Green Paper on Damages Actions for Breach of EC Antitrust Laws"* in 2005 indicating key issues relevant for damages actions and setting out options for improving the current system of private enforcement in parallel to the conclusions of the Ashurst Report. The Commission has not yet decided if actions –legislative or otherwise- are needed nor does it yet have a view about whether any possible action is best taken at the EU level or the level of the Member States. The Green Paper is expected to be a

[34] Ashurst is a law firm which produced two comprehensive comparative reports for the Competition Directorate General in advance and preparation of the Green Paper.

discussion forum stimulating debate rather than setting out definite proposals. However it is not wrong to say that the Commission is dissatisfied with the underdevelopment of private enforcement and strives for promoting its enforcement.

As highlighted by the Ashurst Report and the Green Paper, major reasons of the underdevelopment are absence of common legal standards in proving and calculating the damage, absence of treble damages remedy, difficulties in establishing standing (requirement of protective purpose of the norm or direct damage condition), lack of procedural mechanisms that hardens plaintiffs' chance to become successful in trials which are, yet not limited to, high standard of proof, strict approach to causality, high trial expenses; absence of discovery rights enabling plaintiffs access to evidence, absence of class action mechanism; disallowing of indirect purchaser claims; non-specialized courts' difficulty in dealing with complex antitrust issues (Clifford, J., 1999, p.88); last but not least, the legal uncertainty arisen from low degrees of private litigation. But above all, potential plaintiffs are left with little or no legal guidance and they are not aware of their rights.

There are also practical challenges to private antitrust litigation in Europe like, for example, difficulty of gathering evidence when it is necessary to do so in multiple jurisdictions (Clifford, J., 1999, p.248). As touched upon above, main practical challenge emanates from co-existence of the national and European Community system.

It is widely acknowledged that the use of Articles 81 and 82 of the EC Treaty in private litigation as a basis for claiming damages has been extremely rare in the Community. However, while some gladly anticipate the floodgates of antitrust damage actions to be opened as a result of the *Crehan* judgment in combination with the reform brought about by the Modernization Regime, others believe that antitrust damages remedy is neither necessary nor desirable in the Community assuming that the goal of antitrust enforcement is to ensure that antitrust prohibitions are not violated which is already provided by the public enforcement. Nevertheless, total underdevelopment of actions for damages grounded on breach of Community competition law cannot be disregarded and the question of how to facilitate damages

actions will continue to constitute an important discussion topic in the immediate future of European Community competition policy (Hosseinian, F., 2004, p.4).

As having reaffirmed by the previous Commissioner Monti in his speech to the Sixth European Union Competition Law and Policy Workshop in Florance in June 2001, increased private action would further develop a culture of competition amongst market participants, including consumers, and raise awareness of the competition rules as well [12]. It can also be inferred from his speech which indicates that the European Union insight to the matter is to develop and raise awareness and culture of compliance with competition rules through private enforcement, yet to avoid United States-style excessive litigation. Since the Commission has insufficient staff to deal with all infringements of Community competition law, it wants more enforcement to be done by national courts (Korah, V., 1997, p.153).

In conclusion, the European Union and some of the Member States are influenced by the United States' longer experience in antitrust enforcement. Many Member States, however, have their own rich history of law. It is thus, unlikely that US antitrust rules be imported into the EU wholesale [6] and all above mentioned attempts are willing to foster a competition culture, not a litigation culture, as stated by Kroes [7]. In spite of the recent efforts of the Commission to eliminate these obstacles, it is not easy to predict a private litigation-boom in the European Union similar to the United States in recent future.

2.2.4 Sample Cases from National Courts on the Application of Private Enforcement of Competition Law

In this part, sample case law of Germany, France and the United Kingdom will be presented. Due to their more improved industrial capacity, these countries are supposed to create more opportunities for private litigation. Case summaries have been mostly derived and selected from national reports prepared by Ashurst according to their effect and importance. However, it should be taken into account that the accuracy of the views therein does not guaranteed by the Commission.

2.2.4.1 Sample Cases from Germany[35]

In the *Nachfragerkartell* case, plaintiff who was affected illegal cartel of bidders brought action against other bidders (p.35, OLG Bremen, Az. U (Kart) 1/88, *Nachfragerkartell,* [1989], ZIP 1085). The court held that plaintiff is a person whose protection was intended by the cartel prohibition and claimed damages were awarded. Similarly in the *Bieterabkommen* case, plaintiff brought action against the creditor who enjoys a lien on his property and fix auction price of the property (p.38, OLG Frankfurt a. M., Az. 6 U (Kart) 176/88, *Bieterabkommen*, [1989], WM 1102). The court held that the defendant and the third person co-operated and intentionally directed their anti-competitive conduct against the plaintiff. The plaintiff therefore qualified as a person whose protection was a purpose of the cartel prohibition. The amount, by which the earnings of the auction were reduced, has been calculated as damage.

In the *Depotkosmetik* case, although the plaintiff fulfilled all requirements of a selective sales system, he was not given authorization due to his low-price policy (p.35, BGH, Az. KZR 23/96, *Depotkosmetik,* [1999], GRUR 276). The court held that a business which is barred from participating in a selective sales system by the producer of the goods, although fulfilling the producer's quality requirements (the requirements themselves complying with Community competition law) belongs to the group of persons whose protection was intended by Article 81. The plaintiff was therefore entitled to an award of restitution in kind.

In the *Apollo-Optik* case, the plaintiff was a franchisee of the defendant (p.41, OLG Bremen, Az. Kart 2/2001, *Apollo-Optik I*, [2002], WRP224). Plaintiff claimed that the defendant was publicly offering specific prices without taking into account that franchise shops were not bound by these price offers. The plaintiff argued that the defendant thereby achieved anti-competitive retail price maintenance and claimed for a declaratory statement. The declaratory judgment stating the defendant's obligation to pay damages was rendered as requested.

In the *Autovermietungsagenturen* case, one of the competitior of the defendant claimed that the contract used by defendant comprises non-competitive clauses and

[35] Case names have been abbreviated by the author for convenience. BGH corresponds to Federal court, OLG corresponds to Higher District Court, LG corresponds to District Court.

fixed prices. (p.39, LG Frankfurt, Az. 3-11 O 87/02, *Autovermietungsagenturen*, [2004], WuW, DE-R 1200). The court held that the defendant infringed public cartel law. The breach of Article 81 constituted a *per se* infringement and the plaintiff was thus entitled to damages and injunctive relief national law. The court only ruled on the defendant's obligation to pay damages, but not on a specified amount.

In the *British Telecommunications* case, where the plaintiffs sought a declaratory judgment that the defendant was liable in damages as a result of the premature implementation of a joint venture in the telecommunication sector, the court held that the defendants had acted in breach of Article 81(1) prior to the effective date of the exemption granted to a telecom joint venture by the Commission and that they could be liable in damages pursuant to the German Civil Code in conjunction with Article 81(1) and under Section 1 of German Antitrust Code (British Telecomm. PLC & Viag Interkom GmbH v. Deutsche Telekom, [1998] C.M.L.R. 114 (1998), [1998] CMLR 114 (Landgericht, Düsseldorf)). No damages have been awarded in this case. Plaintiffs only sought a declaratory judgment that they were entitled to damages and, subsequently, pending appeal of the proceedings to the Federal Supreme Court, the plaintiffs voluntarily withdrew the action in 1999 following a settlement between the parties (Woods, D., 2004, p.452).

In the *Vitaminkartell* III case, plaintiff who was a producer of sweets and for this purpose a purchaser of vitamins brought action against the producer of vitamins (p. 43, LG Dortmund, Az. 13 O 55/02 Kart., *Vitaminkartell III*, [2004] unpublished). The plaintiff sought damages on the basis that the defendant participated in a world wide vitamins price cartel, as a result of which the plaintiff suffered reduced profits due to artificially increased prices for vitamins. In this case, damages were awarded to the plaintiff. The court held that customers of world wide price cartels belonged to the group of persons whose protection was intended by the infringed cartel prohibition and that it was not necessary that the infringement was specifically directed against the plaintiff. The court assessed the damage as amounting to the difference between the cartel price and the hypothetical market price. It applied the *prima facie* rule, based on general life experience, that a market price is lower than a cartel price. It held that the defendant bore the burden of proof, but that he did not

present sufficient facts. The court also held that the defendant bore the burden of proof for any passing-on effects but he did not present sufficient facts for an application of the passing-on defense. In this case the court has not decided upon the applicability of the passing-on defense in general. For the assessment of the exact amount of damage, esp. for the assessment of the hypothetical market price, the court mainly has taken into account the price decline after the termination of the cartel.

In contrary to above judgment German court reached an opposite decision in a very similar case. In the *Vitaminkartell* case, the plaintiff who was a producer of infant food and a purchaser of vitamins brought action against the producer of vitamins (p. 35, LG Mannheim, Az. 7 O 326/02, *Vitaminkartell*, [2004], GRUR 182). The plaintiff sought damages on the basis that the defendant participated in a world wide vitamin price cartel, as a result of which the plaintiff suffered reduced profits due to artificially increased prices of vitamins. The court held that in the event of a world wide price cartel affecting all customers equally, the customers do not qualify as persons against whom the cartel's action was intentionally directed. Therefore the plaintiff was not entitled to damages. Yet, the court also held that the passing on defense is - if proved - available under German law.

In the *Transportbeton* case, the plaintiff, a building contractor, claimed damages on the basis that the producer of ready-mixed concrete was part of an anti-competitive agreement that distributed market shares between the 40 members of the agreement and that allowed the cartelists and the defendant to raise their prices for ready-mixed concrete (p.39, LG Berlin, Az. 102 O 134/02 Kart, *Transportbeton,* [2003], unpublished). The damage of the plaintiff allegedly consisted of the overcharge paid to the defendant. The court dismissed the claim and held that the plaintiff was not a member of a group of person whose protection was the purpose of the infringed provision of competition law, because the effect of price increases was only indirect.

2.2.4 2 Sample Cases from France

In the case *Mors v. Labinal*, the companies Mors and Westland signed a preliminary joint venture agreement to participate in a tender issued by British

Aerospace for the fitting of Airbus A-330 planes with the Tyre Pressure Indication System (hereafter referred to as "TPIS") with the purpose of increasing their chances against Labinal, another strong company in the market (p. 38-39, Mors v. Labinal and Westland Aerospace; Cour de Cassation, Commercial Division, 14 February 1995; Paris Court of Appeal, 13 January 1998; Paris Court of Appeal, 19 May 1993 (Revue de l.Arbitrage, 1993, n°4, at 645-663); Paris Commercial Tribunal, 3 June 1992). Afterwards, Westland signed a confidential agreement with Labinal and thus, Mors accused Westland of having contracted with Labinal to exclude it from the market. The Commercial Court first held that, despite the arbitration clause in the agreement between Westland and Mors, it had jurisdiction to examine the claims. The court then decided that the agreement between Labinal and Westland was in breach of Article 81(1) and therefore illegal. The Commercial Court ordered Westland and Labinal to make an interim payment on the award of damages. Labinal appealed this decision. Following the experts conclusions, the Court of Appeal awarded damages amounting to 5,213,756 EURO for loss of markets to Mors in 1998. In order to evaluate these damages, the court took into account the lost chance of selling TPIS on the whole potential market of A 330/340, and did not limit its analysis to the part of the market concerned by the offer of Labinal and on which the anti-competitive practices took place. However, no damages were awarded for lost sales on the adjacent markets for other categories of planes. *The Cour de Cassation* confirmed the Court of Appeals decision.

In the *Concurrence v. Sony* case, the plaintiff who was a company specialized in the sale of electronic goods, as well as one of Sony's distributors first lodged a complaint before the Competition Council on the basis that Sony had allegedly imposed unfair and discriminatory conditions of sale on him, compared to other distributors (p. 39, Concurrence SA v. Sony, Paris Court of Appeal, 22 October 1997). The Competition Council decided that Sony was responsible for several practices contrary to Article L. 420-1 Commercial Code which is the French equivalent of Article 81(1). This decision was confirmed by the Court of Appeal. The plaintiff then brought an action for damages before the Commercial Court, to get compensation for the damage it suffered as a result of these anti-competitive

practices. The Commercial Court held Sony liable for the injury suffered by the plaintiff, and lump sum damages have been awarded. Sony appealed this decision. The Court of Appeal held that Sony was liable to pay damages. However, the court did not consider that Sony was liable to pay damages for all of the anti-competitive practices for which it had been fined by the Competition Council. The court especially insisted on the importance of a causal link. For some of the anti-competitive practices, the causal link between the practices and the damage alleged could not be proved. Therefore the court did not grant compensation for the damages caused by all these practices. Furthermore, the court held that damages could not be awarded on the basis of a lump sum, but that the exact amount of injury suffered had to be assessed. It therefore appointed an expert to evaluate this amount.

In the case *Jerbo v. Estée Lauder*, the undertaking Parfumerie Gerbo has been one of the distributors of the undertaking Estée Lauder, in its selective distribution network (p.42, Paris Court of Appeal, 1st February 1995, SARL Parfumerie Jerbo v. SNC Estée Lauder). A provision of the selective distribution contract imposed on Parfumerie Gerbo the obligation to purchase annually a certain amount of products. In a letter dated 8th July 1991, Estée Lauder announced its intention to terminate its commercial relationships with Parfumerie Gerbo given that its turnover for 1990/1991 did not reach the set amount. Parfumerie Gerbo brought an action for damages against Estée Lauder and asked for an injunction ordering Estée Lauder to maintain its commercial relationships with Parfumerie Gerbo. The Court of Appeal held that the provision in question was manifestly excessive and anticompetitive because of the disproportion of the amount imposed in comparison with the actual market share of the product. Hence, the clause was considered as in breach of Article 7 of the 1986 Ordinance and thus, void. The Court of Appeal held that Estée Lauder was liable to pay damages amounting to 50 000 French francs (approximately 7.600 EURO) for the termination of the commercial relationships and ordered Estée Lauder to maintain its commercial relationships with Parfumerie Gerbo.

In the *Eco system v. Peuguot* case, Eco system has been an agent buying new cars of different brands from car distributors established in other European Union Member States, in the name and on behalf of individuals (p.42, Sté Eco system v.

Peugeot; Paris Commercial Tribunal 22 October 1996; Case C- 322/93, Peugeot v. Commission, (1994) ECR I-2727; Case T-23/90, Peugeot v. Commission (1991) ECR II-653). Due to difficulties encountered in obtaining deliveries of cars from Peugeot distributors, following a letter sent by Peugeot to its distributors instructing them not to deliver cars to Eco System, the latter lodged a complaint before the European Commission. The European Commission decided that Peugeot was in breach of Article 81(1). Peugeot appealed the decision before the Court of First Instance which rejected the appeal, and the decision was confirmed by the European Court of Justice. Consequently, Eco system brought an action for damages against Peugeot before the Paris Commercial Court. It claimed damages for loss of operating income and loss of business value. The Commercial Court held that a breach of Articles 81(1) and 82 by Peugeot, (which had been recognized as such by the European Courts), amounted to a fault under Article 1382 of the Civil Code. The court recognized that Peugeot's fault had a direct influence on the evolution of Eco System's business activity. The court then went on to state that the European Commission, in view of the danger presented by Peugeot's behaviour on Eco System's financial equilibrium, had taken conservatory measures, thereby recognizing the causal link between the fault and the claimed damage. The Court held that Peugeot was liable to pay damages only for the loss of operating income that occurred while the letter sent to the distributors was in force, 239.263 EURO (1,600,000.00 French francs). However, it held that it could not be proven that the loss of business value was resulted from Peugeot's fault, since the value of the business did not rest entirely on sales of Peugeot cars.

In the *SA BMW v. RTO* case, a car manufacturer had recommended its distributors a certain company, SARL Rotative Typo Offset (hereinafter referred to as “RTO”), as a direct supplier of printed forms for invoices (p.42-43, Versailles Court of Appeal, 11 September 1997, SA BMW France v. SARL Rotative Typo Offset Imprimeries). At a later stage, after a modification of the computer system within the group, the undertaking SA BMW France decided to switch to another supplier, and to act as an intermediary for the whole group in the purchase of these products. As a consequence, RTO could not supply its products to any member of the

group, and therefore brought an action before the Versailles Commercial Court, in order to be awarded damages. The Commercial Court stated that SA BMW was liable to pay damages under Article 7 of the 1986 Ordinance to RTO. SA BMW France appealed this judgment. The Court of Appeal upheld the decision of the Commercial Court. It considered that by compelling its distributors to terminate their commercial relationships with their usual supplier, SA BMW France was instigator of an illegal agreement between the company and its distributors, and hence, liable to pay damages to RTO amounting to 70.000 French Francs (approximately 11.000 EURO) for loss of chance to obtain a new supply contract within the group after the modification of the group's computer system.

In the *UGAP v. SA CAMIF* case, the Union of Public Purchase Groupings (hereinafter referred to as "UGAP"), a public company with which State and local authorities could place orders for the purchase of supplies and services (p.39-40, UGAP v. SA CAMIF, Paris Court of Appeal, 13 January 1998, JCP G 1998, II-10217, and Paris Court of Appeal 22 October 2001), had put several references in its catalogue which had the effect of forcing its co-contractors to deal exclusively with the UGAP. SA CAMIF, a buying co-operative which is also present on the market of supplies to public authorities brought proceeding against UGAP, claiming that it had committed an abuse of its dominant position in breach of Article 82 of EC Treaty, and Article 420-2 of the Commercial Code. The Court of Appeal held that there was an abuse of dominant position in breach of both national and Community competition laws. An expert has been appointed to assess the amount of damages to be awarded. The expert, in his assessment, gave a range of damages based on different hypothesis, for the court to retain one of them. First, the expert proposed a calculation based on the hypothesis of contracts made with local authorities in which the minimum projected amounts of purchases would correspond to one third of the budget, and also proposed a calculation based on a second hypothesis where the minimum amount of purchases would correspond to half of the budget. The court retained the first hypothesis (one third of the budget). In a second step of its analysis, the expert calculated damages due to the advance payments that would decrease the corresponding amount of spending. Five hypotheses were proposed for the

calculation, ranging from 60% of advance payment on the projected amounts to exclusivity benefiting UGAP. The court retained the lowest figure (advance payments amounting to 60% of the projected budget). Thirdly, the expert made a calculation of the damages that would have occurred if purchases of public local schools had been transferred towards regional councils, in regions closed because of the presence of the contested contracts. The expert then made a calculation in the hypothesis of an absence of such transfers, which the court retained. The Court, on the basis of the elements of the expert's report, awarded total damages of 153.800 EURO (10,000,000 French Francs) to CAMIF.

In the *SARL P. Streiff Motorsport v. Société Speedy France SAS* case, the yearly Elf Masters event, taking place in the *Palais Omnisports* of Paris, was sponsored by two undertakings, the main partner, Total Fina Elf in association with Elf Aquitaine, and the smaller partner, the undertaking Speedy (p.43, Paris Court of Appeal, 28 June 2002, SARL P. Streiff Motorsport v. Société Speedy France SAS). According to the contract entered into with the organizers, the undertaking Speedy has been the beneficiary of the right to have allocated advertising areas on its demand. In 1997, the undertaking Elf Aquitaine complained to the organizers about the presence as a sponsor of the event, of the undertaking Speedy which was its competitor on certain products. Subsequently organizers unilaterally and substantially reduced the participation of Speedy in this event. Speedy brought action against Elf Aquitaine and Total Fina Elf in order to obtain damages for loss of profits. It claimed that its reduced participation resulted from an abuse of dominant position of both Elf Aquitaine and Total Fina Elf on the market, as well as from an illegal agreement between the latter and the organizers, and invoked both national and European competition rules. The Court of Appeal considered that Elf Aquitaine and Total Fina Elf were dominant on the market and had abused their dominant position by encouraging the organizers to deprive Speedy of its contractual rights. The Court of Appeal held that this constitutes breach of Articles L. 420-1 and L. 420-2 of the Commercial Code and a fault under Article 1382 Civil Code. Elf Aquitaine and Total Fina Elf were held liable to pay damages amounting to 300.000 EURO (2.000.000 French francs) on this ground. The court considered that Articles 81 and

82 of the EC Treaty could not be applied because of the absence of a proven effect on trade between Member States.

2.2.4.3 Sample Cases from the United Kingdom

In *Arkin v. Borchard Lines Ltd.* case, plaintiff claimed that he had to withdraw from the market due to abuse of dominant position under Article 82 (Y Arkin v Borchard Lines LTD & ZIM Israel Navigation Company LTD [2003] EWHC 687 (Comm) QBD Commercial Court (Colman J) 10/4/2003 2001 EU LR 232, QBD). Yet, his claim is dismissed mainly on the grounds that the plaintiff failed to prove that any of the alleged breaches of Article 81 and 82 by the defendant's were the predominant cause of any loss claimed. Put differently, there is no infringement and even there would be, chain of causation has been broken. This case was also examined in detail in Chapter IV, 4.

In the *Provimi* case, two English companies and a German company, which were direct purchasers of vitamins from companies within the Roche and Aventis groups, sued defendant companies which were sellers and associated companies in those two groups for their losses suffered in relation to purchases that had taken place in Germany. (Provimi Ltd v. Roche Products Ltd et al, (2003) QBD (6 May 2003)). Following the decision of the European Commission dated 10 January 2003 that various companies in Roche and Aventis groups had participated in cartels, the plaintiffs sought damages for breach of a statutory duty by infringing Community competition law, in particular Article 81. It was alleged that the plaintiffs had suffered damage because vitamins were sold at an inflated price as a result of the formation and implementation of the cartel. In this case, most striking outcome is the High Court's view holding that according to the Brussels Regulation and Lugano Convention, English or foreign plaintiff seeking damages for loss suffered as a result of a breach of European competition law, can sue for its entire loss in the English courts, irrespective of where the loss was suffered, provided that there is an English element to a cartel (In the case, there is an English subsidiary which implemented an anti-competitive conduct). Instead of having to pursue separate claims in multiple jurisdictions, in *Provimi* decision standing has been extended to non-United

Kingdom plaintiffs and co-defendants which may make United Kingdom more appealing for actions of damage under Community competition law.

In the *Crehan* case, plaintiff claimed damage on the basis that his lease contract with the first defendant contains beer ties requiring him to purchase beer supplied by Crehan for the terms of 20 years which led to his failure of business contrary to Article 81 (Courage v Crehan, Case C-453/99, [2001] ECR I-6297). He claimed that price difference between Courage and other brewing companies had led to damage and he has to obtain reimbursement of the price excess on the grounds that Courage bears tort liability for breach of statutory duty. English courts were minded to treat him as a participant in an anti-competitive practice, not a victim of one, and to deny in principle his claim for compensation (Weathrill, S., 2006, p.609). A preliminary reference was made and European Court of Justice concluded that the plaintiff had a right under Community law to claim damages and given that the beer ties were in breach of Article 81 and that they caused the failure of Crehan's business, provisional damages of £131,336 plus interest were granted (Ashurst, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.48).

In the *Unipart Group* case, the court argued applicability of Article 81 in the market for the wholesale supply of airtime for mobile telephones (Unipart Group Ltd v. O2 (UK) Ltd (formerly BT Cellnet Ltd) and Anor, [2004] EWCA Civ 1034, A3 2002 2587). Plaintiff, as an independent service provider, purchases air time from defendant and sells to end-users according to the prices set by the defendant. Defendant has adopted a policy of margin squeeze; put differently, a policy of charging service providers excessive prices for air time and thereby, due to its market power, compelled service providers to reduce or even to eliminate their retail margins in order to remain competitive. Plaintiff sought for his damages under Article 81. Defendant claimed that such a conduct, if happened, is a unilateral act on its part and did not constitute an infringement. Appeal Court found that plaintiff's contractual obligation to pay the set prices in accordance with its published price lists is not an agreement which can found a claim under Article 81(1). Defendant's

alleged conduct in adopting a policy of margin squeeze was found a unilateral conduct on its own and the appeal was dismissed.

2.2.4.4. Evaluation of the Presented Cases

Nine decisions of German courts which referred to the provisions of German competition law and the EC Treaty have been examined above. All decisions are given under the previous German competition law and as a result, courts' first assessment was whether the claim is falling within the scope of protective purpose of the norm. Plaintiffs have been awarded damage in all cases except the second case of *Vitaminkartell.* Cases mainly stem from the cartel activities (as agreements restricting competition) and the plaintiffs are the persons who have been vertically affected from cartel prices. In the second *Vitaminkartell* case, the court strikingly held that passing on defense is available in German law. In that decision, damage was calculated on the basis of the decline percentage in prices following the desistance of the cartel. In Germany, damages are limited to actual loss which includes loss of profit (Witz, W., Bader, C., 2005, p.36). The 7th amendment to the current German Law explicitly allows courts to take into account, when assessing and estimating the amount of the damage according to the German Code of Civil Procedure that part of the infringer's profit generated as a result of the anti-competitive conduct (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Analysis of Economic Models for the Calculation of Damages, prepared by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.91). In order to ease the plaintiff's evidentiary burden as to quantification of damages, the 7th amendment provided that the profits made by the infringer can be taken into account in assessing the damages.

Seven decisions of French courts referring to the provisions of French competition law and of the EC Treaty have been examined in the above. Cases arise from abuse of dominant position and more specifically, vertical imposition of anticompetitive conditions. In all cases plaintiffs are the undertakings affected from the anticompetitive behaviour and claiming loss of profit. Claims have been awarded in all cases. One of the striking cases is the *UGAP* since the court has entered into a

more complicated analysis on the appraisal of loss of profit. In France civil and commercial courts take into consideration actual losses or loss of profits. For example, in the *Mors-Labinal* case, the expert calculated a margin on the TPIS turnover and assessed the production costs of supplying TPIS equipment. This was done with reference to the factors including current orders, Airbus's projections, new Airbus versions expected, penetration rate of TPIS, the expected life time of Airbus 330/340 etc. The court accepted all the conclusions reached by the expert, and therefore granted FF 34.2 M damages to Mors for his loss of market (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.44).

Three decisions of English courts referring to the provisions of the EC Treaty have been held above. However, although only national court decisions have been given place in this part, one ECJ decision, *Crehan*, has been added due to its foundational feature in the private enforcement of Community competition law. The ECJ has underlined the indispensable character of private enforcement by the *Crehan* judgment. Another remarkable case from the UK is the *Provimi* judgment whereby foreign plaintiffs have been granted to bring action in the UK irrespective of where the infringement has taken place or loss was suffered. Examined cases equally stem from abuse of dominant position and agreements or concerted practices restricting competition. In the first case no damage was awarded due to the difficulty in proving the infringement.

In the United Kingdom, English courts are applying usual rules of civil procedure to competition cases rather than seeking to develop any significant expertise or differentiated procedure for the purpose of quantification of damages in such cases (Woods, D., 2004, p.457). In *Arkin*, for example, the court was provided with detailed expert, econometric evidence as to the position in which the plaintiff would have been *but for* the anti-competitive conduct of the defendants. However, the judgment of the court places no weight on this material. In the *Arkin case*, the judge stated that the court should take a common sense approach to the quantification of damages. A similar approach was taken in the *Crehan*. A customer might be

awarded the difference between the price it actually paid for the goods and the price it would have paid in a competitive market (Mobley, S., Cassels, T., Jones, K., Fyfe, T., Garcia, M., Mann, S., 2005, p.22). The English Court of Appeal in the *Crehan* case indicated that its assessment of quantum of damages was provisional and said that it would, if necessary, hear further submissions from the parties on the issue. Since economic loss beyond the loss of profits or loss of value of a business directly caused by the infringement are difficult to quantify and, therefore, will not be recoverable since it is purely speculative, in the *Crehan* case, the High Court accepted a sum for the hypothetical loss of future profits less 15 per cent to cover uncertainties and loss in value of the business claimed by Mr. Crehan on the basis of his expert witness evidence. In ordinary English tort law, losses other than direct damage (which is typically physical damage) are not recoverable as being too speculative or oo remote. Consequently, the Court of Appeal overturned the High Court's assessment of damages and limited the award of damages to lost profits and loss in the sale value of the business at the date of injury. Both the High Court and the Court of Appeal in the *Crehan case* gave great weight to the evidence of the plaintiff's expert accountant witness in relation to the quantification of the plaintiff's lost profits (C-453/99, Courage v. Crehan, ECR (2001) I-6297).

2.3. Turkish Competition Law

2.3.1.General Aspects of Turkish Competition Law

Turkey undertook the obligation to enact competition legislation in compliance with the Association Agreement between Turkey and the European Community for the operation of the Customs Union between Turkey and the European Community. Article 16 of the Association Agreement requires that the parties should maintain the applicability of the provisions of the EC Treaty on the harmonization of competition, tax and law and Article 37 seeks compatibility of competition legislation with that of the European Community (Öz, G., 1996, p.34). As a result of this commitment, (together with the earlier undertaken common objective as an OECD member) and with a view to realizing constitutional duty envisaged in Article 167 of the Turkish Constitution so as *"…to take measures to ensure and promote the sound, orderly*

functioning of ... markets" and *"…to prevent the formation, in practice or by agreement of monopolies and cartels…",* Turkish Competition Act was adopted on December 7, 1994 (Law No.4054 on the Protection of Competition, published in the Official Gazette No. 22140, dated December 13, 1994). The TCA has been to a large extent an adoption of the Community competition law. The Competition Authority with its decision making organ, the Competition Board, began its operations three years later, in 1997. Turkish Competition Board is responsible for the implementation of the TCA and its decisions are judicially reviewed by the Council of State. The Competition Authority may not only act on its own initiative against infringements of competition but also evaluates complaints from the parties concerned and consumers, which fall under its scope of duty.

Pursuant to Article 4 of the TCA, any agreements, concerted practices, decisions and practices of enterprises or associations of enterprises restricting, preventing or distorting competition directly or indirectly are unlawful and thus prohibited. The definition of the practices and even the examples of those practices are almost identical to those of the European Community rules (Erol, K., 1997, p.153), except for the general objective of the Community law as the achievement of the single market. Article 4 includes a very wide range of activities no matter that they have been realized on vertical (through *solus agreements*) or horizontal planes either explicitly or in a disguised form. As regards the implementation scope of the TCA, whatever the place of operation or domicile have been or wherever the undertaking concerned operates or is established in, either in Turkey or abroad, so long as the agreement, decision or concerted practice (*parallel actions*) or abuse of dominance or merger and acquisition impair competition in the market for goods and services within the territory of Turkey, the undertakings involved in such activities will fall within the scope of the TCA. According to the decisions of the Competition Board, the TCA shall apply to public undertakings as well (Ansay, T., Schneider, E.C., Karayalçın, Y., İnan, N., Öz, G.A., p.112)).

Article 5 lists conditions for exemption from the application of Article 4.[36] Should all the terms therein are met, the Competition Board may grant individual exemption for a specific agreement or decision upon the request of the concerned party.

The Competition Authority also issues communiqués of block exemptions exempting group of agreements or decisions from the scope of the aforementioned articles of the TCA. Vertical agreements have been granted block exemption by the Block Exemption Communiqué (2003/3 sayılı Rekabet Kurulu Tebliği ile Değişik Dikey Anlaşmalara İlişkin Grup Muafiyeti Tebliği Tebliğ No: 2002/2).

Article 6, which is identical to Article 82 of the EC Treaty as well, prohibits abuse of dominant position in the relevant product market determined through a case by case approach since there is no common criteria set forth in the TCA. The abuse shall be established by taking into account the non-exhaustive list provided in the article. There is no exemption clause for cases of abuse of dominant position.

Article 7 prohibits mergers and acquisitions that aim to create or strengthen dominant position and result in inhibiting competition in markets for goods and services. With respect to the enforcement of Article 7, the Communiqué on the mergers and acquisitions that requires the permission of the Competition Board (1998/2, 1998/6 ve 2000/2 sayılı Rekabet Kurulu Tebliğleri ile Değişik, Rekabet Kurulu'ndan İzin Alınması Gereken Birleşme ve Devralmalar Hakkında Tebliğ No: 1997/1) has been issued by the Competition Authority. Thai Communiqué enlists the types of mergers and acquisitions that require notification to Competition Authority for its permission of legal validity.

Additionally, privatization which may be defined as transfer of undertakings controlled by the state to private sector is also regarded within the scope of mergers and acquisitions and therefore, examined and inspected by the Competition Authority (Communiqués No: 1998/4 and 1998/5).

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[36] The necessity of granting exemptions in competition law has emerged as a result of the idea of allowing persons excessively bound to seek relief by way of exemptions particularly in cases where complex nature of disputes involving both law and economics and at the intersection of different interests.

Setting aside the discussions over the compatibility of the main objective of the European competition law with the Turkish system, which is to establish common market, the TCA has been operating for almost a decade in Turkey and as it will be mentioned below, it includes very new elements to Turkish law system.

2.3.2 Invalidity of Agreements

In Turkish competition law, pursuant to Article 56 of the TCA, any agreements and decisions of associations of undertakings which are contrary to Article 4 shall be invalid. Thereby, such kind of transactions will be unable to produce legal consequences having been intended to obtain. Yet, there are many problems arisen from the application of sanction of invalidity. Invalidity can be encountered more often than claims for damages and therefore, problems related to this area were fairly well-taken up in the literature.

Although, general principle in law is that "agreements need to be respected" (known also by the maxim of *pacta sunt servanda*) agreements against the law constitute one of the exemptions of this general rule. Therefore, agreements containing provisions that were prohibited by competition laws cannot be deemed valid.

In case if void provisions were not substantive to the parties, it would not be the whole of an agreement that would be rendered void, but only those provisions that restrict competition. This is called "*partial nullity*" or "*severance*" in law. Thanks to partial nullity, an agreement becomes capable to survive in line with the principle of *pacta sunt servanda*. Yet, without further inspection it is presumed that violation is substantive to the parties in most of the cartel agreements. However, when agreements of joint venture or patent licenses are concerned, applicability of partial nullity deserves mention.

The general provision in Article 20 of the Turkish Civil Code set forth that a contract against the mandatory rules of law shall be subject to the sanction of "*absolute nullity*" due to the public interest considerations and in no way does it become valid again. Absolute nullity can be invoked by any interested party. This right is unlimited in time. Since the provision is directly effective, agreements or

decisions have become void from the moment they were made without any prior declaration of infringement either by the Competition Board or a judicial authority. The performance of considerations arising out of void agreements and decisions can not be requested. As a result, any performance having fulfilled can be reclaimed pursuant to the provisions of unjust enrichment of the Turkish Civil Code. In sum, it can be stated that concepts of invalidity and nullity are different from each other in terms of the Code of Obligations. Invalidity can be restored and an invalid transaction may become valid whereas a null and void transaction (or absolute nullity in a transaction) cannot be restored or corrected.

There has been no accord in the Turkish literature as to the legal nature and theoretical place of concepts of voidability, nullity, partial nullity or invalidity when they apply to the agreements that may be benefited from exemption decisions of the Competition Board. Legal uncertainty peaks particularly for the agreements having been granted exemption pursuant to Article 5 for a certain period of time since they would be deemed valid in spite of the anticompetitive clauses therein. Such an exemption distorts the nature and consistency of absolute nullity concept. Speaking in legal terms, whether this is a new kind of nullity or an ordinary case of a "*provisional invalidity*" till the exemption decision is obtained is not definite. In terms of invalidity, Sanlı and Aksoy agree on provisional invalidity (Aksoy, N., 2004, p.36, Sanlı, K.C., 2000, p.402). Invalidity can be recovered and restored if the conditional exemption is removed. Exemption decision of the administrative authority is not an element creating validity. Alike, according to Gürzumar it is a provisional validity in principle. Absolute nullity can be probable, yet, exceptional to him (Gürzumar, O., 2002, p.47 and following). Upon the rejection of exemption request agreement becomes certainly invalid. According to Aslan, notification and exemption system should be removed. Therefore integrity of agreements would be ensured by removing their legally indefinite position [8].

As for block exemptions, İnan is of the view that they are not mandatory regulations. In order to benefit from exemptions, concerned parties should conclude agreements in compliance with these block exemptions. However, if there are any non-complying clauses in an agreement, courts cannot deem the agreement void

alone. Instead, courts should review the entire agreement and determine whether it is infringing Article 4 of the TCA and therefore, void or not (İnan, N., 2002, p.604, 605).

As a different aspect of the problem, whether exemptions have binding nature upon the judiciary is not also a straightforward issue in the doctrine; because, the Competition Board, as depending on its exclusive authority granted by law, removes illegality element in agreements under Article 4. As touched upon by Eğerci, even civil law judge rules that the agreement at hand violates law, following exemption decision of the Board would cause such a holding no longer in force (Eğerci, A., 2005, p.258).

Another issue related to Article 56 is the content of the concepts of "*agreement*" and "*decision*". These concepts necessitate to be defined in legal terms in order to ensure proper application of law. Such determination is also useful for claims for damage actions. For instance, non-binding rules of conduct such as gentlemen's agreements are not easily and practically deemed as agreement in this context, although intents of the parties were accorded on a specific issue. With respect to the content of the agreement, Aslan is in favor of a wide interpretation that will include all kind of explicit, implicit, oral or written conformity of intentions in a way to comprise gentlemen's agreements (Aslan, Y., 2001, p.72). According to Sanlı, even the agreements which cannot be deemed directed towards a legal consequence should be included in this interpretation (Sanlı, K.C., 2000, p.390). On the contrary, Topçuğlu expresses that a narrow interpretation should be made in a way to limit the concept to contracts (Topçuoğlu, M., 2001, p.169, 170).

Since the scope of Article 56 seems to limit its application to Article 4, its applicability to the agreements and decisions falling within the scope of Articles 6 and 7 needs to be evaluated. Invalidity, where applicable, can be taken into account in the cases falling within the scope of Articles 6 and 7. Therefore, an agreement including clauses which intend to abuse of dominant position or establishment of merger or acquisition leading to abuse of dominant position (if the related permission is not obtained from the Competition Authority) can be deemed invalid. As to the agreements that lead to abuse of dominant position, according to Aslan, Article 57

proclaims what is already known and it should not be interpreted in a strict fashion as far as Article 6 is concerned because of the fact that injured undertakings were in need of the agreement in spite of the abuse [8]. Therefore, these agreements should not be deemed unlawful *per se*. According to Sanlı, Article 4 prohibits "*agreements*" whereas Article 6 prohibits a "*status*" and merger or acquisition can be formed only through a legal transaction which should be deemed invalid. Plus, in cases where the abuse of dominant position emanates from an agreement this agreement should be accepted as null and void (Sanlı, K., 2000, p.390, 440-441). According to İnan, abuse of dominant position does not appear as an act all the time. It may be imposed through a transaction or something similar. This kind of transaction shall be invalid as a result of the general rule stated in Articles 19 and 20 of the Code of Obligations. However, invalidity of agreements which comprise clauses abusing dominant position should have been set forth by the TCA in the first place (İnan, N., 2002, p.606).

2.3.3 Damage Claims in Turkish Competition Law

Article 57 of the TCA grants individuals who suffer from anticompetitive conducts the right to claim damage and sets forth that any person who restricts competition via practices, decisions, contracts or agreements shall be liable for this action and be obliged to compensate any damages of the injured party. Article 57 did not set forth any specific limitation as to damage (whether it is pecuniary, moral etc.), damaged persons (whether they are consumers, rivals, reflectively injured undertakings etc.) and legal scope thereof (irrespective of where the infringement sources from). The right to claim damages given by Article 57 is the one of the civil law remedies. Other remedies are injunctions which can include structural or behavioral remedies and orders requiring the defendant remedy consequences of his infringement including the order to publish the judgment. According to Gürzumar, the TCA should contain such a clause allowing courts to decide injunctive reliefs (Gürzumar, O., 2005, p.172). On the other hand, it is claimed that injunctive relief lost its importance; because, its benefits can be obtained more easily by stimulating public authorities (Akıncı, A., 2001, p.390).

Article 58, explains terms and content of the right to compensation and stipulates that injured persons shall claim the difference between the amount they actually paid and the amount they would have paid if the infringement had not occurred. Unlike Article 57, this article seems not to include cases of abuse of dominant position since it limits the injured parties to those who sustained damages due to the prevention, distortion or restriction of competition. Abuse of dominant position mostly refers to an action instead of an agreement. Considering Articles 57 and 58 together, it can be concluded that Article 4 and 6 are within the content of private law liability. According to Eğerci mergers and acquisitions are also within the scope of Article 57 (Eğerci, A., 2005, p.254). On the other hand, according to Gürzumar, Article 7 of the TCA which regulates mergers and acquisitions is left out of the scope of the liability (Gürzumar, O., 2005, p.150). Considering that Article 57 is a more general clause when compared to Article 58, infringements of the TCA in all kinds can be subject to compensation claims. However, in order to remove this ambiguity scope of private enforcement should be widened in a way to comprise cases of abuse of dominant position.

Lastly, agreements which are granted exemption cannot be treated within the liability scope since they enjoy a legitimate cause. Even claiming an offsetting-distributive damage for the harm arisen from the agreements having been granted exemption is not possible (Gürzumar, O., 2005, p.142).

Although right to remedy for antitrust infringements has been granted in the Turkish competition law, its application is quite rare. There is no exact measurement at hand as regards the application ratio of the private enforcement aspect of the TCA. Only a little case law has been reached and thus, benefited from in this study. These decisions were given by the Court of Cassation and did not evaluate merits of the case. Therefore it is quite difficult to reveal application extent and form of Article 57 and 58 in the Turkish law context. In spite of such a difficulty it is tried to elaborate what remedies of damage claims in competition law entail and who can avail himself of such remedies arisen from the infringement of the TCA in the following chapter.

CHAPTER 3

CIVIL LAW CONSEQUENCES OF COMPETITION LAW

3.1. Legal Basis of Actions for Damage in Competition Law

Remedy of the injured persons by means of private enforcement denotes a civil liability that implies an obligation imposed on individuals to remedy damage sustained by another individual as a result of their infringement of law or breach of contract. Infringement of antitrust laws leads to a tort law liability since the damage sources from an infringement of obligation which has to be fulfilled for the sake of public, not only individuals (Akıncı, A., 2001, p.358). However, should there is a contractual relationship it is also possible to base the claim upon contractual liability.

In order to hold infringer liable for his/her tortious act four elements are collectively sought; fault –which implies requirement of negligence rather than intent to commit crime-, damage as a result of the act against law and a causal link between damage and fault.

In Turkish tort law, persons are liable for the damage negligently or willingly they caused pursuant to Article 41 of the Turkish Code of Obligations. These four elements are required by national laws of the European Union members as well (Akıncı, A., 2001, p.365).

As for fault, intentional torts and torts of negligence involve acts that depart from a reasonable standard of care and cause injuries. In civil law claims, intent (i.e. the will of the tortfeasor) is not sought as strictly as it is sought in the criminal law. Should a person fail in duty of care which measured by the reasonable person standard –that escalades for merchants to a higher degree of diligence- and someone suffer injury, the wrongful activity must cause the harm for a tort to have been committed. On the other hand, under the doctrine of strict liability (*liability without fault, unintentional liability*), liability for injury is imposed for reasons other than fault and individuals may be held liable regardless of the degree of care they

exercised. For instance, cases where there is an extreme risk of the activity, it may be found fair to ask the person engaged in that activity to pay for the injury. If the liability were accepted as a strict liability, existence of infringement would be enough to lay down liability on infringers regardless of the infringer's intent or negligence.

In Turkish law, strict liability is exceptional and legally applicable only where the lawmaker explicitly set forth. Therefore, the general rule applies and intent or negligence is sought to hold tortfeasor liable. Where fault is a requirement, existence of negligence which goes beyond the standard of care is deemed sufficient to establish liability. When we look at the unfair competition regulation in Turkish law it bears very similar elements to antitrust, yet has got to do with misuse of economic competition in any form contrary to rules of good faith. In unfair competition regulated by the TCC, fault shall not be sought for the prohibition of violation (by injunctive reliefs); however, existence of the fault element is necessary to demand compensation (Arkan, S., 1995, p.292).

However, Topçuoğlu states that it is a strict liability and infringement of the TCA is sufficient since such an infringement is of gross importance for the market order and society (Topçuoğlu, M., 2001, p.299). As a supportive basis to this argument, it can be asserted that fault is not required to impose fines in the TCA (as set forth in Article 16). According to İnan, such an implementation will be against the basic principles of liability law (İnan, N., 2002, p.607-608). The rule that fault is not required for administrative fines cannot apply to the provisions of compensation by analogy (İnan, N., 2002, p.607-608, Eğerci, A., 2005, p.255, Akıncı, A., 2001, p.358). Provisions of those regulating civil law remedies and administrative fines bear different purposes and those provisions belong to different branches of law. Since competition law has a public enforcement aspect already protecting public order and in the Turkish law context, treble damage remedy is availed as a deterrence tool, it would be too extreme to create a strict liability. Alike, Gürzumar is in view that related clause in the TCA, Article 57, does not create a special non-fault liability (Gürzumar, O., 2005, p. 153). Gürzumar additionally underlines the deficiency in the present TCA. According to him the TCA should refer to general provisions of tort

law in order to eliminate hesitations in judicial interpretation (Gürzumar, O., 2005, p. 141).

Aslan touches upon another aspect of the issue. According to him, to prove fault would be an obstacle to the application of liability law and most of the infringement cases it is not possible to make the infringement happen without fault. Therefore fault should not be sought in order to facilitate private enforcement of competition law. Although this approach may enhance private enforcement through strengthening deterrent effect upon probable infringers and finally, serve maintaining public order; as the general rule in damage actions merited on competition law infringements, fault should be sought to hold infringers liable.

This issue becomes strikingly important in cartel cases. Because the tendency towards cartel activities is to presume that the activity is against law and the fault is embedded within the activity itself. In other words, when there is a cartel agreement (aiming at fixing prices, sharing markets, excluding other competitors from the market etc.), fault is deemed to emanate from the agreement itself since it is for serving no other aim but to restrict competition.

However, still there exists a possibility of bringing justification for cartel activities. Major argument to bring justification to a cartel is that price system does not work properly, and a cartel which controls price prevents unstable market pricing. Cartels also provide quality improvement by limitation of promotion/advertising and similar expenses to attract consumers and thereby saving resources. In some cases, cartel may lead to better conditions or prices for consumers. As it was alleged in the Microsoft case, no consumer harm occurred from Microsoft's market power; although, there is no guarantee that things will remain same in the future. New economies, in other words knowledge-based economies transmitted through networks on a global scale are apt to appear as not being detrimental to consumers due to the network efficiencies. Matters become more complex in evaluating agreements or horizontal mergers that generate efficiencies, such as economies of scale (Carlton, D., 2003, p.6).[37]

[37] Economies of scale imply savings achieved in the cost of production by larger enterprises because the cost of initial investment can be defrayed across a greater number of producing units as seen in sectors of telecommunication or information technologies.

It is also difficult to determine fault when agreements having secondary nature in restricting competition such as agreements for exchange of information, standardization and expertise are concerned; because, restriction may arise from market conditions itself. Furthermore, in patent, license or joint venture agreements restriction is the consequence of the agreement itself (Akıncı, A., 2001, p.369). Nonetheless, these agreements may exceed the public good and cause damage. In those cases infringer can only be acquitted of liability if he/she proves that he/she has no fault and infringement has arisen from market conditions, not from his/her own conduct.

Consequently, fault should be sought to hold tortfeasor liable, because; to remove fault requirement completely from competition law damage claims seems problematic, even in cartel agreements, due to the complex nature of antitrust cases. In cartel cases, *per se* approach towards cartel agreements should be taken up with prudence given that even cartels may generate efficiencies for individuals and society. It had better to take up each case on its own merits rather than espousing presumably that in cases of cartel fault needs not to be sought.

When we look at some of the Member States' national laws, we see that fault element is generally required.

United Kingdom requires fault in non-contractual damages actions. Yet, breach of statutory duty is a specific cause of action in English tort law and there is no requirement of fault in case law in terms of Turkish law [10]. Where fault is required, intent and negligence are both sufficient (47A, 47B, 58A, 60 CA).

In France, actions are based on general tort law regime. France and German essentially require undertakings to exercise the degree of care or diligence of an average person (Article 1382 of CC and Art. L. 442-6 and 420-6). Yet, undertakings are to exercise a greater degree of care than would be expected from an individual. In France, violation of competition rules will automatically imply that the fault element is fulfilled and negligence is enough to constitute fault. In other words, there is no double requirement of showing infringement of the law as well as fault.

In Germany, infringement is based on tort law and fault is required, but is rebuttably presumed where a violation of competition law is shown (33 GWB, § 9

UWG, § 822 BGB, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.29).

With respect to Community competition law there is no explicit requirement of fault for the implementation of Article 81 or 82. However considering that fault is required even for administrative penalties, it can be concluded *a fortiori* that in compensation cases arisen from Community competition law fault shall be sought (Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003).

3.2. Damaged Persons and Protective Purpose of the Norm

Mainly four groups may affect from the upset of competitive environment. In the general framework, society as a whole sustains damage since effective and productive allocation of resources disorganize. At this stage, state is assumed to undertake the responsibility for the protection of public order damaged by anticompetitive conduct. Relieving ways of such damage can be directly ensured by means of public enforcement mechanisms.

Secondly, undertakings operating in the related market and observing competition law could sustain damage since restriction of competition by or between some undertakings leads to aggravate conditions for those observing law due to the distortion of equal opportunity. As for competing undertakings damage generally occurs as loss of profit and extent of the damage differs as to the connection –or distance- between the damaged and the violator. In some cases, damage emerges so high that the undertaking may have to shut down his business as seen in cases where cartels increase customers' switching costs to a non-cartel member by, for example, refusing to supply. Last but not least, undertakings that were not able to enter the market due to the restriction of competition can be added to this group.

Third group, indeed a highly contested one, consists of undertakings which have been reflectively damaged (i.e. indirect purchasers).[38] This group comprises tertiary undertakings including inter-undertakings in a sale chain and undertakings

[38] See 3.3, Causality and Passing on Defense for detailed elaboration of this group.

which have been doing business with the directly harmed undertakings by rendering complementary, supplementary or secondary goods or services to them (As defined by Gürzumar, reflectively harmed is a third person who has been imposed to damage as a result of the damage incurred by directly damaged person (Gürzumar, O., 2005, p.156)).

As for the former, damage amount becomes mostly arguable since the inter-undertakings in the chain of distribution undertake a part of the damage. As the overcharge passes through successive sales layers, it basically shrinks. Put differently, identification of damaged persons and measurement of damage amount becomes difficult particularly when many middlemen are involved in a sale chain. The matter gets even more complicated when the concerned product is repackaged or used as an ingredient or input in another product. In these cases there may be several levels of distribution before the product reaches consumers.

According to Gürzumar, considering principles of law seeking protective purpose of the norm it cannot be concluded (from Article 57 of the TCA) that all persons, without being subject to any limitation as to their distance to infringement or their environment, would be able to claim damages. Therefore it is not possible to extent the content of the Article towards persons reflectively harmed.

One of the limitations to the standing, and as a matter of fact impeding widespread application of the private enforcement since it limits indirect purchasers' and consumers' right to bring action in competition-based damage claims, is the requirement of protective purpose of the norm. This requirement provides that only those who belong to the group of people and whose protection is the purpose of the norm can base their cause of action on that norm. If, for example, concerned law is supposed to protect solely a certain group of individuals, individuals who do not belong to that group may not be able to sue. When applying this requirement, courts usually demand that the plaintiff to be a person or to belong to a definable group of persons against whom the infringement was specifically directed with the aim of worsening that person's or group's situation.

In Turkish law, protective purpose of the norm *("effect reflex")* should be taken into account to determine the causality. Only those whose protected assets were

directly injured as a result of the infringement of that norm can claim damages. In Turkish/Swiss and German law, third persons who were damaged as a result of the reflection –or in other words as a result of the spattering of indirect effects of the infringing act- cannot claim damages (Uygur, T., 2003, p.1371). Therefore, tertiary victims such as persons procuring raw material, undertaking maintenance services or leasing equipments etc. cannot bring actions based on the compensation of antitrust infringements. However, according to Topçuoğlu, there is no specific allocation in the TCA as to persons who can bring action and thus, all damaged persons who can prove causality should be able to claim damages, even the damage is reflective (Topçuoğlu, M., 2001, p.302).

Germany had been one of the countries among the Member States specifically and strictly requiring protective purpose of the norm before the 7th Amendment were realized [14]. Such condition has been alleviated by the 7th Amendment by switching the subject of the requirement from protected to affected parties [22]. In the United Kingdom, tort law applicable to breaches of statutory duty will apply to standing i.e. the plaintiff must fall within the class of persons intended to be protected by the act in question [10].

Fourth group consists of consumers[39] who suffer from the restriction of competition since it causes an increase in prices. Their damage generally results from price differences and this type of damage can be considered as a direct damage. Consumers are not always able to find substitute goods since undertakings outside a cartel may prefer to raise their prices in line with the cartel prices, thereby harming their direct purchasers ("*umbrella effect*"). Thus, consumers are exposed to overcharge in prices.

Whether or not consumers should be equipped with the right to compensation to offset their loss through specialized legal devices is much contested in competition studies. Major problem is the practical challenges to their standing in antitrust cases since it is very difficult to define the group of consumers granted with that right and to establish causality. For instance, consumers who could not afford concerned product at the increased price or who refused to purchase it cannot be granted the

[39] Terms end-users and consumers are used interchangeably in this study.

right to sue since the standing depends on assumptions or assertions rather than concrete facts. If the standing is granted, it is not always easy to measure the exact amount of damage. It can be concluded that it is quite difficult to define injured persons from antitrust infringements in a manner suffice to manage a proceeding, especially considering that class actions are not allowed in many law systems. As quoted from Posner by Roach and Trebilcock;

> *Everybody's economic welfare is bound up with everybody else's. Why stop with the ultimate consumer? If he is forced to pay a high price for a product, demand for other products will fall, and this may hurt the suppliers of those products and the suppliers' suppliers and so on ad infinitum.* (Roach, K. & Trebilcock M.J, 1996, p.491; quoted from W.M. Landes & R.A. Posner, "The Private Enforcement of Law" (1975) 4 J. Legal Stud. 1 at 15.)

On the other hand, competition law infringements mostly target at consumers. As indicated by Neelie Kroes, the Competition Commissioner, in 2005 that "*a private enforcement system which disables or even discourages final consumers from bringing actions for damages is unacceptable*" [7].

In Turkish competition law, it is inferred from the expression of "*any damages of the injured*" in Article 57 of the TCA that any differentiation as to standing has not been brought. Therefore, ultimate consumers can have standing in theory. However, as underlined by İnan, there may be no practical interest for consumers to bring a suit pursuant to Articles 57 and 58 (İnan, N., 2002, p.16-17). On the contrary, Gürzumar is in the view that the Article can be considered covering consumers (Gürzumar, O., 2005, p. 146-148).

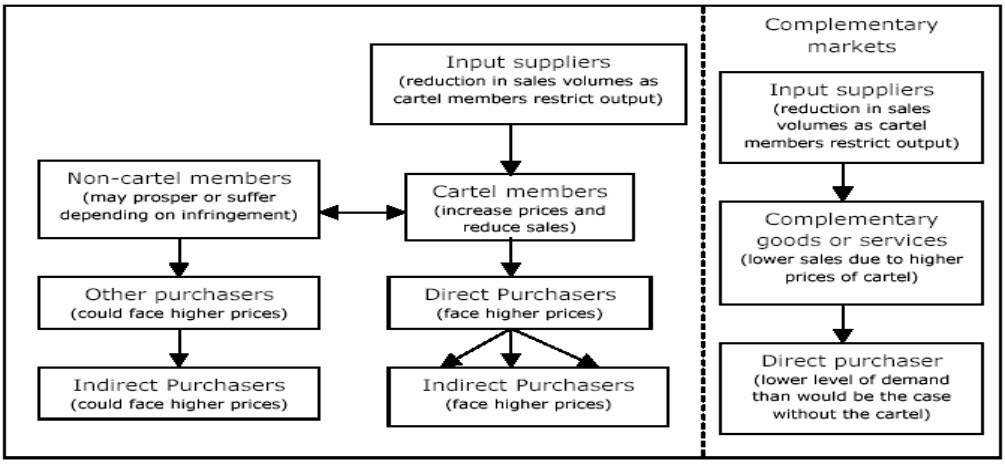
As the fourth group, professional or economic associations such as chambers of commerce, unions etc. may be considered injured and thus, allowed to bring action for injunctive reliefs. This is the outcome of thoughts regarding violation of law against the interests of not only other competitors in the market but also an occupation and hence, the society in general. Such a right has been given in the TCC for specified unfair competition cases. These groups are entitled to bring actions for declaratory relief, prohibition and removal of unfair competition (Ansay, T., Schneider, E.C., Karayalçın, Y., İnan, N., Öz, G.A., p.107). Yet, damage claims cannot be raised by such groups in antitrust litigation in Turkish law. Consumers whose economic interests are injured are entitled to bring action for their actual

damage pursuant to the provisions regulating unfair competition in the TCC. Right to claim damages for consumers' organizations is not possible; yet, granting such a right has being discussed in the foreign literature in order to facilitate private enforcement. For example, certain representative organizations have the right to ask for a cease and desist order against an infringement of competition law, but not for damages under the 7th Amendment of German competition law (Cf. BT-Drs. No. 15/3640, 11-12 (§ 34a (1) GWB).

As a last remark to the possibility of claiming damage by infringers, it can be stated that persons who took part in the infringement cannot employ and benefited from this right against each other. More concretely, cartel members will not be able to bring action against each other on the grounds that they exposed to damage as a result of the cartel they participated in.

In order to display probable damaged persons in cartel cases where the purport is to restrict competition but nothing else below schema is presented (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.13):

Figure 1: Potentially damaged parties due to cartel members increasing prices



Both in the United States and the European Union, plaintiff must have an interest to have standing to sue ("*locus standi*"). Plus, the absence of an indirect purchaser restriction in the Community law means that many private parties will

have admissible actions, although there is no treble damage remedy (Clifford, J., 1999, p.246, 247).

In the United Kingdom, representative claims for damages can also be made by specified bodies acting on behalf of individual consumers (so long as they are not using or receiving the goods/services in question in the course of business). Damages are awarded directly to the consumer, but the CAT may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body acting on behalf of the individual. In the United Kingdom there must be an economic or personal interest [10].

In France, plaintiff has to justify that he has an interest in the case and right to sue. The plaintiff's interest must be personal, existing, real and legitimate. (Executive Summary and Overview of the National Report for France, 2004, p.1).

In sum, standing in damage actions can be granted either on the basis that a litigant would be directly affected in their business or property or materially (even it is indirectly) affected. The latter is preferable because to grant indirect purchasers standing on the basis that they have been materially, but perhaps not directly, affected by the alleged anti-competitive behaviour (Roach, K. & Trebilcock M.J, 1996, p.402). Protective purpose of the norm highly limits application possibilities of private enforcement in competition law by excluding indirect purchasers' (including end users') standing. Otherwise, only competing undertakings can claim damages under law. Considering that all the damaged persons are granted to claim damage in the TCA the norm therein should be considered as protecting not only direct purchasers or competing undertakings in the market but also consumers and undertakings those reflectively harmed. Denying standing of these groups in the first place on the grounds that they are not covered by the protective purpose of the norm would be against the purposes sought by effective private enforcement of competition law.

3.2.1 Cases by Competition Authorities for Injunctive Reliefs

In Turkish competition law, pursuant to Article 9 and 27(a) of the TCA, the Competition Board shall take necessary interim measures in order to cease

infringements. However, under those provisions whether the Competition Authority request the competent judge to impose appropriate preliminary or interim restrictions (i.e. attachments, sale or purchase restriction orders, to force undertakings enjoying exclusive rights by concession agreements entering into contracts "*zorunlu unsur",* to cease operations of undertakings till the final decision of the Board etc.) or can take these sort of measures without recoursing to the judiciary are the subjects that should be examined. For instance, in the Community competition law, pursuant to Article 5 of the Regulation1/2003 ("*Modernization Regime*"), national competition authorities –similar to the Commission- can require an infringement to be brought to an end and order interim measures in cases of urgency.

It is doubtless that, injunctive relieves (cease and desist orders) that provides termination of the illegal conduct can only be given by judiciary in Turkish law. Other considerations would be against the constitutional government where the legislative, executive and judicial powers are apart from each other. Recourse to civil courts for injunctive reliefs cannot be possible for administrative bodies unless they were entitled by an explicit statutory provision (as seen in the institution of "*public interest litigation*") since they represent public interest.

On the other hand, although injured persons can claim in civil courts that tortious act is to be ended or prevented, as it is the case in unfair competition law or law of trademarks, there is no specific indication as to the remedies of this kind in the current TCA.

However, the Competition Board may take interim measures which will be in force until the final decision of the Council of State and for the cases where the occurrence of serious and irreparable damages is likely. These measures are envisaged as emergency tools and bear secondary nature. They aim only at mitigating the loss; therefore, interim measures cannot exceed the scope of the Board's final decision.

There are two types of interim measures as structural and behavioural. According to the current legislation in Turkish law structural remedies (measures) cannot be taken by the Competition Authority. Briefly, by means of behavioural remedies, behaviours that had to be avoided under competition law would be ordered

to be ceased by the Competition Board. For instance, the Board may decide the transfer of company shares in cases of abuse of dominant position or disallow the sales at cartel prices. However, the difference between two sorts of remedies and the extent of the authority delegated to the Board by law with respect of these remedies may tend to blur in specific cases. Pursuant to Article 55/1 of the TCA final decisions, interim measures, administrative fines of the Board shall be subject to the legal review of Council of State as the Court of First Instance. Therefore, behavioural measures exceeding purposes envisaged by the TCA may be annulled by the Council of State.

In Community competition law, the Commission may impose behavioural or structural remedies to bring infringement to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy (Council Regulation 1/2003, Chapter 3, Article 7) in cases of urgency due to the risk of serious and irreparable damage to competition the Commission order interim measures as well (*ibid.* Article 8). Since the Commission has been vested the authority to impose structural and behavioural remedies there would be no practical interest for it to recourse to court for injunctive reliefs.

3.2.2. Cases against Public Undertakings

There is not an explicit provision in the TCA excluding public undertakings from the application of the TCA; thus, until and unless a specific exemption is provided, public undertakings, such as state economic enterprises or other undertakings to which special or exclusive rights are granted, should also be treated in the same way as private undertakings are treated (Öz, G., 1996, p.35). Therefore it can be concluded that the TCA does not discriminate between public and private undertakings as to the obligation to observe competition rules.

The Competition Board held in one of its decisions that *"when competition is limited or restrained through acts of undertakings comprising legal entities or individuals committing severally or jointly to those acts, the TCA shall apply. When*

competition is restrained through decisions held or transactions made by regulatory units of judiciary or administration which were not acting as undertakings the TCA shall not apply.. (00-25/258-140, 04.07.2000)".

As to the precedence of the Council of State, although public undertakings shall be bound by competition rules, in cases where their primary activities lead to a superior interest compared to the limitation of competition, competition rules can be set aside (Danıştay 10. Daire E. 2001/4817 K. 2003/4770 T. 5.12.2003). However, drawing lines between public and private interests is not an easy task for all cases.

With respect to the type of action which will be brought in the event that a public undertaking infringes competition law, it should be noted that administrative acts depending on the rule-making power of the administration shall be the merit of an action for annulment and/or full remedy action under the administrative law, similar to the contracts executed by public authorities so as to meet public needs. These contracts would only be subject to administrative judiciary and damage claims would be heard in administrative courts. In sum, contracts executed by public authorities, other than those indicated above, could be subject to the private law enforcement.

3.2.3. Class Actions and Group Litigation

Class action is a procedural mechanism sourced from American law whereby one party, or a group of parties, may sue as representatives of a larger class of individuals who did not exclude themselves from the proceedings (Ashurst, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Analysis of Economic Models for the Calculation of Damages, prepared by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.44). In other words, only the class members who opt out are not bound by the judgment in a legal action where the rest is bound. Damage resulted from illegal action would be awarded to class members as a whole, i.e. individual awards will not be made to the different members of the class although each will be entitled to a part of the award (ibid, p.43). Private enforcement of antitrust laws through class actions is often the

vehicle by which consumers can recover damages resulting from antitrust violations in the USA [11].

However, class actions brought by certain entities or individuals on behalf of wider groups, classes or the public at large, which result in damages being awarded, are quite rare. Because, manageability of a class action case comprises difficulties such as in identifying and notifying class members, calculation of individual damages and distribution of damages.

In spite of such difficulties, class actions have been developed to assure that large number of plaintiffs could enforce their rights efficiently, although, from the beginning, it has been regarded controversial. The goal behind class actions is particularly suited to antitrust cases, where many small purchasers have little realistic opportunity to pursue their claims independently. This procedure increases fairness by making it possible for victims of antitrust violations to sue for damages when the costs of individual lawsuits exceed the expected benefits (White, L., 2002, p.313).

Many laws are not familiar with group litigation and particularly class actions. However, the latter is commonly applied in the United States although it has also become troublesome therein considering that it may result in massive treble damage recoveries. In order to avoid its improper application, this procedure was subjected to some conditions. Briefly, a matter cannot proceed as a class action in Federal Court unless the court certifies the case for class requirement under Article 23 of the Federal Rules of Civil Procedure. The four prerequisites of Article 23(a) are numerosity of the class, typicality of the claims, commonality of the issues in question to the whole of the class and adequacy of the representing party. If the foregoing prerequisites are satisfied, the court may then grant class certification only if one of the additional conditions in Article 23(b) is satisfied (Martin, S., 2005, p.82)[40]. Second test mainly aims at measuring up the real necessity to recourse such a mechanism and seeks to find out whether the common questions of fact or law

[40] Obtaining class action certificate is of importance particularly in cases where individual claims are so small to litigate individually. Because, if the defendant is successful in persuading the court to deny certification there is a strong possibility that plaintiffs will not proceed with individual claims and he/she would be unlikely to hire counsel and litigate the matter separately, since it would not be cost-effective to litigate the claims on an individual basis.

predominate over individual questions. Article 23(c) (2) also allows potential class members to opt out of a class. Opt-out plaintiffs generally have large or many claims.

Table 2: Group Litigation

(Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.54)

		Claim brought on behalf of:		
		Public	Unidentified class	Group of identified or identifiable individuals
Awards made to:	Individuals of group separately			Representative action
	Group/class as a whole		Class action	Collective claim
	Public at large	Public interest Litigation		

In Europe, class actions only exist in few Member States and even these States, this procedure is applied only to a limited extent. Class actions are not regarded as a tool equivalent to those in the United States. Only in the United Kingdom class proceedings are available. The Competition Act 1998 allows for designated consumer bodies to bring proceedings for monetary damages before the CAT on behalf of two or more individuals. Apart from joinder of parties with the same claim, it is possible to bring a representative action when more than one party has the same interest in a claim or more commonly a group action when there are multiple plaintiffs and common issues of law or related fact under a Group Litigation Order ("*GLO*"). Thus, consumer associations specified by the Secretary of State can bring actions for damages on behalf of two or more individual consumers before the CAT on the back of an infringement decision made by a public authority (either by the OFT or the European Commission) [10].

In Germany, class actions are not available; yet, present German law allows for an action for injunction to be brought before courts by associations for the promotion

of trade interests provided that the association has legal capacity. The 7th Amendment established the possibility for trade and consumer associations to bring action to recover the infringer's profits in relation to breach of national and Community competition law (Cf. BT-Drs. No. 15/3640, 11-12 (§ 34a (1) GWB).

In France class actions are not allowed (Executive Summary and Overview of the National Report for France, 2004, p.1). However, French law provides that in some circumstances certified consumers' associations and professional unions can bring actions to claim for a collective damage or for several individual damages under the Consumer Code; yet, under very strict conditions [15]. Additionally, there is a possibility of an action in the interest of the public order to be brought by the *Ministère Public*, though this action is only available in relation to certain specified restricted practices (Code of Commerce Article L.442-6, Code of Consumer Article L.421-1).

None of the Member States recognize public interest litigation which means litigation for the protection of public interest commenced by the court of law itself, not by the aggrieved party (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.54). Such cases may occur when the victim does not have the necessary resources to commence litigation.

In Turkish law, collective claims, class actions or public interest litigation are not possible. It can be said that persons who have an interest in bringing action can claim damages individually. However, pursuant to Article 24 of the Consumer Protection Law consumer organizations can only bring action in case marketed and serially produced goods has had detects and demand these goods' production and sale to be ceased in addition with their collection from those who possess such merchandise to sell. Other than above provision, there is no option for class actions and consumers who purchased such defective goods can claim damages only individually.

3.3. Causality and Passing on Defense

Causality refers to the existence of a causal link between the illegal/wrongful activity and the damage. The first test to determine causality is the "*but for*" test. If the injury had occurred because of the defendant's act in lieu of the case that it would have occurred in anyway, with or without the defendant's act, "*but for*" condition is deemed fulfilled. In other words, without "*but for*" the wrongful act, the injury would not have occurred. Therefore, wrongful action becomes *"conditio sine qua non"*. However, any contribution to the damage's occurrence, even it is remote and insignificant, might lead to liability and an additional adequacy filter should be added to avoid its inflexible and extreme application.

Secondly, causality can be established through the evaluation whether the act is the "*proximate cause*" of the injury. Proximate cause, or legal cause, exists when the connection between an act and an injury is strong enough to justify imposing liability. Courts use "*foreseeability*" as the test for proximate cause (Dessemontet, F., Ansay, T., 1995, p.128; Miller, L.R./Jentz G.A, 1999, p.89). Proximate cause approach assesses natural progression of events and allows a reversal of the burden of proof where the damage appears a normal consequence of the defendant's conduct. In Turkish law, proximate cause ("*uygun neden teorisi"*) is espoused. In the European Community law, although no clear standard of proof has been established, something very close to the criminal standard of "*beyond reasonable doubt*" applies (Martin, S., 2005, p.81).

In the United States, the Supreme Court requires proximate cause condition as well. It does not provide recovery for every harm directly or indirectly attributable to an antitrust violation. Instead, it provides recovery where the causation is higher in a way to comprise a reasonable degree of certainty that the illegal act was a material cause of the harm [13]. Thus, antitrust injury must be proven with a reasonable degree of certainty (Martin, S., 2005, p.81).

For a defendant to be held liable of plaintiff's loss German law requires the defendant to have participated in the causation of the damaging event according to the principle of "*conditio sine qua non*" and that his contribution to the causation is adequate. These causation requirements can imply indirect causation [14].

In France, two theories apply. First theory is the theory of determining factor ("*adequacy*") whereby a causal link only exists between the damage and the determining factor among all the factors that caused the damage. Second theory is the theory of the equivalence of conditions, whereby a causal link exists between the damage and any of all the circumstances that led to the damage. In competition law, courts seem to favor the first theory, and require the proof of a direct link between the fault and the damage [15].

In the United Kingdom, to prove causation, plaintiff must show that it is more likely than not that the damage would not have occurred "*but for*" the breach of duty [10]. Therefore, damage should be within the scope of the loss that may be claimed if it can be proved to have been caused by the infringement. There are no restrictions on potential plaintiffs other than the rules on remoteness causation and foreseeability, for example, it might be foreseeable by a cartelist that a direct purchaser would mitigate losses by passing on to indirect purchasers a price increase charged by the cartelist to direct purchasers [10]. In too much criticized *Arkin* case, plaintiff's action for damages for breach of Articles 81 and 82 did not succeed through a failure to establish infringement of either provision. However, the judge stated that the claim would have failed on causation in any event. According to the judge, the court was required to consider whether the plaintiff was the author of its own misfortune by seeking to stay in a loss-making market. The judge found that plaintiff's response to the price setting policies of one of the defendant was so irrational that it could not be justified and broke the chain of causation and it represented an intervening cause of such losses as may be proved to have been sustained by the plaintiff and he should have withdrawn from the market to cease its losses (predominant cause of the loss). On the other hand, plaintiff defended himself on the grounds that in order to break the chain of causation a defendant who has committed a tortuous act has to establish that the plaintiff responded recklessly to that breach. The argument is that mere unreasonable conduct will not constitute an intervening act breaking the chain of causation, but will simply go to quantum and mitigation of loss (Arkin v Borchard Lines Ltd [2003] EWHC 687).

It can be difficult to attribute loss specifically to the defendant's behaviour rather than other factors such as a general economic slowdown or even the plaintiff's own business strategy. To attribute the loss to the plaintiff's behaviour breaks the causal link and the English court found this effect in the *Arkin* case. In the *Provimi* case, the court held in relation to causation that selling on the market at a fixed price could be held to have caused loss to a purchaser, even though that purchaser did not purchase from the infringing undertaking in question. The court reasoned that in conditions of competition, the seller could be expected to provide the product at a lower price to the benefit (either direct or in terms of the downward pressure this would have put on prices charged by other sellers) of such purchaser.

Causality does not always follow a smooth path. An independent intervening force may break the connection between the wrongful act and the injury. In terms of tort law, force majeure (act of god, state, third party and of victim (including his consent to the action)) and self-defense are very general grounds breaking causality. Among those justification grounds act of victim is of special importance in terms of competition law since, in most of the cases, the victim –plaintiff- might have no other chance but to abide by the defendant's conduct due to his weak bargaining position. The ECJ's judgement in the *Crehan* case limits at least to a certain extent the availability of act of victim justification in Community competition law–based damages cases, as the *Crehan* provides that the liability of the defendant cannot wholly be excluded unless the plaintiff bears a significant responsibility for the infringement because of the strong bargaining power of the defendant. American and European Community laws share similar approach to *pari delicto* -the principle which precludes a claim for damage relying on the plaintiff's own illegality- the fact that the plaintiff was party to an illegal agreement does not bar recovery if plaintiff had a weak bargaining position [13].

Another highly controversial issue in competition law is the "*passing on defense"* that can be raised where the plaintiff/injured persons are indirect purchasers. It relates to direct purchaser's transfer of overcharge to indirect purchasers (i.e. middleman, undertakings reflectively damaged). Passing on defense diminishes, or at least lessens, the ability of indirectly damaged purchasers to initiate

proceedings. There is potential for this defense to be raised against claims arising from market-wide cartel activity or in abuse cases where the dominant firm has a particular pre-eminence in the market at hand.[41]

Under passing on defense, defendant claims that plaintiff, direct purchaser, was able to mitigate any loss by passing on any additional costs caused by his infringing of competition law to its own customers in the form of higher prices. Put differently, passing on defense is used by an antitrust defendant to argue that the plaintiff did not suffer loss on the grounds that he/she had passed on illegal overcharge to the next purchaser instead of absorbing it. In sum, direct purchaser who acts as an intermediary between the infringer and a subsequent purchaser might encounter such a defense and cannot claim damages.[42]

Passing on defense highly limits plaintiffs' standing in competition based damage claim proceedings. Rationale behind limiting standing to direct purchasers is associated almost entirely with the concerns about multiple recoveries of damages. Because, if both direct and indirect purchasers were allowed to sue this could probably result in multiple damages being awarded. On the other hand denying standing for indirect purchaser may mean real bearers of damage's deprivation of claiming damages although the necessity to prove causal link may constitute a serious obstacle to the success of indirect purchaser actions.

The passing-on dilemma arises from the difficulty of determining the identity of the damaged and the extent of damage particularly due to the fact that an anti-competitive behaviour, such as price -fixing, is likely to spill-over into several markets, causing monetary injury in the production chain, before ultimately falling in part on consumers. The wave of anti-competitive behaviour may inflict harm upon actors in an indeterminable number of submarkets. The net effect varies depending

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[41] There could be "cascades" of indirect purchasers. For example, a cartel relating to the supply of raw materials could impact on the processors which buy the raw material (the direct purchasers), and then a cascade of indirect purchasers including the manufacturers which buy the processed raw material to use in the manufacture of a product, wholesalers which buy the product, retailers who buy from wholesalers, and the final consumers which buy from retailers (Study on the Conditions of Claims for Damages in case of Infringement of European Communities Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.4).

[42] This subject highly depends on economic analysis and theories (See ibid, p.33, 34 for further information).

on the time scope, the nature of competition in the downstream markets and on the proportion of demand-supply elasticity in the market. It is nearly an impossible task to accurately identify real victims and the harm inflicted upon them.

In practice, tracing everyone who is damaged by anti-competitive behaviour and calculating the extent of individualized damages in all submarkets would require courts to perform long and complicated analyses involving a large number of interested parties, which would also be costly.

This problem is analogous to the problem in public finance theory of determining the impact of a tax or a subsidy. When a government imposes a tax or subsidy on a consumer good, price usually does not rise or fall by the full amount of the tax or subsidy. The incidence of a tax or subsidy is usually split between producers and consumers. The fraction each group ends up paying or receiving depends on the relative elasticity of supply and demand which is quite difficult to estimate.

In Swiss law, which is the source law to Turkish law of obligations, damages will only be remedied if following three conditions are fulfilled. The existence of damage must be reasonably certain, which implies that the injured person must be able to establish its existence or at least its probability; the damage must be personally suffered, which excludes third persons citing a tort they have not personally experienced as previously mentioned (e.g. an association claiming damages caused to its members); and finally, it must be direct, that is, it must affect the person who has been the victim of the injury; persons who are only affected by the consequences of an act cannot receive damages except only certain statutory reservations or reservations imposed by the court decision (Dessemontet, F., Ansay, T., 1995, p.127-128). Under Turkish law, indirect purchasers who passed on the damage arisen from the antitrust infringement seem not able to demand such a loss since they did not suffered the damage personally and proving causality seems quite difficult for indirect purchasers. Nevertheless, should an indirect purchaser is able to prove that the act is the proximate cause of the damage; he or she can claim damages. Since there is an explicit definition as to the damaged in the second sentence of Article 58 by stating that they are "*competing undertakings*" whereas first sentence

only refers to damaged with no explicit reference to whom they are allows us to interpret the provision as indirect damage claims are allowed or at least, are not prohibited. It can be concluded that, theoretically, there is a room for indirect purchaser actions in Turkish law. Yet, it will be developed by judiciary through case by case approach.

Passing on defense is one of the issues in the field of private enforcement in competition law which has been broadly examined and taken up in several judgments in the United States. In the American law, private plaintiff must have been directly harmed by reason of the unlawful conduct and standing is generally limited to direct purchasers. Under Federal law, indirect purchasers are denied standing. However, almost half of the states, unlike Federal law, allow indirect purchaser actions[43] which mean antitrust suits by and on behalf of consumers and purchasers that do not buy the product directly from the defendant (Martin, S., 2005, p.82). It is more or less the outcome of American system that provides for punitive treble damages and where private antitrust proceedings make up around 90% of all the United States antitrust cases (Olsen, G., 2005, p.4).

Two Supreme Court rulings, the first one in 1968, called as *Hanover Shoe* (Hanover Shoe Inc. v. United Shoe Mach. Co., 392 United States, 481, 492-93 (1968)), and the second in 1977 of *Illinois Brick* (*Illinois Brick v. Illinois*, 431 United States 720 (1977)), have reduced the potential complexity of damages claims. Subsequently in *Cargill case,* the Supreme Court held that potential litigants must show a specific anti-competitive effect on them as a result of the merger (ICC, p.76), (Cargill, Inc. v. Montfort of Colorado, Inc., 9 December 1986, 479 U.S. 104).

The Supreme Court determined that in passing-on situations, it would be too complicated to trace what was passed through from direct to indirect purchasers. In *Hanover Shoe*, the court reasoned that it would be impractical to determine what portion of any price increase by the direct purchaser is attributable to the overcharge, and how that price increase affected the direct purchasers' sales.

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[43] These state suits are litigated separately, even though they usually involve the same behavior, products and facts as the federal class action suits. Passing-on defense has been significantly undermined by the actions of a number of states that have sought to avoid the *Illinois Brick* ruling by passing legislation allowing indirect purchaser claims (Olsen, G., 2005, p.3).

Illinois Brick case barred claims from indirect purchasers to prevent compensation for the same loss twice. The plaintiff was denied compensation and the precedent was set that only direct purchasers (first plaintiff in the chain of claimants) of antitrust violators can sue for damages even if they have passed their injury on to their buyers or the consumer. The logic which the ruling is based on is that allowing indirect purchasers to sue for further money as well would effectively multiply the total liability of the defendant far over the appropriate deterrence level since the direct purchaser is entitled to the full overcharge by the proceeding. The Supreme Court justified upon the argument that direct purchasers as being closest to the violation would generally be the parties with the most at stake and would be most likely to provide the deterrence that the antitrust system needs. Therefore, it made a choice in favor of one class of possible victim, trading off the rights of indirect purchasers.

Another consideration led to such a decision is that, given the problems of proof (because, the effort of gathering and submitting the evidence necessary to claim would be an overwhelming deterrent as well), litigation over dividing the overcharge among multiple classes would only hinder antitrust enforcement. In the US law context, the burden of these calculations can make a consumer class action unmanageable in terms of class action procedure. However, in the *Microsoft* indirect purchaser litigation, most of the local courts (dissimilar with the Supreme Court's above mentioned decisions) that have considered the issue have granted class action certification. In addition, the courts have accepted the argument that indirect purchasers should be allowed to sue because direct purchasers will not do so for fear of retaliation by the defendants. (Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002)).

In order to alleviate outcomes of *Illinois*, courts in some antitrust consumer class actions have attempted to distribute settlement funds to consumers. These attempts involve gross approximations of real harm. For example, in the *Domestic Air Transport* litigation (Domestic Air Transport Antitrust Litigation, 148 F.R.D. 297 (N.D. Ga. 1993)), the court set up a procedure for distribution of money based upon the amount of air travel, presumably on the assumption that consumers who bought

more tickets paid more of the overcharge. All consumers who purchased any tickets would get a $100 certificate; those who could prove more travel could get more. Even with approximations of various kinds, many settlement funds are not fully distributed, because consumers do not find it worth their while to file claims. Similarly, in *Microsoft* case, one of the judges, Judge Motz, proposed a national settlement that would have required Microsoft to donate computer equipment to schools rather than to compensate consumers directly [23]. Yet, it seems that all these efforts are not really able to compensate consumers' damage.

As regards the situation in the Community competition law, the ECJ has in several proceedings regarding unlawful taxes and administrative charges touched upon the concept of passing-on defense. In these cases the ECJ has accepted defendants' ability to invoke the principle of "*unjust enrichment*". By invoking the principle of unjust enrichment defendants sought to avoid repaying unlawfully collected taxes and administrative charges that the plaintiffs had passed through to ultimate consumers. It is not clear yet that whether the ECJ will follow American antitrust approach to the problem of passing-on when an antitrust private litigation is directed against the Community and the Member States.

It has been also argued that recovery would not be limited to direct purchasers under the Community law (The General Report in the 1998 report of the FIDE on the application of Community competition law on enterprises by national courts and national authorities at p. 44; referring to the case law of the Community court on the protection of Community law rights by the national courts.). As to the *Hanover Shoe* rule, Advocate General Van Gerven in one of the ECJ's case [44] has argued that European Community case law implies that the passing-on theory is available for defensive use under Community antitrust laws (The Opinion of AG Van Gerven in Case C-128/92, *Banks v. British Coal*, 1994 E.C.R. 1-1209). Jones and Wahl disagree with the view of the Advocate-General and claim that there are no legal barriers for the ECJ to forbid passing-on defense in antitrust litigations. Jones states, with the support of Wahl, that the existing Community case law on passing-on is not of any relevance to the antitrust field. They claim that applying passing-on defense in

[44] He also dealt extensively with the issue of the availability of damages before national courts for breach of Community competition law before *Crehan* judgment.

cases when the plaintiff is recovering unlawfully paid taxes is accurate, since compensation is the one and only purpose of such actions. In antitrust law however, they argue, the effectiveness of Community antitrust law must prevail (Hosseinian, F., 2004, p.20).

The future Community approach towards the passing-on question will have a decisive impact on the basic principles of the European competition policy. According to Hoseinian, if efficiency, overall social welfare and minimum transfer costs are the factors to be taken into account while determining competition policy, then it is submitted that the Community must take initiatives to follow the symmetry of the passing-on solution adopted under the American law. Should corrective justice and the solicitude for small and medium sized enterprises are to prevail, then at least offensive, but arguably also defensive, passing-on should be encouraged (Hoseinian, F., 2004, p.25). This issue has not been resolved at the European level in relation to competition law claims; although a number of advocate-general opinions on whether the principle of "*unjust enrichment*" can defeat a right to compensation or repayment under EC law suggest that the passing on defense may not be contrary to EC law *per se* [9].

All of the Member States allow indirect purchasers right to claim damages in theory (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.88). Most considers, however, that there would be serious problems in determining causal link due to third party interventions (esp. the party originally purchasing goods from the defendant).

In the United Kingdom only damage directly sourced from the infringement may be claimed. There is no case law yet on the passing-on defense in the United Kingdom. Pursuant to the national report, direct purchaser should be under a duty to prove that he will not be unjustly enriched by identifying all customers to whom he has passed on his potential loss caused by the infringer and to notify these indirect purchasers so that their claims against the direct purchaser may be joined to the direct purchaser's claim [10]. According to Olsen, exclusion of the passing-on

defense would not sit comfortably with the fundamental principles applied by the United Kingdom courts in making damages awards such as impossibility of over-compensation and awarding punitive damages (Olsen, G., 2005, p.3).

In Germany, indirect purchasers are regarded as able to claim in certain circumstances in theory (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.88). However, to date, German courts have only awarded damages to direct purchasers. In a recent case involving an alleged world-wide price cartel, the District Court of Mannheim stated that the passing on of a price increase reduces the recoverable damage, because the damages are calculated by comparing the plaintiff's total assets before and after the damaging event. This point of view was confirmed by the Higher Regional Court of Karlsruhe. By contrast, the District Court of Dortmund expressed doubts as to the applicability of the passing-on defense [14]. According to some legal experts, who criticize the principle of protective purpose and deny the passing on defense, only direct purchasers should be able to claim damages. Consequently, passing on defense is taken into account but under discussion. The effect of the German decision in *Max Boegl* would appear to have a similarly restrictive effect as to standing for consumers (Woods, D., 2004, p.449). In the 7th amendment, the German government has considered the possibility to explicitly exclude the passing-on defense, but finally decided to leave it to the courts to find an appropriate solution, based on the fact that, according to the prevailing opinion among legal experts, it should be excluded.

Passing on defense and indirect purchaser issues are also being debated in France; nevertheless, pursuant to French law, direct damage is required (Executive Summary and Overview of the National Report for France, 2004, p.3). One of the criteria of awarding damage is that the injury suffered be direct and certain. Where the plaintiff could pass on any charges attributed to anti-competitive behaviour to a subsequent purchaser, these overcharges would not be the source of any damage actually suffered by the plaintiff himself. Indirect purchasers may also have suffered a direct injury, where for example, the overcharges attributed to anti-competitive

behaviour have been passed on to them by the direct purchaser, the increase in price constitutes a direct injury [14].

In conclusion, indirect purchasers should be allowed standing to bring action; yet, this right should be exercised in a way to minimize the risk of duplicate recovery. Since there is no statutory prohibition this subject will remain one of the issues to be solved by judiciary.

3.4. Calculation of Damage

Quantification of damage in competition cases is not a straightforward issue either. In order to provide proper implementation of private enforcement, damage should be determined and designated in a way allowing proper re-functioning of free market economy as well as adequate restitution of individual rights. To this end, an appropriate calculation system for different types of damages should be found. However, to determine exact damage content to be recovered is not an easy task. For instance, in addition to actual damage and even loss of profit, whether expenditures incurred for the idle capacity that increases average costs can be claimed in the content of damage is not clear and needs to be ascertained.

In terms of obligation law, damage is simply defined as the decrease of a person's patrimony against his/her will. In tort law, damage is considered equal to the difference arisen from what his/her patrimony would have been if the tortuous act had not occurred. Standard format of damages study depends on a negative determination aiming at finding out what the patrimony would have been if the tort had not occurred. Stated differently, actual state of the patrimony is deducted from would-be state of the patrimony had the harmful event not occurred, and the interest rates applies to that amount (*"but for"* scenario) since antitrust violations mostly occur from tort liability and the first aim is to restitute the individuals and bring them back to the situation before the tortuous act. However, it should be taken into account that there is a fundamental difference between simple tortuous acts and unlawfully inflated prices. In the former situation an actual monetary damage occurs, which must be repaired by the mandatory transfer of assets from the offender to the victim.

In the latter case, apart from the dead-weigh loss[45], no actual loss occurs in many cases, instead assets are re-allocated. This is one of the reasons why treble damage remedy has been envisaged, as touched upon later on.

Should there is a contractual relation between the damaged and the tortfeasor, then damaged party can claim damages on the basis of negative interest (*"menfi zarar", "but for"* scenario) that enables him to be in a situation he would have been had he never entered the contract in cases where the contractual relation is willing to be brought to en end. Should this relation is willing to be accomplished then damaged party may claim damages on the basis of positive interest ("*müsbet zarar*") that enables him to be in a situation he would have been had the contract been duly and properly fulfilled.

Tortuous act may cause both actual and consequential damages. In actual damages (*effective* damages, *damnum emergens*), there occurs a decrease in actives (*assets and receivables*) or an increase in passives (*debts or liabilities*) of property. However, when there is a deprivation of profit (*loss of profit, lucrum cessans*, consequential damage), there exists no difference in property; yet, there would have been if the infringing act had not happened. Loss of profit especially appears in agreements excluding other competitors from the market. For example, working under idle capacity, storage costs for unsold goods, employees' wages, due credit interests that could not be paid constitute a loss of profit item (Topçuoğlu, M., 2001, p.302). Deprivation of profit depends on a fictional calculation and it should be decided by the judge by taking into account what equity rules and ordinary course of events require (Uygur, T., 2003, p.1371).

As regards to damage calculation, there are basically two available options to measure the damage extent. First one is, to look on the side of infringer and to set the basic damage equal to the gains of the infringer who has engaged in anti-competitive activity. The second way is, to look on the side of the injured and to set the damage equal to the harm inflicted upon him. For instance in cartel cases first option cannot

[45] Dead-weight loss is a measure of the welfare loss due to the exercise of market power in raising prices above the competitive level. Customers who were willing to pay the competitive price but not the cartel price and were thus forced to buy less desirable substitute goods, or simply reduce their total purchases. Customers incurring these losses are known in economic terms as dead-weight loss.

be applicable for consumers who were exposed to higher prices whereas it is preferable for other undertakings exposed to loss of profit.

Similarly, Roach states that it is important to distinguish two classes of cases; those where downstream parties have suffered a monopolistic overcharge (including end users); and those where competitors are complaining of exclusionary practices. In the first class of cases, to remove all gains from the violator engaging in monopolistic practices may discourage the pursuit of these practices. Such an action leads to greater gains to the violator than its harm to the society (*e.g.*, a merger which yields some price increases but also enables the realization of even greater cost efficiencies). To allow recovery of the full monopoly overcharge may also ignore the costs incurred by the monopolist in obtaining monopoly power. These difficulties suggest that it may be preferable to define the basic damages so as to reflect harm to society rather than gains to the monopolist (Roach, K. & Trebilcock M.J., 1996, p.493). In short, damages suffered by plaintiff in both classes will be a poor means of reflecting either benefit gained by or harms caused to society from violations. However, whether judges and adjudicators charged with interpreting law will possess the necessary incentives, information, and expertise to interpret and enforce them in ways that maximize social welfare is another point to be taken into account (Roach, K. & Trebilcock M.J., 1996, p.495).

In cases of exclusionary or predatory conducts that led to loss of profit, earning-based, market-based or asset-based valuations of businesses or a portion of a business should be used. In cases of abuse of dominant position, these methods can also be used; yet, benefits gained from abusive conduct could have been hidden away in the defendant's accounts. Plus, such valuations inevitably depend on hypothetical estimations of how markets work and thus require economical expertise (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.6, 28).

Price-based estimation method (ibid, p.28) would be particularly useful for the calculation of actual damages of indirect purchasers in cartel overcharge cases. However, it is important to distinguish price increases resulted from market

conditions, not price-fixing. Besides, profits gained through the overcharge by the infringer might be more than the total amount of overcharge paid by consumers; because, a decrease in marginal costs, advertising or in the quality might lead to extra gains for the infringer (Akıncı, A., 2001 p.387). Calculation of such items seems almost impossible. All these difficulties in calculation have been asserted as the justification base of the treble damages remedy. Because, it is not always possible to assess and measure entire damage in most of the antitrust violations particularly of those aimed at establishing or maintaining cartel.

According to the authors, all these displayed methodologies can be considered as complementary to each other, and can be used as cross checks where time and data permit. Therefore even judge of the case is able to determine that price-based estimation should be used, it has to advance one step forward and decide the best way to reveal price-based illegitimate gains of the infringer and losses of the injured (which are indirect purchasers). In conclusion, one method can be elected by experts as the most appropriate to the situation in question and other methods can be used for cross-check the elected method.

Last but not least, mitigation of loss in response of an infringement should also be taken into account while assessing the damage. In fact, undertakings mostly react to infringements in a way to mitigate their losses. For instance, they would probably reduce their prices to the dominant undertaking's level. Contributory negligence is another issue engendering other problems to be taken into account, as in the case where the plaintiff had no choice but to be involved in the illegal activity due to the pressure coming from the defendant.

From a different viewpoint all these methods can become a hindrance to private enforcement. American experience shows how the possibility of sophisticated econometric analysis and complex methods of damage quantification can complicate and obliterate private actions. In the European case law, it does not seem that courts of any jurisdiction have developed a coherent approach to the subject, let alone a standardized approach across the different jurisdictions (Woods, D., 2004, p.456).

Table 3: Methods of overcharge calculation

(ASHURST, (2004) "Study on the Conditions of Claims for Damages in case of Infringement of European Communities Competition Rules, Analysis of Economic Models for the Calculation of Damages" by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.17)

Type of method	**Method of calculation**	**But for price**
"before-and-after"	Price comparison before and after the infringement	Prices before infringement
"yardstick"	Price comparison with similar product market	Prices elsewhere
"cost-based" ("margin")	Estimation of competitive price based on past margins	Costs plus margin
Price prediction	Statistical estimation of relationship between prices and demand and supply factors	Calculate (predicted) price based on past relationships
Theoretical modeling (simulation) of oligopoly	Theoretical models to understand effects on prices and output, with econometric and other data being inputs into the model	Theoretical price, based on model's estimates

In Turkish law, pursuant to Article 58 of the TCA, all damages including loss of profit can be requested similar to Article 58 of TCC on unfair competition (İnan, N., 2002, p.622). Judging by looking at the wording of Article 58, it can be said that the lawmaker espouses before-and-after price-based method for the calculation of overcharge; yet, as for competing undertakings there is no limitation with respect to the damage and thus, loss of profit can be claimed by these undertakings. However it may be asserted that probable profits to be gained should not be asked and it is more appropriate to restrict compensation amount to the damage incurred since treble damage system already comprises other results which the lawmaker wished to attain and therefore, it is also not appropriate to determine type of damage to be claimed as it is done in Article 58 or to depict a specific calculation method. Considering that treble damage system as a system exceeding restitutive character of compensation and functioning as a punitive deterrence tool has no wide application and its

application is left to the discretion of judges, it would be more appropriate not to limit damage content to actual damages as it is in Article 58.

As regards the Community competition law, it can be said that all the Member States foresee the possibility of claiming monetary compensation for loss resulting from a violation of competition law and reduction in the value of assets and loss of profits can be claimed in theory. The underlying principle rationale for damages actions in most of the Member States is restitutive-compensation with no deterrence purpose therein. In the national laws of the Member States, the level of injury sustained by the plaintiff is taken as the basis for the claim (Ashurst, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Analysis of Economic Models for the Calculation of Damages, prepared by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.91).

As for moral damages, national laws shall apply to the Community competition law. Both in France and Germany loss of profit and moral damages can be claimed whilst neither of them can be claimed in the United Kingdom. Moral damages are not awarded in the United States either (Akıncı, A., 2001, p.389) whereas mental anguish can be claimed. According to Topçuoğlu, moral damages can be requested in Turkish antitrust cases (Topçuoğlu, M., 2001, p.304). However, Akıncı is against this view (Akıncı, A., 2001, p.389). Since the economic integrity and personality is an integral part of personal rights moral damages need to be claimed if all statutory requirements are met.

Regarding the time periods taken into account while determining the moment when interest start to run, different from other laws, time of injury (*ex-ante* assessment) is taken in the United Kingdom while in France and Germany time of trial (*ex-post*) assessment applies (Ashurst, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Analysis of Economic Models for the Calculation of Damages, prepared by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.91). In Turkish law, time of judgment is taken as the basis for interest to be run.

3.5. Treble Damages

As generally accepted, main purpose of tort law is not to punish individuals for their tortious acts but to compensate the injured parties' damages. This is why awarded damage should be equal to damage sustained except the cases of mitigation resulted from contributory negligence or consent of the injured party etc. (Eren, F., 1998, p.487).

However, in competition cases gains of wrongdoer can be more than the damage he or she caused. Particularly in cases of cartel, it is almost impossible to calculate the gains derived from the decrease in marginal costs, advertising or in quality. As mentioned above, difficulties in granting standing indirect purchasers and calculating their losses (which have spilled-over different middlemen and become petit when it reached to end user) also hinder successful awarding of damages in these actions. Furthermore, given the large potential gains to firms from anticompetitive conduct such as after forming a successful cartel, it is crucial to recognize that tiny penalties or awarded damages will not simply enough to deter. Decision to commit any crime simply creates a cost-benefit problem for a prospective criminal who compares the expected gain from illegal activity with the expected cost. Cost would include the penalty to be imposed if the violation is detected and punished. As such, obedience to the law can be taken for granted only if the cost exceeds gains. Such activities can be prevented only if compensation amounts are high and certain enough to make the illegal activity unprofitable.

Additionally, low degree of detecting wrongdoers -and in case if they are caught, to establish causality- are another factors which should be taken into consideration (Akıncı, A., 2001, p.388). Under the circumstances above stated, it is highly probable that wrongdoers can get away with their violations which inflict damage upon individuals. Competition authorities probably detect, investigate and successfully prosecute only a small fraction of violations.

In order to prevent or set off low level of detection in competition cases, individuals should be encouraged to enforce law. Following his pioneering work stressing the need for high penalties to compensate for low probabilities of detection,

Gary Becker with George Stigler argued that private enforcement could duplicate the public enforcement outcome. They concluded:

> *Society is more likely to use fines equal to damages divided by the probability of conviction to punish offenders if it must pay this amount to successful enforcers. Although private enforcement of rules need not change the rules, we predict that they would gain currency and relevance because enforcement would then be much more efficient and transparent.* (quoted from White, L.J., 1998, p.88)

Consequently, in private enforcement of competition law, damage should include both compensatory damages (which are intended to reimburse plaintiff for his actual losses) and punitive damages (which are intended to punish the wrongdoer and deter others from similar wrongdoing). Treble damages system seems indispensable considering that in most of the cases, gains derived by anticompetitive conduct are higher than actual losses of the damaged.

On the other side, Becker and Stigler's ideas were challenged by Posner and Landes. They claimed that private enforcement would lead to too much enforcement relative to optimal public enforcement (quoted from Roach, K. & Trebilcock M.J., 1996, p.476). They attacked treble damages remedy on economic efficiency grounds, contending in part that it encouraged too much private litigation at too high cost, resulting in over-deterrence and allegedly consequent economic inefficiency (Clifford, J., 1999, p.80, 81). Richard Posner has pointed out over-deterrence danger as such:

> *…burgeoning of the private antitrust action has induced enormous, and I think justified, concern about the over expansion of the antitrust laws and their increasing use to retard rather than promote competition* [17]

It is also argued that treble damages engender plaintiffs' avoiding from adopting precautions that can mitigate the impact of antitrust violation. Furthermore single damages provide necessary recovery, and double or treble damages are an unjustified windfall to the plaintiff (Roach, K. & Trebilcock M.J. K. & Trebilcock M.J., 1996, p.490). Another danger as depicted by Areeda and Turner is that the treble damage remedy has also made courts more hesitant to expand antitrust law (Areeda Turner, 1978, p.150).

In sum, these critics contend that treble-damage remedy promotes excessive application of private enforcement, encourages nuisance suits designed to benefit

from large monetary awards. Moreover, the risk of unfair encountering to the treble damage remedy may deter companies from taking risks in areas near the uncertain line defining legal behaviour, for fear of becoming targets of enormous private actions and as a result, innovative techniques may not be adopted (White, L.J., 1998, foreword). Another possibility is that firms employ antitrust laws as a weapon to handicap their rivals. In extreme cases, it may result in firms' attempt to win in the courts instead of in the market.

Taking into consideration all these pros and cons, it can be concluded that treble damages remedy has an effect in offsetting imperfect detection and conviction of antitrust violations (White, L.J., 1998, p.32). Punitive damages are, in general, considered to serve preserving and establishing business ethic by deterring undertakings from illegal conduct in many areas of law. Last but not least, treble damages encourage persons to bring action. It reduces the cost of errors in assessing liability and damages, because it increases litigation effort (White, L.J., 1998, ibid).

Treble damage remedy originates from the United States. Harsher business environment can be shown as the reason to the question why treble damages remedy originated from the United States. Clayton Act, Section 4 provides that *any private person*[46] *injured in his business or property by reason of anything forbidden in the antitrust laws shall recover threefold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee*. Treble damage is awarded if the defendant can be shown to be reckless or malicious in the United States law (Clayton Act, 15 United States C. § 15a). However in order to eliminate its excessive application it is proposed to introduce the concept of decoupling antitrust damages in the United States (Schwartz, W., p.31-32).

General rule in the Turkish law system is that the compensation ought to be equal to the loss incurred as much as possible and not to be benefited as a means of enrichment. Alike, general principle in Swiss law from which the Turkish law has been adopted is not to impose punitive or exemplary damages. This is nearly same in national obligation laws of European Community members.

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[46] In addition to private individuals, the term "person" has been interpreted to include associations, corporations, partnerships and other business entities as well as municipalities, states, and foreign governments and governments with a connection to the United States.

However, in the TCA, second paragraph of Article 58 envisages that "*if the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage"*.

The expression of *"three fold the damage"* or *"damage up to three times*" (which may vary depending upon the translation) is quite new to Turkish liability law.[47] Therefore its application content and conditions are not definite yet.

First of all, there seems a disagreement upon the interpretation of "*three times*" expression in the TCA. Should the judge award compensation at three times the damage or, at his/her discretion, up to three times the damage? As to this contested statement of "*up to three times*" in Article 58, in contrary to Aslan, Öz expresses that any other interpretation is not possible due to the wording of the Article (Aslan, Y., 2001 p.390; Öz, G.A., 2000 p.197). The modal auxiliary used in the wording indicates a future possibility which allows a broad discretion to the judge in case where the damage arose from an agreement or decision of the parties or from cases involving gross negligence of them. According to Aslan, the judge of the case should take into account the size of the profit gained, number of the injured persons, weight and duration of the infringement and so on when applying this provision to decide gross negligence [8]. Gürzumar is in the view that the expression is "*up to three times*" and the judge may also decide two times the damage (Gürzumar, O., 2005, p.170). It is considered to replace the actual provision with the version in Article 27 of the draft Act which can be translated as "*in case where the infringement sources from gross negligence or purpose of the parties, up to three times the damage can be awarded*" [18].

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[47] However, as a very similar regulation, Article 68 of Code of Turkish Intellectual Property known as "FSEK" sets forth that persons whose financial rights have been breached can claim maximum three times of their damage as of the current market value of their works. Similarly, pursuant to Article 58/1 of TCC on unfair competition, judge may decide on the interest that is possible to be gained by the defendant as a result of unfair competition (Arkan, S., 1995, p.301). According to the justification of the TCC, in practice it would be very hard, almost impossible for the plaintiff to prove the amount of the damage he/she sustained and such a determination by the judge realized at his/her own discretion would not always lead to satisfactory results for plaintiffs. Moreover, compensating the damage only sustained by the injured party would lead to defendant's taking advantage of the gain exceeding the damage's amount. Yet, plaintiff has to choose either his loss of profit or the interest that is possible to be gained by defendant.

Secondly, although present provision seems to exclude cases of abuse of dominant position this kind of conclusion would be inappropriate and abuse of dominant position should be incorporated in the provision (İnan, N., 2002, p.614).

Thirdly, legal nature of the remedy is not definite. As to İnan, it is a civil law remedy (İnan, N., 2002, p.612). According to Topçuoğlu, treble damage is similar to the supplementary damages ("*munzam zarar"*) which, upon the request of the creditor, can be awarded up to the amount of the obligation secured by the pledge by also taking into account debtor's fault under Article 12/3 of the Law of Pledges on Commercial Enterprises. Comparatively, treble damage envisaged by the TCA can be considered a form of bad-faith compensation (Topçuoğlu, M., 2001, p.307). Bad-faith compensation has also been provided in the Turkish labor law as triple of the notification (of termination of the employment contract) compensation in cases where the termination is against law and the employment term is less than 6 months.

In the Community law context, the Commission does not put forward introduction of treble damages as an option. However, in order to create a sufficient incentive to bring action in relation to serious infringements like cartels, the Commission has suggested in the Green Paper, for debate, the option of introducing double damages for cartels. When we look at the Member States we see that none of the Member States recognize punitive damages (except South Cyprus) and exemplary damages are only recognized in Cyprus, Ireland and United Kingdom (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.84). Main reason is that the restitutionary-compensatory nature of damage conflicts with the idea of exemplary or punitive damage in legal systems of Continental Law. As a form of exemplary damage, some states provide for the publication of court decisions in the press as is in France, Italy, Netherlands, Poland (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004, p.84). In the United Kingdom, exemplary damages are anomalous since they offer a quasi-criminal sanction in civil litigation and only

available in limited circumstances. Although multiple damages provisions -even quadruple damages- appeared in many early English statutes, there is no treble damages remedy in the current legal system of the United Kingdom (Clifford, J., 1999, p.35). However, whilst there is as yet no direct authority, exemplary damages (i.e. damages over and above straightforward compensation for the loss suffered) which would correlate to the amount of profit by which defendant was unjustly enriched may be available for competition law infringements both before the ordinary civil courts and CAT (Mobley, S., Cassels, T., Jones, K., Fyfe, T., Garcia, M., Mann, S., 2005, p.23). According to Page, given the availability of pre-judgment interest in the United Kingdom, treble damage remedy is less significant than it first appears (Page, W., 1996, p.43).

Although there is no treble damages system in France, the Paris Court of Appeal recently imposed a fine of 40 million Euros on France Telekom by redoubling the amount of the fine since it found the infringement "*particularly serious*". This decision conveys a strong message concerning the court's liberty as to the assessment of facts. Thus, it can be anticipated that other courts may follow similar approach as they encounter with such infringements [15].

When Turkey becomes a full member of the European Union, treble damages system may provide Turkey to become more attractive to private litigation in cases where the infringement of Community competition law is realized by a foreign undertaking, considering that there is no treble damages system or any other similar in the other Member States.

3.6. Proof

Damage claims is knotted on the subject of proof since proving damage becomes almost impossible for the plaintiffs in most of the antitrust cases since proving infringement requires a special economical analysis and expertise which cannot be easily done by an average plaintiff. High standard of proof constitutes an obstacle to damages actions. For example, existence of loss of profit relies so heavily on the hypothesis requiring significant proof displaying existence of such loss.

Additionally, proving infringement highly depends on the evidence which belongs to defendant. Considering the importance of unofficial documents' importance, obtaining these documents or at least being aware of their existence creates major obstacle to the private enforcement of competition law, especially where there is no prior decisions of competition authorities. At this point it is necessary to stress that lodging complaints to competition authorities before initiating lawsuits would be very useful for potential plaintiffs. Particularly inspections carried out by competition authorities, especially those realized on-the-spot, are very crucial to reveal the infringement.

General principle in the Turkish procedural law is that claiming party proves his or her claims. However through so-called concerted practice presumption ("*adi karine*") in Article 59, when plaintiff submits enough evidence to give an impression on the restricted behavior, burden of proof switches to the defendant. Apart from this presumption, burden of proof lies with the plaintiff.

In terms of proof instruments, Article 59 sets forth that existence of agreements, decisions and practices restricting competition can be proved by any kind of evidence. Article 58 sets forth that previous years' balance sheets can be used in order to determine loss. In this way, private law enforcement has been facilitated for plaintiffs.

With respect to means of proof in Turkish law, it can be said that any kind of evidence including testimony of witnesses and opinions of experts as well as deeds can be submitted to prove torts. However, as for these evidences which are subject to judge's discretion, the judge must be convinced or stated differently, his conviction won. Merchants' books of account are admitted as evidence on the condition that they have been kept properly and certified by notary. In cases of unfair competition, probable interest to be possibly gained by the defendant shall be concreted via examining defendant's accounts (*ticari defterler*). In case of defendant's avoiding submission of his/her accounts the judge can request plaintiff to take oath.

Plaintiff bears the burden of proof both in the American and European Community law. Plaintiff must prove by a preponderance of evidence that it has suffered injury causally linked to a violation of the antitrust laws. Plaintiff also bears

the burden of proving damages. Owing to the difficulty in establishing antitrust damages with exactness, the standard is less stringent than the reasonable degree of certainty required for proving injury. Yet, the damage award cannot be based on speculation or guesswork.

Article 2 of the Regulation 1/2003 ("*Modernization Regime*") provides that the burden of proving an infringement of Article 81(1) or Article 82 of the EC Treaty shall rest on the party alleging the infringement while the burden of proving that the conditions of Article 81(3) have been met rests with the party seeking to rely on that provision.

In France, burden of proof lies with both the plaintiff and administration in cartel or abuse of dominant position cases (Fourgoux, J.L., Djavadi, L., 2005, p.30). French system also provides a different mechanism; Ministry of Economic Affairs can intervene to submit observations with a view to helping the plaintiff to establish breach (Article L470-5 Com. Code). Documentary evidence is accorded greater value.

In Germany, more than a certain degree of probability, a high degree of probability is sought and this relatively strict standard of proof may become problematic in actions where Community competition law is invoked (Witz, W., Bader, C., 2005, p.35). Presentation of proof of approximate amount of damage for all type of damages is sufficient in Germany (ibid. p.35).

In the United Kingdom, plaintiff bears the burden of proof. In cases where a prior decision of the OFT, CAT or the European Commission has already established a competition law infringement, the plaintiff needs only prove causation and loss (Mobley, S., Cassels, T., Jones, K., Fyfe, T., Garcia, M., Mann, S., 2005, p.20). There is no general limitation on form of evidence in the United Kingdom in contrary to France and German in where an exhaustive list of forms of admissible evidence exists (ibid. p.20).

Pre-trial discovery is another contested point in competition law compensation suits. Discovery means that a party to a procedure is entitled to require the opposing party to disclose all relevant documents in its possession, i.e. compulsory disclosure of all documents relevant to the case. Common law lawyer is under an obligation

towards the court to disclose all evidence, both supportive and harmful to his case (Woods, D., 2004, p.442). In the course of the discovery procedure, parties to litigation can demand production and inspection of any information from other party concerning the facts in the case. Yet, improper recourse to discovery right would be against confidentiality and professional secrecy rights. In Turkish law there is no such a compulsory disclosure of evidence before or during the trial. Yet, the judge may decide, at his own discretion, examination of the evidence requested by the plaintiff. Similarly, before trials, injured party may request declaratory judgment in order to prevent concealment of evidences.

Little discovery is available in the European Union and parties must specify individual documents to be produced whereas extensive discovery is available in United States [4]. One of the issues related to discovery is accessibility of European Community documents –or evidence collected by the European Community- to the plaintiffs.

There are broad discovery rights in England, compared to other European jurisdictions, which makes England an attractive forum for potential plaintiffs (Mobley, S., Cassels, T., Jones, K., Fyfe, T., Garcia, M., Mann, S., 2005, p.19). Incentives to litigate would undoubtedly increase if discovery procedures were available. But, in the European system of Continental Law an "*American style*" discovery would probably be undesirable because of its high cost and the risk of discovery being abused to obtain competitors' business secrets (Hoseinian, F., 2004, p.4).

Cross examination procedure which means the questioning of a witness by the party other than the one that called him to testify exists in the United States and United Kingdom and this procedure is considered a very useful tool in competition cases. Furthermore, adversarial cross examination method is devised in the American system whereby each party submits their evidences including experts and challenges them face to face. In other words, in adversarial system, each side offers its own evidence including economic ones, often through experts, who are subject to cross examination whereas in Continental Law, court retains experts and expert opinions do not bind courts. Court appointed experts' procedure enjoy the advantage of

ensuring impartiality, but it may suffer from lack of transparency. However, Continental Law is not familiar with cross examination procedure and it is not anticipated this will change for antitrust cases for the time being.

3.7. Competent Court

To determine competent court is a necessary step for initiating a lawsuit and this determination is made according to the procedural law provisions.

Before going into detail on procedural law provisions, the necessity of constituting specialized courts on antitrust violations should be evaluated. Given the complex nature of antitrust involving law and economics at the same time, even so-called easy-to-deal with cartel cases can be very complicated, such an insight looks noteworthy (Carlton, D., 2003, p.14) and forcing firms to deal with rivals at a reasonable price seems not a job for an unspecialized court to decide. On the other hand, first concern in this regard is the danger of turning existing courts into regulatory agencies by imposing a duty to deal with rivals in the market. Even specialized courts should not be the substitute for a regulatory agency where presumably there is a staff having specialized skills in the particular industry (Carlton, D., 2003, p.14).[48] It can be asserted that generalist courts are better suited to enforce key procedural rights which constitute an important part of the case than specialized ones and thus, there is no need to confine competition cases to separate competition courts or separate chambers of commercial courts (Woods, D., 1997, p.70). According to Woods, in order to eliminate the disadvantage of generalized courts, parties to an antitrust case should have knowledge of both economics and law in depth. Specialized courts need to be established depending on the application ratio of private aspect of competition laws.

Other solution would be the further training of judges on antitrust issues since judges' lack of expertise, along with the lack of precedents, constitute an obstacle to competition-based damage actions which might lead to their reluctance to engage in complex economic arguments. This solution is also suggested in the study of Ashurst. According to the Report judges should be equipped with enough knowledge

[48] This subject also relates to the relationship between competition authorities and courts. See next part for further details.

to deal with competition matters (Ashurst, Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Analysis of Economic Models for the Calculation of Damages, prepared by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004, p.121). The FIDE report addresses this solution proposal as follows:

> *Some Member States have taken initiatives to provide training for their national judges in the application of Articles 81 and 82 of EC Treaty, or to create a certain level of specialization within their judiciary, so as to ensure that cases involving more complex questions of application of Articles 81 and 82 of the EC Treaty could be dealt with by judges with specific expertise* (The Modernization of EU Competition Law Enforcement in the European Union, FIDE–The International Federation for European Law-2004 National Reports, p.39)

The only specialized tribunal among the Member States is the CAT in the United Kingdom which was established by the Enterprise Act in 2002. It has jurisdiction to award damages following the adoption of infringement decisions by the OFT and/or the European Commission. Yet, infringement of Articles 81 and 82 can be subject to applications for injunctive relief in trials of an injured party before general courts but not the CAT. Interim injunctions may be sought from the civil courts in the United Kingdom if it is shown that the case is a good arguable one (Mobley, S., Cassels, T., Jones, K., Fyfe, T., Garcia, M., Mann, S., 2005, p.23).

In Germany, although there are no specialized courts for competition, panels within the courts are specialized (Executive summary and overview of the national report for Germany p.3).

In the United States, Federal courts are generalist courts (Wood, D., 1997, p.27).[49]

In Turkish law, there is no specialized court to hear merely competition cases. Therefore, general rules of law of procedure will apply to determine competent court. In civil matters, claims where the amount in controversy does not exceed 5.000 New

[49] Pitofsky from the Federal Trade Commission also expresses that "There is an alternative that is beginning to develop in the United States: some trial judges, excellent trial judges, have obtained the services of some of most distinguished economists as advisers to the judge on economic matters. The advantage is that the adviser is objective and expert and the judge gets the advantage of that kind of input. The disadvantage is that the parties do not know what the advisers say to the judge and cannot cross examine. They may feel that the economic adviser is biased in one way or another. To call it a trend would be perhaps to go too far, but there is experimentation with this."(Pitofsky, OECD, Discussion part, p.75)

Turkish Liras (as of 2005) shall be heard by Peace Courts. Claims exceeding above amount shall be heard by general trial court which is Civil Courts of First Instances. Pursuant to Article 4 of the TCC, law suits arisen from the disputes having commercial nature for both parties under the TCC -as for the merchants it is presumed so unless otherwise inferred or explicitly expressed by the merchant that the activity concerned is not related to his business activities- are commercial and within the jurisdiction of commercial courts. Similarly, disputes arisen from the provisions of the TCC are heard in commercial courts.

As regards the determination of venue or in other words, of the place where the lawsuit can be initiated general rule in Turkish law is that lawsuit must be brought in the place of the defendant's domicile. There are also special rules for the venue. For instance, lawsuits arisen from tort law can be brought in the place where the tortious act has been committed to pursuant to Article 21 of the Turkish Procedural Law. Additionally, Article 2 of the Turkish Procedural Law sets out that actions can be brought where the effects has occurred if the infringement has an impact within the boundaries of Turkey.

In France, one can bring action in place of infringement, place where the effects are felt or damages are occurred and in the country having the closest connection (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004 p.98, 99).

In the United Kingdom one can bring action in place of infringement and place where the effects are felt or damages are occurred which provides a broad range of private enforcement application as underlined by the *Provimi* judgment (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004 p.98, 99). The conclusion is that, under Community law as applied by English courts, a purchaser based in one Member State has standing to bring a damage action against the subsidiary of a cartel member based in another Member State.

In Germany, action can only be brought in place where the effects are felt or damages are occurred (Study on the Conditions of Claims for Damages in case of Infringement of Community Competition Rules, Comparative Report, prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004 p.98,99). Contrast to the *Provimi*, in *Max Boegl* decision (Max Boegl Bauunternehmung et al v Hanson), the court held that purchasers of cement purchasing at cartel prices could not claim damages unless they had been individually targeted by a market-sharing cartel. This is clearly much narrower than the effect of the decision under English law, and introduces a much stricter requirement as to causation of loss (Woods, D., 2004, p.441).

It is obvious that these kinds of discrepancies constitute an obstacle to the parallel application of Community competition law. Max Boegl decision can be criticized since it limits application of private enforcement for purchasers in a case where the plaintiff had not too many options other than lodging the suit in Germany. A less strict approach to venue would facilitate private enforcement and provide Community wide detection of infringements which will ensure, in the end, protection of the competitive environment throughout the Community.

3.8. Relationship between Judiciary and Competition Authorities

Existence of two different authorities being involved in the same case creates the risk of conflicting decisions, which in turn, jeopardize proper application of law. The risk of conflicting decisions is inherent in the dual system created by competition laws; because, both competition authorities and courts may be under a duty to decide on the same matter. It is partly attributable to the diversity of functions which each authority must perform. The possibilities of conflict are numerous: For instance, one authority might rule that an agreement is void in private law sense, while the other considers that it is not contrary to the public interest and does not infringe competition law rules. Similarly, the court of the case might rule that an abuse of dominant position is unlawful whereas the competition authority considers that it does not harm the public interest, vice versa. Such conflicts may cause impediment of legal consistency and confidence. In order to avoid these kinds of

conflicts, legal nature of the relation between courts and competition authorities should be specified by law.

As it was previously held, rulings of competition authorities through negative clearances and exemptions which establish that agreement in question is not infringing law shall have a binding impact upon the decisions of judiciary since the duty of executing that kind of ruling has been exclusively given to competition authorities by law. Yet, fines or injunctive remedies imposed by competition authorities after investigation phase and their final decisions shall not be binding on courts.

It is doubtless that as an autonomous administrative authority, competition authorities have been given very extensive examination and investigative powers and performs semi-judicial activity (Öz, G.A., 1996, p.35). However, it is an administrative body, not a judicial organ.[50] As a result, administrative decisions shall not be binding upon judiciary in line with the principle of judicial independence.

In Turkish law, the TCA has not made any depiction as to the matter whether courts have to adjourn proceedings and refer the case at hand to the Competition Authority till it gives a decision on the existence of infringement. In the event that courts decide to refer the case to the Competition Authority (although they are not under an obligation to be bound by the decisions of the Competition Authority under Turkish law) or, at least, to take decisions of the Competition Authority into consideration *ex officio,* the evidence value of the previously given Competition Authority decisions is not definite.

According to the decision (*decree of dissolution*) given by the Turkish Court of Cassation in 1999, in order to award damage to the case of abuse of dominant position the court shall refer the case to the Competition Board for its determination on the abuse. According to this decision, it is not legally appropriate to decide without taking into account whether or not the plaintiff had applied to the Competition Authority; if he had not, then the court is to adjourn the proceeding till

[50] However, according to Yılmaz, the Competition Board is a judicial authority in broader sense and the Supreme Election Council, for instance, is also a judicial authority in this sense (Yılmaz E. Rekabet Kanunu'nun Uygulanmasında Usul ve İspat Sorunları, Perşembe Konferansları 2, Rekabet Kurumu Yayınları, Ankara, 1999, p.112).

such an application is lodged and the Competition Authority gives its decision on the matter (Yargıtay 19. HD. 1999/3350E., 1999/6364K.). According to İnan, that ruling is not appropriate since the lawsuit basically depends on tort law and given that even in penal law cases, the Court of Justice can determine the element of violation of law independently from the decisions of the Penal Court (İnan, N., 2002, p.597-598).[51] Similarly, the Court should act independently from an administrative authority *a fortiori*. Yılmaz is in the identical viewpoint and according to him, Private Law Court should not adjourn proceedings in all the cases easily, especially in cases where the Competition Authority is at the beginning of its investigation (this might even lead to the liability of the judge on the grounds that he/she neglected to enforce law); because, Private Court investigates private law violations which are different from public law investigations and considerations (Yılmaz, E., 1999, p.115). Reverse situation is also probable. Acting on the grounds of public policy considerations, Public Law Courts can investigate cases which were previously decided and finalized by Private Law Courts.

In the another similar decision of the Court of Cassation, it was found not appropriate to decide on damage claim since the Competition Authority had decided that the TCA had not been violated. Pursuant to the Court, local court had to wait for the afore-mentioned decision's legal review at the Council of State since coercion or duress was not involved in the case (Yargıtay 19. HD. 2002/2827 E., 2002/7580 K.).

Considering that the private law mainly proceeds upon the submissions of parties in contrary to public law in which the absolute reality should be attained, it is certain that examination realized by the Competition Authority would be broader than of the courts and thus, should be attributed greater value. Decisions of the Competition Authority cannot be even deemed as binding evidences in Turkish law, since binding evidences can only be created by law (İnan, N., 2002, p.598). However, in a very recent decision of the Court of Cassation, the court has given decree of dissolution without making any reference to the necessity of waiting Competition Authority's view or decision on the matter (Yargıtay 19. HD.

[51] Pursuant to Article 53 of Code of Obligations; judge is not bound by the acquittal decision of penal court ….. while deciding on the existence of fault. Penal Court's decision is not even taken into account while assessing amount of the damage and determining the fault.

2004/9634E., 2005/4463K.). This decision is to be welcomed because, other than the cases where the court is convinced/believed that it had better to wait for the Competition Board decision it shall continue proceedings and decide infringements of the TCA without referring the case to the Competition Authority. On the other hand, court decisions shall be binding upon competition authorities. However, it can be noted that Board decisions would constitute highly weighted discretionary evidence in compensation suits (Öz G., 2000, p.189).

According to İnan, waiting for the decision of the Competition Authority is not appropriate from the angle of cost-effective litigation principle as well since it leads to undue extension of the trial. A comprehensive investigation takes at least two years and when the appeal process before the Council of State has been added, total time lapsed would reach to minimum three years (İnan, N., 2002, p.597). Additionally, compensation suits merit on tort and illegality (as for the "*against-law*" element) which shall be determined by judiciary (ibid., p.597) to the extent reasonably necessary for the private enforcement. In a parallel fashion, the Competition Authority should decide independently from the judiciary and it should not be obliged to wait for the final decision of the judiciary. Otherwise, operation of the Competition Authority which has to be concluded in certain time periods according to the TCA can be easily blocked through false trials.

Similarly, both competition authorities and judiciary may decide upon the invalidity of an agreement or a decision. It is doubtless that the Civil Court has jurisdiction to examine whether a contract at hand is against the TCA. However, according to Topçuoğlu, invalidity can solely be determined by the Competition Authority and once an exemption is granted, invalidity claims cannot be brought forward before courts any longer (Topçuoğlu, T., 2001, p.290, 292). Courts shall only abide by the individual exemption decisions of competition authorities since they remove illegality element in an agreement (İnan, N., 2002, p.615, Gürzumar, O., 2005, p.194).

Same problems are also valid between administrative and civil law courts. In other words, the Council of State may decide that there is no infringement of law whereas civil court decides contrary. Aslan states that courts are bound by legally

finalized decisions of the Competition Authority (Aslan, Y., 2001, p.416). However, Öz is against this view (Öz, G.A., 2000, p.188). In order to prevent such a discrepancy an amendment should be made in the TCA similar to the expropriation law whereby it has been set forth that Civil Courts are obliged to adjourn proceedings until the Administrative Court's decision (Eğerci, A., 2005, p. 265). On the other hand the Council of State would not be bound by the decisions of Civil Courts. Notwithstanding the above, it is highly probable that conflicting decisions will emerge and they will be experienced in the recent future.

In cases where there were no prior decisions of the Competition Authority, the possibility of the appointment of the Competition Authority by the court as a mandatory expert to the case should also be taken into account. Retaining the Competition Authority as the mandatory expert can only be possible through an explicit provision.[52]. Since there is not such a statutory depiction of that kind in Turkish law, the matter would be within the discretion of courts. Therefore, even the cases where the Competition Authority retained by judge, the judge will not be bound by the Competition Authority's opinion.

It would also be appropriate to inform the Competition Authority of the infringement when it is known by the court (İnan, N., 2002, p.601); because, the infringement may fall within the scope of the duty given to the Competition Authorities by law and the Competition Authority can find appropriate to initiate an investigation *ex officio*.

In the United States, decisions of the DOJ are given preclusive effect. Enforcement guidelines or consent decrees of government agencies are not binding on courts in the United States as well (Vance, S., 1997, p.117). In the European Union, decisions of the Competition Authorities are regarded admissible but not binding. As to the preliminary ruling procedure of the Community law, the ECJ added in its *Master foods* decision that, where the outcome of a dispute in a national court depends on the outcome of an appeal against a Commission decision, the national court should stay its proceedings pending till the final judgment of the Community court, unless it thinks that it would be appropriate to make an Article

[52] It is similar to the statutory obligation to retain High Council of Health or Forensic as mandatory experts where the law requires.

234 reference to the ECJ for a preliminary ruling on the validity of the Commission decision.[53]

Article 16 of the EC Treaty incorporates the *Master foods* case law obligations requiring national courts to be bound in a specific case by any previous Commission decision (subject to any contrary ruling by the Community Courts, either on an Article 230 appeal or following an Article 234 reference) and not to adopt decisions conflicting with prior or contemplated Commission decisions. In the latter case, national courts, if necessary, should stay proceedings until the finalization of the Commission decision. This is the outcome of the thoughts regarding Community competition rules as a mater of public policy. Article 249 of the EC Treaty provides that a decision of the Commission is binding upon the person to whom it is addressed regardless that the Commission's decision has been upheld on appeal by the ECJ. Thus, a would-be litigant in an action merited on the Community competition law would be in a much better position if it had benefited from a Commission decision establishing that the conduct complained of was an infringement of Article 81 or 82 (Whish, R., 1986, p.281).

Article 15 of the Regulation 1/2003 empowers national competition authorities and the Commission where coherent application of Article 81 or Article 82 so requires submitting written observations (or oral observations with the permission of the court in question) to national courts on issues relating to the application of those articles. As regards the role of the Commission decisions on national courts, the Commission has acknowledged that his observations are not legally binding on national courts, and has stated that it intends to use its right sparingly, and generally only in appeal cases. Clearly, however, any observation from a competition authority, and particularly from the Commission, will carry a great deal of persuasive weight on the overall prosecution of the case. How the courts will react to these observations is an area of great uncertainty. Plus, these observations' compatibility

[53] Pursuant to the mentioned article, the ECJ shall have jurisdiction to give preliminary rulings concerning the interpretation of the EC Treaty, the validity and interpretation of acts of the institutions of the Community and the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

with Article 6 of the European Convention on Human Rights creates another problem in this regard.[54]

In conclusion, legal relationship between competition authorities and courts is ambiguous and should be defined either by law or precedents. Considering that mostly non-specialized courts hear claims, it is crucial to determine the function of the Competition Authority in proceedings. Competition Authority's decisions will not be binding on courts unless otherwise provided by law. Therefore, it is the sole authority of courts to decide on the tortuous act and the infringement of law unless this authority is vested in the Competition Authorities. However, a prospective litigant should first lodge a complaint to the Competition Authority, where possible, to acquire a decision as to the infringement which would undoubtedly have a persuasive effect on the judiciary.

3.9. Limitation Periods

In Turkish tort law limitation period ("*statue of limitation*") for indemnification claims pursuant to Article 60 of the Turkish Code of Obligations is one year that starts to run from the time of being cognizant of either the damage or the infringer by the plaintiff. After ten years having passed from the date of the infringement the plaintiff may encounter statue of limitation defense from the defendant which removes admissibility of his/her claim. In continuous infringements limitation period shall not start to run. Limitation period for lawsuits should cease running when competition authorities institute proceedings. Such a conclusion is preferable and does facilitate private litigation since only after an investigation injured parties could decide on bringing action more clearly. An explicit expression on this matter should be given place in the TCA.

In the United States, Clayton Act provides a four-year statute of limitation for private antitrust actions which begins to run when plaintiff suffers injury from an antitrust violation (Martin, S., 2005, p.81).

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[54] This Article sets forth foundations of fair and impartial exercise of jurisdiction in civil or criminal actions. Only an "*independent and impartial tribunal established by law*" can hear cases and thus, courts should be free of any other authorities' views, decisions etc., including of the Commission in this case.

The limitation period for bringing damage claims based on competition law infringements in civil courts of the United Kingdom is six years commencing from the date on which the cause of action accrued. For a claim brought before the CAT, plaintiff will have two years from the later of the date on which the relevant infringement decision of the OFT, CAT or European Commission is no longer appealable or the date on which the action accrued (Mobley, S., Cassels, T., Jones, K., Fyfe, T., Garcia, M., Mann, S., 2005, p.20). In Germany, regular period is three years from the end of the year in which the claim arose and the plaintiff be cognizant of the facts on which the claim is based and irrespective of such knowledge lasts in ten years from the date the claim arose (Witz, W., Bader, C., 2005, p.35). In France limitation period is ten years before commercial courts (Fourgoux, J.L., Djavadi, L., 2005, p.31).

CHAPTER 4

CONCLUSIONS

Private enforcement of competition law ensures effective enforcement of competition rules by, to a certain extent, shifting the enforcement burden from regulatory bodies to private parties. Without private enforcement, it is possible for anti-competitive conducts to go undetected and unchallenged by any public authority, thus adversely affecting individuals as well as the economy itself. Although there is a huge literature in the United States which claims that damage suits in antitrust infringements may have detrimental effects on the economy when they are employed massively and with motives other than pursued by law; competitive environment cannot be duly ensured without the presence of an individual control system.

Private enforcement of competition law has fallen behind public law enforcement in laws presented in this study, other than those enforced in the USA. Realizing this fact, the European Commission, has recently focused on the enhancement and facilitation of private enforcement in the Community competition law. The lagging behind of the EU in this aspect takes its roots from the cultural and traditional differences in the understanding of liability law between Anglo Saxon Law and Continental Law. Anglo Saxon law tradition is inclined to leave the matter to individual action, whereas Continental Law is in more favor of strengthening regulatory mechanisms. Similar to Continental Law, the culture in the Community law enforcement can be observed as institution-centered where the enforcement depends highly on institutions regulating, developing and monitoring the field. Such a tendency causes individuals to become indolent whilst following their rights. Additionally, the applicability of private enforcement increases with the industrialization level and individual initiative. Therefore, one cannot easily

anticipate the "*American style*" immense individual initiative in Europe in the near future.

As part of a relatively newly emerging field, private law aspect of the Turkish competition law has been hitherto applied only in a few instances before the Turkish Courts; yet, there is no exact measurement at hand as to the application ratio thereof. This is partly due to the fact that decisions of the courts, especially of the first instances, are not regularly published in Turkey. Only a few case laws could have been accessed due to the reason mentioned above and contributed to this study. These were the decisions of the Court of Cassation and the Court has not engaged itself to the merits of the case. Thus, it has not been possible to elaborate private enforcement of competition law in Turkey comprehensively since such case data is very limited.

Private enforcement *prima facie* evokes consumers' right to bring action although protecting consumers is not its first concern of competition laws. All damaged persons have the right to bring action in laws which have been examined in this study, including the Turkish law; but, as far as the consumers are concerned, practical and procedural challenges detain them from exercising this right. Considering that actions for damage are perceived more strictly in Continental Law; and that procedural mechanisms such as class actions and pre-trial discovery rights are not envisaged, and the damage is proportionally very small for each individual, the consumers' chance to become successful in trials is very low. On the other hand, denying the standing of consumers would highly limit the application of private enforcement and thus, lessen competition law's efficient application in general. As an interim solution, it is proposed that enactment of provisions for antitrust cases that allow professional and consumer organizations to recourse to civil courts in order to obtain injunctive decisions would be beneficial for consumers. Plaintiff's right to demand injunctive reliefs (*cease and desist orders*) before courts should also be given place in the TCA, although general rules in Turkish law enable the parties to litigation to request injunctive relieves.

Likewise, indirect purchasers may not become successful in such trials, since in most of the cases they were able to pass on their damage to their purchasers and

finally to consumers through overcharges (*spill-over effect*). As a result, such damage awarding to indirect purchasers may result in duplicate recoveries.

Requirement of the protective purpose of the norm also hinders the indirect purchasers' chance to become successful in trials; since the protection scope of the norm is considered to be limited to groups whose protected assets and/or interests were directly injured as a result of infringement. Similarly, tertiary victims or, in other words, "*persons harmed reflectively*" such as undertakings procuring raw material, providing maintenance services or leasing equipment to the directly injured, cannot bring action where the protective purpose of the norm applies.

Under Turkish law, indirect purchasers who have passed on the damage arisen from the antitrust infringement have probably not been able to demand such loss since they did not suffer it personally. On the other hand, considering that all damaged persons are granted with the right to claim damage by the TCA, the norm therein should be interpreted as protecting not only the direct purchasers or competing undertakings in the market, but also consumers and indirectly injured undertakings. Denying the standing of these groups in the first place, on the ground that they are not covered by the protective purpose of the norm would be against the purposes sought by effective private enforcement of competition law. However, it is very difficult to expand the scope of the provision to persons harmed reflectively. Nonetheless, as long as a plaintiff is able to prove that the act is the proximate cause of the damage; he should be allowed to state his case.

Observing the subject from the legal base of claims, it can be said that obligation arisen from the antitrust infringement sources from tort law. It is also possible to base such claims on contractual liability in cases where there is a contractual relationship between the parties involved. In order to eliminate hesitations in judicial interpretation, the TCA should refer to the general provisions of tort law. As a requirement for establishing tort liability, fault should be sought to hold the infringer liable. Removing fault requirement completely from damage claims seems problematic due to the complex nature of antitrust cases. *Per se* approach towards cartel agreements that lead to a liability without fault (*strict*

liability) should be approached with prudence keeping in mind that cartels may be generating efficiencies for individuals and the society.

The scope of liability should be widened to include both agreements restricting competition and cases of abuse of dominant position. As it is stated in the *Crehan* judgment of the ECJ, remedy should be available to victims of breaches of Article 81, and by analogy, Article 82. Considering that Article 57 of the TCA is a more general clause that allows all damaged persons to claim damage, it can be concluded that both Article 4 (which outlaws agreements and concerted practices restringing competition) and Article 6 (which outlaws abuse of dominant position) are within the content of private law liability of the TCA. However, agreements which are granted exemption cannot be treated within this scope since they enjoy a legitimate cause. In order to eliminate this ambiguity, Article 56 (which regulates the invalidity of the agreements that are in contrary to Article 4) of the current TCA should be amended in a manner to comprise cases of abuse of dominant position. Mergers and acquisitions that have to be notified to competition authorities when they are exceeding certain thresholds cannot be considered within the scope of private enforcement; since, if these conglomerations are not notified in advance and come to existence, infringement will appear either as an abuse of dominant position or as agreements restricting competition. It should be also noted that mentioning contracts along with agreements in Article 56 lead to a repetition since both indicates the same. Therefore wording of Article 56 should be simplified by giving place merely to agreements.

It is also very difficult to calculate and set the damage in all cases with exact figures due to the fact that most of the competition cases highly require sophisticated economic analysis and hypothetical estimations of how markets work. In cases of abuse of dominant position and exclusionary or predatory conducts that lead to loss of profit; earning-based, market-based or asset-based valuations of business can be employed. Price-based estimation methods would be particularly useful for the calculation of actual damages of indirect purchasers or consumers in cartel overcharge cases. However, when applying a price-based estimation, it is of extreme importance to distinguish price increases resulting from market conditions, but not

from the price-fixing itself. Consequently, one method which mostly fits the case can be elected and other methods can be used to verify the elected method.

All these difficulties in calculation have been asserted as the justification base for the treble damage remedy; although, there is an ongoing debate in the United States on the treble damage's over-implementation. It should be taken into account that the main purpose behind this United States-originated remedy is to encourage the damaged persons to sue, but not to impose an unfair penalty on undertakings. Therefore, in the current TCA it is proposed that Article 58 be amended, where presently the plaintiff may claim three times the damage, with the indication that the plaintiff may claim up to three times the damage, subject to the discretion of the judge.

Amongst the laws examined herein, treble damage remedy is only envisaged in American and Turkish competition laws. Hopefully, when Turkey becomes a full member of the European Union, granting treble recovery will cause Turkey to become a venue for antitrust infringements which have the character of affecting trade between the Member States. Additionally, in the Community law context, a less strict approach to venue would facilitate private enforcement and provide Community-wide detection of infringements which will eventually ensure protection of the competitive environment throughout the Community.

Proving infringement is also a problematic issue, since it requires a special economical analysis and expertise which cannot be easily managed by an average plaintiff. In most of the cases, proof depends highly on the evidence which belongs to the defendant. Considering the importance of unofficial documents particularly in cartel cases, obtaining these documents or at least being aware of their existence creates an obstacle to private enforcement, especially where there is no prior decision of competition authorities. As for Turkish law, the best way for plaintiffs is to lodge complaints to competition authorities before bringing action since competition authorities enjoy broader authority to investigate infringements. This method prevents unduly extension of trials, and besides, decisions of the competition authorities disposing that the law has been breached strengthen the plaintiffs' position before the courts.

Relationship between antitrust authorities and the judiciary should also be defined in a way to eliminate conflicting decisions and to increase efficiency of the implementation of law. Compensation suits merit on tort law and the illegality (*against-law*) element should be determined by the judiciary to the extent reasonably necessary for private enforcement. Courts should take into consideration the decisions of the competition authorities; yet, the judiciary should remain independent from any decisions of administrative bodies and accordingly, must not be bound by decisions of the competition authorities, unless otherwise set forth by the law. Otherwise, operation of competition authorities that must be completed within certain time periods can be easily blocked through false trials.

The judges' lack of expertise, along with the lack of precedents may constitute other obstacles to competition-based damage actions. It is not essential to establish a specialized court, considering that the application ratio of the private enforcement in competition law is very low. On the other hand, judges dealing with antitrust cases should be trained on the economic and legal aspects of competition law.

As a result, judicial authorities should consider each case on its own merits and approach private enforcement cases with a flexible attitude to the extent that statutory law permits. In order to escalate private law enforcement, a plaintiff-friendly environment should be provided. Encouragement of early peaceful settlements, efforts for shortening proceedings, foreseeing solutions for legal fees will also contribute to the promotion of private enforcement.

With respect to the problems peculiar to the Community competition law, the major concern is the risk of its inconsistent application throughout the single market; since, by the introduction of the Modernization Regime, national courts and authorities have been granted with the authority to independently and fully adjudicate Community competition law through their own substantial laws. It is not difficult to predict that infringements which affect the trade between the Member States would increase, as the integration deepens and widens. Particularly as the European Union goes through an enlargement process and increases the number of its Member States, the possibility of inconsistent interpretation and application of Articles 81 and 82 of the EC Treaty by national authorities may rise. Furthermore, the vigorously pursued

single market aim may weaken, since national authorities and courts may not be as eager as the Commission in pursuing the single market objective.

Enhancement of private enforcement both at national and European Community levels in a way to provide a consistency between these laws has become one of the priorities of the Commission. These obstacles can be removed through further community legislation on the national obligation law and the competition law, on the grounds of essential harmonization or approximation which, on the other hand, would be at the expense of national autonomy. Therefore, it is difficult to anticipate harmonization of substantial laws of the Member States in the near future.

In the light of the circumstances presented hereabove, whether it is a useless effort when the legal practice is concerned, to facilitate private enforcement of competition laws, or conversely, a necessity to spread competition culture and to guide persons, (especially first the undertakings in the markets and ultimately the consumers, surrounded by a world in which the competition has increased) and thus, has become more vicious and complicated, is the key policy question that stands before the decision-making authorities. It should be specifically taken into account that without the threat of consumer litigation, wrongdoers can hide violations from competition authorities and consumers will remain the real victims of infringements in most of the antitrust cases.

REFERENCES

"4054 Sayılı Rekabetin Korunması Hakkında Kanun ve Bu Kanun'da Değişiklik Yapılmasına İlişkin Taslak" Sempozyum Bildiriler-Tartışmalar-Panel (7-8 Ekim 2005), Banka ve Ticaret Hukuku Araştirma Enstitüsü Yayınları, 2005

AKINCI, A. (2001) "Rekabetin Yatay Sınırlanması", Rekabet Kurumu Yayınları, Ankara, 2001

AKSOY, N. (2004) "Rekabetin Korunması Hakkında Kanuna Aykırılığın Özel Hukuk Alanındaki Sonuçları", Rekabet Kurumu Yayınları, Ankara, 2004

ANSAY, T. (2002) "Introduction to Turkish Business Law", Kluwer Law International, Turhan Kitabevi, Ankara, 2002

AREEDA-TURNER, (1978) "Antitrust Law", c.II, Boston, 1978

ARKAN, S. (1995) "Ticari İşletme Hukuku", Bankacılık ve Araştırma Enstitüsü, Ankara, 1995

ASLAN, Y. (2001) "Genişletilmiş Rekabet Hukuku", Genişletilmiş 2. Bası, Bursa, 2001

BENEDICT, P.B FRANCIS., (1995) "Subsidiarity and Antitrust: The Enforcement of European Competition Law in the National Courts of Member States", Law and Policy in International Business Vol.27

BORK, R. (1978) "The Antitrust Paradox A Policy at War with Itself", New York, 1978

CANIVET, G. (1997) "The Responsibility of the Judiciary in the Implementation of Competition Policy", OECD, Judicial Enforcement of Competition Law, Paris, 1997

CARLTON, D. (2003) "The Proper Role for Antitrust in an International Setting", Chicago, 2003
http://gsbwww.uchicago.edu/fac/dennis.carlton/research/The%20Proper%20Role%20for%20Antitrust%20in%20an%20International%20Setting.pdf
(last visited July 10, 2005)

CARRINGTON, P. (2004) "The American Tradition of Private Law Enforcement", 5. German Law Journal, No. 12, 1 December 2004, Special Edition, 2004

CAVANAGH, E. and KLAWITER, D. ZSCHOCKE C. (1999) "Class Action Litigation in the United States, Antitrust Litigation as a Case Study", 1999
http://www.morganlewis.com/pubs/01B7AE21-A921-4892-96CF8E0EC68E46CE_Publication.pdf
(last visited July 10, 2005)

CLIFFORD, A. J. (1999) "Private Enforcement of Antitrust Law in the EU, UK and the USA", Oxford University, 1999

INTERNATIONAL CHAMBER OF COMMERCE DOSSIERS (1993), "Competition and Arbitration Law", Paris, ICC Publishing S.A., 1993

DERINGER, (1968) "The Competition Law of the European Economic Community", Chicago, 1968

DESSEMONTET, F. and ANSAY, T. (1995) "Introduction to Swiss Law", Second Edition, Kluwer, 1995

EĞERCİ, A. (2005) "Rekabet Kurulu Kararlarının Hukuki Niteliği ve Yargısal Denetimi", Rekabet Kurumu Yayını, Ankara, 2005

EREN, F. (1998) "Borçlar Hukuku Genel Hükümler", Cilt I, Beta, İstanbul, 1998

EROL, K., (1997) "Judicial Review of Competition Cases", OECD, Judicial Enforcement of Competition Law, Paris, 1997

FOURGOUX, J.L., DJAVADI, L., (2005) "France", Global Competition Review, Special Report: Private Antitrust Litigation, London, United Kingdom, 2005

GINGSBURG, D.H., (2005) "Comparing Antitrust Enforcement in the United States and Europe" Oxford University Press, London, 2005.

GÜRKAYNAK, G., (2003) "Türk Rekabet Hukuku Uygulaması İçin "Hukuk ve İktisat" Perspektifinden "Amaç" Tartışması" Rekabet Kurumu Yayını, Ankara, 2003.

GÜRZUMAR, O., (2002) "4054 Sayılı Rekabetin Korunması Hakkında Kanun'un 4. Maddesine Aykırı Sözleşmelerin Tabi Olduğu Geçersizlik Rejimi", Rekabet Dergisi, Sayı 12, Ekim-Kasım-Aralık 2002, Ankara

HOSSEINIAN, F. (2004) "Passing-on Damages and Community Antitrust Policy, an Economic Background", 2004
http://www.kernbureau.uva.nl/acle/object.cfm/object.cfm/hoseinian.pdf?objectID=71228B22-1D04-48B1-8271976949FFFE5C&download=true
(last visited July 10, 2005)

JOELSON, R. MARK (2001) "An International Antitrust Primer, A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy" Second Edition, Kluwer Law International, Washington D.C., 2001

JOSHUA, J. (2004) "Competition Law Enforcement, Criminalization, Cartel, Leniency and Class Actions: A Look into the Future", Competition Law Insight, London, 2004

JOSHUA J. and KLAWITER, D. (2002) "Step Forward or Another Complication?", The United Kingdom Criminalization Initiative, Antitrust Magazine, the IP/Antitrust Intersection: Promoting Competition and Innovation, Vol:16, No:3, Chicago, 2002

KLEES, A. (2006), "Breaking the Habits: The German Competition Law after the 7th Amendment to the Act against Restraints of Competition", German Law Journal, No.4, 2006
http://www.germanlawjournal.com/article.php?id=719
(last visited May 2, 2006)

KOOB, C. and VANN, D. and ORUC, A. (2005) "Developments in Private Enforcement of Competition Laws-Introduction", 3-8, Global Competition Review, Special Report: Private Antitrust Litigation, London, United Kingdom, 2005

KUNTALP, E. and ÖZDEMİR A. and ARIKEL, S. (1999) "Rekabet Hukukunda Temel Yaklaşımlar: Chicago ve Harvard Okullarının Rekabet Kanunu Açısından Karşılaştırılması", Perşembe Konferansları, Rekabet Kurumu, Ankara, 1999

KORAH, V. (1997) "An Introductory Guide to European Communities Competition Law and Practices", Sixth Edition, Hart Publishing, Oxford, 1997

LANDOLT, P. (2006) "Modernised EC Competition Law in International Arbitration", Kluwer Law International, The Netherkands, 2006

LOPATKA, J. and PAGE, W. (2003) "Indirect Purchaser Suits and the Consumer Interest", 2003
http://www.law.ufl.edu/faculty/publications/pdf/indir1.pdf
(last visited July 10, 2005)

İNAN, N. (1999) "Rekabet Hukukunun Diğer Disiplinlerle İlişkisi", Rekabet Kurumu Perşembe Konferansları, Ankara, 1999

İNAN, N. (2002) "Rekabet Hukuku Uygulamasında Adliye Mahkemelerinin Rolü", Ankara Barosu Uluslararası Hukuk Kongresi, Ankara, 2002

MARTIN, S. (2005) "United States", Global Competition Review, Special Report: Private Antitrust Litigation, London, United Kingdom, 2005

McDAVID, J. and WEBER, H. (2005) "European Union Private Actions", The National law Journal, April 25, 2005

MILLER, L.R. and JENTZ G.A. (1999) "Fundementals of Business Law", Fourth Edition, West Educational Publishing, United States, 1999

MOBLEY, S. and CASSELS, T. and JONES, K. and FYFE, T. and GARCIA, M. and MANN, S. (2005) "England and Wales", Global Competition Review, Special Report: Private Antitrust Litigation, London, United Kingdom, 2005
OLSEN, G. (2005) "Actions for Damages", Competition law Insight, London, 10 May 2005

ÖZ, G.A. (1999) "Competition Law and Practice in Turkey", European Competition Law Review, Vol. 20-3, 1999

ÖZ, G.A. (1996) "New Era in Turkey The Act on The Protection of Competition", Turkey's Profile towards European Union, 1st Edition, İstanbul, 1996

ÖZ, G.A. (2000) "Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması", Rekabet Kurumu Yayınları, Ankara, 2000

PAGE, W. (1996) "Proving Antitrust Damages: Legal and Economic Issues", American Bar Association (ABA), Chicago, 1996

POSNER, R. (1979) "The Chicago School of Antitrust Analysis", 127 University of Pennslyvania, 1979

ROACH, K. and TREBILCOCK M.J. (1996) "Private Party Access to the Competition Tribunal", Competition Policy Bureau, Osgoode Hull Law Journal Vol.34 No:3, 1996

SANLI, K. C. (2000) "Rekabetin Korunması Hakkında Kanun'da Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği", Rekabet Kurumu Yayınları, Ankara, 2000

SCHWARTZ, W. (1980) "Economic Critique", Georgetown Law Journal, NJ, Washington, 1980

SHUGHART, W. (1990) "Private Antitrust Enforcement, Compensation, Deterrence or Extortion?" Regulation, the Cato Review of Business & Government, Cato Institute, NW, Washington, 1990

TOPÇUOĞLU, M. (2001) "Rekabeti Kısıtlayan Teşebbüsler Arası İşbirliği Davranışları ve Hukuki Sonuçları", Rekabet Kurumu Yayınları, Ankara, 2001

UYGUR, T. (2003) "Açıklamalı İçtihatlı Borçlar Kanunu, Sorumluluk ve Tazminat Hukuku", Seçkin Yayınları, Ankara, 2003

VANCE, S. (1997) "Judicial Review of Competition Cases", OECD, Judicial Enforcement of Competition Law, Paris, 1997

WEATHERILL, S., (2006) "Cases and Materials on EU Law", 7th Edition, Oxford University Press, New York, 2006

WEINTRAUB, R. (2000) "Globalization's Effect on Antitrust Law", New England Law Review, Vol.34:1, 1-28, Boston, 2000

WHISH, R. (1986) "Competiton Law", Fourth Edition, Butterworths, London, 1986

WHITE, L.J. (1998) "Private Antitrust Litigation; New Evidence, New Learning", MIT Press, Cambridge, Massachusetts London, England, 1998

WHITE, L. (2002) "Antitrust During the Clinton Administration: An Assessment, Presented at the Conference on High Stakes Antitrust: The Clinton Legacy", NY, 2002

WITZ, W., BADER, C. (2005) "Germany", Global Competition Review, Special Report: Private Antitrust Litigation, London, United Kingdom, 2005

WOODS, D. (1997) "Standards of Proof in Competition Cases", OECD, Judicial Enforcement of Competition Law, Paris, 1997

WOODS, D. (2004) "Private Enforcement of Antitrust Rules Modernization of the European Union Rules and the Road Ahead", Loyola Consumer Law Review, Chicago, 2004

YILMAZ, E. (1999) "Rekabet Kanunu'nun Uygulanmasında Usul ve İspat Sorunları", Perşembe Konferansları-2, Rekabet Kurumu Yayınları, Ankara, 1999

DOCUMENTS

"EU Competition Policy and the Consumer", (2004) European Commission, Publication Office, Luxemburg, 2004

"Antitrust Enforcement and the Consumer" US Department of Justice, Washington D.C.,
http://www.usdoj.gov/atr/public/div_stats/9142.pdf
(last visited July 10, 2005)

Council Regulation (European Communities) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and the Enforcement of Judgments in Civil and Commercial Matters, Official Journal of European Communities, 2001.

Council Regulation (European Communities) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal of European Communities, 2003

European Commission, "The Application of Article 85 and 86 of the EC Treaty by National Courts in Member States", Brussels 1997 (referenced as "EC Report")

FIDE (2004) "European Union and European Competition Law and Policy: The Reform of Competition Law Enforcement - will it work?", 2004
http://www.fide2004.org/docs/BROCHURE.pdf
(last visited July 10, 2005)

Judicial Enforcement of Competition Law, OECD, Paris, 1997
http://www.oecd.org/dataoecd/34/41/1919985.pdf
(last visited July 10, 2005)

The European Antitrust Review; a Global Competition Review Special Report, 2005
http://www.globalcompetitionreview.com/ear/eur_atr.cfm
(last visited July 10, 2005)
ASHURST, (2004) "Study on the Conditions of Claims for Damages in case of Infringement of European Communities Competition Rules, Analysis of Economic

Models for the Calculation of Damages" by Emily Clark, Mat Hughes and David Wirth, Brussels, 2004
http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf
(last visited July 10, 2005)

ASHURST, (2004) "Study on the Conditions of Claims for Damages in case of Infringement of European Communities Competition Rules, Comparative Report" prepared by Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Brussels, 2004
http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/economic_clean_en.pdf
(last visited July 10, 2005)

ASHURST, (2004) "Executive Summary and Overview of the National Report for France"
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/executive_summaries/france_en.pdf
(last visited October 13, 2006)

ASHURST, (2004) "Executive Summary and Overview of the National Report for Germany"
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/executive_summaries/germany_en.pdf
(last visited October 13, 2006)

Rekabetin Korunması Hakkındaki Kanun Tasarısı ve Adalet ve Sanayi ve Ticaret Komisyonları Raporları (1/542)" TBMM Dönem:19 Yasama Yılı:3 S.Sayısı: 599

European Commission, Green Paper Damages Actions for Breach of EC Antitrust Rules, Brussels, 19.12.2005, COM(2005), 672 Final (referenced as "Green Paper")
http://europa.eu.int/comm/competition/antitrust/others/actionsfordamages/gp.en.pdf
(last visited March 20,2005)

European Commission, "Notice on Cooperation between National Competition Authorities and the Commission in handling cases Falling Within the Scope of Articles 85 or 86 of the EEC Treaty", OJ.C.313, 15/10/97

European Commission, "Notice on Cooperation between National Courts and the Commission in handling cases Falling Within the Scope of Articles 85 or 86 of the EEC Treaty", OJ.1993 C.39/6

Guidelines on the Effect on Trade ([2004] OJ C101/81)
http://europa.eu.int/comm/competition/index_en.html
(last visited March 20,2005)

INTERNET SOURCES

[1] http://www.independent.org/pdf/open_letters/antitrust.pdf
(last visited June, 15 2005)

[2] United States Department of Justice, Antitrust Enforcement and Consumer, http://www.usdoj.gov/atr/public/div_stats/9142.htm
(last visited June, 15 2005)

[3] EU Competition Policy and the Consumer at http://europa.eu.int/comm/competition/publications/consumer_en.pdf
(last visited June 15, 2005)

[4] McDavid and Weber, The National Law Journal at http://www.hhlaw.com/articles/1835_EuropeanUnion%20Private%20Actions.pdf
(last visited June 7, 2005)

[5] OSTOYICH, J. DECASTRO A., "The Increasing Risks of US Litigation for Global Companies", US: Private Enforcement, The Antitrust Review of the Americas 2006
http://www.howrey.com/docs/USPrivateEnforcement.pdf
(last visited April 03, 2006)

[6] Private Enforcement of Competition Law-Trials and Tribulations, November 3, 2005
www.linklaters.com/pdfs/publications/eucompetition/nov05.pdf

[7] KROES, N. (Member of the European Commission in charge of Competition Policy) "Enhancing Actions for Damages for Breach of Competition Rules in Europe", Dinner Speech at the Harvard Club, New York, 22nd September 2005
http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/533&format=HTML&aged=0&language=EN&guiLanguage=en
(last visited April 03, 2006)

[8] http://www.actistanbul.com/doc/CA8H0HKB.doc
(last visited July 8, 2005)

[9] WOODGATE, T. JELLIS, J. "EU Private Antitrust Litigation" Global Competition Review, London, United Kingdom, 2005
http://www.globalcompetitionreview.com/ear/12_eu_pal.cfm
(last visited March 20, 2005)

[10] United Kingdom Report, Ashurst, Mark Clough QC/ Arundel McDougall, http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports/united_kingdom_en.pdf
(last visited July 9, 2005)

[11] http://www.morganlewis.com/pubs/01B7AE21-A921-489296CF8E0EuropeanCommunities68E46CE_Publication.pdf
(last visited June 7, 2005)

[12] http://europa.eu.int/comm/competition/speeches/text/sp2000_009en.html (last visited June, 15 2005)

[13] http://www.ibanet.org/images/downloads/Janet%20McDavid%20-%20Presentation.pdf, as of July 5, 2005.

[14] German Report, Ashurst, Karl Wach/ Manja Epping/ Ute Zinsmeister/ Eva Bonacker,
http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports/germany_en.pdf
(last visited July 9, 2005)

[15] French Report, Ashurst, Chantal Momège, Nicolas Bessot, http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports/france_en.pdf
(last visited July 9, 2005)

[16] http://www.luc.edu/law/academics/special/center/antitrust/symposium/woods.pdf
(last visited June 24, 2005)

[17] http://www.cato.org/pubs/regulation/regv13n3/reg13n3-shughart.html (last visited June 7, 2005)

[18] http://www.rekabet.gov.tr/word/taslakkanun.doc
(last visited July 9, 2005)

[19] http://europa.eu.int/comm/competition/speeches/text/sp2000_009en.html
(last visited June, 15 2005)

[20] RAY, NEIL., "European Competition Commissioner Advocates for Enhancing Damages for Breach of European Antitrust Rules", October 7, 2005
http://www.antitrustlawblog.com/article-european-competition-commissioner-advocates-for-enhancing-damages-for-breach-of-european-antitrust-rules.html
(last visited April 03, 2006)

[21] OECD, Competition Law and the Policy in the European Union 2005
http://www.oecd.org/dataoecd/7/41/35908641.pdf
(last visited August 27, 2006)

[22] Wurmnest, W., A New Era for Private Antitrust Litigation in Germany A Critical Appraisal of the Modernized Law against Restraints of Competition
http://www.germanlawjournal.com/print.php?id=626 - 59k
(last visited August 27, 2006)

[23] http://www.findarticles.com/p/articles/mi_zdpcm/is_200111/ai_ziff19112
(last visited November 5, 2006)