



***EU-China Trade Project (II)***

中国-欧盟世贸项目(二期)



A project funded by  
the European Union

## LEGAL FOUNDATIONS OF PRIVATE ACTIONS

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## Overview

- Policy Considerations
- Development of Private Enforcement in the European Union
- Legal Conditions in the European Union
- Legal Conditions in the Member States
- Recent Developments as to Passing on Defence



## Policy Considerations

- Two reasons why private enforcement is considered mandatory
  - Public enforcement should be enhanced by private enforcement
  - Objective of public enforcement
    - Protection of competition as such
    - Also: Compensation for victims suffering from infringements against competition rules
  - Objective of private enforcement
    - Compensation for victims suffering from infringements against competition rules
    - Private enforcement enhances public enforcement
    - Additional deterrent effect



## Development of Private Enforcement in the European Union

- Neither competition rules in the Treaty nor EU secondary law (regulation or directive) include any provision on private enforcement
- Until 2001 no case law as to private enforcement by the Court of Justice
- State of national competition law in the Member States heterogeneous
  - Some Member States no private enforcement
  - German Act against Restraints of Competition has always contained a provision on private enforcement
    - Many decisions and important case law relating to abuse of market power, discrimination and unfair hindrance
    - Position of Federal Cartel Office: not sufficient manpower to deal with all infringements; complainants are referred to private enforcement
    - Very few cases on damages in cartel cases



## Legal Conditions in the European Union

- No provision relating directly to private enforcement

- Case law of Court of Justice

  - Courage v. Crehan (CJEU, 21.9.2001 - C-453/99)

    - In 1991, Bernard Crehan, a publican in England, concluded a 20 years lease containing an obligation on the innkeeper to purchase a minimum of specified beers from Courage Ltd at prices specified in Courage's price list. Courage is a British beer brewery with a market share of 19%. In 1993, Courage brought an action against Mr Crehan for the recovery of more than 15.000 £. Mr Crehan contended that the beer tie was contrary to Article 85 of the Treaty (now Article 101 TFEU) and counter-claimed for damages.



## Legal Conditions in the European Union ...

### ■ Case law of Court of Justice ...

#### — Courage v. Crehan (CJEU, 21.9.2001 - C-453/99) ...

- Court of Appeal in London referred case to Court of Justice. According to the referring court, English law does not allow a party to an illegal agreement to claim damages from the other party. So, even if MrCrehan's defence, that the lease into which he entered infringes Article 85 of the Treaty, were upheld, English law would bar his claim for damages.
- Court of Justice: Any individual must be able to claim damages for loss caused to him by a contract liable to restrict or distort competition



## Legal Conditions in the European Union ...

### ■ Case law of Court of Justice ...

#### — Courage v Crehan (CJEU, 21/9/2001 - C-453/99) ...

#### ■ Reasoning of Court of Justice

- (25) *As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (...).*
- (26) *The full effectiveness of Article 85 of the Treaty [now Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 85(1) [now Article 101(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.*



## Legal Conditions in the European Union ...

### ■ Case law of Court of Justice ...

- Manfredi/Lloyd Adriatico (CJEU, 13/7/2006 - C-295/04 to C-298/04)
  - Case in which direct purchasers of insurance services had suffered damages from a price cartel of the insurance companies
  - *(21) Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC [now Article 101 TFEU].*
- The case law of the Court of Justice puts an obligation on the Member States
  - either to construe their national law in a way complying with the ruling of the Court in Courage and in Manfredi
  - or to create such a ground for action in their national law





## Legal Conditions in the Member States

### ■ Civil law systems

- Most Member States belong to the family of civil law systems
- As a rule, general clause in tort law, e.g. Article 1382 French Civil Code
  - Article 1382: *Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.*
- German Civil Code contains a general clause not as wide as the French version but also covering breach of statutory duty
  - Section 823: (1) *A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.*  
(2) *The same duty is held by a person who commits a breach of a statute that is intended to protect another person. ...*



## Legal Conditions in the Member States ...

### ■ Civil law systems ...

- German Act against Restraints of Competition provides even more specifically for private enforcement
  - Section 33(1): *Whoever violates a provision of this Act, Articles 81 or 82 of the EC Treaty [now Articles 101 and 102 TFEU] ... shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement.*



## Legal Conditions in the Member States ...

### ■ Civil law systems ...

- Further encouragement of private actions in the German Act against Restraints of Competition

#### ■ Section 33(3)

- Damages are not excluded because the goods or services have been resold
- When assessing damages the profit gained through the infringement has to be taken into account
- Interest has to be paid starting from the day of infringement

#### ■ Section 33(4)

- For follow-on actions civil courts are bound by decision of the Commission or any other European competition authority



## Legal Conditions in the Member States ...

### ■ Common law

- Tort in common law: Breach of statutory duty
- After the case *Courage v Crehan* had returned from Luxembourg English Court of Appeal found that common law tort known as breach of statutory duty provides a ground for Mr Crehan's claim
- Judgment was later overturned by the House of Lords for other reasons



## Recent Developments as to Passing on Defence

### ■ ORWI judgment of Federal Court of Justice (Germany)

#### — The case

- Papermill Köhler (defendant) had supplied ORWI (claimant) with carbonless paper for the multipart forms
- Four wholesalers acted as intermediates (one of them being a 100% subsidiary of Köhler)
- Cartel of ten producers of carbonless paper
- Commission decision against cartelists of 20 December 2001 (COMP/E-1/36.212)
- CFI and ECJ judgments of 26 April 2007 and 3 September 2009 (T-102/02 and C-322/07)
- ORWI asks for damages suffered by Köhler (223.540,26 €)



## Recent Developments as to Passing on Defence ...

### ■ ORWI judgment of Federal Court of Justice (Germany) ...

- Court of Appeal granted only damages ORWI had suffered as a direct purchaser, but rejected the action as to damages ORWI had suffered as an indirect purchaser
- Federal Court of Justice reversed this decision and remitted the case to Court of Appeal (BGH, 28/6/2011 - KZR 75/10)

#### ■ Reasoning

- In case of a cartel the indirect purchaser has standing for claim for damages against any member of the cartel
- Indirect purchaser carries the burden of proof for any damage suffered by the cartel
- The advantage of the overcharge having been passed-on to purchasers of the next level may mitigate the damage suffered



## Recent Developments as to Passing on Defence ...

### ■ ORWI judgment of Federal Court of Justice (Germany) ...

- Federal Court of Justice reversed this decision and remitted the case to Court of Appeal (BGH, 28/6/2011 - KZR 75/10) ...

#### ■ Reasoning ...

- The respondent carries the burden of proof for any mitigation by benefits received
- Claimant may have all the price details but is not necessarily obliged to supply the respondent with this information which may include business secrets carefully. Interests involved on both sides have to be balanced. Duty to supply information must not result in an unfair discharge of the cartel
- Members of the cartel are liable as joint debtors for all damages suffered through the cartel