INJUNCTIONS AT THE REQUEST OF THIRD PARTIES IN EU COMPETITION LAW

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ABSTRACT

The European Commission recently made significant efforts to encourage the private enforcement of EU competition law, by inducing natural and legal persons who suffered damage as a result of competition law infringements, to bring actions for monetary damages before national courts. An important obstacle to the success of this type of actions is the difficulty to prove and assess the amount of damages. This problem could be evaded by bringing actions for injunctions instead of actions for damages. Surprisingly, however, actions for injunctions have received less attention in the debate as to the private enforcement of competition law. This article investigates the current possibilities to bring actions for such injunctions either in the course of administrative procedures or in the course of civil procedures and suggests proceeding to the introduction of a harmonized action for the cessation of competition law infringements.

Keywords: Competition law; injunctions; interim measures; tort law; unfair commercial practices

§1. INTRODUCTION

In recent years, the European Commission has made significant efforts to increase the private enforcement of EU competition law, by inducing natural and legal persons who suffered loss as a result of competition law infringements, to bring actions for monetary damages before national courts. These efforts have led to a certain increase in damages actions, especially in member states that have introduced new legislation facilitating such damages actions and allowing collective action by groups of victims who suffered similar losses. A steep increase of damages actions, however, did not take place.

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Injunctions at the Request of Third Parties in EU Competition Law

Some of the main obstacles for damages actions appear to be the difficulties of proving and assessing the loss and proving the causal link between the alleged loss and the alleged infringement of competition law. Moreover, as regards the loss suffered by consumers, there will remain practical problems, even if collective action by or in the name of groups of victims is possible. In the case of opt-in actions, the costs of opting in and organizing the procedure may remain high compared to the damages that may be recovered. In the case of opt-out actions costs and practical difficulties of the opt-in procedure are avoided, and the total amount of damages to be recovered will be higher, but practical problems and relatively (too) high costs may arise at the time the global amount of damages needs to be divided amongst the actual victims. Undertakings on the other hand seem less concerned to obtain damages for loss suffered by past competition infringements, than to bring an end to current ones and to regain as soon as possible their ability to compete, to develop their business without being hindered by anticompetitive conduct of competitors, suppliers and purchasers. And indeed, given the practical problems in obtaining compensation by consumers, the best ‘remedy’ for loss caused by anticompetitive conduct to consumers might also for them consist in preventing the further occurrence of it!

Finally, the attempts of the Commission to (further) harmonize the rules relating to damages for competition law infringements may cause resistance from the member states that are opposed to a ‘European intrusion’ in their liability and procedural laws and the creation of a ‘special law of antitrust damages’ separated from general liability law. Although cease and desist orders are also considered as elements of tort law in some legal systems, their harmonization or ‘forced’ introduction in competition cases might encounter less resistance, albeit only because member states are used to the idea of having to implement them on the basis of consumer law directives. Moreover, having a mainly preventive character, they fit very well in the Commission’s private enforcement program which aims, to a significant extent, at preventing competition law infringements, even though this aim has become less visible in the White Paper, which focuses on ‘compensation’, than in the Green Paper. It is therefore a bit surprising


that the Commission has up until now hardly ever mentioned cease and desist orders, or the wider, but related concept of ‘injunctive relief’ in its statements on private enforcement of competition law. Would this be the case because they are harmonized by the Injunctions directive and so there is no need for further harmonization? Or because the opportunities to obtain injunctive relief before the Competition Authorities are more than sufficient and/or harmonized? Or because there has been a spontaneous harmonization of procedures for injunctive relief before the civil courts? Or, would the Commission have lost interest in injunctive relief because of disappointing experiences with the Injunctions Directive in consumer law?

In this article, I will first investigate whether the Injunctions Directive already provides for (some) harmonization in the field of injunctions. Then, I will outline the opportunities to obtain injunctive relief from the competition authorities and the courts. I will compare the situation in Belgium with that in France, the Netherlands, Germany and England. Finally, I will evaluate the results of the comparative research and propose the adoption of a harmonization measure concerning injunctive relief.

§2. THE CONCEPT ‘INJUNCTION’

In this article, the concept ‘injunction’ refers to ‘an order requiring or prohibiting the performance of a specified act’. Orders requiring a party to perform an act are called ‘mandatory’ or ‘positive injunctions’. Orders prohibiting an act are called negative or prohibitory injunctions. In the Injunctions Directive, actions for an injunction refer primarily to actions for ‘an order (…) requiring the cessation or prohibition of any infringement’. These orders are also referred to as actions to cease and desist. Under the heading ‘actions for an injunction’, the Injunctions Directive also orders the member states to provide for other measures, such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement. In this article this element will not be included in the concept ‘injunction’. The Injunctions Directive further orders the Member States ‘in so far as (their) legal system (…) so permits’ to provide for

‘an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day’s delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions’.

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This type of payment will in this article be referred to as a ‘penalty payment’. Further on in this article I will deal with the particularities of several national equivalents of the injunction, in particular with the sometimes confusing issue whether an order to cease and desist from a (competition) infringement can take the form of an order to perform a specific act (for example to resume deliveries to a previous client).

§3. SCOPE OF THE INJUNCTIONS DIRECTIVE AND THE UCPD

The Injunctions Directive is directed at the harmonization of injunctions for the protection of the collective interests of consumers dealt with by the directives included in the annex. The directive is not (directly) concerned with injunctions ordering the cessation of infringements of the Articles 101 (ex Art. 81 EC) and 102 (ex Art. 82 EC) TFEU or of the national competition rules.\(^5\)

The Unfair Commercial Practices Directive (UCPD) is, however, included in the annex to the Injunctions directive and it seems that infringements of Articles 101 and 102 TFEU that affect consumers will often qualify as unfair commercial practices within the meaning of Article 5 §2 UCPD. Article 5 §2 UCPD indeed states that

> ‘A commercial practice shall be unfair if:
> (a) it is contrary to the requirements of professional diligence, and
> (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers’.

Indeed, an infringement of Articles 101–102 TFEU seems to be contrary to the requirements of professional diligence and it will often materially distort or be likely to distort the average consumer within the meaning of Article 5 §2 UCPD.\(^6\)

The UCPD does not deal with unfair practices toward businesses. It does provide, however, that member states need to include legal provisions under which persons or organizations, including competitors, recognized under national law as having a legitimate interest in combating unfair commercial practices may take legal action against unfair commercial practices in business to consumer relationships and/or to bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings. The courts or administrative authorities need to have powers enabling them, in cases where they deem such measures

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to be necessary taking into account all the interests involved and in particular the public interest, to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, unfair commercial practices. If the unfair commercial practice has not yet been carried out but is imminent, the authority needs to be able to order the prohibition of the practice, or to institute appropriate legal proceedings for an order for the prohibition of the practice (Art. 11 (1) and (2) UCPD). This does not, however, imply a straightforward order to the member states to allow competitors to bring actions for injunctions for infringements of the rules implementing the UCPD.

§4. ADMINISTRATIVE INJUNCTIONS FOR COMPETITION LAW INFRINGEMENTS

A. INJUNCTIONS AT EU LEVEL

1. Final injunctions

Europe has a tradition of administrative enforcement of competition law. EU competition law is traditionally enforced by the Commission in the interest of protecting competition as such. Originally the Commission acted mainly on its own initiative, but gradually the number of third parties that complained to the Commission because they suffered from infringements of EU competition law has grown.

Third parties seek not so much the imposition of penalties on the infringers, as decisions ordering the infringers to refrain from their illegal conduct. Given the idea that competition law is an administrative affair, they traditionally turned to the Commission with these requests. As complaints are a valuable source of information to the Commission, the Commission also encourages individuals and undertakings to a certain extent to complain to it. Any individual may make an informal complaint to the Commission and such a complaint may induce the Commission to start an investigation on its own initiative. If it finds an infringement of Article 101 (ex Art. 81) or 102 (ex Art. 82) EC7, the Commission certainly has the power to require the infringer to bring such an infringement to an end.8 For this purpose, pursuant to Article 7 Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

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7 An order to bring an infringement to an end does not require proof of fraud or negligence of the undertaking concerned, see G.A. Sofianatos, Injonctions et engagements en droit de la concurrence, (LGDJ, Paris, 2009) p. 35. See also Bouscant, ‘La faute dans les infractions aux règles de concurrence en droit européen’, 36 RTD eur. (2000) p. 67–98.

positive, orders to do something, e.g. resume deliveries\(^9\) (at least as far as an infringement of Article 102 TFEU is concerned\(^10\)). Structural remedies can only be imposed where either 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. The Commission may also impose penalty payments if there is no compliance with the injunction.\(^11\) However, making an informal complaint is certainly not the most preferable and effective way for a victim of a competition law infringement to obtain an injunction. As mentioned above, an informal complaint may only induce the Commission to act on its own initiative. The Commission is in no way under an obligation to start investigations following an informal complaint. Even if the Commission starts investigations or proceedings, the informal complainant has no procedural rights (e.g. access to the file or a right to be heard, …).

A person or undertaking who claims a legitimate interest has a better option. They may choose to make a formal complaint to the Commission. A legitimate interest will be accepted if the claimant is directly and adversely affected by a competition law infringement (e.g. because of suffering from a refusal to supply) by a dominant undertaking.\(^12\) A formal complaint requires the use of a specific form (Form C), and must be accompanied by comprehensive information in relation to the complaint, including copies of relevant supporting documentation.\(^13\) A formal complainant’s position is stronger than that of an informal complainant. Indeed, the Commission is under a duty to examine carefully the factual and legal elements brought to its attention by means of a formal complaint in order to assess the Community interest in further investigation of a case.\(^14\) Yet, subsequently the Commission may decide not to investigate a case any further because it lacks sufficient Community interest. Before it takes a final decision to reject the complaint, it must inform the complainant by letter of its motivated provisional decision. It must provide the complainant with the opportunity to submit supplementary information or observations within a given time-limit. If the complainant does not respond within the time-limit set, the complaint is deemed to have been withdrawn. If the complainant submits supplementary observations, the Commission takes cognizance of them, and decides either to pursue its investigations or to take a final decision to reject the complaint. A decision to reject a complaint is subject to appeal before the Community

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\(^9\) See e.g. Joined Cases 6 and 7/73, CSC & ICI v Commission [1974] ECR 223. See also Case T-201/04, Microsoft Corp. v Commission [2007] ECR II-3601 (order to disclose interoperability information).

\(^10\) Orders to supply are not feasible where there is an infringement of Art. 101 TFEU: case T-24/90 Automec v Commission [1992] ECR II-2223.


\(^12\) See e.g. CSC & ICI v Commission [1974] ECR 223. As to the legitimate interest of associations of undertakings, consumer organizations etc., see Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty[2004] OJ C 101/65, no. 33 et seq.

\(^13\) Commission Notice on the Handling of Complaints by the Commission under Articles 81 and 82 of the EC Treaty [2004] OJ C 101/65 (hereinafter Complaints Notice), esp. no. 29 et seq.

\(^14\) Ibid., no. 41.
Courts.\textsuperscript{15} If the Commission decides to further investigate the case, it will open a formal procedure, during which the formal complainant has certain procedural rights (e.g. the right to be heard, access to the file, the right to protection for confidential information contained in the complaint). However, the procedure remains one that is controlled by the Commission and directed at the protection of competition itself and not of the private interests of the complainant. The position of a formal complainant is therefore far from comparable to that of a plaintiff in a civil procedure which is directed at the protection of the plaintiff’s rights and interests and where the plaintiff himself controls the procedure, and may for example decide to stop the proceedings because an agreement has been reached with the other party. An administrative procedure, however, has the advantage that the competition authority will assist the claimant in proving the infringement of the competition law.

2. \textit{Interim measures}

A third party’s opportunities to obtain interim relief from the Commission are limited. A third party may try to induce the Commission to adopt interim measures, but it does not have a right to them, not even if it suffers serious loss as a result of a competition law infringement.\textsuperscript{16} The Commission does not even need to give reasons for a refusal.\textsuperscript{17} The complainant has no procedural rights. In interim procedures the Commission formally always acts on its own initiative.\textsuperscript{18} Moreover, the Commission will only order interim measures on the basis of a \textit{prima facie} finding of an infringement ‘\textit{In cases of urgency due to the risk of serious and irreparable damage to competition}’\textsuperscript{19} and not merely to another undertaking. The Commission does not want to intervene in conflicts relating to subjective rights, but to concentrate on the protection of competition itself.\textsuperscript{20} This does not exclude of course that a third party may benefit from measures intended to protect competition as such.

The preconditions for interim measures are threefold: main proceedings must be pending, there must be a \textit{prima facie} infringement, and there must be a situation of urgency due to the risk of serious and irreparable harm to competition. The first requirement is not explicitly mentioned in Regulation 1/2003, but it is accepted by legal

\textsuperscript{15} Ibid., no. 68 et seq.
\textsuperscript{18} Art. 8 (1) Regulation 1/2003 [2003] \textit{OJ} L 1/1.
\textsuperscript{19} Art. 8 (1) Regulation 1/2003.
\textsuperscript{20} Complaints Notice, esp. no. 17; Sofianatos, \textit{Injonctions}, p. 41.
Injunctions at the Request of Third Parties in EU Competition Law

...scholarship. Support for this position is found in the fact that Article 8 (2) Regulation 1/2003 provides that interim measures are limited in time.

The requirement of a *prima facie* infringement of Article 101 or 102 TFEU does not mean that the infringement must be clear and manifest. On the contrary, it means that the degree of certainty that is required for a final decision is not required for interim decisions. The last requirement is that there is a case of urgency due to a serious and irreparable harm to competition. Urgency is not an autonomous condition; it is only an element of the condition of risk of a serious and irreparable harm. The seriousness of the harm is a factual matter. It is not required that an undertaking would be driven out of the market. It is sufficient to demonstrate that it would suffer a serious diminution of its competitive position. The fact that an undertaking is forced to request the opening of an insolvency procedure may constitute a serious and irreparable harm.

An insolvency procedure is however in itself not sufficient if it does not exclude the pursuit of the economic activity of the undertaking. Harm is considered irreparable if it cannot be compensated by a final Commission decision on the illicit character of the anticompetitive practices. The fact that a claim for damages can be brought before the civil courts is not taken into account.

The objective of interim measures is to maintain the *status quo ante*. The nature of the Commission’s interim measures is the same as that of its final decisions. Interim measures need to respect the principle of proportionality. The Commission needs to balance the interests that are at stake. The Commission has been very reluctant to order interim measures. It prefers the parties to seek interim relief in their domestic courts or from NCAs.

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22 Ibid.
24 Ibid., p. 45.
B. INJUNCTIONS AT NATIONAL LEVEL

1. Power of the national competition authorities to grant injunctions for infringements of EU competition law

Following the entry into force of Article 5 Regulation 1/2003 the Commission shares the power to apply the Articles 101 and 102 TFEU with the competition authorities of the Member States. The Co-operation notice provides criteria to determine which authority is best placed to deal with a case. In most instances the authority that receives a complaint will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure where either that authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act.33 The Co-operation notice also contains a number of information and co-operation duties that apply between the NCAs and between the Commission and the NCAs.

2. Final injunctions

Although there are differences between the various legal systems, a third party who complains to a national competition authority will encounter mainly the same advantages and disadvantages as a complainant before the Commission. Informal complaints may only lead a national competition authority to start investigations on its own initiative and do not provide the complainant with any procedural rights.

In all the legal systems under survey third parties who are in a certain way directly and individually affected by an alleged infringement may, however, if they satisfy certain requirements, obtain the more convenient status of ‘formal complainant’. Therefore the complaints usually need to satisfy certain requirements as to form and content.34 In most legal systems, even a formal complaint does not, however, compel

34 For information regarding Belgium, see KB 31 October 2006, Belgian Official Journal 22 December 2006; D. Vandermeersch, De Mededingingswet, (Kluwer, Mechelen, 2007) no. 13–12. For information on The Netherlands, see Chapter 4.1.1. Awb; NMA, Brochure klachten, tips, signalen en besluitaanvragen, 2009, electronically available at www.nmanet.nl (last visited 16.05.2010). In England, OFT set out guidelines on Involving third parties in Competition Act Investigations (electronically available at www.of.t.gov.uk). The OFT recognizes, however, that some complainants may be able materially to assist the OFT in its investigation even where they are not in a position to provide all of the information which is required in a written, reasoned complaint. Such complainants may also be given Formal Complainant status. Different rules apply to the super-complaints process under section 11 of the Enterprise Act 2002. On the super-complaints process, see the OFT’s booklet Supercomplaints: Guidance for designated consumer bodies (OFT514), electronically available at www.of.t.gov.uk/shared_of.t/business_leaflets/enterprise_act/of.t514.pdf (last visited 16.05.2010); OFT, Involving third parties in Competition Act investigations, 2006 electronically available at www.of.t.gov.uk/shared_of.t/business_leaflets/ca98_guidelines/of.t451.pdf (last visited 16.05.2010), hereafter OFT Guidelines 451, §2.20; Regarding Germany, see Schmidt in Immenga/Mestmäcker, Wettbewerbsrecht: Band 2 GWB (C. H. Beck, München, 2007) §54, no. 4.
the NCA to investigate the case. The NCAs remain free to select cases according to their administrative priorities.\textsuperscript{35} In certain legal systems, the NCAs, however, need to notify a provisional rejection to the complainant and give him the opportunity to comment on it and give additional information.\textsuperscript{36} Exceptionally, an NCA has no discretion to reject a formal complaint on the basis of administrative priorities. This is the case in Belgium where the Auditoriaat, a section within the Belgian competition authority, is under a duty to investigate every formal complaint. Only as regards cases that are inadmissible or unfounded it may decide not to investigate them any further. A decision not to investigate the case further needs to be communicated to the complainant, who may appeal it. All complaints the Auditoriaat considers founded are submitted to the Council, another section within the Belgian Competition Authority in order to be decided upon.\textsuperscript{37}

If the NCA starts proceedings, the formal complainant has certain procedural rights such as access to file,\textsuperscript{38} and the right to be heard.\textsuperscript{39} Sometimes the NCA may, however, decide to consult formal complainants and other third parties to a more limited extent, or not at all (e.g. in cartels cases where there is a risk of prejudice to a related criminal investigation).\textsuperscript{40} If the NCA finds that an infringement exists, it may order a prohibitory injunction.\textsuperscript{41} The wordings used by the national laws in this respect differ slightly. The German system is most faithful to the rules set out by Article 7 Regulation 1/2003. Pursuant to §32 GWB\textsuperscript{42} the cartel authority may require undertakings or associations of undertakings to bring an infringement to an end. For this purpose, it may impose on undertakings and associations of undertakings all measures which are necessary to effectively bring the infringement to an end and are proportionate to the infringement established. Exceptionally structural measures can be ordered.\textsuperscript{43}

In Belgium the NCA may according to Article 52 WBEM, order the cessation of the infringement and if necessary impose ‘modalities’ as to how the cessation of the infringement takes place. The WBEM does not give further information as to these ‘modalities’. Article 7 Regulation 1/2003 may however provide guidance to the Council when imposing modalities. In any case, the modalities imposed seem to need to be

\textsuperscript{35} For The Netherlands, see Korsten and van Wanroij, \textit{Nederlands Mededingingsrecht} (Deventer, Kluwer, 2008) p. 75–76, 251 and 321; M.R. Mok, \textit{Kartelrecht} (Kluwer, Deventer, 2004) p. 277. For England, see OFT Guidelines 451, §2.36. In Germany a claimant has no right to an intervention on the basis of §32 GWB if he can protect his rights under §33 GWB.

\textsuperscript{36} OFT Guidelines 451, §2.1 et seq. See also Art. 4.5 and 4.7 et seq. Algemene wet bestuursrecht (hereinafter Awb), \textit{Dutch Official Journal} 1992, 315.


\textsuperscript{38} But this right is not absolute, see England: OFT Guidelines 451, nos. 2.34 and 3.22; Belgium: Vandermeersch, \textit{De Mededingingswet}, 2007, no. 13–10.

\textsuperscript{39} §54 II in conjunction with §56 I GWB.

\textsuperscript{40} OFT Guidelines 451, §3.12.

\textsuperscript{41} Art. L.464–2 I French Commercial Code.

\textsuperscript{42} Gesetz vom 15 Juli 2005 gegen Wettbewerbsbeschränkungen, \textit{BGBl.} I 2114, 2009 I 3850.

\textsuperscript{43} Rehbinder in U. Loewenheim et al (eds.), \textit{Kartellrecht} (Beck, München, 2009) §32 GWB, no. 17.
The proportionate to the infringement and its consequences. The situation is similar in France.

In England, pursuant to sections 32(1) and 33(1) Competition Act 1998, if the OFT finds an infringement to such person or persons as it considers appropriate, it may give directions to bring the infringement to an end. It is not certain that the power to give directions includes the right to impose structural remedies. According to Whish, it would seem, in principle, that a structural remedy to bring the infringement to an end would be justified if the competition law infringement is itself the result of a structural change in the market. Structural remedies will probably not be available on the basis of the Competition Act 1998 as a remedy against serial abuse of a dominant position. In such a case, however, structural remedies under Chapter 11 of the Enterprise Act 2002 may be available.

To ensure that the injunctions are complied with, the NCAs may impose penalty payments.

In the Netherlands, two types of injunctions are distinguished as to whether or not they are supported by penalty payments: ‘burdens under penalty payments’ and ‘binding directions to comply with the law’. When a binding direction to comply with the law is not complied with, the Council can still impose a burden under penalty or an administrative fine on the infringer. The burdens can consist of positive orders or of prohibitions. Also structural measures are possible if they are proportionate to the infringement and necessary to bring it to an end. With the exception of structural measures, the duration of burdens is limited to two years.

In all the legal systems the complainant can benefit from the NCA’s assistance in proving the infringement, but he has the disadvantage that the NCA controls the proceedings. Moreover, the willingness to impose injunctions differs significantly between the member states. In Germany, measures based on §32 GWB are important in practice. As soon as there is a serious concern that an unlawful act will take place (for the first time or after a previous infringement) an order to cease and desist

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51 Rehbinder in Loewenheim at al (eds.), *Kartellrecht*, §32 GWB, no. 1.
(Abstellungsverfügung) can be given. The Dutch Competition Authority is on the other hand very reluctant to impose burdens under penalty payments. The power to impose binding directions to comply with the Competition act has been introduced in order to allow consumer organizations to protect the interests of consumers that benefit from compliance with competition rules more easily. Legal scholars claim however not to understand why a binding direction to comply, which is in fact a burden without penalty payments, could be imposed more easily than burdens with penalty payments. In Belgium final decisions have been taken in only a limited number of cases (51 between 1996 and 2005). In almost half of the cases it was decided that the limitation period had passed. This is ascribed to the limited amount of manpower and means available. Recently, however, the procedures before the Belgian Competition Authority have been reviewed. It remains to be seen whether this will increase efficiency.

3. Interim measures

As to the opportunities to obtain interim measures before the NCAs the differences between the member states are even larger. The differences are already significant with regard to the issue of standing. In several member states, interim measures can be given at the request of a formal complainant. In France, interim measures may be ordered at the request of undertakings or of certain associations, but not at the initiative of individual consumers (Art. L464–1). In Germany interim procedures can only be initiated on the Competition Authority’s own initiative. Interested third parties may only try to induce the Competition Authority to start proceedings on its own initiative. Once the Competition Authority initiated proceedings, third parties have, however, the right to be heard ($§54 GWB). In certain legal systems interim measures may be imposed to protect the interests of the affected undertakings. In other legal systems the interim measures may only be imposed to protect the interests of competition in general.

All legal systems require a prima facie infringement of the Competition rules. Further, there needs to be a risk of serious and irreparable harm to the protected interests

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52 Ibid., no. 4.
53 Korsten and van Wanroij, Nederlands Mededingingsrecht, p. 250.
55 Art. 62, §1 WBEM; OfT Guidelines 407, §3.8; Korsten and van Wanroij, Nederlands Mededingingsrecht, 2008, p. 328.
57 §32a GWB.
as well as a need for urgent intervention.\textsuperscript{59} Often interim measures are only available if main proceedings are pending.\textsuperscript{60} Interim measures consist generally of injunctions to cease and desist from an infringement. They may include injunctions to commit positive acts.\textsuperscript{61} Often the need for proportionality and the preservative character of the interim measures is stressed.\textsuperscript{62} Interim measures may be supported by penalty payments.\textsuperscript{63}

Interim measures are limited in time. They expire in any case as soon as a final decision in the case is given.\textsuperscript{64} In certain legal systems additional limits apply. For example, in Germany they should normally not exceed one year (§32a GWB).

If the procedure has been initiated by a complaint, the complainant will usually be heard before a final decision is taken.\textsuperscript{65} The OFT Guidelines, however, point out that given the particularly time-critical nature of the interim measures process, it may be necessary to limit the involvement of applicants, or to request comments within very short time scales.\textsuperscript{66}

In most of the studied systems, NCAs are reluctant to impose interim measures and procedures are slow.\textsuperscript{67} The Dutch Competition Council took only two interim decisions between 1998 and 2007.\textsuperscript{68} In one of those cases, it took almost a year before a decision was reached.\textsuperscript{69} In France the reluctance to order interim measures is ascribed, amongst other things, to the strict approach with regard to the notion of urgency and gravity of damage and the French reluctance to ’administrative interventionism’ in the course of


\textsuperscript{61} OFT Guidelines 407, §3.10; Art. 83 (2) Dutch Competition Act.


\textsuperscript{63} Art. L464–2-II(b) French Commercial Code.

\textsuperscript{64} Art. 85 (3) Dutch Competition Act; OFT Guidelines 407, §3.11.

\textsuperscript{65} As regards England, see OFT 451, §4.1 et seq.; For France, see Art. L464–1 Commercial code; For Belgium see Art. 63, §6 in conjunction with 48 WBEM. In Belgium, the interim procedure consists like the main procedure of two stages: one before the Auditoriaat and one before the (President of) the Council. If the Auditoriaat finds the request unfounded and decides to reject it and not submit it to the President of the Council, it will inform the complainant of this decision. The complainant may appeal this decision, Art. 63 §3 and 4 WBEM.

\textsuperscript{66} OFT 451, §4.3 and 4.5.


\textsuperscript{68} Korsten and van Wanroij, \textit{Nederlands Mededingingsrecht}, p. 328.

\textsuperscript{69} Decision 11 August 2003, Case 3125, (NHA/LOI), electronically available at www.nmanet.nl. The other case referred to is Decision 11 August 1998, Case 803 (Edipress/Audax), electronically available at www.nmanet.nl.
injunctions at the request of third parties in eu competition law

trade. it will normally be more efficient to request interim measures before the courts. the belgian nca seems less reluctant to order interim measures.

§5. injunctions before the national courts

in manfredi the ecj has recognized that any individual who suffers loss as a result of an infringement of the eu competition rules, should be able to claim compensation. however, eu law does not (explicitly) impose on the member states a duty to award injunctions for competition law infringements. whether or not these are available depends in first instance on the national legal systems which possess procedural autonomy. however, the national laws need to respect the principles of equivalence and effectiveness. the principle of equivalence requires that the same remedies that are available for infringements of national rules are available for comparable infringements of eu law. the principle of effectiveness requires that the remedies available are effective, that they must not render virtually impossible or excessively difficult the exercise of rights conferred by eu law.

the power to grant injunctions under national law may result from specific competition legislation or from the general contract and tort or other rules.

a. a specific regime for antitrust injunctions in germany

germany adopted a specific regime for antitrust injunctions. §33 i gwb entitles the interested parties, such as competitors or other market participants who are impaired by the infringement, to obtain an injunction ordering the infringer of any rule of the gwb or of the articles 101 or 102 tfeu or of a decision of the competition authority to cease and desist from such action. a distinction is made between a beseitigungsanspruch, a claim to cease a current infringement and an unterlassungsanspruch, a claim to refrain from a threatening (first or repeated) infringement. the unterlassungsanspruch is available

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70 möllers and heinemann (eds.), the enforcement of competition law, p. 543; sofianatos, injunctions, p. 39.
71 korsten and van wanroij, nederlands mededingingsrecht, p. 328. examples of judicial decisions imposing interim measures include pres. rb. rotterdam 1 april 1998 and court of appeal’s gravenhage 30 september 1999, cited by korsten and van wanroij, nederlands mededingingsrecht, p. 328.
72 fifty-four cases between 1996 and 2005, see de bauw and verdonck in mededingingsrecht, p. 131 et seq.
73 sofianatos, injunctions, p. 109.
74 on the development of this requirement, see p. craig and g. de burca, eu law (oxford university press, oxford, 2008) p. 313 et seq.
75 it has been argued that in cartel cases only ‘directly interested parties’ would be taken into account, further links in the production and distribution chain would be excluded. this view is related to the refusal of the passing on defence in damages actions, but the restriction to directly interested parties would also apply to actions for injunctions because the gwb does not distinguish between both types of actions, see rehbinder in loewenheim et al (eds.), kartellrecht, 2009, §33 gwb, no. 19 et seq.
as soon as an infringement is foreseeable.\textsuperscript{76} The objective threat of an infringement is sufficient. Fault (\textit{Verschulden}) meaning intention or negligence is not required.\textsuperscript{77} Mere economic loss is, however, not sufficient to obtain an injunction. What is required is rather a continuing impairment of the ability to compete.\textsuperscript{78}

Claims for injunctions may also be asserted by associations with legal capacity for the promotion of commercial or independent professional interests, provided they have a significant number of member undertakings selling goods or services of a similar or related type on the same market, provided they are able, in particular with regard to their human, material and financial resources, to actually exercise their statutory functions of pursuing commercial or independent professional interests, and provided the infringement affects the interests of their members (§33 II GWB). These claims are, however, not frequent in practice.\textsuperscript{79} To ensure compliance with an injunction the court can impose penalty payments (\textit{Ordnungsgeld}).\textsuperscript{80}

Injunctions on the basis of §33 GWB are only given as interim measures if the victim would suffer serious competition disadvantages if he did not obtain an immediate decision.\textsuperscript{81}

§33 GWB does not exclude general tort law. §33 GWB is, however, a \textit{lex specialis} as regards §823 II BGB. Also §823 I BGB is excluded by §33 GWB because this is only a subsidiary rule.\textsuperscript{82} §33 GWB, however, does not exclude the application of §826 BGB. Under §1 UWG as of 1909\textsuperscript{83}, courts tended to consider competition law infringements as acts of unfair competition and to allow the \textit{Unterlassungsklage} of the UWG.\textsuperscript{84} Under the UWG as of 2004\textsuperscript{85}, case law tends to refuse to apply the UWG as far as there is no infringement of independent rules of the UWG.\textsuperscript{86} §33 GWB seems not to exclude the application of general contract law. If a competition infringement is at the same time a contractual non performance, the claimant can also claim an injunction to perform on the basis of §241 I BGB.

\textsuperscript{76} If the infringement is foreseeable, but has not yet materialized, the \textit{Unterlassungsanspruch} is called \textit{Vorbeugender Unterlassungsanspruch}, see Emmerich in Immenga/Mestmäcker, \textit{Wettbewerbsrecht: Band 2 GWB.}, §33, no. 98–99.

\textsuperscript{77} Rehbinder in Loewenheim et al (eds.) \textit{Kartellrecht}, §33 GWB, no. 42.


\textsuperscript{79} Rehbinder in Loewenheim et al. (eds.), \textit{Kartellrecht}, §33 GWB, no. 49 et seq.

\textsuperscript{80} §890 German Code of Civil Procedure.


\textsuperscript{83} Gesetz gegen den unlauteren Wettbewerb. Old version dd. 7 June 1909, \textit{RGBl.} I S. 499, \textit{BGBl.} III 4 no. 43–1.


\textsuperscript{85} Gesetz gegen den unlauteren Wettbewerb, \textit{BGBl} I 1414, coordinated on 03.03.2010, \textit{BGBl.} I 254.

\textsuperscript{86} Rehbinder in Loewenheim et al (eds.), \textit{Kartellrecht}, §33 GWB, no. 48.
Injunctions are thus available, but the proceedings may take time and interim measures are rather restrictively given.

### B. USE OF GENERAL RULES ON PERFORMANCE, CONTRACTS AND TORTS IN THE NETHERLANDS

The central article concerning injunctions in the Dutch civil code is Article 3:296(1) which states that a person who is held to give, to do or not to do something towards another can, at the request of the creditor, be ordered to do so by the judge, unless it follows from the law, the nature of the obligation or from a juridical act that this is not possible. In fact, even the threat of a breach of such an obligation already justifies a mandatory or prohibitive injunction.\(^{87}\)

The Articles 101–102 TFEU impose duties ‘not to do’ on undertakings and associations of undertakings. It could, however, be questioned whether these duties could be considered as duties towards competitors and/or consumers. In relation to Article 3:296(1) Dutch Civil Code, this question has hardly been investigated. However, in relation to claims for damages on the basis of Article 6:162 Dutch Civil Code, it seems currently to be accepted that the Articles 101–102 TFEU are intended to prevent loss suffered by competitors and consumers. It would then seem inconsistent to hold that the mentioned articles do not contain duties towards competitors and consumers.

In order to bring a claim on the basis of Article 3:296 Dutch Civil Code, the claimant must have a sufficient interest.\(^{88}\) In general, the claimant will, based on the *quod plerumque fit* principle, be assumed to have a sufficient interest. Only when the other party or the court *motu proprio* alleges the absence of a sufficient interest, will the claimant be required to show that he has a sufficient interest. The sufficient interest needs to exist at the time of the judgment.\(^{89}\) If sufficient interest is lacking, the court will have to declare the action inadmissible.\(^{90}\) It follows that competitors and consumers who have a sufficient interest to do so, can claim an injunction to stop a competition law infringement such as a coordinated practice of price fixing on the basis of Article 3:296 Dutch Civil Code or even an order to perform a particular act, for example an order to a dominant undertaking to contract with the claimant.

According to Article 3:305a Dutch Civil Code, a foundation or association with full legal competence can file an action for the protection of the similar interests of other persons as far as it effectively promotes those interests, according to its articles of association and its activities. During the legislative process it was pointed out that this article confers onto interest groups the power to act in cases where the individual

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\(^{87}\) Korsten and van Wanroij, *Nederlands Mededingingsrecht*, p. 334.

\(^{88}\) Article 3:303 Dutch Civil Code.

\(^{89}\) Groene serie vermogensrecht, comment on Art. 3:296 Dutch Civil Code, no. 6.

interests are limited but the combined interests are significant and that the threshold to go to court is lower for interests groups than for individuals. The collective action was also expected to have a preventive effect.\footnote{Kamerstukken II 1991/92, 22 486, no. 3, p. 2 (MvT).} It is however not very successful.

If the breach of an obligation is proved, the court is obliged to award the claimed injunction.\footnote{C.J.J.C. van Nispen, Sanctions in het vermogensrecht, (Kluwer, Deventer, 2003) p. 28. With regard to contractual obligations, see HR 21 December 1956, NJ 1957, 126, LEHR. With regard to non-contractual obligations: HR 28 June 1985, NJ 1986, 356, MS.} The power of an injunction may be strengthened by accompanying it with penalty payments.\footnote{Art. 611 et seq. Dutch Code of Civil Procedure (hereinafter: Rv); Korsten and van Wanroij, Nederlands Mededingingsrecht, p. 334.} Injunctions based on Article 3:296 Dutch Civil Code are also available in tort law as damages \textit{in specie}. Proving a tort requires proof of an illegal act that is imputable to the defendant, loss suffered by the claimant, a causal link between the illegal act and the loss and finally, relativity, which means that the infringed rule must serve to protect against loss as suffered by the claimant. As injunctions can directly be based on Articles 101–102 TFEU and 3:296 Dutch Civil Code, use of tort law seems, in order to obtain an injunction, an unnecessary detour.

If the competition law infringement is at the same time a contractual non-performance, the normal remedy is the performance of the obligation. The creditor may claim performance according to the provisions of Article 3:296 Dutch Civil Code. The most popular procedure before the Dutch civil courts in competition cases is the interim procedure for an injunction on the basis of Article 3:296 Dutch Civil Code.\footnote{Pres. Rb. Breda 13 December 2000, (AOWL/BN De Stem), KG 2001, 18.} The interim procedure is only available in urgent affairs.\footnote{Art. 254 Rv.} Moreover, in interim procedures the court is not under an obligation to award the claimed injunction if the breach of an obligation is proved. In interim procedures, the court has the discretion to reject a claim on the basis of a balancing of the interests at stake, even if the alleged breach of an obligation is established.\footnote{Van Nispen, Sanctions, p. 29; HR 15 December 1995, NJ 1996, 509.}

\section*{C. A VERY EFFICIENT USE OF AN UNFAIR COMPETITION PROCEDURE IN BELGIUM}

The most commonly used and appreciated procedure for infringements of competition law before the civil courts is the \textit{action en cessation}, an action to cease and desist from unfair competition.\footnote{De Bauw and Verdonck, Mededingingsrecht, p. 139; Vandermeersch and Gielen, ‘Damages Actions in Belgium for Competition Law Violations’ in Liber Amicorum Hubert Bocken (Die Keure, Bruges, 2009) pp. 132–133. This action is currently regulated by the Law of 6 April 2010 on certain procedures for the infringement of the Law of 6 April 2010 on Market Practices and Consumer Protection (see Belgian} This action is available for infringements of the Law of 6 April 2010...
Injunctions at the Request of Third Parties in EU Competition Law

on Market Practices and Consumer Protection. Article 95 of this law prohibits every seller from using unfair commercial practices that may harm the professional interests of other sellers. Infringements of the Law on Market Practices and Consumer Protection itself, and of national and EU Competition law are unfair commercial practices within the meaning of Article 95 of the Law. Article 84 of this law prohibits unfair practices in business to consumer relationships. This Article implements Art. 5 UCPOD. As has been argued earlier, infringements of national and EU Competition law will usually be unfair commercial practices within the meaning of this Article.98

The action is brought before the President of the Commercial Court.99 The procedure that applies is that for interim measures, but in the case of an action to cease and desist, this exceptionally leads to a final decision. It can even be executed pending an appeal.100 The action to cease and desists is thus a fast means to obtain a final decision, which explains to a large extent its success. Unlike in normal interim procedures there is no need to prove urgency.101 Unlike in tort procedures, there is no need to prove a loss or a causal link between the loss and the infringement. The action can be brought by the interested parties, a professional or interprofessional association with legal personality and, unless the action concerns an infringement of Article 95 Law on Market Practices and Consumer Protection, also by the Government102 and by recognized consumer organizations.103

There is some dispute as to the question whether the action to cease and desist is literally limited to ordering the cessation of a practice, that is, to ordering the defendant to refrain from doing of continuing to do something, or whether also positive acts can be ordered. The majority opinion is that an action to cease and desist can only lead to an injunction to do something to the extent that what has to be done is stopping the continuation of unfair practice.104 The claimant will normally request that the cease and desist order is accompanied by penalty payments (dwangsom). Further, the publication of the judgment can be claimed.105

If a competition law infringement constitutes at the same time a contractual non performance, for example if a dominant undertaking abuses its dominant position by refusing to supply an existing customer in conformity with the contractual clauses, the

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101 De Bauw and Verdonck in Mededingingsrecht, p. 139.
102 In fact, by the Minister of Economic Affairs or the Director-General of the General Direction Control and Mediation of the Federal Government Service Economic Affairs, the Self-employed & Energy.
103 Art. 113 Law on Market Practices and Consumer Protection.
victim of the infringement cannot use the action to cease and desist. It has to use the normal contractual remedies: *exceptio non adimpleti contractus*, claiming performance, resolution, damages. A claim for performance is the normal contractual remedy, be it that the creditor may in case of bilateral obligations normally choose between a claim for performance and a claim for resolution. If the award of performance or resolution did not compensate all the losses suffered by the victim, he may claim additional damages. If performance or resolution would not be possible or if it would constitute an abuse of right to ask for them (because they would cause the debtor a disproportional harm compared to the benefit for the creditor) damages may be claimed instead of resolution or performance. Damages may also be in kind.

If the competition law infringement does not at the same time constitute a contractual non-performance, a civil claim against the infringer can be based on tort law.\(^\text{106}\) This will also be the appropriate legal basis if the competition law infringement constitutes a *culpa in contrahendo*, for example, a refusal to supply to a new customer. Tortious liability requires proof of a fault, of loss and of a causal link between the alleged infringement and the alleged loss. A fault within the meaning of Articles 1382–1383 Belgian Civil Code consists of two elements: an objective element and subjective element. The objective element can be either an infringement of a rule that imposes a specific order or prohibition, or it can constitute an infringement of the general duty of care. An infringement of Article 101–102 TFEU will count as the objective element of the fault.\(^\text{107}\) The subjective element comprises again two elements: the ability to be responsible for one’s acts and the fact that a particular act can be attributed to the defendant. These requirements are more difficult to satisfy than those of Articles 84 and 95 Law on Market Practices and Consumer Protection. Tort law is therefore rarely used in order to obtain cease and desist orders.\(^\text{108}\) It may however be useful to obtain injunctions for positive acts.

Interim measures can be requested before the President of the Commercial Court if the defendant is a merchant or before the Court of First Instance if the defendant is non-merchant, such as a member of a liberal profession. The essential condition for interim measures is that the case is urgent. The Presidents will not be competent unless the claim that introduces the procedure mentions that the case is urgent. Whether or not there is, in fact, an urgent situation is no longer a matter of competence but relates to the question of whether the request is founded. Urgency is present when an immediate

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\(^{106}\) Art. 1382–1383 Belgian Civil Code.

\(^{107}\) Certain legal scholars argue however that, with the exception of some of the hard core infringements listed in Art. 101–102 TFEU and 2–3 WbEM or established by case law, an infringement of these articles can only be considered as a fault if a normally careful and reasonable person placed in the same circumstances would have concluded that the conduct constituted an infringement of competition law, see Cornelis and Gilliams, ‘Private enforcement of the competition rules in Belgium’, *TBM* 2 (2007) p. 18.

\(^{108}\) De Bauw and Verdonck in *Mededingingsrecht*, p. 150.
decision is desirable to prevent harm of a certain extent or serious inconvenience. To obtain an interim measure, the applicant must show at least ‘an appearance of right’. However, the fact that there is an urgent need for a decision and that an interim measure is justified on the balance of the interests of the parties is more important than the *fumus boni iuris*.

The interim measure may not negatively affect the main procedure (Art. 1039 Belgian Code of Civil Procedure). This implies that the President may not order measures that affect the rights of the parties in a final and irrevocable way. If the applicant requests a measure that cannot be considered as an interim measure because it affects the rights of the parties in a final and irrevocable way, his request has to be declared unfounded. In any case, the President may not order a measure the court dealing with the main procedure could not order.

As the laws on market practices and consumer protection and related procedures (amongst others) provide competitors and consumer organizations with an action to cease and desist that is dealt with under the same fast procedure as an action for interim measures but which does not require the competitor to prove urgency and leads to a final measure, interim measures are seldom requested in cases concerning infringements of competition law. However, the possibility to request interim measures exists and may be used. An advantage of the interim procedure is that the measures the President may order are not limited to cease and desist orders. It can also be applied in contractual matters while the action to cease and desist is in principle limited to non-contractual relationships.

Applicants sometimes apply for a cease and desist order and for interim measures.

All injunctions can in principle be strengthened by the imposition of periodic penalty payments (Art. 1385bis Belgian Code of Civil Procedure).

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111 Cass. 4 February 2000, *TBH* 2000, 184 and note B.D.
D. PLEAS FOR THE RECOGNITION OF A GENERAL ACTION TO CEASE AND DESIST IN FRANCE

In the field of the so-called *pratiques restrictives de concurrence* (certain unfair commercial practices) the courts are competent to impose prohibitive and mandatory injunctions based on Article L442–6 IV French Commercial Code (*référé-concurrence*, see further below). In cases of misleading commercial practices the power to impose prohibitory injunctions, if necessary accompanied with periodic penalty payments, is recognized by Article L121–3 French Consumer Code. The courts can, however, only order these injunctions at the request of the Ministère Public or at their own initiative. Recognized organizations can further apply for injunctions for the infringement of provisions implementing the EU directives mentioned in Annex I of the Injunctions Directive, Art. L421–6 French Consumer Code.

As regards other types of anti-competitive practices, it has been argued that injunctions would not be available. The recognition of an injunctive power of the Courts would transform them in regulators of the conduct of undertakings making choices of economic policy rather than applying the law. Moreover, it has been argued, the legislative texts explicitly confer the power to impose injunctions to the competition authorities and not to the courts. The competition authorities would therefore possess an exclusive competence to impose injunctions and courts would be restricted to pronouncing the nullity of anticompetitive agreements and awarding monetary damages. This opinion however seems to disregard the general rules on contractual and delictual liability.

If the anticompetitive practice is at the same time a breach of contract, for example, a refusal to supply as promised, the creditor is entitled to claim (specific) performance of the contract. This amounts in practice to an injunction to perform the contract as promised (*exécution en nature*). Specific performance is indeed the primary remedy in French contract law. The Court may only order another remedy if specific performance would be impossible or it would be abusive to claim it, or if highly personal obligations are concerned. If specific performance of the contract is not a suitable remedy, the court may award damages (*réparation*), but even reparation does not necessarily take the form of an injunction.

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119 See also Art. L421–9 Code de la consommation: the Court may order the publication of its decision. In addition, the Court may order periodic penalty payments (*astreinte*). See, on the *astreinte*, Desdevises, *J. Cl. Procédure civile*, fasc. 2120–2140, 2005.
123 Art. 1134 French Civil Code.
of a payment of money, the court may also order reparation in kind (réparation en nature). This means that the court imposes an injunction on the debtor to perform certain acts that bring the creditor as far as possible into the situation he would have been in if the contract would have been performed according to its terms. As regards the loss that occurred in the past, this will, in cases of competition infringements, often be difficult. However, the occurrence of further loss can be remedied by an injunction to cease and desist from the anti-competitive conduct. Reparation in kind will in general be preferred by the Courts and it will generally only be refused where it would require an injunction to perform a highly personal obligation.\textsuperscript{125}

When the infringement of competition law takes place outside a preexisting contractual relationship, it is regarded as a fault, which, if it causes loss to a third party, gives rise to delictual liability.\textsuperscript{126} In an early decision, the Cour de cassation held that the court has the discretion to award compensation in kind or in money;\textsuperscript{127} it should choose the reparation that is adequate to the cause.\textsuperscript{128} Modern legal scholarship and case law however tend to refuse reparation in kind only in the case of highly personal obligations or if reparation in kind is impossible.\textsuperscript{129} Already in 1963 the Cour de cassation ordered the cessation of anti-competitive conduct, which was at that time not yet prohibited by a specific competition law. More recently the Court of Appeal of Paris ordered an undertaking that took part in a cartel and abused its dominant position to cease committing these acts and to desist from committing them in the future.\textsuperscript{130} In both cases the injunction was accompanied by penalty payments. There are a number of other decisions imposing injunctions to cease and desist.\textsuperscript{131} The injunctive power of the courts is, however, not limited to prohibitory injunctions. Injunctions ordering the defendant to perform certain acts, such as to communicate certain data,\textsuperscript{132} or to conclude a contract,\textsuperscript{133} have been imposed as well.

Injunctions can thus be ordered by way of reparation in kind. However, certain legal scholars argue that the injunction to cease and desist should be distinguished from


\textsuperscript{129} Sofianatos, \textit{Injonctions}, p. 131; Viney, \textit{Les effets de la responsabilité}, no. 14 et seq.

\textsuperscript{130} CA Paris 1 Ch. A. 19 May 1993, \textit{Contrats, concurrence, consommation} 1993, no. 136, note Vogel.


\textsuperscript{132} CA Paris 1 Ch. sect. G 22 September 1999, \textit{Jurisdata} no. 024259.

the reparation in kind.\textsuperscript{134} When the Court issues an injunction to cease and desist, it does not, they argue, repair any loss, but it removes its origin.\textsuperscript{135} The measures to end and prevent an illicit situation would, however, form part of liability law.\textsuperscript{136} They allow liability law to have a preventive function,\textsuperscript{137} that is to prevent an illicit act from taking place and to prevent an illicit situation from continuing in the future.\textsuperscript{138} The distinction between the injunctions to cease and desist and reparation in kind would have practical consequences. The injunction to cease and desist is a preventive measure; it does not require proof of a loss, nor of a causal link between the infringement and the loss. It is sufficient that the plaintiff has an interest to file a claim.\textsuperscript{139} Therefore a specific action to cease and desist should be introduced in French law.\textsuperscript{140}

In case of urgency, the president of the \textit{Tribunal de grande instance} or the commercial court may order in a summary procedure all measures that do not encounter any serious challenge or which the existence of the dispute justifies. The court may order the mandatory performance of the obligation even where it is an obligation to do a particular thing.\textsuperscript{141} Even where confronted with a serious challenge, the President may order in a summary procedure such protective measures or measures to restore the parties to their previous state as required, either to avoid an imminent damage or to abate a manifestly illegal nuisance.\textsuperscript{142} The Courts do not hesitate to use injunctions to restore the \textit{status quo ante}.\textsuperscript{143}

The already mentioned Article L442–6, IV French Commercial Code installs a procedure called \textit{référé-concurrence}, interim measures-competition. This procedure is, however, only available in cases of \textit{pratiques restrictives} and not for other anticompetitive practices. Article L442–6, IV French Commercial Code does not exclude the general rules on interim procedures.\textsuperscript{144} The difference between both procedures is that the \textit{référé-concurrence} is open for the Minister of Economic Affairs and the president of the Competition Authority while the general interim procedure is not. The \textit{référé-concurrence}

\textsuperscript{135} Ibid.
\textsuperscript{139} Roujou de Boubée, \textit{Essai sur la notion de réparation}, p. 219; Sofianatos, \textit{Injonctions}, p. 138.
\textsuperscript{141} Art. 808/873 NCPC.
\textsuperscript{142} Art. 809 NCPC.
\textsuperscript{143} Sofianatos, \textit{Injonctions}, p. 112.
is hardly used; the general interim procedure is used instead. A civil procedure for interim measures is often faster than an administrative procedure to that end. All injunctions can in principle be strengthened by the imposition of penalty payments.

E. ENGLAND: INJUNCTIONS ARE EQUITABLE REMEDIES

If the competition law infringement is an unfair commercial practice within the meaning of Sec. 3 Consumer Protection from Unfair Trading Regulations, 2008 it seems that an action to obtain a cease and desist order may be brought on the basis of Sec. 212 et seq. of the Enterprise Act, 2002 by general enforcers or designated enforcers who act in the interest of consumers, amongst others. Apart from this situation, injunctions for competition law infringements can only be given according to the rules of contract or tort law.

For breach of contract, the primary remedy is damages. Specific performance of contracts is only a secondary, equitable remedy which is at the court’s discretion. The courts have developed certain guiding principles that govern the exercise of this discretion. Originally it was accepted that specific performance was only available if damages were not an adequate remedy. At present, specific performance is held to be available if it is the most appropriate remedy. The adequacy of damages is still an important element that is taken into account, but it is no longer absolutely necessary. Courts remain nevertheless reluctant to order specific performance. Elements that will induce the courts to grant specific performance include the fact that there is no available substitute or that the award of damages would be unfair to the plaintiff. Elements the courts will take into account to refuse specific performance include the fact that the obligations are of a personal nature, that specific performance would require constant supervision or that specific performance would cause severe hardship to the defendant.

Apart from contract, the cause of action that is generally held to be available in case of breach of competition law is that of breach of a statutory duty. A successful action for breach of statutory duty requires the plaintiff to show that the injury he has suffered is within the ambit of the statute, that the statutory duty imposes a liability to civil action, that the statutory duty was not fulfilled and that the breach of duty has caused his loss. The normal remedy for breach of a statutory duty consists of damages. However, pursuant to sec. 37 of the Senior Courts Act, 1981,

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148 An enforcement order may require a person against whom the order is made to publish the order or a correction statement in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement, see s. 217 (8) Enterprise Act 2002.
‘(t)he High Court may by order (whether interlocutory or final) grant an injunction (…) in all cases in which it appears to the court to be just and convenient to do so’.

An injunction is an equitable remedy, which means that it is at the court’s discretion to grant it or not. But, as regards continuing prohibited conduct, a prohibitory injunction is generally accepted to be the primary remedy.\(^{150}\) As the Articles 101 and 102 TFEU and their national equivalents prohibit anticompetitive conduct, prohibitory injunctions seem to be an appropriate remedy, not precluding of course actions for damages.\(^{151}\)

Cases dealing with injunctions in competition law generally concern interim measures. Interim measures will be ordered if the Court is satisfied that a serious question is to be tried, that damages will not be an adequate remedy and the balance of convenience favours interim measures to be ordered.\(^ {152}\) These requirements were considered to be fulfilled in \textit{Cutsforth v Mansfield Inns}.\(^ {153}\) The plaintiff was a supplier of jukeboxes and gaming machines. Cutsforth complained about a clause Mansfield had included in its public house tenancy agreements and which obliged the tenants only to contract with juke box and gaming machines suppliers appearing in its approved list, from which Cutsforth was excluded. This constituted an infringement of Article 8 (b) of the Commission’s block exemption 1984/83\(^ {154}\) that applied at the time of the facts. The High Court found that there was a serious question to be tried and that the plaintiff would have gone bankrupt if interim measures were refused. Therefore damages were not an adequate remedy. On the balance of convenience, the Court decided in favour of the plaintiff.

In \textit{Garden Cottage Foods} however, the House of Lords seemed to support a more reluctant approach as to the granting of injunctions for competition law infringements.\(^ {155}\) A dominant producer of bulk butter sold in the United Kingdom, announced that thenceforth it would refuse to sell to a distributor to which it had regularly sold bulk butter before. The distributor claimed that this was an infringement of Article 102 TFEU (then 86 EC) and applied for an injunction before a civil court. The judge refused the injunction on the grounds that damages would be adequate to compensate the distributor if successful in the action. On appeal this decision was reversed. Lord Denning expressed the view that there was a good deal to be said for there being a remedy in damages, but


\(^{151}\) \textit{Contra} the Court of Appeal in \textit{Garden Cottage Foods v Milk Marketing Board}, which decided that an injunction was the only available remedy. This decision has been reversed by the House of Lords [1984] 1C 130, [1983] CMLR 43.

\(^{152}\) \textit{American Cyanamid v Ethicon} [1975] AC 396.

\(^{153}\) 1 CMLR 1.


that the only effective remedy in a case of abuse of dominance was an injunction.\textsuperscript{156} When the case came before the House of Lords, Lord Wilberforce expressed, in a dissenting opinion, the view that a private person can sue to prevent an infraction of Article 102 TFEU (at the time 86 EC). He suggested that this is required by the ECJ’s decision in Case 127/73 (SABAM), where it held in connection with Article 102 TFEU, that it is for the national courts of the Member-States to safeguard the rights of individuals.\textsuperscript{157} Since Article 102 TFEU states that abuses of a dominant position are prohibited, and since prohibited conduct in England is sanctioned by an injunction, it would, according to Lord Wilberforce, seem to follow that an action lies, at the instance of a private person, for an injunction to restrain the prohibited conduct. To allow a defendant to persist in conduct which is prohibited at the price of paying damages is something the court did not countenance. He further pointed out that it was precisely this principle which induced the House of Lords, in \textit{Hoffmann-La Roche v. Trade Secretary}\textsuperscript{158}, to grant an interim injunction restraining the illegal conduct until trial. The majority of the House of Lords, however, restored the decision of the judge, holding that it was clearly arguable that the distributor would have a claim in damages so that the judge had been entitled to reach the conclusion he did, and there was nothing to justify the appellate court in interfering with the judge’s exercise of discretion.\textsuperscript{159}

\section{6. EVALUATION AND PROPOSALS TO FACILITATE INJUNCTIVE RELIEF AT THE REQUEST OF THIRD PARTIES}

Competition law infringements may cause serious losses to competitors, supplying and purchasing undertakings and consumers. In recent years efforts have been made to facilitate damages actions to compensate these types of losses. However, there remain practical and legal obstacles. It will often be difficult to assess the quantity of the losses, and to prove the causal link between the infringement and the loss. Further, if the loss is spread over a large number of victims, the cost and effort of bringing actions for damages may be disproportionate to the damages that may be recovered. Moreover, proposals to harmonize damages actions for competition law infringements meet opposition from Member States and scholars who fear this would distort their procedural and liability law (§1).

The growing number of complaints to the Commission (§4, Sec. A), the requests for injunctive relief from NCAs (§4, Sec. B) and the use of certain civil and commercial law actions for injunctions (§5) show, however, that third parties want to take action against competition law infringements and more precisely, they want them to stop as soon as possible. It appears further that undertakings are more active in this respect

\begin{footnotes}
\item[156] Ibid.
\item[157] Case 127/73, Belgische Radio en Televisie v SV SABAM and NV Fonior, ECR 1974, 313.
\item[158] [1975] A.C. 295.
\item[159] [1984] A.C. 130.
\end{footnotes}
than consumers or consumer organizations. The lack of interest in injunctions on the part of individual consumers is understandable. Firstly, consumers will often not be aware of the infringements. Further the loss they suffer will often be limited and disproportional to the costs of starting a legal procedure. Last but not least, the nature of injunctive relief will often not be of use to individual consumers. Injunctive relief is particularly appropriate to bring a continuing infringement to an end. Yet, consumers often enter into a relationship with the infringer only once (for example when they buy a car or a dishwasher). They usually do not find out about an infringement until after they contracted with the infringer and paid too much as a result of a cartel. An injunction can prevent the infringer from continuing the cartel and from overcharging customers in the future. The individual consumer will, however, often not benefit from this as he will not purchase from the infringer again.

To consumer organizations it seems to make more sense to bring an action for an injunction as they act in the interest of consumers in general and thus of all the future purchasers from the infringer. Where the success of actions for injunctions brought by consumer organizations is limited, this seems to a large extent due to financial restraints and to the lack of understanding of the notion of the collective interest of consumers. This does not apply to undertakings. Moreover, the procedures introduced to implement the Injunctions Directive in the field of consumer law seem to function quite well in several member states as far as national infringements are concerned. The limited use of cross border injunctions in the field of consumer law is also to a large extent due to financial restraints. Experiences with the Injunctions Directive should thus not dissuade the European legislature from harmonizing the procedures for injunctive relief at the request of undertakings.

As opposed to consumers, undertakings are repeat players, they conclude the same kind of contracts over and over again, which means that they will benefit in the future if an infringement is brought to an end. Moreover, the financial interests of undertakings in ending a competition infringement will often be significant. Competition law infringements may not only cause them to pay too much for their supplies, they may actually drive them out of a market or even of all markets in which they are active.

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While there is a certain harmonization of actions for injunctive relief by recognized organizations acting for the collective interest of consumers, there is surprisingly no harmonization of actions for injunctive relief by undertakings (§3). As well the procedures before the competition authorities, as those before the civil or commercial courts, differ significantly. It is, however, a common trait of the procedures before the NCAs that the NCA controls the proceedings. Although a formal complainant will have some procedural rights, his position is not comparable to that of a plaintiff in a civil procedure where the plaintiff controls the procedure, and may for example decide to stop the proceedings because an agreement has been reached with the other party. Administrative procedures on the other hand have the advantage that the competition authority will assist the claimant in proving the infringement of the competition law and they will usually be less expensive.

As regards the procedures before the civil courts, the legal systems differ as to the discretion of the court in granting an injunction, as to whether a final decision can be obtained within a short period of time, whether a final decision in non-contractual matters at the request of a competitor requires proof of a loss, or whether the ‘fast’ procedure is limited to urgent affairs.

The diverging opportunities for undertakings to obtain injunctive relief for infringements of the Articles 101–102 TFEU in the various member states seem to affect the competitive position of undertakings within the single market as well as trade between the member states. Of course, the Commission may intervene if the infringement causes an appreciable distortion of competition within the single market and appreciably affects trade between the member states, but the Commission’s resources are limited, obtaining a final decision from the Commission takes time, private parties have no right to start a procedure for interim measures before the Commission and the Commission is reluctant to order them at its own initiative and prefers the parties to seek interim relief from their national courts (§4, Sec. A). The Modernization Regulation 1/2003 was directed at decentralization and the Commission actively promotes private enforcement to increase compliance with competition law. To create a level playing field and to ensure that the EU competition rules have the same effects and offer an equal protection in all member states it seems logical to harmonize the national procedures for injunctive relief at the initiative of third parties in competition cases.

In line with the approach of the Injunctions Directive the European legislature could think of issuing a directive ordering the member states to make the courts or administrative authorities competent to rule on proceedings commenced by plaintiffs with a sufficient interest seeking an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement of the EU competition rules as well as measures such as the publication of the decision, and in so far as the legal system of the Member State concerned permits, an order for penalty payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision. It might, however, be
better to attempt a further harmonization and to provide that such a procedure should be available before the courts, as this will in general provide the plaintiff with more control over the proceedings. Given the success of the Belgian action to cease and desist which is dealt with according to the rules on interim measures but does not require urgency and leads to a final decision, it may be advisable to provide that this should be the case for the harmonized actions to cease and desist in the member states. To ensure an equal treatment of the plaintiffs in all the member states, it seems also advisable to provide that penalty payments should be made either into the public purse or to the plaintiff. The latter option seems to be most in line with the idea of private enforcement.

The legal basis for adoption of a harmonization measure in this field could probably be found in Article 103 TFEU which provides that the appropriate regulations or directives giving effect to the principles set out in Articles 101 and 102 TFEU shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.\textsuperscript{163} Reasons to believe that this article constitutes a sufficient legal basis for the proposed action seem to have increased since the entry into force of the Lisbon Treaty, whose Article 3(1)b expressly provides that the establishment of the competition rules necessary for the functioning of the internal market are an exclusive Union competence. The Protocol on the internal market and competition adds that the internal market includes a system ensuring that competition is not distorted and confers the Union the power, if necessary, to take action under the provisions of the Treaties, namely Articles 101–104 TFEU (ex Art. 81–84 EC) and 352 TFEU (ex Art. 308 EC). This suggests that Art. 352 TFEU could also be used as a legal basis for the introduction of harmonized rules on injunctions for competition law infringements. However, this article should in principle only be used when there is no more specific and therefore appropriate Treaty provision. As Article 103 TFEU seems to be a more specific and appropriate Treaty provision, it seems to prevail.\textsuperscript{164}

Opposition to the introduction of harmonized rules on injunctions could be less compared to that to the harmonization of damages actions, as member states are used to the introduction of harmonized rules on injunctions in consumer law. Also, in France, there is some dissatisfaction with the current state of national law as regards orders to cease and desist (§5, Sec. D) and this will probably be the case for other Member States in which the Civil Code is inspired by the French one. Harmonized rules on cease and desist orders for infringements of EU competition law will then not distort the national civil law systems, but improve them.


\textsuperscript{164} Comp. in relation to actions for damages Rizzuto, ‘Does the European community have legal competence to harmonize national procedural rules governing private actions for damages from infringements of European antitrust rules?’, 2 GCLR 1 (2009) pp. 29–48.