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COMPETITION LAW ENFORCEMENT PENALTIES AND PROCEDURES – FURTHER REFORM OPTIONS FOR NEW ZEALAND

LLM RESEARCH PAPER
LAWS 501 – COMPETITION LAW

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2003

CONTENTS

ABSTRACT

A successful competition policy is a necessary element in the efficient operation of market economies. To be successful, however, competition policy needs to be backed up by effective competition enforcement. This paper examines the questions whether the New Zealand competition law enforcement regime, though amended in 2001, could benefit from further reform. It reveals that doubts as to the effectiveness and ultimate success of the current system are justified. This is in particular true for the imposition of appropriate penalties and the private remedy of damage actions. To explore alternative enforcement processes and tools, the paper applies a comparative analysis of the competition enforcement regimes of New Zealand, Germany and the United States. In the course of the analysis two reform options emerge: The conferment of the power to impose penalties to the New Zealand Commerce Commission and the introduction of a multiple damages provision. The paper scrutinises each of these options as to their advantages and possible disadvantages. It comes to the conclusion that neither option faces insurmountable obstacles and suggests that the New Zealand Parliament should not hesitate to seriously consider these options if the 2001 amendments ultimately fail to succeed.

WORD LENGTH

The text of this paper (excluding abstract, table of contents, footnotes and bibliography and appendices) comprises approximately 16,034 words.

I INTRODUCTION

A successful competition policy is a pivotal element in the efficient operation of a market economy. Since market mechanisms are endangered through monopolistic or other anti-competitive practices, a strong competition law is required to promote competitive markets and ensure the efficient allocation of resources. To be strong, however, any competition law needs to be backed up by efficient law enforcement. As a matter of fact, investigation and enforcement of breaches of competition law require significant time and resources. Therefore, competition enforcement authorities are under an ongoing commitment to optimise their enforcement activity, and legislators should constantly review the existing enforcement regime to provide enforcement authorities with the most efficient and appropriate enforcement tools available.

The New Zealand legislator has recently acted accordingly and modified its competition law enforcement regime to address certain enforcement and deterrence deficiencies.[1] The amendment of the Commerce Act in 2001 was accompanied by an intense discussion and subsequently concerns have been voiced as to the effectiveness of some of the changes. In fact, there are several factors that justify some doubts as to the ultimate success of the amendments. This paper will, therefore, explore the existing competition law enforcement regime and examine the question whether further reforms to the New Zealand enforcement regime are advisable and which means are appropriate. The examination will, thereby, focus on the administrative and the private aspect of enforcement, leaving criminal enforcement essentially aside.

To provide answers to the above questions, the paper applies a comparative analysis of the enforcement regimes of New Zealand, Germany and the United States. Germany's competition law enforcement system heavily relies on administrative enforcement and, thus, might serve as a model for reforms in this area. The United States system provides a good example for the importance and impact of private enforcement as a means of deterrence, and, consequently, some inspiration will be drawn from that.

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[1] Commerce Amendment Act 2001.

In a competition law context the concept of "enforcement" is often very broadly used and refers, *inter alia*, to investigation, remedies and subsequent judicial review. This paper focuses on the sanctioning aspect of enforcement, which means penalties and remedies; therefore, reference to investigations or judicial review is only made where necessary. Administrative powers such as the authorisation of restrictive trade practices or mergers are not covered. Also, enforcement authorities may be responsible for a broad variety of general and specific regulatory regimes. Enforcement activities may concern fair trade practices as well as specific industries like the telecommunications or the electricity lines industry. To create a comparable basis, this paper will only focus on the enforcement of the 'general' competition law of each country. Therefore, the legislation relevant for this paper will be the national law that primarily aims at the protection of the concept of competition as such rather than promoting fair trade or regulating special industrial sectors. Complementary legislation providing rules for enforcement proceedings and the like will be considered as required.

The examination will proceed in three parts. First, the paper explores the competition law enforcement regimes of New Zealand, Germany and the United States. It will outline the main enforcement remedies and procedures and, to some extent, assess and discuss their effectiveness. The second part conducts a comparative analysis of the three jurisdictions, focussing on the role and importance of each the public and the private sector in competition law enforcement. In the third part, the focus is on the question whether any options for reforming the New Zealand system can be derived from the results of the analysis. Two options for further reform are extracted and closely examined: The power to impose pecuniary penalties conferred to the Commerce Commission; and the introduction of a multiple damages provision. The paper concludes that there is something to be said for both options to make an improvement to the current system if the recent changes made to the Commerce Act ultimately fail to achieve their goal.

II ENFORCEMENT REGIMES IN DIFFERENT COUNTRIES

A New Zealand

The former New Zealand Ministry of Commerce summarised its view of competition law enforcement in a discussion document "Penalties, remedies and court processes under The Commerce Act 1986" published in January 1998.[2] It stated that:

> A law has little effect unless it is efficiently enforced. Penalties and remedies under the Commerce Act should support the goals of the Act by deterring anti-competitive conduct. Court processes should not hinder the goals of the Act and should balance justice and efficiency.[3]

This document marked the beginning of the most recent review of New Zealand's competition law set out in the Commerce Act 1986 ("the Act"). The review revealed that the existing enforcement regime failed to achieve sufficient deterrence of anti-competitive behaviour and led to the enactment of the Commerce Amendment Act 2001 (2001 No 32) in May 2001. In terms of enforcement, the Amendment Act, *inter alia*, increased corporate penalties, introduced cease and desists orders, and empowered the courts to award exemplary damages.

Some of these modifications have been blamed as an unneeded result of the popular 'cry for tougher sentences'.[4] Others have not yet had a chance to prove their usefulness in practice. However, the amendment and the preceding discussion show that the New Zealand legislator is aware of the significance of law enforcement for an effective competition policy and is willing to adopt modifications to the current system, if and as necessary.

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2 New Zealand (NZ) Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf> (last accessed 7 October 2003).

3 NZ Ministry of Commerce, above, 1.

4 Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194.

1 Public enforcement bodies

Two institutions are concerned with the public enforcement of New Zealand's competition law, the Commerce Commission and the High Court.

(a) The Commerce Commission

The Commerce Commission ("the Commission") is a statutory body corporate, which was originally established by the Trade Practices (Commerce Commission and Pyramid Selling) Act 1974. Its purpose is to apply and enforce the Commerce Act 1986, the Fair Trading Act 1986 and specific regulatory legislation such as the Electricity Industry Reform Act 1998. The Commission's enforcement activities cover investigation, litigation, and the provision of information to the public.[5] The Commission consists of a Chair, a Deputy Chair, and no more than six other Commissioners, all of which are appointed for a five years term appointed by the Governor-General on the recommendation of the Minister of Commerce.[6] The Commission has approximately 110 staff and offices in Wellington, Auckland and Christchurch.[7] In the 2001/2002 year the Commission had a total annual budget of NZ$ 17 million.[8] In exercising its functions the Commission shall have regard to the economic policies of the government as transmitted to the Commission by the Minister of Commerce pursuant to section 26(1) of the Act. Apart from that, the Commission is independent of both the political and the executive branches of government.[9]

Though often being referred to as "New Zealand's competition enforcement agency",[10] the Commission has more of a prosecution role than a decision-making role

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5 New Zealand (NZ) Commerce Commission *Regulatory Control and Enforcement Activities of the Commerce Commission 2001/2002* (Wellington, 2002) 7 <http://www.comcom.govt.nz/about/documents/Regulatory%20Control%20and%20Enforcement%20Activities%20of%20the%20Commerce%20Commission%202001-2002.pdf> (last accessed 7 October 2003).

6 Commerce Act 1986, ss 9, 10.

7 NZ Commerce Commission, above, 8.

8 Organisation for Economic Cooperation and Development (OECD) *Competition Law and Policy - Annual Report of New Zealand 2001-2002* (Paris, France, 2002) 11 <http://www.oecd.org/dataoecd/34/13/2488976.pdf> (last accessed 7 October 2003).

9 NZ Commerce Commission *Memorandum of Understanding between the Minister of Commerce and the Commerce Commission 2002/2003* (Wellington, 2003) 5 <http://www.comcom.govt.nz/about/mou/MOU2002.pdf (last accessed 7 October 2003); see also John H Farrar, John F Burrows and Williams C S Leys (eds) *Butterworths Commercial Law in New Zealand* (4 ed, Butterworths, Wellington, 2000) 559.

10 OECD, above, 2.

in competition enforcement. Since it can generally neither determine that the Act has been breached nor impose penalties or injunctions, the Commission's primary function is the investigation of alleged breaches and the commencement of proceedings in the High Court for contraventions of the Act.[11] Only the recently introduced cease and desist orders provide the Commission with the power to terminate conduct that is, *prima facie*, in breach of the Act, by way of an administrative injunction.[12]

(b) The High Court

In terms of enforcement the High Court ("the Court") is the most important decision-making body.[13] Under section 75(1) of the Act, the Court has jurisdiction to determine a wide variety of proceedings. It may order contraveners to pay pecuniary penalties or damages or grant permanent or interim injunctions. Other orders include the exclusions of certain persons from management of a body corporate (section 80C), and the varying or cancelling of contracts deemed to contravene the Act (section 89(2) of the Act). To ensure that the Court has the necessary economic expertise to decide Commerce Act cases, section 78 of the Act provides that, on the application of any party to the proceedings, or on the Court's own motion, an additional lay member may be appointed to hear and determine competition enforcement issues.[14]

2 Enforcement by the Commission

When an investigation produces evidence that a person has probably breached the Act, the Commission has several options for taking enforcement action.[15] Some of these options, like warnings and settlements, are not governed by the Commerce Act but nevertheless acknowledged and the respective procedures are set out in guidelines issued by the Commission.

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[11] Rex J Ahdar "Antitrust Policy in New Zealand: The Beginning of a New Era" (1992) 9 International Tax and Business Lawyer 329, 338.

[12] Commerce Act 1986, ss 74A-D.

[13] John H Farrar, John F Burrows and Williams C S Leys (eds) *Butterworths Commercial Law in New Zealand* (4 ed, Butterworths, Wellington, 2000) 561.

[14] Commerce Act 1986, s 78.

[15] These options are listed in NZ Commerce Commission *Regulatory Control and Enforcement Activities of the Commerce Commission 2001/2002* (Wellington, 2002) 8 <http://www.comcom.govt.nz/about/documents/Regulatory%20Control%20and%20Enforcement%20Activities%20of%20the%20Commerce%20Commission%202001-2002.pdf> (last accessed 7 October 2003).

(a) 'Soft' enforcement measures – Warnings and settlements

If the alleged breach is neither deliberate nor significant the Commission may issue a warning letter.[16] The aim of such an informal letter is to inform the person in question, to stop the behaviour and to deter future illegal behaviour. These warnings may be publicised. In terms of enforcement of the Commerce Act, warnings play a negligible role: In 2001/2002 only five of 125 investigations conducted by the Commission under the Act resulted in warnings (all of which concerned restrictive trade practices).[17] In comparison, during the same year 186 warnings resulted from 437 Fair Trading Act investigations.[18] The Commission may also negotiate settlements with contraveners where there is a serious breach of the Act, which the business acknowledges. Settlements aim at modifying the behaviour in question, too, but may also seek redress for the affected parties. Staff settlements take the form of signed undertakings to alter the impugned conduct and introduce, e.g., compliance programs. Commission settlements are similar in nature, but are reserved for cases involving significant market, major market participants or conduct having a significant impact on competition.[19] All settlements are published in the Commission's newsletter. If the Commission is unable to agree the terms of a settlement with a business, it will proceed to prosecution. In 2001/2002 only two applications for extensions of the timeframe for divestment undertakings arising from earlier clearance decisions were resolved by way of settlement.[20]

(b) Cease and desist orders

Cease and desist orders are administrative orders that restrain a certain conduct or that require a person to do something. According to section 74A(1) of the Act the responsible Commissioner will make such an order if it is necessary to act urgently in the public interest or in order to prevent damages. Pursuant to section 95 of the Act, cease

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[16] *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986 – Investigation and Enforcement Criteria) vol 1, Appendix 1 – 22 (last updated 13 March 2003).

[17] NZ Commerce Commission *Annual Report 2001/2002* (Wellington, 2002) 28-29 <http://www.comcom.govt.nz/about/documents/CommAnn_Report2001-2002.pdf> (last accessed 7 October 2003).

[18] Commerce Commission, *Annual Report,* above, 31.

[19] *Brooker's Gault on Commercial Law*, above, App 1 – 24, para C 2-4.

[20] Commerce Commission *Annual Report 2001/2002* (Wellington 2002) 28-30 http://www.comcom.govt.nz/about/documents/CommAnn_Report2001-2002.pdf (last accessed 7 October 2003).

and desist orders remain in force pending determination of any appeal which supports the deterrent effect of these orders.

An intense discussion had preceded the introduction of cease and desist orders in 2001.[21] The Commission was against it because it considered the ability to apply for an interim injunction was a sufficient safeguard. However, the Commerce Committee proposed cease and desist orders as a desirable supplement to interim injunctions because they would avoid the high costs and delays associated with litigation under the Act.[22] It also considered that cease and desist orders had advantages over administrative settlements because "[t]o be effective such settlements need to be backed up with the threat of court action" which would not be the case with cease and desist orders.[23] Finally, the Commerce Committee argued that empowering the Commission to issue cease and desist orders would improve transparency in the processes and procedures of the Commission which would enhance the perception of the Commission among the business community. One year after sections 74A to 74D coming into force, it still remains to be seen, what impact cease and desist orders will have on competition law enforcement in New Zealand. As far is the author is aware, the Commission has not yet issued such an order but is developing its approach to this new enforcement option.[24]

3 *Enforcement by the High Court*

Where there has been a deliberate breach of the Act, the Commerce Commission will consider taking civil action. The Commission may institute court proceedings seeking example pecuniary penalties, injunctions, and, in respect of business acquisitions, an order for divestiture of assets or shares.

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[21] See NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 39 *et seq.*; *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) 3-274, paras CA74A.04-05 (last updated 18 April 2002).

[22] *Brooker's Gault on Commercial Law*, above, para CA74A.04.

[23] *Brooker's Gault on Commercial Law*, above, para CA74A.04.

[24] NZ Commerce Commission *Regulatory Control and Enforcement Activities of the Commerce Commission 2001/2002* (Wellington 2002) 8 <http://www.comcom.govt.nz/about/documents/Regulatory%20Control%20and%20Enforcement%20Activities%20of%20the%20Commerce%20Commission%202001-2002.pdf> (last accessed 7 October 2003).

(a) Pecuniary penalties

Under section 80 of the Act the Court may impose a pecuniary penalty on a person who has breached a provision of the Act relating to restrictive trade practices. Section 80 sets out two maximum penalties (one for individual and one for corporate offenders), which apply to all offences under Part II of the Act. Individuals may be ordered to pay a pecuniary penalty of up to $500,000. To further deter individuals, the Court must impose a penalty on an individual contravener, unless there is good reason not to.

This focus on deterring individuals is further supported by sections 80A and 80C, as inserted by the Commerce Amendment Act 2001. Section 80A provides that companies cannot indemnify their directors, servants, or agents from liability for pecuniary penalties or for costs incurred by defending any proceedings with respect to price fixing. Section 80C enables the Court to order that individuals are excluded and banned from management of a body corporate for up to five years. These amendments were considered important features to deter individuals more effectively.[25] However, the (deterrent) effect of both provisions remains to be seen. Section 80A(1)(a) could well be read as if only referring to indemnity for price fixing, thus allowing general indemnity clauses.[26] The exclusion and banning from management functions in any body corporate is a very harsh sanction, which may amount to an occupational ban. Quite likely, such a ban will only rarely, if ever, be sought.

The maximum penalty for bodies corporate is the greater of $10,000,000 or three times the value of any commercial gain resulting from the contravention. Since it is often very difficult to ascertain such additional proceeds, subsection 80(2B)(b)(ii)(B) provides that the Court may also order to pay 10 per cent of the (annual) turnover of the body corporate and all of its interconnected bodies corporate.

The High Court may also impose a pecuniary penalty for breach of section 47 concerning prohibited business acquisitions.[27] The maximum penalties here are $500,000

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[25] Jill Mallon & Jenny Stevens "Commerce Act Penalties for Individuals" (2001) NZLJ 339; prior to the amendments, individuals had been penalised in only three Commerce Act cases: *Commerce Commission v BP Oil New Zealand* [1992] 1 NZLR 377; *Commerce Commission v Wrightson NMA Ltd* (1995) 5 NZBLC 99-346; *Commerce Commission v Christchurch Transport Ltd* (21 August 1998) High Court Christchurch CP 72/98.

[26] Mallon & Stevens, above, 341.

[27] Commerce Act 1986, s 83(1).

for individuals and $5,000,000 for bodies corporate. The Commerce Amendment Act 2001 left the maximum corporate penalty relating to prohibited business acquisitions unchanged. The reason for this might have been that, so far, Courts have not imposed any penalties under section 83.[28]

Although the Commission has conducted the investigation and is probably most familiar with a particular case, it is to the Court's discretion to determine the appropriate amount of the penalty having "regard to all relevant matters".[29] New Zealand Courts traditionally refer to a list of relevant factors set out in the Australian decision of *TPC v Annand & Spencer Pty Ltd*.[30] These factors include:

- Whether the conduct was deliberate;
- Whether damage was caused to the public or to the retailer;
- The size of the corporation's activity in the relevant market;
- The degree to which conduct was initiated or condoned by senior management;
- Whether there has been similar conduct in the past;
- Whether the corporation has made a full and frank disclosure and cooperated with the Commission.

Other factors that have been influential in the Court's decisions are:

- The need for penalties to be set at a deterrence level;
- The signal given by the statutory increase of the maximum penalties;
- The difficulty in detecting breaches;
- The lack of evidence on the quantum of the damage;
- The lack of clear guidance as to quantum of penalties provided by the cases;
- The costs of the Commission taking the case.[31]

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[28] For a table setting out the penalties imposed by the Commerce Commission between 1990 and 2000 see Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194, 198.

[29] Commerce Act 1986, ss 80(2A), 83(2).

[30] *TPC v Annand & Spencer Pty Ltd* (1987) 9 ATPR 40-772 (FCA).

[31] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 18.

Moreover, sections 80(2A) and 83(2) of the Act specify which factors the Court must "in particular" take into account when determining the amount of the penalty. These factors include the extent of any commercial gain a corporate body may have obtained through the breach, the nature of the prohibited conduct, the damage any person has suffered from the offence and any past offending. Although the Commerce Amendment Act 2001 altered the factors specified in section 80(2A),[32] it is considered to be likely that the Court will continue to observe the traditional set of factors but attribute more or less importance to certain factors in accordance with the 2001 alterations.[33]

Apparently, the above factors have provided sufficient guidance about the appropriate level of penalties to enable the Commission in a significant number of cases to reach agreements with the offenders as to the amount of the penalty. In fact, in 12 out of 16 cases between 1994-2000, in which penalties were imposed, the Commerce Commission presented an agreed penalty to the Court.[34] Comparing court-imposed and negotiated penalties, the Commission observed that it has been "more successful in obtaining higher penalties where it has been able to present the court with a penalty agreed with the defendant."[35]

The reason for Parliament doubling the corporate penalty under section 80 of the Act in 2001 was the perception that Courts had been setting penalties at a too low level to achieve sufficient deterrence.[36] In 1998, Peter Allport, then Chairman of the Commerce Commission, complained that the "penalties imposed by Courts have been consistently considerably lower than penalties agreed by the Commission and the defendant and then approved by the Court."[37] In fact, until 1998, the highest penalty for a single contravention had been $300,000, which accounted for only six per cent of the (then)

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[32] Former s 80(2) was identical to s 83(2), comprising all the factors specified there.

[33] Jill Mallon & Jenny Stevens "Penalties for Corporate Offenders" (2001) NZLJ 389.

[34] For instance *Commerce Commission v Toyota New Zealand Ltd* (9 September 1997) High Court Wellington CP95/95; *Commerce Commission v DB Breweries Ltd* (28 November 1997) High Court Auckland CL35/97; *Commerce Commission v Taylor Preston Limited & Ors (No.2)* (1998) NZBLC 102,598; *Commerce Commission v Eli Lilly and Co. (New Zealand) Ltd* (30 April 1999) High Court Auckland CL 19/98, 6; see also NZ Ministry of Commerce, above, 18 fn. 44.

[35] NZ Commerce Commission *Penalties, Remedies and Court Processes under the Commerce Act 1986* (submission to Ministry of Commerce, March 1998) para 21 <http://www.comcom.govt.nz/publications/GetFile.CFM?Doc_ID=65&Filename=PENALTY.PDF> (last accessed 7 October 2003).

[36] NZ Ministry of Commerce, above, 31.

[37] Peter Allport "Competition Law "An Evolution"" (1998) NZLJ 275.

maximum amount of $5,000,000.[38] After the imposition of the highest single pecuniary penalty to date ($1,500,000) in *Commerce Commission v Taylor Preston Ltd*[39], there appears to be a trend to slightly higher pecuniary penalties.[40]

However, in *Commerce Commission v Giltrap City Ltd*, the Court again imposed a pecuniary penalty well below what the Commission wanted despite several factors that were in favour of a large penalty.[41] The Court found that the conduct of the defendant was deliberate and performed by senior management. It accepted the Commission's submission that the defending company had a high standing, large size, and had more extensive financial resources in contrast to other like businesses.[42] Finally, the court found that the defendant had only co-operated with the Commission little more than it was legally obliged to. Despites these findings, the Court only imposed a pecuniary penalty of $150,000 on the defendant, although the Commission had suggested a penalty of up to $250.000.[43]

(b) Injunctions

The High Court may also grant an injunction for contraventions of Part II, III and IV of the Act to restrain a person from (further) engaging in the prohibited conduct.[44] Pursuant to section 88 of the Act, the Court has a wide discretion for its decision. For example, if the Court is satisfied that a person has engaged in the said conduct it may grant an injunction even if it considers that the person does not intend to engage again in the offending conduct and there is no imminent danger of substantial damage.

The High Court may also grant an interim injunction pending the determination of an application for an injunction, if it deems it to be desirable.[45] Such interim injunctions aim to temporarily restrain the defendant form doing something that will cause people

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38 *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406, 568-9 (HC) McGechan J.

39 *Commerce Commission v Taylor Preston Limited & Ors (No.2)* (1998) NZBLC 102,598-599 (HC).

40 *Commerce Commission v Eli Lilly and Co. (New Zealand) Ltd* (30 April 1999) High Court Auckland CL 19/98, 5 ($500,000 and $200,000); *Commerce Commission v Caltex New Zealand Ltd* (2000) 9 TCLR 366, 368-9 ($450,000, $375,000 and $350,000); *Commerce Commission v Carter Holt Harvey Building Products Group Ltd* (2000) 9 TCLR 636, 649 ($525,000).

41 *Commerce Commission (CC) v Giltrap City Ltd* (2002) 10 TCLR 305 (HC).

42 *CC v Giltrap*, above, 314.

43 *CC v Giltrap*, above, 306, 319.

44 Commerce Act 1986, ss 81, 84, 87.

45 Commerce Act 1986, s 88(2)(b) and (3)(b)

damage for which they cannot be compensated at the full hearing. As an exemption by law, section 88A(1) of the Act provides that the Court cannot require the Commission to give an undertaking as to damages if the Commission applies for an interim injunction. This is because the Commission, as a public enforcement body, is deemed to have "as little as no incentive to behave opportunistically".[46] Finally, when considering the granting of an interim injunction, the Courts must give weight to the public interest.[47]

(c) Divestiture orders

Section 47 of the Act provides that the acquisition of a business, which would, or would be likely to, substantially lessen competition in a market, is prohibited. In the event of a contravention of section 47 the Court may order the disposal of assets or shares of the contravening parties.[48] It can determine the way of the divestiture either by its own discretion or in accordance with an undertaking given by the contravening party to the Commission under section 69A of the Act. Since the substitution of section 85 in 1991, divestiture is no longer limited to those shares and assets acquired in the merger.[49] In fact, the Court now may order divestiture of *any* shares or assets belonging to any party of an illegal merger.[50] The remedy of divestiture is available for contraventions of section 47 only. The Courts cannot order the divestiture of assets or shares to overcome the effects of practice of other anti-competitive acts like, for example, restrictive trade practices pursuant to Part II of the Act.[51]

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[46] Commerce Commission, see *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) vol 1, CA88.08, 302 (last updated in 13 March 2003); Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194, 210.

[47] Commerce Act 1986, s 88(3A), inserted by Commerce Amendment Act 2001, s 22.

[48] Commerce Act 1986, s 85.

[49] Section 85 was substituted, as from 1 January 1991, by s 32 Commerce Amendment Act 1990 (1990 No 41).

[50] *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) vol 1, CA85.04 (last updated 13 March 2003).

[51] *Brooker's Gault on Commercial Law*, above, CA85.04.

(d) Criminal prosecution

New Zealand does not criminalize offences under the Commerce Act 1986.[52] Thus, the Commerce Commission can take criminal action only in relation to offences under the Fair Trading Act 1986.

4 Private enforcement

In New Zealand, the private right of action in competition matters was first introduced by the Commerce Act 1986. Under the Trade Practices Act 1958 as well as under the Commerce Act 1975, enforcement of competition law had been reserved to administrative officials and the Courts.[53] One reason for the introduction of private remedies was to utilise the potential "insider" knowledge of competitors and suppliers to alleged contraveners that presumably would facilitate detection and prosecution of anti-competitive conduct.[54] Another consideration was to avoid solely relying on a public enforcement agency, which might be constrained by budget restraints.[55] Under the Act, private actions are generally available for contraventions of Part II, III and IV of the Act. Accordingly, private parties may file an action addressing anticompetitive conduct like arrangements that substantially lessen competition, group boycotts, price fixing, and contraventions of the merger provisions. However, from the limited data available on private competition law claims it seems that private actions have dealt primarily with allegations of abuse of dominant position in contravention of the old section 36 of the Act.[56]

(a) Standing to sue

The Act provides for open standing to sue for injunctive relief. Sections 81 and 84 provide that the Court may "on the application of the Commission or any other person"

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[52] Under s 23C of the Trade Practices Act 1958 and s 58 of the Commerce Act 1975, restrictive trade practices contraventions had been enforceable by criminal proceedings.

[53] Rex J Ahdar "Antitrust Policy in New Zealand: The Beginning of a New Era" (1992) 9 International Tax and Business Lawyer 329, 334, who calls this regime a "cumbersome, bureaucratic system".

[54] Bernard M Hill & Mark R Jones *Competitive Trading in New Zealand: The Commerce Act 1986* (Butterworths, Wellington, 1986) 159.

[55] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 32 <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf> (last accessed 7 October 2003).

[56] NZ Ministry of Commerce, above, 31.

grant an injunction. Applicants do not have to claim that they were injured by the alleged contravention or have a special interest in the application. Therefore, public interest groups, consumer groups and trade associations theoretically qualify as potential plaintiffs. Damage claims, in contrast, require the plaintiff to establish a causal connection between anti-competitive conduct in question and the alleged damages or losses.[57] According to sections 82 and 84A of the Act, only those may bring an action for damages, whose loss or damage was "caused" by the alleged contravention.[58] New Zealand's Courts do not appear to have developed any criteria to further specify this causation requirement.

(b) Remedies

In general, private parties can choose between the remedies of injunctive relief and damages for contravention of the above provisions. Private plaintiffs cannot obtain divestiture orders in merger cases. Section 85(1) of the Act only refers to "applications of the Commission" for issuing such an order.

(i) Injunctions

According to sections 81 and 84 of the Act, private parties can obtain injunctive relief from contraventions of Parts II and III of the Act. Under section 88(2)(b) of the Act, the court may also grant interim injunctions "[i]f in the opinion of the [c]ourt it is desirable to do so" and regardless of whether it appears to the Court that the target of the interim injunction "intends to engage again, or to continue to engage" in the alleged misconduct.

So far, most of the key enforcement decisions under the Commerce Act have been made in private actions for injunction.[59] However, the discussion preceding the Commerce Act amendment in 2001 revealed that especially interim injunctions, until then, had failed to achieve sufficient deterrence and that litigation under the Commerce Act in

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[57] It could be argued that the requirement to prove a causal connection is not an element of the standing requirement.

[58] See also s 89(1), which empowers the court to order, inter alia, the payment of damages in an action for an injunction. Before making such an order, however, the court must find "that a person who is a party to the proceedings has suffered, or is likely to suffer loss or damage by conduct ... in contravention of any of the provisions of Part II of this Act."

general was associated with high cost and delay.[60] These considerations led to the introduction of cease and desist orders to be made by the Commerce Commission under the new sections 74A-D of the Act. The Commerce Committee stated that "cease and desist orders would be an administrative injunction to terminate conduct that is, *prima facie*, in breach of the Act."[61] It, therefore, remains to be seen whether private actions for injunctions will continue to contribute to New Zealand's competition jurisprudence as they have done in the past. It is not unlikely that private parties will attempt to minimise cost and delay by seeking to induce the Commerce Commission to commence proceedings for cease and desist orders before making application for injunctive relief in court. The future may become clearer once the Commerce Commission has developed its approach to cease and desist orders.[62]

(ii) Damages

Under sections 82 and 84A of the Act, private parties may claim damages for any loss or damage caused by a contravention of the provisions relating to restrictive trade practices and business acquisitions. As it becomes clear from the discussion preceding the Commerce Act amendment in 2001, the role of damages under the Act is not just to compensate plaintiffs for their losses but also to deter anticompetitive conduct.[63] The rationale behind this approach is the notion that, ultimately, it is the general public who suffers from anti-competitive conduct rather that just the individual competitor.[64] Moreover, compensation for anti-competitive conduct by awarding purely compensatory damage is often deficient, because it can be hard to identify the number of customers

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[59] See NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 57, Appendix 4, for a list of cases.

[60] In 1996, the Ministry of Commerce estimated that, on average, it took 121.4 weeks for a Commerce Act case to be litigated in the High Court, see *Review of penalties, remedies and court processes under the Commerce Act 1986 - Paper 4: Improving Court Processes* (Wellington, 1999) 1.

[61] *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) vol 1, CA74A.04 (last updated 24 June 2003).

[62] See NZ Commerce Commission *Regulatory Control and Enforcement Activities of the Commerce Commission 2001/2002* (Wellington, 2002) 8 <http://www.comcom.govt.nz/about/documents/ Regulatory%20Control%20and%20Enforcement%20Activities%20of%20the%20Commerce%20Commission%202001-2002.pdf> (last accessed 7 October 2003).

[63] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 32: "The main issue that we consider ... is whether the role of damages under competition law is to compensate or deter or both. We conclude that there is a deterrence role and that the current approach to damage awards does not achieve the deterrence objective."

[64] NZ Ministry of Commerce, above, 7-9.

harmed who even may have passed on some of the damage for example by subsequently on-selling an overpriced product.[65]

Although the Commerce Act has been in force for over 17 years now, damages have been sought in only a small number of cases and only in one case the Court held that the plaintiff was entitled to, though unspecified, damages.[66] It seems that plaintiffs have difficulties in proving the causal connection required by sections 82 and 84A of the Act. In *Union Shipping NZ Ltd v Port Nelson Ltd*, for example, the plaintiffs sought orders for damages for loss suffered as a result of the inability to load or unload a vessel arising out of the defendant's alleged anti-competitive conduct.[67] Although the High Court held that the conduct was illegal, it also concluded that the plaintiffs had been unable to establish a sufficient nexus between any loss suffered by them to entertain the claim for damages.[68] In another case, *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd,* the High Court, the Court of Appeal, and the Privy Council found that Telecom was in breach of section 36 of the Act by refusing to supply its Direct Dial In (DDI) facilities to Clear for interconnection with the network.[69] However, all three courts dismissed Clear's claim for damages on the grounds that Clear had suffered no remediable loss because it was unlikely that Clear would have accepted even a reasonable offer by Telecom for interconnection to the network.[70]

It, therefore, seems highly questionable whether the remedy of damages has achieved the intended degree of deterrence so far.[71] Its contribution to competition jurisprudence in New Zealand has been, by all means, negligible.

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65 NZ Ministry of Commerce, above, 32-33.

66 In *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1992) 5 TCLR 166, 219, 220, the High Court held that the plaintiff (Clear) was entitled to damages flowing from a breach of section 36 of the Act. However, it suggested that they could be absorbed by the negotiated terms of interconnection. On appeal, Clear's entitlement to damages was confirmed but due to the special circumstances of the case, no specific amount of damages could be awarded, see *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1993) 5 TCLR 413, 438.

67 *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662.

68 *Union Shipping*, above, 662, 713.

69 *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

70 *Telecom v Clear*, above, 385, 409.

71 In 1998, the Ministry of Commerce concluded that the remedy of damages had failed to achieve the deterrence objective. Nothing much has changed since then.

(iii) Exemplary damages

In order to fix the lack of deterrence pertaining to damages, Parliament decided to introduce exemplary damages into the Commerce Act in 2001. The idea was to give an unmistakable signal to the courts that damages claims should be considered as a deterrent available to private plaintiffs.[72] Initially, the Ministry had considered multiple damages as an option to achieve the deterrence objective but the idea was eventually rejected because multiple damages were thought to give too strong incentives to overlitigation.[73] As from May 2001, section 82A(1) of the Act allows the Court to order a person to pay exemplary damages for any breach of Part II of the Act, even though it has already imposed (or will impose) a pecuniary penalty for the same conduct. However, the Court must have regard to the amount of such a penalty when determining the amount of exemplary damages to be awarded.[74] This rule was established to meet concerns about possible double jeopardy.[75]

(iv) Analysis

To date, New Zealand Courts have not yet exercised their discretion to award exemplary damages. It, therefore, remains to be seen if exemplary damages will achieve the deterrence objective as intended. The expectations are, however, low.[76] Several factors suggest a rather pessimistic view.

First of all, it could be derived from the Ministerial discussion document that Courts have already under-utilised their powers relating to *compensatory* damages.[77] There is no obvious reason why the mere availability of *exemplary* damages should reverse this trend.

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[72] NZ Cabinet Economic Committee *Review of the Penalties, Remedies and Court Processes Under the Commerce Act 1986 - Paper 3: Reforming Remedies* (Wellington, December 1998) para 21.

[73] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 36-8.

[74] Commerce Act 1986, s 82A(2).

[75] *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) vol. 1, 3-294, CA82A.04 (last updated 24 June 2003).

[76] Jill Mallon & Jenny Stevens "Commerce Act Penalties for Individuals" (2001) NZLJ 339, 341; Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194, 208-9.

[77] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Wellington, January 1998) 36.

Secondly, as cases like *Union Shipping v Port Nelson* and *Telecom v Clear* indicate, the reason for the lack of successful damage claims appears to be the difficulties private plaintiffs have in proving both damages as well as a causal connection between the alleged anti-competitive conduct and the damages.[78] These difficulties and the costs and delay usually associated with Commerce Act litigation make settlements in potential (exemplary) damage cases a more reasonable alternative to litigation.[79]

Third, the judicial threshold for the award of exemplary damages in other areas of law such as tort, breach of contract, breach of fiduciary duty seems to be quite high. In *Ellison v L*, the Court of Appeal recently stated in regard to a claim in tort for personal injury:

> "Exemplary damages are awarded to punish a defendant for high-handed disregard of the rights of a plaintiff or for acting in bad faith or for abusing a public position or behaving in some other outrageous manner which infringes the rights of the plaintiff. ... We said in Cable v Robertson at p15:
>
> New Zealand Courts are conservative in their approach to exemplary damages, reserving them for cases of truly outrageous conduct, which cannot be adequately punished in any other way. They are awarded only in serious and exceptional cases. "[80]

Consequently, if exemplary damages are to be granted only in cases of the worst offending, there is likelihood that the Commerce Commission will step in anyway and seek action for a pecuniary penalty. In this case, Mallon and Stevens consider the chances to obtain exemplary damages as "minimal if not non-existent."[81]

Furthermore, awards of exemplary damages in other commerce-related areas of law have been rather low. In *Cook v Evatt* for example, Fisher J, having found a breach of a fiduciary duty, awarded exemplary damages of only $5,000 compared to compensatory damages of $22,000 (which was, in effect, the profit wrongfully made on the transac-

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[78] See also Jill Mallon & Jenny Stevens, above, 341.

[79] Mallon and Stevens speculate that exemplary damages might have minimal practical impact as a threat in settlement negotiations.

[80] *Ellison v L* [1998] 1 NZLR 416, 419 (CA).

[81] Jill Mallon & Jenny Stevens "Commerce Act Penalties for Individuals" (2001) NZLJ 339, 342.

tion).[82] Other cases comprise *Harding v Kummer* ($5,000 for a conspiracy to rig an auction) and *Witten Hannah v Davies* ($10,000 for breach of a fiduciary duty).[83]

Finally, as already adumbrated, it is also the structure of section 82A of the Act that renders it unlikely that exemplary damages will achieve the envisaged deterrence or pose a sufficient incentive to sue. First, it is to the Court's discretion to award exemplary damages at all, and if so, to determine the amount of such damages.[84] In the absence of an automatic trigger for exemplary damages, parties are left uncertain as to whether or not the Court will actually grant exemplary damages. Secondly, the Court must consider any pecuniary penalty already been imposed for the same conduct when determining the amount of the exemplary damages.[85] This further reduces the incentive to sue in cases where a pecuniary penalty has already been imposed or is likely to be imposed.

To conclude, the private right of action in New Zealand has contributed to the anti-trust jurisprudence primarily through private actions injunctions, but has, so far, failed as an instrument to achieve sufficient deterrence through private damage actions.

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82 *Cook v Evatt* [1992] 1 NZLR 676.

83 *Harding v* Kummer (21 March 1983) High Court Auckland A 1107-80, Casey J; *Witten Hannah v Davies* [1995] 2 NZLR 141.

84 Section 82A(1) reads: "The Court ***may*** order a person ... *to* pay exemplary damages..."

85 Commerce Act 1986, s 82A(2).

B Germany

The relevant German competition law is set out in the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen,* "GWB"), which protects the existence of competition in Germany against all forms of restrictions.[86] Contraventions of the GWB are framed as administrative offences. Thus, complementary enforcement legislation comprises the German Administrative Offences Act (*Gesetz über Ordnungswidrigkeiten,* "OWiG"), the German Penal Code (*Strafgesetzbuch*, "StGB") and the Code of Criminal Procedure (*Strafprozeßordnung*, "StPO").

1 Public enforcement bodies

Competition law enforcement on a federal level is primarily in the hands of the Federal Cartel Office (*Bundeskartellamt* – "the Office"). In exceptional cases, the Federal Ministry of Economics and Labour Ministry (*Bundesministerium fuer Wirtschaft und Arbeit*) may, on application, authorise cartels or mergers otherwise prohibited if they are deemed necessary on public interest grounds.[87] The State Cartel Offices (*Landeskartellämter*) are the Office's counterparts at a state level. They are competent to deal with restraints on competition only if the influence on competition does not extend beyond the territory of the State (*Bundesland*).[88]

(a) The Federal Cartel Office

The Federal Cartel Office is an independent federal agency. Its main task is to apply and enforce the provisions of the GWB. The Office proceeds against all restraints of competition, which have an effect within Germany, but is not concerned with unfair trade practises.[89] The Office comprises of 11 Decision Divisions, which decide on all administrative and administrative fine cases. A Division consists of a chairperson and

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[86] For an official English translation of the GWB see <http://www.bundeskartellamt.de/GWB01-2002.pdf> (last accessed 7 October 2003); Bundeskartellamt *The Tasks of the Bundeskartellamt – An Overview* (Bundeskartellamt, Bonn, 2002) 2 <http://www.bundeskartellamt.de/Broschure_engl_Jan02.pdf> (last accessed 7 October 2003).

[87] Sections 8, 42 GWB.

[88] Sections 48(2) GWB.

[89] The relevant law here, the UWG, is enforced by private parties.

two other members who must reach a majority decision. Each Division is responsible for activities in a particular product and service market. For example, the 3rd Division deals with the chemical products branch while the 7th Division is mainly concerned with electrical engineering products.[90] The ultimate head of authority is the President of the Federal Cartel Office. The Decision Divisions decide independently on the cases and on competitive criteria alone.[91] They do not receive instructions from any internal bodies (for instance the President) or external authorities. Although being responsible to the Ministry of Economics and Labour[92] the Federal Cartel Office does not receive instructions from it. Located in Bonn, the Office has a staff of about 270, 50 per cent of which are senior civil servants appointed for life and holding degrees in law or economics.[93] The current annual budget of the Office accounts for about EUR 16 million (approximately NZ$ 31.5 million).[94]

(b) The courts

In terms of competition enforcement, German courts are primarily responsible for judicial review. Individuals or undertakings may file an appeal with the Court of Appeal in Düsseldorf (*Oberlandesgericht* "OLG" *Düsseldorf*) against decisions of the Federal Cartel Office. Decisions on appeals are rendered by a specialised cartel division, which is neither a civil nor criminal division but an independent panel of judges with special expert knowledge.[95] Appeals on points of law against the decisions of the Court of Appeal may be filed with the Federal Supreme Court (*Bundesgerichtshof*). The ordinary courts decide private actions arising under the Act.

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[90] For an English structure chart see <http://www.bundeskartellamt.de/Organigrammeng0703.pdf> (last accessed 7 October 2003).

[91] Bundeskartellamt *The Tasks of the Bundeskartellamt – An Overview* (Bundeskartellamt, Bonn, 2002) 4 <http://www.bundeskartellamt.de/Broschure_engl.Jan02.pdf> (last accessed 7 October 2003).

[92] Section 51(1)(1) GWB.

[93] Bundeskartellamt *The Tasks of the Bundeskartellamt – An Overview*. Above, 9.

[94] See <http://www.bundeskartellamt.de/bundeskartellamt.html (last accessed 7 October 2003).

[95] For a structure chart see <http://www.olg-duesseldorf.nrw.de/index.htm> (last accessed 7 October 2003).

2 Administrative enforcement by the Federal Cartel Office

The GWB vests the Office with far-reaching enforcement powers. Its competences comprise the investigation and determination of a contravention as well as the power to impose administrative fines or to issue cease and desist orders.

(a) Administrative cease and desist orders

The Office may prohibit any conduct, which is in contravention of the provisions of the GWB, by way of an administrative order pursuant to section 32 GWB.[96] Section 34 GWB provides for excess proceeds surcharge orders. If an undertaking or person, as a result of a conduct prohibited by the Office, has obtained additional proceeds following service of the prohibiting decision, the Office may order the undertaking to pay to it "an amount equivalent to such additional proceeds (skimming-off additional proceeds)."[97] The Office may estimate the amount of such additional proceeds.

(b) Administrative fines

The predominant sanction for anti-competitive behaviour in Germany is the imposition of an administrative fine. The Office may impose such fines on persons or undertakings committing infringements of the GWB or decisions of the Office pursuant to section 81 GWB. This section provides that whoever intentionally or negligently violates one of the substantive GWB provisions referred to in section 81(1), commits an administrative offence. Section 81(2) GWB distinguishes between severe administrative offences and minor offences. Severe administrative offences are listed in section 81(2) GWB and comprise contraventions of substantive law prohibitions like the prohibition of cartels and the abuse a market-dominating position.[98] Such serious offences may be punished by a fine of up to EUR 500,000, and in excess of this amount up to three times the additional proceeds obtained as a result of the violation. Contraventions not listed in section 81(2) GWB constitute only minor offences. Such cases concern the protection of official information duties as well as reporting duties; a minor offence is, for example,

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[96] Section 32 GWB reads: "Prohibition – The cartel authority may prohibit conduct by undertakings and associations of undertakings which is in contravention of this Act."

[97] According to s 34(1) GWB, this rule does not apply insofar as such additional proceeds have been balanced by payments of damages or by an administrative fine.

the failure to notify the Office after having put a concentration into effect.[99] For minor offences the Office may impose a fine up to EUR 25,000.

The Office may impose a fine on "whoever" wilfully or negligently contravenes a prohibition or order referred to in section 81 GWB. This affects private individuals as well as undertakings. If an undertaking is a legal entity (*Juristische Person*), it can be held liable for an offence committed by its organs and representatives. According to section 30 OWiG, such an offence will be deemed the offence of the association, if the offence infringes a company-related duty of the association, or if the association is enriched and this enrichment was intended. Company-related duties include guarantor obligations and duties of care towards third parties in trade, and, in particular, the duty of the proprietor of the undertaking to supervise pursuant to section 130 OWiG.[100] Since the breach of supervisory duties can consist in faulty organisation, the Office can impose an administrative fine if the duty to supervise has been breached but is not possible to identify the person who actually committed the breach.[101]

The basic factors in setting the amount of the fine are the significance of the administrative offence and the charge levelled at the offender.[102] Section 17(2) OWiG further provides that a fine imposed for negligent infringement may only amount up to half of the maximum amounts set out in section 81(2) GWB. Apart from these general rules, German law does not provide any sentencing guidelines as to how to determine the amount of a fine.[103] However, the Office's and Courts' practice has established several factors that must be taken into account, which are quite similar to the factors adopted by New Zealand courts. These factors relate to the nature, gravity and duration of the infringement. Some of them are:

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98 Section 81(1) no.1 GWB, referring, *inter alia*, to ss 1, 19 GWB.

99 Sections 81(1) no. 4, 39(6) GWB.

100 See Jörg Biermann "Report" to be published in Gerhard Dannecker / Oswald Jansen (eds) *Competition Law Sanctioning in the European Union: The EU-law Influence on National Competition Law Sanctioning* (Kluwer Law International, The Hague, The Netherlands, forthcoming 2003) 12, 13 <http://english.pbc.or.id/data/indonesien1_antitrust_jerman.doc> (last accessed 7 October 2003).

101 Bundesgerichtshof (BGH) (8 February 1994) KRB 25/93 WuW/E BGH 2904 and NStZ 1994, 346 *Unternehmenssubmission* <http://www.recht-find.de/bgh30owig.htm> (last accessed 7 October 2003).

102 Section 17(3) OWiG.

103 Only the Office's guidelines for its 'leniency programme' set out some mitigating factors, see Bundeskartellamt *Bekanntmachung Nr. 68/2000 über Richtlinien des Bundeskartellamtes für die Festsetzung von Geldbußen - Bonusregelung* (Bonn, Germany, April 2000) <http://www.bundeskartellamt.de/Bonusregelung.pdf> (last accessed 7 October 2003).

- The way in which the offence was carried out, for example, the application of confidentiality measures when putting plans restricting competition into effect;[104]
- The motives and aims of the offender, for example, whether the offender was acting out of necessity or emergency;[105]
- Whether the infringement affected the whole national market or or a market of considerable economic importance and scale;[106]
- Whether an infringement constitutes a purely administrative irregularity;[107]
- The duration of the offence as well as the frequency of similar contraventions are also important considerations;[108]
- Whether the offender has cooperated with the Office to uncover anti-competitive conduct.[109]

(c) Procedure of administrative decision-making

The procedure of administrative decision-making is governed by sections 57 *et seq* GWB, while penalty proceedings are specifically regulated by the OWiG. The Office may use information and documents obtained during the investigation under section 59 GWB in subsequent penalty proceedings provided that the administrative proceedings were carried out properly, that means in particular that advice was given concerning the right to non-disclosure under to section 59(5) GWB.

According to section 47(1) OWiG, the prosecution and punishment of anti-competitive offences and, thus, the institution of proceedings for administrative fines lies within the proper discretion of the cartel authority and is subject to considerations of

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[104] KG Berlin (14 January 1972) *Zahnpasten* WuW/E OLG 1265, 1268.
[105] See Biermann, above, 20, fn. 19 for further reference.
[106] KG Berlin (6 June 1984) WuW/E OLG 3175, 3180 *Preisanpassungsklausel*; BKartA (16 February 1982) WuW/E BKartA 2005, 2007 *Behälterglas*; KG Berlin (11 September 1998) WuW/E DE-R 228, 232 *Osthafenmühle*.
[107] BKartA (28 December 1971) WuW/E BKartA 1376, 1387 *Linoleum*.
[108] BGH (29 April 1991) WuW/E BGH 2718, 2720 *Bußgeldbemessung*; KG Berlin (2 September 1974) WuW/E OLG 1569, 1570 *Tierpflegemittel*.
[109] See Bundeskartellamt *Bekanntmachung Nr. 68/2000 über Richtlinien des Bundeskartellamtes für die Festsetzung von Geldbußen - Bonusregelung* (Bonn, Germany, April 2000) <http://www.bundes kartellamt.de/Bonusregelung.pdf> (last accessed 7 October 2003).

expedience.[110] The Office can confine itself to prosecuting individual offences taking into account objective goals and the gravity of the contravention. In an unclear state of affairs, the authority can set the estimated costs of investigation in relation to the expected result of the investigation.[111]

In an administrative fine proceeding, a range of statutory provisions, which are to guarantee a fair trial, protects the accused. Once, the Office has instituted proceedings against a person for a contravention of competition law, it must inform the accused of his right to remain silent pursuant to section 136 StPO.[112] Any accused is given opportunity to comment on the accusation.[113] He or she has the right to make a statement before the closing of investigations at the latest.[114] Counsel for the defence is entitled to inspect the files, provided that the Office has noted the termination of investigations in the file.[115] The Office must inform counsel as soon as the right to inspect files exists without restriction. Counsel enjoys legal privilege; oral and written communication between the accused and counsel may neither be restricted nor be subject to seizure.[116] If the Office decides to impose an administrative fine, it issues a penalty notice, which is send to the accused and which the Office may enforce pursuant to sections 90(1), 92 OWiG.

(d) Legal remedies against sanctions – Right to appeal

The offender may file an objection against a penalty notice with the Office within two weeks after service of the notice pursuant to section 67 OWiG. If the Office does not revoke the penalty notice, the file is forwarded to the cartel division of the Court of Appeal in Düsseldorf.[117] The cartel division normally decides on such objection at a full trial. The penalty notice forms the basis of the trial. The Court, however, may order further investigation of the matter according to section 71(2) no 1 OWiG. Because of its

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[110] Gerhard Dannecker & Jörg Biermann in Ulrich Immenga & Ernst-Joachim Mestmäcker *GWB Gesetz gegen Wettbewerbsbeschränkungen – Kommentar* (3 ed, CH Beck, München, Germany, 2001) preamble to section 81 paras 148 *et seq.*

[111] Erich Göhler (ed) *Gesetz über Ordnungswidrigkeiten – Kurzkommentar* (13 ed, CH Beck, München, Germany, 2002) section 47 paras 3 *et seq.*

[112] Göhler *Gesetz über Ordnungswidrigkeiten – Kurzkommentar*, above, section 55 para 8 with details.

[113] Section 56(1) GWB.

[114] Section 46 OWiG in connection with s 163(1) StPO.

[115] Section 46 OWiG in connection with s 147 StPO.

[116] Sections 97, 148(1) StPO.

[117] The OLG Düsseldorf has jurisdiction on penalties matters pursuant to section 83 GWB.

special expertise, the Office may respond to the appeal and has the right to attend the trial.[118] The judgment is made independently of the penalty notice, and will either acquit, convict or suspend proceedings.[119] The Court may also increase the sanction originally imposed by the penalty notice.[120] Appeals against judgments of the cartel division of the OLG may only be made on points of law pursuant to section 79(1) OwiG to the Federal Court of Justice, which has exclusive jurisdiction pursuant to section 84 GWB.

(e) Efficiency and deterrence of fine proceedings

Statistical data on the speed and accuracy of the Office's administrative fine proceedings is rare. However, there are some indications as to the efficiency of the administrative process. According to its Activity Report for 2001/2002, the Office commenced cartel proceedings against firms in the ready-made concrete sector, which resulted in the imposition of fines amounting to a total of EUR 1.6 million and EUR 2.7 million.[121] The respective penalty notices became final binding in less than a year. In May 1998, the Office carried out a nation-wide search of road signs manufacturers and subsequently imposed fines totalling DM 3.7 million against 10 undertakings and 14 individuals, which became final in less than 8 months.[122] These sample figures show that the Office is able to conduct complex investigations and subsequently impose significant fines without major delay and, apparently, without legal fault. All penalty notices in the cases above became legally binding, that means no (successful) appeals were filed against them.

In terms of amounts of fines, one can fairly safely assume that administrative fines grant significant deterrence. The Office does not hesitate to conduct nation-wide investigations and subsequently impose large fines on offenders, which it has frequently done in the past. In 1999 and 2000 the Office detected a State-spanning price and quota cartel between firms in the ready-mixed concrete sector, which operated over several years. By

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[118] Göhler *Gesetz über Ordnungswidrigkeiten – Kurzkommentar*, above, section 76.
[119] Sections 46(1), 71(1) OWiG, 411(4) StPO.
[120] Compare ss 71, 72(3)(2) OWiG.
[121] Bundeskartellamt *Tätigkeitsbericht des Bundeskartellamtes 2001/2002* (Deutscher Bundestag, Drucksache 15/1226, Bonn, Germany, 27 June 2003) 147 <http://dip.bundestag.de/btd/15/012/1501226.pdf> (last accessed 7 October 2003).
[122] Bundeskartellamt *Tätigkeitsbericht des Bundeskartellamtes 1997/1998* (Deutscher Bundestag, Drucksache 14/1139, Bonn, Germany, 25 June 1999) 34 <http://dip.bundestag.de/btd/14/011/1401139.pdf> (last accessed 7 October 2003).

virtue of the evidence seized during the investigation, the Office was able to impose administrative fines amounting to a total of around DM 370 million on 69 firms and on 51 managing directors.[123] Most of the fines became legally binding very quickly because the firms did not deny the allegations.[124] In April 2003, the Office imposed even larger, and up to now, record fines totalling approximately EUR 660 million in cartel proceedings against the six largest German cement manufacturers.[125] In both cases, the Office applied the surcharge rule of section 81(2) GWB to determine such massive fines.

3 Criminal enforcement

The GWB does not provide for criminal sanctions. However, a violation of competition law may constitute a criminal act subject to criminal prosecution under the German Criminal Code. The only criminal sanction specifically concerning competition is for bid rigging pursuant to section 298 StGB, which may be punished by imprisonment up to five years or imposition of a fine. Anti-competitive conduct may also constitute general offences such as fraud, coercion or extortion. In practice, however, German competition law enforcement largely relies on the deterrence achieved by administrative fines. So far, there is hardly any case law on section 298 StGB.[126] Reasons for this are presumably the narrow focus of section 298 StGB and the fact that it is a relatively new provision.[127]

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[123] Bundeskartellamt *Activity Report 1999/2000 – Short version* (Bundeskartellamt, Bonn, Germany, 2001) <http://www.bundeskartellamt.de/Kurzbroschuere-BKartA-TB-English.pdf> 29, 30 (last accessed 7 October 2003).

[124] Bundeskartellamt (3 November 1999) Press Release <http://www.bundeskartellamt.de/03_11_1999_englisch.html> (last accessed 7 October 2003).

[125] Bundeskartellamt (14 April 2003) Press Release <http://www.bundeskartellamt.de/14_04_2003_englisch.html> (last accessed 7 October 2003).

[126] Jörg Biermann "Report" to be published in Gerhard Dannecker / Oswald Jansen (eds) *Competition Law Sanctioning in the European Union: The EU-law Influence on National Competition Law Sanctioning* (Kluwer Law International, The Hague, The Netherlands, forthcoming 2003) 16 <http:// english.pbc.or.id/data/indonesien1_antitrust_jerman.doc> (last accessed 7 October 2003).

[127] Section 298 StGB was introduced as part of the Act Combating Corruption which entered into force on 20 August 1997.

4 Private enforcement

The GWB provides for private enforcement of competition law in section 33 GWB.[128] According to this section, private actions are available for the violation of any provision of the GWB (or decision by a cartel authority), if the provision (or decision) in question is intended to protect the interests of the potential plaintiff. The actionable conduct comprises, *inter alia*, a contravention of the ban on cartels (section 1 GWB) and the abuse of a market-dominating position (section 19 GWB). According to the practice of the German courts, competitors to the parties of a cartel are protected by Section 1 GWB in any case and have, therefore, standing to sue for injunctive relief or for damages if they are significantly affected by a cartel.[129] Suppliers and customers, however, will have to establish that the cartel in question aims at their individual detriment or hindrance. This could be the case, for instance, with respect to a customer who suffers from a price cartel.

Under section 33 GWB, private parties may sue for injunctive relief or claim contractual and tortuous damages for any loss or damage caused by a wilful or negligent contravention of such provision. Since German law does not recognise "punitive damages", private parties can only claim compensatory damages for anti-competitive behaviour.[130] Under sections 249 *et seq.* of the German Civil Law Code (*Bürgerliches Gesetzbuch*, "BGB"), such a claim for compensation is limited to restoring the state of affairs, which would have existed without the infringement.[131]

Much like criminal enforcement, the private right of action has not played a significant role in competition law enforcement in Germany. In particular, the practical significance of private damages claims in Germany has been low.[132] To date, German courts have not ordered cartel participants to pay a certain amount of damages. As a matter of fact, private actions for damages by companies as cartel victims hardly ever occur. A

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[128] Section 33 GWB reads: "Liability for Damages; Claims for Injunctions – Whoever violates a provision of this Act or a decision taken by the cartel authority shall, if such provision or decision serves to protect another, be obliged vis-à-vis the other to refrain from such conduct; if the violating party acted wilfully or negligently, it shall also be liable for the damages arising from the violation. The claim for injunction may also be asserted by associations for the promotion of trade interests provided the association has legal capacity."

[129] Volker Emmerich in Ulrich Immenga & Ernst-Joachim Mestmäcker *GWB Gesetz gegen Wettbewerbsbeschränkungen – Kommentar* (3 ed, C.H. Beck, München, Germany, 2001) section 33 paras 8 *et seq*

[130] Biermann, above, 15.

[131] Emmerich in Ulrich Immenga & Ernst-Joachim Mestmäcker, above, section 33 paras 45 *et seq.*

reason for this might be that cartels are extremely difficult to detect from the outside because they are usually concluded under highly conspiratorial circumstances.[133] In this regard, the prospect of mere compensation may not be enough to induce private parties to commence litigation. One impediment to private enforcement of the rules against abusive conduct of market-dominating enterprises has been the reluctance of adversely affected small firms to commence an action for fear of retaliatory measures taken by accused business partners.[134] This obstacle was removed by the 1999 Amendments to the Act. Now, the Office may institute proceeding *ex officio* upon the request of a complainant in order to protect the claimant's anonymity.[135]

C *United States*

The federal antitrust laws of the United States are enforced in several ways. Public enforcement authority is vested in two federal agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission, which exercise their authority through civil and criminal actions. The antitrust laws give also standing to private parties, who can bring lawsuits seeking treble damages and injunctions. Final decisions in terms of penalties, damages awards, injunctions and other orders are up to the federal courts. In the United States, the private antitrust actions are "the principal mechanism, by which the antitrust laws are enforced."[136] Over the past 25 years, private actions have constituted in excess of 90 % of all antitrust cases filed in the United States.

The relevant substantial antitrust law of the United States is set out in three major federal codes. The Sherman Act outlaws all acts that unreasonably restrain interstate and foreign trade or monopolise any part of interstate commerce. Sherman Act violations are punished as criminal felonies and can lead to criminal fines or the imprisonment of individuals. The Clayton Act is a civil statute carrying no criminal penalties. It prohibits

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[132] Emmerich, above, section 33 para 1.

[133] This was also on of the reasons for the Bundeskartellamt to launch its 'leniency programme' in April 2000. This programme provides incentives for cartel members to leave the cartel and to inform the Office via reduced fines for the informer, see <http://www.bundeskartellamt.de/Bonusregelung-E.pdf> (last accessed 7 October 2003).

[134] Joachim Rudo "The 1999 Amendments to the German Act Against Restraints of Competition" (Berlin, Germany, 1999) <http://www.antitrust.de> (last accessed 7 October 2003).

[135] Section 54(1)(1) GWB.

[136] Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and Its Practice* (West Publishing, St. Paul, MN, United States, 1994) 542.

mergers and acquisitions that are likely to lessen competition, and discriminating business practices like price discrimination.[137] The Clayton Act also provides for the private right of action. The Federal Trade Commission Act prohibits unfair methods of competition in interstate commerce. It also created the Federal Trade Commission to police violations of the Act. Complementary procedural legislation comprises the Antitrust Procedures and Penalties Act (Tunney Act) and the Federal Administrative Procedure Act.

1 Public enforcement bodies

Public enforcement of the federal antitrust laws is largely in the hands of two federal enforcement agencies, the Antitrust Division of the Department of Justice of the United States and the Federal Trade Commission. The Antitrust Division has technically exclusive federal responsibility for enforcing the Sherman Act, and has joint authority with the Federal Trade Commission over enforcement of the Clayton Act. Since the jurisdiction of the two agencies overlaps, they have developed clearance procedures to notify each other before commencing investigations or filing actions to avoid duplicative investigations and prosecutions.[138]

(a) The Antitrust Division of the Department of Justice

The Antitrust Division ("the Division") is part of the executive branch of the government. Its location in the Department of Justice, rather than in a department more specifically charged with economic policy, follows from the Sherman Act's origins as a criminal statute. The Division has exclusive federal responsibility to enforce the criminal provisions of the federal antitrust laws.[139] The Division's main antitrust enforcement activity is the launching of investigations and, if necessary the subsequent pursuit of criminal or civil litigation. However, the Division also can (and often does) terminate civil antitrust investigations leading to litigation by reaching a settlement approved by the court ("consent decrees"). The Division cannot issue binding orders on its own au-

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[137] Section 2 of the Clayton Act, as amended by the Robinson-Patman Amendment in 1936; section 2, therefore, is also referred to as the Robinson-Patman Act.

[138] Ernest Gellhorn & William E Kovacic (eds) *Antitrust Law and Economics* (4 ed, West Publishing, St. Paul, MN, United States, 1994) 452.

[139] Sections 1 and 2 of the Sherman Act, s 3 of the Robinson-Patman Act, and s 14 of the Clayton Act.

thority, but must make its cases to the judges. The Antitrust Division is headed by the "Assistant Attorney General" who is nominated by the President and confirmed by the Senate.

(b) The Federal Trade Commission

The Federal Trade Commission ("the Commission") is an independent regulatory agency, located politically between the legislature and the executive. The Commission has direct authority for civil enforcement of the Clayton Act. It also has the power to challenge "unfair methods of competition" under section 5 of the Federal Trade Commission Act.[140] Courts have interpreted this section to include all practices that violate the Sherman Act and the other antitrust laws, so the Commission has effectively the authority to enforce the substance of all of the antitrust laws.[141] The Commission consists of five commissioners who are appointed by the President subject to Senate confirmation and serve seven-year terms. The Commission exercises its enforcement authority mainly through administrative adjudication, which take the form of an internal complaint procedure. Its remedial authority is limited to issuing cease and desist orders and assessing civil penalties for violations of such orders.[142]

2 Public enforcement

Public remedies for violations of the antitrust laws include criminal penalties such as fines and jail sentences and civil remedies such as injunctions, cease and desist orders.

(a) Criminal prosecution – Fines and imprisonment

The Antitrust Division may bring criminal prosecutions under the Sherman Act, which can lead to criminal fines or jail sentences. According to the Assistant Attorney General, R. Hewitt Pate, criminal antitrust enforcement is a "core priority" of the Anti-

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[140] 15 USC Section 45(a)(1).

[141] Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and Its Practice* (West Publishing, St. Paul, MN, United States, 1994) 536.

[142] 15 USC Section 45(l) & (m).

trust Division.[143] Under section 1 and 2 of the Sherman Act, the Antitrust Division can seek (and the courts can impose) criminal fines of up to US$ 10 million for corporate offenders. If a greater fine is appropriate, the Division can invoke 18 USC Sec. 3571(d), a general provision governing the sentencing of criminal fines.[144] According to this section, a corporate defendant may be fined twice the illegal gross gain derived from the crime or twice the pecuniary loss caused to the victims. Under this provision the Division was able to obtain record fines of US$ 500 million from Swiss F. Hoffmann-La Roche Ltd and US$ 225 million from German BASF AG in 1999 for their participation in a worldwide vitamin cartel.[145] The fines in these two cases as in almost all other major criminal proceedings have, however, not been assessed by a court but have been negotiated between the offenders and the Division in either Plea or Sentencing Agreements.[146] Individual offenders may be fined up to US$ 350,000. In addition, courts can sentence individuals to up to 3 years in federal prison for each offence. In the last years there has been a trend towards increasing jail sentences, leading to a record of 10,000 days of total jail time in the fiscal year 2001/02 with an average sentence of more than 18 months and jail terms imposed on high-profile executives.[147]

(b) Civil enforcement – Injunctions and consent decrees

The Division may sue for an injunction under section 15 of the Clayton Act.[148] The obtainable relief includes forbidding orders as well as orders requiring positive acts to restore competition including the divestiture or discontinuance of parts of a business.

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[143] R Hewitt Pate, Assistant Attorney General, Antitrust Division, US Department of Justice) "Vigorous and Principled Antitrust Enforcement: Priorities and Goals" (Speech before the Antitrust Section of the American Bar Association on its Annual Meeting, San Francisco, California, 12 August 2003) <http://www.usdoj.gov/atr/public/speeches/201241.htm (last accessed 7 October 2003).

[144] 18 USC Section 3571(d) reads: "Alternative Fine Based on Gain or Loss - If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process."

[145] Both companies agreed to plead guilty, see US Department of Justice (20 May 1999) Press Release <http://www.usdoj.gov/atr/public/press_releases/1999/2450.htm> (last accessed 7 October 2003).

[146] A list of all recent Sherman Act violations yielding a fine of US$10 million or more is available at <http://www.usdoj.gov/atr/public/criminal/12557.htm> (last accessed 7 October 2003).

[147] Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice "A Review of Recent Antitrust Division Actions" (Speech manuscript distributed at American Bar Association, Section of Business Law, 2003 Conference for Corporate Counsel, Washington, D.C. 12 June 2003) <http://www.usdoj.gov/atr/public/speeches/201159.htm> (last accessed 7 October 2003).

[148] 15 USC Section 25.

Under section 15 of the Clayton Act, the Court may also make a "temporary restraining order or prohibition" as it deems just. In contrast to private actions under section 16, the Division does not have to provide security or bond against damages for an improvidently granted temporary order. Most of the civil antitrust cases brought by the Division result in consent decrees, which are binding out-of-court settlements approved by the court. In this case, the issues raised in the action are not discussed in trial and no testimony is taken. Consent decrees are attractive to defendants because, other than a final judgment, they do not constitute *prima facie* evidence against the defendant in any follow-on treble damage action under section 5(a) of the Clayton Act.[149]

(c) Cease and desist orders

The Federal Trade Commission's main enforcement remedy is a cease and desist order.[150] The Commission can issue such orders without having to resort to the courts after a specific internal proceeding governed by the Federal Trade Commission Act[151] and supplementary regulations.[152] Usually, the Commission receives inquiries and complaints from customers and competitors about possible antitrust law violations. The Commission evaluates each inquiry or complaint, and where appropriate, makes a formal complaint to the Administrative Law Judge, a Commission employee with somewhat protected tenure and status.[153] The defendant has thirty days to file an answer to the complaint. If the complaint is contested, the Administrative Law Judge conducts a hearing, which is similar to a trial and then issue a preliminary decision. During this process, the Commission's complaint counsel bears the burden of proof. The Commission can either approve or disapprove the preliminary decision. The Commission's cease and desist order from may be judicially reviewed by the Federal Court of Appeal.

3 Private enforcement

Private actions have been accessible under the United States antitrust laws since the enactment of the Sherman Act in 1890. The private right of action was initially estab-

[149] 15 USC Section 16 (Tunney Act).
[150] See s 5(b) of the Federal Trade Commission Act, 15 USC Section 45(b).
[151] 15 USC Sections 41-58.
[152] 16 CFR (Code of Federal Regulations) Chapter I.

lished in section 7 of this statute and was superseded by section 4 of the Clayton Act in 1914.[154] Despite this long tradition of private antitrust actions, Hovenkamp has pointed out that "neither Congress nor the courts has articulated a rationale for private enforcement."[155] He presumes that the purpose of private antitrust enforcement is to maximise social wealth by deterring inefficient practices and permitting efficient ones. According to a OECD report on the role of competition policy in regulatory reform provided by the United States Government, private suits are deemed to be a supplement to public enforcement of competition law, but it is also noted, that "the litigants' priorities and motivations may not always be consistent with the government agencies' views on competition policy."[156]

(a) Actionable conduct

According to sections 4 and 16 of the Clayton Act any violation of "the antitrust laws" may be subject to a private action.[157] The term "antitrust laws" as defined in section 1 of the Clayton Act comprises the Sherman Act and the Clayton Act. The Federal Trade Commission Act is not included in this definition and, therefore, cannot be enforced by private parties.

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[153] See 16 CFR (Code of Federal Regulations) Section 0.14 concerning the organization of the Federal Trade Commission.

[154] 15 USC Section 15 reads: "a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

[155] Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and its Practice* (West Publishing, St. Paul, MN, United States, 1994) 543.

[156] Organisation for Economic Cooperation and Development (OECD) B*ackground Report on the Role of Competition Policy in Regulatory Reform* (Michael Wise, peer reviewed in June 1998 in the OECD's Competition Law and Policy Committee) 17 <http://www.oecd.org/dataoecd/3/24/2497266.pdf.> (last accessed 7 October 2003).

[157] Section 16 of the Clayton Act provides: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, ...", 15 USC Section 26.

(b) Standing to sue

According to the simple language of section 4 of the Clayton Act, a private plaintiff is only required to claim injury to his business or property caused by someone else's antitrust violation in order to have standing. However, United States courts have established several limits on private standing to sue under the Clayton Act. In *Blue Shield of Virginia v McCready*, the Supreme Court stated that "there is a point, beyond which the wrongdoer should not be held liable" and that "[i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property."[158] One reason for the limits on private antitrust enforcement rights has been the concern that the potential windfall of mandatory treble damages plus attorney's fees to prevailing plaintiffs encourages not only justified claims but also strategic or frivolous litigation.[159]

An essential element of antitrust standing is that the plaintiff must have suffered "antitrust injury".[160] The United States Supreme Court introduced this concept in *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.* in 1977.[161] The Court rejected the damage claim brought by a competitor of the alleged contravener because it found that the plaintiff's injury was due to an increase of competition arising from the conduct of the defendant. The Court held, that

> "Plaintiffs to recover treble damages ... must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation."[162]

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[158] *Blue Shield of Virginia v McCready* (1982) 457 US 465, 477, citing *Illinois Brick Co v. Illinois* (1977) 431 US 720, 760.

[159] Ernest Gellhorn & William E Kovacic *Antitrust Law and Economics* (4 ed, West Publishing, St. Paul MN, United States, 1994) 462; Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and its Practice* (West Publishing, St. Paul, MN, United States, 1994) 543.

[160] There is some debate whether antitrust injury is an element of standing or rather an analytically distinct requirement, see E Thomas Sullivan & Jeffrey L Harrison *Understanding Antitrust And Its Economic Implications* (3 ed, Matthew Bender, New York, United States, 1998) 45; this paper applies a broad concept of 'standing', therefore "antitrust injury" is treated as an element of standing.

[161] *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.* (1977) 429 US 477.

[162] *Brunswick*, above, 489.

Antitrust injury refers to the nature of the plaintiff's injury. The courts have used the antitrust requirement to strike out complaints from competitors, which, in fact, had been injured but by reason of an increase in competition resulting from the illegal conduct rather than as a result of a diminution in competition.[163]

According to the Supreme Court's decision in *Cargill, Inc. v Monfort of Colorado, Inc.*, the antitrust injury standard also applies to private claims for injunction.[164] The Court held that a plaintiff must demonstrate a threat of antitrust injury in order to have standing to sue for injunctive relief under section 16 of the Clayton Act.

United States courts have developed other judicial rules further limiting antitrust standing, but with little consistency in tests and results.[165] Some of these limitations are reflected in the Supreme Court's decision in *Associated General Contractors of California, Inc. v California State Council of Carpenters*, where the court made an attempt to elaborate a generalized standing test.[166] In this case, the Court denied standing to a labour union, which claimed that the defendant non-union employers had coerced general contractors and landowners into employing non-union rather than union contractors. It stated that standing under section 4 of the Clayton Act should be determined by applying the following factors flexibly on a case-by-case basis: (1) whether the plaintiff's injury is of the type Congress sought to redress; (2) whether the defendant intended to harm the plaintiff; (3) the directness or indirectness of injury; (4) the existence of other persons more directly injured who are likely to sue; and, (5) whether the claim involves speculative harm, duplicative recovery, or a complex apportionment of damages.[167] Despite the diversity of tests and limitation, the common notion seems to be that standing is limited to consumers or competitors in the market that is targeted by the alleged antitrust violation.[168]

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[163] *Brunswick,* above; *Cargill, Inc. v Monfort of Colorado, Inc.* (1986) 479 US 104, 107; *Atlantic Richfield Co. v USA Petroleum Co.* (1990) 495 US 328.

[164] *Cargill, Inc. v Monfort of Colorado, Inc.* (1986) 479 US 104, 107.

[165] See Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and its Practice* (West Publishing, St. Paul, MN, United States, 1994) 553-557.

[166] *Associated General Contractors of California, Inc. v California State Council of Carpenters* (1983) 469 US 519, 537.

[167] *Associated General Contractors of California,* above, 537-43.

[168] Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and its Practice* (West Publishing, St. Paul, MN, United States, 1994) 557; E Thomas Sullivan & Jeffrey L Harrison *Understanding Antitrust And Its Economic Implications* (3ed, Matthew Bender, New York, United States, 1998) 44.

(c) Remedies

In the United States private action enforcing the antitrust laws can be either for treble damages of injunctive relief. Additionally, private antitrust plaintiffs may initiate a class action for injunctive or declaratory relief. However, since the antitrust laws do not govern class actions, they are not subject to this examination.[169]

(i) Injunctions

According to section 16 of the Clayton Act, "any person, firm, corporation, or association" can sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws". Private plaintiffs may also obtain an interim or "preliminary" injunction if they execute "proper bond against damages for an injunction improvidently granted and ...[show] that the danger of irreparable loss or damage [from the antitrust violation] is immediate." However, section 16 does not allow the seeking of injunctive relief on behalf of the public. To become entitled to injunctive relief, a plaintiff must show that he or she is threatened with a special injury differing from that, which might be suffered by the public at large.[170] A plaintiff who successfully obtains an injunction is entitled to collect attorney's fees from the defendant.

(ii) Treble damages

If a plaintiff satisfies the requirements for standing, he or she is entitled to "threefold the damages by him sustained" plus attorney fees pursuant to section 4 of the Clayton Act. Since the multiplying effect triggers automatically, it is not to the court's or jury's discretion whether damages are to be trebled or not. The judge simply multiplies the jury's award by three. Damages are calculated either from the difference between the competitive price and the 'overcharge' price the plaintiff was forced to pay or from the lost profits of the plaintiff due to an antitrust violation.[171] Up to date statistical data on private treble damages awards granted by United States courts is sparse. One reason for this is that a high percentage of private antitrust suits are either settled or dismissed be-

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[169] In the United States, class actions are governed by Rule 23 of the Federal Rules of Civil Procedure, 7 FRCiv P 23.

[170] *Revere Camera Co. v Eastman Kodak Co.* (1948) 81 F Supp 325, 331 (ND Ill).

[171] Herbert Hovenkamp *Antitrust* (2 ed, West Publishing, St. Paul, MN, United States, 1993) 293-4.

fore trial.[172] However, private treble damage actions often follow successful public enforcement action.[173] For example, in the aftermath of the vitamin-cartel-proceedings against F. Hoffmann-La Roche Ltd Roche, BASF AG, and others, private parties brought civil suits against these companies seeking treble damages and received several million dollars in a settlement.[174]

III COMPARATIVE ANALYSIS

A The Role and Importance of Public Enforcement

In all three jurisdictions in this study the public sector plays a predominant role in competition law enforcement. This is not only shown by the kind of remedies available and the deterrence flowing from them but also by the administrative mechanisms and quasi-judicial powers that facilitate the public sector's enforcement activities.

First, the public sector has more deterring remedies available than the private sector. In New Zealand, Germany, and the United States, the public sector has the exclusive power to recover substantial penalties or fines. New Zealand's Commerce Commission may seek a maximum penalty of the greater of $10 million or either three times the illegal commercial gain or 10% of annual turnover of a corporate contravener. The highest single pecuniary penalty ever imposed on a corporate offender amounted to $1.5 million.[175] The German Federal Cartel Office can punish serious administrative offences by a fine of up to EUR 500,000, and, in excess of this amount, up to three times the illegal proceeds. This surcharge rule has enabled the Office to impose record fines totalling approx. EUR 660 million in cartel proceedings in April 2003. In the United States, the Antitrust Division can seek criminal fines for corporate offenders in an amount equal to the largest of US$10 million or twice the illegal gain derived from the crime or twice the

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[172] According to Steven C Salop & Lawrence J White "Treble Damages Reform: Implications of the Georgetown Project" (1986) 55 Antitrust Law Journal 73, 77, the settlement rate lies between 70 and 80 per cent.

[173] Spencer Weber Waller "The Incoherence of Punishment in Antitrust" (2003) 78 Chicago-Kent Law Review 207, 210.

[174] Michael Freedman "Here Comes Treble" (27 August 2003) <http://www.forbes.com/2003/08/27/cz_mf_0827antitrust.html> (last accessed 7 October 2003).

[175] *Commerce Commission v Taylor Preston Limited & Ors (No.2)* (1998) NZBLC 102,598-599.

pecuniary loss caused to the victims.[176] The largest fine ever imposed in a criminal prosecution on a single offender has been an impressive US$500 million for a corporate offender.

Private actions, though a common feature of all jurisdictions, have not resulted in damage awards that are even close to the amount of fines imposed by the public agencies. In New Zealand and Germany, no specified sum of damages has ever been granted to a private plaintiff for a contravention of competition law. The research has revealed that, for different reasons, a future increase in damage awards is unlikely in both countries. In the United States, a private action for damages could theoretically approach the level of public penalties due to the treble-damages-trigger of section 4 of the Clayton Act. However, this is unlikely against the background that treble damages are one part compensation and only two parts penalty. Moreover, private damage awards are confined to the illegal gain made at the expense of the individual plaintiff, not the illegal gain made by the defendant overall.

Secondly, the public sector has more far-reaching remedies at its disposal than the private sector. The public enforcement agencies of New Zealand, Germany, and the United States have the exclusive power to obtain (or, in Germany, to make) orders directing positive acts to restore competition in a market, namely dissolution and divestiture orders.[177] In the United States, the Antitrust Division can even seek imprisonment for individual offenders as violations of the Sherman Act are considered criminal felonies. Private plaintiffs, by contrast, are largely confined to actions for damages and injunctive relief.

Thirdly, the agencies of all three jurisdictions are vested with a quasi-judicial power to issue cease and desist orders without having to convince a court that this relief is appropriate. While this power is confined to prohibitive (or sometimes formative) orders in New Zealand and the United States, Germany's competition enforcement regime provides for more far-reaching powers. As the only agency in this study, the Federal Cartel Office may, by its own power, impose administrative fines without having to take the case to the court.

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[176] 18 USC Section 3571(d).
[177] Commerce Act 1986, s 85(1); s 41(3) GWB; s 15 Clayton Act, 15 USC Section 25.

Lastly, the public sector can benefit from an array of different administrative mechanisms to assist it in exercising its enforcement powers. The enforcement agencies of all countries are vested with comprehensive powers to investigate potential contraventions. Moreover, New Zealand's Commerce Commission has been relieved of the requirement to give an undertaking as to damages when applying for an interim injunction. Likewise, the Antitrust Division does not have to provide security or bond against damages for an improvidently granted temporary restraining order under section 15 of the Clayton Act.

B The Role and Importance of Private Enforcement

The three jurisdictions in the study each attach a different degree of importance to private enforcement of competition law.

Among the three countries, the United States has probably gone farthest in this respect. The availability of treble damages plus a reasonable attorney's fee has proven a powerful incentive to sue and private actions have contributed significantly to antitrust jurisdiction in the United States. Private actions have constituted in excess of 90 % of all antitrust cases in the past 25 years and outnumbered public sector actions by a ratio of 9:1. However, private enforcement of competition law in the United States does not seem to contribute much to achieving the ultimate goal of competition, which is to the benefit of the consumer. The issues in treble damage actions are narrowly confined to conduct that injured the plaintiffs. The same is true in actions for injunctive relief. Private parties are not granted open standing to sue, as they are in New Zealand. To obtain injunctive relief, they must prove that they were subjected to threatened injury by the alleged contravention of the antitrust laws. The threatened injury must be "special," in the sense of being different from that, which might be suffered by the public at large.[178] The private right of action, therefore, appears to be an egoistic rather than an altruistic enforcement tool.

New Zealand, in contrast, has so far rejected the introduction of multiple damages as a private enforcement remedy, but has granted the private sector a larger role in protecting the public interest. Under the Commerce Act, private parties have open standing

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[178] *Revere Camera Co. v Eastman Kodak Co.* (1948) 81 F Supp 325, 331 (ND Ill).

to claim for injunctive relief. Applications may be made by any person, which would include, for example, consumer groups and trade associations. Applicants are not required to prove that they were injured by the alleged contravention or possess an otherwise special interest in the application. Furthermore, courts must consider the interests of consumers when determining whether to grant an interim injunction in a private action.[179] Finally, since its amendment in 2001, the Commerce Act provides for exemplary damages to be granted to private plaintiffs by the courts. However, while private parties have, to some extend, contributed to antitrust jurisprudence via actions for injunctive relief, they, so far, have not had great success in obtaining damages awards.

In Germany the private right of action plays an almost negligible role in competition law enforcement. Although the GWB provides for private claims for damages and injunctions this feature has rarely been used and has, therefore, contributed little to antitrust jurisdiction in Germany. One reason for this phenomenon can, most likely, be seen in the comprehensive decision-making power of the Federal Cartel Office and the deterrence flowing from its penalty notices and other orders.

IV REFORM OPTIONS FOR NEW ZEALAND

A Room For Further Improvements

New Zealand amended the Commerce Act only recently in 2001. Therefore, the new features of the Act such as increased corporate penalties and exemplary damages should be given sufficient time to prove (or disprove) their usefulness. However, the research has shown that by now doubts are justified whether these new enforcement will bring about an increase in deterrence as envisaged by the Ministry of Commerce.[180] Therefore, it seems reasonable to consider further reform options for New Zealand's competition law enforcement regime, which might become relevant if the 'deterrence gap' cannot be closed in the future. The preceding synopsis and comparative analysis of competition law enforcement in New Zealand, Germany, and the United States has pre-

[179] Commerce Act 1986, section 88(3A).

sented some alternatives for the New Zealand regime. The following part closely examines two aspects taken from those regimes and explores the question as to what extend each might serve as a model for further reform of the New Zealand system.

B *Option No 1: Increased Competences of the Commerce Commission*

The first reform option to be considered is to confer additional decision-making power to the Commerce Commission, more precisely the power to impose pecuniary penalties. The model is this case is the respective competence of the German Federal Cartel Office. The reasons for such a change and its advantages as well as potential concerns will be assessed underneath.

1 Reasons and advantages

The analysis above has shown that by comparison New Zealand does not lack tough penalty provisions as a public enforcement remedy. The United States maximum numeralised fine is only twice (if converted) as high as its New Zealand counterpart, which is not such a big difference taking into account the countries' economies and the average volume of business transactions. The German maximum fine is only one tenth of the New Zealand maximum. Still, the German Federal Cartel Office has been able to impose large and deterrent penalties without much delay and often without subsequent litigation. This paper has revealed that in penalty cases New Zealand parties tend to settle their cases with the Commerce Commission and that the Commission is able to set penalties at a reasonable but deterrent level. In fact, such agreed penalties presented to the courts by the Commission have been higher (thus, more deterrent) than court-imposed penalties. Moreover, the Commission has indicated that it could have obtained even larger penalties but has been hindered from doing so by the availability of smaller court-imposed penalties.[181] Instead of considering further tougher penalties, it, therefore, seems appropriate to review the processes and the division of powers under the Com-

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[180] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Ministry of Commerce, Wellington, January 1998) 3, 4 <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf> (last accessed 7 October 2003).

[181] NZ Commerce Commission *Penalties, Remedies and Court Processes under the Commerce Act 1986* (Submission to Ministry of Commerce, March 1998) para 21 <http://www.comcom.govt.nz/publications/GetFile.CFM?Doc_ID=65&Filename=PENALTY.PDF>.

merce Act and consider the conferment of the power to impose penalties to the Commission.

(a) Speed and efficiency gains

To confer the power of imposing fines to the Commission would bring about an increase of speed and efficiency in penalty proceedings. It would reduce friction losses resulting from the existing two-step approach and lead to more appropriate, presumably higher and more deterrent fines.

The Ministerial discussion document of 1998 revealed procedural shortcomings relating to Commerce Act cases, especially inefficiencies in court processes. The most obvious concerns were the delay, uncertainty and complexity associated with Commerce Act case proceedings.[182] A general issue was the cognition that courts, by their very nature, are less flexible in the so-called "justice *versus* efficiency of process trade-off".[183] The main reason for this is that one can seek judicial review of an unjust decision rather than on the grounds that a court was inefficient.[184] Consequently, courts accept delays resulting from strict adherence to specific orders for court processes rather than risking an efficient but possibly unjust process. However, the 2001 Commerce Act amendment left the judicial system untouched.

The *Giltrap* proceedings between 1994 and 2002 serve as an illustrative example of the delay and intricateness associated with penalty proceedings under the Commerce Act. This case involved proceedings against Giltrap City Limited ("GCL") for price fixing in breach of sections 27 and 30 of the Act. In 1993 eight Toyota car dealers had entered into an arrangement to fix the price of new Toyota motor vehicles. The Commission commenced proceedings in 1994 and in 1996 seven defendants admitted liability and each were fined $50,000.[185] GCL, however, continued to defend the proceedings. After lengthy procedural challenges[186] the case was partly heard in September

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[182] NZ Ministry of Commerce, above, 3.

[183] NZ Ministry of Commerce, above, 47, referring to an examination of the civil justice system in England and Wales conducted by Rt Hon the Lord Woolf "Access to Justice" (July 1996).

[184] NZ Ministry of Commerce, above, 50.

[185] The Commission entered into a settlement with the dealers, see NZ Ministry of Commerce, above, 54 (Appendix 2).

[186] These challenges involved, *inter alia*, civil procedure rules concerning evidence of subpoenaed witness, see *Commerce Commission v Giltrap City Ltd & Anor* (30 August 2000) 14 PRNZ 450; the

2000, recommenced in February 2001 with final submissions delivered in March 2001. The Court delivered its judgment in September 2001, declaring that GLC, in fact, had entered into a price fixing arrangement.[187] However, it took another five months until the High Court in Auckland made a determination as to penalty (in this case NZ$ 150,000.[188]

In addition to the length of the proceedings, *Giltrap* also resulted in a penalty, which was significantly lower than what the Commission had requested.[189] Although the Court agreed with the Commission that numerous factors were in favour of a large penalty,[190] it considered itself being barred from fully taking into account the financial resources of the defendant to justify a higher penalty than those imposed on the other seven defendants. Glazebrook J found that he could not use this factor because the Commission had not made such a differential when setting penalties for the seven other dealers in the negotiated settlement although there had been indications as to different financial resources of those defendants.[191] Thus, ultimately the two-step approach, the time span, and the different types of dispute resolution (settlements in 1996, penalties set by Commission *versus* litigation between 2000 and 2002, penalty set by the Court) caused a friction loss, which in this case materialised in a less than appropriate penalty.[192]

If it were up to the Commission to impose penalties, it would not have to wait for court hearings being scheduled. Under a simple set of procedural rules, which provide for a fair trial but also set deadlines for submissions, it could largely avoid the delays resulting from the strict adherence to High Court rules and obstructive defendants. The example of the German Federal Cartel Office has shown that it is possible to finalise penalty proceedings within less than a year since the beginning of an investigation and to impose rigorous penalties, which are not opposed by the accused.[193] If the penalty

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question whether to treat one witness as hostile, *Commerce Commission v Giltrap City Ltd & Anor* (19 September 2000) High Court Auckland CP 88-94 Glazebrook J; an application for non-suit, see *Commerce Commission v Giltrap City Ltd & Anor* (2001) 15 PRNZ 410.

[187] *Commerce Commission v Giltrap City Ltd* (13 September 2001) 10 TCLR 190.

[188] *Commerce Commission v Giltrap City Ltd* (2002) 10 TCLR 305.

[189] See this paper, above, II A 3 a).

[190] *Commerce Commission v Giltrap City Ltd*, above, 319.

[191] *Commerce Commission v Giltrap City Ltd*, above, 319.

[192] Even Glazebrook J indicated that he would have imposed a higher penalty if he had deemed it possible, *Commerce Commission v Giltrap City Ltd*, above, 319.

[193] See this paper, above, II B 2e).

could be imposed without much delay, it would also be more efficient in terms of deterrence. First, (potential) offenders would see the punishment following the offence promptly. Secondly, an offender should not enjoy the use of the money he or she owes to the state as a penalty longer than absolutely necessary. Granted, if a long enough time lies between the violation and the judgment, an offender might even be able to 'refinance the penalty' by benefiting from interest rates or lucrative investments. Speedy penalty proceedings would deprive the offender of these benefits. Moreover, the additional deterrence won from this tempo gain would possibly supersede the frequent need to increase maximum penalties just to induce courts to impose higher penalties.[194]

(b) Knowledge and expertise

To confer the power of imposing fines to the Commission would also mean that the public body, which is most familiar with the case and which has the most general expert knowledge would make the decision.

The Commission is more familiar with a particular case than any court because it has conducted the investigation. During an investigation the trained Commission staff can require persons to furnish information, produce documents or give evidence. The Commission may also require persons to appear before the Commission and give evidence under oath. A Commission employee may also, under a search warrant, search the premises of an alleged contravener for documents and other things, inspect documents and take copies. Other sources of information and evidence of a contravention are so-called 'Whistle-blowers', who are encouraged to inform and cooperate with the Commission under its Leniency Policy.[195] The first-hand information obtained from these sources enables the Commission to carefully assess the case taking into account all relevant circumstances.

In addition, the Commission has, by its very nature, more general economic expertise than High Court judges. This expert knowledge, represented by its qualified and

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[194] This correlation effect has already been doubted to occur, see Jill Mallon & Jenny Stevens "Penalties for Corporate Offenders" [2001] New Zealand Law Journal 389, 390.

[195] The Leniency Policy of the Commerce Commission is currently under revision, see <http://www.comcom.govt.nz/about/documents/leniency_policy.pdf> (last accessed 7 October 2003).

experienced members and staff,[196] contributes to finding the most appropriate remedy in a particular case. An analysis of court decisions reveals no evidence that the High Court has made poor decisions because of lack of economic expertise. However, it cannot be denied that the High Court is not a panel of experts predestined to decide complex commerce cases. New Zealand High Court judges are generalists and not specifically trained judges like, for example, the members of the cartel division of the OLG Düsseldorf.[197] It has been this lack of expertise that has led to the New Zealand legislator providing for expert lay members to sit with a High Court judge pursuant to section 77, 78 of the Act. Unfortunately, there have been problems in the past in assembling a Court for Commerce Commission cases due to the unavailability of lay members.[198] However, as Connor has pointed out, it were these very lay members that have been praised for being responsible for some high quality judgments of the High Court.[199] So, there is something to be said for the predestination of the Commission to assess and decide on penalties.

In practice the Commission could benefit from the extensive list of factors Courts have developed and which have to be taken into account when determining the appropriate amount of a penalty. Again, the German experience shows that this is possible. To determine the amount of an administrative fine, the Federal Cartel Office has applied factors, which are more or less the same as the factors used by New Zealand courts. In summary, the closeness with the case in question and its natural expertise predestine the Commission not only to make a specific charge, but also to make an appropriate decision.

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[196] Section 9(4) of the Commerce Act 1986 requires that members of the Commission have knowledge of (or experience in) industry, commerce, economics, law, accountancy, public administration, or consumer affairs; see also <http://www.comcom.govt.nz/about/strategy.cfm> (last accessed 7 October 2003).

[197] Geoff Connor, Delegate from New Zealand, in a discussion concerning "The Role of Economics and Economists in Competition Cases" in OECD Competition Policy Roundtable "Judicial Enforcement of Competition Law" (OCDE/GD(97)200, 1997) <http://www1.oecd.org/daf/clp/Roundtables/Jug04.HTM> (last accessed 7 October 2003).

[198] Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194, 212; see also NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Ministry of Commerce, Wellington, 1998) 49, 50.

[199] Connor, above.

2 *Possible concerns*

(a) Conflicts of interest and natural justice

Regarding the introduction of cease and desist orders there have been concerns that this additional power would lead to an inherent conflict of interest of the Commission resulting from its joint roles as a investigator, prosecutor, and judge in the same matters.[200] It has also been questioned whether such orders would infringe ss 25 and 27 New Zealand Bill of Rights Act 1990, in particular the principle of natural justice.[201] These concerns would arise all the more if the additional power to impose penalties were to be conferred to the Commission.

Section 25 of the Bill of Rights Act provides for the "minimum standard of criminal procedure". It, *inter alia*, stipulates: " Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public hearing by an independent and impartial court: [...]" It, therefore, might be concluded that a public body that has prosecuted an offence, could never constitute an independent and impartial tribunal or court. However, the requirements of section 25 apply to *criminal* procedure. Contraventions of the Commerce Act do not constitute criminal offences, unless explicitly specified.[202] Moreover, the enforcement of Commerce Act provisions largely follows the rules of civil proceedings. In particular the standard of proof for penalties proceedings under the Act is the ordinary civil standard.[203] Consequently, when sought for an opinion on cease and desist orders, the Attorney-General of New Zealand advised that such orders did not infringe the New Zealand Bill of Rights Act.[204] Furthermore, the Bill of Rights Act 1990 does not contain a general principle or provision, which requires that functions and powers of a judicial nature

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[200] New Zealand Business Roundtable (NZBR) "Submission to the Commerce Select Committee on the Supplementary Order Paper amending the Commerce Amendment Bill" (Wellington, September 2000) 7, paras 5, 6< http://www.nzbr.org.nz/documents/submissions/submissions-2000/commerce_sop.pdf (last accessed 7 October 2003); Ian Millard "Penalties and Remedies", in: Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194, 212; *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) vol 1, 3-274(b), para CA74A.05 (last updated 13 March 2003).

[201] *Brooker's Gault on Commercial Law*, above, 3-274(a), para CA74A.05.

[202] See Commerce Act 1986, ss 80E(1), 86.

[203] See Commerce Act 1986, ss 80(3), 80B(3), 83(3).

[204] *Brooker's Gault on Commercial Law*, above, 3-274(a), para CA74A.05.

must be administered only in the courts.[205] So, it is not unsafe to assume that an additional power of the Commerce Commission to impose penalties would not infringe section 25 of the New Zealand Bill of Rights Act.

Section 27 of the Bill of Rights Act provides for the "right to justice". It reads:

> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority, which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

The concept of 'natural justice' basically requires the observance of procedural due process by administrative authorities whose decisions will (adversely) affect an existing right, interest or expectation of a person.[206] The two core elements of natural justice are: that parties be given adequate notice and opportunity to be heard and that the decision-maker be disinterested and unbiased. The concept of 'natural justice' and the content of its rules are considered to be flexible and its individual requirements depend on the circumstances of the case and the subject matter.[207]

To comply with the requirement of a fair hearing the procedure for the imposition of a penalty could be modelled after the German proceeding, which includes a full hearing, the right to comment, access to documents, and the principle of *nemo tenetur*.[208]

However, the joint roles of the Commission as an investigator, prosecutor, and judge in the same matter could raise doubts as to impartiality. Impartiality means that the decision-maker must not be biased. According to the rule *nemo judex in causa sua* – no one may judge his or her own cause – a decision-maker is biased when he or she has a personal interest in the case.[209] The Commerce Commission, *per se*, is a public body

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[205] For example, Articles 34 and 37 of the Constitution of Ireland essentially contain such a principle; the Irish Competition Authority, therefore, cannot itself impose fines for infringements of national competition law.

[206] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 847-8.

[207] Joseph, above, 848; Andrew S Butler & Petra Butler *The Laws of New Zealand: Human Rights* (LexisNexis, Wellington, 2003) 135 para 155.

[208] See this paper, above, II B 3 (b).

[209] Geoffrey A Flick *Natural Justice: Principles and Practical Application* (2 ed, Butterworths, Sydney, Australia, 1984) 147 *et seq.*

corporate, which is mandated to act solely in the public interest and is believed to have "as little as no incentive to behave opportunistically".[210] It is a popular misconception that competition authorities have a private or personal interest to impose penalties and fines. In fact, they do so solely because it is their statutory mandate or, simply put, "their job".

Challenges of impartiality, however, can also be based upon an alleged prejudgment of the merits of a particular case. Such prejudgment could flow from the prior involvement of a decision maker with the facts of the case he or she is later called upon to decide.[211] However, it is widely acknowledged that this presumption is to some extend eased when it comes to decisions in an administrative process.[212] First, the fact that an agency has conducted the investigation does not necessarily mean that the minds of its members are irrevocably closed to the merits of a case or to persuasion.[213] In this regard, it should be borne in mind that the Commerce Commission has no incentive to behave opportunistically or to pursue private interests. Secondly, the rigid adherence to a strict separation of powers within an administrative process strongly reduces its efficiency.[214] It is just not possible to leave every administrative determination to the judiciary, which possibly touches on the rights of the defendant. The New Zealand legislator has acknowledged this and, for example, has accepted a joint role of prosecutor and judge in the area of infringement offence notices (also known as "instant fines").[215] Government agencies may investigate and prosecute infringements such as traffic matters, resources management offences and biosecurity offences and subsequently impose fines for such infringements.[216] The United Kingdom, where the idea of the incompatibility between a prosecuting and a judging role was 'borne',[217] has recently further diluted this rule for efficiencies sake. According to sections 25, 36 of the Competition Act, the Director

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[210] *Brooker's Gault on Commercial Law* (Brookers, Wellington, 1994, Commerce Act 1986) vol 1, 302, para CA88.08 (last updated 13 March 2003); Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194, 210.

[211] Flick, above, 164.

[212] Flick, above, 164.

[213] Flick, above, 166-169.

[214] Flick, above, 165.

[215] David Wilson "Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand" (2001) 17 Social Policy Journal of New Zealand 72; for the infringement process see Summary Proceedings Act 1957, s 21.

[216] Wilson, above, 72, 73, 76.

[217] J R S Forbes refers to three ancient English cases as the source of this rule, in J R S Forbes Jus*tice in Tribunals* (The Federation Press, Sydney, Australia, 2002) 249 para 15.43.

General of Fair Trade has the power to investigate suspected infringement of the Act as well as the power to impose impose a penalty if he is satisfied that an infringement has been committed.[218] So it seems that concerns as to an infringement of natural justice are not so large that they should hinder New Zealand to follow the United Kingdom in this respect.

(b) Parties will appeal every time

Finally, there is a theoretical concern that offenders will not accept decisions of the Commerce Commission and will appeal on a regular basis. If that were the case, nothing much would be gained because then time-consuming court proceedings would protract proceedings even more and hearings would be doubled. However, there are some indications that this trend is not likely to emerge. The research has shown that in the past the Commerce Commission has settled the majority of penalty cases and has presented the Courts with a negotiated penalty. Apparently, the Commission has been able to find a penalty, which the offenders frequently found appropriate so that they saw no need to appeal and let a judge decide. This capability of competition authorities to assess and set penalties and fines at an appropriate level is further evidenced by the practice of the United States antitrust enforcement agencies. The Antitrust Division has obtained most of its large fines through Plea and Sentencing Agreements; and civil antitrust investigations of the Federal Trade Commission frequently result in consent decrees.

C Option No 2: Multiple Damages

The second option for a further reform proposed by this paper is the introduction of treble damages to efficiently promote the private enforcement of competition law in New Zealand. The model is this case is the respective private right of action in the United States. Again, the reasons for such a change and its advantages as well as potential concerns will be assessed subsequently.

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[218] Competition Act 1998 (UK), ss 25, 36, see <http://www.hmso.gov.uk/acts/acts1998/19980041.htm> (last accessed 7 October 2003).

1 Reasons and advantages

As the comparative analysis has revealed, New Zealand opted for a cooperative enforcement of competition law between the public and private sector when it introduced the Commerce Act in 1986. Unless this 'enforcement philosophy' is to be abandoned, any reform of the enforcement regime should consider the further strengthening of the private right of action for its merits such as disburdening public enforcement authorities and achieving additional deterrence. Before the 2001 amendment, Ministry analysis showed that the remedy of private damages suits failed to achieve sufficient deterrence and there is a strong likelihood that exemplary damages will not close the deterrence gap either.[219] Although it is presumably too early to assess the effects the 2001 amendment will have, it is not too early to evaluate a potential solution to the question of how the private sector should be equipped to achieve sufficient deterrence. The potential solution considered in the following is a multiple damages provision.

(a) Certainty for the parties

One advantage of a multiple damages provision modelled after section 4 of the Clayton Act would be an increase of certainty for the parties. If the damage multiplication triggered automatically, plaintiffs could figure out what their gain would be once they have established their claim. Under the present system, private parties are committed to the court's discretion in awarding exemplary damages and have to wait till the very last minute of the final judgment to see whether their efforts will be rewarded. Certainty as to the amount of damages one can expect would not only increase business predictability for potential plaintiffs, but would also reduce the complexity and costs of litigation.[220] In particular, plaintiffs would not have to plead why and to what extent multiple damages are appropriate, but could concentrate on proving the damage sustained and the causal connection between the contravention and the damage. As the paper has shown the latter has proven to be quite difficult for private plaintiffs. Moreover, an automatic trigger for multiple damages would also do away with the difficulty for the

[219] See this paper, above, II A 4 b) iv.

[220] E Thomas Sullivan & Jeffrey L Harrison *Understanding Antitrust and Its Economic Implications* (3 ed, Matthew Bender, New York, United States, 1998) 39.

Courts as to how to quantify the exemplary or non-compensatory component of the total amount of damages.[221]

(b) Increased deterrence

Another advantage of an automatic damage multiplier would be that it is more capable of achieving the deterrence objective than exemplary damages. It creates a strong incentive for private suits because of the potential windfall for the plaintiff. Statutory 'guaranteed' multiple gains from a private action are much more attractive to a plaintiff than the dim prospect of being awarded (presumably low) exemplary damages. Thus, the incentive to overcome the difficulties in investigating potentially anti-competitive conduct and proving damages and a causal connection is much higher. The counterpart of such increased incentive to sue would be an increase in deterrence. The deterrence would not only flow from actual damage suits but also from the mere availability of such threatening private enforcement tool. Moreover, New Zealand Courts would be freed from their constraints pertaining to the award of exemplary damages (award only in the most outrageous cases, traditionally small awards in commercial cases) and could impose higher damage awards than in the past. All this would make private damage actions a powerful enforcement tool, which would disburden the enforcement authorities. Another beneficial side effect would be that private damage suits could likely contribute more to the development of New Zealand competition jurisdiction than they have done in the past.[222]

2 Possible concerns

During the discussion preceding the 2001 amendment of the Commerce Act, the Ministry of Commerce had considered the introduction of treble damages but ultimately rejected the idea because treble-damages might lead to overlitigation and over-

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[221] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Ministry of Commerce, Wellington, January 1998) 34 <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf> (last accessed 7 October 2003).

[222] See this paper, above, II A 4 b) ii).

deterrence.[223] Even in the United States, the treble damages remedy has not been without challenge or controversy.[224]

(a) Overlitigation

It has been argued that treble damages encourage frivolous, meritless, and even strategic suits and, thus, lead to over-litigation.[225] The Ministry of Commerce was also afraid that the strong incentive provided by treble damages would seduce potential plaintiffs to turn ordinary business tort or contractual claims into competition law claims.[226] However, there are solutions to problems like this one. In the United States courts have been able to filter out meritless or non-competitive claims through the application of special antitrust standing requirements such as 'antitrust injury'. Firms victimized by frivolous treble damages actions are further protected by several rules of civil procedure, which provide sanctions for baseless suits and enable courts to dismiss meritsless claims without the necessity of formal motion papers.[227] New Zealand courts could benefit from the highly developed antitrust jurisprudence and experience with treble damages in the United States, and, thus, largely avoid the obstructions resulting from possible baseless or strategic suits. So this concern does not need to be a very convincing argument against the introduction of multiple damages.

(b) Overdeterrence

A second concern with regards to multiple damages is that they might deter more than is actually required. As Cavanagh has pointed out, trebling damages could discourage conduct, which is beneficial to competition rather than detrimental.[228] Corporate managers may shy away from aggressive or vigorous competition for fear that their con-

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[223] NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Ministry of Commerce, Wellington, January 1998) 36-7 <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf> (last accessed 7 October 2003); instead, the Ministry favoured the idea to make pecuniary penalties available in private actions.

[224] E Thomas Sullivan & Jeffrey L Harrison *Understanding Antitrust and Its Economic Implications* (3 ed, Matthew Bender, New York, United States, 1998) 38-9.

[225] Sullivan & Harrison, above, 38-9; Edward D Cavanagh "Detrebling Antitrust Damages: An Idea Whose Time Has Come?" (1987) 61 Tulane Law Review 777, 809-815.

[226] NZ Ministry of Commerce, above, 37; see also Herbert Hovenkamp Federal *Antitrust Policy – The Law of Competition and Its Practice* (West Publishing, St. Paul, MN, United States, 1994) 543.

[227] Fed R Civ P 11, 16(c)(1); see also Edward D Cavanagh "Detrebling Antitrust Damages: An Idea Whose Time Has Come?" (1987) 61 Tulane Law Review 777, 810-11.

duct might overstep the bounds of legality. This could lead to less competition and subsequently deny society the benefits of pro-competitive business practices.[229] This argument, however, is highly theoretical in nature.[230] Statistical data or other empirical material that could prove this contention is not available.[231] It is clear, that at one stage, the multiplication of damages, like for example by factor 20, will deter more than necessary. According to the New Zealand Ministry, damages should be best set at the point where the marginal benefit from deterring illegal conduct equals the marginal cost of deterring legal conduct.[232] However, it also admitted that it would be asking the courts to do too much to ask them to calculate or estimate the relevant marginal costs and marginal benefits.[233] Thus, a statutory damage multiplier at a reasonable level seems more appropriate and promising to achieve the deterrence objective.

(c) Overcompensation

Finally, treble damages have been called unfair because mandatory trebling may expose a plaintiff to high damage judgments that far exceed the scope of harm caused by a given defendant's wrongful acts. Moreover, plaintiffs are compensated in excess of the damages from actual injury ("windfall") and, thereby, "overrewarded".[234] However, with regard to the US system, Professor Lande has revealed that these contentions are built upon a false foundation, namely the assumption that damages awarded to plaintiffs are threefold the damages sustained.[235] Relying on numerous studies, extensive statistical data and case material, Lande elaborated that there are seven factors that increase the actual damage sustained, which are not covered as 'damages' to be trebled under the

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[228] Cavanagh, above, 801 *et seq*.

[229] Frank H Easterbrook "Detrebling Antitrust Damages" (1985) 28 Journal of Law and Economics 445, 456-7.

[230] E Thomas Sullivan & Jeffrey L Harrison *Understanding Antitrust and Its Economic Implications* (3 ed, Matthew Bender, New York, United States, 1998) 38.

[231] For example, Breit and Elzinga resort to economic theories, models and curves to illustrate this contention, see William Breit & Kenneth G Elzinga "Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis" (1973) 86 Harvard Law Review 693, 699 *et seq*.

[232] The Ministry applied Posner's and Becker's economic approach towards penalties, see NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Ministry of Commerce, Wellington, January 1998) 7-10, 37 <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf> (last accessed 7 October 2003).

[233] NZ Ministry of Commerce, above, 38.

[234] E Thomas Sullivan & Jeffrey L Harrison *Understanding Antitrust and Its Economic Implications* (3 ed, Matthew Bender, New York, United States, 1998) 39; Robert H Lande "Are Antitrust "Treble" Damages Really Single Damages?" (1993) 54 Ohio State Law Journal 115, 118.

[235] Lande, above, 118.

current system. These "adjustments" to the damage multiplier, *inter alia*, include: the lack of prejudgment interest paid to plaintiffs; non-recoverable costs of the plaintiff for pursuing a case such as hourly rates for employees conducting investigations; costs to the judicial system arising from handling often complex and lengthy antitrust cases; and umbrella effects of market power.[236] Lande concludes that, taking into account all the above adjustments, awarded damages in the United States have been at best equal to actual damages instead of trebling them. This shows that the 'overcompensation' argument is not quite convincing. Although it is certainly difficult to determine an appropriate damage multiplier for New Zealand, Lande's writings provide guidance as to what should be taken into account to reach fair and efficient damages awards.

V CONCLUSION

The New Zealand Ministry of Commerce has made it clear that the Commerce Act needs to be efficiently enforced in order to be effective. When discussing an optimal enforcement regime for New Zealand, it must be further borne in mind that deterrence is the main objective of penalties and remedies under the Act and that enforcement processes should balance justice and efficiency. With the 2001 amendment of the Commerce Act, the New Zealand legislator has responded to deficiencies detected in this regard. However, this research has revealed that from today's point of view there are certain indications that the recent changes to the Commerce Act will not sufficiently remedy these deficiencies. The additional deterrence flowing from increased penalties and the availability of exemplary damages seems questionable. If this prediction comes true, the New Zealand legislator should consider further options for reforming its competition law enforcement system.

In the past, foreign legislation (the Australian Trade Practices Act 1974) served as a model for New Zealand's antitrust law. Again, a look to other jurisdictions seems appropriate and promising to identify enforcement features that could improve the New Zealand system. The German system relies heavily on public enforcement of competi-

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[236] Lande, above, 130, 142, 144, 147.

tion law and, therefore, has vested its enforcement agency, with far-reaching and quasi-judicial powers to make its work efficient. Though fairly unfamiliar in the New Zealand system, this approach could be taken into account as a reform option because it has proven to be quite effective without denying offenders procedural due process or confining their right to appeal. A properly resourced enforcement agency with quasi-judicial powers seems like a straighter way to more appropriate remedies than the loop way via increased maximum penalties and the hope that courts will implement the legislative will. This paper further recommends a second look at a multiple damage provision similar to the treble damages section of the Clayton Act in the United States. The reasons why the New Zealand legislator initially rejected the idea of multiple damages, on a second look, do not appear to be very convincing. If New Zealand further wants to divide the burden of enforcement and deterrence onto two shoulders, the public and the private, a multiple damages provisions might remedy what the availability of exemplary damages might fail to do.

Although the first option would require considerable changes to the structure and operation mode of the Commerce Commission and the second option would call for a careful application by the courts, the New Zealand Parliament should not hesitate to seriously consider these options. As the Ministry has put it, "penalties and remedies under the Commerce Act should support the goals of the Act by deterring anti-competitive conduct"; and the foremost and ultimate goal of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.

BIBLIOGRAPHY

I LEGISLATION

A New Zealand

Bill of Rights Act 1990.

Commerce Act 1975.

Commerce Act 1986.

Commerce Amendment Act 1990

Commerce Amendment Act 2001.

Fair Trading Act 1986

Summary Proceedings Act 1957.

Trade Practices Act 1958.

Trade Practices (Commerce Commission and Pyramid Selling) Act 1974.

B Germany

Bürgerliches Gesetzbuch (BGB) [German Civil Code].

Gesetz gegen Wettbewerbsbeschränkungen (GWB) [German Act against Restraints of Competition], official English translation at <http://www.bundeskartellamt.de/GWB01-2002.pdf.>.

Gesetz über Ordnungswidrigkeiten (OWiG) [German Administrative Offences Act].

Strafgesetzbuch (StGB) [German Penal Code].

Strafprozeßordnung (StPO) [German Code of Criminal Procedure].

C United States

Clayton Act 15 USC §§ 12-27 and 29 USC §§ 52-53 (1914).

Code of Federal Regulations.

Federal Rules of Civil Procedure.

Federal Trade Commission Act 15 USC §§ 41-51 (1914).

Robinson-Patman Act 15 USC § 13 (1936).

Sherman Antitrust Act 15 USC §§ 1-7 (1890).

II CASE LAW

A New Zealand

Clear Communications Ltd v Telecom Corp of New Zealand Ltd (1992) 5 TCLR 166 (HC).

Commerce Commission v BP Oil New Zealand [1992] 1 NZLR 377 (HC).

Commerce Commission v Caltex New Zealand Ltd (2000) 9 TCLR 366.

Commerce Commission v Carter Holt Harvey Building Products Group Ltd (2000) 9 TCLR 636.

Commerce Commission v Christchurch Transport Ltd (21 August 1998) High Court Christchurch CP 72/98.

Commerce Commission v DB Breweries Ltd (28 November 1997) High Court Auckland CL35/97.

Commerce Commission v Giltrap City Ltd & Anor (30 August 2000) 14 PRNZ 450 (HC).

Commerce Commission v Giltrap City Ltd & Anor (19 September 2000) High Court Auckland CP 88-94.

Commerce Commission v Giltrap City Ltd & Anor (2001) 15 PRNZ 410 (HC).

Commerce Commission v Giltrap City Ltd (13 September 2001) 10 TCLR 190 (HC).

Commerce Commission v Giltrap City Ltd (2002) 10 TCLR 305 (HC).

Commerce Commission v Eli Lilly and Co (New Zealand) Ltd (30 April 1999) High Court Auckland CL 19/98.

Commerce Commission v Port Nelson Ltd (1995) 6 TCLR 406, 568-9 (HC).

Commerce Commission v Taylor Preston Limited & Ors (No.2) (1998) 1 New Zealand Business Law Cases (NZBLC) 102,598 (HC).

Commerce Commission v Toyota New Zealand Ltd (9 September 1997) High Court Wellington CP95/95.

Commerce Commission v Wrightson NMA Ltd (1995) 5 NZBLC 99-346 (HC).

Cook v Evatt [1992] 1 NZLR 676 (HC).

Ellison v L [1998] 1 NZLR 416, 419 (CA).

Harding v Kummer (21 March 1983) High Court Auckland A 1107-80.

Telecom Corporation of New Zealand Ltd v Clear Communications Ltd [1995] 1 NZLR 385 (PC).

Union Shipping NZ Ltd v Port Nelson Ltd [1990] 2 NZLR 662 (HC).

Witten-Hannah v Davies [1995] 2 NZLR 141 (CA).

B Australia

TPC v Annand & Spencer Pty Ltd (1987) 9 Australian Trade Practices Reports (ATPR) 40-772 (FCA).

C Germany

Bundeskartellamt (BKartA) (16 February 1982) WuW/E BKartA 2005, 2007 *Behälterglas*.

BKartA (28 December 1971) WuW/E BKartA 1376, 1387 *Linoleum*.

Bundesgerichtshof (BGH) (29 April 1991) WuW/E BGH 2718, 2720 *Bußgeldbemessung*.

Bundesgerichtshof (BGH) (8 February 1994) KRB 25/93 *Unternehmenssubmission*, WuW/E BGH 2904 and NStZ 1994 346 <http://www.recht-find.de/bgh30owig.htm>.

Kammergericht (KG) Berlin (11 September 1998) WuW/E DE-R 228, 232 *Osthafenmühle*.

KG Berlin (6 June 1984) WuW/E OLG 3175, 3180 *Preisanpassungsklausel*.

KG Berlin (2 September 1974) WuW/E OLG 1569, 1570 *Tierpflegemittel*.

KG Berlin (14 January 1972) WuW/E OLG 1265 *Zahnpasten*.

D United States

Associated General Contractors of California, Inc. v California State Council of Carpenters (1983) 469 US 519.

Blue Shield of Virginia v McCready (1982) 457 US 465.

Brunswick Corp. v Pueblo Bowl-O-Mat, Inc. (1977) 429 US 477.

Cargill, Inc. v Monfort of Colorado, Inc. (1986) 479 US 104.

Revere Camera Co. v Eastman Kodak Co. (1948) 81 F Supp 325 (ND Ill).

III GOVERNMENT PUBLICATIONS AND OTHER PRIMARY SOURCES

A Germany

Bundeskartellamt *Broschuere zu den Aufgaben des Bundeskartellamtes* (Bundeskartellamt, Bonn, Germany, 2002) official English translation at <http://www.bundeskartellamt.de/Broschure_engl.Jan02.pdf>.

Bundeskartellamt *Bekanntmachung Nr. 68/2000 über Richtlinien des Bundeskartellamtes für die Festsetzung von Geldbußen - Bonusregelung* (Bundeskartellamt, Bonn, Germany, April 2000) <http://www.bundeskartellamt.de/Bonusregelung.pdf>.

Bundeskartellamt *Tätigkeitsbericht (Activity Report) des Bundeskartellamtes 1997/1998* (Deutscher Bundestag Drucksache 14/1139, Bonn, Germany, 25 June 1999) <http://dip.bundestag.de/btd/14/011/1401139.pdf>.

Bundeskartellamt *Activity Report 1999/2000 – Short version* (Bundeskartellamt, Bonn, Germany, 2001) <http://www.bundeskartellamt.de/Kurzbroschuere-BKartA-TB-English.pdf>

Bundeskartellamt *Tätigkeitsbericht (Activity Report) des Bundeskartellamtes 2001/2002* (Deutscher Bundestag, Drucksache 15/1226, Bonn, Germany, 27 June 2003) <http://dip.bundestag.de/btd /15/012/1501226.pdf>.

B New Zealand

New Zealand (NZ) Commerce Commission *Annual Report 2001/2002* (Wellington, 2002) <http://www.comcom.govt.nz/about/documents/CommAnn_Report2001-2002.pdf>.

NZ Commerce Commission *Memorandum of Understanding between the Minister of Commerce and the Commerce Commission 2002/2003* (Wellington, 2003) <http://www.comcom.govt.nz/about/mou/MOU2002.pdf>.

NZ Commerce Commission *Regulatory Control and Enforcement Activities of the Commerce Commission 2001/2002* (Wellington, 2002) <http://www.comcom.govt.nz/about/documents/Regulatory%20Control%20and%20Enforcement%20Activities%20of%20the%20Commerce%20Commission%202001-2002.pdf>.

NZ Commerce Commission *Penalties, Remedies and Court Processes under the Commerce Act 1986* (submission to Ministry of Commerce, March 1998) <http://www.comcom.govt.nz/publications/GetFile.CFM?Doc_ID=65&Filename=PENALTY.PDF>.

NZ Ministry of Commerce *Penalties, remedies and court processes under The Commerce Act 1986: A discussion document* (Ministry of Commerce, Wellington, January 1998) <http://www.med.govt.nz/buslt/bus_pol/penalties.pdf>.

C OECD

Organisation for Economic Cooperation and Development (OECD) *Competition Law and Policy - Annual Report of New Zealand 2001-2002* (Paris, France, 2002) <http://www.oecd.org/dataoecd/34/13/2488976.pdf>.

Organisation for Economic Cooperation and Development (OECD) *Background Report on the Role of Competition Policy in Regulatory Reform* (Michael Wise, peer reviewed in June 1998 in the OECD's Competition Law and Policy Committee) <http://www.oecd.org/dataoecd/3/24/2497266.pdf>.

Organisation for Economic Cooperation and Development (OECD) Competition Policy Roundtable *Judicial Enforcement of Competition Law* (OCDE/GD(97)200, 1997) <http://www1.oecd.org/daf/clp/Roundtables/ Jug04.HTM>.

D United States

R. Hewitt Pate (Assistant Attorney General, Antitrust Division, United States Department of Justice) "Vigorous and Principled Antitrust Enforcement: Priorities and Goals", speech before the Antitrust Section of the American Bar Association (Annual Meeting, San Francisco, California) on 12 August 2003 <http://www.usdoj.gov/atr/public/speeches/201241.htm>.

Deborah Platt Majoras (Deputy Assistant Attorney General, Antitrust Division, United States Department of Justice) "A Review of Recent Antitrust Division Actions", distributed at the American Bar Association, Section of Business Law (2003 Conference for Corporate Counsel, Washington, D.C.) on 12 June 2003 <http://www.usdoj.gov/atr/public/speeches/201159.htm>.

IV SECONDARY SOURCES

A Textbooks, Digests and Loose Leaf Services

Jörg Biermann "Report Germany" to be published in Gerhard Dannecker & Oswald Jansen (eds) *Competition Law Sanctioning in the European Union: The EU-law Influence on National Competition Law Sanctioning*" (Kluwer Law International, The

Hague, The Netherlands, forthcoming 2003) <http://english.pbc.or.id/data/indonesien1_antitrust_jerman.doc>.

Brooker's Gault on Commercial Law (Brookers, Wellington, 1994).

John H. Farrar, John F. Burrows & Williams C. S. Leys (eds) *Butterworths Commercial Law in New Zealand* (4 ed, Butterworths, Wellington, 2000).

Geoffrey A. Flick *Natural Justice: Principles and Practical Application* (2 ed, Butterworths, Sydney, Australia, 1984).

J. R. S. Forbes Jus*tice in Tribunals* (The Federation Press, Sydney, Australia, 2002).

Ernest Gellhorn & William E. Kovacic *Antitrust Law and Economics* (4 ed, West Publishing, St. Paul, MN, United States, 1994).

Erich Göhler (ed) *Gesetz über Ordnungswidrigkeiten –Kurzkommentar* (13 ed, C.H. Beck, München, Germany, 2002).

Bernard M. Hill & Mark R. Jones C*ompetitive Trading in New Zealand: The Commerce Act 1986* (Butterworths, Wellington, 1986).

Herbert Hovenkamp *Antitrust* (2 ed, West Publishing, St. Paul, Minn., United States, 1993).

Herbert Hovenkamp *Federal Antitrust Policy – The Law of Competition and Its Practice* (West Publishing, St. Paul, Minn., United States, 1994).

Ulrich Immenga & Ernst-Joachim Mestmäcker *GWB Gesetz gegen Wettbewerbsbeschränkungen – Kommentar* (3 ed, C.H. Beck, München, Germany, 2001).

Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001).

The Laws of New Zealand (LexisNexis Butterworths, Wellington, 2003) Human Rights.

E. Thomas Sullivan & Jeffrey L. Harrison *Understanding Antitrust and Its Economic Implications* (3 ed, Matthew Bender, New York, United States, 1998).

B Articles, Essays and Seminar Papers

Peter Allport "Competition Law "An Evolution"" [1998] New Zealand Law Journal 275.

Rex J. Ahdar "Antitrust Policy in New Zealand: The Beginning of a New Era" (1992) 9 International Tax and Business Lawyer 329.

William Breit & Kenneth G Elzinga "Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis" (1973) 86 Harvard Law Review 693.

Edward D. Cavanagh "Detrebling Antitrust Damages: An Idea Whose Time Has Come?" (1987) 61 Tulane Law Review 777.

Frank H. Easterbrook "Detrebling Antitrust Damages" (1985) 28 Journal of Law and Economics 445.

Michael Freedman "Here Comes Treble" (27 August 2003) on Forbes.com <http://www.forbes.com/2003/ 08/27/cz_mf_0827antitrust.html>.

Robert H. Lande "Are Antitrust "Treble" Damages Really Single Damages?" (1993) 54 Ohio State Law Journal 115.

Jill Mallon & Jenny Stevens "Commerce Act Penalties for Individuals" [2001] New Zealand Law Journal 339.

Jill Mallon & Jenny Stevens "Penalties for Corporate Offenders" [2001] New Zealand Law Journal 389.

Ian Millard "Penalties and Remedies" in Mark N Berry & Lewis T Evans (eds) *Competition Law at the Turn of the Century – A New Zealand Perspective* (Victoria University Press, Wellington, 2003) 194.

New Zealand Business Roundtable (NZBR) "Submission to the Commerce Select Committee on the Supplementary Order Paper amending the Commerce Amendment Bill" (Wellington, September 2000) <http://www.nzbr.org.nz/documents /submissions/submissions-2000/commerce_sop.pdf>.

Joachim Rudo "The 1999 Amendments to the German Act Against Restraints of Competition" (Berlin, Germany, 1999) <http://www.antitrust.de>.

Steven C. Salop & Lawrence J. White "Treble Damages Reform: Implications of the Georgetown Project" (1986) 55 Antitrust Law Journal 73.

Spencer Weber Waller "The Incoherence of Punishment in Antitrust" (2003) 78 Chicago-Kent Law Review 207.

David Wilson "Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand" (2001) 17 Social Policy Journal of New Zealand 72.

All websites have been last accessed on 7 October 2003.