

EN

EN

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.4.2008
SEC(2008) 404

COMMISSION STAFF WORKING PAPER
accompanying the
WHITE PAPER on
Damages actions for breach of the EC antitrust rules

{COM(2008) 165 final}
{SEC (2008) 405}
{SEC (2008) 406}

TABLE OF CONTENTS

<i>Chapter 1 — Introduction</i>	7
A. The aim of the White Paper	7
1. The background.....	7
2. The obstacles to the enforcement of the victims’ right to damages.....	8
3. The need for facilitating measures and the positive effects of an enhanced level of actions for damages	10
B. A balanced European system which preserves strong public enforcement	10
1. The designing of a balanced European system	10
2. The importance of preserving effective public enforcement	11
3. The interaction between public enforcement and actions for damages: the underlying objectives	11
C. The measures proposed in the White Paper	12
<i>Chapter 2 — Standing: indirect purchasers and collective redress</i>	13
A. The options in the Green Paper and the results of the public consultation.....	13
1. Standing of indirect purchasers.....	13
2. Collective redress.....	13
B. The <i>acquis communautaire</i> as regards standing of indirect purchasers.....	14
C. Measures as regards collective redress	15
1. Necessity of collective redress mechanisms and identification of key issues	15
a. Necessity to provide for means of collective redress for all categories of victims of competition law infringements	15
b. Key issues to be addressed.....	16
2. Measures ensuring effective collective redress mechanisms in the competition field	18
a. A representative action for damages brought by qualified entities.....	18
b. An opt-in collective action	20
c. The relation between representative actions, opt-in collective actions, and individual actions.....	21
3. The relationship with other Commission initiatives in the field of collective redress.....	22

<i>Chapter 3 — Access to evidence: inter partes disclosure</i>	23
A. The options in the Green Paper and the results of the public consultation	23
B. The <i>acquis communautaire</i>	24
1. The principles of equivalence and effectiveness.....	25
2. Community rules on disclosure of evidence in the IP Directive 2004/48/EC	27
C. Measures to ensure effective EC antitrust damages actions	28
1. The problem: need for better access to evidence in antitrust damages cases.....	28
2. Solutions not retained: lowering the standard of proof or shifting the overall burden of proof.....	29
3. The proposed solution: a minimum level of disclosure based on fact pleading, combined with judicial control of relevance and proportionality	30
4. Conditions for obtaining a disclosure order by the court and its scope	31
a. Fact pleading: presentation of reasonably available facts and evidence sufficient to make out a plausible claim.....	31
b. Inability of claimant to otherwise access relevant evidence	32
c. Specification of categories of evidence to be disclosed.....	33
d. Judicial control of relevance, necessity and proportionality of disclosure measure ..	33
5. Further issues related to the scope of the disclosure order.....	34
a. All types of evidence.....	34
b. The disclosure and protection of confidential information	35
c. The disclosure of corporate statements submitted to a competition authority as part of an application for immunity or reduction of fines.....	36
d. Investigative privilege of competition authorities.....	37
e. No possibility to object to disclosure of unfavourable evidence	37
6. Potential addressees of disclosure orders and their right to be heard	37
7. Refusal to turn over evidence and destruction of evidence.....	38
a. Sanctions for refusal to produce evidence and for destruction of evidence.....	39
b. Protective measures to preserve relevant evidence	40
<i>Chapter 4 — Binding effect of decisions adopted by competition authorities</i>	41
A. The options in the Green Paper and the results of the public consultation.....	41
B. <i>Acquis communautaire</i> and possible measures to ensure effective antitrust damages actions	42

1.	<i>Acquis communautaire</i> : binding effect of decisions by the Commission	42
2.	Binding effect of NCA decisions finding an infringement of Article 81 or 82 EC ...	43
a.	Irrebuttable probative effect of NCA decisions ensures the coherent application of Articles 81 and 82 EC and the effectiveness of antitrust damages actions.....	43
b.	Types of NCA decisions concerned.....	45
c.	Conditions for binding effect of NCA decisions.....	46
d.	Territorial scope of binding effect of NCA decisions.....	47
 <i>Chapter 5 — Fault requirements</i>		50
A.	The options in the Green Paper and the results of the public consultation.....	50
B.	<i>Acquis communautaire</i> and measures to ensure effective antitrust damages actions	51
1.	Fault requirement in the case law of the Court of Justice	51
2.	Fault requirements under national law as a condition for a victim to exercise his right to damages	52
a.	Member States with strict or irrebuttably presumed liability for infringements of Article 81 or 82 EC	52
b.	Member States requiring proof of elements of fault	52
 <i>Chapter 6 — Damages</i>		55
A.	The options in the Green Paper and the results of the public consultation.....	55
B.	<i>Acquis communautaire</i> and measures to ensure effective antitrust damages actions	56
1.	The definition of damages.....	56
a.	The <i>acquis communautaire</i>	56
b.	Measures to ensure effective antitrust damages actions	58
2.	The calculation of damages.....	59
a.	The <i>acquis communautaire</i>	59
b.	Measures to ensure effective antitrust damages actions	60
 <i>Chapter 7 — The passing-on of overcharges</i>		62
A.	The options in the Green Paper and the results of the public consultation.....	62
B.	Measures to ensure effective antitrust damages actions	63
1.	The passing-on shield against an action brought by a purchaser other than the final consumer	63

2.	The passing-on sword in an action brought by a purchaser other than the direct purchaser	65
3.	The passing-on shield and sword in joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain.....	67
<i>Chapter 8 — Limitation periods</i>		70
A.	The options in the Green Paper and the results of the public consultation	70
B.	Ensuring the effectiveness of antitrust damages actions.....	70
1.	The <i>acquis communautaire</i>	70
2.	Measures to ensure effective antitrust damages actions	71
a.	The commencement date of the limitation period.....	71
b.	The duration of the limitation period	72
c.	The effect of public antitrust proceedings on the limitation period	72
<i>Chapter 9 — Costs of damages actions</i>		74
A.	The options in the Green paper and the results of the public consultation	74
B.	Measures to ensure effective antitrust damages actions	75
1.	Encouraging settlements	75
2.	The allocation of court costs and party costs	76
a.	The application of the “loser pays” principle.....	76
b.	Court discretion as regards the allocation of costs.....	77
3.	Legal provisions regarding determination of court fees	79
4.	Funding of antitrust damages actions.....	79
<i>Chapter 10 — Interaction between leniency programmes and actions for damages</i>		81
A.	The options in the Green Paper and the results of the public consultation	81
1.	Consensus on the necessity to protect leniency programmes and exclude discoverability of leniency applications.....	81
2.	Diverging opinions on whether to grant a conditional rebate on damage claims to successful leniency applicants.....	82
3.	Support for the removal of joint liability for the successful leniency applicant	83
B.	Measures regarding the interaction between leniency programmes and actions for damages.....	84
1.	Exclusion of discoverability of corporate statements submitted by applicants for immunity and reduction of fines	84

a.	The protection granted should apply to applications for leniency submitted under the EC and national leniency programmes.....	84
b.	The protection against disclosure granted to corporate statements.....	86
2.	Limiting the scope of the civil liability of the successful immunity applicant	88
<i>Chapter 11 — Conclusions</i>		90
A.	Measures to ensure the effectiveness of antitrust damages actions	90
1.	The <i>acquis communautaire</i>	90
2.	Measures to ensure effective antitrust damages actions	92
B.	Instruments to ensure the effectiveness of antitrust damages actions.....	96
1.	The need for a Community instrument underpinning national measures	96
2.	The appropriate Community instruments.....	97

CHAPTER 1 — INTRODUCTION

A. THE AIM OF THE WHITE PAPER

1. *The background*

1. On 19 December 2005 the European Commission adopted a Green Paper on damages actions for breach of the EC antitrust rules (hereinafter the “Green Paper”).¹ The purpose of the Green Paper and of the annexed Staff Working Paper² was to identify the main obstacles to a more effective system of damages claims, and to set out different options for further reflection and possible action to improve both follow-on and stand-alone actions.³
2. The adoption of the Green Paper opened a period of public consultation which ended on 21 April 2006. The Green Paper was met with broad interest in the antitrust community, and certainly achieved its objective of raising awareness of victims’ right to compensation, and of the obstacles faced by victims of competition law infringements when attempting to enforce their rights. Practically all the submissions received accepted the complementary role of private actions in the overall enforcement of EC competition rules. Also, most submissions agreed that victims of competition law infringements are entitled to damages and that national rules should enable this right to be exercised effectively. The submissions on the Green Paper, and the range of comments received more informally from stakeholders,⁴ highlighted the difficulties involved in bringing damages claims, and emphasised the expectations of respondents regarding an effective system of private enforcement.⁵ However, other respondents expressed their concerns about the costs of private enforcement and therefore called on the Commission to refrain from setting up a system leading to excessive and unmeritorious litigation.
3. The European Parliament and the European Economic and Social Committee (EESC) contributed to the debate by adopting a Resolution and an Opinion on the Green Paper. On 25 April 2007, the European Parliament adopted a Resolution calling on the Commission to “prepare a White Paper with detailed proposals to facilitate the bringing of ‘stand-alone’ and ‘follow-on’ private actions claiming damages (...) which addresses in a comprehensive manner, the issues raised in [its] resolution and gives consideration, where appropriate, to an adequate legal framework”. The issues raised in the Resolution are, in particular, the comple-

¹ COMP(2005) 672 final.

² SEC(2005) 1732, hereinafter the “2005 Staff Working Paper”.

³ Follow-on actions are civil actions brought after a competition authority has found an infringement. Stand-alone actions are civil actions which do not follow on from a prior finding by a competition authority of an infringement of competition law.

⁴ For example, on the occasion of a variety of dedicated conferences or in international fora.

⁵ Private enforcement of EC competition rules can take different forms, actions for damages being one of them. Private enforcement also covers actions for injunctive relief (to stop behaviour contrary to the competition rules), actions for nullity, as well as the use of the competition rules as a defence, in particular against actions for the enforcement of a contract or against actions for the enforcement of other rights (e.g. intellectual property rights where such enforcement constitutes an abuse of a dominant position). In this White Paper, the Commission is focusing on damages actions so as to render the victims’ right to damages effective in Europe.

mentary role of actions for damages (and the issue of joint and several liability of the successful leniency applicant), the asymmetry of information and of resources between the parties, the disclosure of evidence *inter partes*, the binding nature of national competition authorities (“NCA”) decisions, the need for collective actions, the definition and quantification of damages, the promotion of settlements as well as the issues of passing-on defence, costs and limitation periods.⁶ On 20 October 2006, the EESC adopted an Opinion on the Commission’s Green Paper.⁷ The EESC’s Opinion is positive about the Commission’s efforts to facilitate antitrust damages actions and considers that the Green Paper has opened up a broad and welcome debate on the need to make it easier for those injured by anti-competitive practices to recover damages. The Opinion supports measures at Community level to facilitate damages actions.

4. The Commission, encouraged by the comments received from stakeholders, the European Parliament, the EESC and the Member States, as well as taking into account the recent case law of the European Court of Justice (ECJ or the Court),⁸ has decided⁹ to adopt a White Paper in order to foster and further focus the ongoing discussions by setting out concrete measures aimed at creating an effective private enforcement system in Europe.

2. *The obstacles to the enforcement of the victims’ right to damages*

5. The ECJ acknowledged, and recently confirmed, that the right to damages is necessary to guarantee the useful effect of the EC competition rules.¹⁰ However, the exercise of this right in Europe is still facing considerable hurdles. First, the traditional tort rules of the Member States, either of a legal or procedural nature, are often inadequate for actions for damages in the field of competition law, due to the specificities of actions in this field. In addition, the different approaches taken by the Member States¹¹ can lead to differences in treatment and to less foreseeability for the victims as well as the defendants, i.e. to a high degree of legal uncertainty.
6. A number of factors influence the victims’ choice whether or not to bring a damages action. In balancing the costs and benefits of bringing a damage claim, the victims will often consider that the difficulties of proving their claim, combined with the uncertainty in outcome and the risks associated with a rejection of the claim, make it too difficult or hazardous, or not attractive enough, to enforce their rights in court.
7. The main obstacles have been described and analysed in the Green Paper and the 2005 Staff Working Paper: the rules on access to evidence, the fault requirement, the definition of damages, the availability of the passing-on defence, the question of

⁶ The Resolution of the European Parliament of 25 April 2007 (2006/2207(INI)) can be found at <http://www.europarl.europa.eu/oeil/file.jsp?id=5378362>.

⁷ The EESC Opinion of 26 October 2006 (INT/306) can be found at http://eescopinions.eesc.europa.eu/viewdoc.aspx?doc=\esppub1\esp_public\ces\int\int306\en\ces1349-2006_ac_en.doc.

⁸ Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619. See also Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.

⁹ See the Commission Legislative and Work Programme 2007 — COM(2006) 0629 final.

¹⁰ *Manfredi* (footnote 8 above).

¹¹ See the conclusions of the study on the conditions of claims for damages in case of infringement of EC antitrust rules (hereinafter the “2004 Study”), available on the Commission’s website at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

standing of indirect purchasers, the question of collective redress mechanisms, the costs of actions, the issues of limitation periods and of applicable law.

8. With regard to the latter, the European Parliament and the Council adopted on 11 July 2007 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations, also referred to as the Rome II Regulation.¹² According to Article 6(3) of that Regulation, the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is (likely to be) affected. However, when the market is (likely to be) affected in more than one country, as is often the case when Article 81 or 82 EC is violated, the claimant may also choose to base his claim on the law of the Member State where he is bringing his claim. In order to limit forum shopping, the claimant can only choose that law when the market of that Member State is directly and substantially affected by the restriction of competition that gives rise to the damages claim.¹³
9. The Commission believes that Article 6(3) of Regulation 864/2007 contains an appropriate applicable law rule enabling claimants to effectively use their right to obtain antitrust damages in case of an infringement of the EC competition rules. In particular, these new rules, read together with the rules on jurisdiction,¹⁴ allow for procedural economy as they provide claimants with the option to have their case for antitrust damages heard by one court applying one single law, even in situations where more than one defendant is involved and where the damages occurred in several Member States. The Commission therefore does not consider it necessary to further address the issue of applicable law in the White Paper.
10. In recent years, some Member States enacted legislation aimed at facilitating antitrust damages actions, even though not addressing all the issues identified in the Green Paper. There is no indication however that any sizeable number of other Member States is likely to introduce, in the foreseeable future, legislative changes that ensure an effective legal framework for damages actions of victims of antitrust infringements. In addition, isolated initiatives can not ensure that a coherent level of effective minimum protection of the victims' entitlement to damages is achieved throughout Europe. Finally, the interaction of measures facilitating actions for damages with various aspects of public enforcement needs to be addressed, and individual action by Member States is not sufficiently capable of achieving this in any consistent manner.
11. Since the Green Paper, one can observe an increase in awareness, leading to more reported antitrust damages cases, especially cases following on decisions of competition authorities, and most probably also to more settlements. Some of these cases have further highlighted the difficulties faced by the victims in bringing a damages claim. The problems identified in the Green Paper remain essentially unchanged and there is thus still a clear need to improve the conditions for effective

¹² Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II", OJ 2007, L 199/40).

¹³ Note that according to Article 6(4) of Regulation 864/2007, the applicable law pursuant to this provision may not be derogated from by an agreement between the parties.

¹⁴ Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001, L 12/1.

compensation of victims for harm suffered through EC competition law infringements.

3. *The need for facilitating measures and the positive effects of an enhanced level of actions for damages*

12. The Commission made clear in its 2005 Staff Working Paper that it does not intend to incentivise victims to bring an action when their actions are not meritorious. It considers it fundamental, though, that those victims who have meritorious claims for damages are able to bring such actions successfully, and are not deterred from bringing an action to court due to the numerous obstacles they face.

13. The Impact Assessment annexed to the White Paper has shown that in the absence of any measures to facilitate actions for damages, most of the harm caused by competition law infringements will continue to be left uncompensated, and victims and businesses that comply with the law will continue to have to absorb that loss.¹⁵

14. Enhancing the effectiveness of actions for damages will, amongst other effects, mean that compensation of the harm suffered by victims of illegal anti-competitive behaviour will be achieved more often. Compensation of the harm is fundamental so that companies who comply with the law do not suffer from a competitive disadvantage, and victims who are harmed do not bear the costs of the infringements: these costs must be borne by the infringers. Victims have a right to compensation, as confirmed by the ECJ, and it is fundamental that they can enforce it effectively.

15. Even though actions for damages in Europe are primarily about victims effectively exercising Treaty rights, an enhanced level of actions for damages will also have the positive effect of increasing deterrence for potential infringers. Indeed, actions for damages can complement public enforcement by adding to the risk of administrative sanction, the risk of having to compensate the harm caused to the victims, and also by widening the scope of enforcement of EC competition rules to cases not dealt with by the competition authorities. Better enforcement of the law, by increasing the risks associated with a breach of EC competition rules, will encourage companies to comply with the law, thus helping European markets to remain open and competitive. An enhanced level of actions for damages will also help develop a culture of competition amongst market participants and raise awareness of the competition rules.

B. A BALANCED EUROPEAN SYSTEM WHICH PRESERVES STRONG PUBLIC ENFORCEMENT

1. *The designing of a balanced European system*

16. The Commission's White Paper takes account of the stakeholder input it has received since the adoption of the Green Paper on the options put forward for discussion. It also gives consideration to the possible economic and social impacts of an enhanced level of actions for damages.¹⁶ In this White Paper the Commission suggests targeted measures which are designed to effectively tackle the identified obstacles. These

¹⁵ See the Impact Assessment Report annexed to the White Paper (hereinafter the Impact Assessment), section 2 and section 5.2.5.

¹⁶ See the Impact Assessment.

measures are embedded in, and build on, the European legal cultures and traditions of the 27 Member States. Great care has been taken to strike a balance in order to have effective measures which do not result in a situation where unmeritorious litigation are encouraged or facilitated.

2. *The importance of preserving effective public enforcement*

17. Since the adoption of the Green Paper many stakeholders have expressed the opinion that it is important to preserve the central role of the public authorities in the overall enforcement of EC competition rules. It was also often underlined that in Europe the main objective of damages actions was different from that of public enforcement, the former primarily pursuing compensation of a loss (even though it also increases deterrence), whereas the latter is primarily pursuing deterrence and overall compliance with the rules by penalising infringements of Articles 81 and 82 EC.
18. As confirmed in the 2005 Staff Working Paper, the aim is not to substitute public enforcement, or parts thereof, with actions for damages. The role of the public authorities will continue to be of crucial importance in detecting anti-competitive practices such as cartels, where the special investigation powers vested in the public authorities are indispensable for effective and efficient enforcement of competition law. When assessing the different options put forward for discussion in the Green Paper, and then identifying the measures contained in this White Paper, the Commission has borne in mind the need to maintain a strong and effective public enforcement system.

3. *The interaction between public enforcement and actions for damages: the underlying objectives*

19. The Green Paper sought consultation on the interaction between actions for damages and public enforcement, in order to avoid tensions between, on the one hand, rendering the victims' right to damages effective in Europe, and on the other, preserving the effectiveness of public enforcement.¹⁷
20. Actions for damages and enforcement by public authorities necessarily interrelate to some extent. Greater enforcement by both public authorities and through private actions will increase deterrence and will increase the probability that infringers bear the costs for the harm caused. This will normally lead to a decrease, in the long run, of the number of infringements.
21. The Commission's objective is to create an effective system of private enforcement through damages actions as a complement to, and not a substitute for, public enforcement. This notion of complement covers two categories of cases. Firstly, it covers those cases where the public authorities, for reasons of limited resources and public priorities, do not take any enforcement action, or limit their enforcement activities to specific aspects of a particular behaviour. In that case, private actions for damages can extend the enforcement of EC law through what are known as stand-alone actions. Secondly, private enforcement covers cases where a private party claims damages for harm arising from an infringement established by a public authority. These are known as follow-on actions. The Commission ensured that the

¹⁷ See question J in the Green Paper and the 2005 Staff Working Paper.

measures contained in the White Paper are designed in such a way as not to jeopardise public enforcement.

C. THE MEASURES PROPOSED IN THE WHITE PAPER

22. In the White Paper, the Commission proposes policy choices in relation to the following issues:
- standing: indirect purchasers and collective redress (Chapter 2);
 - access to evidence through *inter partes* disclosure (Chapter 3);
 - binding nature of competition authorities' decisions (Chapter 4);
 - fault (Chapter 5);
 - definition of damages (Chapter 6);
 - availability of the passing-on defence (Chapter 7);
 - limitation periods (Chapter 8);
 - costs of damages actions (Chapter 9);
 - interaction between actions for damages and leniency programmes (Chapter 10).
23. The White Paper is accompanied by an Impact Assessment. It assesses the economic and social impacts of an enhanced level of antitrust damages actions in Europe and of the policy measures contained in the White Paper.

CHAPTER 2 — STANDING: INDIRECT PURCHASERS AND COLLECTIVE REDRESS

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

24. In the event of small damages claims, it is unlikely that victims will bring individual actions against the perpetrators of competition law infringements given the costs of litigation in relation to the harm they have suffered. Even when a number of such actions are brought, they do little to deter the perpetrators from violating the law, and the full harm caused to society is not repaired. To make enforcement of the competition rules more effective, the Green Paper put forward two options aimed at encouraging some form of collective actions, such as actions taken on behalf of consumers by consumer organisations and collective actions for businesses.
25. The issue of collective redress is all the more relevant when indirect purchasers are the victims of the violations. Their damage claims face increased obstacles due to the number of layers between them and the infringers (e.g. production, distribution, retail). A possible way of reducing the burden for indirect purchasers' claims is to allow some form of collective redress.
26. This Chapter analyses the issue of standing with regard to indirect purchasers as well as collective and representative actions.

1. *Standing of indirect purchasers*

27. In its Green Paper, the Commission indicated that the question of standing for indirect purchasers and the question of how, if these purchasers have standing, their claim can be brought are two issues which are closely linked. Comments were therefore invited on both issues.¹⁸ Some respondents to the Green Paper acknowledged that granting standing to indirect purchasers could run counter to effective enforcement of Articles 81 and 82 EC, given the complexities faced by indirect purchasers' claims. However, a majority of respondents were opposed to limiting the standing to direct purchasers. Such limitation was usually considered to be contrary to the underlying principle of full compensation.

2. *Collective redress*

28. The first option¹⁹ put forward for discussion in the Green Paper suggested giving a cause of action to consumer associations without depriving individual consumers of their right to bring an individual action. In their submissions, respondents were invited to consider several issues raised by this option, such as standing (a possible registration or authorisation system), the distribution of damages (whether damages go to the association itself or to its members), and the definition of damages (on the basis of the harm suffered or of the illegal gain). The second option²⁰ in the Green Paper, which may be used in complement to the previous one, was to enact special

¹⁸ See options 21 to 24 of the Green Paper.

¹⁹ See option 25 of the Green Paper.

²⁰ See option 26 of the Green Paper.

provisions allowing collective actions by groups of purchasers other than final consumers.

29. In reaction to the Green Paper, some respondents opposed any initiative which would facilitate collective redress. The objections focus principally on the potential costs of collective redress mechanisms for society, and on the risk of multiple recoveries from infringers. Those opposing any initiative in that field evoke the US system in their argumentation, mentioning the excesses this system has led to, and the resulting costs for business and society as a whole.
30. However, many respondents recognise the need to allow consumer claims to be aggregated in some way, in particular in order to reduce the difference between the costs of the action and the often small value of the damage individually suffered. Among those not opposed to collective redress mechanisms there is some support for allowing actions to be brought through consumer organisations. Such representative actions by consumer organisations are said to serve the purpose of rendering rights under competition law more effective and accessible to citizens, while clearly moderating the excesses and external costs associated with certain types of “class actions” (such as abusive settlements). However, opinions diverge on the standing of consumer organisations, some respondents favouring an authorisation system while others point out that such a system is not necessary in Europe to avoid abuses. On other practical issues, especially the distribution of damages, opinions also diverge but seem to favour the solution where the award would directly benefit the victims themselves, in accordance with the principle of compensation.
31. The question of the special provision for collective actions for groups of purchasers other than final consumers was less commented on. A number of submissions were favourable to such collective means of action for small businesses, with some underlining that collective actions should be available for all types of victims since there was no justification for distinguishing between end consumers and small businesses.
32. The consultation therefore shows that the availability of some form of collective redress for the victims of competition law infringements is supported, but that such a system should be designed in a way that protects against unmeritorious actions. Generally it is believed that actions through consumer associations are less likely to lead to abuses.

B. ACQUIS COMMUNAUTAIRE AS REGARDS STANDING OF INDIRECT PURCHASERS

33. In *Courage and Crehan*, the ECJ stated that:
34. “the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.²¹ (emphasis added)
35. Since the publication of the Green Paper, the ECJ has reaffirmed this position in *Manfredi*, stating:

²¹ *Courage v Crehan* (footnote 8 above) at paragraph 26.

“It follows that *any individual* can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC”.²² (emphasis added)

36. It can be noted, first, that although the judgment only refers to Article 81 EC because of the facts underlying the case, the reasoning of the Court clearly applies also to Article 82 cases.
37. Second, the wording used by the ECJ (“any individual” having suffered harm caused by the infringement) is such that it encompasses indirect purchasers. In fact, infringements of Articles 81 and 82 EC may cause quite significant harm to indirect purchasers. However, given that the Court emphasised the requirement of causality, the finding of the Court does not exclude national provisions or case law that lead to barring damages actions brought by certain indirect purchasers for reasons of remoteness. The Commission welcomes these clarifications by the Court and does not intend to suggest any limitation on standing of anyone who can show a causal link between his harm and an infringement of Article 81 or 82 EC.

Acquis communautaire:

Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle also applies to indirect purchasers.

C. MEASURES AS REGARDS COLLECTIVE REDRESS

38. On the basis of the results of the public consultation, it appears appropriate to examine possible collective redress mechanisms aimed at defending the interests of consumers and businesses²³ having suffered from competition law infringements. The following sections (1) underline the necessity to provide for such mechanisms for all categories of victims of competition law infringements, and (2) identify effective means of collective redress in the competition field. A final section (3) addresses the relationship between the suggested measures and other Commission initiatives in the field of collective redress.

1. *Necessity of collective redress mechanisms and identification of key issues*

a. *Necessity to provide for means of collective redress for all categories of victims of competition law infringements*

39. Individual consumers and small businesses are less likely to bring individual damages claims against the perpetrators of competition law infringements in cases of scattered low-value damages. These victims may be dissuaded from starting an

²² *Manfredi* (footnote 8 above) paragraph 61.

²³ The term “businesses” refers to all the persons, legal or natural, acting for purposes falling primarily within their trade, business and profession (see for the definition also the Green Paper on the Review of the Consumer Acquis COM(2006) 744 final). Whilst it is not appropriate to establish certain thresholds (e.g. in terms of size or turnover) for standing, the collective redress mechanisms would be more used by small businesses for which they would be particularly well-suited given the obstacles they face when bringing an action for damages. These obstacles are usually not encountered in the same manner by bigger businesses.

individual action given the costs, delays and burdens involved in actions for damages in this field, compared to the value of their individual claim. Also, the victims are not always aware of the existence of the competition law infringement, often secret or difficult to appreciate, or of the extent of the losses suffered due to this infringement. Moreover, the uncertainty as to the outcome of the proceeding, mainly due to the difficulty of having access to the relevant evidence, also acts as a disincentive. This leads to the unsatisfactory situation that the victims concerned receive no compensation and the illegal gain often remains in the hands of the tortfeasors. Finally, a situation where national courts would have to handle a multitude of scattered low-value individual claims with no possibility of collective redress would lead to procedural inefficiency.

40. Even though some of the difficulties outlined above may to a certain extent be addressed through certain specific remedies (e.g. by alleviating cost rules or improving access to evidence), it remains that the costs and uncertainty in outcome make it necessary for the victims to be able to share the risks and costs associated with the action. Therefore, competition law is a field where collective redress mechanisms can significantly enhance the victims' ability to obtain compensation and thus access to justice, and contribute to the overall efficiency in the administration of justice. For the reasons set out above, it is essential that collective redress mechanisms are available for competition law infringements.
41. Collective redress for low-value damages can be achieved through a number of different mechanisms, either of a voluntary or compulsory nature, either judicial or non-judicial, either initiated by a group of victims, a representative body or a public authority. A non-judicial voluntary resolution of claims for damages may often be preferable for victims as well as for infringers, since such resolution does not involve the same costs and burden as do judicial proceedings, and usually allows for swift resolution of the matter at stake. However, alternative dispute resolution (ADR) and other voluntary mechanisms can only be effective and efficient if there is another effective option for the victim should no fair resolution be agreed on by the infringer. Judicial collective redress mechanisms, which may usefully be complemented by ADR, are therefore necessary to improve the situation of victims of competition law infringements, even though safeguards should be put in place so as to avoid abusive litigation. By allowing an aggregation of claims for damages that would otherwise not be viable in individual court action, judicial collective redress mechanisms not only ensure the victims' right of access to justice, but also reduce the inequality between the victims (often the weaker party) and the infringers (often the financially stronger party) in out-of-court/settlement discussions.
42. It is therefore necessary to design facilitating measures enabling consumers and small businesses to effectively seek redress in court for the harm suffered from competition law infringements. These measures would play an important role in rendering the victims' right to antitrust damages more effective in Europe.

b. Key issues to be addressed

43. The development of collective redress mechanisms in Europe has increasingly attracted attention because of the importance of these mechanisms for access to justice, but also due to the excesses that have been reported from other

jurisdictions.²⁴ It is important to underline that specific features may be designed in order to serve as effective safeguards against misuse of the system. These measures can contribute to ensuring that the collective redress mechanisms for victims of competition law infringements in Europe achieve the objective of improving access to justice and guaranteeing compensation, whilst avoiding imposing unnecessary costs on potential defendants and the judicial system.

44. The aggregation of individual claims in court raises a number of issues that are specific to collective redress mechanisms, and also amplifies the practical importance of certain general issues in comparison with individual actions. The actual design of collective redress mechanisms therefore requires that these issues be addressed. At this stage, however, the purpose of this section is to stress the importance of these issues rather than to already set out concrete solutions.
45. The first key issue is the funding of the action.²⁵ Even if collective redress mechanisms allow for more efficient bundling of claims and sharing of the risks and costs among a greater number of victims, the fact remains that available ways of funding can have a serious impact on the use, or misuse, of collective redress mechanisms. Launching a court action requires initial funding, an up-front cost that may discourage victims from bringing an action, as well as the ability to face the cost exposure, when relevant.²⁶ Several ways of funding group litigation can be envisaged and they depend on the specificities of the collective redress mechanism in place. The funding may be provided by the victims launching the action themselves, or by the entity representing the latter,²⁷ by legal aid mechanisms or other publicly or privately administered funds, by insurance companies or other players on the market, or by the claimant's lawyers working under a contingency fees agreement. In order to limit the cost exposure, early resolution through settlement negotiations may be facilitated or encouraged (e.g. at the initiative of the judge). By limiting the costs incurred and allowing a swift resolution of the case, early settlements are beneficial to the parties as well as to the judicial system.
46. The second key issue is the way the group of victims, whose claims are collectively pursued in court, is (i) defined and (ii) represented, and (iii) what control mechanisms are put in place. First, the way the group of victims is defined influences the practical functioning of the mechanism (e.g. how many victims will participate to the action, the way damages will be quantified and distributed, etc.). Several systems may be envisaged: the group may be strictly defined (e.g. strict identity of harm, named victims) or more loosely defined (e.g. similarity of harm, unnamed victims, etc.). Affiliation to the group may be limited to victims that have expressly stated

²⁴ Excesses in US class action litigation have often been mentioned, and the risk of importing these excesses into Europe was raised. It is important to note, however, that the overall legal context in the US, which goes well beyond the mere class action mechanism, is very different from the one in Europe. US class actions in antitrust cases are characterised by a combination of features that is very specific to the US, including jury trial, one-way shifting of costs, treble damages, wide pre-trial discovery, contingent fees agreements and an opt-out mechanism. The introduction in Europe of features similar to one or some of these features may not produce the same effects. For instance, the introduction of opt-out mechanisms in Portugal and The Netherlands is not reported to have led to similar excesses.

²⁵ For an analysis of the costs of proceedings, see Chapter 9.

²⁶ This is generally the case in Europe where the prevailing cost rule is the loser-pays rule.

²⁷ Representative entities may, for instance, be financed through the fees paid by their members (e.g. trade associations), public subsidies (e.g. consumer associations) and/or proceeds from commercial activities.

their intention to be included in the action or, on the contrary, to all those who have not expressly opted out of the action. Finally, inclusion in the group may be possible until the initiation of the action, or on the contrary, be possible until a very late stage in the procedure. Moreover, the way victims can be represented may have practical consequences, for instance on the number of actions that will be brought (depending on how strictly eligibility is defined). Lastly, there may be different degrees of control mechanisms put in place (e.g. through various degrees of court supervision) in order to guarantee an appropriate definition of the group of victims, the adequacy of the representation or to avoid unmeritorious actions being brought.

47. The third key issue is the quantification and distribution of the damages. The more loosely the group of victims is defined, the more difficult it will be to precisely quantify the harm suffered by all the individual claimants, and to actually distribute the damages awards to the victims. Distribution of the award itself may be direct (e.g. by the defendant or by an independent fund, with various possible degrees of action requested from the victims) and may exceptionally be more indirect (e.g. cy-pres distribution,²⁸ distribution to a public interest foundation).

2. *Measures ensuring effective collective redress mechanisms in the competition field*

48. Two systems, which are complementary, effectively address the concerns outlined above in the competition field, both for follow-on and stand-alone antitrust damages actions. When further implemented, they should address the key issues outlined in the preceding section and contain sufficient safeguards to avoid abusive litigation in the competition field. These two mechanisms are, on the one hand, a representative action brought by qualified entities, and on the other hand, an opt-in collective action. They would usefully allow victims to enforce their rights, thereby providing them with a minimum level of protection beyond which Member States could decide to go depending on their legal traditions.²⁹

a. A representative action for damages brought by qualified entities

49. A representative action for damages brought by entities with certain characteristics may constitute an appropriate collective redress mechanism in the field of competition law. A representative action for damages is an action brought by a natural or legal person on behalf of two or more individuals or businesses who are not themselves party to the action, and aimed at obtaining damages for the individual harm caused to the interests of all those represented (and not to the representative entity). One may think of a consumer association defending consumers' interests, or a trade association defending the interests of its members active in a given industry. It is obviously important that qualified entities that are about to bring, or have brought, a damages action are under a clearly set out obligation to use effective mechanisms for informing the victims they represent.

²⁸ Distribution according to the “cy-pres” doctrine means that the damages awarded are not distributed directly to those injured to compensate for the harm they suffered (for instance because they cannot be identified) but are rather used to achieve a result which is as near as may be (e.g. damages attributed to a fund protecting consumers' interests in general).

²⁹ As it is further explained in Chapter 9 below, complementary early resolution of disputes, especially through settlements reached via alternative dispute resolution mechanisms, is beneficial to the parties as well as to the judicial system, and should therefore be encouraged.

50. Such a representative action is appropriate in competition cases because consumer organisations, trade associations or State bodies having as their object to protect specific interests may be less reluctant to start actions against competition law infringers than the individual consumers or small businesses whose interests have been harmed. One reason is that an action for damages against the infringers would be related to their core activity (i.e. the protection of specific interests), whereas especially small businesses may not be able to invest time and resources in an action to the detriment of their usual business activity. Also undertakings, especially SMEs, may be reluctant to start an action against a commercial partner with whom they conduct business on a regular basis. Similarly, for consumers, costs, delays and administrative burdens involved in judicial proceedings may discourage them from bringing an action, in particular if they suffered a relatively small economic loss. While representative actions for damages are appropriate for competition cases, procedures for representative bodies to bring this type of action on behalf of the victims they represent are, for the main part, either not available under national law or not fully suitable.

(i) Definition of qualified entities

51. Standing should be restricted to certain types of entities so as to exercise some public control over the entities able to bring representative actions, e.g. verification of the legitimacy of the interests to be represented. However, the definition of the entities having standing should not be overly restricted so that the possibility of a representative action remains an effective and accessible means of redress. Therefore, standing for representative actions in the competition field should be authorised for two types of entities.

52. The first type would include entities representing legitimate and defined interests, officially designated in advance by their Member State to bring representative actions for damages on behalf of identified or, in rather restricted cases, identifiable victims³⁰ (not necessarily their members). In order to be designated, these qualified entities would need to meet specific criteria set in the law, which give sufficient assurance that abusive litigation is avoided.³¹

53. The second type would be *entities* that would be *certified*, in order to be able to bring a representative action in relation to a particular infringement, on an *ad hoc* basis according to the procedures laid down in the national law of their Member State. Eligibility should be limited to entities whose primary task is to protect the defined interests of their members, other than by pursuing damages claims (e.g. a trade association in a given industry) and which give sufficient assurance that abusive litigation is avoided.³²

³⁰ Victims shall normally be identified either at the beginning of the proceedings or at a later stage. Exceptionally there may be no need to identify the victims, in particular where the damages awarded to the representative entity are distributed to related entities or used for related purposes, as set out in paragraph 56.

³¹ For an example of such mechanism and possible but non exhaustive criteria for designation, see for instance Article 3 of Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (OJ 1998 L 166/51).

³² As regards the information of the members, see paragraphs 49 and 61 below.

54. This second type of representative entity (*ad hoc* certified entity), as opposed to the first type (qualified entities designated in advance), would only be able to represent the interests of its members, which are identified. The entity may also decide to bring a representative action on behalf of a subgroup of its members, which would be identified or identifiable victims of the competition law infringement.
55. EC competition law infringements are likely to affect consumers and small businesses located in several Member States, and the court competent to hear a damage claim may be located in a Member State different from the one where the qualified entity willing to bring an action is located. Therefore, entities having standing in one Member State should automatically be granted standing in all other Member States, without having to be certified in the latter. This rule should apply both to entities designated in advance and those certified on an *ad hoc* basis for bringing an action in relation to a particular infringement.

(ii) Distribution of damages

56. The damages would be awarded to the representative entity, who is the party bringing the action.³³ Where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action (e.g. the harm suffered by the producers in a given industry). However, it may be necessary to reflect on the possibility that, exceptionally, the damages awarded to the representative entity are distributed to related entities or used for related purposes.

b. An opt-in collective action

57. In a collective action, claims from individuals or businesses are combined in one single action.³⁴ A collective action differs from a representative action where only the qualified entity brings a claim. In a collective action, as opposed to representative actions as defined above, the claimant himself has suffered harm. A collective action system improves the situation of the claimants by rendering the cost/benefit analysis of the litigation more attractive, since it allows them to share the evidence obtained as well as the costs, but also more indirectly by reinforcing their position in the litigation and providing moral support. A collective action also differs from the mere joining of individual claims. The joining of individual claims has also some advantages, such as ensuring consistency in the outcome of the individual claims, facilitating the sharing of evidence and providing moral support for the individual claimants, but does not in itself render the cost/benefit analysis more attractive since each action has to be pursued individually.
58. The opt-in collective action system that should be envisaged is a system where the victims have to express their intention to be included in the action. An opt-in collective action system would usually result in a smaller number of victims claiming damages than in an opt-out system, thereby limiting corrective justice, and would have as a consequence that some of the illicit gain may be retained by the infringers, thereby limiting the deterrent effect of the mechanism. By requiring the identification of the claimants (and the specification of their alleged harm suffered), an opt-in

³³ With respect to the definition of damages, see Chapter 6 Section B.

³⁴ In an opt-in collective action, the claims brought in the single action are the claims of the victims who opted-in. In an opt-out collective action, the claims brought in the single action are the claims of the victims who have not opted out.

collective action may also render the litigation in some way more complex since it increases the defendant(s) possibility to dispute each victim's harm. However, the analysis in the field of competition suggests that an opt-in collective action should be preferred to an opt-out collective action in which a person can bring an action on behalf of a class of unidentified persons. Combined with other features, such opt-out actions have in other jurisdictions been perceived to lead to excesses. In particular there is an increased risk that the claimants lose control of the proceedings and that the agent seeks his own interests in pursuing the claim (principal/agent problem). Opt-in mechanisms are more similar to traditional litigation, and would therefore be more easily implemented at national level.

59. In accordance with the principle of full compensation, the damages awarded in an opt-in collective action for damages should correspond to the harm suffered by those included in the action. The issue of distribution of damages awarded would not cause any particular difficulty since the claimants would be individually identified.

Victims of competition law infringements should be able to bring an opt-in collective action for damages or to be represented in a representative action for damages brought by qualified entities.

Qualified entities, able to act on behalf of identified or, in rather restricted cases, identifiable victims should include (i) entities designated in advance by the Member States according to national procedures, representing legitimate and defined interests; and (ii) other existing entities whose primary task would be to protect the defined interests of their members, other than by pursuing damages claims, which would be certified on an *ad hoc* basis in relation to a particular infringement according to national procedures.

The damages awarded in an opt-in collective action or in a representative action for damages should correspond to the harm suffered by those included or represented in the action.

c. The relation between representative actions, opt-in collective actions and individual actions

60. Representative actions and opt-in collective actions can act as mutually complementary means of collective redress. First, a qualified entity may not have the resources to simultaneously handle several actions related to distinct infringements and may decide to prioritise its action. The qualified entity may also be prevented from bringing an action because of a conflict of interest, for example when a trade association has as members both victims of a competition law infringement and infringers. Secondly, there may be subgroups of victims which, even though they could theoretically be represented by the same qualified entity, may want to bring distinct claims collectively. Finally, it is possible that the interests of certain groups of victims are not represented by any existing qualified entity (e.g. SMEs active in a new market with no trade association).
61. The coexistence of representative actions, collective actions and possible separate individual claims raises the issue of their interrelationship. In particular, it is possible that the interests of those represented in a representative action for damages, and of those victims having decided to bring a distinct claim, either individually or through

an opt-in collective action, coincide. The basic principle should be that individual victims are not deprived of their right to bring an action for damages (either individually or through an opt-in collective action) if they so elect nor from their right not to bring an action at all. It is therefore important that qualified entities inform the victims they represent as stated in paragraph 49. Finally, necessary safeguards should be put in place in order to avoid the same harm being compensated several times through the various means of action available (individual, collective and representative actions).

3. *The relationship with other Commission initiatives in the field of collective redress*

62. As regards consumer collective redress more generally, the Commission launched, in March 2007, two studies on collective redress, which are not specific to competition law. The first of these studies will evaluate the effectiveness and efficiency of the national collective redress systems that currently exist in EU Member States, assess whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available, and examine the existence of negative effects for the Single Market and distortions of competition. The second study will analyse in detail the problems faced by consumers in obtaining redress for mass claims, as well as the economic consequences of such problems for consumers, enterprises and the market.
63. After receiving the results of these studies, the Commission intends to publish a Communication on consumer collective redress in December 2008. This Communication will be used to consult on the options that are available in relation to consumer collective redress. Following this consultation, the Commission will consider whether, and if so, to which extent an initiative on consumer collective redress is necessary at EU level.
64. Should the further analysis show that a possible broader initiative would not be appropriate to effectively tackle the difficulties encountered by victims of competition law infringements,³⁵ specific measures may be needed to render these victims' rights to compensation effective.

³⁵ See paragraphs 39 to 42.

CHAPTER 3 — ACCESS TO EVIDENCE: INTER PARTES DISCLOSURE

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

65. Competition cases are particularly fact-intensive. The finding of an antitrust infringement, the determination of damages and the establishment of the relevant causal links all require the assessment of a variety of often complex factual elements.³⁶ All these elements must be corroborated by appropriate evidence.
66. Competition cases are characterised by a very asymmetric distribution of the available information and the necessary evidence: it is often very difficult for claimants to produce the required evidence, since many of the relevant facts are in the possession of the defendant or of third persons and are often not known to claimants in sufficient detail.
67. In view of these circumstances, it is widely acknowledged, and the comments on the Green Paper confirm this, that the difficulty for a claimant of obtaining all the evidence necessary to demonstrate his case for antitrust damages constitutes one of the major obstacles to antitrust damages actions. The Green Paper put forward for discussion a range of options aimed at removing this obstacle and improving the effectiveness of the legal framework for actions for antitrust damages across the EU Member States.
68. The Green Paper asked for views on whether there should be special rules on disclosure of evidence and, if so, what form such disclosure should take. The Green Paper described three options to facilitate the disclosure of evidence: disclosing identified individual documents, disclosing classes of documents, and drawing up a list of all relevant documents and making all documents on this list available.³⁷ Whilst these options differ as to the scope of the disclosure requirement, each is subject to the condition that a party has reasonably described the known facts of the case and has proffered reasonably available evidence in support of its allegations (“fact pleading”).³⁸
69. The large majority of respondents agreed that access to evidence is crucial for ensuring effective exercise of the right to seek compensation for antitrust damages. Some respondents argued that special rules concerning access to evidence in competition law litigation were not warranted, as antitrust cases do not present evidentiary difficulties greater than other commercial litigation.
70. Several respondents emphasised that any rules concerning improved access to evidence should avoid unwelcome externalities, such as “fishing expeditions”,³⁹

³⁶ In follow-on actions, claimants may – as regards the proof of an infringement – be able to rely on a decision by a competition authority; cf. in more detail Chapter 4 below.

³⁷ See options 1, 2 and 3 of the Green Paper.

³⁸ See option 1 of the Green Paper.

³⁹ The term “fishing expedition” describes a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found.

“discovery blackmail”,⁴⁰ procedural abuses and excessive costs for potential defendants. Some felt that such unwelcome externalities could be kept under control, provided there is sufficient judicial control over the scope, the manner and the relevance of disclosure.

71. A number of respondents stressed that it would not be practical or proportionate to require that the party seeking disclosure must specify individual documents, as this party will often simply have no knowledge of the existence of particular documents, let alone be able to specify them in a sufficiently detailed manner. It was further pointed out that also courts would face practical difficulties to “reasonably identify individual documents”.
72. Several respondents argued that disclosure of classes of documents would strike the right balance: the “classes” of documents to be divulged would have to be defined by the court on the basis of the “fact pleading” by the claimant. This would limit “fishing expeditions” and would be less burdensome on the parties, whilst providing an effective solution to the information deficit on the part of the claimant.
73. The Green Paper also put forward for discussion the option of introducing sanctions for the destruction of evidence and obligations to preserve evidence.⁴¹ Several commentators on the Green Paper argued that both a failure to produce evidence or its destruction should result in adverse procedural consequences for the offending party in the civil damages case and/or should be subject to penalties. The option,⁴² however, whereby the unjustified refusal of a party to turn over evidence has the consequence of modifying the burden of proof in favour of the other party was only supported by some.
74. In the context of access to evidence held by other parties, the Green Paper finally presented the option of lowering the standard of proof or reversing the burden of proof as a possible means to address the information asymmetry between the plaintiff and the defendant.⁴³ In this context, it was pointed out by some that alleviations of proof should not apply to the finding of the antitrust infringement (which should be fully proven by the claimant), but, if at all, only to the issues of damages and causation. Overall, however, there seems to be a preference for measures facilitating disclosure of evidence over alleviations of proof.

B. *ACQUIS COMMUNAUTAIRE*

75. In order to enhance the effectiveness of actions for damages based on EC competition rules, the Commission considers it indispensable to improve the position of victims as regards their access to the relevant evidence.

⁴⁰ The term “discovery blackmail” describes a strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defence may be rather weak or even unmeritorious. It is a strategy that can be employed by both claimants and defendants.

⁴¹ Option 4 and 5 of the Green Paper.

⁴² Option 10 of the Green Paper.

⁴³ Option 9 of the Green Paper.

1. *The principles of equivalence and effectiveness*

76. The Court of Justice has repeatedly stated that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of rights which individuals acquire directly under Community law. However, when laying down the applicable rules for the enforcement of Community rights, Member States are under a Community law obligation to respect both the principle of equivalence and the principle of effectiveness.⁴⁴
77. The *principle of equivalence* requires that the rules governing the enforcement of Community rights are not less favourable than those governing similar domestic actions. This principle constitutes an important support for the enforcement of Community rights, in particular where the Member States have not provided for any specific rules for the enforcement of Community rights. It is, however, of little avail when the applicable rules for the enforcement of the rights under national law are such that they hinder the effectiveness of antitrust damages actions.
78. According to the *principle of effectiveness*, the domestic rules governing the enforcement of Community rights may not render the exercise of those rights practically impossible or excessively difficult.
79. The effects of the principle of effectiveness on domestic rules can be both negative and positive. The negative effect is that Member States' authorities — and thus also national judges — cannot apply domestic rules to the extent that they are incompatible with the principle of effectiveness. The positive effect means that Member States are under an active Community law obligation to apply the rules in such a way that they make the exercise of Community rights practically possible and not excessively difficult. This Community law obligation exists independent from whether or not there are domestic rules governing the matter.
80. In the context of access to evidence in civil proceedings for antitrust damages, it follows from the *principle of equivalence* that Member States must apply to EC antitrust damages actions all rules and mechanisms that are available to facilitate the bringing of evidence in domestic antitrust damages actions or similar cases. This concerns, for instance, all national rules on allowing claimants to obtain knowledge of information and to access means of evidence that are in the possession of the defendant or of third persons. It also concerns any alleviations of the burden of proof or alleviations of the standard of proof that may be available under national law to compensate the consequences of information asymmetry.
81. Rules of this type (i.e. rules on access to evidence in cases of information asymmetry and rules on alleviating the burden or standard of proof) are likely to exist in all Member States. It is true that comprehensive sets of rules on disclosure of evidence in the possession of the opponent or third parties exist principally in Member States whose system of civil procedure is more adversarial in nature (particularly in countries of the common law tradition). Nonetheless, the feedback received on the

⁴⁴ See e.g. Case C-261/95 *Palmisani* [1997] ECR I-4025 paragraph 27, Case C-453/99 *Courage and Crehan* (footnote 8 above) paragraph 29, and Joined Cases C-295/04 to C-298/04 *Manfredi* (footnote 8 above) paragraph 64.

Green Paper shows that also Member States of the civil law tradition (whose systems of civil procedure are more “inquisitorial” in nature, i.e. where evidence-taking is conducted through and before the judge) contain various examples of facilitations of the bringing of evidence through forms of disclosure or the reversal of the burden of proof. As regards disclosure, many Member States of the civil law/continental legal tradition provide that courts can order opponents or third parties to hand over evidence in their possession, if the claimant specifies this evidence sufficiently and if it is relevant to the case. There are also examples whereby jurisdictions of the civil law tradition reduce, in cases of information asymmetry and under certain conditions, the requirement of specification of means of evidence and allow the taking of evidence in the sphere of the opponent (or third parties) on the basis of more general factual contentions.

82. The *principle of effectiveness* requires Member States to apply their domestic law in such a manner that the exercise of Community rights is practically possible and not excessively difficult. From this follows, first, that in law suits on EC antitrust damages, Member States must make full use of any rules that may exist under national law so that victims can exercise their right to compensation effectively. This concerns in the present context particularly rules and principles on the facilitation of bringing evidence, for example in situations of information asymmetry such as those mentioned above. The Court of Justice has explicitly held that “if the national court finds that the fact of requiring a [company] to prove that wholesale distributors are overcompensated [...] is likely to make it impossible or excessively difficult for such evidence to be produced, since *inter alia* that evidence relates to data which such a [company] will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.”⁴⁵
83. The principle of effectiveness secondly requires that any domestic rules making the exercise of this right practically impossible or excessively difficult must not be applied. For example, to the extent that very strict specification requirements under national rules of civil procedure render the exercise of the right to compensation excessively difficult for victims of EC antitrust infringements, national courts must loosen these requirements in situations where the victims have no access to crucial means of evidence which are located in the sphere of the opponent or third parties.

Acquis communautaire:

In actions for EC antitrust damages, Member States must apply all domestic rules and principles on the facilitation of bringing evidence available in order to ensure that victims of EC antitrust infringements can exercise their right to compensation effectively.

Member States must apply such rules and principles to the same extent as in similar cases based on the infringement of national law.

Domestic rules that make the exercise of the right to compensation excessively difficult must not be applied to cases of damages for the infringement of EC

⁴⁵ Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529 paragraph 55.

2. *Community rules on disclosure of evidence in the IP Directive 2004/48/EC*

84. There already exists Community legislation, in a specific area of law, on obligations to disclose *evidence to the opponent* in civil litigation. Directive 2004/48 on the enforcement of intellectual property rights (IP Directive)⁴⁶ provides in its Article 6, with regard to the disclosure of evidence:

“Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities *may order that such evidence be presented by the opposing party*, subject to the protection of confidential information. [...]”

“Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to *order*, where appropriate, on application by a party, *the communication of banking, financial or commercial documents under the control of the opposing party*, subject to the protection of confidential information.” (emphasis added)

85. The IP Directive also addresses the issue of ensuring the *preservation of evidence* which is located in the sphere of the opposing party. Article 7(1) provides in this respect that:

“Member States shall ensure that, even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his/her claims that his/her intellectual property right has been infringed or is about to be infringed, *order prompt and effective provisional measures to preserve relevant evidence* in respect of the alleged infringement, subject to the protection of confidential information. [...] Those measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the rightholder or where there is a demonstrable risk of evidence being destroyed. [...]” (emphasis added).

86. These rules provide useful points of reference when considering ways to improve access to evidence in competition cases. They also illustrate that in certain areas of law the presence of specific problems, such as a very asymmetric distribution of the available information and pronounced difficulties for claimants to produce the required evidence, can require solutions that differ to some extent from the general legal regime in civil litigation.

⁴⁶ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004 L 195/16. The measures on evidence adopted in the Directives are derived from the obligations of the Community and the Member States towards the World Trade Organisation under Part III of the Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994.

C. MEASURES TO ENSURE EFFECTIVE EC ANTITRUST DAMAGES ACTIONS

1. *The problem: need for better access to evidence in antitrust damages cases*

87. The feedback received on the Green Paper confirmed that national rules on evidence often have the effect of making it very difficult, if not impossible, for claimants to bring a successful action for antitrust damages. This appears to result from a combination of three factors: first, competition cases are particularly fact-intensive due to the economic nature of antitrust law. The second factor relates to the “information asymmetry” that typically exists in competition cases, namely the situation in which the comprehensive factual information and the corresponding means of evidence required to prove a case of antitrust damages are located within the sphere of the opponent or third persons. The third factor is the fact that in many Member States there are strict rules requiring claimants to assert in detail all the facts of their case and to proffer exactly specified pieces of evidence in support of these assertions; the limited alleviations of these requirements currently applied are insufficient to ensure effective redress in situations of information asymmetry typical in competition cases.
88. In relation to the first and second factor it is important to recall that cases on antitrust damages often require an unusually complex assessment of economic interrelations and effects. This analysis is not only a very extensive and often difficult exercise. It presupposes the knowledge and the ability to prove a wide range of underlying factual elements, which are often not known to the claimant. For example, to establish an infringement of the competition rules, proof is often required of the defendant’s trading practices, commercial strategy, pricing policy, cost structure or his positioning on the market. In many competition cases it will be necessary to show negative effects on prices, output or innovation on the relevant market. In some cases, notably cartels or other restrictions of competition by object, such negative effects can be presumed, but the establishment of the conduct will, in the absence of an infringement decision by a competition authority, be all the more arduous. In fact, the undertakings involved in the gravest antitrust infringements usually employ efforts and sometimes sophisticated means to conceal their illegal conduct. This is not only an issue in secret cartels, but it often also occurs in other cases of serious antitrust infringements, for instance in the context of Article 82 EC.
89. Even where claimants are in a position to describe and prove the factual elements necessary for finding an infringement,⁴⁷ having to demonstrate in detail the causation and quantification of their damages remains a particular difficulty in competition cases. To establish their damage, claimants have to compare the anti-competitive situation to a situation which would have existed in the absence of the infringement, i.e. a hypothetical competitive market. In a breach of contract case, a claimant can normally use market prices at the time of the breach of contract as the benchmark for calculating his loss. However, in a typical competition case, the claimant cannot rely on the prices at the time of the infringement and has to establish what the price would have been in the absence of the restriction of competition. For this purpose, he will often depend on information that is in the sphere of the defendant and possibly their partners in the infringement: for example, notes on the price overcharges agreed

⁴⁷ In follow-on actions, claimants may be able to rely on a decision by a competition authority finding the infringement; cf. in more detail Chapter 4 below.

secretly between cartel members, details on how and when they influenced price and other parameters of competition, or internal documents of the infringer showing his analysis of market conditions and developments. Also the reconstruction of a hypothetical competitive market to quantify the damage caused by the infringer usually presupposes knowledge of facts on the commercial activities of the infringer and other players on the relevant market. The same or similar types of difficulty arise in the context of causation, e.g. when claimants try to identify the precise elements of anti-competitive behaviour by an infringer that have caused the claimants damage, or the extent to which several infringers have individually contributed to the damage caused.

90. This high evidential burden on victims of antitrust infringements and the structural asymmetry in the distribution of the information required by claimants render the third factor mentioned above particularly problematic. Indeed, the absence of rules addressing the specific information asymmetry of competition cases often leads to great difficulties for victims to win their antitrust damages cases. As a result, many claimants are discouraged from even trying to bring a meritorious action. A more effective framework for the exercise of the right to compensation for antitrust damage therefore hinges on improved access for victims to evidence in the possession or under the control of the opponent or third persons. Enhanced possibilities of *inter partes* disclosure are thus crucial. Even in follow-on actions, the existence of evidence on the investigation files of a competition authority does not constitute an equivalent alternative that could effectively remedy the structural deficits in terms of access to evidence: first, much of the specific evidence required to corroborate claims for damages, e.g. as regards the exact quantification of individual damage suffered and the causal link to certain victims, will not have been investigated by the authority and therefore often not exist on its file. Second, rules on public access to documents normally do not constitute an appropriate legal basis for obtaining access to evidence for the purposes of pursuing private damages actions.⁴⁸

2. ***Solutions not retained: lowering the standard of proof or shifting the overall burden of proof***

91. The option of *lowering the standard of proof*, i.e. to let less evidence and a lesser degree of likelihood suffice to obtain a damages award, would facilitate antitrust actions for damages. However, the described difficulties of claimants in accessing evidence are of such magnitude that a reduced standard of proof would have to be inappropriately low to avoid them: without better access to information and evidence held by infringers, all that claimants can often show is a plausible suspicion that an antitrust infringement has caused them harm. Reducing the standard of proof to such a low level would entail an unacceptably high risk of incorrect judgments and of procedural abuses by the claimant.
92. The option of generally *shifting the overall burden of proof* does not constitute an as effective general remedy to the consequences of the structural information asymmetry in competition cases as do measures to improve access to evidence.⁴⁹ For

⁴⁸ See footnote 50 below.

⁴⁹ The fact that a reversal of the burden of proof does not appear to be an as effective general mechanism to remedy the structural deficits in terms of access to information does not exclude the exceptional

instance, one could envisage a partial shift of the burden so that the claimant would “only” have to show that there was an infringement of competition rules that may have caused damage to him whilst the defendant would have to demonstrate that his breach of the law did not cause a harm to the claimant. However, such shift would not address the difficulties victims have in obtaining information or evidence necessary to (even roughly) describe and prove the infringement. Even where victims can rely on the finding of an infringement in the decision of a competition authority, the reversal of the burden is of no real help with respect to the quantification of damages, because without access to the relevant information on how e.g. a price-fixing agreement was implemented in the specific case of the claimants, they and courts will often be unable to even roughly estimate a quantum of damage that then has to be rebutted by the defendant. Moreover, generally shifting the burden of proof would produce undesirable results because it would encourage unmeritorious claims as much as meritorious claims. This sets the wrong incentives and would entail the risks of incorrect judgments and procedural abuses referred to above.

3. *The proposed solution: a minimum level of disclosure based on fact pleading, combined with judicial control of relevance and proportionality*

93. Whilst it is essential to improve in antitrust damages cases access to evidence held by the opponent or third persons, the negative effects of certain systems of disclosure must be avoided. In some (non-European) jurisdictions, opponents or third persons are obliged to cooperate in potentially very wide-ranging, time-consuming and expensive disclosure procedures on the basis of rather low thresholds. In such systems, parties can be required to spend large amounts of time and resources on screening, compiling and disclosing the requested documents, even where there is only a low probability that the case is meritorious. This creates risks of abuses, e.g. through what is called “discovery blackmail” where the threat of potentially immense costs of disclosure procedures may be used to drive defendants to agree on an early settlement even where the claimant has a rather weak or even fully unmeritorious case. The same can occur in reverse, namely the situation where defendants with “deep pockets” use the threat of costly disclosure measures to cause the claimant to settle at a very low amount or even to abandon the case.
94. The Commission therefore proposes, to ensure across the EU a minimum level of disclosure *inter partes* in antitrust damages cases that avoids excesses in both directions, i.e. on the one hand, overly broad and costly disclosure obligations that are prone to abuses and, on the other hand, high obstacles to revealing the truth just because the relevant evidence happens to be under the control of the defendant or a third person. Claimants suing for antitrust damages should, plausibility of their claim provided, have the realistic possibility to obtain evidence that is indispensable for proving the case.
95. To this end, the Commission suggests to build on the approach adopted in the IP Directive and to follow the legal tradition of the majority of Member States. The accordingly proposed minimum standard for disclosure in antitrust damages cases is described in more detail below. It relies on the central function of the court seised with the damages claim. Disclosure measures could only be ordered by judges and

drawing of adverse inferences as a sanction for obstructive behaviour of a party as discussed in paragraph 130 below.

would be subject to strict and active judicial control as to their necessity, scope and proportionality. The Commission thus clearly does not propose a system of overly broad pre-trial disclosure, which may not fit easily with the legal tradition and principles of civil procedure of Member States and which may conflict with public policy principles of some Member States.

96. Member States which currently apply very strict requirements in terms of specification of facts and means of evidence would have to allow for an initial alleviation of these strict requirements in antitrust damages cases. The general standard of proof for ultimately winning a case would, however, remain unaffected. Moreover, any disclosure order would presuppose that the claimant has presented reasonably available facts and evidence that are sufficient to make his claim a plausible one. The Commission considers that such a fact-pleading requirement can have useful functions in safeguarding against unmeritorious claims and in structuring and streamlining civil procedures.
97. For reasons of equality of arms, this minimum level of disclosure in antitrust damages cases should be available not only to support claims of claimants but also defences by defendants (where in the following sections reference is made to “the claimant”, the same shall apply *mutatis mutandis* to defendants).

4. *Conditions for obtaining a disclosure order by the court and its scope*

98. The civil procedure systems of Member States should allow, as a minimum level of disclosure in antitrust damages cases, targeted disclosure measures under the condition that (a) the claimant has asserted all the facts and offered all those means of evidence that are reasonably available to him, provided that these are sufficient to make his claim a plausible one; (b) he has shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, to assert the specific facts or to produce the means of evidence for which disclosure is envisaged; (c) he has specified sufficiently precise categories of information or means of evidence to be disclosed, and (d) the court is satisfied that the envisaged disclosure measure is relevant to the case as well as necessary and proportional in scope.
99. Disclosure would be ordered upon application by a party, or upon the court’s own motion where necessary, and would be tailored by the court to fit the facts pleaded by the parties and the particular circumstances of the case.
- a. *Fact pleading: presentation of reasonably available facts and evidence sufficient to make out a plausible claim***
100. The first condition for any disclosure measure under the system of access to evidence proposed in the White Paper would be reasonable fact pleading by the claimant to the extent possible in the individual case. The facts presented must be sufficient to make out a plausible claim. As regards more specifically the last aspect, a claimant for antitrust damages would have to assert, as a condition for any disclosure, sufficient facts to show that there are plausible grounds to suspect that he suffered some harm through the infringement of competition rules by the defendant.
101. The purpose of requiring from the claimant a minimum level of fact pleading, and be it through rather general factual allegations (and where required reference to less precisely identified evidence), is to provide the court with a basis (i) to filter out

manifestly unmeritorious cases, (ii) to assess the adequacy, the relevance and proportionality of the requested disclosure measure and (iii) to tailor the ultimate disclosure order.

102. What constitutes sufficient fact pleading that can reasonably be expected from the claimant would depend on the circumstances of each case, especially the amount of essential information and evidence that is inaccessible to the claimant. Courts should always bear in mind the difficulties of the claimant to assert, in the initial fact pleading, detailed facts to support his case. It is indeed inherent to the information asymmetry in antitrust cases that the claimant cannot be expected to demonstrate any elevated degree of probability that his claim is founded. All that many claimants are able to produce is information and evidence providing plausible grounds for suspecting that an antitrust infringement by the defendant caused them some damage. For example, a claimant may produce an infringement decision showing that the defendant participated in a cartel for product X covering territory Y and for period Z. He may also be able to produce purchase receipts for the same product from the defendant on the same territory and covering the period of the cartel. This makes his claim a plausible one and should be sufficient to allow the claimant to access the evidence necessary to meet the applicable standard of proof required for ultimately winning the case. For instance, the claimant may need access to documents in the possession of the defendant to assist in the calculation of the overcharge arising from the secret cartel. This information can be an important element for the claimant to establish his loss.

b. Inability of claimant to otherwise access relevant evidence

103. An alleviation, in some Member States, of the general procedural rules on specification of facts and evidence will only be justified if there is a real risk that a victim of an antitrust infringement would lose his action for damages just because certain relevant pieces of information and evidence are under the control of the defendant or third persons and inaccessible to the claimant. A disclosure order should therefore only be granted where the claimant shows that he is, despite applying all efforts that can reasonably be expected, unable to assert the specific facts or to produce the relevant means of evidence in another manner than through a disclosure order.
104. In this context, it is important to emphasise that in the Commission's view Article 255 EC and Regulation 1049/2001 setting out the principles, conditions and limits of public access to documents held by Community institutions normally do not constitute an appropriate legal basis for obtaining access to evidence for the purposes of pursuing private damages actions.⁵⁰ The fact that certain information or pieces of

⁵⁰ Persons requesting access to documents under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145/43) do not have to give reasons for their request. If a document is accessible under that Regulation, anyone can have access. The consequence is that disclosure to one person has the effect that the document enters into the public domain, as it is accessible to anyone else. By their nature, documents submitted to the Commission in the context of antitrust proceedings are likely to contain commercially sensitive information, the public disclosure of which would harm the legitimate interests of the undertakings concerned. In addition, public interests, for example the protection of the purpose of inspections and investigations within the meaning of Article 4 of Regulation 1049/2001, may also require protection of such information. Therefore, litigants

evidence may exist in the file of the Commission should therefore not be a relevant consideration for the purposes of assessing, in the context of a request for an *inter partes* disclosure order, the claimant's ability to access information or evidence. In any event, much of the facts and evidence needed to corroborate a civil damages claim will not have been investigated by the public authority.⁵¹

c. Specification of categories of evidence to be disclosed

105. The scope of disclosure orders should be limited to what is genuinely relevant to the case and proportionate with a view, on the one hand, to the burden of the disclosure and, on the other, the nature and value of the claim and the seriousness of the alleged infringement. In order to allow the court to tailor the disclosure order with these objectives in mind, and to render the disclosure order as focused as reasonably possible whilst ensuring the effectiveness of antitrust damages actions, the claimant would have to specify sufficiently precise categories of information, documents or other means of evidence relevant to the claim. These categories should be specified as precisely and narrowly as possible, but as comprehensively as necessary so as not to endanger the effectiveness of the legal framework for antitrust damages actions. The court would need to have a margin of appreciation in this respect given that the appropriate measures would depend on the circumstances of the individual case.
106. In the above example of a cartel relating to product X covering territory Y during period Z, the claimant in the system proposed above may well seek disclosure of documents about the price discussions between the cartelists for the clearly described product, period and territory to the extent that they may concern him. Disclosure could also be requested, for the specified product, period and territory, of facts to enable the claimant to determine what the pricing structure on the market would have been in the absence of the cartel. In this context, details of prices prior to the cartel prices on a comparable market where there was no cartel, or details of price discussions during the life of the cartel may be relevant.

d. Judicial control of relevance, necessity and proportionality of disclosure measure

107. It is a central feature of such a system for access to evidence that any disclosure takes place under the strict and active control of the court seised with the claim for antitrust damages. The court would, in particular, be called upon to verify *ex officio* that the envisaged disclosure measure is relevant to the case as well as necessary and proportional in scope. The outcome of this assessment, for which courts should enjoy a margin of appreciation, will very much depend on the specific circumstances of the case at hand.
108. The envisaged disclosure measure would have to be, in the first place, relevant for the case brought by the claimant. This means that the court would therefore have to assess whether the information or evidence to be disclosed is suitable to support the allegations in the initial fact pleading by the claimant. In the second place, the disclosure measure would have to be necessary, i.e. there would have to be no other equally suitable but less onerous measure available. For being "equally suitable", the

in civil proceedings for damages should not rely on that Regulation to obtain access to evidence for their damages claim.

⁵¹ See paragraph 90 above.

other measure that is the reference point would have to be certain to produce in all likelihood equivalent results to render the action for antitrust damages effective.⁵²

109. In the third place, the court would, when defining the disclosure obligation, have to take into consideration the burden of disclosure and maintain the proportionality of the disclosure ordered to the nature and value of the claim and the seriousness of the underlying infringement. The disclosure measure must not imply disadvantages to the legitimate interests of the other party that are manifestly out of proportion to the objective pursued. The specific issue of confidential information is addressed separately in paragraphs 112 to 117 below. In the proportionality assessment that implies a balancing of legitimate interests, account should be taken of the likelihood (and possibly certainty) that the addressee of the disclosure order is the one who infringed competition law and thereby gave rise to the damages action in the first place. In this context, courts would also have to pay particular attention to the legitimate interests of third persons and the burden a disclosure order may impose on them.

As a minimum standard of disclosure in actions for antitrust damages, national courts should under specific conditions have the power to order disclosure *inter partes* of precise categories of information or evidence relevant to the claim.

Conditions for a disclosure order in actions for antitrust damages should include that (a) the claimant has asserted all the facts and offered all those means of evidence that are reasonably known and available to him, provided that they show plausible grounds to suspect that he suffered harm through the infringement of competition rules by the defendant; (b) he has shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, to assert the specific facts or to produce the evidence for which disclosure is envisaged; (c) he has specified sufficiently precise categories of information or evidence to be disclosed, and (d) the court is satisfied that the envisaged disclosure measure is relevant to the case as well as necessary and proportional in scope.

5. *Further issues related to the scope of the disclosure order*

a. **All types of evidence**

110. The objective of disclosure orders is to assist the parties in revealing the truth and obtaining the evidence necessary to underpin the allegations supporting their case (either as claimant or as defendant). Disclosure orders should therefore cover *all* types of evidence that are admissible in the Member State concerned where these means of evidence are under the control of the opponent or third persons.⁵³
111. This would mean that a court may order parties or third persons to produce any information, irrespective of the medium on which it is stored. Besides that, the court could also order parties or third persons to give oral testimony, in accordance with

⁵² It is recalled that Article 255 EC and Regulation 1049/2001 on public access to documents held by Community institutions, in the Commission's view, normally do not constitute an appropriate legal basis for obtaining access to evidence for the purposes of pursuing private damages actions, see paragraph 104 above.

⁵³ For the group "third persons" from whom disclosure may be sought, see paragraph 121 below.

the applicable national rules. The latter should determine whether it is the court that is hearing the parties and interrogating third persons or whether the parties themselves are allowed to examine and to cross-examine. Member States whose procedural systems are based on the centrality of the judge would therefore remain free to prevent any hearing of witnesses outside the courtroom.

b. The disclosure and protection of confidential information

112. In actions for antitrust damages, the information and evidence relevant to prove the case is likely to be in large part commercially sensitive. Confidential information may be relevant for determining whether there has been an infringement (e.g. data on the market position of the defendant and his cost structure) or for determining the quantum of the harm caused (e.g. pricing data of the defendant or third parties or pricing strategies).
113. It is a general rule of Community law that confidential information, in particular business secrets, should in principle be protected. Community law nonetheless also recognises that there may be specific circumstances in which confidential information may be made public. For instance, the obligation of the Commission under Regulation 1//2003 to protect the confidentiality of information acquired through such intrusive coercive measures as unannounced on-site inspections is subject to the exception that the Commission may rely on and disclose confidential information to the extent that this is necessary to prove an infringement of Articles 81 or 82 of the Treaty.⁵⁴
114. The likelihood that confidential information plays a central role in proceedings for damages makes it indispensable that the protection granted to confidential information is not disproportionate and does not *de facto* preclude the exercise of the right to compensation. If addressees of a disclosure order were to be able to invoke a general confidentiality defence to block disclosure of any commercially sensitive information, the access to evidence that is essential for establishing the truth would often become practically impossible. A protection against disclosure without exception would almost inevitably lead to the loss of the damages action by the claimant.
115. In a different context, namely that of the IP Directive, the Court recently confirmed in its *Promusicae* judgment⁵⁵ that the right to judicial protection of victims of infringements of EC law and the right to privacy of the infringer are both fundamental rights under Community law that must be balanced carefully by national courts and other authorities. This balance becomes particularly delicate when, as in that case, the right to privacy refers to the personal data of natural persons.

⁵⁴ See Article 27(2) of Regulation 1/2003 and Article 15(3) of Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ 2004 L 123/18) and recital 14 of that Regulation: “Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure”.

⁵⁵ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* (not yet reported).

116. When Member States apply the rules and principles existing in their national laws on civil procedure to protect business secrets and other confidential information, they should therefore ensure that the exercise of victims' right to compensation remains effective in practice, and that the two conflicting groups of interests are balanced in an assessment of proportionality. This should be part of the proportionality test mentioned above (paragraphs 100 to 109). Relevant considerations include, on the one hand, the nature and value of the claim for damages and the degree of relevance the contentious piece of information or evidence has for the claimant to substantiate his case for damages. Account should also be taken of how likely it is that the owner of the confidential information infringed competition law, i.e. that it was his breach of law that put the claimant in the situation of having to claim damages in court which necessitate access to evidence under the control of the defendant. On the other hand, the proportionality assessment should consider the nature and the value of the interests at stake for the owner of the information. The harmful consequences to be considered are likely to differ significantly between a disclosure to the public at large and a disclosure to the claimant only. For an exclusion or limitation of disclosure to be justified, the interests in the protection of confidentiality would have to clearly outweigh the interests of the claimant, which normally coincide with the public interest, in an effective compensation of damage caused through antitrust infringements.

117. In the appreciation of the conflicting interests and the proportionality of disclosure, possibilities to reduce the scope of disclosure or to limit its impact are likely to be of paramount importance. Various possible solutions, which achieve both objectives of protecting confidential information and of making this information useable in the proceedings for damages, are conceivable and are already applied in Member States. For instance, it may be sufficient to protect information from the wider public whilst it is not harmful for the claimant to take note of it, because the information is not confidential vis-à-vis him. This could be achieved by a court order that court hearings are to be in private, that the parties are obliged not to use the information for other purposes than the ongoing court proceedings and that any public access to the file is limited. There would have, in all cases, to be an obligation that any confidential information or evidence disclosed must not be used for any other purposes than the ongoing proceedings for damages. Member States may also consider limiting direct disclosure to the parties' lawyers or to exclude direct disclosure to the parties and make the information directly available only to experts (e.g. certified accountants) who would produce a summary of the information in an aggregated or otherwise non-confidential form. The rules of civil procedure for some Member States already provide for such solutions.

c. The disclosure of corporate statements submitted to a competition authority as part of an application for immunity or reduction of fines

118. In order to avoid an applicant for immunity or for a reduction of fines ("leniency applicant") being placed in a less favourable situation than the other infringers only due to the fact that he applied for leniency, leniency applicants should be protected against court orders requesting disclosure or reproduction of certain documents and information they have submitted to the competition authorities. This protection would cover the voluntary presentations, by or on behalf of an undertaking to the competition authority, of the undertaking's knowledge of a cartel and its role therein, drawn up especially for submission under the Leniency Notice (hereinafter

“corporate statements”), and should be applicable both before and after a decision is taken by the authority.

d. Investigative privilege of competition authorities

119. With respect to evidence other than corporate statements, it may in specific circumstances be that its disclosure would unduly interfere with an ongoing antitrust investigation by a competition authority. This may occur, for example, if during the investigative phase an applicant for leniency would be ordered to disclose documents submitted in addition to the corporate statement to the competition authority, and if these documents were to become known to other members of the cartel in the course of an action for damages or a request for a settlement. Consideration should therefore be given to a possible rule that courts should temporarily refrain from adopting a disclosure order if the Commission or an NCA shows to the court that an order obliging the disclosure of certain pieces or categories of evidence during a specified period of time would jeopardise an ongoing antitrust investigation.

e. No possibility to object to disclosure of unfavourable evidence

120. The mere fact that the disclosure of evidence may entail unfavourable consequences for the addressee of the disclosure order in the civil proceedings, cannot constitute a reason to object to the disclosure order. On the contrary, it is inherent to the need to overcome the information asymmetry in antitrust damages cases that defendants would have to reveal *all relevant* evidence, within the specified categories, ordered by a court, including facts that are unfavourable to their own case. Concepts that may exist in certain national laws such as the old maxim *nemo tenetur edere contra se*⁵⁶ therefore could not be invoked against the disclosure mechanisms for antitrust damages cases. To the extent that such maxims are intended to prevent overly broad and unfocused disclosure requests (“fishing expeditions”⁵⁷), the requirements of fact-pleading, the need to specify sufficiently precise categories of evidence and the judicial control of relevancy and proportionality of the disclosure measure (see paragraphs 107 to 109 above) constitute adequate safeguards in this respect.

Disclosure orders can cover all types of evidence under the control of the opponent or third persons. Adequate protection should be given to confidential information as well as to corporate statements of leniency applicants and the investigations of competition authorities.

6. Potential addressees of disclosure orders and their right to be heard

121. Disclosure orders will normally be directed against the opponent in the action for damages. They presuppose, as set out above, that the claimant has shown plausible grounds for his claim. In the great majority of cases, the information in the possession of the defendant and the claimant will be sufficient to show whether the former inflicted damage on the latter through the infringement of antitrust rules.
122. Exceptionally, however, it may be indispensable for a victim to seek disclosure from a third party, i.e. someone otherwise not involved in the law suit for damages. This

⁵⁶ Or *nemo tenetur edere instrumenta contra se*, which may be translated as “nobody is bound to produce documents against himself”.

⁵⁷ Cf. footnote 39 above.

third party may be a co-infringer who committed a breach of antitrust rules together with the defendant and who may control certain relevant pieces of evidence thereof. It may also be that the third party did not participate in the infringement, but was involved in transactions related to the infringement. For instance, in the context of the passing-on defence, an undertaking (the infringer) may wish to seek information from its direct customers (or their customers) to demonstrate that an overcharge was not passed on to the indirect purchaser who is suing for damages.

123. Judges will, when assessing the proportionality of a disclosure measure and thereby balancing the legitimate interests at stake, take into account the likelihood (and possibly certainty) that the addressee of the disclosure order is the one who infringed competition law and thereby gave rise to the damages action. The legitimate interests of third parties will, conversely, carry a particular weight in the proportionality assessment if they clearly had no involvement in the antitrust infringement. This means that a disclosure measure may be proportionate *vis-à-vis* someone whose breach of the antitrust law is established, whilst the same measure would be disproportionate (and therefore refused by the judge) *vis-à-vis* someone not at all involved in the infringement.
124. Third parties would therefore benefit from a double protection against excessive requests for disclosure in law suits between other parties: first, judges would not turn to a third party where the required information is available from one of the parties of the law suit. Second, the proportionality threshold is higher for third parties than for undertakings involved in the infringement.
125. Moreover, third parties would be entitled to be reimbursed for any costs they reasonably incur through compliance with a disclosure order. This reimbursement of third-party costs would be made by the party to the law suit who is ordered to bear the costs of the proceedings according to applicable national rules. This is usually the losing party.
126. Prior to the adoption of a disclosure order, provided that there is no particular urgency, the addressee of such order should have a right to be heard in order to present his views on the matter. This right should exist for all potential addressees, i.e. the opposing party in the action for antitrust damages as well as any third persons from whom disclosure may be sought.
127. Usually, there are specific rules that apply to the access to information held by public authorities. The group of “third persons” from whom disclosure may be sought would therefore normally not comprise public authorities to the extent that the matter concerns an activity within the exercise of their public function. The specific rules should normally prevail over the general rules on *inter partes* disclosure of evidence described above.

<p>Except for cases of particular urgency, the addressees of a disclosure order would have the right to be heard.</p>
--

7. *Refusal to turn over evidence and destruction of evidence*

128. The lodging of an action, or the beginning of an investigation by antitrust authorities, entails a serious risk that the defendant will destroy or hide incriminating material

crucial for victims' to corroborate claims for damages. In order to guarantee the full effectiveness of the aforementioned disclosure mechanism, sufficiently deterrent sanctions must be considered to prevent any destruction of relevant evidence or the refusal to produce evidence pursuant to a court order. Furthermore, consideration should be given to the possibility that courts order, where appropriate, provisional safeguarding measures to preserve relevant evidence.

a. Sanctions for refusal to produce evidence and for destruction of evidence

129. The refusal to turn over evidence pursuant to a court disclosure order, as well as the destruction of evidence, could be sanctioned by different types of measures which are not necessarily mutually exclusive, such as direct financial and/or personal sanctions or the drawing of adverse inferences by the judge within the civil proceedings.
130. As regards *parties to an action for damages*, Member States are encouraged to provide courts hearing the action for damages with the discretion to choose from a sufficient range of possible measures the most effective and appropriate sanction in the specific situation. Whilst courts may find the imposition of financial (e.g. fines and/or periodic penalty payments) or personal sanctions available under national law to be the most effective sanction in certain cases, they may in other cases not always achieve the intended result without undesirable delays. It appears therefore advisable that national courts should in all cases have the option to draw adverse inferences from a refusal to produce evidence or a destruction of evidence by a party to the action. For instance, the national court may consider a particular fact alleged by the claimant as established and strike out the defendant's counter arguments in this respect.⁵⁸
131. As regards refusals or the destruction of evidence by *a person or an entity that is not a party to the action for damages*, national law should equally ensure that the available sanctions are sufficiently severe to have a deterrent effect. Courts hearing a particular action for damages should be entitled, through appropriate direct sanctions, to coerce disclosure of the evidence relevant to the case by a third party.
132. Individuals and undertakings should face effective sanctions for the destruction of evidence as of the moment that they knew, or should reasonably have known, that the evidence is of relevance for corroborating an actual or reasonably foreseeable antitrust damages claim.

Where a party refuses to disclose evidence pursuant to a court order or destroys evidence, any court hearing a claim for damages should have the power to impose effective, i.e. sufficiently deterrent sanctions on the individual or the undertaking concerned. Courts should be provided with a range of such sanctions to choose from, which should include the possibility to draw adverse inferences from the refusal or destruction in the civil action for damages.

⁵⁸ Whereas an automatic shift of the entire burden of proof does not appear to be an appropriate general mechanism in antitrust damages cases to address the existing information asymmetry (see paragraph 92 above), the threat of adverse inferences in the event of the refusal to produce or destruction of evidence may well constitute an effective and efficient incentive for parties to cooperate.

b. Protective measures to preserve relevant evidence

133. In addition to the deterrent effect emanating from the sanctions discussed above, Member States may wish to entitle courts to order, where appropriate, prompt provisional measures to actively preserve relevant evidence prior to the introduction of a damages claim. Article 7 of IP Directive 2004/48 requires Member States to ensure that a court may order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. The court may do so on application by a party who has presented reasonably available evidence to support a claim that their intellectual property rights have been infringed, even before the proceedings on the merits of the case have started. The Commission suggests that equivalent possibilities be considered with respect to antitrust damages claims. Member States are likely to be best placed to determine, in accordance with their legal traditions whilst ensuring full effectiveness of the measures, whether they provide for the execution of the court's safeguarding order by a public authority (e.g. a court official or *huissier de justice*) who would seize the evidence concerned, or whether a private party should be entitled to enter the premises of the opposing party to secure the evidence.

CHAPTER 4 — BINDING EFFECT OF DECISIONS ADOPTED BY COMPETITION AUTHORITIES

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

134. The same antitrust infringement can be the subject, on the one hand, of administrative proceedings by a public authority that find a breach of antitrust rules, and, on the other hand, of civil proceedings before national courts where victims of the infringement sue the infringers for damages. Such subsequent actions for damages are usually referred to as “follow-on actions”.
135. It follows from Article 16(1) of Regulation 1/2003 that a Commission decision finding an infringement under Articles 81 or 82 EC constitutes a binding act to which decisions by national courts must not run counter, unless the decision is annulled by the European Court of Justice.⁵⁹ This means that victims of antitrust infringements can rely on the Commission decision in a subsequent action for damages against the addressees of the decision before national courts.
136. The Green Paper put forward for discussion a similar rule for decisions of NCAs finding an infringement of Articles 81 or 82 EC.⁶⁰ Comments were also invited on the alternative option of shifting the burden of proof: under this option, the decision of the NCA would create a presumption that an infringement existed, unless the defendant can show that he did not infringe Article 81 or 82 EC.
137. The results of the public consultation on the Green Paper were diverse. They showed, however, widespread support in favour of the option to endow NCA decisions on finding an infringement of Articles 81 or 82 EC with a legally binding effect in civil proceedings for damages. These commentators emphasised that the lack of any such effect of infringement decisions by NCAs contributed to the uncertainty of the outcome of a claim for antitrust damages. They argued, in particular, that a binding effect would significantly simplify and shorten court proceedings for damages, help reduce costs and thereby constitute an important facilitation of antitrust damages actions. It was further emphasised that such a rule would also contribute to consistent application of Articles 81 or 82 EC across the EU. Many respondents of this group proposed to limit the binding effect of NCA decisions to situations where all appeal avenues against the decision have been exhausted. Some respondents to the Green Paper argued that civil courts should only be bound by decisions of the NCA of the

⁵⁹ See in more detail paragraph 139 below.

⁶⁰ See option 8 of the Green Paper. “Decisions by NCAs” means, in the present context, decisions pursuant to Article 5 of Regulation 1/2003 adopted by the authorities designated by Member States within the meaning of Article 35 of that Regulation. As explained in paragraph 2 of the Commission’s Notice on cooperation within the Network of Competition Authorities OJ 2004C 101/43: “The structure of the NCAs varies between Member States. In some Member States, one body investigates cases and takes all types of decisions. In other Member States, the functions are divided between two bodies, one which is in charge of the investigation of the case and another, often a college, which is responsible for deciding the case. Finally, in certain Member States, prohibition decisions and/or decisions imposing a fine can only be taken by a court: another competition authority acts as a prosecutor bringing the case before that court.”

same Member State, whilst several others saw no compelling reasons for such distinction between the domestic NCA and NCAs in other Member States.

138. At the other end of the spectrum, a significant number of comments received during the public consultation rejected the idea that NCA infringement decisions based on Article 81 or 82 EC should have any legal effect in subsequent antitrust damages cases. Concerns were, in particular, raised as to a potential conflict with the principle of an independent judiciary and a danger that a binding effect would incite frivolous claims. In view of such concerns, several respondents favoured a rule that would facilitate actions for antitrust damages by stipulating a rebuttable presumption that the finding by an NCA of an infringement of Article 81 or 82 EC is accurate.

B. ACQUIS COMMUNAUTAIRE AND POSSIBLE MEASURES TO ENSURE EFFECTIVE ANTITRUST DAMAGES ACTIONS

1. Acquis communautaire: binding effect of decisions by the Commission

139. Recital 22 of Regulation 1/2003 recalls that “in order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided”. One rule that serves this purpose is contained in Article 16(1) of Regulation 1/2003, which codifies the ECJ’s interpretation of the Treaty, in particular in its *Masterfoods* judgment⁶¹. Article 16(1) provides that:

“When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. [...]. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.”

140. On the basis of this rule, claimants who bring actions for damages before national courts subsequent to a Commission decision, can rely on the Commission’s decision directly as irrebuttable proof that an addressee of the decision infringed Article 81 or 82 EC. The obligation of national courts not to run counter to a Commission decision concerns the operative part of the decision which “must be construed in the light of the statement of the reasons upon which it is based”.⁶²
141. Such binding effect of the Commission’s decision is without prejudice to the interpretation of Community law by the Court of Justice. If the national court has serious doubts on the legality of the Commission’s decision, it can refer a question to the Court of Justice for a preliminary ruling (Article 234 EC). Where the Commission’s decision is challenged before the Community courts pursuant to Article 230 EC and the outcome of the dispute before the national court depends on the validity of the Commission’s decision, the national court should stay its

⁶¹ See Case C-344/98 *Masterfoods* [2000] ECR I-11369.

⁶² Case T-266/97 *Vlaamse Televisie Maatschappij NV v Commission* [1999] ECR Page II-2329 paragraph 151. See also Joined Cases 40/73 to 48/73 and others *Suiker Unie* [1975] ECR 1663 paragraph 123: “operative part of the decision [...] considered in the light of the statement of reasons”.

proceedings pending final judgment in the action for annulment by the Community courts.⁶³

Acquis communautaire:

National courts cannot take decisions ruling on agreements, decisions or practices under Article 81 or Article 82 EC that run counter to a decision adopted by the Commission on the same agreements, decisions or practices.

Commission decisions finding an infringement of Article 81 or 82 EC therefore constitute a sufficient legal proof of this infringement by the addressee(s) of the decision in subsequent actions for damages before national courts.

This effect of a Commission decision can only be removed by a judgment of the Community courts under Article 230 or 234 EC.

2. *Binding effect of NCA decisions finding an infringement of Article 81 or 82 EC*

142. Whilst it is not the general rule in the Member States that decisions of administrative bodies (such as most NCAs) are legally binding on national courts in civil matters,⁶⁴ with respect to the decisions of NCAs in competition cases some Member States have introduced a rule that civil courts in follow-on proceedings for antitrust damages cannot deviate from the NCA decision.⁶⁵

143. For the reasons set out below, the Commission considers that effective facilitation of antitrust damages actions requires the introduction of such a binding effect for the decisions of all NCAs establishing an infringement of Article 81 or 82 EC. It is submitted that this rule should be based on the mechanism of the rule contained in Article 16(1) of Regulation 1/2003 relating to the effect of the Commission decisions, but should be more limited than this rule in several aspects (see paragraphs 152 *et seq.* below).

a. *Irrebuttable probative effect of NCA decisions ensures the coherent application of Articles 81 and 82 EC and the effectiveness of antitrust damages actions*

144. A rule endowing NCA decisions with legally binding effects in damages cases before national civil courts regarding the same infringement of Article 81 or 82 EC would significantly enhance the consistent application of Community antitrust law and increase legal certainty. The latter aspect has been emphasised by the Court of Justice, for example, in its *Delimitis* judgment, in relation to the possibility that civil courts deviate in competition cases from a Commission decision: “conflicting decisions [by civil courts] would be contrary to the general principle of legal

⁶³ Unless the national court considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted. See *Masterfoods* (footnote 61 above) paragraph 57.

⁶⁴ Such effects are, however, by no means unknown in Member States: it does occur that the findings of an administrative or a regulatory body concern a condition of a civil claim and have to be taken, under national law, as an irrebuttable fact in the civil law suit.

⁶⁵ See, for instance, Sections 18 and 20 of the UK Enterprise Act 2002, inserted as sections 47A and 58A into the UK Competition Act 1998, and Section 33(4) of the German Competition Act. Another example is found in Article 88/B of the Hungarian Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices), introduced by Act LXVIII of 2005.

certainty and must, therefore, be avoided”.⁶⁶ The risk of inconsistent application of Articles 81 and 82 EC by different national instances has become more significant since the introduction of parallel full competences for the enforcement of these Articles by the Commission, NCAs and national courts. Preventing decisions of civil courts, where the same facts are concerned, from running counter to the final findings of an NCA (or a review court) would indeed complement the mechanisms safeguarding the consistent application of Articles 81 and 82 EC provided for in Regulation 1/2003.

145. A rule providing that national courts in civil proceedings for damages will accept the findings in NCA decisions as incontestable findings would, furthermore, relieve claimants of the difficulty of having to formally prove again that the defendant infringed Article 81 or 82, a fact which was already established by the NCA. Such relitigation of legal and factual issues that were already decided in the proceedings before the NCA, and often also before review courts, would indeed add significant costs and imponderability to the victim’s action for damages and can be dissuasive to bringing such an action.
146. If defendants were allowed to call into question the findings of the NCA (and review court) decisions, civil courts seised with a claim for damages would be required to re-examine all the facts already investigated and assessed by a specialised public authority and possibly review court. Such duplication of factual and legal assessment would not only generate considerable extra costs and extend the duration of the court proceedings on the claim for damages, it is also not warranted by objective considerations. In all Member States, the findings of the NCA are open to substantive and procedural scrutiny by review courts. It is these courts which are best placed to ensure the legal and factual accuracy of NCA decisions. Once this appeal process has been exhausted, there is no justification why the same issues should be litigated again.⁶⁷
147. The option considered in the Green Paper to merely shift the burden of proving the absence of an infringement onto the defendant would not produce the same result in terms of rendering antitrust damages actions in follow-on cases more effective and in terms of ensuring consistency in the application of Articles 81 and 82 EC. Such a rule would still allow the defendant to call the findings of the NCA in their entirety into question. Defendants could reiterate their views on the factual and legal assessment of the NCA (as upheld by the competent review court(s)), thereby unnecessarily giving rise to the aforementioned uncertainties, costs and delays of the action for antitrust damages. The appropriate route for a defendant to challenge the NCA decision establishing his infringement of Article 81 or 82 is to lodge an appeal before the competent review courts against this decision within the applicable time limits. Once this route has been exhausted, there is no reason to allow relitigation of the same issues in the civil proceedings for damages.
148. A rule endowing NCA decisions with legally binding effects for civil courts in antitrust damages proceedings would not, as explained in the following paragraphs,

⁶⁶ See Case C-234/89 *Stergios Delimitis v Henninger-Bräu AG* ECR [1991] I-935 paragraph 47.

⁶⁷ The Commission suggests endowing only those NCA decisions with binding effect for which all appeal avenues have been exhausted or the time limits have expired, see below at paragraph 155.

unduly interfere with the principles of an independent judiciary and separation of powers, which are part of Member States' constitutional orders.

149. First, the rule would make only *final* NCA decisions binding, i.e. those which either have been accepted by their addressees (by refraining from an appeal) or which were confirmed upon appeal by the competent review courts. It would therefore often be a judgment confirming the NCA decision that binds the judge hearing the civil case on damage claims. The concept that ultimate review court judgments can bind other courts in cases where the same matter is at stake and the same persons are concerned is a familiar notion in Member States, for instance in the (slightly different) context of the *res judicata* principle or the issue estoppel rule. The Commission notes that the burden of proof in administrative proceedings for breach of the competition rules is likely not to be lower than the burden of proof in civil actions for damages for the same infringement. Therefore, the standards of proof that the civil courts must uphold with regard to the juridical fact of infringement are not in any way undermined by the binding effect of NCA decisions.
150. Second, a rule on the effect of NCA decisions in civil law suits for damages modelled after Article 16(1) of Regulation 1/2003 would not prevent a national court, in the event it has serious doubts as to the legal correctness of the interpretation of Article 81 or 82 EC by the NCA, to make use of its right (and possibly obligation) to refer the question for preliminary ruling to the Court of Justice pursuant to Article 234 EC. National civil courts would thus retain their judicial independence to hold a diverging view on the interpretation of the law; they would merely be prevented from applying Article 81 or 82 EC in a manner that runs counter to the NCA decision without first having obtained clarification from the Court of Justice on this question.⁶⁸
151. In light of the above, the Commission proposes the following rule on the binding effect of NCA decisions on Article 81 or 82 EC in antitrust damages actions before national civil courts:

When national courts in actions for damages rule on agreements, decisions or practices under Article 81 or Article 82 EC which are already the subject of a final decision by an NCA within the European Competition Network (ECN) finding an infringement of Article 81 or Article 82 EC, or are the subject of a final ruling by a review court upholding the NCA decision or itself finding an infringement, they cannot take decisions running counter to such a decision or ruling.

This obligation is without prejudice to the right, and possibly obligation, of national courts to seek clarification on the interpretation of Article 81 or 82 EC under Article 234 EC.

b. Types of NCA decisions concerned

152. The above suggestion concerns decisions of NCAs applying Article 81 or Article 82 EC, not those applying national law only. Negative decisions confirming that certain

⁶⁸ It may also be that the court seised with an appeal against the NCA decision has already taken the initiative to refer questions on the interpretation of Article 81 or 82 EC to the Court of Justice.

agreements or practices do not constitute an infringement of Article 81 or Article 82 EC are not part of Article 5 of Regulation 1/2003, which sets out an exhaustive list of the types of decisions an NCA can take when applying Article 81 or Article 82 EC. The above rule therefore relates only to decisions finding an infringement of Article 81 or Article 82 EC.

153. Article 5 of Regulation 1/2003 also implies that NCA decisions applying Article 81 or Article 82 EC can be invoked with binding effect in follow-on actions only *to the extent* that they find an infringement. Negative statements in infringement decisions on the absence of an infringement for certain aspects of the case are not covered.

c. Conditions for binding effect of NCA decisions

(i) Same infringers and same practices

154. The probative effects of an NCA decision in civil damages cases pursuant to the rule set out in paragraph 151 above would, of course, be confined to the scope of the decision: like Article 16, they can only relate to (i) the same agreements, decisions or practices that the NCA found to infringe Article 81 or Article 82 EC, and (ii) to the same individuals, companies or groups of companies which the NCA found to have committed this infringement (normally, the addressee(s) of the decision). The requirement that there is identity of the infringer would ensure that the NCA decision can only be invoked against undertakings that were a party to the NCA proceedings and therefore had the opportunity to make their arguments on the substance known and to exercise their rights of defence. Identity of *all* parties of the civil proceedings with those of the administrative proceedings (as in the *res iudicata* rule) can naturally not be required for a binding effect of NCA decisions, because the claimants in the civil proceedings are not, or at least not necessarily, a party or participant in the proceedings before the NCA (e.g. as complainants).

(ii) Only decisions that are final

155. The rule set out in paragraph 151 concerns only decisions that are final. “Final” in this context means that all appeal avenues against the NCA decision⁶⁹ have been exhausted or that the relevant time limits for appeal have expired with respect to the defendant concerned. This means that defendants in civil proceedings would not only have had the opportunity of exercising their rights of defence before the NCA, but also the opportunity of persuading the review court(s) of their position. Where the undertakings concerned have accepted the NCA decision (by not appealing against it) or where review courts have confirmed the decision, the Commission sees no reason why a final NCA decision, or a final ruling by a review court upholding the NCA decision or itself finding an infringement, should not be accepted as irrebuttable proof by national civil courts set out in paragraph 151 above.
156. Such a rule would not create over-incentives that would lead to unmeritorious or frivolous lawsuits. As pointed out before, the binding probative effect would be attributed only to NCA decisions as confirmed by review courts or accepted by defendants. Moreover, such effect would normally only alleviate the claimants’ proof of the existence and the scope of the antitrust infringement. Accordingly, it would not alter the scope of the other conditions for a successful damages claim, such as the

⁶⁹ See footnote 60 above.

quantification of damage and the establishment of a causal link between the infringement and the damage.

157. Where an appeal is pending against the NCA decision,⁷⁰ national civil courts seised with a damages action are encouraged to consider whether staying their proceedings is appropriate. It may, however, well be that the appeal against the NCA decision does not question the finding of an infringement, but for example only challenges the amount of the fine imposed. In this case, there is no risk of conflicting decisions that would warrant a suspension.

d. Territorial scope of binding effect of NCA decisions

158. As mentioned above, some respondents to the Green Paper argued that an NCA decision should only be binding upon the domestic courts of the Member State of the NCA. A number of others saw, however, no compelling reasons for a distinction between the domestic NCA and NCAs in other Member States, which are all part of the ECN. There is also the example of recent national legislation that explicitly endows the decisions of *all* NCAs within the ECN applying Article 81 or 82 with a binding effect upon its civil courts.⁷¹
159. Limiting the effects of NCA decisions to antitrust damages proceedings brought before the civil courts of the same Member State can indeed create significant complications and dissuasive effects for victims who consider bringing an action for damages.
160. This concerns, for example, cases where a decision of one Member State's NCA finds an infringement of Article 81 or 82 EC and where the claimant decides to file a claim for antitrust damages in another Member State, for instance because the defendant (or one of several defendants) is domiciled there. An NCA decision in most cases concerns infringements that occurred on the territory of that NCA's Member State. Compared to civil courts located in another Member State, the NCA will usually be particularly well-placed, due to its proximity, to investigate and assess the alleged infringement of Article 81 or 82 EC. If a civil court in another Member State were forced to re-investigate and re-assess whether an infringement has occurred, it would face a range of practical difficulties. It would *inter alia* have to take evidence in another country, possibly in a different language than the language of the court, and in all likelihood after even more time has elapsed than when the NCA initially investigated and assessed the infringement. Any re-opening of the same issues, which are already the subject of a *final* decision by a specialised competition authority that was either confirmed on appeal or accepted by the defendant through refraining from an appeal, would add an unnecessary imponderability to the civil proceedings and increase their cost and duration.
161. Dissuasive effects also arise, for example, in other constellations: antitrust infringements occurring in several Member States are frequently related. Where such infringements are the subject of decisions by several NCAs, a victim who suffered damages as a result of these infringements can have a legitimate interest in bringing a damages action against the infringer(s) involved before one single civil court. Such a

⁷⁰ Or while the relevant time limits for filing an appeal have not yet expired.

⁷¹ See e.g. Section 33(4) German Competition Act.

concentration of proceedings greatly enhances procedural economy and helps to avoid conflicting judgments. To foster these objectives, Article 6(1) of Regulation 44/2001⁷² allows tort victims to cumulate their damages actions against all co-defendants before one court of the country where at least one of them is domiciled. A rule that limits the binding probative effect of NCA decisions to those rendered by the domestic NCA would *de facto* create a strong disincentive against such desired concentration of proceedings, because the findings of the foreign NCAs would have to be re-investigated and re-assessed (with the dissuasive effects mentioned above).

162. In order to avoid such disincentives and to enhance consistent application of Articles 81 and 82 EC across Member States, the Commission considers it appropriate that the rule set out in paragraph 151 above applies to decisions of *all* NCAs within the ECN applying Article 81 or 82, regardless of the Member State in which civil proceedings are brought. There are no reasons to introduce a distinction of the effects of NCA decisions based on their origin. Within the ECN, all NCAs are equally competent to apply Articles 81 and 82. Pursuant to Article 11 of Regulation 1/2003, they adopt infringement decisions after informing the Commission and the other Member States; where NCAs envisage conflicting decisions in the same case or decisions which are obviously in conflict with consolidated case law, the Commission can initiate its own proceedings and thereby relieve the NCA of its competence to apply Article 81 or 82. Moreover, the rule envisaged in paragraph 151 above attributes binding effect only to *final* NCA decisions, which means that the addressees of decisions by foreign NCAs either had them scrutinised by at least one review court, or accepted them by refraining from an appeal. As mentioned above, civil courts that do not share the interpretation of Article 81 or 82 EC adopted by the NCA and/or the court reviewing the NCA decision can refer the question for clarification to the ECJ pursuant to Article 234 EC.

In the context of the recognition of civil and commercial judgments, Article 34(1) of Regulation 44/2001 allows the courts of a Member State to exceptionally refuse the recognition of a judgment from another Member State on the ground of public policy, primarily if the right to fair legal process was not guaranteed during the proceedings leading to the judgment.⁷³ The rights of defence and fair trial are guaranteed by the European Convention on Human Rights and the EU Charter on Fundamental Rights⁷⁴ and all Member States' instances are held to fully respect them in the proceedings that lead to an NCA decision and in subsequent review court proceedings. The Commission would nonetheless see no objection if Member States were to introduce an additional safeguard ensuring the protection of the rights of defence, and to make the binding effect of an NCA decision from another Member State subject to an exception analogous to that contained in Article 34(1) of Regulation 44/2001 as regards fair legal process.

⁷² Council Regulation (EC) No 44/2001, see footnote 14 above.

⁷³ See for the interpretation of the exception in Article 34(1) of Regulation 44/2001 (footnote 14 above) e.g. Case C-7/98 *Krombach* [2000] ECR I-1935 paragraph 21.

⁷⁴ See Article 6 of the Convention and Articles 47(2) and 48 of the Charter.

Consideration could be given to allowing an exception to the binding effect of NCA decisions from other Member States analogous to the public order exception contained in Article 34 n°1) of Regulation 44/2001, with a view to safeguarding a defendant's rights of defence, as recognised by the European Convention on Human Rights and the EU Charter on Fundamental Rights.

CHAPTER 5 — FAULT REQUIREMENTS

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

163. As set out in the Commission's Green Paper,⁷⁵ Member States take diverse approaches on the interaction between competition law and the general rules on liability for damages, in particular as regards the question of fault (*culpa*). It is also noteworthy that the concept of fault is not a homogeneous one across Member States.
164. Some Member States do not require any form of fault element as a condition for a damages claim based on the infringement of EC competition law, or they provide that the infringement as such constitutes fault. Other Member States, whilst conceptually requiring fault in addition to illegality, irrebuttably presume the existence of fault once the infringement of Article 81 or 82 EC has been shown.⁷⁶
165. In a third group of Member States, claimants either have to demonstrate the existence of fault (negligence or intention) without the facilitation of any presumption, or they can draw only on a rebuttable presumption of fault once they have established the existence of an infringement of antitrust law.
166. The Green Paper put forward for discussion different options relating to the issue of fault in antitrust damages cases.⁷⁷ These options ranged from a regime of strict liability over a differentiation between serious and less serious antitrust law infringements to a regime where defendants could only invoke the absence of fault in the event that the breach of antitrust law was the result of an excusable error.
167. Feedback received on these options in the Green Paper showed quite some support for a uniform system of strict liability in all Member States. Under such a regime, the proof of an infringement of EC competition law would suffice to fulfil any fault requirement in the litigation for damages. Other respondents argued in favour of a regime allowing defendants to invoke excusable errors (factual or legal) as a defence. In this context, some pointed to perceived difficulties for undertakings to assess in factual and legal terms whether — especially in novel and complex situations — a certain behaviour infringes Article 81 or 82 EC. Others emphasised that care needed to be taken to avoid misuses of such a defence of excusable error so that exculpation is limited to cases of genuine and objectively excusable errors. Finally, there was some, albeit limited support for the option of introducing a uniform system of strict liability limited to cases of the “most serious antitrust law infringements”. In this respect, it was frequently pointed out that such a model would risk introducing a new legal uncertainty resulting from the difficulties entailed in determining what constitutes a sufficiently serious infringement.

⁷⁵ See option 6 *et seq.* of the Green Paper and paragraphs 101 *et seq.* of the 2005 Staff Working Paper.

⁷⁶ See, generally, Comparative Study, pages 1-50 *et seq.*

⁷⁷ See options 11, 12 and 13 of the Green Paper.

B. ACQUIS COMMUNAUTAIRE AND MEASURES TO ENSURE EFFECTIVE ANTITRUST DAMAGES ACTIONS

1. Fault requirement in the case law of the Court of Justice

168. The conditions for civil liability for infringement of directly applicable provisions of EC law have been addressed by the Court of Justice on various occasions. Explicit statements specifically on the issue of fault to date exist, however, only in the context of the liability of a Member State for infringing directly applicable EC law. The Court of Justice clarified in its *Brasserie du Pêcheur* judgment that there is only very limited scope for national law to make the reparation of damages conditional upon the existence of fault. In particular, any fault requirement under national law is limited to the extent that the conditions for the existence of a right to damages under EC law encompass elements of fault:

“The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.”⁷⁸

169. As regards the liability of undertakings for breach of directly applicable EC antitrust law, the Court of Justice mentioned the following conditions for liability of undertakings for breach of EC antitrust law:

“(…) any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC.”⁷⁹

170. With respect to liability for repairing antitrust damage, the Court thus neither refers to fault nor to a sufficiently serious degree of the breach of EC antitrust law. This may suggest that the Court considers any infringement of Article 81 or 82 EC to be *in itself* sufficiently serious. Indeed, undertakings do not enjoy any margin of discretion as to whether they wish to adjust their business practices to the rules set out in Article 81 and 82 EC; on the contrary, competition rules are part of the set of imperative public policy rules.⁸⁰ Moreover, infringements of antitrust rules are likely to entail very significant negative effects on consumer welfare and on the functioning of the internal market.

171. The Court’s case law on the conditions for civil liability for breaches of directly applicable Treaty rules and, in particular, the principle of effectiveness⁸¹ suggest that any fault requirements under national law would have to be limited to very specific and exceptional situations.

⁷⁸ Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029 paragraph 79.

⁷⁹ *Manfredi* (footnote 8 above) paragraph 61, see also paragraph 63.

⁸⁰ The principle of effectiveness contains the requirement that national rules governing the enforcement of Community rights must not render the exercise of these rights excessively difficult. *Ibidem*, paragraph 31.

⁸¹ *Ibidem*, paragraph 62.

172. The principle of equivalence⁸² requires Member States to apply at least the same rules on the exercise of the right to damages for infringement of EC competition rules by an undertaking as they would apply to rights for compensation derived from a similar infringement of national competition law. It follows, therefore, that Member States which do not require fault to be proven for the exercise of a right to antitrust damages or which presume (rebuttably or irrebuttably) the existence of such fault with respect to antitrust infringements under their national laws, are bound to maintain at least an equivalent standard with respect to damages for infringements of EC antitrust law.

2. *Fault requirements under national law as a condition for a victim to exercise his right to damages*

a. Member States with strict or irrebuttably presumed liability for infringements of Article 81 or 82 EC

173. Some Member States do not require any fault at all as a condition for an antitrust damages claim, while others irrebuttably presume the existence of fault once an infringement of their national antitrust laws has been shown. As set out above, the principle of equivalence requires Member States to apply the same standard with respect to damage claims based on infringements of Article 81 or 82 EC. Neither the comments received on the Green Paper nor the Commission's analysis indicate any overriding policy grounds arguing against such a regime.

The effectiveness of actions for antitrust damages does not require changes of the legal regime in those Member States where, once a breach of EC antitrust law has been established, no elements of fault have to be proven or fault is irrebuttably presumed in civil proceedings for antitrust damages.

b. Member States requiring proof of elements of fault

174. As regards the legal regime in Member States which do require fault to be proven⁸³, the Commission considers it appropriate to provide for more legal certainty in terms of the maximum level of fault requirements under national law that do not hamper the effective exercise of the right to reparation and thereby the *effet utile* of Article 81 or 82 EC. Below this maximum level, Member States would remain entirely free in applying any requirements of fault for antitrust damages claims. For the time being and subject to revaluation at a later stage, the Commission does not consider it necessary for ensuring effective damages actions to introduce across the EU a harmonised notion of fault or a strict liability rule.

175. As mentioned above, the Court's case law on the conditions for civil liability for breaches of directly applicable Treaty rules and the principle of effectiveness suggest that any fault requirements under national law would have to be limited to very exceptional situations. Moreover, most of the factual elements and evidence required for determining whether or not an infringer of Article 81 or 82 EC applied in all relevant circumstances the requisite standard of care in order to determine fault

⁸² *Ibidem*.

⁸³ Either with the burden of proof fully on the claimant, or where the proof of fault is facilitated through a rebuttable presumption once an infringement has been established; in the latter case, the claimant may have to refute a defendant's claim of the absence of fault.

usually lie within the sphere of the infringer. On the basis of these considerations, the Commission does not see any conceivable grounds to relieve infringers from liability for absence of fault other than cases where the infringer made an excusable error. The Commission submits that the acceptable maximum standard of fault is to presume fault of the infringer once his breach of Article 81 or 82 has clearly been established, but to allow the possibility of exculpation to genuinely excusable errors. The Commission does not see any conceivable grounds to relieve infringers from liability for absence of fault other than in cases where the infringer made an excusable error.

176. To this end, the Commission suggests introducing a measure that would clarify that, once the claimant has shown a breach of EC antitrust law, the maximum fault standard that could be applied is to allow the infringer the possibility to demonstrate that his infringement was the result of an excusable error.
177. It also follows from the above that the possibility of exculpation in the event of excusable error should be applied restrictively. Care should be taken that the possibility of exculpation is not abused so as to make the exercise of the right to damages excessively difficult. An error would only be excusable where a defendant can show that a reasonable person in the same circumstances applying a high standard of care could not reasonably have been aware that the conduct restricted competition.
178. The more serious the restriction of competition by an undertaking, the less likely it would be that the undertaking, whilst applying the required high standard of care, could not have been aware of the anti-competitive object or effects. The Commission does not see how an error could be excusable where restrictions of competition by object are concerned.
179. Genuinely excusable errors will thus be very rare. They may occur in novel and complex situations. The mere ignorance of the law, however, clearly cannot render an error excusable; one is bound by the law even if one does not know of it. It will thus normally be irrelevant whether or not the undertaking actually realised that it was infringing Article 81 or 82 EC. Reliance on wrong legal (or other professional) advice, as such, equally cannot exonerate an undertaking.⁸⁴ Errors based on incorrect official statements by competent public entities such as competition authorities and courts, should only be excusable where undertakings applying a high standard of care could reasonably rely on such statements.

Whilst the general notions of fault in the Member States should remain unaffected, the Commission suggests that more legal certainty be provided in terms of which level of fault requirements under national law hamper the effective exercise of the right to reparation and thereby the *effet utile* of Article 81 or 82 EC.

Once a claimant has proven an infringement of EC antitrust law, the infringer should be liable for damages unless he shows that the infringement was the

⁸⁴ The Court explicitly clarified this in Case T-175/95 *BASF Coatings v Commission* [1999] ECR II-1581 paragraph 152 (in the context of the fault requirement under Article 15(2) of Regulation No 17 (now Article 23 of Regulation 1/2003)).

result of a genuinely excusable error. Errors should be excusable only where the infringer, despite applying a high standard of care, could not reasonably have been aware that his conduct restricted competition.

Member States would remain free not to require any fault at all as a condition for liability for antitrust damages or to irrebuttably presume fault once an infringement is established.

CHAPTER 6 — DAMAGES

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

1. *The definition of damages*

180. The public consultation on the Green Paper showed an interest in determining in general terms what is the appropriate scope of damages that victims of competition law infringements should be able to recover.⁸⁵ In other words, a definition of what should constitute the basis for the calculation of the damages in a particular case. The basic definition of the scope of damages is mere compensation for the harm caused by the infringement. The Commission Green Paper suggested that this compensation not only refers to the actual loss due to the price increase (*damnum emergens*), but also encompasses the loss of profit resulting from a reduction in sales (*lucrum cessans*). Compensation also includes a right to interest that ensures compensation of real, rather than nominal values.

181. The definition of damages could also go beyond mere compensation in order to provide greater incentives for victims to start an antitrust damages action. In that context, the Green Paper asked for comments on the suggestions (a) to award double damages for horizontal cartels, and (b) to set an interest rule that compensates more than real value.

182. The majority of respondents to the Green Paper argued that damages should be regarded as a compensatory instrument. They therefore oppose a system that would result in damages that are higher than the loss suffered by the victim. Within that philosophy of compensation, most respondents also indicated that the concept of damages should be broadly understood, in order to ensure that victims of antitrust infringements be compensated fully for their loss, including, where appropriate, compensation for loss of profits and interests, set in such a way that the claimant is given the real value of his loss.

2. *The calculation of damages*

183. Once it is conceptually clear what the scope of damages is that victims of antitrust infringements can recover, these damages also need to be calculated. To that end, the Commission Green Paper outlined a number of economic models, with varying levels of complexity.⁸⁶ The question was asked whether the presumed accuracy brought by the more complex calculation methods is sufficient to outweigh the extra cost and time involved in bringing and assessing the required economic evidence. From a legal perspective, the use of simpler models could be underpinned by an *ex aequo et bono* estimation of damages. The latter would imply that it is not always necessary to prove the exact amount of the damage, since it allows the court to award a reasonable amount, based on some economic approximation.

⁸⁵ See options 14 to 17 of the Green Paper and paragraphs 114 to 124 and 147 to 151 of the 2005 Staff Working Paper.

⁸⁶ See options 18 to 20 of the Green Paper and paragraphs 125 to 144 and 152 to 155 of the 2005 Staff Working Paper.

184. Finally, the Green Paper also envisaged that the Commission could provide national courts with some guidance on the calculation of damages. The majority of respondents to the Green Paper reacted favourably to this suggestion, underlining the non-binding character of such guidance.

B. ACQUIS COMMUNAUTAIRE AND MEASURES TO ENSURE EFFECTIVE ANTITRUST DAMAGES ACTIONS

1. The definition of damages

a. The *acquis communautaire*

185. The Court of Justice has repeatedly stated that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of rights which individuals acquire directly under Community law. However, when laying down the applicable rules for the enforcement of Community rights, Member States are under a Community law obligation to respect both the principle of equivalence and the principle of effectiveness.⁸⁷ In its 2006 *Manfredi* judgment, the Court of Justice applied both principles to the definition of antitrust damages. The judgment is particularly important because of the consequences of the Court's interpretation of the principle of effectiveness for the definition of what antitrust damages should cover as a minimum.

186. In *Manfredi*, the Court first confirmed that “in the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 [or 82] EC, provided that the principles of equivalence and effectiveness are observed.”⁸⁸ According to the Court, “it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.”⁸⁹

187. With regard to the payment of interest, the Court refers to its earlier judgment in the 1993 *Marshall* case.⁹⁰ In that judgment, the Court stated that “full compensation for the loss and damage sustained (...) cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation”.⁹¹ The Court's objective is thus clearly to ensure that the victim is given the real value of the loss suffered. The reference in *Manfredi* to the payment of interest should therefore be understood as covering the

⁸⁷ See paragraphs 76 to 79 above.

⁸⁸ *Manfredi* (footnote 8 above) paragraph 98. Although the judgment only refers to Article 81 EC because of the facts underlying the case, the reasoning of the Court is such that it can also be applied to Article 82 cases.

⁸⁹ *Ibidem*, paragraph 95.

⁹⁰ *Ibidem*, paragraph 97.

⁹¹ Case C-271/91 *Marshall* [1993] ECR I-4367 paragraph 31.

whole period from the time the damage occurred until the capital sum awarded is actually paid.⁹²

Acquis communautaire:

Victims of an EC competition law infringement are entitled to full compensation of the harm caused. That means compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.

188. The requirement of full compensation already being part of the *acquis communautaire*, the national court which asked the preliminary questions that led to the *Manfredi* judgment took it a step further and wondered whether the useful effect of the EC competition rules also requires “national courts to award punitive damages, greater than the advantage obtained by the offending operator, thereby deterring [behaviour] prohibited under [those rules].”⁹³
189. Although the Court of Justice acknowledges the deterrent effect of antitrust damages actions⁹⁴, it did not go as far as to claim that the principle of effectiveness requires Member States to provide for punitive damages. It is thus, in the absence of relevant Community rules, for the domestic legal system of each Member State to set the criteria for determining the extent of the damages. However, “in accordance with the principle of equivalence, it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on the Community competition rules, if such damages may be awarded pursuant to similar actions founded on domestic law”.⁹⁵
190. Although some may find the above application of the principle of equivalence to be obvious, it is important to note that the Court did not consider punitive damages to be contrary to European public order.⁹⁶ Provided that they are awarded in accordance with the general principles of Community law, amongst which the fundamental rights, punitive damages founded on an infringement of EC competition rules are thus not excluded. They are available if and under not less favourable conditions than punitive damages founded on similar national law infringements are.

⁹² *Ibidem*, paragraph 32: interest has “to compensate for the loss sustained by the recipient of the compensation as a result of the effluxion of time until the capital sum awarded is actually paid.”

⁹³ *Manfredi* (footnote 8 above) paragraph 83.

⁹⁴ *Courage v Crehan* (footnote 8 above) paragraph 27, and *Manfredi* (footnote 8 above) paragraph 91: “[T]he existence of [a right to claim damages for loss caused by a competition law infringement] strengthens the working of the Community competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community”.

⁹⁵ *Manfredi* (footnote 8 above) paragraph 93.

⁹⁶ Compare with Article 26 of Regulation 864/2007 on the law applicable to non-contractual obligations (“Rome II”, footnote 12 above): “The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (“*ordre public*”) of the forum.” According to recital 32 “[i]n particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.”

Acquis communautaire:

Victims of an EC competition law infringement are entitled to particular damages, such as exemplary or punitive damages, if and to the extent such damages may be awarded pursuant to actions founded on the infringement of national competition law.

191. A final notion which the Court of Justice often refers to when it comes to the definition of damages, relates to unjust enrichment. That notion is of particular importance in the context of the passing-on defence, but it is useful to recall it here in a more general context.⁹⁷ In its *Manfredi* judgment, as it was the case in previous case law, the Court did not as a matter of Community law find that unjust enrichment is prohibited. The notion was rather referred to in an enabling way, namely “that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.”⁹⁸
192. The fact that the Court accepts the existence of punitive damages, which by definition implies a transfer of assets to the claimant beyond the damage actually suffered, shows that there is no absolute principle of Community law that prevents victims of a competition law infringement from being economically better off after a successful damages claim than the situation they would be in ‘but for’ the infringement. It can thus be assumed that an enrichment would no longer be unjust if it results directly from the application of the relevant substantive and procedural rules, meaning that it would be ‘justified’ by law. In the absence of such rules, the Court seems to accept domestic rules that aim at prohibiting enrichment without a just cause.

Acquis communautaire:

In the absence of Community law on the matter, Member States are allowed to take steps to ensure that the protection of the right to claim damages for the loss caused by a competition law infringement does not entail the unjust enrichment of the victims.

b. Measures to ensure effective antitrust damages actions

193. Paragraphs 185 to 192 above show that the Court of Justice has already to a large extent indicated where the *acquis communautaire* stands with regard to the definition of damages. For reasons of legal certainty this *acquis* should be codified in a Community legislative instrument. This would further increase the transparency of the *acquis* and it would thus contribute to the *acquis* becoming more widely known, both to victims and infringers.

⁹⁷ For further details, see paragraphs 209 to 211 and 217 to 218 below.

⁹⁸ *Manfredi* (footnote 8 above) paragraph 94. See also Case 238/78 *Ireks-Arkady v Council and Commission* [1979] ECR 2955 paragraph 14, Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-7145 paragraph 31, and *Courage v Crehan* (footnote 8 above) paragraph 30.

194. Given the broad concept of full compensation, it does at this stage not appear necessary to suggest a definition of damages that would go beyond that concept. This policy choice obviously does not prevent Member States' authorities that consider it appropriate, from adopting or maintaining measures or a jurisdictional practice that provide for a damages award for victims of a competition law infringement that would go beyond mere compensation. Neither does this approach exclude methods of calculating damages such as the *ex aequo et bono* method (paragraph 183), or simplified rules of estimation (paragraph 200). It is with that same objective of full compensation in mind that the calculation of the actual loss of the claimant on the basis of the illegal gain of the defendant is acceptable in cases where the exact calculation of the harm suffered would be excessively difficult or even impossible. This may be the case where the claimant represents a group of victims who cannot all be precisely identified.⁹⁹

The *acquis communautaire* on the definition of damages should be codified as a minimum standard.

195. That being said, one also has to take into account the fact that the risk/reward balance in antitrust damages litigation is skewed against bringing actions. The Commission considers it necessary to address this negative balance by ensuring that there are sufficient incentives for victims of competition law infringements to bring meritorious claims. One way of doing so would be to assure the claimant *a priori* that if he wins the case, he will be awarded damages that are higher than the loss actually suffered. However, as mentioned in paragraph 194, such a general approach would not appear necessary today. If it were to emerge, though, that the current situation in Europe of very limited repair of the harm caused by infringements of the competition rules does not structurally change over the coming years, it should be considered what further incentives are required to ensure that victims of competition law infringements actually bring their antitrust damages action. In that context the appropriateness of the current definition of damages might have to be reconsidered.

2. *The calculation of damages*

a. *The *acquis communautaire**

196. Although it is difficult to pronounce in general terms on the calculation of damages, one can at least deduce one consequence from the fundamental principle of full compensation that may be relevant when determining the level of the damages. The Court of Justice has ruled that the requirement of full compensation of the harm caused by an infringement of a directly effective Community rule cannot be reconciled with national provisions that fix an upper limit on the amount of compensation that the victim of such an infringement could recover. Indeed, such national provision would limit the amount of compensation *a priori* to a level which is not necessarily consistent with the requirement of full compensation.¹⁰⁰

Acquis communautaire:

The principle of full compensation implies that Member States may not *a priori*

⁹⁹ On representative actions, see paragraphs 49 to 56 above.
¹⁰⁰ *Marshall* (footnote 91 above) paragraph 30.

fix any form of upper limit on the amount of compensation that the victim of a competition law infringement could effectively recover.

197. According to the case law of the Court of Justice, in the absence of any further Community rules concerning the calculation of damages, it is for the domestic legal system of each Member State, and ultimately for the national judge, to determine the requirements the claimant has to fulfil when proving the amount of the damage suffered as a result of a competition law infringement, the preciseness with which he has to prove that amount, the methods that can be used in calculating the amount and the consequences of not being able to fully respect the requirements set. These domestic requirements are applicable provided that they are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). The latter principle thus excludes a national court, that found that the claimant was harmed by the defendant's infringement of the competition rules, from not awarding any damages simply because the claimant cannot prove sufficiently precisely the amount of the harm suffered.

b. Measures to ensure effective antitrust damages actions

198. The Green Paper tried to assist in the calculation of damages by showing the availability of a number of calculation methods, the outcome of which depends very much on the quality of the input. The methods are indeed characterised by the fact that the resulting approximation of the actual loss suffered seems to be proportional to the complexity of the required input.¹⁰¹ The calculation of damages could thus become a very cumbersome exercise, arguably a practically impossible or excessively difficult one, if one strictly adheres to the idea that the exact amount of the damage caused by a competition law infringement has to be fully compensated, nothing more, nothing less.

199. Given the wide support for the suggestion in the Green Paper for further guidance on the calculation of antitrust damages, the Commission intends to draw up a framework to that end.¹⁰² The objective is to provide pragmatic, non-binding assistance in the difficult task of quantifying damages in antitrust cases, both for the benefit of national courts and the parties.

200. The Commission believes that such assistance should not only aim to calculate the exact amount of the actual damage suffered. Far-reaching calculation requirements could indeed be disproportional to the amount of the damage suffered and can constitute an obstacle to bringing an antitrust damages case and to obtaining damages. The Commission is therefore committed to considering the possibility of suggesting simplified rules of estimation in order to assist the claimant in proving his damage. For example, the average overcharges in price-fixing cases could serve as guidance for courts in determining the quantum of damages.

¹⁰¹ See paragraph 183 above.

¹⁰² In order to assist the Commission in the formulation of such a framework, a study will be commissioned later this year.

The Commission intends to issue non-binding guidance on the calculation of damages. As part of such guidance, the Commission will consider suggesting simplified rules for estimating the loss suffered as a result of a competition law infringement.

CHAPTER 7 — THE PASSING-ON OF OVERCHARGES

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

201. If as a result of a competition law infringement, a purchaser, e.g. a wholesaler, is buying his goods or services at a supra-competitive price, he suffers a harm for which he can seek compensation. That harm is composed of the actual loss (*damnum emergens*) and the loss of profit (*lucrum cessans*) that results from the infringement.¹⁰³ The actual loss is the illegal overcharge, namely that part of the price paid that is in excess of the competitive price. Depending on a number of economic variables,¹⁰⁴ this (direct) purchaser may or may not be able to pass on all or some of the illegal overcharge to the next (indirect) purchaser in the chain, e.g. a retailer or a consumer. In case of (partial) passing-on, this next line of purchasers, who are only indirectly linked with the initial anti-competitive behaviour, in turn suffers a loss by paying a supra-competitive price which has been passed on to them. The question addressed in this Chapter is whether the defendant in an antitrust damages case should be allowed to invoke the claimant's passing-on in order to limit his liability for compensation. Linked to this question is the issue of whether, and if so, how a purchaser to whom an illegal overcharge has been passed on, will be able to be compensated for the harm resulting from that passing-on.
202. Before addressing this question further, it has to be recalled that the passing-on issue only addresses the passing-on of overcharges. It has no bearing on the claimant's entitlement to compensation of other harm suffered, namely the loss of profit. Depending on the price setting in the resale market, the (partial) passing-on of the overcharge by the claimant, and thus the price increase of his product, normally leads to a reduction in the quantity the claimant is selling. The resulting loss of profit is a harm that has been caused by the defendant's illegal increase in price and should thus be compensated by the latter. The argument that the claimant's increase in price was his own choice for which the defendant cannot be held liable, cannot be accepted. Indeed, the only alternative — if at all economically viable — for the claimant would have been to (fully or partially) absorb the illegal price increase himself. Since in that scenario the resulting actual loss for the claimant would clearly be recoverable, so should be the actually incurred loss of any profits that directly results from a passed on overcharge.
203. In the Green Paper,¹⁰⁵ the Commission left open the question whether or not a defendant should be able to invoke the passing-on defence. It presented both options, combined with the issue of standing for indirect purchasers, for public consultation. Although at first sight, respondents appeared to be very much divided on the issue, they all seemed to base their position on the same concern: avoiding unjust enrichment; for some, that of the claimant, for others, that of the defendant.

¹⁰³ See paragraphs 185 to 187 above.

¹⁰⁴ It would appear that passing-on is more likely if it relates to the variable costs of the purchaser, if there is a high degree of competition at the purchaser's level and if demand elasticity is low.

¹⁰⁵ See options 21 to 24 of the Green Paper (footnote 1 above) and paragraphs 156 to 157 and 181 to 187 of the 2005 Staff Working Paper (footnote 2 above).

204. Those who opposed the prohibition of the passing-on defence, mainly raised two objections. They argued that the passing-on defence is necessary to avoid a direct purchaser who passed on the overcharge from receiving damages for a harm he did not suffer. If in addition to that undue payment, the defendant would also have to pay damages to those who were really harmed by the infringement, namely those downstream of the direct purchaser, the liability of the former would lead to a multiple recovery. Others consider this scenario to be purely theoretical. They argue that when the passing-on defence is allowed, direct purchasers will be less inclined to start an antitrust damages action. Since the purchasers further downstream usually have difficulties in bringing the evidence of the infringement and of how it relates to the damage suffered, the passing-on defence may *de facto* lead to no-one being compensated at all.

B. MEASURES TO ENSURE EFFECTIVE ANTITRUST DAMAGES ACTIONS

205. The Court of Justice has confirmed that “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 [or Article 82] EC.”¹⁰⁶ From this statement it can be deduced that there can be no *a priori* limitation as to the standing of direct and indirect purchasers in antitrust damages cases.¹⁰⁷ However, given that the Court emphasised the requirement of causality, the finding of the Court does not exclude national provisions or case law that lead to barring damages actions brought by certain indirect purchasers for reasons of remoteness.

206. Since both direct and indirect purchasers can claim compensation for the harm they suffered, and acknowledging the overarching objective of achieving effective and full compensation for the harm caused by a competition law infringement, the question arises as to what are the appropriate policy measures with regard to the passing-on of overcharges resulting from that infringement.

207. This section distinguishes between two basic scenarios. The first scenario is the one in which a defendant invokes the passing-on of overcharges *as a shield* in order to mitigate the damages claim brought by a purchaser other than the final consumer, particularly an action brought by the direct purchaser (paragraphs 208 to 213). The second scenario is the one in which a claimant other than the direct purchaser relies on the passing-on of overcharges (*as a sword*) in order to substantiate his damages claim against the defendant (paragraphs 215 to 220). The final section analyses the specific issues that arise when purchasers at different levels in the distribution chain bring joint, parallel or consecutive damages actions (paragraphs 221 to 225).

1. *The passing-on shield against an action brought by a purchaser other than the final consumer*

208. For a claimant to be awarded antitrust damages, he has to bring evidence of the antitrust infringement and of the harm this infringement has caused him. For some antitrust infringements, such as price-fixing cartels or retail price maintenance systems, part of that harm, namely the actual loss, follows from the illegal

¹⁰⁶ *Manfredi* (footnote 8 above) paragraph 61.

¹⁰⁷ On the standing of indirect purchasers, see paragraphs 33 to 37 above.

overcharge. In a case where the victim of the competition law infringement is not a final consumer, he may have used this illegally increased price as a basis for setting the sales price of his own product. The overcharge, and thus also the ‘actual loss’ part of the harm, may therefore have been partly or completely passed on to the next level in the distribution chain.

209. To the extent that the claimant did not suffer the (entire) actual loss resulting from the illegal increase in price, he should not be able to (entirely) recover the illegal price increase imposed upon him. Given the objective of ensuring full compensation of the harm that a claimant has suffered as the result of a competition law infringement, the defendant should be allowed to invoke the passing-on of the overcharge by the claimant in order to reduce the amount of damages, that the former may have to pay, to what the claimant really suffered.
210. If the defendant would not be allowed to use the passing-on shield, it would result in an unjust enrichment of the claimant in a case where the latter had (partially) passed on the overcharge. Denying use of the passing-on shield by the defendant could also imply that he would have to compensate the illegal overcharge more than once. That would be the case if, for example both the direct purchaser (who suffered from the initial price increase) and an indirect purchaser (to whom the overcharge was (partially) passed on) were both to claim antitrust damages for the same illegal price increase.
211. The negative consequences of a prohibition to invoke the passing-on defence are, however, more modest when no-one downstream of the claimant is bringing an antitrust damages case, for example because the damage is too limited or too difficult to prove. In that case only the argument related to the unjust enrichment of the claimant remains relevant. That would, however, not be a legal impediment as long as the prohibition to use the passing-on shield was itself established by law. Such a law could be justified by the more compelling need to avoid a situation in which the defendant does not compensate anyone for the harm caused by the infringement. That would precisely be the result when the passing-on shield could be used against the claimant, while no-one downstream of the claimant brings a damages case.
212. The observations in the previous paragraph appear, however, not sufficiently persuasive to deprive the defendant from his right to dispute the evidence brought forward by the claimant in determining his damage. Moreover, since the Commission considers it appropriate to address the obstacles faced by claimants who find themselves towards the end of the distribution chain (thus more likely to have relatively small and scattered damage and a long causation line to the infringement),¹⁰⁸ it would be incoherent to devise a policy on the basis of the assumption that these claimants do not bring a damages claim. As a result, the defendant in an antitrust damages case would have to be entitled to raise the passing-on defence against the claimant who is not a final consumer.
213. The argument that the claimant passed on (part of) the overcharge resulting from the competition law infringement is a means for the defendant to correct the claimant’s allegation and calculation of the harm he suffered. It is thus to be defined as a means

¹⁰⁸ On collective and representative actions, see Chapter 2, section C.

of defence. Consequently, the burden of proving the passing-on of overcharge would have to lie with the defendant.¹⁰⁹ That implies that it would be up to the defendant to bring evidence (1) of the fact that the overcharge has been passed on and (2) of the extent to which the overcharge has been passed on.

214. Although the standard to which the passing-on and its extent should be demonstrated depends primarily on national law, the effectiveness of an antitrust damages claim would suffer from a too low standard. That is particularly so if the standard of proving the passing-on would be lower than the standard to which the claimant has to prove the damage he suffered. That situation would amount to a reversal in the burden of proof, which cannot be reconciled with the objective of achieving effective and full compensation of the harm caused by a competition law infringement. As a result, the standard of proof for the passing-on cannot be lower than the standard to which the claimant has to prove the existence and the amount of his damage.

The defendant in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge, brought by a claimant who is not a final consumer.

The burden of proving the passing-on of overcharge would have to lie with the defendant. The standard of proof for the passing-on should not be lower than the standard to which the claimant has to prove the damage.

2. *The passing-on sword in an action brought by a purchaser other than the direct purchaser*

215. As said before, a claimant bears the burden of bringing evidence of the antitrust infringement, of the harm he suffered and of the causal link between both. Bringing sufficient evidence may be particularly difficult for those in the distribution chain who do/did not have a direct contractual or non-contractual relationship with the tortfeasor. However, in those situations in which the illegal overcharge has been (partially) passed on, they are the ones who are really harmed by the competition law infringement. In order to ensure effective and full compensation of the harm caused by a competition law infringement, it is therefore not only appropriate to allow the defendant to invoke the passing-on defence (see paragraphs 209 to 212), but also to mirror this defence possibility by addressing this particular obstacle for indirect purchasers to bring an antitrust damages claim.

216. In order to prove that the damage claimed was caused by the initial competition law infringement, the claimant will have to reconstruct the distribution chain, thereby showing a link between the goods or services he purchased and the goods or services that were subject of the infringement. That reconstruction, however, is in itself not yet sufficient to prove that the claimant bought his goods or services at a supra-competitive price and that such overcharge was due to the initial competition law infringement.

¹⁰⁹ Compare Section 33(3)(2) *GWB* as amended by the 7th amendment, whereby the passing-on defence is not excluded as a matter of German civil law. According to the report before the German Parliament, the facts underlying that defence have to be proven by the defendant (Deutscher Bundestag — 15. Wahlperiode, Drucksache 15/5049, page 49).

217. Bringing sufficient evidence of whether and if so, to what extent, the overcharge that resulted from the initial infringement has been passed on along the distribution chain is equally difficult for both the defendant and for the claimant who is not a direct purchaser. That implies that whoever bears the burden of proof risks a negative effect. If the claimant would bear the full burden of showing the passing-on and its extent, he risks not being compensated for the harm he suffered. In such scenario, the defendant, who may (have) successfully use(d) the passing-on shield vis-à-vis another claimant upstream, does not compensate anyone for the harm caused by the infringement. This outcome would not only be contrary to the objective of effective and full compensation of the harm caused by a competition law infringement, but it can also be qualified as an unjust enrichment of the defendant.¹¹⁰ If, conversely, the burden of proof would lie with the defendant and he cannot prove the limits of the passing-on, he risks multiple liability in case both the direct purchaser and others claim damages for the same (part of the) overcharge. In such a scenario, claimants other than the direct purchaser may receive damages for a harm they did not suffer. Such payment amounts to an unjust enrichment on their side.
218. Because the scenario according to which the defendant is unjustly enriched is more likely than the one where he would face multiple liability, the Commission considers it appropriate to ease the claimant's burden of proving the passing-on and its extent. Indeed, for the defendant to face multiple liability, three conditions are to be fulfilled. First, he is sued for compensation of the same (part of the) overcharge by both direct and other purchasers, while only one has suffered the harm due to that given overcharge; second, the defendant cannot successfully invoke the passing-on defence;¹¹¹ and third, the court acting in a joint, parallel or subsequent action does not offset the damages already awarded/paid to another claimant.¹¹² The likelihood that these three cumulative conditions are fulfilled, and that as a consequence a defendant faces multiple liability, is considered to be much lower than the likelihood that, in a scenario where the overcharge has been passed on to the claimant, the latter is nonetheless not compensated because he could not bring sufficient evidence of the passing-on and its extent. Finally, even if the likelihood of non-compensation of the claimant who suffered harm on the one hand and of multiple liability of the defendant on the other would be comparable, it can be considered justified that the infringer, rather than the victim, bears the described risk burden. Indeed, once the victim has demonstrated that there was an infringement and an overcharge, it is considered more equitable that the one who breached the law bears the risks flowing from the infringement, rather than his victim.
219. In order to ease the claimant's burden of proving the passing-on of the overcharge and its extent, it is suggested that he could rely on a presumption that the overcharge that the defendant illegally imposed on the direct purchaser has been passed on in its entirety down to his level. The defendant could rebut this presumption by proving to the required standard of proof that the overcharge was not passed on to the level of

¹¹⁰ Defendants can also have a fine imposed on them by a competition authority. To the extent that the fine does not aim to skim the illegal profit or does not fully achieve that objective, defendants who do not compensate anyone for the harm caused by the infringement are unjustly enriched.

¹¹¹ If there was (partial) passing-on, the defendant can avoid multiple liability by invoking the passing-on defence as a shield (paragraphs 208 to 213 above).

¹¹² For more details on the passing-on shield and sword in joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, see paragraphs 221 to 225 below.

the claimant or that it was only partially passed on by showing the extent to which the overcharge has been passed on. In that context, the defendant may want to use a prior judgment by which he was ordered to compensate a purchaser upstream of the claimant for the overcharge he suffered.¹¹³ Although the required standard of proof would depend primarily on national law, the effectiveness of an antitrust damages claim would suffer from a too low standard. That situation cannot be reconciled with the objective of achieving effective and full compensation of the harm caused by a competition law infringement.¹¹⁴

220. Overall, the described presumption is but a very limited, although important, alleviation of the victim's burden of proof, as it would only ease the claimant's burden of proving the passing-on and its extent. The claimant would continue to bear the burden of proving the infringement, the existence of the initial overcharge and the size of his damage. He would thus have to show to what extent the overcharge, which is presumed to have been passed on to him, caused him harm. Particularly where in the course of the production/distribution chain the overcharged good or service was used to produce other goods or services, the claimant would still have to indicate the degree to which the goods or services he purchased incorporate the defendant's overcharged good or service, in order to show his harm.

An indirect purchaser would be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level.

3. *The passing-on shield and sword in joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain*¹¹⁵

221. It may occur that purchasers at different levels in the distribution chain bring a damages action for harm caused by the same competition law infringement. It is not excluded that in those joint, parallel or consecutive actions, purchasers claim damages for the harm caused by the same overcharge. If the defendant in those actions cannot prove the passing-on vis-à-vis those who claim there was no passing-on of overcharge, nor rebut the presumption that is invoked by those who rely on the alleged passing-on, he may face multiple liability for the same overcharge. If conversely, the defendant can successfully invoke the passing-on defence vis-à-vis those who claim there was no passing-on of overcharge and rebut the presumption that is invoked by those who rely on the alleged passing-on, he will not have to compensate anyone. In order to attain the overarching objective of achieving full compensation of the harm caused by the competition law infringement, the Commission suggests the following measures to avoid as much as possible these situations of over- and under-compensation.¹¹⁶

¹¹³ See also paragraph 225 below.

¹¹⁴ See also paragraph 217 above.

¹¹⁵ This section does not deal with joint, parallel or consecutive actions brought by several purchasers at the same level in the distribution chain, nor with parallel or consecutive actions brought by the same claimant against the same defendant, for instance multiple claims pursuant to Article 5(3) of Regulation 44/2001 (footnote 14 above). Treatment of the passing-on shield and sword is considered irrelevant for those joint, parallel or consecutive actions.

¹¹⁶ The issue is also referred to in paragraphs 217 and 218 regarding the burden of proving the passing-on in an action brought by a purchaser other than the direct purchaser.

222. If purchasers from different levels in the distribution chain bring a *joint action*, the court hearing the case should be able to avoid the contradicting outcomes described in the previous paragraph. Indeed, when all levels of the distribution chain are represented in the same action, the court should not find that the defendant has both proven and rebutted the passing-on of the illegal overcharge. Conversely, the court should in the same case not find that the defendant failed both to prove and to rebut the passing-on.
223. Whereas the situation is relatively straightforward in joint actions where claims are concentrated in one court, it is much more difficult to achieve that same result in parallel or consecutive actions brought by purchasers from different levels in the distribution chain. However, in order to achieve the objective of full compensation of the harm caused by a competition law infringement, national courts are encouraged to use all mechanisms available under national, Community or international law to avoid the above described risks of under- or over-compensation.
224. In case of *parallel actions* brought by purchasers from different levels in the distribution chain — meaning that related actions are at the same time pending in different courts — courts are not obliged to stay proceedings. All but one may, however, want to consider doing so and to the extent possible, refer the matter to a single court, provided that this court has jurisdiction to hear those actions. For related actions pending in the courts of different Member States, national courts are thus encouraged to use the possibility offered by Article 28 of Regulation 44/2001, which favours the court first seised.¹¹⁷
225. In case of *consecutive actions* brought by purchasers from different levels in the distribution chain, both the claimant and the defendant in the subsequent action should have to be able to invoke the judgment of the national court in the preceding action. Since the parties in those consecutive actions are normally not identical,¹¹⁸ the judgment in the preceding action cannot be binding for the court acting in the subsequent action. Subject to arguments being brought by a party in the subsequent action that was not a party in the preceding action, it could however be justified to allow the claimant or the defendant to rely on that judgment as an element of proof. The defendant could, for example, invoke an earlier judgment that ordered him to pay damages (a) to a direct or (b) to an indirect purchaser, in order to rebut the presumption, or as the case may be to show the existence of passing-on. Conversely, a claimant could invoke an earlier judgment that relieved the defendant from paying damages (a) to the direct purchaser because of passing-on or (b) to the indirect purchaser because of an absence of passing-on, as proof of the existence, or as the case may be of the absence of passing-on. When the earlier judgment is invoked against the party that was also a party in the preceding action and that party

¹¹⁷ Article 28 reads as follows: “1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof. 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

¹¹⁸ Where there is identity of parties in both actions (for instance because national law allows the claimant in the subsequent action to intervene as a third party in the preceding action), the finding regarding passing-on (yes or no) in the preceding action binds both parties in the subsequent action.

exhausted its rights of appeal, the finding against that party could even be regarded as decisive evidence.

In case of joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, national courts are encouraged to use whatever mechanism under national or Community law at their disposal in order to avoid under- or over-compensation of the harm caused by a competition law infringement.

CHAPTER 8 — LIMITATION PERIODS

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

226. While a limitation period performs an important role in providing for legal certainty, it can also constitute a considerable obstacle to the recovery of damages. Much depends on the duration of the limitation period, the moment it begins to run and whether or not it can be suspended.
227. An appropriate limitation period for antitrust damages claims is important for stand-alone cases, but even more so for follow-on cases. Indeed, the finding of an infringement by a competition authority could in itself prompt victims of an antitrust infringement to bring a damages claim. If the limitation period is too short (compared to the length of proceedings of competition authorities) or cannot be suspended, a claim might be already time-barred when a decision by a competition authority is finally rendered, so that potential claimants are no longer able to bring a case.
228. In order to preserve the possibility of follow-on actions, the Commission suggested in the Green Paper to suspend the limitation period for damages claims from the date proceedings are instituted by the Commission or any of the EU national competition authorities. Alternatively, the limitation period could start running as soon as public enforcement proceedings are concluded, for instance after a court of last instance has decided on the issue of infringement.¹¹⁹
229. As both suggestions share the same objective, there was wide support for either suspension of the limitation period during public proceedings or a fresh start once these proceedings are brought to an end. Only a few submissions proposed a combination of the two alternatives, namely suspension during public enforcement proceedings followed by a minimum limitation period of one or two years after the final decision. Finally, some commentators argued that the suggested suspension of the limitation period would unduly prolong legal uncertainty.

B. ENSURING THE EFFECTIVENESS OF ANTITRUST DAMAGES ACTIONS

1. *The acquis communautaire*

230. The European Court of Justice held in its *Manfredi* judgment that, in the absence of Community rules governing the matter, it is for the Member States to prescribe the limitation period in actions for antitrust damages subject to the principles of equivalence and effectiveness. Thus, limitation periods may not be such as to render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm suffered.¹²⁰

¹¹⁹ See option 36 of the Green Paper.

¹²⁰ *Manfredi* (footnote 8 above) paragraphs 81 and 82.

231. Based on the principle of effectiveness, the Court found that “[a] national rule under which the limitation period begins to run from the day on which the agreement or concerted practice was adopted could make it practically impossible to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice, particularly if that national rule also imposes a short limitation period which is not capable of being suspended.”¹²¹

Acquis communautaire:

A limitation period cannot be such that it renders the right to seek compensation practically impossible or excessively difficult. Such is the case for short limitation periods that begin to run from the moment the infringement started and which cannot be suspended.

2. *Measures to ensure effective antitrust damages actions*

232. The principle that the rules governing the limitation period should be such that they effectively allow for antitrust damages claims to be brought has repercussions on the commencement date of the limitation period, the duration of the limitation period and how enforcement proceedings by competition authorities may affect the limitation period. In order to ensure that all Member States provide the minimum safeguards in this respect, thereby also ensuring a more level playing field for both claimants and defendants, the Commission suggests the following measures with regard to each of the named issues.

a. *The commencement date of the limitation period*

233. The general principle in antitrust enforcement seems to be that the limitation period starts to run on the day on which the infringement is committed. However, on the basis of the comments received during the public consultation it appears that this principle needs to be nuanced. That is the case when there is a continuous or repeated infringement (paragraph 234) and when the injured party cannot reasonably have been aware of the infringement and the harm it caused (paragraph 235).
234. In *Manfredi*, the Court stated that “where there are continuous or repeated infringements, it is possible that the limitation period expires even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.”¹²² Since one cannot *a priori* determine how long a specific continuous or repeated antitrust infringement will last, the breach of the effectiveness principle the Court refers to in this quote cannot be remedied by setting a particular duration, unless it were a very long duration. The Commission therefore suggests remedying this situation by stating that in case of a continuous or repeated antitrust infringement, time cannot begin to run before the day on which the infringement has ceased.
235. Some of the most serious competition law infringements, which are most damaging for consumers and businesses, may remain covert both during and after their

¹²¹ *Ibidem*, paragraph 78.

¹²² *Ibidem*, paragraph 79.

lifespan. If limitation periods were to run while the infringement has not yet been discovered, damages claims may become time-barred before the existence of the claim has even been noticed by the victim. Since consumers and businesses harmed by these infringements should have a realistic possibility to gather the required evidence and effectively bring an antitrust damages claim, it appears inappropriate that the limitation period, the duration of which in itself may be reasonable, would start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

In case of a continuous or repeated infringement, the limitation period should not start to run before the day on which the infringement ceases.

The limitation period should not start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.

b. The duration of the limitation period

236. The Green Paper already observed a considerable diversity between the Member States as to the rules concerning limitation periods, the duration of which ranges between 1 and 30 years.¹²³ At this stage, the Commission does not consider it necessary to suggest a minimum duration for stand-alone cases, the appropriateness of which would depend on the remaining determining factors of the limitation period, such as the commencement date, rules on suspension, interruption, restart, etc.¹²⁴ It should be recalled, though, that the duration cannot be that short that, in combination with the other rules of limitation, it renders the right to seek compensation practically impossible or excessively difficult.¹²⁵

c. The effect of public antitrust proceedings on the limitation period

237. The public consultation has shown wide support for the idea to preserve the possibility of follow-on actions by preventing the possibility that the limitation period expires while the public enforcement of the competition rules by competition authorities (and their review courts) is still ongoing. The further analysis of the two alternative options put forward in the Green Paper (see above at paragraph 228) appears to favour the one according to which a new limitation period starts once a competition authority or its review court has adopted a final infringement decision.

238. The option according to which the limitation period would simply be suspended appears less appropriate. The main reason is that the opening of proceedings by competition authorities is rarely known by the public. That implies that potential claimants would have some difficulties to precisely calculate the period that remains once the competition authority has dealt with the case. Moreover, some competition authorities do not formally close proceedings, or do not make the closing of proceedings publicly known. Consequently, potential claimants would not know when the remaining part of the limitation starts running again. Finally, another

¹²³ Staff Working Paper paragraph 265 *et seq.*

¹²⁴ For follow-on cases, the Commission suggests a new limitation period of at least two years (see paragraph 240 below).

¹²⁵ See also paragraph 231 above.

obstacle could emerge in cases where suspension commences at a very late stage when the limitation period has almost expired. After the public proceedings are concluded there might not be enough time left to prepare the claim.

239. A better option, which would guarantee that antitrust damages claims are brought more effectively would be to allow a new limitation period to start following the final infringement decision of a competition authority or its review court on which the claimant wants to rely in his antitrust damages action. The new limitation period would thus begin to run on the day that the appeal period against an infringement decision of a competition authority has elapsed or the review court has upheld the decision or has itself found an infringement of Article 81 or 82 EC. In contrast to the problems mentioned in the previous paragraph regarding the opening and the closing of proceedings, infringement decisions of a competition authority or its review court are public documents.¹²⁶ Potential claimants are thus able to know when the new limitation period starts running.
240. To enable claimants to bring their claim effectively, it seems appropriate that the new limitation period should be at least two years. This would ensure that potential claimants have enough time to prepare their claim. The new limitation period may be shorter than the limitation period for stand-alone actions. This apparent disadvantage would, of course, be offset by the existence of an infringement decision, on which the claimant can rely in the context of his antitrust damages action.

A new limitation period of a minimum of two years starts to run once the infringement decision on which the claimant relies in his antitrust damages action has become final.

¹²⁶ Most ECN Members publish their infringement decisions, or a reference to them, on their website. For the Commission, see http://ec.europa.eu/comm/competition/index_en.html; the respective websites of the national competition authorities can be found at: http://ec.europa.eu/comm/competition/ecn/competition_authorities.html. According to Article 15(2) of Regulation 1/2003, Member States have to send the judgments of the review courts to the Commission. The judgments received can be found at <http://ec.europa.eu/comm/competition/elojade/antitrust/nationalcourts/>.

CHAPTER 9 — COSTS OF DAMAGES ACTIONS

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

241. The level of costs associated with the bringing of actions for damages, as well as cost recovery rules, can play an important role as a disincentive to bringing a damage action.¹²⁷ This issue of costs is especially relevant in competition-related damage claims as they may be particularly costly and are generally more complex and time-consuming than other kinds of civil action. Two kinds of risks related to costs of damages actions can be distinguished: the obligation for the claimant to pay certain fees upfront, which may discourage potential claimants if the fees are high; and the general application of the “loser pays” principle, pursuant to which the unsuccessful litigant has to bear the costs of the civil action.¹²⁸ In addition to the complexity and length of competition-based damage actions, the outcome of these cases cannot always be assessed upfront. Due to the “loser pays” principle, this uncertainty makes it very difficult for a potential claimant to know whether he will have to pay all the costs or rather be in a position to recover his own costs.
242. In order to alleviate the financial risk of litigation for those who bring a damages claim, the Green Paper put forward for discussion the possibility that unsuccessful claimants pay the costs of the defendants only if they acted in a manifestly unreasonable manner by bringing the case. This would be assessed by the court at the end of the proceeding. The Green Paper also put forward for discussion the possibility of giving national courts the discretionary power to order, at the outset of the trial, that the claimant is not to be exposed to any cost recovery even if the action were to be unsuccessful,¹²⁹ thereby providing claimants with upfront certainty as regards the risk of cost recovery.
243. Many respondents expressed the opinion that the current national rules, predominantly the “loser pays” principle, constitute a good safeguard against unmeritorious actions. At the same time, it was widely acknowledged by the respondents that, in relation to general risks of proceedings, the current national rules are a disincentive to potential claimants. Those advocating alleviation of the claimant’s financial risk predominantly favoured cost protection orders to allow the judge to decide whether there are sufficient reasons to deviate from the general cost rules.
244. Although the Commission did not suggest any changes concerning lawyers’ fees in its Green Paper, several submissions addressed this topic in connection with legal costs. Most of the respondents supported the viewpoint that contingency fees, whereby lawyers’ fees are calculated as a percentage of any successful claim, should

¹²⁷ The notion of costs generally covers two different categories of costs: court costs and party costs. Court costs are defined as all costs generated by the court, such as court fees, fees for experts appointed by the court and expenses incurred by witnesses ordered by courts. Party costs are defined as all costs that are not court costs, in particular lawyers’ fees, experts appointed by the parties, parties’ expenses.

¹²⁸ 2005 Staff Working Paper, page 57.

¹²⁹ See option 17 of the Green Paper.

not be encouraged. Conversely, some see the absence of contingency fees as constituting an obstacle to antitrust-related damages claims.¹³⁰

B. MEASURES TO ENSURE EFFECTIVE ANTITRUST DAMAGES ACTIONS

245. Taking into account the predominant views in the submissions on the Green Paper, the Commission does not suggest any specific changes to national cost regimes in favour of claimants. However, given the importance of the issue of costs, Member States are encouraged to reflect on their cost regimes so as to facilitate meritorious antitrust litigation, particularly for cases brought by claimants whose financial situation is significantly weaker than that of the defendant, and/or in situations where costs prevent meritorious claims being brought due to the uncertainty of the outcome.¹³¹

Member States are encouraged to reflect on their cost rules so as to facilitate meritorious litigation, taking into consideration existing practices.

246. In particular, Member States should consider establishing mechanisms favouring settlements in actions for damages, and should reflect on their cost allocation rules, the level of court fees and the issue of funding.

1. Encouraging settlements

247. Early resolution of competition cases may allow for a significant reduction, or elimination, of the costs that the victims and tortfeasors would have normally incurred in court proceedings, in particular lawyers' fees and experts' fees. By reducing the number of (potentially lengthy) cases pending before the courts, early resolution is also beneficial to the judicial system.¹³²
248. The efficiency of settlement mechanisms is directly related to the efficiency of the mechanisms for seeking redress through normal court actions. Settlement mechanisms cannot alone guarantee the effectiveness of the victims' right to damages following a breach of EC competition rules, in the absence of a viable and credible judicial alternative. Potential defendants will only be willing to settle if their chances of losing in court are credible and if the risk associated with such loss is not negligible. Similarly, the terms of a settlement will be more satisfactory to the

¹³⁰ It can be noted that, concerning success fees, Advocate General Poirares Maduro stated in his opinion in the *Cipolla* case that the possibility of fixing "success fees" for lawyers' services might improve access to the courts by enabling parties who have no financial resources to have access to the courts with the risk being borne by the lawyers. See opinion of the Advocate General of 1 February 2006 in Joined Cases C-94/04 and C-202/04 *Cipolla* [2006] ECR I-11421 paragraph 94.

¹³¹ It should be noted that in The Hague Programme of November 2004, the European Council underlined that further efforts should be made to facilitate access to justice. It emphasised that the effectiveness of existing instruments on mutual recognition should be increased, by standardising procedures and documents as well as by developing minimum standards for aspects of procedural law, in particular the transparency of costs.

¹³² With regard to alternative dispute resolution, see the 2004 proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2004) 718 Final. See also the Green Paper on alternative dispute resolution in civil and commercial law adopted on 19 April 2002, COM(2002) 196 final.

alleged victims if their chances of winning in court are credible, and the amount of damages they may eventually obtain adequate.

249. In a context where potential claimants would not face the same obstacles as they do today, and where victims would have a realistic chance of obtaining compensation in court, the latter would be in a much better situation to enter into settlement discussions with the tortfeasors. In such a context, settlements should be encouraged. Settlements can occur at various stages. They can occur before a proceeding is initiated, thereby avoiding all litigation costs. They can also occur in the course of legal proceedings (e.g. after the establishment of the infringement), thereby avoiding the additional costs (e.g. quantifying the damage) that the normal continuation of the litigation process would have implied.
250. As to the way settlements negotiations are conducted, there are a certain number of available mechanisms. In many Member States there is a possibility of solving a civil dispute without the need for conventional litigation, through a structured form of conciliation, for example by using a trained mediator.¹³³ In some instances, in-court settlements can be encouraged by the court itself. For example, pursuant to the rules applicable to the proceedings of the European Court of Human Rights,¹³⁴ the registrar of the court, acting on instructions of the chamber or its president, is to enter into contact with the parties with a view to securing a friendly settlement of the matter, in a confidential proceeding. The court is to take any steps that appear appropriate to facilitate such a settlement. Member States may also consider that settlements negotiations should be a compulsory step before the victim can pursue a claim for damages in court.
251. Given the costs inherent to actions for damages in competition cases, the Commission considers that structured and efficient settlement mechanisms should be made available in the Member States to the parties to such proceedings.

Member States are encouraged to design procedural rules fostering settlements, as a way to mitigate costs of actions for damages following a breach of EC competition rules.

2. *The allocation of court costs and party costs*

a. *The application of the “loser pays” principle*

252. All Member States have rules governing the allocation of costs in civil proceedings, which aim to determine which party will bear the costs. The rule generally applicable in the Member States is the “loser pays” principle, even though the rule is often moderated (e.g. most of the recovery rules limit to some degree the amount of fees which can be recovered for the work of a lawyer), and applied differently in practice in the Member States.
253. Whilst cost rules should be such that claimants with a strong damages case are less hesitant to start an action, unmeritorious claimants should not be encouraged. In that

¹³³ See the 2004 Study, pp. 1 to 133.

¹³⁴ See Articles 38 and 39 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and its rule of proceedings No 62.

regard, the “loser pays” principle acts as a strong deterrent to the bringing of unmeritorious litigation. Indeed, one effect of the “loser pays” principle is to encourage case selection by potential claimants. Potential claimants will usually be more reluctant to pursue unmeritorious claims. However, it may also happen that the “loser pays” principle discourages, under certain circumstances, victims with meritorious claims when they are risk-adverse and are not willing to even take the (small) risk of having to pay the defendants’ (potentially high) costs in case of failure.

254. Recent EC legislative instruments have adopted the “loser pays” principle. This is the case, in particular, in the Regulation establishing a European small claims procedure,¹³⁵ Article 16 of which states that the unsuccessful party is to bear the costs, except where the costs were unnecessarily incurred or are disproportionate to the claim. Similarly, according to Article 14 of Directive 2004/48/EC on the enforcement of intellectual property rights:

“Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.”¹³⁶

b. Court discretion as regards the allocation of costs

255. The option mentioned in the Green Paper to make the cost recovery dependent on a court order, and to give the court the power to grant protection from cost recovery even if the claimant is not successful, already exists in several Member States. Such a possibility could attenuate the possibility that risk-adverse victims are discouraged, under certain circumstances, from bringing a meritorious action given the risk of having to pay the defendants’ costs in case of failure when the “loser pays” rule is applicable. At the same time, in order not to incentivise unmeritorious claims, such orders should be subject to certain conditions. In the Member States, the reasons for granting such orders may be of different kinds.
256. In Finland, derogation from the “loser pays” principle exists in cases that are legally ambiguous enough for the unsuccessful party to have a justified reason to litigate. The court can order the interested parties to pay a part or all of their own legal costs. In addition, the law contains exceptions for situations where a party pursued unjustified litigation or unjustified claims. Similarly, in Italy, as an exception to the “loser pays” principle, the court may decide that each party bears its own costs in the event the legal issues are complex and unusual, that there are conflicting court precedents in respect of those issues or whenever the judge deems that any other “justified reason” exists for each party to bear its own legal costs.
257. In the UK, in determining what costs order should be issued, the courts have wide discretion to consider all the circumstances of the case, including the behaviour of the parties and the way they have conducted the case (e.g. whether it was reasonable for a party to defend a particular allegation or issue in the proceedings). Likewise, the Competition Appeal Tribunal (CAT) may at its discretion at any stage of the

¹³⁵ Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ 2007 L 199/1.

¹³⁶ Directive 2004/48/EC on the enforcement of intellectual property rights (footnote 46 above).

proceedings — including upfront — make any order it deems appropriate in relation to the payment of costs by one party to another. In France, the courts also enjoy wide discretion when deciding whether to derogate from the “loser pays” principle.

258. National courts may also take into account the financial situation of the parties. In Germany the costs to be paid — being court fees, lawyers’ fees and other additional costs — are generally calculated with reference to the value of the claim. However, beyond this general rule, the German Act against restraints of competition allows for certain adjustments to the value of the claim in antitrust cases. In order to benefit from such an adjustment, or limitation, the party concerned (either the claimant or the defendant) has to assert credibly that the burden of the costs of the proceedings based on the normal value of the claim would significantly endanger his economic situation. The legal consequence of the adjustment is that the party benefiting from it, if unsuccessful, only has to pay the costs calculated on the basis of the adjusted amount of the value of the claim, and not on the basis of the normal value. Where the party benefiting from an adjustment is successful, his lawyer is nevertheless entitled to recover his fees calculated on the basis of the normal (not adjusted) value of the claim.
259. Finally, considerations of fairness, reasonableness or equity may also be a basis for alleviation of the normal cost rule. As was explained above, Directive 2004/48/EC on the enforcement of intellectual property rights states that the unsuccessful party bears the costs of the proceedings, unless equity does not allow this. Similarly, according to the rules of procedure of the ECJ, the Court may deviate from the “loser pays” principle in exceptional circumstances, or may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.¹³⁷
260. With respect to timing, it is usually at the end of the procedure that courts decide on which party bears the costs of the action. However, it is worthwhile considering to what extent a decision on costs could be taken before the very end of the proceedings. Indeed, increased certainty upfront in the proceedings would reduce the financial risk for the claimants of pursuing a claim where the “loser pays” principle is applicable. Upfront certainty as regards cost allocation would also allow the claimant not being granted such a cost order to withdraw his claim should he consider the risk of litigating too high. Such a court order on costs upfront in the proceedings could, for example, limit the types of costs that would be recoverable from the unsuccessful party, or cap the recoverable amount. In order to avoid a party partially protected upfront against cost recovery abusively investing in litigation, the court order could be made conditional upon the behaviour of the parties until the end of the proceedings.
261. In view of these national practices, Member States should be encouraged to provide national courts with the possibility to issue cost orders derogating from the normal cost rule. These orders could, for example, guarantee that a claimant, if unsuccessful, does not have to bear the defendants’ costs that were unreasonably or vexatiously incurred, or are otherwise excessive. Member States may also consider other possible grounds for such cost orders. These cost orders should preferably be issued upfront

¹³⁷ Article 69 of the Rules of Procedure of the Court of Justice.

in the proceeding and could be made conditional upon the conduct of the claimant during the proceedings.

Member States are encouraged to provide national courts with the possibility to issue cost orders derogating from the normal cost rule, preferably upfront in the proceeding.

Such cost orders would guarantee that a claimant, even if unsuccessful, will not have to bear all costs incurred by the other party.

3. *Legal provisions regarding determination of court fees*

262. In order to alleviate the obstacle that court fees may represent for potential claimants, interesting measures can be observed in the Member States. In particular, the exemption of certain categories of claimants from having to pay court fees can further facilitate private damages actions. In this regard, Romanian law provides for an exemption from court fees for representative actions brought by consumer associations against undertakings that infringed the law or violated legitimate interests of consumers. Similarly, in the Spanish system, individuals and companies with a turnover below 6 million euros are exempt from court fees.

263. In most Member States court fees are required to be paid upfront and the level of court fees is generally expressed either as a fixed sum or as a percentage of the value of the claim. In the majority of Member States, fees are calculated as a percentage of the value of the claim and these percentages vary considerably between the different Member States. Although the percentage level in most Member States is low — in some only 2% — it can reach up to 6% in other Member States. The level of court fees can in some instances constitute a strong disincentive in antitrust cases given the uncertainty in outcome (reliance on complex economic data), and the fact that the claims may often be of high value.

Member States are encouraged to set their court fees in an appropriate manner so that they do not constitute a disincentive for antitrust damages claims.

4. *Funding of antitrust damages actions*

264. The provision of financial assistance to those who are unable to bear the full costs of legal proceedings is essential to enable victims to enforce their rights.

265. In certain cases, victims may benefit from national legal aid mechanisms, even though their scope is often limited either to certain categories of claimants (individuals, or undertakings in cases not concerning their commercial or professional activity) or to certain types of litigation.¹³⁸ In other Member States however,¹³⁹ legal aid can be granted with regard to any type of litigation and to both natural and legal persons if they prove that they do not have sufficient means to meet the costs.

¹³⁸ Some form of legal aid is available in all Member States since the adoption of Directive 2003/8/EC establishing minimum common rules relating to legal aid, OJ 2003 L 26/41.

¹³⁹ For example, Germany, Poland, Portugal.

266. Irrespective of the specificities of the legal cost regimes mentioned above, other mechanisms for alleviating the burden of bearing the costs have been developed. These mechanisms may also have the effect of mitigating expenses and therefore help reduce the obstacles related to the funding of private actions.
267. The possibility for victims to have their legal expenses covered by an insurance company could further facilitate antitrust-related damages claims. In the majority of Member States legal aid insurance (either public or private) is available, but is not widely used regarding competition law infringements. The possibility of a third party funding litigation is also known in Europe. There, third parties provide funds to claimants to cover all, or a proportion of, the costs of an action. In return, such investors are guaranteed a share of the winnings if the claimant is successful. Other forms of litigation funding may emerge in the future should more victims decide to seek redress in courts.

CHAPTER 10 — INTERACTION BETWEEN LENIENCY PROGRAMMES AND ACTIONS FOR DAMAGES

A. THE OPTIONS IN THE GREEN PAPER AND THE RESULTS OF THE PUBLIC CONSULTATION

268. With its Green Paper, the Commission aimed at identifying possible measures that would preserve the attractiveness of leniency programmes in the context of an enhanced level of damages claims in Europe, since these programmes are critical to the uncovering of cartels and therefore essential to the development of follow-on private actions for damages. The Commission also aimed at determining whether other measures could be tailored in order to improve the interaction between leniency programmes and an effective system of actions for damages.

269. The issue of interaction of leniency programmes with actions for damages met with broad interest during the public consultation. A large number and a variety of respondents expressed a view on this issue.

270. In its Green Paper, the Commission invited comments on three different options: (a) the exclusion of the discoverability of the leniency application, (b) the possibility to grant the successful leniency applicant a conditional rebate on any damages claim, and (c) the removal of joint liability for the successful leniency applicant.¹⁴⁰

1. *Consensus on the necessity to protect leniency programmes and exclude discoverability of leniency applications*

271. The issue of the interaction between leniency programmes and actions for damages is only relevant for a certain type of damages claims, i.e. actions brought in relation to those infringements that are covered by leniency programmes, namely secret cartels affecting the Community.¹⁴¹

272. The question was raised in the Green Paper whether leniency applications should be protected against discovery.¹⁴² If leniency applications were to be available to claimants in follow-on actions, the proof of the claim would be facilitated for the claimant, and this would contribute to the objective of rendering the victims' right to damages more effective. However, such a disclosure would reduce the attractiveness of leniency programmes, and therefore their efficiency: it could deter potential leniency applicants from asking for leniency in the first place, or affect the quality and comprehensiveness of leniency submissions.

¹⁴⁰ “Leniency applicants” cover both applicants for immunity from fines and applicants for a reduction of fines.

¹⁴¹ Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. Such practices are among the most serious violations of Article 81 EC. See for instance the Commission Notice on immunity from fines and reduction of fines in cartel cases, hereinafter the “Leniency Notice”, OJ 2004 C 298/17, point 1.

¹⁴² See option 28 of the Green Paper.

273. The need to protect leniency programmes is widely recognised by the respondents which, apart from a very few exceptions, support precluding disclosure of leniency applications or the central parts thereof, and often consider this to be essential. A few submissions consider, however, that leniency applications should be made available in private actions since they contain critical evidence, while some doubt whether such protection is at all needed, in particular since leniency applications can be made orally. Comments were also received on what should be covered by the protection. This issue is further analysed below.

2. *Diverging opinions on whether to grant a conditional rebate on damage claims to successful leniency applicants*

274. The objective pursued by granting a conditional rebate on damage claims¹⁴³ to successful leniency applicants¹⁴⁴ is to reward them in the private proceeding for their cooperation in the public proceeding, by awarding them a conditional rebate on any damages claim. This rebate option as set out in the Green Paper would be made conditional upon provision of evidence to claimants in follow-on damages claims.

275. Some submissions gave arguments in favour of such an option, in particular since this would increase the attractiveness of leniency programmes. Of these submissions, some respondents underlined that while it is appropriate to guarantee the efficient functioning of leniency programmes, this should not be at the expense of the injured parties. Indeed, many respondents stressed the importance of the principle of full compensation for the harm suffered by the victims. In a situation where double damages became available, the respondents usually agreed that the successful leniency applicant could benefit from a rebate in the form of a de-doubling of the amount of damages, since this would not prevent full compensation. Some submissions also underlined the necessity to limit such award only to the successful immunity applicant, given his contribution in the uncovering of the cartel, as opposed to leniency applicants only benefiting from a reduction in fine.

276. Such rebate would increase the gap between the situation of the successful leniency applicant (benefiting from a reduction of, or immunity from, fine as well as a reduction of civil liability) and the situation of non-collaborating firms (having to face the fine plus, possibly, an increased civil liability). In addition, it would facilitate damages claims by providing claimants with significant evidence. Finally, the risk of incomplete compensation for the victims due to the existence of the rebate would be limited since the victims could subsequently claim their entire loss against the other members of the cartel.

277. However, some submissions opposed, as a matter of principle, a situation in which successful leniency applicants could be rewarded on the civil side as a result of their application by facing a reduced liability, arguing that public enforcement and private proceedings should be independent from each other. Some respondents also argued that it would be unfair to reward a member of a cartel in civil proceedings, even if he had applied for leniency.

¹⁴³ See option 29 of the Green Paper.

¹⁴⁴ An applicant for leniency (immunity or reduction of fines) is considered successful only after the final decision of the competition authority.

278. Compliance with the principle of full compensation of the victims, the importance of which was recalled by a number of submissions, would imply that any rebate awarded in a damage claim be paid by the other members of the cartel,¹⁴⁵ jointly and severally liable for the entire damage. Some respondents have underlined that any such increase in liability would be unfair and discriminatory. In addition, a risk of incomplete compensation of the victims cannot be excluded in the exceptional situation where all the co-cartelists, excluding the successful leniency applicant, are insolvent. The rebate system would also limit the victim's choice as to the identity/number of co-cartelists from which he could recover his whole damage.
279. Taking account of the arguments expressed, at this stage it would not appear appropriate to retain this option as long as it has not been demonstrated that an enhanced level of actions for damages would unduly affect leniency programmes and that such a strong reward should be given to leniency applicants as regards their civil liability. However, if leniency programmes were to be unduly affected, or should the balance in the approach be modified, further incentives, such as the rebate granted to the leniency applicant, may need to be considered.

3. *Support for the removal of joint liability for the successful leniency applicant*

280. The Commission has also put forward for discussion an option¹⁴⁶ which provides for the removal of joint liability from the successful leniency applicant, thus limiting the latter's exposure to damages. The removal of joint liability aims not at granting an additional financial reward to the successful leniency applicant, but only at guaranteeing that his liability would be strictly limited to a certain share in the damage caused. The removal of the joint liability would not be made conditional upon the cooperation of the successful leniency applicant with the victims on the civil side.
281. Generally, under the rules of civil liability applicable to antitrust damages actions, undertakings which are parties to anti-competitive agreements are liable for the entire damage caused by these agreements. The co-infringers are jointly and severally liable for the damage caused by their actions. This means, for example, that a victim having suffered harm due to an illicit agreement may claim his entire damage not only against his trading partner(s), but also against any of the other parties to the illicit agreement. However, between the co-infringers, the liability is several. This implies that the infringer who compensated the entire harm then has a right to seek contribution from the other co-infringers. It is therefore at the contribution stage that the respective share of ultimate liability of each co-infringer is determined.¹⁴⁷
282. Removing the joint liability of the successful leniency applicant was meant to pursue a two-fold objective. It was, firstly, to give the successful leniency applicant a procedural advantage, by avoiding that he has to seek contribution from the other tortfeasors (his ultimate liability would no longer be determined only at the contribution stage). Secondly, it was to give him an advantage in cases of (partial) insolvency of one or some of the cartel member(s), since the successful leniency

¹⁴⁵ In the absence of double damages.

¹⁴⁶ See option 30 of the Green Paper.

¹⁴⁷ In contrast, in antitrust cases in the United States, there is no such right for an infringer to seek contribution from the other co-infringers. For a recent discussion of the current system in the United States, see the recommendations of the Antitrust Modernization Commission.

applicant would be the only cartel member not having to bear an increased financial burden as opposed to the other solvent cartelists which are jointly and severally liable for the entire damage.

283. The objective pursued by this option received support from various respondents. However, some concerns were expressed on the effectiveness of the measure to achieve the objective, as well as on the criteria to be used for determining the scope of the liability of the successful leniency applicant. Some respondents also underlined that the benefit of the removal of joint liability should be limited to the successful immunity applicant, as opposed to leniency applicants in general. Some submissions finally stressed that incentives given to successful leniency applicants should not be granted at the expense of the victims.
284. In line with the results of the public consultation, it is considered appropriate to further explore the possibility of limiting the civil liability of the successful immunity applicant, as analysed below.

B. MEASURES REGARDING THE INTERACTION BETWEEN LENIENCY PROGRAMMES AND ACTIONS FOR DAMAGES

285. The Commission recalls that according to its 2006 Leniency Notice:

“The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.”¹⁴⁸

286. Given the inevitable interaction between an increased level of damages claims and the operation of an efficient leniency programme, it appears appropriate to maintain the attractiveness of leniency programmes in Europe, on the one hand, by ensuring an adequate level of protection of leniency applications in a future context of an enhanced level of actions for damages, and, on the other hand, to further reflect on the possibility to further incentivise potential immunity applicants.

1. *Exclusion of discoverability of corporate statements submitted by applicants for immunity and reduction of fines*

287. Excluding the discoverability¹⁴⁹ of leniency applications would avoid a situation in which a leniency applicant is placed in a less favourable situation than the other infringers due to the fact that he applied for leniency. However, an application for leniency should not unduly protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC. The boundaries of this protection are defined below.

a. The protection granted should apply to applications for leniency submitted under the EC and national leniency programmes

288. The measure aims to maintain the efficiency of leniency programmes in a foreseen context of increased damages claims based on EC competition rules, with the

¹⁴⁸ Leniency Notice, point 39.

¹⁴⁹ In this Chapter, the terms “discovery”, “discoverability” and “disclosure” are used indistinctly and do not refer to any legal regime of specific jurisdictions.

ultimate objective to guarantee effective enforcement of Article 81 EC. Any possible measure designed to ensure the effectiveness of public enforcement of EC rights should also be applicable at national level since EC antitrust rules are notably enforced both through EC and national leniency programmes.

289. Therefore, the measure analysed in this section should not only apply when leniency is sought from the Commission pursuant to the EC Leniency Notice. It should cover all leniency applications related to an infringement of Article 81 EC, regardless of which competition authority within the ECN received the leniency application. The protection should also apply in cases where Article 81 EC is applied in parallel with national competition law.
290. Possible arguments in favour of limiting the rule to the applications submitted under the EC leniency programme ultimately do not prevail. This would mean, as is the case today, that the protection granted to leniency applications would differ depending on the NCA in charge of the case, even though the same Treaty Article is at stake. Ensuring consistency in application of the same Treaty Article (Article 81 EC) by different authorities is important. Indeed, it has to be borne in mind that the rules are enforced in a system of parallel competences where several competition authorities have the competence to deal with a given case and where simultaneous leniency applications in various Member States may sometimes be advisable.¹⁵⁰ Such consistency would also limit “forum shopping”.
291. Similarly, the extension of the rule to national leniency applications would increase legal certainty and the efficiency of the system. Within the ECN, leniency applications may be transmitted from one competition authority to another.¹⁵¹ In particular, leniency applicants would be more willing to give their consent to the transmission of their application by an NCA to another NCA if they knew that the protection granted by the receiving NCA is similar to the one ensured by the transmitting authority.¹⁵²
292. Finally, the extension of the rule to national leniency applications would also be coherent with the current trend within the ECN towards soft harmonisation of the existing leniency programmes. Indeed, the ECN members have committed to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme.¹⁵³
293. It appears therefore appropriate that any such protection of leniency applications applies not only to the applications submitted under the Commission’s leniency programme but also to those submitted under national leniency programmes when EC competition law is applicable.

The protection granted to leniency applications should apply to applications submitted under the EC and under national leniency programmes when the

¹⁵⁰ See in particular Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/03, point 38, hereinafter the “ECN Notice”.

¹⁵¹ Such transmission is, however, subject to the conditions set out in points 40 and 41 of the Commission ECN Notice.

¹⁵² See in particular the Commission ECN Notice, points 40 and 41.

¹⁵³ See ECN Model Leniency Programme at http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf.

enforcement of Article 81 EC is at stake, including in cases of parallel application of national competition law.

b. The protection against disclosure granted to corporate statements

(i) The scope of the protection

294. As explained in the Commission's Green Paper, the threat of discoverability of the confession submitted by the leniency applicant to a competition authority is considerable. The prospect of his application being made available to private claimants can have a negative impact on the quality and the comprehensiveness of his application for leniency, or even dissuade an infringer from applying for leniency in the first place.
295. The protection of leniency applications against disclosure should be applied to all those voluntary presentations, by or on behalf of an undertaking to the competition authority, of the undertaking's knowledge of a cartel and its role therein, which are drawn up specially for submission under the Leniency Notice (hereinafter "corporate statements").¹⁵⁴
296. This protection should be awarded to such corporate statements of all the leniency applicants, i.e. both applicants for immunity and for reduction of fines. First, the threat of disclosure of their confession is as acute for immunity applicants as for applicants for a reduction of fines. Also, when making their confession, undertakings do not necessarily know whether they will qualify for immunity or only for a reduction of fines. It is only at the end of the administrative procedure that immunity (or reduction of fines) is granted. Extending the protection to the corporate statements made by all leniency applicants for immunity and reduction of fines therefore improves the legal certainty for potential applicants.
297. Corporate statements should remain protected even where the application for leniency is rejected by the competition authority or does not lead to any decision on the infringement. Such a solution removes the risk of uncertainty for potential leniency applicants which could have a certain deterrent effect against applying for leniency.
298. It has to be noted that the common practice of the Commission, partly developed in response to other jurisdictions' wide-ranging discovery rules, is to take corporate statements orally, and not to provide the applicant with a copy of his statements.

Corporate statements submitted by applicants for immunity and for a reduction of fines should be protected against disclosure.

(ii) No disclosure by the competition authorities of corporate statements neither before nor after the adoption of a decision

299. The Commission itself will never disclose to parties in private actions for damages any corporate statements it receives in the context of its Leniency Notice. The Commission considers that public disclosure under Regulation 1049/2001 of

¹⁵⁴ See in more detail points 6 and 31 of the Leniency Notice.

corporate statements submitted by leniency applicants would undermine certain public and private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of that Regulation,¹⁵⁵ even after a decision has been taken.¹⁵⁶ In addition, the absence of disclosure is justified by the need to safeguard the interests of the Community, and to avoid any interference with its functioning, in particular by jeopardising the accomplishment of the tasks entrusted to it. For the same reasons, the Commission will not transmit the corporate statements it receives to national courts in the framework of the Commission's cooperation duties,¹⁵⁷ neither before nor after the adoption of the Commission's decision.

300. As the Commission's statements of objections and decisions may to a great extent be based on information provided by the leniency applicants, it is necessary that all undertakings subject to the investigation in the public proceeding have access to corporate statements in order to be able to exercise their right of defence. However, when accessing the file, such undertakings are not provided with a copy of the corporate statements, and the use these undertakings can make of the information obtained through access to the file is limited. According to Article 15(4) of Regulation (EC) 773/2004,¹⁵⁸ this information can only be used for the purposes of judicial or administrative proceedings for the application of Article 81 and 82 EC.

The Commission's consistent policy is not to disclose corporate statements to national courts neither before nor after a decision is taken.

(iii) No disclosure of the corporate statements by leniency applicants for immunity or reduction of fines

301. The voluntary disclosure or reproduction of corporate statements by leniency applicants, e.g. in the context of settlement negotiations, can have detrimental effects on the competition authorities' investigations. In order to protect these investigations, it is therefore of great importance to preclude disclosure from the date of the application at least until the issuance of a statement of objections.
302. It is also important to protect leniency applicants against court orders requesting disclosure or the reproduction of their corporate statements before or after the issuance of a statement of objections, and even after a decision is taken by the competition authority. Indeed, such protection of leniency applicants is necessary to safeguard the interests of the Community in having an efficient leniency programme. If corporate statements were to be made available, there would be a risk that potential leniency applicants refrain from giving extensive details on the infringement in their application, thereby affecting the effectiveness of leniency programmes and public enforcement.

¹⁵⁵ OJ 2001 L 145/43. See also point 40 of the Leniency Notice.

¹⁵⁶ It should also be noted that the protection of private interests in claiming damages is clearly not the objective of Regulation 1049/2001 (footnote 50 above).

¹⁵⁷ Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 OJ 2004 C 101/54, point 26.

¹⁵⁸ Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18.

Voluntary disclosure or reproduction of corporate statements by leniency applicants for immunity or reduction of fines should be precluded at least until the issuance of a statement of objections.

Leniency applicants should be protected against court orders requesting disclosure or reproduction of the corporate statements both before and after the adoption of the decision by the competition authority.

2. *Limiting the scope of the civil liability of the successful immunity applicant*

303. In the absence of leniency applications, many serious competition law infringements would not be uncovered and the victims would not receive compensation. Given the importance of leniency programmes, an increased level of antitrust damages actions should not result in leniency applicants finding themselves in a less favourable situation than other infringers. However, as it is at this stage not demonstrated that leniency programmes would in the future be unduly affected by an enhanced level of actions for damages, additional incentives granted to leniency applicants, if any, should be limited. It is therefore suggested that any such incentive be limited, possibly to the successful immunity applicant only (the “immunity recipient”).
304. If any measure concerning the immunity recipient was to be proposed at a later stage, it results from the consultation that the option put forward for discussion in the Green Paper (i.e. the removal of the joint liability) may not be sufficient to effectively limit the immunity recipient’s liability to a certain share of the harm caused. The argument was indeed raised that an undertaking colluding with other undertakings is generally liable for all the consequences of that collusion, irrespective of the notion of joint and several liability. On this basis, the White Paper no longer discusses this option but sets out, for further reflection, a slightly different mechanism that would pursue the same objective, namely a limitation on the scope of the immunity recipient’s civil liability.¹⁵⁹
305. This mechanism suggested for further comments would imply that the immunity recipient remains liable on the civil side in relation to the infringement for which he was granted immunity, but only towards his direct and indirect contractual partners. As a result, the only persons entitled to receive compensation from the immunity recipient would be the victims who directly bought the cartelised products or services from the immunity recipient (i.e. direct contractual partners), or those further down the supply chain who bought these products or services (directly or through intermediaries) from the direct contractual partners (i.e. indirect contractual partners). The immunity recipient would then not be held liable for the damage suffered by a victim that did not directly or indirectly purchase cartelised products from him nor for the harm caused by products or services bought from another carteliser.¹⁶⁰ The

¹⁵⁹ For the reasons set out in section 1.a above, the liability limitation suggested for further reflection would be equally applicable to the situations where immunity is granted on the basis of the Commission’s leniency programme or on the basis of a national leniency programme in a case where EC competition law is applicable. The measure would be limited to the infringement for which immunity is granted.

¹⁶⁰ For instance, where 30% of a victim’s total purchases of cartelised products originate from the immunity recipient, the latter would only be liable for 30% of the total harm suffered by this victim due to the overcharge of the cartelised products.

burden of proving the extent to which his liability is limited would have to be borne by the immunity recipient.

306. At this stage, it seems appropriate to further reflect on the need for such incentive granted to the immunity recipient. Moreover, as it should be ensured that the victims' right to full compensation is not unduly affected, and that the other cartelists' liability is not unduly increased, further consideration should be given to the impacts of such measure on the position of victims of cartels and that of co-infringers, in particular other leniency applicants.

Further reflection should be given to a possible limitation of the immunity recipient's civil liability to his direct and indirect contractual partners.

CHAPTER 11 — CONCLUSIONS

A. MEASURES TO ENSURE THE EFFECTIVENESS OF ANTITRUST DAMAGES ACTIONS

307. The Green Paper on damages actions for breach of the EC antitrust rules, the subsequent public consultation and the wide debate amongst stakeholders have shown the need for measures to ensure, more than it is the case today, that all victims of EC competition law infringements have access to effective redress mechanisms in order to be fully compensated for the harm they suffered. The White Paper and this Staff Working Paper make a number of concrete suggestions on how to achieve this objective.

1. *The acquis communautaire*

308. Before coming to these suggestions, it is important to recall the existing *acquis communautaire* that is relevant for antitrust damages claims. An overview of that *acquis* can be found in the box below paragraph 310. Particular attention should be given to two key building blocks of this *acquis*. There is first of all the establishment under Community law of a right to compensation that is available to all individuals who suffered a harm caused by an infringement of the EC competition rules. The availability of this European law remedy can as such not be refuted or conditioned by national legislation of any kind.

309. As long as there is no Community law on the matter, national legislation will continue to determine how individuals can exercise the right to compensation they derive directly from Community law. But Member States do not enjoy absolute liberty when laying down and applying the rules that govern EC antitrust damages actions. This is where the second key element of the *acquis communautaire* becomes relevant: the said national rules cannot be less favourable than those governing similar domestic actions (principle of equivalence), nor can they render the exercise of these Community law rights practically impossible or excessively difficult (principle of effectiveness). To the extent that national rules are incompatible with any of these two principles, national courts are required not to apply those rules.

310. As indicated, the following box gives a more general overview of the relevant *acquis communautaire*:

Acquis communautaire

On standing:

- Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle also applies to indirect purchasers.

On access to evidence:

- In actions for EC antitrust damages, Member States must apply all domestic rules and principles on the facilitation of bringing evidence available in order to ensure that victims of EC antitrust infringements can exercise their

right to compensation effectively.

- Member States must apply such rules and principles to the same extent as in similar cases based on the infringement of national law.
- Domestic rules that make the exercise of the right to compensation excessively difficult must not be applied to cases of damages for the infringement of EC antitrust rules.

On the binding effect of Commission decisions:

- National courts cannot take decisions ruling on agreements, decisions or practices under Article 81 or Article 82 EC that run counter to a decision adopted by the Commission on the same agreements, decisions or practices.
- Commission decisions finding an infringement of Article 81 or 82 EC therefore constitute a sufficient legal proof of this infringement by the addressee(s) of the decision in subsequent actions for damages before national courts.
- This effect of a Commission decision can only be removed by a judgment of the Community courts under Article 230 or 234 EC.

On the definition and calculation of damages:

- Victims of an EC competition law infringement are entitled to full compensation of the harm caused. That means compensation for actual loss (*damnum emergens*) and for loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.
- Victims of an EC competition law infringement are entitled to particular damages, such as exemplary or punitive damages, if and to the extent such damages may be awarded pursuant to actions founded on the infringement of national competition law.
- In the absence of Community law on the matter, Member States are allowed to take steps to ensure that the protection of the right to claim damages for the loss caused by a competition law infringement does not entail the unjust enrichment of the victims.
- The principle of full compensation implies that Member States may not a priori fix any form of upper limit on the amount of compensation that the victim of a competition law infringement could effectively recover.

On limitation periods:

- A limitation period cannot be such that it renders the right to seek compensation practically impossible or excessively difficult. Such is the case for short limitation periods that begin to run from the moment the infringement started and which cannot be suspended.

2. *Measures to ensure effective antitrust damages actions*

311. Despite the existing *acquis communautaire*, victims of competition law infringements still face significant difficulties when looking for effective redress. In order to allow these victims to obtain more effective redress in the future, the Commission considers it necessary to make suggestions that go beyond a mere clarification of the current *acquis*. The following box gives an overview of the suggestions made per section of the Staff Working Paper. It goes without saying that this list is non-exhaustive. Some Member States have adopted, are considering or may consider adopting other measures than those listed below to ensure effective redress for victims of competition law infringements. The Commission encourages Member States to continuously improve their domestic legal framework for antitrust damages actions and to build on each others experiences.

Commission suggestions

On standing:

- Victims of competition law infringements should be able to bring an opt-in collective action for damages or to be represented in a representative action for damages brought by qualified entities.
- Qualified entities, able to act on behalf of identified or, in rather restricted cases, identifiable victims, should include (i) entities designated in advance by the Member States according to national procedures, representing legitimate and defined interests; and (ii) other existing entities whose primary task would be to protect the defined interests of their members, other than by pursuing damages claims, which would be certified on an *ad hoc* basis in relation to a particular infringement according to national procedures.

On access to evidence *inter partes*:

- As a minimum standard of disclosure in actions for antitrust damages, national courts should under specific conditions have the power to order disclosure *inter partes* of precise categories of information or evidence relevant to the claim.
- Conditions for a disclosure order in actions for antitrust damages should include that (a) the claimant has asserted all the facts and offered all those means of evidence that are reasonably known and available to him, provided that they show plausible grounds to suspect that he suffered harm through the infringement of competition rules by the defendant; (b) he has shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, to assert the specific facts or to produce the evidence for which disclosure is envisaged; (c) he has specified sufficiently precise categories of information or evidence to be disclosed, and (d) the court is satisfied that the envisaged disclosure measure is relevant to the case as well as necessary and proportional in scope.
- Disclosure orders can cover all types of evidence under the control of the

opponent or third persons. Adequate protection should be given to confidential information as well as to corporate statements of leniency applicants and the investigations of competition authorities.

- Except for cases of particular urgency, the addressees of a disclosure order would have the right to be heard.
- Where a party refuses to disclose evidence pursuant to a court order or destroys evidence, any court hearing a claim for damages should have the power to impose effective, i.e. sufficiently deterrent sanctions on the individual or the undertaking concerned. Courts should be provided with a range of such sanctions to choose from, which should include the possibility to draw adverse inferences from the refusal or destruction in the civil action for damages.

On the binding effect of NCA decisions:

- When national courts in actions for damages rule on agreements, decisions or practices under Article 81 or Article 82 EC which are already the subject of a final decision by an NCA within the ECN finding an infringement of Article 81 or Article 82 EC, or are the subject of a final ruling by a review court upholding the NCA decision or itself finding an infringement, they cannot take decisions running counter to such a decision or ruling.
- This obligation is without prejudice to the right, and possibly obligation, of national courts to seek clarification on the interpretation of Article 81 or 82 EC under Article 234 EC.
- Consideration could be given to allowing an exception to the binding effect of NCA decisions from other Member States analogous to the public order exception contained in Article 34 n°1 of Regulation 44/2001, with a view to safeguarding a defendant's rights of defence, as recognised by the European Convention on Human Rights and the EU Charter on Fundamental Rights.

On fault:

- Whilst the general notions of fault in the Member States should remain unaffected, the Commission suggests that more legal certainty be provided in terms of which level of fault requirements under national law hamper the effective exercise of the right to reparation and thereby the *effet utile* of Article 81 or 82 EC.
- The effectiveness of actions for antitrust damages does not require changes of the legal regime in those Member States where, once a breach of EC antitrust law has been established, no elements of fault have to be proven or fault is irrebuttably presumed in civil proceedings for antitrust damages.
- In the other Member States, once a claimant has proven an infringement of EC antitrust law, the infringer should be liable for damages unless he shows that the infringement was the result of a genuinely excusable error. Errors should be excusable only where the infringer, despite applying a high standard of care, could not reasonably have been aware that his conduct

restricted competition.

On the definition and calculation of damages:

- The *acquis communautaire* on the definition of damages should be codified as a minimum standard.
- The Commission intends to issue non-binding guidance on the calculation of damages. As part of such guidance, the Commission will consider suggesting simplified rules for estimating the loss suffered as a result of a competition law infringement.
- The damages awarded in an opt-in collective action or a representative action for damages should correspond to the harm suffered by those included or represented in the action.

On the passing-on of overcharges:

- The defendant in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge, brought by a claimant who is not a final consumer.
- The burden of proving the passing-on of overcharge would have to lie with the defendant. The standard of proof for the passing-on should not be lower than the standard to which the claimant has to prove the damage.
- An indirect purchaser would be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level.
- In case of joint, parallel or consecutive actions brought by purchasers at different levels in the distribution chain, national courts are encouraged to use whatever mechanism under national or Community law at their disposal in order to avoid under- or over-compensation of the harm caused by a competition law infringement.

On limitation periods:

- In case of a continuous or repeated infringement, the limitation period should not start to run before the day on which the infringement ceases.
- The limitation period should not start to run before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him.
- A new limitation period of a minimum of two years starts to run once the infringement decision on which the claimant relies in his antitrust damages action has become final.

On the costs of proceedings:

- Member States are encouraged to reflect on their cost rules so as to facilitate meritorious litigation, taking into consideration existing practices.

- Member States are encouraged to design procedural rules fostering settlements, as a way to mitigate costs of actions for damages following a breach of EC competition rules.
- Member States are encouraged to provide national courts with the possibility to issue cost orders derogating from the normal cost rule, preferably upfront in the proceeding. Such cost orders would guarantee that a claimant, even if unsuccessful, will not have to bear all costs incurred by the other party.
- Member States are encouraged to set their court fees in an appropriate manner so that they do not constitute a disincentive for antitrust damages claims.

On the interaction with leniency programmes:

- The protection granted to leniency applications should apply to applications submitted under the EC and under national leniency programmes when the enforcement of Article 81 EC is at stake, including in cases of parallel application of national competition law.
- Corporate statements submitted by applicants for immunity and for a reduction of fines should be protected against disclosure.
- The Commission's consistent policy is not to disclose corporate statements to national courts neither before nor after a decision is taken.
- Voluntary disclosure or reproduction of corporate statements by leniency applicants for immunity or reduction of fines should be precluded at least until the issuance of a statement of objections.
- Leniency applicants should be protected against court orders requesting disclosure or reproduction of the corporate statements both before and after the adoption of the decision by the competition authority.
- Further reflection should be given to a possible limitation of the immunity recipient's civil liability to his direct and indirect contractual partners.

312. The Commission acknowledges that some of the problems identified in the Green Paper also occur in other areas of civil/tort litigation and that some of the suggestions of the White Paper might thus also be appropriate beyond the boundaries of antitrust damages actions. Where there is a need, a technical feasibility and a clear political will to adopt measures with a more horizontal scope, that route should therefore seriously be considered. However, the similarities between redress for victims of an antitrust infringement and other civil/tort litigation cannot in themselves constitute a sufficient reason to abstain from considering or even taking measures aimed specifically at ensuring the effective exercise of rights which victims of competition law infringements derive directly from Community law. Moreover, civil litigation in the field of competition touches upon a particular public interest and offers a number

of specific aspects which — taken together — mean that the bringing of an action is unusually difficult.

313. Articles 81 and 82 EC are indeed a matter of public policy and are thus fundamental provisions of the Treaty designed to protect competition in the single market.¹⁶¹ In its *Courage* and *Manfredi* judgments the Court of Justice clarified that the right to claim damages strengthens the working of the EC competition rules and discourages agreements and practices which are liable to restrict competition. The Court also emphasised that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in Europe.¹⁶² The right of victims of a competition law infringement to bring an action for damages must thus be seen as being also in the public interest. Guaranteeing that right should therefore be considered of the utmost importance.
314. Compared to most other types of civil litigation, competition litigation is also characterised by the particular complexity of the analysis and the wide scope of the evidential burden that a potential litigant is facing. To establish an infringement of the competition rules, it is generally necessary to define the relevant market and prove that the conduct complained of negatively affects prices, output or innovation on that relevant market. Also, quantification of damages may be particularly difficult since the claimant will have to bring evidence of what his situation would have been in the absence of the infringement. This implies, amongst other aspects, that the claimant will have to show what in such ‘but for’-scenario would have been the quantity he would have bought at which (competitive) price. These difficulties will often require access to evidence describing the commercial activities of the defendant and other actual and potential players on the market and a complex analysis requiring the gathering of a substantial number of facts.
315. Finally, the evidential burden on the potential litigant is not only particularly high, the information required to successfully bring a damages case is also unevenly distributed: as proof of the defendant’s market position and his trading practices is commonly required, there is a marked asymmetry between the — potential — claimant and the defendant who is accused of engaging in anti-competitive behaviour. It is precisely this information inequality that needs to be addressed if one wants to ensure effective redress for victims of competition law infringements.

B. INSTRUMENTS TO ENSURE THE EFFECTIVENESS OF ANTITRUST DAMAGES ACTIONS

1. *The need for a Community instrument underpinning national measures*

316. As mentioned in point 312 above, the suggestions listed in the White Paper should not be read as limiting the kind of measures that could be taken in order to ensure the effective exercise of the right of victims of competition law infringements to be compensated for the harm suffered. The list of suggestions should rather be regarded as what the Commission considers to be the minimum necessary to achieve that objective.

¹⁶¹ Case C-126/97 *Eco Swiss* [1999] ECR I-3055 paragraph 36 and *Manfredi* (footnote 8 above) paragraph 31.

¹⁶² *Courage v Crehan* (footnote 8 above) paragraph 27 and *Manfredi* (footnote 8 above) paragraph 91.

317. While some Member States may well take the initiative of adopting measures in some areas highlighted, it remains appropriate to consider incorporating some of these suggestions into a Community instrument. Indeed, it is only by laying down the fundamental principles of antitrust damages litigation in a Community instrument that one can guarantee basic equality of treatment of victims of an EC competition law infringement, independent of where a damages case is brought and which national law is applicable.¹⁶³ Moreover, the more convergence there is between national rules, the more levelled the playing field for antitrust damages actions and the lower the need for claimants to shop around looking for the most appropriate forum to bring a damages case.
318. It is clear that these objectives, which contribute to the effective enforcement of the EC competition rules, cannot be sufficiently achieved through Member States' action alone. A Community instrument setting out what is required to ensure the effectiveness of antitrust damages actions may therefore be warranted. Such an instrument would also serve as a point of reference for Member States to adopt appropriate measures.

2. *The appropriate Community instruments*

319. When it comes to the choice of the appropriate instrument for further Community action, certain of the issues mentioned in the White Paper may require Community legislative action.¹⁶⁴ Although soft-law approaches, such as guidelines or recommendations, may assist Member States in increasing the effectiveness of the exercise of the right to antitrust damages, there is no guarantee that all Member States will achieve that objective. Since the Commission considers the suggestions in the White Paper to be the basic framework for an effective antitrust damages regime, Community legislation would appear to be the best possibility to make sure that such a framework is established in all Member States.
320. A European legal framework would have a number of advantages:
- It would first of all give businesses and consumers who are victims of a competition law infringement a clear picture of their basic rights under Community law. The fact that they know their rights would, in itself, already constitute a very significant step towards more effective redress.
 - Second, it is important for Member States' authorities to know which minimum standard of protection they have to ensure of rights that individuals derive directly from Community law. This should guarantee that national legislatures and judges can adopt or apply national legislation that renders the exercise of the right to damages effective and, conversely, do not adopt or apply national legislation that

¹⁶³ The jurisdictional rules are laid down in Council Regulation 44/2001 (footnote 14 above). For the applicable law in antitrust damages cases, see Article 6(3) of Regulation 864/2007 ("Rome II", footnote 12 above).

¹⁶⁴ The competence of the Community to adopt legislative measures aimed at making antitrust damages actions more effective has indirectly been confirmed by the Court of Justice. See *Courage v Crehan* (footnote 8 above) paragraph 29 and *Manfredi* (footnote 8 above) paragraph 62: "*in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State (...) to prescribe the detailed procedural rules governing (...) actions [for damages based on an infringement of the EC competition rules]*" (emphasis added).

runs counter to the *acquis communautaire*. By enhancing transparency on the *acquis* through European legislation, one also increases the likelihood for individuals to be compensated for harm caused by a breach of the *acquis* by a Member State's authority.¹⁶⁵

- Third, a basic European legal framework would enhance both awareness and deterrence. It may thus already in itself constitute an additional incentive for undertakings to respect the EC competition rules. Those effects are multiplied when national legislation is adopted in line with a European legislative provision, when a national judge applies those rules and when victims of a competition law infringement rely on them to seek compensation for the harm they suffered.
- Finally, a European legal framework would contribute to a European level playing field for both claimants and defendants, thereby contributing to the objectives of the European single market. Individuals who find themselves in the same situation can expect the same basic treatment throughout Europe.

321. Moreover, some of the suggestions addressed in the White Paper fill a gap in national law or may even deviate from existing national legislation. It is clear that none of these could be achieved through soft law: it is only through Community legislation that one could reach a suitable level of legal certainty. Depending on the degree to which a level playing field in Europe is required to ensure the effectiveness of antitrust damages actions, a choice will have to be made between the available instruments for Community legislative action. While some of the issues enumerated below could thus be the subject of an EC regulation, others may be more suited for an EC directive.

322. In addition to the codification of the key aspects of the *acquis communautaire*, the Commission believes that some aspects of the following issues may require EC legislative action to ensure the effectiveness of antitrust damages actions:

- the availability of collective and representative actions;
- the *inter partes* disclosure;
- the binding effect of NCA decisions;
- the fault requirement;
- the passing-on defence;
- the limitation period;
- the protection of leniency applications from disclosure;
- the removal of the joint liability for the immunity recipient.

Other aspects of these issues and the remaining suggestions, in particular those concerning the calculation of damages and the rules concerning court and party costs of damages actions, can at this stage adequately be dealt with via soft-law instruments.

¹⁶⁵ For more details on the Member States' liability for the infringement of EC law, see for example *Brasserie du Pêcheur* (footnote 78 above).