

IMEDIPA Comments on the European Commission's White Paper on Damages Actions for Antitrust Violations

IMEDIPA (Institute for Studies in Competition Law and Policy), is an independent, non-profit organization, founded in February 2007 in Athens. Its objective is to promote legal, policy and economic analysis of competition law and policy in the Eastern Mediterranean, the Balkan region and the Member States of the Black Sea Economic Cooperation Organisation. It aims to promote a strong competition law community as well as to advance the competition idea in this geographic area by organising events and advancing the debate among competition law and economics scholars, policymakers and competition authorities, the judiciary, practitioners, consumer associations as well as the business community.

IMEDIPA aims, through external events, research projects and publications, at stimulating research in competition law and policy and its application to specific industries (e.g. energy, maritime transport, telecommunications, information technology, financial services).

IMEDIPA wishes to welcome the White Paper on Damages Actions for Antitrust Violations ("WP") and offer some comments in the form of an article written by Dr. Assimakis P. Komninos, Member of the Regional Advisory Board of IMEDIPA and published recently at *Concurrences*.

In broad terms, IMEDIPA supports most of the choices made in the WP and congratulates the Commission, on the one hand, for bringing this important whole project forward despite some resistance, and on the other hand, for not having espoused too radical positions that are foreign to European legal traditions.

- We believe that the choice to recognise standing to all persons harmed by an EC competition law violation, including competitors, direct and indirect purchasers, and of course consumers, makes sense in Europe for two main reasons: first, primary Community law, as expressed in the ECJ rulings in *Courage* and *Manfredi* makes clear that the right to damages is a Community law matter and this is enjoyed by all individuals harmed by an EC competition law violation; second, at the current nascent state of private antitrust enforcement in Europe, it would not be sensible to introduce limitations to standing or other overly restrictive prudential mechanisms.
- Since indirect purchasers' standing is recognised, the choice to allow defensive passing-on makes perfect sense. Indeed, Community law currently does not prohibit such a defence, it rather prohibits restrictive national evidentiary rules associated with this defence.
- We welcome the introduction of some means of collective redress through (i) representative actions by consumer associations, state bodies or trade associations, that are officially certified in the Member States, and (ii) opt-in collective claims for consumers and businesses. Although we support collective redress mechanisms of this kind, we consider that public enforcement may also be in a strong position to protect collective interests. An additional instrument of collective redress would be to

introduce a specific mechanism before both the European Commission and national competition authorities that aggregates collective interests. The UK system of “super-complaints” that can be made to the OFT by a designated consumer body, is a good example.

- As far as access to evidence is concerned, the measures proposed by the WP are helpful, but it will be imperative to organise a far-reaching educational programme for judges, particularly those of continental legal systems.
- For the reasons explained in the article annexed, we are against the idea expressed in the WP to make final infringement decisions issued by the Commission and by national competition authorities or final judgments on judicial review binding on national courts throughout the EU in follow-on civil actions. We believe that the introduction of a *rebuttable* presumption of illegality is a better option.
- We support that objective (strict) liability should be the rule for the award of damages, once the infringement has been established and assuming that the causal link is satisfied, unless the infringer demonstrates that there is a excusable error.
- We believe that some degree of harmonisation is called for in the area of limitation periods. The current national divergences are unfortunate and do not serve the establishment of a level-playing field.
- We finally agree that corporate statements by leniency applicants (including unsuccessful ones) should not be discoverable, even after the adoption of a final decision and we also find the idea of limiting the immunity recipient’s civil liability to claims by his “direct and indirect contractual partners” interesting. We put, however, to the Commission’s attention an even more far-reaching solution, to entirely immunise the immunity recipient, to the extent the other cartel members remain solvent to fully compensate the victims of the antitrust violation. We note that the recently amended Hungarian Competition Act provides that a leniency applicant receiving full immunity from fines will not be liable to pay damages to third parties, until and if such damages can be collected from other cartel members. Such a measure would further increase the attractiveness of the leniency programme, without prejudicing the compensation of the victims. A more successful leniency programme means a more effective competition enforcement system with more cartels unveiled and thus with more victims being able to claim compensation for their harm.

These thoughts and proposals reflect the consensus within IMEDIPA and do not necessarily represent the views of IMEDIPA’s members. They certainly do not engage in any way the views of academic or professional bodies to which IMEDIPA members are attached.

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The EU White Paper for damages actions: A first appraisal

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Abstract

The European Commission has published early April 2008 its White Paper on damages actions for antitrust violations. The White Paper makes a number of important specific proposals with the aim to facilitate civil antitrust claims for damages in Europe that will certainly create a lot of discussions. What follows is a first appraisal of these proposals in light of their stated objectives: compensation of victims and increased deterrence.

La Commission européenne a publié début avril 2008 son Livre blanc sur les actions en dommages et intérêts pour infraction aux règles communautaires sur les ententes et les abus de position dominante. Le Livre blanc présente un certain nombre de propositions spécifiques qui permettront de faciliter en Europe des actions en dommages et intérêts pour infraction aux règles du droit de la concurrence. Ces propositions vont sans aucun doute être à l'origine de bon nombre de discussions. Voici donc une première évaluation de celles-ci à la lumière de leurs objectifs avoués: l'indemnisation intégrale des victimes et dissuasion.

The EU White Paper for damages actions: A first appraisal

1. The European Commission has published in April 2008 its long-awaited White Paper on Damages actions for breach of the EC antitrust rules (“WP”)¹. This comes as a follow-up after the publication in December 2005 of a Green Paper² but is also a prelude for Community legislation³. The WP itself is a rather short document that in reality summarises the far more developed Staff Working Paper (“SWP”).⁴ There is also an impressive 600-page long Impact Assessment Study,⁵ which is itself usefully summarised in a Commission Impact Assessment Report⁶. The WP offers a first reading of the measures envisaged by the Commission to enhance private actions for damages but should be read together with the SWP, which is in reality the most important policy instrument. In the present article when reference is made to the “WP”, such reference covers the whole of the recent Commission policy initiative and not just the short document which bears that title.

2. The combination of a WP and a SWP has not been very successful here. At times there are inconsistencies between the two Papers and some confusion is also created by the fact that when one goes to the SWP, some important policy options advocated at the WP, are seriously qualified, reduced or expanded, to the point of inconsistency or confusion. A mere comparison between the parts of the two Papers on the no fault liability or on the exclusion of the joint liability rule for the successful immunity recipient, suffices⁷. It is therefore advisable for commentators not to bother with the WP but rather to study the much more complete SWP.

3. The main measures and policy choices that the Commission intends to pursue can be summarised as follows:

→ standing to sue for damages should be recognised for all persons harmed by an EC competition law violation, including competitors, direct and indirect purchasers, and of course consumers;

- 1 Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2008) 165 final.
- 2 Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final. The Green Paper was accompanied by a Staff Working Paper which set out the various options more discursively: Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2005) 1732.
- 3 In the EU jargon, a “White Paper” is a document containing proposals for Community action in a specific area. It sometimes follows a “Green Paper” published to launch a consultation process at European level. While Green Papers set out a range of ideas presented for public discussion and debate, White Papers contain an official set of proposals in specific policy areas and are a prelude to Community legislation.
- 4 Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404.
- 5 Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report for the European Commission, 30 March 2008. The study was prepared by the Centre for European Policy Studies, the Erasmus University Rotterdam and the Italian University Luiss Guido Carli.
- 6 Commission Staff Working Document Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, Impact Assessment, SEC(2008) 405.
- 7 Compare, for example, with regard to the principle of objective liability, section 2.4 *in fine* of the WP (which clearly speaks of a pan-European rule of objective liability) and para. 174 *in fine* of the SWP (which contradicts the WP); also compare, with regard to protection of immunity recipients, section 2.9 of the WP (which mentions as the only policy option the restriction of liability to direct and indirect contractual partners) and paras. 283-284 and, in particular, para. 322 of the SWP (which also bring into the discussion the exclusion of joint liability).

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- direct purchasers in particular should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety (“offensive passing-on”);
- at the same time, it will be open to defendants to prove that the plaintiff (e.g. a direct purchaser) has passed the illegal overcharge on to his customers; in other words, defensive passing-on should be permitted;
- collective redress should be possible through (i) representative actions by consumer associations, state bodies or trade associations, that are officially certified or designated in the Member States, and (ii) opt-in collective claims for consumers and businesses;
- plaintiffs’ access to evidence held by defendants should be made easier; thus the WP proposes in effect a certain relaxation of the “fact-pleading” system and the introduction of some elements of “notice-pleading” under the control of the judge whereby national courts should have the power to order the litigants or third parties to disclose specific categories of relevant evidence;
- final infringement decisions issued by the Commission and by national competition authorities (NCAs) or final judgments on judicial review should be binding on national courts throughout the EU in follow-on civil actions;
- objective (strict) liability should be the rule (no fault requirement) for damages, once the infringement has been established, unless the infringer demonstrates that there is a genuinely excusable error (he bears such burden of proof);
- full compensation should be available, covering not just actual losses, but also lost profits and interest;
- there should be no Community measure on punitive damages;
- the limitation period should not start to run before the day a continuous or repeated infringement ceases, or before the victim can reasonably be expected to have knowledge of the infringement and of the resulting harm;
- for follow-on claims, there should be a new limitation period running for at least two years after an infringement decision has become final;
- corporate statements by leniency applicants (including unsuccessful ones) should not be discoverable, even after the adoption of a final decision;
- the immunity recipient’s civil liability should be limited to claims by his direct and indirect contractual partners.

I. The White Paper’s basic premises

4. The WP starts from the premise that the right to be compensated for harm caused by an antitrust violation is a right guaranteed by the Treaty itself, as the Court of Justice has

stressed in its 2001 *Courage* and 2006 *Manfredi* rulings⁸. This statement itself is an important reminder because the idea that the right to damages finds its basis in Community law is resisted by some commentators, particularly in the German-speaking theory, who see this purely as a matter of national law, subject only to the Community principles of equality and effectiveness⁹. The Commission is now, however, unequivocal: there are many references to “*the establishment under Community law of a right to compensation*”, derived “*directly from Community law*” and to the fact that “*this European law remedy can as such not be refuted or conditioned by national legislation of any kind*”¹⁰. There is also a clear distinction between the existence of the right, which is a matter of primary Community law, and its exercise which is determined by national legislation but which the WP intends harmonising to a certain extent through secondary Community law¹¹.

5. Another fundamental quality of the WP is that it codifies and restates the existing *acquis communautaire* involving most aspects of the right to damages for EC competition law violations. This is of course a jurisprudential *acquis*. The ECJ *Courage* and *Manfredi* rulings are naturally prominent,¹² but there are also references to other case law that deals with many other questions of remedies and procedures available at national level for the enforcement of Community law. The Commission’s choice to dedicate whole sections of the WP to the presentation of the impressive *acquis communautaire* was a wise one. Firstly, because it shows that even if the whole initiative to introduce Community measures for private actions were abandoned, the existing *acquis* itself is a Community minimum from which there can be no departure, and secondly, because it acts as a powerful support and starting point for Community legislation¹³.

6. Notwithstanding this *acquis communautaire* and the Community law basis of the right to damages, the WP recognises that there are various national legal and procedural hurdles and that therefore there is a need for a strong set of

8 Case C-453/99, *Courage Ltd. v. Bernard Crehan*, [2001] ECR I-6297; Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi et al. v. Lloyd Adriatico Assicurazioni SpA et al.*, [2006] ECR I-6619.

9 See further A.P. Komninos, *EC Private Antitrust Enforcement, Decentralised Application of EC Competition Law by National Courts* (Oxford/Portland, 2008), p. 170 *et seq.* See also in favour of the Community law basis of the right to damages, K. Lenaerts and K. Gutman, “Federal Common Law” in the European Union: A Comparative Perspective from the United States”, 54 *Am.JComp.L* 1 (2006), pp. 91-94, and para. 53 of AG Poiares Maduro’s Opinion in Case C-438/05, *The International Transport Workers’ Federation and the Finnish Seamen’s Union v. Viking Line ABP and OU Viking Line Eesti*, Judgment of 11 December 2007, not yet reported, which, referring to *Courage*, clearly speaks of a claim “based directly” on Community law.

10 SWP, paras. 308-309, emphasis added. See also section 1.1 of the WP.

11 *Ibid.*, para. 309.

12 For the idea that *Courage* and *Manfredi* already provide at Community level for an exhaustive list of the “constitutive conditions” of the right to damages, see Komninos, *supra* note 10, pp. 173-176.

13 Indeed, an argument that is often heard in favour of Community legislation in this area, is that if Community legislation does not step in to deal with the conditions of the exercise of the right to damages (positive integration), the ECJ would have to do this in any way through the preliminary reference procedure (negative integration).

12. Irrespective of the critique that can be made against this rather inflexible US judge-made rule,²³ in the European context of damages claims, the constitutional status of the Treaty competition provisions and the fact that they form the basis of rights for individuals, mean that the US theories could not have been adopted uncritically. Thus, the *a priori* exclusion of indirect purchasers from the ambit of the persons who can claim damages would not have been compatible with Community law and the WP now recognises this fully. Indeed, the Commission duly notes that the Court of Justice in *Courage* has stressed that it is open to “any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”²⁴. This was made clearer in *Manfredi*, where the Court of Justice rendered the debate about indirect purchasers obsolete by stressing, while defining the specific conditions of the right in damages, that all affected individuals enjoy standing to sue, derived directly from the Treaty. It is interesting here that the WP refers to the broad rule of standing not as a proposal but rather as part of the already-existing *acquis communautaire*²⁵.

13. Thus, in Europe, the solution will be the opposite from the US: both direct and indirect purchasers will have standing to sue (or indeed have such standing pursuant to the ECJ’s case law), but at the same time the passing-on defence will be available. The WP makes here a clear policy choice and places the compensatory objective above efficiency, although the US position is that it is more efficient to entrust direct purchasers with the bringing of civil antitrust claims. Whether this reflects a conviction within the Commission that the US rule is flawed or it merely makes a virtue of necessity, bearing in mind the latest ECJ case law and the little space it left for the Commission with regard to standing, is not so important.

14. Allowing the passing-on defence is a logical consequence of the broad rule of standing, otherwise, as the WP accepts, there would be a risk of unjust enrichment of those purchasers that passed on the illegal overcharge to their customers and of multiple compensation of the overcharge²⁶. At the same time, the WP stresses that the standard of proof for the passing-on defence should not be lower than the claimant’s standard to prove the damage. Under this model, the plaintiff must prove that he has suffered loss, but it is open to the defendant to prove that the plaintiff mitigated the loss by passing on the whole or part of the overcharge to downstream purchasers.

15. Finally, since difficulties also arise when the indirect purchaser invokes the passing-on of the illegal overcharge as a basis of his claim (“offensive passing-on”), the WP proposes

23 The problem with the total exclusion of indirect purchasers is that there may be times when the direct purchasers benefited from the infringement and are not at all inclined to sue. In this case the main victims remain the indirect purchasers.

24 *Courage, op.cit.*, para. 26, emphasis added.

25 SWP, paras. 33-37. Of course, the broad rule of standing does not affect the necessity of a causal link between the harm and the infringement of Articles 81 and 82 EC. See SWP, paras. 37 and 205.

26 SWP, para. 210.

the introduction of a rebuttable presumption that the overcharge has indeed been fully passed on to the plaintiff - indirect purchaser. This is intended as an alleviation of the victim’s burden of proof, without, however, affecting the main conditions of civil liability: in other words, the plaintiff would still have to prove the infringement, the existence of the initial overcharge and the extent the overcharge caused him harm (including causation)²⁷.

III. Collective claims – Class actions

16. The second most important proposal of the White Paper is to introduce at Community level collective relief mechanisms. The absence of such mechanisms in Europe has been one of the main perceived reasons for the meagreness of private antitrust enforcement. The proposal is cautious: no opt-out class actions are envisaged. Indeed, the WP itself conspicuously avoids using the term “class actions”, even in their opt-in form, because of the negative connotations of that term for Europeans²⁸. Instead, it speaks of “representative” and “collective” actions.

17. “Representative actions”, on the one hand, are brought by qualified entities, in particular consumer associations but also trade associations, that are either (a) officially designated in advance by Member States to bring representative actions for damages on behalf of identified or identifiable victims, or (b) certified on an *ad hoc* basis by the public authorities of a Member State for a particular antitrust infringement²⁹. According to the Commission,

“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)”³⁰.

18. An issue will be mutual recognition of such certified or designated entities among the Member States, so that they could bring claims in the territory of another Member State. The SWP foresees, indeed, a Community measure to ensure

27 SWP, para. 220.

28 In US class actions, one or more persons belonging to a broad class of persons that have been harmed by anti-competitive practices bring an action on behalf of the unidentified class of persons, although the former might not have asked for the permission of those persons individually. An injured party is thus assumed to be included in the class unless he chooses not to be (opt-out). The judgment, however, has *res judicata* effect for all members of the class, even for those who did not take part in the process, after some formalities are seen to.

29 In the latter case, the WP advocates a cautious approach: certification should be limited to entities whose primary task is to protect the defined interests of their members, other than by pursuing damages claims and which give sufficient assurance that abusive litigation is avoided (SWP, para. 53).

30 SWP, para. 49.

such mutual recognition. This is likely to be achieved through a Directive, which will probably be setting certain criteria for mutual recognition of designated or certified entities.

19. “Collective actions”, on the other hand, are opt-in mechanisms whereby the victims expressly decide to combine their individual claims in one single action. The WP sees such actions as quite attractive in terms of a cost-benefit analysis, since it allows the victims to share the costs but be compensated for the integral part of their harm. Both representative and collective actions would be mutually complementary means of collective redress³¹. One remaining issue is the interrelationship between individual or opt-in collective actions and representative actions³². Since representative actions are brought on behalf of identified or even identifiable victims that are not themselves litigants, the latter could still bring an individual action or be part of an opt-in collective action. The WP is mindful of the problem of over-compensation and duplication of actions but is hesitant to propose any rule of precedence. Indeed, it prefers not to deprive “individual victims” of their right to bring such actions at all times³³. This is certainly a serious gap that should be tackled at some point. The problem cannot be resolved, as the Commission seems to believe, merely by expressing a wish that qualified entities bringing representative actions for damages be under a duty to use effective mechanisms for informing the victims they represent³⁴. Some more hard law rule of precedence/pre-emption should be adopted here.

20. In any event, the WP proposals are certainly not controversial and point to measures that are very different from US opt-out class actions. They are, nevertheless, groundbreaking, since they may well lead to the first Community measure – a Directive in all likelihood – to introduce a system of collective relief in Europe. The WP also makes it highly likely that these proposals will not be superseded or pre-empted by a Community cross-sector collective relief mechanism for consumers. There is in fact such an initiative currently in progress at the Commission, but after the publication of this WP, notwithstanding the WP’s rather hesitant if not cryptic attitude,³⁵ our guess is that the Commission will go on with sector-specific harmonisation measures for collective relief only for competition law violations, without attempting first to introduce more general collective relief measures, something which can take quite a lot of time.

31 SWP, para. 60.

32 No issue arises as between individual and opt-in collective actions, since in both the claimant is a litigant in his own capacity and would therefore be precluded by *lis pendens* or *res judicata* from bringing one action after another.

33 SWP, para. 61.

34 SWP, paras. 61 and 49.

35 See paras. 62-64 of the SWP; compare also section 2.1 of the WP.

IV. Measures to facilitate access to evidence

21. In our view, the most groundbreaking change advocated by the WP is giving the courts increased powers to order disclosure even when the plaintiff has not fully substantiated his claim with the required evidence. In common law jurisdictions, such as the US, which are based on “notice pleading”, discovery is much more substantial. There, the plaintiff must only give the defendant notice of the nature of his claim for him to require discovery. In civil law jurisdictions and also in the United Kingdom, on the other hand, civil procedure is based on the system of “fact pleading”, which means that parties must set out in reasonable detail the relevant facts of their case and describe the specific evidence to be offered in support of their allegations.

22. The WP stresses that competition cases are particularly fact-intensive and that they 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”³⁶. For those reasons, the WP in effect proposes a certain departure from the “fact pleading” system and advocates a greater role for the courts to order the defendant to reveal the evidence in his possession, including “categories of relevant evidence”, which is essential for the plaintiffs to prove their case for damages.

23. The conditions for a disclosure order are that the plaintiff has:

- presented all the facts and means of evidence that are reasonably available to him, provided that these show plausible grounds to suspect that he suffered harm as a result of an infringement of competition rules by the defendant;
- shown to the satisfaction of the court that he is unable, applying all efforts that can reasonably be expected, otherwise to produce the requested evidence;
- specified sufficiently precise categories of evidence to be disclosed; and
- satisfied the court that the envisaged disclosure measure is both relevant to the case and necessary and proportionate.

In addition, discovery should exceptionally be ordered not only *inter partes* but also against third parties under a more stringent test of proportionality and only if the information is not available from the litigants³⁷.

36 SWP, paras. 65-66.

37 SWP, paras. 122-124.

24. Although the WP is eager to present the proposals as part of the “fact pleading” system, it is fair to say that these specific measures constitute in effect the introduction of some elements of “notice pleading”, under the control of the courts, which will have a margin of appreciation and will have the duty to verify, even *ex officio*, whether the envisaged discovery is relevant to the case as well as necessary and proportionate³⁸. This will make competition law litigation an interesting experiment in Europe³⁹.

25. The Commission gives an example of how it intends to ease plaintiffs’ access to evidence:

“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.”⁴⁰

“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.”⁴¹

This example shows how far-reaching the proposed changes in the national civil discovery systems may be.

V. The interaction with the leniency programme

26. The particular question of reducing the civil liability of successful leniency or immunity applicants is quite complex and goes to the core of the relationship of public with private enforcement. It also touches upon the fundamental issue of the

objective of private antitrust damages actions: if the paramount objective is compensation, then limitations of a successful immunity beneficiary’s liability will be difficult; if, on the other hand, the main objective is deterrence and effectiveness of enforcement as such, then it will be easier to protect the integrity and attractiveness of the leniency programme by limiting civil liability. The 2005 Green Paper on damages had examined two options. One was to grant a successful immunity applicant the option to claim a rebate on any damages claim facing him, in return for helping claimants bring damages claims against all cartel members⁴². The claims against the other infringers, jointly and severally liable for the entire harm, would have remained unchanged⁴³. The other option was to remove joint and several liability for the successful immunity applicant and limit his liability to the share of the harm corresponding to his share in the cartelised market⁴⁴.

27. The WP, however, no longer pursues any of these options⁴⁵ and makes instead a surprising proposal that was never discussed in the Green Paper: limiting the civil liability of successful immunity recipients⁴⁶ to claims by their “direct and indirect contractual partners”. In other words, the immunity recipient would be liable only to persons that bought directly from him the products or services in question (direct contractual partners) or those down the supply chain who bought these products or services from the direct contractual partners themselves⁴⁷. Thus, a victim that did not buy cartelised products or services⁴⁸ directly or indirectly from him and, more interestingly, a harmed competitor, will not be able to claim damages. At the same time, this rule would in effect remove the immunity recipient’s joint liability,⁴⁹ since, as the Commission, explains in an example, “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”⁵⁰.

42 Option 29 of the Green Paper.

43 If there had been a system of double damages for horizontal cartels, this rebate would have de-doubled the award for the immunity recipient, thus restoring single damages as the content of the claim which he faces.

44 Option 30 of the Green Paper.

45 While the WP stays clear of any proposal to introduce punitive damages at Community level, such damages may be available under national law, so it is desirable to include some protection for immunity recipients from national punitive damages awards.

46 This proposal does not cover the other leniency applicants that did not receive full immunity.

47 SWP, para. 305.

48 An issue is what happens with cartels that do not involve sale of goods or services to contractual partners (e.g. a cartel not to sell in a particular market to a particular client).

49 The WP considers that removal of joint liability by itself is not sufficient to effectively limit the immunity recipient’s liability (SWP, para. 304). Compare, however, para. 322 of the SWP, where removal of joint liability is surprisingly mentioned as a separate proposed measure. Perhaps the reference in paragraph 322 was left in from a previous draft by mistake.

50 SWP, fn. 160.

38 SWP, para. 107.

39 The WP also takes into account the necessity to allow some degree of protection to business secrets and other confidential information. The courts should therefore balance the above against the victims’ right to be compensated under a proportionality test. See further SWP, para. 116.

40 SWP, para. 102.

41 SWP, para. 106.

28. This is certainly a novel proposal that will create a lot of discussion. It is a solution that, to our knowledge, finds no other parallel. The question is whether the limitation of the right of competitors and others not falling under the Commission's definition of "direct and indirect contractual partners" is at odds with primary Community law, i.e. with the Treaty itself and the ECJ rulings in *Courage* and *Manfredi*, which stress that the right to damages should be open to "any individual".

29. In principle, while some compromise between the principle of effective judicial protection (compensation of all harmed individuals) and effectiveness of competition law enforcement (safeguarding of the effectiveness and attractiveness of the leniency programme) is desirable and Community law can accommodate this, a secondary Community legislative measure (in this case most likely a Regulation) cannot result in the total exclusion of the right to damages for certain categories of persons, as guaranteed by primary Community law. For example, the limitation of the joint liability of the successful immunity recipient in case of a civil claim for damages against all cartel members and thus his protection from the risk of the other cartel members' insolvency, does represent a sensible solution and primary Community law would not stand in the way. Similarly, protecting this undertaking from potential punitive damages at national level, or at Community level, should the Community proceed to the introduction of such a system in the long term, would not raise concerns, because the Community right to damages could still be exercised by all harmed individuals with regard to the immunity recipient's liability to pay single damages for the part of the damage that is attributable to him.

30. The problem here is that the WP proposes to totally bar certain classes of individuals from claiming damages against an undertaking that has infringed Article 81 EC. In particular, it proposes that competitors and other potential plaintiffs, such as shareholders in derivative actions (assuming there is a causal link between the infringement and their harm) should not be able to claim damages from that undertaking.

31. If we look closer, however, at the proposed solution, we see that in reality the WP does not propose to affect the existence or exercise of those persons' right to damages against the other cartel members that did not receive full immunity from fines. Indeed, joint and several liability of these cartel members continues to be the rule, so they would still be jointly and severally liable to pay damages to a potential harmed competitor for the whole of his harm. Thus, in reality what the WP proposes is not to totally bar some persons from suing for damages but rather it would make those persons only slightly worse off by slightly increasing their risk in case of the insolvency of all or some of the other cartel members with the exception of the immunity recipient. This is a rather low risk⁵¹. In fact, irrespective of this WP proposal and of what primary

Community law dictates, all plaintiffs always bear the risk of all the cartel members' insolvency. So, it seems to us that the proposed solution would most likely not seriously affect the Community right to damages, while at the same time it would undoubtedly strengthen the effectiveness of one aspect of the leniency programme, the race to the authority to be the first undertaking that self-reports, thus ensuring full immunity status⁵². Being second or third would not only mean the loss of full immunity but also exposure to damages liability for the whole of the harm⁵³.

32. In fact, an even better solution would be to completely exclude the immunity recipient's liability also for claims by his direct and indirect contractual partners. Again, as above, this would not dramatically affect the exercise of the right to damages by these persons, since they could still claim compensation for the whole of their damage against the other cartel members, who would remain jointly and severally liable. As a safety valve, the law could provide that this total exclusion of liability would not apply to the exceptional case of insolvency by one or more of the jointly and severally liable (other) cartel members⁵⁴. While not affecting the right of compensation, such a solution would even more enhance the effectiveness of the leniency programme⁵⁵.

33. Besides, one must not forget that ensuring that the leniency programme remains attractive and thus effective is quite beneficial for private enforcement and potential plaintiffs. First, the plaintiffs become aware of the cartel infringement, which is more effectively exposed to the public authority by the leniency applicants, second, the facts are established during the administrative proceedings, third, courts or plaintiffs could under certain circumstances ask for documentary evidence in the hands of the public enforcer, in order to establish the liability and/or the damage, and fourth, a final public decision, depending on the applicable rules, may have a binding effect on the follow-on civil proceeding or may constitute *prima facie* evidence of the cartel violation.

34. Finally, the WP proposes to introduce protective measures against discoverability of corporate statements made or submitted by leniency applicants, regardless of whether the application for leniency is accepted, rejected or does not lead to any decision. This is certainly a less controversial proposal

51 The cartels that are prosecuted by the Commission under Article 81 EC are likely to concern activity and companies of a certain size and therefore the risk of insolvency of any of these companies is extremely low.

52 See also Impact Assessment Study, p. 521.

53 Note, however, that the Commission does not propose to disallow contribution among the (non-immunity recipient) cartel members.

54 In such a case, the plaintiffs would have to sue first the other cartel members and, in case of insolvency of the latter, they could then bring a new action against the immunity recipient for the part of harm that is attributable to him (in other words, removal of joint liability for him should here be the rule).

55 Of course, a debate is still possible, if one views *Courage* and *Manfredi* not only as authority for a Community right to damages available to victims but also as authority for a Community law obligation imposed on infringers (to compensate the victims). In that case, indeed, any exclusion of an infringer's liability to certain classes of victims would be contrary to primary Community law. In our view, however, the language in *Courage* and *Manfredi* (*op.cit.*, paras. 26-27 and paras. 89-91, respectively), which is rights- and not obligations-centred, and the underlined powerful rationale of effectiveness would allow for a compromise in order to safeguard the effectiveness of public enforcement and thus by implication the *effet utile* of Article 81 EC.

VII. Other proposals

38. A further incentive proposed by the WP is essentially to introduce a system of strict or objective liability for damages once an infringement of EC antitrust rules has been proven. A rule of strict liability seems, indeed, to have been accepted by the ECJ as the Community law rule in *Courage* and, more specifically, in *Manfredi*. The Commission here in reality refers to fault as to the occurrence of damage: in other words, plaintiffs will not have to prove that the defendant actually intended to cause or showed negligence in causing harm if the competition law infringement has been proven. This proposed measure, of course, does not eliminate the requirement of causation. The causal link between the antitrust infringement and the damage itself must still be proven.

39. The Commission also proposes to qualify the strict liability rule by allowing the defendants to exculpate themselves if their breach of the antitrust rules was due to an “excusable error”. However, the Commission views “excusable error” rather restrictively and it will remain to be seen how this whole rule will be applied by the courts. Particularly problematic may be liability in cases of unclear or novel abuses of dominant positions (monopolisation cases) or non-hardcore agreements which may have certain pro-competitive benefits but are considered on balance to be unlawful. In such cases, a strict liability rule with a very restrictive “excusable error” defence will give rise to serious concerns. Therefore, it is advisable that this defence be available to cover conduct which is not clear to be *a priori* anti-competitive. A horizontal co-operation agreement whereby the parties genuinely believed that they were acting lawfully or the conduct of a dominant company that is considered to be abusive for the first time should be such cases. To apply an unqualified strict liability rule to those cases would not only be unfair but also risk stifling healthy competition and innovation.

40. Another proposal is ensuring that in a case of a continuous or repeated antitrust infringement, limitation periods do not begin to run before the day on which the infringement has ceased. At the same time, the Commission proposes a rule under which 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. Finally, the WP includes an interesting proposal to introduce a new limitation period for follow-on civil actions of at least two years which should start to run once the infringement decision on which the claimant relies in his antitrust damages action has become final. As explained above, this would be either when 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 EC⁶³.

VIII. The way forward

41. The Commission has not indicated what legal basis it might use to implement its legislative proposals. This could be either Article 83(2) EC, which concerns measures to give effect to the

competition law provisions of the EC Treaty, or Article 65(c) EC, which concerns measures in the field of judicial cooperation in civil matters having cross-border implications. These are the two legal bases that best coincide with “the aim and the content of the measure” that is contemplated, as the ECJ requires for the adoption of Community legislative measures⁶⁴.

42. Article 83(2) EC provides for the Council’s adoption of appropriate measures to ensure the enforcement of EC competition law. However, whether an Article 83 EC-based measure could impose changes on national remedies and procedures is open to question. Of course, the text of Article 83(2) EC is quite open-ended, in so far as it merely gives five examples of areas where the adoption of regulations or directives may be necessary to give effect to the principles set out in Articles 81 and 82 EC and does not set out an exhaustive list. As a result, while the Commission could to some extent rely on the wording of Article 83(2)(e) EC, which provides for the adoption of such regulations and directives “to determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article”, the open-ended nature of Article 83(2) EC means it is under no obligation to base its proposed measure on this specific subsection⁶⁵.

43. Alternatively, the Commission could use as the legal basis Article 65(c) EC, which provides for measures “eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States”. This provision is sufficiently general to be an appropriate legal basis, but the Commission will doubtless choose its preferred legal basis mainly on strategic considerations. Article 83 EC requires only the support of a qualified majority in the Council, and the European Parliament is not brought into the legislative process with powers of co-decision, but must only be consulted. The use of this provision would also mean that the legislative measure would be adopted by the Council in a configuration that is more accustomed and friendlier to competition policy⁶⁶. At the same time, politically, the Commission may wish to provide the maximum legitimacy for the projected reforms and, therefore, it may wish to opt for the co-decision procedure of Article 65(c) EC. A further complication here is the fate of Regulation 1049/2001; if, as it is now very likely, the Commission decides to propose an amendment in order to introduce some restrictions to the exercise of the right of access to documents in competition cases, the Parliament would in any event have to be brought in, at least with regard to this specific amendment. ■

63 SWP, para. 239.

64 Case C 300/89, *Commission v. Council (Titanium Dioxide)*, [1991] ECR I-2867, para. 21. The Commission cannot base its proposal on a combination of the two because each legal basis provides for a different legislative procedure (co-decision under Article 65(c) EC, consultation under Article 83(2) EC). See *Titanium dioxide*, *op.cit.*, paras. 17 to 21.

65 Besides, Art. 83(2)(e) refers to the relationship between national competition laws and Arts 81 and 82 EC.

66 Ministers of National Economy and Finance (ECOFIN) or Competitiveness, as opposed to Ministers of Justice, in the case of Article 65 EC.