

**Response**  
**to the European Commission White Paper**  
**on Damages actions for breach of EC antitrust**  
**rules**

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**Department of Enterprise Trade and**  
**Employment on behalf of Ireland.**

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## **Introduction**

1. Ireland warmly welcomes the White Paper and the debate concerning the improved working and enforcement of Article 81 and Article 82 of the EC Treaty. The White Paper and consultation is a very useful means to identify the issues, options and possible actions for consideration by all Member States.
2. The White Paper suggests a number of options for consideration by, and possible action for, Member States in respect of their legal systems and sets out proposals for measures at the Community level.
3. Ireland fully endorses the objective of securing the effectiveness of Articles 81 and 82 by removing barriers that prevent private damages actions by those (consumers and businesses) who have suffered loss due to infringement of competition rules and for ensuring that a person's right to compensation for infringements of competition law is vindicated.
4. While public enforcement is essential, private enforcement with damages as a relief, has always been an important part of securing the effectiveness of both national and community competition law in Ireland. The private enforcement of competition law in Ireland is well-established and specific provision for such enforcement has been a feature of domestic Irish competition law from the enactment of the Competition Act, 1991. Furthermore, Irish law already makes detailed provision for many of the matters discussed in the White Paper. Criminal enforcement, within the public law remit, is also, of course, an important limb of enforcement in Ireland.
5. The options outlined in the White Paper concern domestic civil law and issues of procedure in domestic systems. The reference to 'procedure' ought not to obscure the fact that important issues of principle potentially arise. Choices on procedure frequently involve underlying and fundamental policy choices.

6. Many of the White Paper suggestions, whilst advanced in the specific context of Articles 81 and 82, raise broader questions concerning enforcement, empowerment and the administration of justice more generally.
7. Implementation of the proposals contained in the White Paper would, in certain respects (discussed in more detail below), involve significant alterations to Irish domestic law. It is not immediately apparent to Ireland what rationale there is for proposing such changes in the field of competition law only. Ireland acknowledges that competition litigation has its own specific characteristics - which are well-described in the White Paper. However Ireland would encourage the Commission to further explore the rationale for the creation of a special regime for competition litigation.
8. Given that the aim of many of the proposals is to incentivise private litigation, there is a clear need to consider the consequences and impact of those proposals. Increasing private litigation ought not to be regarded as a value in or of itself, and has consequences for public enforcement, the administration of justice and the economy, as well as society in general. Proportionate and balanced development and improvement of competition law enforcement, both public and private, is to be encouraged. Ireland considers that the consequences of any new measures should be studied by reference to their actual impact over time and to actual experience. It is suggested that Member State-led development may be preferable to Community intervention at this stage.
9. The White Paper and its proposals have been enormously helpful in stimulating debate in Europe around current procedures as well as fundamental issues of principle in the enforcement and the administration of Articles 81 and 82. Ireland looks forward to further discussions and further details on the proposals, and to the development of effective enforcement of competition law.

## Overview and background

### National and Community law

10. It is unsurprising that issues of principle arise when community measures are proposed in the sphere of national procedural law and the administration of the law in Member States. Before addressing each individual proposal, it is appropriate to comment briefly on these issues of principle.
11. As things stand, in the absence of Community rules or obligations, it is for the domestic legal system of each Member State to determine the procedural conditions governing private actions in respect of Articles 81 and 82. The procedural autonomy of Member States is, of course, a well-established aspect of Community law, subject to the requirements of effectiveness and equivalence.
12. Member States are required to ensure that the effectiveness of Articles 81 and 82 are secured and that the principle of equivalence between community and national competition law be respected. Member States are required to provide a remedy in damages to persons aggrieved by infringements of Article 81 or Article 82 in accordance with the judgements of *Courage and Crehan* [2001] ECR I-6297 and *Manfredi v Lloyd* [2006] ECR I-6619. The White Paper places significant reliance on those decisions, especially *Manfredi*. However, Ireland does not read those decisions as inviting, still less directing, the harmonisation of the procedural aspects of competition law within the Community. It is considered that what is proposed in the White Paper goes far beyond the issues considered in those decisions.
13. The White Paper does not identify what Article(s) of the Treaty the Commission is proposing be exercised. There is some uncertainty in that the nature and basis for the proposals cannot be evaluated in the context of the empowering Article or in light of that Article in the scheme of the Treaties as a whole. This is a significant lacuna in the White Paper.

14. There is no definitive indication in the White Paper as to whether the proposals are to be enacted, if pursued, by Regulation, Directive or other instruments. If the proposals are to be enacted, some further discussion as to measures appropriate requires consideration.
15. It is particularly important that the proposed legal basis for any intervention is clearly identified. As already observed, what is proposed in the White Paper is, in effect, a special regime for competition law litigation. However, many of the measures proposed – for instance those relating to collective redress, costs and limitation – are not, intrinsically, confined to the sphere of competition litigation. The implementation of a special regime for competition litigation will doubtless give rise to anomalies with the legal order of the Member States and create pressure to apply the new rules generally.
16. While the Commission is conscious of the requirements of subsidiarity and Article 5 of the EC Treaty, there does not appear to be any analysis at this stage of what is proposed by the White Paper and the requirements of Article 5. There appears to be no reference to subsidiarity in either the White Paper or the Working Paper.
17. In order to alter Member States' competency to determine national procedural rules in respect of the enforcement of law and the administration of justice, in respect of Articles 81 and 82, there should be a firm evidential basis for concluding that Articles 81 and 82 (and concomitant rights to damages for infringements) are being rendered ineffective by reason of national measures, and that the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Further, the extent of any change in competence, should be only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved at Community level. Any action by the Community, of course, should not go beyond what is necessary to achieve the objectives of the Treaty.

18. Given that many of the issues highlighted and proposals made are not intrinsically or uniquely linked to Article 81 or 82, but rather go to the administration of justice generally, the reasons for concluding that the objectives of the White Paper can be better achieved at Community level need to be clearly identified and substantiated by qualitative and quantitative indicators.

### **The *Manfredi* requirements and Irish domestic law**

19. The White Paper and its proposals are rooted in two decisions of the ECJ: *Courage and Crehan* [2001] ECR I-6297 and *Manfredi v Lloyd* [2006] ECR I-6619 which place obligations on Member States. Ireland's national law not only satisfies (and in some respect goes further) than the basic obligations described in *Courage and Crehan*, but also, in respect of *Manfredi*, the legislature foresaw the potential obstacles identified therein and provided appropriate solutions.

20. From a very early stage it has been recognised and accepted by Irish practitioners, judges and litigants that a breach of Articles 81 and 82 gave rise to a remedy in, amongst other remedies, damages. A breach of Article 81 or 82 of the EC Treaty is a breach of statutory duty which gives rise to a right of damages. By virtue of cases like *Manfredi*, Article 10 of the EC Treaty and the requirement of effectiveness and equivalence, a breach of Article 81 or 82 entitles a claimant to compensatory damages on equivalent terms to that applied to breaches of section 4 and section 5 of the Irish Competition Act 2002.

21. Section 14 of the Competition Act 2002, enacted prior to the *Manfredi* judgement, actually foresaw some difficulties which arose in that case. The provision provides solutions similar to the requirements set by the court in *Manfredi* and in some instances, go further in terms of securing the effectiveness of the remedy. There are no national provisions that render it

practically impossible or excessively difficult to exercise the right to seek compensation. It is noted that the White Paper does not refer to any national provision of any Member State which is said to render enforcement of Articles 81 and 82 in breach of the requirements of effectiveness.

## **White Paper proposals**

22. The specific proposals in the White Paper will now be addressed. Please note, however, that what is offered below is strictly subject to the observations already made.

### **Standing: collective and representational actions**

23. This proposal raises serious concerns, both principled and practical.

24. In summary, as regards standing the White Paper makes two related proposals:

- (a) 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. (herein after called “*Representative actions*”)
- (b) Opt in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action, (hereinafter called “*collective actions*”)

25. The principal rationale provided for the proposals in the White Paper and Working Paper in respect of collective and representative actions, is that:

- Any individual is entitled to compensation as described in *Manfredi*.
- Individual consumers and small business are put off claiming damages when they have to act individually, in particular where the damages are ‘*scattered and relatively low value*’.
- Costs, delay, uncertainties, risk and burdens act as a deterrent value for individual action.

26. In principle, Ireland has no particular difficulty with the proposal for collective actions. Irish law already makes provision for actions of that nature in the form of Order 15, Rules 1 and 9 of the Superior Courts. These provisions, it should be said, are rarely utilised which could suggest a weakening of the White Paper’s basic premise that there is a real practical problem which requires to be addressed by the Community legislature.

27. However, little detail is given in the White Paper (or in the Working Paper) as to the precise operation of the opt-in collective action procedure contemplated by the Commission. In the event that the Commission resolves to bring forward legislative proposals in this regard, Ireland will make further observations at that stage.

28. The position regarding what the White Paper characterises as “*representative actions*” is quite different. While Irish law permits the Competition Authority to bring proceedings in respect of alleged breaches of Articles 81 and 82 (as well as breaches of the equivalent provisions of the Competition Act, 2002),<sup>1</sup> the Authority is precluded from seeking damages. Equally, it is likely that, in some circumstances at least, representative bodies such as trade associations or consumer groups would have sufficient standing to bring proceedings on behalf of its members seeking declaratory or injunctive relief in relation to alleged breaches of competition law (including Articles 81 and 82) but a claim

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<sup>1</sup> Section 14(2) of the Competition Act provides that the Competition Authority has a right of action in respect of an action, a practice or an abuse which is prohibited by section 4 or 5 of the Competition Act or by Article 81 or 82 of the EC Treaty.

for damages could not be maintained by such a body (other than in relation to damage suffered by itself). Where members of a representative body have suffered injury each member is required to sue for damages on an individual basis.

29. It is a fundamental and long-standing principle of Irish law that a party seeking damages must establish loss and/or injury to it and cannot (save in very limited circumstances such as where the person who has suffered loss or injury is a minor) sue in respect of loss or damage to another party. Indeed, the Irish law of torts (civil wrongs) recognises the specific torts of maintenance and champerty which are intended to prevent civil actions being taken for the benefit of a third party. While there are some enactments that enable penalties to be awarded to regulatory bodies, these are not in any real sense analogous to what is proposed in relation to representative actions in the White Paper.

30. The proposal for representative actions raise many practical issues which are discussed further below. Apart from such issues, the proposal raises very significant issues of principle and has very significant implications for the Irish legal order as identified above. In the circumstances, it would be helpful to have clear and cogent evidence that (a) there is a significant problem to be addressed and (b) that providing for representative actions of the nature referred to in the White Paper is the appropriate solution to that problem.

31. As regards (a), no empirical evidence is presented. Rather, the White Paper seems to proceed on an assumption that there are significant barriers to the bringing of litigation in Member States and the further assumption that that constitutes a “*problem*”. As to (b), the White Paper and the Working Paper do not present any actual data on the operation of the proposed model.

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<sup>2</sup> For example Regulation 32 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2003 (S.I. No. 307 of 2003) permits the granting of a “financial penalty” on the application of ComReg (the NRA).

32. Ireland believes that the proposal for representative actions raises significant issues relating to the administration of justice, and significant potential for misuse of process.
33. The rules and principles governing the exercise of any right to represent others and seek damages remains to be considered. The following issues arise: What if a body does not wish to commit resources to a particular action? There is no distinction in the White Paper between statutory or public bodies and private representative bodies, nor is there any consideration of the interaction with public law. Would a statutory body have to take actions where a matter fell within the statutory objectives set for it? If there is discretion, how is that discretion to be exercised? Are reasons to be given where the body does not wish to bring an action? Would the provision of representative services be a service that representative bodies should compete on? How are such actions to be financed in the case of a public body? Is it to be out of central funds? Who bears the risks of litigation by authorised public bodies? Is it appropriate for the State to finance and bear the risks of litigation in respect of statutory body representative actions, while private representative bodies must seek finance from their members who may ultimately bear the litigation risks? What impact is there on private parties bringing proceedings of empowering representative actions? What would the effect be in terms of public confidence on the public body carrying out other duties and public services, if the body was to lose the case?
34. Significant issues regarding the distribution of damages in representational actions also arise. The basis on which damages are to be distributed is unclear. The suggestion that proceedings could be brought, at least in certain circumstances, on behalf of unidentified claimants is a cause of concern, as is the suggestion (para. 56 of the Working Paper) that damages might, in lieu of being *“used .. to directly compensate the harm suffered by all those represented in the action”*, be *“distributed to related entities or used for related purposes.”* What such *“related entities”* and *“related purposes”* might be is not addressed. However, it appears to that these aspects of the proposal involve a fundamental departure from the conception of private enforcement

of competition law as remedial or compensatory (a point indeed made by the Court of Justice in *Manfredi*) and, in substance if not in form, would seem to involve a punitive element that is, in Irish law terms, both novel and difficult.

35. It is unclear from the White Paper if the proposed representative action model is based on opt-in or opt out, or no-opt-out (i.e. membership of body alone empowers actions to be brought and the only opt-out is to leave the body) and clarification of that question would be welcome. The “*opt-out*” approach raises significant issues which require to be addressed, particularly in conjunction with the proposal that proceedings might, in certain (unspecified) circumstances, be brought on behalf of “*identifiable*” – that is to say unidentified – claimants. Would a potential claimant who failed to exercise an “*opt-out*” be bound by the determination of the representative action taken on its behalf or would it be free to bring proceedings on its own behalf? The former would appear to represent a significant interference with the rights of the claimant; the latter, however, would involve a double compensation
36. Ireland notes the suggestion that only “*qualified entities*” should be permitted to bring representative actions and would welcome further guidance as to the criteria for qualification including, are those criteria to relate to reliability or propriety, or factors such as legal qualification, resources, expertise, skill, or a mixture of both? While the Commission’s recognition of the need to avoid abusive litigation is welcome, the actual achievement of that objective may well be difficult in practice. In that context, Ireland notes that, while the Working Paper makes reference to a mutual recognition system, the White Paper is silent as to whether an authorisation would apply in just the “*awarding*” Member State or whether it would have a cross-border status. If the latter, the effect would be to significantly interfere with the jurisdiction of Member States and national courts in relation to standing before the Court and Ireland is not currently persuaded that any adequate basis for such an interference has been demonstrated.
37. Ireland notes that a separate consultation process is underway in relation to consumer collective redress. The Department considers that the issue of

introducing a representative action of the nature referred to in the White Paper ought to be considered further in the context of that consultation process. Ireland looks forward to making a contribution to that consultation process in due course.

**Access to evidence – disclosure *inter partes*:**

38. Two central proposals are made in the White Paper. First:-

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.

39. Secondly, conditions for disclosure are prescribed and 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.

The model suggested in the working paper is taken from Article 6 of the Directive 2004/48 on the enforcement of intellectual property rights (IP Directive).

40. Discovery in Ireland is largely governed by the Rules of the Superior Courts (No. 2) (Discovery), 1999<sup>3</sup> The Working Paper correctly characterises the discovery regime in this jurisdiction as a “*comprehensive set of rules on disclosure of evidence in the possession of the opponent or third parties.*” While no special rules apply to discovery in competition law cases, the Supreme Court has acknowledged that particular considerations may apply in such cases.<sup>4</sup>
41. Ireland believes its discovery regime comfortably meets (in fact exceeds) the requirements set out in the White Paper. Save in respect of one matter, the proposals in the White Paper will not therefore give rise to any practical difficulty in this jurisdiction.
42. The White Paper proposal presents a difficulty as far as this jurisdiction is concerned, namely the (proposed) requirement that a party must show as a condition precedent to getting disclosure that it “*has presented all the facts and means of evidence that are reasonably available to him*”.
43. As a matter of Irish law, there is no such pre-condition to the making of a discovery order, whether in competition law cases or otherwise. Discovery is essentially based on the pleadings and the Court does not ordinarily involve itself in any assessment of the evidence available to the parties, or the merits of their respective positions, in considering applications for discovery. A requirement for the production of evidence would, in Ireland’s opinion, be unduly restrictive and, in addition, would require a significant alteration of Irish discovery rules in circumstances where no objective need for such an adjustment has been demonstrated and would not be favoured.

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<sup>3</sup> S.I. No. 233/1999

<sup>4</sup> *Ryanair Ltd v Aer Rianta Cpt* [2003] 4 IR 264. *Framus Ltd –v- CRH Plc* [2004] 2 IR 20.

## **Binding Effect of NCA decisions.**

44. It is proposed that:

“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.”

45. The proposal is stated in terms of a court not ‘*taking a decision running counter to such a decision or ruling*’. The White Paper seems to go somewhat further when it says:

“[t]he Commission sees no reason why a final decision on Article 81 or 82 taken by an NCA in the European Competition Network (ECN)...finding an infringement should not be accepted as *irrebuttable proof* of the infringement in subsequent civil antitrust damages cases. [emphasis added]

46. The proposal is subject to a number of caveats and limitations:

- The obligation would be without prejudice to the right, and possibly obligation, of national courts to seek clarification on the interpretation of Article 81 or 82 under Article 234 of the EC Treaty. Thus where an Irish court disagreed with an NCA final decision on question of interpretation of Article 81 or 82, it could make an Article 234 reference.
- It only applies to final decisions (i.e. after any appeal or review, or the time limits have expired).
- It only applies to “*the same practices*” (though the precise import of that expression remains unclear).

- It only applies to the undertakings for which the NCA or the review court found an infringement.
- The Commission indicated that they will *consider* a proposal as regards deviating from NCAs' final decision in exceptional cases as regards a breach of fair legal process, expressed as follows:

“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(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.”

47. The justifications for the NCA proposal are made by reference to costs and efficiency. The primary rationale for this proposal is stated in terms of the situation without such a rule:-

“if defendants can call into question their own breach of Article 81 or 82 established in a decision of an NCA, and possibly, confirmed by a review court, the court seized with an action for damages are required to re-examine the facts and legal issues already investigated and assessed by a specialised public authority (and a review court).”

48. In addition the following are given as other reasons:

- By reason of Regulation 1/2003 and established case law complainants can rely on a decision of the European Commission as binding proof in civil proceedings for damages and there is no reason not to extend this to National Competition Authorities in the ECN network
- It would ensure a more consistent application of Articles 81 and 82.

- It would increase legal certainty.
- It would increase effectiveness and procedural certainty.

49. The Working Paper takes the view that:-

“...the Commission considers that effective facilitation of antitrust damages action requires the introduction of such a binding effect for the decision of all NCAs establishing an infringement of Article 81 or 82 EC.”

50. It further states in the Working Paper that the proposal would:

“...complement the mechanisms safeguarding the consistent application of Articles 81 and 82 EC provided for in Regulation 1/2003.”

51. In Ireland the Competition Authority, the Commission for Communications Regulation (Comreg) (in respect of electronic communications services and networks), the DPP and the Courts are designated<sup>1</sup> as competition authorities within the meaning of Article 35 of Regulation 1/2003 and exercise different functions as regard the enforcement of Articles 81 and 82. Essentially the Competition Authority (and, within its functional area, ComReg) operates the investigatory, prosecution and civil enforcement powers, whereas the Courts make legal determinations and may impose fines and give reliefs such as declaratory relief or the discontinuation or adjustment of a dominant position and damages. The DPP acts as prosecuting NCA in more serious indictable offences.

52. The conferring on the Courts alone of the power to determine competition proceedings, both civil and criminal, and to award damages/impose penalties, reflects fundamental Irish constitutional norms and requirements.

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<sup>5</sup> SI 195 of 2004 as amended by SI 525 of 2007.

53. The proposal attempts to link the approach of Article 16 of Regulation 1/2003 *as regards decisions by the Commission*. 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.”

54. Article 16(2) is a similar provision as regards national competition authorities:<sup>6</sup>

“When competition authorities of the Member States 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 which would run counter to the decision adopted by the Commission.”

55. Recital 22 of Regulation 1/2003 states 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”.

56. This is said in the White Paper to be a codification of the approach of the ECJ in *Masterfoods* case.<sup>7</sup> The obligation described in *Masterfoods* applies to the operative part of the decision which ‘*must be construed in the light of the statement of the reasons upon which it is based*’.<sup>8</sup> According to the White Paper, it follows that:-

“Commission decisions finding an infringement of Article 81 or 82 EC therefore constitute a sufficient legal proof of this infringement by the

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<sup>6</sup> Of which the Competition Authority, the DPP and the Irish courts have been designated as being.

<sup>7</sup> See Case C-344/98 *Masterfoods* [2000] ECR I-11369.

<sup>8</sup> Case T-266/97 *Vlaamse Televisie Maatschappij NV v Commission* [1999] ECR II-2329

addressee(s) of the decision in subsequent actions for damages before national courts.”

57. This aspect of the White Paper’s proposals would appear to involve a significant and radical transfer of judicial power, not to institutions established under the Treaties, but to administrative bodies and/or courts of Member States. It is thus unsurprising that the Working Paper records that concerns have been raised about a ‘*potential conflict of the principle of an independent judiciary*’. (para. 138).

58. While the particular role of national competition authorities in the enforcement of Articles 81 and 82 under Regulation 1/2003 is relied on as justifying this aspect of the proposal, the rationale offered is not, on analysis, confined to competition matters. National courts are community courts in the first instance in respect of community law generally. In Ireland, the District Court to the Supreme Court, apply directly applicable community law under the conditions stipulated under the Treaty. In that context there is no requirement (Treaty Article or enactment) that determinations of ‘*community courts*’ operating at the Member State level are binding on courts of other Member States in respect of community law/infringements. There is nothing in the White Paper which explains what is so unique about Articles 81 and 82 which sets them apart from other directly applicable Treaty provisions so as to justify the proposal.

59. The proposal also raises constitutional questions that require further consideration. It goes far beyond any issue of the recognition of a judgment of a competent court of a Member State: the recognition of such judgements is, of course, already provided for in Council Regulation 44/2001. What is proposed here is not the recognition of a final decision of a competent court of another Member State as to the rights and obligations inter se of the parties to proceedings before the Court; rather, what is proposed is that courts of one Member State should be bound to give effect to a decision of the NCA of another Member State for the purposes of determining proceedings before the former, regardless of whether the NCA in question was a court or an

administrative body. For the reasons already explained, that raises significant constitutional issues in Ireland. As a matter of Irish constitutional law, justice must – with very few and limited exceptions – be administered by the courts. It would not be competent for the Oireachtas (Irish Parliament) to confer on an administrative body, such as the Competition Authority, a power to adjudicate in competition law proceedings and/or to award damages. That is the preserve of the courts established under the Constitution. A fundamental aspect of the administration of justice by those Courts is their independence. The proposal that those Courts would be bound by the determination of an NCA of another Member State thus raises multiple difficulties from a constitutional point of view.

60. The White Paper does not identify any other community enactment or Treaty Article which transfers binding judicial powers to decision makers from other Member States in the manner proposed and there is nothing in *Manfredi* which supports it.
61. The proposals in respect of NCA final decisions raise questions surrounding the ambit and scope of Article 83. In this regard, subsection (d) is of some assistance, referring as it does to the respective functions of the Commission and of the Court of Justice. It is unclear if the horizontal regulation of administrative and judicial power is contemplated by Article 83 or the Treaty as a whole (having regard to Article 10 and Article 65 of the EC Treaty in particular). There is no express provision contemplating the NCA proposal and there is nothing in the scheme or purpose of Article 83 to suggest that it empowers the community legislature to require decisions of bodies and courts from Member States to determine issues before other bodies and courts of other Member States.
62. The Court in *Masterfoods* referred to Article 10 of the EC Treaty stated that if the case before the national court is already subject of a Commission decision, the national court cannot rule contrary to the Commission decision. It made no reference at all to the decision of national courts (or administrative bodies) and their effect on the proceedings in other Member States. On one view of

the *Masterfoods* case, the ECJ acknowledged that, national courts cannot, strictly speaking, be bound directly by a Commission decision, but only indirectly through the Court of Justice's intervention, to which they can always have access by means of the preliminary reference procedure. Judge Cooke has expressed this point extra-judicially:

'Community law is interpreted and applied by the Court of Justice. It does not follow from this principle that the Commission is infallible. Whether or not an administrative decision of the Commission must be followed as embodying superior law depends not on the fact that the Commission has adopted it, so much as upon the fact that it has been upheld as valid by the Court of Justice'.<sup>9</sup>

63. The primacy of Commission decisions is therefore rooted in the Community Courts: the Court of First Instance which reviews Commission decisions, and the Court of Justice which rules on appeal and gives preliminary rulings on the interpretation and validity of Community law. NCAs are not subject to Article 230, Article 232 or Article 241 of the EC Treaty by the European Courts, so the argument of the primacy of the European Court of Justice in *Masterfoods* is questionable.

64. NCAs are not '*Community organs*' under Article 10. Article 10 cannot cover the cooperation between national competition authorities and national courts Article 10 does appear to envisage a '*horizontal*' duty of cooperation between competition authorities and courts of different Member States, and if such a duty is implicit it is duty of cooperation and no more.

65. Examining the scheme of the Treaty as a whole and in particular Article 65 of the EC Treaty,<sup>10</sup> there is a mandate for cooperative judicial relationship as between Member States. There is nothing in the Treaty, in Article 10 or in

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<sup>9</sup> Cooke 'Centralised Subsidiarity: The Reform of Competition Law Enforcement, (2000) 10 IJEL 4, p 19

<sup>10</sup> A. 65 is situated in Title IV of the Treaty, concerning visas, asylum, immigration and other policies related to the free movement of persons. It is not clear if could be used in respect of the NCA proposal and in the context of A. 81 and 82.

Article 65 to suggest that decisions of national courts (or administrative bodies) should bind other national courts. The express wording and scheme of Article 65 as a whole emphasises cooperation and compatibility rather than a Member State court being bound by another Member State court or administrative body, as now proposed in the White Paper. On one view it is difficult to reconcile the NCA proposal with the finely drafted balance in Article 65 and its cooperative approach in respect of horizontal relations between Member State courts and administrative bodies.

66. The current relationship between national competition authorities (including courts where designated) is governed by Regulation 1/2003 and the Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC. Regulation 1/2003 establishes the Competition Network made up of the Commission and the designated competition authorities in Member States. Decisions by national competition authorities cannot, as a matter of existing Community law, bind national civil courts, even when those authorities act in the framework of Community competition law under Regulation 1/2003.
67. In light of Article 11, recital 15, and the entire scheme of Regulation 1/2003 as a whole, the obligation of cooperation applies as between NCAs in the Network, and not only as between the Commission and individual NCAs. There is no evidence to suggest that this is not working or that, the close cooperation required by Article 11(1) is failing or leaving aggrieved persons without a remedy. Regulation 1/2003 and by the Commission Notice establish some detailed rules by which cases are to be allocated (or shared) as between NCAs, and NCAs and the Commission. As with the proposal for representative action which has been considered above, it seems to Ireland that the White Paper is advancing a “*solution*” which raises very significant issues without fully demonstrating that there is, in fact, a real, identifiable “*problem*” requiring intervention of the nature proposed.
68. In contrast to the prohibition on NCAs applying Articles 81 or 82 once the Commission has initiated proceedings, Regulation 1/2003 *permits* rather than

*obliges* NCAs to suspend proceedings or reject a complaint in favour of another NCA. This discretion raises its own issues for courts. Suspending proceedings or rejecting a complaint is not necessitated by Regulation 1/2003. A court (acting as a NCA) might, in determining whether to exercise that discretion, consider that Plaintiffs and Defendants are guaranteed access to the Irish courts and the Plaintiffs or Defendants might well want to proceed and exercise their right to access the courts and continue with their proceedings. The possibility of different NCAs carrying out functions (including making determinations) in respect of the same practice of the same undertaking is not prohibited by Regulation 1/2003.

69. The White Paper and Working Paper cite the protection of Article 234 as one limit on the NCA proposal. Article 234 provides, in so far as is relevant to the jurisdiction to give preliminary rulings, that:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

70. Unlike the Commission decision which is subject to both Article 234 (a) and (b), in respect of NCA decisions, where the proposal to be enacted, all that would appear to arise in respect of an NCA is the interpretation of Articles 81 and 82 by the NCA. That is to say Article 234(b) does not apply to NCA decisions. If that is correct, Article 234 provides less oversight and protection for NCA decisions than it does for the expert institutional body under the Treaty, the Commission. Other remedies (Article 230, Article 232 or Article 241) available under the Treaty as regards Commission decisions would not appear to apply to decisions of NCAs. One question that therefore arises from

these anomalies is whether the NCA proposal is compatible with the scheme of the Treaty treated as a whole.

71. On one view the Treaty envisages acts of a Community organ which is subject to the ECJ/CFI and the safeguards of the Treaty having primacy over the decisions of national organs, and may not necessarily envisage an NCA having primacy over other NCAs, including administrative NCAs over national courts. It is to be recalled that one view of the *Masterfoods* case places the duty on a Member State court to abstain from taking decisions which run counter to a decision of the Commission stems from the fact that the Commission is a Treaty institution subject to the community courts in the manner prescribed and provided for in the Treaty.
72. A significant purpose of Regulation 1/2003 is, of course, to involve national courts in the process of private enforcement and to place national courts at the heart of the application and enforcement of Articles 81 and 82. However, the NCA proposal would actually reduce the jurisdiction and competency of national courts in private actions to a role of assessing damages, and away from the central role envisaged for national courts under the Treaty and Regulation 1/2003.
73. The necessity for harmonised action generally and/or the necessity for the NCA proposal requires further demonstration by the Commission. There is little by way of quantitative or qualitative evidence in the Working Paper to suggest that the results to be achieved cannot be achieved by less radical means.
74. There is also little by way of evidence to justify treating Articles 81 and 82 any differently from any of the other Treaty Articles to which the national courts (and administrative bodies) bear primary responsibility at first instance. Regulation 1/2003 already imposes a duty of cooperation as between NCAs and there is no evidence in the White Paper that the proposal is required because those duties are being, or are likely to be, breached.

75. Staying with necessity, under Article 10, Member States have a duty of cooperation and must collaborate actively by adopting all general or particular measures to ensure the implementation of Community law and Member States have an extensive obligation to abstain from all measures that could jeopardize the attainment of the objectives of the Treaties; the Member States must facilitate the achievement of the Community's tasks and there is no evidence in the White Paper that the proposal is required because those duties are being, or are likely to be, breached.
76. There is no evidence in the White Paper that the removal of procedural autonomy and radical change in the relationship between national bodies charged with the application of Treaty Articles is proportionate to, or necessitated by, the perceived benefits of the proposal.
77. A viable alternative to the proposal, which reduces the constitutional questions, would be a proposal that national courts and competition authorities would be required to take judicial notice of any final decision of another NCA in respect of the "the same practices" of the same undertakings. Indeed, even without legislative intervention, this may well be the practical effect of a determination abroad by courts or NCAs about particular practices by specified defendants, which are the subject of follow-on proceedings. That approach is to be seen in the context of the establishment of the European Competition Network (ECN) which provides a medium and structure for that to take place, and in the context of the requirements for cooperation in Article 10 and in Regulation 1/2003.
78. The proposal raises a number of practical questions, which are not addressed either in the White Paper or in the Working Paper:
- For how long would the NCA decision be binding?
  - Would a final NCA decision be capable of being departed from by the NCA or appeal/review court in a Member States own jurisdiction; would it apply if the NCA made a patent error, e.g. applied a repealed enactment, an annulled

enactment or a decision of the CFI rejected subsequently on appeal to the ECJ; would a decision be binding where it failed to consider, ignore or was in breach of a decision of the ECJ or CFI or otherwise (e.g. by breach of Regulation 1/2003)?

- Would a final NCA decision, which was procedurally in error or wrong in fact or law (for example where an irrelevant consideration determined the final decision/where the CFI or ECJ had made a determination on a particular), be binding?
- Would a decision be binding where subsequent ECJ or CFI dicta threw doubt on its merits, in law or the procedure applied; would it apply if a new or un-argued point arose ?
- Would it apply to subsidiaries or related company defendants: would they be considered to be “the same infringers” for the purposes of the proposal?
- Would it apply notwithstanding economic, market, legal and factual differences in different Member States?
- Would the determination in respect of each and every element required by Articles 81 and 82 bind national courts
- The White Paper makes clear that what is proposed is that a decision would be ‘*final*’ where appeal time limits have expired, and not just where appeal/review options had been exercised. This could render a court in one jurisdiction subject to a determination of an administrative body in another, and the harmony of such a scheme, where the court in its own jurisdiction would not be bound by its own competition administrative authority, remains to be considered
- What precisely is meant by “*the same practices*”?

79. Another issue that arises is the evident asymmetry of the proposal. It appears from the White Paper that a final NCA decision to the effect that Articles 81 and/or 82 has **not** been infringed would not bind NCAs in other jurisdictions, even where the other requirements for recognition were satisfied. It is difficult indeed to understand the rationale for such an approach, which appears to be wholly unfair to defendants and discriminatory. The Working Paper suggests at para 152 that the proposal does not relate to such decisions because Article 5 of Regulation 1/2003 does not list that as a '*decision*'. However, Article 5 entitles NCAs to apply Articles 81 and 82 and it would appear to follow that NCAs are empowered when making a determination to find that a practice does not infringe Article 81 or 82. In any event, the provisions of Regulation 1/2003, however they are to be construed, would not provide any substantive justification for the distinction proposed between the binding effect of findings of infringement and findings of non-infringement.

80. A further issue which arises is whether a Member State should be obliged to give effect to the decisions of NCAs in other Member States where to do so would offend against the public policy of the Member State concerned. It would seem essential that such an exception be provided for, by analogy with provisions such as Article 34(1) of Regulation 44/2001 and Article 26 of Council Regulation EC/1346/2000.

### **Fault**

81. Ireland notes with interest the discussion of this issue in the White Paper and the Working Paper. However, "*fault*" in the sense used in the White Paper is not as such a requirement of Irish law and Ireland does not consider that it can make any useful contribution to the discussion at this stage. Ireland looks forward to further examining and making observations and submissions on any provisions if drafted.

### **Damages**

82. The first aspect of the proposal here is for the codification in a Community legislative instrument of the current *acquis communautaire* on the scope of

damages that victims of antitrust infringements can recover. Ireland notes that this issue has been recently clarified by the Court of Justice in *Manfredi* .

83. The White Paper also includes a proposal to draw up a “*framework with pragmatic, non-binding assistance in the task of quantifying damages in antitrust cases, both for the benefit of national courts and the parties.*” Ireland would welcome the production of such a framework and believes that it could be of considerable assistance to litigants and their advisers and to the Courts of Member States. It is important, however, that this framework should be non-binding and that it avoid being unduly prescriptive and Ireland looks forward to contributing to future discussions on this issue.

### **Passing-on charges:**

84. Ireland is in broad agreement with the proposals and the rationale behind the proposals. What is proposed would apply in respect of any claim brought in Ireland arising from the general law on damages in most cases. In a civil action concerning a breach of Irish competition rules, damages would generally be assessed on the basis of injury suffered.<sup>11</sup> The assessment of damages for breach of statutory duty is not currently legislated for in Ireland. The general approach is to leave the method and rules as to the calculation of damages to the courts. Where a person seeks damages for infringement of Articles 81 and/or 82 in Ireland, Irish courts apply European jurisprudence, and the requirements described in *Manfredi* which require damages for actual loss and for loss of profit.

85. As regards so called ‘*offensive passing on*’, the proposal is worded in terms of illegal overcharges, and clarification is sought as to whether other costs arising from infringements of Article 81 or 82 which can not be classed as ‘*illegal overcharges*’, arise.

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<sup>11</sup> Donovan and others v Electricity Supply Board [1997] 3 IR 573 at page 585.

## **Limitation periods**

86. In Ireland a breach of Article 81 or 82 of the EC Treaty falls to be classified as an action for breach of statutory duty, and therefore the period of limitation is six years from the date on which the cause of action accrued.
87. As regards the calculation of the date of accrual in any action, significant complexities arise. There is considerable merit in the calculation of limitation periods being set as clearly as possible by way of legislative enactment. As regards Articles 81 and 82 there would seem to be a merit in a harmonised limitation period and a uniform means of calculating it with certainty. The proposals balance policies which have direct comparators in domestic law.
88. The merit of allowing the limitation period in follow on actions start from a final decision of an NCA in other Member States may require some consideration. That would seem to involve the possibility that follow-on actions could be commenced many years after the date of the infringement and after the claimant had knowledge of it. Ireland would welcome clarification as to why any special provision – above and beyond the proposed general rules set out in the White Paper – needs to be made.

## **Costs**

89. The proposals here are in terms of encouraging policy developments at Member State level which is, in Ireland's respectful view, the correct approach.
90. Ireland believes that the rules relating to the awarding of costs in Ireland accord fully with the proposals made in the White Paper. An aspect of the proposals which causes concern is the implicit suggestion that special rules ought to apply in relation to costs in competition proceedings, particularly in relation to the payment of costs by an unsuccessful claimant. Ireland is not persuaded that there is any justification for treating unsuccessful claimants in

competition proceedings differently, or more favourably, than claimants who have failed in other categories of proceedings.

### **Leniency programmes**

91. Ireland broadly welcomes the proposals as regards limiting disclosure of documents and statements by persons availing of leniency programmes. Clarification is, however, needed as to whether '*corporate statements*' is to be interpreted narrowly or whether it extends to other documents, perhaps third party documents, furnished as part of the leniency programme. Clarification is also required as to whether merely submitting corporate statements is enough to be sheltered from court disclosure, or whether the protections only apply to undertakings accepted into a leniency programme - this is said with a concern to prevent the abuse of leniency programmes.

92. The proposal to limit the civil liability of an immunity recipient has significant implications, not least for the right to compensation of those who have suffered loss as a result of his or her infringements of Articles 81 and/or 82. Ireland agrees that this requires further and careful consideration and looks forward to engaging further on this issue in due course.

End

31st July 2008