

July 15, 2008

## COMMENTS ON THE EUROPEAN COMMISSION'S WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES\*

### Overview – General Comments

White & Case LLP welcomes the Commission's White Paper on Damages actions for breach of the EC antitrust rules ("WP") and the accompanying Staff Working Paper ("SWP").<sup>1</sup> The WP follows the publication of a Green Paper ("GP")<sup>2</sup> in December 2005, and is a prelude to Community legislation.<sup>3</sup>

We understand that the combination of a WP and a SWP follows the Commission's administrative practice to publish White Papers that are not overly technical or long. We note, however, that at times there are inconsistencies between the two Papers: when one reviews the SWP some important policy options advocated in the WP are seriously qualified, reduced or expanded. A comparison between those parts of the two Papers that address the subjects of no fault liability or the exclusion of the joint liability rule for the successful immunity recipient illustrates this phenomenon.<sup>4</sup>

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;
- 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");

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\* These comments are made by White & Case LLP, Brussels and do not engage the views of the Firm or of its clients.

<sup>1</sup> *Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final; *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC(2008) 404.

<sup>2</sup> *Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 final; *Commission Staff Working Paper, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC(2005) 1732.

<sup>3</sup> For the purposes of these comments, where reference is made to the "WP", such reference includes (unless otherwise stated) the whole of the Commission policy initiative and not simply the document bearing that title.

<sup>4</sup> Compare, for example, with regard to the principle of objective liability, section 2.4 of the WP (which clearly speaks of a pan-European rule of objective liability) and para. 174 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).

- at the same time, it will be open to defendants to prove that the claimant (e.g. a direct purchaser) has passed the illegal overcharge on to its 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 in the Member States, and (ii) opt-in collective claims for consumers and businesses;
- claimants' 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), as well as final judgments on judicial review either upholding such an infringement decision or themselves finding an infringement, should be binding on national courts throughout the EU in follow-on civil actions;
- objective (strict) liability should be the rule for damages, once the infringement has been established, unless the infringer proves that there is a genuinely excusable error;
- 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 for bringing a damages claim 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; and
- the immunity recipient's civil liability should be limited to claims by its direct and indirect contractual partners.

The WP is based on the premise that the right to be compensated for harm caused by a competition law violation is a right guaranteed by the Treaty itself, as the European Court of Justice ("ECJ") stressed in its 2001 *Courage* and 2006 *Manfredi* rulings.<sup>5</sup> This is an important point in itself, since the idea that the right to damages is based upon Community law is disputed by some commentators who see this purely as a matter of national law, subject only to the Community principles of equality and effectiveness.

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<sup>5</sup> 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.

The Commission, however, is unequivocal. There are many references in the WP and SWP 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*”.<sup>6</sup> A clear distinction is also drawn between the existence of the right to damages, which is a matter of primary Community law, and its exercise, which is determined by national legislation but which the WP would harmonise to a certain extent through secondary Community law.<sup>7</sup>

Another fundamental aspect 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 a jurisprudential *acquis*. The rulings of the ECJ in *Courage* and *Manfredi* are naturally prominent, but there are also references to other case law addressing other questions related to the remedies and procedures available at a national level for the enforcement of Community law.

The WP supports the enhancement of the opportunities for effective redress but does not call for the introduction into Europe of US-style litigation. Instead, a “genuinely European approach” is proposed.<sup>8</sup> This is a legitimate claim given that there is no proposal to introduce punitive damages,<sup>9</sup> opt-out class actions, contingency fees, jury trials or the “no contribution rule” (according to which a US defendant who has paid all the damages, as a result of joint and several liability, cannot seek indemnity from its co-defendants).

While the WP advocates a sensible approach overall, there are some specific points that merit further discussion.

### **Standing and Collective Redress**

Perhaps the most important feature of the WP is the broad rule of standing it advocates, notably for indirect purchasers and consumers. This approach is fully compatible with the ECJ ruling in *Courage*, which 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*”.<sup>10</sup> This was made clearer in *Manfredi*, where the ECJ effectively rendered the debate about indirect purchasers obsolete. It is interesting here that the WP refers to the broad rule of standing not as a proposal, but rather as part of the existing *acquis communautaire*.<sup>11</sup>

As far as collective relief is concerned, the WP refers to “representative” and “collective” actions. Representative actions are actions brought by qualified entities, in particular consumer associations and also trade associations, that are either (a) officially designated

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<sup>6</sup> SWP, paras. 308-309, emphasis added. See also section 1.1 of the WP.

<sup>7</sup> *Ibid*, para. 309.

<sup>8</sup> WP, section 1.2.

<sup>9</sup> The Commission, however, encourages the award of punitive damages to the extent such damages are available under national law for violations of national competition law (SWP, para. 190) and does not exclude the possibility of introducing punitive damages at Community level in the future, if it were shown that further incentives were necessary to encourage private antitrust enforcement (SWP, para. 195).

<sup>10</sup> *Courage, op.cit.*, para. 26, emphasis added.

<sup>11</sup> SWP, paras. 33-37. The broad rule of standing does not affect the need for a causal link between the harm and the infringement of Articles 81 and 82 EC. See SWP, paras. 37 and 205.

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 the purposes of obtaining damages for a particular antitrust infringement.

While providing consumer and trade associations with a role in the system of private antitrust enforcement seems, on its face, less far-reaching than introducing opt-out class actions, bringing a representative action on behalf of “identifiable” victims is largely a novel concept. In that regard the WP is rather vague. There is only limited experience in European legal systems of bringing actions on behalf of “identifiable” victims or “classes” of victims. The system will therefore have to be carefully designed to avoid the risk of excessive or abusive use of such actions.

“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 attractive in terms of a cost-benefit analysis, since it allows the victims to share the costs, yet still be compensated for the harm that they have suffered.

The WP does not adequately address the interrelationship between individual or opt-in collective actions and representative actions. Since representative actions are brought on behalf of identified or even identifiable victims (that are not themselves litigants) the latter may 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 does not propose any rule of precedence. Indeed, it prefers not to deprive “individual victims” of their right to bring such actions. This is certainly a serious omission which will need to be addressed. The problem cannot be resolved, as the Commission appears to believe, simply by expressing a wish that qualified entities bringing representative actions (on behalf of identified and/or identifiable victims) should be under a duty to follow procedures designed to inform the victims they represent. A clear rule of precedence / pre-emption should be introduced.

### **Facilitating access to evidence**

The WP argues that national courts should, under specific conditions, have the power to order parties to proceedings and third parties to disclose precise categories of relevant evidence. It rejects, as undesirable, some of the more far-reaching alternatives set out in the GP, such as lowering the standard of proof or shifting the overall burden of proof, because of the fear that such wide-ranging options may lead to procedural abuses.

Notwithstanding the rejection of some of the more far-reaching alternatives proposed in the GP, the changes advocated by the WP, i.e. giving judges increased powers to order disclosure even when the claimant has not fully substantiated its claim with the required evidence, will be ground-breaking in many (notably, civil law) Member States. Although the WP is eager to present the proposals as part of the “fact pleading” system,<sup>12</sup> these changes signal a modest move towards the US system of “notice pleading.”<sup>13</sup> Indeed, the

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<sup>12</sup> Whereby 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.

<sup>13</sup> Under a system of “notice pleading”, a claimant must only give the defendant notice of the nature of its claim for it to require discovery.

example given in paragraph 106 of the SWP illustrates just how far-reaching the effects of the proposed changes in the national civil discovery systems will be.

Our experience is that claimants are already “voting with their feet”, i.e. choosing to bring private actions in jurisdictions where the rules of discovery are more liberal (predominantly the UK). The WP’s suggestion that “across the EU a minimum level of disclosure *inter partes* for EC antitrust damages cases should be ensured” would help to limit forum-shopping for this reason. However, for several Member States this proposal will require radical amendments to well-established civil procedural rules on evidence and the burden of proof and may well have little effect in practice if such actions are brought elsewhere.

If the Commission pursues this proposal, safeguards must be in place to ensure that the ability to obtain a disclosure order in antitrust damages actions cannot be used as a “fishing expedition” designed to uncover potentially incriminating evidence.

We would make the following comments in relation to the practical implications of the WP’s proposals:

1. As many judges from civil law jurisdictions will not have experience dealing with such disclosure requests, they will require specific training. We would suggest that such training be included as part of the planned training of national judges in EC competition law and judicial co-operation between national judges.<sup>14</sup>
2. The WP’s proposal that a “minimum level of disclosure” should be ensured in EC antitrust damages actions will help to limit forum-shopping. However, further consideration should be given to ensure that national courts are appropriately resourced to monitor compliance by litigants with their disclosure obligations.
3. The WP provides that national laws will govern the question of what constitutes confidential information. It would be helpful for the WP to provide some minimum standard, such as providing simply that the material obtained through disclosure can only be used for the purposes of the litigation itself, with penalties (for example, contempt of court) to apply in the event of abuse.

## **Fault**

Two main legal regimes exist among the Member States with respect to whether fault is required for damages to apply. On the one hand, some legal regimes do not require any additional fault element for a damages claim based on an infringement of competition law, or provide that the infringement itself constitutes the fault. In these countries, fault need not be proven, in addition to the infringement itself. On the other hand, some legal regimes require fault to be proven in addition to illegality, although fault will be presumed (rebuttably or irrebuttably) if illegality is shown.

The WP has opted for the second type of regime, introducing a system of strict or objective liability for damages once an infringement of EC antitrust rules has been proven. The WP suggests that:

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<sup>14</sup> See call for proposals published in the OJ on 20 December 2007 ([2007] C 310/8).

- once a victim has established a breach of Article 81 or 82 EC, the infringer should be liable for the damage caused thereby unless it is demonstrated that the infringement was the result of a genuinely excusable error;
- an error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

One problem with this section of the WP is its lack of clarity. The concept of “fault” is not clearly defined. One could understand the Commission to be referring to the original infringement, which is not the case. The Commission should, therefore, distinguish conceptually between fault in the context of the *anti-competitive conduct* and fault in the context of *civil liability* and *civil damages*. Although interconnected, the two questions are different. The ECJ in *Courage* stressed this conceptual difference in the following terms:

“Contrary to the submission of *Courage*, making a distinction as to the extent of the parties’ liability does not conflict with the case-law of the Court to the effect that it does not matter, for the purposes of the application of Article [81] of the Treaty, whether the parties to an agreement are on an equal footing as regards their economic position and function. That case-law concerns the conditions for application of Article [81] of the Treaty while the questions put before the Court in the present case concern certain consequences in civil law of a breach of that provision.”<sup>15</sup>

It is the second context that is in issue: i.e. whether culpability should play any role in determining civil liability flowing from a proven antitrust violation. In other words, whether claimants have to prove that the defendant actually intended to cause, or showed negligence in causing, harm if the competition law infringement has already been proven.

The WP advocates strict liability as a principle, but at the same time introduces the possibility for the defendant to bring forward a defence of excusable error of law or fact. At this point, the WP raises some concerns. The Commission proposes that the standard of care for a defendant should be set at a high level. In so doing, the Commission takes a correspondingly restrictive view of “excusable error”. A question arises however in cases where the competition law infringement cannot be taken as *a priori* having been established. This may be the case, for example:

- where a novel abuse of a dominant position has been established i.e. where the conduct of the dominant company is considered to be abusive for the first time and/or where there is no existing law or guidance as to the nature of the abuse; and/or,
- in unclear situations where an infringement is found as a result of a rule of reason analysis, for example, where a non-hardcore horizontal agreement that has certain pro-competitive benefits is considered, on balance, to be unlawful; and/or,

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<sup>15</sup> *Courage, op.cit.*, para. 35. The Court was, of course, dealing in that specific case with the issue of the claimant’s contributory fault, but its clear distinction between fault for the establishment of the antitrust violation and fault for civil liability is of general importance.

- where the defendant can prove that it has taken all reasonable steps (such as taking appropriate legal advice) to comply with antitrust rules and that it genuinely believed that it was acting lawfully.

A restrictive interpretation of the notion of excusable error might lead to unfair results or to a stifling of healthy competition and innovation. The excusable error defence should therefore be available to cover conduct which is not clearly *a priori* anti-competitive<sup>16</sup> and this is a finding that should be entrusted to the national judges. The concept of “excusable error” should also be defined more precisely.

None of the above, however, should affect the requirement of causation. The causal link between the antitrust infringement and the damage itself must be proven in all cases. We regret that this item is barely discussed in the WP. This quasi silence on the issue of causation is surprising given its importance as one of the three cornerstones of any tort action. Any Community legislative measure must make it clear that the creation of a principle of liability does not eliminate the need to establish causation.

### **Limitation Periods**

We believe that the general principle in antitrust enforcement must be that the clock should start running immediately after the infringement has been committed, subject to the two exceptions pointed out in the WP: (i) the termination of the infringement in cases of continuous and repeated infringements; and (ii) the possibility that the claimant could reasonably have had knowledge of the existence of the infringement.

There are currently wide disparities regarding the duration of limitation periods for bringing competition law damages actions throughout the Member States, ranging from one to thirty years. This creates a lack of certainty for companies as regards the timeframe for their potential exposure to civil claims. We would, therefore, recommend minimum harmonisation in this area, for example, by introducing a Community limitation period beyond which no antitrust damages action may be brought (for example, five years after commission of the infringement), but retaining Member States’ existing limitation periods for tortious actions to the extent that they are shorter.

### **Binding Effect of Commission and National Competition Authorities’ Decisions**

The proposal to confer binding effect on all infringement decisions of the Commission and National Competition Authorities (“NCAs”) for follow-on civil actions is problematic. Article 16(1) of Regulation 1/2003 already provides that national courts cannot take decisions running counter to those adopted or contemplated by the European Commission. However, the WP introduces a much broader rule conferring full binding effect in follow-on civil actions of infringement decisions of both the Commission and of all NCAs that are members of the European Competition Network (“ECN”).<sup>17</sup>

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<sup>16</sup> Since excusable error would be pleaded by way of defence, the burden of proof would rest on the defendant.

<sup>17</sup> SWP, para. 149. Binding effect would also be conferred on final rulings of national courts that review NCA decisions and find an infringement, to the extent that such a possibility exists in national procedural systems.

With regard to decisions taken by the Commission, we strongly disagree with the way the Commission interprets Article 16(1) of Regulation 1/2003 and the *Masterfoods* jurisprudence,<sup>18</sup> on which that provision relies.<sup>19</sup> According to the WP:<sup>20</sup>

“[o]n the basis of this rule, claimants who bring actions for damages before national courts subsequent to a Commission decision, *can rely on the Commission’s decision directly as irrebuttable proof* that an addressee of the decision infringed Article 81 or 82 EC.”

However, *Masterfoods* and the corresponding provision of Article 16 of Regulation 1/2003 make national courts subject not to the Commission’s authority, but rather to that of the ECJ, which is the only judicial organ that can validly review Community acts, through Article 234 EC.<sup>21</sup> This approach relies on the fact that *Masterfoods* does not stipulate that national courts must always consider themselves positively *bound* by Commission decisions. In fact, the Court avoided using the term “binding”, but rather used the more negative language that national courts “cannot take decisions running counter to that of the Commission”.<sup>22</sup>

A formal, positive, binding effect of Commission decisions exists only in fields where the Commission has exclusive competence.<sup>23</sup> This was the case with the old Articles 65 and 66 ECSC<sup>24</sup> and with Article 81(3) EC under the previous system of enforcement.<sup>25</sup> It still continues to be the case with regard to decisions withdrawing the benefit of a block exemption regulation under the present system of enforcement.

By contrast, in a system of parallel competences, national courts are in principle in a position to form their own view as to the application of the competition rules independently of administrative agencies. Indeed, the Court essentially held in *Masterfoods* that a national court is not bound by a Commission decision which is being attacked before the Community Courts, but may decide to stay proceedings pending a

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<sup>18</sup> Case C-344/98, *Masterfoods Ltd. v HB Ice Cream Ltd.*, [2000] ECR I-11369.

<sup>19</sup> See generally A.P. Komminos, “Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight”, 44 CMLRev. 1387 (2007).

<sup>20</sup> SWP, para. 140, emphasis added.

<sup>21</sup> See former Director General A. Schaub, “Die Reform der Europäischen Wettbewerbspolitik”, in: C. Baudenbacher (Ed.), *Neueste Entwicklungen im europäischen und internationalen Kartellrecht, Ahtes St. Galler Internationales Kartellrechtsforum 2001* (Basle/Geneva/Munich, 2002), p. 13; E. Paulis and C. Gauer, “La réforme des règles d’application des articles 81 et 82 du Traité”, 11 JdT (Eur.) 65 (2003), p. 69.

<sup>22</sup> *Masterfoods*, *op.cit.*, paras. 51-52. See also F. Castillo de la Torre, “Decisiones de la Comisión Europea en materia de política de competencia ante los tribunales nacionales: La sentencia *Masterfoods*”, (2001-5/6) GJ 29, p. 36; E. Gippini-Fournier, “Institutional Report: The Modernisation of European Competition Law: First Experiences with Regulation 1/2003”, in: H.F. Koeck & M.M. Karollus (Eds.), *The Modernisation of European Competition Law, Initial Experiences with Regulation 1/2003* (Vienna, 2008), p. 470 *et seq.* Note that Art. 16 and Recital 22 Reg. 1/2003 follow the *Masterfoods* language and do not use the positive term “binding effect”.

<sup>23</sup> See in this direction R. Whish, “The Enforcement of EC Competition Law in the Domestic Courts of Member States”, in: Gormley (Ed.), *Current and Future Perspectives on EC Competition Law, A Tribute to Professor M.R. Mok* (London/The Hague/Boston, 1997), p. 84.

<sup>24</sup> Thus, in case C-128/92, *H.J. Banks & Co. Ltd. v British Coal Corporation*, [1994] ECR I-1209, para. 23, the Court held that Commission decisions based on Arts 65 and 66(7) ECSC, which lacked direct effect and could only be enforced by the Commission, were “binding on the national courts”. See also case C-18/94, *Barbara Hopkins et al. v National Power plc and Powergen plc*, [1996] ECR I-2281, para. 31; case T-89/98, *National Association of Licensed Opencast Operators (NALOO) v Commission*, [2001] ECR II-515, para. 85.

<sup>25</sup> See clearly in this direction E. Paulis, “Nouvelles procédures et méthodes de coopération entre institutions”, in: G. Canivet (Ed.), *La modernisation du droit de la concurrence* (Paris, 2006), p. 48.

final ruling in Luxembourg, “unless it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted”.<sup>26</sup>

Thus, in principle, Commission’s decisions should not be treated as positively binding. Instead, the supranational nature of the Community legal system requires that national courts should not compromise the supremacy and uniform application of Community law by taking decisions which are incompatible with those adopted by the Commission. In practice, the courts should always seize the Court of Justice if they intend to contradict the Commission.

As to the real meaning of “conflict”, to which Article 16 of Regulation 1/2003 refers, a real conflict between a Commission decision and a national court judgment would occur only if the national court were to prevent compliance by the addressee of a Commission decision with the operative part of that decision. In the words of a Commission official, writing in his personal capacity,

“[t]he Commission’s reasoning leading it to a particular decision, including its interpretation of Article 81 or Article 82 and its findings of fact, are clearly not ‘binding’ as such. The addition to the Community legal order that Commission decisions represent is not a particular interpretation of Article 81 or Article 82, or its findings of fact. It is in the operative part of the decision that specific provisions are found, creating legal effects: the obligation to pay a fine, the duty to conform to an order to cease certain behaviour or to take certain positive action. This is the part of the decision that becomes part of Community law and is vested with supremacy as long as the decision stands.”<sup>27</sup>

Irrespective of what the law is under Article 16 of Regulation 1/2003 or *Masterfoods*, the WP proposes, for the future, legislative action to confer a positive binding effect on all Commission and NCA infringement decisions for follow-on civil actions for damages. Although there is some merit in the Commission’s point that this would bring cost and time benefits to potential claimants, in our view, this proposal is materially flawed for the following reasons:

- Introducing a rule of primacy of public enforcement, in the form of a binding effect of public enforcement decisions would contravene the principles of separation of powers and judicial independence.
- It would unsettle the current balance between public and private antitrust enforcement and would essentially subject private enforcement to public enforcement, thus creating a state of dependence between private and public

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<sup>26</sup> *Masterfoods*, *op.cit.*, para. 57. In that regard, one must bear in mind that the Court departed from the Opinion of its Advocate General who was prepared to give some precedence to the Article 230 EC procedure over Article 234 EC (*Masterfoods*, *op.cit.*, AG Cosmas’s Opinion, paras. 41-44). The Court, however, preferred not to fetter the discretion of the national courts to use the preliminary reference procedure. In other words, the Court acknowledged that national courts could not, strictly speaking, be positively directly bound by a Commission decision, (see in this sense S. O’Keeffe , “First among Equals: The Commission and the National Courts as Enforcers of EC Competition Law”, 26 *ELRev.* 301 (2001), p. 304; S. Preece, 22 *ECLR* 281 (2001), pp. 284-285) but only indirectly through the intervention by the Court of Justice, to which they always have access by means of the preliminary reference procedure.

<sup>27</sup> See E. Gippini-Fournier, *op.cit.*, p. 471.

enforcement. This approach also undermines the role of courts as enforcers of equal standing.

- Allowing litigants to contradict or rebut a presumption established by an infringement decision taken by an administrative authority would enrich national litigation because the courts will be fully involved in the application of substantive competition law. This would ensure that national courts remain active players in the application and enforcement of the competition rules and not merely damage assessors.
- It fails to take proper account of the great variety of national administrative and judicial review systems, both in law and practice. It must not be neglected that in some Member States, the degree of judicial review of administrative authorities' decisions is extremely limited. Indeed, it is unclear why the principle of limited judicial review over an administrative authority's findings of antitrust liability, which is limited to administrative law disputes, should be imported in – if not imposed on – the system of resolution of civil law disputes.
- The approach of NCAs to evidence and due process varies significantly.
- Politically-sensitive mini-wars may arise between the NCA of one Member State and the courts of another Member State, if latter is required to take the extreme view that fair legal process grounds were not applied before it can refuse to enforce on NCA clauses to be taken up.<sup>28</sup>

It would therefore be preferable either to avoid intervening in such matters, since an NCA infringement decision always has a *de facto* highly persuasive value for a civil court or, at most, to introduce a rebuttable presumption of antitrust infringement when such a national infringement decision exists.

### **The Interaction with the Leniency Programme**

The question of reducing the civil liability of successful leniency applicants is complex and goes to the core of the relationship between public and private enforcement. On the one hand, if the paramount objective is to provide compensation for loss, then restricting a successful immunity applicant's liability for its infringement is difficult to justify. On the other hand, however, if the main objective is deterrence, it will be easier to justify protecting the integrity and attractiveness of leniency programmes by limiting civil liability.

Currently, national civil courts are not bound by administrative leniency schemes.<sup>29</sup> An undertaking's immunity from administrative fines is totally unconnected from its potential exposure to civil damages.

The WP makes a surprising proposal that was never discussed in the GP: limiting the civil liability of successful immunity recipients<sup>30</sup> to claims by their “direct and indirect

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<sup>28</sup> See para. 162 *in fine* of the SWP.

<sup>29</sup> *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, OJ [2006] C 298/17.

contractual partners”. In other words, the immunity recipient would be liable only to direct purchase of the products or services in question (direct contractual partners) or those down the supply chain that bought such products or services from the direct contractual partners themselves.<sup>31</sup> Thus, a victim that did not buy cartelised products or services directly or indirectly from the immunity recipient or a harmed competitor, will not be able to claim damages. This rule would also, in effect, abolish the immunity recipient’s joint liability,<sup>32</sup> 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”.<sup>33</sup>

We believe that the limitation of the right of competitors and others not falling under the Commission’s definition of “direct and indirect contractual partners” to recover damages from immunity recipients is potentially problematic. If the EU systems of private enforcement included punitive or multiple statutory damages, then a de-doubling or de-trebling of such damages for the immunity recipient would make sense, as is the case currently in the US. However, restricting an immunity recipient’s liability for damages only to certain categories of victims, is extreme. Leniency/immunity refers to public enforcement and may deservedly lead to the imposition of no fine at all by the public authority; however, excluding liability for damages as well is potentially unfair to victims.

In addition, there are serious doubts as to the compatibility of the proposed solution with primary Community law, and in particular the *Courage* and *Manfredi* rulings. This jurisprudence, echoing the *Van Gend & Loos* line of case law,<sup>34</sup> makes clear that the principle of individual civil liability creates rights and duties/obligations for individuals. It can, of course, be argued that limiting an immunity recipient’s liability to certain claims by his direct or indirect contractual partners, will not affect other victims’ Community law rights, since they could pursue their claims against the other non-immunity recipient members of the cartel. However, this line of argument fails to take into account the fact that, irrespective of the victims’ rights, there is also the question of the immunity recipient’s obligations: if the Treaty itself imposes certain obligations on individuals vis-à-vis other persons, it is unclear how secondary legislation can intervene to extinguish such obligations.

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<sup>30</sup> This proposal does not cover the other leniency applicants that did not receive full immunity.

<sup>31</sup> SWP, para. 305.

<sup>32</sup> 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.

<sup>33</sup> SWP, fn. 160.

<sup>34</sup> Case 26/62, *NV Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1.