



**Study on the conditions of
claims for damages in case of
infringement of EC competition rules**

COMPARATIVE REPORT

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Executive summary

I. Introduction

The picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment.

As regards the latter point, the study has revealed only around 60¹ judged cases for damages actions (12 on the basis of EC law, around 32 on the basis of national law and 6 on both). Of these judgments 28 have so far resulted in an award being made (8 on the basis of EC competition law, 16 on national law and 4 on both).

On the basis of answers by national reporters from each of the 25 Member States to a set of questions prepared by the European Commission, the comparative report sets out to give a comparative analysis of the different legal systems in the Member States of the enlarged EU and, on this basis, tentatively to identify what the real obstacles are to private enforcement and how damages actions might be facilitated. The findings of this analysis can be summarised as follows. References to competition law unless specified means both national and EC competition law.

II. Status quo and obstacles

Legal basis for bringing competition base damages claims²

- Status quo

Only 3 of the Member States have an specific statutory basis for bringing EC competition law-based damages actions (12 for national law based claims). However, this generally only has a marginal material effect (or no effect at all) on the conditions for bringing a successful damages claim since where a specific legal basis exists, this usually simply creates a right to damages and refers to general provisions for the conditions of liability. The exception to this is that where a specific legal basis exists, the requirement of fault in tort (if any) is sometimes explicitly waived or presumed where a violation of competition rules is established.

- Obstacles

The greatest obstacle here generally seems to stem from lack of clarity, either because what the legal basis actually is for such claims is unclear or because the interaction between the specific legal basis and general provisions on conditions for liability is unclear. The absence of a legal basis does not in itself seem to create any specific obstacles although the existence of such a legal basis may raise the profile of and thus encourage private actions.

Competent courts³

- Status quo

Although only the UK formally has specialised courts for dealing with competition based damages actions, most Member States provide for the general rules for designation of competent courts to be derogated from in some way when it comes to these actions. This is done in various ways, for example by using higher jurisdictions than normal, limiting the number or type of competent

¹ No official statistics are available on this issue. These figures have been compiled from the information gathered in the national reports. To this figure should be added a large number of parallel cases for small amounts brought in Italy by customers of members of an insurance cartel (probably around 50). There are, however, a number of ongoing questions in these cases which remain unresolved, especially regarding the legality of the procedure followed. These are described in full in the Italian report.

² Question II.A(i).

³ Question II.B(i) and B(ii).

courts or resorting to specialist panels within the general system of courts. In the context of such actions, the possibility for the courts to refer or put questions to the national competition authorities (NCA) is also frequent.

- Obstacles

Three main obstacles to damages actions occur here. These are:

- in claims based on both national and EC law, the fact that in some states different courts are competent to hear national law and EC law based claims;
- the fact that non-specialised courts, often without the necessary expertise, are competent to hear such claims;
- lack of legal certainty that arises in some circumstances as to which courts are competent.

Standing and Jurisdiction⁴

- Status quo

The main relevant limitation on standing that was observed was the requirement of "interest" of the plaintiff in bringing the action, which exists in nearly all countries, although the content of this requirement varies. Also, in a handful of states further limitations were placed on standing such as the requirement that the law violated exists to protect the plaintiff or that only undertakings can sue under national competition law.

Jurisdiction will be governed in most cases by Regulation 44/2001. Where this does not apply, most Member States provide for similar jurisdictional rules but these can provide for wider jurisdiction by allowing for alternative jurisdictional bases, for example, the defendant has property, a business or branch in the jurisdiction or where the impugned conduct has competitive effects or affects markets within the jurisdiction.

- Obstacles

The main obstacle identified here was the restrictions that exist specifically in Finland and Sweden on the standing of consumers to bring damages actions on the basis of the national competition act. See also the comments below on class actions etc.

Collective claims, class actions and public interest litigation etc.⁵

- Status quo

The level of diversity in this area means that any attempt at categorisation looks very much like shoe-horning and is moreover often inadequate due to the non-equivalence of terms in the different Community languages. That said, nearly all Member States provide for some collective or representative actions of some type. However, pending claims of this sort claiming damages were identified only in Austria and the Netherlands. Although some national reporters consider that their Member States have "class actions" there is nothing that corresponds exactly to the US definition of the term, although Sweden comes extremely close and Spain has a similar albeit more limited action.

One trend which did seem identifiable was the rise of litigation by representative associations, although this seems often limited to injunctions or cease and desist orders to the exclusion of damages actions.

⁴ Question II.C(i).
⁵ Question II.C(ii).

- Obstacles

The restrictions that exist to a greater or lesser extent in all Member States on the use of aggregated claims are discussed further under point III.

Compensation and other forms of civil liability⁶

- Status quo

Member States mainly see damages actions as being restitutionary in nature. Therefore, the key forms of remedy open to plaintiffs are compensation and restitution. Few states provide for punitive or exemplary damages. Several provide for publication in the press of the fact of the violation or the judgment.

In many Member States directors can in theory be held liable by shareholders but in no country was the disqualification of directors foreseen as a remedy within a civil action.

- Obstacles

Limitations on the forms of compensation available did not seem to constitute a particular obstacle to private enforcement. The facilitating nature of punitive damages is discussed further below at point III.

Fault⁷

- Status quo

Most Member States require fault (in the sense of negligence or intention) in non-contractual damages actions. However, in several of these jurisdictions fault is (rebuttably or irrebuttably) presumed where a violation of competition law is shown.

Where fault is required, negligence will suffice. The degree of care required varies but is generally that of either a *bonus pater familias* (or equivalent) in similar circumstances or of a professional undertaking in similar circumstances (the latter being a higher standard of care than the former).

- Obstacles

Where proof of negligence or intention (in addition to proof of an infringement) is required, this constitutes an extra hurdle for the plaintiff and thus an obstacle to damages actions (although it should be noted that where a hard core violation is shown fault will often not be contested at all – a view which is reflected in existing case law).

Burden and standard of proof⁸

- Status quo

All national reporters stated that the burden of proof was on the plaintiff in the first instance (with the notable exception of the element of fault which it fell on the defendant to disprove in many countries). However, various means by which this burden was lightened or reversed were identified by many reporters. Such means included facts considered to be of public knowledge and the contents of public documents and (public) deeds being considered in many countries to be proven. Other factors lightening the burden on the plaintiff/reversing the burden of proof include the existence of prior court or NCA decisions and refusals by the defence to produce certain documents.

⁶ Questions II.D(i) and D(ii).

⁷ Question II.D(iii).

⁸ Question II.E(a)(i) and E(a)(ii).

The way in which the requisite standard of proof is described varies widely between Member States. In many Member States the free assessment of evidence by the court and the need to "convince" the judge were underlined. Where the standard of proof was given in the form of an accepted expression, these ranged from the need to show one's case on the balance of probabilities to absolute certainty. Some countries acknowledged that the standard of proof may be lowered in certain circumstances such as when proving loss of profits.

- Obstacles

The burden of proof borne by the plaintiff coupled with a high standard of proof (in particular when there is restricted access to evidence) are clearly obstacles to private actions. This is particularly the case as regards proof of causation and damage (although as noted above the standard of proof as regards the latter is in some cases lowered).

Limitations on forms of evidence⁹

- Status quo

The limitations placed on forms of evidence are complex. However, in general, eighteen national reporters stated that there were generally no limits on admissible forms of evidence whilst seven had exhaustive lists laid down in law (usually covering a very wide range of means of evidence).

The most highly regulated area of evidence is given by witnesses. These restrictions take a variety of forms but generally witnesses may refuse in most Member States for reasons of professional secrecy. Limitations are placed in some Member States on written witness statements. Moreover, in a few Member States, there is some hierarchy of forms of evidence, with documentary evidence generally being given greater weight.

- Obstacles

Generally, limitations on evidence do not constitute clear obstacles (although this is not the case as regards the restrictions that exist in some Member States on the appearance of parties or their representatives who may be in a position to disclose facts unknown to any other third party).

Discovery and production of evidence¹⁰

- Status quo

The power of national courts to order production of documents varies widely against the Member States. At one end of the scale are the UK, Ireland and Cyprus where wide (pre-trial) discovery exists (a discovery like procedure is also proposed in Sweden). Besides these countries, courts in Poland and Spain also have relatively wide powers, which allow parties to request categories of documents. However, in all other Member States parties must more or less specify the individual documents that they wish to be disclosed.

The limits placed on who can be ordered vary, although some more or less limited justifications exist in most states (usually professional privilege or interests of third parties). Discovery may also be refused, generally on grounds of legal privilege or in most Member States (to a greater or lesser extent) for the protection of business secrets.

- Obstacles

The clearest obstacle here is the fact that in most Member States parties are not under an obligation to produce relevant information and often will only be ordered to do so when the

⁹ Question II.E(a)(iii).
¹⁰ Question II. E(a)(iv).

requesting party can identify the individual document he seeks, which in many cases will simply not be possible.

Expert evidence¹¹

- Status quo

Expert evidence in some form is admissible in all Member States. In nearly all states, experts can be appointed by either the court or the parties, although when the parties appoint expert, evidence is generally given less evidential value. In several Member States, there are lists of “official” experts.

In cases where damages have been awarded experts have typically been called on in particular to assess damages.

- Obstacles

In certain Member States, only the court (and not the parties) may appoint experts.

Cross examination¹²

- Status quo

Two general approaches are taken to the questioning of witnesses in the Member States. In some states, only the judge may question witnesses (although the parties may request that certain questions be put). In other states, all parties may question witnesses directly, regardless of which party called them. Cross-examination is considered of particular importance in common law jurisdictions.

- Obstacles

The inability of parties to directly question witnesses may clearly constitute an obstacle where such direct questioning is in practice the easiest or even only way to obtain certain facts.

Value of NCA, Commission or court decisions¹³

- Status quo

In all Member States, such decisions can be submitted as evidence in damages proceedings and are often highly persuasive. However, only in a handful of Member States are NCA decisions considered binding. The German draft 7th amendment is particular in this regard in that it proposes to make not only German NCA decisions binding on national courts but also decisions from the Commission and any other Member State NCA insofar as they find an infringement of competition law. It must, however, be noted that in the few successful damages cases there have been, any pre-existing NCA or Commission decisions finding infringement have been followed.

- Obstacles

The fact that in most Member States decisions of the types mentioned above do not formally have binding effect on national courts will constitute an obstacle to the extent that plaintiffs will formally be required to prove certain elements of liability (in particular the existence of an infringement) that would otherwise be taken as proven by said decisions.

¹¹ Question II. E (b)(i).

¹² Question II. E(b)(ii).

¹³ Question II. E (b)(iii).

Specific rules on evidence of damages¹⁴

- Status quo

The general position in all Member States is that the existence and extent of damage should be proven in the same way as other elements of the damages claim. However, the difficulty of proving the extent of damages results, in a number of Member States, in a certain relaxation of the rules of evidence in favour of the plaintiff.

The general idea here is that if warranted for a particular reason, e.g. difficulty or disproportionate cost in proving extent of damage, proof of exact extent of damage can be waived and a "reasonable" amount awarded in its place. In some Member States such an abstract evaluation may be limited to certain types of damage (e.g. loss of profits). In all Member States, however, the actual existence of damage must nevertheless be proven.

- Obstacles

Proof of damages is considered complex and difficult and thus a particular obstacle to private actions. Relaxation of the rules on evidence as described above is discussed below at point III.

Causal link¹⁵

- Status quo

A third of Member States require a direct causal link to be shown when proving damages. Several national reporters commented that proof of the causal link in competition based damages cases would be particularly difficult whilst a small number of states indicated particular circumstances allowing for a reduction of the burden of proof as regards the causal link.

More generally, the great flexibility of the notion of causal link in the Member States and the case by case approach to it has limited a meaningful comparative analysis of this point.

- Obstacles

Proof of causal link is considered as a great obstacle to plaintiffs. This will particularly be the case as regards plaintiffs who are indirect purchasers.

Passing on and the indirect purchaser¹⁶

- Status quo

Due to the lack of case law on this point, nearly all reporters limited themselves to applying general principles of compensation-restitution, coming to the conclusion that the passing on defence was theoretically possible (although the defendant would bear the burden of proof) and indirect purchasers could theoretically sue (but would have trouble in proving causal link). The passing on defence was considered possible in Denmark, Germany (by some courts) and Italy where the question had arisen.

- Obstacles

The existence of the passing on defence itself is an obstacle to the extent it complicates claims. Moreover, to the extent it reduces the money paid to the plaintiff it clearly also reduces the latter's incentive to bring a claim. Lack of clarity as concerns the possibility for the indirect purchaser to claim and the difficulties of proof (in particular as regards causation and damages) both constitute

¹⁴ Question II. E(c)(i).
¹⁵ Question II. E (d)(i).
¹⁶ Question II. F (ii).

obstacles to the indirect purchaser's claim. The combination of the passing on defence (in particular where this is readily accepted) and the difficulties faced by indirect purchasers will seriously restrict private claims.

Mitigation and contributory negligence¹⁷

- Status quo

Although classified or labelled in different ways, nearly all Member States provide for a reduction in damages where there has been some fault on the plaintiff's part (either seen as contributory negligence or failure to mitigate). As regards taking into account of benefits, although not explicitly provided for in all Member States, the application of the restitution principle could tend to have a similar effect.

- Obstacles

Obstacles here stem from lack of clarity (in particular as to what the victim must do to mitigate loss) and the simple fact that application of these principles will reduce the quantum of damages, making claims less attractive.

Calculation of damages¹⁸

- Status quo

In all Member States, damages are assessed on the basis of injury suffered by the plaintiff rather than profits made by the defendant, although in some states, the latter can sometimes be used as a guide or taken into account when assessing injury.

In all Member States, damages can be awarded for injury suffered outside national territory.

On the question of whether damages are calculated *ex-ante* or *ex-post*, half the national reporters indicated that this distinction did not fit with the approach taken in national law. Of the national reporters in the other Member States, some distinguished between the two approaches essentially on the basis of how the effects of the period between injury and judgment on the value of the loss (e.g. inflation) were taken into account. Others distinguished on the basis of foreseeability and/or the extent to which events intervening between injury and judgment were considered. With regards to the latter distinction, the recent *Crehan* judgment shows the different results that can in certain circumstances be reached by applying the two different approaches (in that case the Court of Appeal, adopting an *ex ante* approach, awarded one tenth of the amount that had been calculated by the High Court applying the *ex post* approach).

No Member State recognised a formal maximum limit to damages.

The vast majority of Member States did not consider that taking into account of fines when setting damages was possible, the only theoretical exception being that in some Member States, damages can be reduced where they would be considered grossly unfair.

- Obstacles

The main general obstacles in the areas discussed above is the difficulties inherent in assessing damages (e.g. lack of generally recognised models) and disincentives created by restrictions on the amounts that can be awarded (e.g. absence of punitive damages).

¹⁷ Question II. F (iii).
¹⁸ Question II. G (a).

Interest¹⁹

- Status quo

The time at which interests can start to accumulate varies across the Member States but in general, the courts of half the Member States may award interest from the date of the infringement/damage.

The level of interest rates varies between 2 and 14 percent and was in most cases decided by statute/decreed, although several countries also calculated with reference to ECB or national bank rates. Compound interest was not generally available anywhere except in the Netherlands and Poland although a few countries make limited exceptions to this rule.

- Obstacles

Restrictions on level and duration of application of interest rates clearly reduce the plaintiff's potential award and are therefore a disincentive to private actions.

Timing²⁰

- Status quo

Limitation periods again vary widely between 1 and 30 years with many states having long stop dates.

As regards estimated length of proceedings, most reporters felt it impossible to estimate the average length of proceedings, although figures given ranged from under six months first instance proceedings to ten years or more where the case was appealed more than once.

Few Member States acknowledged ways of accelerating proceedings although some indicated the availability of summary proceedings or "fast track" proceedings (although these were generally considered unsuitable for competition based damages cases). However, "partial" judgments (i.e. where (interim) judgment is passed on part of the claim) are available in several Member States.

The number of judges hearing cases varies greatly although generally for first instance cases this is between one and three and five to seven at Supreme Court level.

- Obstacles

The main obstacles as regards the above are lengthy proceedings (which may also be reflected in increased costs) and short limitation periods (particularly for parallel claims brought after an original successful "test case" and where limitations on access to evidence are coupled with an obligation to present all evidence on filing a claim).

Costs²¹

- Status quo

Court fees in all but two Member States are payable up front and all Member States provide that the loser pays costs (although these can be divided in particular in case of partial success). It is, however, frequently the case that fees are not fully recoverable in practice.

¹⁹ Question II. G(b).

²⁰ Question II.H.

²¹ Question I.

Although the existence of contingency/conditional fees is not explicitly recognised in many Member States, the possibility of using bonuses or uplifts combined with low fixed fees could have the same practical effect.

It was generally considered impossible to give the average cost of bringing a competition based damages action although of the rough estimates given, there is a clear divide between old Member States and the ten new Member States, the figures given for the latter being far lower, indeed of a different magnitude altogether.

- Obstacles

The costs and risk involved in bringing proceedings are clearly a disincentive. This can be seen to be exacerbated by the likelihood of non-recovery of all costs (although the effects of the latter are indecisive as this also reduces the risk borne by the plaintiff).

General questions²²

- Status quo

Apart from some mostly minor points in individual Member States, the fact that EC competition rules are regarded as being public policy was not considered to change any answers given. The fact that a defendant may be a public authority did make some difference (Article 86 EC type exceptions exist in several Member States and some procedural issues change).

Moreover, in no Member States are there any specific provisions on the interaction between leniency programmes and damages actions. Although in practice such interaction cannot be ruled out, it was generally considered by several Member States that general principles of restitution-compensation would indicate that, in law, there would be no such interaction such as to affect damages claims.

III. Facilitating private enforcement

The ways in which private enforcement of competition law damages claims could be facilitated are extremely diverse. Moreover, due to the absence of damages actions in the majority of Member States many of the points considered are necessarily hypothetical.

The key areas where private actions could be facilitated are grouped thematically below: (a) access to courts, (b) reducing risks, (c) facilitating proof, (d) reducing costs, (e) other incentives, (f) transparency and publicity, and (g) interaction between national and EC law.

Before addressing these issues, it can be noted that the *Crehan* judgment states that the efficacy of EC competition law requires that there be a right to compensation for loss suffered as a result of anticompetitive conduct and that this right discourages anti-competitive conduct in the first place. The strengthening of the compensatory and deterrent effects of private enforcement are reflected in the various ways of facilitating private enforcement considered below.

(a) Access to courts

Limitations on standing

Removal of both general and particular limitations on standing would facilitate and could thus encourage claims, for example, removal of the "protective purpose" requirement in German law which generally limits the circle of potential claimants or the limitation of standing to undertakings and contractual partners under the Swedish national competition act²³.

²² Question II.J.

²³ The removal of these obstacles in Sweden is already contemplated by the respective national authorities. In Germany, the draft 7th amendment suggests specifying that Articles 81 and 82 EC are intended to protect market

Class actions, collective claims and representative actions

Due to the perceived financial risk and lack of incentives to bring competition law based damages claims, the introduction of other types of actions such as (US style) class actions or claims by consumer organisations or public representatives to spread risk could facilitate claims (although it was noted that class actions may in some jurisdictions be contrary to general principles of civil law²⁴). In addition to these general suggestions on the widening of standing, the introduction of a Community instrument giving a basis for collective claims was also suggested.

Indirect purchasers

Although national reporters generally agreed on the theoretical possibility for indirect purchasers to bring claims, lack of clarity on this point and difficulties in proving causal link and the existence of passing on bring into question the practical possibilities for such claims. Suggestions for facilitating claims by indirect purchasers ranged from clarification of the law to ensure standing rights of indirect purchasers, to creation of a specific legal basis for indirect purchasers to bring claims.

(b) Reducing risks

One of the main disincentives to private enforcement is the level of risk involved, *inter alia*, in terms of uncertainty of outcome. In this regard the national reports often underlined the complexity of this type of litigation.

Lack of legal certainty also stems from lack of clarity in the law. In this regard, it can be noted that the answers to several basic questions relating to competition law based damages claims remain unclear (e.g. competent court and conditions for liability).

Clarity could be improved in a variety of straightforward procedural ways, for example, the creation of a single, specific legal basis for EC and national competition law based claims²⁵, clarification as to the existence or not of a fault requirement and the designation of a reduced number of competent courts.

Lack of expertise of the ordinary courts (which are in most Member States competent to treat such claims) was also underlined as being an obstacle to private enforcement. Greater recourse to greater expertise could improve predictability in the application of the law. Such expertise could come from a variety of quarters, such as the creation of courts specialised in competition matters and/or the training of judges (the latter being particularly emphasised in the national reports).

Restrictions on the number of competent courts already exists in some Member States and such restrictions are also proposed in others. Another possible way of introducing specialised courts would be to create the possibility for ordinary courts to make references to a specialised court specifically on questions of competition law.

Another source of expertise that could be introduced/increased to contribute to the consistent and predictable application of competition rules is that of national competition authorities (this input could take various forms, for example, references by courts to national competition authorities, the intervention of national competition authorities as *amicus curiae*, the possibility for rulings on damages to be made within the context of administrative proceedings).

participants, even if the infringement was not specifically directed against them, which removes to an extent the obstacles created by the protective purpose requirement.

²⁴ Thus, for example, in France the introduction of class actions could be seen to offend against the requirements of interest in bringing a case and the general principle that "nul ne plaide par procureur". This is not, however, the view in all Member States (see e.g. Italian report at point II.C(ii)).

²⁵ Although this would need to be coupled with clear indications of how this legal base interacts with other provisions and should not end up complicating the status quo by e.g. applying only to either EC or national law based claims.

Recourse to experts is possible to some extent in all jurisdictions and relaxing the restrictions that do exist (e.g. by allowing parties to call their own experts) could also constitute a valuable source of expertise. However, it can be noted that this source of expertise may not bring with it the same guarantees of independence that can to a greater or lesser extent be associated with, for example, court appointed experts or opinions/decisions of national competition authorities. Moreover, the use of experts can significantly increase the costs of litigation, acting as a disincentive to private actions and where appointed by the parties could result in the economically stronger party being favoured. Finally, the use of court appointed experts in place of party appointed experts would help avoid duplication of costs.

(c) Facilitating proof

Proving the elements of the infringement

The difficulty of proving the various elements of liability was underlined by a number of national reporters as constituting a serious obstacle to damages actions (in particular causal link, fault and existence of an infringement).

In general terms, some jurisdictions considered that a lowering of the standard of proof or even a reversal of the burden of proof with regards to these elements would facilitate private actions.

As regards the fault requirement (where this exists), ways of facilitating proof range from reducing the requisite level of fault to simply removing fault as a condition to liability.

Evidence

Several national reporters identified the difficulty of obtaining evidence as one of the major obstacles to damages actions due to the limited scope for ordering disclosure of documents that exists in most Member States.

Proposed solutions range from the introduction of discovery rules, to the power of judges to order the production of classes of documents, to a relaxation of the requirements a plaintiff has to fulfil before disclosure is ordered. Other proposals in this regard were the facilitation of access by the courts to documents held by national competition authorities and greater access to documents by experts.

Other ways of reducing the obstacles created by strict disclosure rules include removing restrictions on calling certain witnesses (e.g. company representatives) and the introduction of cross-examination, where this does not already exist.

Evaluating damages

Evaluating damages can be complex and not only constitutes an obstacle to proving the different elements of the action but also acts as a disincentive to the plaintiff.

The main solution proposed to this problem was the publishing of guidelines (or even binding instruments) on the different methods of calculation of damages. Other proposed solutions included widening the powers of courts to call for expert reports.

It should also be noted that the laws of a number of Member States already provide for ways of facilitating the evaluation of damages. Thus, where quantification of damages is difficult or impossible several Member States allow for "reasonable" or "equitable" estimations of damages to be made. Moreover, some states envisage the possibility to use the defendant's profits as a guide to measuring damages. The availability of such proxies for measuring damage clearly facilitate the plaintiff's task.

Finally, the possibility exists in a number of Member States for courts to render partial judgments finding that there has been a violation of competition law but leaving the assessment of damages

to a later date which, in cases where actions are then settled, facilitates private enforcement by obviating the need for a court assessment of damages at all.

Evidential value of prior decisions of competition authorities

Although most national reporters consider that decisions of the Commission and those of their own Member State's competition authority would be highly persuasive, this appears generally not to be the case as regards decisions of competition authorities of other Member States.

One way of facilitating proof would therefore be to accord greater value to such decisions. This could be done, for example, by shifting the burden of proof onto the defendant where a prior decision exists finding an infringement. Another approach which takes this logic further would be to make such decisions binding on national courts. Such a proposal, which extends also to decisions of NCAs of other Member States, is currently proposed in Germany. However, this approach would raise serious questions of compatibility with Article 6 of the ECHR.

(d) Reducing costs

Another obstacle to private enforcement identified by several Member States is the financial costs involved in such litigation. These could be reduced by, for example reduction of/dispensation from court or other state fees (for example, as proposed in the German draft 7th amendment for plaintiffs facing financial hardship). The introduction or increased use of contingency or conditional fees could also facilitate private enforcement (although these would appear already to be *de facto* available in most Member States).

Length of competition proceedings was also underlined as a disincentive to potential claimants. As well as generally better organisation of court proceedings, the creation of specialised courts to deal with competition damages claims (such as the CAT in the UK) and the formal tightening of the timetable for court proceedings could help reduce delays.

Finally, as noted above, some Member States allow for some possibility of partial judgments. Where such a possibility exists, the length and costs of proceedings will clearly be reduced avoided if settlement becomes possible as a result of a partial judgment finding an infringement of the competition rules.

(e) Other incentives

Several national reporters considered that the level of damages awarded was too low and constituted a disincentive to plaintiffs. The main solutions proposed to solve this problem were: introduction of punitive damages and the use of defendant's profits as a guide to measuring damages.

The availability of punitive, exemplary or treble damages would clearly increase a potential plaintiff's possible award and constitute an incentive to bring an action in the first place (although its compatibility with the national laws of some Member States could be questioned).

The use of the defendant's profit as a guide to measuring damages may also have these incentivising effects and would also contribute to facilitating the calculation of damages.

(f) Transparency and publicity

Simple lack of knowledge of rights under competition law, the workings of the procedure for claiming damages and simple lack of knowledge about the availability of damages claims was underlined as being a reason for lack of private enforcement.

Greater availability of information to potential claimants could therefore both encourage and facilitate damages actions. Wider dissemination of information could take the form of increased publicity and increased transparency. As regards publicity, general promotion of competition law

and the issuing of guidelines and brochures explaining the scope of the rules are the most obvious forms, coupled with explanations of the remedies available to potential claimants.

As regards transparency, removal of existing restrictions (on e.g. the publication of court judgments, potentially in the press) and more effective provision of information (e.g. through use of central databases²⁶ of claims would at least give greater exposure to potential claimants).

²⁶ A step towards this has already been taken by the Commission which, in collaboration with the Member States, now provides a database of national judgments on its website (the database was only recently created and as yet has few judgments). See http://europa.eu.int/comm/competition/antitrust/national_courts/index_en.html

Table of abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
AGCM	Italian national competition authority (Autorità Garante della Concorrenza e del Mercato)
Art.	Article
BGB	German Civil Code (Bürgerliches Gesetzbuch)
CC	Civil Code
CDL	Spanish Law 16/1989 on the Defence of Competition (Ley de Defensa de la Competencia)
CFI	European Court of First Instance
Comm C	Commercial Code
EC	European Communities
ECA	Estonian Competition Act (Konkurentsiseadus)
ECJ	European Court of justice
EU	European Union
FCA	Finnish Act on Restrictions of Competition (Laki kilpailunrajoituksista)
GWB	German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbechränkungen)
ICA	Irish Competition Act
LUCA	Lithuanian Competition Act (Konkurencijos įstatymas)
MS	Member State
s.	Section (of a national law)
SWCA	Swedish Competition Act (konkurrenslagen)
UCL	Spanish Unfair Competition Law (Ley de competencia desleal)
UKCA	United Kingdom Competition Act
UWG	Austrian and German Unfair Competition Act (Gesetz gegen unlauteren Wettbewerb)

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²⁷

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Section One

Comparative analysis of the national reports

I. Introduction

A. General remarks concerning the comparative analysis

The present report aims at condensing into around 100 pages, the laws of twenty five different states. It is therefore inevitable that there has been a great deal of simplification. Moreover, there are of course inherent limits to the amount of comparison that can be done between very different legal systems and the very process of comparing and even more the process of categorising can thus lead to a distortion of the legal realities in the countries being compared. This does not make the contents of the report wrong but the reader should keep in mind the limits of such comparative analysis.

B. General remarks concerning the reading of the report

National v. EC based claims

Where the term competition law appears in the text without any further specifications, this refers to both national and EC competition law.

Lists of countries

In a number of places in the report general observations on the law are made and are followed by examples or exhaustive lists of countries to which such observations do (or do not) apply. The following points should be noted about these lists. Firstly, the lists are generally put in alphabetical order and thus no importance should be attached to the order. Secondly, in some lists comments/clarifications are put in brackets after certain countries. It should be noted that those comments relate only to the country immediately preceding the comment/clarification in the list unless otherwise specified.

Tables

Much of the information in the report has been put into tabular form for ease of reading. It should be noted that although the tables give a quick overview, the text surrounding the tables often adds important specifications, clarifications or comments.

C. Aim of the report

The report is aimed at providing a comparative analysis of national rules and case law regarding the enforcement of EC competition rules and, in the absence thereof, of national competition rules before national judges in the 25 Member States of the enlarged European Union (hereafter the "25 Member States").

The report therefore aims at taking stock, gathering data on the status quo on claims for damages for breach of competition law in the 25 Member States and making a comparative analysis of that data.

The report also aims at looking forwards at ways in which enforcement can be made easier both at the level of individual Member States and at the European level. See also the comments on this immediately below under point D.

The report should not be divorced from its context, that is the fact that private enforcement of EC competition law is lagging behind public enforcement. The 'golden thread' that should run through the report should therefore be an enquiry into why private enforcement is so underdeveloped and what can be done to rectify this situation.

D. Structure of the report

The report is divided into three parts.

The first part comprises the 25 national reports and their executive summaries compiled by the specialists from the different Member States (details of the contributors are given in [Annex 1](#) to the present report).

The second part of the report consists of the comparative study, compiled by Ashurst. The comparative study is divided into two sections. Section One consists of a comparative presentation, question by question, of the main data gathered from the national reports as confirmed and commented on by the national reporters. Section Two consists of an analysis, question by question, of the obstacles to competition based damages claims and a thematically structured part on how such claims could be facilitated²⁸.

The third part of the report consists of a study of economic models used to calculate damages, also compiled by Ashurst.

II. Status quo

A. What is the legal basis for bringing an action for damages?

(ii) Is there an explicit/specific statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

The answers to this question are mixed. In short 12 countries do have a specific statutory basis for national law based claims (3 for EC based claims), 13 do not (the results are shown in the table below).

Table 1: Legal bases for bringing damages actions in the different Member States

Country	Specific basis for national law based actions	Specific basis for EC law based actions	Statutory basis for national law based claims	Statutory basis for EC law based claims	Identical legal bases for national and EC law based claims
Austria	-	-	Sec 1311 ABGB Sec 1 UWG	Sec 1311 ABGB Sec 1 UWG	✓
Belgium	-	-	Art. 1382 CC	Art. 1382 CC	✓
Cyprus	✓	-	s. 35 of Law 207/89	Beach of statutory duty	-
Czech Rep.	-	-	s. 373 and 757 Com C	s. 373 and 757 Com C	✓

²⁸ For the sake of clarity, it should be underlined that the dividing line between the two parts of Section Two of the report regarding obstacles on the one hand, and facilitating measures on the other, is not always clear and so the two parts are highly complementary. Thus, whether the absence of a particular feature in a legal system is considered as an obstacle or whether its introduction is regarded as a facilitating measure (or both) is often simply a case of presentation. For example, the fact that most Member States do not provide for class actions could be looked at as an obstacle. However, since the general approach of the Member States is to regard class actions as the exception rather than the rule, the introduction of such actions has been presented in the report rather as being a way to facilitate private actions.

Denmark	-	-	§ 348 AJA ²⁹	§348 AJA	✓
Estonia	✓	-	Art. 78 ECA Art. 1045 LOA ³⁰ Art. 1043 LOA	Art. 1045 LOA ³¹ Art. 1043 LOA	-
Finland	✓	✓	Art. 18a FCA	Art. 18a FCA	✓
France	- ³²	-	Art. 1382 CC ³³ Art. L. 442-6 Comm C ³⁴ Art. L. 420-6 Comm C ³⁵	Art. 1382 CC ³⁶	-
Germany	✓	-	§ 33 GWB § 9 UWG ³⁷	§ 823 BGB § 9 UWG [§ 33 GWB] ³⁸	-
Greece	-	-	Art. 914 CC	Art. 914 CC	✓
Hungary	-	-	s. 339(1) Act IV CC ³⁹	s. 339(1) Act IV CC ⁴⁰	✓
Ireland	✓	-	s. 14(1) ICA	General rules on breach of statutory duty	-
Italy	✓	-	Art. 33.2 of Law 287/90 Art. 2043 CC	Art. 2043 CC	-
Latvia	✓	-	Art. 21 CA	Art. 1779 CC	-
Lithuania	✓	✓	Art. 46(1) LUCA Art. 6245-6255 CC	Art. 46(1) LUCA Art. 6245-6255 CC	✓
Luxembourg	-	-	Art. 1382 CC ⁴¹ Art. 23 LUC ⁴²	Art. 1382 CC ⁴³	✓
Malta	-	-	Art. 1033 CC ⁴⁴	Art. 1033 CC ⁴⁵	✓
Netherlands	-	-	Art. 162 (Book 6) CC	Art. 162 (Book 6) CC	✓
Poland	-	-	Art. 415 CC ⁴⁶	Art. 415 CC ⁴⁷	✓
Portugal	-	-	Art. 483 et seq. and 562 CC	Art. 483 et seq. and 562 CC	✓
Slovakia	-	-	Art. 373 et seq., Art. 757	Art. 373 et seq., Art. 757	✓
Slovenia	✓	-	Art. 44 PRCA Art. 131 CC	Art. 131 CC	-
Spain	✓	-	Art. 13.2 CDL Art. 1902 CC	Art. 1902 CC Art. 18.5 UCL	-

²⁹ Administration of Justice Act ("retsplejeloven").

³⁰ Law of Obligations Act (Võlaõigusseadus). Art. 78 ECA provides Law of Obligation Act. Which one of the subsections of the latter applies (i.e. Art. 1045 or 1043) is not yet clear.

³¹ Idem.

³² See, however, the comments below on actions under Article L 420-6 of the Commercial Code at note 35.

³³ Art. 1147 CC in the case of contractual claims. However, in a contractual claim where the contract is null, the legal basis for an action for damages is Article 1382 of the Civil Code.

³⁴ This provides a separate ground for damages actions but is nevertheless an application of Article 1382 of the Civil Code. It relates to violations of the provisions of the Commercial Code on restrictive practices for which no equivalent exists in EC competition law (see French report at points I and A(i)(2)). See also point C(i) and (ii) below.

³⁵ This article provides for criminal sanctions to be imposed for certain fraudulent breaches of national competition law only. During the same proceedings, damages can be awarded to victims of such offences. The principle of strict interpretation of criminal sanctions would indicate that damages cannot be awarded in the same way for breach of EC competition law.

³⁶ Art. 1147 CC in the case of contractual claims. However, in a contractual claim where the contract is null, the legal basis for an action for damages is Article 1382 of the Civil Code.

³⁷ This provision relates to actions for unfair competition and generally requires *inter alia* that the plaintiff and defendant are competitors. Violation of Art. 81 and 82 EC are considered per se acts of unfair competition. Treatment of unfair competition law goes beyond the scope of the present study and will therefore not be discussed further here.

³⁸ The draft 7th amendment foresees the extension of § 33 GWB to EC competition law - based damages claims (see also the dialogue box in the present section).

³⁹ s. 318(1) CC in the case of contractual claims.

⁴⁰ s. 318(1) CC in the case of contractual claims.

⁴¹ Art. 1134 CC in the case of contractual claims.

⁴² Law of Unfair Competition. This Article provides *inter alia* for civil parties to be joined to criminal proceedings for breach of unfair competition rules and to obtain compensation in the context of those proceedings.

⁴³ Art. 1134 CC in the case of contractual claims.

⁴⁴ Art. 1125 CC in the case of contractual claims.

⁴⁵ Art. 1125 CC in the case of contractual claims.

⁴⁶ Art. 471 CC in the case of contractual claims.

⁴⁷ Art. 471 CC in the case of contractual claims.

			Art. 18.5 UCL ⁴⁸		
Sweden	✓	✓	s. 33 SWCA	s. 33 SWCA ⁴⁹	✓
UK	✓	-	s. 47A, 47B, 58A, 60 (s.2 and s. 18) CA 1998	European Communities Act s 2(1)	-

In states where there is no specific statutory basis, a general legal basis is used, for example in the national civil or commercial code.

However, even where a specific statutory basis exists, all states refer at least to some degree to general rules for the substantive and procedural rules governing such claims. Usually, therefore, specific legal bases, which are all basically contained in the various national competition law acts, simply state the right of an individual to claim, and the obligation of a wrongdoer to compensate, for damages caused by a breach of competition law.

The following distinguishing elements should also be noted:

Firstly, where a specific statutory basis exists, this either applies also to EC law based claims (Finland, Lithuania and (implicitly) Sweden) or only to claims based on national law (Cyprus, Estonia, Germany⁵⁰, Ireland, Italy, Latvia, Slovenia, Spain and UK). However, in a number of states, due to lack of case law, it is unclear whether the specific legal basis that exists for competition-based damages claims extends to EC based claims. In some jurisdictions (Finland, Sweden) it was considered that the specific legal basis should apply to both types of claim.

In any event, subject to the comments made below, such a distinction may mostly be of little practical importance given that the conditions of liability are generally regulated by the general rules of tort and contract.

In some cases, however, the fact of having a specific statutory basis does in some cases make a material difference as special provisions often facilitate the filing of suits for damages. In this regard, where explicit provisions do exist in national competition legislation, they tend to give a right to damages where the rules contained in such legislation (and in some cases also Articles 81 and 82 EC) have been breached without any further requirement of fault. The effect of this is sometimes that, where national law requires an element of fault or negligence to be proved by the plaintiff, this is effectively considered to be fulfilled where a violation of competition law exists (see Belgium⁵¹, Estonia, France, Germany (presumption of fault is not due to special provision but equally exists in general tort law), Italy (although this remains a moot point to some extent⁵²) and Lithuania. This is, however, not the case in Finland, Latvia, Spain⁵³ and Sweden⁵⁴ where fault must still be established.

Moreover, the Draft 7th amendment (see dialogue box below) proposed in Germany purports to regulate certain aspects of liability for breaches of competition law (both national and EC) with specific rules relating to calculation of damages, interest, definition of potential claimants, collective claims and public interest litigation, which seeks to expand civil liability for breaches of competition law.

⁴⁸ This provision relates to actions for unfair competition. Violation of Art. 81 and 82 EC or national equivalents can be considered per se acts of unfair competition. Treatment of unfair competition law goes beyond the scope of the present study and will therefore not be discussed further here.

⁴⁹ Deemed to apply by analogy to EC based claims.

⁵⁰ Although this is set to change under the Draft 7th Amendment which will make the statutory basis for EC and national law based claims the same.

⁵¹ although this point is debatable and has never been explicitly addressed

⁵² Article 2600 of the Italian Civil Code provides that "when acts of unfair competition are ascertained, fault is presumed". This is a rebuttable presumption applicable to acts of unfair competition which is deemed by main doctrine to arise by analogy to competition law but has not so far been tested by the courts.

⁵³ Although Article 13.2 of the Law for the Defence of Competition may appear to create an "objective" regime it explicitly refers to the rules in the civil code that require establishment of fault. The point has not been decided by court.

⁵⁴ Fault being here intention or negligence in relation to the anti-competitive effect.

Finally, in Sweden, fault of a person in a leading position in the infringing company must be shown (which is a stricter requirement than in relation to fines where a fine may be imposed on a company for a fault attributable to any employee).

Secondly, as regards claims against state controlled undertakings for violation by the latter of competition rules, the general rule is that the legal basis for actions does not change (although there may be some differences as to the courts which have jurisdiction e.g. in France, Lithuania, Portugal and Spain – see point J(iii) below for further details on this issue). Moreover, national competition law does not apply to State controlled entities in Germany where activities of a public entity are sovereign in nature, or in Italy, where undertakings which are entrusted with the operation of services of general economic interest or are allowed to operate as monopolists on a given market, are exempt from application of national competition law, as regards those activities which strictly relate to the task entrusted. A similar result could be attained in Malta through government decree relating to specific companies but this is set to change soon with the introduction of a provision similar to the main exemption contained in Article 86 EC. Further details on this point are given below at point J(iii). Finally, it should be noted that the substantive conditions for damages actions against the state will obviously be subject to the requirements laid down in *Francovich*⁵⁵.

Finally, in some cases, the criteria set out by the specific legal basis may have the effect of restricting possibilities for claiming damages. Thus, in Sweden it should be noted that only undertakings and parties to a contract with the infringing undertaking can bring competition law-based damages claims. In Finland, consumers may not bring damages actions under the FCA but can in theory bring such actions under the general laws on damages.

German draft 7th amendment

The current draft 7th amendment to the Act Against Restraints of Competition, which is yet to be introduced to Parliament, is the result of the Government's deliberations as to how the private enforcement of Articles 81 and 82 EC (as well as of domestic competition law) can be facilitated. If enacted, the main changes it will implement are as follows:

- the concept of the protective purpose of the norm will be alleviated;
 - When assessing the amount of damage, courts will be permitted to take into account the infringer's profit. Representative organisations and institutions registered for public interest litigation will have the right to claim the infringer's profit which will however be awarded to the state. The Federal Cartel Office will be in charge to reimburse those plaintiffs for their costs.
 - interest will be due from the moment of occurrence of the damage;
 - Final Decisions of the German Federal Cartel Office, the EC Commission and competition authorities of other EU member states, final decisions issued by courts of other EU member states having the function of a competition authority as well as court decisions on appeals against the aforementioned decisions will be binding on civil courts, insofar as they find an infringement of competition law;
 - limitation periods for actions will stop running when competition authorities institute proceedings for infringement of competition law;
- court fees and lawyers' fees will be subject to reduction if a party is not in a financial position to bear those costs (new s. 89a GWB as proposed).

⁵⁵

Joined cases C-6 and 9/90, *Francovich v. Italy*, [1991] ECR I-5357.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

It should be noted at the outset that, as regards EC law based claims, under Article 6 of Regulation 1/2003 "*National courts shall have the power to apply Articles 81 and 82 of the Treaty*". Nevertheless, Article 35 of that Regulation preserves national procedural autonomy by stating that Member States have the power to designate the courts that are competent to apply Articles 81 and 82 EC.

Which courts are competent to hear damages actions varies widely from one jurisdiction to another but the main points on jurisdiction that have arisen from the study are laid out below.

a) Special rules for the designation of competent courts in competition related matters

Although "specialised courts" as such do not exist outside the UK (see point B(ii) below), the normal rules for the designation of competent courts are sometimes derogated from in competition-based damages cases resulting in higher qualified or more specialised judges handling cases. This is mainly done in the following ways, some of which are summarised in the table at the end of this section.

Higher than normal courts

Four countries accord first instance jurisdiction to higher courts than would normally be competent for other types of damages claims. These are: Czech Republic, Ireland (only for claims based on national competition law and not EC competition law), Italy (only for claims based on national competition law and not EC competition law) and Slovakia⁵⁶.

A comment should be made specifically on the jurisdiction of Italian courts. Briefly, as noted above, the Court of Appeal is competent to hear, at first instance, national law based claims. According to recent case law, the jurisdiction of the Court of Appeal would be limited to national law based claims brought by and between undertakings, with the exclusion of claims brought by consumers. However, the limitation of the jurisdiction of the Court of Appeal to hear only claims between undertakings at first instance is in doubt. The latter question is currently pending before a joint session of the Court of Cassation. Therefore, there is in Italy a fair degree of uncertainty as to the courts competent to hear competition claims brought by consumers. Full details of this are given in section B(i) of the Italian report.

Finally, in Ireland national law based claims may be brought at first instance before the Circuit Court or the High Court and EC law based claims may be brought at first instance before the District Court, the Circuit Court or the High Court. This therefore effectively restricts the choice of the plaintiff in national law based claims.

Limitation on number of competent courts

Some countries explicitly limit the number of courts that are competent to hear competition-based damages actions. This is currently done in Germany, where the Bundesländer have competence to make such limitations by regrouping the competence within a small number of district courts ("Landgericht") and even courts of appeal. In France, the possibility of introducing by governmental decree such a restriction as regards national competition law and most probably EC based damages actions is foreseen although this has not been done yet. Moreover, similar restrictions exist in Slovakia and are proposed in two other countries. In Lithuania, the new legislative amendment gives exclusive competence to the Vilnius district court as regards

⁵⁶ However this will be changed under the new Act on Court Seats and Circuits, which was approved by the Slovak parliament on 27 May 2004 and was not yet signed by the President. Pursuant to the new law, all competition based cases will be heard by one district court (the lowest court in the court system).

competition based damages actions. In Spain exclusive competence for EC competition-based damages claims will in principle be given to the mercantile courts as of September 2004 (although this will not cover national law based claims).

Specialist panels

In Germany, a specialist commercial panel can be designated competent at the request of one of the parties at first instance. On appeal, a special cartel law panel is exclusively competent. Moreover, even where there is no exclusive competence of a special cartel law panel, there is generally a tendency in courts' practice to allocate competition cases to one or a limited number of panels specialised in competition.

In the UK, the Chancery Division of the High Court is charged with treating competition claims and is thus intended to develop specialist expertise but is not intended to be specialised only in competition cases.

In Sweden, it is a specialist department (chamber) within the Stockholm district court that hears competition-based damages actions (although not in the special formation including economists that is required by law for certain other types of competition law cases). However, it is not a formal requirement that this department hears all competition law - based damages actions, but merely follows from the internal organisation of the district court.

Reference to national competition authorities or higher courts

In a small number of jurisdictions, the competence to adjudicate on the existence of a breach of national competition law (but not of EC competition law) has to varying degrees been given exclusively to the national competition authority.

The most extreme examples of this are Malta and Spain.⁵⁷ In Malta, although actions for damages for breaches of competition law fall within the competence of the ordinary civil courts, it appears that it is the Commission for Fair Trading (a judicial organ established under the Competition Act) that is competent to decide whether the conduct of undertakings is in breach of the Competition Act⁵⁸. Although the question has not yet been decided, in the case where plaintiff alleges that he has suffered damages as a result of a breach of Articles 81 and/or 82 of the EC Treaty it may be argued that no reference to the Commission for Fair Trading is required and the civil court hearing the action for damages may itself decide whether there has been a breach of Articles 81 and 82 of the EC Treaty⁵⁹.

In Spain, Article 13.2 of the CDL has been commonly interpreted in case law and by some academics to mean that an administrative decision declaring the infringement of national competition rules is required before damages may be awarded by the civil courts. However, this requirement should not apply to EC competition law. Other academics consider that there are grounds for the view that Article 13.2 of the CDL does not prevent an injured party from seeking damages based on the infringement of national competition rules directly before civil courts.

In Hungary there does exist case law on this issue. Although general courts are competent to rule on competition based damages claims, the courts have not shown willingness to decide whether

⁵⁷ In Cyprus, the law could potentially be interpreted as requiring a decision from the national competition authority finding a breach before any damages action can be brought. However, the Cypriot national report considers that such a prior decision would most probably not be required.

⁵⁸ Indeed, according to section 27 of the Competition Act, where before a court of civil jurisdiction it is alleged that there is an abuse of a dominant position in terms of section 9 of the Act or that an agreement is null and unenforceable in terms of section 5, the civil court is to stay proceedings and make reference to the Commission. Thus, if in an action for damages before the ordinary civil courts the plaintiff alleges that he has suffered damages as a result of a breach of national competition law, the question whether there has been a breach of section 5 and/or section 9 would have to be referred to the Commission and the civil court hearing the action for damages would be able to continue hearing the case after a decision is given by the Commission.

⁵⁹ This is because section 27 of the Competition Act mentions only sections 5 and 9 and does not expressly mention Articles 81 and 82 of the EC Treaty. Moreover, in terms of the above-quoted Article 6 of Regulation 1/2003 the Maltese civil courts have the power to apply Articles 81 and 82 of the EC Treaty.

there has actually been a violation of national competition law, notwithstanding the legal provisions – upon literal interpretation – do not restrain them to do so.

More generally, in most (but not all e.g. Ireland⁶⁰, Italy) Member States, where a case raises an incidental question on competition law which is pending before but has not yet been decided upon by the national competition authority, the court is entitled to decide upon such a question itself, but may also decide to stay proceedings until the decision of the national competition authority is reached.⁶¹

It should also be added that in Poland, judges hearing competition-based claims may order that the plaintiff request the national competition authority to institute proceedings.

Finally, in Belgium there is a compulsory reference to a specialised chamber of the Court of Appeal.

b) Other factors which may have an influence on the determination of the competent court

The following aspects of the Member States' ordinary jurisdictional rules should also be noted as they have the effect of bringing damages claims before higher/a more restricted number of courts.

Value of claim

Due to the complexity of competition-based damages claims, it is fair to assume that more often than not the value of the claim will need to be fairly high in order to justify the expense involved in bringing it. This will have an important effect on the identity of the competent court as many countries have a system of hierarchy of courts which results in claims for larger amounts having to be brought before higher courts. The value of the claim may also have the effect of there being a greater than normal number of judges (see below at point II.H(iv)).

Division Commercial/Civil courts⁶²

A number of jurisdictions (Austria, Belgium, Denmark (in the Copenhagen area), France, Germany⁶³ and Portugal (in some larger districts)) distinguish between civil and commercial matters, commercial (and therefore more specialised) courts having competence for the latter. Whether this rule as to jurisdiction applies will sometimes depend on certain factors such as whether a party asks for the case to be heard by the commercial courts (France, Germany), whether the damage arose from a contractual commercial relationship (Austria) and on the capacity of the defendant (Belgium).

c) Distinction between EC or national competition law in determining the competent court

In some jurisdictions, which court is considered competent will depend on whether the basis of the claim is EC or national competition law. This may result in higher or more specialised courts being charged with handling claims under EC law than national law or vice versa.

As regards higher courts, this point is dealt with above at point B(i)(a). In addition, as of September 2004, jurisdiction for EC law based claims in Spain will be given to the mercantile courts whilst claims based on national law remain in the hands of the ordinary civil courts⁶⁴.

d) Competence of different courts where the defendant is a public authority

⁶⁰ Where the issue does not arise since the NCA does not have the power to make enforcement decisions
⁶¹ As noted above, in Malta, such a reference may be compulsory.
⁶² The role played on the one hand by civil and on the other hand commercial courts varies from one jurisdiction to another. However, generally speaking, commercial courts are charged with settling disputes between business people or undertakings or disputes concerning commercial acts, whereas civil courts are charged with settling disputes between individuals. The composition of commercial and civil courts may also vary in some cases with judges having some business background.
⁶³ Germany does not have commercial courts as such but panels for commercial matters within the civil courts.
⁶⁴ This division of jurisdiction has no impact on the remedies available.

It should be noted that the laws of some Member States give competence to different courts (usually referred to as administrative courts) where the defendant is a public authority. This is the case for France (when acting with "prerogatives of public authorities"), Lithuania, Portugal and Spain. In all these jurisdictions, competence of the administrative courts is dependent on the violation being committed in the exercise of public authority. In addition, in Germany, Social Courts have the exclusive competence for claims in compulsory health insurance matters against entities of the public health sector. It should be noted here that in Poland, public authorities cannot be sued at all for breach of national competition law.

e) Criminal proceedings

In some jurisdictions, certain violations of national competition law also constitute a criminal offence. Where this is the case, and criminal proceedings are brought against the infringing undertaking, there exists a limited possibility in some Member States (e.g. Belgium, Denmark, France⁶⁵ and Luxembourg), for individuals to be joined as "parties civiles" to those criminal proceedings and to claim damages in the context of those proceedings.

f) Conclusions on competent court

The conclusions on the issue of the competent court can be summarised as follows in tabular form.

⁶⁵ It has to be noted that in France, criminal proceedings for anti-competitive practices can only be brought against individuals.

Table 2: Court competent to hear competition related cases⁶⁶

	Higher than normal courts ⁶⁷	Limitation on number of competent courts	Specialist panels	Division commercial/ civil
Austria				
Belgium				
Cyprus				
Czech Republic				
Denmark				
Estonia				
Finland				
France		⁶⁸		
Germany				
Greece				
Hungary				
Ireland				
Italy				
Latvia				
Lithuania				
Luxembourg ⁶⁹				
Malta				
Netherlands				
Poland				
Portugal				
Slovakia				
Slovenia				
Spain		P		
Sweden			⁷⁰	
UK				

Legend:

P: Proposed in new legislation

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

Only the UK has a specialised court, the Competition Appeals Tribunal (CAT), to hear damages actions based on breach of national and EC competition law. However, as can be noted from the answers received in response to question II.B(i) above, the regular rules on jurisdiction are often derogated from to produce a similar effect.

In the UK, claims based on national law and EC law, where there has been an administrative decision adopted by either the OFT or the European Commission, can be brought before the CAT (see dialogue box below for more details on the CAT) and those decisions will be binding on the CAT under section 47A of the Competition Act. Where EC law based claims are brought before the ordinary courts, the decisions of the European Commission are not binding on the ordinary courts by reason of statute but by virtue of the *Masterfoods*⁷¹ and *Delimitis*⁷² case law as now contained in

⁶⁶ Unless indicated otherwise, the entries in this table refer to national and EC law based claims.

⁶⁷ In Ireland and Italy, this only applies to national and not EC law based claims.

⁶⁸ Although this limitation has not yet been implemented.

⁶⁹ No specialised courts exist for competition matters. The courts ruling on general commercial cases are also competent for competition law cases.

⁷⁰ There is no specialist "panel" as such. However, due to the Stockholm District Court's internal organisation, the competition cases involving damages claims are all referred to the same chamber.

⁷¹ Case T-65/98, *Van den Bergh Foods Ltd v Commission of the European Communities*, not yet reported.

Article 16(1) of Regulation 1/2003. This contrasts with the position of OFT competition decisions before the ordinary courts which are binding under s 58A of the Competition Act.⁷²

Finally, it should also be noted that a recent legislative proposal in Italy foresees exclusive jurisdiction for certain specialised courts in the field of intellectual property and national competition law-based claims related to the exercise of those IP rights. Moreover, in Slovakia, under the new Act on Court Seats and Circuits, which was approved by the Slovak parliament on 27 May 2004 and not yet signed by the President, all competition based cases will be heard by one district court, which will specialise in competition cases, but will also have the other agenda from its district.

⁷²

Case C-234/89, *Delimitis v. Henninger Bräu*, [1991] ECR I-935.

⁷³

In Ireland national law based claims may be brought at first instance before the Circuit Court or the High Court and EC law based claims may be brought at first instance before the District Court, the Circuit Court or the High Court. This therefore effectively restricts the choice of the plaintiff in national law based claims.

The Competition Appeal Tribunal and Active Case Management

The Competition Appeal Tribunal (the "**CAT**" or "**Tribunal**") was created by Section 12 and Schedule 2 to the Enterprise Act 2002 (the "Enterprise Act") which came into force on 1 April 2003. The current functions of the CAT include (i) the hearing of appeals in respect of decisions made under the Competition Act 1998 by the Office of Fair Trading (OFT) and the regulators in the telecommunications, electricity, gas, water, railways and air traffic services sectors; (ii) the hearing of actions for damages and other monetary claims under the Competition Act 1998, where there exists a prior decision of the OFT or the European Commission and (iii) the review of decisions made by the Secretary of State, OFT and the Competition Commission in respect of merger and market references or possible reference under the Enterprise Act 2002.

According to the CAT's own guidance material, the rules of procedure of the CAT (the "**Rules**") are intended to enable the CAT to deal with cases justly, in particular by ensuring that the parties are on an equal footing, that expense is saved, and that appeals are dealt with expeditiously and fairly. To achieve this objective the Rules are modelled partly on the UK Civil Procedure Rules 1998 (the "**CPR**") and partly on the Rules of Procedure of the Court of First Instance of the European Communities (CFI), which deal with appeals in competition cases arising under Articles 81 and 82 of the EC Treaty. A central feature of both the CPR and the rules of the CFI is active case management by the court. There are five main principles of the Rules which are indicative of the active case management practised by the CAT: (1) Each party's case must be fully set out in writing as early as possible, with supporting documents produced at the outset. (2) The CAT will endeavour to identify and concentrate on the main issues at as early a stage as possible in order to avoid undue prolixity or delay, and to ensure that evidence is presented in an efficient manner. (3) Strict timetables will be imposed and the stages of the case will be geared to meeting this timetable. In general the Tribunal will aim to complete straightforward cases in less than six months. (4) The CAT will pay close attention to the probative value of documentary evidence. Where there are essential evidential issues that cannot be satisfactorily resolved without cross-examination, the Tribunal may permit the oral examination of witnesses. As regards expert evidence, the Tribunal will expect the parties to make every effort to narrow the points at issue, and to reach agreement where possible. (5) The structure of the main oral hearings before the Tribunal will be planned with a view to avoiding lengthy oral argument and since the written arguments of the parties will have already been set out, and since the main issues will have been identified prior to the main oral hearing, this hearing will normally be conducted within short defined time limits, in accordance with established practice in the CFI.

Decisions of the CAT can be appealed either on a point of law or in penalty cases as to the amount of any penalty. Any such appeal lies to the Court of Appeal in relation to CAT proceedings in England and Wales; in relation to CAT proceedings in Scotland, to the Court of Session; and in relation to CAT proceedings in Northern Ireland to the Court of Appeal in Northern Ireland. Such a further appeal may only be made with the permission of the CAT or the relevant appellate court.

C. Who can bring an action for damages?

(iii) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factors are required with the jurisdiction in order for an action to be admissible?

a) Standing of natural or legal persons

In very general terms any natural or legal person of full capacity (age, mental capacity etc.) has standing to sue or be sued at least in the courts of the Member State in which he is domiciled. There are no relevant differences in the way non-nationals and nationals are treated other than that some countries require non-nationals who are filing a claim to give security under certain circumstances - usually where a similar security is required in the country of which the plaintiff is a national (Belgium, Czech Republic, Denmark, Germany, Hungary, Ireland⁷⁴, Slovakia, Slovenia)⁷⁵. Furthermore, in some states, there are limited circumstances in which an entity without legal personality can sue or be sued (Belgium, Germany, Greece, Poland, Slovenia).

In nearly all jurisdictions this right is nevertheless explicitly qualified by a requirement such as affectation of the rights or interests of the plaintiff or genuine grievance. In some countries the type of interest required will also often to an extent be defined (e.g. existing, personal, legal, certain) and in particular some jurisdictions require the interest to be direct (Luxembourg, Malta)⁷⁶.

Some Member States impose different or additional limitations, for example:

- the law violated was there to protect the plaintiff (Austria, Germany (although this requirement will perhaps be modified under new legislation – see dialogue box on draft 7th amendment, above at point A(i) and the dialogue box below on "protective purpose");
- only undertakings can sue (Finland (under the Competition Act, although under the general rules of tort this limitation does not apply), Sweden⁷⁷ (although this limitation is under review)).

Protective purpose of the norm ("Schutznormtheorie")

The protective purpose requirement provides that only those people can base their cause of action on the norm who belong to the group of people whose protection is a purpose of the norm in question. If for example the law is meant to protect competition or a certain group of individuals only, an individual not belonging to that group may not be able to sue.

When applying this requirement, the courts usually demand that the plaintiff be a person or belong to a definable group of persons against whom the infringement was specifically directed with the aim of worsening that person's or group's situation. However, that this is the correct interpretation of the statutory prerequisite has been doubted and denied by at least one District Court. If the current draft 7th amendment becomes law, the amended statute will expressly state that Articles 81 and 82 EC as well as the provisions of national competition law are intended to protect other market participants even if the infringement is not specifically directed against them thus responding to academic criticism.

⁷⁴ Security for costs is available to defendants in certain circumstances without prejudice to Article 12 of the EC Treaty, the Brussels Convention and Regulation (EC) 44/2001.

⁷⁵ This does not apply to nationals of EC member states or of states party to the EEA who are exempt from giving security by application of EC law (see C-323/95, *Hayes*, [1996] ECR I-1711).

⁷⁶ However, as noted below at point II.F(ii), this does not in principle exclude claims by indirect purchasers.

⁷⁷ Although natural persons that are parties to an agreement with the infringing undertaking will also have standing.

b) Territorial jurisdiction

Jurisdiction between Member States

Regulation 44/2001 lays down rules indicating which Member State's court is competent to adjudicate on competition-based damages actions⁷⁸. A brief outline of these rules is given below.

Regulation 44/2001 On Jurisdiction And The Recognition And Enforcement Of Judgments In Civil And Commercial Matters ("Regulation")

Where parties from different Member States ("**MS**") are involved in a legal dispute which has arisen anywhere in the EU, it may be difficult not only to determine which court is competent but also to settle any disputes between two courts as to their competence to determine the claim. The Regulation was intended to harmonise the rules on jurisdiction and to settle any disputes between two formally competent courts.

The Regulation governs jurisdiction for all MS of the EU other than Denmark. It came into force on 1 March 2002.

The Regulation will apply only where there is a connection between the situation and the Regulation and where the situation falls within the ambit or the scope of the Regulation. As for a necessary nexus, this will be established if (i) the defendant is domiciled in a Regulation state; (ii) a court of a MS has exclusive jurisdiction pursuant to Article 22 (which is expanded on below); or (iii) where, in accordance with Article 23, the defendant is a party to an agreement that provides that the courts of a MS are to have exclusive jurisdiction to settle any dispute which has arisen in connection with a particular legal relationship (usually with the aid of a choice of forum/jurisdiction clause). Note that the rules on exclusive jurisdiction as set out in Article 22 of the Regulation override any choice of forum clauses. As far as scope is concerned, the Regulation only applies in civil and commercial matters, whatever the nature of the court or the tribunal. It does not extend, in particular, to revenue, customs or administrative matters, nor does it apply to (i) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (ii) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (iii) social security; or (iv) arbitration.

⁷⁸ As regards Denmark Regulation 44/2001 does not apply, cf. recital 21 and 22 of the Regulation. The Convention is drafted subject to Articles 61(c) and 67(1) under Chapter 4 of the EC Treaty concerning which Denmark has a reservation, cf. Article 69 EC. If a case involves persons from Denmark and other EU Member States or EFTA States the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 1968 (the Judgments Convention) therefore applies.

Regulation 44/2001 cont.

The general rule is that persons domiciled in a MS, whatever their nationality, must be sued in the courts of that MS (Article 2). The Regulation does, however, offer alternatives to this rule ("special jurisdiction"), which are set out in Articles 5, 6 and 7. The most common alternatives mentioned in Article 5 are the following:

For contracts (Article 5.1), a person *may* be sued in the place of performance of the obligation in question (i.e. for the sale of goods, the place of delivery, for the provision of services, the place where the services were provided). This rule may be displaced by an explicit agreement on the place of performance.

In matters relating to tort, a person *may* be sued in the place where the harmful event occurred (Article 5.3).

Where a dispute arises out of the operations of a branch, agency or other establishment, a person *may* be sued in the MS in which the branch etc is situated (Article 5.5).

Article 6 provides further alternatives relating to co-defendants (Article 6.1), third party proceedings (Article 6.2) and counterclaim (Article 6.3) and Article 7 deals with liabilities incurred as a result of the use or operations of a ship.

Exceptions to the general rule are set out in Articles 8 to 21. These are special rules governing matters relating to insurance (Articles 8-14), consumer contracts (Article 15-17) and contracts of employment (Articles 18-21).

In some cases, a court of a MS will have exclusive jurisdiction (Article 22). This is established in the following situations: (i) for land, the MS where the property is located has jurisdiction; (ii) for companies, the MS where the company is domiciled has jurisdiction; (iii) where the validity of entries in public registers is in question, the MS where the register is kept has jurisdiction; (iv) where the dispute is about patents, trade marks or designs, the MS where the respective IP right is registered has jurisdiction; and (v) where the enforcement of a judgment is in dispute, the MS in which the judgment is to be enforced has jurisdiction.

As already mentioned above, if the parties, one or more of whom is domiciled in a MS, have agreed that the courts of a MS are to have jurisdiction to settle any disputes which have arisen in connection with a particular legal relationship, those courts have jurisdiction. Such jurisdiction is exclusive unless the parties have agreed otherwise (Article 23). Where such an agreement is concluded by parties, none of whom is domiciled in a MS, the courts of other MS have no jurisdiction over their disputes unless the court chosen has declined jurisdiction. In both situations, such an agreement shall have no legal force if the court whose jurisdiction the parties purport to exclude has exclusive jurisdiction under Article 22.

Finally, according to Article 24 a party can voluntarily submit to the jurisdiction of a MS by appearing in the proceedings. Parties cannot voluntarily submit to jurisdiction where Article 22 (exclusive jurisdiction) applies.

According to Article 27 et seq., a court shall not accept jurisdiction where there are already proceedings in place in another MS relating to the same cause of action involving the same parties. Alternatively, where proceedings have already started, any court which is not the court "first seised" (as defined in Article 30 of the Regulation) shall either decline jurisdiction or stay proceedings.

Where Regulation 44/2001 does not apply (i.e. where the question of jurisdiction arises between a Member State and a non Member State) some countries have specific conflict of law rules. These are briefly discussed below.

Conflict of laws where Regulation 44/2001 does not apply⁷⁹

In the majority of countries, the conflicts rules applied in this type of situation are very similar to those laid out under Regulation 44/2001.

As regards torts, almost without exception courts of a Member State will have jurisdiction where the defendant is domiciled/has its seat in that state or where the damage or behaviour giving rise to the damage has occurred there.

The courts of some countries, however, also have jurisdiction on other relevant grounds, most importantly:

- The defendant has property in the jurisdiction (Austria, Czech Republic, Denmark, Finland, Estonia, Finland, France (when the action relates to the defendant's real estate property located in France), Germany, Greece, Hungary, Lithuania, Slovakia, Slovenia (if the property is proven to be sufficient));
- The defendant has a business or a branch⁸⁰ in the jurisdiction (usually also with the requirement that the legal dispute must relate to the activities of said business or branch): Austria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Poland, Slovenia;
- Competitive effects/affectation of the market in the jurisdiction (Austria, Estonia, Finland, Germany, Spain);
- Risk of damages in the jurisdiction (Hungary);
- Submission to the jurisdiction of the national courts (Estonia, France, Greece, Hungary, Ireland, Malta, Slovenia, Spain, UK);
- Defendant has been duly served in the jurisdiction (Denmark, Ireland (subject to the principle of *forum non conveniens*));
- Ireland: where a defendant outside Ireland has been duly served and the case is so closely connected to Ireland or with Irish law that there is ample justification for it being tried in Ireland; and
- There are several defendants in connected claims, one of which is domiciled in the jurisdiction where the claim is brought (Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Netherlands, Slovenia).

⁷⁹ There may be specific cases where these rules may not apply even if the situation falls outside the scope of the Regulation 44/2001. For example, there may be instances where other international treaties apply, the main example being the Lugano Convention.

⁸⁰ The expression business or branch is used here to indicate that the defendant company has some form of commercial presence in the jurisdiction albeit not a subsidiary.

These results are summarised in the table below:

Table 3: Reasons other than domicile/seat of defendant and place of damage for giving jurisdiction to a specific country

Country	Property in jurisdiction	Business/branch in jurisdiction	Effects in jurisdiction	Risk of damage in jurisdiction	Submission	Defendant duly served in jurisdiction	Multiple defendants, with one domiciled in jurisdiction
Austria	✓	✓					
Belgium			✓				✓
Czech Rep.	✓	✓					
Cyprus		✓					✓
Denmark	✓	✓				✓	
Estonia	✓						✓
Finland	✓	✓	✓				
France	✓	✓			✓		✓
Germany	✓	✓	✓				
Greece	✓				✓		✓
Hungary	✓	✓		✓	✓		✓
Ireland					✓	✓	
Italy							✓
Lithuania	✓						
Malta					✓		
Netherlands							✓
Poland		✓					
Slovakia	✓	✓					
Slovenia	✓	✓			✓		✓
Spain			✓		✓		
UK					✓		

(iv) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

As a preliminary point it should be noted that the present section of the report will not consider claims that cannot by law end in the award of damages, although as a general point it can be noted that, in several Member States, the power of representative organisations, consumer associations and other bodies to bring actions for injunctions is broader than the power of such entities to bring claims for damages.

The definitions of the terms used above for the purposes of the present study are given in the dialogue box below.

Group litigation: definition of terms

To avoid any misunderstanding and to deal better with the diversity of legal systems in the EC, the terms "collective claim", "class action", "joint action", "public interest litigation", "representative action" and "assignment of claim" have been given the following broad definitions. These definitions may well vary from those generally accepted in the Member States.

Public interest litigation: litigation, usually by a representative organisation, that is not done on behalf of any identified individuals but for the benefit of the public at large. Any damages awarded in the context of such claims are in some way given to the general public. This differs from class actions and collective claims in that the proceedings are brought on behalf of the public at large rather than a group of individuals (either identified or unidentified).

Class action: civil court procedure under which one party, or a group of parties, may sue as representatives of a larger class of unidentified individuals. Members of the class may exclude themselves from the proceedings. Only the class members who opt out are not bound by the judgment in the case. Any damages resulting from the action will be awarded to the members of the class as a whole i.e. individual awards will not be made to the different members of the class although each will be entitled to a part of the award.

Collective claim: single claim brought on behalf of a group of identified/identifiable individuals. Any award resulting from the action will be made to the group as a whole i.e. individual awards will not be made to the different members of the group.

Representative actions: single claim brought by, for example, an association on behalf of a group of identified individuals (usually its members). Any award resulting from the action will be made to the individual members.

Joint action: set of claims brought by several plaintiffs together or joined by the judge hearing the claims due to some link between them (e.g. same defendant, damages resulting from same facts). This type of action differs from class actions or collective claims in that the joining of the cases is procedural and at the end, although a single judgment may be made covering the cases of all the plaintiffs, the plaintiffs claims will be treated separately within that judgment and awards will be made individually to the different plaintiffs.

Assignment of claims: possibility for potential plaintiffs to assign their right of claim to an unconnected third party.

The definitions in the box above are summarised in the chart below which distinguishes the actions (i) according to the group on behalf of whom they are brought (public at large, class of unidentified individuals, group of identified individuals) and (ii) the person(s) to whom the award is made (public at large, group as a whole, individuals of the group separately).

		Claim brought on behalf of:		
		Public	Unidentified class	Group of identified or identifiable individuals
Awards made to:	Individuals of group separately			Representative action
	Group/class as a whole		Class action	Collective claim
	Public at large	Public interest litigation		

The answers given by the different national reporters to this question vary greatly. Indeed, due to the disparity that exists in this area, the definitions given here are to a great extent artificial and could be seen to result in a "forced" categorisation. Reference should therefore be made to the individual national reports to appreciate the diversity that exists in this area. However, the following general statements can be made.

a) Joint actions

All Member States recognise the existence of joint actions in some form – either claims being brought jointly by two or more individuals or claims pending before the courts being joined for the procedure.

b) Public interest litigation

No states recognise "public interest litigation" ending in the award of damages, according to the definition given in the dialogue box above. However, in Germany the draft 7th amendment envisages giving certain bodies the right to claim the profits made by infringers of Articles 81, 82 EC, of any of the provisions of the German Act Against Restraints of Competition or of an order of cartel authorities, provided that the infringement was committed intentionally and the profit has been obtained at the expense of a large number of customers, and provided these profits have not yet been claimed by the competition authority. According to the latest draft published by the German government on 28 May 2004, these profits will not be awarded to the plaintiff but to the state, whilst the Federal Cartel office is in charge of reimbursing the plaintiff for the necessary costs of litigation as far as reimbursement of those costs cannot be obtained from the infringer. The amount of costs to be reimbursed by the Federal Cartel Office may not exceed the economic benefit obtained by the state through the public interest litigation..

The section on "other forms of group litigation" below considers some of the other types of actions that can be brought on behalf of consumers or the general public but which do not end in damages.

c) Class actions and collective claims

Class actions and collective claims in the above sense which can end in the award of damages appear to exist (in legal texts) in Portugal (to a certain extent as there are limitations to the award of damages in these cases (there is a current debate as to whether individual damages may be granted and in any case, there are no precedents on grounds of competition laws)) and Sweden. Something resembling a class action is available in Spain also, although it does not correspond exactly to the definition given above and is thus considered below under .

In Portugal, an *actio popularis* may be brought for the protection of diffuse interests. This action is generally seen as being on behalf of the public at large but can be considered to fall within the broad definitions of class action and collective claim given above.

In Sweden, "opt-in" class actions were introduced in 2003. Class action is defined as an action where someone litigates for the members of a group with legal effect for each of the latter. The members must "opt in" i.e. choose to be considered as a member of the class (this can be contrasted with the US approach to class actions which adopt rather an "opt out" approach). However, members are not parties to the trial and do not have to participate actively. Three forms of class action are created by the law. The first of these is the private class action, initiated by a person belonging to the class and having a claim of his own. In competition-based claims this action can be initiated only by undertakings or others having a contractual relationship with the infringing party. The other two types of action are organisational class action (initiated by consumer or labour organisations) and public class actions (initiated by a government appointed authority). It should also be added that the Swedish class action model differs from the above definition as it may result in individual awards being made.

In Spain, the law of civil procedure (CPL) provides that consumer associations representing general consumer interests may bring actions to protect the interests of an unascertainable group of consumers or end users who have suffered damages (note that this does not, therefore, cover competitors). The same section of the CPL also provides for representative actions, where certain groups or entities may bring actions to protect the interests of a group of consumers or end users whose members are identified (or easily identifiable). Although not completely clear, it is thought that economic loss can be claimed using these two types of action and therefore they would apply to competition-based damages claims. No such actions have been brought under the above provisions of the CPL. It should also be noted that in such actions any award that is made is made in respect of each individual claimant and not in respect of the class as a whole (the first action mentioned is therefore not clearly a "class action" in the sense defined above). Thus, following the judgment made in respect of the action, each applicant must then apply to the Court: (a) to be recognised as a member of the class; and (b) to quantify individual damages. Therefore, although in a first phase this action resembles a class action or collective claim (as it aims to protect groups of identified (or unidentified) individuals), the second phase involves awards being made to individuals.

Finally, it should be noted that in Finland the debate on class actions has been given new life at least in part owing to the recent introduction of class actions in Sweden.

d) Representative actions

The number of Member States providing for representative actions ending in an award of damages is also limited. Such actions do however exist in some states. In this regard, Belgian and French law provide that in some circumstances certain associations can bring actions to claim for a collective damage or for several individual damages. See also the comments on Spain under point (c), immediately above.

In Italy a new type of action is proposed that would allow certain consumer organisations to bring actions for damages caused by a series of separate offences committed in the context of a contractual relationship governed by standard terms and conditions. The procedure would be split into two phases. In the first phase the consumer associations would bring the action to establish liability and the criteria each consumer needs to fulfil to be entitled to an award. In a second phase, which should be preceded by a mandatory non contentious settlement procedure, the individual consumers fulfilling those criteria would be able to obtain (before the small claims court) a "customised" quantification of damages.

e) Assignment of claims

It should also be noted that in some states there exists the possibility to "assign" claims for damages (e.g. Austria, Germany, Netherlands). In Austria, this practice has become common for general damages claims of consumers represented by a consumer organisation. A similar claim for damages allegedly caused by the "Lombard Club" cartel is currently discussed, the actual legality of this type of claim remains disputed. A similar mechanism for assignment of claims exists in the Netherlands where it has been put into practice by several public authorities which have formed and authorised a foundation to pursue proceedings against several construction companies for bid rigging.

It would furthermore appear that there are instances in Europe of companies being set up with the more general aim of having damages claims assigned to them.

f) Actions brought by public prosecutor or ombudsman

Some jurisdictions provide the possibility for a public official such as the public prosecutor or ombudsman to bring damages actions on behalf of (a) specific person(s).

This is the case in France where claims for damages can be brought by the public prosecutor on behalf of individuals. However, this only relates to damages arising from restrictive practices and not anti-competitive practices. Such a possibility also exists in Poland and Lithuania. In Denmark, in the case of a plurality of consumers having uniform damages claims, the Consumer Ombudsman may recover those claims collectively (this possibility does, however, not relate to damages arising from violations of the Competition Act).

Such actions by the public prosecutor do exist in certain other Member States but do not necessarily extend to damages actions (Czech Republic, Slovakia).

g) Other types of group litigation

Most Member States recognise – to a limited extent and in varying forms – the possibility for entities which have not necessarily suffered any harm from a breach of competition law to bring an action on behalf of entities that have suffered such harm although such claims will usually not end in damages being awarded. In Belgium, for example, public interest litigation is in principle not possible, but certain exceptions have been provided for by law, such as associations defending consumers' interests who can request a cease and desist order with respect to unfair trade practices. In Austria (before the Cartel Court) and Germany, certain representative organisations have the right to ask for a cease and desist order against an infringement of competition law.

One salient feature of this area is that there is a tendency for greater rights to be given to representative organisations regarding claims for breach of unfair competition rules or consumer protection rules (e.g. Austria, Czech Republic, Germany (as regards public interest litigation; this is however set to change under the draft 7th amendment), Hungary, Italy, Slovakia, Spain). Again, however, the remedy is not damages but usually a cease and desist order (Austria, Czech

Republic, Germany, Italy⁸¹, Slovakia, Spain) or restraining injunctions (Italy and Lithuania in the case of unfair terms in consumer contracts).

Another notable feature is that, in some states, only representative organisations that figure on a statutory list (Austria, Hungary), are of a certain category (Lithuania, where only the Consumer Protection Institution or public consumer organisations can act on behalf of the consumers and only in limited circumstances), have governmental authorisation (France) or fulfil certain criteria e.g. number of members or time that the organisation has existed for (Germany, France, Greece (under consumer protection law but not for actions under competition law), Italy, Spain⁸²) may bring actions on behalf of the general public.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

In general, all forms of compensation described below are available for EC and national law based actions.

a) Restitution

Without exception, non-contractual damages are awarded in Member States principally on the basis of the principle that the victim must be restored to the situation he would have been in had the tort not taken place (although in some Member States exemplary or punitive damages are also foreseen). Depending on the Member State, contractual damages may be awarded on the basis of restoration of the victim to the situation he would have been in either in the absence of the contract or in the absence of the illegality.

The notion of restoring the victim's previous position is therefore central to this question. Resultantly, some national reporters cite restitution as being the main form of remedy open to a plaintiff (Austria, Denmark, Germany, Portugal). In some states compensation may not be given unless full restitution is impossible or excessively difficult (Belgium, Germany (the plaintiff can choose compensation in case of personal injury or property damage), Hungary (the plaintiff can decline restitution for a good reason), Portugal), whereas in certain other jurisdictions, restitution must be specifically requested by the plaintiff (Czech Republic, Greece, Slovakia).

b) Monetary compensation

Monetary compensation in the form of damages is available in all jurisdictions. What this covers (actual loss, loss of profits etc) varies slightly depending on the Member State although all Member States provide for actual loss and loss of profits to be compensated. The following table also indicates which states provide for monetary compensation of a loss of chance (see dialogue box below) and moral damages.

⁸¹ However, according to Italian prevailing case law, the remedy vis-à-vis acts of unfair competition as provided by Article 2601 CC should also be damage.

⁸² However, this requisite exists only as regards the protection of "diffuse interests".

Table 4: Types of damage recoverable

Country	Loss of chance	Moral damages
Austria	✓	-
Belgium	✓	✓
Cyprus	-	-
Czech Republic	-	-
Denmark	-	-
Estonia	✓	-
Finland	-	-
France	✓	✓
Germany	✓	✓ ⁸³
Greece ⁸⁴	✓	✓
Hungary	-	✓
Ireland	✓	-
Italy ⁸⁵	✓	-
Latvia		
Lithuania	- ⁸⁶	-
Luxembourg	✓	
Malta	-	-
Netherlands	✓	
Poland	✓	✓
Portugal	✓	✓
Slovakia	-	-
Slovenia	-	✓
Spain	✓ ⁸⁷	✓
Sweden	✓	-
UK	-	-

It should be noted that several jurisdictions foresee the possibility for monetary damages to be paid either in the form of a lump sum or as repeat payments (e.g. Belgium and Estonia (both foreseeing periodic payments) and Hungary (allowances)).

c) Punitive and Exemplary Damage

In addition to restitutive-compensatory damages, punitive and exemplary damages are provided for, although rarely awarded, in some jurisdictions (see below point G(a)(vi)).

d) Other types of compensation

Most other jurisdictions do not foresee any other type of compensation (although other remedies such as injunctive relief and cease and desist orders are available in most jurisdictions).⁸⁸ In Germany, a claim for remedy regarding the consequences of infringement is available⁸⁹.

⁸³ Only if the lost had economic value
⁸⁴ Loss of chance would be covered by loss of profit.
⁸⁵ Damages for loss of chance were claimed but not awarded for lack of evidence in the Italian *Telsystem v. SIP* case.
⁸⁶ In Italy, the existence of a contractual element in refusal to supply cases could give rise to an order to supply being imposed on a dominant firm. However, this possibility remains theoretical and unlikely on the basis of existing case law which defines refusal to deal as tortious.
⁸⁷ The concept of "loss of chance" is not provided in Lithuanian law. In most of cases the "loss of chance" would probably be covered by the "loss of profits".
⁸⁸ Loss of chance is covered by the concept of loss of profits, as long as this loss of chance is not just mere hope or expectation but there is a certain degree of likelihood that it would have been realised.
⁸⁹ In Italy, the existence of a contractual element in refusal to supply cases could give rise to an order to supply being imposed on a dominant firm. However, this possibility remains theoretical and unlikely on the basis of existing case law which defines refusal to deal as tortious.
⁸⁹ The remedy regarding the consequences of infringement provides redress for harm which has already occurred, but still entails nuisances. It applies, for example, where a persisting infringement is established and is still impairing the plaintiff, such as a continuing exclusion from a particular market (cp. National Report). In such a case, the plaintiff may claim access to that market. However, in many cases the remedies available through a damages claim and a claim regarding the consequences of an infringement are the same.

No other forms of civil liability relevant to the present study are recognised in any of the Member States in the context of private damages actions, other than in Poland which foresees the possibility of donations to charity under the rules on unfair competition and in Ireland which foresees the possibility of obtaining a "declaration of infringement".

e) Publication of the decision

Finally, some states foresee the possibility to order publication in the press of the fact of the violation (Poland) or the court decision (Austria (in cases concerning unfair competition law), Belgium, France⁹⁰, Germany (as restitution or remedy regarding the consequences of infringement), Greece (in cases concerning unfair competition law), Italy⁹¹, Luxembourg, Netherlands, Portugal⁹², Slovakia (in cases concerning unfair competition law and consumer protection only), Slovenia (in cases concerning unfair competition law only), Spain (in cases concerning unfair competition law only)) which could also be considered as a form of compensation.

In all these Member States publication is made on the request of the claimant with the consent of the Court. In addition, France foresees the possibility of forced publication of the judgment in the annual report of the defendant.

With regard to publications in the press, it can be noted that in two of the rare competition-based damages actions that have been brought to judgment, publication was refused (Bluvacanze in Italy and UGAP in France). In the Bluvacanze case this was because the infringement had already come to an end. In the UGAP case, the refusal to order publication was not explained by the court.

(ii) Other forms of civil liability (e.g. disqualification of director)

In several countries, directors may be held personally liable as a result of the company's participation in a breach of competition law (Belgium⁹³, Czech Republic, Denmark, France⁹⁴, Germany⁹⁵, Ireland, Italy, Luxembourg, Portugal⁹⁶, Slovakia, Spain, Sweden⁹⁷, UK).

It is also worthy of note that, in Greece, the directors of an undertaking infringing national competition law are jointly and severally liable for the payments of the fines imposed on the undertaking in breach of the above articles.

As regards disqualification of directors, no Member State foresees the possibility of such liability in the context of a private action. However, the laws of most Member States (although not in Cyprus, Czech Republic, Greece, Hungary, Netherlands, Slovakia) envisage the possibility of disqualifying directors as a result of their company's participation in a breach of competition law, albeit in the context of different procedures. These procedures are often criminal and so their relevance to competition cases is in many cases very limited (e.g. Austria⁹⁸, Denmark, Estonia, Germany, Ireland, Poland, Spain⁹⁹).

⁹⁰ Publication in the press was requested in the French UGAP v. CAMIF case, but was rejected by the Court of Appeal. The remedy is more common in cases of breaches of intellectual property and unfair competition rules.

⁹¹ Publication in the press was requested in the Italian Bluvacanze case, but was rejected by the Court of Appeal as the infringement had already been brought to an end.

⁹² Publication of court decisions only occurs in case of criminal acts. The national competition authority may, however, order the publication of a decision finding violation.

⁹³ On the basis of the general provisions for tortious liability.

⁹⁴ Shareholders can bring an action against directors on behalf of the undertaking, where the company has not brought such an action itself.

⁹⁵ Directors can be held personally liable by third parties.

⁹⁶ Although not a form of civil liability, it is noteworthy that in Portugal, the national competition authority may impose administrative fines on directors of infringing companies.

⁹⁷ Proceedings brought by the company to recover damages may be brought only by the owners of at least not less than one-tenth of the shares in the company. The directors may not be held personally liable by anyone else than the company or such shareholders of the company as described above.

⁹⁸ Disqualification can be based on provisions of Austrian company law.

⁹⁹ In Spain, disqualification can follow from criminal proceedings.

Finally, it can be noted that in some jurisdictions directors can be held criminally liable for violations of national competition law and can be imprisoned as a result (Austria (for bid rigging only), Cyprus (in case of repeated violations), Czech Republic, Estonia, France, Germany (in case of anti-competitive agreements concerning invitations to tender), Ireland (where the breach involves price fixing, limiting output or sales or sharing markets or customers), , Portugal¹⁰⁰, Slovakia, Slovenia (for criminal abuse of dominant position only), Spain).

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

It should be noted that a distinction is drawn here between fault and illegality (violation of competition rules). As is described below, Member States vary as to whether they require both fault and illegality, only illegality or if fault is presumed (rebuttably or irrebuttably) where illegality is shown. Moreover, in some Member States it should be noted that liability may also exist where there is fault even in the absence of an illegal act.

None of the national reporters notes a difference between the treatment of claims under national or EC law as regards the fault element.

Most Member States require fault in non-contractual damages actions (all except Cyprus, Czech Republic, Ireland, Slovakia, UK). In all states where fault is required, intent and negligence are both sufficient. The following general observations on the requirement of fault can be made.

Firstly, in some Member States fault must be shown in relation to the violation of competition law i.e. the infringement is not in itself sufficient but must have been committed negligently or intentionally (Austria, Denmark (although it may be that fault is automatically implied - the point has been raised in a pending case¹⁰¹), Estonia, Finland, Germany, Greece, Hungary, Poland, Portugal (but the consequences should, at the time of the damage have been reasonably foreseeable)). In other states, fault must be shown in relation to the (actual or potential) effects of the violation (Slovenia, Sweden).¹⁰²

Secondly, in some Member States, violation of competition rules will automatically imply that the fault element is fulfilled. In other words, there is no double requirement of showing infringement of the law as well as fault. This is the case in Belgium, France, Luxembourg, Malta (although this point has never been addressed in existing case-law) and the Netherlands.

Thirdly, in certain other states, fault is technically a requirement, but is rebuttably presumed where a violation of competition law is shown i.e. the burden of proof is reversed as regards this element. This is the case for Austria, Estonia, Germany, Hungary (the defendant can exculpate himself by proving absence of fault), Italy (although this is debatable and another possibility is that fault must be shown), Lithuania and Slovenia and Spain).

¹⁰⁰ See note 96.

¹⁰¹ TV Danmark A/S v. TV2 Danmark A/S, pending before the high court, 13th dept.

¹⁰² It should be added here that some case law of the ECJ indicates that violation of EC competition law can take place without fault (for example Case 107/76, Hoffmann La Roche, [1977] ECR 957). However, since these cases were decided in the context of appeals against administrative decisions, the case law does not readily seem transposable to damages actions between private parties.

These basic points are laid out in the table below:

Table 5: Requirement of fault

Country	No fault required	Fault implied (irrebuttably presumed)	Fault in relation to infringement	Fault in relation to effects	Fault rebuttably presumed
Austria			✓		✓
Belgium		✓			
Cyprus	✓				
Czech Republic	✓				
Denmark			✓		
Estonia			✓		✓
Finland			✓		
France		✓			
Germany			✓		✓
Greece			✓		
Hungary		✓			✓
Ireland	✓				
Italy ¹⁰³			✓		✓
Latvia					
Lithuania					✓
Luxembourg		✓			
Malta		✓			
Netherlands		✓			
Poland			✓		
Portugal			✓		
Slovakia	✓				
Slovenia				✓	✓
Spain			✓		
Sweden				✓	
UK	✓				

The following points also deserve to be noted:

Degrees of fault

As noted above, in countries where fault is required, intention and negligence are both considered sufficient. However, some countries make further distinctions between degrees of negligence (Austria and Slovenia (minor and major negligence), Estonia (negligence and gross negligence), Greece (light and heavy negligence)) or vary penalties according the degree of fault (Ireland (existence of intention is relevant for the awarding of exemplary damages), Portugal).¹⁰⁴

Degree of care required

Negligence will exist where undertakings fail to exercise the requisite degree of care. The degree of care required and the terminology used vary between Member States, however, the following common trends can be noted.

¹⁰³ Fault in relation to the infringement must be proven even though the rebuttably presumed fault as provided for unfair competition acts under Article 2600 CC is deemed to apply by analogy to competition-based damages actions, although this remains a moot point, For further details, please refer to the Italian report, point D)(iii).

¹⁰⁴ The degree of negligence may have other consequences also e.g. in Denmark, a particularly high degree of fault can lead to a lowering of the requisite standard of proof (see Danish report point E(a)(ii)).

Firstly, some countries essentially require undertakings to exercise the degree of care or diligence of an average person (Austria, Denmark, France, Germany, Greece, Luxembourg, Lithuania (although this may be different depending on the activity), Malta, Poland, Portugal, Spain). These states apply a test including (i) an objective and (ii) a subjective element to establish whether the requisite degree of care has been exercised: (i) did the undertaking's behaviour live up to a set of hypothetical behavioural standards (ii) in the specific (external) circumstances of the case. As regards the first limb of this test, terminology differs although by far the most common approach is to require the degree of care of a *bonus pater familiae* (Belgium, Denmark, France, Luxembourg, Malta).

Secondly, some countries require undertakings to exercise a greater degree of care than would be expected from an individual. The test applied in these states again involves a subjective and an objective element. However, the difference lies in the fact that the objective behavioural standards are not those of the average person but of a professional undertaking (although again terminology differs in this regard). This is the case for Poland and Slovenia and is also usually the approach taken in Belgium, France, Hungary and Spain¹⁰⁵.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party)

As a preliminary remark it should be noted that pursuant to Article 2 of Regulation 1/2003:

"In any national or Community proceedings for the application of Article 81 and 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 shall rest on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of Article 81(3) shall bear the burden of proving that the conditions of that paragraph are fulfilled."

In order to establish liability in damages all jurisdictions require proof of an infringement of competition law, damages and a causal link. Many jurisdictions also require fault to be shown. In addition, Austria, Estonia and Germany require that the provision that has been infringed was intended to protect the plaintiff (this is a question of law and not of fact).

In all jurisdictions, the burden of proving the infringement, the existence of damages and the causal link rests in principle on the plaintiff. As regards the burden of proving fault details are given above at point II.D(iii). However, as regards the burden of proving the extent (rather than the existence) of damages, there may be some presumptions which operate. Further details of the latter are given under point II.G(c)(i).

In general terms, where the burden of proof is discharged by the plaintiff it will shift to the defendant.

Passing on

Because there is little case law on the subject it is not always clear which party bears the burden of proving that there has been no passing on. However, where the defence exists, the defendant may claim that there has been passing on to reduce its liability. Thus, in line with the San Giorgio

¹⁰⁵ In practice courts tend to take into account the sophistication and the legal and technical resources of the relevant undertaking.

case-law¹⁰⁶, the plaintiff does not bear the burden of proving from the outset that there has been no passing on. Further information is given on this issue at point II.F(ii).

Public knowledge

A number of jurisdictions explicitly provide that certain facts will be considered to be proven where they are considered to be public knowledge which could result in the burden of proof being shifted to the defendant as regards those facts. This is the case in Germany, Greece and a number of new Member States (Estonia, Lithuania, Poland, Slovenia). In Hungary, the courts only have the right, but they are not obliged to accept such facts.

Situations leading to a reversal of the burden of proof

Although not changing the above principles on who bears the burden of proof, there are a number of types of evidence or situations that can lead to an automatic reversal of the burden of proof. These are outlined below.

Public documents and deeds

In a number of jurisdictions, facts contained in deeds (Belgium, Italy, Netherlands, Portugal, Slovakia (public deeds)) or public documents (Czech Republic (where decisions finding infringements of law will relieve the plaintiff of the burden of proving an infringement), France, Germany (full evidence of acts carried out by issuing authority but not of correctness of a decision), Greece (where they constitute full evidence of acts carried out by their author), Lithuania (where facts contained in authentic state documents are rebuttably presumed), Slovakia (rebuttable presumption), Slovenia (where this rule extends also to foreign public documents), Spain (*inter alia* complete evidence of the facts, acts or situations to which they refer), UK (OFT decisions are binding on courts and the CAT and European Commission decisions are binding on the CAT)) are taken as proven which again can result in a reversal of the burden of proof. In Germany, the binding effect of decisions of cartel authorities is due to be introduced along with the draft 7th amendment. Further information on this issue is given below at point E(b)(iii).

Decisions of courts

As a preliminary point, it should be recalled that under Regulation 44/2001 judgments of courts in EC Member States where the parties and the issues are the same will be given the force of *res judicata*. However, where this is not the case, foreign or domestic judgments will often have strong evidential value and may result in a reversal of the burden of proof.

Indeed, in addition to those countries listed above in relation to public documents, several jurisdictions provide that facts contained in judgments may be presumed. This is usually limited to domestic judgments (Estonia, Poland and UK). Further information on this issue is given below at point E(b)(iii).

In Germany, the 7th amendment plans to give binding effect to final decisions of national competition authorities in any EU Member State, the EC Commission or a German court on the infringement of competition law as far as these decisions state an infringement of competition law. Decisions issued by national courts of other Member States shall be binding as far as these courts have the function to issue administrative decisions stating the infringement of competition law or if they decide on appeals against such administrative decisions.

¹⁰⁶ Case 199/82, *San Giorgio*, [1982] ECR 3595. This line of case law, however, relates generally to charges levied by national authorities that are considered contrary to EC law (see most recently C-129/00, *Commission v. Italy*, not yet reported).

Refusal to produce documents

All jurisdictions to some extent give powers to courts to order the production of documents. Refusal to do so may in many cases be taken into account by the judge.¹⁰⁷ In practice this may result in a reversal of the burden of proof. This is further discussed below at point E(a)(iv).

Presumptions

Ireland and Germany are both jurisdictions that provide for a number of important presumptions in competition-based damages actions. In Ireland, a detailed list of presumptions, mainly regarding the authorship of documents, is contained in the Competition Act¹⁰⁸. These are laid out in full at point E(a)(i) of the Irish report.

In Germany, the following legal rebuttable presumptions apply in certain circumstances to national based claims:

- concerted practice is presumed where there is contact between undertakings and they act concurrently¹⁰⁹;
- dominance is presumed when certain market thresholds are met;
- where it appears that an undertaking has used its market power for acts of discrimination or unfair hindrance, it falls to the defendant to rebut the appearance and clarify such aspects of its business as it/they cannot be clarified by the claimant; and
- systematic pricing below cost by a dominant undertaking is presumed to constitute an unfair hindrance;

Further details are given in the German report at point E(a)(i).

The following miscellaneous points should also be mentioned.

- France: present case law seems to indicate that where a dispute involves questions over the legality of franchise contracts, the burden is on the defendant to prove the legality of the latter;
- Estonia: The current version of a new draft of the Code of Civil procedure provides for factual circumstances presented by a party to be considered proven until actually disputed by the other party;
- Latvia: Where the Competition Council has already determined that a breach of competition law has occurred and where this decision has entered into force and has not been appealed against, in an action for damages for breach of competition law the claimant does not have to prove the fact of the violation, i.e. the breach, again¹¹⁰; and
- Portugal: if one party has deliberately made it impossible (rather than merely difficult) to prove a fact, the burden of proof is explicitly reversed (such an explicit rule does not generally exist in other jurisdictions but courts may take the fact into account which may *de facto* result in a reversal of the burden of proof (e.g. Denmark, Germany)).

¹⁰⁷ In some jurisdictions, the possibility for the judge to take such refusals into account is provided for by law (e.g. France, Italy, Poland). That such refusal can reverse the burden of proof is explicitly foreseen in draft amendments to the Estonian Civil Code of Procedure.

¹⁰⁸ However, the Competition Act does not specifically provide that these presumptions apply in civil actions in respect of breaches of EC competition law. The presumptions are quite radical and consequently, it is not clear whether the Irish courts would apply them in civil actions concerning breaches of EC competition law. There has been no reported case law to date on point

¹⁰⁹ It is unclear whether this presumption is meant to be applied in damages proceedings, however, there are no imperative arguments against its application in civil proceedings.

¹¹⁰ Although see below note 152.

(ii) Standard of proof

In the majority of states there exists no commonly accepted abstract definition of the standard of proof such as "balance of probabilities" or "beyond all reasonable doubt" as is often seen in common law jurisdictions. Moreover, the abstract use of these terms does not appear to be particularly revealing. However, the following table gives a graduated list of the terms that can be found:

Table 6: Standard of proof

Country	Standard of proof
Cyprus, Ireland, Malta, Poland, UK ¹¹¹	Probability, Balance of probabilities
Denmark	High degree of probability
Slovakia	No reasonable or serious doubt
Greece, Lithuania	Beyond reasonable doubt
Slovenia	Certainty

It should of course be emphasised that although more or less standard terms exist in the above jurisdictions, it is difficult to appreciate their value when used in the abstract.

Although terminology may differ slightly, many countries often refer to the fact that the judge must be convinced or his conviction won (Austria, Belgium, Estonia (this is interpreted as the more probable version of the facts), France, Germany, Greece, Hungary, Latvia, Luxembourg, Netherlands, Portugal, Spain)).¹¹² In Italy, recent case law on national competition-based damages actions show that, demonstrating a consistent and conclusive set of circumstances is sufficient for the burden of proof to be discharged.

Moreover, all countries recognise the principle of the free evaluation of evidence by the judge.¹¹³

It can also be noted from the national reports that, as regards injunction proceedings, the standard of proof required is generally lower than in proceedings on the merits, although most countries will require other conditions to be fulfilled relating to the inadequacy of damages, urgency etc. The level and way of expressing the requisite standard of proof in injunction proceedings varies between Member State although many use terms such as probability (e.g. Cyprus (reasonable probability), Denmark, Germany, Greece, Luxembourg, Poland), prima facie case (e.g. Austria, Italy, Malta) or serious question to be tried (e.g. Ireland, UK). Slovakia noted that the standard of proof is in practice lower for injunction proceedings although this is not explicitly provided for in law but results from the practice of the courts. In the Netherlands, the normal rules on evidence are not applicable to injunction proceedings. Parties do not have to offer proof for their statements. Even if they do, the judge in his discretion may ignore the offer and he may freely reverse or divide the burden of proof over the parties. However, the standard of proof as such is not lowered.

It is interesting to note from the above that, although many Member States do not tend to express burden of proof in terms of probabilities or degree of certainty, the probability test appears to be the most frequently used in the context of injunction proceedings.

¹¹¹ This is the standard that is usually applied in civil cases in the UK. It is the standard that is also applied in proceedings before the Competition Appeals Tribunal when applying the Competition Act 1988. However, in the case of EC law based damages actions, there is case law to suggest that the standard of proof is rather a high degree of probability (*Shearson Lehman Hutton Inc v Watson Co Ltd* [1989] 3 CMLR 429 at 570). Yet another position was taken in *Arkin v Borchard Lines Ltd* ([2001] EU LR 232, QBD (preliminary issues)) where the test was a "high" balance of probabilities.

¹¹² This in essence means that the judge has to be convinced of the facts that constitute the basis for the claim.

¹¹³ Free evaluation of the evidence means that the judge is free to decide as to the value of each piece of evidence laid before him and this value is not dictated by law (or only to the extent explicitly provided for, by e.g. hierarchy of evidence).

Finally, the following exceptions or specificities should be noted (in relation to proceedings on the merits):

- Austria, Germany: loss of profits need only be "probable";
- Czech Republic: where loss of profits are claimed then it must be shown that these would have been earned with a "probability nearing certainty";¹¹⁴and
- Denmark: in certain circumstances, for example where fault is particularly grave, the standard of proof for other elements such as causation may be lowered.

In relation to standard of proof and assessment of damages see also below at point E(c)(i).

(iii) Limitations concerning form of evidence

The limitations that are placed on forms of evidence are highly complex and the finer details can only be fully appreciated by referring to the national reports themselves.

However, the following general comments can be made.

Countries with no general limitations on forms of evidence

There are no relevant, general limitations on the forms of evidence that can be submitted in the following 18 countries (although there may be some particular restrictions the most important of which will be listed below): Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, Hungary, Ireland, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovenia, Slovakia, Spain, Sweden and UK.

Categories of forms

Conversely, in 7 jurisdictions, an exhaustive list of forms of admissible evidence exists (Estonia, France¹¹⁵, Germany¹¹⁶, Greece, Italy, Latvia, Lithuania). The list of admissible forms of evidence is however generally very wide (particularly France, Germany and Latvia where even illegally obtained evidence is admissible in proceedings). As a general remark, all states that exhaustively list forms of acceptable evidence include at least the following (although sometimes with limitations):

- documents;
- parties' statements (sometimes also questioning of the parties);
- expert opinions; and
- witnesses.

Hierarchy of forms of evidence

A number of states consider certain forms of evidence or categories of documents to have a greater evidential value than others:

- Belgium and France: documentary evidence is accorded greater value; and
- Belgium and Luxembourg: verbal testimonies are secondary to written evidence.

Witnesses

By far the most heavily regulated form of evidence is evidence given by witnesses. Restrictions on such evidence takes a wide variety of forms of which the key ones are laid out below. Further rules on procedure as regards witnesses are given under point E(b)(ii).

¹¹⁴ Although this standard has not yet been accepted by higher courts.

¹¹⁵ Due to a number of exceptions to the general rule, this only applies as regards the proof of legal acts in civil matters.

¹¹⁶ This list only applies as to the merits. No limitations are imposed on the forms of evidence that can be used to show admissibility.

- Limitations on certain categories of witness

In some Member States certain categories of witness may refuse (or are under a duty not) to testify. The two main categories are: people subject to professional secrecy and (close) relatives of the parties. Albeit with slightly different conditions attached to their applicability, such rules exist in practically all Member States.

- Exclusion or special treatment of statements by parties

In some states parties (including their representatives) may not be called as witnesses as such (Czech Republic, Estonia, Germany, Hungary, Italy, Luxembourg¹¹⁷, Portugal, Slovakia, Sweden (although they can be called to give a statement as a party)).

However, in most of these jurisdictions, there is some scope for parties to submit statements (Czech Republic (testimonies as parties to the proceedings), Estonia (statements can be requested or volunteered by parties), Germany (under specific circumstances, e.g. if no other evidence is accessible), Portugal, Slovakia).

- Written statements

In some jurisdictions witness statements cannot take written form (Estonia, Finland, Italy, Portugal (with some exceptions), Slovenia (such a written statement would not be considered "witness statement", but other form of evidence, which is also permissible as there are no limitations concerning form of evidence), Sweden).

Common instruments

Evidence or witnesses will often be situated abroad. In this regard two instruments are of particular importance: Regulation 1206/2001 on Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters¹¹⁸ and the Hague convention of 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. These instruments are described in the dialogue box across the page.

Other rules

Belgium: in civil claims above 375, written evidence must be submitted. This rule does not apply to commercial cases.

¹¹⁷ The limitations placed on statements by directors are fairly complex. See for further details Luxembourg report, point E(a)(iii).

¹¹⁸ Denmark is not bound by this Regulation.

Hague Convention (1970)

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 provides for a system for the transmission of requests for the taking of evidence before consuls and court appointed commissioners via central authorities, providing minimum standards with which contracting states agree to comply. The Convention's primary purpose is to reconcile different, often conflicting, discovery procedures in civil and common law countries. It also streamlines procedures for compulsion of evidence, using a form "Letter of Request" which can be sent directly by the requesting state to a foreign central authority, eliminating the cumbersome diplomatic channel. The applicability of the Convention is for "civil and commercial" matters only and different for each country because each country had the opportunity of making reservations and declarations regarding the applicability of each article of the Convention.

Under the system established by the Convention, requests for the taking of evidence are forwarded by the competent authorities of the requesting state to the central authority designated by the State in question, which undertakes to transmit them to the authority competent to execute them. The Convention does not preclude contracting States from permitting methods of taking evidence other than those provided for in the Convention. Presently, 41 states are bound by the Convention, among them the Member States of the European Union with the exception of Austria, Belgium, Greece and Ireland. For EU Member States other than Denmark, the Convention has as of 2004 been replaced by the Regulation of 28 May 2001 on Co-operation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters.

Article 3 provides mandatory provisions concerning the content of the Letter of Request to compel evidence. The request should include any specific procedures desired by the requesting court, such as verbatim transcripts or participation in the proceedings before the foreign court by counsel (or other) of the requesting state. The Evidence Convention, unlike the Service Convention., does not require that a Letter of Request be submitted in duplicate. If testimony is desired of two or more witnesses, separate Letters of Request should be issued for each witness. The Convention requires a Letter of Request in the language of the receiving state, but English or French is acceptable unless the receiving state has expressly stated the contrary. Translations should have a notarised certification by the translator. Letters of Request will be executed in accordance with local foreign law. The Convention further provides that requests be executed "expeditiously" and the executed request shall be returned to the issuing authority (requesting court) by the foreign central authority. Article 17 provides for the possibility of court appointed commissioners to take depositions under restrictions similar to those confronting consular officers. To date, only Finland and the United States have given broad permission for court appointed commissioners to take depositions. The United Kingdom approves such depositions on a reciprocal basis. Some countries, such as Denmark and Portugal, made specific declarations prohibiting such activities by court appointed commissioners. In other countries, specific permission must be sought from the foreign central authority for a commissioner other than a consular officer to conduct depositions. Articles 14, 26 and 28(f) govern costs and fees for execution of Letters of Request. Generally speaking, there is no fee. However, if the executing country incurs expense for fees paid to "experts and interpreters" reimbursement can be sought in accordance with paragraph 2 of Article 14.

Regulation 1206/2001

History

Before the Regulation came into force, there was no binding instrument between all the Member States of the EU concerning the taking of evidence. The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial matters only applies between eleven Member States of the European Union. Regulation 1206/2001 was therefore intended to set up procedures to improve, simplify and accelerate co-operation between all Member States as regards the taking of evidence in civil and commercial matters.

Scope

The Regulation, which entered into force on 1 July 2001 and applied from 1 January 2004, applies in civil and commercial matters where the court of a Member State (a) requests the competent court of another Member State to take evidence or (b) requests to take evidence directly in another Member State (the term "Member State" means any Member State except Denmark). The procedures to be followed and which are explained hereinafter are the same for (a) and (b) except that no coercive measures may be applied in scenario (b). This is expanded upon further below.

A request may be made only for the taking of evidence intended for use in proceedings pending before the requesting court, and any request is governed by the law of the Member State of the requesting court. The kind of evidence that can be requested therefore differs from Member State to Member State as a consequence of different national laws on evidence.

Therefore, it is not possible for a Member State with narrow rules of evidence to make use of another Member State's wider rules: As the nature and the scope of the request is governed by the law of the requesting state and the execution is governed by the laws of the requested state, any request is always subjected to the more stringent set of rules, be it that a request has to be drafted narrowly from the requesting court, or that a widely drafted request cannot be enforced by a requested court which has stringent rules of evidence.

In general, a request to take evidence (option (a)) must be refused in case the interviewee (i) claims the right to refuse to give evidence or to be prohibited from giving evidence, (ii) the request does not fall within the scope of the regulation, (iii) the judiciary is not competent to execute the request, (iv) the request is incomplete and not completed within 30 days or (v) no deposit is provided for after a query of the requested court for it.

Procedure

Celerity

Requests or other communications must be transmitted by the requesting court directly to the requested court and be transmitted by the swiftest possible means. To facilitate transmission, each Member State must draw up a list of the courts competent for the performance of judicial acts. Each Member State must designate at least one central authority responsible for supplying information to the courts, seeking solutions to any difficulties regarding transmission, and forwarding, in exceptional cases, a request to the competent court.

Regulation 1206/2001 cont.

Form, content and language

The Regulation lays down precise criteria regarding the form and content of the request. The request must be made using form A, which is annexed to the Regulation, and must contain certain details, such as the name and address of the parties to the proceedings, the nature and subject matter of the case, a description of the taking of evidence to be performed, etc. The Regulation also stipulates that the request must be drawn up in one of the official languages of the Member State of the requested court, or in any other language provided the requested Member State has consented to it.

Receipt of request

The Regulation also sets out provisions on the receipt of a request (acknowledgement of receipt, procedure to be followed if the request is incomplete, sending of a notification of delay if the requested court is not in a position to fulfil the request within 90 days of receipt).

Execution of request

As regards the execution of a request, the requested court must proceed in accordance with local procedural law. The request must be executed within 90 days of receipt, if necessary applying any coercive measures available to the requested court; however, if a court requests to take evidence directly in another Member State under procedure (b) above, this can only be on a voluntary basis without the use of coercive measures. If the requesting court calls for the request to be executed in accordance with a special procedure (including the use of sound and image recordings), the requested court must comply with such a requirement unless there are legal or practical obstacles. The execution of a request may be refused only to the extent that the request does not fall within the scope of the Regulation, the execution of the request does not fall within the functions of the judiciary, the request is incomplete, or a person of whom a hearing has been requested claims a valid right to refuse to give evidence or a valid prohibition from giving evidence. Where a request is refused, the requested court must notify the requesting court within 60 days of receipt of the request, using form H annexed to the Regulation.

Presence of representatives

Representatives of the requesting court may be present at the performance of the judicial act by the requested court. The parties and, if applicable, their representatives may also be present. If this is not possible, modern communications technology, and in particular videoconferencing may be used to facilitate the participation of the requesting court and of the parties.

Post- execution and costs

After execution of the request, the requested court will send the requesting court the documents establishing the execution. Execution of the request must not give rise to a claim for any reimbursement of taxes or costs, unless the requesting court has asked for special procedures to be used.

Arrangements between Member States

The Regulation does not preclude two or more Member States from concluding or maintaining agreements aimed at expediting or simplifying the execution of a request for the performance of judicial acts.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court *vis-à-vis* defendants, third parties and competition authorities

With the exception of Cyprus, the UK and Ireland, discovery (for a general definition of discovery see dialogue box below) does not exist in any of the Member States. Sweden is contemplating the introduction of a discovery-like procedure in competition-based damages actions.

UK law provides for the "disclosure" of documents, which is defined as the process whereby a party to a claim is obliged to disclose to the other party the existence of all documents which are or have been in his or her control which are material to the issues and the proceedings. Lists of documents are drawn up which the other parties are then entitled to inspect and copy (subject most importantly to legal professional privilege and privilege against self-incrimination).

The Court may (or the parties may agree to) dispense with or limit standard disclosure. The documents covered by the obligation are very broad and includes the documents relied on, and those which either adversely affects his own or the other party's case or support another party's case.

Pre-action disclosure (by parties and third parties) may also be ordered by the Court if certain cumulative conditions are satisfied, including the fact that advance disclosure is desirable to dispose of the anticipated proceedings fairly, or to prevent the need to commence proceedings, or to save costs. In doing so, the Court must, *inter alia*, specify the documents or the classes of documents which the respondent must disclose.

In the case of Cyprus, pre-trial discovery of all relevant documents or of specific documents in the possession of the other party (except for privileged documents such as lawyer client correspondence) can be requested by the parties. No procedure exists for pre-trial discovery from third parties although during the trial third parties can be ordered to produce documents. If a party fails to comply with an order for discovery, he will be prevented from adducing any documentary evidence in support of his own case. The party is also subject to contempt proceedings upon the application of the other party. The court in Cyprus also has the discretion to refuse a discovery order for one or more documents but this is rare and almost always relates to privileged documents such as client-lawyer correspondence.

In the case of Ireland, discovery does exist but is in fact more limited than the definition given in the box below. Discovery must be requested by the parties and be "*necessary for disposing fairly of the matter or for saving costs*". The party seeking discovery must specify the precise category of documents sought and the reasons why they are required. Stricter requirements apply for third party discovery and the court moreover has discretion to refuse to award non-party discovery.

Discovery

Discovery is taken to mean here the compulsory (pre-trial) disclosure of all documents relevant to a case (this is of course without prejudice to specific exceptions to the general rule that may exist in jurisdictions having discovery or to the conditions that must be fulfilled before the rule applies, for example, court authorisation). In the course of the discovery procedure, parties to a litigation can demand production of and inspect any information from the other side concerning the facts in the case. This may also apply information held by third parties although usually with more conditions being imposed on granting of such discovery.

This must be distinguished from a general duty of disclosure of relevant information and from the ability of judges to order production of specific documents.

Securing evidence

Process by which evidence is recorded and preserved in order to ensure its continued existence or availability, for example, by taking copies of documents that may otherwise be destroyed.

However, in all Member States, judges have some power to order production of documents. In this regard, the following points can be noted:

Who can order production of documents?

In those countries where discovery does not exist, only the judge is in a position to demand the production of a document. Usually this is done at the request of one of the parties but may in some cases be done *ex officio* (Belgium, Czech Republic, Denmark, France, Germany, Greece, Italy¹¹⁹, Luxembourg, Netherlands (only with respect to accounts), Poland (where the rule is very broad and encompasses the court's right to order anybody to produce a certain document, whether this document is situated in Poland or abroad), Portugal, Slovakia, Slovenia (if the parties intend to dispose of their claims in violation of mandatory legal rules or morals) and perhaps also Estonia (this depends on whether competition law is viewed as public policy)).

In cases where disclosure of a document is requested by one of the parties, whether or not to allow such a request will generally depend on the judges' discretionary evaluation of the relevance of the document, the latter usually being with no specific limitations.

Who can be ordered to produce documents?

In all countries there is at least limited scope for parties and third parties (see the wide powers of a Danish court in that respect) or even public authorities (Poland) to be ordered to produce documents. Sometimes, the power of judges in this regard is more limited *vis-à-vis* third parties (in Spain, for example, disclosure can only be demanded in the course of the trial if it is fundamental to the case).

¹¹⁹ Italian judges may in theory order inspection of property where evidence may not be acquired otherwise. However, this power is rarely used in practice and it is debated whether documents can be obtained in this way. Other limited exceptions exist allowing the Italian judge to request documents *ex officio*, including parts of accounts, correspondence and invoices.

As regards competition authorities, evidence can as a general rule be requested from foreign competition authorities and the Commission¹²⁰ but production cannot be ordered. The relationship between competition authorities and courts in the same Member State varies but in general competition authorities may be requested to give evidence but usually not ordered. However, in Malta, the Director for Fair Competition may be subpoenaed by a party to the cause to give evidence.

Under Finnish law, the Finnish competition authority has the right to be heard by the Court. In addition, the Court is entitled to request a statement from the Market Court if the assessment of the case requires special expertise.

What can be demanded?

One of the major differences between the discovery procedure and an order to produce evidence is that in the latter case the party requesting production must, in all states where discovery does not exist, specify what document he is looking for.

The level of specification required varies from one Member State to another. In some Member States the party requesting disclosure must in practice identify the document (Austria, Belgium, Czech Republic, Estonia, Finland, Greece, Hungary, Lithuania, Slovakia). In other Member States, less detail is required (France). In Germany, the judge can order a party to produce a document if it is referred to in that party's or the other party's pleadings. A party may also be required to produce its accounts¹²¹ and any document to which another party has a legal right of access¹²². In Italy, the approach is case by case, and any document may be demanded if it is shown to be related to the dispute, indispensable to the case and in the possession of the other/third party. Clearly, these conditions mean that the document will have to be identified with some degree of precision. In Denmark the requesting party must specify the facts that he wishes to prove via the requested documents and the disputed fact must be of relevance for the case.¹²³

On the other hand in Spain, it is not necessary to specify what document should be produced and it is possible to apply for the exhibition of a category of documents¹²⁴ or, for example, of documents precedent, simultaneous or subsequent to a given fact or circumstance. In Poland, the production of classes of documents can be ordered also.

Can disclosure be legitimately refused?

Although the scope and the content of the relevant rules vary from one Member State to another, all Member States have rules allowing production to be refused to some extent where there is a question of professional secrecy. What exactly is covered by professional secrecy depends on each Member State. For example, in France, professional secrecy is limited but lawyers can legitimately refuse to produce documents which form part of the case they are handling and banks can refuse to disclose client account details. On the other hand, in Germany, individuals subject to professional secrecy can more generally refuse to disclose documents.

The extent to which disclosure can be refused on the grounds of protection of business secrets also varies. In some cases this ground of refusal is limited (e.g. France includes among others trade secrets or information on competitor's structure). In other jurisdictions refusal on the grounds of business secrets appears much broader (e.g. Austria, Germany (includes all technical work equipment and working methods that are not generally known as well as economic facts, if a

¹²⁰ See Case C-234/89, *Delimitis*, [1991] ECR I-935 and Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, [1993] OJ C 39/6.

¹²¹ Interestingly, the possibility to demand generally books and accounts is specifically excluded under Italian law (although the production of parts of accounts can be ordered).

¹²² In particular, if a party has an obligation to account for profits resulting from infringement of intellectual property rights, that party can be obliged to account for those profits.

¹²³ For these reasons the requesting party normally has to specify the documents, e.g. by mentioning the type or category of documents. However, there are no specific provisions concerning clarification demands.

¹²⁴ A "category" can be, for example, invoices issued by the defendant within a specific period, the supply agreements entered into by the defendant and one of its suppliers for the last five years, etc.

substantial interest in non-disclosure exists¹²⁵). In some jurisdictions, under certain conditions, all or parts of the hearing can be held behind closed doors for reasons of business secrets (e.g. Denmark). Finally, in a number of other jurisdictions, the protection of business secrets is not explicitly mentioned at all as a grounds for refusal to disclose (e.g. Cyprus¹²⁶, Estonia, Italy¹²⁷, Malta, Netherlands¹²⁸, Portugal, Slovakia, Spain).

As regards the UK, where much wider discovery rules exist than in most other Member States, business secrets may be protected from disclosure by the CAT. In the ordinary courts, there is no such express power, but a general power to when ordering discovery to control disclosure (e.g. by restricting disclosure to the parties' lawyers and excluding the parties themselves).

Some jurisdictions in addition provide that legitimate reasons or the interests of third parties may be invoked to justify refusal (e.g. France, Germany, Italy,).

In some jurisdictions disclosure can be refused on the grounds that the person being asked for the document could not be called as a witness to give the same information (Czech Republic (although not in respect to disclosure of documents), Denmark, Estonia, Germany (applies to third parties only), Greece, Poland (where the only other two reasons for refusal to supply a document are (i) that the document in question contains a state secret and (ii) that the document is in the hands of a third party who claims that he could not be compelled to give evidence as a witness)).

What are the penalties for failure to disclose otherwise?

In the majority of states, a person who refuses to produce a document following an order to do so will be subject to penalties. These are usually financial penalties (Belgium, Czech Republic, Denmark (if disclosure is demanded from a third party), Estonia, France (a defendant's refusal to disclose may result in damages being awarded and third parties may be subject to fines or periodic penalty payments), Germany (if disclosure is demanded from a third party), Hungary, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain, Sweden). However, sanctions can take other forms. In Germany, third parties refusing to disclose documents can be imprisoned for up to six months in the case of repeated disobedience. In Denmark the court may commit third-parties to custody, however, not for longer than six months. In Ireland, any party failing to comply with an order for discovery is liable to an order of attachment, and, if a plaintiff, to have his or her action dismissed for want of prosecution, or, if a defendant, to have his or her defence, if any, struck out.

In some other countries the court cannot force disclosure (Denmark (if disclosure is demanded from a party), Germany (if disclosure is demanded from a party), Italy, Netherlands,¹²⁹ Slovenia (except if disclosure is demanded from a third party)).

Furthermore, a judge may well draw conclusions from a failure to produce documents. Exactly what conclusions are drawn appear to vary from state to state and depend on the particular context. However, in some jurisdictions such refusal can be taken to constitute proof of the relevant alleged facts (e.g. Germany (prevailing view among experts), Latvia) although other jurisdictions emphasised that such a refusal in itself would probably not be conclusive and other evidence would be required (e.g. France, Hungary, Italy).

Securing of evidence

Some jurisdictions explicitly provide for procedures to "secure" evidence (see dialogue box above) if necessary (Czech Republic, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Poland, Slovakia, Slovenia and Spain).

¹²⁵ However, only third parties may invoke business secrets

¹²⁶ There is no procedure in the rules regulating discovery in Cyprus for the protection of trade secrets nor is it a ground to refuse discovery unless the documents are not relevant to the case.

¹²⁷ Although disclosure can be refused where this would cause "serious harm", which may cover disclosure of business secrets.

¹²⁸ The judge is prevented from deciding on the basis of evidence "for his eyes only".

¹²⁹ In the Netherlands, parties are free to refuse an order for production of documents and the Court is free to decide on the consequences of such request, e.g. it may even treat the refusal as conclusive evidence to the contrary.

Product of foreign discovery

Although not recognising discovery, some Member States may nevertheless admit evidence obtained through discovery in other countries¹³⁰ (Austria, Belgium, Czech Republic, Denmark, Estonia¹³¹, France, Germany, Greece, Italy (although subject to the satisfaction of the prior identification requirement and thus with reference to specific documents obtained through discovery abroad¹³²), Luxembourg, Netherlands, Portugal, Slovenia (although there is no practice concerning this issue), Spain). There is no specific limitation in these Member States as to where (i.e. in which third country) the evidence may have been collected.

In the UK, where discovery does exist, a party to court proceedings is obliged to list for disclosure all material documents within that party's control, regardless of their location.

(b) Proving the infringement

(i) Is expert evidence admissible?

As a preliminary remark, it should be noted that, although the question strictly speaking relates to proof of the infringement, many national reports underlined that expert evidence would be most helpful in determining the amount of damages. Indeed, as far as existence of the infringement goes, certain limits exist to the usefulness of expert evidence as it often cannot take the form of an opinion on the application of the law (see below).

Expert evidence in some form is admissible in all Member States. There are, nevertheless, differences, the most important of which are laid out below:

Who can appoint an expert?

In most jurisdictions experts can be appointed either by the court or by the parties (except in Austria, Estonia, Greece, Italy, Lithuania where only the court may appoint experts). In Latvia, experts may be appointed on mutual agreement by the parties or otherwise by the court. In the Czech Republic, Latvia and Slovakia, if expert knowledge is necessary then an expert must be appointed by the court.

Who can be an expert?

In some jurisdictions there is a list of "official" experts (Austria, Belgium, France, Greece, Poland, Spain). However, in Austria, Belgium, France, Hungary, Italy and Spain this does not prevent parties from appointing their own private experts although less evidentiary weight will be accorded to such opinions (see below). In Belgium and France, the court may also appoint experts that are not listed as "official" experts.

What can the expert give evidence on?

In general experts are requested to give evidence on points that require specific knowledge or technical expertise. In Italy, the expert's role (except in limited circumstances which require highly specialised technical knowledge) is further limited to comments on the evaluation of evidence which has already been proven by the parties (e.g. this involvement is limited to the quantification of damages). In a number of jurisdictions expert evidence on the law is not admissible, although there is generally an exception as regards foreign law (Austria, Belgium, Denmark, Estonia, Germany, Ireland, Malta, Portugal, Slovakia and Slovenia).

What is the value of the expert report?

¹³⁰ Often subject to some general restriction such as that the individual's constitutional or human rights must not have been violated in the taking of the evidence (e.g. Germany, Portugal, Spain).

¹³¹ However, a request to obtain documents by discovery cannot be submitted in Estonia.

¹³² For further details, please see the Italian report, point E(a)(iv).

A key distinction is between evidence that comes from a court appointed expert and evidence that comes from an expert appointed by one of the parties. The latter have a lesser evidential value than the former (although not in Luxembourg, provided the expertise has been conducted on a contradictory basis). This distinction may be either formally provided for (Austria (only treated as being capable of proving the author's opinion), Germany (treated as substantiated statements by the parties), Lithuania (treated as written documentary evidence only), Poland (treated as a private document only), Slovenia (only treated as being capable of proving the author's opinion)) or may simply reflect the reality of the judge's assessment (Belgium, Denmark, France, Spain). In Greece, such reports, regardless of their provenance, are freely assessed by the Court.

Other points to note

In Germany, according to Art. 1 No. 14 of the First Act for the Modernisation of Judiciary, expert opinions delivered in former court proceedings might be introduced into later court proceedings with the full probative value of an expert opinion. Under former law, expert opinions deriving from other court proceedings could only qualify as documentary evidence, but did not have the probative value of an expert opinion.

(ii) To what extent, if any, is cross-examination possible? Can witnesses be subpoenaed?

For the sake of clarity, the expressions "cross-examination" and "subpoena" are defined in the dialogue box below. It should be noted that, as regards in particular "subpoena", the definition given below is made for the purposes of the present study and is narrower than the ordinary definition.

<p style="text-align: center;"><u>Cross-examination</u></p> <p>Cross-examination is taken here to mean the questioning of a witness by a party other than the one that called him to testify.</p> <p>Although definitions of the term often involve other elements such as the use of leading questioning or the purpose of such questioning (e.g. to cast doubt on the credibility of the witness or elicit new information) this simplified definition will be used here.</p> <p style="text-align: center;"><u>Subpoena</u></p> <p>Order to a person to appear in court on a certain day to give evidence with penalties for failure to appear without legitimate reason.</p>
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Cross-examination

There are two general approaches that can be identified with regards to this question.

- Only the judge may question witnesses.

This system is used in the geographically concentrated Belgium, France, Italy and Luxembourg.

It should, however, be noted that in all of these countries the parties may request the judge to put questions to the witness. In Italy these must be submitted in advance.

- The parties may question all witnesses.

In all other countries all parties may also directly question witnesses. In all these jurisdictions the judge may also question the witnesses.

The following points should also be noted with regards to cross-examination:

- Austria, Czech Republic¹³³, Germany, Greece, Slovakia: witnesses are first examined by the judge to ensure an opportunity to give a complete and coherent statement. Both parties can then put supplementary questions;
- Hungary: parties may solicit questions to be put by the judge and may request the judge to ask the witnesses directly;
- Portugal: when examining the opposing party, only questions on the original testimony may be put; also, only experts called by either party can be cross-examined;
- Slovakia: the judge must first permit questions to be put by the parties; and
- Slovenia: witnesses are first examined by the judge.

In the common law jurisdictions, cross examination appears to carry particular importance in court proceedings. For example, in the UK, cross examination is considered an important tool for testing a witnesses veracity, or in the case of expert witnesses, for example, the reliability of the witness (even if not dishonest). In competition cases, cross examination will therefore be a useful tool in cases where there are major factual disputes (e.g. in the case of cartels) although not always. In the CAT, cross examination must be tailored to the Tribunal's directions.

In Ireland, cross-examination is regarded as a crucial element of natural and constitutional justice to the extent that judgments may be set aside if parties have not been afforded the opportunity to cross-examine. Cross-examination serves principally to elicit evidence to support the cross-examiner's version of events and to undermine the credibility of a witness. As regards Cyprus, the scope of cross examination is very wide and substantial leeway is allowed by the judge for the cross examiner within the bounds of relevancy and the testing of the witness' credibility.

Subpoena

The following table lays out the basic rules in the Member States regarding who has the power to subpoena witnesses, the potential penalties for refusal to appear and the discretion for the court to refuse to subpoena a witness. Further details on legitimate reasons that can be invoked to refuse to testify and on restrictions on the types of witnesses that can be subpoenaed are given above at point II.E(a)(iii)

¹³³ Subject to approval of the judge

Table 8: Power of the courts to subpoena witnesses

Country	Judge can subpoena witnesses ex-officio	Judge can subpoena witnesses on request of parties	Judge has discretion to refuse subpoena request by party	Penalties for refusal to appear
Austria	✓	-	-	F ¹³⁴
Belgium	✓	✓	✓	F
Cyprus	✓	-	-	F ¹³⁵
Czech Republic ¹³⁶	✓	✓	✓	F, I
Denmark		✓	✓	F, P (I ¹³⁷)
Estonia ¹³⁸	✓	✓	✓	F, compelled attendance
Finland	-	✓	✓	F, P
France	✓	✓	✓	F
Germany	✓ ¹³⁹			F, I
Greece ¹⁴⁰				F
Hungary	✓	-	-	F ¹⁴¹
Ireland	Only in limited circumstances	✓		F, I
Italy	✓	✓	✓	F ¹⁴²
Latvia				
Lithuania	-	✓	✓	F
Luxembourg	✓	✓	✓	
Malta	-	✓	✓	F
Netherlands	✓	✓	✓	I ¹⁴³
Poland	✓	✓	✓	F ¹⁴⁴
Portugal	✓	✓	✓ ¹⁴⁵	F, I ¹⁴⁶
Slovakia	✓	✓	✓	F, I
Slovenia		✓	✓	F, I
Spain	✓ ¹⁴⁷	✓	✓	F
Sweden	-	✓	✓	P or detention
UK	✓	✓	✓	F, I

Legend

- F - Fines
- P - Periodic penalty payments
- I – Imprisonment

¹³⁴ The witness can also be ordered to pay all costs caused by his non-attendance. In case of repeated refusal to appear in court, the court can summon the witness by force to the trial.

¹³⁵ The court can summon the witness by force to the trial (although this is very rare).

¹³⁶ Note that the fine may be imposed repeatedly. Moreover, although theoretically possible, imprisonment would be highly improbable in practice.

¹³⁷ The court may commit the witness to custody until the witness is willing to answer, however, not for longer than six months.

¹³⁸ Judge can subpoena witnesses ex-officio only if competition law is considered as a matter of public policy. As there is no respective practice yet the possibility remains theoretical.

¹³⁹ No request of parties required; judge is obliged to subpoena witnesses for refusal to appear or to testify (no discretion)

¹⁴⁰ Witnesses are subpoenaed by the litigants not the Judge

¹⁴¹ The witness may be fined but in any case must be ordered to pay all costs caused by his non-attendance. The witness can also be compelled to come to the court by force.

¹⁴² The witness can also be compelled to come to the court by force.

¹⁴³ The refusing party may also be held liable for damages and/or made to reimburse costs.

¹⁴⁴ The witness can also be compelled to come to the court by force.

¹⁴⁵ A fine will be always applied to the missing witness, but the judge may decide that there is no reason to apply additional penalties (imprisonment).

¹⁴⁶ Imprisonment shall be used just to ensure that the witness will attend Court.

¹⁴⁷ In Spain, a judge can subpoena witnesses ex-officio only in exceptional circumstances, if evidence provided by parties yields insufficient certainty on the facts under consideration (as a "final measure").

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

As a preliminary point it should be recalled that, under Article 16 of Regulation 1/2003:

"When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated [...] 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 already adopted by the Commission".

The ("minimum")¹⁴⁸ value of Commission decisions in proceedings before national courts is therefore already laid down in EC law and will not be further discussed here.¹⁴⁹

All Member States at least recognise that statements/decisions by a national competition authority, a national court or an authority from another EU Member State can be submitted as evidence in damages proceedings although most do not consider them as binding.

The following points should be noted:

Decisions as important/compelling evidence

In the following countries such decisions are in practice generally considered to be of particular importance: Belgium (such decisions are treated like other documents, although generally they are regarded as having more authority), Cyprus, Estonia, France (decisions of the national competition authority are considered crucial evidence)¹⁵⁰, Ireland, Italy (given their high technical value, decisions by national competition authorities are considered difficult to rebutt),¹⁵¹ Lithuania (here public documents – national or not – have a higher evidential value in law), Malta (here public documents – national or not – have a higher evidential value in law), Poland (although less so with regard to foreign decisions), Slovakia, Sweden. In Germany, statements by German public authorities have to be accepted by civil courts but the underlying facts and legal evaluations are not usually considered by the courts as binding. In Latvia, such decisions relieve the plaintiff of having to prove the existence of a violation but this does not prevent the actual correctness of the decision being called into question.¹⁵²

Binding decisions

In a few Member States, decisions of the national competition authority are binding on the courts (Czech Republic, Greece (when they become final), Slovenia and Sweden (though only as regards individual exemption decisions), UK (see above, point B(ii) for further details). In Poland, court rulings finding a breach of competition law are binding on civil courts.

In Austria, decisions of the Austrian Cartel Court or a judgment of an Austrian court is binding upon the Court deciding on a damage claim.

¹⁴⁸ Germany's draft 7th amendment envisages making Commission decisions binding on national courts.

¹⁴⁹ See in this regard e.g. Case T-65/98, *Van den Bergh Foods Ltd*, not yet published.

¹⁵⁰ As was shown with regard to the causal link in the Eco System/Peugeot case (see French report case summaries).

¹⁵¹ See as regards the evidential value of decisions of the AGCM the judgment in *Telecom v. Albacom* (Italian report case summaries). There is, however, a procedure in Italy that has never so far been used whereby decisions of the national competition authority, for example exemption decisions, can be disallowed as evidence where these may affect the rights of third parties.

¹⁵² In a recent case before the supreme court in Latvia, the court ruled that the prior decision of the competition authority invoked by the plaintiff was invalid (*SIA „Latgales Reklāma” vs. SIA „Dautkom* (see Latvian report case summaries).

In Germany's draft 7th amendment, it is envisaged that final decisions of national competition authorities in any EU Member State (and the EC Commission) would be binding on the parties to a damages action. This also applies to decisions issued by national courts of other Member States as far as these courts have the function to issue administrative decisions stating the infringement of competition law or if they decide on appeals against such administrative decisions.

In France, references to decisions of other national competition authorities seem to have only been factual to date.

In Estonia, judgments by the commission in relation to a criminal or administrative offence are binding on civil courts as to the question whether commission of an act occurred and whether it was committed by a particular person.

In Hungary, (final and binding) decision of the Competition Office on an issue falling within its competence is decisive.

Finally, in Belgium, when the outcome of a case is dependant on a competition practice, the court before which the case is pending (except for the Supreme Court ('Hof van Cassatie/Cour de Cassation')), has the obligation to ask a preliminary question to the Appeal Court of Brussels, which will render a binding decision.

Non-binding opinions

In a number of Member States, there is an official procedure for non-binding opinions on national competition law to be given by competition authorities to national courts (Estonia (only if the court considers that there is a public interest in the case and the court decides to join the competition authority to the case for an opinion¹⁵³), Finland, France, Germany, Hungary). In Spain, a civil court may ask the Competition Court to issue a non-binding report on the origin and quantum of damage.

In France this procedure has been frequently used and the reports that result from it are generally considered to be crucial for the case. Such opinions can relate to both factual and legal questions and, importantly, the national competition authority is able to use its powers of investigation in establishing the report. However, as noted below, such reports do not bind the national courts.

(c) Proving damage

(i) Are there any specific rules for evidence of damages?

The general position in all Member States is that the existence and extent of damage should be proven in the same way as other elements of the damages claim. However, the difficulty of proving the extent of damages results, in a number of Member States, in a certain relaxation of the rules of evidence in favour of the plaintiff. Contrast, for example, Spain, where no such relaxation exists and where no damages will be awarded if the exact amount of loss cannot be established and proven by the claimant.

The general idea is that if for a particular reason proving extent of damage is too difficult or implies a disproportionate cost, proof of exact extent of damage can be waived and a "reasonable" amount be awarded in its place (for instance in Estonia where the court may decide on the amount of compensation payable where the exact extent of the loss cannot be established and similarly in the Czech Republic, the plaintiff may opt to claim for "abstract loss of profit" i.e. the profit that is as a rule achieved in its line of business, respecting fair business relations and under normal competition conditions). In some states such an abstract evaluation may be limited to certain types of damage (e.g. loss of profits). In all Member States, however, the actual existence of damage must nevertheless be proven.

¹⁵³ Changes have been proposed to ECA, and if they are adopted then Estonian Competition Board must be joined to the Court proceedings if application of Articles 81 et 82 EC is under question.

The position in those Member States can be summarised as follows distinguishing on the basis of (i) grounds (grounds on which proof of exact extent of damages can be waived), (ii) how much i.e. what the basis for estimating damage is in such circumstances, (iii) type of damage (what type of damage the rule relates to).

It should also be added that in Greece and Germany by analogy with case law on product liability, some court decisions indicate that there may be a reversal of the burden of proof regarding fault where facts that can substantiate the plaintiff's claim are limited to the 'sphere of influence' of the defendant, due to which the plaintiff cannot access them.

Table 9: Relaxation of rules on proving damage

Country	Grounds	How much	Type of damage
Austria	Unreasonable difficulty	Assessment to the best of the judge's knowledge and belief	All
Belgium	Mathematical certainty not possible	Reasonable amount	All
Czech Rep.	Impossibility/excessive difficulty in proving amount	Judge's discretion	All
Czech Rep. ¹⁵⁴	Always possible	Profits usually earned in same line of business	Loss of profits
Estonia	Impossible to prove, including future damage	Judge's discretion	All
Finland	Impossible or exceptionally difficult/costly to prove	Reasonable amount	All
Germany ¹⁵⁵	Proof of facts allowing estimation of loss of profits	Profit that could have been expected	Loss of profits
Germany	Proof of approximate amount of damage	Approximate amount	All
Hungary	Impossibility of proving the amount of damages	Amount capable to compensate the damaged person in full	All except moral damages
Italy	Impossible or especially difficult to determine amount exactly	Equitable assessment	All
Lithuania	Difficulty in proving amount	Profit of plaintiff used as yardstick	All
Luxembourg	Impossible to assess with precision	Ex aequo et bono	All
Poland	Impossible or difficult to determine amount	Appropriate sum based on circumstances	All
Slovakia	Always possible	Profit generated in the plaintiff's business by fair business conduct and under normal conditions	Loss of profits
Slovenia	Impossibility/excessive difficulty in proving amount	Judge's discretion	All
Sweden	Disproportionate inconvenience or cost, impossibility or excessive difficulty in determining amount	Reasonable amount	All

Partial judgments

In some jurisdictions, where the existence of damage can be determined but not its extent a partial judgment can be rendered and the procedure continued until such time when ascertainment

¹⁵⁴ Referred to as "abstract loss of profits".

¹⁵⁵ In such cases the plaintiff must give an approximation of damage incurred and prove the surrounding facts enabling an estimation of the loss.

and liquidation of damages is possible (Austria, France, Germany, Hungary (the judge decides on all elements of liability save the quantum of the damages), Ireland (this is not necessarily the case, but is a possibility), Italy (in the first phase the standard of proof is lowered so that the plaintiff need only show the probability that the defendant's fault was a potential source of damage), Malta, Netherlands, Poland, Portugal, Slovenia, Spain (partial judgments are limited to actions brought by associations on behalf of consumers)).

Partial judgments generally appear to fall into two categories. Firstly, in some Member States the procedure is split into two phases with a first phase where liability is established and a second phase where damages are assessed (Czech Republic, France,¹⁵⁶ Ireland, Italy,¹⁵⁷ Malta, Netherlands (the second phase forms a separate special procedure), Poland, Spain). Secondly, in other Member States, a "full" appealable judgment is rendered finding liability and is followed by a second "full" judgment setting the amount of damages (Austria, Belgium (the first judgment will generally designate an expert to assess the extent of the damages, the second judgment will then contain this assessment), Denmark, Estonia (this possibility exists for assessment of future losses), Germany,¹⁵⁸ Hungary, Portugal, Slovenia). In addition, in Germany, a declaratory judgment stating the defendant's obligation to compensate the plaintiff for all damage caused by the infringement may be rendered if the plaintiff is not in possession of all necessary information to quantify the amount of damage¹⁵⁹.

Finally it should be noted that Portugal provides for an interim decision on preliminary matters such as standing, the facts that are accepted by the defendant and the facts to be discussed at trial.

Other points to note

Italy: As an exception to the general rule expert reports may be allowed as evidence of facts when they are the only means of proving facts which could not be ascertained otherwise. This principle has been applied in one competition-based damages claim.¹⁶⁰

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

Direct causation is required in between 7 and 9 Member States (Austria, Ireland, Italy, Luxembourg, Malta,¹⁶¹ Sweden, UK and possibly France and Portugal in competition cases). No other Member States require direct causation. However, it should also be noted that few Member States actually make any formal distinction between direct and indirect causation. Where legal texts or judgments do mention "direct" causation, this often appears more as a label used generally to help distinguish between cases where liability should or should not be incurred rather than having any concrete and identifiable content such as exclusion of liability in the presence of intervening events.

Going beyond the narrower question of direct and indirectness, it emerges from the national reports that the test of causation is approached in very different ways in the Member States. There are resultantly severe limits on the level of comparative analysis that can be done here without giving misleading results. For this reason, no table summarising results has been provided here.

¹⁵⁶ This technique was used in the *Mors v. Labinal* case (see French report case summaries).

¹⁵⁷ This technique was used in the *Telesystem v. SIP* case (see Italian report case summaries). It should be added that in splitting the judgment this way the burden of proving existence of damage is reduced without prejudice to its reassessment in the liquidation phase.

¹⁵⁸ It can be noted that, despite the small number of judgments awarding damages in Germany, there are a substantial number of preliminary judgments finding violation of competition rules. This could indicate that cases were settled after the first partial judgment was rendered.

¹⁵⁹ It can be noted that, despite the small number of judgments awarding damages in Germany, there is a higher number of declaratory judgments finding violation of competition rules. This could indicate that cases were settled after the first partial judgment was rendered.

¹⁶⁰ See *Telesystem vs. Sip* case of Italian report case summaries.

¹⁶¹ However, if the act complained of has led to a state of affairs which would never have transpired but for the act, a Maltese court may lower the test for causation and be content if an indirect cause is proven.

A list of expressions that are commonly found in the Member States reports is given in the dialogue box below. However, as will be clear from the further explanations given for the larger Member States, and from the national reports themselves, these terms may have very different interpretations in the various Member States.

Probably the only general remark that can be made about causal link that appears to apply to all states is that courts tend to take very much a practical, case by case approach to this question. Nonetheless, it would seem that in most Member States similar issues and questions arise such as whether the conduct complained of was really a determining factor, how predictable the damage suffered was, and whether intervening events were sufficient to exclude liability.

It should also be added that several national reports consider that causality can be extremely difficult to prove (irrespective of whether indirect causation is sufficient).

Necessary causes

In the context of identifying the causes of damage, the expressions "but for" and "sine qua non" are generally used to describe the process by which courts ask whether the damage suffered would have occurred (to the same extent) in the absence of ("but for") the plaintiff's behaviour. Put differently, was the plaintiff's behaviour a necessary cause of the damage. It should be noted that the expression used here is not the same as that used in the context of the calculation of damages.

Sufficient causes

Since the but for/sine qua non test can lead to many irrelevant causes being identified as necessary causes of the damage, this test is often coupled with a second test to filter out "minor" causes and leave only sufficient causes. In other words, this type of test is used to draw the line between the causes that are expected to create liability and those that are not.

The tests used to filter out insufficient causes have various names such as adequacy, remoteness, directness, foreseeability etc. The exact form these tests take differs between Member States and equivalent names may mask important differences in practical application. However, the following general comments are proposed to aid with the reading of the present section.

Directness

Tests that relate to the directness of certain consequences appear to consider the practical chain of events and the level of proximity there is between the defendant's act and the plaintiff's damage. Directness may be affected by the intervention of a third party although this is not necessarily the case.

Adequacy

Such tests appear to aim at establishing which potential cause of the damage was the determining one.

Foreseeability

This test appears to limit liability on the basis of the predictability of certain aspects of the damage caused by the defendant such as the (type of) damage, the extent of the damage or the manner in which it occurred.

Remoteness

This term, used *inter alia*, in English law, appears generally to constitute some combination of the directness and foreseeability of the damage caused.

Another important point to underline here is that in a few Member States (Denmark, France, Italy, the Netherlands) it was indicated that in some cases the burden of proof of causality could be reduced or even reversed. In the Netherlands this may occur where it is shown that a risk of damage was created and actual damage subsequently occurred. In Denmark, one example of reducing the burden of proof of causation is where the fault of the defendant is particularly grave. In Spain civil courts tend to apply a modern approach to liability in tort based on the allocation of risk created by the relevant activity, which consists in reversing the burden of proof and requiring the defendant a high standard of care. As for France, the national report mentions that there is no legal basis for a reversal of the burden of proof based on the presumption that once damage is established a causal link with fault is inferred. It nevertheless happens in practice that the burden of proof of causation is reduced, but might be confined to special cases.

France and Italy are particular in that judgments on competition-based damages claims exist. In both countries there have therefore been examples of such reducing of the burden of proof.¹⁶²

France requires that causation be adequate. The examples of analysis of causal link in competition case in France appear to confirm the need for direct causation, which has shown to be difficult to prove in cases where the/some damage is allegedly caused on adjacent markets or competitors alleging damage are serving different customer groups.

Italian law combines a *sine qua non* test with an adequacy test. The relevant provision of the Civil Code requires that causation be direct and immediate. However, liability for indirect consequences may still be established if supervening events are not considered to break the chain of causation (i.e. notwithstanding supervening events, the defendant's behaviour is still an adequate cause of the damage). The causal test applied in essence requires that the author of the unlawful conduct be held accountable for those damages that are the normal consequence of the unlawful conduct according to the laws of statistics and has been explained by some scholars by reference to the purpose of the breached provision of law. Based on this last position, the causal test shall be satisfied when the damages claimed constitute the realisation of the risk that the breached provision of law was intended to prevent. This provides a good example of the limits of categorisation in this area and the difficulty of providing abstract definitions of terms since the adequacy test appears to incorporate elements of foreseeability in the sense used in the dialogue box above. Since the Italian direct causation test should consider (at least according to some scholars) the type of risk that the breached legal provision was intended to prevent, it could also be considered in a way reminiscent of the "protective purpose" limitations which exist in German and Austrian law (which operate to restrict the circle of potential claimants based on the protective purpose of the law).

The case law cited in the Italian report also reveals a pragmatic approach to causation since causation can be presumed where damage appears to be a normal consequence of the unlawful conduct on the basis of a probabilistic reasoning based on what is normally found to happen under equal circumstances.

German law combines a *sine qua non* test filtered by a practical adequacy test to rule out causation under peculiar and improbable circumstances. This again provides a good example of the limits of categorisation in this area since the definition of adequacy under French law appears to relate more to identifying the determining factor causing the damage, whereas under German law the focus appears more on the foreseeability (in the sense of normal or predictable outcome) of the damage. In addition, German law requires that the damages claimed derive from the sphere of dangers whose prevention was the purpose of the infringed provision.

Polish law requires that the breach of competition law be an adequate cause which is interpreted as requiring both that the conduct must be a cause *sine qua non* of the damage and that the damage was a normal consequence of the conduct. This approach to causation is considered as capable of admitting liability for indirect causes.

¹⁶² See Italian report, case summaries and point E(d)(i), and French report case summaries.

Spain proposes two alternative tests for causation, the first being a *sine qua non* type test and the second an adequacy test (where causation will exist if the damage is a "natural, adequate and sufficient" cause of the conduct). Again we see here incorporation of foreseeability in the adequacy test. Both direct and indirect causation can be sufficient.

In the UK, remoteness of damage has two parts, causation and foreseeability, in the sense of the damage being within the scope of the loss that may be claimed if it can be proved to have been caused by the infringement.

F. Grounds of justification

(i) Are there grounds of justification?

In the context of point F(i), the term justification is taken to mean anything that wholly exculpates the defendant, despite the plaintiff having fulfilled all the conditions necessary for the action for damages to succeed. Thus, in particular the fact that (i) the plaintiff has failed to prove an element of the tort or the defendant has successfully rebutted the evidence presented (ii) the defendant fulfils the conditions of Article 81(3) EC or its national equivalent or (iii) some elements are invoked to reduce the damages payable (even to nil) are not considered as constituting justifications.

The dialogue box below gives general definitions of the main terms relevant to the present study. A number of other justifications exist in Member States such as force majeure or necessity. However, for the purposes of the present study only certain justifications will be considered in any detail here.

<p style="text-align: center;">Act of state</p> <p>Act of Member State authority that encourages or compels the anti-competitive conduct complained of. Act of state is not, however, considered here to include the possibility of obtaining exemptions under the national equivalent of Article 81(3).</p> <p style="text-align: center;">Act of third party/victim</p> <p>Intervening act of third party/victim that constitutes grounds for entirely exculpating the anti-competitive conduct of the defendant. This will not be taken to include reduced liability due to contributory negligence or failure to mitigate which will be dealt with under section II.F(iii) below.</p> <p style="text-align: center;">Consent</p> <p>Agreement by the plaintiff to the anti-competitive conduct of the defendant. This may fall within the definition of act of victim above.</p>

The following table lays out the main justifications that are available in the Member States. Some national reporters indicated that, absent any case law on the point, it cannot be foreseen what justifications may apply in competition-based damages cases (Estonia, Ireland, Finland)

Table 10: Grounds of justification

Country	Force majeure	Act of state	Act of third party	Act of victim	Consent	Necessity	Self-defence or reaction to illegal conduct	Protection of legitimate interests in face of dominant firm
Austria	✓	✓	-	-	-	-	✓	-
Belgium	✓	✓	-	-	-	-	✓	-
Cyprus	✓	-	✓	✓	-	-	-	-
Cz. Rep.	✓	-	-	-	-	-	-	-
Denmark	✓	✓	-	-	✓	-	-	-
Estonia	Disputable	-	-	-	✓	✓	-	-
Finland	✓	✓	-	-	✓	-	-	-
France	✓	✓	✓	✓	-	-	-	-
Germany ¹⁶³	✓	✓	-	-	-	-	✓	✓
Greece	✓	-	-	-	✓	-	✓	-
Hungary	✓	✓	-	-	✓	✓	✓	-
Italy	✓	-	-	-	-	✓	✓	-
Latvia	✓	-	-	-	✓	-	✓	-
Lithuania	✓	✓	✓	✓	✓	✓	✓	-
Luxembourg	✓	✓	✓	✓	-	-	-	-
Malta	✓	-	-	-	✓	-	-	-
Netherlands	✓	✓	-	-	✓	-	-	-
Poland	✓	✓	✓	✓	-	-	-	-
Portugal ¹⁶⁴	✓	✓	✓	✓	✓	✓	✓	✓
Slovakia ¹⁶⁵	✓	-	-	-	-	-	-	-
Slovenia	✓	✓	-	-	-	-	✓	✓
Spain ¹⁶⁶	✓	✓	✓	✓	✓	-	-	-
Sweden ¹⁶⁷	-	-	-	-	-	-	-	-
UK ¹⁶⁸	✓	✓	✓	✓	✓	✓	-	-

Before looking at these justifications in more detail, it should be noted that, other than Germany (protection of legitimate interests in the form of a boycott against a dominant firm), no national reporters reported practical examples of such a defence being used in a competition-based action for damages so the application of these defences remains somewhat theoretical.

The most relevant justifications for the purposes of this study are act of state and consent.

Act of state

The role of the state in the context of imposition of fines for breach of EC competition law has been considered in a number of ECJ judgments. The latest of these indicates that, as regards conduct promoted by the Member State, immunity from fines will only exist where the conduct complained of was required by national legislation. Where national legislation merely facilitates or promotes

¹⁶³ Force majeure in Germany is considered as being absence of fault; see German report, point F (I). Similarly, reliance on an act of state bars any damages claim.

¹⁶⁴ In theory all the grounds of justification are admissible and they can lead from a simple reduction of compensation to a whole exculpation of the defendant.

¹⁶⁵ Under Slovak law justifications are grounds or circumstances of any kind provided that they occurred independently from the will of obligor, could not be reasonably foreseen or overcome by obligor and prevent the obligor from fulfilment of its obligation.

¹⁶⁶ Although the act of state defence is disputable and the availability of the act of victim/third party defences will only operate in so far as it can be shown that the causal link is broken.

¹⁶⁷ No specific grounds of justification exist to exclude liability as such.

¹⁶⁸ These are all defences known to English law, which preclude or limit liability. However, they are highly unlikely to be relevant in the context of non-contractual competition based damages claims.

that conduct, penalties may be imposed, although due account must be taken of the specific features of the legislative framework in which the defendant undertakings acted.¹⁶⁹

As this issue has not been addressed in any known existing judgments in competition-based damages actions¹⁷⁰, there is no way of telling whether the ECJ's case law cited above would also be applied in the context of such actions.¹⁷¹ Nor can it be said for sure whether there would be a distinction in this regard as concerns national law based claims. However, as can be noted from the table above, several Member States do provide for an act of state justification in the context of damages claims. No distinction is generally made between justifications as applicable, on the one hand, in EC based claims and on the other national based claims.¹⁷²

Moreover, in Malta, the same result may also be achievable through the force majeure defence.

Consent of plaintiff

As a preliminary point, it should be noted that the ECJ's judgment in *Courage v. Crehan*¹⁷³ limits at least to a certain extent the availability of this justification in EC competition law - based damages cases, as *Crehan* provides that the liability of the defendant cannot wholly be excluded unless the plaintiff bears a significant responsibility for the breach because of the strong bargaining power of the claimant¹⁷⁴. Nonetheless, this may not prevent application of national rules on contributory negligence which could be used to reduce the plaintiff's damages to nil (see point F(iii) below for further information on contributory negligence).

Outside the specific action before the UK courts, exactly how the *Crehan* case will be applied cannot be estimated given that no other competition-based damages actions discussing this point have been rendered in the Member States since the ECJ's ruling in *Crehan*.

In Germany the draft 7th amendment explicitly provides that civil claims are not excluded for the only reason that the plaintiff has participated in the infringement. Yet, contributory fault may be taken into account.

Consent may also be included within the act of third party defence.¹⁷⁵

(ii) Are the "passing on defence" and "indirect purchaser" issues taken into account?

As a preliminary remark, it can be noted that many states underlined the restitutive-compensatory function of damages actions and the absence of any punitive element separate from that function. Applied in the abstract this logic would tend to allow both for indirect purchasers to claim, where they have indeed suffered loss, and for defendants to invoke a passing on defence, where higher prices have been passed on. The French and Maltese¹⁷⁶ reports, however, also noted that even where higher prices have been fully passed on, there may be some damage sustained by the direct purchaser due to loss of customers, for which he could in theory claim.

¹⁶⁹ Case C-198/01, *Conorzio Industrie Fiammiferi*, not yet reported.

¹⁷⁰ However, the German Federal Court applied the case law of the ECJ in a judgment of 10 February 2004, "Verbindung von Telefonnetzen" (see case summaries). In this particular case, justification by act of state was denied because the defendant, Deutsche Telekom AG, had, on its own free motion, applied for authorisation of telephone charges that might result from an abuse of a dominant market position (Art. 82 EC). Moreover, in a claim brought before the French Competition Council for an alleged abuse of dominant position, the Council did refer to the CIF judgment (supra note 169). Decision n°03-MC-03 of 1 December 2003, *Towercast/TDF*, and on appeal, Paris Court of Appeal, 8 January 2004.

¹⁷¹ However, in theory it may be that in some Member States, the existence of an act of state e.g. allowing, condoning, requiring certain behaviour could mean that any fault requirement would not be fulfilled (this is the approach that would likely be taken in Germany).

¹⁷² However, in Denmark, as concerns national law based damages claims, this justification is explicitly provided for in the Competition Act.

¹⁷³ C-453/99, *Courage v. Crehan*, ECR [2001] I-6297.

¹⁷⁴ Although *Crehan* does not technically apply to national law based claims, given that most Member States national competition regimes are based very heavily on the EC system, it is likely that the judgment will be taken into account in national law based claims.

¹⁷⁵ Although conversely, act of third party may not extend to consent (France).

¹⁷⁶ Although underlining that this is purely theoretical in the absence of case law.

Indirect purchaser

No Member State has any case law on this subject. Resultantly, all replies to this question were based on application of general principles and the use of analogy. The national reporters generally did not distinguish between EC competition law based and national competition law based claims in this regard.

All states considered that indirect purchasers could in theory claim damages. Most considered, however, that there would be serious problems showing a causal link due to the intervention of a third party (i.e. the party originally purchasing the good from the defendant). This would appear to be due to the fact that there is no direct contact between the original seller and the indirect purchaser, so the extent to which effects on the indirect purchaser are attributable to the defendant's conduct (as opposed to that of the middleman) are less clear than for direct purchasers.

In the jurisdictions that require a direct causal link it was considered that indirect purchasers may still be able to claim for damages (Austria, Cyprus, Ireland, Italy, Luxembourg, Malta (although the discretion exercised by the intervening third party would most probably be considered to break the chain of causation), Sweden, UK). Because of the case by case nature of application of the causal link it was not possible to give further details.

The following remarks can nevertheless be made about certain jurisdictions:

- Austria: no clear answer exists as to whether consumers or only competitors can claim damages at all for violation of national competition rules;
- Germany: in theory, indirect purchasers should be able to claim in certain circumstances. However, to date German courts have only awarded damages to direct purchasers. According to some legal experts, who criticise the principle of protective purpose and deny the passing on defence, only direct purchasers should be able to claim damages;
- Italy: in a case concerning passing on, it was stated in the reasoning that the final customers who had suffered due to passing on, would have standing to seek compensation although difficulties may arise in particular as to the identity of the defendant (the undertaking responsible for the original violation of competition law and/or the direct supplier of the final purchaser);
- Poland: no specific rules on indirect purchasers exist and general principles would therefore apply. These would tend to indicate that indirect purchasers may sue and defendants may invoke the passing on defence;
- Spain: no specific rules on indirect purchasers exist and general principles would therefore apply. These would tend to indicate that defendants may invoke the passing on defence. As regards indirect purchasers the individual circumstances of the case would need to be considered to establish whether the plaintiff should sue the direct supplier or a supplier further up the production/distribution chain¹⁷⁷;
- Sweden: presently, only undertakings and parties to an agreement with an infringing undertaking can claim damages under the national competition act. Moreover, the preparatory works of the competition act may be taken to restrict further the circle of possible claimants to those directly affected. What consequences this may have for future damages actions is not clear; and
- UK: there are no restrictions on potential plaintiffs other than the rules on remoteness (causation and foreseeability, see above point E(d)(i)), for example, it might be foreseeable by a cartelist that a direct purchaser would mitigate losses by passing on to indirect purchasers a price increase charged by the cartelist to direct purchasers.

¹⁷⁷

Although no case law exists on this point, in case of doubt as to the identity of the infringing entity, the indirect purchaser would in theory normally sue both the manufacturer and the seller from whom they acquired the product, and have the court decide the issue.

Passing on

The national reporters generally did not distinguish between EC competition law based and national competition law based claims in replying to this point.

With the exception of Denmark, Germany and Italy, no Member State has any case law on this subject. Resultantly, except for those three states, all replies to this question were based on application of general principles and the use of analogy. All 22 states in which there is no case law on the matter considered that the passing on defence could in theory be used, with the exception of Cyprus where it was thought that the courts would not accept such a defence. The burden of proof to show that there had been passing on should fall on the defendant.

As regards the other Member States, in Denmark the passing on defence has been accepted.¹⁷⁸ However, it is not completely clear from these cases on whom the burden of proof lies (although initially with the defendant).¹⁷⁹ In Germany, the passing on defence has been explicitly accepted at regional level by some courts.¹⁸⁰ However, this approach is questioned by legal doctrine and has not yet been confirmed at federal level. In the course of drafting its proposal for a 7th amendment of the German Act Against Restraints of Competition, the German government has considered the possibility to explicitly exclude the 'passing on' defence, but finally decided to leave it to the courts to find an appropriate solution, based on the fact that, according to the prevailing opinion among legal experts, it should be excluded.

Finally, with regard to Italy, the passing on defence has been considered in two cases. In the first of these cases, Juventus contracted to sell two tied products at over inflated prices to VIH on condition *inter alia* that they were tied when sold to end consumers. VIH's claim for damages allegedly caused by the illegal contract was refused on the basis of absence of damage (due to the passing on of higher prices to end consumers) and also because the plaintiff had contributed to the damage incurred by final consumers.¹⁸¹ In the second case, Unimare, alleged that it had lost a customer, NSO, because it had passed on higher prices charged by its dominant supplier, Geasar. The court considered *inter alia* that the ultimate consumer, NSO, had suffered the damage and rejected the claim.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement or has failed to mitigate losses?

In the present question, the expression "benefit" is used to mean any advantage, financial or otherwise, gained by the plaintiff as a result of the conduct complained of.

All the Member States provide for reduction of damages where plaintiffs have contributed to the infringement¹⁸². The general approach is that damages will be reduced in proportion to the contributory act of the plaintiff, although in some Member States the defendant can be fully acquitted.

This is also the case even in Member States where no fault element needs to be shown in order to establish liability. The general approach in these jurisdictions appears to be that, although not

¹⁷⁸ GT-Linien under konkurs v. De Danske Statsbaner DSB; Ekko A/S v. Brandt Group Norden A/S. See Danish report case summaries.

¹⁷⁹ However, in Ekko A/S vs. Brandt Group Norden A/S, AM Hvidevarer A/S and GRAM A/S the Maritime and Commercial Court held that the defendants' actions gave rise to liability and that the defendants were to compensate the loss to the plaintiff as the *plaintiff* had proven that the extra charges had not been passed on to the customers of the plaintiff.

¹⁸⁰ LG Mainz, Az. 12 HK.O 52/02, [2004]; LG Mannheim, Az. 7 O 623/02, [2003]. See German report point F(ii). In the latter case, the passing on point was addressed *obiter dicta* although it has since been confirmed by the Karlsruhe Higher Regional Court (OLG Karlsruhe, Az. 6 U 183/03, Vitaminpreise, [2004], WuW/E DE-R 1229, 415). By contrast, LG Dortmund, Az. 13 O 55/02 Kart. [2004] expressed serious doubts as to the applicability of the passing on defence.

¹⁸¹ VIH v. Juventus F.C. See Italian report case summaries.

¹⁸² However, in the UK, due to the fact that non-contractual competition law-based damages actions are brought for breach of statutory duty, there is no fault element and thus damages will not be reduced due to the fault of the plaintiff.

taken into account in establishing liability, fault on the part of the plaintiff can operate to reduce damages.

Thus, in France, for example, the fault requirement is met due to infringement of competition law. In such a case, fault on the part of the victim would not attenuate the defendant's fault but only the extent of the defendant's responsibility and obligation to indemnify a given damage. The Netherlands takes a similar approach. There, the fact that the plaintiff is at fault does not detract from or negate the fault of the defendant. However, on the basis of the equitable principle of contributory negligence, as codified, the level of damages payable to the plaintiff may be reduced in proportion to the contribution made to the injury by the plaintiff.

Further, all Member States (except France¹⁸³, Luxembourg, and Poland (although a duty to mitigate in Poland can be inferred from other written provisions)) provide for a reduction in damages where the plaintiff has failed to mitigate losses.¹⁸⁴

Moreover, in all Member States damages can be reduced where the plaintiff has benefited from the infringement¹⁸⁵. This generally flows from the principle that the plaintiff will be compensated only for the injury he has suffered.

It is worth recalling in this context that with regard to contributory negligence and mitigation, the duty of care that is imposed on companies may be higher than that imposed on individuals (see above point D(iii)).

Finally, it should be noted that as regards claims of contributory negligence, benefit from the infringement or failure to mitigate, it is the defendant who bears the burden of proof.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

As stated above, the underlying principle rationale for damages actions in all the Member States is restitution-compensation. The act of paying compensation clearly also has a deterrent *effect*. Moreover, in some Member States, the existence of punitive or exemplary damages, despite their rare use, indicates that in certain situations damages actions are capable of having a distinct *aim* of punishing or deterring the wrongdoer, independently of the act of paying compensation to victims. In all Member States the level of injury sustained by the plaintiff is the basis for the claim (although in the Netherlands damages are calculated in the manner considered most appropriate by the judge hearing the case, which does not in principle exclude assessment of damages on the basis of profits made by the defendant).¹⁸⁶

However, it should be noted that in several Member States, although damages are not assessed on the basis of profits made by the defendant, the latter can be taken into account or used as a yardstick when assessing the level of injury sustained by the plaintiff (Italy¹⁸⁷, Lithuania, Luxembourg, Netherlands, Poland and Spain). In Germany, the draft 7th amendment explicitly allows the courts to take into account, when assessing and estimating the amount of damage according to § 287 ZPO, that part of the infringer's profit generated as a result of the anti-competitive conduct. This new provision is intended to facilitate the enforcement of damages

¹⁸³ Although the absence of such obligation in case law is debated.

¹⁸⁴ However, in Germany mitigation of damages by benefits received must not unreasonably favour the defendant. This is one of the main arguments – also used by the German government in its explanation of the draft 7th amendment – against the passing on defence

¹⁸⁵ This is only the case in the Czech Republic where such a benefit effectively reduces the damage suffered.

¹⁸⁶ Although in some Member States profits made by the defendant are used as the measure of damages in claims for breach of intellectual property rights.

¹⁸⁷ An example of this can be seen in the *Albacom v. Telecom* case. See Italian report case summaries.

claims, especially in cases where the assessment of a hypothetical market price as a basis for the calculation of damages is difficult.

Finally, as regards the type of damages which can be claimed (loss of profits, moral damages etc), further details are given above at point D(i) on types of compensation.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

Assuming that jurisdiction of the national courts has been established, almost all the Member States allow damages to be claimed for injury suffered outside the national territory by a claimant over which the national court in question has and exercises jurisdiction.

The only apparent exceptions to this rule are:

- Luxembourg: damages would only be awarded for injury suffered within the relevant geographic market (although no case law exists in such respect); and
- Portugal: no power is explicitly granted to courts to award damages for injury suffered outside Portugal, however, such injury could be taken into account in assessing the damages to be awarded.

Finally, in the Czech Republic, where the plaintiff opts for damages for loss of profits to be calculated on the basis of an estimate, the base figure used is that of usual profits achieved in the place where the plaintiff has its seat or domicile.

(iii) What economic or other models are used by courts to calculate damages?

This question is treated as part of the separate report on economic models appearing in the third part of the report.

(iv) Are *ex-ante* (time of injury) or *ex-post* (time of trial) estimates used?

The concepts of *ex-ante* and *ex-post* are not standard terminology in most Member States therefore this question has not been interpreted in the same way in all Member States. This limits the usefulness of a simple statement that a Member State follows one or other approach. There are essentially two issues that the national reporters took into account when replying to this question. These are discussed below. The following table states which approach is generally used.

Table 11: *ex-ante* or *ex-post* estimates of injury

Country	General approach
Austria	N/A
Belgium	P
Cyprus	A
Czech Republic	N/A
Denmark	N/A
Estonia	N/A
Finland	N/A
France	P
Germany	P
Greece	P
Hungary	A
Ireland	N/A
Italy	A
Latvia	A
Lithuania	P
Luxembourg	P
Malta	N/A
Netherlands	N/A
Poland	P
Portugal	P
Slovakia	N/A
Slovenia	N/A
Spain	N/A
Sweden	N/A
UK	A

Legend

P: Ex-post assessment

A: Ex-ante assessment

N/A: Not applicable - either both possibilities are available and which is chosen will depend on the case or the distinction is not generally recognised in national law.

- Belgium: provision for inflation can take either the form of added interest or can be comprised in a global amount;
- Czech Republic, Denmark: this distinction is generally not made;
- Latvia: damages are assessed at time of loss but taking into account inflation; and
- Netherlands: the court shall assess the damage in a manner most appropriate to the nature of the damage. Where the extent of the damage cannot be determined precisely, it shall be estimated.

One way of perceiving the distinction between the *ex-ante* and *ex-post* approaches is they are simply two ways of arriving at the same point – full compensation of the loss suffered by the victim (e.g. Italy). With an *ex-ante* approach this is achieved by the judge placing himself at the time the injury was sustained and calculating loss at that point in time (and depending on the approach taken to these issues in each Member States, with some adjustment to take account of inflation¹⁸⁸ and interest during the intervening period between loss and judgment). The *ex-post* approach looks at loss as at the time of judgment and thus compensates that loss with a global sum. As noted, however, both approaches aim at awarding full compensation of loss.

¹⁸⁸ What type of inflation is involved will depend on the circumstances of the case, e.g. inflation of general prices or of real estate.

Further information on the way effects of inflation are dealt with is given in the table below.

Table 12: Effects of inflation

Country	Inflation
Austria	I
Belgium	I/G
Cyprus	I/G
Czech Republic	N
Denmark	N
Estonia	N
Finland	N
France	G
Germany	G
Greece	G
Hungary	I
Ireland	I
Italy ¹⁸⁹	I
Latvia	G
Lithuania	G
Luxembourg	G
Malta	N
Netherlands	I
Poland	I/G
Portugal	I
Slovakia	N
Slovenia	I/G
Spain	N
Sweden	N
UK	I

Legend

I: effects of inflation covered by application of interest/inflation rate

G: effects of inflation taken into account in global assessment

N: no particular provision for inflation. Inflation will be taken into account using either of the above methods.

Another question which is sometimes considered as distinguishing the *ex-ante* and *ex-post* approaches (e.g. France, Germany, Portugal) is if and to what extent intervening events are taken into consideration and the repercussions this may have on the way in which the damage is assessed (especially what are seen as future losses at the time of injury) and on the way in which the causal link is perceived (in particular in relation to foreseeability).

As a general rule it in fact appears that all Member States' courts may take into account intervening events to some degree when assessing damages¹⁹⁰.

¹⁸⁹ In Italy the effects of inflation on the amount of damages calculated at the time injury is hedged by applying inflation rate from the time of injury to the date of judgment. Statutory interest may also be awarded on top of inflation rate to compensate the plaintiff for the loss suffered for being deprived of that sum of money from the time of injury to the day of judgment (or payment is made by the defendant).

¹⁹⁰ Thus, for example, in the Italian *Bluvacanze* case which concerned the travel sector (see Italian report case summaries) when assessing damages the judge took into consideration whether the events of 9/11 (clearly intervening events that were unforeseeable at the time of the anti-competitive conduct) would have had any impact on the plaintiff's profits and hence on the damages. Thus, if taking into account intervening events or not is the distinguishing factor between *ex-ante* and *ex-post*, no country would technically be categorised as taking an *ex-ante* approach (i.e. ignoring intervening events)

The effect that intervening events can have on the calculation of damages and the choice between an *ex ante* and *ex post* approach is the recent judgment of the English Court of Appeal in *Crehan*. In that case damages were calculated at first instance at the time of judgment – *ex post* – to amount to 1.31 million GBP. The Court of Appeal calculated the damages at the time of loss – *ex ante* – to be 131,336 GBP plus interest. The reason for the difference between these two figures is that the Court of Appeal considered the plaintiff's losses to crystallise in 1993 (at the time he went out of business due to the defendant's anti-competitive conduct) whereas the High Court at first instance calculated damages on the basis that, were it not for the defendant's conduct, the plaintiff would have continued in business for the intervening ten year period. Almost the whole difference between the sum calculated *ex ante* by the Court of Appeal and the sum calculated *ex post* by the High Court was made up of the hypothetical profits that, but for the defendant's infringement, the plaintiff would have made between 1993 and 2003.

Thus, the High Court in *Crehan* was prepared to accept a high degree of foreseeability and take into account hypothetical future profits extending from 1993 to the date of judgment, which could be categorised as an *ex-post* approach. However, the Court of Appeal was prepared to accept a lesser degree of foreseeability and did not take into account any future profits from 1993 onwards, which could be categorised as an *ex-ante* approach.

The judgment in *Crehan* shows that, if the distinction *ex-ante* and *ex-post* is considered, not only to reflect an approach to inflation which results in full compensation being awarded in both cases, but also an approach to foreseeability, then the choice between the two approaches has a marked effect on the level of damages awarded.

(v) Are there maximum limits to damages?

No Member State recognises a maximum limit to damages (other than limitations such as those relating to the jurisdiction of the court hearing the claim or the reduction of damages due to the circumstances of the case such as contributory negligence or foreseeability). Many national reporters recalled the importance of the restitutionary-compensatory function of damages claims and that the full extent of the damage must in any event be compensated, regardless of its extent.

See also point G(a)(vii) below.

(vi) Are punitive or exemplary damages available?

Only a handful of Member States recognise punitive (Cyprus) or exemplary (Cyprus, Ireland, UK) damages. In Cyprus in particular, any bad faith or negligence will be taken into account in a decision to impose punitive damages. National reporters of many of the Member States where such damages do not exist recalled that with regards to the current state of the law, the principally restitutionary-compensatory nature of damages claims conflicted with the idea of exemplary or punitive damages.

Moreover, it should be noted that in Cyprus, Ireland and the UK exemplary damages, while they exist, are rarely awarded.

Some states provide for the publication of the court decision (in the press) or a published admission by the defendant of the violation (France, Italy, Netherlands, Poland, see in this regard point D(i)). This could be seen as a form of "exemplary" damages as it goes beyond financial compensation of the plaintiff.

Finally, in Poland, defendants may in some cases be ordered to make a donation to charity which could also be considered as a type of "exemplary" damages, again as this goes beyond financial compensation of the plaintiff.

(vii) Are fines imposed by competition authorities taken into account when setting damages?

The vast majority of national reporters did not consider that taking fines into account when setting damages was possible (although several national reporters specifically noted that there was no court practice in this area). Again, a number of national reporters stressed that in their jurisdiction, the currently restitutionary-compensatory nature of damages claims was at odds with taking into account any fines that may have been imposed.

The limited exceptions to this are in Member States where, for example, judges have discretion to reduce damages because the result would otherwise be grossly unfair to the defendant or unacceptable for other reasons (Estonia, Lithuania, Netherlands, Spain).

Another theoretical possibility is that fines would be taken into account to help determine (rather than as a reason to reduce) the level of damages awarded (Luxembourg).

(b) Interest

(i) Is the interest awarded from the date the infringement occurred, the judgment or the date of a decision by a competition authority?

It can generally be said that there are four key periods from which interest can start to run¹⁹¹. Although these periods cover a number of dates e.g. date of breach and date of injury, they are used here for the purposes of categorisation: (i) the first period covers preliminary events such as the date of the infringement, the date of injury and the date the cause of action accrued, (ii) the second period covers later events such as a demand for payment, notice to stop breach; the second period ends before a claim is filed, (iii) the third period covers the beginning of the action such as the filing of the claim form or the writ of summons, (iv) the final period is the date of judgment.

Most Member States allow for some flexibility as regards the time from which interest can accrue. The table below summarises, to the extent possible, the situation in the different Member States either on the basis of a clear rule or the most common approach(es) taken. This may result in different options being available.

¹⁹¹ This section refers to pre-judgment interest. Such pre-judgment interest may be added to reflect the plaintiff's cost of being deprived of a certain sum between the time of loss and judgment (e.g. Italy). It may in addition serve to take into account inflation from the time of the loss (e.g. France, Portugal).

Table 13: From what date can interest be claimed?

Country	From what date can interest be claimed?			
	Date of injury /infringement/ when cause of action accrued	Date quantified and defendant informed	Date action introduced/writ of summons	Date of judgment
Austria		✓		
Belgium	✓	✓	✓	✓
Cyprus			✓	
Czech Republic		✓	✓	
Denmark		✓	✓	
Estonia		✓	✓	
Finland		✓	✓	
France	✓	✓	✓	✓
Germany ¹⁹²		✓	✓	
Greece		✓	✓	
Hungary	✓			
Ireland	✓			
Italy ¹⁹³	✓			✓
Latvia		✓		
Lithuania			✓	
Luxembourg	✓	✓	✓	✓
Malta		✓	✓	✓
Netherlands	✓			
Poland	✓			✓
Portugal	✓		✓	
Slovakia		✓	✓	
Slovenia	✓			✓
Spain ¹⁹⁴	✓			✓
Sweden		✓	✓	
UK	✓			✓

(ii) What are the criteria to determine the levels of interest?

A number of different methods are used in determining the level of interest applicable. The most common are:

- compulsory statutory interest rate (although in some states this may be deviated from by agreement): Austria, Cyprus, Czech Republic¹⁹⁵, France, Germany (as a minimum, there is no upper threshold provided the party can show that a higher level is justified), Ireland (judge decides if interest is to be awarded but the rate of interest is set by statute), Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovenia;¹⁹⁶
- statutory default rate: Belgium, Greece, Hungary, Spain;
- calculated with reference to national bank or ECB rates: Denmark, Estonia, Finland, Germany (as far as statutory interest rate applies), Hungary, Slovakia, Sweden; and
- judge decides: UK.¹⁹⁷

¹⁹² The draft 7th amendment proposes to award interest from the moment the damage occurs.

¹⁹³ Interest is awarded from the time of judgment but may also be awarded from the time the damage occurred.

¹⁹⁴ If the defendant does not pay the damages immediately after the first instance decision has been issued, then the relevant amount will accrue so-called "procedural interest" from the date of judgment,.

¹⁹⁵ Calculated with reference to national bank rates.

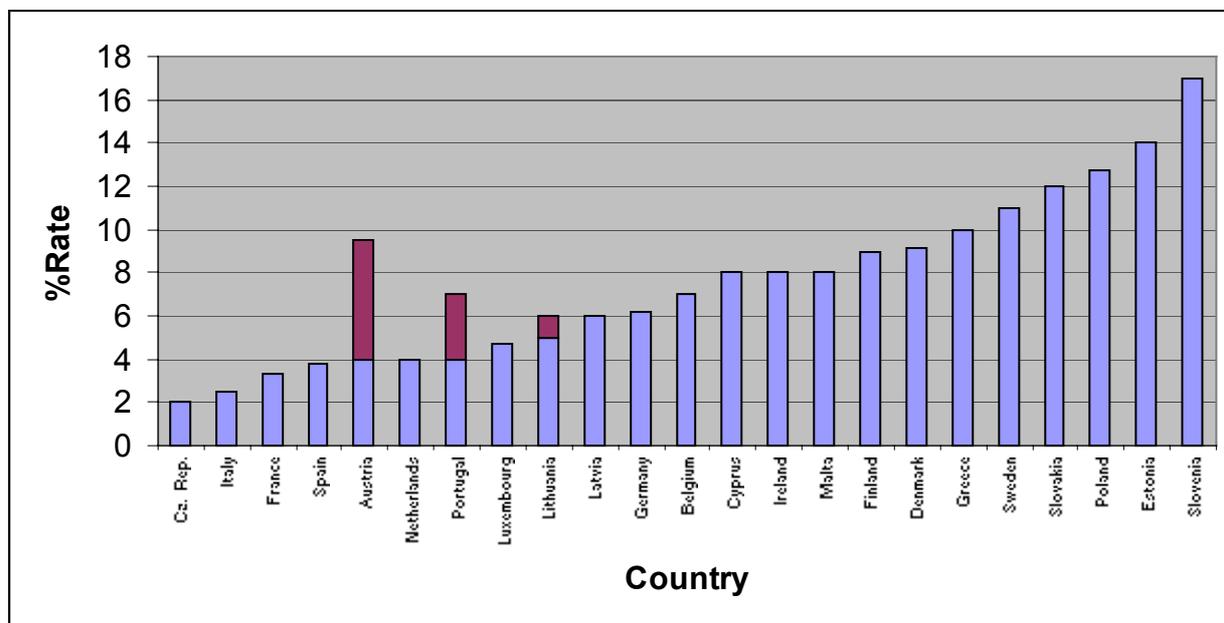
¹⁹⁶ Although laid down in the Civil Code (at 8%), the interest rate has been set far higher by special legislation (currently at 15.5%) in order to cope with the present economic conjuncture.

¹⁹⁷ Although there is a basis in statute the judge ultimately decides.

It should also be noted that in a number of states the rate is higher between undertakings (Austria (if based on a contractual relation between the parties), Hungary, Lithuania) or where the creditor is an undertaking (Portugal).

Bearing these differences in mind, the currently existing rates¹⁹⁸ in most of the states are given below (the darker sections above Austria, Portugal and Lithuania indicate increased interest rates for undertakings):

Table 14: Currently existing interest rates



(iii) Is compound interest included?

In all Member States except the Netherlands and Poland the answer here is no. However, in a number of states there are limited exceptions to this which are laid out below:

- Austria: compound interest can be claimed at 4% once the claim is pending;
- France: available on claimants request and at the court's discretion;
- Germany: compound interest may be claimed as part of damages; and
- Malta: available from a judicial demand to that effect or by agreement after the interest has fallen due provided in either case interest has been due for a year.

Moreover, in certain Member States compound interest may begin to accrue after a certain time has elapsed since judgment either automatically or by court order or by agreement of the parties (Belgium, Italy (although not in relation to tort liability actions), Luxembourg, Portugal).

H. Timing

(i) What is the time limit?

Except for Cyprus (where a 6 year period is currently being introduced) all countries have limitation periods after the expiry of which any claim for damages following a breach of competition law becomes statute barred.

The Member States generally fall into three groups. Firstly, in some countries there is an objectively set long stop date in which to bring the action i.e. the period starts to run from the

¹⁹⁸ Rates may fluctuate considerably. As an example, the Czech rate given here is 2% although in 1997 it peaked at 26%.

date on which the infringement occurred irrespective of the knowledge of the plaintiff (Hungary¹⁹⁹, Ireland, Luxembourg, Malta, Sweden). Secondly, in some countries there is a subjectively set time limit in which to bring the action i.e. damage was detected or ought to have been detected, with differing standards of care (Finland, France, Italy, Latvia, Lithuania, Portugal, UK). Thirdly, some Member States apply both types of time limit i.e. there is a subjectively fixed time limit but also an objective long stop date after which no action can be brought irrespective of the knowledge of the plaintiff (Austria, Belgium, Czech Republic, Denmark, Estonia, Germany, Greece, Netherlands, Poland, Slovakia, Slovenia).

The objective long stop date which is applied in the Member States falling into the first and third categories above, ranges between 5 years (Slovenia and Sweden) and 30 years (Austria, Germany). Germany's long stop date is qualified as follows: the objective limitation period is the shorter of 10 years from the emergence of the damage or the already mentioned 30 years starting from the infringement.

The length of limitation periods differs greatly and oscillates between 1 year (Spain) and 30 years (Germany (objective test), Luxembourg). 7 out of 25 countries set the subjective limitation period at 3 years.

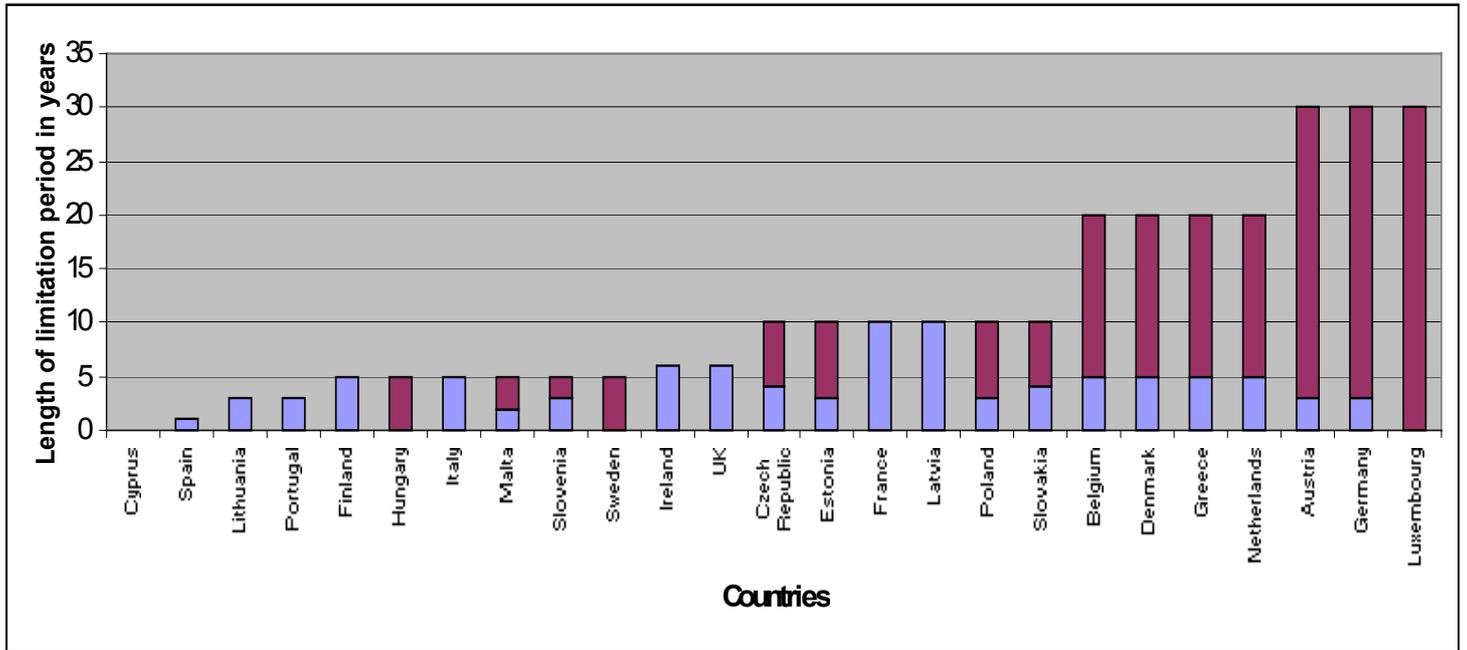
Below is a chart giving an overview of the above limitation periods for tortious claims. Where the graph consists of two shades of grey, the lighter shade indicates the subjective limitation period which (in most countries) starts to run when the damage was detected or should have been detected. The darker shade indicates the long stop date where applicable (however, as regards Malta, the lighter shade is an objective limitation period and the darker shade indicates a possible extension of the limitation period where the damage was caused by a criminal act).

The following comments should be made about certain countries:

- Denmark: the limitation period may be extended to 20 years where the damage was caused by a criminal act;
- Malta: it appears that the limitation period is 5 years where the damage was caused by a breach of competition law which constitutes a criminal offence, but the legal position is not entirely clear (see national report for further details);
- Hungary: the basic limitation period is 5 years. However, should the plaintiff not be in a position to raise his claim due to an excusable reason, he is entitled to raise his claim within one year from the moment at which he finds himself in a position to assert his claim;
- Germany's objective limitation period is split into two tests, which are explained above; and
- Sweden: an extension of the objective period from 5 to 10 years has been proposed.

¹⁹⁹ However, should the plaintiff not be in a position to raise his claim due to an excusable reason, he is entitled to raise his claim within one year from the moment at which he finds himself in a position to assert his claim.

Table 15 : Limitation periods



(ii) On average, how long do proceedings take?

All countries stressed that there are no "average cases" and some cite the results of national statistics. However, it seems to be thought that competition cases, because of the complex evidence gathering and analysis related to them, take longer on average still (moreover, in some states the competition regimes are relatively new and resultantly proceedings may take longer).

A brief overview of the replies made by national reporters to this question is given below. However, it should be stressed here that these numbers cannot be taken to constitute anything more than broad indicators.

In Estonia average any type of civil proceedings would take a total of 1 year (140 days at first instance with a further 3-4 months at each appeal level), however, in competition cases, it is estimated that the proceedings would take longer. Proceedings are similarly rapid in Lithuania with an estimated length of 11-14 months in total (although in competition cases, a delay is usually caused by applying to the Competition Council with a possible appeal to the appropriate administrative court) and Luxembourg (10-18 months).

In most other countries, cases seem to last between 2 and 5 years until final judgment with some countries indicating a total of 7 (France, for complex cases) or even in excess of 10 years (Netherlands²⁰⁰).

A review of proceedings in which damages have actually been awarded shows the varying length of time taken and also the extent to which the right of appeal can seriously increase the length of time required to reach final judgment.

Thus, in France, in the *Peugeot/Eco System* case damages were awarded six years after the original Commission decision finding infringement and in *Mors Labinal*, which went to appeal, damages were awarded ten years after the infringement took place. In Italy, proceedings before the Corte d'Appello in such cases have taken between two and three years (as far as is known, the successful damages actions in Italy were not appealed, with the exception of the *Bluvacanze* case for which appeal is pending but it is estimated that proceedings before the Corte di Cassazione would take a further two to three years). In the UK, the *Crehan* litigation, which ended in an award of damages being made in May 2004, began in 1993. In Denmark, the successful cases that have been brought lasted around two years. In Ireland, around nine years elapsed between the bringing of the action in the *Donovan* case and the final out of court settlement. Finally, in the UK, in the *Crehan* case, damages were awarded over ten years after the infringements.

(iii) Is it possible to accelerate proceedings?

In 15 countries acceleration by means other than parties co-operating or the court imposing a schedule with time limits is not provided for in the respective civil procedure codes.

France, the Netherlands and the UK indicated that there is a system providing for interim/advance payment of damages albeit in limited circumstances only.

Other ways of accelerating procedures mentioned are summary judgments and fast-track procedures (see dialogue box below for general definitions of these terms).

As regards summary judgment, while several (mainly common law) Member States recognised the existence of such a tool (e.g. Cyprus, Ireland, Malta, Netherlands, UK) it was generally considered that such a procedure would be unsuitable for competition-based damages claims (given the typically contentious nature of the questions raised). Moreover, in other jurisdictions the procedure simply does not exist (e.g. Denmark, Estonia) or does not result in damages (e.g. Germany (except in limited circumstances), Luxembourg).

²⁰⁰ Although this would be an extreme case.

Acceleration of proceedings

"Fast-track" procedure is a procedure, often for claims of lower value, which is significantly shortened by mandatory procedural rules. This differs from shortening proceedings through the goodwill of the parties, in that once a court has decided that the "fast-track" procedure is to be used, there are limits on the amount and type of evidence and the length of proceedings. Often no legal representation is required. However, the actual circumstances of the "fast-track" are likely to vary between jurisdictions.

"Summary judgment" on the other hand would be given if (in the opinion of the judge) one of the parties to the proceedings has no prospect of success (i.e. there is no chance that the claim could be successfully brought or defended) and there is no other reason to have a full trial (like, for example, publicity).

A "fast track" (i.e. simplified procedure often for claims of lower value) is recognised in a number of jurisdictions, for example, Belgium, Lithuania, Spain and the UK as well as Italy, where it is possible to by-pass the second instance by mutual consent of the parties.²⁰¹ Generally countries indicated that competition cases are most likely too complex and too valuable to make use of the fast track.

(iv) How many judges sit in actions for damages cases?

Some countries have one judge sitting at first instance (Cyprus, Czech Republic, Denmark (in the City Court, although in its commercial and Maritime Court it is 1 judge plus 2-4 expert judges), Hungary, Ireland, Latvia, Luxembourg ("tribunaux de justice de paix"), Malta, the Netherlands²⁰² and Spain) whereas other countries have the choice between 1 or 3 either at the option of the parties (Estonia²⁰³, Portugal) or depending on the value (Austria, Denmark (depending on jurisdiction), Finland (and the complexity of the dispute), Greece) or the nature (France) of the case.

In Belgium, the system is different in civil cases (parties have the choice between 1 or 3 judges) and commercial cases 1 judge plus 2 expert judges.

Some countries have indicated 1-3 judges at first instance: Finland, Italy, Lithuania, Poland, UK (although in the UK it would not be 3 professional judges but 1 judge and two or more lay expert assessors).

Yet other countries have 3 judges at first instance, either all professionals (Germany (if not referred to panel for commercial matters and including the possibility to have the matter referred to a single judge), Luxembourg (district courts), Slovakia²⁰⁴, Sweden) or 1 judge with assessors (Germany (panel for commercial matters), Slovenia).

Almost all countries have 3 judges on appeal except Ireland (1 in the Circuit Court and the High Court and 3-7 in the Supreme Court, depending on the nature of the appeal), Sweden (5) and the UK where the Competition Appeals Tribunal has two non professional members.

The number of judges at highest instance ranges from 3 (Lithuania) to 12 (Estonia, Lithuania, in most complex cases) with most countries that have indicated a number having 5-7 judges at Supreme Court level: Denmark (but it can vary depending on the case), Germany (5), Greece, Italy (5-9), Luxembourg, Netherlands, Slovakia, Slovenia (5), Spain (6), Sweden (5-7).

²⁰¹ In Italy, national competition cases go directly to the Court of Appeal (this is distinct from the fast track procedure).

²⁰² For claims above 5000, the court may treat the case in a three-judge chamber if it deems this more appropriate.

²⁰³ In Estonia the choice is between either one judge or one judge and two lay judges.

²⁰⁴ This will however likely be changed as of 1 January 2005, when district courts will be competent, with one judge sitting.

(v) How transparent is the procedure?

Every country considered its procedure transparent citing different reasons for this: parties' full access to all documents (i.e. rules on exchange and discovery), public hearings and judgments to be given in open court etc.

It seems noteworthy that Germany appears to be the only country which does not allow for proceedings to be in camera for reasons of protection of business secrets, nor is there a privilege on correspondence between the court and the lawyers.

It must also be noted that, despite generally stating that procedures were transparent, some specific post-procedure restrictions do exist in certain Member States. Thus, in the Czech Republic, and Slovenia the names of parties do not appear on publicly available judgments²⁰⁵.

Another, more general restriction that apparently exists in most Member States is that, although judgments of higher courts are generally available (sometimes this also extends to publication on the internet) copies of judgments of lower courts are frequently not available. Moreover, where judgments are available, they are not often available in a readily accessible form (e.g. categorised on an electronic database by number, name, subject matter etc).

I. Costs

(i) Are Court fees paid up front?

All countries except for France and Luxembourg provide for court fees (if they are payable at all) to be paid up front. Some countries (Estonia, Hungary, Lithuania and Poland) have systems in place which allow for derogation from the general rule (in Poland, for example, a party with limited means can be exempted from court costs and in Spain, companies with an annual turnover below 6m and individuals are exempted from paying court fees altogether) and three, Greece, Slovenia and Portugal, indicated that the only part of the court fee has to be paid up front with the remainder being payable at a later stage.

(ii) Who bears the legal costs?

All countries provide for the general rule that the losing party pays the winning party's costs. At the same time, every country recognises exceptions to the rule, primarily based on whether the claim was totally or only partially successful. The conduct of the parties during the proceedings and whether expenses were incurred negligently also enters the judge's decision when making an order for costs. In addition, in Greece, if the interpretation of the invoked rule of law was difficult and the outcome of the trial reasonably uncertain, legal costs may be set off between the parties.

²⁰⁵

As regards the Czech Republic, there is no official reason for this approach although it is considered that one reason may be that names are deleted to protect the interests of the parties. In Slovenia, the official reasons given concern data protection.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

**Contingency fees
(also referred to as quota litis)**

Payment to the plaintiff's counsel is only due if proceedings are successful. Fees are calculated in function of the size of the award, for example as a percentage.

**Conditional fee agreement
(also referred to as no win no fee arrangement or palmarium)**

Payment to the plaintiff's counsel is only due if proceedings are successful. Fees are not calculated in function of the size of the award.

Bonus

An increase of lawyer's fees above a basic charge where the claim is successful. The bonus is calculated in function of the size of the award.

Uplift

An increase of lawyer's fees above a basic charge where the claim is successful. The uplift is not calculated in function of the size of the award.

Minimum tariff

Compulsory minimum fees that lawyers must charge, as laid down in the relevant national instrument.

Some of the different expressions indicating that fees are linked either in whole or in part to the success of a claim and the amount awarded are explained in the dialogue box above. These arrangements may also be known under other names.

The situation in the Member States in relation to such fees is summarised in the table below. Rules relating to such types of fee vary markedly. Some countries appear to allow them without qualification (Estonia, Hungary, Latvia) whereas other do not allow contingency fees at all (Cyprus, Denmark, Germany, Ireland, Italy, Malta, Portugal).

All countries, while often not allowing a contingency or conditional fees, do allow for uplifts or bonuses in case of success.

In a number of states, regardless of the existence or not of contingency/conditional fees, the final level of fees must be "reasonable" (Czech Republic, Denmark, France, Lithuania, Slovakia).

It can be noted that whilst few of the "old" Member States allow contingency/conditional fees, a large proportion of the new Member States do (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia).

Table 17: Availability of contingency fees etc.

Country	Contingency fees (%)	Conditional fees	Bonus (%)	Uplift	Minimum tariff
Austria	-	-	✓	✓	✓
Belgium	-	-	✓	✓	-
Cyprus	-	-	-	-	✓
Czech Republic ²⁰⁶	✓	-	-	-	-
Denmark	-	✓	-	✓	-
Estonia ²⁰⁷	✓	✓	✓	✓	-
Finland ²⁰⁸	✓	✓	✓	✓	-
France ²⁰⁹	✓	-	✓	✓	-
Germany ²¹⁰	-	-	✓	✓	✓
Greece	-	✓	-	✓	✓
Hungary	✓	✓	✓	✓	-
Ireland	-	✓	-	✓	-
Italy	-	-	-	✓	✓
Latvia					
Lithuania	✓	✓	✓	✓	-
Luxembourg	-	-	-	-	-
Malta	-	✓	-	✓	-
Netherlands	-	-	✓	✓	-
Poland	-	-	✓	-	✓
Portugal	-	-	✓	✓	-
Slovakia	✓	-	✓	-	✓
Slovenia	✓	-	-	-	✓
Spain	-	-	✓	✓	-
Sweden ²¹¹	-	-	-	-	-
UK	-	✓	-	✓	-

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

The types of costs that are recoverable are very broad. The general rule among all countries appears to be that all costs are recoverable albeit either with a ceiling on legal costs (i.e. solicitors' fees) or a ceiling on several items where tariffs are periodically set by legislation. Several countries make recovery subject to reasonableness (Finland, Hungary, Italy, Poland, Slovenia, Sweden, UK).

In Malta the successful party may recover the costs incurred from the other party but extra-judicial costs cannot be recovered. In Portugal solicitor's fees are not recoverable, even by the winning party, although the law foresees a theoretical compensation, which is extremely low: 0,25% to 0,50% of the claim. In Belgium, a recent change in the law enables parties to recover "reasonable" legal cost in certain limited circumstances. However, this provision is very narrow and therefore the general rule in Belgium remains that the amount that can be recovered for solicitors' fees is symbolic.

Every country has a system in place whereby the 100% recoverable costs can be reduced in proportion to the success of the action or taking into account the behaviour of the parties throughout the proceedings. Often the court is given considerable discretion in this regard. In Germany, the draft 7th amendment provides for a reduction of cost recovery in favour of companies whose economic standing would be endangered if they had to pay the full costs. This provision might reduce the litigation risk for smaller companies and thus encourage damages claims by those plaintiffs.

²⁰⁶ Conditional fees are only allowed in particular circumstances.
²⁰⁷ Although permitted, contingency/conditional fee arrangements are rare.
²⁰⁸ Idem.
²⁰⁹ Contingency fees are available, but only as a complement.
²¹⁰ If agreed after the lawyer has ceased to act for the client in the relevant matter.
²¹¹ However, contingency fees are permissible in class actions.

Luxembourg is the only country where legal costs (i.e. fees) will always be borne by each party. By way of exception, the Court may order a lump sum to be paid which may be used to cover some of the lawyer's fees.

(v) What are the different types of litigation costs?

All countries gave an extensive list of items when asked to enumerate the types of litigation costs, comprising court fees, duties, legal costs, costs for experts, witnesses and translators, other disbursements etc. Reference is made to the national reports for complete lists.

(vi) Are there national rules for taxation of costs?

As regards the types of costs that are recoverable see above at question I(iv). As noted also under that question, costs that are recoverable are often limited to what is reasonable and in certain jurisdictions limits on, or indicative values of, lawyers' and other professionals' fees exist.

As regards disputes over the costs awarded by judges within the above limits, some countries indicated that, since the award of costs forms part of the judgment itself the latter can only be challenged by appealing the judgment (Germany (decision on which party has to bear the costs; a special procedure (including appeal) applies to the taxation of the amount of costs), Greece, Lithuania). In Ireland, in the event of a dispute over costs the losing party may require these to be reviewed by a special officer of the court. Luxembourg indicated that separate litigation over costs was possible and subject to special rules. An appeal on costs only is also possible in Denmark (where costs exceed DKK 10000), Poland and Slovenia. In Spain, disputes over costs are reviewed after judgment by the Court in a special procedure, no appeal being possible.

Taxation of costs
Taxation of costs is a term which refers to a process by which the successful party to a litigation must file with the court breakdown of its costs and the court will then assess the reasonableness of the costs if the costs cannot be agreed between the parties.
There may also be specific rules as to how disputes over the level of costs set by the judge are settled.

(vii) Is any form of legal aid insurance available²¹²?

Legal aid insurance is available in 21 countries: Austria, Belgium, the Czech Republic, Denmark,²¹³ Estonia,²¹⁴ Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the UK. Only Cyprus, Germany (not for competition law cases) and Malta do not provide for legal aid insurance.

It is interesting to note in this context that both Hungary and Lithuania specify in their replies that insurance, while generally available, is uncommon and rarely used, in particular in relation to competition cases.

These results are summarised below:

Table 18: Availability of legal aid insurance

²¹² Legal aid insurance, which involves the insuring of either the plaintiff against losing the case it has brought or the defendant against such actions generally or against losing the particular action brought. This is to be distinguished from legal aid, which can be defined as the financial assistance sometimes provided to those who are unable to meet the full cost of legal proceedings.

²¹³ Provided by private insurance companies. Public legal aid is not available in commercial cases.

²¹⁴ Even though legal aid insurance has been provided for in Estonian law, there are currently no Estonian insurance firms, who would offer such type of insurance, and thus legal aid insurance in practice is not available to persons in Estonia.

Country	Legal aid insurance available?
Austria	√
Belgium	√
Cyprus	No
Czech Republic	√
Denmark	√
Estonia	No
Finland	√
France	√
Germany	No
Greece	√
Hungary	√
Ireland	√
Italy	√
Latvia	√
Lithuania	√
Luxembourg	√
Malta	No
Netherlands	√
Poland	√
Portugal	√
Slovenia	√
Slovakia	√
Spain	√
Sweden	√
UK	√

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

Generally countries felt that this question could not be answered. Half the national reporters have given an indication of average total costs of proceedings on the basis of a 1 million euro claim where the level of damages is relatively easy to establish. However, every country emphasised that there is no "average hard core competition case" and that estimates are very rough indeed.

The replies that were received indicate that fees are generally lower in the new Member States, although in all countries it appears that on the basis of a 1 million euro claim where the level of damages is relatively easy to establish, costs would run into tens of thousands of euro. In the UK and Ireland this figure is even higher, going well above 100,000 euro.

In states where court fees are calculated as a percentage of the value of the claim (e.g. Czech Republic) it appears that a large part of the costs is represented by these fees.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

The major differences that exist between competition-based damages actions and other types of damages actions in the Member States have been outlined above. These will not be reiterated here.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

In general the fact that EC competition rules are regarded as public policy does not affect any answers given. However, the following points can be noted:

- *ex officio*: In a few jurisdictions, this impacts on the power of judges to act *ex officio*. Thus, in Slovenia judges have the power to establish facts *ex officio* (in specified circumstances only);
- standing: in Ireland, the Competition Act provides that "any person who is aggrieved" by a violation of Irish competition law has standing to bring an action in respect of that violation. Conversely, in Germany and Austria, the group of individuals who have standing is restricted due to a restrictive interpretation of the protective purpose of the rules (although, in Germany, this applies to tort law in general and, in addition, the restrictive approach is challenged by some courts and legal experts and the situation may change with the draft 7th amendment which widens the interpretation of the protective purpose of these rules);
- Malta: public policy rules, including competition rules, override any rules to the contrary in national law;
- Netherlands: case law indicates that the Dutch equivalent of Article 81 EC is not regarded as being of public policy; and
- UK: case law indicates that no fresh evidence can be adduced which contradicts a Commission decision (as this would be considered contrary to public policy).

(iii) Are there any differences according to whether the defendant is a public authority or natural or legal person?

Again, generally the fact that a defendant is a public authority does not have any impact. The following points are, however, of note in this regard:

- **administrative courts**: in some jurisdictions (Belgium, France, Lithuania, Luxembourg, Portugal, Spain) some disputes with state bodies are brought before administrative courts;
- **pre-action submissions**: in some jurisdictions (Czech Republic, Malta, Slovenia) some form of statement of breach must be presented to the public authorities before an action is brought before the courts in order to allow for the situation to be remedied;
- **Article 86 EC type exemptions**: many Member States have exemptions where national competition law does not apply i.e. essentially where they relate to activities which are carried out under exclusive rights. In Germany, where actions relate to sovereign activities and in Italy, where undertakings entrusted with the operation of services of general economic interest or are allowed to operate as monopolists, national competition law may not apply;
- Latvia: disputes involving public authorities may not be resolved by recourse to arbitration;
- Poland: public authorities cannot be held liable for infringement of national competition rules (although EC based claims against such bodies should be possible).

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

Factual and legal interaction should be distinguished here. As concerns factual interaction between leniency programmes and actions for claims for damages under competition rules, the latter cannot be ruled out (for example, leniency applicants may take into account the possibility of subsequent damages claims when considering whether to file for leniency).

On the other hand, there are no specific provisions in any of the Member States concerning possible legal interaction between leniency programmes and actions for claims for damages under competition law.

However, the following points can be noted:

In some states no leniency programme exists (Austria, Estonia, Luxembourg, Poland (although fines can be reduced or not applied under certain conditions), Portugal, Slovenia, Spain). In states

where such a programme does exist, there is no legal interaction or no reason exists under general principles for such interaction to exist although no case law exists on the point.

Germany questioned whether documents produced during investigations by national competition authority or the Commission for the purpose of leniency programs would have to be disclosed to plaintiffs in subsequent damages actions.

As regards confessions, in Denmark it was stated that it would be difficult to retract a confession in the context of a civil procedure and in Portugal confessions given in the context of competition authority proceedings cannot be automatically carried across into civil proceedings. In Ireland, it would be open for an undertaking or individual to argue in civil proceedings that previously seeking immunity under the immunity programme did not constitute an admission of guilt.

Finally, in Lithuania, in case of Article 82 EC type violations one of the conditions for its application is that some form of compensation is given to victims.

(v) Are there any differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

The answer to this question in nearly all Member States was that no such differences exist (other than which courts have territorial jurisdiction. This question is treated above at point B. Some national reporters, however, underlined that although no legal differences exist, no conclusions can be made on this point as yet due to an absence of case law (Finland, Sweden).

The following points can however be noted:

- Slovakia: although no case law exists, in other areas of damages actions, there are significant differences in the amounts awarded which is considered to be mainly due to an absence of calculation methods;
- Spain: The national competition act is applicable throughout Spain. However, as the autonomous regions have their own competition authorities, they may in some instances apply competition law (to breaches confined to that territory) or draw up reports requested by courts; and
- UK: Although Northern Ireland and Scotland have to an extent different substantive law, terminology (Scotland), court structure (Scotland) and procedures the competition act is applicable throughout the UK. Further details are given in Annex 1 to the UK national report.

(vi) Please mention any other major issues relevant for the private enforcement of EC competition law in your jurisdiction.

The main issues relevant for the private enforcement of EC competition law have already been brought to light in the context of the questions raised in section II above.

However, as regards non-contractual competition-based damages claims, the table below gives an overview of the current rules for choice of applicable law. Generally, the applicable law is either that of the country where the infringement occurred, of the country where the damage occurs/effects are felt or of the country having the closest connection with the dispute. The table below summarises the general rule for identifying the applicable law in the different Member States.

Table 19

Country	Place of infringement	Place where the effects are felt/damage occurs	Country having the closest connection
Austria	✓	✓ ²¹⁵	✓
Belgium	✓	-	-
Cyprus	✓	-	-
Czech Republic	✓	✓	-
Denmark	✓	✓	✓
Estonia	✓	✓	✓
Finland	✓	✓	✓
France	✓	✓	✓
Germany	-	✓	-
Greece	✓	-	-
Hungary ²¹⁶	✓ ²¹⁷	✓ ²¹⁸	-
Ireland	-	-	✓
Italy	✓	✓	-
Latvia	✓	✓	-
Lithuania	-	✓	-
Luxembourg	-	-	✓
Malta	✓	-	-
Netherlands ²¹⁹	✓	✓	-
Poland	✓	-	-
Portugal	✓	-	-
Slovakia	✓	✓	-
Slovenia	✓	✓	✓
Spain	✓	✓	-
Sweden	✓	✓	-
UK	✓	✓	-

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon.

There have been relatively few damages cases brought for breach of national or EC competition law. There are even fewer in which the issue of damages was actually decided upon.

No official statistics are available on this issue in any of the Member States.

However, where possible, the following table lists the number of known cases in which damages have been awarded in the different Member States, the number of cases in which damages were refused and also actions pending. Each of the above categories is broken down according to the basis of the claim (EC law, national law or both). Where there was a prior decision by a competition authority finding violation of competition rules, this is indicated in a footnote.

It should be underlined here that the figures below only reflect the actions which the present study has revealed and should in no way be considered to give a complete picture of litigation in this area in the different Member States. This is particularly the case as regards unsuccessful actions and pending actions.

²¹⁵ Only for damages claims based on the Austria Unfair Competition Act.

²¹⁶ In the event that the country of residence of the party causing the damage and the injured party are in the same state, the law of that state shall apply.

²¹⁷ Unless application of the law of the place of the occurrence of the damage is more favourable.

²¹⁸ If more favourable to the injured party.

²¹⁹ In the event that the country of residence of the party causing the damage and the injured party are in the same state, the law of that state shall apply (unless the parties choose otherwise).

Table 20: Number of damages actions brought

Country	Damages awarded			Damages refused			Pending cases		
	Based on EC law only	Based on national law only	Based on national and EC law	Based on EC law only	Based on national law only	Based on national and EC law	Based on EC law only	Based on national law only	Based on national and EC law
Austria	-	-	-	-	-	-	-	-	-
Belgium	1 ²²⁰	-	-	-	-	1	-	-	-
Cyprus	-	-	-	-	-	-	-	-	-
Cz. Republic	-	-	-	-	-	-	-	2	-
Denmark	1 ²²¹	1 ²²²	-	1	-	-	2	-	-
Estonia	-	-	-	-	-	-	-	-	-
Finland	-	-	-	-	-	-	-	-	-
France	3 ²²³	3 ²²⁴	2 ²²⁵	-	-1 ²²⁶	2 ²²⁷	-	2 ²²⁸	-
Germany	-	8 ²²⁹	1	-	15	5	3	9	-
Greece	-	-	-	-	-	-	-	-	-
Hungary	-	-	-	-	-	-	-	1 ²³⁰	-
Ireland ²³¹	-	1	-	-	-	-	1 ²³²	-	-
Italy ²³³	-	3	-	1	5	-	-	1	-
Latvia	-	-	-	-	1 ²³⁴	-	-	-	-
Lithuania	-	-	-	-	-	-	-	2	-
Luxembourg	-	-	-	-	-	-	-	-	-
Malta	-	-	-	-	-	-	-	-	-
Netherlands	2	-	1	1	1	-	-	-	1
Poland	-	-	-	-	-	-	-	2	-
Portugal	-	-	-	-	-	-	-	-	-
Slovakia	-	-	-	-	-	-	-	-	-
Slovenia	-	-	-	-	-	-	-	1	-
Spain	-	-	-	-	1 ²³⁵	-	-	-	-
Sweden	-	-	-	-	6-10	-	-	2	-

²²⁰ In this case, a complaint was filed with the European Commission for breach of competition law. The Commission acknowledged the breach, but did not take any measures because the parties entered into a settlement agreement. Shortly thereafter, the plaintiffs filed a claim with the Court of First Instance of Brussels, which awarded damages. An appeal against this judgment was lodged, but never decided upon because parties entered into a settlement agreement. For the facts of this case, please consult the Belgian report case summaries).

²²¹ This case, GT-Linien (see Danish report case summaries) is currently on appeal before the Supreme Court.

²²² This case, Ekko A/S (see Danish report case summaries) which was preceded by a decision by the national competition authority.

²²³ In one of these cases, namely Eco System v. Peugeot (see French report case summaries), there existed a prior decision of the Commission finding infringement.

²²⁴ In the case Concurrence v. Sony, there existed a prior decision of the Competition Council. The two other cases are SARL Parfumerie Jerbo v. SNC Estée Lauder ; SA BMW France v. SARL Rotative Typo Offset Imprimeries

²²⁵ In the first case, the UGAP v. SA CAMIF, there was no prior decision of the Competition Council, but the Council was consulted by the Court. The second case is SARL P. Streiff Motorsport v. Société Speedy France SAS where damages were awarded in respect of national competition law only.

²²⁶ SNCF v. SOGEA (see French report case summaries).

²²⁷ Société Catimini v. Société Cofotex (see French report case summaries), and SARL P. Streiff Motorsport v. Société Speedy France SAS but only as regard EC law.

²²⁸ SNCF v. Dumez and SNCF v. Bouygues (see French report case summaries). Liability has been established in these cases but damages have not yet been assessed. These cases were brought after a decision by the Competition Council, and on appeal by the Paris Court of Appeal finding an infringement. The decision awarding damages, when taken, might still be appealed.

²²⁹ Including six declaratory decisions.

²³⁰ A decision on competence was made in this case but the question of damages is still pending.

²³¹ Where boxes have been left blank, this indicates that no statistics are available.

²³² Masterfoods v. HB Ice Cream. The Commission took a decision in this case but only after proceedings had been initiated in the national courts.

²³³ The following points should be noted in relation to the above figures (i) figures are based on nation-wide internal searches (ii) figures do not include the 50 or so national law based actions brought by policy-holders before the competent Giudice di Pace (see Italian report at point II.B(i)) (iii) figures do not include actions which did not go beyond the *interim* phase (although most of these were in any event unsuccessful); however evidence has been found of around 25 *interim* decisions; (iv) only one action brought under EC competition rules where damages were claimed but not awarded was found (Prograf v. Siemens – see Italian report case summaries).

²³⁴ This case was based on a prior decision of the national competition authority. That decision was annulled by the court and the action resultantly failed.

²³⁵ In this case (Court of Appeal of Burgos, judgment dated 26 July 2002) the Court required a report issued by the Spanish Competition Court on the quantum of the damages to be awarded but did not provide a conclusive amount, since the necessary data was not available. However, the claimant based its case on infringements of UCL rather than DCL (despite the fact that there was a decision from the Spanish competition authorities declaring the infringement of national competition law).

UK	1	-	-	1	-	-	1 ²³⁶	-	-
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Based on the Commission vitamins decision (Commission decision of 21 November 2001, Vitamins, [2003] OJ L 61).

Section Two

Facilitating private enforcement

I. Introduction

The information in the national reports has been summarised and the salient points underlined in Section One above and these will not be repeated here. What will be underlined are the various aspects of the national systems which appear to make it more difficult for private applicants to bring an action. For simplicity of presentation and cross reference to other parts of the report, the following section will more or less take the same structure as the preceding section i.e. treating each question of the report individually.

II. Obstacles to private enforcement

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

As can be seen from Section One, the approach to legal basis in the different Member States is varied although generally two types of approach could be identified: (i) the existence of a specific legal base in the national competition act backed up by the general rules for damages actions and (ii) no specific legal base but reference to a general legal base e.g. in the civil code. Four points are worth underlining here.

Firstly, some national reporters gave a strikingly simple answer to this question simply quoting the legal base from the competition act and/or the legal base in a more general text e.g. the civil or commercial code. In other states, the picture seemed far less clear with lack of certainty, especially on the question of whether a specific legal base applied also for EC based claims. Lack of certainty also existed in some states as to the interaction between the competition act and the more general rules of liability, in particular on the question of fault (in the sense of negligence or intention) and the existence or not of objective fault. In this context, it can be noted that where the existence of a specific legal basis means that the fault condition is no longer required, this clearly removes one of the obstacle to private enforcement.

Lack of clarity creates an obstacle to or at least inhibits to an extent the bringing of damages claims. However, some of the uncertainty may simply stem from a total absence of litigation and a simple answer may be found in time, which would mean that this issue does not create a significant obstacle to litigation. The issue of fault will be returned to below at point D(iii).

Secondly, whereas lack of clarity regarding legal basis can be said to constitute an obstacle, simple absence of a specific legal basis for bringing competition based damages claims does not clearly constitute an obstacle to bringing such claims (although the existence of a separate legal basis may raise the profile of damage claims and therefore encourage more to be brought – see in this regard the comments at point III below regarding legal basis and publicity).

Thirdly, in some states there clearly are separate legal bases for the bringing of, on the one hand, EC based claims and, on the other, national law based claims. This could be seen to create difficulties to the extent that some claims are based simultaneously on national and EC law.²³⁷ Dealing with two separate legal bases further adds to the complexity to damages claims (which again ties in with the issue of clarity mentioned above). The inhibitive effect of this is, however, probably very slight in comparison to other obstacles discussed below and may in some cases have very little effect at all. To the extent that the existence of two separate legal bases affects the

²³⁷ See, for example, the Dutch case *Praet en Zonen v. Coöperatieve Productenorganisatie van de Nederlandse Mosselcultuur*.

jurisdiction competent to hear the claim this could constitute an important obstacle and this issue is treated further below at point B(i).

Fourthly, it should be noted that in Sweden only undertakings and parties to a contract with the infringing undertaking may bring competition-based damages actions. This is obviously a far more serious obstacle to damages claims than the points treated above as it effectively acts as a complete bar to claims by consumers. In Finland only undertakings may bring damages actions under the FCA but consumers could in theory bring actions under the more general rules on damages claims.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

A number of factors regarding the courts competent to hear damages claims in the Member States could potentially be viewed as obstacles to the bringing of such claims.

National competition authorities

As outlined above in the comparative analysis, in Malta²³⁸ and Spain²³⁹ it appears that national courts do not have the power to rule that there has been a breach of national competition law without a pre-existing decision to that effect by the respective national competition authority (these restrictions should not in principle apply to EC competition law, not least by virtue of Article 6 of Regulation 1/2003). In Hungary it is doubtful if the courts would rule on an infringement of national competition rules, although Article 6 of Regulation 1/2003 will clearly have to be applied in cases of infringement of EC competition rules.

To the extent that the necessary intervention of the national competition authority will prolong proceedings beyond the length that they would otherwise be, this will act as an obstacle to private enforcement (although, as noted below under III, this may well be offset by the added value brought by the expertise of the competition authority).

In Poland judges have the power to order plaintiffs first to submit a complaint to the national competition authority, which could also prolong proceedings.

Different courts competent to hear national and EC based claims

In some states, different courts are competent to hear national and EC competition-based claims respectively. This will create an obstacle to bringing an action where plaintiffs wish to rely simultaneously on national and EC competition law. Such plaintiffs will, in practice, be forced to introduce two separate claims before two separate courts (where this is possible) or to drop one of their claims altogether²⁴⁰.

A similar problem arises where plaintiffs are obliged to obtain a decision of violation by a national competition authority before bringing their claim before court (see preceding point). In the latter case, the plaintiff must either drop their claim under national competition law, or wait for the outcome of the competition authority's investigations.

Finally, it should be noted here that the division of national courts' jurisdiction as regards the application of EC and national competition law would appear to run counter to Article 3(1) of Regulation 1/2003, which states that national courts having the power to apply national competition law must also have the power to apply EC competition law.

²³⁸ In Malta, the legal texts seem to imply that ordinary courts do not have such power but the question has not yet been ruled upon.

²³⁹ In Spain, this question is hotly debated. National Courts can rule on the infringement of national competition law, but, according to some case law and several scholars, Courts may only award damages based on this infringement once a definitive decision to that effect by the national competition authority has been given.

²⁴⁰ As concerns Ireland, while, in theory, this is possible where a plaintiff decides to bring a civil action in the District Court in respect of a breach of EC competition law and, due to section 14(3) of the Competition Act, would have to bring a simultaneous action in respect of a breach of Irish competition law by the same defendant in the Circuit

Level of expertise

There are a number of ways in which the jurisdiction of courts to hear EC or national competition law - based damages claims is limited to higher or more specialised courts or panels.

One of the effects of these types of measures is that it should generally increase the level of expertise and experience of the people judging the case.²⁴¹ Hopefully, one result of this would be better judgments, but the possible effects this may have on encouraging competition-based damages actions are impossible to measure. In theory, one could argue that more experienced judges may be less inhibited about handling complex damages claims, which could result in more successful claims. This type of reasoning is, however, extremely speculative.

Moreover, as regards limiting such claims to higher courts, this may, in some cases, increase obstacles to private enforcement. Firstly, it should be noted that claims before higher courts are generally more costly and more time consuming. Secondly, the use of higher courts may not be appropriate for small claims by consumers.

The first of these points is discussed further under point I(viii) below on costs. As regards the second point, attention should be drawn here to the example of the multiple claims brought before the small claims courts in Italy by customers of car insurance providers found guilty of price fixing by the national competition authority (see above Section One point II.B(i)). Leaving aside, for the moment, questions arising as to the competence of the small claims courts in these cases, the latter could be viewed as the most successful set of parallel competition-based damages claims ever brought in the EC.²⁴²

These last points are, however, less applicable to situations where jurisdiction over competition-based damages claims is limited to specialist courts or panels. Indeed, a number of national reporters indicated that the lack of expertise of judges and courts was, in their view, an obstacle to competition-based damages actions.²⁴³

Lack of legal certainty

As to the question of legal basis, there is a degree of uncertainty in some Member States as to which courts are competent to hear competition-based damages claims.

The situation in the Member States (and in particular Italy) is described in the comparative analysis above. All that will be said here on this point is that any lack of legal certainty in this area may contribute to inhibiting damages actions, although this effect cannot of course be measured.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

The only "specialised" court, the UK's Competition Appeal Tribunal appears to have several features that facilitate rather than hinder damages actions and will be discussed further below at point III.

Court or the High Court, this is unlikely to arise in practice as the monetary jurisdiction of the District Court is so low (□6,348.96).

²⁴¹ Arguably, a similar effect will be achieved through input from national competition authorities (for example through referrals or *amicus curae* briefs) or recourse to expert witnesses. The latter will be dealt with under point E(b)(i).

²⁴² Although, it must be underlined that these claims were facilitated and probably made possible due to a pre-existing decision of the Italian national competition authority finding a violation.

²⁴³ Nonetheless, the study has not revealed any particular tendency for states having specialised courts or panels (Germany and Sweden) to have more instances of successful litigation by private applicants.

C. Who can bring actions for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factors are required with the jurisdiction in order for an action to be admissible?

The study revealed two serious obstacles to the standing of private applicants. Firstly, actions by consumers under the specific legal basis provided for in the national competition acts in Finland and Sweden are seriously restricted (although in Finland consumers may be able to sue under the general tort rules). Secondly, in Germany and Austria, limitations apply due to the need for the plaintiff to show the protective purpose of the competition norm invoked. The first of these is dealt with above at point A, last paragraph. The second of these is discussed below at D(ii).

On the issue of private international law rules, it can be noted that jurisdiction within the EC is governed by Regulation 44/2001.²⁴⁴ Adding to the bases of jurisdiction provided for in that regulation could facilitate damages actions by giving potential claimants a greater choice of fora in which to bring their action. However, such reforms are beyond the scope of the present report.

As regards conflicts between EC Member States and non Member States, it can be noted that the Member States generally apply rules similar to those provided for in Regulation 44/2001. In such cases, several Member States have jurisdiction in circumstances not foreseen in Regulation 44/2001. These rules therefore add to the bases of jurisdiction provided for in Regulation 44/2001 and can be considered to facilitate private enforcement again by giving potential claimants a greater choice of fora in which to bring their action.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

As noted above, actions brought by certain entities or individuals on behalf of wider groups, classes or the public at large, which result in damages being awarded, are quite rare. They only exist in a few Member States and even there only to a certain extent. Moreover, in Italy, one of the few countries where this type of actions is envisaged, it is limited to claims for damages caused in the context of contractual relationships governed by standard terms and conditions.

Such limitations could be seen to constitute an obstacle to private enforcement as they effectively reduce the number of alternative forms of litigation open to plaintiffs. This point will be discussed further below at point III.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

All Member States foresee the possibility of claiming monetary compensation for loss resulting from a violation of competition law. All countries foresee that reduction in the value of assets (*damnum emergens*) and loss of profits (*lucrum cessans*) can be claimed in theory.

The limitations on the forms of compensation available do not seem to constitute a particular obstacle to the bringing of private actions. The publication of judgments in the press, which is provided for in a number of jurisdictions, may be considered to encourage private actions (see below at point III).

(ii) Other forms of civil liability (e.g. disqualification of director)

No Member State provides for the disqualification of directors in the context of damages actions. It is not thought that this limit creates an obstacle to private damages actions. A number of Member States do provide for the liability of directors which may be considered to encourage private actions.

²⁴⁴ Except in the case of Denmark. See *supra* note 44.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

As a preliminary point, it should be noted that in EC law, technically there is no requirement of fault to show that there has been a violation of Article 81 or 82 EC. In the case of Article 81 EC, this flows as much from the text of the provision itself (which condemns agreements having the "effect" of restricting competition) as from the case law of the Court. In the case of Article 82 EC, the case law makes it clear that abuse is an objective concept.²⁴⁵ Nonetheless, it must be recalled that we are dealing here with actions for damages, not administrative procedures investigating alleged infringements and therefore the fault element is a condition of liability in a number of Member States.

The requirement that fault be shown in addition to illegality for liability to be established undeniably constitutes an obstacle to damages actions²⁴⁶. However, as can be noted from Section One point II.D(iii) above, the plaintiff bears the burden of proving fault only in four to seven Member States (Finland, Greece, Poland and Portugal (although it is not yet clear whether fault must be shown as regards EC based actions)) and also possibly in Denmark, Italy and Spain. In the other Member States there is either no requirement of fault, fault is implied or the defendant bears the burden of proving that there is an absence of fault.

Moreover, the ease of fulfilling the fault requirement will vary considerably depending on the type of violation in question. Thus, for example, in hard-core violations of Article 81 EC there should be little difficulty in establishing fault, where the very object of the agreement is to restrict competition²⁴⁷.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests

It can be noted from the comparative analysis of the laws of the Member States above that a plaintiff must, at most, prove five different elements in order to bring a successful damages action in either EC or national competition law: violation of competition law, fault, damage, causation and that the rule that was violated was there for the protection of the plaintiff.

At a very basic level, the fact that in the first instance the plaintiff bears the burden of proof for any of these element clearly constitutes an obstacle to private enforcement. The extent to which the plaintiff's need to prove violation of competition law, fault, damage and causation constitute an obstacle to competition-based damages actions are dealt with at section two points II.E(b)(iii), II.D(iii), II.G and II.E(d)(i) respectively.

The requirement that the plaintiff also show that the rule that was violated was there for the protection of its protection exists in Austria, Estonia and Germany ("protective purpose requirement").

As regards Germany, the extent to which the protective purpose requirement constitutes an obstacle to competition-based actions is difficult to gauge. In applying this requirement to both national and EC law based claims, the German courts usually demand that the plaintiff be a person or belong to a definable group of persons against whom the infringement was specifically directed with the aim of worsening that person or group's situation or preventing that person or group from entering the relevant market. The Federal Court has not yet decided upon the minimum conditions under which an infringement qualifies as being directed specifically against a certain person or group. Nevertheless, recent judgments of regional courts in claims based on both EC and national competition law have denied damages to customers of global price cartels where the cartel was not directed towards bringing about the specific harm but merely at a general price increase

²⁴⁵ See e.g. Case 85/76, *Hoffmann La-Roche v. Commission*, [1979] ECR 461.

²⁴⁶ It will be recalled that, for the purposes of the present report, a distinction is drawn between fault and illegality.

²⁴⁷ The question of fault was not specifically addressed at all in the two Danish cases where damages were awarded. This is also the case of the Italian cases where damages were awarded.

affecting the entire market. As far as can be seen, only one court has as yet challenged the restrictive interpretation of the protective purpose requirement with regard to global price cartels.²⁴⁸ The protective purpose requirement, therefore, obviously not only creates a serious obstacle to competition-based damages claims but in many cases will be fatal to such actions.

It should be noted that the German draft 7th amendment envisages alleviating the protective purpose requirement. If the current draft becomes law, the amended statute will expressly state that Articles 81 and 82 EC as well as the provisions of national competition law are intended to protect other market participants even if the infringement is not specifically directed against them.

As regards Austria, the absence of case law in this area means that for the moment the debate on the protective purpose requirement remains mainly academic. However, the opinion in academic debate and case law in other areas would indicate that EC and national competition rules are "acts of law that are meant to prevent harm" and so damages actions can be brought on that basis. It is less clear which individuals (consumers and competitors or competitors only) could potentially claim, although the prevailing opinion is that both competitors and consumers could.

(ii) Standard of proof

As noted above, it is uncommon for Member States to have a fixed expression laying down the standard of proof in damages cases. Moreover, even where such expressions do exist, analysis of them in the abstract would not seem to be particularly helpful given their case by case application. However, the following two points are worth noting.

Firstly, to the extent that the standard of proof is very high, this in itself could be seen to constitute an obstacle to private enforcement. The imposition of a standard of proof which is high in comparison to the available evidence would certainly create such obstacles. The question of availability of evidence is looked at in more detail below at points II.E(a)(iii) to E(c)(i).²⁴⁹

Secondly, it is interesting to note that, as regards assessment of damages, in a number of Member States the standard of proof to show loss of profits is effectively lowered to allow "reasonable" assessments to be made (see also sections one and two point II.E(c)(i)). Such an approach appears logical. The existence of loss of profits relies so heavily on hypothesis, that requiring significant proof of the existence of such loss would act as a serious obstacle to any claim made on that basis. This point is indeed generally applicable to the proof of damages in competition-based damages claims. Since proof will always to an extent require recourse to hypothetical models, a certain confidence must inevitably be placed on such models. While this could be seen as a lowering of the standard of proof, it could also potentially be viewed as simply a greater openness of judges to the use of such techniques – a judge is unlikely to be convinced of a damages calculation based on an overtly hypothetical model he has never seen and perhaps does not understand, than by a model he is familiar with and trusts to reflect real world situations.

Thus, a "high standard of proof" may in itself constitute an obstacle to damages actions. However, the extent to which this is the case will also depend on other factors relating to the difficulties involved in meeting that standard, such as the availability of evidence and the receptiveness of judges to economic models.

(iii) Limitations on forms of evidence

In general, the limitations of forms of evidence described by the national reporters do not appear to constitute an appreciable obstacle to damages claims. The only exceptions to this are the limitations that exist in some jurisdictions, on the one hand, on parties and their representatives being called as witnesses and, on the other hand, on written witness statements.

²⁴⁸ See German report, point II.D(iii)a).

²⁴⁹ It should, however, be recalled here that in some jurisdictions it is explicitly acknowledged that judges can take into account the degree of access that each party has to relevant evidence when determining the facts (e.g. Denmark, Spain).

As regards the latter, it appears that this is an obstacle only in the sense of the increased cost, organisation and delay associated with having witnesses appear in person. Cost and time obstacles are dealt with in below at point II.I and II.H respectively.

As regards limitations on calling parties and their representatives as witnesses, these will clearly constitute serious obstacles where certain decisive information can in practice only be revealed by calling officials from defendant undertakings, such as CEOs, to testify. As noted above, in most jurisdictions providing for such limitations, there is some scope for parties to submit statements. However, clearly this prevents the questioning of witnesses in court which could potentially reveal information that it would not be practical to obtain through the use of written statements.

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis defendants, third parties and competition authorities

Rules on discovery vary considerably ranging from pre-trial discovery (as defined above in Section One point II.E(a)(iv)) in the UK, Ireland and Cyprus, through to jurisdictions where (third) parties can only be requested (but not compelled) to produce more or less specifically identified documents.

It is clear that the less possibility plaintiffs have to demand the production of documents, the greater the obstacles will be to proving their case. In the case of a secret price cartel, for example, some of the documents may be more or less official (such as minutes of meetings or parts of accounts showing compensatory payments between members of the cartel). In several Member States obtaining such documents will not be easy given the need to identify more or less precisely the document sought. It will be even more difficult where evidence exists in the form of less official documents which the plaintiff is highly unlikely to have knowledge of such as *ad hoc* memos or internal notes. Decisions of the Commission and national competition authorities condemning cartels often found almost their entire case on such unofficial documents.

Such difficulties will be palliated to an extent by the ability to obtain evidence in other ways, in particular the examination of witnesses, or the existence of presumptions that allow plaintiffs to rely in the first instance on circumstantial evidence, such as the German presumption that a concerted practice exists where undertakings act concurrently.²⁵⁰ Nonetheless, it is interesting to note that there have so far been no successful damages cases brought by end customers against members of price or market sharing cartels in the absence of a prior decision by a national competition authority.²⁵¹

However, it should also be underlined that the Member States in which there have been the most successful damages actions (France, Italy, Netherlands) the rules regulating the disclosure of documents are generally restrictive. In France and Italy, documents requested must be quite precisely identified. In the Netherlands, it appears that less precision is required (the documents requested only needing to be relevant for the case, however, no sanctions can be imposed for refusal to disclose (although refusal can be taken into account by the judge)).

Thus, whilst severe limitations on judges power to order the production of documents clearly constitute serious obstacles to successful damages actions, the existence of successful damages actions in jurisdictions with restrictive rules in this area indicates that these obstacles can be overcome.

Finally, it should be noted that Member States do not generally appear to put any restrictions on evidence presented by a plaintiff that has been obtained in another country having a wider discovery procedure. However, it is not apparent that this fact alone appreciably reduces the obstacles to damages actions created by narrow procedures for production of documents.

²⁵⁰
²⁵¹

It is unclear whether this presumption only applies to administrative proceedings or also to civil proceedings. As noted in the Italian report, several customers of members of a car insurance cartel have brought successful actions for damages before the Italian small claims courts. However, a decision by the AGCM condemning the cartel already existed. Nonetheless, it should be pointed out that the Bluvacanze case represents a successful damages case brought by a customer (i.e. Bluvacanze, a travel agency operator), against members of a boycotting cartel in the absence of a prior decision by the AGCM).

(b) Proving the infringement

(i) Is expert evidence admissible?

As noted above, expert evidence is generally admissible in Member States. The only obstacle in this regard that could be mentioned is that in certain Member States parties do not have the right to nominate experts as this is done by the court alone (Estonia, Greece, Italy, Lithuania), although the parties may request the appointment of an expert. However, if the appointment of an expert is justified then the court should in theory accept the request (in Czech Republic, Latvia and Slovakia, where an expert is necessary the court is legally obliged to appoint one).

(ii) To what extent, if any, is cross-examination permissible?

In a number of jurisdictions, parties are not allowed to ask questions directly to witnesses, although there is always a possibility of directing questions through the judge. To the extent that questioning of witnesses through the judge is less effective at obtaining information than direct cross examination, these limitations will constitute an obstacle to a plaintiff's proving its case. The extent to which this is the case will clearly depend on a number of factors, in particular the modalities of questioning through the judge, such as the degree of filtering done by the judge and the way in which the tone or content of questions is altered. Other than this, the national reports did not reveal any particular obstacles to private damages actions arising from limitations to cross-examination.

As regards subpoenas, it can be noted from the above that, in most Member States, courts have wide powers to subpoena witnesses and often enjoy significant powers to force compliance with such an order (see, however, above at Section One and Two, point E(a)(iii) on limitations as to who can be called as a witness). Moreover, where such powers are reduced, conclusions will often be drawn from a witnesses failure to appear. In these circumstances, it does not appear that any limitations on the ability of Member States courts to order the appearance of witnesses could constitute a significant obstacle to private actions.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

The fact that, in most Member States, decisions of the types mentioned above do not formally have binding effect on national courts will constitute an obstacle to private enforcement to the extent that plaintiffs will formally be required to prove certain elements of liability (in particular the existence of an infringement) that would otherwise be taken as proven by said decisions. However, as already noted, in most Member States decisions of national competition authorities are generally viewed as having high evidential value. This also appears to be the case in practice as can be noted from the Italian and French case law cited in Section One II.E(b)(iii). Less evidential value is, however, generally placed on decisions of foreign competition authorities.

The potential for making such decisions binding on national courts will be further discussed below at point III.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

One of the key difficulties in bringing a successful competition-based damages claim is the quantification of the damages. A number of Member States explicitly recognise this problem and allow for a lowering of the standard of proof as regards certain types of damage. This is particularly the case for loss of profits. The difficulties involved in proving level of damages will be discussed further at point II.G below.

As regards the existence of partial judgments in certain Member States, which was also a rule considered specific to evidence in damages claims, this appears to constitute a factor facilitating rather than hindering private enforcement and will be considered further below at point III.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

As noted above, the approach by Member State courts to the question of causal link is extremely diverse. Moreover, due to the case by case approach used and the relative absence of case law specifically on competition-based damages claims it is impossible to give any general answer to the question of what obstacles are created by the need to prove a causal link.

It is, however, clear that proving a causal link in competition-based damages claims may be extremely difficult due to the fact that claims will nearly always be for economic loss suffered as a result of anti-competitive conduct and such loss could very likely have many other potential causes. Indeed, a number of national reports underlined the difficulty of proving causal link. Causal link will be particularly difficult to show where the plaintiff is an indirect purchaser.

Nonetheless, it can be noted that in some Member States there appears to be an openness to a practical approach to causal link which assesses the natural progression of events and allows a reversal of the burden of proof where the damage appears a normal consequence of the defendant's conduct. This obviously reduces the obstacles to a successful action.

F. Grounds of justification

(i) Are there grounds of justification?

Where they apply, justifications such as consent or act of state will ensure that the plaintiff's action does not succeed. However, since these defences will only be available in limited circumstances, they do not constitute general obstacles to damages actions in the same way as, for example, limitations on discovery and will therefore not be treated in any detail here.

Although the consent defence, where it exists, has been limited as regards EC claims by the judgment in *Courage v. Crehan*,²⁵² similar results may ultimately be reached through application of principles of contributory negligence. The obstacles that such rules create are discussed further below at point F(iii).

As regards the act of state defence, in the case of hard-core infringements of competition law, it seems unlikely that this will constitute an obstacle except in the most limited of circumstances.²⁵³

(ii) Are the passing on defence and the indirect purchaser issues taken into account?

Passing on defence

In all states where this question has been addressed in the context of competition-based damages actions, the defence has been accepted. Nearly all other national reporters considered that such a defence would be possible (with the exception of Cyprus).

The passing on defence is capable of constituting an obstacle to damages actions in two ways.

Firstly, it acts as an obstacle to the extent that it complicates damages actions.

Secondly, a successful passing on defence will operate to reduce liability, and thus constitute an obstacle to private enforcement. However, the burden of proving the existence of passing on generally lies with the defendant and the extent to which the defence constitutes an obstacle by reducing liability will therefore ultimately depend on the facility with which the defendant can show there has been passing on.

²⁵² See *supra* note 173.

²⁵³ Although not a justification in the narrow sense used above in Section One, with less obvious infringements, it could be that invoking acts of state condoning certain types of behaviour may make it difficult for plaintiffs to establish the existence of fault on the part of the defendant (if this is a requirement).

It goes without saying that the type of plaintiff most likely to encounter the above problems is the direct purchaser which acts as an intermediary between the infringer and a subsequent purchaser.

Indirect purchaser

In general, all Member States accept that indirect purchasers may in theory claim for damages (although the fact that there remains any doubt as regards this question is in itself an obstacle to actions by such plaintiffs). Nonetheless, the need to prove a causal link between the infringement and the final damage may constitute a serious obstacle to the success of such actions given the intervention of a middleman. It can in this regard be noted that there have to date been no successful competition-based damages actions by indirect purchasers.

Conversely to the passing on defence, where an indirect purchaser brings a claim, the latter will as a general rule bear the burden of proof. The extent to which the proof of causal link or actual damage will be rendered more difficult due to the interposition of a middleman will therefore depend to an extent on the facility with which the plaintiff can show there has been passing on.

Finally, it can be noted that the combination of a passing on defence where the defendant can fairly easily discharge the burden of proof to show there has been passing on and the difficulties experienced by the indirect purchaser to show the existence of a causal link would seriously restrict successful damages actions.

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or benefited from the infringement? Mitigation?

Due to the case by case way in which notions such as contributory negligence, mitigation and reduction due to benefits are applied, it is difficult to make any generally applicable observations about the extent to which the existence of these principles would constitute an obstacle to private enforcement.

Nevertheless, the following observations are worth noting.

As regards the duty of mitigation, it appears to create two main obstacles to private enforcement. On the one hand, if the duty is hard to fulfil i.e. the standard of care required is extremely high, then it will clearly create an obstacle to successful cases. This, however, will depend on the level of care demanded by each Member State and its application to individual cases.

On the other hand, what reaction by the plaintiff the duty requires will not always be clear. For example, in the context of an action for damages by a competitor who has been forced out of the market by predatory pricing by a dominant firm, what should the competitor have done to mitigate its losses? Reduce its prices to the dominant undertakings level, maintain its prices at the level they were at or something else? It may be that all these reactions are considered compatible with the duty to mitigate (which in a way can be seen to go back to the standard of care required), however, this will only be clear from practice. The lack of certainty here as to how a reasonably prudent business undertaking should react to anti-competitive behaviour in order to be considered as having fulfilled the duty to mitigate, could constitute an obstacle to private enforcement.

As regards contributory negligence, particular obstacles may arise where both parties have played some role in the anti-competitive conduct complained of but the defendant is a particularly strong undertaking in comparison to the plaintiff. For example, even if the plaintiff was involved in certain anti-competitive practices he may in reality have had limited choice in the matter due to pressure from the defendant. The extent to which application of principles of contributory negligence may create obstacles to private enforcement in this regard will essentially depend on how far the legal system in question is capable of taking into account pressure from the defendant in its assessment of liability.

Finally, it should be noted that to the extent the application of the above principles may result in a reduction of the quantum of damages, this will make damages actions less attractive to potential plaintiffs.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

As stated above, in all Member States the level of injury sustained by the plaintiff is the basis for the claim. However, one of the key obstacles to bringing a successful competition-based damages claim is the quantification of the damages. In carrying out the exercise of quantification of damages, some Member States allow for the profits made by the defendant to be taken into account or used as a yardstick when assessing the level of injury sustained by the plaintiff. This flexibility could be seen as a way of facilitating private enforcement and will be further discussed below at point III.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

Limitation of damages to compensation for injury suffered on the national territory would clearly constitute a serious obstacle to private enforcement as it would mean that different parallel actions in every jurisdiction where injury was suffered would be necessary to recover fully for all the damage caused.

However, as noted above, nearly all Member States provide for damages to be awarded for all injury regardless of where it was suffered, the only real exception to this being Luxembourg (limitation to damages suffered within the relevant geographic market).

(iii) What economic or other models are used by courts to calculate damage?

This question is treated as part of the separate report on economic models appearing in the third part of the report.

(iv) Are *ex-ante* (time of injury) or *ex-post* (time of trial) estimates used?

As noted above, there are two key factors that are of importance in the *ex-ante/ex-post* distinction, namely how inflation and intervening events between the occurrence of damage and judgment are taken into account.

As regards inflation²⁵⁴, whether this is taken into account in the award of a global amount or in any other way (for example indexation or award of interest) could only be considered to constitute an obstacle to damages actions if the use of these different methods would lead to very different awards. However, given the discretion of the judge that is involved in calculating a global amount, no answer can be given on this point that would be valid for all claims. It can, however, be noted that were inflation to be the only factor, there may well be very little difference between an *ex ante* and *ex post* approach.

However, the question of events intervening between loss and judgment is also a factor, as is illustrated by the English *Crehan* and Italian *Bluvacanze* cases. It is clear that the *ex post* approach taken by the High Court (at first instance) in *Crehan* resulted in the assessment of damages being far greater than those calculated by the Court of Appeal using an *ex ante* approach. This is because, in applying the *ex post* approach, the High Court was prepared to hypothesise on the plaintiff's loss of profits over a ten year period.

²⁵⁴ What type of inflation is involved will depend on the circumstances of the case, e.g. inflation of general prices or of real estate.

Were the difference between the *ex ante* and *ex post* approaches simply that the latter was more flexible as regards admitting ongoing loss of profits, then it is clear that an *ex post* approach would be vastly more favourable to plaintiffs than an *ex ante* approach and encourage private enforcement. However, from the limited case law in this area, it appears that both the *ex ante* and *ex post* approaches take into account intervening events and the effects they may have on the evolution of damages²⁵⁵.

(v) Are there maximum limits to damages?

No Member States recognises formal limits on the amount of damages that can be awarded and this point shall therefore not be discussed further here.

(vi) Are punitive or exemplary damages available?

Where they do exist, punitive or exemplary damages can be seen to encourage private actions and so will be discussed further below under III.

(vii) Are fines imposed by competition authorities taken into account when determining damages?

The only situations in which certain national reporters considered that fines could theoretically be taken into consideration to reduce damages payable and thus act as an obstacle to private enforcement is where, for example, judges have discretion to reduce damages because the result would otherwise be grossly unfair to the defendant or unacceptable for other reasons.

In the Member States where there are such rules, no case law exists which could indicate how they would be applied to competition-based damages actions. Such rules would, however, clearly be applied only in certain circumstances and would therefore not constitute a general obstacle to damages actions.

(b) Interest

(i) Is interest awarded from the date the infringement occurred, the date of the judgment or the date of a decision by a national competition authority?

(ii) What are the criteria to determine levels of interest?

(iii) Is compound interest included?

The three points relating to interest rates are dealt with together below.

As can be noted from above, the way in which the question of interest is dealt with varies considerably from one Member State to another. Clearly the earlier interest rates are applied and the more generous they are, the more conducive they are to private enforcement. The availability of compound interest will reinforce this effect. Nevertheless, it is clear that certain external factors such as inflation or market rates will have a bearing on how favourable particular interest rates are in the context of a given procedure.

Finally, other than the increased legal certainty, conducive to private enforcement, that comes from having either fixed rates or rates set according to points of reference (e.g. ECB or national central bank rates), there is no clear reason why one choice of criteria in determining levels of interest should create more obstacles than another.

Some further observations are on interest are made below at III.

²⁵⁵ Indeed, the labels *ex ante* and *ex post* may be more relevant in categorising outcome than approach. In other words, the extent to which judges will take into account intervening events or foreseeability of loss will depend not on a principled *ex-ante* or *ex-post* approach, but rather on the facts of the case. If the facts of the case lead the judge to conclude that there was a high degree of foreseeability with regard to certain losses then this outcome of the judicial reasoning may be classed as an *ex-post* approach. If, on the other hand, foreseeability is considered limited then this outcome could be classed as an *ex-ante* approach (e.g. that taken by the Court of Appeal in *Crehan*).

H. Timing

(i) What is the time limit in which to institute proceedings?

As noted above, the time limits for instituting damages actions vary considerably between Member States. Evidently, the longer a plaintiff has to institute proceedings, the less of an obstacle any time bar will be for bringing such actions.

Any other effects that time bars have are difficult to measure. However, the following comments can be made.

Firstly, although no figures exist indicating the number of competition-based damages cases which are settled out of court, anecdotal evidence suggests that the figures are very substantial in comparison to the number of cases that are actually adjudicated on in court (in the UK, for example, the number of settled cases is estimated by some practitioners at between 50 and 100 as compared to 1 case awarding damages). However, it may be considered that the longer limitation periods are, the greater negotiating space the plaintiff will have as he will feel reduced pressure to bring an action to stop the "clock". This will generally not prejudice the possibility of settling before the case is actually judged,²⁵⁶ but from a purely practical point of view, it may be preferable for a party which has ongoing business relations with the potential defendant, to avoid bringing an action at all, in which case a longer time limit would again give greater breathing space to find an amicable solution to any dispute.

Secondly, a comment should be made concerning potential "parallel cases" (i.e. cases arising from the same set of facts) and proceedings before competition authorities. It is clear that, if a judgment or decision has already been rendered finding a breach of competition law, any other parties which feel aggrieved by the impugned, anti-competitive behaviour will be more inclined to bring an action, as the risk of failure has been considerably reduced.²⁵⁷ However, if limitation periods are short in comparison to the length of proceedings before competition authorities or courts, once a judgment or decision is finally rendered, other potential plaintiffs may be time barred from bringing a case.²⁵⁸

Thirdly, it could also be considered that, given the difficulties in collecting evidence to support a competition-based damages claim, a short time limit, especially when coupled with obligations to present all evidence at the moment of filing of the claim, could constitute a serious obstacle to the bringing of competition-based damages actions.

(ii) On average, how long do proceedings take?

As noted above, it is impossible to give an average length of proceedings in competition-based damages actions. The cases that do exist, however, show that proceedings are very long, lasting at least two years and usually more (ten years appears to be the maximum length of time in existing cases).

Clearly, the prospect of waiting several years for a judgment in a damages action can be highly dissuasive to potential claimants and constitute a serious obstacle to damages actions (this will particularly be the case for private individuals who wish to pursue such cases due to the possibly greater degree of personal involvement in the case). These issues are further discussed below at III.

Finally, it should be noted that lengthy proceedings may have the further effect of time barring claims by third parties arising out of the same behaviour by the defendant. This creates a

²⁵⁶ Perhaps with the exception of Estonia, where it may be that competition law is considered as public policy which would have the effect that discontinuance of proceedings or pre-judgment settlement may not be accepted by the Court.

²⁵⁷ Although the mere instituting of proceedings by another claimant may be sufficient to encourage potential "parallel claimants" to start their own action.

²⁵⁸ In this regard, several Member States note that the commencement of proceedings by national competition authorities does not stop the clock for the purposes of adherence to limitation periods.

particular obstacle as many individuals or undertakings may not consider litigation at all as an option, absent a prior judgment by a court awarding damages to another claimant.

(iii) Is it possible to accelerate proceedings?

The complexity of competition-based damages actions means that, even where such procedures exist, they are generally not considered to be of great use in competition-based damages actions. This question is returned to below at point III.

(iv) How many judges sit in actions for damages cases?

Two conflicting approaches to this question can be taken. On the one hand, it could be argued that a greater number of judges sitting in such cases provides for more serious consideration of the issues at hand and accordingly "better" judgments. On the other hand, the use of a larger (and often higher) court will also probably result in increased costs in particular by lengthening proceedings.

However, when considering obstacles to private enforcement, it is perhaps the experience and familiarity of judges with the issues involved rather than the number of judges that is of greater relevance. This question has already been treated to a great extent above at point II.B(i), in particular as regards the use of specialised courts, and will be returned to below at point III.

(v) How transparent is the procedure?

In most cases, the national reports did not reveal any limits on transparency of court proceedings that might give rise to serious obstacles of private enforcement. As concerns publication of judgments, however, although judgments of higher courts are generally published in most Member States (and where they are not, they can be obtained on request), this is often not the case as regards judgments of lower courts and, moreover, in certain Member States few judgments are published at all.

The following points also merit mentioning.

Firstly, in some cases publication, where it does occur, does not happen until well after the judgment is rendered. Secondly, the mere existence of judgments does not mean that they are readily accessible or even discoverable with reasonable research. With regards to the latter point, the present study constitutes an example of these difficulties since there is no complete²⁵⁹ central European database that lists judgments awarding damages for breach of competition law. Indeed, in many Member States there is no national database classifying judgments in such a way that a search for competition law based damages claims would be quick and simple (e.g. classification according to legal basis of the claim or field of law concerned). Difficulties in locating judgments (or confirming the absence of such judgments) were underlined by several national reporters (e.g. Czech Republic, France, Germany²⁶⁰, Slovenia).

I. Costs

(i) Are Court fees paid up front?

As noted above, Court fees are generally required to be paid up front. This could only create a real obstacle to competition-based damages actions where the level of these fees are prohibitively high. The level of Court fees in the different Member States varies considerably and is generally expressed either as a fixed sum (which may nevertheless vary to an extent with the size of the

²⁵⁹ Shortly before completion of the present study such a new database was created by the Commission (see http://europa.eu.int/comm/competition/antitrust/national_courts/index_en.html) although as yet few judgments appear on it.

²⁶⁰ In drafting the national report, the German reporters conducted an extensive survey among German courts in order to identify cases where damages had been awarded or decided upon. Many of the courts that answered that request indicated that it was impossible to identify those cases as no specific information about single decisions was available in data bases. Often only lists of reference numbers regarding competition-related cases in general could be provided.

claim) or as a percentage of the value of the claim. Where court fees are expressed as a fixed sum they range from tens of euros usually to a few thousand euro at the most (although in Czech Republic and Estonia the fixed fee for commencing an action is graduated and can reach tens of thousands of euro). Fees also vary greatly where they are expressed as a percentage of the value of the claim. Thus, in Hungary fees are set at 6% of the value of the claim²⁶¹ whereas in Greece they are set at 4‰ of the claim.

Given their limited level, it is not considered that fixed sum type fees would constitute an appreciable obstacle to the bringing of damages actions. Fees calculated as a percentage of the value of the claim could, however, be thought to have such an effect (although less so in the case of Greece where the percentage level is very low) especially where they constitute a large part of all potential costs (see in this regard the Czech Republic report at point I(viii) where court costs might constitute up to 2/3 of final costs²⁶²).

More general comments on cost barriers are given below at point I(viii).

(ii) Who bears the legal costs?

The general rule that applies in Member States is that the loser pays the winner's legal costs. This rule is an obstacle since it creates a risk that the plaintiff will have to pay the defendant's legal costs. However, the rule equally creates the possibility that the plaintiff will not have to pay any legal costs at all. The obstacle is therefore essentially in the risk taken by litigating. Although this is an obstacle which generally applies to all types of litigation, given the general complexity and long duration of competition litigation, such a risk may make competition-based damages claims particularly unattractive.

However, given that the loser pays rule couples a risk of paying all with a chance to pay nothing, it is unclear whether this rule constitutes a greater obstacle than an alternative rule such as that all parties bear their own costs. The latter option eliminates the risk obstacle inherent in the loser pays rule but at the same time creates another obstacle by making payment of one's own legal costs inevitable.

However, it must also be noted that the loser pays rule is usually not applied completely in practice. Thus, in most Member States, even where the plaintiff is successful, there are often (very important) limitations on the costs he can recover. This is particularly the case with regard to legal fees, which are recoverable in many Member States only up to a legally determined level or to the extent that they are deemed reasonable by the court.

To the extent that the loser pays rule is derogated from in this way, there is an obstacle to bringing private actions by virtue of the fact that the plaintiff will inevitably have to pay part of his own costs. However, as noted above, it is unclear whether this obstacle is greater than that created by the risk of paying both parties' fees but benefit from the chance of paying none.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

As can be noted above, most of the Member States do not, strictly speaking, allow contingency/conditional fees, although all Member States allow some form of uplift or bonus (see definitions given above) in case of success.

Given that few Member States impose minimum fees, the practical difference appears slight between, on the one hand, a limited fee plus a bonus or uplift and on the other hand, a contingency or conditional fee arrangement.

Therefore, while it is true that the absence of true contingency or conditional fees in the majority of Member States could be seen to constitute an obstacle to competition-based damages claims,

²⁶¹ With a minimum of HUF 7.000 (approx. EUR 2,8) and maximum of HUF 900.000, (approx. 3.600) at first instant.
²⁶² Although the example given in the national report is based on the maximum reimbursable fee which is in reality often exceeded by parties' lawyers (which would thus reduce the percentage of costs attributable to court fees).

the relative importance of the obstacle is not great since an effect similar to such fees can usually be achieved in practice. Moreover, it can be noted that in two of the countries where contingency or conditional fees are permissible (Czech Republic, Estonia and Finland) it has been underlined that such arrangements were very rare (although in Ireland conditional fees are widely used and conditional/contingency fee arrangements are also common in the UK). Also, it is worth bearing in mind that, in all Member States, costs are at least to an extent paid by the losing party. Therefore, even if the losing party need not pay any fees to his own lawyer, he will most probably have to pay (some of) the defendant's costs.

It would therefore appear that the absence of contingency/conditional fee arrangements in most Member States is not a significant obstacle to competition-based damages claims.

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

Reference is made to points I(i), I(ii) and I(viii).

(v) What are the different types of litigation costs?

The different types of litigation costs did not reveal any significant further obstacles beyond those already dealt with elsewhere (see in particular points I(i)-(iii) and I(viii)).

(vi) Are there national rules for taxation of costs?

Reference is made to point I(i), I(ii) and I(viii).

(vii) Is any form of legal aid insurance available?

Lack of access to legal aid insurance, or limitations on the coverage that is available, clearly constitute obstacles to private enforcement, given the cost and risks involved in such litigation. The obstacles created by these costs and risks are dealt with above and will not be considered further here.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

Although no clear answer can be given to the question of how much such actions would cost, it would appear that, in a 1 million euro claim, costs would generally be in the region of 50,000 to 150,000 euro (although in a few states the numbers may be outside this range).

High costs can clearly constitute an obstacle to the bringing of damages claims when it is sure that the plaintiff will have to bear (a part of) these even when he succeeds. Moreover, to the extent that a loser pays rule is applied, an obstacle to actions will be created by the risk that the plaintiff has to bear of being unsuccessful and having to pay (part of) the defendant's costs²⁶³.²⁶⁴ Such risk calculations clearly depend on so many case specific factors (not least the parties' level of risk aversion) that it is impossible to assess the obstacle that costs constitute.

Nonetheless, in very general terms, it is clear that the higher the absolute costs to bringing an action the higher the risks involved and the higher the obstacles to private claims.

Another issue worth addressing briefly here is that of appeals. The above cost estimates relate to first instance proceedings before national courts. All Member States provide for the possibility of appeal and costs will increase accordingly. The extent to which these further costs will constitute an obstacle will again depend on several factors including the absolute increase in costs and the risk of an appeal happening at all (which in turn will depend on factors such as the abundance and stability of national case law, the degree of review exercised by higher jurisdictions etc).

²⁶³ See also Section One and Two point II.I(ii).

²⁶⁴ It should be noted here that the "objective" assessment of how likely a case is to succeed, which clearly forms part of risk assessment, is rendered more difficult by the relative absence of any case law in this area. This absence of case law can itself be seen to constitute an obstacle to private enforcement.

J. General

This section did not reveal any particular obstacles to private enforcement and so the questions are not dealt with individually. However, it can be noted in general terms that the relative absence of case law in this area, as can be observed from point J(vii) above, could contribute to plaintiffs being more reluctant to take the risk of bringing claims.

The question of applicable law, dealt with above in Section One II.J(vi) should also be briefly mentioned here. As can be seen from other sections of the present report, the substantive law of each Member State is often complex and/or lacks clarity which complicates the plaintiff's task in proving its case. It is clear that if the applicable law is that of another Member State then the difficulties facing the plaintiff will be even greater. This will be all the more so if a court is required to apply a number of different national laws to the same set of facts (for example because the impugned conduct and injury covers several Member States). Thus, the diversity between the various national rules governing this area can also be seen as an obstacle to private enforcement (although it could be questioned whether such situations as those outlined above will arise very often – or even at all – in practice, given the public nature of competition law).

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

The elements suggested by those involved in the preparation of the present report for improving private enforcement of competition law damages claims are extremely diverse. Moreover, due to the absence of damages actions in the majority of Member States most suggestions are necessarily hypothetical and constitute (in many instances) solutions that would be applicable in most or all Member States. Resultantly, the following section does not couple proposed solutions with particular Member States but rather takes a broader approach, looking at key areas where private actions could be facilitated. Where names of Member States appear in the text below, this indicates that the immediately preceding point was explicitly raised in their national report with regard to facilitating private enforcement.

The key areas where private actions could be facilitated that are discussed below are (a) access to courts, (b) reducing risks, (c) facilitating proof, (d) reducing costs, (e) other incentives, (f) transparency and publicity, and (g) interaction between national and EC law. These headings have mainly been chosen for presentational purposes and, as will be seen, many issues could be looked at under two or more headings.

Before addressing these issues, a comment should be made about the effects of private enforcement. As indicated by the Commission in the call for tenders for the present study, private enforcement is capable of compensating, deterring and more generally ensuring the efficient and effective enforcement of competition rules. This is underlined by the *Crehan* judgment which states that the efficacy of EC competition law requires that there be a right to compensation for loss suffered as a result of anticompetitive conduct and that this right discourages anti-competitive conduct in the first place. The strengthening of the compensatory and deterrent effects of private enforcement are reflected in the various ways of facilitating private enforcement considered below.

(a) Access to courts

Limitations on standing

Damages claims will not be possible at all if access to courts to bring such actions is denied. In this regard, a number of specific limitations on standing have been discussed in the preceding sections. In particular, the limitations on access created by the protective purpose requirement in German (and possibly to an extent Austrian) law should be underlined (although it should be underlined that these are not technically questions of standing but rather conditions of a successful action). Were these restrictions to be removed or alleviated, this would clearly facilitate private

enforcement. As noted already, the alleviation of the protective purpose requirement is already envisaged in Germany by the 7th draft amendment.

Moreover, in Sweden, recent proposals suggest that standing to bring damages actions be extended to consumers, who do not have standing to bring such actions under the present competition act.

Prior decisions of national competition authorities

In Malta general courts are not competent (or at least such competence is unclear) to adjudicate on the existence or not of a violation of national competition law. In Hungary, the court practice results in similar effect. Moreover, in Spain, national Courts can rule on the infringement of national competition law, but according to some case law and scholars, Courts may only award damages based on this infringement once a definitive decision to that effect by the national competition authority has been given (or by the Court competent to review the national competition authority's decisions). The removal of this obstacle was considered by the Spanish report to be a way of facilitating private actions. The ability of individuals to directly access courts without first having an obligation to pass by the national competition authority not only puts the power to decide when to bring an action into the hands of the claimant but also potentially facilitates private actions by reducing the length of time an aggrieved party must wait to obtain compensation (this is of course assuming that the administrative and judicial procedures would, together take longer than a single judicial procedure²⁶⁵).

Class actions, collective claims and representative actions

Lack of incentives for plaintiffs to bring damages claims due to the factors listed in this section also leads a number of reporters to suggest that more or other types of actions should be available (or their availability extended) such as class actions or claims by consumer organisations or public representatives (Czech Republic, Denmark, France (it was considered that development of collective actions could facilitate claims although class actions would themselves be contrary to general principles of civil law²⁶⁶), Germany, Italy, Slovakia)). The Danish report also proposes the introduction of a Directive or Regulation, *inter alia*, providing a legal basis for collective claims. The recent introduction in Sweden of class actions is perceived as facilitating damages actions.

One of the main ways in which the availability of alternative types of action on behalf of wider groups or classes could be seen to facilitate private enforcement is that it spreads the risk and costs of "individual" litigation or may even shift (part of) that cost onto the entity making the claim.

Nonetheless, the use that has been made of alternative types of litigation is extremely limited²⁶⁷. In this regard, it can be observed in this context that some Member States noted the limited existence in their jurisdiction of some of the types of alternative actions on behalf of wider groups or classes discussed in Section One II.C(ii) above, but commented that they were not (widely) used (France, Lithuania). Only two concrete examples came out of the report and did not concern class actions or collective claims but rather an assignment of actions to a single plaintiff in Austria (in relation to interest adjustment clauses applied by Austrian banks) and the creation of an entity specifically to follow up claims resulting from bid-rigging activities in the Netherlands.

Indirect purchasers

Another question that arises here is access to courts by indirect purchasers. As already noted, this is generally not in fact considered technically to be a question of standing but rather of proof, in particular of causal link and the existence of passing on. This point will therefore be dealt with in detail under point (d) below. However, it can be noted here that some national reporters

²⁶⁵ This will not necessarily be the case if, for example, the existence of a prior decision by the national competition authority reduces the amount of time the court needs to spend on certain questions.

²⁶⁶ Thus, briefly, the introduction of class actions could be seen as contrary in particular to the general principles that an individual must have an interest in the case he is bringing and that "*nul ne plaide par procureur*". However, this is not necessarily the position in other Member States (see e.g. Italy, see Italian report point IIC(ii)).

²⁶⁷ Although such claims have been more common in actions not aimed at obtaining damages (e.g. actions for injunctive relief).

considered that doubt could be removed as regards the standing of indirect purchasers by providing an explicit provision according standing to such plaintiffs (Estonia, Germany).

Limitation periods

As noted above under section two II.H, time bars on damages actions can constitute obstacles to private enforcement. The obvious solution to such barriers is to extend the limitation periods that apply to damages actions (extension of limitation periods is currently envisaged in a reform proposal in Sweden).

Another possible solution to this is that proposed in the German 7th draft amendment, which envisages the suspension of limitation periods from the moment proceedings are instituted by competition authorities. This solution has the advantage for the plaintiff of keeping its right to claim open until such time as proceedings have run their course and thus eliminating the risk involved with proving the infringement (the 7th draft amendment also envisages that decisions by the national competition authority would bind the national courts). However, although this may in some way facilitate actions, it must be noted that one effect could be for plaintiffs to systematically go before competition authorities in order to obtain a finding of infringement before lodging a complaint before the courts..

(b) Reducing risks

One of the main disincentives to private enforcement is the level of risk involved. This will be looked at here from the point of view of uncertainty of outcome, which raises *inter alia* questions of clarity and legal certainty. The question of the "stake" the plaintiff has to put up both in terms of cost and time will be dealt with below at point (e) on reducing costs.

Reducing risk through greater clarity and legal certainty

One way of reducing uncertainty of outcome in private damages claims would be to increase legal certainty in this area and predictability as to how the law will be applied. Evidently, such a suggestion has extremely far reaching implications, that concern to a large extent the actual substantive content of competition rules, both national and EC. Such a revision of competition rules is beyond the scope of the present report. However, there are a number of procedural ways in which legal certainty and clarity could be increased, which may facilitate private actions.

Firstly, clarity could be improved as regards certain aspects of procedure, for example, legal basis, competent courts and the requirement of fault.

As regards legal basis, clarity could be improved by creating a specific legal basis stating the right to claim damages (although the converse could also be argued: the proliferation of legal bases and the questions that raises as to the interaction between them may only add to confusion – in this regard see above at Section Two point II.A(i)). The provision of a specific legal basis may very well also contribute to publicity, by raising the profile of competition claims, and transparency (subject to the comments in the preceding sentence). Moreover, in some Member States the legal basis for EC and national law based claims is not the same and clarity may be improved by creating a single legal basis in those states.

Furthermore, in some Member States it is not always clear which courts are competent to hear competition-based damages actions. This is particularly the case in the Member States where damages actions are heard by different courts depending on the nature of the defendant (e.g. France: public authority), or depending on whether the claim is based on national or EC law. Clarity as regards which courts are competent (which also ties in with the question of reduction in the number of competent courts as discussed above) and the granting of jurisdiction over EC and national law based claims to the same courts could also facilitate enforcement (Italy).

As regards fault, it is not always clear whether proof of illegality is sufficient or whether an additional fault element is required to found a damages action. In order for a plaintiff to be able to assess the likelihood of success in a damages action, it appears crucial that he at least knows

which conditions must be fulfilled. Damages actions would at least to some extent be facilitated if it were clear whether fault is a requirement or not.

Issues of clarity are further addressed at various other points in the present section, in particular point (g) below.

Secondly, the level of expertise that is engaged in the course of private actions could be increased. In some cases, lack of expertise can to an extent be put down to relative newness of this area of the law (this is particularly the case in the newer Member States). However, other than 'giving the system time to mature', further expertise could be introduced in a number of ways, for example, creation of specialised courts, increased input from competition authorities and increased recourse to experts. These possibilities are considered below.

- Specialised courts

The complexity of competition-based damages actions and the relative lack of experience of the courts was underlined as being an obstacle to private actions in a number of national reports. Two ways which were suggested to overcome this problem are further training of judges to deal with competition matters (France, Greece, Italy, Portugal) and a restriction in the number or type of competent courts²⁶⁸, creation of specialised courts or creation of specialised panels within courts (Belgium, Czech Republic, Estonia, France, Italy).

As noted from Section One, this restriction in the number of courts already exists in some Member States and its introduction is proposed in certain others. In this regard, it will be recalled that the UK has a specialised court for hearing competition-based damages claims in the form of the CAT. Such restrictions would also have the effect of making it easier to gather data on the claims that have been made (see point (f) below).

Another possible way of introducing specialised courts would be to create the possibility for ordinary courts to make references to a specialised court specifically on questions of competition law (this possibility is envisaged in the Maltese report under section II.B(i)).

- Competition authorities

Another source of expertise that could be introduced/increased to contribute to the consistent and predictable application of competition rules is that of national competition authorities.

This input could take various forms, for example, references by courts to national competition authorities on certain points of the case (Slovakia (although it is considered that this would create further delays in already lengthy procedures)), the intervention of national competition authorities as *amicus curiae* (Portugal), the possibility for rulings on damages to be made within the context of administrative proceedings (Poland).

In this regard, it can be noted that Article 15 of Regulation 1/2003 already empowers national competition authorities (and the Commission where coherent application of those provisions so requires) to submit written observations to national courts on issues relating to the application of Articles 81 and 82 EC. This extends to oral observations where the consent of the relevant court has been obtained.

As regards references by courts to national competition authorities, such a possibility would clearly constitute important specialist input. However, important questions arise as to the automaticity of such references and the binding nature of opinions delivered as a result of them, which evoke

²⁶⁸ It can be noted in this regard that the Commission launches calls for proposals on this subject on an annual basis. Moreover, the recent FIDE report "European Union and European Competition Law and Policy: The Reform of Competition Law Enforcement - will it work?" specifically treats this point indicating that "*some Member States have taken initiatives to provide training for their national judges in the application of Articles 81 and 82 EC, or to create a certain level of specialisation within their judiciary, so as to ensure that cases involving more complex questions of application of Articles 81 and 82 EC could be dealt with by judges with specific expertise.*" The report also refers to the Commission proposal for a Decision "*establishing a Community action programme to promote bodies active at European level and support activities in the field of education and training. The proposed decision, based on Articles*

issues of procedural guarantees and independent evaluation of the facts by the judiciary. Compatibility with Article 6 of the European Convention on Human Rights would be central to these questions.²⁶⁹ A second related point which would require addressing in this regard is the scope of such opinions, in particular whether they could cover only factual issues such as definition of markets or whether they could extend to opinions on the existence of a violation. Finally, the question of how such opinions of competition authorities would be financed arises. If the costs were to be borne by the parties to the proceedings, this could create a disincentive to private actions.

Another way in which similar results could be achieved would be the creation of the possibility for national competition authority and the European Commission to intervene in court proceedings as *amicus curiae*.

Finally in this regard, it was suggested that rulings on damages could be made within the context of administrative proceedings before the national competition authority. As well as giving access to the specialist knowledge of national competition authorities, this proposal has the advantage of reducing the number of separate procedures undertaken with regards to the same alleged violation of competition law. However, the proposal also raises similar questions to those outlined above in relation to references by courts to national competition authorities.

- Recourse to experts

Recourse to experts is possible to some extent in all jurisdictions. Relaxing the restrictions that exist in some Member States with regards such recourse, in particular, by allowing parties to call their own experts, or simply greater recourse to experts more generally, would constitute a valuable source of expertise (Belgium, Italy). However, it can be noted that this source of expertise may not bring with it the same guarantees of independence that can to a greater or lesser extent be associated with, for example, court appointed experts or opinions/decisions of national competition authorities. Moreover, the use of experts can significantly increase the costs of litigation, acting as a disincentive to private actions.

Increased recourse to court appointed experts has a number of advantages. Firstly, it carries greater guarantees of independence than party appointed experts. Secondly, it avoids the extra costs that would be incurred if both parties were to appoint an expert. Thirdly, it avoids the party with the greater resources being favoured by being in a position to appoint a more renowned expert. However, again the benefits that this brings must be balanced against the cost that is incurred by using such experts.

Although not negating the advantages brought by increased use of experts, it should also be noted that the French report underlined the limits of recourse to experts as one expert often does not himself have the necessary level of expertise to carry out a full analysis, and may need to be assisted by specialists in given fields. The French report also remarked that the appointment of experts does not always get round problems of access to evidence given the possible reluctance of parties to provide the expert with the necessary information, and the lack of evidence gathering powers of experts. In this respect, The French report suggested to increase the powers of the court appointed experts in the gathering of evidence, especially in order to reduce delays associated with the use of experts..

Finally, it should be noted that the use of experts also facilitates private actions in other ways. In particular, recourse to experts will often constitute a way of facilitating proof.

149(4) and 150(4) EC, which is expected to be adopted in the first half of 2004, will allow Community financial support for training of national judges in the application of Articles 81 and 82 EC." at page 699.

²⁶⁹

It can be noted that in the French system, in which such references are possible, references are not automatic, opinions of the national competition authority are not binding and there are instances of courts not following the latter (see French case summaries UGAP v. CAMIF).

Other ways of reducing risk

Another way of reducing risk borne by individuals or single undertakings is to spread risk. In this regard, the possibility of collective and representative claims could be considered to facilitate private enforcement. This point is discussed above under point (b) access to courts.

Finally, another way of reducing risk more generally could be to encourage the development of legal aid insurance²⁷⁰. This is of particular relevance to the Member States where such insurance is not available at all. However, it also applies to a lesser extent to certain other Member States where such insurance is available but the level of cover that can be obtained is limited.

(c) Facilitating proof

Proving the elements of the infringement

The difficulty of proving the various elements of liability was underlined by a number of national reporters as constituting an obstacle to damages actions (Czech Republic, France, Greece, Lithuania). This is particularly the case as regards: causal link (due to multiple other factors capable of causing loss), fault and existence of an infringement (considered by most as being more connected to questions of obtaining evidence, which is dealt with below under a separate heading).

- Causal link

In general terms, some jurisdictions considered that a lowering of the standard of proof or even a reversal of the burden of proof with regards to these elements would facilitate private actions (Germany).

As regards the causal link, one possibility would be to reduce the standard of proof required of the plaintiff, for example by requiring only *prima facie* evidence of a causal link which would then shift the burden onto the defendant. A more radical proposal would be simply to reverse the burden of proof where the plaintiff has proven the existence of an infringement and damages (Netherlands). However, the highly contextual nature of this condition of liability makes it difficult to propose any more specific solutions.

Private enforcement could also be facilitated by allowing for partial judgments, which leave proof of the causal link to a second phase. This possibility, which already exists in some Member States, is discussed further below in relation to evaluating damages.

Some further remarks on causal link are made below in relation to the questions of passing on and the indirect purchaser.

- Fault

It can be seen from Section One above that not all Member States require fault to be shown for liability to be established. Where fault is a condition of liability, a number of different suggestions were made as to how proof of this element could be facilitated. Firstly, non-fault liability could be introduced. In other words, fault should be simply removed as a condition to liability (Greece, Malta (although this is more a question of clarification as non-fault liability may already exist in Maltese law)). Secondly, once an infringement is established, fault could be rebuttably presumed (Greece, Italy). Thirdly, the level of fault required could be reduced. The latter two of these could be applied alternatively or cumulatively.

The first option above – removing the fault requirement altogether – would be the option which would most facilitate private actions. However, one difficulty which could perhaps arise with such an approach would be that competition law is simply not an exact science and although some violations are clear cut, others are much less so. Therefore, it could be questioned whether undertakings should be held liable in the absence of any intention or negligence. Moreover, where damages actions relate to hard-core violations of competition law, the fault condition will likely be

²⁷⁰ As opposed to legal aid. See above at note 212.

easy to fulfil and will therefore not constitute a significant obstacle to claims. Such issues are of less – although still of some – relevance to the second suggestion (presumption of fault).

As regards the third proposal above, reducing the level of fault required, it can be observed from the national reports that where fault is a requirement, negligence is already sufficient. Increasing the standard of care required of undertakings as regards violations of competition law could, however, achieve the suggested result.

Finally, as noted above (Section One II.J(vi) and Section Two II.J), the diversity that exists between the laws of the Member States may in itself also constitute an obstacle to proving the plaintiff proving its case. This will be the case where a national court is called on to apply one or more foreign laws within the context of a competition based damages claim and therefore the plaintiff will have to prove the various conditions of liability as imposed by foreign law. To the extent that this proves to be a real problem in practice (it may be considered that the public law nature of competition law will mean that it is not appropriate for courts to apply foreign competition laws) the obvious solution would be some form of harmonisation of the substantive law in this area. This could take the form of a "model" competition law (as suggested by the Maltese reporter) or go further and completely harmonise certain points of law. However, it should be noted that there will be practical limits to such an approach. Thus, for example, it is unclear how the content of the notion of causation would be harmonised. In this regard, even if a suitable way of codifying the notion of causation could be found, it is unclear whether it is realistic to expect such a notion to be applied consistently across the twenty five Member States. There may, however, be other areas that are more apt to such harmonisation, for example, the existence or not of a fault requirement and the content of that requirement. However, serious consideration of this point would require a separate study in itself and it will not be further discussed here.

Evidence

Some of the national reporters identified the difficulty of obtaining evidence as one of the major obstacles to damages actions (Belgium, Finland, France, Italy).

- Production of documents and discovery

Judges in all Member States have a certain degree of power to order the production of documents. As can be seen from the comparative analysis of the different national laws with regard to discovery, a wide range of approaches exists, going from discovery in the broad sense defined above in Section One point II.E(a)(iv) (UK and Cyprus²⁷¹), through jurisdictions in which it is possible to apply for production of categories of documents or, for example, of documents prior to, simultaneous with or subsequent to a given fact or circumstance (Spain), to jurisdictions requiring the plaintiff to specify the document requested and show its relevance to the case.

Various solutions could be proposed to alleviate the problem of restrictive rules of production which generally reflect the range of solutions already existing in some Member States. These range from the introduction of discovery rules (Belgium), to the power of judges to order the production of classes of documents (Italy), to the widening of experts' powers to require production of documents (France), to a relaxation of the requirements a plaintiff has to fulfil before disclosure is ordered. Other proposals in this regard were the facilitation of access by the courts to documents held by national competition authorities and greater access to documents by experts (France, Italy (which, subject to certain restrictions, suggested allowing experts to take documentation using a procedure similar to that provided for under national rules implementing TRIPS)).

Another potential obstacle to private enforcement is the inability of the courts in certain Member States to order (on pain of sanction) the production of documents. Although giving such power to courts may facilitate gathering of evidence, the national reports make clear that in general, courts will often draw negative conclusions from a failure to comply with an order to produce a document.

²⁷¹ There is a Swedish proposal for a procedure in competition law damages cases similar to discovery.

- Witnesses

Limitations on calling parties and their representatives as witnesses, even where this is palliated for example by the possibility of parties submitting written statements, could constitute an obstacle to obtaining evidence and thus to private enforcement more generally. Such obstacles could clearly be reduced or removed by allowing representatives of defendant companies to be witnesses.

Where such powers do not already exist, empowering national courts to order (on pain of sanction) the appearance of certain witnesses could also potentially facilitate the gathering of evidence.

Finally, the introduction of cross-examination was also mentioned as a way of facilitating actions (Belgium).

- Other points relating to evidence

Another way to facilitate the gathering of evidence suggested by the national reports was greater involvement of plaintiffs in any administrative proceedings before the national competition authority (Czech Republic).

Evaluating damages

Evaluating damages can be complex and not only constitutes an obstacle to proving the different elements of the action but also acts as a disincentive to the plaintiff who is unable properly to evaluate the amount he will be able to claim (France). The French report noted that the possibly lengthy and, costly process of evaluation of damages may sometimes be carried out prior to bringing a claim, in order to evaluate the interest of bringing such a claim .

The main solution proposed to this problem was the publishing of guidelines on the different methods of calculation of damages (Czech Republic, France, Latvia, Slovakia, Slovenia). Latvia also suggested that a similar but binding instrument could be introduced. Malta suggested that rules on type and quantification of damages could be directly included in the national competition act.

Other proposed solutions included widening the powers of courts to call for expert reports (further discussed above at point (c)) and creating "statutory damages"²⁷² (Lithuania (although the practicalities and fairness of this were questioned)).

It should also be noted that the laws of a number of Member States already provide for ways of facilitating the evaluation of damages. Thus, where quantification of damages is difficult or impossible several Member States allow for "reasonable" or "equitable" estimations of damages to be made. Moreover, some states envisage the possibility to use the defendant's profits as a guide to measuring damages. The availability of such proxies for measuring damage clearly facilitate the plaintiff's task.

Finally, the possibility exists in a number of Member States for courts to render partial judgments finding that there has been a violation of competition law but leaving the assessment of damages to a later date. Allowing for such a possibility does not do away with but simply postpones the exercise of evaluation of damages. However, it is possible that the existence of a partial judgment in the plaintiff's favour could encourage a settlement before there is any need to assess damages in court. The possibility of such partial judgments could therefore be seen as facilitating private enforcement in some cases by obviating the need for a court assessment of damages at all (which will also reduce costs for both parties). The availability of partial judgments can also be seen to facilitate private enforcement in other ways, for example, by allowing one party to "throw in the towel early" so as to avoid costs in terms of time and money of a judgment on all aspects of liability. It should, however, be underlined that such partial judgments are already available in some form in most Member States.

²⁷² I.e. damages that are defined in law rather than requiring proof.

Evidential value of prior decisions of competition authorities

Another way in which proving liability could be facilitated is to give greater value to prior decisions of the Commission or of national competition authorities finding an infringement. This would greatly reduce the burden on the plaintiff to prove an infringement.

As regards Commission decisions, the evidential value of these before national courts is already provided for in Regulation 1/2003 and the case law of the ECJ. Making these decisions binding on national courts would facilitate private enforcement in certain cases, although in many cases the practical difference between the present situation and a situation where Commission decisions are formally binding will not be great.

Although most national reporters consider that decisions of their own national competition authority would be highly persuasive, this appears generally not to be the case as regards decisions of competition authorities of other Member States.

One way of facilitating proof would be to accord greater value to decisions of national and foreign competition authorities. This could be done, for example, by shifting the burden of proof onto the defendant where a prior decision exists finding an infringement.

Another approach which takes this logic further would be to make decisions by national competition authorities binding on national courts as regards the existence or not of an infringement. This is the approach in Austria with regard to decisions of the Austrian Cartel Court. This approach is also proposed in Germany under the 7th draft amendment, as far as an infringement was established by national competition authorities in any EU Member State, the EC Commission or a German court or by national courts of other Member States as far as these courts have the function to issue administrative decisions stating the infringement of competition law or if they decide on appeals against such administrative decisions.

Whilst making decisions of the Commission or national competition authorities binding on national courts as to the existence of an infringement clearly facilitates the plaintiff's task of proving liability (even more so than according such decisions strong evidential value), the compatibility of this approach with Article 6 of the European Convention on Human Rights could again potentially be called into question (see above point (c)).

Finally, another form of facilitating private enforcement suggested by the national reports was to allow plaintiffs to rely on a finding of violation in a previous action brought by another plaintiff but against the same defendant and concerning the same behaviour. Such an approach could potentially be applied to both national and foreign judgments, although this may again raise questions of compatibility with Article 6 of the European Convention on Human Rights.

Passing on defence and the indirect purchaser

Proving liability can be particularly difficult for the indirect purchaser. Given the current emphasis on the restitutive-compensatory nature of damages actions, this point is for the moment closely linked with the question of passing on as a defence to a claim, which also renders proof of liability more difficult. The two issues will therefore be treated together here.

- Passing on defence

As noted above, the main obstacles created by the passing on defence are the extra complexity added by the very existence of the defence and the fact that the defence can be used to reduce liability and therefore make damages actions less attractive for the plaintiff. There are probably two main ways in which the obstacles created by the availability of a passing on defence could be overcome. One solution could be that the burden of proof is clearly placed on the defendant to show that there has been passing on (although this only replies to the reduction of liability point and clearly does not respond to the charge that the very existence of a passing on defence complicates actions and thus creates an obstacle to private enforcement). Alternatively, the passing on defence could be excluded altogether (the solution favoured by many German legal

experts and by the German government which, however, intends to leave it to the courts to find an appropriate solution).

As regards placing the burden of proof on the defendant, this will not actually change the *status quo* in most Member States. However, the introduction of a rule similar to that in the ECJ's *San Giorgio*²⁷³ judgment providing that the existence of such a defence should not make it virtually impossible or excessively difficult to claim damages, could reduce the obstacle to private enforcement.

As regards the exclusion of the passing on defence, this would completely remove any obstacle. However, given the emphasis placed on the restitutive-compensatory purpose of the award of damages, it is clear that such exclusion may create serious problems of compatibility with general principles of law in many Member States since, where passing on has occurred, it would result in the plaintiff being over-compensated.

Nevertheless, excluding the passing on defence could be done in two main ways. One way would simply be to exclude any passing on defence, allow the direct purchaser to claim for all damages caused and deny standing to indirect purchasers. Another solution would be to exclude the passing on defence, to allow direct purchasers to claim for all damages but allow indirect purchasers to claim where they can show passing on has actually occurred.

Both of these solutions have the drawback of going against the principle of the restitutive-compensatory nature of damages actions. Thus, the first solution excludes compensation for damage actually suffered by the indirect purchaser (creating in itself a new and serious obstacle to private enforcement by denying standing to a whole category of potential plaintiffs) and the second results in overlapping claims (i.e. the possibility of the defendant being held liable twice for the same damage). The first (and to a lesser extent the second) do, however, create greater clarity in this area.

Another theoretical solution which could overcome the obstacles mentioned above would be to exclude the passing on defence, deny standing to indirect purchasers but allow the latter to claim against the direct purchaser. The latter solution again facilitates private enforcement by doing away with the extra layer of complexity of the passing on defence. However, further complexity is inevitably added by creating the potential for indirect purchasers to claim against the direct purchaser. This study has not examined the issue of the legal basis for such an action under the laws of the Member States.²⁷⁴

- Indirect purchaser

To the extent that uncertainty as to the indirect purchaser's right to sue at all, constitutes an obstacle to private enforcement, this issue was discussed above at point (b).

Two of the other main obstacles to actions brought by indirect purchasers will be proof of the existence of a causal link and damages. One way in which proof of these elements might be facilitated would be the introduction of rebuttable presumptions, shifting the burden of proof onto the defendant to show there has been no passing on. Thus, for example, where it can be shown that suppliers of the indirect purchaser have operated price rises subsequent to the defendant's infringement a rebuttable presumption of passing on could be created. Another way in which the indirect purchaser's action could be facilitated would be generally to relax the causation requirements for indirect purchasers (Malta) or to create an express rule stating that the (independent) choice of the middleman to pass on increased costs either wholly or partially would not be sufficient to break the chain of causation.

²⁷³ Case 199/82, *San Giorgio*, [1983] ECR 3595.

²⁷⁴ Were the passing on defence to be maintained, there are two ways in which the question of the rights of the direct and indirect purchasers could be resolved. Firstly, passing on is allowed and both direct and indirect purchasers may in theory claim, with the obstacles implied by this which have already been discussed. Secondly, the passing on defence is allowed but indirect purchasers are denied standing. This solution obviously has the drawback of excluding a group of potential claimants that may well have actually suffered harm.

However, introducing such presumptions and alterations to the burden of proof may have a practical knock on effect, in cases brought by direct purchasers, of lowering the burden of proof on the defendant to show that there has been passing on.

Moreover, the possible effects of over compensation and overlapping damages claims (as discussed above with regard to passing on) would be increased by facilitating indirect purchasers' claims.

It should also be noted that the introduction of such presumptions and alterations to the burden of proof leave several questions open. Among others, what proportion of price rises imposed by the indirect purchaser's direct supplier should be presumed to be attributable to the original infringement? What evidence should the defence be able to produce to rebut the presumptions outlined above? Given that rebutting these presumptions would most likely require production of evidence by the plaintiff's direct supplier, how and to what extent should the latter be involved in the procedure?

Finally, the absence of passing on could reveal to be excessively difficult to prove for the defendant, as the proof of a negative fact ("the absence of") always is. Especially, in cases where no prior claim was brought by the direct purchaser and where the latter is not a party to the case, the defendant will not have access to the necessary evidence to rebut the presumption. Furthermore, calling the direct purchaser as a witness in such a case would put the defendant in an odd situation where the fact he needs to establish (the absence of passing on) could be used against him by the witness (the direct purchaser) in a future claim. Moreover, the rejection of the indirect purchaser's claim because of the absence of passing on would bind the court hearing a subsequent claim brought by the direct purchaser. Therefore, the defendant would have a strong incentive not to establish the absence of passing on when the indirect purchasers' damage is lower than the one of the direct purchaser.

(d) Reducing costs

Another obstacle to private enforcement identified by several national reporters is the cost that such litigation represents in terms of time and money (France).

Financial costs

The main costs and the obstacles they create have been identified in Section One and two II.I above.

There are a number of ways in which such costs could be reduced thus potentially facilitating private enforcement. The main ones of these are as follows:

- reduction of/dispensation from court or other state fees (Denmark, Estonia, also proposed in the German draft 7th amendment);
- legal aid to plaintiffs (Denmark);
- increased availability of legal aid insurance.

Another possible way of reducing costs that was suggested would be to ensure full recovery of costs (Czech Republic). However, this would equally increase the risk borne by the plaintiff as he would be called upon to reimburse the full costs of the defendant in case the action failed. As noted above, given that the loser pays rule couples a risk of paying all with a chance to pay nothing, it is unclear whether this rule constitutes a greater obstacle than an alternative rule such as that all parties bear their own costs (or as is presently the case in most Member States, a "hybrid" situation where the winner is reimbursed some, but not all, of its costs). The latter option eliminates (or reduces) the risk-obstacle inherent in the loser pays rule but at the same time creates another obstacle by making payment of (part of) one's own legal costs inevitable²⁷⁵.

²⁷⁵ Clearly, a hypothetical way to reduce obstacles to private actions would be to allow the plaintiff to recover all costs when he wins but bear none when he loses. However, this begs the practical question of who would finance the cases in which the plaintiff loses and more fundamentally opens the debate as to whether this type of "have your cake and eat it" approach is acceptable.

The introduction or increased use of contingency or conditional fees could also facilitate private enforcement. However, as noted above at section two point I(iii), these are in practice already available to a great extent in most Member States and their existence does not affect any obligation to pay (part of) the defendant's costs in case the action is unsuccessful.

It should also be noted here that in some Member States plaintiffs appear to have recourse to different legal bases or indeed different courts. In particular as regards the use of different courts to bring national and EC based claims, these different rules could create extra costs for the plaintiff where he wishes to base his claim in the case on both national and EC law. The creation of uniform procedural rules applying to both EC and national based claims could facilitate private actions by, *inter alia*, reducing costs (see also above under point (c)).

Length of proceedings

Some national reporters identified the potential length of competition proceedings as a disincentive to potential claimants. Reduction of the length of proceedings would clearly reduce this obstacle (Cyprus, France, Latvia, Luxembourg, Slovenia, Slovakia, Sweden).

Some of the ways of facilitating private enforcement already discussed in the present section of the report such as increased clarity and legal certainty and the use of more specialised courts could contribute towards reducing the length of proceedings.

It was also commented that streamlining and more effective management of competition cases could help save time and costs (Ireland).

One way in which delays may perhaps be reduced would be the creation of specialised courts to deal with competition-based damages claims, such as the CAT in the UK. Such a solution could, moreover, contribute to reducing other obstacles that have been identified such as lack of expertise and hurdles created by the complexity of the law.

Another possible way of reducing delays, which could be combined with the introduction of specialised courts, would be a formal tightening of the timetable for court proceedings (for example, limiting the possibilities for the defendant unreasonably to extend proceedings (Poland), limiting the time allotted to oral hearings or fixed deadlines for submission of written pleadings).

The report from the Netherlands also mentions the existence of summary proceedings, although judges are reluctant to award damages in the context of such proceedings due to lack of pressing interest. Moreover, the complexity of competition-based damages cases makes it unsure whether such a type of procedure would be appropriate.

Ultimately, however, the length of proceedings in competition-based damages actions is perhaps inevitably increased due to the relative complexity of this area of the law. As regards the latter point, some solutions to this problem have been proposed above (for example, guidelines on methods for calculation of damages). However, more wholesale reform and simplification of competition rules is again beyond the scope of the present report.

Delays may, nevertheless often be due, at least in part, simply to underfunding of or more general structural problems in the judicial systems of some Member States (Belgium, Latvia). Again, treatment of such problems goes beyond the scope of the present report.

Finally, as noted above, some Member States allow for some possibility of partial judgments. Where such a possibility exists, the length of proceedings will clearly be reduced if settlement becomes possible as a result of a partial judgment finding an infringement of the competition rules.

(e) Other incentives

Several national reporters considered that the level of damages awarded was too low and constituted a disincentive to plaintiffs. Different solutions proposed to solve this problem were (i) the use of defendant's profits as a guide to measuring damages (Slovenia), (ii) granting part of the

defendant's gain to the plaintiff (Cyprus), (iii) introduction of punitive damages (Denmark, France (although to date, legal doctrine has seemed rather opposed to such introduction), Germany) – the Danish report also considered the possibility of a Directive or Regulation providing, *inter alia*, for claiming double or triple damages (iv) the granting of more generous interest rates for longer periods.

As regards use of the defendant's profits as a guide to measuring damages, this is dealt with above at point (d) under the heading of evaluation of damages.

The availability of punitive, exemplary or treble damages would clearly increase a potential plaintiff's possible award and constitute an incentive to bring an action in the first place..

The compatibility of such damages with the national laws of some Member States was questioned (France)²⁷⁶. In this regard it can be noted that a recent discussion on the introduction of treble damages in Sweden was rejected by the governmental committee in their proposal to amend the current rules, as it would constitute a drastic change to the fundamentals of national tort law (see also in this regard the comments above at point (d) in relation to overlapping claims of direct and indirect purchasers).

However, it can equally be noted that, although rarely used, the existence of punitive/exemplary damages in three Member States shows that at least those Member States do in theory accept the granting of such awards.

As regards making (a substantial) part of the defendant's profits a mandatory part of any damages award, the Cypriot report also suggested in this regard that this be coupled with an obligation on the defendant to reveal any relevant financial information in order to help determine the actual gain.

Finally, another way in which damages could be increased, thus increasing the incentive for the plaintiff to bring an action, would be to allow interest on damages to accrue from the moment of injury. This is currently the position in some Member States (it is also proposed in the German 7th draft amendment). A similar incentive could be created by increasing interest rates generally or allowing for plaintiffs to claim compound interest²⁷⁷.

(f) Transparency and publicity

Before any private enforcement can exist, it is clear that potential claimants must be aware both that they have suffered because of behaviour which is prohibited and also that they have a right to claim damages. Looking at the question from this angle, facilitating private enforcement requires improving public knowledge of the existence and scope of competition laws and transparency as regards claims that have already been brought (Denmark, Luxembourg (Luxembourg noted that general lack of awareness was the main reason for low levels of private enforcement)). These essentially information related issues are also closely tied in with the question of clarity since the effects of any increased publicity will most probably be reduced if, from the first contact with the general principles of the enforcement system, potential claimants receive an impression of obscurity and lack of certainty.

Publicity could be improved simply by making more information more readily available to the public. This information could take a number of forms. General promotion of competition law and the issuing of guidelines or brochures explaining the scope of the rules are the most obvious forms of publicity. This could be coupled with an explanation of the remedies available to individuals or undertakings that feel they have suffered due to an infringement of competition law.

²⁷⁶ "Thus, the principle aim of non-contractual damages actions is restitutive-compensatory and in most (although not all) Member States there is no separate deterrent or punitive objective behind awards of damages (without prejudice to the deterrent effect that payment of compensatory damages may have)."

²⁷⁷ It can be noted here that the application of more generous interest rates from an earlier date may actually result in awards that are higher than awards of triple damages. More generous interest rates applied for longer periods can therefore be seen as a clear way to incentivise private enforcement.

As well as information on the existence and scope of the law, actions before courts could be made more transparent and publicised more widely. In this regard, generally "better" or more regular publication of judgments in this area could create more awareness (Czech Republic and Slovenia (where it was noted that, where judgments are published, names of parties are removed²⁷⁸), Germany, Poland (where it was noted that currently the general public has no access to administrative decisions finding violation of competition law)). This could include publication in the press as exists in a number of Member States. The existence of a central database of claims in the Member States could also provide greater publicity (the Commission began to construct such an online database in summer 2004²⁷⁹). It should be noted in passing that the more complete such a database is, the more transparent the enforcement procedure would become. In particular, were such a database to include, for example, successful, unsuccessful and discontinued claims, it would give fuller information to potential claimants and possibly facilitate their risk assessment (the question of risk assessment is further discussed below at (d)).

The removal of specific limits on publicity and transparency could also contribute to facilitating enforcement (for example, the publication of the names of parties on judgments in the Czech Republic).

As noted above, publicity and transparency are also related to clarity. Although competition law can be a highly complex area of the law, the present report indicates that there are instances of very basic rules that lack a sufficient degree of clarity such as: who has standing to bring a claim for damages, what is the legal basis to bring a claim, what is the competent court, does fault need to be shown? The issue of clarity is rather a horizontal one and will be dealt with at various points below, in particular with regards to risk assessment. Moreover, the issue of clarity as regards the interaction between national and EC law is specifically addressed below at point (g).

Finally, it should also be noted that transparency of the procedure and in particular transparency of reasoning may be improved by greater recourse to court appointed experts as a source of independent opinion on complex points.

(g) Interaction between national and EC law

Interaction between national and EC law appears of particular importance to the question of increased clarity and legal certainty already evoked above.

In this regard it should be recalled that the case law of the ECJ lays down the general principle of national procedural autonomy²⁸⁰ but also places certain limits on that principle.²⁸¹ General uncertainty as to the limits imposed on national procedural autonomy and the fact that general national law may not in fact be compatible with those limits can create difficulties for national courts in how to apply the law, and thus uncertainties for parties as to how their claim will be handled. The *Crehan*²⁸² case gives an example of how such difficulties may arise.

One way to reduce these uncertainties and thus create greater legal certainty and facilitate private actions would be some degree of harmonisation of national procedural rules applicable to EC competition law-based damages actions. It should be noted that such a development would, however, constitute an inroad into the principle of national procedural autonomy and possibly also involve a degree of harmonisation of fundamental concepts of national civil law (both substantive and procedural)²⁸³.

(ii) Are there alternative means of dispute resolution available and if so, to what extent are they successful?

²⁷⁸ See *supra* note 205.

²⁷⁹ http://europa.eu.int/comm/competition/antitrust/national_courts/index_en.html

²⁸⁰ See e.g. Case 158/80, *Rewe*, [1981] ECR 1805.

²⁸¹ See e.g. Case C-453/99, *Courage v. Crehan*, [2001] ECR I-6297.

²⁸² *Idem*.

²⁸³ Thus, for example, the question of whether damages are calculated using an *ex-ante* or *ex-post* approach could be considered as a question of procedure. However, any harmonisation of this issue would inevitably lead to consideration of questions of how foreseeability and causation are dealt with in national law, which are both questions of substantive law.

The dialogue box below gives general definitions of arbitration and mediation.

Arbitration

Determination of a dispute by one or more independent third parties rather than by a court.

Mediation

Method of solving a civil dispute without the need for conventional litigation through a structured form of conciliation using a specially trained mediator acting as a go-between. Mediation differs from arbitration or litigation in that it does not impose a solution. If mediation does not result in an acceptable solution then parties may still turn to arbitration or litigation.

With the exception of Lithuania (where, due to the public policy nature of competition law arbitration is excluded) and possibly also Estonia (as it is foreseen that competition breaches be compensated by civil procedure), all countries acknowledged the existence of arbitration as an alternative means of dispute resolution. Interestingly, in Denmark, first instance courts are obliged to mediate to try to reach a settlement. The table below shows the availability of mediation in the Member States, the other major alternative form of dispute resolution.

Table 21: Availability of mediation in the Member States

Country	Mediation
Austria	✓
Belgium	✓
Cyprus	-
Czech Republic	-
Denmark	✓
Estonia	-
Finland	✓
France	✓
Germany	✓
Greece	-
Hungary	✓
Ireland	✓
Italy	-
Latvia	-
Lithuania	-
Luxembourg	✓
Malta	-
Netherlands	✓
Poland	-
Portugal	-
Slovakia	✓
Slovenia	✓
Spain	✓
Sweden	-
UK	✓

As a preliminary point, it should be noted that in the *Eco Swiss* case²⁸⁴ the Court of Justice held that where national law allows for an arbitration award to be annulled on the grounds of public policy, national courts must grant an application for annulment where the award is considered contrary to EC competition rules (further details of this case are given in the Spanish report at point III.(ii). Moreover, arbitrators have no express power to apply Article 81(3) EC under Regulation 1/2003 which may mean that every arbitration award must be appealed to court to allow for application of Article 81(3).

Settlement

In the vast majority of countries the possibility of out of court or pre-trial settlement was listed as being an alternative means of dispute resolution (although it can be noted that, in Estonia, Once the claim has been submitted to the court, settlement could be barred in Estonia, if it were decided that it is a public policy matter, however, there is no respective practice yet)

Reference should also be made to the observations above at Section One, point II.E(c)(i) with regard to partial judgments.

Finally, although no figures exist indicating the number of competition-based damages cases which are settled out of court, anecdotal evidence suggests that the figures are very substantial in comparison to the number of cases that are actually adjudicated on in court (in the UK, for example, the number of settled cases is estimated by some practitioners at between 50 and 100 as compared to 1 case awarding damages).

²⁸⁴ Case C-126/97, *Eco Swiss*, [1999] ECR I-3055.

Secrecy

Due to the private and confidential nature of arbitration proceedings reporters were generally not able to give concrete information on the use of arbitration in competition disputes. Nevertheless, some reporters did consider that arbitration/mediation was common (Portugal, UK) or indicated the existence of cases of competition law disputes settled in this way (Poland (2 cases in recent years)).

Annex 1

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