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COMMISSION STAFF WORKING PAPER

Annex to the

GREEN PAPER

Damages actions for breach of the EC antitrust rules

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SECTION I: INTRODUCTION

A. THE SUBJECT OF THE COMMISSION STAFF WORKING PAPER

1. The aim of the Green Paper and this Commission Staff Working Paper is to look at ways in which damages actions for breach of Articles 81 and 82 of the EC Treaty (EC antitrust rules) before national courts may be facilitated so as to better compensate victims and complement the enforcement activities of public enforcement authorities. Damages actions are part of “private enforcement” of Community competition law.
2. What is meant by “private enforcement” is enforcement by means of legal action brought by the victim of anti-competitive behaviour before a court. The courts charged with the responsibility of administering these actions in Europe are the national courts of the Member States. There is no court at EC level competent to hear damages actions brought by private parties for breach of EC antitrust rules.
3. Private enforcement and public enforcement are the two pillars of enforcement of EC antitrust rules. Private enforcement differs from public enforcement, whereby the public authorities (the Commission at EU level and the national competition authorities at the Member State level) investigate suspected violations of competition law and can impose certain measures and sanctions such as fines on infringing undertakings. Fines are paid into the public budget and the activities of the public enforcer are paid for by the state. Private enforcement actions are paid for by the individual bringing the action, and that individual can recoup the money paid out as part of the award of compensation if the action is successful.

B. THE AIMS AND ADVANTAGES OF PRIVATE ENFORCEMENT

1. Compensation

4. It is fundamental to the idea of private damages actions that the victim of a violation of the law is entitled to compensation for the loss suffered as a result of the violation in question. If competition law is to better reach consumers and undertakings and enhance their access to forms of legal action to protect their rights, it is desirable that victims of competition law violations are able to recover damages for loss suffered. Damages can be claimed both in actions between co-contractors, as well as in actions brought by third parties against infringers of the law.

2. Deterrence

5. Enhanced private enforcement will maximise the amount of enforcement as a means of enforcement additional to public enforcement. Increased levels of enforcement of the law will increase the incentives of companies to comply with the law, thus helping to ensure that markets remain open and competitive.
6. Increased private enforcement will enlarge the range of infringements for which competition law will be enforced as well as the level of enforcement generally. This will arise in particular from litigation which is not brought on the back of decisions

adopted by public authorities (“follow-on” actions). In relation to follow-on actions, facilitating private enforcement will add more frequently than before to the fines imposed by public competition authorities the possibility for the victim of the anti-competitive behaviour to recover his losses. Both damages awards and the imposition of fines contribute the maintenance of effective competition and deter anticompetitive behaviour.

3. Bringing competition law closer to the citizen

7. By having better opportunities to enforce directly effective rights in the field of competition, the businesses and citizens in Europe, be they a corporation or an individual consumer, will be brought closer to the competition rules and be more actively involved in the enforcement of those rules. The same can be said for undertakings which would face the threat of litigation in the case of failure to comply with the obligations imposed on them by Community competition law. Bringing Community competition law closer to the citizen will encourage greater involvement in the enforcement of that law and thus a greater awareness of and engagement in competition law on the part of European citizens. It will help bring European citizens and undertakings into closer and more direct contact with laws and policies made at European Union level.

4. Other advantages of private enforcement

8. Private action can have a number of other advantages for private parties. For example, national courts may apply civil sanctions of nullity to contractual relationships at the same time as hearing a damages claim. National courts can order the defendant to pay the successful party’s legal costs whereas costs are not recoverable in the case of a complaint to a competition authority. It is possible to combine a claim before a national court with other claims.
9. Private enforcement is also important in the wider context of enhancing Europe’s competitiveness. Competition in the market encourages companies to innovate, operate efficiently, and contribute to a more efficient use of resources, leading to improved growth in productivity. Open and competitive markets are the main driver behind competitiveness, and ultimately the standard of living of citizens. This is explicitly acknowledged in the Commission’s Action Plans for the renewed Lisbon Strategy forming a Partnership with the Member States. The objective is to enhance Europe’s delivery of economic growth and jobs. Ensuring open and competitive markets is one key area where stronger action is needed both at EU and national level.
10. Enforcement of competition rules plays a key role in ensuring a level playing field for companies in the EU. It keeps private barriers to competition (e.g. cartels and the exclusionary abuses of dominant firms) in check by using competition law instruments to tackle individual cases. Facilitating and increasing private enforcement of EC antitrust rules would further add to the efficiency of competition law enforcement, and make an important contribution to the key objective of ensuring open and competitive markets in the EU’s internal market.

11. A higher level of private enforcement of competition law is, therefore, fully in keeping with the wider objectives of the renewed Lisbon Strategy to help Europe become more competitive to the ultimate benefit of European citizens and business alike.

5. A balanced approach

12. While private enforcement therefore has important advantages both for individuals and undertakings as well as for society in general, any debate on how private enforcement could be facilitated should carefully consider the costs which are associated with furthering private competition law litigation in the case of unmeritorious or not well founded claims. As the social costs of litigation outweigh the benefits in those cases, the bringing of such claims should not be facilitated. The Commission wants to use the debate to find ways to better compensate for antitrust injuries and increase deterrence, while avoiding the situation where defendants settle simply because litigation costs are too high. The ultimate objective should be to foster a competition culture, not a litigation culture.

C. PRIVATE ENFORCEMENT IS A COMPLEMENT TO PUBLIC ENFORCEMENT

13. Private actions before national courts are to a large extent a complement to public enforcement of EC antitrust rules. Private action should not and cannot replace public enforcement. The role of the public authorities will continue to be of critical importance in detecting anti-competitive practices such as cartels, where the special investigation powers vested in the public authorities and leniency programs are indispensable for efficient enforcement of competition law. Also, competition authorities will continue to play a strong role in cases in which a full economic analysis is necessary.
14. Private litigation can in particular deal with cases which the public authorities will not deal with, in particular due to resource constraints and other prioritisation needs.
15. The principle of private enforcement of Community law rights in addition to their enforcement by the public authorities goes back to the *van Gend & Loos* judgment. In that judgment the Court expressed the principle of the complementary nature of public and private enforcement of rights deriving from Community law as follows:

“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [226] and [227] to the diligence of the Commission and of the Member States.”¹

¹ Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* [1963] ECR 1.

D. ACTION FOR DAMAGES FOR BREACH OF EC ANTITRUST RULES IS AN ESTABLISHED RIGHT IN COMMUNITY LAW

16. Private enforcement of EC competition rules can take different forms, actions for damages only being one of them. Damages actions are brought against the infringer of the law to seek a monetary award to compensate the victim for the harm he has suffered. Next to this kind of actions, private enforcement can take the form of actions for nullity or actions for injunctive relief, e.g. actions to stop anticompetitive behaviour or actions for enforcement of a contract. Injunctions could be awarded either as an interim measure or as a final award.
17. Whereas nullity as a sanction for infringements of Article 81 EC has been explicitly foreseen by the EC Treaty itself (Article 81(2) EC), damages actions or actions for injunctive relief can be deduced from Article 10 EC. In addition, according to the case-law of the Community Courts, the full effectiveness of directly applicable Community law requires national courts to have jurisdiction to grant interim relief² as well as damages.³
18. The obligation for national courts to provide a remedy in damages was established by the European Court of Justice (ECJ) in its ruling *Courage v Crehan* which specifically concerned the enforcement of the rights and obligations created by Article 81 EC.⁴
19. The *Courage* judgment is based on a long established jurisprudence of the Community Courts relating to the effective protection of Community rights by the courts of the Member States. This case law is focussed on the protection of individuals' rights against violations of Community law committed by Member States. This case law includes for instance the obligation on national courts to grant interim relief when a Community law right is under judicial examination,⁵ to provide for restitution of charges levied by a Member State contrary to Community law,⁶ or

² Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame and others* ("Factortame I") [1990] ECR I-2433 at paras 20 and 21. In para 104 of his opinion in the case C-264/01 *AOK Bundesverband* [2004] ECR I-2493, AG Jacobs declared that the reasoning of the *Courage* judgment was applicable, in his opinion, to injunctive relief as well. As to the criteria for granting injunctive interim relief, see joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 and case C-465/93 *Atlanta Fruchthandelsgesellschaft and others (I) v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761.

³ Whilst private enforcement of competition law can be improved through rendering damages actions more effective, in other areas of EU law, other types of remedy actions may lead to better results. This might be the case in infringements of public procurement law, for example, where interim measures and the setting aside of unlawful decisions may be more appropriate. For example, in the case of a violation of the public procurement Directives (Directives 2004/17 and 2004/18), the Remedies Directives 89/665 and 92/13 require Member States to make other types of remedies available, such as the possibility to obtain interim measures or the setting aside of unlawful decisions. These actions are very effective if they are rapid and available at a stage where infringements can still be corrected (i.e. preferably during the award procedure which precedes the signature of a public contract).

⁴ Case C-453/99 *Courage v Crehan* [2001] ECR I-6297. See also the Opinion of AG Van Gerven in case C-128/92 *Banks v British Coal* [1994] ECR I-1209 at paras 36 to 54.

⁵ See for instance *Factortame I*, as note 2 above.

⁶ Case 68/79 *Hans Just v Danish Ministry for Fiscal Affairs* [1980] ECR 501, case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595 and case C-192/95 *Comateb and others v Directeur général des douanes et droits indirects* [1997] ECR I-165.

to provide damages for breach of Community law by a Member State.⁷ The *Courage* ruling extends this case law to actions brought by a private party against another private party for breach of Community law by holding that national courts must under certain circumstances allow individuals to claim damages for breach of Community competition law committed by another individual.

20. The existence of a Community law remedy of damages against individuals for breach of Articles 81 and 82 EC follows from the same principles those that rise to such a remedy against Member States for breaches of other provisions of Community law. It is founded on the fact that, as is set out in the case law of the Court,⁸ Articles 81 and 82 EC create directly effective obligations on, and rights for, individuals. The principle of direct effect means that individuals can assert these rights and enforce these obligations directly before a court in a Member State. Thus the Court held in the *Courage* ruling as follows:

*“[j]ust as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions.”*⁹

21. In order to ensure the effectiveness (*effet utile*) of directly applicable Community law rights, national courts must provide adequate remedies for their protection. This protection includes the right to claim damages. This applies equally to all obligations and rights arising as a matter of Community law, both those imposed on Member States and now, pursuant to the *Courage* ruling, those imposed on individuals. Thus the Court held as follows in the *Courage* ruling:¹⁰

“The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”

22. The conditions for the exercise of this right to a remedy to damages are, in the absence of Community law rules on the matter, to be determined by national law, subject to the principles that those conditions be equivalent to the conditions governing similar national law actions and that they allow for the effective exercise

⁷ Joined case C-6/90 and C-9/90 Francovich and others v Italy [1991] ECR I-5357 and joined cases C-46/93 and C-48/93 Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame and others (“Brasserie du Pêcheur”) [1996] ECR I-1029.

⁸ Case 127/73 BRT v SABAM [1974] ECR 51 at para 16.

⁹ *Courage* at para 19, referring to the judgments van Gend & Loos, as note 1 above, case 6/64 Costa v ENEL [1964] ECR 585 and Francovich, as note 7 above, at para 31. See also paragraphs 20 to 23 of *Courage*.

¹⁰ *Courage* at paras 26 and 27.

of the Community law right.¹¹ The Green Paper and this Commission Staff Working Paper explore ways in which a remedy in damages for the protection of rights deriving from Community antitrust law can be made effective in Europe.

E. BUILDING ON THE REFORM OF REGULATION 1/2003

23. The recent reform of the enforcement system of Community antitrust law set in place by Regulation 1/2003,¹² which came into force on 1 May 2004, pursued the objective of an enhanced enforcement by the competition authorities of the Member States and by national courts. This enforcement system leads to an increased possibility of private enforcement of competition law.
24. Article 6 of Regulation 1/2003 states that national courts shall have the power to apply Articles 81 and 82. Article 3 of the Regulation provides that national courts shall apply Community competition law to anticompetitive behaviour which may affect trade between Member States where they apply national competition law to such behaviour. In order to facilitate the application of EC antitrust rules by the national courts, Article 15(1) of the Regulation expressly provides for a number of mechanisms by which courts can ask for opinions or information from the Commission.
25. Recital 7 of the Regulation explicitly acknowledges the important complementary role played by private damages actions before national courts to the public enforcement of EC antitrust rules. It provides as follows:

“National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States.”
26. The Commission Notice on complaints highlights that Regulation 1/2003 “pursues as one principal objective that Member States’ courts and competition authorities should participate effectively in the enforcement of Articles 81 and 82”.¹³ The Notice indicates the importance of private actions to the enforcement of Community competition law.
27. Modernisation of Community competition law has opened the way for increased private enforcement of the competition rules by removing the Commission’s monopoly over Article 81(3) exemptions and by empowering national courts to apply those rules. To complete that process and to ensure the most efficient and effective enforcement of antitrust law in Europe, it is necessary to think about what else is required to make private enforcement a more effective means of enforcement.

¹¹ Courage at para 29, referring to case C-261/95 *Palmisani v INPS* [1997] ECR I-4025 at para 27.

¹² Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty, OJ 2003 L 1/1.

¹³ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ 2004 C 101/65, para 9 (see generally part II A and B).

F. OBSTACLES TO ACTIONS FOR DAMAGES

28. In order to assist in the identification of potential obstacles to damages actions in Europe, the Commission commissioned a study on the conditions for claims for damages in case of infringement of EC competition rules which was published on DG Competition's website on 2 September 2004.¹⁴ References to 'the Study' throughout this Paper should be understood as references to this study.
29. The conclusions of the Study were that not only is there "*total underdevelopment*" of actions for damages for breach of EC antitrust rules, but there is also "*astonishing diversity*" in the approaches taken by the Member States. It identified only a very limited number of successful damages awards for breach of EC antitrust rules since 1962. The Study also established that there has been a similarly limited number of damages awards under national competition law.
30. The Study identified *inter alia* the following principal obstacles to private enforcement of EC antitrust law currently existing in the EC Member States (in the order as presented by the Study):

1. Collective actions

31. The Study notes the restrictions on collective actions in the Member States. In particular, the Study notes the rarity of collective actions (by which is meant a single claim brought on behalf of a group of affected persons) and representative actions (actions brought by representative organisations, such as consumer organisations). The Study views this as an obstacle to private actions in so far as it reduces the litigation options open to potential claimants.

2. Fault

32. Proof of negligence or intent is required in some Member States, in addition to proof of the infringement. The Study notes that this is an obstacle to private actions since it constitutes an additional hurdle to be overcome by the claimant. The Study notes, however, that in the majority of Member States there is either no fault requirement or there is a presumption of fault, either rebuttable or irrebuttable, once a violation of competition law has been established, or the violation is in itself considered to constitute a fault.

3. Burden and standard of proof

33. The Study notes that the fact that the burden of proof of causation and damage is on the claimant, which is the case in all Member States, is an obstacle to private actions. The high standard of proof required in some Member States also exacerbates the difficulties faced by claimants, particularly where the available evidence may not be very complete. Some Member States lower the standard of proof required in relation to quantification of damages, which can be difficult to demonstrate to the requisite standard.

¹⁴ The full documentation making up the Study is available on DG Competition's website at http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html#damages.

4. Collection and presentation of evidence

34. The Study points out that in most Member States, the powers of national courts to order production of documents are very limited. In addition, very few Member States have mandatory pre-trial disclosure requirements. Parties are thus not obliged to produce relevant documents unless the requesting party can expressly identify the individual document he seeks, which makes it more difficult to obtain the evidence necessary to support a claim. The Study finds that restricted power on the part of the claimant to demand production of evidence constitutes an obstacle to successful claims.
35. Furthermore, the Study points out that in some Member States only the judge can question witnesses, and comments that this constitutes an obstacle to private actions in the event that questioning through the judge is a less effective way of obtaining information than direct questioning by the parties.

5. Evidential value of national competition authorities and national court decisions

36. The Study finds that the fact that decisions of national competition authorities (the home NCA and those of other Member States) and courts' decisions of other Member States do not have binding effect on the courts in most Member States constitutes an obstacle to private actions. Claimants will as a result have formally to prove certain elements of the claim such as the infringement which would otherwise be taken as proven.

6. Quantification of damages

37. Proof of damages is complex and difficult which can make bringing a claim for damages very risky. The Study comments that quantifying damages is a “*key difficulty*” in bringing private actions and notes that there is a lack of generally recognised models for quantification. Differences of approach in relation to lost profits can result in considerably different awards. A restriction on this could operate as a disincentive to private actions. Many Member States allow for a reduction in the standard of proof required when damages are difficult to quantify.

7. Passing on defence and indirect purchaser claims

38. The Study finds that the existence of the passing on defence is an obstacle to private actions because it considerably complicates claims. To the extent that it reduces the award paid to the direct purchaser it also decreases the latter's incentive to bring a claim.
39. The Study observes that in most Member States actions by indirect purchasers are in theory possible. However, the Study notes that the lack of clarity as regards the possibility for indirect purchasers to bring a claim, combined with difficulties of proof (in particular as regards establishing causation and damages), constitute serious obstacles to claims by indirect purchasers. The Study notes that a combination of the possibility for the defendant to rely on the passing on defence with the indirect purchaser actions would seriously restrict private actions.

8. Amount of damages

40. The Study finds that disincentives created by restrictions on the amounts that can be awarded, such as the unavailability of punitive damages, can also constitute an obstacle to private actions.
41. The Study notes the variety between Member States in approaches to interest on damages awards (variations on the level and duration of interest rates, e.g. whether interest should apply as from the date of the infringement or the date of the judgment). It comments that restrictions on the level and period of application of interest rates are a disincentive to private actions.

9. Time limitations

42. The Study observes that short limitation periods constitute obstacles to private actions. For instance, a short limitation period could time bar parallel actions brought after an original successful test case. Private actions brought in the wake of an administrative infringement decision could also be time barred by a short limitation period. A short limitation period could also be problematic where limitations on access to evidence are coupled with an obligation to present all evidence on filing a claim.

10. Costs

43. The Study notes the general rule that in all Member States the loser pays costs, although in practice fees are usually not fully recoverable. The high costs and risks involved in competition actions, as well as the length of proceedings, operate as a disincentive to bringing private actions. This is exacerbated by the likelihood of non-recovery of all costs (although this can also be seen as reducing the risk for the claimant in the event that the claim is unsuccessful).

11. Applicable law

44. The Study notes that the application by a national court of a variety of different national laws in an action involving injuries suffered in different Member States can complicate actions and constitute an obstacle to private enforcement. The Commission has presented a proposal for a Regulation on the law applicable to non-contractual obligations (the so-called “Rome II” proposal).¹⁵ The issue of the law applicable to damages claims for breach of Community antitrust law should be reviewed in the light of the general rule foreseen in the Commission’s proposal (whereby the place where the damage occurs is determining the law applicable to the recovery of that damage) and the possibility to make a proposal for a specific rule for the law applicable to damage claims for breach of Community antitrust law.

¹⁵ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM(2003) 427final as amended by the modified proposal; see the Report of the Committee of Legal Affairs of the European Parliament on this proposal, A6-0211/2005, 27 June 2005.

G. FACILITATING ACTIONS FOR DAMAGES FOR BREACH OF EC ANTITRUST RULES

45. The Study found very few successful damages awards for breach of EC antitrust rules. Summarising the major obstacles to these private damages actions, one could say that that is basically due to issues of information asymmetry. The uncertainty of the outcome in many cases means that the potentially high costs are not necessarily balanced by correspondingly good prospects of recovery. There are certain legal, and other, questions which arise which involve considerable complexity and permit divergent and in some cases conflicting approaches. The risk/reward balance in antitrust litigation is skewed against bringing actions. This needs to be addressed in order to encourage claimants to enforce their rights and bring claims. Encouraging actions for damages has been acknowledged by the ECJ as “strengthen[ing] the working of [Articles 81 and 82 EC and thus] mak[ing] a significant contribution to the maintenance of effective competition in the Community.”¹⁶
46. In contrast to the current situation in Europe, the US system of antitrust litigation offers strong incentives to bring actions and thus addresses the difficult risk/reward balance in antitrust cases. The most notable features in the US system which have the effect of providing strong incentives to litigation include the availability of treble damages, adapted rules on costs and the possibility to amalgamate small claims into one effective claim under the class action procedural rules. Some of these features can be classified as “financial incentives” and are generally specific to antitrust litigation, while others are features common to the US litigation system as a whole.
47. The US system is often perceived as encouraging unmeritorious or vexatious litigation. This system should be examined carefully and lessons drawn from it, as well as from the experiences of other foreign jurisdictions in this field, as appropriate. The protection of rights deriving from Community competition law is important, but it is also important to keep excessive litigation in check and to try to achieve some form of moderation in the enforcement system.
48. In the European context, it is strongly arguable that increased clarity as to the rules will promote legal action. This applies not only to the substantive rules but also, in the context of damages actions for the enforcement of antitrust law, to the remedies and the procedures governing those actions. Clarity as to substance already exists in the form of a body of settled law at EC level on what constitutes a violation of Articles 81 and 82 EC. The existence of this settled case law was a *sine qua non* for the replacement of Regulation 17 by Regulation 1/2003. Without it, the Community could not have opened up the power to apply Article 81(3) to national courts and the competition authorities of the Member States.
49. Private enforcement of Community competition law is therefore to be distinguished from substantive competition law, i.e. what sort of behaviour constitutes a violation of the law. The focus of the Green Paper and of this Commission Staff Working Paper is on the rules as to the remedies and procedures governing damages actions, i.e. the rules for the enforcement in the courts of the substantive law. If potential claimants, undertakings and individual citizens alike, do not know what the rules are which they will face in court before they commence an action, this will deter them

¹⁶ Courage at para 27.

from litigating and enforcing their rights. These rules can make a big difference because they can influence the likelihood of a finding of liability in the first place or they can determine other issues as, for instance, the amount of the damages which the court is likely to award.

50. In the European context, not only is clarity desirable, but so too is the principle of creating a level playing field of EC rights enforcement across the Member States. If a litigant in one Member State faces a better chance of his national court making him a larger damages award than the litigant in another Member State, then the substantive body of Community competition law, itself uniform across the Union, will not be enforced in a uniform way across the Community. It is essential to ensure that the rights of European citizens are subject to the same protection across the whole Community.
51. Measures to improve the conditions for bringing damages actions for breach of Community competition law can be taken both at Community and national level. It is hoped that the Green Paper will stimulate debate on the issue of private enforcement of Community antitrust law in general, including discussion as to the possible methods of facilitation at all levels, Community and national, as appropriate.
52. Although some of the issues debated in the Green Paper and this Commission Staff Working Paper are common to a number of areas of civil litigation (of which civil claims for infringement of competition law is only one) it is appropriate to discuss these issues with reference to competition law alone. Civil litigation in the field of competition touches upon a particular public interest and offers a number of specific aspects which – taken together – mean that the bringing of an action is unusually difficult. Among the most important of these specificities are:
 - In the first place Articles 81 and 82 EC are fundamental provisions of the Treaty designed to protect competition in the single market.¹⁷ In its *Courage* judgment the ECJ recognised that the right to claim damages strengthens the working of the EC competition rules and discourages agreements and practices which are liable to restrict competition. The ECJ also recognises that actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in Europe.¹⁸ The right of private parties to bring an action for damages must be seen as being in the public interest. Therefore the first distinguishing aspect is the public interest element.
 - Secondly, there is the importance of market context. A wider review of the relevant facts will be justified in cases in which competition law is invoked. To establish an infringement of the competition rules it is generally necessary to define the relevant market and prove that the conduct complained of has negative effects as to prices, output or innovation on the relevant market. Also, quantification of damages may be particularly difficult as in the case of an overcharge the difference between the cartelized price and a fictional competitive price will have to be calculated. These difficulties will often require access to evidence describing the commercial activities of other actual and potential players

¹⁷ Case C-126/97 *Eco Swiss v Benetton* [1999] ECR I-3055, para 36.

¹⁸ *Courage* at para 27.

on the market and a complex analysis requiring the gathering of a substantial number of facts. Therefore, the second distinguishing aspect is the scope of the evidential burden facing a potential litigant.

- Furthermore, the evidential burden on the potential litigant is not only particularly high, the information required to successfully bring a case is also unevenly distributed: as proof is often required of the defendant's market position and his trading practices, there is a marked asymmetry between the – potential – claimant and the defendant who is accused of engaging in anti-competitive behaviour.

53. Sections II to X of this Paper will address actions for damages on an issue by issue basis and identify options for the facilitation of damages actions in relation to each of the major issues identified. Responses will be invited on the options and questions identified in relation to each of the issues addressed in the Green Paper and this Commission Staff Working Paper. The Commission will assess what steps, if any, are necessary to promote further facilitation of actions for damages of EC antitrust law on the basis of responses received to the Green Paper and this Commission Staff Working Paper.

SECTION II: ACCESS TO EVIDENCE

A. DISCLOSURE AND PRODUCTION OF DOCUMENTARY EVIDENCE

1. *The general framework*

a. The situation in the EU Member States

54. It has been generally acknowledged that the difficulty for the claimant of obtaining evidence of the alleged antitrust infringement constitutes one of the major obstacles to damages actions.¹⁹ That is particularly the case when there is no prior decision from a competition authority finding the infringement. In these so-called ‘stand alone’ actions, a lot depends on the possibility for the claimant to oblige the defendant or even a third party to disclose documents in their possession, which may constitute evidence of the alleged infringement.
55. Judges in all EU Member States have at least some power to order both parties to the dispute and third parties to disclose documents, although this right may be more limited *vis-à-vis* third parties. Usually this is done at the request of the litigating parties, but it can also be done *ex officio*. Production is common to both common law and civil law jurisdictions in Europe. The main difference between these two legal traditions is that in the common law tradition, disclosure is to a large extent conducted by the parties with only minimal supervision by the courts. In contrast, under civil law systems, the parties generally only have limited power to compel the “production of evidence” or to elicit adverse testimony from adverse or third parties. They must therefore rely upon voluntary co-operation or seek intervention by the court. That being said, it has to be recalled that the judges in civil law procedures generally play a more significant role in fact-finding than under common law.
56. In some common law systems, disclosure is available ‘pre-trial’, which means that it takes place after the filing of a claim but before the final hearing on the merits.²⁰ Via this procedure, the parties to an action disclose to each other all documents in their possession or power, relating to matters at issue in the action. This process is best seen as the ordered exchange of evidence and statements between the parties with a view to eliminate surprises and clarify what the claim is about, allowing both sides to evaluate the merits of their respective cases, and promote settlement. If the lawyers do a thorough job in disclosure, they should not be surprised by any of the answers the opposing party’s witnesses give to their questions during trial. On the other hand, extensive pre-trial procedures can be expensive and time consuming. Such procedures can slow down litigation by requiring parties to spend large amounts of time and resources on producing and disclosing various documents to the other side. However, delays arising from disclosure can be minimised by effective case management on the part of the court. Where it appears that any proceedings would be facilitated by holding a case management conference or pre-hearing review, the

¹⁹ Study on the conditions of claims for damages in case of infringement of EC competition rules, the Comparative Report (“Comparative Report”), available at: http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index_en.html, page 11.

²⁰ A “pre-action” disclosure even covers the period prior to the lodging of a claim.

national court should be able, on the request of a party or at its own initiative, to give directions for such a conference or review to be held.²¹

57. An argument against extensive procedures to obtain evidence is that such measures might be abused to obtain business secrets. However, in most EU Member States, both in jurisdictions which provide for disclosure and in jurisdictions which obtain evidence primarily through production orders, safeguards have been built into the rules on obtaining evidence.²² The extent to which business secrets are protected from disclosure varies from Member State to Member State. For example, in Germany, the protection of business secrets extends to all technical work equipment and working methods. However, only third parties can invoke business secrets in order to refuse disclosure of documents.²³ In France, the grounds of refusal are limited to trade secrets or information on the structure of competitors and do not cover accounting documents. In some jurisdictions, under certain conditions, all or parts of the hearing can be held behind closed doors for reason of business secrets.²⁴ Under English procedural law, confidential documents may be prevented from disclosure by the Competition Appeals Tribunal (CAT).²⁵ In the ordinary English courts, there is no such express power, but if a party claims secrecy the court may order a controlled measure of disclosure deciding in each case what degree of disclosure is appropriate, for example, by restricting disclosure to the parties' lawyers and requiring them not to disclose to their clients.

b. European and international initiatives

58. At European level, the disclosure of evidence has been dealt with in the Directive on the enforcement of intellectual property rights.²⁶ According to its Article 6(1)

“Member States shall ensure that, on application by a party which has presented reasonably available evidence to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.”

59. Some form of disclosure has also been recommended by two projects which examined the European and international harmonisation of civil procedural law,

²¹ See for example for the UK, rule 20(1) of the Competition Appeal Tribunal Rules 2003 (“CAT Rules”, SI 2003 No. 1372), available at <http://www.cattribunal.org.uk/documents/SI2003No1372.pdf> and for Ireland, Order 63B, rules 13 and 14 of the Rules of the Superior Courts, available at <http://www.courts.ie/rules.nsf/>.

²² In Estonia, Spain, Italy, Cyprus, Malta, the Netherlands, Portugal and Slovakia, the protection of business secrets is not explicitly referred to as a ground for refusal to disclose.

²³ Section 142 (2) Zivilprozessordnung (ZPO).

²⁴ E.g. in Denmark.

²⁵ See CAT Rules, as note 21 above, rule 53.

²⁶ Directive 2004/48 on the enforcement of intellectual property rights, OJ 2004 L 157/45.

namely the European Code of Civil Procedure²⁷ and the ALI/UNIDROIT Principles of Transnational Civil Procedure.²⁸

60. The draft European Code of Civil Procedure provides for limited disclosure obligations. Article 4 obliges a party to serve on all other parties a list of the documents in his possession, custody or power which relate to any question in issue in the action and which have not previously been communicated to the other parties, where a general rule of national law so requires or where the court so orders, after all the parties have been given the opportunity to be heard. Under Article 4.2.1 of the draft code, a party who has served such a list of documents shall communicate to or allow all other parties to inspect and to take copies of any of the documents listed, other than those in respect of which the party serving the list has made a claim of privilege against disclosure or communication. The grounds of privilege against disclosure or communication are to be determined by national law. Where the court is satisfied that the communication or the inspection and copying of a document would cause undue harm to the party serving the list or to any other person, it may relieve that party of the obligation to disclose that document. A court, on the application of a party, would also be able to order a third party to disclose or communicate any document which he has in his custody, power or possession and which relates to a question in issue in the action.
61. According to principle 16.2 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, a national court should upon request of a party, “order disclosure of relevant, non-privileged and reasonably identified evidence in the control or possession of another party or non-party.” The fact that the evidence can be used against the one who disclosed it cannot justify a refusal to disclose. According to the comment attached to this principle, “‘relevant’ evidence is probative material that supports, contradicts, or weakens a contention of fact at issue in the proceeding. A party should not be permitted to conduct a so-called ‘fishing expedition’ to develop a case for which it has no support, but an opposing party may properly be compelled to produce evidence that is under its control. These Principles thereby permit a measure of limited ‘discovery’ under the supervision of the court.” This comment is linked to another principle which requires the parties to set out “in reasonable detail” the relevant facts of their case and to describe “with sufficient specification” the available evidence to be offered in support of their allegations, the so-called fact-pleading.²⁹

²⁷ A Working Group for the Approximation of Civil Procedural Law was founded in 1987 and published a final report and draft law in 1994. See M. Storme (ed.), *Rapprochement du Droit Judiciaire de l'Union européenne - Approximation of Judiciary Law in the European Union*, (Dordrecht/Boston/London, 1994).

²⁸ The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States. It has a joint working group on this issue with the American Law Institute (ALI) since 2000. The Principles of Transnational Civil Procedure were approved both by UNIDROIT and ALI in 2004 (ALI/UNIDROIT Draft Principles of Transnational Civil Procedure, February 2004 (UNIDROIT 2004 Study LXXVI – Doc 11)). States could adopt these principles and court rules for handling transnational disputes outside arbitration.

²⁹ Principle 11.3 of the ALI/UNIDROIT Principles of Transnational Civil Procedure, as note 28 above. The requirement of “sufficient specification” ordinarily would be met by identification of principal documents constituting the basis of a claim or defence and by concisely summarizing expected relevant

62. Finally, mention should be made of Regulation 1206/2001 on the co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters.³⁰ On the basis of this regulation a court of a Member State may request a court of another Member State to take evidence or request to take evidence directly in another Member State.³¹ The wording of the regulation, in particular Article 1(2), seems to suggest that such request could relate to a pre-trial disclosure of evidence.

2. Measures against the refusal to disclose evidence and against the destruction of evidence

a. Sanctions for not disclosing evidence

63. In the majority of Member States, a person who refuses to produce a document following an order to do so, will be subject to penalties.³² These are usually financial penalties³³, but sanctions can also take other forms. In Denmark and Germany, third parties refusing to disclose documents can be imprisoned for up to six months in the case of repeated disobedience. In England and Ireland, a person making a false disclosure statement without an honest belief in its truth or refusing to make disclosure may be held to be in contempt of court.³⁴
64. In some Member States, the refusal to disclose evidence may have consequences for the ongoing procedure.³⁵ In Ireland, for example, any party failing to comply with an order for disclosure is liable to an order of attachment and, if a claimant, to have his action dismissed for want of prosecution or, if a defendant, to have his defence struck out.³⁶ In France, a defendant's refusal to disclose may result in damages being awarded. In England, a party that is dissatisfied with the extent of his opponent's disclosure, can obtain a court order requiring the opponent to give further specific disclosure or conduct a further search. If such an order is made, failure to comply can amount to contempt of court and may have serious consequences including the dismissal of a party's claim or judgment being entered against him.

b. The prevention of destruction of evidence

65. A weakness of evidence taking in the context of private action is that the lodging of an action which is necessary to trigger disclosure or production of documents entails the risk that the defendant destroys incriminating materials. This problem is only

testimony of identified witnesses. "Fact pleading" contrasts with "notice pleading", as permitted under the US Federal Rules of Civil Procedure. Under notice pleading it is not necessary to make a prima facie case for a party to require discovery of evidence by another party.

³⁰ Regulation 1206/2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 L 174/1.

³¹ For the purpose of this Regulation, the term "Member State" means any EU Member State except Denmark.

³² See the Comparative Report, page 65.

³³ Such is the case in Belgium, the Czech Republic, Denmark, Germany, Estonia, Spain, France, Latvia, Lithuania, Hungary, Poland, Portugal, Slovakia, and Sweden. In Denmark, Germany and France, financial penalties are only imposed if disclosure is demanded from a third party.

³⁴ Contempt of court is a common law concept pursuant to which the court has full discretion in imposing fines or even ordering imprisonment.

³⁵ See also paragraph 88 and following of the Working Paper on the evidentiary consequences of a refusal to disclose evidence.

³⁶ Order 31, Rule 21 of the Rules of the Superior Courts as note 21 above.

partly addressed by the above-mentioned sanctions for non-disclosure. To be properly addressed, this problem may require sanctions for the destruction of such materials which have a sufficient deterrent effect.³⁷

66. Another way of addressing this issue is to have procedures to "secure" evidence, whereby 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. In the Czech Republic, evidence may be secured on a motion before proceedings on the case proper are initiated, if there is concern that such evidence might not be available later or only obtainable with great difficulty. In Italy, Lithuania, Luxembourg and Slovenia, one can secure evidence if there is a risk that by the time proceedings have started, the witness concerned has died or the place or thing to be inspected has altered. In Spain, if there are reasonable grounds for believing that evidence may no longer be available at the time of the trial, an early assessment of the evidence may be sought. If such early assessment is granted, the claimant has then to serve its claim within two months; otherwise the evidence will cease to be valid. This provision seems to allow for measures to be taken even before the action is filed.
67. Finally, Directive on the enforcement of intellectual property rights³⁸ also contains measures for preserving evidence. Article 7 of that Directive requires Member States to ensure that a court may order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information. The court may do so on application by a party who has presented reasonably available evidence to support a claim that their intellectual property rights have been infringed, even before the proceedings on the merits of the case have started.

3. Witnesses in court

a. Summoning of witnesses to give evidence before the court

68. In several jurisdictions there are limitations on calling parties and their representatives as witnesses. These limitations can constitute an obstacle to obtaining evidence, especially in antitrust cases where the statements of the representatives of the companies involved can provide significant and important information. In nine EU jurisdictions, neither parties nor their representatives may be called as witnesses as such, although most of these jurisdictions provide for the possibility for parties to make statements.³⁹ In practically all Member States people subject to professional

³⁷ E.g. US discovery procedures are reinforced by a maximum jail sentence of five years for contempt of court, for the non-production or destruction of documents (Rule 37 of the Federal Rules of Civil Procedure).

³⁸ As note 26 above.

³⁹ Parties may not be called as witnesses in the Czech Republic, Germany, Estonia, Italy, Luxembourg, Hungary, Portugal, Slovakia and Sweden. However, in Sweden, parties can be called to give a statement as a party and in the Czech Republic, Germany, Estonia, Portugal and Slovakia, parties can submit statements.

secrecy and (close) relatives of the parties may refuse or are even under a duty not to testify. Finally, in some jurisdictions witness statements cannot take written form.⁴⁰

b. Examination and cross-examination of witnesses in court

69. Examination is the questioning of a witness in court. There are three possible stages of examination. Examination in chief is the examination of a witness by a party who has called him. This first stage is normally followed by cross-examination, which is the questioning of a witness by a party other than the one that called him to testify. Cross-examination is usually made with the objective of diminishing the effect of the evidence of the witness. The third possible stage is re-examination, this is the further examination of the witness by the party who called him, with a view to explaining or contradicting any false impression arising from the cross-examination.
70. Examination will be particularly important in establishing facts where documentary evidence is not available or in establishing the truth where facts are in dispute. In the common law countries, cross-examination appears to carry particular importance in court proceedings. Cross-examination makes it possible to check the reliability and accuracy of the evidence of a witness. In competition cases, cross examination is thus said to be a useful tool in cases where there are major factual disputes, e.g. in the case of cartels.⁴¹
71. In most Member States some form of cross-examination is permitted.⁴² Cross-examination by the parties is not available in four countries, namely Belgium, France, Italy and Luxembourg. However, even in these four countries the parties may request the judge to put questions to the witnesses. In Italy, these questions must be submitted in advance. In this system the parties themselves are thus not afforded the possibility to check the veracity of witness statements as is possible in direct cross-examination.
72. It should also be noted that most of the countries that allow direct cross-examination have also built in mechanisms to protect the witness. For example, in the Czech Republic, Germany, Greece, Austria and Slovakia, the judge will first question the witness to ensure an opportunity to give a complete and coherent statement.⁴³ Also in the cross-examination a judge can dismiss questions which he considers to be irrelevant for the case or confusing. The possibility of re-examination also allows rectification of any false impression arising from the cross-examination.

4. Access to documents held by the Commission or by national competition authorities

a. Access under the rules concerning administrative openness

73. Most, if not all Member States have rules concerning the administrative openness of their institutions. For the European Union, that principle of transparency is laid down

⁴⁰ That is the case in Estonia, Finland, Italy, Portugal, Slovenia and Sweden. In Slovenia, such a written statement would not be considered as a “witness statement”, but as another form of evidence, which is also permissible as there are no limitations concerning the form of evidence.

⁴¹ See the Comparative Report, page 66 and following.

⁴² Although German law does not exclude it, it would appear that in practice, cross-examination does not happen very often. In Lithuania, cross-examination is also not used in practice.

⁴³ See the Comparative Report, page 68.

in Article 255 EC, which allows EU citizens and those residing in the EU to have access to the documents of the European Parliament, the Council and the Commission. The principles, conditions and limits of this access have been laid down in Regulation 1049/2001.⁴⁴ The main purpose of this Regulation is, in the words of its third recital, to improve “the transparency of the decision-making process” of EU institutions. The Regulation is part of an effort to increase openness and accountability of the work of the EU institutions. Persons making an application for access to documents under this Regulation do not have to give reasons for their request⁴⁵ and any document which has been released following an application enters into the public domain.

74. Although the interest of the applicant is not relevant for the purpose of assessing whether or not a document should be disclosed,⁴⁶ the protection of private interests in claiming damages is clearly not the objective of this Regulation. Therefore, it might be appropriate to create a specific right for private litigants to obtain directly from the other parties in the private litigation the information they supplied to the Commission or to a national competition authority.

b. Access by national courts under the duty of loyal co-operation between the Commission and the Member States

75. The access to documents held by the Commission follows different rules where a national court makes the request. The basic rule for the co-operation of the Commission with the national courts is based on the duty of loyal co-operation between the Commission and the Member States as laid down in Article 10 EC as interpreted by the Community Courts.⁴⁷ The issue is specifically addressed in Article 15(1) of Regulation 1/2003 which stipulates that national courts in proceedings for the application of Article 81 or 82 EC “may ask the Commission to transmit to them information in its possession”. The Commission’s accompanying Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC contains a specific section on the Commission’s duty to transmit information to national courts.⁴⁸
76. When transmitting information to national courts, the Commission is under an obligation to uphold the guarantees given to natural and legal persons by Article 287 EC. This Treaty provision obliges all staff of the Commission not to disclose information covered by the obligation of professional secrecy. Article 28(2) of Regulation 1/2003 repeats this obligation and extends it to officials of the Member States. The obligation of professional secrecy mainly seeks to protect business secrets and other confidential information. When transmitting such information to a national court, that protection becomes a matter for that court. The Commission, however, has to take the necessary precautions to protect the business secrets and

⁴⁴ Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43.

⁴⁵ Article 6(1) Regulation 1049/2001.

⁴⁶ Joined cases T-110/03, T-150/03 and T-405/03 Jose Maria Sison v Council, judgment of 26 April 2005, not yet reported, para 55.

⁴⁷ See case T-353/94 Postbank v Commission [1996] ECR II-921 for an application of the duty of loyal co-operation between the Commission and national courts in a competition case.

⁴⁸ Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/54, paragraphs 21 to 26.

other confidential information. Such precautions include, in particular, informing the national court of the documents or parts of documents which contain business secrets or other confidential information. It also implies that prior to transmitting documents which contain business secrets or other confidential information to a national court, the Commission has to make sure that the national court will guarantee the confidentiality of those documents. In the “exceptional cases” that the court cannot provide such a guarantee, the Commission must refuse the transmission.⁴⁹

77. Apart from this ultimate protection of business secrets and other confidential information, the Commission can also refuse to transmit information to national courts for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it.⁵⁰ On the basis of this exception, the Commission announced in its notice on co-operation with national courts that it will only transmit to national courts information voluntarily submitted by a leniency applicant with the latter’s consent.⁵¹

B. ALLEVIATING THE CLAIMANT’S EVIDENTIARY BURDEN OF PROOF

1. The burden and the standard of proof

78. The normal rule under the national laws of the Member States is that the burden of proving all elements of the claim rests on the claimant. This means that the claimant in all cases has to prove the infringement, the causal connection between infringement and damage, and the quantum of damages. The burden of proving a defence to an action rests on the defendant. As a matter of Community law, Article 2 of Regulation 1/2003 states these rules for actions based on EC antitrust rules.
79. Article 2 of Regulation 1/2003, however, does not regulate the standard of proof. The standard of proof thus remains regulated by national laws. The civil law jurisdictions tend to operate with a test such as the need for the claimant to “win the conviction” of the judge.⁵² In the common law jurisdictions, on the other hand, the test tends to be a “balance of probabilities” test for the establishment of the conditions of violation under Articles 81 and 82 EC.⁵³ In the individual case there may not be any significant difference between these two tests, since the judge may require being convinced that one explanation is more likely than the other.
80. The standard of proof as put forward in the above-mentioned ALI/UNIDROIT draft Principles of Transnational Civil Procedure⁵⁴ bridges the civil law and common law jurisdictions by stating that “[f]acts are considered proven when the court is

⁴⁹ Case C-2/88 Zwartveld [1990] ECR I-3365, paras 10 and 11 and Postbank, as note 47 above, para 93.

⁵⁰ Ibidem and case C-275/00 First and Franex [2002] ECR I-10943, para 49.

⁵¹ Paragraph 26 of the Notice, as note 48 above.

⁵² This appears to be the case for example in Germany, Estonia, Spain, France, Italy, Latvia, Luxembourg, Hungary, the Netherlands, and Portugal.

⁵³ This is the test used in Cyprus, Ireland, Malta and the UK.

⁵⁴ As note 28 above.

reasonably convinced of their truth”.⁵⁵ This test adopts the civil law test of the subjective conviction of the court and incorporates some element of the common law probabilities test through the use of a reasonableness test.

2. Alleviating the claimant’s burden of proving the infringement in case of information asymmetry

81. Information asymmetry exists when one party (usually the defendant) has in its control or has access to more evidence relating to a given claim than the (potential) claimant. There are indications both in national law and under Community law that in case of information asymmetry, the claimant’s burden of proving the antitrust infringement is being alleviated.

82. In German competition law, Section 20(5) *Gesetz gegen Wettbewerbsbeschränkungen (GWB)* alleviates the claimant’s evidentiary burden in abuse actions brought by SMEs. Where the claimant is able to establish a *prima facie* case, the defendant is required to clarify those issues relating to its field of business which cannot be clarified by the claimant, but which can be easily clarified, and may reasonably be expected to be clarified, by the defendant. Similarly, under Austrian civil procedural rules, it is sufficient for the claimant to bring some basic evidence relating to an issue within the defendant’s sphere of control. The latter then bears the burden of rebutting this evidence.⁵⁶

83. The alleviation of the claimant’s evidentiary burden was also addressed by the ECJ in the *Aalborg Portland* judgment. After having paraphrased Article 2 of Regulation 1/2003, the Court continued that

*“although according to those principles the legal burden of proof is borne either by the Commission or the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged”.*⁵⁷

84. It is arguable that the case presented in situations of information asymmetry by the claimant, e.g. information on price and commercial strategy, would be covered as “factual evidence (...) of such a kind”. As a result, in situations of information asymmetry, it would be sufficient for the claimant to present facts which may constitute evidence of an infringement of the EC competition rules. The burden would then be on the defendant to adduce the necessary explanations or justifications to proof that those facts do not constitute an infringement of the EC competition rules.

⁵⁵ Principle 21.2. The comment to the text (comment P-21B) states: “The standard of ‘reasonably convinced’ is in substance that applied in most legal systems. The standard in the United States and some other countries is ‘preponderance of the evidence’ but functionally that is essentially the same”.

⁵⁶ See Oberster Gerichtshof (OGH) of 16 December 2002, 16 Ok 11/02 on the application of this rule in a predatory pricing case.

⁵⁷ Joined cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00 *Aalborg Portland and others v Commission* [2004] ECR I-123, para 79.

3. Alleviating the claimant's burden of proving the infringement in case of a prior decision of a national competition authority

85. According to Article 16(1) of Regulation 1/2003 “[w]hen national courts rule on agreements, decisions or practices under Article 81 or Article 82 EC which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.”⁵⁸ That means that in a subsequent proceeding before a national court, a claimant can rely on the Commission’s infringement decision in relation to the same behaviour as proof of the infringement.
86. Some national provisions have extended this principle to decisions of national competition authorities. In Germany, Section 33(4) GWB provides that in actions for damages for breach of EC or national competition law, the court is bound by the finding of an infringement by the Commission or by a national competition authority, be it the German competition authority or the competition authority of another Member State. It also provides that the court is similarly bound by a decision of the court of another Member State in so far as that court has the function to issue a finding of an infringement in the capacity of public enforcer or to decide on an appeal against an administrative decision.
87. Similarly, in damages proceedings before the UK ordinary courts or before the Competition Appeals Tribunal (CAT), the court/tribunal is bound by a European Commission infringement decision, or by a decision of the Office of Fair Trading (OFT, the UK competition authority) that either national or Community competition law has been violated, or by a decision of the CAT on appeal from a decision of the OFT to either of these two effects.⁵⁹

4. Evidentiary consequences of a refusal to disclose evidence

88. The weight to be given to restrictions on access to evidence placed by one of the parties in the way of the other appears to vary as between Member States. In some Member States, the refusal to disclose evidence appears to be taken as proof of the alleged facts relating to those documents.⁶⁰ In other Member States, where one party makes it impossible for the other to prove a fact, the burden of proof is explicitly reversed.⁶¹ This is only the case where access to evidence is made impossible, not if such access is merely made more difficult. In a last group of Member States, the refusal to disclose would not in itself be sufficient to establish proof of the alleged facts but the judge would require further persuasion on the point.⁶² In such a

⁵⁸ See also case C-344/98 Masterfoods [2000] ECR I-11369, para 52.

⁵⁹ Sections 18 and 20 of the Enterprise Act 2002, inserted as sections 47A and 58A respectively into the Competition Act 1998.

⁶⁰ This appears to be so in Latvia and it is the prevailing view among experts that this is also the case in Germany (see page 64 of the Comparative Report). The German national report (page 10) states only that if one party makes it impossible for the other party to prove a fact, then the court may alleviate the burden of proof or shift it away from the obstructed party.

⁶¹ See e.g. Article 344 of the Portuguese Civil Code.

⁶² E.g. in France, Italy, Hungary and Denmark. For the latter, see the Administration of Justice Act Section 344(2) and (3). The Danish national report does not refer specifically to refusal to produce evidence, but to a failure by a party to “*fulfil his obligation to give information or to follow the court’s*

situation, the refusal to produce documents will be taken into account by the judge in his evaluation of the evidence⁶³ and when determining whether the burden of proof has been discharged.⁶⁴

C. POLICY OPTIONS

1. Options in relation to disclosure of documentary evidence

89. Claimants may fail to bring a successful action for damages because they are not able to give sufficient evidence of (one of) the constituent elements of a damages claim. When that evidence is in the possession of someone else, be it the defendant or a third party, one may consider allowing the claimant access to that evidence. In designing a system allowing for such access, one should carefully assess the proportionality of any such option. Paragraphs 90 to 92 present a gradation of options for disclosure of documentary evidence. They describe a form of disclosure between the parties to an antitrust damages claim, but all options should also be read as extending to disclosure of documents which lie in the control of a third party. Paragraph 93 contains an option of effective sanctioning for the destruction of evidence, whereas paragraph 94 presents an option aimed at preserving the evidence.

Option 1: The disclosure of relevant and reasonably identified evidence by court order

90. Most Member States already have rules governing the production by parties of specified documents during the trial. It might be appropriate to have all Member States introducing some form of disclosure. Once a party has set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations (fact pleading), a court should be able to determine the scope and relevancy of any further information sought which lies in the control of the adverse party and order the disclosure of that information. This limited form of court ordered disclosure of relevant and reasonably identified individual documents would avoid excessively broad disclosure.

Option 2: Mandatory disclosure for classes of documents by court order

91. Consideration could be given to extending the existing disclosure rules by introducing, subject to fact pleading, a mandatory disclosure requirement for classes of documents between the parties, under some form of supervision of the court.

Option 3: An obligation to provide parties with a list of accessible documents

92. Under this option a party would, subject to fact pleading, be obliged to serve on all other parties a list of relevant documents in his possession. Unless the court is satisfied that disclosure would cause undue harm to the one who serves the list, all documents on the list would be accessible for the parties to the case.

request e.g. for further and better particulars". This would appear to cover failure to produce evidence when requested to do so by the court.

⁶³ See the Polish national report, page 8.

⁶⁴ Article 217(6) of the Spanish Civil Procedure Law refers to the ease of access to the relevant evidence of the party bearing the burden of proof (see the Spanish national report at page 9).

Option 4: Sanctions for destruction of evidence

93. One could provide for sanctions for the destruction of evidence following the start of legal proceedings or in anticipation of legal proceedings. There could be provision for monetary or criminal sanctions and/or procedural consequences, such as, with regard to the claimant, the striking out of the statement of claim or, with regard to the defendant, the striking out of the defence.

Option 5: Preservation of evidence

94. Courts could be allowed to order prompt and effective provisional measures to preserve relevant evidence in respect of the alleged infringement. In order to make this possibility effective and proportional, a party should be able to ask a court for such an order even before the commencement of proceedings on the merits of a case. That party should, however, present reasonably available evidence to support a *prima facie* infringement case.

2. Options in relation to access to documents held by the Commission or by a national competition authority

Option 6: Access to documents submitted by litigants to the Commission or to a national competition authority

95. It should be considered whether to give the litigant the right to request other parties to the procedure to let it have a copy of all documents handed over to the Commission or to a national competition authority in the course of the administrative procedure, with the exception of any leniency application, business secrets or other confidential information. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defence would be addressed under the law of the forum.

Option 7: Access by the national court to documents held by the Commission

96. Under the case law of the Community courts, the Commission is required to transmit to national courts all information they ask for. However, the Commission can refuse to send information for overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence. The Commission is also barred from sending confidential information to a national court that cannot guarantee the confidential treatment of that information. Taking these constraints into account, the Commission would like to foster the co-operation with national courts and thus invites feedback from stakeholders on how to ensure the usefulness of this co-operation. Feedback would be particularly welcome on (a) how national courts consider they are able to guarantee the confidentiality of business secrets or other confidential information, and (b) on the situations in which national courts would ask the Commission for information that also parties could provide.

3. Options in relation to the alleviation of the claimant's evidentiary burden of proving the antitrust infringement

97. Each of the following options could alleviate the claimant's evidentiary burden of proving the competition law infringement. The option dealt with in the next

paragraph aims at assisting the claimant in follow-on actions, whereas the options in the following paragraphs are particularly useful in stand-alone actions. Although the latter options would each of their own merits contribute to an alleviation of the claimant's burden of proving the antitrust infringement, a combination of both would be most effective in helping the claimant discharge his burden of proof.

Option 8: The evidential value of an infringement decision of a national competition authority

98. A prior infringement decision of a national competition authority, whether domestic or of another EU Member State, or of its review court, could be used to alleviate the claimant's burden of proving the infringement. A first option would be that such a prior decision shifts the burden of proving the absence of an infringement onto the defendant. A further option would be to make this infringement decision binding on the civil court.

Option 9: Shifting the burden of proving the infringement in situations of information asymmetry

99. It could be considered whether to shift the burden or, as the case may be, to lower the standard of proving the infringement where there is information asymmetry as between claimant and defendant. For example, once the claimant has made a *prima facie* case for an infringement, it would be up to the defendant to explain and if necessary, justify issues relating to evidence within his control.

Option 10: Evidentiary consequences of an unjustified refusal to disclose evidence

100. There are three options in relation to this issue: the unjustified refusal to disclose evidence (a) equates to proof of the facts alleged (irrebuttable presumption), (b) leads to a reversal of the burden of proof (rebuttable presumption), and (c) it can be taken into account by the judge to some extent in his evaluation of the evidence.

SECTION III: FAULT REQUIREMENT

A. INTRODUCTION

101. Member States take diverse approaches as to the interaction between competition law and the general rules of liability, in particular on the question of fault. A first group of Member States does not require any fault element whatsoever for a damages claim based on the infringement of competition law, or provide that the infringement constitutes, on its own, the fault. In these countries fault does not need to be proven.⁶⁵ A second group of States appears to require fault in addition to illegality, but fault is presumed (rebuttably or irrebuttably) if illegality is shown. Therefore, these legal systems seem to facilitate private enforcement of competition law since fault does not present a hurdle to the claimant in these countries.⁶⁶
102. Hence in the majority (18 out of 25) of Member States the fault requirement does not form an obstacle to private enforcement of competition law. The remaining seven countries (Denmark, Greece, Spain, Poland, Portugal, Finland and Sweden) all appear to require fault either in relation to the infringement or in relation to the effects of the infringement. Therefore, fault is an additional obstacle in these countries for any damages action.
103. Where the legal system requires an element of fault for a damages action, there is usually a distinction between intention and negligence. In all countries where fault is a precondition to liability, negligence will suffice.⁶⁷ Negligence exists where undertakings fail to exercise the requisite degree of care. In this respect the terminology used vary between Member States.
104. In EC competition law, 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 “object” or “effect” of restricting competition) as from the case law of the Community courts. In the case of Article 82 EC, the case law makes it clear that abuse is an objective concept.⁶⁸ Under Article 23 of Regulation 1/2003, the Commission may impose fines on undertakings or associations of undertakings only where they acted intentionally or negligently. However, it must be recalled that the provisions and case law are only relevant for the imposition of fines by a public authority (and not for the finding of the infringement). The question remains to what extent these provisions and case law can be applied *mutatis mutandis* to the awarding of damages for violation of the EC antitrust rules.
105. In the field of damages claims based on violations by Member States of their Treaty obligations (liability of public authorities) the ECJ specified in *Brasserie du Pêcheur*

⁶⁵ The Czech Republic, Ireland, Cyprus, Slovakia and the UK belong to this group.

⁶⁶ Belgium, Germany, Estonia, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria and Slovenia belong to this group.

⁶⁷ Some countries make further distinctions between degrees of negligence or vary penalties according to the degree of fault, see the Comparative Report, page 52.

⁶⁸ See e.g. case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461.

that Community law confers a right to claim for compensation if three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious;⁶⁹ and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.⁷⁰ The ECJ held further that

*“the obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order”.*⁷¹

106. A sufficiently serious breach of Community law is a prerequisite for liability of acts of public authorities. But if that public authority has acted with only considerably reduced, or even no, discretion, like all private undertakings, the mere infringement of Community rules may suffice to establish this sufficiently serious breach according to the *Camar* judgment.⁷²
107. Breach of EC competition law, which belongs to the public order,⁷³ is a serious breach of law which can have significant negative effects on the internal market. Consideration should therefore be given to the question of whether or not a fault requirement separate from the proof of the infringement is needed.
108. A comparable approach was taken with the Product Liability Directive.⁷⁴ Under this Directive a producer is liable for any damage caused by its products irrespective of the existence of fault with possible defences (inter alia) laid down in Article 7 (b) and (e) of the Directive. The absence of a fault requirement in the Directive was based on risk creation and on information asymmetry. In product liability law information on the production process is extremely difficult for the claimant to adduce. This reasoning can by analogy be applied to antitrust cases, for example to information on price and commercial strategy. A competitor of the tortfeasor usually has no insight into the relevant documents and every infringement of Art. 81 and 82 EC likewise may create a risk for competition.

⁶⁹ According to the ECJ a breach of Community law is sufficiently serious if the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. In this context the competent court may take into consideration the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law, see *Brasserie du Pêcheur*, as note 7 above, at para 55 et seq.

⁷⁰ *Brasserie du Pêcheur*, as note 7 above, para 51.

⁷¹ *Brasserie du Pêcheur*, as note 7 above, para 79.

⁷² Case C-312/00 *Commission v Camar and Tico* [2002] ECR I-11355, para 54.

⁷³ See *Eco Swiss*, as note 17 above, paras 23 and 25.

⁷⁴ Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

B. POLICY OPTIONS

Option 11: Liability based on the infringement itself

109. One option to facilitate private damages actions would be to remove fault as a condition of liability for a breach of competition law or to consider that the infringement constitutes on its own the fault as it is currently the case in five Member States or to introduce an irrebuttable presumption of fault. In this case illegality (violation of competition rules) would suffice for non-contractual liability. It can be argued that such an approach would be in line with the existing case law of the ECJ. Given the serious consequences of an infringement of competition law, a system where the infringement would constitute by itself a fault, would appear justified.

Option 12: Liability based on the infringement itself in relation to the most serious infringements

110. Another option would be to confine the system whereby the infringement would constitute by itself a fault to so-called hard core violations. In non clear cut cases it is questionable whether undertakings should be held liable in the absence of any intention or negligence.

Option 13: Defence of excusable error where illegality is shown

111. A third option could be to presume fault where a violation of competition law is shown but there would be a possibility for the defendant to introduce a defence of excusable error of law or fact. While the ruling of infringement would still stand against the defendant, there would be no liability for damages in those cases where he had, in good faith, acted on the basis that his conduct was in compliance with the law. Such a defence would of course implicate a lower degree of certainty for the claimant than an irrebuttable presumption and would result in some cases where injured parties do not receive compensation for injuries arising from an infringement of competition law. These negative aspects could, to a certain extent, be negated by requiring that the standard of care for undertakings be set at a high level.

SECTION IV: DAMAGES

A. INTRODUCTION

112. Damages are traditionally considered to compensate a victim for the loss suffered because of an antitrust infringement. It seems, however, that pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. As a result, thought should be given to other methods of approaching damages. Paragraphs 114 to 124 present different approaches that Member States have taken to calculate the basis of the damage in a way that makes it more attractive for claimants to file a damages claim. In doing so, the award may have as its purpose not only the compensation of the victim's individual loss but also the recovery of benefits gained by the defendant as a consequence of the tortious act. In addition, some Member States pursue beyond the mere deterrent *effect* of compensation, a distinct *aim* of punishing or deterring the wrongdoer by the grant of punitive or exemplary damages.
113. Apart from defining the basis of the damage, difficulties often arise with regard to the calculation of damages. Paragraphs 125 to 144 focus on different methods of quantification, showing both various models for the calculation of damages and a more equity based approach. Independent from the quantification method chosen, the risk remains that the mere fact that damages have to be quantified may serve as a disincentive for potential claimants. The final paragraphs 145 and 145 therefore consider a procedural alternative by splitting the finding of the liability from the calculation and the award of the exact quantum of damages.

B. ELEMENTS RELEVANT TO THE DEFINITION OF DAMAGE

1. Compensation

114. Compensation is the grant of an equivalent in kind or in money for the harm suffered. It differs from restitution, that aims at putting the victim in the situation he was in prior to the infringement. In some Member States compensation may only be given where full restitution is impossible or excessively difficult.

2. Recovery of illegal gain

115. Alternatively, the action can be structured as an action for recovery of illegal gain made by the infringer as a result of the infringement. In this case, the claimant's claim is not for subjective loss suffered, but for the illegal gain that the defendant has made from the infringement. Where the illegal gain made by the infringer exceeds the loss of the claimant, using the former as a basis for calculating the damage is more advantageous to the claimant than pure compensation. The German competition law contains an example of this approach by allowing the national competition authority (*Bundeskartellamt*) to order an undertaking that infringed the

competition rules to pay an amount that corresponds to the gain made as a result of the antitrust infringement.⁷⁵

3. Exemplary or punitive damages

116. Exemplary or punitive damages are damages awarded by way of punishment of the defendant for breach of the law and in order to deter repetition of wrongful conduct. The punitive element of a damages award can be viewed in part as simply compensating for aspects of real damage that are difficult to estimate. But usually, punitive damages deliberately go beyond compensation in order to achieve more deterrence or other policy goals.

117. In *Brasserie du Pêcheur*, the Court of Justice held that

*“[i]n the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims for damages founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law”.*⁷⁶

Therefore, if domestic law allows for exemplary damages for actions similar to damages actions for breach of the competition rules, it should also be possible to award exemplary damages for the latter actions.

118. In England, case law has established categories for determining which claims allow for the award of exemplary damages. One of these categories is “wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant”.⁷⁷ An action for breach of competition law is considered to fall into this category in extreme cases, such as where there was evidence that the defendant had calculated that his illegal profit would outweigh any damages awarded against him.⁷⁸

119. In Ireland, exemplary damages are available in actions for breach of national competition law.⁷⁹ In accordance with the principle of equivalence, exemplary damages should thus also be available to a claimant in an action concerning a breach of Article 81 or 82 EC. Exemplary damages may be awarded where there has been a conscious and deliberate violation of rights or where the court is satisfied that the

⁷⁵ Section 34 GWB.

⁷⁶ *Brasserie du Pêcheur*, as note 7 above, para 90.

⁷⁷ Lord Devlin in *Rookes v Barnard* [1964] AC 1129. See also *Broome v Cassell* [1972] AC 1027 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29.

⁷⁸ See e.g. B. Rodger, *Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages*, [2003] ECLR 103.

⁷⁹ Section 14(5) of the Competition Act.

wrongdoer intended to make a profit over and above what would be awarded to the injured party. In *Donovan v Electricity Supply Board*, the court stated that, in compensating injured parties for damage suffered as a result of a breach of Irish competition law, "[it] is not concerned with the motives or the intention of the party in default unless the question of exemplary damages arises".⁸⁰ Exemplary damages are rarely awarded in Ireland and are, usually, relatively modest.⁸¹

120. Under German law, exemplary or punitive damages are deemed to be contrary to public policy.⁸² Nevertheless, the recent report of the Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*, lists a number of measures which it considers not to be purely compensatory in nature.⁸³ In particular it refers to provisions that have a sanctioning character such as damages claims for copyright infringements that are monitored by the collecting society GEMA. GEMA is entitled to recover double damages under which a 100% addition to the ordinary licensing fee can be made. This has been upheld by the Federal Court of Justice (*Bundesgerichtshof*) in Germany, that justified the sanctioning character of the double damages claim on the basis that potential infringers would have otherwise no incentive to comply with the rules.⁸⁴
121. It should be borne in mind that most Member States exclude exemplary or punitive damages as contrary to their public policy. For that very reason, those Member States may refuse to recognize and to enforce decisions providing for such damages.⁸⁵ Despite this situation, one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim. Such an incentive would be most apparent were the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or, alternatively, leave it completely to the discretion of the national court.

4. Interest on damages

122. In the *Marshall II* case, the Court of Justice acknowledged that

"full compensation for the loss and damage sustained (...) cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The

⁸⁰ *Donovan v Electricity Supply Board* [1997] 3 IR 573 at page 585.

⁸¹ E.g. *Kennedy v Ireland* [1987] IR 587.

⁸² See Sections 723 s.2(2) and 328 s.1(4) ZPO.

⁸³ The report is available at: http://www.monopolkommission.de/sg_41/text_s41.pdf. See paragraph 79 and following.

⁸⁴ *Bundesgerichtshof* (BGH), judgments of 24 June 1955 (I ZR 178/53, BGHZ 17, 376), of 10 March 1972 (I ZR 160/70, BGHZ 59, 286) and of 15 November 1994 (VI ZR 56/94, NJW 1995, 861).

⁸⁵ See Article 11 of the Convention of 30 June 2005 on Choice of Court Agreements concluded within the context of the Hague Conference on Private International Law: "(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings."

*award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation”.*⁸⁶

123. What matters in the award of interest are both the interest rate and the point in time from which interest is awarded. In order to attain a genuine form of compensation, both elements have to be determined at a level that ensures that at least real values, as opposed to mere nominal values, are being compensated. There are a number of possible points in time from which interest can be awarded, such as the date of the infringement, the date of the injury, the date of a demand for payment, the date of the notice to stop the breach, the date of the filing of a claim or the service of a writ of summons and finally the date of judgment.⁸⁷ Courts frequently have discretion in this matter. For example, in *Crehan v Inntrepreneur Pub Company*, the English High Court ruled that although the normal rule under English law is that damages are assessed at the date of loss, this is not an invariable rule of law and it may be that the justice of the case requires damages to be measured at the date of judgment, e.g. “in times of high inflation when interest would not be any form of acceptable compensation”.⁸⁸
124. When set at a level that goes beyond compensating real value, interest may serve as a technique to increase deterrence. That technique was used in the Directive on combating late payment in commercial transactions.⁸⁹ The Directive recognises the problem of late payments and the resulting heavy administrative and financial burdens which they place on businesses, particularly SMEs. It finds that late payment has been made financially attractive to debtors in most Member States by low interest rates. The Directive therefore aims at reversing this trend of late payments and ensuring that the consequences of late payments are such as to discourage late payment.⁹⁰ The Directive does so by establishing the interest rate at a level where it becomes financially more interesting to borrow at lower interest rates than to extend ones debts by way of late payment.

C. QUANTIFICATION OF DAMAGES

1. Introduction

125. In an action for damages for breach of Community competition law, as in any damages action, the claimant will need to quantify the damages suffered. Quantification of damages in competition litigation can be particularly complex given the economic nature of the illegality and the difficulty of reconstructing what the situation of the claimant would have been absent the infringement, as usually required under tort rules.

⁸⁶ Case C-271/91 M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority [1993] ECR I-4367 at para 31.

⁸⁷ For an overview of what Member States use as the point in time from when interest can be claimed, see the Comparative Report, page 86.

⁸⁸ *Crehan v Inntrepreneur Pub Company and another* (Case No: CH 1998 C801), [2003] EWHC 1510 (Ch).

⁸⁹ Directive 2000/35 on combating late payment in commercial transactions, OJ 2000 L 200/35.

⁹⁰ Recital 16 of Directive 2000/35, as note 89 above.

126. Typically the measure of loss which shall be compensated in an antitrust damages case is taken to be the difference between the claimant's actual position and the situation he would have been in "but for" the illegal conduct (the counterfactual). The former encompasses actual losses as well as profits that have not been gained, while the latter refers to the hypothetical situation in which the claimant would be had no competition law infringement occurred. The loss is thus compensated if the claimant is put into the financial situation he would have been in "but for" the infringement. A number of methods are used to establish this "but for" scenario, e.g. the prices, profits, costs, and the market situation etc., that would have prevailed in the absence of the infringement, to allow a comparison between the hypothetical and the actual situation.
127. The most commonly claimed types of antitrust damages are likely to be *overcharges* (i.e. increased prices in case of cartels or excessive prices in case of a dominant position) and damages claimed for other anti-competitive conduct (i.e. predatory pricing or refusal to supply) which has led to *lost net profits* to a continuing business or even lost going concern value of a terminated business.
128. A damage due to overcharge can consist of two parts, the damage due to the infringement (i.e. the higher price paid due to the cartel), but also lost profits due to the fact that the purchaser might have bought fewer input goods or services, e.g. for production purposes, and thus made less profit as he only could produce and sell fewer products.
129. When awarding damages, the court may also have to take into account effects that result from the behaviour of the claimant. That is particularly the case when the claimant is under an obligation to mitigate any losses. In addition, there is a question as to whether the claimant would have had to pay taxes in relation to the revenues he lost as a result of the antitrust infringement and for which he now asks compensation. If so, a court order would normally take these taxes into account by reducing the award.

2. Methods for calculation of damages

130. A variety of damage quantification methods are available to the parties, as described in part II of the Study (the Economics Report). There is no reason why any Member State should require the use of one quantification method over another, though the claimant will often (in the common law jurisdictions in particular) need to bear in mind that his quantification will be disputed by the other side and to this extent will need to "defeat" the evidence put forward by the other side. In civil law jurisdictions investigation of quantum may to a greater degree be undertaken by the court, if necessary assisted by an expert.
131. Although in what follows, the methods for calculation of damages are presented separately, they are complementary in the sense that several methods may be considered depending on the facts of the case in order to see whether they yield similar estimates of the quantum of any damage. To a certain degree an overlap of the methods can not be avoided and does not diminish the value of one method over the other. The simple methods can be used as a cross-check for the more complex methods. The existing case law from the Member States to date appears to show that the courts prefer the simple methods. There appears to be no case law to date in

which econometric evidence has been considered by the court as the basis for an award.

132. A crucial question from a policy perspective is whether the accuracy brought by the more complex methods (assuming that this is the case) is sufficient to outweigh the extra cost and time involved in bringing and assessing this evidence. It might be desirable for courts to rely on simpler techniques, underpinned by the presumption that an equity estimation is sufficient or even, in some respects, preferable.

a. The simple calculation methods⁹¹

133. There are basically three simple methods to calculate the damage caused by an antitrust infringement:

- the *before-and-after method* involves a simple comparison of prices during the infringement with the situation before and after the infringement to provide a reasonable assumption of the real price levels in the absence of an infringement;
- the *yardstick approach* compares the distorted market with similar markets that were not affected by the infringement. Ideally the structure as to prices, costs and other characteristics is more or less similar to allow the assumption that price differences in the distorted market are the result of the anticompetitive action;
- the *cost based approach* is based on information produced by those responsible for the infringement about their average unit production cost, to which a reasonable profit margin is added to obtain a price which can be considered to be reasonable under competitive conditions.

b. More complex calculation methods⁹²

134. The following two calculation methods may lead to a more accurate result, but are more time-consuming and data-intensive:

- the *price prediction approach* uses econometric modelling to seek to predict prices in a “but for” scenario on the basis of historical determinants of prices or yardstick comparisons with other markets. This approach is a more sophisticated version of the before and after and yardstick approaches but is heavily dependent on the quality of the data available;
- the *theoretic modelling approach* simulates an oligopolistic model to ascertain the effects of the distortion. Econometric modelling and other data are used to estimate key model parameters to feed them into a theoretical model.

c. The sampling method

135. Sometimes it may be disproportionately difficult or even impossible to exactly calculate the damage suffered as a result of an antitrust infringement. In those

⁹¹ See Study on the conditions of claims for damages in case of infringement of EC competition rules, Analysis of economic models for the calculation of damages (the “Economics Report”), from page 17 onwards.

⁹² See the Economics Report, from page 21 onwards.

circumstances, it should be acceptable to show reasonable approximations of the damage suffered. One method to reach an approximation is the sampling method. This technique may be particularly effective in litigation involving large groups, such as certain indirect purchaser classes or consumer associations.⁹³

136. In *Société anonyme des laminoirs* the European Court of Justice supported the technique to calculate damage via sampling. It held that

*“[w]hen it is necessary to consider a situation as it would have been if there had been no wrongful act or omission, the court must, whilst insisting that all available evidence be produced, accept realistic approximations, such as averages which have been established by means of comparisons. (...) In assessing their loss the applicants have used the only method possible. This consists in imagining the position which would have arisen for each factory concerned as regards the purchase of ferrous scrap, if the promises relating to the transport parity had not been made. Although in using this method it is not possible to arrive at an exact assessment of the damage, nevertheless the sampling methods habitually used in economic surveys make it possible to reach acceptable approximations provided that the basic facts are sufficiently reliable”.*⁹⁴

d. The *ex aequo et bono* quantification

137. The basic rule, operating in many Member States, is that where exact quantum is difficult to prove, proof of exact damage can be waived and the court can award a reasonable amount in its place (this is often called an *ex aequo et bono* estimation). In a few Member States, this possibility only applies to certain categories of damage, most notably loss of future profit.⁹⁵
138. In a few Member States, this lowering of the required standard of proof of the claimant in relation to the quantification of damages does not exist. That means that if the claimant is unable to prove the exact loss, the claim fails. That is the case, e.g. in Spain, where a civil court may request the Competition Court to issue a report on the origin and quantum of damage.⁹⁶ The Competition Court is, however, not obliged to produce such a report and the findings of the report do not bind the requesting court.
139. *Ex aequo et bono* estimation of damages could be used in conjunction with, or to underpin from a legal perspective the use of simple calculation methods as outlined above. The principle is less compatible with complex models, that attempt to quantify damages with precision on the basis of econometric or statistical techniques.

⁹³ In US *parens patriae* actions, damages may be calculated in a price fixing case for the whole class represented by statistical or sampling methods. There is no need to calculate damages for each individual on whose behalf the action has been brought (Section 4D of the Clayton Act).

⁹⁴ Joined cases 29, 31, 36, 39 to 47, 50 and 51/63 *Société anonyme des laminoirs v High Authority* [1966] ECR 139.

⁹⁵ See in particular the table at page 71 of the Comparative Report.

⁹⁶ Article 13.3 of Law 16/1989 of 17 July 1989 on the Defence of Competition.

3. *Two special cases: calculating lost profits of the claimant and calculating damage on the basis of the defendant's illegal gain*

a. Calculating lost profits of the claimant

140. To calculate losses sustained in cases of anticompetitive conduct other than price increases, such as refusal to supply or predatory pricing, different methods are used. In such circumstances, damages may be assessed in terms of lost profits arising from the misconduct where the objective is to value that portion of a business that has been lost as a result of the antitrust infringement. A calculation will involve accounting, finance and economic methodologies to estimate the difference between what the claimant's profit was and what it would have been but for the infringement.

141. The following methods could be used for calculating lost profits.⁹⁷ These methods also appear to presuppose the use of one of the methods outlined at paragraphs 133 and 134 in the calculation of the counterfactual (i.e. the hypothetical price against which lost profit is measured):

- the *earnings based approach* involves discounting sales, costs and cash flows from the income statement in order to provide an estimate of the “but for” scenario;
- the *market based valuation approach* uses financial multiples to value the injured business, such as stock market value or profits of comparable businesses whose shares are publicly traded on stock exchanges;
- the *assets based valuation approach* uses information from the balance sheet to value a business. Measures include the book value of tangible net worth, fair market value of tangible net worth and liquidation value.

142. A number of generic issues are raised in loss of profits calculations that would apply to antitrust cases as well as in other contexts. Timing of injury means establishing the period in which the claimant's business was affected by the infringement. This might be difficult as this period could have started later than the infringement, but the infringement may continue to have consequences even after it has been terminated.

143. Finally, it should be underlined that in case of calculating damage resulting from lost profits, the Court of Justice pointed at the broad discretion of national courts where it stated that

“the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data. The Court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen and also, above all, as to the way in which they are to be used to calculate and evaluate the damage”.⁹⁸

⁹⁷ See paragraph 5.6 and following of the Economics Report.

⁹⁸ Joined cases C-104/89 and C-37/90 *Mulder and others v Council* [2000] ECR I-203, para 79.

b. Calculating damage on the basis of the defendant's illegal gain

144. Where the claimant's individual loss is too difficult to assess on a subjective basis, as may be the case particularly in relation to consumer claims, it may be possible to calculate the loss on the basis of the defendant's illegal gain.⁹⁹ E.g. in the case of a cartel the illegal gain is the difference between the competitive price and the cartel price, namely the overcharge. The calculation of the illegal gain does thus not take into account the lost profits from sales which the defendant no longer made as a result of the price increase. In Community law, the Directive on the protection of intellectual property rights¹⁰⁰ provides that the unfair profits made by the infringer can be taken into account in the calculation of the claimant's damages, next to the lost profits that the injured party has suffered.

D. SPLIT PROCEEDINGS

145. In some Member States, it is possible to get a partial judgment regarding the finding of the infringement and the finding of the damage. That judgment does not pronounce on the quantification of the damage, but the procedure continues until such time when the damages can be quantified. It is not infrequent for this latter procedure to be interrupted by a settlement between the parties as to the damages to be awarded.
146. Such split proceedings generally exists in two forms. In a first group of Member States, a single procedure is split into two phases, whereby liability is established in a first phase and damages are assessed in a second phase.¹⁰¹ In a second group of Member States, two "full" and separately appealable judgments are rendered: a first one finding the liability and a subsequent one setting the amount of damages.¹⁰²

E. POLICY OPTIONS

1. Options in relation to the basis of defining the damage

Option 14: Compensatory damages

147. A first option is to award damages to the victim on the basis of pure compensation, to make amends for loss or injury arising from an infringement of EC antitrust rules.

Option 15: Recovery of illegal gain

148. Another option would be to allow the victim to calculate its loss on the basis of the defendant's overcharge. One could envisage two sub-options:

⁹⁹ This calculation method is accepted in Cyprus, Germany, the Netherlands, Poland, Lithuania and Spain. As note 26 above.

¹⁰¹ This is the case in the Czech Republic, Spain, France, Ireland, Italy, Malta, Poland.

¹⁰² This is the case in Denmark, Germany, Estonia, the Netherlands, Portugal and Slovenia. In Germany, the claimant who does not have all necessary information to quantify the amount of damage, can ask the court for a declaratory judgment stating the defendant's obligation to compensate the claimant for all damage caused by the infringement.

- a first is to allow the victim to claim the entire overcharge from the infringement. In a subsequent procedure, damages are then allocated between all parties that have suffered a loss;
- another option would be to allow the victim to claim the overcharge only arising from his commercial dealings with the defendant. For example if the overcharge was 30%, the claim would be for 30% of invoice price of the victim's purchases.

149. The recovery of the defendant's illegal gain only covers part of the victim's loss, namely what the latter paid more than what he would have paid at a competitive price (*damnum emergens*). In order to fully compensate the victim, this part needs to be completed by a compensation of the victim's quantitative loss in purchase (*lucrum cessans*, named "deadweight loss" because it is not appropriated by the defendant). The amount of the deadweight loss largely depends on the price elasticity of the claimant's demand. It may in some circumstances therefore be difficult for the claimant to quantify the deadweight loss. In those circumstances, an *ex aequo et bono* estimation of damages seems most appropriate.

Option 16: Double damages for horizontal cartels

150. In order to create a clear incentive for claimants to bring antitrust damages cases, it could be envisaged to award double damages in case of the most serious antitrust infringements, i.e. horizontal cartels. Comments are invited as to whether, if it is introduced, such award is considered useful, it would be automatic, conditional or at the discretion of the national court.

Option 17: Prejudgment interest

151. To ensure that the availability of prejudgment interest is a sufficiently strong incentive to encourage claimants to bring cases, the date from which prejudgment interest runs could be set at the date of the infringement or the date of the injury. A similar incentive could be created by increasing interest rates generally and/or allowing for claimants to claim compound interest.

2. Options in relation to methods of quantification of damages

Option 18: The quantification methods

152. From the description in paragraphs 125 to 144 it can be seen that there are a variety of techniques available for quantifying damages. The choice of technique, ranging from an equity approach, over simple methods to more complex and detailed methods will usually depend on the specifics of the case and the data that are available.

153. Views are sought as to the suitability of the described methods in damages quantification before civil courts. In particular, a key issue would appear to be the added value brought by the more complex models over the simpler models in terms of greater accuracy of quantification and whether, in the view of stakeholders, any such added value is justified by the additional time and cost that the more complex models might be expected to bring.

3. Other options

Option 19: Commission guidelines on quantification of damages

154. It may be appropriate to provide national courts with some form of guidance with regard to the quantification of damages. Such guidance might be particularly useful in explaining the more complex quantification techniques as set out above.

Option 20: Split proceedings as between liability and quantum

155. Split proceedings may be another way of facilitating actions for damages. If liability can be established separately before assessing damages, this may well reduce the cost of litigation. If liability is demonstrated it is not unlikely that parties will reach a settlement as regards the quantum of damages, thereby avoiding costly recourse to experts and shortening the actual court proceedings.

SECTION V: THE PASSING ON DEFENCE AND INDIRECT PURCHASER STANDING

A. INTRODUCTION

156. If a cartel or a dominant company sells its goods at supra-competitive prices, a direct purchaser, e.g. a wholesaler, suffers as a result of having paid a price that is in excess of the competitive price. However, the direct purchaser may be able to pass on all or some of the loss to the next purchaser in the chain, e.g. a retailer or a consumer. These purchasers, who are only indirectly linked with the seller, e.g. a cartel member or a dominant firm engaged in anti-competitive behaviour, in turn suffer a loss by paying a supra-competitive price which has been passed on to them.
157. This leads to two related questions:
- Firstly, if the direct purchaser brings a damages claim, should the court take account of the passing on of some or all of the loss to other purchasers down the line?
 - Secondly, should indirect purchasers be entitled to bring actions to compensate them in respect of their loss?
158. These questions are at the heart of the way in which a system for damages for breach of antitrust law, particularly in relation to overcharge claims, functions.

B. THE PASSING ON DEFENCE

159. Price fixing (or other anti-competitive behaviour leading to an increase in price) in one market not only harms the purchasers in the subsequent downstream market. Harm can be inflicted upon purchasers and non-purchasers at all levels of the supply chain. The Study addresses the model where passing on and indirect purchaser standing are allowed. The example given is that of a cartel between manufacturers of a foodstuff which is refined by processors, then included by food manufacturers in various products sold to grocery retailers. It is stated that “*the analysis becomes considerably more difficult as pass through must be assessed at each stage of the supply chain.*”¹⁰³ It is furthermore argued that if a passing on defence is allowed, this may also create conflicts between the claimants at the various levels of the supply chain.
160. The Study gives an overview of the determinants of passing on.¹⁰⁴ In simple terms, the key determinants of passing on are the nature of competition in the claimant’s output market, and whether the overcharge affects the position of the claimant relative to its competitors. According to the Study, in general, the more competitive the downstream market (i.e. the market in which the claimant is operating), the greater the likelihood of passing on.

¹⁰³ See paragraph 4.3 of Part I of the Economics Report.

¹⁰⁴ Paragraphs 4.9 to 4.14 of Part I of the Economics Report.

161. The Study addresses the crucial issue of measuring the impact of passing on.¹⁰⁵ Techniques include a “theoretical approach” which would start from a theoretical model of the claimant’s market and the structural determinants of pass-on, to an approach which directly estimates the extent of pass-on using a statistical study of the historical relationship between the claimant’s prices and the determinants of these prices. Both of these approaches are described in the Study. However, given their highly complex and technical nature they are not reproduced here. While a certain level of complexity is necessary in determining the total overcharge of the cartel, replicating this complexity at every stage of the supply chain would magnify the complexity and cost of actions for damages. It does not appear possible to construct a model which accurately identifies, at reasonable cost, the harm suffered by players at different levels of the supply chain.

162. This great technical complexity associated with calculating the passing on of the overcharge along the supply chain has been a determining consideration in US law. In its Illinois Brick ruling, the US Supreme Court motivated as follows its decision not to permit the passing-on defence in federal US antitrust law:¹⁰⁶

“Permitting the use of pass-on theories ... essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.”

163. In conclusion, having to calculate the total overcharge is already sufficiently complex and any attempt to go beyond this and apportion overcharge along the supply chain would greatly increase the complexity and cost of antitrust enforcement.

164. There is no detailed analysis of the passing-on defence in competition law in the case law of the Community courts. However, the ECJ has held as follows at paragraph 30 of the judgment in *Courage*:

“The Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, paragraph 14, Case 68/79 Just [1980] ECR 501, paragraph 26, and Joined Cases C-441/98 and C-442/98 Michailidis [2000] ECR I-7145, paragraph 31).”

¹⁰⁵ Paragraphs 4.15 to 4.21 of Part I of the “Economics Report”.

¹⁰⁶ Illinois Brick v Illinois, 431 US 720 (1977).

165. The passage from *Courage* set out above draws on previous case law of the ECJ. The possibility of the passing on defence has been acknowledged by the Court in actions for the non-contractual liability of the Community (Article 288(2) EC)¹⁰⁷ and actions for the recovery of illegally levied duties brought by undertakings against Member States.¹⁰⁸
166. The existence and operation of the passing on defence in Community law is complex. Indeed, the Court itself has placed such conditions on the operation of the passing on defence that it could be argued that when it exists such a defence is in practice redundant.
167. Firstly, the majority of the Community case law is not in the field of competition. So far the Community courts have not examined the issue in depth in competition litigation. In particular, apportionment of damage as a result of the use of the passing on defence could be more complex in antitrust cases than in tax or subsidy refund cases because of the wider effects of the cartel globally.
168. Secondly, the existing case law of the Community courts is limited to stating that Community law does not preclude a rule of national law which seeks to prevent unjust enrichment. It does not establish the existence of the passing on defence as a matter of Community law. As AG Slynn stated in his Opinion in *Bianco*:
- “The Court [in Just] did not, however, hold that the fact that charges had been passed on must as a matter of Community law, e.g. pursuant to a general principle forbidding unjust enrichment, mean that the charges wrongly demanded and paid could never be recovered.”*¹⁰⁹
169. The primary basis for the existence of the passing on defence in the reasoning of the Community courts is the prevention of the unjust enrichment of the claimant. This is the motivation referred to at paragraph 30 of *Courage*. However, passing on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the trader has to raise prices.¹¹⁰

¹⁰⁷ Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, referred to in paragraph 30 of *Courage*.

¹⁰⁸ See *Just*, as note 6 above; joined cases C-441/98 and C-441/98 Kapniki Michailidis v IKA [2000] ECR I-7145, referred to in paragraph 30 of *Courage*; see also *San Giorgio*, as note 6 above, joined cases 331/85, 376/85 and 378/85 *Les Fils de Jules Bianco and J Girard Fils v Directeur général des douanes et droits indirects* [1988] ECR 1099 and *Comateb*, as note 6 above; see also the Opinion of AG van Gerven in *Banks*, as note 4 above, para 48: “Community law does not prevent the national court from ensuring, in accordance with national law, that the protection of rights guaranteed by the Community legal order does not result in the unjust enrichment of those entitled” and para 51: “In quantifying the damage it is necessary, in any event, in accordance with the (...) prohibition on unjust enrichment (...), to take account of the extent to which the damage has been passed on in the selling prices of the complainant undertaking.”

¹⁰⁹ *Bianco*, as note 108 above.

¹¹⁰ The consideration as to a reduction in sales in cases where an overcharge is passed on also is suggested by the reasoning of the US Supreme Court in *Hanover Shoe v United Shoe Machinery*, 392 US 481 (1968).

170. Indeed, in the later case law of the Court of Justice passing on and actual unjust enrichment are expressed by the ECJ as cumulative conditions to be fulfilled for the reduction of the charge on the basis of passing on. As the Court held in *Comateb* at paragraph 27

*“Accordingly, a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment.”*¹¹¹

171. More recently, the Court has held at paragraph 102 of its judgment in *Weber*

*“It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse – a point which falls to be determined by the national court – repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established.”*¹¹²

172. The disconnection between passing on and the unjust enrichment of the claimant has evolved in the case law of the Court to the point where a presumption that passing on leads to unjust enrichment is so unfounded as to offend against the Community law principle of effectiveness (where the context is judicial protection of a Community law right, namely restitution of a charge levied in contravention of Community law).¹¹³

173. It can be said that there is no passing on defence in Community law; rather, there is an unjust enrichment defence which requires (1) proof of passing on (which can be difficult in itself – see below) and (2) proof of no reduction in sales or other reduction to income.

174. Furthermore, if the passing on defence were to be recognized, it would be extremely difficult to apportion damage as between the different claimants at the different levels of the production/distribution chain. The door to apportionment is opened by the Court’s recognition of partial passing on in *Comateb* and *Michailidis*.¹¹⁴ This is correct as a matter of principle if one wishes to seek to try to estimate as precisely as possible the extent of any unjust enrichment. However, it does not open the same complexities when applied in the field of recovery of charges as the possibility of consumer actions in the latter does not appear to be of any relevance (though it could be a theoretical possibility).¹¹⁵ This cannot be said of antitrust actions.

¹¹¹ *Comateb*, as note 6 above (emphasis added); repeated in case C-147/01 *Weber’s Wine World* [2003] ECR I-11365 at para 94.

¹¹² *Weber*, as note 111 above (emphasis added).

¹¹³ See *Weber*, as note 111 above, para 117.

¹¹⁴ *Comateb*, as note 6 above, paras 27 and 28 and *Michailidis*, as note 108 above, para 33. See also para 51 of the Opinion of AG van Gerven in *Banks*, as note 4 above.

¹¹⁵ See para 7 of the Opinion of AG Mancini in *San Giorgio*, as note 6 above: “[i]t is absurd to think of a mass of consumers who, in a system in which the class action is unknown, would bring an action against the State in order to recover minimal amounts”.

175. Finally, in *San Giorgio*¹¹⁶ the ECJ held that a provision of national law which placed the burden of proof on the party claiming repayment to show that it had not passed on the charges to the final consumer was incompatible with Community law on the grounds that it made it virtually impossible or excessively difficult to secure repayment of the charge wrongly levied and paid. Under Community law the burden of proving passing on, where the issue arises under national law, is on the defendant. Passing on operates, where it does operate, as a *defence*.¹¹⁷ It is a question of fact for the *defendant* to establish. The defendant's burden of showing passing on in the individual case will often be very difficult in practice to discharge.

C. INDIRECT PURCHASER STANDING

176. As mentioned above, the question of standing of indirect purchasers and the question how, if these purchasers have standing, their claim can be calculated in situations where passing on has taken place, is intimately linked with the question of the availability of the passing-on defence as such and, where it exists, its operation.
177. The Community courts have not taken any position on the standing of indirect purchasers in antitrust actions. It has been argued that the ruling of the Court in *Courage* operates against any restriction on standing of indirect purchasers. Firstly, the Court reaffirmed at paragraphs 23 and 24 of its judgment in the *Courage* case that Articles 81 and 82:

“produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (...). It follows from the foregoing considerations that any individual can rely on a breach of Article [81](1) before a national court” (emphasis added).

This is a reaffirmation of principles laid down in the Court's earlier jurisprudence.¹¹⁸

178. It is submitted that, looked at in isolation and applying the general principles set out in the foregoing case law, both direct and indirect purchasers have the right to bring a claim subject to proving infringement, injury suffered and causation. To depart from such a principle would deny those most likely to have suffered antitrust injury a remedy. It is equally clear that allowing all parties downstream of a competition infringement to claim damages creates additional complexities (how to calculate the level of passing on), disincentives (successful claimants will get less), and higher transaction costs (increase in number and complexity of cases following from the same infringement).
179. In designing any system for claiming antitrust damages the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree. Therefore, providing an efficient system can be found to compensate

¹¹⁶ *San Giorgio*, as note 6 above.

¹¹⁷ It should also be noted that according to Section 33 (3)(2) GWB as amended by the 7th Amendment, the passing-on defence is not excluded as a matter of German civil law, but that it operates as a defence and that the facts underlying that defence have therefore to be proven by the defendant.

¹¹⁸ See BRT and SABAM, as note 8 above, para 16; see also case C-282/95 P *Guérin Automobiles v Commission* [1997] ECR I-1503, para 39.

indirect purchasers, and in particular final purchasers, then there is no reason why they should not also benefit from actions for damages. Given the above-mentioned complexities, it is, however, likely that a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable.

180. It is suggested that the determining factor could be the effective enforcement of Community law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles 81 and 82, then it is submitted that such limitations should be acceptable under Community law. Therefore, it might be necessary to determine what rights must be facilitated to ensure an effective enforcement system rather than insisting on the absolute protection of all private rights. For the protection of the rights of consumers, a specific small claims procedure or collective action might be an efficient form of redress given the very low level of individual damage suffered in many of the cases (see further below in Section VI).

D. POLICY OPTIONS FOR THE TREATMENT OF THE PASSING ON DEFENCE AND INDIRECT PURCHASER STANDING

Option 21: The passing on defence is allowed and both indirect and direct purchasers can sue the infringer

181. Under this model, damages have to be apportioned between direct and indirect purchasers. This can involve difficulties in the assessment of passing on at the various stages in the production and distribution chain, as discussed above, though the system would adhere to the principle of compensatory damages for each party that has suffered injury. The actions would be in principle separate and independent though in practice there is no reason why parties could not seek to coordinate their actions and thereby possibly save costs and time through making use of appropriate procedural devices. In this regard, the use of joinder or group action mechanisms, as well as some form of collective or representative action at consumer level (see further below in Section VI), could be applied under this model.

Option 22: The passing on defence is excluded and only direct purchasers can sue the infringer

182. This option privileges direct purchaser recovery over recovery by other classes of potential litigant. This brings advantages principally in terms of the deterrent effect of actions for damages of competition law, since it can be anticipated that the direct purchaser normally has better access to the evidence necessary to establish the infringement and also to quantify damage, including damage suffered at lower levels of the production/distribution chain. The more one moves away from the infringer(s) and direct purchasers, the more difficult it becomes to assess effects. For these reasons the direct purchaser is usually the best placed claimant and so a system which encourages direct purchaser claims can be anticipated to achieve a greater degree of enforcement and deterrent effect.

183. It is arguable in addition that if the direct purchaser is operating in a competitive market, market dynamics may, in some cases, redress the alleged unjust enrichment made by the direct purchaser by forcing him to pass on the gain made in the form of any damages award to the next levels of the production/distribution chain.
184. In order to allow for the possibility of recovery at the consumer level and the protection of consumer interests, an exception would need to be created within this model to the reservation of standing to direct purchasers so as to allow for claims at the consumer level (see further section VI below).

Option 23: The passing on defence is excluded and both direct and indirect purchasers can sue the infringer

185. This model could lead to over-recovery from the infringer. On the other hand, this model promotes a strong form of deterrence against the infringer and increased incentives to sue for both direct and indirect purchasers.

Option 24: A two-step procedure¹¹⁹

186. This system could be structured as follows:
- (A) In initial proceedings the passing on defence is excluded and the infringer is sued for the total overcharge.
 - (B) In later proceedings damages are allocated as between all parties that have suffered a loss.
187. This system has the advantage of ensuring that the infringer pays (deterrence aim). The subsequent allocation proceedings ensure as far as possible that the compensation aim is achieved. This option raises some further questions as to the precise modalities in which it might operate, which would require further consideration.

¹¹⁹ See, for example, ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement – 2001, Report of the Task Force on the Federal Antitrust Agencies - 2001 at page 24, and ABA Section of Antitrust Law, Report on Remedies (2004).

SECTION VI: DEFENDING CONSUMER INTERESTS

A. INTRODUCTION

188. There is a merit in fostering claims by final consumers, because these contribute directly to the overarching aims of compensation and increased deterrence, as well as to the development of a competition culture. Costs, delays and administrative burdens involved in ordinary judicial proceedings can certainly discourage consumers who suffer a relatively minor economic loss from seeking a judgement against undertakings engaging in anti-competitive conduct. To enable consumers to be viable litigants, some facilitating instruments may be required.
189. The obstacles to private redress have led to the introduction of simplified court procedures in several jurisdictions across Europe. Although diverging in scope and access conditions, the existing small claims procedures present some common characteristics: the economic burden faced by the plaintiffs is minimised; the ordinary rules governing the acquisition of evidence and the quantification of damages are relaxed, enlarging the scope of court discretion; finally, while preserving the adversarial structure of the trial and the neutrality of the judicial authorities, the court is often allowed to provide some procedural support to the parties and to identify relevant information to decide the case.
190. In March 2005, the Commission adopted a proposal for a Regulation establishing a European small claims procedure¹²⁰, which would apply also to infringements of EU competition law. The proposal suggests making this optional procedure available to litigants as an alternative to the already existing procedures under national law. The European Small Claims Procedure is intended to simplify, speed up and render less costly litigation concerning claims where the total value does not exceed €2000. It would give consumers the possibility to commence the procedure by completing a standard claim form, without the assistance of a lawyer. The court is granted discretion to determine the means of proof and the extent to which evidence is taken. Finally, it is specifically provided that when the unsuccessful party is a natural person not represented by a lawyer, there will be no obligation to reimburse the legal expenses incurred by the counterpart.
191. The development of appropriate simplified judicial procedures could arguably facilitate consumer claims for damages arising from infringement of European antitrust law. Special rules on costs and legal assistance could arguably reduce the financial burden that consumers have to face when litigating competition cases. Moreover, the uncertainty as to the practical outcome of the case can be minimised by specific provisions governing the award and quantification of damages as well as the evidence threshold that consumer claimants have to meet.

¹²⁰ Commission's proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005)87 of 15 March 2005.

192. In addition to the European Small Claims Procedure, it may be appropriate to offer consumers means of collective redress.¹²¹ In that respect, distinction could be made between representative action, collective action and public interest litigation. A ‘representative action’ is an action brought by a representative natural or legal person, such as a consumer organisation, on behalf of a group of identified individuals, usually its members, and aimed at protecting the individual rights of those represented. A ‘collective action’ is brought on behalf of a group of identified or identifiable individuals and aimed at protecting interests of those represented.¹²² A further variant is the ‘public interest litigation’, which is not done on behalf of any identified individuals but for the benefit of the public at large. The award resulting from any such action could be made to the natural or legal person who brought the action or to those who suffered the damage.
193. Collective and representative actions are particularly important in the context of defending consumer interests. However, also beyond the specific context of consumer claims, collective and representative actions can improve the efficiency of the litigation process by consolidating a potentially large number of different actions into one action. This saves time and cost and avoids the risk of tactical litigation (one group of claimants waiting to see how a prior case goes before bringing an action). Moreover, some form of organised collective action can be important in balancing the resources and bargaining position of otherwise diffuse claimants against well-organised and potentially resource-rich defendants.
194. Easier enforcement of legal rights and increased ability to recover economic losses are essential to bringing European citizens and their associations closer to European laws and policies. In order to achieve such objective, there is a range of actions under way or under discussion at EU level and in the OECD forum¹²³, which go beyond the area directly dealt with in the Green Paper. In particular, the Commission has recently commissioned a study in order to analyse and evaluate the means of consumer redress, other than redress through ordinary judicial proceedings, available in the EU Member States, as well as in other jurisdictions, for both national and cross-border disputes. The scope of the analysis will encompass small claims procedures and means of collective redress, such as representative actions, collective actions and class actions. The study will cover all alternative means of redress available in business-to-consumers disputes, thus including competition cases, which

¹²¹ See AG Jacobs in his opinion in case C-195/98 *Österreichischer Gewerkschaftsbund v Austria* [2000] ECR I-10497, para 47: “*Collective rights of action are an equally common feature of modern judicial systems. They are mostly encountered in areas such as consumer protection, labour law, unfair competition law or protection of the environment. The law grants associations or other representative bodies the right to bring cases either in the interest of persons which they represent or in the public interest. This furthers private enforcement of rules adopted in the public interest and supports individual complainants who are often badly equipped to face well organised and financially stronger opponents.*”

¹²² A collective action differs from an opt-out class action, where an individual can bring an action on behalf of an unidentified class of persons. An injured party is thus assumed to be included in the class unless he chooses not to be, which may result in the certification of very large classes. It also differs from a joint action, where the claimants or the judge join individual claims because of some link between them (e.g. same defendant or damages resulting from same facts). The joining of claims is procedural and at the end, although a single judgment may be made covering the cases of all claimants, awards will be made individually to the different claimants.

¹²³ See the OECD background report for the workshop on consumer dispute resolution and redress in the global market place, at <http://www.oecd.org/dataoecd/59/21/34699496.pdf>.

will therefore be considered by the study in the wider context of consumer redress mechanisms. The results of that study will become available in 2006. The Commission will take due account of the results and decide which actions need to be taken in order to improve the effectiveness of consumer redress.

B. COLLECTIVE AND REPRESENTATIVE ACTIONS FOR ANTITRUST DAMAGES CASES IN THE MEMBER STATES

195. In some Member States, consumer and other representative organisations already have successful experience of litigation in areas other than competition law, although in several cases such possibility is limited to seeking injunctive relief, with no award of damages.¹²⁴ It is understood that in some countries collective or representative actions have been brought before the national courts, principally in financial services (for example cases relating to banking and credit cards). Often the specific plea appears to be for unfair contractual terms. It is understood that these actions do not have a sector-specific legal basis but are brought under general standing provisions of national law. Indeed, in many Member States, general procedural laws grant standing for representative bodies to bring actions on behalf of diffuse interests, often where some specific conditions are met.
196. One of the most elaborated national legislation in this respect is the 2002 Swedish Group Proceedings Act, which provides for actions to be brought by the representative of a group.¹²⁵ A group action may be instituted as a private group action, an organisation action or a public group action. A private group action may be instituted by a natural or legal person who himself has a claim that is subject to the action. An organisation action may be instituted by a non-profit association that protects consumer or wage-earner interests in disputes between consumers and a business operator. Finally, a public group action may be instituted by an authority that is suitable to represent the members of the group and that has been allowed by the government to institute such actions.¹²⁶ For a group action to be permitted the circumstances on which the action is founded must be common or similar to the entire group. Also, it must be clear that the larger part of the claims cannot equally well be pursued by individual actions by the members of the group. Group actions are opt-in, which means that a claimant must choose to be included as a member of the group. Only such members who have given a written notice to the court to opt-in can participate in the proceedings as passive members and are then bound by a final decision of the court. The passive group members have as a general rule no

¹²⁴ Many of these provisions have a Community law origin, since they are adopted in implementation of European Directives in the field of consumer injunctions and unfair contract terms (e.g. Directive 93/13 on unfair terms in consumer contracts, OJ 1993 L 95/29 and Directive 98/27 on injunctions for the protection of consumers' interests, OJ 1989 L 166/51), protection of the environment (e.g. Directive 2003/35 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ 2003 L 156/17) and protection of intellectual property rights (e.g. Directive on the enforcement of intellectual property rights, as note 26 above).

¹²⁵ The Swedish Group Proceedings Act (2002:599) is available at <http://www.sweden.gov.se/content/1/c6/02/77/67/bcbe1f4f.pdf>.

¹²⁶ In Germany, Section 34 GWB allows the German competition authority (Bundeskartellamt) to order an undertaking that infringed the competition rules to pay an amount which corresponds with the profits made as a result of the antitrust infringement.

obligation to pay any legal cost to a successful defendant. In relation to the representative claimant, the normal rule under Swedish procedural law applies that the loser has to pay the winning party's cost.

197. So far, only one Member State has specific legislation allowing for collective or representative actions for damages in case of breach of the competition rules.¹²⁷ In the UK, consumer associations specified by the Secretary of State can bring actions for damages on behalf of two or more individual consumers before the CAT.¹²⁸ Such claims can only be brought on the back of an infringement decision made by a public authority (either the OFT or the European Commission).

C. POLICY OPTIONS

Option 25: A cause of action for consumer associations

198. It remains to be seen to what extent existing simplified judicial procedures already available at national level – eventually in combination with the European Small Claims Procedure proposed by the Commission – can adequately tackle the obstacles that hinder access to justice in competition cases. It appears that there is scope to introduce additional means of collective consumer redress, such as a collective or representative action by consumer associations or other qualified entities. Consumer association actions are not unfamiliar to Community and Member State law, although they are often confined to injunctive relief, without any award of damages. It should be considered whether to make provision for a collective or representative action by reference to competition law, i.e. an entity representing the interests of consumers in competition cases. A specific legal basis for actions to be brought by consumer associations or other qualified entities in the competition field would have the advantage of greater clarity, as well as possibly defining the relationship of such actions to other issues such as the standing of direct or indirect purchasers.
199. Further thought would need to be given to issues such as standing (a possible registration or authorisation system or the use of a legal standing test directly applicable by the court), the distribution of damages (whether damages go to the association itself or to its members), and the quantification of damages (damages awarded to the association could be calculated on basis of the unlawful gain of the defendant, whereas damages awarded to the members are calculated on basis of the individual damage suffered).
200. Any provision of specific forms of collective organisation of claims for antitrust litigation will need to be carefully co-ordinated with other initiatives undertaken by the European institutions as well as the Member States, aimed at improving consumers' access to justice. Enforcement of consumer rights in competition cases must be appropriately set in the wider context of consumer redress mechanisms. The Commission is following closely the developments in this field to decide what sort of

¹²⁷ In France, a working group set up by President Chirac and composed of representatives of consumers, industry and government, is about to deliver its final report on the introduction in France of collective actions in the field of consumer law. The report may advise to extend the possibility of collective actions to the field of competition law.

¹²⁸ Section 47B of the Competition Act 1998, as inserted by section 19 of the Enterprise Act 2002.

EU-level action might in future be considered in order to ensure the consistency and effectiveness of the regulatory framework.

Option 26: Some provision for collective action for groups of purchasers other than final consumers

201. Arguably, existing procedures for consolidation and joining of claims protect to some extent the interests of claimant groups other than final consumers. However, it is conceivable that some other form of opt-in group action may be desirable for the protection of groups of litigants other than final consumers. Such litigants, for example at the retail stage in the production or distribution chain, may be otherwise unaware of their claim and require organisation into a group to make the cost/benefit analysis as to the prospects of litigation more attractive.

SECTION VII: COSTS OF ACTIONS

A. INTRODUCTION

202. The bringing of an action for damages entails costs. Economically speaking, these costs represent different expenditures necessary for the work of the people involved in bringing the action as well as other material costs. Although all civil actions have a cost, competition-related damage claims may be particularly costly as they are generally more complex and thus more time-consuming than other kinds of civil action.
203. The Study has identified cost exposure as one possible obstacle for damages actions.¹²⁹ The Study distinguishes two kinds of risks associated with costs rules:
- The obligation for a claimant to pay certain fees upfront might make it difficult as such to bring an action if these fees are high. Although normally the fees can be recovered from the losing party, it might be difficult for a claimant to put up the required sum of money with the hope of getting it back at the end of a – possibly long – trial.
 - The application of the “loser pays” principle has ambiguous consequences for the likelihood of a (possible) claimant to bring an action: on the one hand the principle will allow him to recover his own costs from the defendant if he wins his action. On the other hand, he might face paying his own expenses as well as those of the defendant if he loses his case. As mentioned above, the application of the principle is especially problematic in unclear cases and might serve in such a situation as a disincentive for bringing an action.
204. All the relevant jurisdictions have rules governing the allocation of costs in civil proceedings. These rules provide that the costs associated with a civil action shall be borne by one of the parties. Most of the time (as will be shown in greater detail below) these rules start from the assumption that costs should be borne by the unsuccessful litigant. It should be stressed however, that there is a difference between those legal rules regarding cost recovery and the real costs of an action: most of the recovery rules for example limit, to some degree, the amount of fees which can be recovered for the work of a lawyer or of an expert witness.

B. THE OBLIGATION OF THE MEMBER STATES TO PROVIDE FOR EFFICIENT COST RULES GUARANTEEING ACCESS TO COURTS

205. According to Article 6 of the European Convention on Human Rights (“Convention”), everyone is entitled to a fair hearing by a tribunal in the determination of his civil rights and obligations. This principle is applicable to actions for damage claims in competition-related cases as these concern civil obligations of the parties. According to settled case law of the European Court of Human Rights (“ECHR”), the right of access guaranteed by Article 6 of the

¹²⁹ Comparative Report, page 116.

Convention is not an absolute one. The contracting parties to the Convention have the right to formulate rules of access to civil tribunals if these rules serve a legitimate interest and are proportional to the attainment of that interest. The ECHR has ruled on the question of cost recovery in this regard.

206. In its 2001 decision in the case *Kreuz v Poland*, the ECHR considered whether the collection of court fees was contrary to the Convention.¹³⁰ The Court declared that the collection of court fees as such was not contrary to Article 6 of the Convention as such a requirement was justified by a legitimate aim, was proportionate and did not infringe the “essence” of the right conferred by Article 6. However, the Court found that the amount of court fees demanded was excessive and violated Article 6. The national court had demanded court fees of PLN 100,000,000 – an amount equal to the average annual income in Poland at that time. The Polish court had refused to modify this sum, stating that as a businessman the claimant was in a position to provide this sum. The European Court of Human Rights found that this infringed Article 6 of the Convention, as the national court had based its decision on guesswork as to the financial situation of the claimant and had not tried to establish clearly whether he was indeed – as he himself had claimed – unable to provide the court fees demanded. What is interesting about the decision of the ECHR is that it refers strictly to the claimant's financial situation – it is with reference to that situation that the question should be answered whether the court fees demanded are excessive. The European Court of Human Rights adopts a subjective understanding of the issue, in which costs exposure for access to tribunals is seen as a – possibly legitimate – limitation or condition of that right of access.
207. Similarly, the ECHR has ruled that Article 6 of the Convention guarantees, in certain circumstances a right to legal aid. In its 2005 decision in the case of *Steel and Morris v United Kingdom*, the ECHR considered that there was no absolute right to legal aid in all proceedings and that it was not incumbent on the state to guarantee a total equality of arms between the parties.¹³¹ The Court found, however, that the circumstances in that particular case, which involved a libel action brought by the McDonald's company against two litigants of moderate income, commanded that these defendants be given legal aid by the United Kingdom in order to ensure the possibility of an effective defence. The Court based its decision specifically on the drastic difference in resources between claimant and defendants and the consequences of this difference for the effective possibility of the defendants to deal with the claim brought against them. Transposed to the field of competition law, this case might well indicate that there is an obligation to grant legal aid in those circumstances in which such a profound difference in resources exists.¹³²
208. The Community courts have developed a case-law on liability for infringement of Community rights. The decision in *Courage* is just one of those cases. The general principles of these cases are similar: Community law provides for a right and in the absence of EC law on the matter, it is for the legal system of the Member States to provide the “procedural modalities” for the bringing of the corresponding action.

¹³⁰ ECHR, *Kreuz v Poland*, (Application No. 28249/95), judgment of 19 June 2001.

¹³¹ ECHR, *Steel and Morris v United Kingdom*, (Application No. 68416/01), judgment of 15 February 2005.

¹³² See also in a similar context Directive 2003/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 26/41.

These legal rules of the Member States in this respect are subject, on the one hand, to the principle of equivalency (rules with regard to EC law may not be more stringent than those for violations of national law) and to the principle of effectiveness (a certain minimum effectiveness of the remedy under national law and its procedural regulations must be guaranteed).

209. In its 2001 decision *Clean Car Autoservice v Stadt Wien & Republik Österreich*, the ECJ applied these principles to the question of cost recovery.¹³³ The original dispute concerned an infringement by Austria of the freedom of movement guaranteed under EC law. The Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*) had referred the case to the ECJ under Article 234 EC and the ECJ had passed judgment on that application.¹³⁴ In accordance with its rules of procedure the ECJ had determined that the question of cost recovery was for the national court to decide. Charged with making this decision, the Austrian court had referred the question to the ECJ for a preliminary ruling.
210. While the ECJ did not find an infringement of the principle of effectiveness in this particular case, it made it clear that the principle was applicable with regard to costs recovery. As damages claims are a right conferred by Community law, the cost rules governing those actions must conform to the principle of effectiveness, e.g. they must not render impossible or excessively difficult the bringing of such a claim. As far as can be ascertained, there has been no case as of yet in which a cost rule from one of the Member States was found to have infringed the above-mentioned principle of effectiveness. It should, however, be stressed that the application of that principle to the kind of cases here considered means that – under applicable Community law – the Member States are under a legal obligation to design their cost rules in such a way that actions for damage claims can “effectively” be brought before the competent national courts.

C. COST RULES OF THE COMMUNITY COURTS

211. The Community courts themselves have rules regarding costs recovery in proceedings brought before them. The main principles of these rules are as follows:
- In general, there are no court fees to be paid for proceedings before either the ECJ or the CFI.¹³⁵ There is only an exception for vexatious actions.
 - Recoverable costs include lawyer’s fees or the expenses of other agents or advisers (with the exception of Commission staff) as well as expenses incurred by witnesses. Costs for certain technical tasks performed by the Courts (such as authenticated copies of decisions, etc...) may also be recovered.
 - The Courts rule on cost recovery in their final decision. An exception to this is cost recovery in proceedings for a preliminary ruling, in which the ECJ leaves the

¹³³ Case C-472/99 *Clean Car Autoservice v Stadt Wien and Republik Österreich* [2001] ECR I-9687.

¹³⁴ Case C-350/96 *Clean Car Autoservice v Landeshauptmann von Wien* [1998] ECR I-2521.

¹³⁵ Rules of Procedure of the Court of Justice, Art. 72; Rules of Procedure of the Court of First Instance, Art. 90.

question of cost recovery to the court of the Member State who has referred the question to the ECJ.

- An order for cost recovery is only made on application by a party. If no such application is made, each party will bear its own costs.
- In general, the Court will order the unsuccessful party to bear the costs of the action. There are some exceptions to this rule (especially for vexatious actions).
- There is no official tariff for the individual items recoverable under such a ruling. The Courts will consider the complexity of the case and its economic importance in fixing the recoverable lawyer's fees. An example of how the Court decides the recoverability of certain items is provided in the *Airtours* decision, in which the Court discussed in depth whether the costs claimed were indeed necessary with regard to the general importance of the case and its economic value.¹³⁶ Regardless of the complexity of the case, however, the Court will generally only regard as recoverable the fees of one single lawyer per party.

D. COST RULES OF THE COURTS OF THE MEMBER STATES

212. The legal rules regarding costs recovery in the Member States are of great complexity and differ considerably in their detail. Some common themes emerge from a comparison of these rules:

- All Member States charge court fees which in most cases are paid upfront by the claimant.
- All Member States follow the rule that the unsuccessful litigant has to bear the costs of the civil action. In cases of partial success, the costs are either divided between the parties or – in some instances – borne by one party alone. Some Member States make an exception from the “loser pays” principle in cases where the legal (or factual) assessment of the dispute was difficult.
- The amount of recoverable fees both for lawyers as well as for experts and other witnesses is often limited by statutory fee schemes.
- Both the court fees and the fees for lawyers and witnesses are generally calculated with reference to the economic value of the case. A high-value case may therefore lead to high court fees (to be paid upfront in most cases) as well as to the possibility of exposure to substantial fees for lawyers, to be borne (in most cases for both sides) by the unsuccessful litigant.
- In most Member States some form of legal aid insurance exists. Only in three Member States does such insurance not exist at all, or does not cover cases of antitrust law (namely Cyprus, Germany and Malta).

213. Particularly interesting in this respect is the evolution in some Member States of the “loser pays” principle. As mentioned above, this principle is applied in one form or

¹³⁶ Case T-342/99 DEP *Airtours v Commission*, order of 28 June 2004, not published.

the other in all Member States. In some Member States, cost rules for some procedure foresee that the unsuccessful claimant will be ordered to pay costs only if his action was unreasonable. Such a rule is particularly useful in cases where the outcome of litigation cannot be easily assessed. In such cases, the “reasonableness” rule might act to lessen the risk of litigation for claimants. In a similar fashion, Article 14 of the draft Regulation establishing a European Small Claims Procedure, states that the unsuccessful party shall bear the cost of the proceedings, except where this would be unfair or unreasonable, thus limiting cost recovery to the notion of reasonableness.¹³⁷

E. COST RULES AS INCENTIVES FOR BRINGING AN ACTION

214. Cost rules play an important role in being an incentive – or disincentive – for bringing an action. While it is clear that the single most important issue in deciding whether to bring an action is the likelihood of winning, rules on cost recovery can either give special incentives for going to court, or can act as a restraining influence.
215. As mentioned above, the most commonly applied rule for cost recovery is the “loser pays” principle. The application of this principle will neither act as an incentive nor as a disincentive in those cases in which the claimant can be reasonably sure about winning his case and in which the exact rules on cost recovery will allow the successful claimant to recover the entirety (or a very large part) of his actual costs.
216. The application of the “loser pays” principle will, however, be problematic in those cases in which very small amounts of damages are being claimed. In such a situation the actual cost of the action might be disproportionate, even with regard to recoverability under cost rules. This is especially true in those Member States in which recoverable lawyer’s fees are defined by reference to the value of the claim. The introduction of collective proceedings can be helpful in making these actions worthwhile by bundling small damage claims together.¹³⁸
217. The application of the “loser pays” principle will also be problematic in those cases in which the outcome of the case cannot be assessed upfront. In such a situation, it will be very difficult for a possible claimant to know whether he will be in a position to pay all the costs or in a position to recover his own costs. Although this is probably true for a number of areas of the law, the dilemma is likely to be particularly acute for damage claims in competition-related cases: these often will depend on complex factual (as well as possibly legal) assessments and may therefore “go either way”. In terms of cost recovery this will put the risk associated with this uncertainty on the claimant, as it is he who will have to begin the action. Some of the Member States allow exceptions from the “loser pays” principle in cases in which the claim under review is difficult or particularly complex. But the majority of Member States applying this principle do not allow for such a distinction and will order the losing side to pay costs even if the outcome of the trial was difficult to assess at its beginning. As mentioned above, a cost rule stating that the unsuccessful claimant

¹³⁷ Proposal for a Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure, COM(2005) 87 final.

¹³⁸ On collective actions, see Section VI.

shall only bear the costs if he acted unreasonably by bringing the action can arguably play a role in addressing those situations.

218. Some jurisdictions provide further incentives for bringing an action of damages. Specific cost rules can also serve to provide an incentive. For example, contingency fees are a strong incentive because the financial risk for bringing the action is borne not by the claimant but by private attorneys. The experience of US law suggests that the existence of contingency fees is a factor in the emergence of a claimant bar strongly associated with bringing actions for damages. It must be underlined, however, that contingency fees are not allowed in some Member States and are regulated in others.

F. POLICY OPTIONS

219. As shown above, Community law as well as the European Convention on Human Rights demand of the Member States that they regulate costs recovery in such a way that access to courts in civil matters is not unduly restricted and that effective remedies exist for violations of rights derived from Community law. The rules which exist in the Member States differ considerably. Beyond the formal content of the rules, there are appreciable differences in the economic impact of these cost rules. In some Member States, for example, court fees are hardly important, whereas in others they might be calculated as a percentage of the claim brought and this may result, where no cap exists, in high amounts of court fees, usually to be paid upfront.

Option 27: Limitation of cost exposure of the claimant

220. In order to prevent the disincentive effect of the “loser pays” principle in those cases in which the outcome can not be clearly assessed at the outset of the action, one could make cost recovery dependent always on a court order and give the court the power to grant a protection from costs recovery even if the claimant fails to win the case on the merits. Such “cost protection order” could be given at the outset of the action. The risk of facing cost recovery from the defendant could therefore be limited in those cases by a grant from the court at the beginning of an action of an order ensuring that no cost exposure will take place. Such an order could also be used to protect economically weak parties from cost exposure, thereby strengthening their right of access to a court for their damages claims. A similar idea would consist in adopting the rule that costs will only be ordered against a claimant who acted manifestly unreasonable by bringing the action. Such a rule would work to protect claimants while at the same time working as a mechanism against unmeritorious litigation.

SECTION VIII: COORDINATION OF PUBLIC AND PRIVATE ENFORCEMENT

A. INTRODUCTION

221. Competition law is enforced both by way of public enforcement as well as by way of private enforcement. A strengthening of damages actions for infringement of competition law does not in any way signify less public enforcement by competition authorities. It is, however, necessary to examine the coordination of public and private enforcement procedures. In Section II of this paper, the importance of infringement decisions by competition authorities was examined and an option was put forward concerning the role to be played by the decisions of NCAs (see Option 8 above). Furthermore, the coordination of public and private enforcement decisions plays an important role in determining the adequate regime of limitation/prescription for civil claims (see below in Section IX). Of particular importance for the coordination of public and private enforcement is the existence of leniency programs operated by competition authorities.
222. One of the key aspects of public enforcement of competition law is the existence of leniency programs. The common characteristic of leniency programs is the fact that an undertaking is granted either immunity from fines or a reduction of a fine if that undertaking has disclosed significant information about a secret cartel to the competition authorities. The granting of immunity or a reduction of the fine depends both on the quality of the information disclosed and on the timing of the submission of the information.

B. LENIENCY AND CIVIL ACTIONS AS PART OF AN OPTIMUM DETERRENCE OF INFRINGEMENTS

223. Both leniency programs and civil actions for damages are part of the general fabric of competition law enforcement. Damages claims and fines imposed by competition authorities are the consequences of an infringement of EC antitrust rules. In some Member States, the infringement of competition law can also lead to criminal sanctions against those involved in anti-competitive behaviour. The primary purpose of these remedies lies in the prevention of cartels being entered into in the first place. Undertakings understand that anti-competitive agreements are illegal under EC and national competition law and that infringement of these rules carries great risks both in terms of fines and in terms of civil liability, with criminal sanctions (where applicable) serving to strengthen the effect of these remedies. By making the discovery of secret cartels likely, the leniency program is part of this system of deterrence. The likelihood of being found out because of leniency applications and the strength of both public enforcement (fines, criminal sanctions) and private enforcement (civil liability through damage claims) will serve to deter undertakings from entering into anti-competitive agreements, thus driving the number of cartels down. Fewer cartels mean fewer losses suffered by the victims of anti-competitive agreements. A strengthening of private enforcement thus serves to strengthen the deterrence system as such.

C. RELATIONSHIP BETWEEN LENIENCY PROGRAMS AND DAMAGE CLAIMS

224. In its notice on leniency the Commission specifically states:

*“The fact that immunity or reduction of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.”*¹³⁹

225. The benefit which an undertaking receives from the operation of the leniency program is therefore limited to those remedies which the Commission itself administers and does not have an influence on the civil liability towards other undertakings or persons.

226. It is, however, important to underline that unlike in the US system, it is not part of the conditions for a valid leniency application under current EC law that the applicant undertakes to indemnify those who have suffered a loss as a result of anti-competitive practices. An undertaking which fulfils the conditions set out in the Leniency notice will be granted immunity/reduction of the fine; indemnification of losses suffered by third parties is not part of those conditions. Similarly, national leniency programs do not typically contain an obligation to indemnify those who have suffered losses nor do they alter the conditions for damages claims under civil law.

227. It is possible that the very existence of leniency programs will make damage claims more frequent. Some of the ongoing antitrust damages litigation stems from cartel procedures which were started or aided by leniency applications. It must be underlined that any such increase only concerns cases of follow-on actions and only such cases for which leniency programs exist. Vertical arrangements or Article 82 cases for example may not be covered by the leniency programs.

228. The use made by competition authorities of the information supplied by the leniency applicant in motivating their decision can lead to (at least partial) disclosure of that information. Competition authorities have to give the factual background of their decisions. The Commission may use the information supplied under the leniency program to motivate its decisions. The information contained in the decision will allow the claimant to offer a detailed account of the infringing acts by the defendant. It will be effectively impossible for a cartel member to defend himself on the grounds that there has been no infringement. The Commission decision may also offer the claimant a factual starting point for the quantification of damages.

229. The leniency applicant is like the other cartel members subject to a decision by the Commission finding that the applicant has infringed EC antitrust rules. If not appealed successfully to the Community courts, such a decision by the Commission will have a legally binding effect on the courts of the Member States deciding on the same infringement as part of a decision on a damages claim (Art. 16 of Regulation 1/2003).

¹³⁹ Commission notice on immunity from fines and reduction of fines in cartel cases (“Leniency notice”), OJ 2002 C 45/3, para 31.

230. Another possible influence of the leniency program on damages claims is the use of documents prepared for the leniency application as evidence in civil trials. The actual confession made by the applicant undertaking must be distinguished in this respect from pre-existing documents submitted by the applicant together with that confession. As part of its leniency program, the Commission accepts oral corporate statements. In case such an oral statement has been given by the undertaking, the leniency applicant will not have in his own files a copy of his corporate statement. In those cases, however, in which the leniency applicant has made a written statement and has kept a copy of the application, it depends on the applicable national law whether he has to turn over these documents to a claimant.
231. It has been argued that the prospect of damages claims could constitute a disincentive for leniency applicants and thus exercise a negative effect on public enforcement in the field of cartel fighting. Some effect is certainly not to be excluded. However, the existence of a negative effect is by no means certain given the fact that a cartel member is already today exposed to civil claims and does not want to forgo his chance to at least reduce his liability of fines in favour of some other cartel member who may at any time choose to apply for leniency in which case the potential applicant would be exposed to both fines and civil damages. However, any measure which optimises the combined deterrent effect of leniency programs and private enforcement should be considered.

D. POLICY OPTIONS

232. The consideration of these diverse influences between the operation of leniency programs and damages claims leads to several policy options. These options are designed to ensure that leniency programs and the rules on damages claims are coordinated in such a way that the underlying aims are optimally achieved. As mentioned above, civil liability and leniency programs pursue a common goal.

Option 28: Exclusion of discoverability of the leniency application

233. As mentioned above, it is unclear whether the leniency application is discoverable in those Member States which have disclosure rules. If the threat of discoverability of the confession submitted by the applicant to a competition authority is considerable, a possible change would be to specifically exclude the discoverability of such an application. Such an exception on discoverability would certainly have to cover the actual corporate statement (“the confession”). It must be underlined that such an exception will only be important in those cases in which a written statement has been given and the leniency applicant has kept a copy of his statement.
234. A shield against disclosure of pre-existing documents submitted by the leniency applicant together with his statement would not be justified as this would allow the applicant to use the leniency program in order to prevent the disclosure of these documents. Thus, the operation of the leniency program would substantially enhance the position of the applying undertaking with regard to the operation of disclosure rules under national procedural law. It is, however, arguable that the operation of the leniency program on the contrary should not worsen that position either. Rather, the operation of the leniency program should be neutral with regards to the obligations of the leniency applicant under applicable national disclosure rules. It might therefore be necessary to exclude not only the actual corporate statement but also to disallow

that a claimant seeks through disclosure the documents in the form submitted by the leniency applicant to a competition authority. Although these documents might still be discoverable under other (more general) grounds, it might be particularly harmful to the leniency applicant if his choice of documents, as submitted with regard to their use in the leniency program, were to become known to the claimants of a damages action.

Option 29: Rebate on damages claim

235. One option would be to grant the successful leniency applicant the option to claim a rebate on any damages claim facing him in return for helping claimants bring damages claims against all cartel members. The claims against the other infringers, who are jointly and severally liable for the entire damage, remain unchanged. Someone who has been granted leniency from fines could for example, in return for helping claimants with evidence, receive a rebate of 50 % on any damages claim in a follow-on action. If there was a system of double damages for horizontal cartels, this rebate would de-double the award for the leniency applicant, thus restoring single damages as the content of the claim which he faces.¹⁴⁰

Option 30: Removal of joint liability for the leniency applicant

236. Damages claims are tort claims and under general rules of civil liability undertakings which are parties to anti-competitive agreements will be liable for the whole of the damage caused by these agreements. The tortfeasors will be jointly and severally liable for the damage caused by their actions. A possible policy solution would be to limit the liability of the leniency applicant to the share of the damage corresponding to his share in the cartelized market.

¹⁴⁰ On doubling of damages, see above at Section IV.

SECTION IX – JURISDICTION AND APPLICABLE LAW

A. JURISDICTION AND CONSOLIDATION OF CLAIMS

237. Jurisdiction of courts to hear cases brought against defendants domiciled in Member States is governed by Community law.¹⁴¹ Under Regulation 44/2001, persons domiciled in a Member State may be sued in that State, irrespective of their nationality.¹⁴² It is the choice of the claimant to seek to found jurisdiction in the alternative on the basis of Article 5(3). Under Article 5(3), every person domiciled in a Member State may be sued in the courts of the place where the harmful event occurred or may occur. The place where the harmful event occurred can be either (a) the place where the event giving rise to the damage occurred or (b) the place where the damage itself occurred (at the choice of the claimant).¹⁴³
238. Under Article 6(1) of Regulation 44/2001, a person domiciled in a Member State may also be sued where he is one of a number of co-defendants, in the courts of the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments arising from separate proceedings. Article 6(1) only refers to the jurisdiction under Article 2, the jurisdiction defined by domicile.
239. The claimant in competition-related litigation has thus a wide variety of jurisdictions from which to choose when deciding where to launch his action. It is, however, important to stress that the case-law of the ECJ on the interpretation of Regulation 44/2001 (and, where appropriate, on the Brussels Convention, its predecessor) has a significant influence on the parameters of that choice. For instance, in its 1995 decision in the *Shevill* case the ECJ declared that the jurisdiction of the courts where the damage occurred under Article 5(3) was limited to those damages which occurred in the Member State thus designated.¹⁴⁴ Although this judgment was given in the context of a press tort, it is generally accepted that it applies in other tort cases as well and would therefore be authoritative in competition cases as well.
240. Regulation 44/2001 also governs the coordination of existing and separate claims filed before the courts of different Member States (*lis pendens*). Under Article 27, if proceedings concerning the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized must of its own motion stay its proceedings until the jurisdiction of the court first seized is determined. If the jurisdiction of the court first seized is established, any other court must decline jurisdiction in favour of that court. Under Article 28, where “*related actions*” are pending in the courts of more than one Member State,

¹⁴¹ For Denmark, jurisdiction is governed by the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1990 C 189/2), as amended, which is substantially similar to Regulation 44/2001.

¹⁴² Article 2(1) Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1. Under Article 15 et seq. of Regulation 44/2001, there are special rules on jurisdiction for actions based on a contract concluded by a consumer.

¹⁴³ Case 21/76 *Handelskwekerij G. J. Bier v Mines de Potasse d’Alsace* [1976] ECR 1735; case C-68/93 *Fiona Shevill and others v Presse Alliance* [1995] ECR I-415 at para 20.

¹⁴⁴ See *Shevill*, as note 143 above.

the court seized later may stay proceedings and may further, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction and is able under its own law to consolidate the claims. Actions are deemed to be related where they are “*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*”. While Article 28 thus allows consolidating closely connected actions which have been filed in different courts, it does not grant in itself a jurisdictional basis for a genuine consolidation of claims. It works as an exception from jurisdiction rather than as a positive ground for the assumption of jurisdiction.

B. APPLICABLE LAW

1. Introduction

241. For every damages action based on a violation of competition law it is fundamental to know which substantive law will be applied to the case. Insofar as trade between Member States may be affected by the practice in question, Articles 81 and 82 EC will apply. In the absence of Community legislation, the detailed conditions for a damage claim (such as the definition and quantification of damages, the availability of the passing-on defence, etc.) will be governed by national law. It should also be noted that Article 3(2) of Regulation 1/2003 allows Member States to enforce rules on unilateral conduct which are stricter than Article 82 EC even where that Article is applicable. Clear and unambiguous rules on applicable law would help to facilitate damages actions for breach of EC antitrust rules. Given the factual background of many cartels, there is a special risk that in a subsequent civil action the laws of several states could be applicable to the claim. This would make litigation extremely complicated and should be avoided.

2. Factors determining the applicable law

The Rome II project

242. In order to determine the right approach to take, it is essential to look at the approximation proposals by the Commission in the field of civil and commercial matters. The Commission has proposed a Regulation on the law applicable to non-contractual obligations, the so-called “Rome II” Regulation.¹⁴⁵ The applicable law in contractual disputes is determined with reference to the Rome Convention on the law applicable to contractual disputes.¹⁴⁶ As damage claims are generally tort claims, the Rome II project is of greater importance in this field.

243. The draft Rome II Regulation, according to Article 1, shall apply in situations involving a conflict of laws to non-contractual obligations in civil and commercial matters. Given that a universal application is foreseen in Article 2, any law specified by the Regulation shall be applied whether or not it is the law of a Member State. According to the non exhaustive list of Article 13, the scope of applicable law shall

¹⁴⁵ As note 15 above.

¹⁴⁶ 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), OJ 1998 C 27/34. The Commission intends bringing a proposal to replace the Convention with a Regulation.

govern: the conditions and extent of liability; the grounds for exemption from liability; the existence, the nature and the assessment of damages or the redress sought; whether a right to claim damage may be transferred; persons entitled to compensation for damage sustained personally; the liability for the acts of another person; the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period. Procedural aspects remain covered by the law of the forum.

244. Most damages claims based on breaches of competition rules are tort claims. The general rule applicable to torts is set out in Article 5 of the proposal:

Article 5 – General rule

1. *Where no choice has been made under Article 4, the law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.*
2. *However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country.*
3. *Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the non-contractual obligation in question. For the purpose of assessing the existence of a manifestly closer connection with another country, account shall be taken inter alia of the expectations of the parties regarding the applicable law.*

245. In cases arising out of a practice restricting free competition, it is unclear whether Article 5 meets the specific needs of EC competition law. Several interpretations of the general rule are possible in cases involving a damage claim for breach of competition law. One interpretation would construe the place where the damage occurs to be the territory where the anti-competitive behaviour has its effects on competition. It could, however, also be argued that the application of Article 5(1) in these cases will connect the claim not to the market effects of the illicit practice but to the - often coincidental - place of financial loss. If damage is sustained in several countries and/or there are multiple claimants from different countries, the laws of all the countries concerned would have to be applied. This has the consequence that in cases involving pan-European or global cartels the optimal scenario of having one applicable law would not be reached. Furthermore, the application of Article 5(2) is not appropriate for cases involving an infringement of competition; the underlying rationale that the law of the common domicile of tortfeasor and victim is best placed

to determine the regulation of the recovery of losses between them does not fit the public policy nature of competition law.

246. In Article 7 of the Commission's proposal, it is clarified what the general rule of Article 5 means in cases arising out of an act of unfair business practice. In such a case the place where the damage occurs shall be the territory where the competitive relationship is directly and substantially affected. Accordingly, the laws of the state where that territory lies, shall govern the claim. It appears that this provision is applicable only to laws concerning unfair business practice, thus not covering claims based on an infringement of Articles 81 and 82 EC (or similar provisions in national competition law). Furthermore, the application of the rule to antitrust litigation would pose problems because it cannot be said in an action by a purchaser against a seller that there exists between them a competitive relationship. Purchaser and seller are not normally competitors.

An effect-based test

247. It should therefore be considered whether a special rule for civil claims based on an infringement of competition law should be introduced. Such a rule could serve to clarify the meaning of the general rule as contained in Article 5 of the Commission's proposal for these types of claims. Such claims could be governed by the law of the state on whose market the victim was affected by the anti-competitive practice. The civil remedy (damage claim) would thus be linked to the restriction or distortion of competition. According to a comparative analysis of the Member States' private international law there is currently a broad consensus in favour of applying the law of the country in which the market is distorted by competitive acts. This result is mainly obtained by application of the *lex loci delicti* principle. But there is, however, a situation of uncertainty, especially in countries where the courts have not had an opportunity to rule on how the *lex loci delicti* rule should operate in practice. The effects in question would have to be the effects on competition as such, not the financial loss caused to certain undertakings.
248. The application of such an effects-based test would lead to the application of one single law in those cases in which the market affected is either national or sub-national. If, however, the affected market is bigger than one single state or where there are several national markets, special problems arise with the proposed rule as in such a case the laws of a number of different states could be applicable to a claim. The recovery of each loss would be governed by the law specifically applicable to it. This could render litigation very complex.

The application of *lex fori*

249. An alternative solution would be to stipulate that the applicable law shall always be the law of the forum called upon to adjudicate the dispute. As explained above, jurisdiction is regulated by Regulation 44/2001 within the European Union. The coherence of substantive EC antitrust rules could justify that a court of a Member State should always apply its own substantive law to civil disputes concerning competition cases. Such a policy would greatly simplify the bringing of damage claims for infringement of competition law. It would, however, lead to the result that the applicable substantive law is not the same depending on which court has jurisdiction over the matter. This might be an incentive for forum shopping.

Choice of the claimant

250. As mentioned above, there are specific difficulties with an effects-based approach in cases in which the jurisdiction of the court allows the court to rule on the entirety of the loss suffered and those cases in which the markets affected are situated in more than in one state.¹⁴⁷ In such a case, the laws of several states could become applicable, as the recovery of each loss would be covered by the law specifically applicable to it. It could be considered whether in such a situation it might be justified to let the claimant choose a single applicable law from among a number of different laws. This choice could be limited to choose one single applicable law from those laws designated by the application of the principle of affected market. The choice could also be widened so as to allow for the choice of one single law, *or* of the law applicable to each loss separately *or* of the law of the forum.

C. POLICY OPTIONS

Option 31: The applicable law shall be determined by the general rule as expressed in Article 5 of the proposed Rome II Regulation

251. The proposed Rome II Regulation contains in its Article 5 a general rule for the determination of the law applicable to torts. This rule has as its starting point the law of the state where the damage occurs. The application of this rule in cases of damage claims for infringement of competition law is unclear.

Option 32: There could be a specific rule for damage claims based on an infringement of competition law. That rule could clarify that the law of the state where the damage occurs shall be, in the case of such claims, any of the laws of the states on whose market the victim is affected by the anti-competitive conduct on which the claim is based.

252. An effects-based test would link the civil remedy (damage claim) to the market affected by the conduct on which the remedy/claim is based. This is in line with general competition policy. It might, however, result in the laws of a number of states being applicable to the damage arising in those states (e.g. in the case of a Community-wide cartel).

Option 33: The specific rule could be that the applicable law is always the law of the forum

253. The application of the law of the forum which has jurisdiction to deal with the case would facilitate litigation. It must be carefully assessed, however, whether it could lead to arbitrary results and whether it could unduly further forum shopping.

Option 34: The specific rule could be that in those cases in which the markets of more than one state are affected, the claimant should have the choice of law.

¹⁴⁷ Where jurisdiction is based on the place where the damage occurred (Art. 5(3) of Regulation 44/2001) and where that jurisdiction is limited to the recovery of the losses which occurred in that Member State (see Shevill, as note 143 above), these difficulties do not arise and the option discussed here is not appropriate.

254. Such a rule would address the specific difficulties which the “pure” application of the law of the affected market would pose in cases in which a number of different laws would be applicable. The choice of the claimant would have to be made between any of the laws designated by the application of the principle of the affected market. Alternatively, the claimant could be given the wider choice between the three different options: a) the recovery of each loss under the law specifically applicable to it (the general rule under Article 5 of the proposed Rome II Regulation), b) any one of the laws so designated as a law applicable to the whole case or c) the law of the forum.

SECTION X: OTHER ISSUES

A. USE OF EXPERTISE IN COURT

1. Introduction

255. It has become apparent from the foregoing sections that due to their very complex nature claims for damages in the area of competition law often call for specific expertise of the court involved (e.g. proof of infringement, quantification of damages). The level of expertise of the competent courts varies considerably between Member States. The reason behind this is the different approach taken by Member States. While some countries have tried to increase the expertise by according first instance jurisdiction in damages claims to higher courts than normal or by limiting the number of competent courts to hear competition-based damages actions, other countries rely on their general rules governing all kinds of claims. Clearly the civil judges in the latter Member States are unlikely to acquire as much experience and expertise as judges in countries where some kind of centralising action has been taken. Specialist courts or specialist panels for competition cases might be useful in fostering a culture of expertise of the judges involved and could play a positive role in promoting efficient enforcement of competition law.
256. Under Article 15 of Regulation 1/2003, national courts can ask the Commission for its opinion on questions concerning the application of the Community competition rules whenever the national court is applying Article 81 or 82 EC. Paragraph 3 of Article 15 empowers NCAs to make written submissions to the court of their Member State on their own initiative and to submit oral observations with the permission of the court. The Commission is empowered to make written submissions to the court of any Member State on its own initiative and to make oral submissions with the permission of the court “*where the coherent application of Article 81 or 82 of the Treaty so requires.*” Furthermore, national courts can make a reference to the ECJ for a preliminary ruling under Article 234 EC.
257. Recourse to expert evidence in court is in some way possible in all Member States.¹⁴⁸ Nevertheless important differences persist among Member States as to the question of who can nominate an expert, who can be an expert, on which issues the expert can give evidence and the relevant evidential value of an expert report. Experts can be appointed either by the court, by a single party or by mutual agreement of the parties.
258. The value of an expert report differs in many jurisdictions depending on the author. The majority of Member States attributes a higher evidential value to a report by an official court appointed expert than to a report that derives from an expert appointed by one of the parties. This distinction may be either formally provided for or may simply reflect the reality of the judge’s assessment. It should be noted, that in

¹⁴⁸ See the Comparative Report, page 65.

Germany, expert opinions delivered in former court proceedings might be introduced into later court proceedings with the full probative value of an expert opinion.¹⁴⁹

2. Policy Option on Experts

Option 35: Use of external expertise in court

259. External expertise is necessary particularly where Member States do not provide for specialist courts or panels. This likewise increases the expertise available in court, but may also boost the costs of litigation. In most cases a higher evidential value will be attributed to a court appointed expert. Hence a provision requiring the parties to agree on an expert to be appointed by the court may increase the expertise and save costs. It would possibly facilitate actions for damages and assist judges if the nomination and use of experts by the court were possible in all legal systems.
260. It should be borne in mind that the expertise of the courts will be further increased through the training programmes for national judges in EC competition law first introduced in 2002 by the Commission.¹⁵⁰ The situation could also be further improved were the national courts to make greater use of the existing possibilities of Article 15 of Regulation 1/2003 (see paragraph 256 above).

B. IMPACT OF LIMITATION PERIODS IN THE MEMBER STATES

1. Introduction

261. Limitation periods (prescriptions) can impose significant restrictions on the recovery of damages. While time-barred claims cannot be enforced (thus leading to a denial of recovery for the victim in question), limitation periods perform an important role in providing for legal certainty by ensuring that the legal position of the parties concerned becomes irreversible at a certain point in time.
262. The Study explains that the number of competition-based damages cases which are settled out of court is very substantial in comparison to the number of cases that are actually adjudicated on in court. The power of the claimant in settlement negotiations might increase the longer the limitation period is as the claimant will feel reduced pressure to bring an action to stop the running of the limitation period.
263. Special consideration needs to be given to the relationship between limitation periods and procedures before public competition authorities. Longer time limits are favourable for follow-on claims as other parties which feel aggrieved by the impugned, anti-competitive behaviour will be more inclined to bring an action if a judgment or decision has already been rendered finding a breach of competition law. If limitation periods are too short a claim might be already statute barred once a judgment or decision is finally rendered, so that potential claimants are no longer able to bring a case.

¹⁴⁹ Article 1 No. 14 of the First act for the modernisation of Judiciary (“1. Justizmodernisierungsgesetz”) as adopted on 9 July 2004, Bundestagsdrucksache 15/3482 and the Study, the German national report, page 16.

¹⁵⁰ See e.g. call for proposals, available at:
http://europa.eu.int/comm/dgs/competition/proposals2/20040316_call/call_en.pdf.

264. Also, the obligation in some jurisdictions to present all evidence to the court when filing a claim has important consequences for the role played by limitation periods. A short limitation period together with an extensive need for collecting evidence could thus constitute a serious obstacle to the bringing of such competition-based damages cases.

2. Limitation periods in the Member States

265. There is considerable diversity between the Member States as to the rules concerning limitation periods. According to the Study, some Member States set their limitation periods irrespective of the knowledge of the claimant, i.e. the period starts running from the date on which the infringement occurred while others allow for a time limit dependent on the subjective knowledge of the potential claimant, i.e. damage was detected or ought - under usual circumstances - to have been detected. Finally, in many Member States (Belgium, the Czech Republic, Denmark, Germany, Estonia, Greece, the Netherlands, Austria, Poland, Slovakia and Slovenia) both types of time limits are applied, i.e. there is a subjectively fixed time limit starting from the subjective knowledge of the claimant but also an objectively fixed longer period after the expiration of which no action can be brought irrespective of the claimant's knowledge. The length of limitation periods in general appears to differ substantially and ranges between one and 30 years.¹⁵¹
266. The German 7th amendment to the Competition Act (*GWB*) provides in Section 33(5) for the suspension of limitation periods from the moment proceedings are instituted by any of the European competition authorities. This provision applies to investigations by any competition authority of the EU. As mentioned above, such a provision is particularly important for the coordination of private and public enforcement.
267. In Spain, the injured party has to bring a damages action before the court within one year of the date when the party discovers the damage or, according to the opinion of most academics, from the date the Competition Court gives a definitive decision on the infringement in the event that previous administrative procedure has been initiated.¹⁵² It is not entirely clear how this period is calculated in cases where a judgment is appealed. In principle it can be argued that a period of one year seems to be too short for competition law cases, on the other hand a period of one year following the last court decision seems rather fair, as a couple of years can have already passed by until the last instance decided.

3. Limitation periods in Community law

268. Under Article 25 of Regulation 1/2003, the limitation period for powers conferred to the Commission by Articles 23 and 24 are subject to a three (infringements of provisions concerning requests for information or the conduct of inspections) and respectively five year limitation period (all other infringements). According to Article 25(2) of the Regulation the clock starts on the day on which the infringement

¹⁵¹ In *Palmisani*, as note 11 above at para 29, the ECJ has held - although in the context of a limitation period for claims stemming from legislative or administrative malpractice - that a period of one year does not make it excessively difficult to start court proceedings to obtain redress for damages sustained.

¹⁵² See the Spanish national report, page 22.

is committed. However, in the case of continuing or repeated infringements, the clock starts on the day on which the infringement ceases.

269. Articles 10 and 11 of the Product Liability Directive¹⁵³ deal with limitation periods effective between private individuals:

“Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.”

The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.

Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.”

270. Article 7 of the Commission Proposal for a Directive on certain aspects of mediation in civil and commercial matters¹⁵⁴ foresees that limitation periods shall be suspended when the parties have agreed to mediation or the use of mediation has been ordered by a court or when an obligation to use mediation arises under the national laws of a Member State. This proposed rule is particularly relevant for the present issue as it too concerns the coordination between two different types of proceedings and is an example that the functioning of limitation can be made dependant on another procedure.

4. Policy option on limitation periods

Option 36: Suspension of the time period where there is a public investigation

271. Particularly in the possible absence of any form of disclosure serious thought should be given to the suggestion contained in Section 33(5) of German *GWB* as amended by the 7th Amendment. This provides for the suspension of the limitation period from the moment proceedings are instituted by either the Commission or by any of the competition authorities of the Member States. This solution has the advantage for the claimant of keeping his right to claim open until such time as proceedings have run their course thus eliminating the risk involved with failing to prove the infringement. However, although the envisaged suspension facilitates private actions, it could also make potential claimants hesitant to start actions on their own on the grounds that it is much more convenient for them to await a final decision which lowers the risk (as then the infringement itself or at least a rebuttable presumption is established) and the efforts to be taken by the claimant. Compared to the general prolongation of limitation periods a private claimant might be less inclined to put off an action since he does not know if proceedings actually will be initiated by a competition authority.

¹⁵³ As note 74 above.

¹⁵⁴ COM(2004) 718final.

272. The “Spanish” model¹⁵⁵ is a variant on this idea. A period which starts running after a court in last instance has decided on the matter of infringement could at least preserve all follow-on claims.

C. CAUSATION

273. The requirement of causation is a necessary element of any damage claim. In principle, recovery will be ordered where an infringing behaviour has caused a damage. Causation links damages to infringing acts, thus ensuring that the defendant will only be liable for those damages which are the consequence of his illicit action.
274. When considering the importance of the causation requirement for the actual availability and efficiency of damages claims, a difference must be made between the legal notion of causation and the evidence showing that in a given case the requirement (as defined by the legal notion) is fulfilled. Proof of causation can be highly complex in antitrust cases. The financial loss suffered by the victims of anti-competitive behaviour will often consist in the paying of a supra-competitive price. The claimant will therefore often have to show that a rise in price was the consequence of the actions of the defendant. The defendant might in turn argue that any rise in prices was in fact caused by something different, such as the normal functioning of the market or by the actions of third parties. Proving a causal link might require complex economic analysis based on a large number of facts and economic data. Insofar as proof of causation is concerned, we refer to Section II of this paper which deals in greater length with access to evidence.
275. With regard to the legal notion of causation, the legal systems of the Member States adopt diverse approaches. Legal systems refer to such concepts as “foreseeability”, “direct cause” or “adequate cause”. It is arguable that the application of these concepts in concrete cases will not lead to widely diverging results and that the concepts derive from the legal culture of the jurisdictions in question more than to actual differences in appreciation. Given the complex nature of the assessments to be made and given that case-law has played a very important role in all jurisdictions on this question, it could be considered that no further action is necessary in this field in order to facilitate damage claims.
276. It must, however, be stressed that the application of the legal requirement should not lead to the exclusion of groups of victims of anti-competitive behaviour from recovering their losses. It must be recalled in this respect that the ECJ has ruled in its *Courage* decision that the full effectiveness of the EC Treaty would be put at risk if it were not open to any individual to claim damages for loss caused to him by a conduct prohibited by Articles 81 and 82 EC.¹⁵⁶ In the absence of Community legislation, the detailed conditions for the claim remain covered by national law. However, the application of national law in this matter depends on the double principle of equivalence and effectiveness. These principles and particularly the latter can influence notions of causation as existing in national civil law. It should be considered whether a clarification of the legal requirement of causation is necessary in order to further facilitate damages actions.

¹⁵⁵ See above, para 267.

¹⁵⁶ *Courage*, para 26.