1. We agree with the current European-wide prevailing view on this matter, according to which more private enforcement of EC and national competition law is not only desirable, but necessary in order to bring the working of these rules to their required strength, foster their efficiency and ensure that the objective of art. 3(g) of the EC Treaty is attained in the internal market. However, a proper balance must be stricken between, on the one hand, the aim of full compensation of victims (which will indirectly stimulate deterrence) and, on the other hand, the negative side-effects of an out-of-control system of private enforcement (which could lead to an undesirable over-deterrence). We consider that, generally speaking, the proposals of the White Paper succeed in managing to create an effective framework for private enforcement while, at the same time, keeping the role of national courts limited to what is indispensable for the compensation of the victims. In the present state of EC law and according to the legislation of a majority of Member States, full compensation must be the primary objective of a Community instrument; the consequent deterrent effect should ensue of its own motion.

2. In this comment, we intend to address only some of the issues dealt with by the White Paper. Due to our Private International Law background, our approach will be focused on some transnational aspects of the measures envisaged by the Commission. It is now beyond doubt that the strengthening of private enforcement as promoted by the Commission and by most of the national legislators and enforcers raises significant concerns in a number of fields, especially in terms of legal provisions (both procedural and
substantive) and also of economic theories. Such hurdles are those which the measures suggested in the White Paper try to overcome. But as is frequently the case in the international field, when parties to a proceeding are shifted from a national to a transnational –though intra-Community– scenario, some of these hurdles increase their relative weight. The result is that some of these obstacles can become close to insurmountable, since in an international setting they acquire a greater blocking effect. Consequently, we consider that it is necessary to tackle these problems in the framework of the current discussion triggered by the White Paper and bear them in mind when drafting the future Proposal for Community legislation.

The taking into consideration of these transnational issues is especially necessary in light of the current increasing volume of cross-border transactions, obviously from a global standpoint but also, and more specifically to the scope of our comments, from an intra-Community perspective. Indeed, the reach of the operations of undertakings has widened, and the effects of their activities are often felt throughout the Community. Therefore, the effects of an infringement of the competition rules spread accordingly, potentially giving rise either to cross-border litigation or to litigation requiring the intervention of cross-border elements such as means of proof obtained abroad, or a decision taken in another Member State needing to be recognised or enforced. This kind of situations should be accurately regulated by the Commission so that plaintiffs, defendants and judges can cope with these cases with as few difficulties as possible. To be sure, private enforcement involving transnational elements deserves at least as much attention as purely national private enforcement, if not more, considering the increased difficulties that private actors need to face in these situations.

Thus, the cross-border issues we will deal with are: (I) the binding effect of decisions adopted by foreign NCAs; (II) the harmonised rules required to grant standing to foreign collective redress entities; and (III) the possible recognition and enforcement of foreign judgments awarding punitive damages in Member States which traditionally do not allow them.

I. The binding effect of decisions adopted by NCAs is an essential feature of an efficient private enforcement system. Many of the hindrances that discourage plaintiffs from bringing private enforcement suits in stand-alone situations either disappear or are significantly reduced when they face a follow-on action. A potential actor who can rely on a
previous decision taken by a competition authority is much more likely to resolve to go to court, so such decisions should be awarded as far-reaching effects as possible. Therefore, we strongly endorse the proposal of extending the *Masterfoods* rule, as codified in Article 16(1) of Regulation 1/2003, to decisions of national and especially foreign NCAs, for the sake of coherence and effectiveness. Indeed, coherence is required not only in terms of consistency between the decision of a national NCA and the ruling of a court on damages in the same case, but also in terms of consistency of treatment for all decisions taken by administrative bodies: we don’t see any reason for not granting to decisions of NCAs the same binding effect granted to Commission decisions. The concerns of some Member States regarding the independence of the judiciary and the separation of powers lose their strength not only in light of the arguments advanced by the Commission in the Working Paper accompanying the White Paper, but also due to the fact that Commission decisions already benefit from this automatic binding effect. NCAs undoubtedly guarantee at least the same level of respect for all the necessary requirements (in terms of burden of proof, application of legal standards, use of legal basis, etc.) as the Commission, especially on account of their common involvement in the European Competition Network. Thus, the use of the principle of mutual trust and confidence is in order. Moreover, since only a few Member States—the UK, Germany and Hungary—grant binding effects to their own NCAs decisions, and only one—Germany—grants this effect to foreign NCAs decisions, the rule proposed by the Commission is clearly a necessary one.

The automatic recognition by a civil court of the binding effect of a decision of its own NCA should not be problematic: once Community law grants this effect, the proof of the decision and its content is relatively easy for a court familiar with its own legal system and institutions. On the other hand, foreign NCAs decisions may be more difficult to handle, not only in terms of language, but also as far as specific elements of foreign law are concerned. Therefore, in order to ensure the efficiency of these provisions, we would suggest the creation of a standard form to certificate the civil effects of foreign NCAs decisions. The standard form should cover aspects such as the content, the parties and the object of these decisions, their final character (or lack thereof, whenever an appeal is pending against the decision or the time limits for filing an appeal have not yet expired), the authority which has issued the decision, etc. In the Working Paper, the Commission draws inspiration from Regulation 44/2001, and more specifically from Article 34(1), concerning the public order exception and the rights of defence and to a fair trial. Similarly, we think
that the Commission should adopt a standard form similar to the certificates contained in Annexes V and VI of Regulation 44/2001. This kind of standard form, which didn’t exist in the Brussels Convention of 1968—the predecessor of Regulation 44/2001—, has proved to be a very efficient and facilitating measure, permitting to ease the recognition and enforcement of foreign decisions both from a legal perspective and from the standpoint of the psychological effect for the judge, who has a reliable model certificate on which to base his or her decision. Actually, the method of creating standard forms has proved so successful that it has been adopted in all the Community instruments in matters requiring the cross-border circulation of similar documents.¹ A similar standard form to certificate the most relevant aspects regarding the civil effects of NCAs decisions would therefore greatly facilitate the proper working of the cross-border follow-on private enforcement system.

II. Another essential feature of an efficient private enforcement system is the facilitation of collective redress, especially in light of the characteristics of the White Paper model: admission of the passing-on defence for direct purchasers and granting of standing for indirect purchasers, as well as a presumption in their favour as to the passing-on of the overcharge in its entirety to them. Consequently, we consider the creation of opt-in collective actions and representative actions as positive steps towards the objective of strengthening private litigation. However, in an increasing cross-border setting, it is fundamental that these forms of collective redress take into consideration the need to ensure that litigants from other Member States will have full access to courts. For individual plaintiffs who wish to take part in a collective action this poses no problem. On the other hand, representative actions may have to face greater difficulties, since collective redress entities will have to be previously qualified by a Member State in order to carry out their role before national courts. It is therefore of the utmost importance to guarantee that entities qualified according to the legislation of a Member State are automatically granted standing in all other Member States, as suggested by the Working Paper. Once again, the principle of mutual trust and confidence plays an essential role to avoid that these entities need to be certified for a second time.

¹ Regulation 1206/2001, on the taking of evidence (Annex); Regulation 2201/2003, on matrimonial matters and matters of parental responsibility (Annexes I to IV); Regulation 805/2004, creating a European enforcement order for uncontested claims (Annexes I to VI); Regulation 861/2007, establishing a European small claims procedure (Annex IV); or Regulation 1393/2007, on the service of documents (Annex I).
To this end, it is fundamental to establish a harmonised framework of rules and criteria having to be met in order to qualify as a certified entity. The requirements set out by the procedural rules of the Member States in this respect can substantially vary. And given the fact that the granting of standing to such entities is a delicate matter, since the direct victims of the anticompetitive practices are not directly involved in the judicial actions, it is advisable to provide for a set of common rules to control them *ex ante*. In the cross-border scenario we are particularly thinking about, the functioning of this system will more likely be assured if national courts know that foreign entities litigating before them have been controlled according to rules equivalent to those applied to their own national entities. We consider this system of harmonised Member State certification to be more effective and less hindering than a centralised Community certification process, and therefore suggest the adoption of minimal Community standards to be applied by the Member States.

**III.** Finally, from a cross-border perspective, the recognition and enforcement of foreign judgments awarding punitive damages deserves a closer look. As we have stated at the beginning of this comment, we consider that full compensation should be the only direct aim of the legislation enacted in order to promote private enforcement. Nevertheless, we agree there are good reasons to think that full compensation may require a bolder approach, such as the double damages rule for hard-core cartels, previously envisaged by the Commission; otherwise, the end result might be a general tendency to under-compensation in these extremely harmful cases.²

In any event, from a pragmatic perspective we concede that it may be advisable to stick to a simple damages rule, especially considering that punitive damages are only available for competition cases in Ireland and in the UK; and then again, conditions to obtain such an award in these Member States are not easily met. Therefore, a provision aiming at foreseeing a direct rule for granting punitive damages is not in order: for the time being, Member States should not be obliged to award these damages. Incidentally, we note that this is the consideration that lies behind Article 26 and Recital 32 of the so-called “Rome II Regulation”: courts cannot be forced to apply a law granting punitive damages if this is *manifestly incompatible* with their public policy.

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² See Editorial Comments, 45 CMLRev. (2008), 609, at 613.
However, from a recognition and enforcement perspective, we consider that there could be a chance for indirectly obtaining non-strictly compensatory damages in more cases than what is generally expected in most Member States. As the ECJ stated in *Manfredi*, punitive damages are not in themselves contrary to European public order. The fact that at least two Member States allow for these damages to be awarded clearly indicates that the result reached by the ECJ is appropriate. But on top of that, an indirect door to allow punitive damages to be recognised and enforced may in fact be ajar. Indeed, as shown by John Y. Gotanda, “Charting Developments Concerning Punitive Damages: Is the Tide Changing?”, *Villanova University School of Law Working Papers* 65 (2006), some Member States are beginning to introduce changes in their legislations which indicate a possible shift towards a more receptive attitude for punitive damages. As well as that, other Member States have started to permit the indirect entering of these damages inside their legal order, by means of judicial recognition and enforcement. This is the case of the Spanish Supreme Court (*Tribunal Supremo*), which on 13 November 2001 delivered a decision (*Auto*) recognising the judgment of a US federal court sitting in Houston, Texas. This judgment awarded punitive damages against a Spanish company for unfair competition and violation of intellectual property and trademark rights of an American and an Italian company. Spanish law does not permit the awarding punitive damages, as the Supreme Court itself has held (see for example the judgment of 19 November 2005); however, according to the same court, Spanish public policy is not *per se* contrary to the recognition of foreign judgments awarding such damages. The Supreme Court based its decision on several grounds, among which the proportionality of the foreign court decision, the balancing of the interests at stake and a certain deterrent effect found in some Spanish remedies granted in damages actions.

In short, it may well be that Member States traditionally opposed to directly awarding punitive damages could at least start opening the door for the recognition of judgments awarding them, in similar terms to the Spanish Supreme Court, as long as the amount of damages is not disproportionate. Given the boosting effect for private litigation that such a development would undoubtedly have, it could be advisable for the Commission to point out that this indirect way to an amount of damages assuring full compensation may be open to plaintiffs in more jurisdictions. As long as the common rules

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3 Available at [http://law.bepress.com/villanovalwps/papers/art65](http://law.bepress.com/villanovalwps/papers/art65), and also published as 45 *Columbia Journal of Transnational Law* (2007), 507 et seq.

4 For a summary of the Supreme Court reasoning in English, see Gotanda, *loc. cit.*, at 21-22.
on distribution of jurisdiction and determination of applicable law are respected and enforced as required by the national and Community standards, the quest for the most efficient competent forum should not be regarded as an abuse (actually, should such an abuse exist, the foreign decision would not be recognised precisely on grounds of violation of public policy), but simply as a means of compensating victims and, as a consequence, promoting competition. In this respect, the possibility of indirectly receiving punitive damages should bear a significant weight when it comes to deciding which the most efficient competent forum is.

Barcelona, 15 July 2008